

LEONARD v. PEPSICO, INC.

United States District Court, Southern District of New York

88 F. Supp. 2d 116 (1997)

WOOD, J.

This case arises out of a promotional campaign conducted by defendant, the producer and distributor of the soft drinks Pepsi and Diet Pepsi . . . The promotion, entitled "Pepsi Stuff," encouraged consumers to collect "Pepsi Points" from specially marked packages of Pepsi or Diet Pepsi and redeem these points for merchandise featuring the Pepsi logo . . . [p]laintiff saw the Pepsi Stuff commercial that he contends constituted an offer of a Harrier Jet

The commercial opens upon an idyllic, suburban morning, where the chirping of birds in sun-dappled trees welcomes a paperboy on his morning route. As the newspaper hits the stoop of a conventional two-story house, the tattoo of a military drum introduces the subtitle, "MONDAY 7:58 AM." The stirring strains of a martial air mark the appearance of a well-coiffed teenager preparing to leave for school, dressed in a shirt emblazoned with the Pepsi logo, a red-white-and-blue ball. While the teenager confidently preens, the military drumroll again sounds as the subtitle "T-SHIRT 75 PEPSI POINTS" scrolls across the screen. Bursting from his room, the teenager strides down the hallway wearing a leather jacket. The drumroll sounds again, as the subtitle "LEATHER JACKET 1450 PEPSI POINTS" appears. The teenager opens the door of his house and, unfazed by the glare of the early morning sunshine, puts on a pair of sunglasses. The drumroll then accompanies the subtitle "SHADES 175 PEPSI POINTS." A voiceover then intones, "Introducing the new Pepsi Stuff catalog," as the camera focuses on the cover of the catalog.

The scene then shifts to three young boys sitting in front of a high school building. The boy in the middle is intent on his Pepsi Stuff Catalog, while the boys on either side are each drinking Pepsi. The three boys gaze in awe at an object rushing overhead, as the military march builds to a crescendo. The Harrier Jet is not yet visible, but the observer senses the presence of a mighty plane as the extreme winds generated by its flight create a paper maelstrom in a classroom devoted to an otherwise dull physics lesson. Finally, the Harrier Jet swings into view and lands by the side of the school building, next to a bicycle rack. Several students run for cover, and the velocity of the wind strips one hapless faculty member down to his underwear. While the faculty member is being deprived of his dignity, the voiceover announces: "Now the more Pepsi you drink, the more great stuff you're gonna get."

The teenager opens the cockpit of the fighter and can be seen, helmetless, holding a Pepsi. [Looking very pleased with himself,] the teenager exclaims, "Sure beats the bus," and chortles. The military drumroll sounds a final time, as the following words appear: "HARRIER FIGHTER 7,000,000 PEPSI POINTS." A few seconds later, the following appears in more stylized script: "Drink Pepsi — Get Stuff." With that message, the music and the commercial end with a triumphant flourish.

Inspired by this commercial, plaintiff set out to obtain a Harrier Jet. Plaintiff explains that he is "typical of the 'Pepsi Generation' . . . he is young, has an adventurous spirit, and the notion of obtaining a Harrier Jet appealed to him enormously." Plaintiff consulted the Pepsi Stuff Catalog The Catalog specifies the number of Pepsi Points required to obtain promotional merchandise. The Catalog includes an Order Form which lists, on one side, fifty-three items of Pepsi Stuff merchandise redeemable for Pepsi Points. Conspicuously absent from the Order Form is any entry or description of a Harrier Jet. The amount of Pepsi Points required to obtain the listed merchandise ranges from 15 (for a "Jacket Tattoo" ("Sew 'em on your jacket, not your arm.")) to 3300 (for a "Fila Mountain Bike" ("Rugged. All-terrain. Exclusively for Pepsi.")). It should be noted that plaintiff objects to the implication that because an item was not shown in the Catalog, it was unavailable.

The rear foldout pages of the Catalog contain directions for redeeming Pepsi Points for merchandise The Catalog notes that in the event that a consumer lacks enough Pepsi Points to obtain a desired item, additional Pepsi Points may be purchased for ten cents each; however, at least fifteen original Pepsi Points must accompany each order.

Although plaintiff initially set out to collect 7,000,000 Pepsi Points by consuming Pepsi products, it soon became clear to him that he "would not be able to buy (let alone drink) enough Pepsi to collect the necessary Pepsi Points fast enough." Reevaluating his strategy, plaintiff "focused for the first time on the packaging materials in the Pepsi Stuff promotion, and realized that buying Pepsi Points would be a more promising option. Through acquaintances, plaintiff ultimately raised about \$700,000.

On or about March 27, 1996, plaintiff submitted an Order Form, fifteen original Pepsi Points, and a check for \$700,008.50 At the bottom of the Order Form, plaintiff wrote in "1 Harrier Jet" in the "Item" column and "7,000,000" in the "Total Points" column. In a letter accompanying his submission, plaintiff stated that the check was to purchase additional Pepsi Points "expressly for obtaining a new Harrier jet as advertised in your Pepsi Stuff commercial."

On or about May 7, 1996, defendant's fulfillment house rejected plaintiff's submission and returned the check, explaining that:

"The item that you have requested is not part of the Pepsi Stuff collection. It is not included in the catalogue or on the order form, and only catalogue merchandise can be redeemed under this program. The Harrier jet in the Pepsi commercial is fanciful and is simply included to create a humorous and entertaining ad. We apologize for any misunderstanding or confusion that you may have experienced and are enclosing some free product coupons for your use."

[Subsequently], in a letter dated May 30, 1996, BBDO Vice President Raymond E. McGovern, Jr., explained to plaintiff that:

I find it hard to believe that you are of the opinion that the Pepsi Stuff commercial really offers a new Harrier Jet. The use of the Jet was clearly a joke that was meant to make the Commercial more humorous

and entertaining. In my opinion, no reasonable person would agree with your analysis of the Commercial

Plaintiff's understanding of the commercial as an offer must . . . be rejected because the Court finds that no objective person could reasonably have concluded that the commercial actually offered consumers a Harrier Jet.

In evaluating the commercial, the Court must not consider defendant's subjective intent in making the commercial, or plaintiff's subjective view of what the commercial offered, but what an objective, reasonable person would have understood the commercial to convey. See *Kay-R Elec. Corp. v. Stone & Weber Constr. Co.*, 23 F.3d 55, 57 (2d Cir. 1994) ("We are not concerned with what was going through the heads of the parties at the time [of the alleged contract]. Rather, we are talking about the objective principles of contract law."); *Mesaros*, 845 F.2d at 1581 ("A basic rule of contracts holds that whether an offer has been made depends on the objective reasonableness of the alleged offeree's belief that the advertisement or solicitation was intended as an offer.")

If it is clear that an offer was not serious, then no offer has been made:

An obvious joke, of course, would not give rise to a contract. See, e.g., *Graves v. Northern N.Y. Pub. Co.*, 22 N.Y.S.2d 537 (App. Div.1940) (dismissing claim to offer of \$1000, which appeared in the "joke column" of the newspaper, to any person who could provide a commonly available phone number). On the other hand, if there is no indication that the offer is "evidently in jest," and that an objective, reasonable person would find that the offer was serious, then there may be a valid offer. See *Barnes*, 549 P.2d at 1155 ("If the jest is not apparent and a reasonable hearer would believe that an offer was being made, then the speaker risks the formation of a contract which was not intended."); see also *Lucy v. Zehmer*, 196 Va. 493, 84 S.E.2d 516, 518, 520 (Va. 1954) (ordering specific performance of a contract to purchase a farm despite defendant's protestation that the transaction was done in jest as "just a bunch of two doggoned drunks bluffing").

Plaintiff's insistence that the commercial appears to be a serious offer requires the Court to explain why the commercial is funny The commercial is the embodiment of what defendant appropriately characterizes as "zany humor."

First, the commercial suggests, as commercials often do, that use of the advertised product will transform what, for most youth, can be a fairly routine and ordinary experience. The military tattoo and stirring martial music, as well as the use of subtitles in a Courier font that scroll terse messages across the screen, such as "MONDAY 7:58 AM," evoke military and espionage thrillers. The implication of the commercial is that Pepsi Stuff merchandise will inject drama and moment into hitherto unexceptional lives. The commercial in this case thus makes the exaggerated claims similar to those of many television advertisements: that by consuming the featured clothing, car, beer, or potato chips, one will become attractive, stylish, desirable, and admired by all. A reasonable viewer would understand such advertisements as mere puffery, not as statements of fact . . . and refrain from interpreting the promises of the commercial as being literally true.

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Second, the callow youth featured in the commercial is a highly improbable pilot, one who could barely be trusted with the keys to his parents' car, much less the prize aircraft of the United States Marine Corps. Rather than checking the fuel gauges on his aircraft, the teenager spends his precious preflight minutes preening. The youth's concern for his coiffure appears to extend to his flying without a helmet. Finally, the teenager's comment that flying a Harrier Jet to school "sure beats the bus" evinces an improbably insouciant attitude toward the relative difficulty and danger of piloting a fighter plane in a residential area, as opposed to taking public transportation.

Third, the notion of traveling to school in a Harrier Jet is an exaggerated adolescent fantasy. In this commercial, the fantasy is underscored by how the teenager's schoolmates gape in admiration, ignoring their physics lesson. The force of the wind generated by the Harrier Jet blows off one teacher's clothes, literally defrocking an authority figure. As if to emphasize the fantastic quality of having a Harrier Jet arrive at school, the Jet lands next to a plebeian hike rack. This fantasy is, of course, extremely unrealistic. No school would provide landing space for a student's fighter jet, or condone the disruption the jet's use would cause.

Fourth, the primary mission of a Harrier Jet, according to the United States Marine Corps, is to "attack and destroy surface targets under day and night visual conditions." United States Marine Corps, Factfile: AV-8B Harrier II In light of the Harrier Jet's well-documented function in attacking and destroying surface and air targets, armed reconnaissance and air interdiction, and offensive and defensive anti-aircraft warfare, depiction of such a jet as a way to get to school in the morning is clearly not serious even if, as plaintiff contends, the jet is capable of being acquired "in a form that eliminates [its] potential for military use."

Fifth, the number of Pepsi Points the commercial mentions as required to "purchase" the jet is 7,000,000. To amass that number of points, one would have to drink 7,000,000 Pepsis (or roughly 190 Pepsis a day for the next hundred years — an unlikely possibility), or one would have to purchase approximately \$700,000 worth of Pepsi Points. The cost of a Harrier Jet is roughly \$23 million dollars, a fact of which plaintiff was aware when he set out to gather the amount he believed necessary to accept the alleged offer. Even if an objective, reasonable person were not aware of this fact, he would conclude that purchasing a fighter plane for \$700,000 is a deal too good to be true.

Plaintiff argues that a reasonable, objective person would have understood the commercial to make a serious offer of a Harrier Jet because there was "absolutely no distinction in the manner" in which the items in the commercial were presented In light of the obvious absurdity of the commercial, the Court rejects plaintiff's argument that the commercial was not clearly in jest.

ATLAS CORPORATION v. UNITED STATES
 United States Court of Appeal, Federal Circuit
 895 F.2d 745 (1990)

BENNETT, Senior Circuit Judge.

This appeal is from the final judgment of the Claims Court (Merow, J.) granting the government's motion for judgment on the pleadings and dismissing the complaints. *15 Cl. Ct. 681 (1988)*. We affirm.

BACKGROUND

The plaintiffs are corporations, or successors to corporations, which entered into contracts with the government for the production of uranium or thorium. Following the Second World War, uranium production in the United States was practically nonexistent, and the military was dependent on foreign sources. In the late 1940's, the Atomic Energy Commission (AEC) began a major program to encourage the domestic production of uranium and alternative sources of atomic energy, such as thorium. The AEC encouraged private companies to enter the uranium milling industry by contracting with them for the production of uranium. The contracts contained pricing provisions designed so that the private companies could recover their costs, plus a reasonable profit. In addition, the government funded substantial research and development efforts to improve uranium milling technology, and it provided substantial technical services to the industry. The Atomic Energy Acts of 1946 and 1954 each provided that the federal government could be the sole owner of uranium products. Through statutes and regulations, licensing, administrative oversight, and its contracts, the federal government maintained pervasive control over all aspects of uranium and thorium procurement, production, sales and disposal, starting in the late 1940's and continuing through the 1950's.

The plaintiffs were awarded uranium production contracts by the AEC or have acquired or merged with the original contractor and have succeeded to the interests and obligations of the original contractor. Plaintiff Kerr-McGee is the successor in interest to thorium production contracts. For the purposes of this litigation, the parties have not alleged any significant differences between uranium and thorium production. The contracts between the government and the plaintiffs were amended several times and spanned the period from 1950 to 1970. Beginning in 1964, the uranium producers were permitted to sell their products to private parties without government permission.

Uranium and thorium milling operations produce a sand-like residue called "tailings." Typical domestic uranium ore usually contains only about two to eight pounds of uranium per ton of ore, so the residual tailings may be quite extensive. The tailings are ordinarily stored in large tailings piles, usually located on the land adjacent to the mills. Tailings from the production of uranium pursuant to the contracts with the government have been commingled with the tailings from the production of uranium for private parties.

While nearly all of the uranium is extracted from the ore, the tailings continue to emit residual low-level radiation, primarily in the form of radon

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Because of the tailings, Congress (UMTRCA), Pub. L. No. 103-161, 104 Stat. 4088, 42 U.S.C. §§ 2022, 2023, the federal government's authorization of all in-kind contributions, 42 U.S.C. §§ 7901-7906, the Environmental Protection Agency's authorization of mill site remediation, 42 U.S.C. §§ 2022, 2113. Liability for complying with the tailings piles, decontamination, and reclamation of the site. Regulatory Commission of the licensed mill. In addition, some gas.

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The plaintiffs sought reformation of the contracts other than Atlas Corporation's estate, and Plaintiff Nuclear included in the Fifth Amendment *ex post facto* law

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gas. According to the appellants, this fact was known to the parties to the contracts, but its significance was not fully understood at the time of the contracts. It was not until the late 1970's that the long-term potential health hazards associated with mill tailings and the radon emissions were widely recognized. To alleviate those hazards, costly measures are required to stabilize existing tailings piles. Such measures include seepage control, regarding the piles and covering them with clay and soil, and revegetating the piles or covering them with crushed rock.

Because of the potential health hazards associated with uranium mill tailings, Congress enacted the Uranium Mill Tailings Radiation Control Act (UMTRCA), Pub.L. No. 95-604, 92 Stat. 3021 (Nov. 8, 1978), codified at 42 U.S.C. §§ 2022, 2113, 2114, 7901-7942 (1982). Title I of the Act provides that the federal government has responsibility for the stabilization and decommissioning of all inactive mill sites which were not licensed on January 1, 1978. 42 U.S.C. §§ 7912-7919. Title II of the Act authorizes the Environmental Protection Agency to develop regulations for the stabilization and decommissioning of mill sites which remained active after January 1, 1978. 42 U.S.C. §§ 2022, 2113. Under title II of the UMTRCA, the licensees are responsible for complying with the federal regulations concerning stabilization of the mill tailings piles, decontamination and decommissioning of the mill plants, and reclamation of the plant site. 42 U.S.C. § 2113. The EPA and the Nuclear Regulatory Commission have issued regulations governing the stabilization of the licensed mill sites. 40 C.F.R. pt. 192 (1988); 10 C.F.R. pts. 40, 150 (1989). In addition, some states have enacted laws directed to the hazards of radon gas.

The plaintiffs held licenses on January 1, 1978, for active facilities. As a result of the UMTRCA and the regulations issued pursuant to that Act, and also possibly as a result of the plaintiffs' recognition of general obligations to conduct their business in a manner that does not expose the public to harm, the plaintiffs have undertaken costly measures to stabilize the tailings piles and to decontaminate and reclaim the uranium and thorium mill sites. In their complaints, the plaintiffs sought recovery of the costs associated with stabilization of the mill tailings that were generated from the uranium and thorium production under the completed contracts with the government.

The plaintiffs based their complaints on various theories. All of the plaintiffs sought reformation of the contracts due to mutual mistake. All of the plaintiffs other than Atlas alleged breach of express contract. Western Nuclear, Homestake, and Pathfinder alleged breach of an implied-in-fact contract. Western Nuclear included allegations of agency and that the UMTRCA is a compensable Fifth Amendment taking, violates the equal protection clause, and is an *ex post facto* law.

The government moved, pursuant to RUSCC 12(c) and 12(h), for judgment on the pleadings arguing that the plaintiffs had failed to state a claim for relief. The Claims Court granted the government's motion and dismissed the complaints, except for Western Nuclear's equal protection and *ex post facto* claims, which it transferred to the United States District Court in Colorado. All of the plaintiffs filed appeals. On appeal, Western Nuclear abandoned its agency claim.

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ISSUE

The issue in this appeal is whether the Claims Court erred in granting judgment on the pleadings and in dismissing the plaintiffs' reformation, breach of express contract, breach of implied-in-fact contract, and taking claims.

OPINION

We review Claims Court decisions for errors of law and clearly erroneous findings of fact. Because this case was before the Claims Court on the government's motion for judgment on the pleadings, each of the well-pled allegations in the complaints is assumed to be correct, and the court must indulge all reasonable inferences in favor of the plaintiffs.

I. *The Contract Claims*

The Claims Court held that the plaintiffs could not establish reformation or breach claims on the facts pled. The court referred to its limited contractual jurisdiction and stated that jurisdiction is conferred only where the government has agreed to be bound. It observed that it had no authority to write contracts, or contract clauses, for the United States by means of reformation where there has been no agreement.

The Claims Court stated that it is undisputed that there was no agreement between the parties with respect to the now required tailings stabilization. Because the existence of the tailings hazard was not knowable at the time of the contract negotiations, there was no mutual mistake and no agreement between the parties that could be placed into effect through reformation. The court observed that only those costs that were knowable and subject to actual negotiation formed the basis for the fixed prices that the AEC agreed to pay.

The Claims Court also dismissed the plaintiffs' breach claims, holding that because no agreement on the tailings stabilization was or could have been negotiated, the plaintiffs have no breach claims to assert. The court dismissed Western Nuclear's implied-in-fact contract claim, stating that an implied-in-fact contract theory is not a viable claim in the absence of an agreement that would support reformation. Moreover, the court held that Western Nuclear could not show there was an implied-in-fact tailings hazard contract unrelated to the negotiated uranium purchase agreements.

A. Reformation

The plaintiffs all seek recovery of the costs of tailings disposal on the theory of contract reformation. According to the plaintiffs, the parties to the uranium and thorium contracts made a mutual mistake concerning the necessary tailings disposal, and that mutual mistake requires equitable reformation of the contracts to provide that the government will pay for tailings stabilization. In the Joint Appellants' Brief, the plaintiffs describe the mistake: "The parties were mutually mistaken concerning whether the tailings piles posed potential long-term health hazards and thus whether extensive and costly mill stabilization and plant decommissioning measures were necessary to eliminate those potential hazards." Joint Br. at 23.

We hold that the Claims Court erred in granting judgment on the pleadings and in dismissing the plaintiffs' reformation, breach of express contract, breach of implied-in-fact contract, and taking claims.

(1) the parties made a mutual mistake concerning the necessary tailings disposal, and that mutual mistake requires equitable reformation of the contracts to provide that the government will pay for tailings stabilization.

(2) the Claims Court erred in dismissing the plaintiffs' reformation, breach of express contract, breach of implied-in-fact contract, and taking claims.

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(30) the Claims Court erred in dismissing the plaintiffs' reformation, breach of express contract, breach of implied-in-fact contract, and taking claims.

We hold that the plaintiffs' allegations are insufficient because they have failed to allege a mistake that can support reformation. A party seeking to state a claim for reformation of a contract under the doctrine of mutual mistake must allege four elements:

- (1) the parties to the contract were mistaken in their belief regarding a fact;
- (2) that mistaken belief constituted a basic assumption underlying the contract;
- (3) the mistake had a material effect on the bargain; and
- (4) the contract did not put the risk of the mistake on the party seeking reformation.

See Restatement (Second) of Contracts §§ 151-152, 155 (1981)

A "mistake" that can support reformation is a belief that is not in accord with the facts. Restatement (Second) of Contracts § 151. To satisfy this element of a reformation claim, a plaintiff must allege that he held an erroneous belief as to an existing fact. If the *existence* of a fact is not known to the contracting parties, they cannot have a belief concerning that fact; therefore, there can be no "mistake."

Reformation serves to bring the parties' written contract in accord with their agreement. Professor Corbin states:

Reformation is not a proper remedy for the enforcement of terms to which the defendant never assented; it is a remedy the purpose of which is to make a mistaken writing conform to antecedent expressions on which the parties agreed. These antecedent expressions of agreement may have been such as to constitute a valid informal contract, in which case reformation is merely a step in the enforcement of that contract. The written document was intended to be no more than the integration in writing of the terms already agreed upon. In so far as it differs from those terms it is mistaken and will be corrected.

3 *Corbin on Contracts* § 614 at 723 (1960). He emphasizes that "a court will not decree reformation unless it has convincing evidence that the parties expressed agreement and an intention to be bound in accordance with the terms that the court is asked to establish and enforce." *Id.* at 725.

In *American President Lines*, 821 F.2d 1571, we stated, "The purpose and function of the reformation of a contract is to make it reflect the true agreement of the parties on which there was a meeting of the minds." *Id.* at 1582. In the absence of mistake, fraud, accident, or illegality, a court cannot change the terms of a contract. *Id.*

This court cannot reach the equities of the reformation question. It is clear that reformation can be ordered only where there is an agreement to be given effect. The circumstances alleged by the plaintiffs are such that there could have been no agreement regarding the tailings costs because the existence of the tailings hazard was not recognized by the parties. The parties could not have formed a mutually mistaken belief concerning a fact whose existence they could not recognize. Therefore, there has been no mistake that can support reformation.

In the cases where courts have reformed a contract, the parties recognize the existence of a fact about which they could negotiate, they mutually form a belief concerning that fact, but their belief is erroneous. In those cases, the court may reform the contract to bring the parties' agreement in accord with the true state of the facts.

For example, in *National Presto*, 167 Ct. Cl. 749, 338 F.2d 99, the Court of Claims granted reformation of a contract to permit reimbursement for the cost of an additional step in a process of manufacturing artillery shells. Before the parties entered into the contract, they discussed whether an additional step was needed in which excess metal was shaved from the shells. Their contract did not include provision for the equipment for this additional step, but during the performance of the contract, it was determined that the additional step was in fact necessary. The plaintiff was required to obtain additional equipment. The court permitted reformation of the contract. Although the parties did not know of the need for the additional equipment, *id.* at 107, they clearly recognized that the equipment *might* be needed. They recognized the existence of a fact on which they could reach an agreement, and they formed an erroneous belief concerning that fact. Therefore, there was a mutual mistake, and reformation could bring their agreement in accord with the true state of the facts.

Similarly, in *R.M. Hollingshead Corp. v. United States*, 124 Ct. Cl. 681, 111 F. Supp. 285 (1953), the plaintiff agreed to sell DDT in metal containers to the government under a contract which required the chemical to be a clear, stable liquid. When the DDT subsequently turned cloudy, the government refused payment. The Claims Court denied the government's motion to dismiss, stating that when the parties entered into the contract, neither knew that it was impossible to store DDT in metal containers without a resulting loss of clear color. The clear color requirement was part of the government's specifications, and the parties considered that fact when contracting. Their erroneous belief concerning that fact was their mistake.

Other cases in which courts have permitted reformation of contracts similarly show that the parties held an erroneous belief concerning a fact whose existence the parties recognized and about which they could reach agreement. See, e.g., *Southwest Welding & Mfg. Co. v. United States*, 179 Ct. Cl. 39, 373 F.2d 982 (1967) (the parties mistakenly believed the price of steel was lower than it actually was); *Walsh v. United States*, 121 Ct. Cl. 546, 102 F. Supp. 589 (1952) (the parties erroneously believed the minimum wage rate was a certain amount, even though it had increased earlier); *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980) (the parties erroneously believed that the Wholesale Price Index would accurately represent nonlabor production costs for the purpose of a contractual escalation clause). See also *Bowen-McLaughlin-York Co. v. United States*, 813 F.2d 1221 (Fed. Cir. 1987) (reformation permitted where the parties erroneously omitted certain price items that were in existence and could have been included in the contract). *Macke Co. v. United States*, 199 Ct. Cl. 552, 467 F.2d 1323 (1972), does not show a different rule. The opinion in that case does not indicate whether a "mistake" was made by the parties. Rather, the court "interpreted" or "reformed" the contract to conform to the parties' practical construction. *Id.* at 1328.

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Appellants argue that the Claims Court's distinction between "knowable" and "unknowable" facts has no bearing on whether a plaintiff has properly stated a claim for relief by reformation. The appellants cite *Aluminum Co. of America* in which the district court observed "the law of mistake has not distinguished between facts which are unknown but presently knowable, and facts which presently exist but are unknowable. Relief has been granted for mistakes of both kinds." 499 F. Supp. at 64 (citations omitted). It is true that even though the *outcome* of a fact is unknowable, the parties can make a mistake concerning that fact. But where the *existence* of a fact is unknowable, the parties cannot have a belief concerning that fact, and they cannot make a mistake about it. Thus, in the famous case *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887), the contract for the sale of a cow was held to be voidable where the cow was assumed to be barren but later was discovered to be pregnant. The *existence* of the fact as to whether the cow was barren or fertile was known to the parties even if the *outcome* of that fact was unknown.

In this case, the plaintiffs' allegations of their "mistake" do not show that they held an erroneous belief concerning a fact whose existence the parties could recognize and about which they could negotiate agreement. The statements the plaintiffs make in their complaints and briefs demonstrate that the parties could not have contemplated the potential tailings hazard when they entered into the contracts. Therefore, they could not have reached an agreement on the now-required tailings stabilization, and they could not have held a mutually mistaken belief concerning the abatement of the tailings hazard.

The plaintiffs state, "Thus, as alleged in the complaints, when appellants' contracts were negotiated and performed the parties did not fully appreciate the extent and consequences of the potential health hazards posed by the uranium and thorium mill tailings, or that such hazards could not be abated absent extensive and costly remedial measures." Joint Br. at 12. They state, "It was not until the late 1970's that the long-term potential health hazards associated with mill tailings became widely recognized." Joint Br. at 13.

Atlas states in its supplemental brief, "The full record put before the Claims Court by Atlas underscores the critical fact that neither the Government nor Atlas appreciated the extent or consequences of the potential health hazard posed by this radiation." Atlas Br. at 5. Quivira's complaint states, "These costs were not and could not have been anticipated at the time the Contract was entered into" Quivira Complaint para. 29. Western Nuclear alleged that "when the original Contracts and modifications thereto were entered into between Western and the Government acting through the AEC, the then existing technology did not recognize any reason to perform any Reclamation or Decommissioning on mill tailings or mills." Western Nuclear Complaint para. 29. Atlantic Richfield stated that "neither party considered radiation levels in the produced wastes to represent a potential hazard or matter of concern" (Atlantic Richfield Complaint para. 14) and that "[the reclamation] costs were not and could not have been anticipated at the time the 1951 or the 1959 Contracts were entered into" Atlantic Richfield Complaint para. 40. Umetco alleged that "the parties to those Contracts did not contemplate that any extraordinary efforts to stabilize or manage the tailings would

be necessary." Umetco Complaint para. 27. They also allege that "the state of scientific knowledge at the times the Union Carbide Contracts were entered into and performed had not permitted adequate understanding of the effects of uranium mill tailings." Umetco Complaint para. 30. Homestake, also, alleged that "[the reclamation] costs were not and could not have been anticipated at the time the Contracts which are the subject of this Complaint, or any of the modifications or amendments thereto, were executed." Homestake Complaint para. 27. Pathfinder stated that "[the reclamation] costs were not and could not have been anticipated at the time the Contracts were executed." Pathfinder Complaint para. 20.

The plaintiffs' own statements and allegations demonstrate that the hazard associated with tailings was not, and indeed could not have been, within the contemplation of the parties when they entered into the contracts. Their statements clearly show the correctness of the Claims Court's ruling that the existence of the hazard was not knowable at the time of the negotiations. The Claims Court correctly stated that because it was not possible for the hazard to have been known to the parties, no agreement could have been reached on this matter which can now be put into effect through reformation. If the existence of the hazard was beyond the contemplation of the parties, they could form no belief concerning that fact. There can be no "mutual mistake" to support reformation here.

We have considered the government's alternative arguments for affirming the Claims Court. Except as incorporated in the above discussion, they are not persuasive. In enacting the UMTRCA, Congress chose to place the great burden of stabilizing the uranium and thorium tailings on the producers rather than on the public fisc after January 1, 1978. While this may force the plaintiffs to spend large amounts of money, they cannot show that their contracts with the government may be reformed or that the government has breached the contracts. In addition, the UMTRCA does not constitute a taking that requires compensation. For these reasons, the decision of the Claims Court is affirmed.

AFFIRMED.

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