SUPREME COURT OF QUEENSLAND

CITATION:	*Mercantile Mutual Health Ltd v Commissioner of Stamp Duties & Anor* [2002] QCA 356
PARTIES:	**MERCANTILE MUTUAL HEALTH LTD** ACN 009 789 592 (plaintiff/appellant) **v** **COMMISSIONER OF STAMP DUTIES** (first defendant/first respondent) **STATE OF QUEENSLAND** (second defendant/second respondent)
FILE NO/S:	Appeal No 8068 of 2001 SC No 549 of 1995
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2002
JUDGES:	McMurdo P, Jerrard JA and Holmes J Separate reasons for judgment of each member of the Court; Jerrard JA and Holmes J concurring as to the orders made, McMurdo P dissenting
ORDER:	**1. Appeal dismissed** **2. The appellant to pay the respondents' costs of the appeal**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – MISTAKE – RECOVERY OF MONEY PAID OR EXPENDED – MONEY PAID BY MISTAKE – GENERAL PRINCIPLES – MISTAKE OF LAW – where 1988 amendments to *Stamp Act* 1894 (Qld) exempted insurance policies from stamp duty if entered into in the course of an insurer's "health insurance business" within the meaning of the *National Health Act* 1953 (Cth) – where appellant was ignorant of the enactment of the exemption until early 1994 – where appellant paid duty on renewal and extension of existing policies and on issue of new policies before and after amendments were made – whether appellant was under mistake of law in paying stamp duty after exemption was enacted TAXES AND DUTIES – STAMP DUTIES – RECOVERY

OF DUTY – where amendments to *Stamp Act* 1894 (Qld) exempted insurance policies from stamp duty if entered into in the course of an insurer's "health insurance business" within the meaning of the *National Health Act* 1953 (Cth) – where appellant was not registered to carry on a "health insurance business" under s 67(1) of the *National Health Act* – where business of appellant was that of "discharging liabilities" assumed before the commencement of s 67 as provided for by s 67(3) – whether appellant could be classed as carrying on a "health insurance business" to recover stamp duty paid

Health Legislation Amendment Act 1985 (Cth)
National Health Act 1953 (Cth), s 67
Rules of the Supreme Court 1900 (Qld), O 3 r 13
Stamp Act Amendment Act 1988 (Qld)
Stamp Act 1894 (Qld), s 4, s 4A, s 4A, s 13A, s 24(4), s 24(4A) s 48, s 80A, Sch 1
Supreme Court of Queensland Act 1991 (Qld), s 135
Uniform Civil Procedure Rules 1999 (Qld), r 2, r 69, r 74

Anchor Assurance Company, In re (1870) LR 5 Ch App 632, followed
Australia Health Insurance Association Ltd v Esso Australia Pty Ltd (1993) 41 FCR 450, considered
Bilbie v Lumley (1802) 102 ER 448, distinguished
Cameron v Cole (1944) 68 CLR 571, considered
CE Heath Underwriting & Insurance (Aust) Pty Ltd v Edwards Dunlop & Co Ltd (1993*)* 176 CLR 535, considered
Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1992) 175 CLR 353, considered
Commonwealth & Federal Commissioner of Taxation v Precision Pools Pty Ltd (1994) 53 FCR 183, distinguished
David Securities Pty Ltd v Commonwealth Bank of Australia (1994) 182 CLR 51, distinguished
J & S Holdings Pty Ltd v NRMA Insurance Limited (1982) 41 ALR 539, cited
Lewis v Real Estate Institute of New Zealand Inc [1995] 3 NZLR 385, applied
Lynch v Keddell (No 2) [1990] 1 Qd R 10, considered
Pollard v Bank of England (1871) LR 6 QB 623, distinguished
South Australia Cold Stores Ltd v Electricity Trust of South Australia (1957) 98 CLR 65, considered
Thakral Fidelity Pty Ltd v The Commissioner of Stamp Duties [2001] 1 Qd R 428, distinguished

COUNSEL: RW Gotterson QC, with JD McKenna, for the appellant
K Dorney QC, with P Flanagan, for the respondents

SOLICITORS: Malleson Stephen Jaques for the appellant
Crown Solicitor for the respondents

[1] **MCMURDO P:** I have read the reasons for judgment of Jerrard JA in which the relevant facts and issues are set out. I will repeat only those necessary to explain my reasons for reaching different conclusions on some issues.

[2] The appellant ("Mercantile") claimed restitution of $425,182.54 paid by it under a mistake of law to the first respondent ("the Commissioner") progressively from 26 April 1988 until 30 June 1994 as stamp duty on its policies of health insurance. Mercantile contended that, because of a 1988 amendment to the *Stamp Act* 1894 (Qld) ("the *Stamp Act*"), it did not have to pay this duty. The learned primary judge found the exemption did not apply to Mercantile's policies and dismissed the claim against both respondents. Mercantile appeals against that order.

[3] Mercantile issued the writ against the Commissioner on 3 April 1995. The Commissioner informed Mercantile on 11 July 1996 that it may not be the appropriate defendant. On 14 October 1996 Mercantile obtained an order from Ambrose J joining the second respondent, conditioned that Mercantile be at liberty to apply at or before trial for an order that the proceedings be deemed to have begun against the second respondent on the date of issue of the writ.[1] Mercantile applied for that order at the trial. His Honour found that there were no special circumstances which would justify the bringing of the action against the second respondent outside the limitation period. Mercantile appeals against that finding but not against that part of his Honour's finding on the limitation defence relating to the period between 26 April 1988 and 3 April 1989 when stamp duty of $59,483.97 was paid. This appeal therefore concerns $365,698.48 of disputed stamp duty.

[4] The respondents in a notice of contention submit that, contrary to his Honour's findings, the evidence did not establish that Mercantile acted under a mistake of law in paying the stamp duty or that this mistake caused them to make those payments.

[5] Also in issue are whether the action can succeed against the Commissioner and the appropriate rate of interest on any judgment in favour of Mercantile.

The exemption

[6] Until 26 April 1988 stamp duty was payable upon all health insurance policies.[2] On that date the *Stamp Act Amendment Act* 1988 amended the *Stamp Act* relevantly by inserting into Schedule 1, Policies of Insurance, the following exemption:

> "2. A policy of insurance entered into in the course of an insurer's 'health insurance business' within the meaning of the *National Health Act* 1953 of the Commonwealth, as amended from time to time."

The amending Act also amended the *Stamp Act* to provide that every policy of insurance for an indefinite period is deemed to be a new or separate policy for a 12 month period on the expiration of each successive period of 12 months until termination.[3] These amendments were, of course, prospective only.

[7] The *National Health Act* 1953 (Cth) ("the *Health Act*") was amended on 1 September 1985 to provide relevantly that:

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1 See *Lynch v Keddell (No 2)* [1990] 1 Qd R 10; RSC O3 r13.

2 *Stamp Act* 1894, s 4.

3 Section 48 *Stamp Act.*

"67. (1) A person (other than a registered organization) shall not carry on health insurance business.

…

(3) A person shall not be taken to contravene subsection (1) by reason only that the person is carrying on business for the purpose of discharging liabilities assumed by the person before the commencement of this section.

(4) In this section –

…

'***health insurance business***' means the business of undertaking liability, by way of insurance:

(a) with respect to loss arising out of liability to pay fees or charges in relation to the provision in Australia of hospital treatment or an ancillary health benefit; or

(b) with respect to, or with respect to the happening of an occurrence connected with, the provision in Australia of hospital treatment or an ancillary health benefit;

but does not include:

(c) accident and sickness insurance business;

(d) liability insurance business; or

(e) business of a kind prescribed for the purposes of this paragraph."

[8] Mercantile did not apply for registration as a health insurance business under the *Health Act* and ceased offering health insurance to clients not already insured by it on 1 September 1985. It continued, however, to provide health insurance under its existing policies and offered increased benefits under those policies. Additionally, it issued new policies of health insurance to new clients within the group definition in group policies and to those clients entitled to new policies under the terms of existing policies (for example, to individuals covered by a group policy who leave the group, or to family members covered by a family policy, who exercise the right to have issued an individual policy).

[9] The learned primary judge reasoned that the 1988 amendment to the *Stamp Act* did not provide an exemption from duty for Mercantile's policies which were outside the definition of "health insurance business" in s 67 *Health Act* as Mercantile was merely discharging liabilities assumed by it before s 67 came into effect. His Honour was influenced to reach this conclusion by the use in s 67(4) of the present tense of the verb "undertaking" to qualify "liabilities" whilst s 67(3) refers to "discharging liabilities".

[10] In my view, the definition of "health insurance business" in s 67(4) *Health Act* relates to the carrying on of business only after 1 September 1985. The section allows only registered organisations, other than those protected by s 67(3), to carry on health insurance business after that date. The section is not retrospective and nor are the new definitions contained in s 67(4).

[11] "Health insurance business" in s 67(4) *Health Act* refers only to "the business of undertaking liability, by way of insurance" for those matters set out in s 67(4)(a) and (b) *Health Act*. It specifically does not include the types of insurance business described in s 67(4)(c), (d) and relevantly (e), which provides "business of a kind prescribed for the purposes of this paragraph". Those words must refer to the business of health insurance set out in s 67(4)(a) and (b). It follows that the fact that Mercantile was in the business of providing the type of health insurance set out in s 67(4)(a) and (b) to its clients both before and after 1 September 1985 is not sufficient to bring it within the definition of "health insurance business" in s 67(4) *Health Act*. After 1 September 1985, as Mercantile was not a registered organisation[4], it could only and did continue to provide health insurance "for the purpose of discharging liabilities assumed" by it before 1 September 1985.[5]

[12] Was Mercantile in "the business of undertaking liability by way of insurance"?[6] These words are not further defined in the *Health Act* and should be given their ordinary meaning. The relevant meaning of the verb "undertake" is "to take on oneself by formal promise or agreement; lay oneself under obligation to perform or execute."[7] The "business of undertaking liability" must refer to entering into new policies after 1 September 1985.

[13] Mercantile's standard health insurance policies were continuing policies and were not renewed annually[8] in a new contract. Although for stamp duty purposes continuing insurance was deemed to be a new or separate policy for each 12 month period,[9] this cannot effect the meaning of "health insurance business" within the meaning of the *Health Act*. Were Mercantile's business related only to continuing health insurance policies, Mercantile would not be in "the business of undertaking liability by way of insurance" of the type set out in s 67(4)(a) or (b) *Health Act*. Importantly, in addition to its continuing policies, Mercantile issued a significant number of new policies after 1 September 1985.[10] Although this was not the bulk of Mercantile's health insurance business, in issuing new insurance policies to new clients under group policies and in issuing new policies to those invoking their rights to have such policies issued under the terms of an existing policy after 1 September 1985, Mercantile was in "the business of undertaking liability by way of insurance" of the type set out in s 67(4) (a) and (b). This was so even though these policies arose out of the discharge of Mercantile's liabilities before 1 September 1985, thus saving it from prosecution for non-registration.[11]

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4 Section 67(1) *Health Act.*
5 Section 67(3) *Health Act.*
6 Section 67(4) *Health Act*.
7 The Macquarie Dictionary, Macquarie Library Pty Ltd, Federation Edition 2001.
8 See *C E Heath Underwriting & Insurance (Aust) Pty Ltd v Edwards Dunlop & Co Ltd* (1993) 176 CLR 535, 546.
9 Section 48 *Stamp Act.*
10 For example, 382 new policies were issued after 26 April 1988.
11 Section 67(3) *Health Act*.

[14] The 1988 amendment to the *Stamp* Act applies only to those policies "entered into in the course of the insurer's health insurance business within the meaning of the *National Health Act*."[12] Only those new Mercantile policies entered into after 1 September 1985 were "entered into in the course of an insurer's health insurance business within the meaning of the *National Health Act*", the continuing policies being entered into before that date.[13] Mercantile's continuing policies on which annual premiums were paid were not exempt from duty. Only those 382 Mercantile policies issued after 26 April 1988 were exempt from the $16,367.14 stamp duty paid on them.

[15] This conclusion appears consistent not only with the wording of the sections but also with parliamentary intent. In enacting the 1985 amendment to the *Health* Act the Commonwealth Parliament wished to control those providing health insurance so that risks were shared evenly over the community.[14] There is no apparent reason why the Queensland Government would wish to distinguish between the policies issued by insurers registered under the *Health Act* and those continuing to discharge existing insurance liabilities under s 67(3) *Health Act*. On the other hand, by exempting all new policies issued after 26 April 1988 the Queensland Government was encouraging those who had not entered into health insurance policies to do so, reducing the strain on Queensland's hospital system.

[16] His Honour erred in determining Mercantile was liable to pay the $16,367.14 stamp duty on its new policies issued after 26 April 1988. I would allow the appeal on this ground.

Was the duty paid under a mistake?

[17] His Honour indicated that, were it necessary, he would have concluded that, if the duty was not payable by Mercantile, then on the facts of this case Mercantile's payments of stamp duty to the Commissioner were made in the mistaken belief that it was under a legal obligation to pay the duty, that mistake caused Mercantile to pay the duty and Mercantile would be entitled to repayment of those monies: *David Securities Pty Ltd v Commonwealth Bank of Australia*[15] and *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*.[16]

[18] The respondents contend that Mercantile's payments did not constitute a causative mistake of law but were voluntary payments which Mercantile elected to make, not bothering to inquire whether the payments were legally required and merely assuming the validity of the obligation: *South Australian Cold Stores Ltd v Electricity Trust of South Australia*.[17]

[19] In that 1957 case, the High Court considered only whether restitution was payable because of a mistake of fact.[18] More recently in 1992, in *David Securities* the High Court reviewed the history of restitution for mistake of fact or law.[19] Although originally restitution was available for either a mistake of fact or of law this was

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12 *Stamp Act Amendment Act* 1988 (Qld), Act No 34.
13 See *C E Heath*, fn 8.
14 See the observations of Northrop J in *Aust Health Insurance Association Ltd v Esso Australia Pty Ltd* (1993) 41 FCR 450, 450, 463-464.
15 (1992) 175 CLR 353, 378.
16 (1994) 182 CLR 51, 67, 89, 103.
17 (1957) 98 CLR 65, 73-75.
18 Ibid, 75.
19 *David Securities*, from 370.

later limited only to recovery of monies paid under a mistake of law: *Bilbie v Lumley*.[20] That case, which should be confined to its facts,[21] became entrenched as a decision denying recovery of monies paid under a mistake of law:[22] *Kelly v Solari.*[23] *South Australian Cold Stores* followed this line of authority. The High Court in *David Securities* made the following observations as to recovery of monies paid under a mistake of law:

> "The payment is voluntary or there is an election if the plaintiff chooses to make the payment even though he or she believes a particular law or contractual provision requiring the payment is, or may be, invalid, or is not concerned to query whether payment is legally required; he or she is prepared to assume the validity of the obligation, or is prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment. We use the term 'voluntary' therefore to refer to a payment made in satisfaction of an honest claim, rather than a payment not made under any form of compulsion or undue influence. If such qualifying, factual circumstances are considered relevant, the sweeping principle that money paid under a mistake of law is irrecoverable … is broader and more preclusive than is necessary. As the authorities cited earlier in explanation of the term "mistake of law" make clear, the concept includes cases of sheer ignorance as well as cases of positive but incorrect belief. To define "mistake" as the supposition that a specific fact is true, as Parke B did in *Kelly v Solari,* which was a mistake of fact case, leaves out of account many fact situations. A narrower principle, founded firmly on the policy that the law wishes to uphold bargains and enforce compromises freely entered into, would be more accurate and equitable.[24]
>
> … If the ground for ordering recovery is that the defendant has been unjustly enriched, there is no justification for drawing distinctions on the basis of how the enrichment was gained, except in so far as the manner of gaining the enrichment bears upon the justice of the case.
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> In the light of our view that the decision in *South Australian Cold Stores* can in this court be justified on a narrower basis and that the traditional rule was not necessary to the decision, there is no other decision of this court which constrains us to adopt the traditional rule. For the reasons stated above, the rule precluding recovery of monies paid under a mistake of law should be held not to form part of the law in Australia. In referring to monies paid under a mistake of law, we intend to refer to circumstances where the plaintiff pays money to a recipient who is not legally entitled to receive them.[25]
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> … the payer will be entitled *prima facie* to recover monies paid under a mistake if it appears that the monies were paid by the payer

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20 (1802) 2 East 469; 102 ER 448.
21 *David Securities*, 371.
22 *David Securities*, 372.
23 (1841) 9 M & W 54; (1841) 152 ER 24.
24 Fn 15, 373 – 374.
25 Ibid, 375-376.

> in the mistaken belief that he or she was under a legal obligation to pay the monies or that the payee was legally entitled to payment of the monies. Such a mistake would be causative of the payment."[26]

[20] Mercantile was required to self assess its stamp duty payable to the Commissioner.[27] It calculated this duty on a computer system in accordance with the most recent advice from the respondents. Prior to 1990 Ms Bray, a junior staff member with Mercantile, was the responsible person. She "was not aware of any change in the law which affected [Mercantile's] obligation to pay this stamp duty [and] simply paid the amount which [she] believed was owing." After 1990 another junior staff member, Ms Briscoe, was the responsible officer. Prior to March 1994 she "believed that the monies [she] remitted to the [Commissioner] were monies due and owing to it for stamp duty on health policies issued by [Mercantile]." Only when a new manager, Mr Colwell, was appointed to Mercantile's health care division in 1993 were doubts raised as to the liability of Mercantile for payment of the stamp duty. Mr Colwell immediately instructed Mercantile staff not to remit any further payments of stamp duty to the Commissioner, the last payment being made in March 1994.

[21] These facts amply justified his Honour's conclusion that, if the duty were not payable, Mercantile did not pay the monies voluntarily but under the mistaken belief that it was legally obliged to pay the duty and made the payments because of that mistaken belief. The respondents were unjustly enriched, not in satisfaction of an honest claim, but because of that mistake of law. The ground raised in the respondents' notice of contention fails.

Limitations defence 3 April 1995 to 14 October 1996

[22] The learned primary judge observed that if it were necessary he would have concluded that none of the facts relied upon by Mercantile constituted special circumstances justifying an order that the proceedings be deemed to have begun against the second respondent on the date of issue of the writ against the Commissioner: *Lynch v Keddell (No. 2)*.[28]

[23] The application before the primary judge arose out of the order of Ambrose J of 14 October 1996 joining the second respondent and giving Mercantile liberty to apply at or before trial for the order sought before the primary judge. The order sought by Mercantile was under SCR O 3 r 13.[29] By the time of trial, the UCPR were in force.[30] The UCPR contain no provision in the same terms as SCR O 3 r 13. Inclusion of a party outside the limitation period is provided for in UCPR r 69, especially r 69(2)(a)(iii) and (iv), (g).[31] Under UCPR r 74(5) the proceedings

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26 Ibid, 378.

27 Section 13A *Stamp Act.*

28 Fn 1.

29 "**13. When Defendant Added.** When a defendant is added or substituted, he shall, unless he waives such service, be served with the amended originating proceedings, or with notice in lieu of service, as the case may be, and the proceedings as against him shall, unless otherwise ordered, be deemed to have begun only on such service being effected."

30 Section 135 *Supreme Court of Queensland Act* 1991 (Qld); UCPR r 2.

31 "**69** …
(2) However, the court must not include or substitute a party after the end of a limitation period unless 1 of the following applies –
(a) the new party is a necessary party to the proceedings because –
…

against the new party are taken to have started when the proceedings against the original defendant started, unless the court orders otherwise. Here, the second respondent had already been joined by the 1996 Order. It is arguable that UCPR r 74(5) therefore applied. In any case, under s 135(2) *Supreme Court Act* 1991 (Qld) the primary judge had power to make an appropriate order to resolve the difficulty.

[24] Mercantile first requested a stamp duty refund from the Commissioner on 24 June 1994 and issued a writ against the Commissioner on 3 April 1995. The Commissioner informed Mercantile on 11 July 1996 that it was of the view that the exemption from stamp duty did not apply to its health insurance policies and suggested that it was not the appropriate defendant to Mercantile's claim. The Commissioner was the agent of the second respondent for the collection of stamp duties[32] and effectively the second respondent has had notice of Mercantile's claim since 24 June 1994. In those circumstances, I am surprised the second respondent as a model litigant did not consent to joinder from the time of the issue of the writ against the Commissioner.

[25] His Honour, in concluding there were no special circumstances justifying the order sought, found that competent legal advice should have adverted Mercantile to the necessity of suing the second respondent for the recovery of the disputed stamp duty: *Commonwealth & Federal Commissioner of Taxation v Precision Pools Pty Ltd*.[33] Whilst that may be so in an ideal world, Mercantile should not be penalised for that oversight in the circumstances here, where notice to the Commissioner was effectively notice to the second respondent.

[26] Whether the test be "special circumstances" under *Lynch v Keddell (No 2)*[34] or the matters raised under UCPR 69(2)(a)(iii), (iv) and (g), the learned primary judge should have granted the order sought; not to do so in the circumstances was unjust; his Honour erred in the exercise of his discretion. This ground of appeal also succeeds.

Recovery against the Commissioner

[27] Mercantile paid the stamp duty as a debt due to the second respondent payable to the Commissioner.[35] Although there is no direct evidence, it should be inferred that the monies received by the Commissioner from Mercantile would have been passed on to the second respondent at least in the financial year in which they were received, well before the issue of the writ or notification of the mistake to the Commissioner by Mercantile. The second respondent is liable to refund monies paid by Mercantile to its agent, the Commissioner, under a mistake of law. But is the Commissioner jointly and severally liable to repay those monies to Mercantile?

(iii) the proceeding was started in or against the name of the wrong person as a party, and, if a person is to be included or substituted as defendant or respondent, the person is given notice of the court's intention to make the order; or

(iv) the court considers it doubtful the proceeding was started in or against the name of the right person as a party, and, if a person is to be included or substituted as defendant or respondent, the person is given notice of the court's intention to make the order;

…

(g) for another reason the court considers it just to include or substitute the party after the end of the limitation period."

32 Section 4B(1) *Stamp Act*.

33 (1994) 53 FCR 183,189.

34 At 17.

35 Section 4B(1) *Stamp Act* 1894.

An agent who has received money paid under a mistake of law and passed on that payment to its principal before it became aware of the mistake, is not ordinarily required to repay the money.[36] The Commissioner is therefore not liable to Mercantile unless the *Stamp Act* makes him so.

[28] The only provisions which could have such an effect are ss 24 and 80A *Stamp Act*. This appeal was not brought under s 24 *Stamp Act*[37] which provides for repayment of duty upon such an appeal being successful. Nothing in that section makes the Commissioner liable to repay Mercantile.

[29] Section 80A *Stamp Act* provides:

> "**General provision about refunding stamp duty.**
> **(1)** This section applies to a stamp duty refund that is required to be, or may be, made to a person by the commissioner under this Act or otherwise.
> …
> **(6)** In this section –
> **"stamp duty"** means stamp duty paid, or purportedly paid, under this Act, whether or not the duty is paid under a mistake of law or fact."

[30] That section is primarily aimed at ensuring stamp duty is refunded to the appropriate person. The quoted extracts from the section give some support to a legislative intent that in all cases where there is to be a refund of duty, including restitution of duty paid under a mistake of law, the Commissioner is to pay the refund. That view also receives some support from the Explanatory Notes to the amending Act inserting s 80A *Stamp Act*[38] which include the observation: "This provision will apply regardless of the basis for the payment of the refund."

[31] However, the words in s 80A *Stamp Act*, "a stamp duty refund that is *required to be*, or may be, *made* to a person *by the commissioner*", do not assist Mercantile. The Commissioner as the second respondent's agent who had paid the received monies to his principal was not required to repay those monies to Mercantile. The Commissioner could authorise under s 80A a repayment he chose to make to Mercantile, but the section does not require him to do so because he was not required to do so either in law or under the Act. A further difficulty for Mercantile is that s 80A was not introduced until well after the period of the claim; if the section were to have the effect of making the Commissioner liable to Mercantile, it would have substantive, not procedural, effect and would not be retrospective.

[32] Mercantile's claim against the first respondent fails.

Interest

[33] Mercantile claims interest under the *Supreme Court Act* 1995 from 3 April 1995 until judgment. It claims a rate of interest of about 10 per cent per annum to fully compensate it for its loss. The respondents contend that the appropriate interest rate in a stamp duty matter is the prescribed rate of 5.5 per cent per annum for refunds

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36 *Pollard v The Bank of England* (1871) LR 6, QB 623, at 630-631; *Kleinwort Sons & Co. v Dunlop Rubber Company (*1907) 97 LT 263, 265.

37 See especially, s 24(4) and (4A) *Stamp Act*.

38 1999 No 78, cl 15.

required to be paid by the Commissioner in successful appeals against it under s 24 *Stamp Act.*[39]

[34] Although this was not an appeal under the *Stamp Act*, this court is entitled to consider those provisions in exercising its wide discretion as to the appropriate interest rate. [40] I am satisfied the appropriate rate of interest here is 5.5 per cent from the time of payment of the duty until judgment.

Orders:
I would allow the appeal and set aside the judgment dismissing the action against the second respondent. I would give judgment against the second respondent for $16,367.14, together with interest from the date of payment at 5.5 per cent per annum until judgment. I would allow the parties seven days in which to make submissions as to the appropriate orders as to costs of both the appeal and the trial.

[35] **JERRARD JA:** Between May 1988 and March 1994, Mercantile Mutual Health Limited paid stamp duty totalling $425,182.45 to the Commissioner of Stamp Duties for Queensland. Those self-assessed duties were paid pursuant to the *Stamp Act* 1894 (Qld) as amended, and predominantly self-assessed with respect to premiums paid to Mercantile by persons renewing existing health insurance policies they held with Mercantile. A small amount of stamp duty was self assessed and paid with respect to the issue of new policies of health insurance, to persons who had previously been insured by Mercantile. In about May 1994, Mercantile decided that the effect of amendments made to the *Stamp Act*, which took effect on 26 April 1988, meant it had at all times been exempted since that date from the liability for that duty which it had self-assessed and paid. It said it had paid that duty under a mistake of law. It sued to recover those moneys and failed. It now appeals that decision.

[36] The issues raised for determination include:

- whether Mercantile was exempted from paying the amounts it self assessed as dutiable, or any of them;
- whether payments made where there was no duty payable were paid under a mistake of law and recoverable by Mercantile;
- if so, whether this court should overturn the discretionary decision of the trial judge rejecting the appellant's application that the proceedings against the second defendant (added as second defendant by order made 14 October 1996) be "otherwise ordered" to have begun on 3 April 1995, the date the appellant issued its writ against the first defendant;
- if the appellant succeeds wholly or partially, whether either or both respondents should have the benefit of orders akin to orders pursuant to s 24(4A) of the *Stamp Act*, limiting the rate of interest to be paid on moneys refunded to that prescribed for that subsection.

[37] Prior to 1 September 1985 Mercantile actively promoted the sale of health care insurance policies to members of the public. On that date the *Health Legislation*

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39 *Stamp Duties Regulations* 1999, reg 3.

40 Compare *Thakral Fidelity Pty Ltd v The Commissioner of Stamp Duties* [2001] 1 QdR 428.

Amendment Act 1985 (Cth) came into force. That amending Act inserted a s 67 into the *National Health Act* 1953 (Cth), which section prohibited a person other than a registered organisation from carrying on a health insurance business. Part VI of the *National Health Act* provided for the registration and regulation of "health benefits organisations", but before that amending legislation came into force it had not been mandatory for a person to be registered as an organisation in order to perform the function of an health benefits fund. The relevant Minister's second reading speech explained the enactment of the amending legislation as being due to a concern by the Commonwealth Government that some insurers not registered under the Act were limiting their offers of health insurance to persons considered good risks. The Commonwealth was apparently concerned to ensure that the good risks assisted in carrying the bad risks to "equalise contribution rates".[41] Mercantile did **not** become a registered organisation under the *National Health Act*.

[38] Mercantile had issued numerous policies of health care insurance before 1 September 1985, there being either "group" policies or "individual" policies. The standard form of a group policy offered insurance cover to the employees of the policyholder, ("insured persons") for so long as the policyholder continued to pay premiums. Clause 13 of a standard group policy provided that on certain specified events (such as an insured employee ceasing to be employed by the policyholder, or non payment of a premium by the policyholder), Mercantile would grant cover to any insured person who notified it of "his" desire to be covered under an individual health policy "without any evidence of insurability". By those group health insurance policies, Mercantile promised to reimburse each insured person for public or private hospital accommodation charges (up to a specified amount per day), and other specified hospital charges, incurred by reason of contracting illness or sustaining injury.

[39] There were three varieties of individual health insurance policies which had been offered. The standard form of each provided that the insurance would continue for so long as premiums were paid, and Mercantile likewise promised to pay public or private hospital accommodation, specified hospital charges and ambulance costs, incurred by reason of sickness or injury to insured persons. These were the policyholder, his or her spouse or de facto, and a specified number of dependant children. Each policy promised that if a child or children previously covered by the policy ceased to be so covered by reason of having attained a specified age, Mercantile would issue an individual policy to that child or children upon written application.

[40] Mercantile's standard form policies reserved to it the right to cancel the policy, provided that that cancellation was made:

> "Either as a result of variations in the cost of benefits covered by this policy or in terms and conditions imposed by government, or as certified by an actuary as being necessary to meet normal underwriting requirements or to meet the needs of prudential insurance practice".

[41] Subject to that reserved right, Mercantile's standard policies entered into before 1 September 1985 obliged it to provide a contracted cover and pay benefits, for so

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41 For a description of the purpose of the amending legislation and pre amendment position see the Judgment of Northrop J in *Australian Health Insurance Association Ltd v Esso Australia Ltd* (1993) 41 FCR 450 at pp 461-465

long as each policyholder continued to pay premiums, and likewise to grant cover to any insured person seeking an individual policy issued to them in the circumstances already described. In fact, after 1 September 1985 policyholders continued to pay premiums which Mercantile accepted, and it offered to existing insured persons increased limits of benefit under their policies. It extended insurance cover to new persons (such as new employees) who fell within the "group" policies as "insured persons" on commencing their employment, and issued new policies to those insured persons who invoked their right to have them. Further, Mercantile provided benefits as contracted pursuant to those policies. However, it stopped offering health insurance to persons not already insured as at 1 September 1985, and it remained unregistered.[42]

[42] Other than when external circumstances would have entitled it to cancel the policies, Mercantile was obliged by its contracts to act as it did, namely to extend the health insurance it had agreed to provide when each policyholder paid the requisite premium on time. It was obliged to offer the individual health policies in the described circumstances. It was obliged to provide the contracted for benefits. Provision for persons in Mercantile's position, being persons who had agreed to provide health insurance prior to 1 September 1985, but who did not thereafter become registered organisations, was made by s 67(3) of the *Health Insurance Act*.

[43] The relevant parts of s 67 provided as follows:

> "67(1) A person (other than a registered organisation) shall not carry on health insurance business.
>
> (2) A person who contravenes subsection (1) is, in respect of each day on which the person contravenes that subsection … guilty of an offence punishable on conviction by a fine not exceeding –
>
> (a) if the person is a body corporate, $20,000.
>
> (3) A person shall not be taken to contravene subsection (1) by reason only that the person is carrying on business for the purpose of discharging liabilities assumed by the person before the commencement of this section.
>
> (4) In this section –
>
> "health insurance business" means the business of undertaking liability, by way of insurance –
>
> (a) with respect to loss arising out of a liability to pay fees or charges in relation to the provision in Australia of hospital treatment or an ancillary health benefit; or
>
> (b) with respect to, or with respect to the happening of an occurrence connected with, the provision in Australia of hospital treatment or an ancillary health benefit".

[44] These provisions prohibited Mercantile from and after 1 September 1985, it not being a registered organisation, from carrying on the business of **undertaking** liability by way of insurance with respect to the matters described in (a) and (b) of the definition of health insurance business. Mercantile was not prohibited from carrying on business for the purpose of discharging liabilities assumed by it before 1 September 1985; and as described it did. As described, it did not thereafter carry

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42 The facts recorded herein are taken from the statement of non-contentious facts provided to the learned trial judge.

on the business of undertaking a liability by way of insurance, where that liability had not previously existed. For example, the group health insurance policies described the insured persons covered by that policy to be "all full time employees and their dependants of the policyholder as declared from time to time". When new employees joined the workforce of a policyholder whose policy was issued before 1 September 1985, the extension of health insurance to those new employees was a liability assumed by Mercantile before 1 September 1985. What would be new would be the identity of the insured person, but not the liability to provide health insurance to new employees of the policyholder while the policy continued.

[45] On that analysis, s 67(3) aptly describes both what Mercantile was in fact doing after 1 September 1985, **and** conduct in which a business carried on is not health insurance business as defined in s 67(4). In that regard I accept the submission of Senior Counsel for the respondents that s 67(3) was probably inserted *ex abundanti cautela* in the sense explained in the judgment of Williams J (dissenting in the result but not on this point) in *Cameron v Cole*[43], namely to remove any possibility of doubt that those in Mercantile's position post 1 September 1985 were safe from prosecution for contravening s 67(1).

[46] Mercantile was obliged to pay stamp duty calculated on the premium payable "upon every policy and every renewal of a policy of insurance for a term of one year or less", by reason of the combined operation of s 4 of the *Stamp Act*, and provision (8) of the provisions in the first schedule to that Act in the policies of insurance head of charge provision. As at 1 September 1985, where its policies were ones for an indefinite period (as they were when renewable upon payment of the premium), s 47A(1) of the *Stamp Act* provided that each premium paid and accepted subsequent to the issue of a policy of continuance insurance was a deemed renewal of the policy, notwithstanding that the insurer was bound to accept that payment and continue the policy. This provision enabled the Commissioner to impose a duty on the deemed renewal, in circumstances in which the common law would otherwise have provided that the length of time of the original contract was simply being extended.

[47] It is common ground between the parties that a fresh contract of insurance was not made each time the premium was paid.[44]

[48] On 26 April 1988 the provisions of Amending Act No 34 of 1988 amending the *Stamp Act* came into effect. Those amending provisions introduced an extensive definition of a "policy of insurance" (which by schedule 1 of the *Stamp Act* continued to be instruments charged with stamp duties by s 4), which said definition:

> "includes every certificate or declaration as to the existence of or an agreement for insurance or renewal or reinstatement thereof or any instrument or every writing whereby a contract of insurance or renewal or reinstatement thereof is made or agreed to be made or is evidenced".

[49] A new version of s 48 of the *Stamp Act* was introduced by those amendments, and the rewritten s 48 relevantly provided that where a policy of insurance…

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43 (1944) 68 CLR 571 at 607

44 See *C E Heath Underwriting Insurance (Aust) Pty Ltd v Edwards Dunlop & Co Ltd* (1993) 176 CLR 535 at 545-6

> "is for an indefinite period, the policy shall, on issue or execution and at the expiration of each successive period of twelve months until its termination, be deemed to be a new or separate policy of insurance for a definite period of twelve months and chargeable with duty as such under this Act".

[50] The rewritten s 48 did the work previously done by s 47A(1), which the amending Act repealed. The terms of the rewritten s 48 recognised the existence of policies for indefinite periods, deeming these to be for definite twelve months periods solely for charging purposes.

[51] The important work done by that amending Act, and the reason for the appellant's claim for repayment of duty paid, was in the exemption provided in the first schedule exempting from duty

> "A policy of insurance entered into in the course of an insurer's "health insurance business" within the meaning of the *National Health Act* of the Commonwealth as amended from time to time".

[52] Mercantile was ignorant of the enactment of that exemption until enquiries it made in early 1994 revealed the position. Mercantile had paid duty both on the renewal or extension of existing policies, and on the issue of new individual policies, before and after 26 April 1988 just as if the exemption had either not been legislated or else did not apply to Mercantile. It has not made such payments since May 1994, and it claimed before the trial judge and this court that it had always been entitled to the benefit of that exemption from and after its enactment. It has claimed this in respect of duties calculated on premiums charged for both policies being renewed, and for individual policies being issued.

[53] The argument was put in two ways. The first argument proceeded on the assumption that the relevant policies were "entered into" only at the time the original policy was first issued. That first submission was that there was no reference to any date in the April 1988 exemption. Accordingly, its operation had not been expressed to depend upon the policy having been entered into after either 26 April 1988 or 1 September 1985. Likewise, the definition of "health insurance business" in the *Health Insurance Act* was not expressed in terms which confined it to business activity carried on after 1 September 1985. What the appellant had been doing before 1 September 1985 was undertaking liability by way of insurance cover, of a type later defined as health insurance business in s 67(4) of the *Health Insurance Act*; and policies entered into before 1 September 1985 by it **were** therefore policies of insurance entered into in the course of its health insurance business "within the meaning of the *National Health Act* of the Commonwealth as amended from time to time". Likewise, so it was submitted, policies entered into after 1985 (the individual policies issued on request), were policies entered into when the appellant was carrying on a health insurance business (after 1 September 1985).

[54] I see a number of problems with that submission: One is that while the exemption is not expressed to depend upon the relevant policy having been entered into after any specified date, the fact is, as Senior Counsel for the appellant submitted, the exemption could only apply after 26 April 1988. Likewise, prior to the 1985 amendments to the *Health Insurance Act*, there had been no statutory definition of a "health insurance business" in that latter Act. Accordingly, although policies of

insurance could be entered into anywhere in the world at any time in the course of what was in fact a relevant insurer's health insurance business, only some of those would answer the definition provided in the exemption of a "health insurance business" "within the meaning of the *National Health Act* of the Commonwealth as amended from time to time". I regard the latter words in quotation marks as requiring that to attract the exemption, the policy of insurance be entered into in the course of the relevant insurer's "health insurance business" as defined in the *National Health Act*. Only registered organisations may lawfully carry on such a health insurance business. I think it follows that only registered organisations could lawfully enter into policies of insurance in the course of a "health insurance business" "within the meaning of the *National Health Act* 1953 of the Commonwealth as amended from time to time". The appellant was not an insurer who could enter into policies of insurance in the course of such a "health insurance business".

[55] Finally, and independently and for the reasons described earlier in paragraphs [44] and [45], I do not think the appellant was in fact carrying on a health insurance business within the meaning of that *National Health Act* after 1 September 1985.

[56] The appellant contended that rejecting its argument produced the consequence, described by the appellant as anomalous, that for an insurer who became registered after 1 September 1985 the policies issued by it before that date would not be exempt from stamp duties after 26 April 1988, whereas policies issued by it after that date would be so exempt after 26 April 1988. Assuming the submission is accurate, the consequence is not necessarily anomalous. It is the consequence of the social purposes of two legislatures. The Commonwealth Parliament wanted to control insurers carrying on health insurance business; and the apparent purpose of the State legislature was to encourage people to enter into health insurance policies. Exempting registered organisations from a liability for stamp duties on policies issued after 26 April 1988 is a justifiable consequence.

[57] The appellant's alternative argument was put on the basis that there was in fact a separate "entering into" a policy of insurance, on each occasion when there was a deemed renewal of an existing policy, as well as on those occasions when an individual policy was first issued. Policies of insurance so entered into were entered into in the course of the appellant's health insurance business within the meaning of the *National Health Act*, etc. That business was the more limited variety of business the appellant was lawfully conducting and described by s 67(3), namely that of a business carried on for the purpose of discharging its liabilities assumed by Mercantile before 1 September 1985.

[58] I also have difficulty accepting as correct this alternative way of putting the appellant's case. The first problem I see in the argument is that I accept as correct the concession or approach underlying the appellant's first argument, namely that the appellant's insurance policies were "entered into" once and once only, namely when they were originally issued. I think that the deemed renewal first effected by s 47A(1) and on its repeal by s 48 (as amended), was a self evident artifice intended to attract duties. Both those charging sections recognised in their own terminology that in law and irrespective of the effect of either charging section, the relevant policies were for "an indefinite period" (s 48); or policies of "continuous insurance" whereby "the insurer was bound to accept payment of such premium and to continue the policy" (s 47A(1)). As each of those deeming sections so described

and recognised the common law position applying, I do not think those sections had the effect of rendering each policy one being "entered into" each time the premium paid was accepted.

[59] The *Stamp Act* in its form as amended in April 1988 provided no definition of how a policy of insurance was "entered into". I think the common law described in *C E Heath Underwriting* (supra) did give that definition. The effect of that common law was that where a policy provided for continuation beyond a specified period of insurance unless a particular event, such as the non payment of the premium, took place, then the continuation of the policy which did occur on payment of that premium was an extension of the original contract. In my judgment that original contract would be the only one "entered into".[45]

[60] I also think that the insistence in the exempting provision that the policy of insurance be "entered into" provides a striking contrast with the wide definition quoted earlier of a "policy of insurance" provided in the 1988 amending Act. That definition had the effect that very little was required for a policy to become chargeable, contrasted with the requirement that for the exemption to apply it be "entered into". As Senior Counsel for the respondent submitted, the latter provision is the deliberate use of a well understood legal concept that does **not** embrace an extension of a policy of continuous insurance.

[61] These matters mean that I reject the submission that when each deemed renewal occurred the relevant policy was "entered into". There still remains for consideration those individual policies issued for the first time after 1 September 1985; but for the reasons advanced earlier I reject the submission that those when entered into, were entered into "in the course of an insurer's 'health insurance business'", etc.

[62] The learned trial judge came to the same conclusions, although they were expressed far more succinctly. The view was that all of the liabilities of the plaintiff were liabilities assumed by it before the commencement of s 67 (of the Commonwealth Act), including the obligation to issue new policies to individuals covered by a group policy. The learned judge took the view that the appellant did not satisfy the requirements of the definition of 'health insurance business' in the *National Health Act*, and that the business it did carry on was one for "the purpose of discharging" those liabilities assumed before s 67(1) took effect. The judge considered the purpose of the 1988 *Stamp Act* amendment was to provide an exemption in respect of stamp duty for the "health insurance business" which could be carried on lawfully by a registered organisation. The purpose of the amendment was not to provide an exemption for the type of business already being carried on by the plaintiff. The learned judge accordingly dismissed the appellant's action, and I agree with that order. I would dismiss the appeal.

[63] I will deal briefly with the other matters. If I am wrong about the appellant's liability to pay stamp duty, then, like the learned trial judge, I am satisfied the appellant should recover some but not all of the now disputed money paid.

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45 "A policy of insurance is not exactly a new contract every year, but is a contract made once for all with a condition to be performed *de anno in annum*, and if the condition is not performed in any year the contract is at an end" (*Anchor Assurance Company, In re* (1870) LR 5 Ch App 632 at 638, judgment of Lord Hatherley LC)

[64] My reason for considering the appellant would be entitled to recover, if in truth duty was paid when the policies were not dutiable, is that I do not accept the careful argument of Senior Counsel for the respondents that those payments were voluntary in the sense described in *David Securities Pty Ltd v Commonwealth Bank of Australia*[46].

[65] Counsel's submissions pointed to the administrative system in operation in Mercantile at all relevant times. By this system, payment of stamp duty on those policies was authorised by employees of Mercantile, during the relevant six year period, who had simply assumed, without any enquiry, that Mercantile had continued to be liable to pay stamp duty on them as before. This assumption was made because no relevant employee knew of the enactment of the exemption, and Mercantile had no in-house system of regular (or any) enquiry about changes in liability not notified to it by the relevant stamps office of the relevant state. Instead, when advised, apparently by the state charging authorities, of changes in the rate of charge, Mercantile amended its computer program. It will not surprise that the evidence suggested that the Queensland state taxing authorities were prompt to advise Mercantile of all changes which increased rates of charge or widened the class of dutiable documents, but were less prompt to advise of exemptions.

[66] It was not until a new manager came on the scene in 1993, who undertook a review of the expenses of the health division of the Mercantile Mutual Group of Companies, that any examination was made by Mercantile of the provisions of the Queensland *Stamp Act*, or of Mercantile's obligation to pay duty on these policies.

[67] Prior to that investigation, Mercantile's staff charged with the duty of supervising the payment of stamp duty to state authorities did not regard it as their function to actually examine the legislation, were not aware of the law at all, and assumed that the system in operation after 1988 should be the system in operation before then. I think the position is fairly described in the following passage in cross-examination:

> "And so you didn't have a personal belief about the validity of the payment, your belief was that this was paid because it was always paid.?"
> "Well, this is what was expected of us to be paid."

[68] The respondents' counsel properly pressed the court with the passages at page 73-75 of the decision of the High Court in *South Australian Cold Stores Ltd v Electricity Trust of South Australia*[47]. In that case the Electricity Trust, relying on a defectively worded order issued in January 1952 by the South Australian Prices Commissioner, had increased the charges for electricity supplied to the appellant company in that case. The company's manager was aware from newspaper reports that there was to be an increase in those rates, and that a new prices order must be in existence, and the company paid accounts at the new rate from February 1952 until December 1952 without protest. In December 1952 it had asked for, received, and for the first time examined, a copy of the admittedly defective order; and then refused to pay for the electricity supplied between December 1952 and February 1953. When sued for the cost of that electricity, it sought to set-off the payments previously made at the increased rate under the defective notice, on the basis of a counter-claim for

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46 (1992) 175 CLR 353 at 373 and 374

47 (1957) 98 CLR 65

moneys had and received. It alleged that the payments had been made under the increased rate by reason of a mistake of fact.

[69] There is a good deal in common between the facts of that case and this one. The High Court focused in that case on the propositions that the manager had taken no legal advice, was unaware of the deficiencies in the relevant order, had therefore entertained no belief as to the existence or non existence of facts as such which turned out to be mistaken, and had assumed that in some way or other the increased charge might lawfully be made. That court thought that those matters could not be enough to support the company's action for moneys had and received against the Electricity Trust.

[70] When a different High Court later reviewed the issue of recoverability of payments made under a mistake of law in the decision in *David Securities* (supra), it did not overturn the earlier decision in *South Australian Cold Stores* (supra). So far so good for the respondents. However, the joint decision of the court in *David Securities* held that:

> "The payer will be entitled prima facie to recover moneys paid under a mistake if it appears that the moneys were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the moneys, or that the payee was legally entitled to payment of the moneys. Such a mistake would be causative of the payment."[48]

[71] Their Honours had earlier noted at page 374 that the concept of a mistake of law included cases of sheer ignorance as well as cases of positive but incorrect belief. In my opinion, that joint judgment plainly declined to limit the concept of a "mistake" to the supposition that a specific fact was true (as Parke B had done in *Kelly v Solari*[49]), which definition and which concept provided a significant thread in the reasoning in *South Australian Cold Stores* (supra).

[72] In *David Securities* (supra) the joint decision treated that earlier decision in *South Australian Cold Stores* (supra), another earlier decision of the High Court in *Werrin v Commonwealth*[50], and the decision of the Full Court of the Federal Court in *J & S Holdings Pty Ltd v NRMA Insurance Limited*[51] as cases exemplifying "a narrower principle founded firmly on the policy that the law wishes to uphold bargains and enforce compromises freely entered into". In *David Securities* (supra) it was said of those decisions that:

> "An important feature of the relevant judgments in these three cases is the emphasis placed on voluntariness or election by the plaintiff. The payment is voluntary or there is an election if the plaintiff chooses to make the payment even though he or she believes a particular law or contractual provision requiring the payment is or may be invalid or is not concerned to query whether the payment is legally required; he or she is prepared to assume the validity of the obligation, or is prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment."[52]

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48 (1992) 175 CLR 353 at 378
49 (1841) 152 ER 24 at 26
50 (1938) 59 CLR 150
51 (1982) 41 ALR 539
52 (1992) 175 CLR 353 at 373

[73] I confess to having difficulty in identifying any disqualifying "election" by the payer in *South Australia Cold Stores* (supra) in the period from February 1952 to December 1952, during which it had no knowledge of the defect in the order issued in January 1952. I have the like difficulty in reconciling that analysis of that case with the remarks in *David Securities* that:

> "The rule precluding recovery of moneys paid under a mistake of law should be held not to form part of the law in Australia. In referring to moneys paid under a mistake of law we intend to refer to circumstances where the plaintiff pays money to a recipient who is not legally entitled to receive them".[53]

I respectfully observe that the then applicable law required the payer in *South Australian Cold Stores* (supra) to plead its case on the basis of a mistake of **fact**. In any event, development in the law has not stood still.

[74] For while the facts in *South Australian Cold Stores* (supra) do resemble those here, so do those in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*[54]. There an insurance company paid to the Comptroller of Stamps for Victoria an amount believed to be due under the *Stamps Act* 1958 (Vic) as duty on premiums received in respect of workers' compensation policies issued by the company. It paid those between 1985 and 1989, in ignorance of certain amendments of the Victorian Act exempting from duty premiums so paid for "wages" policies issued after 30 June 1985.

[75] All members of a five member High Court bench held that the overpayments were recoverable from the Comptroller. The judgment of Mason CJ (at page 62) remarks that: "strange as it may seem, Royal remained unaware of the 1985 amendments for some years". His Honour went on (at page 67): "… in this case there is no question but that Royal made the relevant payments in the mistaken belief that in law it was bound to do so". I respectfully consider that that analysis by Mason CJ deliberately treats payments made by reason of ignorance of an amendment to the law relieving from a liability to make those payments, as ones made in the mistaken belief that the law obliged those payments.

[76] I consider that Brennan J made the same analysis in that decision at page 83, His Honour wrote that: "The payments … were made by mistake of law, Royal being unaware of the 1985 and 1987 amendments". At page 89, he wrote of those (same) payments that:

> "Some of the moneys overpaid by Royal were paid under a mistake … as to the existence of a statutory liability to pay".

McHugh and Toohey JJ agreed with the reasons of Brennan J; and I think that in those circumstances the tide of authoritative analysis of the position where payments are made to a statutory authority by reason of the payer's ignorance of an amending law relieving from liability is against the respondents. I am satisfied the appellant's ignorance that the payments were no longer dutiable resulted in the payments being made under an operative or causative mistake.

[77] I am satisfied that no sufficient reason has been shown for overturning the discretionary decision of the trial judge that the plaintiff had not shown the

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[53] (1992) 175 CLR 353 at 376
[54] (1994) 182 CLR 51

existence of those special circumstances which would justify the court ordering otherwise than that the proceedings against the second defendant be deemed to have begun only when they were added by order made 14 October 1996. No error of principle in the judge's reasons was identified in the argument, nor any significant injustice flowing from the failure to otherwise order.

[78] I am satisfied that if there is an operative mistake, it is appropriate to enter judgment only against the second respondent. When the Commissioner of State Revenue (appointed pursuant to s 7 and s 161 of the *Taxation Administration Act* 2001 (Qld)) was substituted for the Commissioner of Stamp Duties as first respondent by consent on the hearing of this appeal, it was not suggested that that substitution made any difference to the first respondent's liability (if any) to have judgment entered against it. I am satisfied that while the first respondent's duty as Commissioner of Stamp Duties under s 4B of the *Stamp Act* 1984 was to demand and receive stamp duty payable, that duty when payable was a debt due to the second respondent. Undoubtedly the first respondent long ago paid to the second respondent the payments received as stamp duty by monthly payments between May 1988 and May 1994, and ordinarily payment by the agent to the principal, of moneys paid under a mistake to the agent, would leave the payer with recourse against the principal only *Pollard v Bank of England*[55]. Despite that principle, I consider there is a necessary implication in s 24(4) and (4A) of the *Stamp Act* 1984 that the first respondent **can** be ordered by this court to repay amounts paid in excess of duty actually owing, when an appeal against assessment is brought to this court pursuant to the provisions of s 24 of that Act. However, I do not think that that statutory alteration of the position otherwise existing at common law, and applying only to statutory appeal procedure described, necessarily implies any wider variations of common law position. Accordingly I think that it continues to apply, and that the first respondent, having undoubtedly paid the moneys over to the second respondent, is not liable in this action for an order for repayment.

[79] This will have the result that the appellant's success against the second respondent would be for a lesser amount than it would have been against the first respondent, by reason of there being a limitation defence available to the second respondent and not available to the first. It also has the consequence that the submissions of the first respondent to the effect that it ought to have the benefit of an order limiting the interest rate on sums it is ordered to refund to the 5.5% rate of interest prescribed by Regulation 3 of the *Stamp Duties Regulations* 1999 for sums ordered to be repaid pursuant to s 24(4A) of the *Stamp Act*, has no application.

[80] Accordingly, I would dismiss the appeal and order that the appellants pay the respondents' costs of the appeal.

[81] **HOLMES J:** I have had the advantage of reading the judgments of the President and Jerrard JA, and will repeat the matters of fact and law there set out only to the extent necessary for my conclusions. I agree with the view that the 1988 amendment to the *Stamp Act* is limited in its application to policies entered after 1 September 1985, since it was only from that date that it could be said any particular policy was "entered to in the course of an insurer's 'health insurance business' within the meaning of the *National Health Act* 1953". I agree also with their Honours' conclusion, for the reasons they have given, that the insurance

[55] (1871) LR 6 QB 623 at 630, 631

policies were entered into when they were originally issued, and not on each deemed renewal of existing policies.

[82] The issue then is whether the applicant after that date entered policies of insurance "in the course of [its] 'health insurance business'"; that is, by reference to s 67(4) of the *National Health Act* 1953, in the course of a business of undertaking liability by way of insurance in relation to what may broadly be described as health care. As McMurdo P and Jerrard JA have described, the appellant was obliged under the terms of its existing policies of health care insurance, issued before 1 September 1985, to issue further policies in certain circumstances. Under its group policies it was required to issue a policy to any individual who on leaving the group insured sought such cover; and it was required to extend group cover to persons, such as new employees, who entered the insured class. Under its individual health insurance policies it was required to issue an individual policy to any applicant who ceased to be covered by a family policy, upon, for example, divorce, or on having attained a specified age. By way of illustration, the appellant issued 382 new health insurance policies after 26 April 1988, those persons having an entitlement to cover under a policy issued before 1st September 1985.

[83] I concur with the conclusion of Jerrard JA that the new policies issued after 1st September 1985 were not entered into in the course of a health care business, although not for precisely the same reasons. In my view, both the phrase "in the course of" in the Stamp Act exemption, and the words "the business of" in the phrase "the business of undertaking liability" contained in the definition of "health insurance business" in s67(4) must be given some work to do. In *Lewis v Real Estate Institute of New Zealand Inc*, after referring to the Oxford English Dictionary, (2nd edition) definition of the term "in the course of" as meaning "in the process of, during the progress of", the New Zealand Court of Appeal went on to say:

> "The sense is thus of a continuing activity into which another is introduced, or within which another is undertaken. The concept is of a primary activity and a subsidiary activity". [56]

[84] The appellant had, prior to 1st September 1985, offered health insurance at large; it ceased to do so, and did not become a registered organisation, after the amendment to the *National Health Act.* In this case it cannot be said that the new insurance policies were issued as a subsidiary activity in the context of a continuing primary activity of undertaking liability by way of health insurance. And while it might reasonably be said that the issue of new policies after 1 September 1985 was undertaking liability, the appellant was not "in the business of" undertaking liability. Even making allowance for the wide construction to be given to the expression[57], the issue of new policies was, at best, a lingering incident of a business earlier conducted by the appellant. Thus, in my view, the new policies were not entered in the course of a business of undertaking liability by way of health insurance. Accordingly I would dismiss the appeal.

[85] In relation to the issue of costs, I agree with the order proposed by Jerrard JA.

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56 [1995] 3 NZLR 385

57 *Australian Health Insurance Associaton v Esso* (1993) 41 FCR 450 at 457, 49.1