Neutral Citation Number: [2010] EWHC 862 (TCC)

Case No: HT-06-311

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 28/06/2010

Before :

THE HON. MR. JUSTICE RAMSEY

- -

Between :

	(1) **BSkyB Limited** (2) **Sky Subscribers Services Limited**	**Claimants**
	- and -	
	(1) **HP Enterprise Services UK Limited (formerly Electronic Data Systems Limited)** (2) **Electronic Data Systems LLC (formerly Electronic Data Systems Corporation)**	**Defendants**

- -

- -

Mr Mark Howard QC and Mr Alec Haydon (instructed by **Herbert Smith LLP**) for the **Claimants**

Mr Alan Gourgey QC, Ms Zoe O'Sullivan and Mr Stephen Tudway (instructed by **DLA Piper**) for the **Defendants**

Judgment No.2

The Hon. Mr. Justice Ramsey:

Introduction

1.
In this judgment I deal with issues arising from the main judgment handed down on 26 January 2010: the liability for the costs of the proceedings, the basis of assessment of costs, the effect of change of corporation tax on Sky's claim for damages and the impact of tax on interest.

Costs Liability

2.
In the main judgment I held that Sky had established allegations of fraud against EDS in relation to representations relating to time which induced them to enter into both the Letter of Intent and the Prime Contract. I also held that Sky had established a claim for damages for negligent misstatement prior to the Letter of Agreement and for breach of contract. The damages established by Sky are accepted by EDS to be at least £270 million.

3.
Sky failed to establish their claims for fraudulent misrepresentation in relation to a number of other heads and failed to establish other allegations of negligent misstatement prior to the Letter of Agreement.

4.
In these circumstances, EDS accept that Sky should be entitled to costs but contend that because Sky lost on a number of issues and abandoned one issue, Sky should only be awarded a proportion of their costs, which EDS submits should be 62%. Sky contends that they should be entitled to all of their costs and that they should be assessed on an indemnity basis.

5.
I now turn to consider these two issues: whether Sky should be awarded a proportion of their costs and if so what proportion and whether the costs should be awarded on an indemnity basis.

The appropriate costs order

6.
The starting point for consideration of costs is CPR Part 44 which at rule 44.3(2) provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party but that the Court may make a different order. In deciding whether to make a different order, and if so, what order to make, rule 44.3(4) provides that the Court has to have regard to all the circumstances, including in this case, the conduct of the parties and whether a party has succeeded on part of his case, even if that party has not been wholly successful.

7.
Rule 44.3(5) states that the conduct of the parties includes conduct before, as well as during, the proceedings and includes consideration of whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue as well as the manner in which a party has pursued or defended their case or a particular allegation or issue and also whether the claim has been exaggerated.

8.
There is a range of possible orders set out under rule 44.3(6) which includes an order that a party must pay a proportion of another party's costs or the costs relating to particular steps in the

proceedings. The Court is encouraged by rule 44.3(7) to order a proportion of costs rather than costs relating to particular steps, evidently because of the difficulty of distinguishing which costs related to particular steps, when costs come to be assessed.

9.
The rules under CPR 44.3 have been considered in a number of cases to which I was referred. Whilst the appropriate order in each case is a matter for the Court's discretion based on the particular circumstances of that case, the following guidance can be derived from previous decisions in relation to proportionate costs orders.

10.
Lord Woolf set out in Phonographic Performance Ltd v AEI [1999] 1 WLR 1507 at 1523 that: "The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new Rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the "follow the event principle" encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."

11.
As Jackson J said in Multiplex Construction (UK) Ltd v Cleveland Bridge (UK) Ltd [2008] EWHC 2280 (TCC) at [72(v)] : "In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order."

12.
As set out in CPR 44.3(7) an approach based on issues should, if practicable, lead to a proportion of costs as summarised by Chadwick LJ in National Westminster Bank v Kotonou [2007] EWCA Civ 223 at [22]: "A more convenient method, while keeping in mind the issue based approach, is to assess all the costs together and then apply a proportion which reflects the fact that a party has won on some issues and lost on the other issues. That is what the Costs Rules require."

13.
In my judgment a proportionate costs order may be appropriate to reflect the extent to which a successful party has not been selective in the points they have taken and so should not recover all of their costs. An example of this situation is a case where an issues based approach might otherwise be appropriate. It is clear that in such a case the Court should avoid ordering, for instance, that each party should have the costs of certain issues, but if practicable should make a proportionate costs order or, alternatively, one which gives one party the costs from or until a particular date.

14.
EDS submit that Sky should be deprived of their costs in respect of a significant number of discrete issues on which they failed, either because the allegation was abandoned or because Sky's case was rejected at trial. EDS say that Sky succeeded only on one of its five allegations of fraud pre-Prime Contract and then on a narrow aspect of the overall estimating process which was otherwise held to be honest. EDS also say that Sky only succeeded on one of its allegations of negligent misrepresentation prior to the Letter of Agreement.

15.
Sky say that this approach should be rejected and that the fact that they were not completely successful should not displace the usual principle that costs follow the event and there should

therefore be no deduction. Sky say that there was a significant overlap between the substance of the allegations on which they failed and the ones on which they succeeded.

16.
I have come to the conclusion that this is a case where a proportionate costs order is appropriate. The approach of Sky to the claims of fraudulent misrepresentation and negligent misstatement was to plead wide ranging allegations under a number of heads but they have succeeded only on one aspect, albeit a central aspect relating to the time estimate.

17.
However I accept Sky's submission that there was a considerable overlap between the various allegations which had to be understood in context by reference to Sky's estimates of costs, time and resources. That makes this a case where it would be extremely difficult to identify separately the costs of the issues on which Sky has succeeded and the costs of the issues on which Sky has failed. This is not a case where Sky has failed on the whole of their case on, for instance, negligent misstatement or breach of contract. It is a case where, to use Lord Woolf's words in Phonographic Performance Ltd v AEI, Sky has not been selective in the points they have taken and because of that have increased the costs of the litigation.

18.
Subject to the question of overlap, I accept that in relation to fraud Sky failed and EDS were successful in relation to:

(1)
The three components of the alleged resource misrepresentation: the Greater Resource Representation, the Lesser Resource Representation and the Ready to Start Misrepresentation.

(2)
The allegations that EDS had made a misrepresentation as to costs.

(3)
The allegation that EDS had made misrepresentations in relation to proven technology or "significant risk".

(4)
The allegations that EDS had made misrepresentations as to methodologies.

(5)
The allegations of dishonesty against Gerald Whelan, John Chan and Tony Dean.

19.
Sky also failed in relation to negligent misrepresentations as to resources, underestimation, progress and costs prior to the Letter of Agreement and in claims against EDSC and for repudiatory breach.

20.
In addition, Sky abandoned an allegation to fraudulent misrepresentation as to the methodology prior to the Letter of Agreement and allegations in relation to Forte Fusion middleware.

21.
Sky's failure on those issues and the corollary of EDS' success makes it inappropriate for Sky to recover the whole of their costs of those proceedings. The question then arises of how this failure/ success should be reflected in the order for costs.

22.
EDS have carried out an analysis of the relative number of pages in the statements of case which were taken up with the issues on which Sky failed compared to those on which it succeeded. They say that of the total of 822 pages of Statements of Case, Sky failed on allegations relating to 352 pages for pre-Prime Contract representations, 39 pages for pre-Letter of Agreement representations and 5 pages for the claim against EDSC and for repudiatory breach. That makes some 48% of the pages.

23.
EDS say that the appropriate reduction is necessarily a rough and ready exercise but submit that, on their analysis of the issues on which Sky failed, Sky should be disallowed 35% of their costs. EDS submit that a further 3% should be added to reflect an adverse costs order on an indemnity basis for Sky having alleged that a fraudulent methodology misrepresentation was made prior to the Letter of Agreement. This makes a total of 38%, resulting in EDS' contention that Sky should only have 62% of its costs.

24.
Sky set out a broad overall assessment of their costs in the total sum of £49m as follows:

HS time cost:	£24.2 m
Counsels' fees	£5.8 m
Experts' fees:PA	£13.0 m
LECG	£5.0m
Stone	£0.7m
Roncoroni	£0.3m
	£49.0m

25.
Sky say that this analysis of the costs shows that the approach taken by EDS, applied over all the heads of costs, would lead to Sky being deprived of a percentage of its costs even where the costs were spent on matters on which it was wholly successful. They say that the only issues which might be separate relate to the allegations of proven technology and methodology. They say that an analysis of the total of 430,000 lines of transcript shows that only around 15,500 lines or 3.5% of the total time spent at trial related to those two issues.

26.
They say that of the £49 million costs figure, the sum of £6m which represents the fees of quantum experts should be excluded as they do not relate to the details of the misrepresentation case as can some £3.6 m of counsel's fees relating to quantum or which would have been paid in any case because the trial would not have been shortened. They estimate that only some £660,000 of fees for solicitors, counsel and the IT experts would have been spent on the additional allegation relating to proven technology and methodology, or some 1.5% of the total. They submit that such a figure shows that the cost effect of those issues was de minimis.

27.
I accept that, as Jackson J said in Multiplex at [72(viii)]: "In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs". In assessing the appropriate proportion, a significant amount of the costs of pleading, disclosure, witness statements and general work carried

out by the solicitors will be common to a number of issues, some of which Sky has succeeded upon and Sky should not be deprived of these costs.

28.
The clearest category of issue on which Sky failed related, as Sky accept, to representations in relation to methodologies and proven technology. In relation to the allegations of misrepresentation as to resources and costs, it would have been necessary to consider certain aspects of these matters, in any case, in relation to the allegations on which they succeeded, including the allegations of breach of contract. However, I also bear in mind that the degree of detail will differ depending on whether some evidence is needed on a related issue or more evidence is required to support a self-standing issue. This relates to both factual and expert evidence as well as to the effort in dealing with pleadings and disclosure.

29.
In the end, any assessment must depend to a large extent on an estimate which derives from my experience of dealing with the issues from the initial stages of case management through to the trial. It is evident that Sky's success, whilst based on only part of the allegations pleaded, has meant that it succeeded on the essence of its case on fraudulent misrepresentation prior to the Prime Contract, negligent misrepresentation prior to the Letter of Agreement and breach of contract. In doing so it has recovered substantial damages.

30.
Against that is the fact that on significant areas of their case on fraudulent misrepresentation and negligent misstatement they have failed. That failure will have meant that the costs of this litigation have been increased in respect of pleadings, disclosure, witness statements and IT expert evidence relating to those allegations. Whilst the effect in relation to those aspects of Sky's case relating to methodologies and proven technology has been greater, the impact in respect of Sky's case on resources and costs will have been less.

31.
It is evident that 38% represents too large a discount and 1.5% is too little. I accept that in applying an overall proportion I must take into account the fact that some elements of cost are not affected, such as quantum costs. My view is that the appropriate discount falls somewhere between 10% and 20% and I adopt 15% as being the appropriate figure to reflect those aspects of the case on which Sky has failed.

32.
Accordingly I award Sky 85% of their costs.

Basis of assessment

33.
Sky submits that an indemnity basis of assessment is appropriate whilst EDS submit that a standard basis of assessment should be adopted.

34.
The considerations which are relevant to ordering an assessment of costs on an indemnity basis have been reviewed in a number of decisions. Evidently, there has to be something in the circumstances of the case which justifies a party recovering costs on the more favourable basis of indemnity costs assessment. On indemnity assessment there is no requirement for the costs to be proportionate to the

matters in issue and any doubt as to whether costs were reasonably incurred or reasonable in amount is resolved in favour of the recovering party. As Lord Woolf said in Lownds v Home Office [2002] 1 WLR 2450 at [6] for those reasons the indemnity basis of costs is considerably more favourable to the recovering party than the standard basis of costs.

35.
Whilst it is not necessary for there to be a moral lack of probity or conduct deserving moral condemnation to justify indemnity costs, there must be something in the circumstances to take the case out of the norm. That may be either because of the nature of the allegations in the case or because of other conduct of the relevant party: see Reid v Minty [2002] 1 WLR 2800; Kiam v MGN Ltd [2002] 2 All ER 242; Excelsior v Salisbury Ham Johnson [2002] EWCA Civ 879.

36.
In many cases the question of indemnity costs arises when a claimant has discontinued proceedings or those proceedings have failed: Three Rivers v BCCI [2006] EWHC 816; National Westminster Bank v Rabobank [2008] 1 Lloyd's Rep 16 and IPC Media v Highbury Leisure [2005] EWHC 283.

37.
In relation to allegations of fraud, when such matters are alleged and succeed at trial then this is a matter which can be taken into account when deciding the basis of assessment. In general, the Court can take into account the conduct of the relevant party in relation to matters which give rise to the litigation based on the following decisions of the Court of Appeal.

38.
In Hall v Rover Financial Services [2003] EWCA Civ 1514 the Court of Appeal (Longmore and Tuckey LJJ) considered that it was not proper to deprive a successful party of its costs because of anterior dishonest conduct which was part of a transaction giving rise to the proceedings. This was on the basis that the conduct could not "be characterised as misconduct in relation to the proceedings themselves."

39.
However in the later case of Groupama v Overseas Partners [2003] EWCA Civ 1846, the Court of Appeal (Butler-Sloss, Brooke and Latham LJJ) took a different view and said that the decision in Hall reflected the contemporary practice of judges of the Commercial Court. Brooke LJ referred to CPR Rules 44.3(4)(a) and 44.3(5)(a) and said that those provisions contained no language of limitation "such as would shut out reliance in an appropriate case of misconduct in and about the matters that triggered off the litigation".

40.
In Sinclair Roche and Temperley v Somatra [2003] EWCA Civ 1474 the Court of Appeal (Schiemann, Tuckey and Longmore LJJ) Tuckey LJ, giving the judgment of the Court, said at [95] that CPR 44.3(5)(a) was not confined to conduct relating to the action in which the order for costs was made although there must be a link between the pre-action conduct and the matters which were the subject of the action. He then added this:

"We regard it as permissible, for instance, for a judge whom has found against defendants in an action based on their fraud practised on the Claimants, to take that fraud into account when deciding the basis of taxation. We are however far from saying that a successful fraud action should usually be accompanied by a special order as to costs. These are matters for the judge's discretion and before he

exercises it in such a way as to order a departure from the standard basis of taxation there must be something to take the case out of the usual run of cases."

41.
In the present case Sky rely on four matters:

(1)
The conduct of EDSL, through Joe Galloway, in making a fraudulent representation and lying both in his witness statement and in the witness box.

(2)
The conduct of EDSL in denying any relevant representation when they must have known that there was no proper basis for the time estimate.

(3)
The conduct of EDSL in their repeated breaches of contract and refusal to admit them at trial.

(4)
The conduct of EDSL in seeking to blame Sky's failure to mitigate or Arthur Andersen's failure to capture requirements for the losses.

42.
As I have found, Joe Galloway made the fraudulent representation and gave perjured evidence. He was in a senior position in relation to EDSL but the dishonest conduct was limited to him, rather than others in EDSL. This is not a case where there was a systematic fraud perpetrated by EDSL and evidently EDSL had no control over what Joe Galloway said in the witness box. Whilst I accept that the conduct can be described as conduct of EDSL, I do not consider that the fraudulent conduct by Joe Galloway or his perjured evidence should lead to EDSL having to pay costs on an indemnity basis.

43.
The other contentions by Sky essentially rely on matters put forward as defences or other allegations raised by EDSL in the proceedings. The conduct of EDSL in denying the misrepresentation, refusing to admit breaches and blaming Sky's losses on others must, in my judgment, be shown to be so unreasonable to take the case out of the norm. I consider that there were elements of EDSL's case which were, on analysis, weak but that is not a reason for the Court to make an order for indemnity costs. For instance, whilst EDSL's case on mitigation was raised late and, as I found, failed entirely, it was not an allegation which it was unreasonable for them to make or seek to establish.

44.
This is a case where I have therefore come to the conclusion that ESDL's overall conduct prior to or during the litigation was not so unreasonable as to justify an order that Sky's costs should be paid on an indemnity basis. Even if Sky had been able to establish conduct which came close to that required, I should add that I would have been reluctant to order that the whole of Sky's costs should be assessed on an indemnity basis, given that such a method of assessment would prevent any question of proportionality being raised, whether justified or not, in relation to the overall costs bill which, on any view, at some £49m, must be one of the highest cost figures ever reached even in this type of complex technical commercial litigation.

45.
Accordingly, Sky's costs are to be assessed on a standard basis.

The impact of Corporation Tax on damages

46.
EDS submit that the sums awarded to Sky by way of damages for lost benefits should be adjusted to take into account the reduction in the rate of Corporation Tax since the PwC CRM System go-live date of 1 February 2003. EDS say that the damages for lost benefits will now be taxed at the rate of 28% whereas the benefits for which such damages are providing compensation would have been taxed at the rate of 30% for the financial years ended 30 June 2003 to 30 June 2007 and at an effective rate of 29.5% for the financial year ended 30 June 2008. EDS also contend that the interest awarded under s. 35A of the Senior Courts Act 1981 should be calculated on lost benefits after the payment of tax.

47.
Sky contend that no adjustment should be made. In any event they say that the actual analysis of the tax position is potentially complex and would require detailed further analysis, including additional pleadings, witness statements and expert evidence.

48.
This issue arose from the report on the quantum of lost benefits produced by EDS's expert, Timothy Hart, dated 19 November 2007. At section 7.2 of that report he stated that there had been a change in the rate in UK Corporation Tax and said that an adjustment should be made using the following formula to arrive at the damages: Losses (before tax adjustment) x ((1.00 less 0.30) ÷ (1.00 less 0.28), which Richard Boulton calculates as a 2.8% reduction in damages.

49.
In section 10 of his fifth report dated 9 April 2008 (revised on 13 June 2008) Richard Boulton deals with the impact of Corporation Tax on damages. He states that he has not seen the tax computations of Sky but has considered certain information disclosed in Sky's annual financial statements.

50.
In summary Richard Boulton raises issues relating to capital allowances, relief for trade losses and group loss relief. He says that a simple calculation of a 2.8% reduction based on Timothy Hart's formula does not take account of these issues. At paragraph 10.35 of his fifth report Richard Boulton says that when these issues are taken into account SSSL did not incur liability to pay Corporation Tax up to 2005/6 because of the impact of trade losses or group losses and that in 2006/7 SSSL's average rate of tax was 14% because of group losses or excess capital allowances.

51.
He says that if the calculation of damages is to take into account the incidence of taxation then it will be necessary to investigate the tax position of Sky and probably other members of the Sky Group which has not been done and which, as both quantum experts accept, is not something which is within their expertise.

52.
Apart from the need to carry out calculations, there is also an issue whether, as a matter of law, a claimant is required to make allowances for changes in the rate of Corporation Tax in calculating damages.

53.
The principle that taxation has to be taken into account in calculating damages in the context of damages for loss of earnings in personal injury actions was established by the decision of the House of

Lords in British Transport Commission v Gourley [1956] AC 185. In that case the damages constituted compensation for income which would have been subject to tax but the damages themselves would not be subject to tax. The House of Lords rejected arguments that the impact of taxation was too remote or res inter alios acta.

54.
The principle was expressed in this way:

(1)
By Earl Jowitt at 202 to 203: “My Lords, it is, I think if I may say so with the utmost respect, fallacious to consider the problem as though a benefit were being conferred upon a wrongdoer by allowing him to abate the damages for which he would otherwise be liable. The problem is rather for what damages is he liable? And if we apply the dominant rule, we should answer: “He is liable for such damages as, by reason of his wrongdoing, the plaintiff has sustained. … I see no reason why in this case we should depart from the dominant rule or why the respondent should not have his damages assessed upon the basis of what he has really lost, and I consider that in determining what he really lost the judge ought to have considered the tax liability of the respondent.”

(2)
By Lord Goddard at 206, 207 and 208:

“The basic principle so far as loss of earnings and out-of-pocket expenses are concerned is that the injured person should be placed in the same financial position, so far as can be done by an award of money, as he would have been had the accident not happened, and I will endeavour to apply this in the first place to the special damage claimed in respect of loss of earnings

...

If, therefore, he is disabled by an accident from earning his salary, I cannot see on what principle of justice the defendants should be called upon to pay him more than he would have received if he had remained able to carry out his duties.

...

Damages which have to be paid for personal injuries are not punitive, still less are they a reward. They are simply compensation, and this is as true with regard to special damages as it is with general damages.”

55.
The House of Lords were aware of the potential difficulty in making the tax calculation, as appears from the following passages in the speeches:

(1)
Earl Jowitt at 203: “It would, I think, be unfortunate if, as the result of our decision, the fixation of damages in a running-down case were to involve an elaborate assessment of tax liability. It will no doubt become necessary for the tribunal assessing damages to form an estimate of what the tax would have been if the money had been earned, but such an estimate will be none the worse if it is formed on broad lines, even though it may be described as rough and ready. It is impossible to assess with mathematical accuracy what reduction should be made by reason of the tax position, just as it is impossible to assess with mathematical accuracy the amount of damages which should be awarded for the injury itself and for the pain and suffering endured.”

(2)
Lord Goddard at 208: “But in considering special damage in these cases the rate of tax to be taken must, as it seems to me, be the effective rate of income tax, and, if necessary, surtax which would have been applicable to the sums in question if they had been earned. That rate depends on the combination of a number of factors that may vary with each case - allowances, reduced rates, surtax rates, other income of the claimant or his wife, charges or reliefs. The task of determining it may not always be an easy one, but in complicated cases it is to be hoped that the parties, with the help of accountants, will be able to agree figures. If not, the Court must do its best to arrive at a reasonable figure, even though it cannot be said to be an exact one.”

(3)
Lord Reid considered this aspect in the context of deciding whether the impact of taxation was too remote. He said at 214 to 215:

“Another element to be considered is whether bringing in the matter of liability to tax would seriously increase the duration and expense of trials; for practical as well as theoretical considerations weigh in determining what is too remote. But I do not think that there would be serious practical effects.

… In considering the importance of practical difficulties I would weigh them against the importance of the element of tax liability, with tax at modern levels, in determining the real loss which the plaintiff has suffered. I cannot find any sufficient reason, theoretical or practical, for excluding the element of tax liability, and I am therefore of opinion that this appeal should be allowed.”

56.
In Parsons v BNM Laboratories [1964] 1 QB 95 this principle was extended to a claim for damages for wrongful dismissal by the majority in the Court of Appeal (Harman and Pearson LJJ, Sellers LJ dissenting). In that case the damages were tax free because they were under the statutory limit of £5,000 and the Court of Appeal held that the notional incidence of taxation on the lost earnings must be taken into account to reduce the damages.

57.
Sellers LJ held that Gourley should be restricted to the assessment of damages in tort and not applied to damages in contract. If it were to be applied, it would apply, he said, to cases where the earnings would have been subject to tax but damages were not taxed. Because of the provision that damages under £5,000 were not taxed he concluded that the sum awarded as damages was within the scope of tax, but escaped actual taxation. On this basis he held that the only satisfactory position was to ignore taxation altogether in the assessment of damages. He also referred to what Lord Reid had said and at 115 added:

“Lord Reid pointed out in Gourley that the assessment of damages is a practical matter, and an element to be considered is whether bringing in the matter of liability to tax would seriously increase the duration and expense of trials. I feel real apprehension that this extension which is proposed would frequently increase the duration and expense of trials, and as far as a contract of service is considered I would ask for what purpose - merely to reduce the obligation which a defendant had expressly undertaken.”

58.
Harman LJ said this about Gourley at 126: “There is no doubt that all that Gourley decided was that where the damages in the plaintiff’s hands would not attract tax, then the principle applied. The House of Lords did not consider cases where such profits were taxable and expressed no opinion on

the point and there is no decision except those at first instance to which I have alluded which deals with the point"

59.
Harman LJ held that the sum awarded as damages was not taxable and therefore the principle in Gourley applied. He considered, obiter, the approach of Lord Hunter in the Outer House in Stewart v Glentaggart [1963] SLT 119 in cases where there was taxation of damages which he expressed as follows at 129: "Lord Hunter goes on to conclude that it would be right to carry the principle to what he calls (and I agree) its logical conclusion and to provide for tax on both sides, that is to say, to make a deduction from the damages on the Gourley lines and then to add to them such a sum as would provide for the tax exigible on them."

60.
Harman LJ then said at 130:

"On the whole I incline to the view that this conclusion of his Lordship, though logical, is impracticable, and that it is better, where the Crown has taken a hand and actually taxed the damages in the recipient's hands, to leave the two taxes to set themselves off one against the other. There may be some roughness in this justice but it does at least make an end of the matter. The law, as Lord Wright said in Liesbosch Dredger v Edison SS, cannot take account of everything.

...

On the whole, therefore, I would incline to the view that, as seems to be the practice in commercial loss of profit cases, no account should be taken of tax at either end. This may be a matter largely dictated by expediency but it strikes me as preferable in an imperfect world to an over-assiduous search after perfection. To make the punishment fit the crime is no doubt a sublime object but it may land the searcher at the end in the ridiculous."

61.
Pearson LJ concluded at 136 that from Gourley and later decisions, it was impossible to decide "any principle requiring taxation to be taken into account in assessing damages in a situation where both the lost earnings or profits and the damages are taxable". He considered two alternative ways in which taxation might be taken into account in such circumstances:

"(a) Taxation should be taken into account on both sides, that is to say both the notional taxation on the lost earnings or profits and the expected taxation on the damages should be ascertained, and the sum of damages awarded should be such sum as will after deduction of tax leave a net sum equal to the plaintiff's net financial loss; (b)Taxation should be taken into account on one side only, that is to say the notional taxation on the lost earnings or profits should be taken into account so as to arrive at the amount of the plaintiff's net financial loss, and that should be the amount of the damages awarded, no regard being had to any expected taxation of the damages."

62.
He rejected (b) as being manifestly one-sided and unjust. In relation to (a) he said that it was more debatable and had the support of Lord Hunter's judgment in Stewart v Glentaggart and had "the attraction of appearing to produce perfect justice." Nevertheless he said at 137 to 138 that there were five serious objections to it:

(1)
It was not supported by any authority except Stuart v Glentaggart;

(2)

That the further calculations and arguments required would tend to increase the length and expense of trial and that was an important consideration because the assessment of damages was an everyday matter.

(3)

The data required for assessing, or estimating with a reasonable degree of accuracy, the amount of the tax on the damages might not be available for a substantial time after the wrongful dismissal, and in such a case either a quick and inaccurate estimate of the tax on the damages would have to be made or the trial of the action for wrongful dismissal would have to be postponed. He said that postponement of a trial is in many cases inimical to justice, because it tends to impair the witnesses' recollection of the events.

(4)

In some cases the amount of the tax on the damages would be decided as between the plaintiff and the defendant in the absence of the Inland Revenue which might cause difficulty for the Inland Revenue.

(5)

It was no part of the normal functions of a court of law to increase the amount of an award of damages so as to protect the plaintiff at the expense of the defendant against the incidence of taxation which the legislature has thought fit to impose.

63.

He concluded at 139: "In my judgment these objections are sufficient to show that, as a general rule at any rate, in a case where both the lost earnings or profits and the damages are taxable, no account should be taken of taxation in assessing the damages. The present practice of ignoring the taxation in such a case is sound and should not be disturbed. That is my conclusion, subject to a proviso that there may be exceptional cases in which a departure from the practice may be required for the doing of justice in special circumstances. The present case is not exceptional."

64.

In Deeny v Gooda Walker [1995] STC 439 Potter J had to consider the question of whether the impact of taxation should be taken into account in a case where Lloyd's names were awarded damages against managing agents for negligence in the conduct of underwriting business. He held that the loss of profit and the damages would be taxable in the name's hands. He declined to take into account taxation in assessing the damages and, applying Parsons, said that this was not an exceptional case where a departure was required to do justice. Whilst the apportionment of the damages between some 3,000 names would follow the syndicate proportions, he held that consideration of the individual tax positions of some 3000 names would increase the length and expense of the trial and that the likelihood that individual names would receive a tax benefit did not justify a departure from the general rule.

65.

In Amstrad plc v Seagate Technology Inc (1998) 86 BLR 34, His Honour Judge Humphrey LLoyd QC awarded damages for loss of profit on the sale of computers caused by breaches of contract. The loss of profit and the damages were both subject to Corporation Tax but the damages would be subject to tax at 31% whilst the loss of profit would have been taxed at 34% or 35%, the rate applicable in earlier years.

66.
Judge LLoyd, applying Gourley and not following Parsons and Deeny v Gooda Walker, held that the impact of the change in Corporation Tax should be taken into account. He did so on the basis that unless account was taken of the incidence of taxation, the plaintiff would recover more than the loss which it was taken to have suffered. He held that the logical conclusion was to take taxation into account. Judge LLoyd reviewed the five reasons given by Pearson LJ in Parsons in considering at 54 whether, as he put it, there were "any other reasons why expediency and pragmatism should override logic and justice". His conclusion was that the objections of Pearson LJ were not valid, certainly in that case.

67.
The decision in Amstrad has received critical acclaim from the author of McGregor on Damages (17th Edition) at paragraph 14-019 where he says that the judgment "neatly and fully" answered the objections raised by Pearson LJ in Parsons.

The effect of taxation in this case

68.
In this case, Sky submit that I should follow Parsons and Deeny v Gooda Walker and decide that no account should be taken of taxation in assessing damages as that is the general rule and this is not an exceptional case where a departure from the rule might be required to do justice.

69.
EDS, on the other hand, submit that I should adopt and apply the reasoning of Judge LLoyd in Amstrad and make an allowance in relation to taxation in the sums awarded as damages.

70.
In this case, compared to Amstrad, the issue had not been developed in pleadings, quantum evidence or submissions prior to the main judgment, apart from what was contained in the expert quantum evidence, as set out above. In the main judgment I reserved the position in relation to the impact of tax.

71.
The Technology and Construction Court is well familiar with difficulties which arise in the assessment of damages in IT and construction cases. Assessments have to be made in complex situations and, as can be seen from this case, experienced quantum experts are often able to reach common ground on principles of assessment and detailed calculations.

72.
Whilst I accept that the assessment of the impact of taxation on damages may require further documentation, expert evidence and submissions, that is not something which should prevent the Court from making an assessment if, in principle, taxation should be taken into account. The passages cited above from the speeches in Gourley make it clear that the approach may have to be broad brush and the range of issues to be taken into account in making the calculation may be wide. That did not prevent the assessment being made in Gourley and the position is similar here. I also bear in mind that, on the current expert evidence, Richard Boulton's view is that the impact of the change in Corporation Tax rates would be less, possibly very much less, than Timothy Hart's 2.8%. However, given the overall sums in issue in this case, the potential sum resulting from the change in Corporation Tax is substantial.

73.

This is therefore a case where I see no obstacle to being able to make the necessary calculation and the potential sum in dispute appears sufficient to justify the issue being considered, because there must always be consideration of proportionality in the approach to assessing damages.

74.

In those circumstances, as a matter of law, should an allowance be made for the impact of the change in Corporation Tax rates? The reasoning in the speeches of Earl Jowitt and Lord Goddard in Gourley cited above is, in my judgment, equally applicable to this case. The question is to assess the damages which Sky have sustained and there is no reason why the court should not assess those damages upon the basis of what Sky have really lost and, in doing so, take account of Sky's tax liability.

75.

The views expressed in Parsons were obiter but obviously are highly persuasive. However, to the extent that the view was expressed on the basis of difficulty in making the calculation, I see no insurmountable difficulty in this case. Otherwise, I would respectfully adopt and apply the reasoning of Judge LLoyd in Amstrad in relation to the five objections raised by Pearson LJ. In particular:

(1)

Taking tax liability into account accords with the dominant principles for the assessment of damages adopted in Gourley.

(2)

The calculations would be no more complex than those contemplated by Lord Goddard in Gourley at 208, cited above.

(3)

There is no reason why the necessary information should not be available. In any event, the court often has to consider matters, such as loss of future profits, in advance of the position becoming certain and can and does make an assessment.

(4)

There is no impact of any decision as to damages on the proper assessment of Sky's liability to pay Corporation Tax.

(5)

Taking taxation into account in assessing damages may reduce damages and therefore potentially reduce Sky's Corporation Tax liability but if that is the proper approach to the assessment of damages, there is no "thwarting of the Revenue".

76.

On that basis, I do not consider that the reasoning in Parsons should lead me, on the facts of this case, to adopt an approach to the assessment of damages which differs from the general approach and which, absent authority to the contrary, should take account of the change in rate of Corporation Tax. There were clearly considerations on the facts in Deeny v Gooda Walker which led Potter J to adopt a different approach based on considerations of proportionality and practicality.

77.

Accordingly, in awarding damages to Sky in this case an allowance should be made for the difference between the Corporation Tax treatment which the lost benefit would have received and the Corporation Tax treatment which the sums awarded as damages are likely to receive.

The impact of taxation on interest

78.
A related question, also raised in Amstrad and in this case, is the impact of taxation when it comes to making an award of interest. In Tate & Lyle v GLC [1982] 1 WLR 149 Forbes J had to consider the award of interest on damages as a result of negligence and nuisance in causing siltation which prevented access to barge moorings. In deciding what interest to award he said this at 156:

"The award of interest in these cases is a discretionary matter and, in approaching the task of deciding upon such an award, I think judges are entitled to and do adopt a very broad approach. Attempting to do so I would look at this matter in this way. The plaintiffs' accounting year runs from October 1 to September 30. For tax purposes, therefore, in order to arrive at an average, it must be assumed that all the invoices were paid halfway through the accounting year, i.e on March 1. But the plaintiffs' corporation tax liability did not have to be paid until January 1, not of the next year but of the year after. As an example, the invoices for the year ending September 1967 would have been notionally paid in March 1, 1967, and those expenses would have been set against the gross income on which the corporation tax would have to be paid on January 1, 1969. There was thus a period of 21 months relating successively to each year's invoices. The plaintiffs have thus been kept out of the whole sum of damages for only part of the time (the precise period I shall have to look at later). For the remaining period they have been kept out of £550,000 less £239,000. It seems to me that one cannot ignore this on the principle that one does not look at the particular borrowing position of a plaintiff; and the fact the plaintiffs may have to pay more in corporation tax (because it is at a higher rate) when they are paid the damages than they saved by charging the dredging costs as an expense is unfortunate but, as Lord Denning M.R. said in Jefford v Gee [1970] 2 QB 130 at 149: ".. that cannot be helped. The tax man must collect all he can." The plaintiffs must, in some way, bring into account in the interest computation the amount of corporation tax they saved. The problem is: how? The answer is, I am sure, to look at the problem broadly and avoid a lot of complicated mathematics."

79.
In Deeny v Gooda Walker (No 3) [1996] LRLR 168 Phillips J held that interest should be calculated on a basis which made allowance for the taxation position. He said at 173: "...it does not follow that the plaintiff should receive an award of interest which compensates not only for his loss of use of money but in addition for the loss of use of the share which should have been received by the Inland Revenue."

80.
Phillips J continued at 173 to 174:

"If the Court proceeds on the artificial premise that the plaintiff has been deprived of the use of the whole of the damages notwithstanding the effect of taxation the interest awarded will provide the plaintiff with a substantial unjustified windfall at the expense of the defendant. In my judgment the Court should approach each claim to interest on its own merits, placing a sensible pragmatic restraint on attempts to conduct a detailed investigation of a plaintiff's tax position but, at the same time refraining from awarding interest for loss of use of money if it appears that the plaintiff is unlikely to have suffered the loss of use in question."

81.
In Amstrad Judge LLoyd cited Tate and Lyle v GLC and Deeny v Gooda Walker (No 3) [cited as (No 4)] and adopted and applied the analysis of Phillips J set out above. The author of McGregor on Damages (17th Edition) at paragraph 15-118 also refers to the fact that in O'Sullivan v Management Agency

and Music [1985] QB 428, Dunn and Waller LJJ at 462 and 473 took account of tax in the interest calculation.

82.
In relation to interest, like Judge LLoyd in Amstrad I respectfully adopt and apply the reasoning of Phillips J in Deeny v Gooda Walker (No 3). The award of interest should therefore be based on the net amount of the lost benefits, after the deduction of tax.

Summary

83.
For the reasons set out above:

(1)
EDSL are to pay Sky 85% of Sky's costs of the proceedings.

(2)
Such costs are to be assessed on a standard basis.

(3)
In assessing damages for lost benefits awarded to Sky an allowance should be made for the difference between the Corporation Tax treatment which the lost benefit would have received and the Corporation Tax treatment which the sums awarded as damages are likely to receive.

(4)
In awarding interest pursuant to s.35A of the Senior Courts Act 1981, such interest should be based on the net amount of the lost benefits, after the deduction of tax.

Postscript

84. This judgment had been circulated in draft and was due to be handed down on 23 April 2010 at a further hearing to deal with quantum issues. In advance of that hearing I was informed that the parties had reached an agreement, in principle, to settle all outstanding matters relating to this litigation. The parties have since been able to reach a complete settlement and, as agreed with the parties, I now hand down this judgment.