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*Feb. 7, 8, 11, 12.
*May 12.

CANADIAN ATLAS DIESEL ENGINES CO. LTD. (DEFENDANT) .. } APPELLANT;

AND

McLEOD ENGINES LIMITED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Commercial—Agreement to supply engines to complete orders —Whether letters of request for engines were orders—Claim for rectification—"Orders"—Admissibility of oral evidence.

The appellant and the respondent were agents for the sale of Chrysler marine engines in British Columbia. On January 26, 1949, the respondent agreed to surrender its franchise and to sell its stock of engines and accessories to the appellant; it was also agreed that the appellant would supply the respondent "with the necessary Chrysler engines to complete the orders shown on the attached list". No such list was attached to the agreement. The parties met again the following day, and the respondent, after showing some of its import permits, wrote to the appellant: "As agreed in our meeting yesterday, we are listing below orders we have on hand . . ." This list was compiled from letters from fishing companies, dated in 1948, and setting out an estimate of the number of engines they would need for the 1949 season and expressing the hope that the respondent would be able to deliver them as and when required. The particulars of equipment and accessories were not set out in the letters. With these letters, the respondent was able to obtain the necessary import permits to bring the engines in from the United States.

After supplying some engines, the appellant refused any further delivery unless the respondent produced firm written orders obtained on or prior to January 26, 1949. In an action for breach of contract, the appellant pleaded, inter alia, that it had agreed to supply the engines to enable the respondent to fulfil only bona fide orders, and counterclaimed for rectification of the contract. The trial judge accepted the evidence of the respondent that there had been no discussion as to the type of orders, and accordingly there could be no rectification and found that the appellant had in no way been deceived by the respondent. This judgment was affirmed by a majority in the Court of Appeal for British Columbia.

Held (Rand and Cartwright JJ. dissenting), that since the letters were not orders within the meaning of that expression as used in the agreement no breach had been shown, and therefore the appeal should be allowed and the cross-appeal dismissed.

Per Estey J.: The evidence adduced supports the contention that a latent ambiguity was raised that justified the examination of the surrounding circumstances to determine the intent and meaning of the word "orders" as used in the contract. But this, however, did not permit the reception in evidence of declarations from representatives of the

*PRESENT: Kerwin, Rand, Estey, Locke and Cartwright JJ.

customers, setting forth their intention with respect to the meaning and purport of these letters. That intention, as in written instruments generally, must be determined by the court upon a construction of the language adopted by the parties to express their intention. The letters were estimates of customers' requirements and not orders for engines to be delivered in the future. If the respondent intended them as orders, it should have disclosed it, or made their contents known to the appellant in such manner that it would have understood respondent's meaning and intention.

Per Locke J.: The documents upon which the respondent must rely as constituting orders are the letters from certain customers prior to the agreement; and the word "orders" in the agreement cannot be construed as including these letters. The respondent's pleadings do not assert that by custom in the trade or otherwise the word "orders" should be construed otherwise than in accordance with its commonly accepted meaning, namely, a direction to make, provide or furnish anything at the responsibility of the person ordering. Oral evidence of those customers as to what they intended to convey by their letters was inadmissible; in the absence of any ambiguity in the language employed and in the state of the pleadings, the question of interpretation was for the trial judge. The letters were by their very terms simply estimates of the requirements of the companies during the coming season and not a direction or request to supply goods or an offer capable of acceptance.

Per Rand and Cartwright JJ. (dissenting): In view of the impossibility of rescission and the completely executed consideration, the only issues open would be fraud and warranty. The former has been disposed of by the vindication of the respondent; the latter must arise as a conclusion of intention to be drawn by the court from the letters, but there is nothing in them that would justify that. There was no reason to affirm when there was no question of what was in mind or of any undisclosed matter. The appellant was willing to supply those engines, and the technical difference between orders and what the letters involved was not of such a nature as would deprive the appellant of something of which it sought assurance. Furthermore, the word "orders" as used embraces the commercial commitments contained in the letters.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), Smith J.A. dissenting, affirming the judgment of the trial judge awarding the respondent damages for breach of contract.

Alfred Bull Q.C. for the appellant. The real issue is whether the respondent had on hand the orders which it stated it had; and whether these letters were orders or just letters non-enforceable as contracts. It was intended by both parties that the appellant would supply engines to the respondent to fulfil existing enforceable orders which the respondent had acquired or sales it had made prior to January 26, 1949.

(1) [1951] 1 W.W.R. (N.S.) 271; 2 D.L.R. 447.

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The evidence discloses that the documents which purportedly created the contract relationship between the respondent and the fishing companies were in reality only estimates of the possible future requirements of these companies. This material was supplied to the respondent upon his solicitation for the sole purpose of enabling the respondent to acquire stock against which the companies could order in the future.

There is no plea of any custom of the trade that was in the contemplation of the parties to the effect that orders would be taken to mean anything but the ordinary meaning of the word, viz., an unqualified offer to purchase.

The evidence as to the meaning of that word was not admissible since the word is not ambiguous.

If the parties were not ad idem, then there was no contract.

As to the cross-appeal, there was no evidence to support the claim on the accessories. There was no contemplation by the parties that the loss of profit was contemplated in the event of a breach of the contract. The second rule in Hadley v. Baxendale (1) is applicable to this case.

W. S. Owen Q.C. and *F. Bonnell* for the respondent. The letters of essentiality were in fact orders requiring the respondent to acquire the engines for future delivery. *Hammond* v. *Bussey* (2).

The appellant did not contemplate that the list should contain sufficient description to identify each individual engine. *Hillas & Co.* v. *Arcos Ltd.* (3), *Northern Ontario Power Co.* v. *Lake Shore Mines* (4) and *Cotter* v. *General Petroleums* (5).

The appellant's representatives were well aware of the import restrictions and that a considerable delay would elapse between the time the applications were filed and the permits granted, and that it would be impossible to specify the particulars of each engine required for future delivery. *Scammell and Nephew Ltd.* v. *Ouston* (6) and *Hillas* case (*supra*).

(1) 9 Exch. 341.
(2) (1887) L.R. 20 Q.B.D. 79.
(3) 147 L.T. 503.
(4) [1944] 2 D.L.R. 20.
(5) [1951] S.C.R. 138.
(6) [1941] A.C. 251.

The appellant is not entitled to rectification as the agreement accurately sets out the intention of the parties and the real agreement between them.

The appellant is not entitled to rescission of the agreement as no misrepresentation of any kind was at any time made by the respondent; and in any event the contract cannot be rescinded after the position of the parties has changed so that the former state of things cannot be restored.

As to the admissibility of the evidence, the case of *Birrell* v. *Dryer* (1) is relied on.

If the parties were not at idem, then there would be no contract but there is a finding by the trial judge that the appellant knew the system followed by the respondent. The appellant had opportunities to clear up the matter if he was not satisfied.

On the cross-appeal, the respondent relies on both rules in *Hadley* v. *Baxendale* (2).

KERWIN J.:—I agree with my brothers Estey and Locke. The appeal should be allowed and the action dismissed with costs throughout to the appellant. The cross-appeal should be dismissed with costs.

The dissenting judgment of Rand and Cartwright JJ. was delivered by

RAND J.:—This controversy is over the terms of an agreement involving the termination of an agency held by the respondents, McLeod Limited, for the sale, in Victoria, British Columbia, of marine engines manufactured by the Chrysler Corporation of the United States. The appellants, Atlas Company, held a like agency for Vancouver and as Chrysler seemed disposed to extend the district of Atlas to include that of McLeod, the latter, who had exercised the agency for about two years against Atlas' fourteen or more, decided to surrender on the best terms obtainable. The parties, including a representative of Chrysler met first in Seattle, later in Vancouver and finally in Victoria, and their agreement is to be deduced from letters to which reference will now be made.

(1) 9 A.C. 345.

(2) 9 Exch. 341.

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The first communication is from Atlas to McLeod at Vancouver, on January 26, 1949, and the material portions are:—

Canadian Atlas Diesel Engine Co. of Vancouver, B.C., agrees to buy from McLeod Engines Ltd., all their stock of Chrysler marine engines, Chrysler marine parts, and marine accessories; also one Dodge service truck.

* * *

It is further agreed that Canadian Atlas Diesel Engine Co. will supply to McLeod Engines Limited the parts necessary to complete engines now being overhauled at Begg Brothers Limited. These parts to be supplied at cost.

It is further agreed that Canadian Atlas Diesel Engine Co. will supply McLeod Engines Limited with the necessary Chrysler engines to complete the orders shown on the attached sheet.

All merchandise purchased will be first-class condition and at actual cost.

The above is agreed to when mutual termination of Chrysler marine franchise in the Province of British Columbia is negotiated.

The second, from McLeod to Atlas, dated, at Victoria, on January 27, reads:—

As agreed in our meeting yesterday, we are listing below orders we have on hand, and in the other column, number of engines that have been delivered against these orders. You will see the orders number one hundred and twenty-four and the deliveries fifty, which will leave us seventy-four to be delivered.

and is followed by an enumeration of ten fishing companies showing a total of 124 engines ordered and fifty delivered.

The last is dated January 31 at Victoria from Cunnings on behalf of Atlas to Alger, Sales Manager of Atlas, with a copy to McLeod:—

Canadian Atlas Diesel Engines Limited has agreed to supply engines to the above company to make deliveries on the list of sales now in our hands at our actual cost, plus $30 to cover our cost of handling. All engines are to be started in our shop to insure engines being in proper mechanical condition at time of delivery.

McLeod Engines Limited will issue purchase request with shipping instructions for each engine, and will also issue payment for same direct to Canadian Atlas Diesel Engines Limited.

The matter of fishermen's rebate will be worked out between Mr. Evans and McLeod Engines Limited.

As is seen, the first letter speaks of "the orders" shown on the attached sheet"; the same word "orders" is used in the letter of January 27; and that of January 31 refers to "the list of sales now in our hands."

It appears that on April 16, 1948 regulations had been passed by the Dominion Government under c. 7 of the Statutes of Canada, 1948, dealing with exchange controls between Canada and the United States, imposing restrictions on the importation of goods from that country. To enable these engines to be brought into Canada, it was necessary to satisfy the department that there was a commercial need for them here. This led to the requirement of evidence of "essentiality" before import permits would be issued.

In accordance with this requirement, McLeod in the autumn of 1948 obtained letters from customers estimating their needs for the fishing season of 1949, and intimating that it would be expected and certainly desirable that the engines should be available for delivery when wanted. Decision on the applications was said to have taken up about two months and the certificates were received by McLeod either toward the end of the year or early in January, 1949.

A representative letter of "essentiality" is that from Canadian Fishing Companies Limited to McLeod dated October 7, 1948:—

> After a careful review of our probable engine requirements over the next several months, we estimate that we will need approximately twenty Chrysler Crown and Chrysler Ace Engines, with 2½ to 1 reduction gears.
>
> The above engines are to be used as power plants for commercial fishing vessels, used exclusively in the commercial fisheries of British Columbia.
>
> We sincerely trust that you will be able to make delivery of these engines when required. Thanking you,

As these letters were solicited by McLeod, they have a general uniform tenor and phraseology, but they were solicited in the regular course of McLeod's business and before any question of the cancellation of the agency arose.

The ground of Mr. Bull's argument is precise and narrow: these letters are not "orders" within the meaning of the word: the obligation is to supply engines only in fulfilment of genuine "orders"; and Atlas were justified in refusing to meet requests of McLeod for delivery. The question is whether that contention is valid.

It should first be made clear that there was no intention on the part of McLeod to misrepresent; they have been acquitted of acting otherwise than in good faith. They

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must then be taken as believing that what had been received from the companies established a relation embraced within the meaning of the word "orders" as used in the correspondence quoted.

The originals of the letters had been sent to Ottawa and kept there, and copies had not been retained. When consequently at the meeting in Victoria inquiries were made about them all that could be produced were the permits for importation, of which the following is a sample:

TO THE DEPARTMENT OF TRADE AND COMMERCE, EMERGENCY IMPORT CONTROL BRANCH

APPLICATION TO IMPORT CAPITAL GOODS

INSTRUCTIONS ON THE BACK MUST BE STRICTLY OBSERVED.

Applicant's Name—McLeod Engines Limited
Address—1221 Wharf St., Victoria, B.C.
Date—October 18, 1948.

The undersigned hereby makes application for a permit to import the goods, articles or commodities described hereunder, in respect of which the information furnished herein is certified to be true and correct.

No. of Pkgs.	Quantity	Description of Goods	Value in Canadian Dollars
15	15	Chrysler Crown Marine Engines.....	$10,500.00
15	15	Chrysler Ace Marine Engines.....	9,900.00
			$20,400.00

INSTRUCTIONS

To be observed in the Preparation and Completion of an Application for Permit to Import.

.....

3. Applications can be considered only when:—

.....

(*b*) this application is accompanied by a separate declaration of essentiality. This declaration must provide details as in (i) (ii) (iii) (iv) below and be signed by the end user of the goods or a senior member of his organization.

(i) why purchase cannot be deferred until the current foreign exchange situation is corrected; and

(ii) why the importation is absolutely essential, giving full reasons with supporting evidence; and

(iii) what steps have been taken to obtain the items from Canadian production sources; and

(iv) could the equipment be imported for temporary use and returned.

Atlas deny knowledge of the practice in obtaining permits as they had been granted a quota of importation against which, however, their imports would be charged unless they could procure an exemption by showing that an imported machine was to be used for essential purposes. This would be to furnish the same justification as for a permit to import.

The trial court held that the contract binds Atlas to supply the 74 engines specified in the list as stated in the letter of January 31, and I agree that it does so. On that footing, and assuming Mr. Bull's contention to be well founded, it can be said to have been made, on the part of McLeod, under a mistaken notion that the letters of essentiality were within the word "orders"; and on the part of Atlas to have been induced by the misrepresentation of McLeod as to their nature. In view of the impossibility of rescission and the completely executed consideration moving from McLeod, however, the only issues now open would be fraud and warranty. The former has been disposed of by the vindication of McLeod; the latter must arise as a conclusion of intention to be drawn by the Court from the letters, but I see nothing in them, read in the light of the circumstances, that would justify that. There was no reason to affirm when there was no question of what was in mind or of any undisclosed matter. Atlas was willing to supply 74 engines, and the technical difference between orders and what the letters involved was not of such a nature as would deprive Atlas of something of which it sought assurance.

That would be sufficient to dispose of the appeal; but as I have come to the conclusion that the word "orders" as used embraces the commercial commitments contained in the letters, I think it desirable to base myself on that ground as well as on the former.

Strictly speaking, an order, in law, is a proposal in the nature of an offer which invites, without more, some form of acceptance intended to lead to an obligation; that acceptance, according to the nature of the order, may be by promise or by some act as, say, the delivery of goods

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to a carrier. The letters of essentiality here do not go to that length; they do not of themselves alone contemplate an acceptance; but they are bona fide estimates of an approaching season's requirements by a customer to a seller which look to subsequent directions for shipment of the goods mentioned. They imply an assurance that such directions will be given, and exhibit that assurance as a representation to the department of government concerned. They did not, from that moment, in a legal sense, bind the companies, but neither would they had they been orders in the strict sense; before acceptance, an order can be revoked and an outstanding revocable order would admittedly satisfy the language used.

Could Atlas have believed that that considerable share of the business in such engines for the approaching season would have been specified otherwise than by such an estimate so far in advance, particularly when there had been placed before them and perused all of the importation permits but one which, as explained to them, was at the customs office? Proctor of Chrysler who inspected the permits with Cunnings of Atlas was familiar with the regulations and the necessity for the letters; in the whole of the negotiations, he played a leading part in relation to all terms of the contract, on behalf of Atlas as well as Chrysler, and his knowledge must be imputed to Atlas. That is particularly so in relation to the permits, since Cunnings, at the time, in the presence of Proctor, stated his lack of familiarity with the import procedure and the discussion of this feature proceeded on the basis of Proctor's acquaintance with it. In November, 1948, Proctor had visited McLeod in Vancouver and in the words of F. B. McLeod, "approved of the orders we had taken." Atlas, in co-operation with Chrysler, were in effect driving McLeod out of the market; with the list before them they were willing, so far as numbers went, that the requirements of McLeod's customers for the coming season be fulfilled by that company. It could not but have been seen that the latter had obtained some form of assurance from their customers covering the season's supply. A commercial obligation equal to a revocable order was represented: did

that in fact exist? Undoubtedly it did. In the ordinary course of business there would be no less dependability supporting the representation of the letters than an order; they were in effect commercial orders as distinguished from legal orders, behind both of which, until an obligation is created, stands the integrity of commercial commitments.

What, then, in all the circumstances did the understanding at Victoria on this feature come to? Atlas and Proctor were well acquainted with the business of the British Columbia coastal fisheries. They knew that the list which they received gave directly not the then outstanding orders but rather the total orders and the number up to that time filled; and they knew that the totals shown represented the season's requirements of the companies named. Atlas clearly meant to stop short of disrupting business relations established by McLeod. The permits satisfied them of the good faith of McLeod and of the existing commitments, and it was not until around the 20th of March following that any demand for evidence of original "orders" was called for.

For these reasons, I must reject Mr. Bull's contention. Commercial words, in any context, must take their meaning from the body of circumstances to which they are related and out of which they arise; and although the golden rule is that, subject to well known qualifications, the ordinary and grammatical meaning of language used is to be taken as intended, nevertheless in the use of such a term as that here in question, a sufficiency of significant surrounding facts may, by showing the perspective in which the matters were viewed and what matters of fact were actually in the minds of the parties, extend or modify its scope.

As Lord Wright, in *Hillas & Co. Ltd.* v. *Arcos Limited* (1), expressed it:—

> This (i.e., the true construction of a document) is a question of law on which evidence is not relevant, except to the extent clearly stated by Lord Dunedin in *Charrington and Co. Limited* v. *Wooder* (110 L.T. Rep. 548, at p. 511; (1914) A.C. 71, at p. 82), where the words "fair market price" were to be construed:
>
> > "Now, in order to construe a contract the court is always entitled to be so far instructed by evidence as to be able to place itself in thought in the same position as the parties to the contract were

(1) (1932) 147 L.T. 503 at 514.

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placed, in fact when they made it, or, as it is sometimes phrased, to be informed as to the surrounding circumstances. As Lord Davey says in the case of *Bank of New Zealand* v. *Simpson*, (82 L.T. Rep. 102, at p. 104; (1900) A.C. 182, at p. 188), quoting from a decision of Lord Blackburn's: "The general rule seems to be that all facts are admissible (to proof) which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used."

and Lord Tomlin at p. 511:—

Commercial documents prepared by business men in connection with dealings in a trade with the workings of which the framers are familiar often by reason of their inartificial forms confront the lawyer with delicate problems.

The governing principles of construction recognized by the law are applicable to every document, and yet none would gainsay that the effect of their application is to some extent governed by the nature of the document.

On the one hand the conveyance of real estate presenting an artificial form grown up through the centuries and embodying terms of art whose meanings and effect have long since been determined by the courts, and on the other hand the formless document, the product of the minds of men seeking to record a complex trade bargain intended to be carried out, both fall to be construed by the same legal principles, and the problem for a court of construction must always be so to balance matters, that without violation of essential principle the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains.

The contract must be construed as a whole: and an undue emphasis upon a word or a phrase may easily distort that balanced understanding which can be seen to have been the crystallized consensus. The expression "the list of sales now in our hands" indicates the generality of the notion of Cunnings and emphasizes the fact that these business men had in mind the substance of business relations, not the precision of language.

McLeod had been very successful as agents and as late as December Proctor had told them it looked as if they would be given the agency for the province. In that situation, with the knowledge of Proctor of the letters as "orders," Atlas cannot now be heard to say that the contract means such items only as may be "orders" as they understand the word. Their intention, in introducing this element of fairness into the proceedings, was to leave intact the body of business McLeod had actually negotiated for the season: and the word as used was intended to describe that.

On the cross-appeal I am unable to find in the record sufficient evidence to support the claim for damages for loss of profits on the prospective sales of accessories, as pleaded, and I am in agreement with the conclusion of the majority of the Court of Appeal on this branch of the matter also.

For these reasons the appeal and the cross-appeal must be dismissed with costs.

ESTEY, J.:—The issues in this appeal are largely determined by the construction of the word "orders" in the contract made between the parties hereto dated January 26, 1949. The respondent would, but the appellant would not, give to this word a construction sufficiently comprehensive to include the letters styled letters of essentiality obtained by the respondent from its customers. The learned trial judge and the majority of the Court of Appeal (1), Mr. Justice Sydney Smith dissenting, have found in the respondent's favour.

The relevant portions of the contract read as follows:

HOTEL VANCOUVER
Vancouver, B.C.
January 26th, 1949.

McLeod Engines Limited,
1221 Wharf Street,
Victoria, B.C.
Gentlemen:

Canadian Atlas Diesel Engine Co. of Vancouver, B.C., agrees to buy from McLeod Engines Ltd., all their stock of Chrysler marine engines, Chrysler marine parts, and marine accessories; also one Dodge service truck.

.....

It is further agreed that Canadian Atlas Diesel Engine Co. will supply McLeod Engines Limited with the necessary Chrysler engines to complete the orders shown on the attached sheet.

.....

The above is agreed to when mutual termination of Chrysler marine franchise in the Province of British Columbia is negotiated.

Yours very truly,
CANADIAN ATLAS DIESEL ENGINE CO. LTD.
per: "A. G. Cunnings"
A. G. Cunnings.

(1) [1951] 1 W.W.R. (N.S.) 271; 2 D.L.R. 447.

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This contract was written by representatives of both parties in Vancouver and the following day, at Victoria, the attached sheet was prepared and annexed thereto. The attached sheet reads:

1221 Wharf Street
Victoria, B.C.
January 27, 1949

Mr. A. G. Cunnings,
Canadian Atlas Diesel Co.,
1859 West Georgia Street,
VANCOUVER, B.C.

Dear Sir:

As agreed in our meeting yesterday, we are listing below orders we have on hand, and in the other column, number of engines that have been delivered against these orders. You will see the orders number one hundred and twenty-four and the deliveries fifty, which will leave us seventy-four to be delivered.

Name	Orders		Delivered
B.C. Packers Ltd.	30		7
Nelson Bros. Fisheries	15		-
Canadian Fishing Co.	20	Customs	6
A.B.C.—North Pacific	30		25
A.B.C.—Phoenix	13		6
R. Cosulich Boat Wks.	4		2
Fred Radler	2		-
Pete Sather	1		-
Kyuquot Trollers	7		3
S. Hansen	2		1
Total	124		50

Yours very truly,
McLEOD ENGINES LTD.
President.

1-27-49
Rec'd copy
"A. G. Cunnings"
FBM/ea

The terms of this contract, other than that providing for the delivery of the engines as set out in the second of the above-quoted paragraphs, have been performed.

The parties hereto, prior to January 26, 1949, under contracts with the Chrysler Corporation of Detroit, Mich., sold marine engines and accessories in separately defined areas in British Columbia. These Chrysler engines had to be imported from the United States. Parliament, in 1948, enacted the *Emergency Exchange Conservation Act* (S. of C. 1948, c. 7) and under the provisions thereof the

Governor General in Council passed regulations and thereafter these engines could only be imported upon compliance therewith. This act and the regulations thereunder came into force on April 22, 1948.

The respondent, in order to comply with the foregoing regulations and have engines available as and when its customers might require them, interviewed and obtained from them, in the fall of 1948, letters that in these proceedings have been styled letters of essentiality. These letters it forwarded to Ottawa, together with such orders as it had on hand, in support of its application for importation permits, and when these were received it imported the engines. The original letters of essentiality were retained at Ottawa. They are similar in phraseology and, while copies of five were placed in evidence, that of October 7, 1948, from The Canadian Fishing Company Ltd., is typical:

Dear Sirs:

After a careful review of our probable engine requirements over the next several months, we estimate that we will need approximately twenty Chrysler Crown and Chrysler Ace Engines, with 2½ to 1 reduction gears.

The above engines are to be used as power plants for commercial fishing vessels, used exclusively in the commercial fisheries of British Columbia.

We sincerely trust that you will be able to make delivery of these engines when required. Thanking you,

The respondent's customers, in these letters, appear to do no more than to estimate their engine requirements in fishing operations, in order that they may assist the respondent in importing the engines and having them on hand as and when they might require them. The language contained in the letter from the British Columbia Packers Ltd. makes this particularly clear, as it states: "We hope this letter will assist you in being able to have engines available for our requirements." The respondent, however, contends that even if these letters be unambiguous upon their face that, having regard to the existence of the regulations, the knowledge thereof by the respective parties, the conversations at Victoria on January 27, the contents of the appellant's letter of instructions dated January 31 and the delivery of 14 engines upon the requisitions specified in that letter, a latent ambiguity is raised that justifies the examination of the surrounding circumstances to determine the intent and meaning of the word "orders" as used by

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the parties in this contract. The evidence adduced supports this contention. In *Frenkel* v. *MacAndrews & Co.* (1), where the court construed the word "route," Lord Warrington of Clyffe, at p. 567, said:

> It is well settled that if the surrounding circumstances raise a latent ambiguity in any of the expressions used, parol evidence may be resorted to for the purpose of ascertaining which of the meanings of an ambiguous expression was contemplated by the parties. . . .

See also *Charrington & Co., Limited* v. *Wooder* (2) and *Bank of New Zealand* v. *Simpson* (3).

This, however, does not permit the reception in evidence, as at the trial hereof, of declarations from representatives of the customers, setting forth their intention with respect to the meaning and purport of these letters. That intention, as in written instruments generally, must be determined by the court upon a construction of the language adopted by the parties to express their intention. *National Bank of Australasia, Limited* v. *J. Falkingham & Sons* (4).

The negotiations commenced in Seattle on January 24, 1949, between Proctor of the Chrysler Corporation, Cunnings of the appellant and McLeod and Bramston of the respondent. Proctor informed McLeod that his corporation was enlarging the area of the appellant's franchise in British Columbia. This, as realized by all parties, adversely affected the respondent's position as vendor of Chrysler engines. Certain alternatives were discussed, but no agreement was arrived at when, on the evening of the 25, the parties motored to Vancouver. There, the next day, an agreement was concluded and its terms embodied in the letter of January 26, 1949, to which the attached list was appended, at Victoria, on the following day.

The learned trial judge, wherever there was a conflict, accepted the evidence of McLeod and Bramston, as against that of the appellant's witnesses. He, however, did not have an opportunity to observe the demeanour of Proctor, whose evidence was taken upon commission in California.

Throughout the negotiations and in the contract both parties apparently used the word "orders" in the ordinary accepted sense of a request from customers for delivery of engines. McLeod made this clear when he stated in the

(1) [1929] A.C. 545.
(2) [1914] A.C. 71.
(3) [1900] A.C. 182.
(4) [1902] A.C. 585.

attached sheet: "we are listing below orders we have on hand." He also deposed to the same effect when he stated that he had the engines "sold" by virtue of these letters. McLeod does not dispute this. In fact he does not contend otherwise, his position being, throughout, that respondent accepted these letters as orders in that sense.

The respondent emphasized that the appellant was aware of the regulations and that it should be concluded therefrom that it was familiar with these letters of essentiality. Both parties hereto were well aware of and complied with the regulations, though under quite different provisions thereof. The respondent followed the practice of obtaining importation permits, while the appellant was granted a quota under these regulations. There is, however, no evidence to justify the conclusion that the appellant's officers and agents had any knowledge of either the existence or the contents of these letters of essentiality at the time of the execution of the contract, or, indeed, at any time prior to this litigation.

The evidence, however, clearly establishes that Cunnings was to inspect the orders and justifies the inference that he would do it at the time of or before the preparation of the list. McLeod himself deposed that because he did not have either the orders or particulars thereof at Vancouver he "couldn't give them adequate information . . . So it was decided to meet in Victoria the following day" in order that Cunnings and Proctor might "take a look at the stock they had bought, also to check our orders and make the attached list."

McLeod, as respondent's manager, had forwarded the letters of essentiality to Ottawa, where he knew they were retained and only the importation permits forwarded to respondent. He, therefore, in Vancouver, when it was arranged for the inspection of the orders next day in Victoria, knew they were not there and could not, therefore, be inspected. Indeed, so far as the evidence discloses, the importation permits in his possession did not evidence the existence of permission to import 74 engines. Moreover, McLeod did not disclose from what records in respondent's office at Victoria he prepared the list of orders. He merely stated that he had done so and that it was being typed when Proctor and Cunnings arrived at respondent's

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office. When finished, he presented it to them and he says that Bramston and Cunnings looked it over, as well as the importation permits which were on the desk, and Cunnings "signed it as having received it and being satisfied with it." This statement goes quite beyond what Cunnings subscribed to, as the list discloses, and is inadmissible to alter, vary or contradict the writing.

That some discussion must have taken place with regard to these orders at Victoria is evident from McLeod's admission that "we explained to them some of those orders had gone—practically all had gone to Ottawa to secure the permits." Moreover, Bramston, in giving his evidence as to what took place in Victoria, states that Cunnings "asked for a copy of the orders on hand" and goes on to explain that there was some discussion as to these orders which had gone to Ottawa and that Proctor and Cunnings were shown the importation permits. While Bramston says they did not ask for further information, he does not go so far as to say they accepted the importation permits in lieu of the orders. Bramston's evidence upon this point is consistent with his conduct before both Evans and Cunnings when he was refused delivery at first of five engines and later of one engine. When Evans refused the delivery of the five, Bramston, upon his own evidence, made no comment. He did, however, immediately consult with McLeod and forthwith wrote a letter enclosing the requisitions for the five engines and stating that appellant had, in the letter of January 26, agreed to deliver "Chrysler marine engines as schedule on attached list." When later, on March 16, Cunnings refused, he did not even press upon him that point of view. This further emphasizes the significance of the difference between the evidence of McLeod and Bramston as to the discussion at Victoria relative to the production of the orders.

The importation permits upon the desk authorized the importation of 47 engines. McLeod explained there was another permit at the Customs for 20 engines, of which four had already been delivered. Upon McLeod's own evidence they disclosed an authority to import only 63 engines. When it is remembered that these were all

business men, it seems difficult to conclude that Cunnings, who had insisted on seeing the orders for 74 engines, should accept such evidence as satisfactory proof of the existence of 74 orders. Moreover, upon the whole of this evidence, Cunnings was denied the inspection of the orders and under these circumstances a conclusion that he accepted an alternative that did not disclose the nature and character of the suggested orders ought to be drawn only where the evidence unequivocally supports that conclusion. Such evidence is not here present. The position might well have been otherwise had Cunnings been shown a copy of the orders, or had their contents been fully explained to him.

McLeod's appreciation of the difference between letters of essentiality and orders is evidenced by his statement

> In some cases we had an order as well, and it was also attached to the application along with that letter of essentiality.

and later

> In some cases we had an order along with the letters of essentiality, if so, we included it with the application, but it wasn't strictly necessary because if we didn't have the complete description of the engine they went through just the same.

If, in these circumstances, McLeod intended the estimated requirements made in the letters of essentiality to be accepted as orders within the meaning of the contract, he should have either exhibited one of the letters, a copy thereof, or made such explanation of their contents as would have enabled the appellant's representatives to understand the word "order" in the sense in which he desired it to be understood. McLeod's failure to do so has created the issue here raised and justifies the application of the rule stated by Blackburn J. in *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (1):

> The language used by one party is to be construed in the sense in which it would be reasonably understood by the other.

Respondent submits that the appellant's letter of January 31, written by Cunnings after the contract was concluded, supports its view that the orders were not to be

(1) (1863) 3 B. & S. 917 at 929.

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produced, but that 74 engines were to be delivered in accordance with the terms thereof. This letter reads as follows:

A. G. Cunnings—Terminal Island
J. C. Alger—Vancouver January 31, 1949.
c.c. Mr. W. H. Stephenson—Oakland
Mr. E. Evans—Vancouver
Mr. Fred McLeod—McLeod Engines Limited, Victoria, B.C.

McLEOD ENGINES LIMITED

Canadian Atlas Diesel Engines Limited has agreed to supply engines to the above company to make deliveries on the list of sales now in our hands at our actual cost, plus $30 to cover our cost of handling. All engines are to be started in our shop to insure engines being in proper mechanical condition at time of delivery.

McLeod Engines Limited will issue purchase request with shipping instructions for each engine, and will also issue payment for same direct to Canadian Atlas Diesel Engines Limited.

The matter of fishermen's rebate will be worked out between Mr. Evans and McLeod Engines Limited.

"A. G. Cunnings"
AGC:HS A. G. Cunnings

The respondent emphasizes not only that in this letter there is no suggestion of any obligation to disclose its orders, but that rather there is a positive assertion that the appellant will "supply engines . . . to make deliveries on the list of sales," as well as the direction that respondent "will issue purchase request with shipping instructions," which letter was followed by the delivery of 14 engines in accordance with the terms thereof. The appellant, on the other hand, submits that McLeod had led them to believe the engines were sold, and with this McLeod agrees, and, with that in mind, Cunnings used the word "sales" in his letter of instructions. This letter does not cover all of the points agreed upon regarding the delivery of these engines; e.g., it does not refer to the fact that these engines were to be paid for, as, in fact, they were, upon delivery. Moreover, Cunnings does not state in his evidence that the orders were to be shown along with, or at the time of, the requisition. It is further significant that throughout all the evidence it is never suggested that the respondent should surrender the orders to the appellant and, therefore, the purchase request with the shipping orders would be the only record upon which the appellant would make the delivery and from which it would make whatever record

it deemed necessary in relation thereto. It was the latter that was evidently uppermost in Cunnings' mind as he wrote this letter, and, having regard to all of these factors, it cannot be said that this letter necessarily supports the affirmative conclusion that the appellant accepted in Victoria the letters of essentiality as orders, or, as suggested at the hearing, as the appellant's obligation to deliver 74 engines to the respondent.

With respect to the 14 engines delivered, Evans, who received the requisition and delivered the orders, states that on two or three occasions he had asked Bramston to show him the orders; that Bramston had not done so and, in fact, had made no reply to his request. Bramston, who gave his evidence first, was not asked as to this conversation and was not recalled and questioned in regard thereto. However, on March 2 Evans did refuse to deliver to Bramston five engines. Bramston at that time made no protest to Evans, but immediately communicated with McLeod.

McLeod, as a result of Bramston's communication, did some long-distance telephoning, apparently with Proctor and perhaps others, and, as a result, Cunnings directed the five engines to be delivered and said that he would "be up in Vancouver." In respect to the whole 19 delivered, Cunnings deposed:

> I knew I was coming back up to Vancouver in the near future and I thought I would be able to get things straightened out when I returned here, and as I had made the arrangement originally I didn't want our Vancouver office personnel to get mixed up in it.

On March 16 Bramston presented a requisition and a cheque for a further engine. Cunnings was in Vancouver and personally refused the delivery of that engine. There is some discrepancy as to the exact language used. Bramston says Cunnings merely expressed regret that he could not provide the engine and that he himself made no comment, but withdrew immediately. Cunnings, on the other hand, states that he told Bramston he would give him the engine if he produced the order; that Bramston withdrew and he thought he would return, but he never did. Thereafter the matter was dealt with through the solicitors for the respective parties.

That 19 engines were delivered without the production of the orders is admitted. The respondent urges that this supports its contention that the orders were not to be

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produced. Appellant's position is that Cunnings permitted the delivery of the 19 engines in reliance upon McLeod's word that the orders would be submitted. When the orders were not submitted Cunnings apparently concluded that, as he himself had conducted negotiations, he would, when in Vancouver, personally insist on the production of the orders. This is consistent with the appellant's contention throughout that it would deliver the engines if orders therefor were produced by the respondent. There can be no question but that the parties agreed upon this on January 28 at Vancouver and the solicitors' letter written on behalf of the appellant to respondent on March 18, 1949, stated:

> Our clients take the position that they are only obliged to deliver to you under the special arrangement, subject to proper payment therefor, engines for which you can produce firm written orders dated January 26, 1949, or prior thereto.

Under these circumstances the delivery of the 19 engines does not assist in determining the issues here raised.

The evidence throughout does not support the respondent's contention. The letters, as phrased, were estimates of customers' requirements and not orders for engines to be delivered in the future. An examination of the surrounding circumstances supports that construction. The fact that McLeod construed these letters as orders does not resolve the matter. More important is that, if he intended them as such, having regard to their contents, he should have disclosed it, or made their contents known to the appellant in such a manner that it would have understood the respondent's meaning and intention.

The respondent's contention that a change was effected at Victoria, under which these orders were not to be produced, is in conflict with the endorsement made by Cunnings upon the list. If such a change had been effected it would have been of even greater or at least of equal importance to that of the acknowledgment of the receipt thereof and one would have expected that it would have been included in the endorsement. It is also in conflict with respondent's letter of March 2. This letter was written to appellant after Evans refused the delivery of the five engines to Bramston. The latter immediately com-

municated with McLeod and, as a consequence thereof, wrote the appellant enclosing the five requisitions and requesting delivery

> under terms of your letter of January 26, 1949, which specifies that your Company, Canadian Atlas Diesel Engines Ltd. shall deliver our company, McLeod Engines Limited, Chrysler Marine Engines as scheduled on attached list.

The respondent, therefore, as late as March 2, was relying upon the contract as made at Vancouver on January 26 under which McLeod had agreed the orders would be inspected.

Moreover, the evidence of McLeod and Bramston, quite apart from the endorsement made by Cunnings on the attached sheet and the letter of March 2, does not justify a conclusion that any such change was agreed upon. The subsequent letter of instructions and the delivery of the 19 engines is as consistent with the appellant's reliance upon the subsequent submission of the orders as with the contention of the respondent.

The evidence, as a whole, justifies the conclusion that the parties negotiated and concluded the contract at Vancouver under which the appellant would purchase the stock on hand and deliver to the respondent the engines for which it held orders. At that meeting the respondent was not in a position to give the particulars of the orders and it was agreed that they would be inspected the next day. This vital term of the contract has never been implemented by the respondent and nothing that took place at Victoria or thereafter justifies a conclusion that the appellant had accepted anything in lieu thereof.

The Court of Appeal varied the judgment of the learned trial judge by deleting an item in the damages. Respondent cross-appealed to this Court with respect to that item. In view of the conclusions arrived at, it is unnecessary to deal therewith.

The appeal is allowed, the cross-appeal dismissed and the action dismissed with costs throughout to the appellant.

LOCKE, J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) which, by a decision of the majority of its members, affirmed the judg-

(1) [1951] 1 W.W.R. (N.S.) 271; 2 D.L.R. 447.

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ment for damages awarded to the respondent at the trial. Sydney Smith, J.A. dissented and would have dismissed the action.

While it is sufficient, in my opinion, for the determination of the appeal to decide whether the documents referred to in the proceedings as "letters of essentiality" were orders within the meaning of that expression as used in the agreement evidenced by the letter written by the appellant to the respondent dated January 26, 1949, in view of the claim for the rectification of the agreement in the counterclaim and of the course of the trial, it is necessary to review the evidence as to the events leading up to the making of the agreement and as to what occurred immediately thereafter.

By an agreement dated July 19, 1948, made between the Chrysler Corporation and the respondent, the latter was granted the right to sell Chrysler Marine Engines, parts and accessories in the cities of Victoria and Prince Rupert. The term of this agreement was for one year but it was provided that either party might terminate it by written notice to be given in a defined manner. The appellant company, by agreements dated respectively April 9, 1947, and January 3, 1949, was granted similar rights in the Districts of Vancouver and Westminster. By the *Emergency Exchange Conservation Act* (c. 7, Statutes of Canada, 1948) restrictions were imposed upon the importation of certain goods into Canada, these including Diesel Engines of the type supplied by the Chrysler Corporation to both parties from the United States. Permits allowing the importation of such goods might be obtained on application to the Minister of Trade and Commerce in a manner thereafter prescribed by regulations made by the Governor in Council. In practice, under these regulations, prospective importers of goods from the United States were required to satisfy the Minister that the goods sought to be imported were required for some purpose approved by him. In the present matter the only market with which the parties were concerned was the sale of engines for use in the fishing industry, a purpose apparently regarded by the Minister as one for which importation should be permitted.

In the Fall of 1948 the respondent took steps to obtain such engines as it might expect to require for its business in British Columbia during the year following. On August

14, 1948, it obtained a letter from a company engaged in the fishing and fish packing industry, Nelson Brothers Fisheries Limited, reading as follows:—

After a careful study of Chrysler Engines which we will require for the 1949 season, we estimate that we will need ten (10) Chrysler Crowns and five (5) Chrysler Ace Engines with 2½ to 1 reduction.

We trust that you will be able to make delivery of these engines, as required, during the Spring of 1949.

By letter dated October 7, 1948, the Canadian Fishing Company Limited wrote to the respondent giving its estimate of the number of Chrysler engines it would require in the next several months as being approximately 20 Chrysler Crown and Chrysler Ace engines with 2½ to 1 reduction gears, saying that they were to be used as power plants for commercial fishing vessels used exclusively in the commercial fisheries of British Columbia, and concluding:—

We sincerely trust that you will be able to make delivery of these engines when required.

On October 8, 1948, British Columbia Packers Limited wrote to the respondent saying that its estimated requirements of Chrysler engines for the 1949 season were approximately 30 engines, of which 15 would be Chrysler Aces and 15 Chrysler Crowns with 2½ to 1 reduction gears, and concluding:—

We hope this letter will assist you in being able to have engines available for our requirements.

By letter dated October 13, 1948, the Anglo-British Columbia Packing Company Limited advised the respondent that during the course of the next six months it would require three Chrysler Crown engines with reductions and ten Chrysler Aces with reductions, that the engines would be used exclusively for their own fish boats and their fishermen's boats, concluding:—

Trusting you will be in a position to deliver these engines as required.

By letter dated October 21, 1948, Kyuquot Trollers Co-Operative Association informed the respondent that it had made a survey of its probable Chrysler marine engine requirements during the next few months and estimated that seven would be needed and, in addition to certifying that the engines would be used only to propel the commercial fishing boats of its fishermen, said:—

We trust you will be in a position to deliver these engines to us as needed during the present season.

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The letters from the British Columbia Packers Limited and Nelson Brothers Fisheries Limited were accepted as sufficient by the Emergency Import Control Branch of the Department of Trade and Commerce and permits to import 45 Chrysler engines for the purpose of resale to these companies were issued on December 2, 1948. Two other permits, each for one Chrysler marine engine, granted for resale to two commercial fishermen were issued on December 15 and December 20 respectively. The documents obtained from these prospective purchasers for the purpose of obtaining the permits were not produced at the trial.

On January 24, 1948, F. B. McLeod, president of the respondent company, met R. H. Proctor, the West Coast divisional manager for the Chrysler Marine and Industrial Engine Division of the Chrysler Corporation at Seattle, at the latter's request. Questions had arisen between the parties to this action as to their respective selling rights on the Pacific Coast and it had apparently been decided by the Chrysler Corporation that these differences should be composed. A. G. Cunnings, the manager of the Chrysler Marine and Industrial Engine Division of Atlas Imperial Diesel Engine Company, an American corporation of which the appellant is a subsidiary, took part in the discussions which were continued on the following day at a hotel in Vancouver. In the result, the respondent company agreed to surrender its Chrysler franchise and to sell its stock of Chrysler engines and accessories to the appellant on terms which were defined in a letter written by the appellant to the respondent, reading as follows:—

HOTEL VANCOUVER
Vancouver, B.C.
January 26, 1949.

McLeod Engines, Limited,
1221 Wharf Street,
Victoria, B.C.

Gentlemen:

Canadian Atlas Diesel Engine Co. of Vancouver, B.C., agrees to buy from McLeod Engines Ltd., all their stock of Chrysler marine engines, Chrysler marine parts, and marine accessories; also one Dodge service truck.

It is agreed that Canadian Atlas Diesel Engine Co. will pay wages of one parts man in Victoria, and one parts man in Vancouver, as from January 28, 1949, for taking inventory of stocks on hand.

It is further agreed that Canadian Atlas Diesel Engine Co. will supply to McLeod Engines Limited the parts necessary to complete engines now being overhauled at Begg Brothers Limited. These parts to be supplied at cost.

It is further agreed that Canadian Atlas Diesel Engine Co. will supply McLeod Engines Limited with the necessary Chrysler engines to complete the orders shown on the attached sheet.

All merchandise purchased will be first-class condition and at actual cost.

The above is agreed to when mutual termination of Chrysler marine franchise in the Province of British Columbia is negotiated.

Yours very truly,
CANADIAN ATLAS DIESEL ENGINE CO. LTD.
per: A. G. Cunnings.

When, according to McLeod, Cunnings asked for a list of the orders referred to, he told him that the records were in Victoria and said that if Proctor and Cunnings would come to Victoria on the following day, he (McLeod) would have the list ready. On January 27 the parties met again at the office of the respondent in Victoria, at which time McLeod says that the import permits for 47 engines were shown to Proctor and Cunnings. McLeod had dictated and presented to Cunnings a letter purporting to contain a list of the orders which his company had on hand and giving information as to the number of engines already delivered. This read as follows:—

1221 Wharf Street
Victoria, B.C.
January 27, 1949.

Mr. A. G. Cunnings,
Canadian Atlas Diesel Co.,
1859 West Georgia Street,
VANCOUVER, B.C.

Dear Sir:

As agreed in our meeting yesterday, we are listing below orders we have on hand, and in the other column, numbers of engines that have been delivered against these orders. You will see the orders number one hundred and twenty-four and the deliveries fifty, which will leave us seventy-four to be delivered.

Name	Orders		Delivered
B.C. Packers Ltd.	30		7
Nelson Bros. Fisheries	15		-
Canadian Fishing Co.	20	Customs	6
A.B.C.—North Pacific	30		25
A.B.C.—Phoenix	13		6
R. Cosulich Boat Wks.	4		2
Fred Radler	2		-
Pete Sather	1		-
Kyuquot Trollers	7		3
S. Hansen	2		1
Total	124		50

Yours very truly,
McLEOD ENGINES LTD.
President.

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The letter was clearly intended to take the place of the list of "orders shown on the attached sheet" mentiond in the fourth paragraph of the letter of January 26. McLeod says that at this time the respondent had 16 other import permits at the Customs House, presumably in Victoria. The original letters from the four packing companies and the Kyuquot Trollers Co-Operative Association, according to him, had been sent to Ottawa for the purpose of obtaining permits and apparently no copies were available. It is not suggested that their contents or the contents of whatever documents had been obtained to enable the respondent to obtain the other 16 permits were made known to Proctor or Cunnings. Nothing in the nature of written orders for any engines was produced to them.

The list given to Cunnings, as will be noted, contained no specifications of the engines for which the respondent had orders. It would be necessary, according to him, for the purpose of ordering an engine to have particulars as to whether engines with reduction gears were required, whether they were to have straight drives, right or left hand rotation, the size of the shaft required, and whether they were to have six or twelve volt ignition. The permits for the 47 engines, which McLeod says were produced at Victoria, merely specified that the engines imported were to be marine engines "with 2·56 to 1 reduction gears and 6 volt electrical systems." McLeod clearly knew, while Proctor and Cunnings did not, that the documents obtained from their customers and which, he said, had been sent to Ottawa, did not contain the necessary particulars.

If any evidence were needed (and I think it is not) to establish the fact, it is made clear in the cross-examination of McLeod that he intended by the letter of January 27 to represent to Proctor and Cunnings that the respondent had orders from the parties named for the number of engines stated or, as he also expressed it, that "we had those sold."

Following the discussion at Victoria, Cunnings, who lived in the United States, dictated a memorandum, a copy of which was sent to McLeod at Victoria. That document was in the following terms:—

A. G. Cunnings—Terminal Island
J. C. Alger—Vancouver January 31, 1949

c.c. Mr. W. H. Stephenson—Oakland,
Mr. E. Evans—Vancouver,
Mr. Fred McLeod—McLeod Engines Limited, Victoria, B.C.

McLEOD ENGINES LIMITED

Canadian Atlas Diesel Engines Limited has agreed to supply engines to the above company to make deliveries on the list of sales now in our hands at our actual cost, plus $30 to cover our cost of handling. All engines are to be started in our shop to insure engines being in proper mechanical condition at time of delivery.

McLeod Engines Limited will issue purchase request with shipping instructions for each engine, and will also issue payment for same direct to Canadian Atlas Diesel Engines Limited.

The matter of fishermen's rebate will be worked out between Mr. Evans and McLeod Engines Limited.

(Sgd.) A. G. Cunnings.

Between the date of this memorandum and March 18, 1949, 19 of the 74 engines were delivered at the direction of the respondent to their customers. No written orders from the purchasers were produced in order to obtain these engines. On the latter date an officer of the respondent company requisitioned a Chrysler marine engine and was told by Cunnings that if he would bring in a purchase order given before January 27 the appellant would supply the engine, whereupon the officer (Bramston) left and did not return. Thereafter the matter was dealt with in correspondence by the solicitors for the respective parties and the action followed.

The point to be decided is the meaning to be assigned to the word "orders" in the letter of January 26, 1949. The issue is not affected, in my opinion, either by what took place at Victoria on January 27 or by the terms of the memorandum of January 31. The signature of Cunnings on the letter of January 27 was, as the document shows, merely an acknowledgment of the receipt of the letter. The document was admittedly given for the sole purpose of furnishing details of the orders mentioned in the letter given the day previous and, accepting McLeod's own

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version of the matter, nothing that took place at Victoria altered the position of the parties. The memorandum of January 31 was prepared for the purpose only of recording for the information of the appellant's officers in Vancouver and of W. H. Stephenson of Oakland (whose status is not given) particulars of the manner in which the undertaking given on January 26 was to be carried out. That in preparing this memorandum there was no intention to contract on the part of the appellant seems perfectly clear upon the evidence.

The documents upon which, the respondent must rely as constituting orders are the letters which it obtained from the Canadian Fishing Company Limited, British Columbia Packers Limited, Anglo-British Columbia Packing Company Limited and Kyuquot Trollers Co-Operative Association prior to January 26, 1949. The judgment delivered at the trial and that of Mr. Justice Robertson in the Court of Appeal (1) proceed on the footing that the word "orders" in the letter of January 26 should be construed as including these letters. With great respect, I am unable to agree with this conclusion. The pleadings of the respondent do not assert that by custom in the trade or otherwise the word "orders" should be construed otherwise than in accordance with its commonly accepted meaning. Oral evidence was admitted from various purchasing agents of the parties by whom these letters were written as to what was intended to be conveyed by them, some asserting that the intention was to obligate their employers and others to the contrary, that they were merely estimates. All of this evidence was, in my opinion, inadmissible: in the absence of any ambiguity in the language employed and in the state of the pleadings, the question of interpretation was for the trial judge. The word "order" is one which in different contexts may have a variety of meanings: in the business of buying and selling goods its commonly accepted meaning is, in my opinion, that assigned to it in the New Oxford Dictionary, namely, a direction to make, provide or furnish anything at the responsibility of the person ordering. The letters from Nelson Brothers Fisheries Limited, the Canadian Fishing Company Limited, the British Columbia Packers Limited and the Kyuquot

(1) [1951] 1 W.W.R. (N.S.) 271; 2 D.L.R. 447.

Trollers Co-Operative Association were by their very terms simply estimates of the requirements of marine engines of these various organizations during the coming season and included an expression of hope that the respondents would be in a position to deliver these engines when required. The language of the letter from the Anglo-British Columbia Packing Company Limited of October 13, 1948, varied in this respect that it contained the statement that the company would require 13 engines during the course of the next six months. None of these letters were acknowledged by the respondent. None of them contained a direction or request to supply goods or an offer capable of acceptance. The purpose of giving these documents to the respondent was to enable the latter to apply for import permits to the Department of Trade and Commerce and for that purpose alone. Both parties contemplated that when the engines were required, orders would be given, at which time of necessity the particulars of the required machine would be furnished. While, according to the letter of January 27, 1949, several of the engines for which the respondent claimed to have orders from the packing companies and the Kyuquot Trollers were said to have been theretofore delivered. The actual orders, pursuant to which they were delivered, were not produced. What was done, however, in the case of the British Columbia Packers Limited is made clear from two written orders from this company for the delivery of Chrysler engines which were sent to the respondent by their purchasing agents, Mills and Packers Limited, on January 25, and in the case of Nelson Brothers Fisheries Limited by their written order for one Chrysler engine date February 9, 1949, addressed to the respondent. Indeed McLeod, while being cross-examined, after referring to the letters from the four packing companies which, he said, had been sent to Ottawa to obtain import permits and being asked if that was all that he had said replied:—"In some cases we had an order as well and it was also attached to the application along with that letter of essentiality," the latter expression referring to letters of the nature obtained from the fishing companies.

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The learned trial judge attached importance to the fact that Cunnings signed the letter of January 27, 1949, written by the respondent, saying in part:—

> That was the time to stipulate for the production of confirmatory evidence of the orders. He signed without reservation or stipulation.

The document itself makes it clear that Cunnings' signature at the bottom of the letter in question was merely to acknowledge its receipt and I find nothing in the evidence to suggest that he signed for any other purpose. A further passage from the reasons for judgment states that the learned trial judge was completely satisfied that the present appellant knew perfectly well the practice which prevailed as between the fishing companies and importers and that "it substantially knew the nature of the documents which the plaintiff was treating as orders." As to this, McLeod had said that Proctor was aware of the procedure to be followed in obtaining import permits, and again that Proctor "had watched me for months obtaining these things (permits)." As to this, the *Emergency Exchange Conservation Act of 1948* had only been proclaimed in April of that year and there is no evidence of any practice which prevailed in regard to obtaining these permits as between the fishing companies and importers, or as to how they had been obtained by any importer other than the respondent. Proctor was an employee of the Chrysler Corporation and not, so far as the evidence shows, connected in any manner with the appellant, though he was familiar with its business dealings with his own employers, and even had Proctor been aware of the terms of the so-called letters of essentiality obtained from the fishing companies (and there is no evidence that he was so aware) it could not, in my opinion, affect the obligation of the appellant under the agreement of January 26.

The learned trial judge further accepted the evidence of McLeod and the respondent's other witnesses where they differed from those called on behalf of the appellant. The appellant had by its counterclaim asked for the rectification of the agreement on the ground that the letters did not express the terms agreed upon and that it was intended that the obligation of the appellant was simply "to fulfil bona fide and enforceable orders." Some evidence was given for the appellant that some such expressions had

been used in the course of the negotiations and this was rejected. Apart from the learned judge's finding, which was fatal to the claim for rectification, I am unable to appreciate the necessity for any such rectification. The word "orders" without more would import that they were orders given in good faith. Except as the question of credibility affected this issue, the decision of the matter did not depend upon the weight to be assigned to the evidence: the question was one of the construction of the language contained in a writing.

The parties to this transaction were experienced business men who after negotiations resulting in an agreement between them evidenced that agreement by the letter of January 26, 1949. Their intention is to be gathered from what I regard as the clear and unambiguous terms of that document. The obligation of the appellant was not to supply a defined number of engines but rather the engines required to complete the orders which the respondent claimed to have. The list given by the respondents to the appellant on January 27 did not contain, so far as the evidence shows, the names of any persons who had given orders for engines to the respondent. In my opinion, no breach of the agreement by the appellant has been shown.

I would allow this appeal with costs throughout and direct that the action be dismissed. The cross-appeal should be dismissed with costs.

Appeal allowed and cross-appeal dismissed, both with costs.

Solicitors for the appellant: *Bull, Housser, Tupper, Ray, Guy & Merritt.*

Solicitors for the respondent: *Campney, Owen, Murphy & Owen.*