

# BSkyB Redux? Lessons from *Orange County v. Tata Consultancy Services*

John P. Beardwood  
Fasken Martineau DuMoulin LLP  
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# Introduction

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- ***BSkyB v. HP (2010)***
- HP inherited high-profile case btw EDS & BSkyB, over failed customer system implementation, when bought EDS in 2008.
- In 2010 it lost a key judgment– after a sales rep was found to have deliberately lied in 2000 about timelines needed in order to win the work – and 6 months later HP reached a final settlement for unprecedented £318 million.
- The settlement was agreed in June 2010 as damages and cost awards continued to pile in, hitting a total of £270 million before BSkyB's £48 million legal costs were assessed.

# Introduction

- ***Changes in Practices post-BSkyB?***
- The UK head of HP Enterprise Services told *Computerworld UK* in 2010 that the outsourcing business was in a “very different place” from the early 2000s.
- “As well as multiple levels of delivery assurance review, there are a series of gated reviews as deals progress,” he said. “It’s physically impossible at HP to sign a deal that doesn’t go through a gated review....**The idea is to “bring together the sales view and the delivery reality ...** You don’t get sales people or project leaders pursuing the whole thing.”
- He insisted BSkyB had not forced HP to change its practices “one jot”. Any changes reflected the growing maturity of the market instead, were already completed pre-judgement and *similar efforts could be seen by other outsourcers.*

# Introduction

- ***Fast forward to 2007...***
- After a competitive procurement Orange County (the “County”) engages Tata America Int’l Corp (“TCS”), a subsidiary of TCS America, to develop custom software to handle operations of most of County’s property tax functions.
- July 2008 go to contract - the County pays TCS \$5 mil over the course of the term
- 2013: the County lets contract expire and sues for \$10 mil, for claims which include promissory fraud, fraudulent misrepresentation, and negligent misrepresentation
  - in effect, claiming Tata deliberately misrepresented - during sales cycle & throughout engagement - ability to perform & to do so during agreed project timelines
- TCS counterclaims for approx \$6 mil

# Introduction

- In this presentation we:
  - A. outline the **background** behind *County of Orange v. Tata Consultancy Services Ltd.*, et al.
  - B. review:
    - i. the **claims** made by the County,
    - ii. the TCS **responses** in their counterclaim; and
    - iii. the issues regarding, and the merits of, each of these positions; and
  - C. review the **strategies** of the case; and
  - D. outline **lessons learned**.

# A. Background

# Background

- In preparation for engaging a contractor to develop a new Property Tax Management System (“PTMS”), the County contracted Sierra Systems to develop the business requirements
- A team of specialists on-site at the County for 15 months resulted in a needs assessment document of over 6,000 pages
- RFP incl. excerpts of needs assessment, followed by a Q&A session at which potential bidders also received “an opportunity to review” a hard copy of full Needs Assessment – all 6,000 pages of it...
- November 2007, TCS submitted a response to the RFP, which contained the alleged misrepresentations, then reiterated a number of these misrepresentations in January 2008 interviews
- Spring 2008: RFP incl model contract, so initiated negotiations re the SOW project plan & schedule; TCS reviews full e-copy of the Needs Assessment; in course of negotiations, TCS reaffirmed the representations

# Background

- Original contract is effective July 2008; provides:
  - that TCS is to be paid approx. \$8 mil to complete the PTMS software, in 25 months
  - for 90 days warranty for the software
  - warranty that all work is to be performed in a professional manner according to generally accepted industry standards
- Series of amendments then result

# Background

- **Amendment #1 (May 2009):**
  - scope deferred: several modules initially assigned for Tier 1 and Tier 2 development are pushed into later Tier 1A & Tier 3; and
  - work offshored: in exchange for cost reduction
- **Amendment #2 (June 2010)**
  - increases TCS compensation by approx \$1.2 million
  - extends project deadline by 6 months to December 2011
- **Amendment #3 (June 2011)**
  - again increases TCS compensation, by \$2.7 million
  - extends project deadline by another year to complete the PTMS project, to August, 2012, and contract end date to January 2013.
- **Proposed Amendment #4:** TCS asks for:
  - an additional \$5.76 million
  - extension of deadline by 18 months = contract end of June 2014.

# Background

- 2012 County begins a systematic review of the PTMS software
- concludes software is not salvageable
- January 8, 2013, the County gives TCS notice of intent not to review contract beyond the next day, January 9, 2013
- **The County Story:**
  - TCS promise: complete project in **3 years + < \$8 million**
  - Now asking the County to accept **6 years + > \$16 million**
  - TCS intentionally misrepresented capabilities/expertise while simultaneously “underbidding” the cost/time required.
  - *“TCS knew that once it had begun work on the PTMS project, it would be exceedingly difficult and expensive for the County to replace TCS and that TCS could seek repeated amendments of the contract to obtain additional time and money from the County just to complete the same work that TCS had promised it would do faster and for less money.”*

# Background

- **TCS Counterclaim**
- Contract was not a turnkey contract: was rather a professional services contract, which contemplated close collaboration with the County
- **Amendment #1:** meant savings of \$1.6 mil to the County
- **Amendment #2:** resulted from scope changes, & other things
- **Amendment #3:** no useful comment
- for both Amendments #2 and #3, TCS agreed to Contract increase that was less than TCS' estimated cost = hardly reassuring
- the County did not provide proper resources
- 6,000 page Needs Assessment was neither correct nor complete
- the County did not conduct a technical review of the software until more than 95% developed/tested = so the County's fault?
- many issues with County role in data conversion & migration

# Background

- **TCS Counterclaim**
- the County was unprepared for, and wholly underestimated time/effort required for UAT preparation/execution
- After Tier 1 went live, County unable to support post-90 day warranty
  - **County:** but when tested software, modules contained so many errors (more than 380) that County could not complete testing.
- **Defence:** the County claims are barred by:
  - Limitation of liability: only excepts wilful misconduct claims
  - Entire Agreement clause
  - Doctrine of waiver, estoppel & ratification, among others
- **Counterclaims:** Alleges the County is guilty of:
  - **Breach of contract**
  - **Breach of covenant of good faith and fair dealing**
  - **Unjust enrichment**

# Background

- **TCS Story:** the County “set out on plan to get as much work out of Tata America as possible, then transfer work to another vendor, thereby not paying Tata America for work performed.”
- General theme: County unfairly surprised us by not renewing the contract.

# Background

- Summary
- Classic arguments/concerns
  - **Customer:**
    - Concern re sales/operations bait and switch
    - Plus claims re ongoing deception inducing entry into three amendments
  - **Provider**
    - Classic, albeit weaker response from TCS
      - No detailed responses to more serious claims
    - Client team inconsistent & did not do their job

## B. The County's Claims

# The the County's Causes of Action

**Complaint** set out the following causes of action

1. Promissory Fraud: .
  2. Fraudulent Misrepresentation:
  3. Fraudulent Concealment:
  4. Negligent Misrepresentation
  5. Lastly, Breach of Contract
- Notwithstanding the formal causes, the bases for 1, 2 and 4 were the following alleged misrepresentations, made by TCS in their 2007 response to the County's RFP, then affirmed in Q&A, and then further affirmed in the Contract

# 1. Performance Misrepresentation

## Performance Misrepresentation

- *that TCS completed 96% of all projects on-time and on-budget*

### County claim:

- Had TCS had as much success/expertise in completing projects on time and on budget as it represented, then TCS's need to ultimately seek a doubling of the promised PTMS budget and timelines suggests that TCS must have known from beginning that it was impossible to meet its original Timeline Representation & Cost Representation
- + 6,000 pages Needs Assessment gave TCS a substantial head start

### TCS Response

- Denial

# 1. Performance Misrepresentation

## Performance Misrepresentation

- *that TCS completed 96% of all projects on-time and on-budget*

### Assessment:

- Difficult to get traction on claim that 96% figure was a misrepresentation, given obvious fact that – even if taking this figure as true – 4% of the projects were not on-time and on-budget, and this could be one of those 4%
- the County arguments seem weak: effectively, that:
  - given the 96% success factor, they ‘should have known better’
    - but Performance Misrep. is backward looking, not prospective
  - given how badly they did, the 96% figure cannot be true
    - See above = it can be true

## 2. Timeline Misrepresentation

### Timeline Misrepresentation

- *that the PTMS program could be completed within 25 months (i.e. by Feb 2010 if project started January 2008)*

### County Claim:

- contract affirmed timeline
- was false because TCS both knew was impracticable, and did not intend, to complete project within time period

### TCS Response

- Contract term was 3 years, from July 2008 to July 2011, and then renewable for two 1 year terms (to July 2013) =
- “the Contract contemplated that it would take until July 2013 to complete the project”.

### Assessment

- Puzzling argument – i.e. existence of optional renewal terms = parties knew that renewal was required to complete project

## 3. Cost Misrepresentation

### Cost Misrepresentation

- *that the total cost to the County for the PTMS project would be \$7,986,580*

### County Claim

- Contract affirmed: expressly states price is compensation for:
    - all services
    - all “reasonably unforeseen difficulties which may arise or be encountered in the execution of the services until acceptance”
    - all risk associated with the services,
- & in no event shall TCS be paid more than specified price
- was false because TCS both knew was impracticable, and did not intend, to complete project within such cost

## 3. Cost Misrepresentation

### Cost Misrepresentation

- *that the total cost to the County for the PTMS project would be \$7,986,580*

### County Claim

- TCS's intent *not* to perform within revised project budgets /timelines in Amendments # 2 and #3 was reflected by how quickly after execution TCS disavowed its ability to perform in keeping with them:
  - Only 6 months after Amendment #2 (i.e. extra six months + \$1.2 million more to complete the PTMS project), TCS asked for an additional 12 months + \$4.8 million more
  - Only 3 months after Amendment #3 (i.e. extra 12 months but only \$2.7 million more), TCS asked for extra eighteen months and \$5.76 million more: the County refused

## 3. Cost Misrepresentation

### Cost Misrepresentation

- *that the total cost to the County for the PTMS project would be \$7,986,580*

### TCS Response

- all additional costs in Amendments were less than TCS' estimated cost = but not really a defence
- Amendment #2: for change requests, & other things
- Amendment #4: “both sides recognized [it] was necessary to complete the test phase”

### Assessment

- But Amendment #4 was for extra 18 months + \$5.76 mil more = for the test phase? = more than 50% of original quoted cost
- Surprisingly very little focus on County change requests as problem

## 4. Quality Misrepresentation

### Quality Misrepresentation

- that TCS was world's first IT company to achieve an "Enterprise wide CMMI Level 5 certification," that processes used to design/develop software were "extremely mature" & designed as quantifiable, repeatable, & able to ensure optimal possible output

### County Claim

- TCS fraudulently concealed its intent not to provide personnel with experience/expertise needed to perform in a manner consistent with a CMMI Maturity Level 5

**TCS Response:** Denial

**Assessment:** Same problem in proving as the 96% Performance Misrepresentation, as a retrospective statement

## 5. Personnel Misrepresentation

### Personnel Misrepresentation

- that certain individuals will be assigned to the project as project manager and key personnel

### County Claim

- only 5 of the 16 promised personnel ever performed a role on project, and of those, 2 were not assigned to the project until two + years had passed. TCS also failed to replace with individuals with equivalent experience or expertise.
- TCS had no intention, at the time it submitted the response, of committing those 16 personnel

**TCS Response:** Denial

**Assessment:** OK, but not an overwhelming point.

## 6. Experts Misrepresentation

### Experts Misrepresentation

- that TCS felt outside expertise was essential, & had engaged 2 senior advisors with expertise in property tax in California

### County Claim

- was false, and, although TCS may have formally engaged Ms. Sexton and Mr. Birchfield, TCS had no intention of relying on those experts' time & services to cover TCS's own deficiencies in the subject matter of California property taxes

**TCS Response:** Denial

**Assessment:** Not clear how this was false, given that the County concedes that TCS may have engaged the two experts

# Breach of Contract

- While less a focus of the Complaint, the last of the County claims below re breach of contract is perhaps the most damaging for TCS
- Claims of contract breach are as one would expect
  - failing to produce complete/functioning software on time
  - failing to perform development in a “professional manner according to generally accepted industry standards,”
  - failing to perform to the County’s satisfaction
  - failing to perform all work “diligently, carefully, and in a good and workman-like manner”; and
  - breach of 180 day warranty
- *failing to produce PTMS software in compliance with agreed technical architecture*

# Breach of Contract

- **Sustainability**
- reliability, maintainability, and scalability goals
- software had to be designed in clear, logical & efficient manner so easy for the County to understand, maintain & update
- formal architecture documentation had to trace the business requirements to applicable (a) screen and user functions and (b) specific source code (i.e. “requirements tracing”)

# Breach of Contract

- **Sustainability**
- the County systematic review of software = to extent completed:
  - was poorly designed
  - would be incomplete even after TCS had completed its projected work: County would need years of work post-implementation to ensure system had intended capabilities.
  - software's architecture deviated substantially from agreed specifications for the technical architecture; causing:
    - substantial problems with the PTMS program's performance,
    - significant security risks for taxpayers
    - other deviations from the Sustainability goals for PTMS
    - widespread lack of standardization.

# Breach of Contract

- **Sustainability**
- Most damning allegation:
  - work of dozens of different TCS programmers deviated from the agreed-upon architecture in certain uniform ways
  - these uniform “**Architectural Deviations**” could only reflect those programmers’ *receipt of instructions* contrary to parameters set by agreed-upon technical architecture
  - nature of the deviations suggests *an intent to develop the PTMS software in a manner that would have been simpler, faster, and less expensive for TCS*, even though not in conformity with the agreed-upon technical architecture & resulting in serious long-term consequences for the efficiency, usability, & maintainability

# Fraudulent Concealment

- TCS fraudulently concealed:
  - its intent not to provide personnel with the experience and expertise needed to perform in a manner consistent with a CMMI Maturity Level 5, which TCS was required to disclose to the County prior to entering into the Original Contract in order to avoid making the Quality Representation misleading; &
  - the existence of the Architectural Deviations, in order to induce the County to enter into Amendment #2 and Amendment #3.

# Strategies of the Case

# Strategies of the Case

- Why did it take three amendments & proposed fourth amendment before County finally determined that the problems were material enough to justify terminating TCS?
- TCS: may argue that amendments extending timelines & budgets effectively resulted in County waiving/being estopped from bringing claims re new timelines & budgets.
- However, County's strategy in focusing on the alleged misrepresentations of TCS is significant in two respects:
  1. if effectively constituted wilful misconduct by TCS, liability limitation of approx \$5 million paid will not apply
  2. in *BSkyB*, EDS had the additional benefit of a full and final release in the amendment, which release was clearly supported by the payment of consideration ...

# Strategies of the Case

... as the Letter Agreement required EDS to make certain payments/credits to Sky. Yet the Court found that this express release provision was not insufficient to exclude claims for negligent or fraudulent misrepresentation, and excluded only claims for breach of the Prime Contract.

- Given that:
  - TCS did not even have the benefit of such a release, &
  - there are doubts as to whether such amendments waive/estoppe the County from bringing claims based on negligent/fraudulent misrepresentation in any caseTCS will face some challenges in making their arguments.
- County's arguments, incl. re fraudulent/negligent misrepresentation, will be heavily evidence-dependent

# Lessons Learned

# Lessons Learned

- Counsel for both customer and providers can learn valuable lessons from this case, which in many cases reinforce the *BSkyB* lessons
- Customer counsel should ensure that customer:
  1. *tests key assertions* made by the provider in connection with a proposal, esp re timelines & budget
  2. has less focus on retrospective provider representations (e.g. the provider has a specific business certification), and *more on prospective warranties & covenants* (e.g. the provider will provide all services as per the provider's "X" certification);
  3. *continues to test the progress of key elements*: TCS is correct - County waited too long to do a code review, and ought to have done so on a per-Tier and/or per-module basis;
  4. (a) structures timeline and work phases so there is an *early warning stage* (for example, a "Phase 0"), & (b) *pays attention* to such warning signs as may emerge from that initial 'test' phase.

# Lessons Learned

- In this case:
  - Tier 1 and its many problems should have served that function
  - In retrospect, the County should have endeavored to create a “stepped” or “gateway” development process and contractual commitment so Tier 1 would need to be accomplished first before the County would commit to the next stage
- 5. *does not over-commit to the deal*, e.g. through continual amendments, because of concerns that it will be exceedingly difficult & expensive to replace the provider; rather, customer should always have, & be prepared to act upon, a viable exit plan
- 6. *expressly disclaims in any amendment any claim* that by entering into the amendment the *customer has agreed to waive, be estopped from bringing, and/or is ratifying the actions of the provider* prior to the date of such amendment.

# Lessons Learned

- Provider counsel, in addition to obvious flip-side of lessons learned for customer counsel, should note that providers:
  1. must be *more careful in assessments of risk* (esp re possible disconnects between sales & operations)
  2. must be *more careful in what they bid for*,
  3. will face *increased bidding costs* due to (a) preparation work, and (b) need to build contingency into pricing in anticipation of risk of misrepresentation claims,
  4. must be extremely *careful about pre-contract representations* re state of a system to be provided,
  5. must pay attention to *qualifications of sales personnel*, as misrepresentation claims are highly reliant on evidence, incl. testimony of provider sales personnel

# Lessons Learned

6. Face *increased demands on insurance*, in that:
  - this trend towards basing claims outside contract may lead to increased IT project litigation;
  - premiums for cover for liability for IT project failures may push up bid prices; and
  - premiums for fraudulent misrepresentation may prove prohibitive.

# Conclusion

# Conclusion

- While we do not yet have a judgment in this case, to a certain extent for TCS the damage has already been done.
- The allegations of the County, while yet to be proven in court, are such that prudent customers will at least take these allegations into account when considering TCS as a potential provider.
- In that sense, perhaps the final lesson of *County of Orange v. Tata Consultancy Services Ltd.* et al. is the old chestnut of Governance.
- With the appropriate governance and communications structures in place, it is likely that the project would never have proceeded as far as it did, & this case never would have entered the public consciousness in the form of a lawsuit.



**John Beardwood** – A partner at Fasken Martineau, Co-Chair of both the firm’s national Technology and Intellectual Property (TIP) Group and the Outsourcing Group; engaged in a corporate/commercial practice, with an emphasis on outsourcing and prthe Countyement, technology and privacy law related matters. Regularly listed among the world's preeminent internet and e-commerce lawyers in *Who's Who Legal - The International Who's Who of Business Lawyers* where, in addition to being referred to as “an authority on outsourcing” in the guide to Internet and E-Commerce Lawyers, he has been identified as being both one of the two most highly nominated Canadian lawyers in the guide, and one of the ten “most highly regarded individuals” globally. Consistently recognized in the in *The Best Lawyers in Canada* in the specialty of Information Technology Law. Listed as “Highly Recommended” for Outsourcing (Canada) in the PLC Cross-border Outsourcing Handbook.

- Direct line: 416 868 3490
- Mobile line: 647 315 7540
- [jbeardwood@fasken.com](mailto:jbeardwood@fasken.com)

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