CASE NOTES

PLATEMASTER PTY. LTD. v. M. & T. INVESTMENTS PTY. LTD.[1]

The Facts:

The payor was in the business of supplying chemicals and equipment for use in the electroplating trade. The payee was a manufacturer of equipment used in the same trade. In March, 1966, the payor imported, from America, a strip plating machine. This machine was stored in premises leased by Space Equipment Co. and was sold by the payor to the latter concern in June, 1966. In 1968 Space Equipment Co. were interested in reselling the machine to Austral Bronze. The sale was to be effected through the payor, whose technical manager showed the machine to representatives from Austral Bronze. It was agreed that, before the sale could go through, the strip plater would need to be reconditioned. In March, 1969, therefore, the managing director of the payor company arranged that the machine should be reconditioned by the payee. The job was, in effect, supervised by officers of the payor company and the rejuvenated strip plater was subsequently collected by employees of the same company. On 4th July, 1969, the payee sent an invoice in respect of the reconditioning work to the payor. The amount claimed was paid by the payor, with the approval of its managing director, by means of a cheque signed by both the manager and the purchasing officer. At the time of signing this cheque the purchasing officer did not appreciate that the machine did not belong to the payor company. Had he known this he would not have signed. There was no evidence led as to the state of mind of the co-signatory, the manager, or the authorizing officer, the managing director.

The Action:

Under these circumstances the payor brought an action for money had and received to its use. It alleged that the money was recoverable as money paid under mistake of fact. Gowans J. rejected the claim. His Honour gave three reasons for so doing:

(a) First, a promise or obligation to repay money paid under mistake of fact will not be imputed to the payee where payment was originally made in satisfaction of a debt due and owing.[2] Here, payment

[1] [1973] V.R. 93. Supreme Court of Victoria. Gowans J.

[2] Citing *Moses* v. *Macferlan* (1760) 2 Burr. 1005; 97 E.R. 676, *Aiken* v. *Short* (1856) 1 H. & N. 210; 156 E.R. 1180, *Krebs* v. *World Finance Co. Ltd.* (1958) 14 D.L.R. (2d.) 405. Even if the debt is statute-barred recovery will be disallowed: *Bize* v. *Dickason* (1786) 1 T.R. 285; 99 E.R. 1097; the same position obtains where it is unenforceable: *Farmer* v. *Arundel* (1772) 2 W. Bl. 824; 96 E.R. 485, *Munt* v. *Stokes* (1792) 4 T.R. 561; 100 E.R. 1176.

was made by way of discharge of such a debt as between the payor and payee. It was considered that the managing director was authorized, if not expressly, then impliedly, to incur the obligation on behalf of the payor.

(b) Second, the mistake was not "one in respect of the underlying assumption of the contract or transaction or which is fundamental or basic".[3]

(c) Third, the mistake was not between the person paying and the person receiving payment.

The Reasoning:

Several comments may usefully be made concerning each of the foregoing reasons for decision.

Whether one subscribes to the view that the action for money had and received is based upon an implied promise or obligation to repay[4] or upon the notion that, having regard to standards of fairness and justice, the payee ought to be required to repay (the unjust enrichment theory),[5] it is clear that the payee will not be compelled to make restitution where it is shown that he was paid by way of discharge of an existing debt.[6] But one may query the correctness, nowadays, of Gowans J.'s somewhat unequivocal assertion, that the "payment must be made in such circumstances as to give rise in law to a promise or obligation to repay. The view of Lord Mansfield in *Moses* v. *Macferlan* (1760), 2 Burr. 1005, that the action lies for money which *ex æquo et bono* the defendant ought to refund has been regarded as too sweeping".[7] The trend of the authorities,[8] and of extra-judicial comment,[9] suggests that the general principle underlying the action, money had and received, is based upon notions of *æquum et bonum*. Fictitious promises to repay withered and disappeared with the enactment, during the nineteenth century, of legislation such as the Common Law Procedure Act 1852 and the Judicature Acts of 1873 and 1875. Fictitious promises of repayment never constituted substantive requirements of recovery. They merely constituted pleading expedients

[3] [1973] V.R. 93, 97.

[4] See Hanbury, "Recovery of Money", (1924) 40 L.Q.R. 31, Holdsworth, "Unjustifiable Enrichment (1939) 55 L.Q.R. 37. And see *Baylis* v. *Bishop of London* [1913] 1 Ch. 127, *Sinclair* v. *Brougham* [1914] A.C. 398, *Morgan* v. *Ashcroft* [1938] 1 K.B. 49, 62, *Re Diplock* [1947] Ch. 716, 724, [1948] Ch. 465, 480, 481, *Holt* v. *Markham* [1923] 1 K.B. 504, 513, *Re Simms* [1934] Ch. 1, 31-32, *Sargood* v. *Cth.* (1910) 11 C.L.R. 255, 308, *Smith* v. *William Charlick Ltd.* (1924) 34 C.L.R. 38, 57, 70, *York Air Conditioning* v. *Cth.* (1949) 30 C.L.R. 11, 31.

[5] *Brooks Wharf* v. *Goodman Bros.* [1937] 1 K.B. 534, 545, *Fibrosa* v. *Fairbairn* [1943] A.C. 32, 61-64, *United Australia Ltd.* v. *Barclays Bank Ltd.* [1941] A.C. 1, 29, *Kiriri Cotton Co. Ltd.* v. *Dewani* [1960] A.C. 192, 204-205, *King* v. *Brown* (1912) 14 C.L.R. 17, 25, *Campbell* v. *Kitchen* (1910) 12 C.L.R. 515, 531, *Sargood* v. *Cth.* (1910) 11 C.L.R. 258, 303, *Mason* v. *N.S.W.* (1959) 102 C.L.R. 108, 146. See also Wright, *Sinclair* v. *Brougham*, (1938) 6 Camb. L.J. 305, Roulston, "A Plea for Restitution", (1958) 1 U. Tasm. L.R. 80.

[6] See fn. 2 supra.

[7] [1973] V.R. 93, 96.

[8] See fn. 5 supra.

[9] Ibid.

devised by Elizabethan lawyers with a view to escaping the Common Pleas, and securing the more favourable Queens Bench, jurisdiction.[10]

Gowans J.'s second ground for decision is substantially similar to his first. His Honour pointed out that the general rule for the recovery of mistaken payments is that the mistake causing payment to be made must be shown to be fundamental to the transaction.[11] The mistake will not be fundamental to the transaction if, the payment having been made pursuant to a contract, it does not have the effect of discharging the payor from liability to make the payment in question.[12] The mistake must render any agreement pursuant to which payment was made void or at least rescindable. This is another way of saying that the law will not compel a man to repay a sum paid by way of discharge of a debt due and owing to him, even although the payment is, in some respect, mistaken.[13] Why? The mistake causing payment is not sufficiently fundamental or basic to the transaction.

The acceptance of the fundamentality test of recovery by Gowans J. would seem to confirm the complete rejection by the courts of this State[14] of the much stricter and more arbitrary test of recovery enunciated by Bramwell B. in *Aiken* v. *Short*:[15] a payor may only recover where he pays mistakenly believing himself to be legally obliged to make payment to the payee.[16] The foregoing test did not contemplate the recovery of a mistaken payment of a supposedly voluntary nature. While its application was certain it was also harsh. It was gradually mitigated by qualification,[17] then disregarded[18] and finally abandoned.[19]

Finally, Gowans J. suggested, citing *Weld-Blundell* v. *Synott*,[20] that there could be no recovery in the instant case as the mistake was not as between the payor and the payee. This requirement of recovery is more usually mentioned in relation to three party situations, an agent making a mistaken payment to the payee on behalf of his principal. In such a case

10 Ibid.
11 Citing *Norwich Union Fire Insurance Society Ltd.* v. *W.H. Price Ltd.* [1934] A.C. 455, 462-463, *Porter* v. *Latec Finance (Qld.) Pty. Ltd.* (1964) 111 C.L.R. 177, 187, *C.T.B.* v. *Reno Auto Sales Pty. Ltd.* [1967] V.R. 790, 796-797. And see also *Morgan* v. *Ashcroft* [1938] 1 K.B. 49.
12 Citing *Steam Saw Mills Co. Ltd.* v. *Baring Bros & Co.* [1922] 1 Ch. 244, and *Holt* v. *Markham* [1923] 1 K.B. 504 per Scrutton L.J. See also *Kerrison* v. *Glyn, Mills, Currie & Co.* (1910) 15 Com, Cas. 241.
13 See fn. 2 above.
14 *C.T.B.* v. *Reno* [1967] V.R. 790, 796-797, *Platemaster Pty. Ltd.* v. *M. & T. Investments Pty. Ltd.* [1973] V.R. 93, and *Porter* v. *Latec Finance (Qld.) Pty. Ltd.* (1964) 111 C.L.R. 177, 187.
15 (1856) 1 H. & N. 210, 215; 156 E.R. 1180, 1182.
16 See also *Deutsche Bank (London Agency)* v. *Beriro & Co.* (1895) 1 Com. Cas. 255, 259, *Re Bodega* [1904] 1 Ch. 276, *Maskell* v. *Horner* [1915] 3 K.B. 106, 109, *Re Thelluson* [1919] 2 K.B. 735, 738, *Jones* v. *Waring & Gillow* [1925] 2 K.B. 612, 630-631.
17 See *Royal Bank* v. *Rex* [1931] 2 D.L.R., 685, *Larner* v. *L.C.C.* [1949] 2 K.B. 683. Cf. *Leedon* v. *Skinner* [1923] V.L.R. 401.
18 See *Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App. Cas. 84, *Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A.C. 49, *Kerrison* v. *Glyn, Mills, Currie & Co.* (1911) 105 L.T. 721.
19 See fn. 11.
20 [1940] 2 K.B. 107.

it appears that there is no difference between the requirement that the agent's mistake be fundamental and the requirement that it be as between the agent and the payee. In those cases where the agent's mistake was unquestionably fundamental it was assumed that the mistake was as between payor and payee.[21] In cases where the agent's mistake was not fundamental, it was suggested that it was not as between the payor and the payee.[22] The "as between payor and payee" requirement has, it is suggested, been subsumed in the fundamentality test and need no longer be cited as a separate requirement of recovery of mistaken payments.

What Gowans J. was really saying, it is submitted, was that the payor was not mistaken at all. The only evidence of mistake concerned one of the signatories (the purchasing officer) of the payor's cheque. There was no evidence that the other signatory (the manager) or the authorizing officer (the managing director) were mistaken. In the latter case the evidence pointed the other way. This leads one to the conclusion that it was impossible to say that the alleged mistake *caused* the payment to be made. And clearly, if the mistake in question does not cause payment to be made it will not be regarded as fundamental or basic and recovery will be denied.[23]

I. J. HARDINGHAM*

ORD FORREST PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION[1]

On 7th March 1974 the judgment of the Full High Court was handed down in the case of *Ord Forrest Pty. Ltd.* v. *Federal Commissioner of Taxation.*[2] This case and its predecessor, the case of *Gorton* v. *Federal Commissioner of Taxation,*[3] are very important for a number of reasons, but mainly, in my opinion, because they bring into sharp focus the different attitudes of judges in deciding taxation cases where large amounts of money are involved ,and because they highlight the irresponsibility of the Commonwealth Government and the Commonwealth Taxation Department during the period 1965-1969. Before considering the *Ord Forrest* case in some detail, the events leading up to it will be briefly outlined.

21 See *Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App. Cas. 84, *Kleinwort Sons & Co.* v. *Dunlop Rubber Co.* (1907) 23 T.L.R. 696, *Cth.* v. *Kerr* [1919] S.A.S.R. 201, *Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A.C. 49, *Holt* v. *Ely* (1853) 1 E1. & B1. 795; 118 E.R. 634.

22 See *Chambers* v. *Miller* (1862) 13 C.B. (N.S.) 125; 143 E.R. 50, *Pollard* v. *Bank of England* (1871) L.R. 6 Q.B. 623, *C.T.B.* v. *Reno* [1967] V.R. 790. The decision in *Barclay & Co. Ltd.* v. *Malcolm* (1925) 133 L.T. 512 is inconsistent with the reasoning of the High Court in *Taylor* v. *Smith* (1926) 38 C.L.R. 48, 55, 62.

23 See *Home & Colonial Insurance Co. Ltd.* v. *London Guarantee & Accident Co. Ltd.* (1928) 45 T.L.R. 134, *Holt* v. *Markham* [1923] 1 K.B. 504.

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1 74 A.T.C. 4034.

2 Id.

3 (1965) 113 C.L.R. 604.