

RJS

SET

File

BETWEEN

ENGINEERING PLASTICS  
a duly incorporated company  
having its registered office  
at Auckland and carrying on  
business as manufacturers and  
wholesalers

Plaintiff

A N D

J. MERCER & SONS LIM  
duly incorporated company  
having its registered office  
at 53 Lunns Road, Christchurch  
and carrying on business in  
Auckland and elsewhere as  
dealers

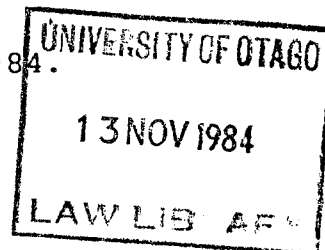
Defendant

Hearing: 28th, 29th and 30th August, 1984.

Counsel: W. J. Spring for Plaintiff.  
P. Whiteside for Defendant.

Judgment:

10 SEP 1984



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JUDGMENT OF TOMPKINS, J.

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The Plaintiff claims from the Defendant \$27,246.42 being the amount claimed to be due pursuant to a contract between the parties made on or about the 16th September, 1982, pursuant to which the Defendant agreed to purchase from the Plaintiff 4,000 O-rings.

The Defendant denies liability to pay the amount claimed. It also raises affirmative defences.

THE FACTS:

The Plaintiff carries on business in Auckland

The Defendant carries on business in Auckland and elsewhere in New Zealand as sheet metal fabricators in stainless steel and other metals. It is a light engineering company.

The contract, the subject matter of this action, was, as I have indicated, for the supply of O-rings. These are used as seals generally for the purpose of sealing gas air or liquid between two components. As its name suggests, it is circular in section. Its cross-section is also in the shape of the letter O. It is a part widely used for engineering purposes, particularly in hydraulic and pneumatic machines, but also in all sorts of other machinery including domestic appliances such as an ordinary tap. O-rings vary greatly in diameter and in cross-section.

Since 1972 the Defendant has manufactured a stainless steel tank known as a post mix tank. It is designed to contain soft drink syrup concentrate prior to it being pumped up to a dispensing head normally in a hotel bar. The tank uses two different O-rings. A smaller ring is used to seal two non-return plug valves in each tank. The larger ring is used to seal the lid of the tank.

Early in 1982 the Defendant approached the Plaintiff to quote for the supply of the smaller rings. These rings had part number of "111". This O-ring was approximately 10 mms. or (since O-rings are apparently still commonly described by Imperial measurements) 7/16ths of an inch internal diameter.

The initial contact was made by Mr. Heeney, the Plaintiff's technical sales representative. The order was for the supply of 30,000 rings. Because of the difference that subsequently developed between the Plaintiff and the Defendant

despatch docket that confirmed the order described the price as

" 3.13/HN "

In the envelope that appears to have accompanied the rings themselves the price is described as:-

" 3.13/HUN "

Both parties interpreted this to mean a price of \$3.13 per hundred rings.

The rings were to be delivered at the rate of 10,000 each on the 1st May, 1982, the 1st September, 1982, and the 1st January, 1983. In the invoice sent following delivery the price was described in the same way as on the despatch docket.

On the 8th April, 1982, the Defendant enquired from Mr. Heeney whether the Plaintiff would be able to supply 4,000 of the larger O-rings required for the post mix tank. Prior to that time the Defendant had obtained the O-rings it required from an Australian supplier, Mytton Rodd Ltd. However, the Defendant, for reasons I need not describe, was interested in obtaining the rings from the local market.

Mr. Heeney was given two Mytton Rodd rings as samples.

On the 2nd June, 1982, Mr. Green, a director of the Plaintiff, wrote to the Plaintiff's American suppliers asking for price and delivery for these rings. He enclosed one of the samples of rings which in the letter he described as being an NBR O-ring.

"4,000 EA. 3.7/16+ ID X 5/16 CROSS SECTION  
50 SHORE NITRILE 245.70/C TOOLING 715.00  
DEL 6-8 WKS ARO "

"50 Shore" was a technical term that described the hardness of the rubber in degrees on a shore scale. As I have indicated Nitrile describes the type of rubber compound. A Nitrile rubber O-ring is oil resistant and also resistant to certain chemicals and to a certain degree of heat. It is the most commonly used type of rubber in seals of this kind.

The reference in the telex to "245.70/C" meant to Mr. Green that the Plaintiff's American agent was offering to supply the rings at US\$245.70 per hundred. The telex also indicated there would be a tooling charge of US\$715.

Mr. Green converted these prices into New Zealand dollars and calculated the price that the Plaintiff would charge incorporating its normal mark-up. The result was a price in New Zealand dollars of \$644.96 per hundred, plus \$1,072.50 for the tooling charge.

He then wrote a letter to the Defendant which, since it is crucial to the case, I set out in detail:-

20th July 1982

J. MERCER & SONS LTD  
95-97 MAY ROAD  
MT ROSKILL

ATTN: MR. B. Wood

OUR REF: RG/LH - 5287

Dear Sir,

Further to your enquiry for 'O' Rings to a sample submitted, we are pleased to advise you that we have heard from our principals overseas and now relate their findings as follows.

Unfortunately there was no tool available for the 'O' Rings in question subsequently a tool



For administrative reasons there was some little delay on the part of the Plaintiff in acting on this order. On the 13th October, 1982, Mr. Green sent a telex to the American suppliers asking delivery in accordance with its earlier quotation. The next day he sent a written purchase order in the same terms. In both cases the price was described as "245.70/C plus tooling 715.00".

The Plaintiff received from its American suppliers a sample of 16 rings. On the 16th December, 1982, these were delivered to the Defendant. Having received them the Defendant then notified the Plaintiff that the rings were satisfactory and to obtain the balance of the order quickly.

The balance of the order arrived by air freight on the 6th January, 1983. On that day they were collected by the Defendant from the Plaintiff's premises. Because by then the Defendant's stock of these rings had been exhausted, immediately they were received 583 rings were despatched either to purchasers of post mix tanks to whom they had been supplied without rings because the Defendant had run out, or to satisfy orders for spares.

On the 17th January, 1983, the Plaintiff sent to the Defendant an invoice for 4,048 rings at a price per ring of 6.44 and a total price of 26,069.12. The invoice also included the tooling price of 1072.50, so was for a total of 27,141.62. Despite the date on the invoice it seems it was received by the Defendant on the 28th January, 1983 - the day after the events described in the next paragraph. By a further invoice dated the 19th January, 1983, the Plaintiff charged the Defendant for 16 rings at 103.04, plus freight 1.76, making a total of 104.80.

On or about the 27th January, Mr. Heeney called on

involved. Mr. Wood was a little surprised - he did not think \$1,700 was a particularly large order. Comments to this effect were, at that meeting, followed by what Mr. Wood described as "a minute or two of stunned silence". Each realised that the other had a very different idea of the price of the rings. Mr. Wood immediately said that the Defendant could not accept the rings at the price the Plaintiff was seeking. Subsequently, on the 27th January, 1983, he rang Mr. Green to say that the price the Plaintiff was seeking was totally different from what the Defendant understood it would be paying. Mr. Wood, as I have indicated, thought that the rings were going to cost \$0.429 each. The total of the two invoices divided by the 4,075 rings supplied resulted in a cost of \$6.67 each.

Mr. Wood at that conversation proposed to Mr. Green that the Plaintiff should take the rings back. Mr. Green declined

On the 28th March, 1983, the Defendant wrote to the Plaintiff a letter purporting to rescind the contract. It read:-

" Following our discussions regarding the unfortunate supply of 'O' rings we confirm our advice wherein we concluded that your supply cannot have been to the sample we submitted with the now apparent price difference between the cost as charged of your supply and the cost as charged of our normal supply from Australia.

As we ordered from you on the understanding from your quotation of a cost price to us of some 43 cents each total and as you are not prepared to supply at this price we further confirm that we do not wish to accept delivery and are holding the goods available for return to you. The reason for our not having already returned the goods is your verbal refusal to accept them back.

By that stage the Plaintiff had paid its American suppliers for the goods. The total cost to the Plaintiff, including freight, was NZ\$15,915.59.

In an endeavour to resolve the matter, the Plaintiff sought and obtained from its American suppliers a 10% discount. Allowing a further discount itself, the Plaintiff wrote to the Defendant on the 15th April, 1983, offering a new reduced price for each O-ring of \$4.51. The Defendant did not find even this reduced price attractive. The offer was not accepted.

These proceedings followed. The amount the Plaintiff is claiming is the total of the two invoices of the 17th and 19th January, 1982.

DEFENCES:

Mr. Whiteside, for the Defendant, raised four alternative defences. They were:-

- (1) The Plaintiff's letter of the 20th July, 1982, and the Defendant's order of the 16th September, 1982, resulted in a contract pursuant to which the Plaintiff was bound to supply 4,000 rings for \$644.96 plus \$1,072.50 for tooling, i.e. 43 cents each.
- (2) There was no binding contract because as a result of the different understanding of what was intended by the letter of the 20th July, 1983, there was not a consensus ad idem - a meeting of the minds.
- (3) This was a sale by sample. The Plaintiff breached a condition of the contract by supplying rings that did not correspond with the sample in quality. The Defendant has cancelled the contract, as it was entitled to, under the Contractual Remedies Act, 1979.
- (4) There had been a mistake. The Defendant sought relief pursuant to s.7 of the Contractual Mistakes Act, 1977.



THE FIRST DEFENCE: THE MEANING OF THE CONTRACT.

The Defendant contended that the symbols "/c" appearing after the price of \$644.96 had no generally recognised meaning. They should therefore be ignored, with the result that the contract evidenced by the Plaintiff's letter of the 20th July, 1982, and the Defendant's order of the 16th September, 1982, bound the Plaintiff to supply 4,000 rings for \$644.96, plus \$1,072.50 for tooling.

I accept Mr. Wood's evidence that he so read the Plaintiff's letter of the 20th July, 1982. He placed no significance on the "/c". He thought it was a typing error. In support he claimed there were other examples of erratic typing in the letter, such as the letters "ea" appearing after the figures "4000" and the omission of symbols to indicate inches after the dimensions.

Evidence was also given by Mr. Greenfield, the Defendant's managing director, and a person with many years' experience in the Defendant's business and businesses similar to it. He said that he would assume the symbols "/c" to be a careless way of indicating cents. Again he considered the letter itself demonstrated what he described as scruffy typing. Evidence was also called on behalf of the Defendant by Mr. Wallen, the managing director of a company in direct competition with the Defendant. He said he would have interpreted the letter of the 20th July in the same way as Mr. Wood did. He would have placed no meaning on the "/c" appearing after the figures \$644.96. It would not have meant anything to him.

It was contended on behalf of the Plaintiff that the symbols "/c" were well understood to mean per hundred. In

like items to quote prices per hundred. As I have already indicated the price of the smaller rings that were ordered in April, 1982, were quoted on a per hundred basis. Then Mr. Green produced a significant number of orders, invoices and the like, from other users of O-rings where the price was quoted per hundred. The Plaintiff's own price schedule is made up on this basis. Mr. Green explained that since his company computerised this aspect of its operation it has abandoned the practice of pricing per hundred because that is not a practical method for the computer to handle. Now, because of computerisation, the Plaintiff quotes prices per unit.

The Plaintiff was able to point to an account from Mytten Rodd for the supply of O-rings of the kind with which this action is concerned where the price was quoted per hundred, shown on the invoice as "/100". I did not understand the Defendant to contest that prices for O-rings were frequently quoted per hundred.

Then in support of the Plaintiff's contention that in quoting per hundred the symbols "/c" were generally used in the trade, the Plaintiff produced an exhibit containing a bundle of thirteen orders it had received between July, 1976, and May, 1984. In every one of these but two the letter C is used to indicate a hundred. In some it is the capital letter, and in some it is the small letter. In almost all the diagonal stroke or solidus, to give it its correct name, is used to indicate per. In one case the hundred is indicated by the letters HN. In another case the price is stated per thousand, indicated by the symbols "/m".

Then Mr. Green produced a further exhibit consisting of a bundle of quotations issued by the Plaintiff for the supply of O-rings. There are fifteen between July, 1975, and June, 1984. In every one the price is quoted per hundred, indicated by the

No custom or usage will be considered by the Court on the construction of a contract unless it is notorious, certain and reasonable (Chitty on Contracts, 25th Ed., para. 829).

Whether such a custom or usage exists is a matter of fact to be proved in evidence.

It hardly needs to be proved that the solidus is a symbol commonly used to indicate per, as in "km/h". The New Zealand Government Printing Office Stylebook published in 1981 states at p.231:-

" Per: Per should be printed as the solidus (/); the letter "p" should not be used in this sense. "

It also hardly needs evidence to establish that the letter "c" is widely used to mean a hundred. It does, of course, have other uses such as to indicate cents. Nor do I consider there is any significance in this sense between a capital C and a little c.

Taken together with the evidence of custom and usage in the trade given by Mr. Green, to which I have already referred, I am satisfied that the Plaintiff has established that there is a custom or usage in the trade of those involved in dealing with O-rings and like goods to use the symbols "/c" when quoting prices to mean per hundred.

Therefore I do not accept the Defendant's contention that the contract should be interpreted disregarding these symbols.

THE SECOND DEFENCE: NO CONSENSUS AD IDEM.

Mr. Whiteside submitted that the Plaintiff's letter

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meant a price per hundred. The Defendant believed that the Plaintiff's method of expressing the price meant that that was the price for 4,000 rings. If both constructions are properly open, then Mr. Whiteside contended the parties did not reach agreement.

I do not consider that in the circumstances of this case this contention can succeed. It is now well settled that an apparent meeting of the minds of the parties will suffice for a binding contract (9 Halsbury's Laws of England, 4th Ed., para. 226).

The principle was thus expressed by Blackburn, J. in Smith v. Hughes (1871) L.R. '6 Q.B. 597, at 607:-

" I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other . . . . If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms. "

The Defendant, by making out its purchase order of the 16th September, 1982, purported to accept the offer contained in the Plaintiff's letter of the 20th July, 1982. This acceptance was in unequivocal terms. It accurately set out the description of the rings to be supplied in a manner precisely conforming to the offer. The purchase order made no reference to the price. Had it done so the misunderstanding that subsequently emerged may well have been avoided.

By accepting the Plaintiff's offer in the manner in which it did, the Defendant so conducted itself that the Plaintiff could reasonably believe that it was assenting to the terms contained in the letter of the 20th July, 1982. Thus the Defendant is as bound as if he had intended to agree to the Plaintiff's terms.

Even if (contrary to the view I have just expressed) the consequence of the Defendant's misunderstanding resulted in there being no enforceable contract, that would, for the reasons I examine in greater detail in dealing with the fourth defence, be as the result of a mistake. There would then be a contract for the purposes of the Contractual Mistakes Act, 1977. S.2(3) of that Act provides:-

" (3) There is a contract for the purposes of this Act where a contract would have come into existence but for circumstances of the kind described in section 6(1)(a) of this Act. "

If there were not a contract it would only be because there was a mistake of the kind described in s.6(1)(a)(iii). Thus the Court would, in those circumstances, have jurisdiction to grant relief in accordance with s.7.

THE THIRD DEFENCE: SALE BY SAMPLE:

Mr. Whiteside submitted that the contract between the Plaintiff and the Defendant was a sale by sample. He relied on the supply by the Defendant to the Plaintiff of the two Mytten Rodd rings as samples of the type of rings that the Defendant wished to purchase. Then he pointed to the opening words of the letter of the 20th July, 1982, where the Plaintiff referred to the enquiry for O-rings to a sample submitted. On the basis of that evidence he submitted that it was

Then he contended that there was a breach of the condition implied by s.17 of the Sale of Goods Act, 1908, that the bulk shall correspond with the sample in quality.

There was submitted in evidence an analysis of the Mytten Rodd ring and the Plaintiff's ring. The former was a natural rubber or a polyisoprene rubber type. The latter was a nitrile rubber type based on acrylonitrile and butadiene. The analyst said that the infra-red examination showed the two rings to be quite different.

It was accepted that this difference may well explain the difference in price. As the analyst put it, the nitrile rubbers have a greater resistance to petroleum products and solvents than natural rubbers, and this may be reflected by a higher price.

The rings supplied by the Plaintiff were therefore of a superior quality to the sample, but Mr. Whiteside contended that it was still in breach of the condition in that it failed to correspond with the sample in quality because it was of a superior quality.

The first issue to determine is whether this was a sale by sample. S.17(1) of the Sale of Goods Act, 1908, provides:-

" (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect. "

So the fact that a sample was shown to the Plaintiff does not, of itself, without more, make the resulting sale into a sale by sample. The sample can be used only to provide the description of the article to be supplied. To be a sale by

intended that the goods to be supplied were to be supplied in accordance with that sample (see Sutton, Sales and Consumer Law in Australia and New Zealand at p.230).

I do not consider that the Defendant has established that the parties intended this to be a sale by sample. In the letter of the 20th July, 1982, there was a detailed and accurate description of the rings the Plaintiff was offering to supply. That description specified the material with which the rings were to be made, the dimensions in terms of inside diameter and cross-section, and the degree of hardness. Then when the Defendant by the purchase order of the 16th June, 1982, accepted that offer, it did so by setting out with equal precision the description in the Plaintiff's letter. Had the Defendant decided to buy not by reference to the Plaintiff's description but by reference to the sample the Defendant had provided, then the purchase order would, in my view, have accepted the order by reference to the sample, not by reference to the description. The purchase order does refer to the Plaintiff's reference "RG/LH 5287" being the reference that appears on the letter of the 20th July, 1982, but I do not consider that this, without more, is sufficient to indicate an intention by the parties that the contract was to be a sale by sample, rather than a sale by description.

Even if this had been a sale by sample, other difficulties face the Defendant in using this ground to justify a rescission of the contract.

First is the Defendant's contention that the bulk did not correspond with the sample in quality where the bulk was of a superior quality to the sample. Mr. Whiteside did not cite to me, and I have been unable to locate, any case where the goods

Indeed, the fallacy in this argument was, in my view, demonstrated by Mr. Whiteside's quite proper concession that had the contract expressed the price "per hundred" then supplying rings of a superior quality would not be a ground for rescinding. This demonstrates that the Defendant's real complaint is not the quality of the rings but the price.

Secondly, it does not follow that because there is a difference in chemical composition between the bulk and the sample that the former does not correspond with the latter in quality. The Plaintiff's rings have performed as satisfactorily as those from which came the sample. For the function they are required to perform in the Defendant's post mix tank there is no difference. Indeed it was not apparent to the Defendant that there was any difference in composition until it received the analyst's report in October, 1983. Prior to that it only thought there may have been a difference because of the price.

Thirdly, the Defendant would have to overcome s.37 of the Sale of Goods Act, 1908. It provides:-

" The buyer is deemed to have accepted the goods when . . . . the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. "

The Defendant when it received the rings was, understandably, very happy with the quality of them. There was never any question at the time of delivery, either of the initial sixteen rings on the 16th December, 1982, or the balance of the order on the 6th January, 1983, of rejecting them. On the contrary, the Defendant re-sold 583 of the rings to persons



One of the tests to be applied in considering whether there has been an act inconsistent with ownership, is whether the seller can have the goods placed at his disposal to allow him to resume possession. Banks, L.J., when discussing the corresponding provision in the English Act, said in Hardie & Co. v. Hillerns & Fowler (1923) 2 K.B. 490, at 496:-

" Where under a contract of sale goods are delivered to the buyer, which are not in accordance with the contract, so that the buyer has a right to reject them, the seller upon receipt of notice of rejection is entitled to have the goods placed at his disposal so as to allow of his resuming possession forthwith, and if the buyer has done any act which prevents him from so resuming possession, that act is necessarily inconsistent with his right. "

In Hammer and Barrow v. Coco-Cola and Others (1962) N.Z.L.R. 723 - the YoYo case - Richmond, J. at p.727 reviews the authorities relevant to this issue and particularly the situation where the goods have been sold by the purchaser to a sub-purchaser. Difficult issues can occur where delivery is made direct by the seller to the sub-purchaser. But that is not the situation in the present case. Here, the rings were delivered to the Defendant. It then sold some of them on after it had ample opportunity for examination and, if it thought fit, for rejection. Not having done so it is deemed to have accepted the rings. It thereby lost any right to reject them. That the act inconsistent with ownership relates only to part and not all of the rings-does not, in my view, affect the conclusion that the Defendant has thereby accepted the goods where, as here, there was only one contract covering the whole of the goods ordered (s.13(3) of the Act, Stunzi Sons Ltd. v. House of Youth Pty. Ltd. (1960) 60 S.R. (N.S.W.) 220).

THE FOURTH DEFENCE: MISTAKE:

The Defendant submitted that the Court had jurisdiction to grant relief under s.7 of the Contractual Mistakes Act, 1977, because the parties entered into the contract influenced by a mistake of the kind described in s.6(1)(a)(iii) of the Act.

The relevant parts of s.6 are:-

" 6. (1) A Court may, in the course of any proceedings . . . . grant relief under s.7 of this Act to any party to a contract -

(a) if in entering into that contract

(iii) that party, and at least one other party (not being a party having substantially the same interest under the contract as the party seeking relief) were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law. "

The statutory objective of the Act in general and the proper approach to s.6(1)(a)(iii) has recently been considered by the Court of Appeal Ozolins v. Conlon (C.A. 16/83, 31.5.84). The judgments of the majority (Woodhouse, P. and McMullin, J.) emphasise that the Act constitutes a new code that supersedes and replaces the common law. McMullin, J. at p.14 of the unreported judgment said:-

" In enacting the Contractual Mistakes Act Parliament provided an entirely new code applicable to every case of mistake which fitted within its framework. It replaced with its own provisions the old and unsatisfactory rules of the common law and those others which equity had evolved in an endeavour to mitigate the harshness of the former. Thus a person who is a party to a contract to which some element of mistake attaches, must now look to the statute and no longer to the common law or equity for his remedy if there is . . .

wording of s.5(1) which expressly says that the Act shall have effect in place of the rules of the common law and of equity governing the circumstances in which relief may be granted on the grounds of mistake. "

In McCullough v. McGrath's Stock and Poultry Ltd. (1981) 2 N.Z.L.R. 428, Mahon, J. held that although the Act had codified the circumstances in which relief may be granted on proof of mistake, it did not touch upon the question as to the manner of proving the existence of mistake or the circumstances from which the existence of mistake in any of its forms may be inferred, either factually or as a matter of law. The majority in Ozolins held that McCullough was wrongly decided.

Mrs. Ozolins intended to sell some land which abutted an extensive kitchen garden at the rear of her home. A price was agreed with Mr. Conlon as purchaser, whereupon they signed an agreement for sale and purchase to give effect to the bargain each believed had been arrived at. Then she found that the land legally described in the agreement included her garden as well. Woodhouse, P. described the result thus at p.4:-

" Considered objectively (the written agreement) is perfectly unambiguous and reflects no kind of mistake by anybody. Nor was this a situation of mutual mistake. Instead each of the parties had a different belief as to what was involved, so that up to the moment of execution of the written document it could not be said that there was any question of the real offer being accepted. "

Having then analysed s.6 he said at p.7:-

" Furthermore there can be no doubt that each then mistakenly believed that the written document correctly represented a mutual intention which did not exist. He mistakenly thought she was consciously selling all of the land at the rear of her house, including the

had been willing to complete a sale of all four lots: about that he was mistaken. On the other hand, she believed he had limited his purchase to the land north of the fence: about that she was mistaken. It is an analysis which shows that their respective decisions to proceed and finally to enter into the written contract, were influenced by a mistaken belief on the one side that was different from the mistaken belief on the other, and also that each mistake was about the size of the land to be bought and sold. Once carried into the written agreement, the contract could not be undone at common law, but in my view the case provides a classical example of one of the situations which is intended to fall within the remedial words of s.6(1)(a)(iii). "

This analysis applies to the present case. Each party had a mistaken belief about their intentions concerning the price. That mistaken belief influenced their respective decisions to enter into the contract. The Plaintiff mistakenly thought the Defendant was intending to agree to buy the 4,000 rings for \$644.96 per hundred, plus the tooling charge. The Defendant mistakenly thought that the Plaintiff was intending to agree to sell the 4,000 rings for \$644.96, plus the tooling charge. Those mistaken beliefs were different, but they were about the same matter of fact, namely, the price each thought was payable under the contract.

The next matter to consider is whether the circumstances are within s.6(b). That provides:-

- " (b) The mistake or the mistakes as the case may be resulted at the time of the contract -
  - (i) in a substantially unequal exchange of values;  
or
  - (ii) in the conferment of a benefit or in the imposition or inclusion of an obligation which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor. "

that price it was obtaining rings that it was able to purchase from its Australian supplier in May, 1982, at 54.4 cents each, and in November, 1982, for 78.3 cents each - the latter being a higher per ring price because only 150 were purchased. The 583 rings that had been sold by the Defendant before the misapprehension concerning the price was discovered, had been sold at the Defendant's normal retail price of 90 cents a ring. To the Defendant, therefore, the benefit from the contract, that is, the rings being supplied pursuant to it, was substantially disproportionate to the consideration therefor, that is, the price the Defendant would be bound to pay pursuant to the contract.

It is next necessary to consider subs.(2)(a) of s.6. It reads:-

" (2) For the purposes of an application for relief under section 7 of this Act in respect of any contract -

(a) a mistake, in relation to that contract, does not include a mistake in its interpretation. "

A Mistake in interpretation to be excluded by that subs. must be in relation to the contract in respect of which relief is sought. That is made clear by s.2(2):

" (2) For the purposes of this Act, and without limiting the meaning of the term 'mistake of law', but subject to section 6(2)(a) of this Act, a mistake in the interpretation of a document is a mistake of law. "

So the question is whether the mistake that occurred in the present case was a mistake in the interpretation of the contract between the Plaintiff and the Defendant.

" Price \$644.96/c "

made a mistake in its interpretation of the contract, but in my view that is not the mistake that gives rise to the right to relief. That, as I have indicated, was a mistaken belief by each party about the intention of the other concerning the price. That is not a matter of interpretation - it relates rather to what the parties thought the other intended when they entered into the contract.

This approach accords with the purpose of s.6(2)(a). It is intended to exclude relief where the words adopted by common consent are then given, by the normal process of the construction of contracts, a meaning different from that which a party thought they had. Thus a party is not entitled to relief only because he has interpreted the words in a sense different from that adopted by a court of construction. In reaching this conclusion I have been assisted by the report of the Contracts and Commercial Law Reform Committee that led to the passing of the Act.

For these reasons I have concluded that s.6(2)(a) does not preclude the granting of relief.

I now consider what relief should be granted. The discretion given to the Court by subs. 7(3) is to make such order "as it thinks just". The subs. sets out, but not in limitation, certain things the Court may do. Also relevant to the exercise of the discretion is subs. 7(2):

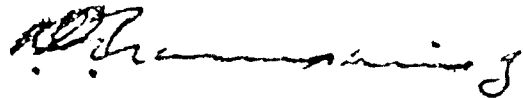
- " (2) The extent to which the parties seeking relief . . . . caused the mistake shall be one of the considerations to be taken into account by the Court in deciding whether to grant relief under this section "

In this case I can see no reason for cancelling the contract. The rings have a use to the Defendant. They do not to the Plaintiff. The appropriate course, therefore, is to declare the contract to be valid and subsisting, and then consider whether, and if so to what extent, relief should be granted by way of variation. I take these factors into account:-

- (1) To some extent the Defendant caused the mistake by ignoring the symbols "/c". As I have said, Mr. Wood thought they were a typing error. But a little more consideration should at least have indicated to him that this may not be so. He had been purchasing these O-rings from Australia shortly before the contract for 54 cents each. As this was a regular source of supply, presumably no tooling charge would have been involved. Had he looked at the price the Plaintiff was proposing, as he took it, disregarding the tooling charge, he would have realised that it resulted in a price of 16 cents per ring, and that should have put him on his guard. In any event, if he thought there had been an error made in the letter, it only required a telephone call to clear it up. It was not as if there were any great urgency. The letter offering to supply the rings is dated the 20th July, 1982. The acceptance was by the order dated the 16th September, 1982.
- (2) The Plaintiff intended to charge \$6.67 per ring. The Defendant intended to pay \$0.429 per ring.
- (3) The Defendant intended to use some of the rings in its post mix tank. Others it intended to sell as replacements. Its normal retail price was and still is 90 cents per ring.
- (4) The cost to the Plaintiff was \$15,915.59 or \$3.91 per ring, excluding telephone and telex costs and other overheads.
- (5) The offer by the Plaintiff in April, 1983, was to accept a reduced price of \$4.51 per ring.
- (6) The most recent evidence of the price at which the Defendant was able to obtain suitable rings from other sources is a quote from the United States company of the 7th September, 1983, of US.45 cents each, which I take to be approximately NZ.90 cents each. Freight would be payable in addition.
- (7) The Plaintiff has not been paid anything. The Defendant has presumably been paid for the 583 rings. It has not been paid for, nor had the use of, the balance.

This includes the tool charge. I have not arrived at this figure by any arithmetical process. It is a somewhat arbitrary assessment intended to take into account the various and conflicting factors to which I have referred. Applied to 4,075 rings results in an amount due under the contract of \$16,300.00. The contract is otherwise declared to be valid and subsisting.

There will be judgment for the Plaintiff against the Defendant for \$16,300.00. I make no order for payment of interest since I have had regard to this factor in fixing the price. The Plaintiff is entitled to costs according to scale with disbursements and witnesses expenses to be fixed by the Registrar.

A handwritten signature in cursive script, appearing to read "R. G. Grierson".

Solicitors:

Simpson Grierson, Auckland, for Plaintiff.

Wynn Williams & Co., Christchurch, for Defendant.