SUPREME COURT OF QUEENSLAND

CITATION:	*Bounty Systems P/L v Odyssey Gaming Services P/L* [2007] QSC 230
PARTIES:	**BOUNTY SYSTEMS PTY LIMITED (ACN 090 692 489)** (plaintiff) **v** **ODYSSEY GAMING SERVICES PTY LIMITED (ACN 061 363 139)** (defendant)
FILE NO/S:	No 9885 of 2006
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 August 2007
DELIVERED AT:	Brisbane
HEARING DATE:	11, 12, 13 July 2007
JUDGE:	Muir J
ORDER:	**As per minutes of order to be settled**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where plaintiff company licensed software to defendant under agreement – where agreement stated that the plaintiff provide work to the defendant for a fee to be determined by expert if parties unable to agree – where the fee to be determined 'taking into account the Costs" to the Plaintiff – whether the fee referred to is to be determined solely taking into account the cost to the plaintiff or whether the fee can allow for a profit or margin – meaning of "have regard to" – whether the agreement should be rectified due to common or unilateral mistake *Trade Practices Act* 1974 (Cth) s 52, s 87 *Butt v M'Donald* (1896) 7 QLJ 68, cited *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259; [1995] 2 All ER 929; [1995] 2 WLR 677, cited *Email Ltd v Robert Bray (Langwarrin) Pty Ltd* [1984] VR 16, applied

Eroc Pty Limited v Amalgamated Resources NL [2003] QSC 074, cited
Foran v Wight (1989) 168 CLR 385, cited
Ishak v Thowfeek [1968] 1 WLR 1718, applied
Mackay v Dick (1881) 6 App Cas 251, cited
R v Toohey; ex parte Meneling Station Pty Ltd (1982) 158 CLR 327, distinguished
Re RJD Hunt, ex parte Sean Investments Pty Ltd (1979) 53 ALJR 552, applied
Royal Botanic Gardens & Domain Trust v South Sydney Council [2002] 186 ALR 289, distinguished
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596, cited
Sudbrook Trading Estate Ltd v Eggleton [1983] 1 AC 444, applied

COUNSEL: S L Doyle SC with him M D Martin for the plaintiff
D G Clothier for the defendant

SOLICITORS: Clarke Kann Lawyers for the plaintiff
Koops Martin Lawyers for the defendant

Introduction

[1] The defendant Odyssey Gaming Services Pty Limited ("Odyssey") monitors gaming machines at gaming venues under licence from the Queensland government. In conducting its monitoring operations Odyssey utilises the Sentinel software system developed by the plaintiff Bounty Systems Pty Ltd ("Bounty") and licensed to Odyssey under an agreement dated 30 June 2003.

[2] Under clause 14 of the agreement, Bounty assumed, implicitly if not expressly, an obligation to effect technical changes to the Sentinel system software required by the Queensland Office of Gaming Regulation ("QOGR"). Clause 14 provides that the fee for any such work ("mandated work or mandated changes") by Bounty in excess of 100 hours per year is to be "negotiated in good faith between the parties" and, in default of agreement, determined by an independent expert.

[3] In 2006 the QOGR required compliance by licensed monitoring software operators with requirements described as "Protocol 1.6". Bounty performed the work necessary to achieve compliance and a dispute has arisen as to its entitlement to payment. The principal matter in dispute is the proper construction of clause 14. In the alternative, Odyssey seeks to have the agreement rectified so that clause 14 is worded consistently with its preferred construction. In addition there is an estoppel claim and a claim under s 87 of the *Trade Practices Act* 1974 (Cth) that the agreement be varied in consequence of alleged conduct on the part of Bounty in breach of s 52 of the *Trade Practices Act*.

The circumstances surrounding the entering into of the agreement

[4] Before considering in detail the parties' respective contentions, it is desirable to recite something of the factual background to the dispute. The agreement, which is for a term of five years, replaced an earlier agreement which commenced on 6 March 2000. In late 2002 Bounty and Odyssey commenced negotiations for a replacement agreement. The negotiations were conducted mainly by Mr Britten on behalf of Odyssey and Mr Schubert on behalf of Bounty. Also involved in the negotiations on behalf of Bounty were Mr Cooper and Mr Philips. Mr Cooper's involvement with the agreement and the negotiation of it ceased in December 2002.

[5] Mr Philips was appointed by Mr Thorburn, the Chief Executive Officer of Golden Casket Lottery Corporation Limited, and a director of the plaintiff, to oversee the negotiation of the agreement. Mr Thorburn was the person to whom Mr Philips reported. If Mr Schubert did not report to Mr Philips, he reported directly to Mr Thorburn. Neither Mr Philips nor Mr Schubert had authority to enter into the agreement. Nor, for that matter, did Mr Thorburn as the decision whether to execute the agreement or not was for the board of Bounty. At an executive level, however, it was Mr Thorburn who "had the final say on the terms of the … agreement".

[6] As between Mr Philips and Mr Schubert, the former had principal responsibility for ensuring that the agreement served Bounty's commercial interests. Mr Philips also appeared to have the primary role of dealing with Bounty's solicitors concerning the drafting of the agreement. Mr Schubert was Bounty's General Manager, Technology, and supplied, on Bounty's behalf, the necessary technical expertise.

[7] Mr Britten is and was a director and the Chief Executive Officer of Odyssey and, apart from Mr Koops, was the only person on behalf of Odyssey involved in the negotiation of the agreement. Mr Koops, chairman of directors of Odyssey and a director of Koops Martin Lawyers Pty Limited, had some involvement in the negotiations prior to Mr Cooper's ceasing his involvement. Mr Koops also had discussion with Mr Thorburn concerning the proposed agreement shortly after Mr Koops sent a letter dated 24 June 2003 to Bounty's solicitors concerning outstanding issues. Mr Koops reviewed drafts of the proposed agreement from time to time and discussed them with Mr Britten.

[8] Bounty's solicitors prepared the first draft of the proposed agreement and forwarded it by email to Mr Philips on 28 March 2003. Clause 13 of the draft dealt with the subject matter of clause 14 of the agreement. It provided for Bounty to bear a threshold cost of a dollar amount in any one year, for the parties to negotiate an increase in the licence fees once that threshold was exceeded and for Bounty to be permitted to withdraw the Sentinel system in the event agreement could not be reached. The increase in fees was to be negotiated "taking into account the increased Cost to Bounty of making the technical changes".

[9] A further draft of the proposed agreement was sent by email on 2 April 2003 by Bounty's solicitors to Messrs Philips and Schubert. The threshold amount was set at $10,000, the reference to "increased" cost was deleted and the term "Cost to Bounty" was included and defined.

[10] On 16 April 2003 Mr Schubert sent the latest draft of the proposed agreement to Mr Britten. By email to Mr Schubert dated 8 May 2003 Mr Britten requested that the sum of $10,000 be removed from clause 14 and replaced with words that "provide for the parties to have dialogue". On 8 May 2003 Mr Philips instructed Bounty's solicitors to incorporate a provision to that effect. Mr Philips, in response to a query by Bounty's solicitors, instructed them that Bounty was to provide up to 100 man hours per annum free of charge and that modifications beyond this would be subject to a "fee for service" to be negotiated and, failing negotiation, to be determined by an expert. A further draft forwarded by Bounty's solicitors to Mr Philips and Mr Schubert on 15 May 2003 incorporated the requested changes. The draft also incorporated clause 14.5 which permitted Bounty to withdraw the system and terminate the agreement in the event that the expert was unwilling or unable to make a determination.

[11] In a letter dated 24 June 2003, Mr Koops objected to the inclusion of clause 14.5. After discussion between Mr Koops and Mr Thorburn clause 14.5 was deleted from the next draft of the agreement.

[12] The agreement was signed on 30 June 2003 after being approved by Mr Koops on behalf of Odyssey. Mr Thorburn, on behalf of Bounty considered it and approved its contents. He then submitted it to Bounty's board for its approval.

Odyssey's submissions on the construction of clause 14

[13] The specification of cost in clause 14, without the express identification of whether or not it is the only factor to be taken into account, gives rise to an ambiguity. That ambiguity is to be resolved by reference to the context of clause 14 against the background facts known to the parties at the time the agreement was entered into. Those facts include the following:

(a) It was known that the QOGR was likely to mandate changes to the system and the parties could not predict the extent of the proposed changes;

(b) The original agreement did not deal specifically with payment for mandatory changes to the system and Bounty had made some changes in the past for no charge;

(c) There was at least one other licensed monitoring operator using the system and a prospect that any changes to the system in Queensland would be adopted in Tasmania. Bounty was seeking to enter other markets with the system, giving rise to the possibility that Bounty may have been able to defray the cost of developing the software to accommodate mandated changes.

[14] Clause 9 which provides for the cost of additional services provided by Bounty, calculates Bounty's fees by reference to fixed rates. Two areas of prospective work within the scope of clause 9 contain express reference to "commercial terms". There is no such reference in clause 14 and it contains no express rates. The differences between clauses 9 and 14 are significant.

[15] The reference in clause 14 to "Cost to Bounty" as something which is expressly to be taken into account indicates that cost is to be the fundamental element of the fee.[1] The omission of any reference in clause 14 to a commercial fee, having regard to the references in clause 9, indicates that the object of clause 14 is not to make provision for a commercial fee.

[16] "Cost to Bounty" is defined to include both internal and external costs. This is inconsistent with commerciality being the guiding consideration. If it were the guiding consideration, there would be no need for the clause to refer to costs. Concepts of commerciality, fairness or reasonableness would necessarily encompass the notion that cost should be taken into account. Had the consideration to which clause 14 expressly refers been one which was broader than or in addition to factors which would normally be taken into account in setting a commercial fee, it might have been argued that the purpose of the express reference in the clause was to expand the categories of relevant factors. The fact that the consideration is a subset of the considerations which would normally be taken into account in setting a commercial fee strongly indicates that the consideration is intended to be exclusive.

[17] The words "taking into account" are explicable by reference to the background facts. Under the agreement Odyssey is granted only a non-exclusive licence to use any mandated upgrade. Bounty is free to commercially exploit that upgrade by licensing other users. In those circumstances, the use of "taking into account" is explicable on the basis that the fee which is determined may be something less than the entire cost to Bounty.

Clause 14 of the Agreement and the definition of Cost to Bounty

[18] Clause 14 of the Agreement provides:

> "14. QOGR APPROVAL
>
> 14.1 Subject to Clause 14.4, Bounty will use all reasonable endeavours to meet all time frames imposed by QOGR for all mandated technical changes for the Sentinel System, Sentinel System Software, APS and BPL.
>
> 14.2 Bounty will undertake up to 100 man hours work per Year (non-cumulative over the Term) at no charge to Odyssey to effect technical changes mandated by QOGR to the Sentinel System Software, APS and/or BPL.
>
> 14.3 Each time Bounty undertakes work pursuant to Clause 14.2, it must provide a report to Odyssey detailing the number of man hours spent in conducting such work.
>
> 14.4 Any work required in excess of 100 man hours per Year to effect technical changes required by QOGR shall be charged by Bounty to Odyssey at a fee for service to be negotiated in good faith between the parties, taking into account the Cost to Bounty of making the technical changes.

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[1] *R v Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333.

> 14.5 If Bounty and Odyssey are unable to agree the fee for service referred to in Clause 14.3 within 30 days of notification by Bounty to Odyssey of a request to negotiate such a fee, the Parties shall, notwithstanding the dispute resolution procedure set out in Clause 26, refer the matter to an independent expert appointed by agreement between the Parties or failing agreement by the President of the Australian Computer Society (Queensland Division) for determination."

[19] Schedule 1 of the Agreement defines "Cost to Bounty" as:

> "… the cost which is or would be incurred by Bounty in making the technical changes including, but not limited to, all labour and material costs and all costs of testing and QOGR approval."

Construction of clause 14

[20] In my view the construction of clause 14 advanced on behalf of Odyssey unacceptably strains the plain language of clause 14.4.

[21] As Mr Doyle SC, who lead Mr Martin for Bounty, pointed out in his submissions, clause 14.4 concerns "a fee for service" to be charged by Bounty to Odyssey. That fee for service is "to be negotiated in good faith between the parties". The subclause finishes with the words "taking into account the Cost to Bounty of making the technical changes". If Odyssey's construction is correct, there would be little point in referring to "a fee for service". It would be unusual also to describe a fee consisting only of a recoupment of Bounty's costs as a fee to be negotiated. The obvious approach would have been to provide that Bounty was entitled to recover its costs and that any dispute as to quantum be resolved by an expert in default of agreement.

[22] The use of the words "to be taken into account" also poses obvious difficulties for Odyssey's construction. A direction to take a matter into account for the purpose of making a determination normally means that regard must be had to it, but not exclusively.[2] It would require a strong contextual indication to cause the words "taking into account" to mean "only having regard to".

[23] The contextual indications are against Odyssey's construction for the reasons already stated. Additionally, under clause 14.5 the matter to be referred to an independent expert for determination is the fee for service and there is a direction that "the Cost to Bounty" must be taken into account in the determination. If the parties had intended that the expert's task would be to determine only "the Costs to Bounty" it is surprising that this was not simply stated.

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2 See eg., *Re RJD Hunt, ex parte Sean Investments Pty Ltd* (1979) 53 ALJR 552 at 554; *R v Toohey; ex parte Meneling Station Proprietary Limited* (1982) 158 CLR 327 at 333 and 338 and *Ishak v Thowfeek* (1968) 1 WLR 1718 at 1725.

[24] Odyssey relied on *Royal Botanic Gardens & Domain Trust v South Sydney Council*[3] and *R v Toohey, ex parte Meneling Station Pty Ltd* in aid of its construction argument. In the former case between the trustees of the Domain and the South Sydney City Council a lease the subject of the dispute provided for a rent to be determined by certain trustees who "in making any such determination … may have regard to additional costs and expenses which they may incur in regard to the surface of the Domain above or in the vicinity of the parking station and the footway and which arise out of the construction operation and maintenance of the parking station by the Lessee". It was held that the phrase "the trustees may have regard to additional costs and expenses" was ambiguous and that the clause should be read as stating the only matters which were able to be taken into account in fixing the successive rent determinations. The parties to the lease and their successors were public bodies acting within legislative regimes in relation to contracts and leases. The transaction was non-commercial in nature.[4] Moreover it was held that the construction favoured by the court accorded with the arrangements between the parties agreed some 20 years before the entering into of the lease. The decision thus sheds little light on the words used in a different contract entered into in quite different circumstances.

[25] In *R v Toohey*, the provision for consideration was subsection (3) of s 50 of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). It provided that in making a report in connection with a traditional land claim, the Aboriginal Land Commissioner "shall have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed, and shall comment on" each of a number of matters. Gibbs CJ concluded that by directing the Commissioner to "have regard to" certain specified matters, it "requires him to take those matters into account and to give weight to them as a fundamental element in making his recommendation".[5]

[26] Mason J was of the view that by requiring the Commissioner to have regard to the strength or otherwise of the claimant's traditional attachment to land, subsection (3) ensures that this factor "will become a central element in the Commissioner's report".[6] It is difficult, however, to draw any principle capable of application to the construction of the agreement from the construction of statutory provisions which are entirely different in purpose, wording and effect from the contractual provisions under consideration. One obvious point of construction which does emerge though from the case is that a direction to "have regard to" a certain matter, whether it is to be given weight to "as a fundamental element" or regarded as "a central element", is unlikely to mean that regard may not be had to other factors and considerations.

Must any fee for mandated changes be negotiated or determined having regard to the fact that such work is not performed exclusively for the benefit of Odyssey?

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3 [2002] 186 ALR 289.
4 Para [37].
5 At 333.
6 R v Toohey, at 338.

[27] Odyssey contends also that on the proper construction of clause 14, the ability of Bounty to grant a non-exclusive licence to use the upgrade to others conferring on it the ability to spread the cost of developing the upgrade must be considered in a negotiation or determination. Odyssey argues in this regard that although cost is the only relevant factor in the calculation of the fee, the parties contemplated that the cost might be spread amongst several users. Consequently, it is asserted, in negotiating or determining a fee by reference to cost, the actual potential pool of users from whom that cost can be recouped is material.

[28] Odyssey's argument appears to be in direct conflict with its contention that clause 14 is concerned only with a determination of "the Cost to Bounty". If, for example, Bounty prepared the same software modifications for use by Odyssey and another customer who was also obliged to pay Bounty for its work, the other customer's contribution may need to be accounted for in determining the "Cost to Bounty". It is more difficult, on Odyssey's argument, to see how the "Cost to Bounty" must be determined by reference to the mere possibility that Bounty may be able to obtain a fee from another or others in the future through licensing the upgraded software.

[29] It may be accepted that Bounty's ability to licence others to use the upgrade is relevant to a determination under clause 14.5 but it does not follow that this is a matter which an expert appointed under clause 14.5 must take into account. The parties, by specifying only one matter which must be taken into account in arriving at Bounty's fee for service, have imposed no contractual boundaries or constraints on the matters to which the independent expert may have regard, except any constraint implicit in the specification of that one matter.[7] They have left themselves similarly unfettered in the negotiations they are obliged to conduct.

Rectification – the alleged conversation between Messrs Britten and Schubert

[30] Odyssey seeks rectification of the agreement on the basis of mutual or, alternatively, unilateral mistake arising out of a conversation alleged by Odyssey to have occurred between Mr Britten and Mr Schubert.

[31] Mr Britten's evidence is to the following effect. The alleged conversation took place quite early in the negotiations and before any draft of the Agreement or other documents setting out prospective terms had been exchanged. In the course of the conversation Mr Schubert said that he was adamant about including a provision in the Agreement to protect Bounty from assuming the cost of providing software upgrades to satisfy the requirements of the QOGR. He accepted in cross-examination that Mr Schubert told him that Bounty wanted to be protected from spending its time and money on effecting such changes. He said that in response to an observation by him to the effect that Odyssey did not currently pay for upgrades and a question as to what Odyssey was paying all its money for, Mr Schubert responded to the effect that he did not want to make money out of this, he just wanted to cover Bounty's position. Mr Britten then said words to the effect that "on the basis this is not Bounty profiting by changes that are mandated by the regulator.

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7 *Email Ltd v Robert Bray (Langwarrin) Pty Ltd* [1984] VR 16 at 21.

I don't want this to be an open cheque". Mr Schubert replied, "No, like I said we just want to cover ourselves." On the basis of this conversation Mr Britten concluded that Odyssey would not be charged for work at the same rate as that charged under clause 9 because the rate for work under clause 9 incorporated a profit component.

[32] In cross-examination Mr Britten accepted that he could not remember the exact words used in the conversation but said that its substance was that the subject work would be done at cost. There was no reference in the conversation to the drafting of a provision for insertion in the proposed agreement. At the time of the discussion he was aware that a provision in relation to the cost would need to be drafted along with many other aspects of the proposed agreement.

[33] Mr Britten accepted in cross-examination that he was told by Mr Schubert that Bounty wanted to be protected "from spending its time and money" on effecting modifications.

[34] The evidence of Mr Schubert, a longstanding friend of Mr Britten, was as follows. Mr Schubert has a recollection of a conversation with Mr Britten fairly early in his involvement in the contractual negotiations. In that conversation he asserted the need for the agreement to contain a clause protecting Bounty against the cost of developing modifications to the Sentinel system because of regulatory requirements. He said that Bounty was not looking to profit from making such changes and was only looking to protect itself against the cost of making them. Mr Britten raised no objection to the proposal and told Mr Schubert that Odyssey would not be able to pass the cost of mandated changes onto its customers. The discussion was "very much subsidiary to the principal matters being negotiated". Not surprisingly, Mr Schubert cannot recall the exact words used.

[35] It was the understanding of Mr Schubert that the Tasmanian licensed monitoring operator was able to use the Sentinel system also and would thus be able to use any modifications to it. He mentioned to Mr Phillips that the contract with the Tasmanian licensed monitoring operator required Bounty to develop mandatory changes at its own cost and that Bounty should make sure that it could recover its costs. He explained to Mr Phillips that he considered it fair that Bounty only ought to recover its costs of making such changes and not profit from them because they were mandatory changes which were outside the control of the parties and were changes which Bounty would have to make in any event. He said also that Odyssey would not be able to pass the cost of the changes onto its customers. Mr Phillips did not express any disagreement with his suggestion.

Rectification - the progress of negotiations

[36] After the discussion between Messrs Phillips and Schubert, Bounty's solicitors prepared a document, described as a "terms sheet" which set out the general thrust of provisions for the proposed agreement which the solicitors considered necessary. Item 14 headed "QOGR Approval" contained the words:

> "If the cost of the technical changes required by QOGR exceeds $1,000 in any one year of the Term, Bounty shall notify Odyssey and both parties will meet in good faith to agree an increase in the Fees for the balance of the Term, taking into account the increased cost to Bounty of making the technical changes."

[37] There was provision also for Bounty to have the right to withdraw the Sentinel system and to terminate the agreement should the parties fail to agree.

[38] On 25 March 2003 Mr Schubert, at Mr Phillips' request, emailed to Bounty's solicitors instructions concerning the agreement. Under the heading "Monitoring", the email stated "Odyssey will pay for enhancements to the system. This includes QOGR specified changes." On 28 March 2003 Mr Phillips sent to Mr Schubert the first draft of the proposed agreement which he had received from Bounty's solicitors with a request that Mr Schubert review it. Mr Schubert considered clause 13, which later became clause 14. The only comment he made in respect of the clause was the following which was noted on a marked up copy of the draft emailed to the solicitors. "Alternatively, we could charge the standard hourly rate for these changes, with the first $10K being provided free. The costs should also include any costs associated with obtaining QOGR approval (e.g. costs of independent testing if required by QOGR)." He agreed in cross-examination that his reference to "standard hourly rate" was not a reference to the cost of changes. He also accepted that his comment contemplated the making of a commercial charge.

Matters relevant to an assessment of the nature extent and import of the discussion between Mr Schubert and Mr Britten concerning the subject matter of clause 14.

[39] In early 2006 Mr Schubert was asked by Mr Britten to prepare a statement for the purpose of preparation of a brief to an independent expert appointed or to be appointed under clause 14 of the agreement to resolve a dispute between the parties over Bounty's fees. He said that he was asked by Mr Britten to record in the statement what he had told Mr Britten concerning clause 14 in an earlier telephone conversation. His evidence was that in that conversation he had said, amongst other things, that clause 14 was "there to accommodate major changes … and that Bounty only wanted to recover its costs not make a profit from any other mandated upgrades."

[40] The statement, which contains 23 paragraphs, makes no reference to any discussions between Mr Schubert and Mr Britten about the import of clause 14 in the course of negotiations. Clauses 12, 14, 15 and 17 of the statement provide:

> "12. My intention and that of Bounty for the inclusion of Clause 14.4 in the Agreement was to allow Bounty to recovery costs, which it would incur in the development required to comply with the ever-changing requirements of QOGR. Clause 14.4 was to limit any loss, which Bounty may incur in the continual development of software in order to comply with QOGR requirements.

> …
>
> 14. The costs charged by Bounty to Odyssey under Clause 14.4 were to be less than a commercial rate.
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> 15. Clause 14.4 was incorporated into the Agreement so work mandated by QOGR would be paid by Odyssey to Bounty at an agreed rate, which was not meant to include a profit component.
>
> …
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> 17. While Clause 14.4 of the Agreement states the cost to Bounty includes, but is not limited to, labour and materials, it was also intended by the parties that this 'cost' would include additional costs of running the business eg labour on-costs, WorkCover, workers compensation etc. However, these on-costs do not to include a profit component."

[41] Mr Britten also made a statement in early 2006 for use in connection with the proposed determination of a fee under clause 14.5 of the agreement. That statement makes no reference to any agreement, consensus or representation in the course of negotiations such as those now alleged. In April 2005 Bounty provided a quote to Odyssey for the cost of the mandated changes which was based on a time estimate of 2,478.8 hours at an hourly rate of $150 per hour. After receiving the quotation, Mr Britten queried the number of hours stated but not the hourly rate on the basis of the charge. The mandated work was done by Bounty and it rendered an invoice for it dated 31 January 2006. The invoiced sum was $519,461.25. In an email sent on 31 January 2006 to Bounty, Mr Britten asked why the invoiced sum was higher than the sum quoted. He did not query the basis of the charge.

[42] On 11 April 2006, after discussions between representatives of Bounty on the one hand and Messrs Britten and Koops on behalf of Odyssey, Bounty sent a letter to Odyssey concerning the basis upon which the upgraded software was to be made available to Odyssey pending resolution of the dispute over fees. The letter contained provision for the appointment of an expert to determine the fee. The letter stated, inter alia:

> "Bounty will submit to the expert … that the fee is to be based on a combination of actual man hours spent in developing and testing the Software Upgrade and the commercial market rates for this type of software development and testing."

[43] A copy of the letter, which was seen by Mr Britten around the time it was sent, was signed by Mr Koops on 18 April 2006 in order to indicate Odyssey's assent to its terms. Although Mr Britten was intimately involved in discussions and negotiations concerning the fee charged by Bounty for the mandatory work, on his own version of events, it was not until well after the commencement of the current dispute and after various discussions with Mr Schubert that he adverted to the conversation between himself and Mr Schubert upon which Odyssey now relies.

Conclusions in relation to the evidence of Mr Schubert and Mr Britten

[44] Mr Schubert and Mr Britten may well have had a conversation early in the negotiations in which Mr Schubert said something to Mr Britten along the lines that Bounty required a clause to cover Bounty against its costs of making mandated changes. I am not persuaded however that Mr Schubert said words to the effect that Bounty was not looking to profit from making such changes.

[45] But whatever was said in any such discussion about Bounty's intention and the nature of the recoverable costs or fees, it is plain that neither man regarded the statement as establishing an unalterable position for the purposes of the negotiations. It is equally plain that in entering into the agreement Odyssey placed no reliance on the statement. At the time of the conversation both men appreciated that the terms of a proposed agreement would appear in a formal written document prepared by lawyers. They appreciated also that the written terms appearing in a draft of the proposed agreement would be the subject of negotiations.

[46] I am unable to accept the evidence of Mr Britten and Mr Schubert to the effect that the expression "taking into account the increased cost to Bounty of making the technical changes" and the later variations of those words in drafts of the proposed agreement were taken by each of them to mean having regard only to Bounty's costs.

[47] Mr Schubert's note in respect of clause 13 on the first draft of the proposed agreement is inconsistent with his having made representations to Mr Britten of the nature alleged by him. Even if Mr Schubert had not been a friend of Mr Britten's, I consider it unlikely that Mr Schubert would have given Bounty's solicitors instructions which were inconsistent with material assertions made by him to Mr Britten in the course of negotiations. The note however is consistent with an understanding on Mr Schubert's part that the question of the fee to be charged for mandated charges remained a matter to be negotiated. It is significant in my view that in the telephone conversation in 2006 in which Mr Schubert discussed the meaning of clause 14 with Mr Britten there was no reference to any agreement or conversation between them along the lines of the one now said to have taken place early in the negotiations.

[48] Messrs Britten and Schubert by virtue of their long-standing friendship and Mr Schubert's employment by Odyssey had ample opportunity to discuss the negotiations leading up to the entering into of the agreement. I have little doubt that they did have such discussions. Yet there was nothing in the consciousness of Mr Britten which caused him to recall before representations made or assurances given in the course of negotiations as to the limitation on Bounty's cost recovery for mandated changes. Also if Mr Britten had relied in any way on any such representation, it is unlikely that he would have refrained from raising the matter with Bounty at the first available opportunity.

[49] I accept that Mr Britten and Mr Schubert each gave his evidence honestly and attempted to give the best of his recollection. It is apparent to me however that both witnesses have, at best, a tenuous recollection of what was said in the course of the critical conversation or conversations. In my view, the recollections of which they

gave evidence are more the product of reconstruction than actual recollection and have arisen, in part at least, out of discussions between them and rationalisation on the part of Mr Britten.

Conclusions on rectification

[50] It is Odyssey's case that at the time of entering into the licence agreement it was the continuing common intention of both parties that clause 14 have the effect referred to in paragraphs 10(a) and 10(b) of the amended defence and counterclaim. That effect is that the fee for a mandated service pursuant to clause 14:

> "(a) was to be negotiated or determined without reference to any profit component for the plaintiff;
>
> (b) was to be negotiated or determined on the basis that the sole purpose of the fee was to compensate the plaintiff for its actual costs of developing the software modifications."

[51] For the reasons given above, Odyssey failed to establish that there was no common intention of the parties such as that alleged. No guiding or operative mind on the part of Bounty had the pleaded understanding at the time the agreement was entered into. In the alternative, Odyssey seeks rectification for unilateral mistake. In order to succeed in this regard Odyssey must establish the existence on its part of the pleaded understanding. I am not satisfied that there was any such understanding. And, to put it in terms favourable to Odyssey, it must be shown that Bounty knew of Odyssey's mistake, or ought reasonably to have known of the mistake, or suspected the existence of a mistake.[8]

[52] The evidence does not establish any of the foregoing. No one on behalf of Bounty at the time the agreement was entered into had reason to suspect or believe that Odyssey had the alleged understanding. It is therefore unnecessary to explore what other factors must be coupled with knowledge or suspicion of the other contracting party's mistake before rectification will be ordered on the grounds of unilateral mistake. Nor is it necessary to consider the role of unconscionability as a prerequisite for such relief. There is nothing unconscionable about Bounty's adherence to the terms of the agreement. The agreement was negotiated at arm's length between commercial entities in receipt of legal advice. Irrespective of what was said early in the negotiations, neither side had reason to conclude that the other derived an understanding of the parties' bargain other than from perusing and construing the written terms of the agreement. Clause 28 of the agreement is an entire agreement clause which expressly provides that the agreement "supersedes all previous agreements, understandings, proposals, representations and warranties relating thereto". Even if representations had been made by Mr Schubert along the lines alleged by Odyssey, I am not satisfied that they were recalled by Mr Britten at the time the agreement was entered into or that they had any bearing on Odyssey's entering into of the agreement.

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8 See the various tests propounded in the authorities collected in *Eroc Pty Limited v Amalgamated Resources NL* [2003] QSC 074.

[53] Another matter which casts doubt on the accuracy of the recollections that Messrs Schubert and Britten now profess is the financial position of Bounty at the time. Golden Casket had acquired a majority interest in Bounty not long before the time of the events in question. Bounty had been incurring losses and the new management was keen to turn matters around. At a workshop in Sydney in October 2002, attended by Bounty executives including Messrs Schubert and Phillips, there was discussion of the necessity that future contracts would need to be concluded so as to "ensure that profitable commercial outcomes were achieved". In cross-examination Mr Schubert did not dispute that it was resolved at the Sydney workshop "that Bounty had to charge a commercial rate for whatever services it provided". He accepted also that an agreement which enabled Bounty to recover no more than its costs of making mandated changes would have been inconsistent with the approach decided in Sydney.

Section 52 of the *Trade Practices Act* 1974

[54] For the above reasons, Odyssey's claims of misleading and deceptive conduct have not been made out.

The alleged failure of the expert determination – Odyssey's contentions

[55] Odyssey argues that specific performance of clause 14 of the agreement must be refused for the following reasons. Odyssey has not failed to perform any relevant obligation. It concurred in the appointment of the expert, Total Metrics. Total Metrics did not complete its determination for reasons which are not said to have resulted from any breach of the agreement by Odyssey. In any event, the correspondence makes plain that Total Metrics regarded itself as unable to perform the terms of its appointment by reason of being provided with insufficient documentation by Odyssey.

[56] If Bounty's construction is accepted, there is no objective criterion by reference to which Bounty's fee is to be assessed. The court is therefore not in a position to determine the fee: the parties have elected to have the fee determined by a specific mechanism and that mechanism has failed.

The alleged failure of the expert determination – conclusions

[57] The expert appointed by the parties obtained an opinion from Melbourne Senior Counsel on 18 September 2006 as to the construction of clause 14.4. The opinion supported the construction for which Bounty contended. On 21 September 2006 the expert, in an email, communicated some preliminary findings to the parties. The expert indicated that a great deal more additional work was necessary before she could arrive at a final conclusion but that, having regard to matters including counsel's advice, "the current price, as detailed on the Bounty Invoice seems a reasonable price even when the lower values in the range quoted are used to calculate cost".

[58] Odyssey's response was prompt and decisive. It informed Total Metrics that it would no longer participate "in the determination process" and that it would not be bound by any determination. It demanded that Total Metrics cease any further activity and stated that it would not be responsible for any further costs incurred by Total Metrics. On 25 September 2006 Total Metrics wrote to the parties. The author of the letter stated that Total Metrics' work had been rendered difficult if not impossible by the absence of specified documentation. Its absence, she said, necessitated reliance on advice from Bounty personnel. In that regard the letter stated:

> "Whilst [Total Metrics consultant] concedes that she believes that the Bounty project personnel are doing their utmost to assist her in identifying the impacted functionality, there is no way she can independently verify the actual impact of the build 58 requirements. This is compromising our position to independently assess the project scope and thus determine a fee.
>
> Total Metrics brought these problems to your notice as soon as they were apparent to Total Metrics. Total Metrics has complied with the contract as far as was possible. But because so many of its requirements (set out above) were not met, it has been prevented from performing the contract as agreed.
>
> Odyssey has responded to Ewa's email on Friday September 22, 2006 stating 'Odyssey demands that the expert now cease any further activity. Odyssey will not be responsible for any further cost incurred by the expert.' (Clause 32). Bounty has indicated its willingness for Total Metrics to continue.
>
> As a result of the problems listed above, Total Metrics is (and indeed any valuer would also be) prevented from performing the valuation independently and in accordance with the 'nomination of expert' document July 2006. Also, as a result of Odyssey's notification of the cancellation of the contract, Total Metrics has no choice but to immediately cease work. The joint engagement of Total Metrics by Odyssey and Bounty has been terminated by Odyssey."

[59] Bounty alleged in its amended statement of claim that Total Metrics refused to determine the amount owing by Odyssey to Bounty "as a consequence of receiving the letter" of 22 September 2006. No one on behalf of Total Metrics was called to give evidence. The statement of claim is not a masterpiece of a pleader's art. It does not, as one might expect, allege the existence of any obligation on the part of Odyssey to give Bounty the benefit of the agreement or of the written agreement between the parties dated 11 April 2006, or of another written agreement between the parties dated August 2006. Nor is there any direct allegation of a breach by Odyssey of any contractual provision or, for that matter, a refusal to comply with any contractual obligation. Despite the pleadings' deficiencies, I think it plain enough that the parties litigated on the basis that Odyssey was in breach of its obligation arising out of the agreement and/or subsequent agreements in 2006 to do "all that was reasonably necessary to secure performance of the contract".[9]

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[9] *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (*1979) 144 CLR 596 at 607 per Mason J referring to *Mackay v Dick* (1881) 6 App Cas 251 at 263 and *Butt v M'Donald* (1896) 7 QLJ 68 at 70-71.

[60] There is no evidence which suggests that had Odyssey cooperated with Bounty in an endeavour to meet the expert's requirements or in finding a solution to problems raised by Total Metrics that company would nevertheless have declined to proceed. The letter of 25 September 2006 does not assert that it is terminating its engagement because of the problems it mentions. The letter specifically states that its joint engagement by Odyssey and Bounty has been terminated by Odyssey. That is an accurate statement and I find that the allegation in paragraph 17 of the amended statement of claim has been made out.

[61] I do not accept that the withdrawal of the expert chosen by the parties results in the failure of the mechanism provided by clause 14.4. Courts endeavour, wherever possible, to give effect to parties' agreements not to frustrate them. Clause 14 requires the question of the fee for service, in the event that the parties are unable to agree the fee, to be referred to an independent expert for determination. If referral is made and the determination miscarries for whatever reason the appointment of the expert can be revoked and a new expert appointed in his stead.[10] This is not a case in which the expert is appointed because of some particular quality or special knowledge on his part to which the parties attach particular importance. The expert is merely a person to be appointed by the President of a particular professional body. The fee to be determined is not one to be arrived at on any idiosyncratic basis. Although the basis for determining the fee is not fully specified, there is no reason to suspect that the parties had in mind anything other than the determination of a reasonable fee in the circumstances.

Odyssey's estoppel claim

[62] Odyssey's estoppel claim relies on many of the facts relied on to support the rectification claim. In particular, it is based on representations by Bounty to Odyssey as to the effect of clause 14 of the agreement and on Bounty's state of mind as to Odyssey's understandings concerning clause 14 of the agreement. The pleaded representations are not made out and there is no factual foundation for the allegations as to Bounty's belief. Nor has it been established that there was any reliance by Odyssey on any alleged representation. Accordingly, the estoppel case fails.

Odyssey's counterclaim

[63] Odyssey alleged that Bounty was in breach of clause 14.1 of the agreement in failing and refusing to use all reasonable endeavours to meet "the timeframe imposed by QOGR in respect of the implementation of the Software Modifications". It alleges also a breach by Bounty of clause 26.6 of the agreement in that Bounty failed to perform its obligations under clause 14.1 of the agreement. It is further alleged that there was a breach by Bounty of an implied term in the agreement that the parties not do anything to hinder or prevent the performance by the other party of its obligations under the agreement.

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[10] See *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 477.

[64] The breaches are alleged to have arisen in this way. QOGR required that Odyssey present the updates and changes required to have the Software comply with QCOM Protocol 1.6 by 1 July 2006. Bounty however failed to provide the Software Modifications to Odyssey unless Odyssey paid Bounty the balance of the amount stated in its invoice in respect of the modifications or entered into arrangements to pay that balance on terms satisfactory to Bounty. Alternatively, Bounty refused to provide the Software Modifications except on terms that Odyssey could not commercially exploit the Software Modifications until such time as the fee to be paid by Odyssey to Bounty was determined pursuant to clause 14 of the agreement.

[65] The only damage alleged to flow from the breaches of contract which was asserted on trial was the cost of provision by Odyssey to Bounty of a bank guarantee in the amount of $500,000.

[66] The terms upon which Bounty insisted and of which Odyssey complains are those to which it agreed in an agreement between it and Bounty dated 11 April 2006. In its second further amended reply and answer, Bounty resisted the counterclaim on the basis that it was not under an obligation to provide the Software Modifications until Odyssey had paid for them.[11] It asserted also that any loss suffered by Odyssey was caused by its failure to comply with clause 14.[12] In submissions, Mr Doyle mounted a different case. It was that the terms imposed by Bounty on Odyssey the subject of Odyssey's pleadings were agreed to between the parties in an agreement made on 11 April 2006. The further contention was that it cannot be a breach of the main agreement for Bounty to require Odyssey to adhere to the terms to which Odyssey had agreed.

[67] The terms of the 11 April 2006 agreement were pleaded in paragraph 12 of the statement of claim and one of Bounty's claims was for specific performance of the agreement, the 11 April 2006 agreement and a later agreement of August 2006.

[68] In its amended defence and counterclaim, Odyssey admits signing the letter of 11 April 2006 but denies that it had the effect of diminishing or otherwise altering the parties' rights under the agreement.

[69] It is also to be doubted that Odyssey, having declined to be bound by its obligations under the terms of the agreement concerning the cost of mandated changes, was in a position to demand performance or to sue for damages for non-performance. Bounty was ready and able to perform its obligations provided Odyssey indicated a willingness to pay.[13]

[70] I accept Bounty's submission that the 11 April 2006 agreement was entered into in compromise of the dispute between Bounty and Odyssey as to provision of the subject software and payment therefor. Whatever relevant rights the parties had under the agreement were subsumed in the later agreement. The claim by Odyssey

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11 Reply and Answer, Paragraph 14.
12 Reply and Answer, Paragraph 15.
13 See generally *Foran v Wight* (1989) 168 CLR 385.

then concerning failure to provide the software in accordance with the terms of the agreement (and not the 11 April 2006 agreement) fails.

Conclusion

[71] There will be an order that the agreement as amended be specifically performed. The order will provide that if, within a specified time the fee pursuant to clause 14.4 of the agreement cannot be agreed, the parties refer the matter to an independent expert agreed between them and failing agreement procure that the President of the Australian Computer Society (Qld Division) appoint the expert. Counsel for Bounty is invited to bring in draft minutes of order which reflect these reasons. There would not appear to be any reason why costs should not follow the event.