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SUPREME COURT OF VICTORIA — FULL COURT

BANK of NEW SOUTH WALES v MURPHETT

Starke, Crockett and King JJ

13 October 1982 — [1983] VicRp 45; [1983] 1 VR 489

CONTRACT – CHEQUE – MONEY PAID UNDER MISTAKE OF FACT – WHETHER BANK CAN RECOVER FROM PAYEE.

On 24 December, D. indicated he would buy M.'s house and bus run; accordingly, on that day, he gave M. a cheque for the $1000 deposit. 5 days later, D. changed his mind and decided not to go ahead with the purchase; so he contacted M., informed him of his change of mind, and requested the return of his cheque. On that day, D. also telephoned his bank and instructed them to stop payment on the cheque. The bank then posted a Stop Payment Notice to D., which D. then signed and sent it back to the bank. However, on the day that M. was requested to return the cheque, he paid it into his own bank, and it was honoured the following day. When the mistake was discovered, D.'s bank refunded the amount of the cheque and sued M. for repayment of the money had and received under a mistake of fact. The magistrate dismissed the claim, relying upon observations made by Gillard J in *CTB v Reno Auto Sales Pty Ltd* [1967] VicRp 100; (1967) VR 790. Upon order nisi to review—

HELD: Order nisi absolute.
The bank is entitled to a return of the money paid to M. because the money was paid under a fundamental mistake of fact (i.e. one which caused it to make the payment). A mistake of fact enables a payer of money to recover it if the mistake was fundamental to the payment even though the payer would not have been liable to pay it if the supposed fact had existed.
***Reno Auto Sales case*, (*supra*) opinion of Gillard J, disapproved;**
***CBA v Younis* (1979) 1 NSWLR 444 followed.**

STARKE J: *[after setting out the facts and the grounds of the order nisi said, at p4 ff]:* The starting point in this case is the decision of Gillard J in *Reno's Case* (*supra*). The facts in that case were not dissimilar to the facts here. But it seems to me that the *ratio decidendi* of that case was that the learned Judge was not satisfied on the facts of the case that the instruction alleged to be an instruction to stop payment amounted to a valid countermand. The mistake of fact is the payment by the bank of a customer's cheque, the payment of which has been stopped, the bank mistakenly believing that it has uncountermanded authority to pay. So the decision itself is one confined to its own facts and of little or assistance in the resolution of the present problem. However the learned Judge did go on to consider whether assuming that there was a valid countermand the could succeed. He concluded it could not. He appears to found his decision on observations of Bramwell B in *Aiken v Short* [1856] EngR 621; [1843-60] All ER 425; (1856) 1 H & N 210 at p215; 156 ER 1180 at 1182. The learned Baron said:

> "In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money, not where, if true, it would merely make it desirable that he should pay the money."

See also *Kelly v Solari* [1841] EngR 1087; [1835-42] All ER 320; (1841) 9 M & W 54; 152 ER 24; (1841) 11 LJEx 10. In other words some privity must exist between the payer and the payee. If His Honour's reasons whether *obiter* or otherwise are correct clearly the appellant cannot here succeed for it is not I suggested nor could it be that if the appellant refused to pay the cheque even if it had not been stopped it was under any legal liability to the payee to do so whatever its position may have been *qua* the drawer. However the problem is not without other authority. In *Porter v Latec Finance (Qld.) P/L* [1964] HCA 49; (1964) 111 CLR 177 at p190 Barwick CJ said:

> "The Appellant submits that what the Respondent paid him it paid him voluntarily though under a mistake of fact, and that money so paid is irrecoverable unless the payer would have been liable to pay it to the payee if the fact had been as he supposed. The doctrine asserted has its main support though perhaps not its origin in the *dictum* of Bramwell B in *Aiken v Short* [1856] EngR 621; [1843-60] All ER 425; 156 ER 1180; (1856) 1 H & N 210; but at least since *Morgan v Ashcroft* [1938] 1 KB

> 49; [1937] 3 All ER 92 and *Larner v London County Council* [1949] 2 KB 683; [1949] 1 All ER 964 the view must, I think, be accepted that a mistake of fact enables a payer of money to recover it if the mistake was fundamental to the payment even though the payer would not have been liable to pay it if the supposed fact had existed: see Sir Percy Winfield's article on *Mistake of Law* (1943) 59 LQR 327 at p 338."

See also per Kitto J *ibid* at p191.

In *Commercial Bank of Australia v Younis* (1979) 1 NSWLR 444 the Court of Appeal in New South Wales considered the matter. It was held that in order to entitle a person to recover back money paid under a mistake of fact it is sufficient if the mistake was fundamental to the payment even though the payer would not have been liable to pay it if the supposed fact had existed. The Court based its opinion on the observations of Barwick CJ and Kitto J in *Porter v Latec (Qld) P/L* to which I have referred and expressly disapproved of *Aiken v Short* (*supra*) and *Reno's Case* (*supra*).

[His Honour then discussed the case of Barclays Bank v WJ Simms Ltd *(1980) 1 QB 677; [1979] 3 All ER 522, and said]: ...* It may be that the expressions "fundamental to payment" used in *Porter v Latec Finance (Qld) P/L*, (*supra*) and "payment without mandate" used in *Barclays Bank v WJ Sims Ltd* (*supra*) are different ways of expressing the same principle. But if there is a difference I am of opinion that the decision of the New South Wales Court of Appeal in *Commercial Bank of Australia v Younis* (*supra*) supported as it is by opinions of high authority in the High Court correctly states the law in Australia. In this case it cannot I think be disputed that the mistake was fundamental to the payment and accordingly the appellant is *prima facie* entitled to succeed.
