SUPREME COURT OF QUEENSLAND

CITATION:	*Commonwealth v Queensland Vocational Training College Pty Ltd* [2010] QSC 341
PARTIES:	**THE COMMONWEALTH OF AUSTRALIA** (plaintiff) **v** **QUEENSLAND VOCATIONAL TRAINING COLLEGE PTY LTD** ACN 010 729 218 (defendant)
FILE NO/S:	SC No 3152 of 2008
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	5 May 2010; 3 June 2010
JUDGE:	Peter Lyons J
ORDER:	**Judgment for the plaintiff in the amount of $1,947,596.86 together with interest calculated at 8.37% for 3 years, being $508,322.55.** **The defendant pay the plaintiff's costs, to be assessed on a standard basis.**
CATCHWORDS:	CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH - CONDITIONS - CONDITIONS AND WARRANTIES - where the plaintiff paid moneys to the defendant pursuant to a contract – where under the contract the defendant's right to retain such moneys was conditional – where one condition related to the plaintiff's satisfaction with evidence to be provided by the defendant relating to expenditure – where the plaintiff alleged that the condition had not been satisfied – whether the plaintiff's satisfaction was required to be reasonable - whether the plaintiff can recover the moneys paid CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - CONSTRUCTION AND INTERPRETATION OF CONTRACTS - INTERPRETATION OF MISCELLANEOUS CONTRACTS

AND OTHER MATTERS – where there was ambiguity as to the meaning of the term "acquit" under the contract – where the defendant alleged that the contract contained reasonableness requirements – whether the plaintiff's lack of satisfaction that the defendant had acquitted expenditure was reasonable

Uniform Civil Procedure Rules 1999 r 166

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912, cited
Murphy v Zamonex Pty Ltd (1993) 31 NSWLR 439, cited
Presmist Pty Ltd v Turner Corporation Pty Ltd (1992) 30 NSWLR 478, cited
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234, considered

COUNSEL: C Conway for the plaintiff
No appearance for the defendant

SOLICITORS: Australian Government Solicitor for the plaintiff
No appearance for the defendant

Introduction

[1] Between 2004 and 2006 the plaintiff paid moneys to the defendant pursuant to a contract described as a Community Work Coordinator Services Contract. Under the contract the defendant's right to retain such moneys was conditional, one condition relating to the plaintiff's satisfaction with evidence to be provided by the defendant relating to expenditure. The plaintiff in this action seeks to recover the sum of $1,947,596.86, together with interest, on the basis that the condition had not been satisfied.

Course of proceedings

[2] The proceedings commenced by way of claim and statement of claim, resulting in a defence and reply. Throughout the action, the defendant has acted without legal representation. Particulars have been sought of the defence, and the plaintiff contends that they were not adequately answered. The matter was deemed resolved, but on 30 November 2009, orders were made for its subsequent progress, which has led to the present hearing.

[3] The defendant did not appear at the hearing. The plaintiff made an application to amend its reply, to overcome a difficulty which may have arisen under r 166 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*). I allowed the amendment, and allowed the trial to proceed. Evidence was given by way of affidavit under r 476, in view of the fact that the defendant had not appeared.

Issues on the pleadings

[4] It seems appropriate to take account of the allegations made in the defence, notwithstanding the absence of the defendant.[1]

[5] There is no issue that the funds which are the subject of the claim were advanced by the plaintiff to the defendant. The defence also accepts that the defendant was required to "acquit" all funding it received under its contract with the plaintiff; and on the plaintiff's request, to produce evidence to enable the defendant to demonstrate how it satisfied itself that the funding had been properly "acquitted"; though the defendant said that the power to request production of evidence had to be exercised reasonably. Nor was it in issue that the plaintiff was entitled to recover funding not "acquitted" by the defendant to the plaintiff's satisfaction, nor that the plaintiff had demanded payment of the funds the subject of these proceedings on the basis that the defendant had not "acquitted" the expenditure to the plaintiff's satisfaction. However, the defendant alleged that the plaintiff was entitled to recover funds under the contract only if its lack of satisfaction relation to the "acquittal" of those fundings was reasonable; and in the present case its lack of satisfaction was unreasonable.

[6] In its most recent reply, the plaintiff does not admit that it was an implied condition of the contract that its lack of satisfaction in relation to the "acquittal" of the funding had to be reasonable. No basis is stated in the pleading for this non-admission. The reply also denies that the plaintiff's refusal to accept that the funding was satisfactorily "acquitted" was unreasonable, on the ground that its request for evidence of acquittal was in accordance with the procedure agreed by the party under the contract; and the evidence of acquittal provided by the defendant could not reasonably have satisfied the plaintiff. The plaintiff also denies that the defendant provided evidence of expenditure in relation to certain work for the dole activities, on the ground that it is untrue. On the same ground, it denied that at the conclusion of each project completed during what are referred to as Milestone Periods 6, 7 and 8, the defendant remitted to the plaintiff evidence of all expenditure claimed by the defendant; and in the alternative, in respect of that expenditure, it alleged that any evidence provided by the defendant was inadequate, and could not reasonably have satisfied the plaintiff. It also alleged that its requests were in accordance with the procedure agreed to by the parties pursuant to the contract.

Background

[7] Between 2002 and 2006, the plaintiff was engaged in providing assistance to persons who had difficulties in obtaining employment. Two programs for this purpose were called Work Experience Funding (*WEF*) and Training Credit Funding. The plaintiff engaged entities to provide services associated with these programs. An entity providing such services is referred to as a Community Work Coordinator (*CWC*). The work experience funding program involved conducting work for the dole activities (WfD Activities). While there was some scope for WfD Activities to be conducted by a CWC, often they were conducted by other organisations, referred to as Sponsor Organisations, by arrangement with a CWC.

[8] The plaintiff and the defendant entered into a contract called a Community Work Coordinator Services Contract dated 3 October 2001. Pursuant to the contract, the defendant was to provide services in Milestone Periods. The contract was varied

---

1 *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279.

and extended. The Milestone Periods of interest were Milestone Period 6 (1 January 2005 to 30 June 2005); Milestone Period 7 (1 July 2005 to 31 December 2005); and Milestone Period 8 (1 January 2006 to 31 December 2006).

[9] As well as providing WfD Activities, the programs also provided Community Work Activities. The services which the defendant was to provide under the contract fell into three categories. The first was Administration Services, which involved attempting to place participants in a Community Work Activity or a WfD Activity, and then assisting participants in preparation for other employment, with associated reporting. The second category was Management Services, directed to developing WfD Activities, and placing participants in them. This category of service included a number of other matters, described as General Management, including the provision of CWC premises. The third category was Work Experience Services. This required the CWC to provide places in WfD Activities for participants. A proportion of the activities had to be conducted by external Sponsor Organisations. A proportion of the places for participants had to be provided in activities for specific projects.

[10] The contract required preparation of budgets for each activity. Funds were to be paid to the CWC, who, in a case where the WfD Activity was provided by external Sponsor, then paid the external Sponsor.

[11] The contract contained provisions relating to the keeping of financial records and the verification and investigation of expenditure, as well as for audits.

[12] The contract was administered by officers of the Department of Employment and Workplace Relations (*the Department*).

[13] By about the end of 2005, officers of the the Department became concerned about verification of moneys paid to the defendant for administration expenses. The defendant had been claiming an administration cost of $110 per approved place for each activity, which provoked a query. The defendant advised that this charge was for accounting and administration costs which it provided and carried out on behalf of Sponsors. However, the amount was charged by reference to the number of approved places, regardless of the number of persons who actually participated in the activity. The charge was in addition to other administration and management fees for services described in the contract as Administration Services. Queries also arose in relation to charges for insurance.

[14] At a visit to the defendant's offices in November 2005, it became apparent that the defendant paid Sponsors without verification of the costs claimed by them.

[15] In December 2005, officers of the Department visited one of the offices of the defendant. This provoked queries in relation to record keeping, in particular in relation to the number of persons attending activities, and claims by Sponsors (including the defendant) for expenditure. It emerged that in early 2006, claims were made for expenditure for first aid kits for activities, which were not received by the defendant.

[16] A site visited in April 2006 resulted in suggestions that computers had been purchased for activities, but had in fact been retained by the defendant; and that invoices had been submitted which did not truly reflect expenditure.

[17] In early 2006 an anonymous complaint was received by the Department, alleging fraudulent conduct by the defendant. Two former employees of the defendant provided comments about its operations.

[18] In April 2006 the Department appointed a Mr Spedding to conduct an audit of the defendant's activities under the contract. Notice was given to the defendant of Mr Spedding's engagement. For a period of about three weeks commencing on 23 May 2006, Mr Spedding spent approximately three to five days per week at the defendant's head office reviewing its records. In the period 21 to 24 August 2006, and 19 to 29 September 2006, he spent similar periods per week at the defendant's head office, for the same reason. He met the staff working at the head office, including the defendant's directors. He also visited other offices of the defendant.

[19] In July 2006, Mr Spedding produced a document described as a draft report, but which is intended, as his affidavit states, to summarise his conclusions at that time. He concluded that an amount of $1.7 million claimed as administration fees was not properly claimable as work experience funding, or was covered by amounts that had already been reimbursed for expenses; the defendant had made claims for protective equipment and rent that were not justified; it had not fully established its right to amounts claimed for telephone charges; and it had not provided sufficient documentation to verify its claim for assets purchased.

[20] Mr Spedding provided a further draft report in October 2006. His conclusions expressed in that report were that the defendant claimed budgeted rather than actual expenditure; some items of equipment purchased by the defendant for which it had been reimbursed under the contract were not required for activities the subject of the contract; $5,200 had been claimed for first aid kits which had not been purchased; claims were made for items of equipment in excess of the amounts paid by the defendant for those items; the defendant had been unable to demonstrate that amounts claimed for promotional activities were, in fact, expended; the same was true in respect of amounts claimed for rent; the defendant had overclaimed for insurance; amounts claimed for supervision of activities exceeded amounts paid to supervisors; protective clothing costs had been claimed at double the cost paid by the defendant; costs had been claimed for a person who was not on the weekly payroll data provided by the defendant, and who, it was suspected, had not worked for the defendant or its associated community organisation; and the defendant was unable to substantiate claims for communication costs, participant training costs, transport costs, other sponsor administration staff fees, sponsor corporate overhead costs, and sponsor administration consumable charges.

[21] In September 2006, Ms Cadioli, as the Department's Contract Manager, sent emails to the defendant. One of them inquired about claims for the cost of insurance for participants and for the defendant and its related sponsor. Another drew attention to the absence of receipts for an amount of almost $15,000, claimed for activity promotions. A third queried claims made for first aid boxes.

[22] On 9 November 2006, Ms Morgan, the Department's Account Manager wrote to the defendant. The letter stated that the Department was at that time not satisfied that certain Work Experience Funding paid by the Department for activities in Milestone Periods 6, 7 and 8 had been satisfactorily "acquitted". The letter enclosed a notice stated to be given pursuant to cl 4.5A of the contract requiring evidence of

expenditure, and warned that the Department might take action under the contract to recover moneys from the defendant.

[23] That letter referred to the work of Mr Spedding. The letter identified 13 types of expenditure about which the Department had concern, and explained in some detail the nature of the concern. In each case, the letter included a statement to the effect that the Department was not satisfied with the "acquittal" of these expenses, or in some cases that it was not satisfied that the expenses were properly claimable, or had been incurred. The identified amounts which were in dispute approached a total of $2.8m. The letter gave notice that further payments would be suspended. It also included a request, based on cl 4.5A of the contract, for evidence of all expenditure claimed in relation to each activity conducted in Milestone Periods 6, 7 and 8.

[24] By letter dated 14 November 2006, Mr Cook on behalf of Ms Morgan wrote to the defendant about three activities which were the subject of claims in early November. Again, relying on cl 4.5A of the contract, a direction was given to provide financial records for receipts and expenditure, including producing all evidence by which the defendants satisfied itself that the funding had been properly acquitted. On 30 November 2006, Ms Morgan wrote to the defendant, confirming the request made on 14 November.

[25] On 1 December 2006, the defendant's then solicitors wrote to Ms Morgan, advising that the defendant's documents were seized under a search warrant on 23 November 2006. On 5 December 2006 Ms Fletcher, the State Manager, replied to the defendant's solicitors, stating that every effort would be made to provide copies of seized documents to the defendant through its solicitors, and extending the timeframe for compliance with the notices given on 9 and 30 November to 12 January 2007.

[26] On 5 January 2007, the defendant's solicitors sought an extension of the time for complying with the notices, on the basis that copies of some of the documents which had been seized under the search warrant had only been recently received by them, and copies of the remainder were expected to be received on 9 January 2007. The request was rejected by a letter from Ms Fletcher dated 11 January 2006, on the basis that the material provided on 9 January 2007 did not include material relevant to Milestone Periods 6, 7 and 8.

[27] On 19 February 2007, Ms Fletcher again wrote to the defendant's solicitors, pointing out that the November notices had not been complied with. On 8 March 2007, the defendant's solicitors wrote, referring to previous objections to compliance with the November notices, on a number of grounds, including the fact that there was then current an on-going criminal investigation.

[28] On 23 April 2007, Ms Morgan sent a letter on behalf of Ms Fletcher to the defendant's solicitors. The letter stated that a digital copy of all seized documents had been provided to the defendant. The letter included a request for repayment of the sum of $221,825.76 provided by way of training credit funding, on the basis that there had not been a proper acquittal for that amount. The defendant's solicitors replied by letter dated 4 May 2007. The letter repeated earlier objections to the November notices, and repeated a request for the provision of the seized documents in the form in which they were seized, which, it was said, was required to assist in

locating and identifying documents. The letter also asked for documents confirming the amounts of training credit funding said to have been paid to the defendant.

[29] By letter dated 31 May 2007, Ms Fletcher offered conditional access to the seized documents of the defendant, and provided copies of payment details for training credit funding. By letter dated 19 June 2007, the defendant's solicitors accepted the offer of conditional access to seized documents, and provided the results of some analysis carried out by the defendant in respect of the training credit funding. They disputed the amounts said by the Department to have been provided to the defendant. That resulted in a letter of 9 August 2007 from Ms Fletcher providing further details of the training credit funding payments.

[30] On 9 August 2007, Ms Fletcher wrote to the solicitors for the defendants. The letter made reference to the audit work done previously, and the requests for further information. It stated that the Department had conducted its own further examination of the work experience funding claimed by the defendant for Milestone Periods 6, 7 and 8; and had in some cases recalculated the amounts of funding which had not been satisfactorily acquitted. The letter stated that an amount of $1,725,761.10 had not been acquitted to the Department's satisfaction, and repayment was demanded. Details of that amount were set out in a table, which apparently accompanied the letter. By letter of 5 September 2007, the defendant's solicitors stated that the defendant disputed the amounts said to be outstanding and would not be making refund payments without further documentary evidence.

[31] In the meantime, in January 2007, Mr Spedding provided a further draft report. His conclusions, found in that document, revised the amounts which had not been substantiated. The total of the revised amounts was $1,725,761.90.

The obligation to "acquit"

[32] The plaintiff relies on two provisions of the contract to recover the amount claimed. Those provisions are as follows:

> "4.1D. The Contractor must:
>
> (a) within 60 days after the completion of each Work for the Dole Activity, provide an acquittal to the Department of all Work Experience Funding paid in respect of the Work for the Dole Activity; and
>
> (b) within 28 days of receiving notice from the Department that any part of the Work Experience Funding is not acquitted to the satisfaction of the Department, repay to the Department the Work Experience Funding not acquitted to the satisfaction of the Department.
>
> The acquittal must include a statement, in the form specified by the Department, certifying that the acquitted amount has been expended for the purpose for which it was provided. Such statement must be prepared by the Contractor's accountant, Executive Officer, or by a person that the Contractor warrants in writing to the Department, has the necessary authority to bind the Contractor, and who has a full and complete understanding of this Contract in its entirety, and of the acquittal requirements in particular. [GCV3]

…

> 4.10. Upon termination of this Contract and at any other times specified by the Department, all Funding unexpended or not acquitted to the satisfaction of the Department shall be repaid to the Department, with the exception of those Funds approved by the Department as being required for expenses incurred during the currency of this Contract and which fall due for payment thereafter (accrued expenditure). For this purpose, accrued expenditure shall include provision for liabilities in relation to audit and acquittal requirements. If the exact amounts are not known, the amount of accrued expenditure shall be estimated by the Contractor as accurately as possible."

[33] Both clauses, in identify the obligation to repay, use the expression "acquit" with reference to funding. Such an expression is not particularly common. It will be seen that cl 4.1D refers to an acquittal as including a statement certifying the purpose for which amounts were expended.

[34] Clause 3 of the contract includes a definition for the term "acquittal", as meaning the process described in cll 4.5 and 4.5A, resulting in the defendant providing the Department with a certified statement, and any other process that the Department may require from time to time, by which the contractor demonstrates that preceding instalments of funding have been expended for purposes for which they were provided. A corresponding meaning is expressly given to cognate expressions.

[35] Clause 4.5 required the defendant to provide a statement certifying that 80 per cent of the funding instalment immediately preceding the statement, and 100 per cent of all other preceding instalments, had expended for the purposes for which they were provided. Clause 4.5A required the defendant to keep and maintain and, if directed by the Department, to provide the Department with a financial statement of the receipt and expenditure of the funding; and on request by the Department, to produce evidence required by the Department "to enable the Contractor to demonstrate how the Contractor has satisfied itself that the Funding has been properly acquitted".

[36] It will be apparent that the term "acquitted" in the passage just quoted from cl 4.5A cannot have the defined meaning. The defined meaning is quite inapt in that context. An examination of the balance of the provisions to which reference has been made reveals that the expression, at least when it appears to be used as defined, relates to the demonstration by the defendant to the plaintiff that funds which have been provided by the plaintiff have been expended for the purposes for which they were provided; the demonstration is initially to be made by provision of a statement of the kind specified in cl 4.5; however, the Department can require the provision of a financial statement which the defendant was required to keep, of receipt and expenditure of funding; and acquittal extends to production of evidence at the request of the Department, in accordance with cl 4.5A.

[37] It would seem a little curious that cl 4.5A permits the Department to require the production of evidence to enable the defendant to demonstrate "how (the defendant)

has satisfied itself that the Funding has been properly acquitted". This curiosity will be referred to later in these reasons.

[38] As has been mentioned, cll 4.1D and 4.10 both make reference to the acquittal of funds advanced by the plaintiff to the defendant. It seems to me that in each case, the expression refers to a demonstration, in accordance with cll 4.5 and 4.5A, which also complies with the additional requirement found in cl 4.1D.

[39] The submissions made on behalf of the plaintiff did not seek to explain these clauses, or their interrelationship. Nor was my attention drawn to that part of cl 4.5 which provides that it does not apply to payments of WEF under cl 4.1C.

[40] Clause 4.1C applies to the payment of WEF as from 1 April 2004. It provides for payment, where the Sponsor Organisation was not the defendant, on receipt of a correctly rendered WEF invoice. Where the Sponsor Organisation was the defendant, provision was made for the payment, at the plaintiff's discretion, of advance instalments on receipt of a correctly rendered WEF invoice.

[41] The structure of the agreement, and the fact that cll 4.1C and 4.1D were both introduced by General Contract Variation No 3 dated 31 March 2004 (*GCV 3*), suggest that cl 4.1D is the provision which regulates acquittal of payments made for WEF funding in Milestone Periods 6, 7 and 8, rather than cl 4.5. That rather explains the appearance in each clause of a requirement to provide a statement certifying that funding has been expended for the purpose for which it was provided. The exclusion of payments of WEF after 1 April 2004 from the operation of cl 4.5 supports this view. It would therefore seem to follow that the requirement to provide a statement for the WEF payments which give rise to the present claim is regulated by cl 4.1D. The history of the variations to the contract rather suggests that it was an oversight that the definition of the term "acquittal" was not amended as part of GCV 3.

[42] Reference should also be made to cl 4.2 and the clauses which appear after it. They are in the following terms:

> "4.2. The Contractor shall acquit the Work Experience Funding as follows:
>
> (a) The Work Experience Funding shall be expended by the Contractor only in accordance with the Approved Budget for each Work for the Dole Activity, including the payment of Work Experience Funding to Sponsor Organisations as specified in the Application for Work for the Dole Activity Form;
>
> (b) Up until 31 March 2004, the maximum amount of Work Experience Funding that is available to be expended and acquitted by the Contractor:
>
> (i) prior to completion of the Sponsor Organisation's Work for the Dole Activity is $0.8N(O+P)
>
> where:
>
> N = the number of approved Work for the Dole Places that must be made available on the Work for the Dole Activity;
>
> O = the Project Unit Cost; and
>
> P = the Participant Unit Cost; and

(ii) after completion of the Activity is $(ON)+(PQ)-R

where:

N = the number of approved Work for the Dole Places that must be made available on the Work for the Dole Activity;

O = the Project Unit Cost;

P = the Participant Unit Cost;

Q = the number of Payable Commencements for the Activity;

R = the amount expended and acquitted by the Contractor in accordance with clause 4.2(b)(i).

(c) The Contractor must pay a correctly rendered invoice from the Sponsor Organisation within 30 days after receipt of the invoice.

(d) For the avoidance of doubt, the Contractor will be responsible for ensuring that any Work Experience Funding forwarded to a Sponsor Organisation is expended by the Sponsor Organisation strictly in accordance with the Approved Budget for the Work for the Dole Activity.

4.2A The Contractor must, prior to commencement of a Work for the Dole Activity, have approved the Activity and a budget for the expenditure of Work Experience Funds on the Activity in accordance with guidelines issued by the Department from time to time.

4.2B Work Experience Funds may only be expended for the purposes of:

(a) providing work experience to Work for the Dole Participants;

and must:

(b) only be expended in accordance with the Department's guidelines relating to the approval of budgets for the expenditure of Work Experience Funding and the guidance provided by the WEF Principles; and

(c) not be used to fund the existing operations, activities or infrastructure of the contractor, that the contractor would have had in place, had the Activity not commenced.

4.2C All Work Experience Funding paid to the Contractor must be held by the Contractor on trust, to be:

(a) expended in accordance with the procedures set down in clauses 4.2, and 4.2B; or

(b) returned to the Commonwealth in accordance with clause 4.10."

[43] An analysis of these provisions, and an appreciation of the variation which resulted in the form of the contract in force for Milestone Periods 6, 7 and 8, suggest that the relevant repayment obligation is that found in cl 4.1D, and not that found in cl 4.10. Clause 4.1D includes a requirement for a statement certifying that funds have been expended for the purpose for which they were provided. However, a question arises as to whether cl 4.5A applies to WEF for Milestone Periods 6, 7 and 8. In my view, that would appear to be the case. It is to be noted that GCV 3 expressly added a sentence to cl 4.5, making that clause inapplicable to WEF provided after 1 April 2004. No such addition was made to cl 4.5A. Moreover, that part of the acquittal process for which provision is made in cl 4.5 is to correspond broadly with that part of the acquittal process dealt with by cl 4.1D. That would rather suggest an intent that cl 4.5A would remain applicable to the acquittal process after 1 April 2004.

Indeed, it is almost inconceivable that the plaintiff would not have maintained a right to obtain the statement and other evidence referred to in that clause. It therefore seems to me that on the correct construction of the contract cl 4.5A applies to WEF both before and after 1 April 2004; and that in cl 4.1D, a reference to WEF having been acquitted to the satisfaction of the Department extends to acquittal both under cl 4.1D and cl 4.5A.

[44] It is a little difficult to relate cl 4.2 to the references to the acquittal of WEF and cl 4.1D. There are some difficulties with the drafting of cl 4.2. It purports to identify the manner in which WEF is to be acquitted by the defendant, though para (b) specifies a maximum amount of WEF which was to be available to the defendant. Paragraph (c) imposed an obligation on the defendant to pay correctly rendered invoices from a Sponsor Organisation. Paragraph (d) imposed on the defendant an obligation to ensure that WEF forwarded to a Sponsor Organisation was expended by the Sponsor Organisation strictly in accordance with an approved budget. These provisions, stated to identify the manner in which WEF was to be acquitted, do not easily relate to other provisions dealing with the acquittal of funding. It is, however, not necessary to give further consideration to this clause.

[45] At this point, it is necessary to consider the defendant's allegations about requirements of reasonableness in relation to some contractual provisions.

Contractual provisions and reasonableness requirements

[46] The defendant raises this matter in the context of two provisions. One is the provision conferring on the plaintiff the power to require the production of further evidence. The other is the absence of satisfaction by the Department in relation to the acquittal of WEF.

[47] There are significant differences between the relevant provisions. Clause 4.5A gave to those administering the contract on behalf of the plaintiff[2] the power to require additional evidence relating ultimately to the expenditure of funding provided by the plaintiff. On the other hand, cl 4.1D, and, if relevant, cl 4.10, created a liability in the defendant, a condition of which was the absence of satisfaction "of the Department" in relation to the acquittal of WEF.

[48] In Seddon, *Government Contracts Federal, State and Local*[3], the following appears:

> "It is common to find powers in a contract that require the exercise of discretion. There is no doubt where a Government party must exercise such powers, a court will expect that the power will be exercised fairly and reasonably. It principally applies across the whole of the law of contract no matter whether the party exercising the power is a private or public entity. But there should be no doubt about its application to public bodies."[4]

---

2 See cl 1.1, definition of "Commonwealth", "Department" and note the various references to the Department in many of the operative provisions of the contract.

3 4th ed at p 22.

4 See also Seddon at p 412.

[49] It has elsewhere[5] been stated more generally that where a contract confers a discretion on a party, that discretion must be exercised reasonably, though exceptions were recognised.[6] It is, however, apparent that the construction of the contract may lead to a different conclusion.[7]

[50] In *Renard Constructions (ME) Pty Ltd v Minister for Public Works*[8] questions arose as to the provisions of a construction contract which permitted the principal to exercise powers (including taking over the work and cancelling the contract) if the contract had failed to show cause to the satisfaction of the principal why those powers could not be exercised. Priestly JA considered the provision to be "subject to the constraint of reasonable use by the principal", on the ground that to hold otherwise would be quite inconsistent with all the main contractual promises by each party made to the other.[9] On this issue, Handley JA agreed.[10] Meagher JA held that the principal's mind being so distorted by prejudice and misinformation that he could not comprehend the facts in respect of which he was to pass judgment, he was unable to come to a relevant state of satisfaction.[11]

[51] In *Presmist Pty Ltd v Turner Corporation Pty Ltd*[12]*it was* held that, in making a decision to give notice to show cause as to why contractual powers should not be exercised, and in considering whether cause had been shown, a party had to act reasonably.[13]

[52] The written submissions on behalf of the plaintiff did not deal with whether there were reasonableness qualifications in respect of the contractual provisions said to give rise to the defendant's obligation to make repayments.

[53] Clause 4.1D(b) imposes an obligation on the defendant to repay WEF if the Department is not satisfied with the acquittal of that funding. Its operation has the potential to deprive the defendant of much, or indeed, all of the benefit to it of the contract; and that may occur in circumstances where, in truth, moneys had been expended by the defendant in accordance with the requirements of the contract. In those circumstances, it seems to me relatively clear that the clause would convey "to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract"[14] that any lack of satisfaction must be reasonable.

[54] On the other hand, cf 4.5A is of a quite different character. It is a clause intended to enable the Department to determine whether funds advanced pursuant to the contract had been properly expended. It was intended to enable the Department to make inquiries for the purpose of protecting public funds. It seems to me that the "reasonable person" previously referred to would take a much broader view of its scope. While the power conferred by the clause could not be exercised capriciously

---

5 Seddon and Ellinghaus *Cheshire & Fifoot's Law of Contract* (9th Aust ed) at para 10.48.
6 One exception there recognised is found in *Murphy v Zamonex Pty Ltd* (1993) 31 NSWLR 439.
7 See *Murphy v Zamonex*.
8 (1992) 26 NSWLR 234.
9 See p 258.
10 P 279.
11 Pp 275-276.
12 (1992) 30 NSWLR 478.
13 P 484.
14 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912; cited in *Maggbury Pty Ltd v Hafele Aust Pty Ltd* (2001) 210 CLR 181, 188.

or for an improper purpose, it seems to me that the "reasonable person" would not consider it to be limited by an objective test of reasonableness. It is therefore unnecessary to give consideration to the question whether the requests for information made by the Department were reasonable.

Liability in respect of WEF

[55] This question depends upon whether the funding which is the subject of the claim was not acquitted to the satisfaction of the Department.

[56] Ms Fletcher was the State Manager for the Department from January 2006 to October 2008. She swears that she was the person authorised in this period to make the decision about the Department's satisfaction with the acquittals provided by the defendant for expenditure under the contract. She deposes that following receipt of Mr Spedding's second report, she concluded that the Department could not be satisfied that WEF paid to the defendant had been satisfactorily acquitted. It was a result of her decision that the letters of 9 and 14 November 2006 were sent. She states that letters signed by Ms Morgan on her behalf, and sent to the defendant's solicitors, were signed and sent with her authority. She also deposes to responsibility for the letter of 9 August 2007 identifying the amounts which had not been acquitted to her satisfaction.

[57] The remaining question is whether the lack of satisfaction was reasonable. The case pleaded on behalf of the plaintiff, at least in part, is that the lack of satisfaction was reasonable because the plaintiff's requests for evidence of acquittal were in accordance with the procedure agreed by the parties pursuant to the contract, and the evidence provided by the defendant could not reasonably have satisfied the plaintiff. The requests for evidence of acquittal are apparently a reference to the November notices. It is at this point that the curiosity raised by cl 4.5A of the contract becomes apparent. It will be recalled that it authorised a request for evidence "to enable (the defendant) to demonstrate how (the defendant) has satisfied itself that the Funding has been properly acquitted". However, the request simply sought evidence of all expenditure, including documents of a number of specified classes. The difficulty with the notices was that they did not, in terms, limit the request to documents that fall literally within cl 4.5A. Nor was there evidence to show that the documents requested were documents on which the defendant had relied to satisfy itself that the funding had been properly acquitted. It might therefore be thought that the notices exceeded the power containing cl 4.5A.

[58] However, in its claim, the plaintiff alleged that the November notices were sent pursuant to cl 4.5A. Technically, these allegations appear as particulars to cl 4 of the statement of claim. However, they are, it seems to me, properly characterised as allegations of material facts, the introductory part of paragraph 4 being a conclusory statement of the obligation which resulted. That, in my view, is how they have been treated in the defence, which admits the allegations in paragraph 4 but says it was an implied condition that the plaintiff would not unreasonably request evidence as to how funding had been acquitted. Moreover, the November notices themselves identified cl 4.5A as the source of the authority on which they were issued. In the correspondence on behalf of the defendant in response to them, there was no suggestion that they were not authorised by cl 4.5A of the contract. It therefore seems to me that on the pleadings, the defendant has admitted that the notices satisfied the conditions for requiring the production of further evidence; and in

correspondence has treated them as such. I therefore am satisfied that the notices were notices authorised by that clause.

[59] Further, it seems to me that this is by no means a critical issue in this case. There had been concern for a long period of time about much of the funding provided to the defendants. That had resulted in inquiries and site visits, to which I have made reference. That was followed by the audit work of Mr Spedding, plainly carried out with the knowledge of the defendant. It must have been apparent to the defendant by the time the November notices issued, that the Department was not satisfied at that point with the acquittals which had been provided. Whether or not the notices in fact came within cl 4.5A, they provided the defendant with the opportunity to address the question whether the plaintiff should reasonably be satisfied with acquittals for the expenditure. The defendant did not do so.

[60] It is against the totality of this background that the question of the reasonableness of the plaintiff's lack of satisfaction with the acquittal provided by the defendant is to be decided. In my view, the earlier investigations and inquiries, coupled with the investigations by Mr Spedding and his conclusions, and the failure of the defendant to address the concerns of the Department, taken together, provided a reasonable basis for the Department's absence of satisfaction. It follows that the defendant is liable to repay the amounts claimed.

Conclusion

[61] There should be judgment for the plaintiff in the amount claimed.