MISTAKEN TENDERS: AN EXAMINATION OF THE RECENT CASE LAW

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I. INTRODUCTION

The circumstances in which a party may be relieved from his contractual obligations because of some mistake made by him have always proven difficult to isolate. There is little agreement even as to the relevant categories of mistake, let alone on how individual cases should be decided. In recent years, the problem of mistake has come to the fore where tenders for construction work have been submitted at too low a price because of an error made by the contractor. Typically, such tenders are expressed to be irrevocable for a certain period of time. Prior to acceptance, however, the contractor discovers his mistake, informs the owner and requests the right to withdraw his tender. The owner rejects the contractor's request and attempts to impose liability upon the contractor for failing to execute a construction contract. The question to be resolved in these cases has been whether, on the one hand, the owner should be entitled to accept a tender which he knows to have been made under mistake or whether, on the other hand, the contractor should be entitled to withdraw a tender which he has agreed to be irrevocable.

A line of authorities developed in Ontario which basically favoured the tenderer in these circumstances. These authorities, however, were thrown into doubt by the intervention of the Supreme Court of Canada into this field in *The Queen in right of Ontario* v. *Ron Engineering & Construction Eastern Ltd.*[1] This comment looks first at the law prior to the Supreme Court's decision. It then deals with *Ron Engineering* itself and discusses the confusion engendered by that case. Finally, it shows how that confusion has flowed down to the lower courts by contrasting the two recent Alberta Queen's Bench decisions of *Calgary* v. *Northern Construction Co. Division of Morrison-Knudsen Co. Inc.*[2] and *Northern Construction Co. Ltd.* v. *Gloge Heating & Plumbing Ltd.*[3]

II. THE TRADITIONAL POSITION

A tender is merely one form of offer. Where an offer has been submitted under some kind of mistake, the courts have traditionally drawn a distinction between a mistake in the offer itself, namely a mistake as to the terms of the contract, and a mistake as to the reasons for making a particular offer or what Palmer[4] calls a mistake in assumptions:[5]

> The distinction parallels that between the statement "I did not intend to say this" and "I did intend to say this but it was because I mistakenly believed the facts were thus and so."

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1. (1981) 119 D.L.R. (3d) 267 (S.C.C.), *revg* (1979) 24 O.R. (2d) 332 (C.A.).
2. (1982) 23 Alta. L.R. (2d) 338 (Q.B.).
3. (1984) 30 Alta. L.R. (2d) 1 (Q.B.).
4. Palmer, *Mistake and Unjust Enrichment* (1962).
5. *Id.* at 6.

This distinction formed the basis of the decision in *Smith* v. *Hughes*.[6] The defendant agreed to buy a parcel of oats from the plaintiff. He refused to complete the contract, however, when the plaintiff supplied new oats, arguing that he believed that he was buying old oats and that new oats were useless for his purposes. The plaintiff thereupon sued the defendant for breach of contract. The Court held that if the defendant merely believed the oats to be old, then there was no basis for relief even if the plaintiff knew of the defendant's mistaken belief. Such a mistake in assumptions would vitiate the contract only if it had been induced by the seller in some way such as through a misrepresentation. Mere knowledge of the buyer's mistake, even with no attempt to correct the error, was insufficient to ground relief.

If, on the other hand, the defendant mistakenly believed that the plaintiff was warranting the oats to be old and if the plaintiff knew of the defendant's mistake as to the terms of the contract, then the contract would be void. It is true that objectively there would be a contract to sell oats with no warranty as to their age. Moreover, the courts, in general, apply an objective test to determine the parties' agreement and the fact that one of the parties is mistaken as to the terms of agreement is irrelevant. Blackburn J. made this point very clearly in *Smith* v. *Hughes* itself:

> 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.[7]

The objective test, however, cannot be applied where one party knows that the other is mistaken about the terms of the contract. The non-mistaken party cannot rely upon the offer or acceptance of the other party in its objective sense when he knows that it relates to a different set of terms. There is no correspondence between the offer and acceptance and, therefore, no contract.[8] Hannen J. said:[9]

> "The promiser is not bound to fulfill a promise in a sense in which the promisee knew at the time the promiser did not intend it." . . . If by any means he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promiser did not assent.
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> If, therefore, in the present case, the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent, and not the real bargain.

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6. (1871) L.R. 6 Q.B. 597.
7. *Id.* at 607.
8. There is some support for the view that the contract is not void in these circumstances but that there is a valid contract on the mistaken party's terms: see *e.g.* Treitel, *The Law of Contract* (6th ed. 1983) 231. The difficulty with this theory is twofold. First, there may be a situation in which one party knows that the other is mistaken as to the terms of the contract but does not know what terms the mistaken party believes to be part of the contract: see Blom, "Mistaken Bids: The Queen in right of Ontario v. Ron Engineering & Construction Eastern Ltd." (1981-82), 6 Can. Bus. L.J. 80, at 82 n. 9. Secondly, this view pre-supposes that mere knowledge of another's mistake as to terms constitutes an assent to the terms in the mind of the mistaken party. It must be admitted, however, that some of the cases suggesting that rectification may be available for unilateral mistakes seem to go this far: *e.g. Riverlate Properties Ltd.* v. *Paul*, [1975] Ch. 133 (C.A.).
9. *Supra* n. 6 at 610.

As a result of *Smith* v. *Hughes*, it became very important to distinguish between mistakes in assumptions and mistakes as to terms. It is true that some mistakes in assumptions will ground relief, such as where the mistake is common to both parties to the contract and sufficiently fundamental,[10] or where the mistake of one party has been induced by the misrepresentation of the other or where one party's knowledge of another's mistake amounts to fraud in some broad equitable sense.[11] On the other hand, a mistake as to terms, apparently however slight, will ground relief provided that it is known to the party seeking to enforce the contract before any agreement is reached.

The distinction is a real one but it can be very fine, as exemplified particularly by cases dealing with mistaken tenders. It is difficult to see why important legal consequences should depend, for example, upon whether a tenderer always intended to enter a bid of 100,000 dollars and, by mistake, filed a bid for 10,000 dollars or whether a tenderer always intended to enter a bid of 10,000 dollars for a job worth 100,000 dollars, such a bid being based upon prior calculations which prove incorrect because of some clerical error.

Nevertheless, this was the approach taken by the British Columbia Court of Appeal in the first of the modern tender cases, *Imperial Glass Ltd.* v. *Consolidated Supplies Ltd.*,[12] where Coady J.A. emphasized the distinction between mistakes in assumptions and mistakes as to contractual terms. The plaintiff was invited to tender for the supply and installation of window glass on the construction of a school. Prior to submitting its bid, it telephoned the defendant to request a quotation on the glass required. An employee of the defendant mistakenly calculated the required amount of glass as being about 200 square feet instead of the correct figure of about 2000 square feet, with the result that the defendant quoted the very low price of 2,000 dollars. The plaintiff relied upon that quotation in submitting its bid and its bid was accepted. At that time, the plaintiff knew nothing of the mistake which had been made. It was found as a fact that the plaintiff acquired such knowledge at a later stage. It then asked the defendant to confirm the original oral quotation. The defendant did so by letter. That letter constituted the offer which the plaintiff accepted with full knowledge of the mistake. The defendant upon discovering its mistake refused to proceed with the transaction and the plaintiff sued for breach of contract.

Despite the plaintiff's knowledge of the defendant's mistake at the time it accepted the offer, the Court refused to hold the contract to be void. There was no mistake here as to the terms of the offer. When the defendant submitted its offer, it intended to supply the glass for the price quoted. It is true that the price was based upon a false assumption as to

10. See *Bell* v. *Lever Bros. Ltd.* [1932] A.C. 161 (H.L.). It is not clear why the mistake must be shared before there can be any relief for a fundamental mistake in assumptions: see Waddams, *The Law of Contracts* (1977) 237-238.

11. This possibility was recognized, for example, in both *Imperial Glass Ltd.* v. *Consolidated Supplies Ltd.* (1960) 22 D.L.R. (2d) 759 (B.C.C.A.) and *McMaster University* v. *Wilchar Construction Ltd.* (1971) 22 D.L.R. (3d) 9 (Ont. H.C.), *affd* (1973), 69 D.L.R. (3d) 400 (C.A.). The scope of such relief, however, remains uncertain.

12. *Supra* n. 11.

the amount of glass required but that fact was irrelevant because the defendant fully intended to supply sufficient glass for the project for 2,000 dollars. Coady J.A. said:[13]

> It is clear that the [defendant] intended to offer the goods at the price named. The mistake was not in the offer. All that is claimed is that the offer would not have been made had the mistake been detected. The mistake was therefore in the motive or reason for making the offer, not in the offer. There was consequently a consensus and a valid contract.

It seems wrong that the defendant's position in such a case should depend upon the fortuitous circumstance of whether its mistake is contained in the tender itself or in the calculations which led to the formulation of the tender. In either situation the defendant has made a serious error on which the plaintiff should not be allowed to capitalize by accepting the tender with full knowledge of the mistake. The actual decision in *Imperial Glass* can be justified on the basis that the plaintiff had relied upon the defendant's original quotation when it knew nothing of any mistake. It had entered into a contract for the supplying and installation of the glass on the basis of the defendant's oral quotation. There was, therefore, every reason for refusing to relieve the defendant from the consequences of its own carelessness.

The reasoning in *Imperial Glass* was heavily criticized by Thompson J. in *McMaster University* v. *Wilchar Construction Ltd.*[14] In the latter case, however, the mistake was in the tender itself and so *Imperial Glass* could easily be distinguished. By mistake, the defendant contractor omitted to include page one of its tender which contained a very important wage escalator clause. This mistake was clearly known to the plaintiff when it went ahead and accepted the defendant's tender. Thompson J. was in no doubt that a contract had not been formed between the parties:[15]

> There can be little doubt that there was no real agreement between the parties and that this is but a bold attempt by the plaintiff to force the defendant Wilchar to fulfil a promise in a sense which the plaintiff knew that Wilchar did not intend it and to which its mind did not assent: and I so hold.
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> To put it simply, this is a case where one party intended to make a contract on one set of terms and the other intended to make it upon another set of terms, with the result that there is lack of consensus. The parties were not *ad idem*. The existing circumstances prevented the formation of a contract.

The other important aspect to *McMaster University* was that the tender provided that it was to be irrevocable for a period of 120 days. Thompson J. pointed out that such a provision could be binding only if it were supported by some consideration flowing from the offeree or if it were made under seal.[16] In either case a valid option contract would be created. The defendant's tender was executed under seal and so Thompson J. was faced with the question of whether the irrevocability of the bid precluded the tenderer from relying upon the doctrine of mistake. Thompson J. summarily dismissed any such notion. He said:[17]

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13. *Id.* at 763.
14. *Supra* n. 11.
15. *Id.* at 22.
16. See also *296349 Ontario Ltd.* v. *Halton Board of Education* (1980) 126 D.L.R. (3d) 439 (Ont. H.C.).
17. *Supra* n. 11 at 24.

> I am not prepared to accede to the suggestion, however, that because an offer may not be withdrawn that there still may not be a genuine mistake by the offeror known to the offeree which will prevent the formation or consumation of the contract, for it is not the offer alone which constitutes the contract but the combined operation of the offer and acceptance. If the offeree knows before acceptance that the promise of the offeror, through mistake, is not intended in the sense in which the offeree purports to accept it, there still is no meeting of the minds of the parties, despite the fact that the offeror may not withdraw the offer during the time limited or before rejection. To hold otherwise would be to state that in no case could there be unilateral mistake where the offer is under seal. To that proposition I do not subscribe.

This reasoning, however, does not deal with the argument that an option contract is formed as soon as a tender has been submitted under seal and, at that time, the owner (optionee) has no knowledge of any mistake made by the contractor (optionor). It could be said, therefore, that to prohibit the owner from accepting the tender (exercising the option) upon acquiring knowledge of the contractor's mistake is tantamount to depriving the owner of the benefit of the option for which he has contracted. This argument will be developed more fully later in this comment.

III. VARIATION OF THE TRADITIONAL POSITION

The fine distinction between a mistake in assumptions and a mistake as to terms was deliberately blurred by the Ontario Court of Appeal in *Belle River Community Arena Inc.* v. *W.J.C. Kaufman Co. Ltd.*[18] in the belief that it was not a distinction upon which relief should depend. The defendant contractor submitted the lowest bid for a construction project, accompanied by a bid bond. The next day it discovered that it had made an error of some 70,800 dollars in formulating its tender price. Immediately, it informed the owner of its mistake and requested that its bid be withdrawn. The owner, however, proceeded to accept the defendant's tender. Upon the defendant taking the position that its tender had been withdrawn, the plaintiff brought an action against the defendant and the bonding company.

The plaintiff relied upon the *Imperial Glass* [19] case for the proposition that a mistake merely in the motive for making an offer, even where known to the offeree, does not invalidate the parties' agreement. The mistake made in *Belle River* was of the *Imperial Glass* variety. The tender had been prepared by the president of the defendant from approximately seventy-five summary sheets and, in using the adding machine, he had left out one summary sheet. Arnup J.A. however, in giving judgment for the Court, declined to accept *Imperial Glass* and set out the following proposition:[20]

> In my view, the authorities establish that an offeree cannot accept an offer which he knows has been made by mistake and which affects a fundamental term of the contract. (Price is obviously one such term . . .). In substance, the purported offer, because of the mistake, is not the offer the offeror intended to make, and the offeree knows that.

In effect, therefore, the Court treated what was a mistake in assumptions as if it were a mistake as to the terms of the contract. The decision, however, was a welcome one, signalling, as it did, the beginning of the

18. (1978) 87 D.L.R. (3d) 761 (Ont. C.A.).

19. *Supra* n. 11.

20. *Supra* n. 18 at 766.

end of *Smith* v. *Hughes*.[21] Professor Blom has pointed out that the *Belle River* test raises a number of questions.[22] He says, for example, that the test does not state how fundamental the mistake must be to warrant relief, merely that it must affect a fundamental term of the contract such as price. Nor does it indicate the kinds of mistake which will bring the doctrine into play. Will a mere error of judgment on the part of the offeror be sufficient or must there be some error of calculation or other similar mistake of fact?[23] Moreover, the decision did not deal effectively with the problem of the offer being irrevocable for a certain period of time. The Court said simply that the offeree cannot accept an offer which he knows to have been submitted under a mistake affecting a fundamental term "even if there is a provision binding the offeror to keep the offer open for acceptance for a given period".[24]

Despite these remaining questions, the approach taken in *Belle River* made much more sense than that adopted in *Imperial Glass*. It was to be hoped that over time many of these problems would be solved and that a new theory of mistake would be accepted. In the short term *Belle River* was well received. It was followed by Cromarty J. in *Municipality of Metropolitan Toronto* v. *Poole Construction Ltd.*[25] and by the Ontario Court of Appeal in *The Queen in Right of Ontario* v. *Ron Engineering & Construction Eastern Ltd.*[26] The Supreme Court of Canada, however, overturned the latter decision and that case must now be addressed.[27]

IV. THE INTERVENTION OF THE SUPREME COURT

In *Ron Engineering*, the defendant, the Ontario Water Resources Commission, called for tenders on certain construction work. Each tender had to be accompanied by a deposit of 150,000 dollars. The instructions for tenderers provided that bids were to be irrevocable for a period of sixty days after the date of the opening of the tenders and contained the following clause (paragraph 13):

> [T]he tenderer guarantees that if his tender is withdrawn before the Commission shall have considered the tenders or before or after he has been notified that his tender has been recommended to the Commission for acceptance or that if the Commission does not for any reason receive within the period of seven days as stipulated and as required herein, the Agreement executed by the tenderer, the Performance Bond and the Payment Bond executed by the tenderer and the surety company and the other documents required herein, the Commission may retain the tender deposit. . . .

The plaintiff, Ron Engineering, submitted a bid under seal, accompanied by the deposit, which proved to be the lowest by about 632,000 dollars. The plaintiff discovered immediately that an item for some 750,000

21. *Supra* n. 6.

22. *Supra* n. 8 at 86-88.

23. *Id.* at 87.

24. *Supra* n. 18 at 766.

25. (1979) 10 M.P.L.R. 157 (Ont. H.C.).

26. *Supra* n. 1.

27. A number of useful and timely comments have been written on the *Ron Engineering* case: *e.g.* Blom, *supra* n. 8; Nozick, "Contract Law — Formation — Unilateral Mistake — Supreme Court of Canada" (1982) 60 *Can. B. Rev.* 345; Swan, "Contracts — Mistake — Irrevocable Tenders in the Construction Industry — *The Queen* v. *Ron Engineering & Construction (Eastern) Ltd.*" (1981) 15 *U.B.C. L. Rev.* 477.

dollars had been omitted in computing the total price and, about an hour after the opening of the tenders, it sent a telex to the defendant pointing out the error made and requesting the right to withdraw its tender without penalty. There was no doubt that a genuine mistake had been made. The defendant, however, ignored the contractor's request and submitted the construction contract to the plaintiff for execution. The contractor refused to sign the contract because of the mistake it had made and the defendant accepted the next lowest tender and forfeited the deposit. The contractor then sued to recover its deposit. The Ontario Court of Appeal in a brief oral judgment applied the reasoning of *Belle River* and held that the owner, once it knew of the mistake, could neither accept the tender nor forfeit the bid deposit.

The Supreme Court of Canada, however, reversed the decision of the Court of Appeal and held that the owner was entitled to retain the deposit for reasons which are not entirely clear. Estey J., in giving judgment for the Court, said that there were two contracts to be considered in this situation. An initial contract arose upon the submission of the tender by the contractor. He described this contract as contract "A" and distinguished it from the construction contract itself, which he designated as contract "B". Contract A was a unilateral contract and its terms were set out in the instructions for tenderers. Its principal term was the obligation of the tenderer not to withdraw its bid for sixty days after the opening of tenders and a corollary term was the obligation of both parties to enter into the construction contract upon acceptance of the tender. The important paragraph 13 was also part of the terms of this contract. Contract A was formed immediately upon submission of the tender and at that time the rights of the parties under that contract crystallized.

When pressed by the plaintiff with the doctrine of mistake, Estey J. said that the construction contract never came into existence and so principles of mistake could be applied only to contract A. There was no question of any mistake operating at the time that contract A was formed. The contractor intended to submit the very tender it did and the owner knew nothing then of any mistake in the contractor's calculations. Therefore, no mistake impeded the formation of contract A. The effect of any such mistake upon contract B was an entirely different question and not one before the Court. The deposit was required in order to ensure that the contractor fulfilled its obligations under contract A. It could, therefore, be forfeited when the contractor failed to do so.

There are real problems with the judgment of Estey J. First, it is difficult to agree with the analysis of how contract A was formed. It was described as a unilateral contract,[28]

> . . . that is to say a contract which results from an act made in response to an offer, as for example in the simplest terms, "I will pay you a dollar if you will cut my lawn." No obligation to cut the lawn exists in law and the obligation to pay the dollar comes into being upon the performance of the invited act. Here the call for tenders created no obligation in the respondent or in anyone else in or out of the construction world. When a member of the construction industry responds to the call for tenders, as the respondent has done here, that response takes the form of the submission of a tender. . . . The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide.

28. *Supra* n. 1 at 274-275.

The unilateral contract found by Estey J. seems to be the wrong way round. If the requested act of acceptance is the submission of the tender, then the offer must come from the owner. It appears, however, that the relevant promise, namely not to revoke the bid, is furnished by the offeree under the supposed unilateral contract. Estey J.'s conclusion is all the more surprising because he could have found the plaintiff's bid to be irrevocable simply on the basis that it had been submitted under seal.

Secondly, it is not at all clear which obligation, under contract A, the plaintiff breached so as to suffer the forfeiture of the deposit. Arguably, the plaintiff did not breach its obligation not to withdraw its tender because it maintained all along that it was not withdrawing it; rather it contended that its tender could not be accepted once the defendant acquired knowledge of the mistake. Therefore, the plaintiff must have breached an obligation to execute the formal construction contract. This reasoning suggests that in effect the plaintiff could not prevent the construction contract, contract B, from coming into existence. It, therefore, casts doubt upon the notion that the Court was not concerned in any way with contract B. The plaintiff had to enter into contract B or lose his deposit.

Thirdly, Estey J. suggests at times that he is in favour of returning to the traditional distinction between mistakes in assumptions and mistakes as to terms. It is true that he does not specifically overrule *Belle River*. He does, however, support the *McMaster University* case on the basis that it concerned "the inability of the parties to comply on the facts with the fundamental rules pertaining to the formation of contracts".[29]

Above all, the rigid separation between contract A and contract B causes problems. Estey J. says that he is not concerned with the question of "whether a construction contract can arise between parties in the presence of a mutually known error in a tender".[30] At the same time, however, the plaintiff lost its deposit for failing to enter into the construction contract. In reality, Estey J. was faced with the same question as that raised in the *Belle River* case, namely, the question of the extent to which an irrevocable bid can be accepted by the offeree after acquiring knowledge that the bid has been submitted under some substantial mistake. The judgment would have been far more persuasive if it had dealt with this fundamental issue. The decision can be justified on the following basis. The plaintiff's bid was irrevocable for sixty days because it was submitted under seal. Therefore, a valid option was formed between the parties because the defendant had no knowledge of any mistake at that time. The subsequent acquisition of knowledge of the mistake by the owner came too late to neutralize that option. To deny the owner the right to exercise that option would be to deprive it of its rights in that contract. The owner could and did exercise its option by accepting the bid.[31] The construction contract thus came into existence. The con-

29. *Id.* at 276.

30. *Id.* at 277.

31. It is true that the defendant never formally accepted the tender but as Nozick, *supra* n. 27 at 354 n. 25 has pointed out, at the very least the proffering of the construction contract must have constituted an acceptance by conduct.

tractor forfeited its deposit for failing to execute the formal documents which it was, therefore, bound to execute.[32]

If this reasoning had been adopted, then the Court would not have been forced to invent some artificial unilateral contract, would not have said that contract B never came into existence and need not have intimated a return to the old dichotomy of mistakes in assumptions and mistakes as to contractual terms. It would, however, have been compelled to face the fundamental question of whether a serious mistake known to an optionee should prevent an optionee from exercising his option. A discussion of that issue would have been very helpful indeed.

V. THE INTERPRETATION OF *RON ENGINEERING*

The confusion engendered by *Ron Engineering* is well illustrated by comparing two recent Alberta decisions. In *Calgary* v. *Northern Construction Co. Division of Morrison-Knudsen Co. Inc.*[33] Waite J. held that the principle laid down in *Belle River* had not been affected by *Ron Engineering* and was able to distinguish *Ron Engineering* on its facts. The defendant contractor furnished a tender under seal, together with a bid bond, for a construction project. The information to tenderers provided that all tenders would be irrevocable, subject to any limitation placed in the tender itself, until such time as the contract had been signed by the successful tenderer and that liability on the bid bond would flow if a tender were withdrawn prior to its consideration by the Council of the City of Calgary or before its earlier award by the City Commissioners. The defendant's tender was the lowest submitted. The defendant then discovered that a clerical error had been made in calculating the tender price and informed the plaintiff of this fact on the same day that tenders were opened. Later, the defendant requested that it be allowed to amend or, alternatively, to withdraw its tender and to have its bid bond returned. The plaintiff ignored the defendant's request, accepted the tender and demanded that the defendant execute the formal contract within five days. The defendant failed to execute the contract and the plaintiff commenced an action for the difference between the defendant's bid and the next highest bid which was ultimately accepted.

The plaintiff relied upon the *Ron Engineering* case. Waite J. distinguished the Supreme Court decision on two grounds. First, the City of Calgary accepted the defendant's tender and this meant that the validity of the construction contract itself had to be considered. Secondly, even if the City of Calgary had elected to pursue a remedy under some form of contract A, it could not have done so. The relevant clause in *Ron Engineering* authorized the owner to retain the tender deposit if the contractor failed to execute the formal construction contract. On the other hand, the relevant clause in this case authorized the owner to take similar action only where the contractor withdrew its tender before it had been considered by City Council or before its earlier award by the City Commissioners. No such withdrawal had taken place.

32. For a different view of the effect of any such option contract, see Nozick, *supra* n. 27 at 352-353.

33. *Supra* n. 2.

Waite J., therefore, felt free to apply the *Belle River* case which in his opinion had not been overruled nor disapproved of by the Supreme Court. At the time it purported to accept the tender, the City knew of the contractor's mistake that went to a fundamental term of the contract and hence was incapable in law of accepting the tender.

This judgment shows that some judges at least will be unwilling to give up the *Belle River* principle and will attempt to read *Ron Engineering* as narrowly as possible.

The most recent case on point, *Northern Construction Co. Ltd.* v. *Gloge Heating and Plumbing Ltd.*,[34] is similar in many ways to the first of the modern tender cases, the *Imperial Glass* case.[35] As in *Imperial Glass*, the dispute did not arise between the owner and the contractor but between the contractor and a subcontractor and, as in *Imperial Glass*, there were good reasons for denying relief to the mistaken tenderer. The plaintiff, a general contractor, invited subcontractors to bid for the mechanical work in the construction of an airport terminal expansion. The defendant, a mechanical subcontractor, submitted a bid by telephone just one hour before the plaintiff had to submit its tender on the main contract. The defendant's bid was about ten per cent lower than the next lowest bid. The plaintiff used the defendant's bid in making its own tender on the main contract and designated the defendant as its mechanical subcontractor. The plaintiff was the low tenderer. According to the tender documents, the owner was entitled to hold all tenders open for a set period of time. On the same day, the defendant discovered that it had made a serious error in its calculations. A few days later the defendant learned from the plaintiff that the plaintiff was the low tenderer and that it had used the defendant's bid. The defendant then told the plaintiff of its error. The plaintiff agreed to approach the owner to see if the owner would permit the defendant to be replaced as the nominated mechanical subcontractor. The owner agreed to do so but would not renegotiate the price. The plaintiff, therefore, informed the defendant that it had no choice but to look to the defendant to do the work at the price quoted. When the plaintiff's tender was accepted by the owner, the plaintiff forwarded the subcontract to the defendant for execution. The defendant refused to sign the agreement. The plaintiff made alternative arrangements to have the mechanical work done and sued the defendant for breach of contract.

Assuming that the plaintiff had no actual or constructive knowledge of the defendant's mistake at the time that it used the defendant's bid, as the judge in fact found, then there was every reason for the plaintiff to succeed. It had relied upon the subcontractor's bid and committed itself to the owner when it was unaware of any mistake. Miller J. pointed out that to relieve the subcontractor from the consequences of its mistake would merely be to shift the loss from the perpetrator of the mistake to an innocent party.[36] A simple resolution of the case, therefore, would be to hold that the plaintiff accepted the defendant's bid when it incorporated it in-

34. *Supra* n. 3.

35. *Supra* n. 11.

36. *Supra* n. 3 at 10-11.

to its tender on the main contract. At that time the plaintiff knew of no mistake and so there was nothing to disable it from accepting. The defendant learned of this acceptance before any attempt was made to withdraw its bid. The resulting contract between the parties was of course conditional upon the plaintiff being awarded the main contract.

This was the argument made by the plaintiff's counsel and it was, in effect, accepted by Miller J. in reaching his decision. *Belle River* was, therefore, inapplicable because the contractor was ignorant of any mistake at the time of acceptance. Miller J., however, went a little further and held that the subcontractor's bid was more than a simple offer. It constituted an option, the consideration for the subcontractor's promise to keep the bid open being the contractor's promise to consider the submitted tender.[37] There is obvious business sense in being able to find that the subcontractor's bid is irrevocable. The bilateral option contract found by Miller J. is certainly more understandable than the unilateral contract found by Estey J. in *Ron Engineering* itself.[38] The suggested consideration furnished by the contractor, however, seems a little artificial. Having held that an option had been granted by the defendant, Miller J. had no difficulty in deciding that the plaintiff exercised its option when it used the defendant's bid in its tender on the main contract. The defendant was, therefore, liable to the plaintiff for failing to execute the formal contract for the mechanical work on the project.

The actual decision in *Gloge* is not surprising. The interesting aspects to the case are first, the way in which, as already seen, the judge constructed an option contract, and secondly, certain *dicta* on the effect of such a contract. Miller J. suggested that, even if the plaintiff knew of the defendant's error prior to the exercise of the option, it would still not have been disabled from so exercising it on the basis that to hold otherwise "would deprive the optionee of his expectation interest under the option contract".[39] This point was well made by Professor Nozick, upon whom Miller J. relied, in his comment on *Ron Engineering*:[40]

> Now, suppose a party enters into an option in which by mistake the option exercise price is lower than intended. Further assume that at the time the option contract was made, the exercisor neither knew nor ought to have known of the option grantor's mistake. Under these circumstances, it is not, I think, open to the grantor of the option to claim that the option cannot be exercised merely because the exercisor knew of the mistake prior to the *exercise* of the option. Such a holding would effectively deprive the exercisor of his expectation interest under the option contract. The principle of unilateral mistake has indeed been utilized to deprive parties of their expectation interests but only where (a) there is knowledge, whether actual or constructive of the mistake of the other party, and (b) where this knowledge was placed with the "guilty" party *prior* to contract formation — this is the so-called "snapping up" of a mistaken offer. It has never been applied where the mistake became known *after* contract formation.

37. *Id.* at 18.

38. In constructing this option contract, Miller J. was heavily influenced by Professor Nozick's comment on the Ron Engineering case, *supra* n. 27, where Nozick points out the impossibility of accepting Estey J.'s analysis of contract A as a collateral unilateral contract and suggests that, to support Estey J.'s two contract theory, one has to find a collateral bilateral contract.

39. *Supra* n. 3 at 19.

40. *Supra* n. 27 at 352-353.

The argument is a good one. It offers a justification for the decision reached in *Ron Engineering*. It is unfortunate that such an argument was not presented to the court in *Belle River*.

VI. CONCLUSION

The rigid distinction between mistakes in assumptions and mistakes as to terms had little to commend it. An offeree should not be allowed to benefit from a serious mistake made by an offeror, unless he has either accepted the offer or relied upon it in some other way prior to learning of the offeror's mistake, whether that mistake be in the offer itself or merely be in the assumptions on which the offer was based. The fine line which would otherwise have to be drawn is illustrated well by the mistaken tender cases. To the extent, therefore, that *Belle River* does away with that distinction, the case should be followed. It is to be hoped that its authority will survive the Supreme Court's intervention in *Ron Engineering*. In this respect, the decision in *Calgary* v. *Northern Construction Co.*[41] is encouraging.

At some time, however, the courts must address fully the problems raised where a mistaken offer is irrevocable and thus constitutes an option. Two resolutions are possible. The courts may decide that controlling effect is to be given to the doctrine of mistake so that an optionee will not be allowed to exercise his option if he knows that it has been made under some serious error. Alternatively, they may decide that a person granting an option must be especially careful to ensure that he has not made a mistake because he is entering into a contract at the time when he submits his offer. To prevent the optionee from exercising his option is to deny him any rights in that contract. It is not enough for a court simply to assert, as was done in *Belle River*, that the principle of mistake expressed in that case "applies even if there is a provision binding the offeror to keep the offer open for acceptance for a given period".[42]

41. *Supra* n. 2.

42. *Supra* n. 18 at 766.