

# Ontario v. Ron Engineering & Construction (Eastern) Ltd., [1981] 1 S.C.R. 111

Supreme Court Reports

Supreme Court of Canada

Present: Martland, Dickson, Estey, McIntyre and Lamer JJ.

1980: November 13 / 1981: January 27.

[1981] 1 S.C.R. 111 | [1981] 1 R.C.S. 111 | [1981] S.C.J. No. 13 | [1981] A.C.S. no 13

Her Majesty The Queen in right of Ontario and the Water Resources Commission (Defendants), Appellants; and Ron Engineering & Construction (Eastern) Ltd. (Plaintiff), Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

## Case Summary

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**Contracts — Mistake — Tender on construction contract — Mistake in calculation of bid discovered by respondent after tenders opened — Appellants notified of mistake before tender accepted — Respondent declined to enter into agreement — Whether or not appellants entitled to consider deposit forfeited.**

This appeal was from a decision of the Ontario Court of Appeal which reversed the trial judge and directed the return to the respondent contractor of \$150,000 paid by it to the appellant owner by way of a tender deposit at the time of filing of a bid in response to a call for tenders by the owner.

Pursuant to the rules applicable to the call for tenders, the contractor submitted his tender accompanied by a certified cheque for \$150,000 that was to be returned after the execution of the contract and the receipt of the performance bond and the payment bond. The bid submitted was discovered to be in error after the opening of tenders: an amount of \$750,058 had been omitted from the total sum tendered. The tender documents included the term that if a tender were withdrawn, or if the Commission did not receive the executed agreement within a certain time, the Commission could retain the deposit. Although the contractor requested by telex to withdraw its tender without penalty, it maintained in subsequent correspondence and in these proceedings that it had not withdrawn its tender but that, by reason of the notice of its error given to the owner prior to acceptance of the tender, the offer was not capable of being accepted. The owner, after receiving the contractor's notice of the mistake and in response to the contractor's position that the offer was not revoked, submitted the contract in prescribed form for the contractor's signature. When the contractor declined to enter the agreement, the owner, relying on the tender deposit term, decided to retain the deposit and proceeded to accept another tender. The contractor commenced this action to recover the tender deposit.

Held : The appeal should be allowed.

Nothing in the tender documentation supported the contractor's position that the owner had not complied with the terms set out in the documentation because the owner did not execute the construction document before proffering it to the contractor.

The revocability of the offer was to be determined in accordance with the "General Conditions" and

"Information for Tenderers" and related documents. A unilateral contract, contract A, arose automatically upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a specified period of time, after which, if the tender had not been accepted, the deposit could be recovered by the tenderer. The principal term of contract A was the irrevocability of the bid and the corollary term was the obligation in both parties to enter into a construction contract, contract B, upon the acceptance of the tender. The deposit was required to ensure the performance by the contractor-tenderer of its obligations under contract A. It is not correct to say that when a mistake was proven after the tenders were opened by the production of reasonable evidence, the person to whom the tender was made could neither accept the tender nor forfeit the deposit. The test was to be imposed when the tender was submitted, not at a later date, and at that time the rights of the parties under contract A crystallized, at least in circumstances where the tender was capable of acceptance in law.

There was no question of mistake on the part of either party before the moment when contract A came into existence. The tender, despite its being the product of a mistaken calculation, could be subject to the terms and conditions of contract A so as to invoke forfeiture of the deposit. There was no error in the sense that the contractor did not intend to submit the tender in its form and substance. Then, too, there was no principle in law under which the tender was rendered incapable of acceptance by the appellant. No mistake existed which impeded the coming into being of contract A. The effect of a mistake upon the formation, enforceability or interpretation of a subsequent construction contract need not be considered in this case.

The issue did not concern the law of mistake but the application of the forfeiture provisions contained in the tender documents. The deposit was recoverable by the contractor under certain conditions, none of which was met, and also was subject to forfeiture under another term of the contract, the conditions of which had been met. The omission by the owner to insert the number of weeks specified by the tender in the appropriate blank in the contract had no bearing on the rights of the parties to the appeal and did not stand in the way of the owner's asserting its right to retain the deposit.

## Cases Cited

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McMaster University v. Wilchar Construction Ltd. et al., [1971] 3 O.R. 801, distinguished; Belle River Community Arena Inc. v. W.J.C. Kaufmann Co. Ltd. et al. (1978), 20 O.R. (2d) 447, considered.

APPEAL from a judgment of the Court of Appeal for Ontario [(1979), 24 O.R. (2d) 332: (1979), 98 D.L.R. (3d) 548], reversing the judgment of J. Holland J. Appeal allowed.

B. Johnston, Q.C., and M. Fleishman, for the defendants, appellants. Hyman Soloway, Q.C., and J. Shields, for the plaintiff, respondent.

Solicitor for the defendants, respondents: H. Allan Leal, Toronto. Solicitors for the plaintiff, appellant: Soloway, Wright, Houston, Ottawa.

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The judgment of the Court was delivered by

**ESTEY J.**

The Ontario Court of Appeal, reversing the trial judge, directed the return to the respondent-contractor (hereinafter referred to as the "contractor") of \$150,000 paid by the contractor to the appellant-owner (hereinafter referred to as the "owner") by way of a tender deposit at the time of filing a bid in response to a call for tenders by the owner.

Under the general conditions applicable to the call for tenders, the owner issued as part of the tender documentation, "Information for Tenderers", paragraph 13 of which, under the heading "Tender Deposit", stated in part:

Except as otherwise herein provided the tenderer guarantees that if his tender is withdrawn 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 for the use of the Commission and may accept any tender, advertise for new tenders, negotiate a contract or not accept any tender as the Commission may deem advisable.

Pursuant to the rules applicable to the call for tenders, the contractor submitted a tender for \$2,748,000 on or before 3:00 p.m., July 4, 1972. Accompanying the contractor's tender was a certified cheque in the amount of \$150,000 as required by the terms and conditions upon which tenders were called. The document already referred to, "Information for Tenderers", further provided with respect to the tender deposit:

After the execution of the Contract and the receipt by the Commission of the Performance Bond and the Payment Bond the tender deposit of the successful tenderer will be returned.

The contractor's employee who filed the tender, Hedges, remained for the opening of tenders. Upon learning that the contractor's tender was the lowest out of eight bids and that it was about \$632,000 lower than the next lowest bidder, she immediately reported to the president of the contractor, Vered. What ensued is set out by J. Holland J., the trial judge, in his judgment:

From her prior experience Hedges felt that there was something radically wrong and wondered if she had made an error ... Hedges went to call Vered after the tender opening--and this would probably be sometime around 3.30 p.m. She says that as soon as she spoke to Vered he said: "We're low. I made a mistake". This statement was made before she reported on the tenders. She asked if there was anything she could do and was told by Vered "No--come back to Ottawa". She never returned to the Ministry office.

...

Following the opening of tenders the plaintiff forwarded a telex at approximately 4.12 p.m. on July 4, 1972. Exhibit 4, (page 27 of exhibit book) is the copy of this telex and reads as follows:

Today we submitted our tender for the above project and unfortunately due to the rush of compiling our last figures we omitted to add to our total the sum for our own forces work and general condition in the amount of 750,058.00 which actually should have been added to our lump sum tender amount for a total of 3,498,058.00 dollars.

Due to this unfortunate error we would appreciate being given the opportunity to show to you our estimate indicating the error and to hereby request to withdraw our tender and request an apology without being penalized.

The word "apology" obviously is difficult to understand but there is no doubt about the fact that this was the very word used by Vered as his own copy from his telex in his office contained the exact wording. In any event, this was a "request to withdraw the tender without penalty".

In subsequent correspondence and throughout these proceedings the contractor has maintained the position that it has not withdrawn its tender but that by reason of the notice of its error, given to the owner prior to the acceptance of the tender, the offer thereafter was not capable in law of being accepted and that the contractor has the right to recover the \$150,000 deposit. The learned trial judge concluded with respect to the facts:

- (1) that the tender as filed was as intended to be filed,
- (2) that the procedure leading to the determination of the tender figure, and not the tender itself, was in error. This was the fault of the plaintiff alone,
- (3) there was no error on the face of the tender,
- (4) that the error was learned of after the filing and after the close of time for filing,
- (5) that the error was known to Vered prior to Hedges advising Vered of the results of the tender opening,
- (6) that the plaintiff was diligent in attempting to get in touch with someone to advise of the error and to request the right to withdraw without penalty,
- (7) that the budget prepared by Gore and Storrie Ltd. in the sum of \$2,744,700.00, was an accurate basis for completion by a conscientious contractor, such to include profit. I point out that there was no real attempt to discredit this budget figure.

It should be explained that the owner obtained an estimate by its consulting engineers of the cost of the water and sewage treatment plant for which work the tenders were being called. These engineers estimated that the cost of the job, including profit, would be \$2,744,700, some \$3,300 lower than the contractor's tender.

The owner, after the receipt of the notice from the contractor of the mistake in the tender, and no doubt responding to the position taken by the contractor that its offer was not revoked by it, submitted to the contractor for signature the construction contract in the form generally prescribed by the tender documents together with the other documents therein called for. The record does not include a blank form of the construction contract, but no issue arose as to the source of the form of contract sent to the contractor, and so it may be assumed said proffered contract complied with the tender documents. The contractor declined to enter into the

agreement for the declared reason that it had by mistake submitted a tender which was \$750,058 lower than the contractor intended the bid to be. The owner then took the position, relying upon the tender deposit term quoted above, that it was entitled to retain the tender deposit and proceed to accept the tender posted by the second lowest bidder. This action was then commenced by the contractor to recover the \$150,000 tender deposit. The owner counter-claimed for damages occasioned by the contractor's refusal "to carry out the terms of its tender" and the consequential necessity of accepting the tender of the second lowest bidder. The trial judge found the owner entitled to retain the tender deposit and dismissed the counterclaim.

The core of the submission by the contractor is simply that a mistake by a tenderer, be it patent or latent, renders the tender revocable or the deposit recoverable by the tenderer, notwithstanding the provisions of paragraph 13 quoted above, so long as notice is given to the owner of the mistake prior to the acceptance by the owner of the contractor's tender. There are subsidiary arguments advanced by the contractor to which I will later make reference.

We are not here concerned with a case where the mistake committed by the tendering contractor is apparent on the face of the tender. Rather the mistake here involved is one which requires an explanation outside of the tender documents themselves. The trial judge has so found and there is evidence in support of that finding. Nor do we have here a case where a trial court has found impropriety on the part of the contractor such as the attempted recall of an intended, legitimate bid once the contractor has become aware that it is the lowest bidder by a wide margin.

The Court of Appeal in reversing the trial court proceeded on the basis that the owner had not attempted "to signify its acceptance of the tender" but rather relied upon paragraph 13 of "Information for Tenderers" which I have quoted above. Relying on its decision in *Belle River Community Arena Inc. v. W.J.C. Kaufmann Co. Ltd. et al.* [ (1978), 20 O.R. (2d) 447] decided by the Court of Appeal after the trial judgment herein had been handed down, the Court of Appeal concluded "that an offeree cannot accept an offer which he knows has been made by mistake and which affects a fundamental term of the contract". The court, speaking through Arnup J.A., continued:

In our view, the principles enunciated in that case ought to be applied in this case. The error in question has been found to be, as it obviously was, material and important. It was drawn to the attention of the Commission almost at once after the opening of tenders. Notwithstanding that, the Commission proceeded as if the error had not been made and on the footing that it was entitled to treat the tender for what it said on its face.

and concluded:

As I said in the course of the argument, a commission or other owner calling for tenders is entitled to be sceptical when a bidder who is the low tenderer by a very substantial amount attempts to say, after the opening of tenders, that a mistake has been made. However, when that mistake is proven by the production of reasonable evidence, the person to whom the tender is made is not in a position to accept the tender or to seek to forfeit the bid deposit.

In the *Belle River* case, *supra*, the contractor purported to withdraw the tender before any action to accept was taken by the owner. In the course of reaching the conclusion that the contractor was entitled to recover his bid bond, Arnup J.A. in that case found that the owner was unable to accept the offer once he became aware that it contained a mistake which affected a

fundamental term of the contract. At p. 452 the learned justice in appeal put it this way:

In substance, the purported offer, because of the mistake, is not the offer the offeror intended to make, and the offeree knows that.

The principle applies even if there is a provision binding the offeror to keep the offer open for acceptance for a given period.

and continuing on pp. 453-4:

In view of the conclusion I have reached as to the inability of the plaintiff to accept the tender, it does not matter, in my opinion, whether the purported tender could be withdrawn, or was in fact withdrawn, before the purported acceptance.

...

If Kaufmann's tender could be withdrawn before acceptance (as occurred in *Hamilton Bd. Ed. case* [[1960] O.R. 594]), then Kauffman's [sic] tender was so withdrawn, and no contract came into existence. If it could not be withdrawn for 60 days, it nevertheless could not be accepted, for the reason already stated, and hence no contract came into existence.

This judgment is the basis for that given by the Court of Appeal in these proceedings.

Before us the contractor took the position that, by reason of the fact that the owner did not execute the construction contract before proffering it to the contractor for signature, the owner had not thereby conformed with the quoted portion of paragraph 13. I find nothing in the "Information for Tenderers" or in any of the tender documents which in any way supports such a position. Indeed, the term of the last part of paragraph 13, which I have already set out above, read literally would require the tenderer to execute the agreement and associated documents and file them with the owner in order to avoid the retention by the owner of the tender deposit. Clearly on the documentary record the owner called upon the contractor to enter into the construction contract in the manner provided for in the tender documents and the construction contract did not come into being solely by reason of the contractor's refusal to execute the form of contract forwarded to the contractor by the owner.

The revocability of the offer must, in my view, be determined in accordance with the "General Conditions" and "Information for Tenderers" and the related documents upon which the tender was submitted. There is no question when one reviews the terms and conditions under which the tender was made that a contract arose upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a period of sixty days after the date of the opening of the tenders. Later in these reasons this initial contract is referred to as contract A to distinguish it from the construction contract itself which would arise on the acceptance of a tender, and which I refer to as contract B. Other terms and conditions of this unilateral contract which arose by the filing of a tender in response to the call therefor under the aforementioned terms and conditions, included the right to recover the tender deposit sixty days after the opening of tenders if the tender was not accepted by the owner. This contract is brought into being automatically upon the submission of a tender. The terms and conditions specified in the tender documents and which become part of the terms of contract A between the owner and the contractor included the following provision:

## 6. Withdrawal or Qualifying of Tenders

A tenderer who has already submitted a tender may submit a further tender at any time up to the official closing time. The last tender received shall supersede and invalidate all tenders previously submitted by that tenderer for this contract.

A tenderer may withdraw or qualify his tender at any time up to the official closing time by submitting a letter bearing his signature and seal as in his tender to the Commission Secretary or his authorized representatives in his office who will mark thereon the time and date of receipt and will place the letter in the tender box. No telegrams or telephone calls will be considered.

Paragraph 13, which I have quoted earlier, provides for the return of the tender deposit on the execution of the construction contract and then goes on to provide, and I repeat the applicable portion for emphasis:

Except as otherwise herein provided the tenderer guarantees that if his tender is withdrawn ... or if the Commission does not for any reason receive within the period of seven days ... the Agreement executed by the tenderer ... the Commission may retain the tender deposit...

Paragraph 14 is also relevant:

The tenderer agrees that, if requested so to do by the Commission or anyone acting on its behalf within 90 days after the date of opening tenders, he will execute in triplicate and return to the Commission the Agreement in the form found [sic] herein within seven days after being so requested.

Here the contractor expressly avoided employing any terminology indicating a withdrawal of the tender, and indeed affirmatively asserted the position throughout that the offer had not been revoked. The owner did proffer a construction agreement and this agreement was not executed by the tenderer within the seven day period.

It is convenient at this point to dispose of a submission by the contractor that forfeiture of the deposit could occur only if the contractor failed to furnish the performance and payment bonds under paragraph 12 of the "Information for Tenderers", and since the contractor's obligation thereunder arose only upon the receipt of the construction contract executed by the owner, no right to forfeiture ever arose. Paragraph 12 deals only with the acceptance of a tender by the execution of the construction contract. The paragraph has no relation to payment or retention of deposit moneys. In short, the provision is concerned entirely with the second stage of the contracting procedure, the construction contract, a stage not here reached and with which we are not concerned.

We are then left with the bare submission on behalf of the contractor that while the offer was not withdrawn it was not capable of acceptance and that by reason thereof the contractor is entitled to a return of the deposit.

I share the view expressed by the Court of Appeal that integrity of the bidding system must be protected where under the law of contracts it is possible so to do. I further share the view expressed by that Court that there may be circumstances where a tender may not be accepted as for example where in law it does not constitute a tender, and hence the bid deposit might not be forfeited. That is so in my view, however, simply because contract A cannot come into being. It puts it another way to say that the purported tender A does not in law amount to an acceptance of the call for tenders and hence the unilateral contract does not come into

existence. Therefore, with the greatest of respect, I diverge from that Court where it is stated in the judgment below:

However, when that mistake is proven by the production of reasonable evidence, the person to whom the tender is made is not in a position to accept the tender or to seek to forfeit the bid deposit.

The test, in my respectful view, must be imposed at the time the tender is submitted and not at some later date after a demonstration by the tenderer of a calculation error. Contract A (being the contract arising forthwith upon the submission of the tender) comes into being forthwith and without further formality upon the submission of the tender. If the tenderer has committed an error in the calculation leading to the tender submitted with the tender deposit, and at least in those circumstances where at that moment the tender is capable of acceptance in law, the rights of the parties under contract A have thereupon crystallized. The tender deposit, designed to ensure the performance of the obligations of the tenderer under contract A, must therefore stand exposed to the risk of forfeiture upon the breach of those obligations by the tenderer. Where the conduct of the tenderer might indeed expose him to other claims in damages by the owner, the tender deposit might well be the lesser pain to be suffered by reason of the error in the preparation of the tender. This I will return to later.

Much argument was undertaken in this Court on the bearing of the law of mistake on the outcome of this appeal. In approaching the application of the principles of mistake it is imperative here to bear in mind that the only contract up to now in existence between the parties to this appeal is the contract arising on the submission of the tender whereunder the tender is irrevocable during the period of time stipulated in the contract. Contract B (the construction contract, the form of which is set out in the documents relating to the call for tenders) has not and did not come into existence. We are concerned therefore with the law of mistake, if at all, only in connection with contract A.

The tender submitted by the respondent brought contract A into life. This is sometimes described in law as a unilateral contract, 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, or a bid as it is sometimes called. 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. There is no disagreement between the parties here about the form and procedure in which the tender was submitted by the respondent and that it complied with the terms and conditions of the call for tenders. Consequently, contract A came into being. The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders.

The role of the deposit under contract A is clear and simple. The deposit was required in order to ensure the performance by the contractor-tenderer of its obligations under contract A. The deposit was recoverable by the contractor under certain conditions, none of which were met;



and also was subject to forfeiture under another term of the contract, the provisions of which in my view have been met.

There is no question of a mistake on the part of either party up to the moment in time when contract A came into existence. The employee of the respondent intended to submit the very tender submitted, including the price therein stipulated. Indeed, the President, in instructing the respondent's employee, intended the tender to be as submitted. However, the contractor submits that as the tender was the product of a mistake in calculation, it cannot form the basis of a construction contract since it is not capable of acceptance and hence it cannot be subject to the terms and conditions of contract A so as to cause a forfeiture thereunder of the deposit. The fallacy in this argument is twofold. Firstly, there was no mistake in the sense that the contractor did not intend to submit the tender as in form and substance it was. Secondly, there is no principle in law under which the tender was rendered incapable of acceptance by the appellant. For a mutual contract such as contract B to arise, there must of course be a meeting of the minds, a shared animus contrahendi, but when the contract in question is the product of other contractual arrangements, different considerations apply. However, as already stated, we never reach that problem here as the rights of the parties fall to be decided according to the tender arrangements, contract A. At the point when the tender was submitted the owner had not been told about the mistake in calculation. Unlike the case of *McMaster University v. Wilchar Construction Ltd. et al.* [[1971] 3 O.R.801] there was nothing on the face of the tender to reveal an error. There was no inference to be drawn by the quantum of the tender (bearing in mind the estimate by Gore and Storrie) that there had indeed been a miscalculation.

In the *McMaster University* case, *supra*, the trial judge, Thompson J., heard an action for breach of contract in refusing to proceed with the execution of a construction agreement, and the claim by the owner was for damages equal to the difference between the defendant's bid and the next lowest. The court dismissed the claim finding no obligation on the defendant to conclude a construction contract. Various references are made to the doctrine of mistake but the case appears to have turned upon the fact that the mistake was known to the offeree and therefore the offer could not be accepted and hence the formation of the contract could not occur. In that case the offer mistakenly omitted one page of the tender and the learned judge, at p. 804, stated:

It undoubtedly must have been apparent to Mr. Hedden [employee of the owner], if not to the entire tender committee, that this page was missing from the Wilchar [contractor] tender as delivered.

and again at p. 808:

To me this is patently a case where the offeree, for its own advantage, snapped at the offeror's offer well knowing that the offer as made was made by mistake.

The court was therefore, in that case, not so much concerned with mistake as with the inability of the parties to comply on the facts with the fundamental rules pertaining to the formation of contracts. There could be no consensus ad idem and hence construction contract B could not come into being. More important to the issue now before us, the document submitted by the contractor was on its face incomplete and could not in law amount to a tender as required by the conditions established in the call for tenders.

It was not seriously advanced that this was a case of patent error in the tender offer and I proceed on the basis that there was not a patent error present.

On the facts as found by the learned trial judge, no mistake existed which impeded or affected the coming into being of contract A. The 'mistake' occurred in the calculations leading to the figures that the contractor admittedly intended to submit in his tender. Therefore, the issue in my view concerns not the law of mistake but the application of the forfeiture provisions contained in the tender documents. The effect a mistake may have on the enforceability or interpretation of a contract subsequently arising is an entirely different question, and one not before us. Neither are we here concerned with a question as to whether a construction contract can arise between parties in the presence of a mutually known error in a tender be it, at least initially, either patent or latent.

It might be argued that by some abstract doctrine of law a tender which could not form the basis of a contract upon acceptance in the sense of contract B, could not operate as a tender to bring into being contract A. It is unnecessary to consider such a theory because it was not and could not be argued that the tender as actually submitted by the contractor herein was not in law capable of acceptance immediately upon its receipt by the owner, the appellant. There may well be, as I have indicated, a situation in the contemplation of the law where a form of tender was so lacking as not to amount in law to a tender in the sense of the terms and conditions established in the call for tenders, and it may well be that such a form of tender could not be 'snapped up' by the owner, as some cases have put it, and therefore it would not operate to trigger the birth of contract A. Such a situation might arise in the circumstances described in *Fridman, The Law of Contract*, at p. 81:

An offer that is made in error, e.g., as where the offeror intended to say \$200 a ton but wrote \$20 by mistake, may be an offer that cannot be validly accepted by the other party.

The rule in *Foster v. Mackinnon* (1869), L.R. 4 C.P. 704 (vide *Cheshire and Fifoot, Law of Contract*, 9th ed., 1976, pp. 239-40, for a discussion of the non est factum rule) might also preclude the creation of a contract based upon such an offer. We do not have to decide that question here.

Nor are we concerned with the position of the parties where an action is brought upon a refusal to form contract B as was the case in *McMaster*, supra. It is true that the appellant-owner here has made a counter-claim for damages resulting from the refusal of the respondent to enter into the construction contract but such counter-claim was dismissed and the appeal herein is concerned only with the claim made by the respondent for the return of the tender deposit.

Left to itself, therefore, the law of contract would result in a confirmation of a dismissal by the learned trial judge of the claim by the contractor for the return of the tender deposit. The terms of contract A, already set out, clearly indicate a contractual right in the owner to forfeit this money.

As the respondent has not raised the principle of the law of penalty as it applies to the retention of the deposit here by the appellant, it is not necessary to deal with that branch of the law.

The contractor has in this Court and in the courts below also founded its claim for the return of the tender deposit on the basis that when the owner submitted the construction agreement for execution by the contractor-tenderer, the proffered contract was not signed and left blank the space in the contract form for the completion of the work although the contractor's tender had specified ninety weeks.

It should be noted that in the prescribed form of tender the contractor could either insert the time for the completion of the works or, on failing to do so, would be deemed to agree with the construction schedule stipulated by the owner's engineer. J. Holland J. at trial stated with

reference to this submission:

I have considered the fact that the time of completion was blank and have concluded that this was purely a clerical error and should not affect the rights and obligations of the parties. I approach this aspect of the case as if the documents as forwarded were in accordance with the tender and include the 90 week period. This is not such a situation as was considered by the Supreme Court of Canada in *Cole v. Summer*, [1900] 30 S.C.R. 379 [sic], where the matter in dispute was whether there had been an offer and an acceptance of the offer which was made.

The Court of Appeal was not, of course, called upon to determine this point by reason of its disposition of the case.

It would be anomalous indeed if the march forward to a construction contract could be halted by a simple omission to insert in the appropriate blank in the contract the number of weeks already specified by the contractor in its tender. It would be a simple matter for the contractor, in executing the prescribed form after having fixed the contract price and all other terms which were directly dependent upon its tender, to complete the form in accordance with that tender where the proffered contract was inadequate. The contractor was not asked to sign a contract which diverged in any way from its tender but simply to sign a contract in accordance with the instructions to tenderers and in conformity with its own tender. When executing the proffered contract, the contractor was free to insert "ninety weeks" in the blank space in the contract form and indeed to make any other additions or alterations required to bring the contract into conformity with the contractor's tender. I cannot conclude therefore that this omission has any bearing upon the rights of the parties to this appeal and specifically that it stands in the way of the owner in its assertion of its right to retain the tender deposit.

For these reasons I would allow the appeal, set aside the order of the Court of Appeal, and restore the judgment of J. Holland J. at trial with costs, here and in all courts below, to the appellant.

Appeal allowed.