Cons David Securities Pty Ltd v Commonwealth Bank 23 FCR 1
Appl Tavistock Pty Ltd v Saulsman 3 ACSR 502
Appl Inn Leisure Industries Pty Ltd v D F McCloy Pty Ltd (1991) 100 ALR 447
Dist David Securities v Commonwealth Bank of Australia (1992) 66 ALJR 768
Dist David Securities v Commonwealth Bank of Australia (1992) 24 ATR 125
Dist David Securities v Commonwealth Bank of Australia (1992) 109 ALR 37
Cons David Securities v Commonwealth Bank of Australia.. (1992) 175 CLR 353

[HIGH COURT OF AUSTRALIA.]

SOUTH AUSTRALIAN COLD STORES LIMITED APPELLANT; DEFENDANT,

AND

ELECTRICITY TRUST OF SOUTH AUSTRALIA RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *Oct.* 15, 16, 30.

Dixon C.J., McTiernan, Williams, Webb and Taylor JJ.

Statute—Operation—Provision that Minister "may fix" maximum rate at which declared service may be supplied—Whether rate having retrospective operation authorised—Provision that order shall come into operation on day specified therein—Order not referring to time except to state that increased rate to operate on accounts rendered on and after certain day—Order dated—Whether order operative—Prices Act 1948-1951 (*No.* 2 *of* 1948—*No.* 23 *of* 1951), *ss.* 24 (1), 44.

Money had and received—Payment pursuant to demand—Lawfulness of demand dependent on legal conclusion—Assumption by debtor of validity of demand without further inquiry or examination—No belief entertained by debtor as to existence or non-existence of facts—Whether moneys paid pursuant to demand recoverable by debtor.

Section 24 (1) of the *Prices Act* 1948-1951 (S.A.) provides that "the Minister by order may fix and declare the maximum rate at which any declared service may be supplied throughout the State . . . ".

Held, that the power thus conferred did not authorise the fixing of a rate having a retrospective operation.

Section 44 of the Act provides, *inter alia*, that an order under the Act shall come into operation on the day specified therein. An order was expressed, so far as material as follows ". . . I hereby fix the maximum rates at which electricity may be supplied by your Trust to be . . . . To operate on accounts rendered on and after 1st February 1952. Dated this fourteenth day of January 1952."

Held, that the order was ineffective in that it specified no day for its coming into operation.

The Electricity Trust of South Australia, acting pursuant to the ineffective order, read the meters of a customer on 1st February 1952 and rendered an

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account to the customer in respect of energy consumed from 1st January 1952 at the increased rates. The customer objected to the charge on the ground of the retrospective operation of the increased rate to January, and declined to pay more than the account calculated at the former rate. Accounts for energy consumed during the respective months from February to November 1952 were rendered at the increased rate to the consumer at the beginning of each following month and were paid promptly without protest. In December 1952 the trust's solicitors demanded payment of the amount which the consumer had declined to pay in respect of January 1952. The consumer then called for production of the prices order, and a copy was supplied to it in January 1953. So far as appeared, this was the first occasion on which it had received a copy of the order. In February 1953 the consumer informed the trust that it had been advised that the authority of the trust to make the increased charges was of doubtful validity and it set out the course it would take to recoup itself for past overpayments.

Held, that the consumer had been prepared to make the payments it sought to recoup without investigating what had been done under the prices legislation. The lawfulness of the demand made by the trust for the higher rates depended upon a legal conclusion which the consumer was prepared to assume without inquiry or examination. The consumer entertained no belief as to the existence or non-existence of facts as such which turned out to be mistaken. In these circumstances the overpayments were not recoverable by the consumer.

Kelly v. *Solari* (1841) 9 M. & W. 54 [152 E.R. 24]; *Slater* v. *Burnley Corporation* (1888) 59 L.T. 636 and *Slater* v. *Burnley Corporation* [*No.* 2] (1889) 53 J.P. 535, referred to.

Decision of the Supreme Court of South Australia (*Mayo* A.C.J.), reversed.

APPEAL from the Supreme Court of South Australia.

The Electricity Trust of South Australia on 2nd April 1953 commenced an action in the Supreme Court of South Australia against South Australian Cold Stores Limited claiming the sum of £4,763 18s. 8d. for electrical energy supplied.

The action was heard before *Mayo* A.C.J., who, on 3rd July 1957, ordered that judgment be entered for the plaintiff for the amount claimed.

From this decision the defendant appealed to the High Court. The facts and the argument of counsel are set out in the judgment hereunder.

A. L. Pickering Q.C., *D. S. Hogarth* Q.C. and *W. A. Ross*, for the appellant.

H. G. Alderman Q.C. and *A. K. Sangster*, for the respondent.

Cur. adv. vult.

THE COURT delivered the following written judgment:—

This appeal turns primarily upon the legal efficacy of a document by which the Prices Commissioner of South Australia sought to raise the maximum rates which the Electricity Trust of that State might charge customers for the supply of electrical energy.

Availing itself of the liberty supposedly given by the document the Electricity Trust, which is the plaintiff in the action in the Supreme Court and the respondent upon this appeal, purported to raise the rates chargeable for the supply, pursuant to certain running conditions, of electrical energy to the South Australian Cold Stores Ltd., which company is the defendant in the action and the appellant upon the appeal. The company disputes the increase in the charges on the ground that the increase is unlawful; unlawful because the commissioner's document never possessed any legal operation.

It might be thought that the Electricity Trust, as a public utility holding its assets on behalf of the Crown (see s. 15 (1) the *Electricity Trust of South Australia Act* 1946) would not be subject to the legislation restricting prices. But that is not so. After the lapse or termination of the *National Security* (*Prices*) *Regulations* (Cth.) price control was continued in South Australia by the *Prices Act* 1948. By s. 3 of that Act the word "service" was defined to mean the supply for reward of, among other things, electricity by any person (including the Crown and any statutory authority) engaged in an industrial, commercial, business, profit-making or remunerative undertaking, or enterprise. The trust, of course, is caught by the words of this definition. The actual power of fixing maximum rates for services is vested in the Minister by s. 24 (1) which provides that the Minister by order may fix and declare the maximum rate at which any declared service may be supplied. The South Australian Prices Commissioner, to give the commissioner his full title, is the principal officer of the Minister and acts under a delegation of the Minister's powers: ss. 4 (1) and 5 (1) and (4).

It will be noticed that the power of fixing the maximum rate for a declared service, which s. 24 (1) confers, must be exercised by an "order". It is desirable, too, to call attention to the fact that the maximum rate is described by that sub-section as the maximum rate at which the service may be supplied. That of course means may be supplied in the future. The power does not therefore authorise the fixing of a maximum price or rate that may be charged for a service that has already been supplied, that is to say, of retrospective rates. There are certain provisions prescribing the manner in which an order is to be made and promulgated. Section

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43 (2) says that every order fixing maximum prices of goods or rates for services shall be published in the *Gazette* or served on the persons bound thereby. The document upon which the trust relies as enabling it to increase the rates charged against the company was not published in the *Gazette*. It was however served on the trust promptly. Section 44 provides that a proclamation or order under the Act shall come into operation on the day specified therein, and if a proclamation or order does not specify the day on which it shall come into operation it shall come into operation on the day on which it is published in the *Gazette*. As the document relied upon by the trust as an order increasing maximum rates was not published in the *Gazette*, it could come into operation only on the day specified therein. One of the objections to the legal efficacy of the supposed order is that it does not specify the day on which it shall come into operation.

The relevant facts may be stated very briefly. It appears that at the end of 1951 the trust was supplying electrical energy to the company at rates the limits of which were fixed by prices orders. The supply was made under conditions which had long governed the obligations of the respective parties. The condition immediately material provided that the rates for electrical energy supplied and for meter charges should be such as from time to time were fixed by the supplier. In other words there were, so far as the conditions went, no charges fixed by agreement ; they might be fixed from time to time by the trust. But the trust, of course, could not by reason of the *Prices Act* increase the rates without an order of the commissioner. The trust accordingly sought from the commissioner an approval of an increase in rates. On 10th January 1952 the trust prepared and submitted to the commissioner certain tariff schedules, four in number, setting out in parallel columns the then existing rates and proposed rates, that is the increased rates proposed by the trust. Apparently these met with the approval of the commissioner who then addressed to the trust a notice which is the document upon which the case turns. It begins with a reference to the *Prices Act* 1948-1951 by way of heading and is directed " To Electricity Trust of S.A.". The body of the notice is as follows: " Take notice that in pursuance of the powers delegated to me by the Minister pursuant to Section 5 (4) of the above Act, I hereby fix the maximum rates at which electricity may be supplied by your Trust to be as per Annexures 'A', 'B', 'C', 'D' and 'E' attached. To operate on accounts rendered on and after 1st February 1952. Dated this fourteenth day of January 1952." Then follow the signature of the commissioner and the title of his

office. The annexures are the four tariff schedules of the trust with the two vertical columns side by side still headed respectively " Present Rate " " Proposed Rate ". It may, indeed, be doubted whether one is justified in going outside the document consisting of the notice and the schedules for the purpose of discovering that it was intended to fix the " proposed " and not the " existing " rates as maxima. Unless you do go outside the document it is a conclusion which you reach by conjecture, sophisticated by experience, rather than by means of any principle of construction.

But be that as it may, other defects in the order form insuperable objections to its valid operation. The most evident objection is that it specifies no date for the commencement of the operation of the order. One answer given on behalf of the trust to this objection was that s. 44 does not say in terms that the day must be specified as one on which the order is to come into operation : it says only that a date must be specified. It is then contended that that was done by dating the document. But s. 44 cannot bear such a construction. It speaks of the order coming into operation on the day specified therein and goes on to say what is to happen if the order " does not specify the day on which it shall come into operation ". Plainly the order must, if it is not gazetted, name a day as that on which its operation is to commence. Then it was argued for the trust, that upon that footing, the document nevertheless complied with the requirement. It did so because the commissioner expressed himself as by the document fixing the rate and the document itself was dated. *Ergo*, it was said, the document exhibited a sufficient intention that it should operate as from its date. The argument was put very clearly by *Mayo* A.C.J. who acceded to it. His Honour said : " It is contended that the order does not *specify a day* as the time for the order to come into operation : see the first part of the section. The document is dated January 14th 1952 and contains the words ' I hereby fix the maximum rates '. ' Hereby ' can, and I think should, be construed ' as a result of this ' or ' by this means '. Manifestly the intention to be deduced from the quoted words is that the fixation will be effective as a fixing from the date of the document, January 14th 1952." His Honour then went on to negative the suggestion that this conclusion might be displaced by the statement as to the order operating on accounts rendered on or after 1st February 1952.

With great respect for the view adopted by his Honour, it puts too great a strain upon the word " hereby ", and moreover, it finds in the common process of dating a document a significance which goes beyond its purpose. That purpose is merely to identify

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and record the day when the signature was attached or, if you like, is to be considered as having been attached. Of course many if not most instruments possess a full legal operation from the time they obtain full legal efficacy and by consequence the date may well serve to record the occasion when the operation of the instrument commences. But we are dealing with the exercise of a power which contemplates the specification of a time *de futuro* when the determination of the maximum rates contained in the document takes effect as the restriction which from that time must be observed. That is a separate question to be decided by the person making the order, supposing it is not gazetted. When he says " I hereby fix " he means no more than that, by the instrument he signs, he determines what the rates shall be. He says nothing which even adverts to the question as from what date those rates and no more may be charged for services thereafter rendered. He leaves that undecided. It follows that s. 44 has not been complied with and the " order " never became effective.

But had it been brought into operation, e.g. by gazettal, a difficulty would remain. For the words " To operate on accounts rendered on and after 1st February 1952 " would produce a retrospective effect. It would apply on its terms to electricity which had already been supplied before 14th January but was made the subject of an account rendered on or after 1st February 1952. The language of s. 24 (1) authorising the Minister by order to fix and declare the maximum rate at which any declared service may be supplied plainly refers to future supplies. The price for services already supplied before the order cannot be fixed under such a power. Possibly the future operation of the order might be severed by construction from its operation on past services but if so, not without some difficulty in determining on what accounts or how it first operated. However that may be, it is impossible to say that any date was specified for the coming into operation of the order and on that ground alone the order is inefficacious. It follows that the company was not liable to pay for electrical energy at the increased rates. The maximum rates which the trust might lawfully charge the company for the supply of energy remained fixed at the old levels just as if there had been no purported order increasing them. Unfortunately for the company however when the trust rendered accounts as for electricity supplied after 1st February 1952 until 1st December 1952, the company paid them without protest. With a view to recouping itself the overcharge the company refused to pay at all for the energy supplied during the next two months, that is to say, between 1st December 1952 and

2nd February 1953 and deducted a sum of £29 13s. 4d. from the payment which the company made for the ensuing month's supply, a payment made at the old rates and not at the new rates demanded by the trust. The amounts which the company thus refused to pay made up £4,763 18s. 8d. and it is for the recovery of this sum that the trust sued in the action. It is the sum for which *Mayo* A.C.J. entered judgment for the plaintiff trust against the defendant company. It will be seen that the total represents a charge at the new rates for the three months ended 2nd March 1953, less a payment at the old rates in respect of the third or last of those three months, reduced by £29 13s. 4d. in order to complete the recoupment of the past overpayments. The plaintiff trust denies that the defendant company can recoup itself for past overpayments by withholding payment for electrical energy subsequently supplied. The trust says that the company voluntarily made payments at the higher rates in satisfaction of the trust's claim or demand of amounts charged and that is the end of the matter so far as those amounts are concerned. They cannot be recovered by the company simply because it is afterwards discovered that the order of the prices commissioner was not validly made or effectively brought into force. But even if that be so it is not a consequence that the full amount of £4,763 18s. 8d. is recoverable by the trust. On the contrary it is a sum which, on the view adopted in this judgment, namely, that the order of 14th January 1952 was ineffective, contains an overcharge in respect of the period of three months to which it relates. The overcharge has been calculated at £1,537 14s. 9d. leaving a balance of £3,226 3s. 11d. This differs slightly from the figure given by the parties during the argument, viz. £3,211, and for the purposes of the Court's judgment it is better to adopt the latter.

But the defendant company, foreseeing the possibility of its being contended that by making voluntary payments at the higher rates in respect of the monthly periods up to 2nd February 1953 it had precluded itself from recovering the excess in respect of those periods, has pleaded that the payments at the increased rates were made under a mistake of fact. On that ground it is contended that the increased payments actually made are recoverable by counterclaim as money had and received or may be relied upon as a set off against the trust's claim in the action as plaintiff. It is now necessary to examine that contention.

It appears from the evidence that the manager and secretary of the defendant company was familiar with price control as it affected his company in the sale of their products or, perhaps the

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charging for the services they gave, but according to some evidence he gave he did not know that the trust as a government instrumentality needed an order to enable it to increase its rates. However, before it happened he heard that the rates were to be increased and in the newspaper he read that the prices commissioner had stated that the rates were to be raised. He agreed that he would have read what the newspaper contained and that it was a matter of considerable interest to his company. He said that he accepted the fact that a new prices order must be in existence when he received the accounts at the increased rates. He requested the trust to read the meters on 28th January 1952, because as he said, he wished to start another motor. It was, however, not done until 1st February and in respect of the energy consumed from January 1st to that date he received an account against his company calculated at the increased rates. The difference between the old and the new rates meant an amount of £575 10s. 8d. This he declined to pay, remitting only the amount which the old charges involved. He remarked in his accompanying letter that the company had requested the trust to read the meters on 28th January 1952 because they wished to start another motor and that it was significant that the trust had delayed until February 1st. This remark can hardly mean anything else but that the trust delayed so as to obtain the advantage of the new rates. A corresponding opposite suggestion, was made for the trust in the cross-examination of the witness, namely, that he had requested an earlier reading of the meters in order to avoid the operation of the increased charge on the account for January. This he denied. Whatever may be the justification for these rival accusations, it is clear enough that the company's objection to the charge of the increased rates for January was founded on its retrospective operation on the supply of energy for January 1952. In answer to the company's letter the trust replied on 6th March 1952 saying that the trust's engineer would call at an early date to discuss the matter. That however was not done. Accounts for the energy consumed during the respective months from February to November 1952 were rendered at the increased rate to the company at the beginning of each following month and the company paid the accounts promptly without protest. Then on 16th December 1952 the company received a letter from the trust's solicitors demanding payment of the amount of £575 10s. 8d. withheld by the company as representing the increase in the charges for energy supplied during January 1952. The letter said: "The account of which the above amount is the unpaid balance was rendered following tariff increases operative on all

meter readings on and after 1st February 1952 pursuant to Prices Order No. 31547 ". This led the company to call for the production of the prices order, which as they said they had not seen. A copy was then supplied to the company on 22nd January 1953. That, as it appears, was the first occasion on which the company had received a copy of the order. By a letter of 9th February 1953 the company informed the trust that it had been advised that the authority of the trust to make the increased charges was of very doubtful validity and it set out the course the company would take to recoup itself for past overpayments and stated that subsequent accounts would be paid at the rates existing prior to 1st January 1952. The *Prices Act* 1948-1951 contains a provision that a court imposing a penalty for selling goods or supplying services at a price or rate higher than the maximum may order the person infringing the Act to repay the excess to the purchaser: s. 25 (2). But otherwise the Act does not provide for the recovery of the excess over the lawful maximum by a person who has paid it.

It is no doubt for this reason that the company falls back upon the contention that the money is repayable as money paid under a mistake of fact. *Mayo* A.C.J. rejected the contention. His Honour said: " In so far as the defendant alleges that it paid moneys to the plaintiff to which the plaintiff was not entitled and that it did so under a mistake of fact my conclusion is that payment was voluntary and furthermore the defendant's manager and secretary were aware of the relevant circumstances at the time. The defendant had notice of the conditions of supply."

Substantially this view appears to be correct. The company was prepared to make the payments without investigating what had been done under the prices legislation. The lawfulness of the demand made by the trust for the higher rates depended upon a legal conclusion or consequence which the manager and secretary of the company was prepared to assume without inquiry or examination. He simply supposed that in some way or other the trust was lawfully entitled to charge the higher rate. It is not the sort of case *Jessel* M.R. describes in the passage in *Eaglesfield* v. *Marquis of Londonderry* (1) where he points out that many statements of legal conclusions may be treated as representations of fact. The manager did not know and he did not inquire whether the trust as a public utility or authority stood in a different position from ordinary suppliers of services and he did not know and did not inquire whether the prices commissioner had made any and what

(1) (1876) 4 Ch. D. 693, at pp. 702, 703.

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order. Had he seen the order he is unlikely to have been aware, at all events unless he took legal advice, that without gazettal it possessed no force. In a vague general way he may have supposed that if any conditions precedent existed upon which the trust's title to charge higher rates depended, those conditions had been fulfilled. As it turns out the question whether they were fulfilled or not depends upon a matter of law. Perhaps that does not matter, because if the document had been otherwise expressed, the conditions prescribed by law might have been fulfilled. And the manager was unaware of the need for the document or its existence, much less of its contents or terms. What does matter is that he entertained no belief as to the existence or non-existence of facts as such which turned out to be mistaken. It was a simple case of a bona fide assertion of right on the part of the trust which the company acceded to without inquiry or investigation. Had the company objected to paying and had the form and contents of the notice been brought under critical consideration, it is a reasonable conjecture that the defects would have been remedied by a new notice before all the overpayments which the company now seeks to recover had been made.

The case appears to be really of the kind illustrated by *Slater* v. *Burnley Corporation* (1) and *Slater* v. *Burnley Corporation* [*No.* 2] (2), although it is true that in those cases the plaintiff sought to recover the moneys paid not as paid under a mistake of fact but as involuntarily made. There the corporation charged water rates and rent on erroneous bases through misinterpretations of its statutory authority but the plaintiff paid the demands which thus did not comply with the statute. The plaintiff nevertheless failed in the attempt to recover the overcharges.

The present case may also be regarded as of the description which Lord *Abinger* C.B. had in mind when in *Kelly* v. *Solari* (3) he said : " There may also be cases in which, although he " (the payer) " might by investigation learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding ; in that case there can be no doubt that he is equally bound " (4). In the present case the only reason why the higher rates were not chargeable was because the formal requirements of the law were not observed by a third party for expressing or giving effect to the decision at which he had actually arrived. Neither he nor the trust were aware of his failure lawfully to exercise his authority.

(1) (1888) 59 L.T. 636.
(2) (1889) 53 J.P. 535.
(3) (1841) 9 M. & W. 54 [152 E.R. 24].
(4) (1841) 9 M. & W., at p. 58 [152 E.R., at p. 26].

They were unaware because they did not perceive what was required or the true effect of what the document contained. On the side of the company it was simply taken for granted that somehow or another the charges might be lawfully made. This seems to fall outside the reason of the rule under which an action of money had received lies in cases of payment by mistake. Under that rule the action is available when the payee cannot justly retain the money paid to him because it would not have come to his hands if it had not been for a false supposition of fact on the part of the payer causing the latter to believe that he was compellable to make the payment or at all events that he ought to make it. It is to be noticed that *Parke* B. in *Kelly* v. *Solari* (1) defines the requisite mistake as " the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue " (2). According to the decision of *Pilcher* J. in *Turvey* v. *Dentons* 1923 *Ltd.* (3) it is too restrictive to say that the fact would if true have entitled the payee to the money; and perhaps the word " specific " may also be too definite. But here there was nothing but an assumption that in some way or other the increased charge might lawfully be made and a readiness to comply with the payee's demand without more, a demand which but for formal defects in the authorisation would have been enforceable.

That cannot be enough to support an action for money had and received.

Accordingly the defendant company cannot recover or set off the excess over the old rates which it paid for electrical energy supplied from 1st February to 1st December 1952. The result is that the plaintiff was entitled to recover in the action the unpaid residue of the aggregate charge calculated at the old rates for the electrical energy supplied during December 1952 and January and February 1953. The amount charged at the new rates was £6,407 6s. 5d. of which £1,643 7s. 9d. was paid by the company. As has already been stated, that left £4,763 18s. 8d. the amourt sued for and the amount for which *Mayo* A.C.J. gave judgment. The excess of the charge at the new rates over the charge at the old must be deducted from that amount. It is perhaps convenient to repeat that the excess has been calculated at £1,537 14s. 9d. and if that is deducted the balance would be £3,226 3s. 11d. The parties however seem to agree, as has already been remarked, upon a figure of £3,211 as the balance and it is proper to accept that figure.

(1) (1841) 9 M. & W. 54 [152 E.R. 24].
(2) (1841) 9 M. & W., at p. 58 [152 E.R., at p. 26].
(3) (1953) 1 Q.B. 218.

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Accordingly the judgment for the plaintiff trust must be reduced to £3,211. The appeal should be allowed with costs and the judgment in the action reduced to £3,211. The order for costs in the action ought not to stand. Although the trust recovers £3,211 the company succeeds in what may be the more important question. In these circumstances there should be no order as to costs in the Supreme Court.

Appeal allowed with costs. Discharge pars. 1 *and* 3 *of the judgment of the Supreme Court of South Australia. In lieu of par.* 1 *adjudge that the plaintiff recover from the defendant the sum of* £3,211 *on the claim.*

Solicitors for the appellant, *Thomson, Hogarth, Ross & Lewis.*
Solicitors for the respondent, *Moulden & Sons.*

R. D. B.