SUPREME COURT OF QUEENSLAND

CITATION:	*Eroc P/L v Amalg Resources NL* [2003] QSC 074
PARTIES:	**EROC PTY LIMITED** ACN 067 084 708 (plaintiff) **v** **AMALG RESOURCES NL** ACN 061 595 051 (defendant)
FILE NO/S:	S10886 of 2001
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	20 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	25 and 26 February 2003
JUDGE:	Muir J
ORDER:	**Judgment on the claim and counterclaim in favour of the plaintiff together with costs, including reserved costs, if any, to be assessed on the standard basis**
CATCHWORDS:	CONTRACT – Rectification – Deed – where the plaintiff sought to enforce the terms of a deed – whether rectification for common mistake of the parties or unilateral mistake of the defendant open on the facts – basis for rectification for unilateral mistake *A Roberts & Co Ltd v Leicestershire County Council* [1961] 1 Ch 555 *Agip (Africa) Ltd v Jackson* [1990] Ch 265 *Bacchus Marsh Concentrated Milk Co Ltd (in liq) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410 *Baden v Société Général pour Favoriser le Dévelopement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] 2 WLR 677 *Commissioner of Stamp Duties (NSW) v Carlenka* (1995) 41 NSWLR 329 *Commonwealth of Australia v VL Investments* (Supreme Court of Victoria, Marks J, 18 December 1987, unreported) *Everglades Country Club Ltd v Eadie* (Supreme Court of New South Wales, Needham J, 13 March 1987, unreported)

Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd [1953] 2 QB 450
Issa v Berisha (1981) 1 NSWLR 261
Johnston v Arnaboldi [1990] 2 Qd R 138
Leibler v Air New Zealand Ltd [1999] 1 VR 1
Lurgi (Australia) Pty Ltd v Gratz [2000] VSC 278
Maralinga Pty Ltd v Major Enterprises Pty Ltd (1973) 128 CLR 336
Misiaris v Saydels Pty Ltd (1989) NSW Conv Rep 55-474
Riverlate Properties Ltd v Paul [1975] Ch 133
Tara Shire Council v Garner [2002] QCA 232
Taylor v Johnson (1982-1983) 151 CLR 422
Thomas Bates & Son Ltd v Wyndhams's (Lingerie) Ltd [1981] 1 WLR 505
Tranchita v Retravision (WA) Pty Ltd [2001] WASCA 264
Tutt v Doyle [1997] 42 NSWLR 10
Winks v W H Heck & Sons Pty Ltd [1986] 1 Qd R 226

COUNSEL: P J Dunning for the plaintiff
A W Duffy for the defendant

SOLICITORS: Clayton Utz for the plaintiff
Freehills for the defendant

The nature of the proceeding

[1] The plaintiff Eroc Pty Limited claims $261,640 from the defendant Amalg Resources NL under the terms of a deed of undertaking and release entered into between the parties on or about 22 October 2001. Amalg claims rectification of the deed on the grounds of either common or unilateral mistake and asserts that, under the deed as rectified, no moneys are payable.

The relevant provisions of the deed

[2] The deed recites that: Eroc has performed work and alleges an entitlement to payment therefor; Amalg does not admit Eroc's entitlement; the parties have agreed to release each other from "rights, obligations and Claims arising directly or indirectly in relation to the Work" and that Amalg has "authorised and directed Glencore International AG to pay the moneys payable by Amalg to Eroc under the deed out of moneys to become due by Glencore to Amalg".

[3] "Work" is defined as "the work performed by Eroc at the Eloise Copper Mine … under or in continuation of any contract between Amalg and Eroc entered into before July 2001" and pursuant to an agreement allegedly entered into between Amalg and Eroc on or about 17 July 2001.

[4] Clause 2 of the deed relevantly provides –

> "In consideration of the mutual releases in clause 3 of this Deed Amalg covenants in favour of Eroc that:
> (a) on or before 31 October 2001, Amalg will pay to Eroc:
> (i) the Payment Amount; and

> (ii) an amount equal to the amount of GST payable by Eroc in respect of any Supply to which the Payment Amount relates …".

The "Payment Amount" is defined in clause 1 of the deed as meaning "$2,616,407.16 which amount is exclusive of GST".

The background to the critical dealings between the parties

[5] Under an agreement entered into between the parties in 1998, Eroc (formerly called Peabody Mining Services Pty Ltd) contracted to carry out the mining activities at Amalg's Eloise underground copper mine. The term of the contract concluded in June 2001 and the parties attempted to negotiate an extension. Eroc sought increases in its rates of charge and on 13 June 2001 wrote to Amalg confirming that it would continue to "operate under the existing rates and conditions … whilst extension negotiations are carried out". The letter concluded "Eroc do request that in the event of an agreement not being reached by 1/7/01 a review of rates and conditions be undertaken".

[6] On about 23 August Mr Rossiter, Eroc's Managing Director who was conducting negotiations on behalf of Eroc, concluded that all outstanding issues of substance had been resolved. He wrote to Mr McGarry, Amalg's Managing Director, on 30 August asserting that there had been a "verbal agreement and acceptance". Mr McGarry rejected this assertion in a letter to Mr Rossiter of 11 September which also made allegations of defective performance by Eroc of its work and requested that Eroc cease work and leave the site.

[7] In a fax of 25 September to Mr McGarry, Mr Rossiter stated that Eroc would continue mining operations until 8 October on receipt of advice from Amalg that –

- Payment of the "August certificate" be made by 28 September; and
- Payment for work performed in September and October together with costs associated with demobilisation be made before Eroc's departure from the site.

[8] On the same day, Mr Rossiter gave notice to the project superintendent of an intention to make various claims in respect of the contract and sent a separate letter to Mr McGarry stating –

> "… You will appreciate that until all of the issues are satisfactorily resolved, Eroc must protect its position in respect of claims it might have against Amalg."

[9] Mr McGarry responded to the 25 September correspondence advising that Eroc would be given preference to other creditors of Amalg in respect of the following payments –

- $1,000,000 by 28 September;
- Balance of Eroc's August 2001 account by 4 October 2001;
- Payment for September 2001 and in respect of operations to 8 October 2001 together with agreed demobilisation costs by 30 October 2001.

The negotiations preceding the entering into of the deed

[10] On 8 October 2001, Mr Rossiter faxed to Mr McGarry a form of undertaking which was the precursor to the deed. It contained the following definition – "'Payment

amount' means $ ……., which amount is exclusive of GST". The accompanying letter observed –

> "The Payment Amount, which is the only matter which requires addressing, will be finalised tomorrow as Gavin Ramage is working on completing the measure for work done in October 2001 with your people today."

[11] Mr Ramage, at the time, was Eroc's project manager at the Eloise copper mine with responsibility for making and processing progress claims.

[12] Mr McGarry submitted the draft deed to Amalg's solicitor for advice. Negotiation on the content of the deed then took place. Throughout those negotiations Mr McGarry continued to consult with Amalg's solicitors concerning the content and effect of the deed and any proposed variations. On 9 October and 12 October he submitted revised draft deeds with substantial alterations to Mr Rossiter for his consideration. Those drafts and one submitted by Mr Rossiter on 11 October all contained the uncompleted definition of "Payment Amount" which had appeared in the first draft.

[13] On 9 October Eroc served on Amalg a claim for damages in excess of $2,000,000 for Amalg's repudiation of a contract allegedly entered into on 17 July 2001.

[14] On 11 October 2001, Mr Rossiter sent a fax to Mr McGarry accompanied by a copy of a "further amended Deed". He observed –

> "With agreement of the Deed the only matter outstanding is the 'Payment Amount'. I have asked Gavin Ramage to work with your people to finalise this today if possible."

[15] Mr McGarry's emailed Mr Rossiter as follows at 1.49 pm on 12 October –

> "I have attached a revision for your consideration, the amount I understand is $2616407.16.
>
> We are now close to where we proposed having both expended some $10k each with lawyers. …"

[16] Mr Rossiter responded with this email at 4.06 pm –

> "Graham,
>
> Minor amendments are in Blue on the attached file. With these and the insertion of the 'Payment Amount' of $2,616,407.16 I believe we have a deal.
>
> If you agree, please fax back a signed copy of the Deed and a copy of your letter to Glencore and I will counter sign and return. You can post the original documents and I will sign and return your copy next week."

[17] The figure of $2,616,407.16 was arrived at as a result of Mr Ramage on behalf of Eroc and Mr Rigley on behalf of Amalg following their normal procedures in relation to progress claims. Mr Rigley was Amalg's underground mine manager. Each month prior to the making of a progress claim by Eroc, the two men would meet and agree on the extent of work and quantities of material the subject of the prospective claim. They would then separately refine the calculations and meet again to finalise them. After this was done Mr Ramage would prepare a tax invoice and claim statement and deliver them to Mr Rigley. The rates at which relevant items were claimed were obtained from the subject contract. The claims for July and

August 2001 were prepared by applying the old contract rates but Mr Ramage, on instructions from Mr Rossiter, used the new rates which Eroc had been seeking prior to the collapse of negotiations in its September and October claims. Those claims were processed in the same manner as the previous claims.

[18] On 9 or 10 October, when Mr Ramage submitted the September progress claim (claim No 37), Mr Rigley, on noticing that it was calculated at a rate higher than the contract rate, observed to Mr Ramage that he would have to pass the matter on to Mr Lord, his superior, for a ruling.

[19] On 10 October 2001, Mr Sainsbury, Amalg's administration manager, wrote to Eroc enclosing progress payment certificate No 37 in respect of the September claim. A similar letter and certificate was issued by Mr Sainsbury on 11 October in respect of the October claim (No 38), which was made on 10 October.

[20] On 11 October Messrs Ramage and Rigley discussed the calculations in respect of the claims at both the old rates and new rates and agreed that they were correct. Mr Ramage faxed to Mr Rossiter copies of the claim documents in the form prepared by him i.e. showing the new rates. He also telephoned Mr Rossiter on 11 October and told him the total of each of two claims calculated at both the higher and lower rates. Mr Rossiter made a note of the lower figures in his diary.

[21] The calculations at the lower and higher rates included GST, consistently with the way such documents had been prepared during the term of the contract. Mr Ramage's belief is that he "would have" told Mr Rossiter that GST was included in these figures. Mr Rossiter's recollection is that he was not so informed. Although Mr Ramage plainly gave his evidence honestly and to the best of his ability, I am not satisfied that his recollection in this regard is accurate.

[22] After finalising the progress certificates and giving them to Mr Ramage, Mr Sainsbury telephoned Mr McGarry to advise him of the totals on the certificates and he may also have faxed him copies of the certificates. In his evidence, Mr McGarry spoke in terms of Mr Sainsbury advising him of the "final figure" and of "the actual dollar sum … that we would have to pay". I consider it probable that Mr Sainsbury, in accordance with his normal practice, advised Mr McGarry of the amount certified for payment in the certificates and of the total of the two sums and that Mr McGarry treated the total as the figure to be inserted in the deed.

[23] Mr McGarry notified Mr Rossiter that the total was the figure to be inserted in the definition of "Payment Amount" in the deed without adverting to the fact that the sum was one calculated on the basis that GST was included or to the fact that in the deed the "payment amount" was expressed to be exclusive of GST.

[24] Mr McGarry, although not definite about his recollection, believes that he probably mentioned the payment amount in a conversation with Mr Rossiter after being informed of it by Mr Sainsbury. Whilst I accept that the figure may well have been mentioned by Mr McGarry in a conversation with Mr Rossiter, I do not accept that he has a recollection of the substance of any conversation which took place on any such occasion. At the time Mr McGarry was under considerable pressure as a result of the change in contractors at the mine, which was not proceeding smoothly, and as a result of financial difficulties being experienced by Amalg.

Rectification for mutual mistake

[25] The primary contention of Mr Duffy, who appeared for Amalg, was that the deed should be rectified on the basis that at the time that it was entered into the common intention of the parties was that "the figure that would be inserted into the draft deed would be a figure net of GST, as the defendant was obliged under the Deed to pay any GST applicable in addition to that figure".

[26] Mr Rossiter accepted in cross-examination that he was told by Mr Ramage that Amalg had not accepted the new rates put forward by Eroc. He denied, however, being told by Mr Ramage that the figures relayed to him by Mr Ramage on 11 October included an amount for GST. He was asked in cross-examination if the figure put forward on behalf of Amalg included an amount for GST and responded that he believed that they did not include such an amount.

[27] It was further put to Mr Rossiter in cross-examination that at the time he agreed the "payment amount" with Mr McGarry he understood Mr McGarry to be "operating on the basis that, like you, that figure didn't already include GST". His response was –

> "Mr McGarry was aware that I was very dissatisfied with the whole outcome of this process and he was also aware that I was not necessarily going to accept the calculation at the old rates, but I was looking for something to satisfy the shortcomings that we had suffered from this contract. So it was – while we never discussed it, it was my expectation that he – being an accountant had been very close to managing the money as he was able to do at out cost, he had some reason for wanting to structure the final payment in this way as an attempt to satisfy me."

[28] There is certainly some evidence which supports the notion that, at least on 12 October 2001 and in the days immediately preceding that date, the understanding of the parties was that the "payment amount" was to be arrived at by a calculation on a relatively formal basis in discussion between Mr Ramage and Mr Rigley. Although extensive alterations were made to provisions of the draft deed from time to time, there were no negotiations about the figure to be inserted in the definition of "payment amount". In Mr Rossiter's fax of 11 October to Mr McGarry he mentioned that he had asked Mr Ramage "to work with your people to finalise this [the figure to be included in 'the payment amount"] to day if possible". Also, Mr McGarry's first email of 12 October, in noting his understanding that "the amount … is $2,616,407.16", suggests that he was putting forward a figure derived from a pre-agreed process rather than putting forward a figure to be the subject of negotiations.

[29] There is, however, evidence which supports a contrary conclusion. Mr Ramage, on express instructions from Mr Rossiter, used rates higher than those agreed under the superseded contract in progress claims 37 and 38. He and Mr Rigley were conscious of the different positions adopted by their respective employers and did not attempt to negotiate a compromise figure. They merely ensured that the two competing sets of figures were accurately calculated. Mr Rossiter gave Mr Ramage no instructions to agree to payment at the old rate and the discussions between Mr Ramage and Mr Rigley proceeded on the basis that they had no authority to reach a compromise and that Eroc's claims for payment at the higher rate would need to be considered by Amalg at a more senior level.

[30] Mr Rossiter had informed Amalg in writing that if an extension of the term of the contract was not agreed by the beginning of July, Eroc wanted "a review of rates and conditions". No agreement was reached and Eroc made a claim against Amalg on 9 October which included a $2,900,000 *quantum meruit* claim. These matters give some credence to the passage from Mr Rossiter's evidence which is quoted above. There was no substantial challenge to this evidence in cross-examination and I accept it. Mr Rossiter impressed me as a truthful witness. Moreover, I infer that Mr Rossiter understood at the time that Mr McGarry was in close contact with Amalg's solicitors concerning the deed.

[31] Mr Dunning, who appears for the plaintiff, made much of the point that the scope of the deed went far beyond determining the extent of the payment for the September and October works in that, amongst other things, it compromised substantial claims made by Eroc against Amalg. That is quite true but it does not follow, necessarily, that there was no understanding about how the figure to be inserted in the deed was to be arrived at.

[32] My impression is that Mr Rossiter had little expectation that Eroc would be able to extract a payment greater than the sum payable for the September and October works calculated at the old contract rate but was concerned to leave the matter open as a negotiating position. He was worried about Amalg's financial position and was anxious to secure a prompt final payment. Nevertheless, as Mr Dunning emphasised, the figure of $2,616,407.16 was put forward by Mr McGarry against a background of claim and counterclaim in which it was contemplated that Eroc would relinquish a substantial claim in return for prompt payment of a smaller sum, the amount of which remained to be agreed. There was no agreement or even understanding that the sum to be inserted in the deed would be no more than the product of calculation and discussion between Messrs Ramage and Rigley on the historical basis applying the rates set by the expired contract.

[33] Having regard to these considerations, I find that Eroc, through Mr Rossiter, did not understand at the time the deed was entered into that the figure provided by Mr McGarry for insertion in the deed was "a figure net of GST". Mr Rossiter accepted the figure merely as one put forward by Amalg, as a basis of the proposed compromise, without giving particular thought to the reason why it had been arrived at by Mr McGarry. There was thus no common mistake. Subsequent discussion also supports this conclusion.

Unilateral mistake

[34] Mr Duffy submits that, if contrary to the defendant's contentions, there was no common mistake then Mr Rossiter knew at the time he agreed the subject figure that Mr McGarry was acting under a mistake.

[35] Mr McGarry's mistake was not that the figure he decided should be inserted in the definition of "payment amount" did not include GST. He did not turn his mind to the question of GST. His mistake was his failure to advert to the definition of "payment amount" and to clause 2 of the deed which required payment, in addition to the figure inserted in the definition, of a further sum on account of GST. If he had considered those provisions and if he had also turned his mind to the manner in which the sums notified to him had been calculated, it is probable that he would have reduced the figure conveyed to Eroc by the amount of its GST component.

That is on the assumption that, upon considering the matter, he would have concluded that the total amount of moneys to be paid by Amalg as a result of the definition of payment amount would have exceeded the certified amounts. But, had Mr McGarry specified a lesser amount he would not have known whether that amount would be acceptable to Eroc.

[36] As the previous discussion shows, Messrs Rossiter and McGarry had no agreement or understanding as to how the subject figure would be determined, although there was an expectation that it would be based on the amounts in the progress payment certificates for September and October. Neither of them had given consideration to the making of any adjustment to the certified sums to allow for the fact that they included sums on account of GST.

[37] Mr Rossiter had no need to consider how the subject sum was to be made up before he was provided with a figure by Mr McGarry, unless he chose to put forward a figure himself. Doubtless he would have been concerned to ensure that the figure was not less than the sum which would have been payable under the expired contract at the old rates for work done and materials supplied during the relevant period. But, beyond that, its method of calculation was not a matter of much moment to him.

[38] It is now well enough established that rectification will lie where the mistake is as to the legal effect of the words used rather than as to the actual words used.[1] The mistake here, however, was not as to the legal effect of the words (and figures) used but was a failure to advert to the practical consequences of the application of the words both parties intended to use and to the inclusion of a GST component in the figure put forward. In these circumstances it is doubtful that rectification is an available remedy.[2] In *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd,*[3] Mahoney AP stated –

> "Similarly it [i.e. intention] does not include consequences which the parties did not have in their mind when the deed was executed even if, had they thought of them, they would have intended them."

[39] In *Leibler v Air New Zealand Ltd*,[4] Kenny JA, with whose reasons Winneke P and Phillips J expressed substantial agreement, said –

> "The principles which govern an application for rectification of a contract on the ground of unilateral mistake can be briefly stated. If (1) one party, A, makes an agreement under a misapprehension that the agreement contains a particular provision which the agreement does not in fact contain; and (2) **the other party, B, knows of the omission** and that it is due to a mistake on A's part; and (3) lets A remain under the misapprehension and concludes the agreement on the mistaken basis in **circumstances where equity would require B to take some step or steps, depending on those circumstances, to**

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1 *Winks v W H Heck & Sons Pty Ltd* [1986] 1 Qd R 226 and *Commissioner of Stamp Duties (NSW) v Carlenka* (1995) 41 NSWLR 329.

2 *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336; *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450; *Bacchus Marsh Concentrated Milk Co Ltd (in liq) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410 at 451; *Issa v Berisha* (1981) 1 NSWLR 261 at 264; *Commissioner of Stamp Duties (NSW) v Carlenka* (1995) 41 NSWLR 329 at 332 per Mahoney AP and *Tranchita v Retravision (WA) Pty Ltd* [2001] WASCA 265 at para 44.

3 (1995) 41 NSWLR 329 at 332.

4 [1999] 1 VR 1.

> **bring the mistake to A's attention**; then (4) B will be precluded from relying upon A's execution of the agreement to resist A's claim for rectification to give effect to A's intention: …". (emphasis supplied)

[40] The quotation was followed by extensive reference to authority. There is some controversy about whether rectification may be had where the party against whom rectification is sought was not aware of the other party's mistake but suspected it or ought reasonably to have been aware of it.

[41] There is also a question of whether silence coupled with knowledge of the mistake is always sufficient without some conduct concealing or inducing the mistake.

[42] These questions were discussed in Kenny JA's reasons when Her Honour qualified or expanded on propositions (2) and (3) in the above passage. After referring to a reference in the joint judgment in *Taylor v Johnson* to a deliberate act of concealment by the non-mistaken party she said –

> "In some circumstances, as in the special circumstances of this case, it may be enough that the non-mistaken party chooses to leave the mistaken party under the misapprehension in executing the agreements."

[43] In relation to the question of whether actual knowledge of the mistake was required, she noted that the Australian authorities, including *Taylor v Johnson* "support some lesser test".

[44] Kenny JA's approach is less narrow than that of Mason ACJ, Murphy and Deane JJ in the following passage from their reasons in *Taylor v Johnson*[5] where their Honours, after a discussion of authority elsewhere in the common law world, said –[6]

> "The particular proposition of law which we see as appropriate and adequate for disposing of the present appeal may be narrowly stated. It is that a party who entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake ... about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake ...."

[45] In *Tutt v Doyle,*[7] Handley JA, with whose reasons Brownie AJA agreed, after quoting that passage said that the majority "also endorsed wider principles which entitle a court of equity to grant relief for unilateral mistake in cases not covered by this principle". His Honour went on to note that –

> "They approved (at 431) the statement by James LJ in *Torrance v Bolton* (1872) LR 8 Ch App 118 at 124, that the power to set aside a contract for unilateral mistake was based on the ordinary jurisdiction of equity 'to deal with' any instrument or other transaction 'in which the court is of the opinion that it is unconscientious for a person to

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5 (1982-1983) 151 CLR 422.
6 At 432.
7 [1997] 42 NSWLR 10 at 12-13.

> avail himself of the legal advantage which he has obtained'. They also approved the decisions in *Riverlate Properties Ltd v Paul* [1975] Ch 133 at 145 and *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 at 514-516; [1981] 1 All ER 1077 at 1085-1086, where rectification, and not rescission, was granted on this ground."

[46] In both *Leibler* and *Tutt v Doyle*, it is accepted that –

(a) The formulation of principle in the above passage from the joint judgment in *Taylor v Johnson* was not intended as a comprehensive statement of the only circumstances in which mistake by a contracting party would attract equitable relief; and

(b) For equitable relief to be available, it must be unconscionable or inequitable for the mistaken party to be held to the unrectified terms of the contract.

[47] In *Tranchita v Retravision (WA) Pty Ltd*,[8] Owen J, with whose reasons Malcolm CJ and Wallwork J agreed, after quoting the above passage from the joint judgment in *Taylor v Johnson* and noting with approval the statement in *Riverlate Properties Ltd v Paul*[9] to the effect that "one way of establishing unconscionable conduct was to assert 'sharp practices'", stated –

> "It is therefore evident that a mistaken party has no right of rescission unless the other party knew of and contributed to the mistake **or otherwise engaged in unconscionable conduct**. A court will not interfere unless these elements are satisfied. The first element to be satisfied is that there is a relevant serious mistake." (emphasis supplied)

[48] The following passage in the reasons, however, suggests that Owen J was not intending to state a principle which went beyond that articulated in the above quoted passage from the joint judgment in *Taylor v Johnson* or expressed by Dawson J in his reasons in that case –

> "Even if this is not correct, I do not believe that the other criteria set out in *Taylor v Johnson* at 422 have been satisfied. I refer in particular to the requirement of deliberate deception or unconscionable conduct by the other party thereby contributing to the mistake of the appellant. A contract may be set aside for a unilateral mistake which was not effective to render the contract void or voidable at common law if the other party contributed to or knew of the mistake **and it would be unconscionable** for the plaintiff to avail himself of the legal advantage which has been obtained: *Torrance v Bolton* (1872) LR 8 Ch App 118 at 124. Mistake of itself is not a ground for rescission of a contract. Fraud, misrepresentation or 'sharp practice' falling short of actual fraud will suffice as a basis for rescission in the eyes of equity: *Taylor v Johnson* at 444 per Dawson J."[10] (emphasis supplied)

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8 [2001] WASCA 264.

9 [1975] Ch 133.

10 Para 45.

Tranchita, like *Taylor v Johnson*, was a rescission case and it does not appear either that it was argued that rescission for unilateral mistake was confined to the circumstances set out in the passage at 432 of *Taylor v Johnson* or that there were facts which lent themselves to a wider analysis of relevant principle.

[49] The requirement that the non-mistaken party's conduct, in order to provide a basis for relief, must be unconscionable or inequitable has long had general acceptance.[11]

[50] The notion that in some circumstances, mere standing by with knowledge of the other parties' mistake may constitute unconscionable or unequitable conduct founding a basis for equitable relief, also finds considerable support in the authorities.[12] So too does the conclusion that something less than actual knowledge of the mistake may suffice. I have already referred to the reference in *Taylor v Johnson* to awareness, "that circumstances exist which indicate that the first party is entering into the contract under some serious mistake or misapprehension". In *Misiaris v Saydels*, Young J observed, by way of dicta, that "… it is enough that the defendant strongly suspects that the plaintiff has made a mistake of a fundamental nature". Needham J in *Everglades Country Club Ltd v Eadie*[13] thought it sufficient for the defendant to "have reason to know" of the mistake.

[51] In *Commission for the New Towns v Cooper (Great Britain) Ltd,*[14] Stuart-Smith LJ held that whilst actual knowledge of the mistake was required normally, there was no such requirement where the defendant intends the plaintiff to be mistaken and acts to divert the plaintiff's attention from the mistake.[15] In those circumstances, the defendant's "conduct is unconscionable and he cannot insist on performance in accordance to the strict letter of the contract …".

[52] His Lordship, drawing on the analysis of circumstances constituting knowledge by Peter Gibson J in *Baden v Société Général pour Favoriser le Dévelopement du Commerce et de l'Industrie en France SA*[16] concluded that the following constituted actual knowledge –

> "(ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; …"

[53] Evans LJ contented himself with adopting "the formulation by the High Court of Australia in *Taylor v Johnson*, (1983) 151 CLR 422, 441, 445 per Dawson J, although that was a case where rescission was claimed".

[54] Dawson J, after quoting a passage from *Riverlate Properties Ltd v Paul*[17] which was based on the premise that the mistake under consideration "… was in no way attributable to anything said or done by the" non-mistaken party said –

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11 See eg, *Misiaris v Saydels Pty Ltd* (1989) NSW Conv Rep 55-474; *Commonwealth of Australia v VL Investments* (Supreme Court of Victoria, Marks J, 18 December 1987, unreported); *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 at 515, 516; and *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259.

12 *Johnston v Arnaboldi* [1990] 2 Qd R 138 at 144, *Misiaris v Saydels Pty Ltd (supra)* and *A Roberts & Co Ltd v Leicestershire County Council* [1961] 1 Ch 555 at 570.

13 Supreme Court of New South Wales, Needham J, 13 March 1987, unreported

14 [1995] 2 WLR 677

15 At 280.

16 [1993] 1 WLR 509.

17 [1975] Ch 133, 140.

> " Fraud, misrepresentation or, perhaps, sharp practice falling short of actual fraud (see *Riverlate Properties Ltd v Paul*) will suffice as a basis for rescission in the eyes of equity. …"[18]

[55] Evans LJ also considered that actual knowledge existed where the facts satisfied categories (ii) or (iii) of the Baden formulation. The remaining member of the Court agreed with the reasons of the other two. Because of the view of the facts taken by the members of the court it was unnecessary for them to comment on whether categories (iv) and (v) of the *Baden* formulation might constitute actual knowledge. Those categories, and category (i) are –

> "(i) actual knowledge; … (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry."

[56] The following observations of Millett J in *Agip (Africa) Ltd v Jackson*[19] show that, in his view, categories (iv) and (v) are capable of constituting actual as opposed to constructive knowledge –

> "According to Peter Gibson J, a person in category (ii) or (iii) will be taken to have actual knowledge, while a person in categories (iv) or (v) has constructive notice only. I gratefully adopt the classification but would warn against over refinement or a too ready assumption that categories (iv) or (v) are necessarily cases of constructive notice only. The true distinction is between honesty and dishonesty. It is essentially a jury question."

[57] The *Baden* tests have also received a degree of endorsement in Australia.[20]

[58] I now turn to a consideration of these principles in the light of the facts. Mr Rossiter did not have actual knowledge (disregarding the *Baden* tests for the moment) of the existence of a mistake on Mr McGarry's part, assuming for present purposes that Mr McGarry had made a relevant mistake.

[59] Nor am I satisfied that the evidence establishes that Mr Rossiter suspected or ought reasonably to have been aware that Mr McGarry had made a mistake in arriving at the subject figure or that he had knowledge of circumstances that would have indicated the existence of a mistake to an honest and reasonable person. These questions were not investigated in any material way in cross-examination and, in these circumstances, it would in my view be inappropriate to make the findings of fact sought by Amalg. I do not make this observation by way of criticism. There may well have been sound forensic justification for the course taken in cross-examination. Furthermore, as I have mentioned, I formed a favourable view of Mr Rossiter's credibility.

[60] Even if I had concluded that Mr Rossiter suspected that Mr McGarry had made such a mistake in not deducting the GST component from the subject sum, putting aside

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18 At 441.

19 [1990] Ch 265 at 293.

20 *Leibler v Air New Zealand Ltd (supra)* para 63; *Lurgi (Australia) Pty Ltd v Gratz* [2000] VSC 278 at para 175 and *Tara Shire Council v Garner* [2002] QCA 232 at para 64. In the latter two cases the fourth category was held sufficient to constitute knowledge for the purposes of accessory liability under the rule in *Barnes v Addy*.

the other difficulty I have addressed, I would not have concluded that Amalg was entitled to rectification for unilateral mistake. The parties were negotiating at arms length to conclude a commercial transaction. The figure to be inserted in the deed remained a matter for negotiation until it was provided by Mr McGarry and accepted by Mr Rossiter. Both parties, to the knowledge of the other, were financially sophisticated and obtaining legal advice.

[61] In the circumstances I have outlined, I doubt that generally recognised concepts of fair dealing would impose on a party which suspected that the other had, by a mistake, given it a benefit or advantage of the nature of that under consideration, a duty to raise the matter with the other. The effect of so doing would be to alert the other party to the fact that the figure put forward to achieve a compromise was more advantageous to the non-mistaken party than the non-mistaken party had expected. Consequently, there would be an appreciable risk that any such query would result in a re-opening of the negotiations even if no mistake had been made. As I have pointed out, this was not a case in which the sum to be inserted in the deed was capable of calculation or objective ascertainment, it was always a matter for negotiation. For these reasons, I would not have regarded mere suspicion on Mr Rossiter's part as sufficient to make Eroc's conduct unconscionable or inequitable.

Conclusion

[62] As, apart from its rectification claim, Amalg has no defence to Eroc's claim, I propose to give judgment on the claim and counterclaim in favour of the plaintiff together with costs, including reserved costs, if any, to be assessed on the standard basis.