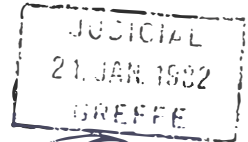


ROYAL COURT (INFERIOR NUMBER)

Before: Sir Frank Breaut, Bailiff  
Jurat J.H. Vint.



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Between  
Jersey Tools and Fastenings Limited, Plaintiff  
and  
Unipat Engineering Limited, Defendant  
(by original action)  
AND  
Unipat Engineering Limited, Plaintiff  
and  
Jersey Tools and Fastenings Limited, Defendant  
(by counter claim.)

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Advocate P. <sup>d&c</sup> Mourant for Jersey Tools and  
Fastenings Limited  
Advocate G. Le V. Fiott for Unipat Engineering Limited

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We will refer throughout to Jersey Tools and Fastenings Limited as "the plaintiff" and to Unipat Engineering Limited as "the defendant".

In the second half of 1976 the plaintiff asked the defendant to make sample cases from a case which it supplied. Having made sample cases in soft aluminium which were acceptable, the plaintiff then instructed the defendant to manufacture 300 similar cases from aluminium alloy supplied by the plaintiff. The defendant did so. The cases were required for use in garages to hold power-flush machines. It was necessary that the front of the cases should be flat, both in order that they could fulfil their functional purpose and also in order that they could be silk screen printed to an acceptable quality. The plaintiff refused to accept the production cases on the ground that their fronts were not sufficiently flat to fulfil the above purposes.

The plaintiff now claims the sum of £1,134.31 being the cost of the aluminium alloy supplied to the defendant by the plaintiff for the manufacture of the production cases.

The defendant denies being indebted to the plaintiff, and alleges that the plaintiff refused without good reason to accept

delivery /

delivery of the production cases and pay for them. It therefore counter-claims as follows:-

To production of 300 cases at £4 each	£1,200
To tooling for 700 cases	490
To carrying out experimental work as instructed by the plaintiff to investigate the viability of reducing a slight convex bow in the shape of the cases.	<u>606.75</u>
	<u>£2,296.75</u>

In its Answer to the counter-claim, the plaintiff denied any liability. The production cases did not comply with the plan submitted to the defendant nor with the sample cases supplied by the defendant to the plaintiff prior to the contract. The convex bow was not slight, and was caused by defects in manufacture by the defendant and was not due to the specification of the material supplied by the plaintiff. Because the production cases did not comply with the samples the plaintiff's customers refused to accept the production cases. The plaintiff was therefore entitled to refuse to accept delivery of them and to pay for them. Moreover, the plaintiff never agreed to pay any tooling charge.

In reply to the above Answer, the defendant stated that whereas the samples were made in soft aluminium the production cases were made in aluminium alloy, which was supplied by the plaintiff for the purpose as being the only material available. The defendant conceded that the production cases were not as flat as the sample cases, but claimed that the increased bowing was entirely caused by the different material specification, and in no way due to any defect in the process of manufacture, which was the same as that used for the samples. The plan provided by the plaintiff showed no standards of tolerance requirements. If the production cases were to meet special requirements, the defendant should have been informed of these, and a raised issue drawing indicating the flatness tolerance should have been provided by the plaintiff. The bowing of the production cases was brought to the attention of the defendant only when difficulty was alleged to have occurred with the silk screen printing of them, and the defendant was then informed that this was the only / ...

the only problem and if it could be overcome the cases would be acceptable. Finally, it was claimed that the plaintiff had agreed to pay the tooling charge.

By consent, the issue before us is whether the plaintiff had good cause to refuse to accept delivery and to pay for the 300 aluminium alloy cases manufactured by the defendant to the order of the plaintiff.

In the second half of 1976, Mr. M.F. Hill-Smith, then Managing Director of the plaintiff, received an enquiry from Wynn's Belgium to supply a quantity of Wynn's "Power Flush" machines. These machines are attached to a wall in a garage and used for the maintenance of cooling systems of motor vehicles. The machinery is fitted inside a case and a handle or lever is fitted to the front of the case, which is silk screen printed. Mr. Hill-Smith sought a supplier in Jersey which could manufacture a quantity of the required cases, into which the plaintiff would then assemble the machinery.

Mr. Hill-Smith approached the defendant, which manufactured three proto-type riveted cases in soft aluminium (obtained from B.G. Romeril & Co., Ltd., Jersey) from a sample which he supplied. Later, he handed to the defendant another sample case (a Wynn's case made in America, Case A) and the defendant manufactured three further proto-type cases (which included Case B) again in soft aluminium, but this time instead of being riveted the cases were welded with six welds. The six weld method was suggested by the defendant as being more economical of the material.

Mr. Hill-Smith sent Case B (one of the proto-types) to his customer, Wynns of Belgium, where it was approved by Mr. Vandergeeten, the Manufacturing Manager. He therefore supplied the defendant with a plan or drawing, which was later modified by a second plan, and asked the defendant to provide a quotation based on an order for one

thousand cases/ ...

thousand cases. The defendant prepared a quotation which comprised a tooling charge and a price per case (which included £2 for material). Negotiations took place and because Mr. Hill-Smith wanted the cost of manufacture kept as low as possible, the defendant suggested that he should supply the material, and the cost of each case would then be reduced to £4 for labour only (in addition to the original tooling charge). Mr. Hill-Smith agreed to this, and he gave the defendant an order to manufacture three hundred cases from the material to be supplied by him.

Mr. Hill-Smith ordered the aluminium from Henry Righton & Co. Limited, London. What was delivered direct to the defendant by Righton's were eighty-eight 8 x 4 16 gauge aluminium/alloy sheets, some of the sheets being NS3 grade and some being NS4 grade. The size and thickness of the sheets were as used for the manufacture of the proto-types, but it is not in dispute that instead of being soft aluminium, as used for the proto-types, the new material was harder, and moreover was in two grades, although the defendant alleged that there were at least three grades.

Mr. Hill-Smith said in evidence that the defendant told him that it required eighty-eight sheets of 16 gauge weldable aluminium sheets. He telephoned the order to Rightons who said that they could supply some sheets of grade NS3 and some of NS4. The sheets to be supplied were of aluminium/alloy, and although the defendant had not asked for alloy he did not think that this mattered because in the Rightons' booklet the aluminium/alloy sheets were described as "weldable". He therefore ordered the sheets, which were delivered direct to the defendant.

Mr. G.D.M. Arnold, a director of the defendant, said in evidence that he told Mr. Hill-Smith to order the same aluminium as had been used for the proto-type cases. That was soft or pure aluminium, as opposed to aluminium/alloy, but Mr. Arnold did not mention this to Mr. Hill-Smith because he did not know the specification of the previous material. He just assumed that Mr. Hill-Smith, who had

Case B in his possession, would order the same material, whatever it was.

The sheets were delivered in three batches, 52 sheets of NS4 aluminium/alloy on 31st August, 1976, eight sheets of NS4 on 7th September, and the rest of NS3 and NS4 on 30th September. Mr. Hill-Smith wanted the first three production cases urgently to display at the Paris Motor Show and so on delivery of the first batch the defendant began cutting up the sheets with a power guillotine. When it came to pressing and folding and punching holes in the cut up sheets Mr. Arnold and his welders noticed that the material was not soft aluminium, that it was harder and that there were at least three different grades, each having a different degree of hardness. Mr. Arnold had not previously realised that the sheets were not soft aluminium because it is apparently impossible to tell just by looking at the material, the invoice note was illegible, and in any case he had been expecting soft aluminium and he therefore assumed that that was what had been delivered.

Mr. Hill Smith visited the defendant's premises on a Friday evening in October to collect the first three cases which he needed urgently to take to the Paris Motor Show, and he was then told that the material was different, consisted of at least three different grades and was harder than soft aluminium. He agreed that he replied: "You have got to take what you can get these days" or words to that effect. He was not unduly disturbed, because the defendant did not say that the material was unsuitable for manufacturing cases similar to Case B, which he had previously accepted, and he therefore assumed that the production cases would be the same.

Mr. Hill-Smith went on to tell us that when he collected the first three production cases on the Friday evening, he did not at once examine them and so did not notice that the front of the cases was bowed. He had them bead blasted that night, and next day (Saturday) he took them to Mr. Proctor, of Le Brocq & Borny for

silk screen /

silk screen printing. Mr. Proctor had difficulty in printing the cases because of the bowing, and Mr. Hill-Smith then realised that the cases might not be acceptable because of the bowing and the consequent difficulty of silk screen printing them satisfactorily. He realised that the bowing could cause a further problem when he assembled the machinery inside one of the cases and the outside handle touched the front of the case. Moreover, the machinery inside seemed under stress.

He then had reservations about the cases, which differed from Case B in their degree of bowing, but he needed three cases for the Paris Motor Show and he hoped that they would prove acceptable to his customer and so he decided to travel with the cases to Paris on the Sunday as planned in time for the opening of the two day Show on the Monday. After the Show he travelled to Belgium where he left the three cases with Mr. Vandergeeten for his approval, and then returned to Jersey. A few days after his return to Jersey he told the defendant that there had been a problem silk-screening the cases, but at that time he still hoped that Mr. Vandergeeten would accept them. A week or so after he had first collected the cases from the defendant he received a letter from Mr. Vandergeeten to say that the cases were not acceptable because of the bowing, and he so informed the defendant.

Much time was then spent by the defendant in attempting to flatten the remaining production cases, Mr. Hill-Smith having said that he would accept the cases if they could be flattened. Attempts to flatten the cases were not successful, because the effect was to produce ripples and a wavy surface. Two such cases were sent to Belgium to see if they were acceptable, but they were rejected. Le Brocq & Borny could not silk screen print them to a satisfactory standard because they were not flat, and although Mr. Kennington claimed that he could have them silk screen printed satisfactorily, the attempts to do so by Mr. Dix were not up to standard.

Eventually / ...

Eventually, having secured an extension of his delivery date, Mr. Hill-Smith ordered cases from a Guernsey firm and these were accepted between November and January. He had expected to receive another order and indeed invited the defendant to tender for the manufacture of further cases, but in fact he never received a further order, the reason being, he believed, that delivery of the first order was late.

Mr. Hill-Smith accepted that he knew on the Saturday, the day after collecting the three cases, that they were not flat and therefore in his opinion unsatisfactory, and so he was asked why he had not returned them to the defendant with a complaint, and why he had knowingly allowed the defendant to continue producing the rest of the order. He gave the following reasons: first, he was extremely busy that week-end; secondly, he did not think that it would be possible to contact anyone at the defendant's workshop over the week-end; thirdly, everything was booked for the Motor Show, his journey to Paris, his equipment, his space at the Show and he thought it better to take the three cases, although they were not satisfactory, rather than cancel the whole expedition, which would have been his only alternative, because he could not have obtained similar cases from any other source at such short notice; and fourthly and most important, he hoped to be able to persuade his customer to accept the cases as being satisfactory. He agreed that he could have taken the three cases but told the defendant to stop production of the rest, but in that case, if the customer had accepted the three cases, the remainder would not have been produced in time to meet his dead-line, which was already overdue

Mr. F.W. Kennington, a director of the defendant, agreed that the production cases were not as flat as Case B, but knowing the purpose for which they were required he thought that they were

sufficiently / ...

sufficiently and reasonably flat for that purpose. The difference in flatness was due to the harder material. It was not possible to tell that the material was harder until after the defendant had cut up all the aluminium/alloy sheets and then began to punch holes in the sheets and fold them into cases. He agreed that it might have been better for the defendant to have checked the specification of the material first before cutting up the sheets, and he agreed that the defendant could have made a sample case.

As soon as the defendant began punching the holes in the cut up sheets and folding them it knew that the effect of the harder material would be to cause more bowing, but Mr. Hill-Smith was not informed because the bowing was likely to be slight, Mr. Hill-Smith was at the Paris Motor Show and could not be contacted, and in any case it was thought that the cases would be reasonably satisfactory for their purpose. Mr. Kennington agreed that he knew that Mr. Hill-Smith wanted a flat surface, even though the drawing showed no tolerances of flatness, but if Mr. Hill-Smith had wanted a flatness to a particular tolerance he should have specified it, and the defendant would then have queried whether it could have made cases to that specification and for the contract sum quoted.

Subsequently, the first complaint which Mr. Hill-Smith had made was that the cases could not be silk screened properly because they were not flat enough. The defendant tried to flatten the cases, but it could not achieve the flatness of Case B. However, the defendant asked Mr. A. Dix, of Henleys, to silk screen print one of the cases as an experiment and Mr. Dix did so, and although the result was not very satisfactory because he did not use a jig, he claimed that he could do a professional job to an acceptable standard. Mr. Kennington therefore considered that he had proved that the cases could be silk screen printed satisfactorily. However, Mr. Hill-Smith was not satisfied and then raised the further complaint that the bowing was unacceptable from a cosmetic point of view.

Mr. A. Dix testified that he could have silk screened printed the cases professionally to an acceptable standard if he had been asked to do the job, in which case he would have made a special jig.  
However, / ...



However, Mr. G. Proctor, of Le Brocq & Bony, gave evidence that he had tried to silk screen print several of the cases, but because of their dome-shaped surface it was impossible to achieve a satisfactory result. As one pressed one part of the front of the case down another part came up. It was suggested to him that he was not interested in doing the job and so did not make a real effort, but he denied this.

Mr. M. Salmon, Managing Director of Melbourne Garages, St. John, said that he had a Wynn's Power Flush case in his garage. He agreed that Wynn's required a high standard, just as Rolls-Royce required a high standard for the dash panels in their motor-cars, and that his case was manufactured to a high standard and was quite presentable. However, he regarded the case as purely functional and he did not think that a bow of  $\frac{1}{4}$ " would affect the functioning of the case and machinery inside.

On the other hand, Mr. Vandergeeten, who had accepted Case B and rejected the production cases sent to him for acceptance, emphasised that his firm were not prepared to have mediocre products bearing its name. If a case was bowed the handles, valves and pipes would not be properly in line and the parts inside would not fit as they should. Bowing meant that the metal was under stress and that would lead to difficulties in use. Proper silk screen printing was also important. The cases submitted to him had not been printed to a good standard. He had rejected the cases on the grounds that they were not flat, the metal was under stress and the printing was not up to standard.

Counsel for the plaintiff submitted that this was a case of sale by sample. The defendant obtained the order because Mr. Hill-Smith had found the proto-type Case B to be acceptable, and, in particular, to be flat in layman's terms. It was true that a drawing was later handed to the defendant, but although it showed no tolerances it did show, from a layman's point of view, a flat surface. The production cases were bowed to such an extent as not to be the same as Case B. The plaintiff never agreed to a different standard of flatness from that of the sample. The plaintiff did agree to two changes, a six weld manufacturing process and to the use of harder material. These two

factors were probably the cause of the aggravated bowing in the production cases. However, the plaintiff did not know that these two factors would have those consequences. The defendant knew, or should have known, and because it was the manufacturer it had a duty to inform the plaintiff, but it failed to do so. It therefore cannot now claim that the plaintiff agreed to vary the terms of the original contract, which was to manufacture cases with a degree of flatness similar to that of Case B.

Counsel for the defendant submitted that although the original basis of the contract may have been a sale by sample (Case B), that was later varied by the plaintiff in two respects.

First, the plaintiff produced a drawing. The drawing showed no specific tolerances in flatness, and therefore the defendant was under no obligation to make the cases as flat as Case B. The production cases complied with the drawing as regards flatness. The defendant was not concerned to know the uses to which the cases were to be put, provided that they complied with the drawing. If the plaintiff regarded the degree of flatness as important, it should have been more specific as to the degree of flatness required.

Secondly, the plaintiff provided different material which, combined with the six weld process, was the cause of the bowing in the production cases. The defendant did inform Mr. Hill-Smith that the material was of different grades and harder, but he told the defendant to continue production. He did not query the consequences of the use of this harder material. Moreover, he took possession of the first three production cases. The defendant manufactured the cases to correspond as closely as possible to the sample, having regard to the different material, and the plaintiff must accept the consequences.

The Court now considers the arguments of counsel in the light of the evidence.

We begin by saying that the defendant was awarded the production order because the plaintiff was satisfied with the proto-type Case B, which in turn was based on the sample American case provided by the plaintiff, Mr. Kennington conceded this in his evidence. If no other event had intervened, therefore, the Court would have had no hesitation in saying that this was a clear case of sale by sample, the terms of the contract being that the

defendant was to produce three hundred cases similar to the sample, namely, Case B.

We will return to this matter shortly, but we must consider first the question whether the production cases were substantially similar to the sample. We are satisfied that in the essential matter of flatness of the front of the cases they were not. We accept that in engineering terms it is difficult, if not impossible, to make a product which is absolutely flat, but Mr. Kennington did agree that in layman's terms Case B was flat. In fact the bowing on the proto-type cases varied between  $1/16$ " (Case B), and  $1/8$ ", and so they were not completely flat, but they were flat enough to be acceptable to the plaintiff, whereas the average bowing on the production cases was  $1/4$ ", that is to say, four times as much as Case B.

We have considered the effect of this difference in relation to the purpose for which the cases were required. Mr. Kennington thought that the cases were reasonably satisfactory and acceptable for the job which they had to do. Mr. Salmon thought that the bowing would not impede the proper functioning of the cases, but that opinion was not based on actual experience, because we are entitled to assume that his Wynn's case was as flat as Case B. We prefer the evidence of Mr. Hill-Smith and, in particular, that of Mr. Vandergeeten, who explained very clearly why he had rejected the cases submitted to him for acceptance. As regards the alleged difficulty of silk screen printing the cases to a good standard, we believe that Mr. Proctor made a number of genuine attempts to achieve that standard, and was unable to do so because of the degree of bowing. We are therefore satisfied on the evidence that the greatly increased degree of bowing was such as to cause the production cases to be essentially dissimilar to Case B, which was the sample upon which the original contract was based.

Having found that the production cases were not as per sample, we now examine the question of the extent to which the original contract was varied, and we consider first the drawing. We accept that, to the extent that the drawing was in conflict with the American sample upon which Case B was based, the drawing was a variation of the contract. The drawing did not provide any tolerances of flatness of the front of the case, and therefore did not indicate how flat the production cases were to be. Mr. P.F. Clayton, a

qualified / ...

qualified engineer, who was called as an expert witness by the defendant, said that if a designer wanted a product manufactured to a certain standard of accuracy he should state that on his drawing. As the drawing contained no tolerance, the defendant was entitled to assume that some tolerance as to flatness was permissible, and he expressed the view that the production cases were sufficiently flat to comply with the drawing. In cross-examination, however, Mr. Clayton agreed that if he, as a manufacturer, was shown both a sample which was flat and a drawing, and if the two referred to each other, then he would realise that a case with a 1/4" bow was not what was required. He added that if the manufacturer was in doubt he should ask the designer how flat the case should be.

Mr. Kennington conceded that he knew that the compiler of the drawing, namely Mr. Hill-Smith, wanted a flat surface, even though no tolerances of flatness were given on the drawing. We think that he was right to concede this. The American sample (on which Case B was based), was, in layman's terms, flat; Case B was flat in the same sense; the decision by the plaintiff to award an order for the production of a quantity of cases was made on the basis of the acceptable Case B; the drawing gave various measurements which were necessary for the manufacture of the production cases, but was silent on the degree of flatness; and the fact that it was silent on that feature meant that it did not conflict with the American sample on which Case B was based. We are satisfied, therefore, that it was the duty of the defendant, under the terms of the contract, to manufacture cases as flat as Case B, and we are also satisfied that that was the intention of the defendant when it began production. Moreover, we also think that if the defendant had been in any doubt as to the flatness required, it would have queried the matter with the plaintiff; it did not. We therefore find that the drawing did not constitute a variation of the degree of flatness required by the American sample, and which formed the basis of, and was achieved by, Case B. The original contract was therefore not varied by the drawing.

We come now to the questions posed by the use of the six weld process and also of the aluminium/alloy material, which was harder, and more varied in specification, than the soft aluminium of which Case B was made. It was

conceded / ...

conceded on behalf of the plaintiff that Mr. Hill-Smith agreed to the variation of the original contract in two respects; firstly, by agreeing, at the suggestion of the defendant, to the use of the six weld process and, secondly, by supplying the aluminium/alloy material, notwithstanding that he was not aware that it was a different material from that used to make Case B.

It was not in dispute that it was the combination of this process and of the different material which caused the excessive bowing in the production cases, and it appears from the evidence that, of these two causes, it was the different and harder material which was the more substantial cause of that bowing. The issue before the Court is therefore whether the plaintiff, by agreeing to the variation of the original contract in these two respects, must be deemed to have agreed also to the consequences of those two variations, that is to say, to the excessive bowing of the production cases, which were therefore, as we have found, essentially dissimilar to Case B. It appears to us that the use of the six weld process would not have materially mattered were it not for the use of the harder material, and it is therefore to that factor that we give our attention.

We begin by saying that although Mr. Hill-Smith had some technical qualification, that does not in our view prevent the application to this case of the general principle that where a designer instructs an engineering firm which has expertise in the matter to manufacture a product to a particular design he is entitled to rely upon that firm to advise him if any event occurs in the process of manufacture which may prevent the manufacture of that product to that design. We think that the defendant failed in that duty.

It is true that it was the plaintiff which caused to be supplied aluminium/alloy and not soft aluminium. It does not appear that Mr. Hill-Smith was told to obtain a particular specification of material, and it seems that he relied on the advice of Rightons. He did not know that the material which he ordered could not be used to produce the product to the design that he required and had ordered.

The defendant had the opportunity to check the specification of the material when it arrived. No such check was made of the first batch before it was all cut up. Mr. Kennington agreed that perhaps it would have been wise to

have / ...

have checked first that it was the correct material, and in our view, because it was not possible to identify the specification visually, the defendant should have done so. The defendant, as the specialist, was at fault in assuming that the material was of the correct specification, the more so because it had not given the exact specification required to Mr. Hill-Smith.

We accept that, in the absence of such a check, the fact that the material was different could not have been known until the process of punching, pressing and folding began. However, Mr. Kennington did agree that a sample case could have been made before the whole of the material was cut up. We think that this would have been the correct course.

For the above reasons we do not consider that the original contract was varied by the plaintiff having agreed to the use of the six weld process and having supplied aluminium/alloy instead of soft or pure aluminium.

The defendant further agreed, however, that even if the production cases were not as per the sample the plaintiff must nevertheless be held to have accepted any variation from the sample by his action in taking three production cases on the Friday night and telling the defendant to go ahead with the production of the remainder of the order. It is true that Mr. Hill-Smith was informed that the material was different (although not the consequences of such difference), that he did reply that nowadays one had to take what one could get, that he did take away three cases and that he did tell the defendant to proceed with the production.

We must mention first that this argument is tantamount to saying that the plaintiff accepted delivery of at least some of the cases. That was not alleged in the pleadings, where the complaint of the defendant was that the plaintiff had refused to accept delivery. Nevertheless we will deal with the argument, and on the evidence it can be dealt with in two ways.

In the first place, we accept the evidence of Mr. Hill-Smith that he did not examine the three cases before taking them away from the defendant's workshops. He had been told that the material from which they had been made was different, but he had not been alerted to the fact that the difference in the material might result in some bowing and that the defendant could not guarantee to produce cases with a similar degree of flatness to Case B.

We do not find it in any way strange, therefore, that he should have taken the three cases away without examining them. That was not an acceptance of the cases, because he had not examined them.

The proper principle is that where goods are delivered to a buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract, unless, of course, he has waived his right to examine the goods. There is no evidence that Mr. Hill-Smith expressly waived his right to examine the cases, but it might be argued that he impliedly did so by instructing the defendant to go ahead with the punching and folding of the remaining cases (the aluminium sheets had all been cut up by then). We do not think that that argument is valid. He had not examined the three cases at that time, and he gave the instructions to go ahead on the assumption that the three cases were as per sample (an assumption which we consider he was entitled to make) and because he needed the remaining cases quickly to meet his customer's dead-line.

He did have the opportunity to examine the cases on the Saturday and Sunday, and he then had his reservations about their suitability because they were not flat, with the resulting difficulties which he described. Notwithstanding those reservations, he did not inform the defendant but took the cases to the Paris Motor Show and then to Belgium for the approval of his customer. Did he thereby accept the cases?

We find assistance in section 35 of the Sale of Goods Act 1893. That Act does not, of course, apply to Jersey, but we think that its provisions are generally in conformity with the law of Jersey on the sale of goods. Section 35 provides -

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

This section is explained in Chitty on Contracts, Specific Contracts, 24th Edition, Chapter 11, paras. 4573 - 4576.

We do not consider that by taking the three cases to the Motor Show and then to Belgium Mr. Hill-Smith did any act which was inconsistent with the ownership of the defendant. He knew that the cases were not as per sample, he thought them unsatisfactory, but he hoped to be able to persuade his customer to accept them, in which case, of course, he would have accepted them.

We have considered whether it can be said that he retained the three cases after the lapse of a reasonable time without informing the defendant that he had rejected them, so as to constitute an acceptance of them. On the evidence some five days or so elapsed between his collecting the three cases and his first mention to the defendant that they were not altogether satisfactory. We understand his dilemma. The cases, as we have found, were not as per sample. We think that he had every right to assume that they would be. He had committed himself to a stand at the Motor Show and to the fulfilment of an order, the agreed dead-line of which had already passed. Notwithstanding the problems he had already experienced with the cases, he still hoped to persuade his customer to accept them, although they were not as per the sample (Case B) which he and his customer had originally accepted, and on the basis of which he had received the order from Wynn's of Belgium and had in turn given the order to the defendant. It is true that because he did not contact the defendant at once the production of the unsatisfactory cases continued from the aluminium sheets which had already been cut up, but as we have said, he had made all his arrangements, he had no other cases to take to Paris and he hoped that they would prove acceptable. In these special circumstances we do not find that the retention of the three cases for this period without informing the defendant that they were unsatisfactory amounted to an acceptance of them.

The argument of the defendant may be looked at in a second way. If the defendant had told Mr. Hill-Smith that the difference in the material might result in some bowing and that it could not guarantee to produce cases with a similar degree of flatness as Case B, then the reply of Mr. Hill-Smith that one had to take what one could get and that production should continue, and also the taking into his possession of three cases, might well have amounted to an acceptance of a possible variation of the standard of flatness. But the evidence does not suggest to us that he was ever alerted to that possibility.



We consider that the onus of alerting him rested on the defendant.

There appear to have been three possible reasons why the defendant did not do so. First, it may not have foreseen that bowing would result and there is some evidence of that. We appreciate it is often not possible to forecast how different materials will behave, but that is all the more reason, therefore, for the defendant to have taken the precautions which we have already mentioned. The burden must surely rest on the manufacturer and not the customer. Where the manufacturer is bound by contract to make a product to a certain standard or design, he will normally himself choose the correct material for the purpose. If he accepts material from the customer which he knows (or, as in this case, would have known if he had checked it first) is not the material he intended should be used for the manufacturing process, the burden is on him, as the expert, to alert the customer to the possibility that if he uses the material he may not be able to make a product which complies with the contract.

Secondly, as we understand Mr. Kennington's evidence, the defendant would have informed Mr. Hill-Smith earlier of the difficulty which the defendant was experiencing in making satisfactory cases, because of the harder material, but the defendant was unable to contact him. It is true that Mr. Hill-Smith was away for a few days at the Paris Motor Show and then in Belgium, but it is difficult for us to judge how persistent were the efforts made to contact him. We repeat that we can have some sympathy with the defendant's position, but we also reiterate our view that the defendant got itself into that position by its omission to take the sensible precautions to which we have already referred.

Thirdly, it appears from the evidence of Mr. Kennington that the defendant decided nevertheless to proceed with the production of the cases because it believed that they would be reasonably satisfactory for the plaintiff's requirements, and in the knowledge that the cases were required urgently. That was a risky assumption, which ignored the terms of the contract, which was to produce cases as flat as Case B. We again repeat that we appreciate the position of the defendant, but it was not for the defendant to make that sort of assumption, or, if it did, it ran the risk that the plaintiff would reject the cases as not complying with the terms of the

contract. As we have already said, we have considered the evidence of Mr. Vandergaeten and the evidence relating to the silk screen printing and we are quite satisfied that the production cases were not suitable for the purposes for which they were ordered. But the crux of the matter is that they did not, in our view, sufficiently conform to the standard of flatness of Case B.

For all the above reasons, we find on the issue before us that the plaintiff had good cause to refuse to accept delivery and to pay for the 300 aluminium/alloy cases manufactured by the defendant to the order of the plaintiff.

The other two issues in this case which were certified by the Judicial Greffier to be tried may now be agreed between the parties, but if they cannot be agreed the parties will have to return to Court.