HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

ALEXANDER GARNET ROXBOROUGH & ORS APPELLANTS

AND

ROTHMANS OF PALL MALL AUSTRALIA LIMITED RESPONDENT

Roxborough v Rothmans of Pall Mall Australia Limited
[2001] HCA 68
6 December 2001
S199/2000

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders of the Full Court of the Federal Court made on 11 November 1999.*

3. *In place thereof, order that:*

   (a) the appeal to that Court be allowed with costs;

   (b) the orders of Emmett J made on 18 February 1999 be set aside; and

   (c) in place of the orders of Emmett J, there be:

      (i) judgment entered for the first appellant in the sum of $14,377.33; for the second appellant for $11,017.12; for the third appellant for $18,521.99; for the fourth appellant for $31,716.32; for the fifth appellant for $15,622.98; for the sixth appellant for $35,877.19; and for the seventh appellant for $26,456.55;

(ii) an order that the respondent pay the appellants' costs of the action; and

(iii) liberty to apply to a Judge of the Federal Court for an order for interest under s 51A of the Federal Court of Australia Act 1976 (Cth).

On appeal from the Federal Court of Australia

Representation:

S J Gageler SC with R A Dick for the appellants (instructed by Glasheen & Quilty)

B W Walker SC with I M Jackman for the respondent (instructed by Clayton Utz)

CATCHWORDS

Roxborough v Rothmans of Pall Mall Australia Limited

Contract – Money had and received – Total failure of consideration – Contract between wholesaler and retailers – Wholesale cost included cost of goods plus tax identified as tobacco licence fee – Tax a distinct part of consideration paid by retailers – Tax held invalid so wholesaler not liable to pay tax collected from retailers – Retailers sought repayment of money for tax as a result of failure of consideration – Whether wholesaler had title to retain the money – Whether failure of the tax involved a failure of a distinct and severable part of the consideration.

Restitution – Recovery – Unjust enrichment – Contract between wholesaler and retailers – Wholesale cost included indirect tax held to be invalid – Whether wholesaler had a duty to make restitution to the retailers – Whether enrichment was at the expense of the retailers who had passed the tax on to consumers and the consumers were unlikely to claim the tax back – Whether unjust enrichment must be at the expense of the party seeking to recover – Whether passing on is a defence to a claim for recovery.

Contract – Implied terms – Test for implying a term – Contract between wholesaler and retailers – Wholesale cost included cost of goods plus tax – Tax held invalid – No express agreement about what would happen if the tax was held to be invalid – Whether such an agreement could be implied from the terms of the contract.

Constitutional law (Cth) – Duty of excise – Invalidity of state law – Consequences of invalidity for contracts agreed to on the basis of the validity of such law – Proceedings by retailers for recovery of invalid tax from wholesaler – Retailers unwilling to refund any amount received to consumers to whom tax passed on – Whether retailers have suffered any loss which they can recover from wholesaler – Whether any such recovery would constitute unjust enrichment of retailers – Whether different principles govern recovery from a state party which has recouped invalid tax and from a private corporation which holds such tax at time invalidity is pronounced.

Words and phrases – "total failure of consideration" – "at the expense of" – "passing on".

Business Franchise Licences (Tobacco) Act 1987 (NSW), ss 41, 45.

1 GLEESON CJ, GAUDRON AND HAYNE JJ. For many years, States, including New South Wales, imposed what was in substance, even if supposedly not in form, an indirect tax upon tobacco products. The burden of the tax was intended to be, and was, passed on to the consumers of those products. If the tax were a duty of excise, then it was invalid, because the power of the Commonwealth Parliament to impose such duties is exclusive (Constitution, s 90). The form of the tax, which it was hoped would sustain a conclusion that it was not a duty of excise, involved the imposition of periodic licence fees upon wholesalers and retailers of tobacco products, such fees being calculated by reference to the value of tobacco sold by a licensee during a period preceding the period for which a licence was issued. In calculating the value of tobacco sold by a licensed retailer, the value of tobacco purchased from a licensed wholesaler was to be disregarded if the wholesaler had paid, or was liable to pay, a licence fee in respect of that tobacco.

2 It is presently immaterial to go into the reasons why it was thought that such a tax might not be a duty of excise. In *Ha v New South Wales*[1] this Court held that it was a duty of excise, and that the New South Wales legislation pursuant to which it was imposed was invalid.

3 Before the legislation was declared invalid, licensed retailers of tobacco (such as the appellants) and licensed wholesalers (such as the respondent) conducted their business dealings upon a basis which reflected the importance, and size, of the tax. At the relevant time, the periodic licence fee was a nominal amount plus 100 per cent of the value of tobacco sold during the earlier period by reference to which the licence fee was calculated[2]. Wholesalers, in a manner which will require closer examination, included the tax in their charges to retailers; and the price of tobacco products to consumers, although determined ultimately by market forces, inevitably reflected the substantial impost which entered into the costs of all retailers.

4 Licences were normally for a month. The relevant period, by reference to which licence fees were calculated, was the month commencing two months before the commencement of the month in which the licence expired[3]. Since sales during that period were the basis of calculation of the fees, and since it was the common expectation of wholesalers and retailers that the wholesaler would

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1 (1997) 189 CLR 465.

2 *Business Franchise Licences (Tobacco) Act* 1987 (NSW), ss 41(1)(a) and (c).

3 *Business Franchise Licences (Tobacco) Act* 1987 (NSW), s 3(1).

continue to maintain a licence, and would pay or become liable to pay a licence fee in respect of tobacco sold by wholesale, (thereby producing the result that the value of that tobacco was disregarded in calculating the retailer's licence fee), prices charged by a wholesaler to a retailer involved, in practical effect, payments to the wholesaler in anticipation of licence fees to be incurred at a future time. The amounts of those payments, like other costs of the retailer, affected the prices retailers charged to consumers. On 5 August 1997, when the taxing legislation was declared invalid, amounts had been paid by the appellants, to the respondent, in respect of tobacco products supplied by the respondent since 1 July 1997, which had been identified on the respondent's invoices as "tobacco licence fee". If the legislation had been held to be valid, equivalent amounts would have been paid by the respondent to the revenue authorities when the respondent's licence was renewed. In the events that occurred, the respondent did not have to make those payments. The appellants claimed to be entitled to repayment of those amounts. That claim failed at first instance in the Federal Court[4], and again, by majority, in the Full Court of the Federal Court[5].

5 In all probability, whoever succeeds in these proceedings will have made a windfall gain. In the absence of some legislative intervention, the appellants, if they succeed, are unlikely to be obliged to pass on the fruits of their success to the smokers who bore the financial burden of the invalid tax. For its part, the respondent has collected what was held to be a tax on goods, but it has not had to pay it over to the revenue authorities. Leaving the cards to lie where they fall is a possible approach; one which, Lord Shaw of Dunfermline once said, "works well enough among tricksters, gamblers, and thieves"[6]. It may also work well enough in cases where there is no contractual or other relationship between the parties, and no coherent legal principle to dictate any other outcome. But here we are concerned with reputable commercial people, who entered into ordinary business dealings, and whose expectations were defeated by the supervening illegality of one aspect of those dealings. They made contracts. The justice of the situation in which they now find themselves must lie in the principles of law and equity which governed their dealings. Those principles, in turn, must be related to the contracts into which they entered. The contracts, both in form and in substance, were strongly influenced by the prevailing fiscal regime.

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4 *Roxborough v Rothmans of Pall Mall Australia Ltd* (1999) 161 ALR 253.

5 *Roxborough v Rothmans of Pall Mall Australia Ltd* (1999) 95 FCR 185.

6 *Cantiare San Rocco SA v Clyde Shipbuilding and Engineering Co* [1924] AC 226 at 259.

6 The details of the legislative scheme for the imposition of the tobacco tax are set out in the reasons for judgment of Gummow J, as are the facts concerning the contractual arrangements between the parties. As they appear to us, the most significant elements are as follows.

7 Although an attempt was made to represent it as a personal tax, in the nature of a fee for a licence, the tax was a tax on goods. That was the essence of the decision in *Ha*[7].

8 In its operation in relation to sales by wholesale, the tax was imposed by reference to the value of tobacco sold during a relevant period by the wholesaler. The Minister administering the legislation was empowered to determine the basis upon which such value was to be ascertained[8]. The Minister determined that such value was to be ascertained by reference to a manufacturer's published wholesale list price from time to time, excluding any amount included in the selling price in consideration of a licence fee. Such exclusion was necessary, for otherwise there would be a tax upon a tax. Thus, separating the value of the tobacco from the tax was important, both to the fiscal regime, and to the commercial response to that regime.

9 The respondent published wholesale price lists in which it set out in one column, (the third column), the wholesale list price per 1000 cigarettes, which was the value upon which the Minister's determination operated, and, in another column, (the fourth column), the total wholesale cost per carton "including State licence fees 100%". This distinction between "price" and "cost" reflected the fact that the tax was imposed by reference to the wholesale value (price) but was to be passed on to the retailer (and ultimately to the consumer), and so formed part of the retailer's cost.

10 In order to deal regularly with the respondent, each appellant was required to sign a form of request for a commercial trading account. The form of request referred to the respondent's wholesale price list as varied from time to time, and provided that any increase in (amongst other things) excise duty between date of order and date of delivery would be payable by the retailer.

11 There was a standard form of invoice issued by the respondent to the appellants. It specified, in relation to each type of product sold, the wholesale price per 1000 cigarettes, being the price specified in the third column of the

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7 (1997) 189 CLR 465.

8 *Business Franchise Licences (Tobacco) Act* 1987 (NSW), s 45.

price list which, after adjustment for discounts, (which no doubt reflected the bargaining strength of a particular retailer), went to make up an "invoice sale subtotal". It specified separately the amount of the "tobacco licence fee". The combined amount of the invoice sale subtotal and the tobacco licence fee was then shown at the foot of the invoice as "net total". The net total was the amount payable by the retailer. It may be inferred that the form of the invoices was, in turn, related to the licensing scheme. The regulations under the Act which imposed the tax required persons who carried on the business of selling tobacco to keep certain records, including records of the value of tobacco sold. The regulations provided that the records could be in the form of invoices or copies of invoices containing the required particulars[9].

12 The part of the net total paid to the respondent by reference to the tax was thus shown separately from the wholesale price of the products sold. The nature of the tax, and the method by which it was imposed and collected, explain why that was done. The tax was an *ad valorem* tax on goods. The value of the goods had to be distinct from the tax. The tax was to be passed on to the retailer, and was to form part of the cost to the retailer of the goods. But in the documents which formed part of the ordinary course of dealing between the appellants and the respondent, and by reference to which their contractual rights and liabilities are to be determined, the parties distinguished between wholesale price, tax, and net total cost to the retailer.

13 The amounts paid by the appellants to the respondent in respect of the tax represented a distinct part of the consideration for the tobacco products purchased by the appellants. They were treated by both parties to each relevant contract as separate from the wholesale price of the goods sold, that price constituting the value by reference to which the amount of the tax was determined. And the tax, being a tax on goods, was of such a nature that it was not intended to be borne ultimately by either the appellants or the respondent. The tax increased the exchange value of the tobacco products in the hands of the retailers, but the initial value by reference to which the Minister's determination as to the basis of the tax operated was a wholesale price exclusive of the tax component. While the wholesale price, exclusive of the tax, was arrived at by the operation of forces of supply and demand in the market for tobacco products, and reflected the negotiated agreement of the parties, the tax was imposed externally by government.

14 The appellants based their case, in part, upon the principles underlying the common *indebitatus* count for money had and received by the defendant to the

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9 Business Franchise Licences (Tobacco) Regulation 1995, reg 14.

use of the plaintiff. The notes to the 1868 edition of Bullen and Leake's *Precedents of Pleadings*, giving examples of cases where such a count would lie, said[10]:

> "Money paid by the plaintiff for a *consideration that has failed*, may be thus recovered …
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> …
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> The failure of consideration must be complete in order to entitle the plaintiff to recover the money paid for it …; but where the consideration is severable, complete failure of part may form a ground for recovering a proportionate part of the money paid for it …; as where a quantity of goods were ordered at a certain rate of payment, and only a portion was delivered." (emphasis in original)

15 Mason and Carter, in *Restitution Law in Australia*, point out that cases decided in relation to the common *indebitatus* counts, although they involved an implied contract analysis which is now out of date, "form the precedents which make up the legal matrix of restitution law"[11]. Lord Mansfield, in *Moses v Macferlan*[12], referred to money paid "upon a consideration which happens to fail" as an example of money which, *ex aequo et bono*, a defendant ought to refund and, therefore, money for the recovery of which the count for money had and received lies.

16 Failure of consideration is not limited to non-performance of a contractual obligation, although it may include that. The authorities referred to by Deane J, in his discussion of the common law count for money had and received in *Muschinski v Dodds*[13], show that the concept embraces payment for a purpose which has failed as, for example, where a condition has not been fulfilled, or a contemplated state of affairs has disappeared[14]. Deane J, referring to "the general equitable notions which find expression in the common law count", gave as an example "a case where the substratum of a joint relationship or endeavour is

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10 Bullen and Leake, *Precedents of Pleadings*, 3rd ed (1868) at 48-49.

11 Mason and Carter, *Restitution Law in Australia*, (1995) at 73.

12 (1760) 2 Burr 1005 at 1012 [97 ER 676 at 680-681].

13 (1985) 160 CLR 583 at 619-620.

14 See Birks, *An Introduction to the Law of Restitution*, (1985) at 223.

removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it"[15]. In the case of money paid pursuant to a contract, it would involve too narrow a view of those "general equitable notions" to limit failure of consideration to failure of contractual performance. In the present case, the amount of the net total wholesale cost referable to the tax was, from one point of view, part of the money sum each appellant was obliged to pay to obtain delivery of the tobacco products. But there was more to it than that. The tax was a government imposition, in the form of a fee payable under a licensing scheme. The nature of the scheme was such that the licensed wholesaler, or, if not the wholesaler, then the licensed retailer, would pay the amount referable to particular tobacco products. The respondent, anticipating liability for the fee, required the appellants, when purchasing products by wholesale, to pay an amount equal to the fee. The appellants, in turn, had an interest in the respondent paying the fee to the revenue authorities, for they were thereby relieved of a corresponding liability. There was a purpose involved in the making of the requirement that the appellants pay the amounts described as "tobacco licence fee", and in the compliance with that requirement. To describe those amounts as nothing more than an agreed part of the price (or, to use the language of the parties, cost) of the goods, is to ignore an important aspect of the facts.

17 In a contract for the sale of goods, the total amount which the buyer is required to pay to the seller may be expressed as one indivisible sum, even though it is possible to identify components which were taken into account by the parties in arriving at a final agreed figure. The final figure itself may have been the result of negotiation, making it impossible to relate a cost component to any particular part of that figure. Or there may be other factors which prevent even a notional apportionment. But there are cases, of which the present is an example, where it is possible, both to identify that part of the final agreed sum which is attributable to a cost component, and to conclude that an alteration in circumstances, perhaps involving a failure to incur an expense, has resulted in a failure of a severable part of the consideration. Here, the buyers, the retailers, were required to bear, as a component of the total cost to them of the tobacco products, a part of the licence fees which the seller, the wholesaler, was expected to incur at a future time, and which was referable to the products being sold. It was in the common interests of the parties that the fees, when so incurred, would be paid to the revenue authorities by the seller, and it was the common intention

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15 (1985) 160 CLR 583 at 619-620.

of the parties (and the revenue authorities) that the cost of the goods would include the fees. In the events that happened, the anticipated licence fees were not incurred by the seller. The state of affairs, which was within the contemplation of the parties as the basis of their dealings, concerning tax liability, altered. And it did so in circumstances which permitted, and required, severance of part of the total amount paid for the goods.

18 The case is not unlike that considered by the Court of Appeals of New York in *Wayne County Produce Co v Duffy-Mott Co Inc*[16]. A war tax of 10 per cent was imposed on cider. A manufacturer sold a quantity of cider by wholesale, at a certain price per gallon, less a stated discount, plus the tax. The total amount was paid to the manufacturer, and the manufacturer remitted the tax to the government. Later, it was ruled that the particular product sold was not taxable, and the manufacturer recovered the tax from the government. The purchaser claimed to recover from the manufacturer that part of the amount paid for the cider which was referable to the tax. The Court of Appeals upheld the claim. Cardozo CJ, who delivered the reasons of the Court, described the issue as being whether the money refunded to the manufacturer by the government was held "to the use of the plaintiff"[17]. He went on to say[18]:

> "This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events … This is a case where the promise of the buyer is to pay a stated price, and to put the seller in funds for the payment of a tax besides. In such a case the failure of the tax reduces to an equivalent extent the obligation of the promise."

19 The same idea may be expressed by saying that, in the present case, the failure of the tax involved the failure of a severable part of the consideration for which the net total amounts shown on the invoices were paid.

20 Although an attempt was made by the appellants to invoke an implied agreement under which they could claim repayment of any unpaid tax, it was artificial and unconvincing. The parties made no agreement, express or implied, about what was to happen if the tax was held to be invalid. If there is here a right to enforce repayment upon the basis of a failure of consideration, it is because, in the circumstances, the law imposes upon the respondent an obligation to make

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16 155 NE 669 (1927).

17 155 NE 669 at 669 (1927).

18 155 NE 669 at 669 (1927).

just restitution for a benefit derived at the expense of the appellants[19]. If there had been a total failure of consideration, because, for example, there had been a prepayment for goods which were never delivered, the respondent's duty to make restitution would have been clear. But there are two questions. The first is whether there has been a failure of a severable part of the consideration. The second is whether, in the absence of restitution, the respondent will retain money at the expense of the appellants. The second problem arises because the appellants have passed on the burden of the tax. According to the respondent, if the respondent has been enriched, then that has been at the expense, not of the appellants, but of the customers of the appellants, and justice does not require it to make restitution to the appellants.

21 It accords with the basis of dealing, and contractual arrangements, between the appellants and the respondent to regard that part of the net total amount of each invoice referable to the "tobacco licence fees" as a severable part of the consideration, which has failed. There is no conceptual objection to this. For the reasons already given, the tax component of the net total wholesale cost was treated as a distinct and separate element by the parties. It was externally imposed. It was not agreed by negotiation. It was not like the discounts, which might differ between retailers, just as the wholesale list price would vary from time to time in accordance with market conditions. To permit recovery of the tax component would not result in confusion between rights of compensation and restitution, or between enforcing a contract and claiming a right by reason of events which have occurred in relation to a contract[20].

22 It then becomes necessary to consider the respondent's objection based upon the fact that, at least in a practical sense, the burden of the tax has been passed on by the appellants to their customers. The factual basis of this objection cannot be refuted. It is in the nature of an indirect tax that it enters into the cost of the goods the subject of the tax and is borne by the consumers of the goods. The conclusion that the character of the tax was that of a tax on tobacco rather than a personal tax on wholesalers and retailers was an important part of the reasoning leading to the decision that it was a duty of excise.

23 Although the factual basis of the objection is correct, it is necessary to be clear as to its legal frame of reference. It cannot be simply an assertion that the appellants lack merit. In that respect, their position is no worse than that of the

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19 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 257 per Deane J.

20 cf *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

respondent. It was put on the basis that any enrichment of the respondent is not at the expense of the appellants and that, in consequence, the equitable foundation for a claim for restitution does not exist. But this, in turn, assumes that, in the circumstances of a case such as the present, it would only be unconscionable of the respondent to withhold repayment of the amounts referable to the tax if the appellants, for their part, were ultimately left impoverished to that extent. It is clear that, in a direct and immediate sense, the payments were made by the appellants, out of their own funds, to the respondent. They did not pay the amounts as agents, on behalf of third parties. The consumers of cigarettes, in an economic sense, bore the burden of the tax, but they were never legally liable as taxpayers. The appellants themselves were taxpayers under the licensing scheme, although if the respondent paid, or became liable to pay, tax in respect of particular tobacco products, the value of those products was disregarded in calculating the appellants' licence fees. And the respondent passed the tax on to the appellants, not merely in an economic sense, but also by the express terms of the dealings between the parties. They dealt on the basis that the appellants would pay to the respondent an amount equal to that part of the respondent's "tobacco licence fees" referable to the products sold to the appellants.

24 There having been a failure of a distinct and severable part of the consideration for the net total payments made by the appellants to the respondent, then, as between the parties to the payments, the respondent has no right to retain the amounts in question. If the tobacco products in question remained unsold by the appellants at the time the claims for repayment arose for determination, the respondent's obligation to make restitution would be clear. Why does it make a difference to the conscientiousness of the respondent's retention of the moneys that the products were sold by the appellants at prices that had the practical effect of recouping the expense they bore in paying the "tobacco licence fees"? The holders of licences were those upon whom the tax was imposed, but they were always intended to pass the tax on to the consumers. As between the licensees, it was the appellants who incurred the expense, in that they were charged, and paid, a severable amount for the purpose of the tax.

25 The decision of this Court in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd*[21] strongly supports the appellants on this question. That was a case of moneys paid by an insurance company to a revenue authority by mistake, in the form of overpaid stamp duty. The revenue authority was held liable to refund the overpayments, even though the amounts had been passed on to policy holders. That conclusion was reached on general restitutionary principles.

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21 (1994) 182 CLR 51.

26 Mason CJ said[22]:

> "Restitutionary relief, as it has developed to this point in our law, does not seek to provide compensation for loss. Instead, it operates to restore to the plaintiff what has been transferred from the plaintiff to the defendant whereby the defendant has been unjustly enriched. As in the action for money had and received, the defendant comes under an obligation to account to the plaintiff for money which the defendant has received for the use of the plaintiff. The subtraction from the plaintiff's wealth enables one to say that the defendant's unjust enrichment has been 'at the expense of the plaintiff', notwithstanding that the plaintiff may recoup the outgoing by means of transactions with third parties."

27 He also pointed out, in terms equally applicable to the present case, that, as between the parties to the litigation, the defendant having no title to retain the moneys, the plaintiff had the superior claim[23]. That, in our view, is the critical question. As between the appellants and the respondent, who has the superior claim? The answer lies in the circumstance that there has been a payment of moneys by the appellants to the respondent for a consideration which has failed, and the respondent has no title to retain the moneys.

28 Brennan J, with whom Toohey J[24] and McHugh J[25] agreed, said[26]:

> "The fact that Royal had passed on to its policy holders the burden of the payments made to the Commissioner does not mean that Royal did not pay its own money to the Commissioner. The passing on of the burden of the payments made does not affect the situation that, as between the Commissioner and Royal, the former was enriched at the expense of the latter. It may be that, if Royal recovers the overpayments it made, the policy holders will be entitled themselves to claim a refund from Royal … However that may be, no defence of 'passing on' is available to defeat a claim for moneys paid by A acting on his own behalf to B where B has

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22 (1994) 182 CLR 51 at 75 (footnote omitted).

23 (1994) 182 CLR 51 at 78.

24 (1994) 182 CLR 51 at 103.

25 (1994) 182 CLR 51 at 103.

26 (1994) 182 CLR 51 at 90-91.

been unjustly enriched by the payment and the moneys paid had been A's moneys."

29 It is impossible to explain those judgments, or that decision, upon the ground that there is some constitutional reason for treating restitutionary claims against governments differently from claims against private citizens. It may be that the same principle applies with even greater force in the case of claims against governments, but *Royal Insurance* stands as clear authority against the respondent's argument on this question. We see no reason to depart from that recent decision of this Court; and every reason in principle to support it.

30 The appellants were entitled to succeed in their claim for money had and received by the respondent to the use of the appellants.

31 The appeal should be allowed, and orders made as proposed by Gummow J.

32 GUMMOW J. At all material times, each of the seven appellants was a retailer of tobacco products and the holder of a retailer's licence granted pursuant to the *Business Franchise Licences (Tobacco) Act* 1987 (NSW) ("the Act") and the respondent ("Rothmans") was a wholesaler of tobacco products and the holder of either or both a wholesaler's licence or a group wholesaler's licence under the Act.

33 In the period 1 July 1997 to 5 August 1997 inclusive ("the Dispute Period"), Rothmans supplied tobacco products to each of the appellants. On 5 August 1997, the Full Court of this Court answered questions respecting the validity of the Act which had been submitted to it for determination on cases stated by Brennan CJ[27]. The Full Court had reserved its decision on 19 March 1997. The Act imposed a licence fee in a nominal sum on the retail and wholesale sale of tobacco and an additional fee. This was *ad valorem* in nature and was calculated by reference to a prescribed percentage of the value of the tobacco sold in a period preceding the licence period. The prescribed percentage had been increased from time to time by legislative amendment from 30 per cent at the commencement of the operation of the Act to 100 per cent as from 28 June 1995[28]. The Act took its form in reliance upon the reasoning in *Dennis Hotels Pty Ltd v Victoria*[29] and later decisions of this Court which denied to these imposts the character of duties of excise within the meaning of s 90 of the Constitution.

34 However, it was held in *Ha v New South Wales*[30] that the licence fees imposed by the Act were duties of excise within s 90 of the Constitution. The result was that the legislation was invalid as beyond the competence of any State Parliament.

The litigation

35 The present litigation is a sequel to the decision in *Ha*. Any rights of recovery from the State of moneys paid to it under the invalid provisions of the Act are regulated and curtailed by the *Recovery of Imposts Act* 1963 (NSW). This case is not concerned with any such claims. Nor are any claims made in this litigation by or on behalf of consumers who dealt with retailers. Rather, the issues concern the respective rights and liabilities under the general law of Rothmans as wholesaler and the appellants as retailers who dealt with Rothmans

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27 *Ha v New South Wales* (1997) 189 CLR 465.

28 *Ha v New South Wales* (1997) 189 CLR 465 at 486.

29 (1960) 104 CLR 529.

30 (1997) 189 CLR 465.

in the Dispute Period. There is no real conflict as to the primary facts, although the parties differ as to the inferences to be drawn from those facts.

36 In a proceeding instituted in the Federal Court on 1 May 1998, the appellants claimed from Rothmans certain amounts paid to it in respect of tobacco products supplied by Rothmans during the Dispute Period which covers some five weeks immediately preceding the handing down of the decision in *Ha* on 5 August 1997. Emmett J ordered that the application be dismissed[31]. An appeal to the Full Court was, by majority (Hill and Lehane JJ, Gyles J dissenting), dismissed[32].

The Act

37 For an appreciation of the nature of the claims made by the appellants and the issues which arise, it is necessary to return to a further consideration of the Act. The parties to this litigation were prohibited under penalty from selling tobacco (s 28), whether by wholesale (s 29) or retail (s 30), without a licence. Licences were issued on application (s 35), for periods of not more than a month, each month expiring on the 27th day of the month (s 39).

38 If on or before the expiry of a licence the licensee paid to the Chief Commissioner for Business Franchise Licences (Tobacco) ("the Chief Comissioner") the fee payable for a further licence, the licensee was to be taken to have applied for a further such licence and to have been granted it (s 40). However, as Emmett J stated[33]:

> "Section 40 did not itself create any liability to pay a licence fee. It simply provided that, if the fee payable for a further licence was paid, the licensee was to be taken to have applied for and have been granted a further licence. If a licensee did not pay the licence fee, the relevant licence was simply not renewed and if the former licensee thereafter engaged in the relevant activity an offence was committed. The Act imposed criminal sanctions for selling tobacco, carrying on tobacco wholesaling or carrying on tobacco retailing without being the holder of the appropriate licence."

His Honour went on[34]:

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31 *Roxborough v Rothmans of Pall Mall Australia Ltd* (1999) 161 ALR 253.

32 *Roxborough v Rothmans of Pall Mall Australia Ltd* (1999) 95 FCR 185.

33 (1999) 161 ALR 253 at 256.

34 (1999) 161 ALR 253 at 256.

"However, under s 47(1), if a person was required to hold a licence in respect of any period but did not do so, the person was required to pay to the Chief Commissioner an amount equal to the fee that would have been payable for the licence if the person had held one plus a penalty. Under s 47(2), the Commissioner was authorised to assess the amount payable. The amount was to be paid within 14 days of service on the person of notice of demand for payment. Further, under s 46(1), if, in the opinion of the Chief Commissioner, the fee assessed in respect of a licence was assessed incorrectly, the Commissioner was authorised to reassess the fee. Under s 46(3), if on a reassessment the fee was increased, the additional amount was payable and was to be paid within 14 days after service of notice of the reassessment."

39 The fee payable by Rothmans for a wholesaler's licence was calculated pursuant to par (a) of s 41(1). This read:

"(1) The fees to be paid for licences are as follows:

(a) for a wholesaler's licence – a fee of $100 together with an amount equal to 100 per cent of the value of tobacco sold by the applicant in the course of tobacco wholesaling during the relevant period, other than tobacco sold to the holder of a wholesaler's licence or a group wholesaler's licence".

The expression "the relevant period" meant, in relation to a licence, "the month commencing 2 months before the commencement of the month in which the licence expires" (s 3(1)). The fee to be paid by the appellants for retailer's licences was prescribed as follows in par (c) of s 41(1):

"(1) The fees to be paid for licences are as follows:

…

(c) for a retailer's licence – a fee of $100 together with an amount equal to 100 per cent of the value of tobacco sold by the applicant in the course of tobacco retailing during the relevant period, disregarding any such tobacco purchased from a licensee".

Paragraph (c) of s 41(1) was qualified by s 41(3). This read:

"For the purposes of subsection (1)(c) … the value of tobacco purchased from the holder of a wholesaler's licence or a group wholesaler's licence is to be disregarded only if the holder of the licence has paid or is liable to pay a licence fee in respect of that tobacco."

40 The interrelation between sub-s (3) and par (c) of sub-s (1) is a matter of some difficulty and produced differences of opinion in the various judgments in the Federal Court. It will be necessary to return to this matter later in these reasons.

41 Section 45 was a provision of central importance for the commercial relationship between wholesaler and retailer. It empowered the Minister from time to time to determine the basis upon which and the means by which a value was to be attributed to tobacco sold during any period. On 9 June 1988, the Minister determined the value of tobacco relevantly to be:

> "The wholesale list price for tobacco as published from time to time by tobacco manufacturers and importers, excluding … any amount included in the selling price in consideration of a licence fee."

Emmett J pointed out that[35]:

> "It is significant that that determination (the minister's determination) contemplated that an amount might be 'included' in 'the selling price', being an amount which was in some way related to a licence fee. In other words, the minister recognised that a manufacturer would add on to the published list price an amount representing a contribution to the licence fee which would be payable by the manufacturer as a wholesaler of tobacco by reason of that sale of tobacco if the manufacturer subsequently applied for renewal of its licence.
>
> …
>
> The minister's determination made it necessary for Rothmans to publish a wholesale list price for tobacco. Rothmans published a price list which it updated from time to time. The price list that was current during the dispute period consisted of a document comprising five columns. The first column was a description of each brand of cigarette. The second column specified the quantity of cigarettes of that brand in a carton. The third column specified the wholesale price per 1000 cigarettes. The fourth column specified the cost per carton at wholesale, including licence fees. The final column specified the recommended retail price per packet 'including State licence fees 100 per cent'. … But for the provisions of the Act, Rothmans would not have published a price list in such a form."

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35 (1999) 161 ALR 253 at 256-257.

The contracts

42 The Act also required (s 66) Rothmans to issue invoices for the tobacco it supplied to the appellants and to keep copies thereof. The invoices issued to the appellants by Rothmans during the Dispute Period were in a standard form. This specified the name and address of the purchaser, the date of the sale and the quantity of each brand of tobacco sold. It also specified the wholesale price per 1000, being the sum specified in the third column of the price list in relation to the relevant product. A summary appeared at the foot of the form of invoice which specified an amount in respect of "tobacco licence fee".

43 It may be convenient for some purposes to refer to "the contract" between the appellants and Rothmans. However, as was accepted in argument in this Court, there was a new contract with each purchase in the Dispute Period and one question on this appeal concerns the terms of those contracts. Save as to quantity sold and moneys paid, those terms did not differ.

44 The contracts were evidenced partly by writing and partly by the acts of, and the course of the dealings between, the parties. Rothmans issued a price list as required by the Act. Each appellant had completed a document addressed to Rothmans and headed "Commercial Credit Application". This stated that the applicant requested a trading account with Rothmans and agreed to comply with the accompanying Terms and Conditions. Clause 2 thereof ambitiously declared that the Conditions applied to all orders placed with Rothmans to the exclusion of all other terms or conditions "unless expressly agreed in writing". Clause 10 contained a *Romalpa* clause and reserved to Rothmans property in the goods until full payment was made. Clause 6 stipulated payment within seven days of delivery of the goods. No reference was made to the Act or to licence fees payable thereunder. Clause 4 did state that Rothmans might without notice alter the prices as set out in its "applicable list".

45 The course of trade involved sales representatives calling at the premises of each appellant, the oral placement of an order, followed by the supply of the goods from the delivery truck, with an invoice, on one copy of which the appellant confirmed receipt of the goods.

The appellants' case

46 The appellants seek to recover from Rothmans sums equal to the amounts shown as "tobacco licence fee" in 74 identified invoices supplied to them by Rothmans in the Dispute Period. Payment of these sums was made within the Dispute Period, save for those in respect of nine invoices which were paid on or shortly after 6 August 1997. The appellants pleaded their case in various ways. These include the assertion that Rothmans is accountable to them as a constructive trustee in respect of the amounts in question. However, in argument in this Court it became clear that what the appellants pressed was not a claim to

any beneficial entitlement in respect of any assets of Rothmans; rather, the equitable relief they sought would be that consequent upon a finding that Rothmans owed the sums in question as equitable debts. The failure to press any claim to specific proprietary relief against Rothmans no doubt reflects a point made by Gyles J in his dissenting judgment in the Full Court. His Honour observed[36]:

> "[A]s [Rothmans] is solvent and retains the benefit of the moneys collected, there is no need to pursue equitable remedies for there to be effective recovery".

That statement should serve as a cautionary reminder against what, for some, appears to be a mesmeric fixation upon the (not always well understood) potential of equitable, particularly trust, remedies where what the common law offers will meet the case[37].

47 Accordingly, attention first should be directed to determining the legal claims made by the appellants. They assert that, in refusing to repay the moneys, Rothmans is in breach of contractual obligations owed to the appellants. However, they also claim that the moneys were had and received by Rothmans to the use of the appellants and are recoverable by reason of a total failure of consideration. The appellants accept that, following *Baltic Shipping Co v Dillon*[38], if they are entitled to recover for moneys had and received, there applies "a pragmatic limitation"[39] whereby they cannot as well recover these amounts as components of a damages recovery on any successful claim they might sustain for breach of contract. It is convenient to consider in the first instance the claim for moneys had and received.

Section 41 of the Act

48 Before doing so, however, it is necessary to return to a consideration of the proper construction of s 41 of the Act.

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36 (1999) 95 FCR 185 at 217.

37 See *Bridgewater v Leahy* (1998) 194 CLR 457 at 494 [126]-[128]; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585 [42]; *Giumelli v Giumelli* (1999) 196 CLR 101 at 113 [10]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 409 [70].

38 (1993) 176 CLR 344.

39 Grantham, "Security of Contract: the Challenge from Restitution", (2000) 16 *Journal of Contract Law* 102 at 110.

49 Paragraph (c) of s 41(1) required for the grant of a retailer's licence (say for the month commencing 28 April) payment of a fee including an *ad valorem* component in respect of the value of certain (not all) tobacco sold by the retailer in the "relevant period". On this example that would be the month commencing 28 February. The tobacco whose value was to be taken into account in computing the fee payable by the retailer comprised (i) tobacco which the retailer had purchased from a party who was not a licensee and (ii) tobacco which, although purchased by the retailer from a licensee, was tobacco whose value, by reason of the operation of s 41(3), was not to be disregarded. If either (i) or (ii) applied, the retailer carried the full burden of the *ad valorem* component in respect of that tobacco.

50 The reference in s 41(3) to the value of tobacco which is to be disregarded requires identification of particular tobacco sold by the retailer during the relevant period, here the month commencing 28 February, which is tobacco in respect of which the wholesaler "has paid" or "is liable to pay" a licence fee. The identification is to occur at the time when the retailer computes the fee it will pay for the licence period to begin 28 April.

51 Because the "relevant period" precedes the licence period, either of two possibilities apply. First, it may be possible to say whether tobacco sold by the retailer during the relevant period commencing 28 February is tobacco in respect of which, at some earlier time, the wholesaler has paid a licence fee. Secondly, if the retail and wholesale transactions both occurred in the same relevant period commencing 28 February, then, at the time (say 27 April) the retailer determines whether its licence fee includes an *ad valorem* element, the wholesaler "is liable to pay" its licence fee. In the phrase "is liable to pay" the word "liable" is used in the sense of exposure to a requirement of payment of the licence fee as the price for the grant of a wholesaler's licence for the period commencing 28 April.

52 If the wholesaler does not seek a licence for that period, the retailer bears the full burden of the *ad valorem* component in respect of that tobacco and also may be subject to reassessment under s 46 by the Chief Commissioner.

53 Where the wholesaler does not renew the licence, there may or may not have been a breach by the wholesaler of s 50A. That provision fixes an obligation by reference to the intention of the wholesaler at an earlier time. When paying the fee for the renewal of the licence for the relevant period commencing 28 February, the wholesaler had been obliged by s 50A to declare whether or not it intended to carry on business during either or both the two months beginning 28 March.

54 What is of particular importance for the present litigation is that when, in July 1997, during the Dispute Period, the appellants purchased tobacco at a price which specified a component for "tobacco licence fee", they had an interest in ensuring that Rothmans as the wholesaler, along with the appellants, renewed its

licence for the period beginning 28 August 1997. This also was true of the payments made immediately before 5 August 1997, in respect of the licence period to begin 28 September 1997. The payments funded the wholesaler to meet a cost of continuing in business for these future licence periods, to the mutual benefit of both wholesaler and retailer[40].

The terms of the contracts

55 The first task is to consider the evidence and to find the relevant express terms[41]. The terms respecting the dealings between the appellants and Rothmans are to be deduced or inferred objectively from the documents to which reference has been made and from the course of conduct of the parties, all against the background of the operation of the Act. Rothmans emphasised in its submissions that each appellant knew and accepted that it would not receive the goods unless it undertook to pay the whole of the amount stipulated in the respective invoice. But that does not necessarily exclude the addition of a term respecting the payment of that element of this amount which was specified as "tobacco licence fee".

56 The better conclusion from the evidence is that, in the contracts made during the Dispute Period, each appellant agreed to pay both the invoiced price of the goods and the licence fee component in exchange for the supply of the goods, but the payment of the licence fee component was the subject of a further term. This was that, if the appellant remained in business and renewed its licence for the periods beginning respectively 28 August and 28 September, Rothmans then would so act that the appellant would not, under s 41(1)(c) and s 41(3) of the Act, bear the *ad valorem* components of its renewed licence for those periods. The term ordinarily would be performed by Rothmans paying for the renewal of its licence for those further periods the equivalent amount to that received and identified as "tobacco licence fee".

57 That is not to maintain that Rothmans failed to acquire ownership in specie of the funds it was paid[42]; nor does it mean that Rothmans was obliged to earmark and keep those funds separate or otherwise treat them as if they were impressed with trusts in favour of the appellants[43]. Nor, given what, it will

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40 cf *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 392.

41 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 442.

42 cf *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 390; *Ilich v The Queen* (1987) 162 CLR 110 at 140-141.

43 cf *Cohen v Cohen* (1929) 42 CLR 91 at 101; *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 77-78.

appear, is the adequacy of the legal remedy available to the appellants, is there any occasion to consider whether, and, if so, when and on what terms, there arose in their favour a constructive trust of the species discerned by Judge Learned Hand in his dissenting judgment in *123 East Fifty-Fourth Street Inc v United States*[44], and to which Mason CJ gave qualified acceptance in observations made in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd*[45].

58 The circumstance that at least some of the appellants were aware during the Dispute Period that a challenge to the validity of the Act was on foot does not require any contrary conclusion to that reached above concerning the conditional nature of the licence fee payments. Nor does the circumstance that no express provision was made as to the future relationship between the parties if the pending challenge to the validity of the Act were to succeed. Litigation asserting the invalidity of legislation based upon the *Dennis Hotels* model had been recurrent over many years and essentially unsuccessful. This is not a case where, from the existence and terms of a contract between the parties, it is proper to infer that the parties denied recourse by one of them to an obligation imposed by the general law[46].

59 In this regard, Emmett J made the following important findings[47]:

> "Had the ad valorem element of the licence fee not been held invalid [on 5 August 1997], the value of tobacco products sold during July would have been taken into account in calculating the licence fee payable by Rothmans for the licence period commencing on 28 August 1997. That licence fee would ordinarily have been remitted on or just prior to 27 August 1997. The value of tobacco products sold from 1-5 August 1997 inclusive, together with the value of products sold during the balance of August, would have been taken into account in calculating the licence fee payable by Rothmans for the licence period commencing on 28 September 1997. That licence fee would ordinarily have been payable on or just prior to 27 September 1997.

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44 157 F 2d 68 (1946).

45 (1994) 182 CLR 51 at 75-78.

46 cf the observations, respecting the relationship between contract and tort, by Lord Goff of Chieveley in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 191-194 and in the joint judgment in *Astley v Austrust Ltd* (1999) 197 CLR 1 at 20-23 [44]-[48].

47 (1999) 161 ALR 253 at 258-259.

> However, by reason of the determination made in *Ha's* case, it was not necessary for any of the [appellants] or for Rothmans to obtain renewal of their respective licences under the Act on 27 August 1997 in order to carry on tobacco retailing and tobacco wholesaling respectively after that date. In particular, it was not necessary for Rothmans to pay any fee for a wholesaler's licence on that date and Rothmans made no payment. For the same reason, it was not necessary for Rothmans to make any payment for licence fee on 27 September 1997 and Rothmans made no such payment."

60 The result was that the appellants had paid moneys on a basis that later became falsified; the state of affairs presented before 5 August 1997 by the operation of the Act in respect of the future licence periods beginning 28 August and 28 September failed to sustain itself. That failure meant that there was no obligation imposed upon Rothmans by State statute to pay a licence fee and Rothmans was free to continue its business, as were the appellants, without doing so. It should be emphasised that there was no contractual obligation, of any variety, which obliged any of the relevant actors to remain in business. A further point is that between Rothmans and the appellants there was no contractual obligation to pay further licence fees and no such term could sensibly be implied. The term which dealt with the payments of the licence fee components postulated for its performance from time to time the continued need for both Rothmans and the appellants to renew their licences. That need disappeared after 5 August and the term then had no further work to do; this is not a case where one party asserts a right to performance of a contractual term and the other sets up discharge consequent upon frustration caused by a supervening event or state of affairs. Nor, contrary to a submission by the appellants, can it be said to have been "necessary" in the sense of the authorities[48] to imply a term in the contracts made in the Dispute Period that, if in law it became unnecessary to renew licences for the future periods, Rothmans would refund the moneys the appellants now seek to recover in this litigation.

61 However, that is not the end of the matter. The purpose upon which the moneys in question had been paid having failed, in the sense described above, does the common law impose upon Rothmans an obligation to restore the moneys to the appellants?

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48 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 347.

Money had and received

62 The appellants rely upon the principle encapsulated by Viscount Haldane LC in *Royal Bank of Canada v The King*[49]. In a passage later adopted by Lord Wright[50], his Lordship said[51]:

> "It is a well-established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid for a consideration that has failed."

63 The words used by the Lord Chancellor derive from the statements respecting the action for money had and received made by Lord Mansfield in *Moses v Macferlan*[52]. In speaking of the action for money had and received, Mason CJ said in *Baltic Shipping*[53]:

> "The action was, as Lord Mansfield said in *Moses v Macferlan*[54], 'quasi ex contractu' and founded on an obligation imposed by law and accommodated within the system of formal pleading by means of the fictitious assumpsit or promise. It was necessary to plead the fictitious assumpsit until the enactment of s 3 of the *Common Law Procedure Act* 1852 (Eng). And even then its influence continued. The abolition of the forms of action inspired an analysis of the sources of obligation in the common law in terms of a rigid dichotomy between contract and tort. In that context, there was little room for restitutionary obligation imposed by law except as a 'quasi-contractual' appendix to the law of contract. As a result, until recently, restitutionary claims were disallowed when a

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49 [1913] AC 283.

50 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 65.

51 [1913] AC 283 at 296.

52 (1760) 2 Burr 1005 [97 ER 676].

53 (1993) 176 CLR 344 at 356-357.

54 (1760) 2 Burr 1005 at 1008 [97 ER 676 at 678].

> promise could not be implied in fact[55]. However, since *Pavey & Matthews Pty Ltd v Paul*[56], such an approach no longer represents the law in Australia."

Earlier, in *National Commercial Banking Corporation of Australia Ltd v Batty*[57], Gibbs CJ indicated that he found it unnecessary in that appeal to discuss the doctrinal basis for the action for money had and received, but continued[58]:

> "Whether the action is based on an implied promise to pay, or on a principle designed to prevent unjust enrichment, the emphasis on justice and equity in both old and modern authority on this subject supports the view that the action will not lie unless the defendant in justice and equity ought to pay the money to the plaintiff". (footnotes omitted)

The rejection of the implied contract theory, of which Mason CJ spoke in *Baltic Shipping*, should be taken as reflecting the settled position in Australia.

64 However, the identification of a satisfactory doctrinal basis for the action is a more difficult matter. The common money counts, particularly after the decisions of Lord Mansfield, have occupied an uneasy position in the legal system between the three great sources of obligation in private law, tort, contract and trust.

65 In *Pan Ocean Shipping Co Ltd v Creditcorp Ltd*[59], Lord Goff of Chieveley stated as a general rule that the existence of a contractual regime for the recovery of overpayments made the imposition by law of a remedy for total failure of consideration "both unnecessary and inappropriate". However, that is not to assert that an action for money had and received may not lie to recover payments made with a view to entry into a contract which never comes to pass. The contrary is the case. Recovery of a deposit made "subject to contract", where the

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55 Birks and McLeod trace civil law origins of the implied contract approach: "The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century Before Blackstone", (1986) 6 *Oxford Journal of Legal Studies* 46.

56 (1987) 162 CLR 221.

57 (1986) 160 CLR 251 at 268.

58 (1986) 160 CLR 251 at 268.

59 [1994] 1 WLR 161 at 164; [1994] 1 All ER 470 at 473-474.

contract is not entered into[60] or is defeated by non-fulfilment of a condition[61], is an example.

66 The action may lie in respect of the moneys improperly received by a fiduciary, in addition to purely equitable remedies. *Boston Deep Sea Fishing and Ice Company v Ansell*[62] and *Reading v Attorney-General*[63] are well known examples. In *Lipkin Gorman v Karpnale Ltd*[64], the plaintiff firm of solicitors sued the defendant gambling club for moneys had and received which represented defalcations by a partner from its trust account; why no tracing remedy was sought does not appear. Presumably the plaintiff regarded the common law remedy as adequate.

67 With respect to express trusts it was settled by 1852, when *Edwards v Lowndes*[65] was decided, that it was only at the stage when there remains nothing to the trustee to execute except the payment over of money to the beneficiary, or the trustee admits the debt, that an action for money had and received might lie at the suit of the beneficiary against the trustee; in other respects, in the courts of law the trustee was treated as the absolute owner and the beneficiary's remedy was exclusively in a court of equity which might give effect to equitable set-offs and other equitable defences available to the trustee. The trust which had not been wholly performed was treated as analogous to the "open" contract, that is to say, one not discharged[66]; at that earlier stage, the action for money had and received did not lie.

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60 *Chillingworth v Esche* [1924] 1 Ch 97.

61 *Wright v Newton* (1835) 2 CM & R 124 [150 ER 53]; *Simmons v Heseltine* (1858) 5 CB (NS) 554 [141 ER 224].

62 (1888) 39 Ch D 339 at 367-368.

63 [1951] AC 507 at 515.

64 [1991] 2 AC 548.

65 (1852) 1 El & Bl 81 at 89 [118 ER 367 at 370]. See also *Bartlett v Dimond* (1845) 14 M & W 49 at 56 [153 ER 385 at 387-388]; *Pardoe v Price* (1847) 16 M & W 451 at 458-459 [153 ER 1266 at 1269]; *R v Brown* (1912) 14 CLR 17 at 25; Bullen and Leake, *Precedents of Pleadings*, 3rd ed (1868) at 46-47; Rath, *Principles and Precedents of Pleading*, (1961) at 28.

66 *Edwards v Bates* (1844) 7 Man & G 590 at 598-601 [135 ER 238 at 241-242]. See also Baker, "The Use of Assumpsit for Restitutionary Money Claims 1600-1800", in Schrage (ed), *Unjust Enrichment*, (1995) 31 at 48. Another use of the expression "open" contract is to identify an informal contract, particularly for the sale of land,

(Footnote continues on next page)

68 Finally, unlike the general position in tort law, the action for money had and received is not concerned with recovery as compensation for loss or damage suffered by the plaintiff. It is settled in this Court that, at least where the plaintiff is not asserting a trust in its favour or seeking other equitable relief, an action for money had and received is, as Mason CJ put it, not "defeated simply because the plaintiff has recouped the outgoing from others"[67]. This is important for the present litigation, given the dealings between the appellants as retailers and the consumers. Mason CJ observed in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* that[68]:

> "it seems that there is no recorded instance of a court engaging in the daunting exercise of working out the actual loss sustained by the plaintiff and restricting the amount of an award to that measure".

Further, his Honour added, why "as between the plaintiff and the defendant, the passing on of the tax to customers of the plaintiff results in conduct which should disentitle the plaintiff in equity from recovery is difficult to understand"[69].

69 The doctrinal reason which points against the "passing-on" defence is the unconscientious conduct of the defendant in refusing to account to the plaintiff. In *Mason v New South Wales*[70], Windeyer J, in a passage approved by Mason CJ, Brennan, Toohey and McHugh JJ in *Royal Insurance*[71], said:

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which does not deal expressly with matters of detail usually found in such contracts: *Cavallari v Premier Refrigeration Co Pty Ltd* (1952) 85 CLR 20 at 25.

67 *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 78.

68 (1994) 182 CLR 51 at 75.

69 (1994) 182 CLR 51 at 75. The United States decisions on the question are divided: Note, "Buyer's Recovery of Invalidated Processing Tax Under Original [*Agricultural Adjustment Act*]", (1941) 51 *Yale Law Journal* 348; Woodward, "'Passing-on' the Right to Restitution", (1985) 39 *University of Miami Law Review* 873, where, at 882, 900 and 923, reference is made to Windeyer J's judgment in *Mason v New South Wales* (1959) 102 CLR 108 at 146.

70 (1959) 102 CLR 108 at 146.

71 (1994) 182 CLR 51 at 74-75, 90-91, 103; cf the observations of Lord Goff of Chieveley in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 177-178.

> "The concept of impoverishment as a correlative of enrichment may have some place in some fields of continental law. It is foreign to our law. Even if there were any equity in favour of third parties attaching to the fruits of any judgment the plaintiffs might recover – and there is nothing proved at all remotely suggesting that there is – this circumstance would be quite irrelevant to the present proceedings."

Unjust enrichment theory

70 Writing extrajudicially, Justice Paul Finn has said of the concept of "unjust enrichment" that "[a]t a quite visceral level it provides an important catalyst to further legal inquiry", particularly as "a unifying legal concept"[72] which "explains why the law recognises an obligation to make restitution in particular contexts"[73]. The conventional view is that it is the unjust enrichment which gives rise to the obligations of restitution. However, Justice Finn expresses concern that the concept of unjust enrichment may "contrive legal analysis" and continues (in a passage I would adopt)[74]:

> "[T]o the extent that it directs attention to outcomes and to the character to be attributed to them, it is capable of concealing rather than revealing why the law would want to attribute a responsibility to one party to provide satisfaction to the other. This is particularly so where, as is so often the case, it is conduct in a relationship or dealing – an expectation created and relied upon; a mistake not corrected; etc – which provides the focus of legal attention and which generates the issue of legal policy for which resolution is required. This, I suspect, provides the reason why 'unconscionable conduct' and not 'unjust enrichment' (a possible effect of that conduct) has achieved the currency it has in Australian law."

71 However, in *Baltic Shipping*, Mason CJ said that, in cases of money had and received, the retention of the money in question[75]:

> "is regarded, in the language of Lord Mansfield, as 'against conscience' or, in the modern terminology, as an unjust enrichment of the defendant

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72 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-257; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 375.

73 Finn, "Equitable Doctrine and Discretion in Remedies", in Cornish et al (eds), *Restitution: Past, Present and Future*, (1998) 251 at 251.

74 Finn, "Equitable Doctrine and Discretion in Remedies", in Cornish et al (eds), *Restitution: Past, Present and Future*, (1998) 251 at 252.

75 (1993) 176 CLR 344 at 359.

> because the condition upon which it was paid, namely, performance by the defendant may not have occurred". (footnote omitted)

Nevertheless, reflection will demonstrate that the notion of unjust enrichment cannot be accepted as a modern synonym for a refusal "against conscience" to pay the money in question. This is because, as Rothmans emphasised in its submissions, the action for money had and received lies against defendants who fail to account but who, on any sensible understanding of the term, have not been enriched. A recent example[76] is the decision of the New Zealand Court of Appeal in *Martin v Pont*[77]. A principal who entrusted money to an agent for the purpose of investing it with a nominated finance company was entitled to recover from the agent when, by reason of a defalcation by an employee of the agent which did not benefit the agent, the purpose was not carried out.

72 Considerations such as these, together with practical experience, suggest caution in judicial acceptance of any all-embracing theory of restitutionary rights and remedies founded upon a notion of "unjust enrichment". To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writing of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.

73 In *McGinty v Western Australia*[78], McHugh J referred to Judge Posner's description of "top-down reasoning" by which a theory about an area of law is invented or adopted and then applied to existing decisions to make them conform to the theory and to dictate the outcome in new cases. Judge Posner spoke of the use of the theory by its adherents[79]:

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76 Earlier authorities include *Parry v Roberts* (1835) 3 Ad & E 118 [111 ER 358]; cf *The Oriental Bank Corporation v Hewitt* (1862) 1 SCR (NSW) (L) 220. See also Jackson, *The History of Quasi-Contract in English Law*, (1936) at 24-26.

77 [1993] 3 NZLR 25. See also Stoljar, "Unjust Enrichment and Unjust Sacrifice", (1987) 50 *Modern Law Review* 603 at 612-613; Kwai-Lian Liew, "Restitution and Contract Risk: Commentary", in McInnes (ed), *Restitution: Developments in Unjust Enrichment*, (1996) 163 at 165-166, 171-175; Grantham and Rickett, *Enrichment and Restitution in New Zealand*, (2000) at 277-279.

78 (1996) 186 CLR 140 at 232.

79 "Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights", (1992) 59 *University of Chicago Law Review* 433 at 433. See also Waters, "The Reception of Equity in the Supreme Court of Canada (1875-2000)", (2001) 80 *Canadian Bar Review* 620 at 645.

> "to organize, criticize, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory and with the canonical cases, that is, the cases accepted as authoritative within the theory".

As it happens, Lord Mansfield favoured the development of legal principle by a journey in the opposite direction. In *Ringsted v Lady Lanesborough*, his Lordship said[80]:

> "General rules are, however, varied by change of circumstances. Cases arise within the letter, yet not within the reason, of the rule; and exceptions are introduced, which, grafted upon the rule, form a system of law."

74 Unless, as this Court indicated in *David Securities Pty Ltd v Commonwealth Bank of Australia*[81], unjust enrichment is seen as a concept rather than a definitive legal principle, substance and dynamism may be restricted by dogma. In turn, the dogma will tend to generate new fictions in order to retain support for its thesis. It also may distort well settled principles in other fields, including those respecting equitable doctrines and remedies, so that they answer the newly mandated order of things. Then various theories will compete, each to deny the others. There is support in Australasian legal scholarship for considerable scepticism respecting any all-embracing theory in this field, with the treatment of the disparate as no more than species of the one newly discovered genus[82].

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80 (1783) 3 Dougl 197 at 203 [99 ER 610 at 613].

81 (1992) 175 CLR 353 at 378-379.

82 See, for example, Stoljar, "Unjust Enrichment and Unjust Sacrifice", (1987) 50 *Modern Law Review* 603 at 610-613; Tilbury, *Civil Remedies*, vol 1 (1990) at [4003]-[4019]; Tilbury, "Restitutionary Damages", in Carroll (ed), *Civil Remedies: Issues and Developments*, (1996) 2 at 2-6, 43-47; Glover, *Commercial Equity: Fiduciary Relationships*, (1995) at [5.15]-[5.17]; Dietrich, *Restitution: A New Perspective*, (1998) at 92-100; Grantham and Rickett, "Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?", (1997) *New Zealand Law Review* 668; Grantham and Rickett, *Enrichment and Restitution in New Zealand*, (2000) at 13-16; Wright, "Professor Birks and the Demise of the Remedial Constructive Trust", (1999) 7 *Restitution Law Review* 128 at 129-136; Doyle and Wright, "Restitutionary Damages – The Unnecessary Remedy?", (2001) 25 *Melbourne University Law Review* 1 at 17-20; Kremer, "The Action for Money Had and Received", (2001) 17 *Journal of Contract Law* 93 at 94-97. See, further, Jaffey, *The Nature and Scope of Restitution*, (2000) at 15-26.

75 On the other hand, the action to recover the moneys sought by the appellants after the failure of the purpose of funding Rothmans to renew its licence may be illustrative of the gap-filling and auxiliary role of restitutionary remedies[83]. These remedies do not let matters lie where they would fall if the carriage of risk between the parties were left entirely within the limits of their contract. Hence there is some force in the statement by Laycock[84]:

> "The rules of restitution developed much like the rules of equity. Restitution arose to avoid unjust results in specific cases – as a series of innovations to fill gaps in the rest of the law."

The decision in *Moses v Macferlan*

76 That returns one to a consideration of the decision in *Moses v Macferlan* itself. What was decided in *Moses v Macferlan*[85]? Moses had owed Macferlan £26, did not pay him and Macferlan sued him. The claim went to arbitration and settlement was reached: Moses would pay £20 and indorse over to Macferlan four 30s promissory notes made by one Jacob to Moses; Macferlan would seek to collect on the bills from Jacob and, if he recovered the entire value of the notes, he would pay one-half of the costs of Moses of the earlier collection action against Moses; by written instrument, Macferlan indemnified Moses against any liability on the notes as an indorser and gave Moses a release.

77 Macferlan was unable to collect on the notes and sued Moses in the local Court of Conscience, for the County of Middlesex, established by statute 23 Geo II c 33 (1750)[86]. Macferlan sued Moses on the promissory notes. It would

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83 Dietrich, *Restitution: A New Perspective*, (1998) at 29-35; Grantham and Rickett, "On the Subsidiarity of Unjust Enrichment", (2001) 117 *Law Quarterly Review* 273 at 289-293.

84 "The Scope and Significance of Restitution", (1989) 67 *Texas Law Review* 1277 at 1278.

85 What follows is drawn from the report (1760) 2 Burr 1005 [97 ER 676], together with an account of the case given by the New South Wales Full Court in *Lyons v Hardy* (1881) 2 NSWR (L) 369 at 372-374, Keener, *A Treatise on the Law of Quasi-Contracts*, (1893) at 413-415 and Oldham, *The Mansfield Manuscripts*, (1992), vol 1 at 169-175.

86 The statute was repealed by the *County Courts Act* 1846 (9 & 10 Vict c 95). The number of commissioners, who composed the bench, the mode of their selection and their qualifications for office varied from one court to the other: Winder, "The Courts of Requests", (1936) 52 *Law Quarterly Review* 369 at 375. In their fifth *Report on the Practice and Proceedings of the Superior Courts of Common Law*,

(Footnote continues on next page)

appear that Moses might have enjoined that action by a suit in Chancery to enforce the indemnity agreement made with Macferlan and thereby have avoided the multiplicity of litigation that ensued. Moses failed to take any such steps. Further, Moses might have sued in a common law court on a special assumpsit to recover the damage suffered by reason of the breach by Macferlan of that agreement. Presumably the failure of Moses to seek injunctive relief would have provided no defence to his action at law. However, Moses did not bring such an action.

78 Rather, in his defence in the Court of Conscience he sought to rely upon the agreement with Macferlan. However, that Court refused to receive that evidence on the ground that the agreement raised issues collateral to the action on the bills; if pursued, the Court might, to determine the defence upon the agreement, have gone beyond the monetary limits upon its jurisdiction. Accordingly, on the notes, Macferlan recovered judgment for the full £6. By statute, no writ of error or certiorari lay from the Court of Conscience to the Court of King's Bench or any other common law court[87].

79 Moses did not seek from Chancery an injunction to restrain Macferlan proceeding on the judgment he had obtained[88]. Rather, Moses satisfied the judgment against him and then sued in the King's Bench to recover £6 in an action upon the case for money had and received by Macferlan to the use of Moses.

80 Contrary to what has been said by some writers[89], the doctrine of *res judicata* had no application to this action in the King's Bench; there was no attempt by Moses to relitigate a cause of action that had merged into the judgment for Macferlan in the proceeding in the Court of Conscience[90]. Nor was

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(1833), (reprinted British Parliamentary Papers, *Legal Administration General*, vol 5), which dealt with provincial courts for the recovery of small debts, the Commissioners said (at 11) that the suspicions of Blackstone respecting the procedures of the Courts of Requests and Courts of Conscience had "not been removed by later experience".

87 23 Geo II c 33, s 4. See Blackstone, *Commentaries on the Laws of England*, (1768), bk 3, Ch 6 at 82-83.

88 cf *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 at 441-442; *High v Bengal Brass Co and Bank of NSW* (1921) 21 SR (NSW) 232 at 237-238.

89 Fridman, *Restitution*, 2nd ed (1992) at 449-450; Jaffey, *The Nature and Scope of Restitution*, (2000) at 183.

90 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 597, 610-613.

there any issue estoppel, given the denial of jurisdiction in the Court of Conscience to deal with issues arising under the agreement[91].

81 The action in the King's Bench was tried before Lord Mansfield and a jury and "there was no doubt but that, upon the merits, the plaintiff was intitled to the money"[92]. However, the Lord Chief Justice reserved for the opinion of the Court *in banc* the question whether the action for money had and received was misconceived. Macferlan obviously had made no promise to repay the fruits of his judgment. Was it necessary for Moses to plead an agreement? If so, the only relevant agreement was the original indemnity agreement[93]. The central issue thus turned upon the appropriate form of the action. The Court answered the question favourably to Moses who thus retained his verdict against Macferlan[94].

82 The litigation conducted by Moses in the King's Bench was not to enforce by an award of damages a primary obligation imposed upon Macferlan by the original indemnity agreement. Macferlan had been bound thereby not to sue Moses on the notes. Moses now sued to recoup what had been obtained from him in breach of that contract and "kept from him iniquitously"[95].

83 Lord Mansfield spoke of the action for money had and received as one which "lies in numberless instances", as "founded in the equity of the plaintiff's case", and as a "kind of equitable action, to recover back money, which ought not in justice to be kept", the question being whether "the defendant may retain it

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91 *Cachia v Isaacs* (1985) 3 NSWLR 366 at 386-387.

92 (1760) 2 Burr 1005 at 1006 [97 ER 676 at 677].

93 Oldham, *The Mansfield Manuscripts*, (1992), vol 1 at 226-227.

94 The actual decision in *Moses v Macferlan* sometimes has been regarded as overruled. In *J & S Holdings Pty Ltd v NRMA Insurance Ltd* (1982) 41 ALR 539 at 549, Blackburn, Deane and Ellicott JJ referred to the opinion of Keener on the point. This was that the case said to overrule *Moses v Macferlan*, *Marriot v Hampton* (1797) 7 TR 269 [101 ER 969], had proceeded on a different basis. It applied to consecutive actions in the King's Bench the rules of *res judicata* to decide that money had and received did not lie to recover an amount paid in the first action where newly discovered evidence would have given a defence in that action: Keener, *A Treatise on the Law of Quasi-Contracts*, (1893) at 411-415; cf *DJL v Central Authority* (2000) 201 CLR 226 at 243-245 [33]-[38].

95 (1760) 2 Burr 1005 at 1012 [97 ER 676 at 681]. See Comment, "Moses v Macferlan – Is it Sound Law?", (1915) 24 *Yale Law Journal* 246.

with a safe conscience"[96]. Later, in *Clarke v Shee*, Lord Mansfield described the action as[97]:

> "a liberal action in the nature of a bill in equity; and if, under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject-matter of it, the plaintiff may well support this action".

84 It has been suggested that the use by Lord Mansfield in his judgment of the phrase "*ex aequo et bono*" and his references to the ties of natural justice and equity bespeak the reception of Roman law[98]. However, it must be remembered that Lord Mansfield borrowed ideas from various sources. An example, recently considered by the House of Lords in *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd*[99], is the concept of good faith in relation to insurance law. Sir Anthony Mason has observed that Lord Mansfield's approach to good faith and to restitution reflects "the spirit of equity rather than what its admirers refer to as the genius of the common law"[100]. With varying degrees of success, Lord Mansfield sought to translate equitable principles, doctrines, and procedures into the trial of actions at law[101]; this reflected his appreciation of equitable doctrine for its flexibility and adaptability to modern needs, particularly in commercial law[102]. Then, as today[103], "equity is the spur to new thought and further remedy, and … provides a means of introducing new policies".

85 Whilst some have preferred to view *Moses v Macferlan* through the spectacles of the civilian, others have taken quite a different approach. In delivering the judgment of the United States Supreme Court in *Myers v Hurley*

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96 (1760) 2 Burr 1005 at 1008-1012 [97 ER 676 at 678-681].

97 (1774) 1 Cowp 197 at 199-200 [98 ER 1041 at 1042].

98 Birks, "English and Roman Learning in *Moses v Macferlan*", (1984) 37 *Current Legal Problems* 1.

99 [2001] 2 WLR 170 at 184-186; [2001] 1 All ER 743 at 757-759.

100 Parkinson (ed), *The Principles of Equity*, (1996), Foreword at vi.

101 Holdsworth, *A History of English Law*, (1938), vol 12 at 583-605 and Fifoot, *Lord Mansfield*, (1936) at 183-197.

102 Holdsworth, *A History of English Law*, (1938), vol 12 at 260, 585.

103 Waters, "The Reception of Equity in the Supreme Court of Canada (1875-2000)", (2001) 80 *Canadian Bar Review* 620 at 694.

Motor Company[104], Sutherland J, with much citation of nineteenth century American authority applying *Moses v Macferlan*, said of the action for money had and received:

> "Such an action, though brought at law, is in its nature a substitute for a suit in equity; and it is to be determined by the application of equitable principles. In other words, the rights of the parties are to be determined as they would be upon a bill in equity. The defendant may rely upon any defense which shows that the plaintiff, in equity and good conscience is not entitled to recover in whole or in part."

86 Shortly thereafter, in *United States v Jefferson Electric Manufacturing Co*[105], the Supreme Court, with approval, set out the following passage from the judgment of the Massachusetts Supreme Judicial Court in *Claflin v Godfrey*[106]:

> "The action is assumpsit for money had and received by the defendant to the plaintiff's use, and for money paid by the plaintiff for the defendant's benefit. This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex aequo et bono* belongs to the plaintiff. It was encouraged and, to a great extent, brought into use by that great and just judge, Lord *Mansfield*, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action".

Finally, when giving the judgment of the Supreme Court in *Atlantic Coast Line Railroad Co v Florida*[107], Cardozo J, with reference to *Moses v Macferlan*,

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104 273 US 18 at 24 (1927); cf Hanbury, *Essays in Equity*, (1934) at 6-7.

105 291 US 386 at 402-403 (1934).

106 38 Mass 1 at 6 (1838). See also to the same effect the elaborate judgments of the New York Court of Appeals in *Chapman v Forbes* 26 NE 3 (1890), the Supreme Court of Illinois in *Board of Highway Commissioners v City of Bloomington* 97 NE 280 (1911), and the Supreme Court of California in *Philpott v Superior Court in and for Los Angeles County* 36 P 2d 635 (1934).

107 295 US 301 (1935).

described the action for money had and received as "equitable in origin and function" and continued[108]:

> "The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it."

The action in *Wayne County Produce Co v Duffy-Mott Co Inc*[109] was for money had and received; the judgment of Cardozo CJ allowing recovery, upon which the present appellants properly relied, is to be read with an understanding of what in the United States was taken as the origin and function of that action.

87 Professor Stoljar has pointed out[110] that the "really passionate" criticisms of *Moses v Macferlan* in the English cases did not begin until *Baylis v Bishop of London*[111] and *Sinclair v Brougham*[112]. The endorsement by Lord Sumner in the later case of the "notional or imputed promise to repay"[113], since rejected in this Court[114], was followed by his Lordship's denial that Lord Mansfield had "imported a head of equity"[115]. On the other hand, Lord Parker, whose authority on a question of equity was said by Isaacs J to be "no light matter"[116], considered that an action for money had and received was not one of "strict law", being analogous to a claim for equitable relief[117]. Reference has already been made in these reasons to the views upon the subject of another considerable lawyer, and a contemporary of Lord Sumner and Lord Parker, Viscount Haldane LC.

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108 295 US 301 at 309 (1935). See also the judgment of the Court delivered by Stone J in *Stone v White* 301 US 532 at 534 (1937) and cf *United States v California* 507 US 746 at 751 (1993).

109 155 NE 669 (1927).

110 *The Law of Quasi-Contract*, 2nd ed (1989) at 16.

111 [1913] 1 Ch 127.

112 [1914] AC 398.

113 [1914] AC 398 at 452.

114 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

115 [1914] AC 398 at 454.

116 *Schnelle v Dent* (1925) 35 CLR 494 at 522.

117 *Lodge v National Union Investment Company Ltd* [1907] 1 Ch 300 at 311-312.

88 The point made by Professor Stoljar respecting the earlier decisions in England is supported by a reading of the judgments of Lord Kenyon[118], Lord Ellenborough[119], Parke B[120] and Tindal CJ[121] in which the action for money had and received was described in the terms which had been used by Lord Mansfield. In *Mayfair Trading Co Pty Ltd v Dreyer*[122], Dixon CJ referred to the distinction drawn by Tindal CJ[123], between trover as "an action of strict law" and the action for money had and received. The third edition of Bullen and Leake, published in 1868, echoed Lord Mansfield by saying of the indebitatus count for money had and received that[124]:

> "[t]his is the most comprehensive of all the common counts. It is applicable wherever the defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff."

89 Recently, Hobhouse J said of the decisions respecting money had and received in the nineteenth century period[125]:

> "The reasoning of the common law judges expressly had regard to what was conscionable and by inference reflected the analogy between the common law 'use' and the fiduciary concept recognised by equity."

In this Court, emphasis was placed by Dixon CJ, McTiernan, Williams, Webb and Taylor JJ upon unconscientious retention by the defendant of the sum claimed by the plaintiff as "the reason of the rule under which an action of money

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118 For example, *Greville v Da Costa* (1797) Peake Add Cas 113 at 114 [170 ER 213 at 213].

119 For example, *Shaw v Jakeman* (1803) 4 East 201 at 205 [102 ER 807 at 809].

120 For example, *Kelly v Solari* (1841) 9 M & W 54 at 58 [152 ER 24 at 26].

121 For example, *Tregoning v Attenborough* (1830) 7 Bing 97 at 98 [131 ER 37 at 38]; *Edwards v Bates* (1844) 7 Man & G 590 at 597-598 [135 ER 238 at 241].

122 (1958) 101 CLR 428 at 450.

123 In *Tregoning v Attenborough* (1830) 7 Bing 97 at 98 [131 ER 37 at 38].

124 *Precedents of Pleadings*, 3rd ed (1868) at 44.

125 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 at 923. This litigation went to the House of Lords, but upon other grounds: [1996] AC 669.

had received lies in cases of payment by mistake"[126]. Their Honours continued[127]:

> "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*[128] 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'[129]." (emphasis added)

The law in Australia

90 The significance of the decision in *Pavey & Matthews Pty Ltd v Paul*[130] for present purposes is that in Australia it removed *Moses v Macferlan* from the pikestaff of "implied contract" upon which in England it was treated as having been impaled firmly by the House of Lords in *Sinclair v Brougham*[131]. This has left Lord Mansfield's "insightful observations"[132] free to have their effect.

91 Two further points should be made. One concerns the attraction to Lord Mansfield of Chancery pleading and procedure over the restrictions placed by the common law pleading system as then understood; the other his conception of the common law as something which should adapt itself to the various situations of mankind, as "the usages of society alter"[133]. By referring to the action as one in the nature of a bill in equity, Lord Mansfield was inviting attention to what

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126 *South Australian Cold Stores Ltd v Electricity Trust of South Australia* (1957) 98 CLR 65 at 75.

127 (1957) 98 CLR 65 at 75.

128 (1841) 9 M & W 54 [152 ER 24].

129 (1841) 9 M & W 54 at 58 [152 ER 24 at 26].

130 (1987) 162 CLR 221.

131 [1914] AC 398.

132 Maddaugh and McCamus, *The Law of Restitution*, (1990) at 7.

133 *Barwell v Brooks* (1784) 3 Dougl 371 at 373 [99 ER 702 at 703]. Similar sentiments were expressed by Lord Mansfield in *Ringsted v Lady Lanesborough* (1783) 3 Dougl 197 at 203 [99 ER 610 at 613].

would be required in the plaintiff's declaration. In *Moses v Macferlan* his Lordship emphasised[134]:

> "One great benefit, which arises to suitors from the nature of this action, is, that the plaintiff needs not state the special circumstances from which he concludes 'that, ex aequo & bono, the money received by the defendant, ought to be deemed as belonging to him:' he may declare generally, 'that the money was received to his use;' and make out his case, at the trial."

On the general issue, the defendant at trial was, as it later was put by this Court in *David Securities*[135]:

> "entitled to raise by way of answer any matter or circumstance which [showed] that his or her receipt (or retention) of the payment [was] not unjust".

92 In this way, there was a movement away from the common law pleading of standard fictitious promises. Further, and in turn, this involved a shift in favour of the more substantive principles of legal liability adopted in the equity courts, and to a preference for substance over form.

93 Specific instances were given by Lord Mansfield, namely that the action lay[136]:

> "for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances".

94 It should be observed that the second of these, "failure of consideration", has an affinity with the head of "accident". This, Lord Wilberforce said (in a case concerning relief against forfeiture), was "always a ground for equity's intervention"[137]; it was concerned with "unforeseen events, misfortunes, losses, acts, or omissions [which] are not the result of any negligence or misconduct in

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134 (1760) 2 Burr 1005 at 1010 [97 ER 676 at 679].

135 (1992) 175 CLR 353 at 379.

136 (1760) 2 Burr 1005 at 1012 [97 ER 676 at 681].

137 *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 722.

the party"[138]. The other examples given by Lord Mansfield were taken by Story as showing that, by this extension of the action for money had and received, "Courts of Law now entertain jurisdiction in many cases of this sort, where formerly the remedy was solely in equity"[139].

95 Lord Mansfield emphasised that he had stated what were but examples of "the gist of this kind of action [namely] that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money"[140]. The particular examples which Lord Mansfield gave, of which failure of consideration is one (his Lordship did not add the qualification "total"), each have developed their own body of authority in which their meaning and scope is expounded. Usually, recourse to that particular body of authority will be sufficient. However, the specific examples Lord Mansfield gave are not exhaustive of the scope of the action. The submission by Rothmans that, where the parties are in contractual relations, "the contractual allocation of risk" would be subverted if the action for money had and received were permitted in any case outside one of those categories should be rejected. The very circumstances respecting the dealings between the parties which were considered in *Moses v Macferlan* itself illustrated the point. Further, in deciding cases such as the present which question the boundaries of the established categories, recourse should be had to the general considerations referred to in *Moses v Macferlan*. As in the United States, there is a long tradition in the Supreme Court of New South Wales of proceeding in this manner[141]. If those general considerations resonate with equitable notions, then in a system in which equity prevails that cannot be a source of surprise.

96 No doubt, as Lord Sumner later affirmed in *Sinclair v Brougham*[142], Pollock CB had been correct when he said that in modern practice (it then being 1849) the action for money had and received "is a perfectly legal action" and the theory that it was an equitable action was "exploded"[143].

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138 Story, *Commentaries on Equity Jurisprudence as administered in England and America*, 13th ed (1886), vol 1, §78.

139 Story, *Commentaries on Equity Jurisprudence as administered in England and America*, 13th ed (1886), vol 2, §1256.

140 (1760) 2 Burr 1005 at 1012 [97 ER 676 at 681].

141 See *Lyons v Hardy* (1881) 2 NSWR (L) 369; *White v Copeland* (1894) 15 NSWR (L) 281; *Watney v Mass* (1954) 54 SR (NSW) 203; *Hitchins v Hitchins* (1998) 47 NSWLR 35.

142 [1914] AC 398 at 455-456.

143 *Miller v Atlee* (1849) 13 Jurist 431 *arguendo*.

97 Well before Lord Sumner spoke, it had been settled in United States jurisdictions, for example by the New York Court of Appeals[144], with reference to *Moses v Macferlan* that the fact:

> "[t]hat an action is of an equitable nature does not make it an action in equity."

Likewise, an action for damages for breach of certain terms implied in contracts of employment is an action to vindicate legal rights, notwithstanding that the terms in question are re-expressions of notions of fiduciary responsibility[145]. Again, certain equitable doctrines "crept into the law" respecting actions on guarantees[146].

98 What these examples illustrate is the statement attributed to Lord Redesdale[147]:

> "A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next."

99 Other examples may be given of the absorption or adoption by the common law of equitable notions. One which merits some attention is the equitable doctrine considered in *Baxter v Obacelo Pty Ltd*[148] whereby a judgment creditor who already had satisfied a judgment held in respect of the same damage would be enjoined from enforcing a second judgment, against another wrongdoer, so as to prevent double satisfaction and unjust enrichment by recovery of more than what in truth was due to the judgment creditor. In *Bird v*

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144 *Chapman v Forbes* 26 NE 3 at 5 (1890).

145 *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 317-318 [25]-[26]; 176 ALR 693 at 700-701.

146 The words are those of Parke B in *Smith v Winter* (1838) 4 M & W 454 at 464 *arguendo* [150 ER 1507 at 1512]. See also the statement by the Earl of Selborne LC in *In re Sherry; London and County Banking Company v Terry* (1884) 25 Ch D 692 at 703, and De Colyar, *A Treatise on the Law of Guarantees and of Principal and Surety*, 3rd ed (1897) at 363.

147 See *Spect v Spect* 26 P 203 at 205 (1891). Further instances of the common law imitating or adopting equity procedures are given in Macnair, *The Law of Proof in Early Modern Equity*, (1999) at 278-279.

148 [2001] HCA 66 at [55]-[62].

Randall[149], Lord Mansfield took some steps to introduce this principle as going to the "justice and conscience" of the plaintiff's action on the case.

100 In all of these areas, as in *Moses v Macferlan*, notions derived from equity have been worked into and in that sense have become part of the fabric of the common law. Hence the statement in *Baltic Shipping* by Deane and Dawson JJ where, after indicating that the indebitatus count for money had and received was framed in the traditional language of trust or use, their Honours continued[150]:

> "[I]n a modern context where common law and equity are fused with equity prevailing, the artificial constraints imposed by the old forms of action can, unless they reflect coherent principle, be disregarded where they impede the principled enunciation and development of the law. In particular, the notions of good conscience, which both the common law and equity recognized as the underlying rationale of the law of unjust enrichment, now dictate that, in applying the relevant doctrines of law and equity, regard be had to matters of substance rather than technical form."

Earlier, in *Muschinski v Dodds*[151], Deane J, after referring to *Moses v Macferlan*, and to "the general equitable notions which find expression in the common law count for money had and received", identified the operation of most of the traditional doctrines of equity as operating upon "legal entitlement to prevent a person from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct". One such instance then identified by his Honour[152] concerned the removal of the substratum of a joint relationship or endeavour:

> "without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it".

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149 (1762) 3 Burr 1345 at 1353 [97 ER 866 at 870].

150 (1993) 176 CLR 344 at 376; cf *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-257.

151 (1985) 160 CLR 583 at 619-620.

152 (1985) 160 CLR 583 at 620.

Those observations are applicable to the class of case where, in Lord Mansfield's words, money has been paid "upon a consideration which happens to fail"[153]. This is such a case.

Failure of consideration

101 The term "failure of consideration" is used in the law to mean several things. The point was made as follows by Stoljar[154]:

> "First, a consideration fails because the defendant's promise is insufficient or illusory or formally void, the failure thus being an initial invalidity preventing a contract from being formed. Secondly, we say that the consideration fails where a promisor fails to perform; the failure is now simply a breach of contract, though usually a substantial or important breach. But, thirdly, failure of consideration has also a much older and specialised sense, one that describes a specific remedy when, upon the collapse of a bargain, the promisee seeks to recover money had and received by the promisor. Thus failure of consideration specifies not only a claim, but also the particular basis for that claim". (footnotes omitted)

102 It is the third meaning with which this litigation is concerned. But what is meant here by the term "consideration"? It is important to appreciate that, although this often is the case, the "bargain" referred to in describing failure of consideration need not be contractual in nature. For example, in *Martin v Andrews*[155], the Court of Queen's Bench upheld a declaration for money had and received to recover conduct money tendered with a subpoena *ad test* where the case was settled before trial. Lord Campbell CJ said[156]:

> "The consideration has failed. The money is paid for the purpose of defraying the expences [sic] of the witness's journey: if there is no journey there is no expence [sic], and the consideration fails; and then an action lies for money had and received. There is indeed no express authority: but the general principles upon which that action is maintained are applicable."

The references to "purpose" and to "general principles" are significant.

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153 *Moses v Macferlan* (1760) 2 Burr 1005 at 1012 [97 ER 676 at 681].

154 "The Doctrine of Failure of Consideration", (1959) 75 *Law Quarterly Review* 53 at 53.

155 (1856) 7 El & Bl 1 [119 ER 1148].

156 (1856) 7 El & Bl 1 at 4 [119 ER 1148 at 1149].

103 In English law, the expression "consideration" has various possible meanings. One is found in the principle referred to by Maitland[157] which treats "valuable consideration" between members of the same family as a source of equitable rights of ownership. Another is the treatment in equity of a bare covenant by deed (where the presence of the seal would support an action at law for damages[158]) as insufficient to remove the covenants from the class of "volunteers" in whose favour equitable remedies (eg specific performance) are unavailable[159]. Three other meanings were identified by Robert Walker LJ in *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council*[160]. His Lordship said of the expression "consideration"[161]:

> "Its primary meaning is the 'advantage conferred or detriment suffered'[162] which is necessary to turn a promise not under seal into a binding contract. In the context of failure of consideration, however, it is, in the very well known words of Viscount Simon LC in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[163]: 'generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.' Then there is the older and looser, and potentially very confusing, usage of 'consideration' as equivalent to the Roman law 'causa' reflected in the traditional conveyancing expression, 'in consideration of natural love and affection'[164]."

This is not the occasion to pursue the linkage between the last and the first of these meanings. Windeyer J said that "[i]n a very general way causa in modern civil law does resemble valuable consideration in English law"[165]. However that may be, the earlier reference by Lord Campbell CJ in *Martin v Andrews* to the

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157 *Lectures on Equity*, (1936) at 33.

158 *Cannon v Hartley* [1949] Ch 213.

159 *Lewin on Trusts*, 17th ed (2000), §10-06.

160 [1999] QB 215.

161 [1999] QB 215 at 236.

162 *Midland Bank Trust Co Ltd v Green* [1981] AC 513 at 531.

163 [1943] AC 32 at 48.

164 See Birks, *An Introduction to the Law of Restitution*, (1985) at 223.

165 *Smith v Jenkins* (1970) 119 CLR 397 at 411.

purpose of a non-contractual payment indicates that the later emphasis by Viscount Simon LC in *Fibrosa* to the performance of a promise is an unsatisfactory explanation of all the cases where repayment is made for failure of consideration.

104 In the present case, there has been no failure in the performance by Rothmans of any promise it made. No question of repudiation by it of its contractual obligations arises. The question is that stated by Deane J in *Muschinski* set out earlier in these reasons. Is it unconscionable for Rothmans to enjoy the payments in respect of the tobacco licence fee, in circumstances in which it was not specifically intended or specially provided that Rothmans should so enjoy them? The answer should be in the affirmative. Here, "failure of consideration" identifies the failure to sustain itself of the state of affairs contemplated as a basis for the payments the appellants seek to recover[166].

105 At this stage attention is required to the notion that the failure relied upon be "total". The general rule, exemplified in *Baltic Shipping*, is that where there has been a partial failure in performance of a contractual promise there is no right to recover back a proportionate part of the money paid on an action for money had and received. One reason for this requirement that the failure be "total" appears to be that, in cases in which the question has arisen, the plaintiff already will have a remedy in damages which will be governed by principles of compensation under which the plaintiff may recover no more than the loss sustained; to allow the plaintiff to claim restitution in respect of any breach, particularly where the plaintiff had made a bad bargain by paying the defendant more than the defendant's performance was worth, would cut across the compensatory principle[167].

106 Another reason for the general rule reflects the law's difficulty with apportionment in respect of an entire obligation, namely one in which the consideration for the payment of money is entire and indivisible. The rule is that the action will not be maintainable where "the money payable is neither apportioned by the contract, nor capable of being apportioned by a jury"[168]. The nineteenth century cases whence that rule is derived were decided when fact finding was the function of juries not judges. They reflected an appreciation of

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166 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 382; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 389; *Goss v Chilcott* [1996] AC 788 at 797.

167 Treitel, *The Law of Contract*, 10th ed (1999) at 978.

168 *Steele v Tardiani* (1946) 72 CLR 386 at 401. See also *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 350, 374, 384, 393.

the imperfections of that method of trial and also what today would be called a "default rule" that the allocation of such gains and losses was properly the exclusive function of the terms of the parties' contract[169].

107 Sir Guenter Treitel[170] suggests that the requirement of a "total" failure of consideration should be restricted to those instances in which the reasons for it, indicated above, still have force. He continues[171]:

> "It should, in other words, no longer apply where the payor has *no* remedy, or no satisfactory remedy, for breach (*eg* by way of action for damages[172]) in respect of the part left unperformed by the payee, or where there is in fact no difficulty in apportioning that part to the whole in respect of which the payor's advance payment had been made." (original emphasis)

108 In the present case, the appellants have no contractual remedy in respect of the retention of the moneys in question after the removal of the need for licence renewals as necessary conditions for the continuation of their businesses and that of Rothmans.

109 The circumstance that it is necessary for the appellants to pay the total of the invoiced amounts in order to obtain delivery and passing of title to the tobacco products supplied by Rothmans does not inevitably point to the conclusion that the sum designated in respect of "tobacco licence fee" was referable solely to the delivery and transfer of property in the tobacco products sold by Rothmans. The parties contracted not only for the supply of the tobacco products but also, in the light of the provisions of s 41 of the Act, with respect to the renewal of the wholesaler's licence and the funding for that to take place. Whilst that is understood, the very form of the transactions indicates that the payments made by the appellants can be "broken up"[173].

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169 Kull, "Mistake, Frustration, and the Windfall Principle of Contract Remedies", (1991) 43 *Hastings Law Journal* 1 at 30-31.

170 *The Law of Contract*, 10th ed (1999) at 979.

171 *The Law of Contract*, 10th ed (1999) at 979.

172 Or, in the case of a loan of money, by way of action for the agreed sum.

173 See *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 383; *Goss v Chilcott* [1996] AC 788 at 797; *Wayne County Produce Co v Duffy-Mott Co Inc* 155 NE 669 (1927).

Result

110 The appeal to this Court should be allowed with costs, the orders of the Full Court of the Federal Court set aside and in place thereof the appeal to that Court should be allowed with costs, and the orders of Emmett J set aside. In the actions, judgment, with costs, should be entered in favour of each of the appellants in their respective total sums specified in the Schedule to the Amended Statement of Claim filed on 15 December 1998. This means that judgment will be entered for the first appellant in the sum of $14,377.33; for the second appellant for $11,017.12; for the third appellant for $18,521.99; for the fourth appellant for $31,716.32; for the fifth appellant for $15,622.98; for the sixth appellant for $35,877.19; and for the seventh appellant for $26,456.55. It will be necessary, in the absence of agreement, for the Federal Court to determine any application by the appellants for interest under s 51A of the *Federal Court of Australia Act* 1976 (Cth).

111 KIRBY J. This appeal from a judgment of the Full Court of the Federal Court of Australia[174] concerns the entitlement of the appellants, Mr Roxborough and other retailers of tobacco products ("the retailers"), to recover from the respondent, Rothmans of Pall Mall Australia Ltd ("the wholesaler"), part of the price paid by the former to the latter on the basis that such part was paid as tobacco licence fees levied under invalid State legislation.

112 By decision of this Court[175], the *Business Franchise Licences (Tobacco) Act* 1987 (NSW) ("the Act") was held unconstitutional. Despite its nomenclature ("licence") and earlier judicial authority by reference to which it had been drafted[176], the Act was held to impose a duty of excise. Under the Constitution, duties of excise may only be imposed by laws made by the Federal Parliament[177].

113 The result of this Court's decision was that the obligations to obtain State licences and to pay substantial fees by reference to the quantity of tobacco products sold by the wholesaler and retailers ceased immediately[178]. However, at the moment of this Court's decision, because of the terms and conditions of contracts between the parties (adapted to the requirements of the Act) the wholesaler held substantial sums paid to it by the retailers which it did not then pay to the State revenue.

114 In the hands of the wholesaler, the foregoing sums represented a windfall. The retailers sued the wholesaler to recover the component of the price paid by them as licence fees unpaid under the Act. However, as was found by the Federal Court (and as was contemplated by the arrangement between the wholesaler and the retailers), the retailers had already passed on to their customers (the ultimate consumers of the tobacco products) the costs of the licence fees paid by them to the wholesaler[179]. The attempt of the retailers to recover a share of the wholesaler's windfall was not a selfless one, ventured on behalf of their customers. Neither before the proceedings reached this Court, nor in answer to repeated questions asked of their counsel, did the retailers indicate

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174 *Roxborough v Rothmans of Pall Mall Australia Ltd* (1999) 95 FCR 185.

175 *Ha v New South Wales* (1997) 189 CLR 465 ("*Ha's Case*").

176 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399.

177 Constitution, s 90.

178 On 5 August 1997.

179 *Roxborough* (1999) 95 FCR 185 at 199 [48].

the slightest interest in recovering the whole, or any part, of the windfall for the benefit of the consumers. They wanted the windfall for themselves.

115 There is nothing unusual in the pursuit of personal gain. Most litigation is motivated by the interests of the parties. However, the question presented by this appeal, as I would approach it, is whether the entitlements asserted by the retailers require, or permit, a disturbance of the status quo as it stood when this Court struck down the Act imposing the tobacco licence fees. Must part of the windfall to the wholesaler, who is undeserving, be passed to the retailers, equally undeserving, without any provision, sought or offered, to recompense the consumers, who are deserving because they ultimately paid amounts towards the unrecovered licence fees? Or should the windfall remain where it is, on the footing that no basis is shown by statute, by equity or by the common law to sustain the recovery claimed by the retailers?

116 Once the fees levied by the State Parliament had been declared invalid as excise duties, it would presumably have been open to the Federal Parliament to legislate for the just disbursement of the windfall held by the wholesaler and other such bodies. Legislation was at one stage promised. No such legislation has been enacted. To fend off any claims against it, the State relied on s 4 of the *Recovery of Imposts Act* 1963 (NSW), which disallows claims for recovery where a tax has been charged to, or recovered from, another person[180]. This appeal is not concerned with the validity or operation of that Act. In this sense, these proceedings are significantly different from others where the recoupment of payments found to have been constitutionally invalid is sought from a government or its agency that purported to levy the relevant charges[181]. These are proceedings between private parties fighting over the spoils of their contractual arrangements as, it is claimed, such arrangements are affected by the constitutional invalidation of the State law.

117 The problem presented by this appeal is by no means unique, either to this country or to others with legal systems sharing a similar history and like economic imperatives. Because the problem is not uncommon, and is bound to be repeated, it is desirable that the solution offered by this Court should be based on sound conceptual foundations. Such foundations are, in my view, more likely to be discovered by a consideration of the contemporary experience of other developed legal systems than by analysis of the reasoning of English courts

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180 For examples of similar legislation, see Mason and Carter, *Restitution Law in Australia*, (1995) at 782 [2038].

181 A point that distinguishes *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51.

before Australia was settled[182]. Such courts were not obliged to solve the legal problem that has arisen in this case by reference to the constitutional invalidation of a taxation statute.

118 Intuition suggests that, as between private parties, legal disturbance of the status quo would only occur if it could be justified so as to ensure that any tax unlawfully imposed was repaid to those who actually paid the costs of its imposition[183]. In other words, a windfall accruing to a private person would only be disturbed in favour of another private person if the latter could "satisfy the court, by the giving of an undertaking or other means, that it will distribute the moneys to the [persons] from whom they were collected, thereby recognizing their beneficial ownership of those moneys"[184]. Otherwise, why should the law intervene at all? Why should it do so, given that the "transfer [of] an unjust enrichment from defendant to plaintiff" would necessarily consume scarce judicial resources towards achieving an outcome that was equally meritless[185]?

119 The rights of the wholesaler and the retailers *inter se* are not decided by intuition. Nor are they decided by responses to questions posed at the foregoing level of generality. To discover the legal answer to the retailers' claims, it is necessary to consider the causes of action upon which they rely. These must be given effect according to their tenor. They must be applied to the facts of this case so as to yield, if possible, a "moderate and sensible integration"[186] of doctrine that avoids the morbid fascination, to which lawyers commonly fall victim, with the "baleful effects" of past authority[187]. This Court should proffer a solution that is as rational and just as the facts, the constitutional setting and existing legal doctrine permit.

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182 The reference is to *Moses v Macferlan* (1760) 2 Burr 1005 [97 ER 676] considered in the reasons of Gummow J at [76]-[87] and in the reasons of Callinan J at [202].

183 cf Bryan and Ellinghaus, "Fault Lines in the Law of Obligations: *Roxborough v Rothmans of Pall Mall Australia Ltd*", (2000) 22 *Sydney Law Review* 636 at 667.

184 *Royal Insurance* (1994) 182 CLR 51 at 78 per Mason CJ.

185 See Mason and Carter, *Restitution Law in Australia*, (1995) at 782 [2038].

186 Bryan and Ellinghaus, "Fault Lines in the Law of Obligations", (2000) 22 *Sydney Law Review* 636 at 637; see also at 666.

187 cf Bryan and Ellinghaus, "Fault Lines in the Law of Obligations", (2000) 22 *Sydney Law Review* 636 at 666.

The facts, legislation and issues

120 *The facts in issue*: The facts relevant to the proceedings are stated in the reasons of Gummow J[188] and Callinan J[189]. The applicable provisions of the Act, with which the individual contracts between the wholesaler and the retailers were designed to comply, are also set out there[190]. It is unnecessary for me to restate these details or the terms and conditions upon which the wholesaler supplied tobacco products to the retailers and debited their accounts at the agreed price. As a matter of practicality that price was obviously designed to cover the tobacco licence fee which, under the Act, the wholesaler was ordinarily obliged to pay in respect of such products[191].

121 *The claims for recovery*: In their endeavour to recover this "component" of the agreed price of the products from the wholesaler, the retailers pleaded their claims upon a number of bases. Some of the retailers' claims, and the issues they presented, can now be disregarded. Thus, although it had originally founded the jurisdiction of the Federal Court, by the time the claim under s 52 of the *Trade Practices Act* 1974 (Cth) reached the Full Court, only some of the retailers pressed it. The Full Court found that the primary judge's conclusions on the two representations relied upon to establish this claim, together with a fair analysis of any representation made by the terms of the wholesaler's written invoice, were fatal to the claim[192]. It is not pressed in the grounds of appeal to this Court.

122 So far as the claim for restitution for mistake is concerned, the Full Court correctly found that the payments made by the retailers to the wholesaler had been made pursuant to valid and enforceable contracts. The payments were therefore not recoverable on the basis that each payment had been made under a mistake either of fact or law. Although the retailers relied on the decision of this Court in *David Securities Pty Ltd v Commonwealth Bank of Australia*[193], that case is distinguishable. There, the *Income Tax Assessment Act* 1936 (Cth)[194] had

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188 Reasons of Gummow J at [32]-[36], [55]-[60].

189 Reasons of Callinan J at [177]-[193].

190 Reasons of Gummow J at [37]-[41]; reasons of Callinan J at [178]-[181] referring to the Act, ss 3, 28, 34, 35, 39, 40, 41, 45.

191 Reasons of Gummow J at [42]-[45]; reasons of Callinan J at [187].

192 *Roxborough* (1999) 95 FCR 185 at 208-209 [80]-[84].

193 (1992) 175 CLR 353 at 376.

194 s 261(1).

rendered void a borrower's contractual obligation to pay the lender amounts under a loan agreement in respect of income tax on the interest payable. The mistake relied upon was the borrower's ignorance of the statutory provision. In the present case, the decision of this Court invalidating the Act did not, as such, invalidate any contracts to pay sums calculated by reference to licence fees payable under the Act. Indeed, no term of the contracts between the parties was invalidated by any decision of this Court. In every case, the retailers' payments to the wholesaler were thus made in discharge of their obligations to the wholesaler under contracts between them that were incontestably valid. The cause of the payment of the sums by the retailers to the wholesaler was thus the obligation of the former to the latter under binding contracts. It was not any mistake as to the constitutional validity of the Act[195]. This ground of claim was therefore rightly rejected. It too can be disregarded.

123 *The issues*: Disposing of these two grounds of claim leaves to be determined whether the wholesaler is liable to account to the retailers for a component of the price paid that was referable to the licence fees:

(1) pursuant to a *constructive trust* that the law imposes on the parties' relations;

(2) pursuant to an *implied term* of the contracts between the parties, which the law recognises or imposes in the circumstances that have arisen; or

(3) as restitution for the *failure of consideration* under the contractual terms agreed to by the parties, in respect of that separate and identifiable component of the agreed price of the tobacco products that related to the licence fees payable under the invalidated Act.

124 The problem of what to do when the private legal relationships of parties have been conducted upon assumptions undermined by a supervening court decision of retrospective operation is one to which a federation, or similar interjurisdictional arrangement, is inherently susceptible. The problem has arisen in the United States and Canada. It has also arisen in the European Union. Therefore, before addressing the residual grounds of claim, it is useful to examine the ways in which the problem now before this Court has been resolved

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195 *Roxborough* (1999) 95 FCR 185 at 207-208 [76]-[79]; cf Bryan and Ellinghaus, "Fault Lines in the Law of Obligations", (2000) 22 *Sydney Law Review* 636 at 656-657.

in other jurisdictions. In Australia, the common law[196] and equity[197] always adapt themselves to the Constitution. Ultimately, the legal solution to the problem presented by this appeal must therefore be fashioned in a way that is harmonious with the postulates upon which constitutional invalidity, and its outcomes, fall to be decided[198]. This is a constitutional context that did not need to be considered by English judges in earlier times. It is therefore not reflected in their reasons. It must be considered in Australia.

Solutions to unconstitutional overpayments

125 *United States*: In the United States of America many cases have been decided involving claims for the refund of taxes later found to have been unconstitutional. In *Richardson Lubricating Co v Kinney*[199], the issue arose in respect of a tax paid on motor fuel. The tax had been collected by the seller in the form of a two cent per gallon levy on the fuel sold. The tax was separately identified. It was not charged as an undifferentiated part of the purchase price. The Supreme Court of Illinois held that, because the plaintiff retailer had not done equity by returning the sums it had recovered to its customers, and had not offered to do so, it had suffered no loss[200]. It was therefore denied a refund from the State of the taxes paid. In effect, this was because it did not come to court with clean hands. This decision has been followed by later authority[201]. In the way it approached the matter, the Court did not have to consider the practical difficulties that would have been involved in refunding the levy to innumerable, unascertainable customers.

126 Occasionally, where legislation has expressly permitted it, a taxpayer has been allowed to recover a refund of a tax struck down as unconstitutional,

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196 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566; *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1122 [66], 1135 [142]; 172 ALR 625 at 643, 662.

197 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [206].

198 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 75 ALJR 1342 at 1350-1352 [41]-[51]; 181 ALR 307 at 318-320.

199 168 NE 886 (1929).

200 168 NE 886 at 889-890 (1929).

201 *Standard Oil Co v Bollinger* 169 NE 236 (1929).

although the economic burden of the tax has been borne by another[202]. However, unless this was the requirement of the legislation in question or unless some other principle applied, courts in the United States have generally been reluctant to permit recovery by a retailer. One judicial explanation for this reluctance strikes a chord with the facts of the present case[203]:

> "To hold otherwise would be manifestly unjust and would result in the unjust enrichment of the one seeking to recover the tax from the commonwealth and supported by no outlay on his part. Indirectly it would … leave the actual payer of the tax with a bare cupboard. … The appellee should be confined in the amount of its recovery to taxes paid out of its own funds and which it did not collect from any other source."

127 Out of decisions of this type developed the "passing on" defence in recovery actions where a tax had been held to be unconstitutional. Thus, in *Decorative Carpets Inc v State Board of Equalization*[204], the Supreme Court of California had to consider an overpayment of a State tax with respect to transactions combining the sale and installation of carpets. For each transaction, the taxpayer had collected a separately stated amount to cover sales tax. But it had charged its customers amounts wrongly computed as sales tax on the installation component which was not taxable as such. The Court concluded that the taxpayer should be permitted recovery but only upon the submission of proof that the overpayments had been, or would be, refunded to the customers. It said[205]:

> "To allow plaintiff a refund without requiring it to repay its customers the amounts erroneously collected from them would sanction a misuse of the sales tax by a retailer for his private gain."

128 This general approach attracted the support of the Supreme Court of the United States in *United States v Jefferson Electric Manufacturing Co*[206]. There, the Court had to consider the meaning of the *Revenue Act* 1928 (US)[207]. That Act

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202 *United States v Jefferson Electric Manufacturing Co* 291 US 386 at 402 (1934); *Shannon v Hughes & Co* 109 SW 2d 1174 (1937).

203 *Shannon v Hughes & Co* 109 SW 2d 1174 at 1177 (1937).

204 373 P 2d 637 (1962); following the dissenting opinion of Learned Hand J in *123 East Fifty-Fourth Street Inc v United States* 157 F 2d 68 (1946).

205 373 P 2d 637 at 638 (1962).

206 291 US 386 at 402 (1934).

207 s 424(a)(2).

precluded a refund of taxes paid to the United States by a manufacturer, producer or importer, unless the plaintiff established, to the satisfaction of the Commissioner, that the moneys paid were either not collected, directly or indirectly, from the purchaser, or, although so collected, had been returned to the purchaser. The Supreme Court held that such a provision did no more than[208]:

> "require that it be shown … that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest. …
>
> If the taxpayer … has shifted the burden [of the tax] to the purchasers, they and not he have been the actual sufferers and are the real parties in interest; and in such a situation there is nothing arbitrary in requiring, as a condition to refunding the tax to him, that he give a bond to use the refunded money in reimbursing them."

129 The Supreme Court returned to the issue in *Anniston Manufacturing Co v Davis Collector of Internal Revenue*[209]. There, the Court was again faced with a statutory provision that permitted a defence of passing on to consumers to be raised in answer to a claim for restitution to the taxpayer of an amount paid under an invalid law[210]. The Supreme Court followed the approach it had taken in *Jefferson Electric*. It said[211]:

> "While the taxpayer was undoubtedly hurt when he paid the tax, if he has obtained relief through the shifting of its burden, he is no longer in a position to claim an actual injury and the refusal of a refund in such a case cannot be regarded as a denial of constitutional right."

130 In later anti-trust cases[212], the Supreme Court rejected, as a defence to the claim for refund of an unlawful tax, the fact that the overcharged claimant had passed on to consumers some, or all, of the costs of the tax. This position has been adopted seemingly to give effect to the high public purposes of the anti-trust

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208 *Jefferson Electric* 291 US 386 at 402 (1934).

209 301 US 337 (1937).

210 *Revenue Act* 1936 (US), s 902(2).

211 301 US 337 at 348 (1937).

212 *Hanover Shoe Inc v United Shoe Machinery Corp* 392 US 481 (1968); *Illinois Brick Co v Illinois* 431 US 720 (1977).

legislation. More recently, in a case involving proceedings to recover taxes paid on alcoholic beverages pursuant to a State excise tax scheme held to be unconstitutional, the Supreme Court has pointed out that, sometimes, such taxes cause damage to the taxpayer that cannot be passed on. Such damage may only be ascertained after a "highly sophisticated theoretical and factual inquiry"[213].

131 Care must be taken in the use of the lastmentioned authorities because they rest upon constitutional foundations that are different from those applicable in Australia. However, this much is clear. Unless a constitutional or statutory basis is demonstrated to require a refund, United States decisions have commonly evinced a reluctance to order refunds of taxes paid but later held unconstitutional, where the result would be a "windfall" to the recipient who has already been able to pass on to a third party consumer the burden of the invalidated tax. These decisions, stated in respect of claims made by a taxpayer upon the government revenue authority or its representative, apply with even greater force (as it seems to me) where the claim for reimbursement is made on one private party by another. Especially is this so where the plaintiff, by explicit evidence or inference, has already passed the tax on to consumers and is unwilling to take, or offer, any steps to refund any money to those who have ultimately borne the burden of the unlawful tax.

132 *Canada*: Similar questions have arisen in Canada. In *Air Canada v British Columbia*[214], three airlines brought an action for restitution of payments made to a provincial government on airline fuel under provincial legislation subsequently held to be unconstitutional. In the context of a claim for recovery by way of restitution, the Supreme Court of Canada upheld the defence that the fuel tax had been passed on to consumers. La Forest J (with whom Lamer and L'Heureux-Dubé JJ concurred) held, in words that are also pertinent to the present appeal[215]:

> "The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued to his benefit, it is restored to him."

133 A dissenting view was expressed by Wilson J[216]. It derived some support from Air Canada's submission that the airlines might have suffered a reduced

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213 *McKesson Corporation v Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida* 496 US 18 at 47 (1990).

214 [1989] 1 SCR 1161.

215 [1989] 1 SCR 1161 at 1202-1203.

216 [1989] 1 SCR 1161 at 1216.

aggregate sales volume, and hence a loss of profit, as a result of raising ticket prices in an attempt to shift the burden of the fuel tax to their customers[217]. However, the "passing on" defence appears to be accepted law in Canada[218].

134 *European Union*: "Passing on" has also been accepted by the European Court of Justice as a permissible defence to a restitutionary claim in like circumstances. In *Amministrazione delle Finanze dello Stato v San Giorgio SpA*[219], the Court held:

> "Community law does not prevent a national legal system from disallowing the repayment of charges which have been unduly levied where to do so would entail unjust enrichment of the recipients. There is nothing in Community law therefore to prevent courts from taking account, under their national law, of the fact that the unduly levied charges have been incorporated in the price of the goods and thus passed on to the purchasers."

135 Not all jurisdictions of the European Union, in their municipal law, recognise this principle of "passing on". German law, for example, has rejected the proposition that a net financial disadvantage must be proved in order to establish that a plaintiff is entitled to recover from a defendant an enrichment which the defendant has gained by reason of an invalid law[220]. As well, the opinions of the Advocates-General of the European Court of Justice, like the later decisions of the Supreme Court of the United States[221], have recognised that the fact that a taxpayer has passed on a tax to consumers may not necessarily mean that the taxpayer has suffered no loss[222]. Sometimes it will be impossible, or

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217 [1989] 1 SCR 1161 at 1202. For criticism see Rose, "Passing On", in Birks (ed), *Laundering and Tracing*, (1995) 261 at 276-280; Michell, "Restitution, 'Passing On,' and the Recovery of Unlawfully Demanded Taxes: Why *Air Canada* Doesn't Fly", (1995) 53 *University of Toronto Faculty of Law Review* 130.

218 *Allied Air Conditioning Inc v British Columbia* (1992) 76 BCLR (2d) 218.

219 [1985] 2 CMLR 658 at 688-689. See also *Hans Just I/S v Danish Ministry for Fiscal Affairs* [1981] 2 CMLR 714.

220 Birks, "Overview: Tracing, Claiming and Defences", in Birks (ed), *Laundering and Tracing*, (1995) 289 at 348 citing Jauernig, *Bürgerliches Gesetzbuch*, 6th ed (1991) at 912 and Weiling, *Bereicherungsrecht*, (1993) at 1-2 as stating German law.

221 *McKesson Corp* 496 US 18 (1990); cf *Bacchus Imports Ltd v Dias, Director of Taxation of Hawaii* 468 US 263 at 267 (1984).

222 Goff and Jones, *The Law of Restitution*, 5th ed (1998) at 684.

difficult, to isolate any portion of the price of a product and to link it causally to a particular cost.

136 In the context of the recovery of sums from the State, unjustly enriched by the collection of unlawful taxes, recovery by retailers may sometimes be seen as less offensive to the rule of law than no recovery at all[223]. But this is not the problem presented in the present appeal. Here, the recovery is not sought from the State but from a private corporation. The reasons of principle that may justify obliging the State to disgorge funds unlawfully collected by invalid taxes have no application to proceedings against a private corporation. There, private remedies alone can be invoked. On the face of things, the fact that the private plaintiff has passed on an invalid tax to consumers deprives it of the justification to recoup the tax for its private benefit. In such a case, there is no public law principle or policy to sustain such a private "windfall". For recovery, other grounds of legal right must therefore be demonstrated.

137 *Australia*: In this Court, in *Mason v New South Wales*[224], Windeyer J rejected the argument of the defendant State that restitutory relief should be denied to the plaintiffs on the footing that they had already passed on to their customers, in the form of higher prices, the burden of a payment collected by them and paid to the State under legislation later held to be constitutionally invalid[225]. By majority, the Court in that case held that, the payments having been made involuntarily under compulsion of an invalid law, the plaintiffs could recover the amount paid as moneys had and received.

138 Menzies J similarly rejected the "passing on" defence[226]. The other members of the Court, however, did not expressly address the issue. The decision must be considered in the light of later authority[227]. *Mason* is clearly distinguishable from the present case because the claim in question involved a demand, not against another private corporation or person but against the State

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223 *San Giorgio* [1985] 2 CMLR 658 at 672-673 per Mancini AG; see also *Les Fils de Jules Bianco SA v Directeur Général des Douanes* [1989] 3 CMLR 36 at 41-45 per Slynn AG; 48-49 per curiam.

224 (1959) 102 CLR 108 at 146.

225 The *State Transport (Co-ordination) Act* 1931-1954 (NSW) was held invalid in *Hughes and Vale Pty Ltd v The State of New South Wales* (1954) 93 CLR 1; [1955] AC 241.

226 (1959) 102 CLR 108 at 136.

227 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Royal Insurance* (1994) 182 CLR 51.

concerned, which was the recipient of the tax revenue the retention of which presented distinct problems of a public law character.

139 In *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd*[228], the defendant Commissioner raised an objection that he had not been enriched "at the expense of" the plaintiff taxpayer which was claiming reimbursement[229]. This objection was rejected by Brennan J[230] (with whom Toohey and McHugh JJ concurred). His Honour held that the passing on of the burden of the payments by Royal Insurance did not "affect the situation that, as between the Commissioner and Royal [Insurance], the former was enriched at the expense of the latter". Upon this analysis, the search was not for the "ultimate" burden of the unlawful tax. It was enough to demonstrate that the "immediate" expense fell upon the plaintiff[231].

140 As the opinion of three Justices of this Court, the foregoing reasoning in *Royal Insurance* must be accorded respect. However, I do not consider that it constitutes a statement of general principle by the Court binding on me in the circumstances of this case. Once again, the issue before the Court in *Royal Insurance* was one of recovery from a State party, which presents different considerations of legal policy and principle, as I shall shortly show. As well, the fourth member of the majority in that case, Mason CJ, expressed himself in language that, with respect, I find more convincing and relevant to the circumstances of the present case. Moreover, the legal principle for which *Royal Insurance* primarily stands involves the interpretation of a recovery provision in the applicable Victorian statute[232]. It does not concern the general rules governing the private rights *inter se* of parties to a contract the terms of which are subsequently said to be affected by a court decision holding that certain statutory fees are constitutionally invalid.

141 Whereas in *Royal Insurance* Mason CJ dismissed the Commissioner's claim that to allow the plaintiff recovery would result in a form of unjust enrichment of the plaintiff, his Honour distinguished between the operation of

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228 (1994) 182 CLR 51.

229 According to the generally accepted analysis, a successful restitutory claim requires proof of (1) enrichment of the defendant; (2) gained at the plaintiff's expense; (3) as a result of an unjust factor; (4) in the absence of a recognised defence.

230 (1994) 182 CLR 51 at 90-91, 103.

231 See McInnes, "'Passing On' in the Law of Restitution: A Re-Consideration", (1997) 19 *Sydney Law Review* 179 at 181.

232 *Stamps Act* 1958 (Vic), s 111(1).

"passing on" in the context of public law and in the law of restitution. So far as the former was concerned, Mason CJ said[233]:

> "It would be subversive of an important constitutional value if this Court were to endorse a principle of law which … authorized the retention by the executive of payments which it lacked authority to receive and which were paid as a result of causative mistake."

142 Like Mason CJ, I would accept that point of distinction. As I have shown, it is also one that is recognised in United States and European judicial authority. Ultimately, it derives its justification from the way in which the constitutional context shapes the applicable legal rules. But, as to the law of restitution outside the context of public law, Mason CJ noted that an accurate determination of the effects of an attempt to pass on an expense to others could be "a very complex undertaking"[234]. Sometimes a taxpayer will indeed have been able to effect a transmission of its statutory obligation to consumers. As Professor Birks has pointed out, its capacity to do so will depend upon many factors, including the "elasticity of demand" for its product[235]. This too is a consideration addressed in recent United States authority and in academic commentary on the application of the law of restitution in this context[236].

143 It can therefore safely be said that, in Australia, no general legal "defence" to recovery of a tax found to have been unlawful is established merely by proof that the taxpayer has "passed on" the tax in question to unknown and unidentifiable consumers. There are special reasons, in proceedings for recovery from a State authority, as to why such a "defence" may not apply. In every case the suggested "passing on", so far as it is said to be relevant, should be subjected to factual analysis. However, where, as in the present case, the demand for recovery is addressed not to a government or government party but to a private corporation the "important constitutional value"[237] of upholding recovery of the unlawful tax from the State is absent. In such a case, in my view, Australian law (as in the law of the United States, Canada and the European Union) is free to,

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233 (1994) 182 CLR 51 at 69.

234 (1994) 182 CLR 51 at 71.

235 Birks, *Restitution – The Future*, (1992) at 126.

236 eg Bryan, "Mistaken Payments and the Law of Unjust Enrichment: *David Securities Pty Ltd v Commonwealth Bank of Australia*", (1993) 15 *Sydney Law Review* 461 at 471; cf Rose, "Passing On", in Birks (ed), *Laundering and Tracing*, (1995) 261 at 284; see *Royal Insurance* (1994) 182 CLR 51 at 73 per Mason CJ.

237 *Royal Insurance* (1994) 182 CLR 51 at 69.

and does, take into account the fact (if it be established) that the plaintiff taxpayer, seeking recovery, has already passed on the tax in question to third party consumers and has not done, or will not do, anything to reimburse those consumers but instead seeks only to make a private gain for itself. In such a case the fact of "passing on" is certainly relevant. In a given case, it may mean that the taxpayer has, in fact, suffered no loss and is entitled to no legal recovery.

The constructive trust case

144 Against the background of this review of analogous proceedings in similar legal systems, I turn to consider the surviving claims of the retailers. I do so in terms of the three ways in which those claims are presented.

145 The first is the claim for equitable damages on the basis of a constructive trust, allegedly obliging the wholesaler to account to the retailers for the licence fee component of the price of the tobacco goods for which the retailers had paid. The precise type of constructive trust that the retailers asserted was not made clear. The retailers conceded that the wholesaler had not received moneys from them on the terms of an express or resulting trust of the type held to exist in *Barclays Bank Ltd v Quistclose Investments Ltd*[238]. That concession was based primarily on the fact that it was agreed that the retailers and the wholesaler were under no obligation to keep separate the amounts in respect of the subject tax. Although the correctness of this concession has been questioned[239], it was made and the Full Court was correct to give effect to it[240].

146 In *Royal Insurance*, Mason CJ recognised that a constructive trust for consumers might be imposed where the consumers had been separately levied with a tax and had paid the tax on the basis that an equivalent sum would be forwarded to the revenue[241]. His Honour contemplated that such a plaintiff, when seeking restitution from the revenue, might be required to satisfy a court, in the form of an "undertaking or other means, that it will distribute the moneys to the patrons from whom they were collected, thereby recognizing their beneficial ownership of those moneys"[242].

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238 [1970] AC 567.

239 Bryan and Ellinghaus, "Fault Lines in the Law of Obligations", (2000) 22 *Sydney Law Review* 636 at 664 and see fn 101.

240 *Roxborough* (1999) 95 FCR 185 at 203 [63], 206 [71] citing *Re Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491 at 501, 502.

241 (1994) 182 CLR 51 at 78.

242 (1994) 182 CLR 51 at 78.

147 In *Mutual Pools & Staff Pty Ltd v The Commonwealth*[243], Brennan, Deane and Gaudron JJ suggested, without deciding, that a taxpayer, to whom a refund of an invalidly imposed tax was paid, in circumstances where the burden had already been passed on to a third party, could be bound, by the law of restitution, to refund to that third party the amount received from the revenue, or the amount recouped from the third party, whichever was the less.

148 The source of this notion (whether explained in terms of the law of trusts or of restitution) is often traced to the influential dissenting opinion of Learned Hand J in *123 East Fifty-Fourth Street Inc v United States*[244]. That opinion was referred to by Mason CJ in *Royal Insurance*, with general approval[245]. Learned Hand J was of the opinion that recovery by the taxpayer in that case would be dependent upon its giving an undertaking that the moneys recovered would be refunded to their beneficial owners. The approach adopted by Learned Hand J in *123 East Fifty-Fourth Street* has been followed in many cases in the United States[246].

149 In *123 East Fifty-Fourth Street*, a restaurant was informed by State revenue authorities that it was liable to pay a cabaret tax. In consequence, the establishment increased the prices charged to customers. It separately itemised the component attributed to the tax in the customers' bills. Later, it was held that the restaurant was not a "cabaret". Accordingly, it was not subject to the tax. The issue was whether the invalidly levied tax could be recovered by the restaurant from the revenue, although the restaurant had already transferred the cost of the tax to its customers.

150 A majority of the Second Circuit Court of Appeals upheld the restaurant's claim for recovery on the basis of restitution. They did so on the footing that, as between the restaurant and the government, the former was entitled to the amounts illegally collected. The payments made by customers had become the property of the restaurant from which property it had paid its own moneys to the government[247]. However, in his dissent Learned Hand J concluded that there was

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243 (1994) 179 CLR 155 at 177, 191.

244 157 F 2d 68 (1946).

245 (1994) 182 CLR 51 at 75-79.

246 eg *Decorative Carpets Inc v State Board of Equalization* 373 P 2d 637 at 638 (1962).

247 *123 East Fifty-Fourth Street* 157 F 2d 68 at 68-70 (1946) per Chase J, Swan J concurring.

no entitlement for the restaurant patrons to assert a legally recognisable interest in the judgment moneys. The tax having been passed on to the customers in the form of itemised bills, the only foundation for recovery by the taxpayer was the imposition of a constructive trust upon the payments made. Learned Hand J said[248]:

> "[T]he [restaurant] collected the money under what the guests must have understood to be a statement that it was obliged to pay it as a tax, and that [as] it meant to do so, the money was charged with a constructive trust certainly so long as it remained in the [restaurant's] hands. …
>
> When the [restaurant], having taken the money charged with the constructive trust, paid it to the [revenue], a claim against the [revenue] at once arose in [the restaurant's] favor, based upon the [revenue's] unlawful exaction. That claim was … a substitute for the money whose payment created it … and, if a constructive trust attached to the money, the same trust attached to the claim."

151 In the opinion of Learned Hand J, the restaurant was entitled to relief of this kind in equity but only if it established that the individual customers were identifiable in a manner that would facilitate refunds to them. As this had not been proved on the facts, his Honour was of the view that the provision of equitable relief should be denied[249].

152 At the core of the foregoing reasons is a basic principle of equity. Relief is denied to those who come to a court seeking equitable intervention without themselves indicating a willingness to do equity. For reasons of constitutional principle, the unwillingness or inability of a plaintiff to make a refund to consumers from any sum recovered by it from a government party might give way to the importance of requiring the government to disgorge moneys unlawfully collected. However, no such consideration applies to the invocation by a private party of equitable relief against another private party. In such a case there is every reason to insist that, before any such equitable relief is granted, the party claiming relief should have demonstrated a willingness to refund the whole, or some proper part, of its recovery to those who, in the language of the Supreme Court of the United States, are the "actual sufferers" and the "real parties in interest"[250]. Without such a commitment, such a plaintiff is not "entitled in

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248 *123 East Fifty-Fourth Street* 157 F 2d 68 at 70-71 (1946).

249 See also *Benzoline Motor Fuel Co v Bollinger* 187 NE 657 (1933); *Indian Motorcycle Co v United States* 9 F Supp 608 (1935) where similar conditions were imposed.

250 *Jefferson Electric* 291 US 386 at 402 (1934).

justice and good conscience to such relief"[251]. So much follows from the equitable nature of the relief claimed[252].

153 I will assume that, conformably with applicable Australian law, a constructive trust of some kind might be imposed upon the wholesaler in proceedings such as the present, so as to make it liable as a constructive trustee for having failed to carry out the purpose for which the moneys had been received by it from the retailers[253]. However, this would not avail the retailers in the present case. That is so because the retailers made it absolutely clear that they did not offer, and would not submit to, any obligation to reimburse the consumers who had purchased the tobacco products from them at prices assumed to include the component referable to the licence fees held to be unconstitutional. In other circumstances, upon different evidence, it might be possible, in a case between a wholesaler and a retailer, affected by an unconstitutional tax, for the retailer to establish that it had suffered some losses itself. The retailer might have done so notwithstanding recoupment from consumers. In such a case, equitable relief might indeed be granted. But the present was not such a case. No such claim was made, still less proved.

154 The onus of securing equitable intervention in the present proceedings rested squarely on the retailers. The provision of equitable relief was within the discretion of the Federal Court. That Court found, uncontroversially, that the arrangements between the parties, and the scheme of the Act, envisaged that the cost of licence fees would be (as it was) passed on to consumers. In the case of tobacco products, the Court could readily infer that demand for them was relatively inelastic. Such an inference arises from common knowledge about the qualities of the product and the consequent dependence of consumers upon its supply to fulfil their needs. Certainly, the retailers produced no evidence to show that they had been unable to pass the whole, or any part, of the cost of the tobacco licence fees on to their customers. The Federal Court found that the opposite was the case[254].

155 In such circumstances, the Full Court was correct to hold that equity's intervention, by way of a constructive trust, would only be warranted if the

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251 *Jefferson Electric* 291 US 386 at 402 (1934).

252 *Jefferson Electric* 291 US 386 at 402-403 (1934).

253 *Muschinski v Dodds* (1985) 160 CLR 583 at 613; *Baumgartner v Baumgartner* (1987) 164 CLR 137; cf O'Connor, "Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust", (1996) 20 *Melbourne University Law Review* 735.

254 *Roxborough* (1999) 95 FCR 185 at 199 [48].

retailers could establish that the wholesaler's retention of the sums paid, pursuant to contract, was unconscionable[255]. But if the retailers refused to provide, or submit to a requirement for, reimbursement to their customers, the result was that, as between the wholesaler and the retailers, the retention of the sums paid was not unconscionable. No "seminal equitable notions of good conscience"[256] were activated by the proved facts. On the contrary, there was nothing in the circumstances to establish a higher claim in conscience to the component for licence fees as between any of the parties. And where "the equities are equal … legal title should prevail"[257], absent any consideration of a constitutional or public law character supporting the entitlement to recovery. It follows that the constructive trust case was correctly dismissed.

The implied contractual terms case

156 The retailers pleaded two implied terms applicable to each contract of sale of tobacco products. The first was that the amount paid by each retailer, as identified in the invoice as the amount of the licence fee referable to the sale, would be refunded in full by the wholesaler to the retailer if such amount were not paid by the wholesaler as licence fees under the Act. The second was that, in consideration of each retailer's payment of the amount identified in the invoice as the licence fee referable to the sale, the wholesaler would pay the amount as licence fees under the Act.

157 The Full Court rejected the suggested implications. It did so by applying the principles governing implied contractual terms stated by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[258]. It concluded that neither of the pleaded terms was necessary to give business efficacy to the contracts between the parties, nor was the implication so obvious that it "goes without saying"[259]. This was an orthodox analysis of the retailers' case. It involved a correct approach yielding the correct result.

158 The Full Court's reasoning has been criticised (as, by implication, have been the principles laid down in the *BP Refinery Case*) on the basis that the analysis represents an unduly narrow approach to "implications in fact" that may

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255 *Roxborough* (1999) 95 FCR 185 at 206-207 [73].

256 *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673.

257 *123 East Fifty-Fourth Street* 157 F 2d 68 at 71 (1946).

258 (1977) 180 CLR 266 at 283 ("*BP Refinery Case*").

259 *Roxborough* (1999) 95 FCR 185 at 199-200 [51].

reasonably be imputed to the parties to a contract and ignores "implications by law" which a court is authorised to impose upon the parties in consequence of the nature of their contract[260].

159 So far as implications in fact are concerned, I have some sympathy for the proposition that resort to the fiction of testing a propounded implied contractual term by reference to what an "officious bystander" would regard as self-evident[261] may unduly restrain the importation of implied terms proper to a particular case. However, I am not convinced that the substitution of the fiction of the "reasonable bystander" for the "officious bystander" would repair this defect[262]. The officiousness of the bystander merely explains the intervention of that fictional person in the private business of the parties. It says nothing about the attitude or approach of the bystander concerned. There is no reason why officiousness and reasonableness could not go together. But the time may be coming where the fiction is dispensed with completely and the courts acknowledge candidly that, in defined circumstances, the law to which they give effect permits, according to a desired policy, the imposition upon parties of terms and conditions for which they have omitted to provide expressly.

160 Even if such an explanation were adopted in the present case, it would not avail the retailers. Nor would the law imply the two terms which the retailers proposed. Neither was essential to the nature of the contract itself. Nor did "policy requir[e] it"[263]. Nor do I consider that the result on this head of claim would have been different if the test to be applied was whether the terms relied upon by the retailers could be regarded as "a legal incident of a particular class of contract"[264].

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260 These points are made in Bryan and Ellinghaus, "Fault Lines in the Law of Obligations", (2000) 22 *Sydney Law Review* 636 at 650-651, by reference to *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 478.

261 Drawing on MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227. The history is recounted in Phang, "Implied Terms, Business Efficacy and the Officious Bystander – A Modern History", (1998) *Journal of Business Law* 1 at 13-24.

262 Bryan and Ellinghaus, "Fault Lines in the Law of Obligations", (2000) 22 *Sydney Law Review* 636 at 645.

263 *Simonius Vischer & Co v Holt & Thompson* [1979] 2 NSWLR 322 at 348; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 194.

264 *Breen v Williams* (1996) 186 CLR 71 at 90. This is suggested in Bryan and Ellinghaus, "Fault Lines in the Law of Obligations", (2000) 22 *Sydney Law Review* 636 at 650-651. The present was not a case where relaxation of the rules governing implication of terms into contracts could be justified on the footing that there was

(Footnote continues on next page)

161 Whatever may be the precise legal criterion for implying terms into a contract upon which the parties have not expressly agreed, it would always be necessary for a court of our legal tradition to be very cautious about the imposition on the parties of a term that, for themselves, they had failed, omitted or refused to agree upon. Such caution is inherent in the economic freedom to which the law of contract gives effect. Absent some statutory or equitable basis for intervention, it is ordinarily left to the parties themselves to formulate any agreement to which they consent to be bound in law. As MacKinnon LJ, who is usually credited with inventing the fiction of the "officious bystander", admitted[265]:

> "[I]n most … cases the Court has … to find … the obvious common agreement, upon a matter as to which it must have the strongest suspicion that neither party ever thought of it at all, and that, if they had, they would very likely have been in hopeless disagreement what provision to make about it".

162 The terms of the agreement between the parties in the present case were reduced to writing in the form of the wholesaler's trading terms and conditions. These made no express provision for the situation that later arose. At the time of the formulation of the general terms and conditions, and indeed of the individual contracts for the supply of the tobacco products in question, it would not have been unreasonable to have dismissed an enquiry by an officious but reasonable bystander as to what would happen if the licence fees were invalidated with the response: "We'll deal with that problem if and when it arises." The long line of authority in this Court upholding earlier tobacco licence fees would have made such a response entirely reasonable. Indeed, it would have gone without saying.

163 If, however, the hypothetical question had been pressed and the wholesaler and retailers had been forced to come to a conclusion as to what was to happen, reasonably, to uphold the contracts between them and as a matter of policy, I venture to suggest that the answer provided would have been that it would "all depend". If, for example, the retailers had then said that, in the circumstances that have now arisen, it was "self-evident" that the wholesaler

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no written contract; cf *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 422, 442-446; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In Liq)* (2000) 202 CLR 588 at 610 [46].

265 Justice MacKinnon, "Some Aspects of Public Law", lecture delivered at the London School of Economics, 3 March 1926, quoted by Phang, "Implied Terms, Business Efficacy and the Officious Bystander – A Modern History", (1998) *Journal of Business Law* 1 at 15.

would be obliged to refund the licence fee component of the purchase price of the goods to the retailers, I suspect that the wholesaler would have responded in these terms: "Not on your life. By then you will probably have passed the costs on to your customers. You will not be out of pocket at all. You are not willing to make any refunds to those customers. You just want to make a windfall for yourselves. If you were to reimburse your customers, that would be different. But without that, the money should stay where it is. That accords with our terms and conditions. They required you to pay 'the purchase price'. That is what you have done. It also has a practical advantage. If the Federal Parliament enacts a law disposing of the unpaid tobacco licence fees in a way advantageous to tobacco consumers, it will be much easier to give effect to such a law whilst the money is in our hands. Once you retailers get your hands on it, it is likely to be spent and a lot of it would be practically unrecoverable. So we will just leave the money where it is."

164 In my view such an answer is unassailable. By the application of current doctrine governing the implication of contractual terms and, indeed, of any reformulation of that doctrine of which I am aware, no legal basis is established in law to imply the two terms propounded by the retailers. Those terms are neither reasonable nor equitable. Still less are they essential to give business efficacy to the retailers' contracts with the wholesaler. This aspect of the retailers' claim was also rightly dismissed by the Federal Court. It should be rejected by this Court.

The claim to restitution for a failure of consideration

165 The final ground upon which the retailers claimed relief was for restitution on the basis of a failure of consideration. The payments made by the retailers to the wholesaler were made in discharge of express contractual obligations agreed between them. The wholesaler discharged its part of such obligations by supplying the goods in question to the retailers. Those goods were supplied in accordance with an agreed price. That price, in each instance, subsumed, and included within it, various component parts, only one of which was that of the licence fees. No doubt it also included component parts for notional charges for acquisition of raw tobacco product, warehousing, packaging, processing, transport, overheads and the like. The separate appearance of the component for the tobacco licence fees on the wholesaler's invoices was doubtless convenient for accounting purposes. It permitted the ready aggregation of the licence fees then thought to be payable under the Act. But the *legal* obligation of the retailers to the wholesaler was to pay the price of the goods in full. This was a single aggregate amount referable to each occasion of supply[266]. Indeed, until such payment was "made in full" to the wholesaler, the property in the goods supplied

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266 cl 6: see reasons of Callinan J at [187].

remained with the wholesaler. The retailers then agreed to hold such goods in a fiduciary capacity as bailee[267].

166 In the foregoing circumstances, it is impossible to assert that there has been a total failure of consideration. The individual contracts between the wholesaler and the retailers were uncontestably valid. They were not ineffective. Nor were they terminated. Far from attempting to terminate the contracts for the supply of goods by the wholesaler, the retailers actually accepted the goods in every case. They onsold them to consumers, thereby recovering the component for licence fees about which they now complain. The law of restitution only rarely operates in the context of an effective contract[268]. The present, in my opinion, is not a case that falls within one of the recognised exceptions.

167 The retailers nonetheless claimed to recover under a "unifying principle" of restitution for unjust enrichment at their expense[269]. They did so on the basis that, notwithstanding that consideration had not *totally* failed, some *part* of the consideration could be separately identified, apportioned and then seen as having failed[270]. This submission should be rejected.

168 By their terms, the contracts between the wholesaler and the retailers left the obligation of the wholesaler to pay the tobacco licence fee to the government entirely out of account. It was unsurprising that this should have been so. At the time the contracts were agreed to, the obligation to pay the tobacco licence fees arose not by any *contractual* agreement at all but by the operation of *statute* law, namely pursuant to the duties purportedly imposed by the Act. As the majority in the Full Court explained[271], the retailers could succeed in a claim for restitution on the ground of failure of consideration only if the wholesaler was bound to them by the promise to pay the amount identified as being for the licence fees and such promise was wholly unperformed.

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267 cl 10: see reasons of Callinan J at [187].

268 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256; Mason and Carter, *Restitution Law in Australia*, (1995) at 83-84 [315]; cf Beatson, "Restitution and Contract: Non-Cumul?", (2000) 1 *Theoretical Inquiries in Law* 83 at 88.

269 Jones, "Restitution: Unjust Enrichment as a Unifying Concept in Australia?", (1989) 1 *Journal of Contract Law* 8.

270 *David Securities* (1992) 175 CLR 353 at 382-383; *Goss v Chilcott* [1996] AC 788 at 797-798.

271 *Roxborough* (1999) 95 FCR 185 at 200 [52].

169 In light of the then understanding of the obligations of the Act, it borders on the surreal to suggest that the wholesaler "promised" the retailers that it would pay the licence fees to the government, in default of which payment there would be a failure of consideration in respect of that part of the price paid. Not only does this hypothesis defy the express terms upon which the parties traded with each other. It also contradicts the historical fact that the obligation of the wholesaler to pay the tax was an obligation imposed on the wholesaler not by private contract but by the terms of the Act.

170 I therefore agree with the Full Court that the basis for asserting a right to recover at common law was not established. The moneys were not had and received by the wholesaler to the use of the retailers. Properly analysed, they were had and received in discharge of a contractually stipulated price payable in full in exchange for the supply of specified goods which were duly delivered.

171 This is not a surprising conclusion. Nor is it an application of the law of restitution different from the way that body of law has developed in Australia. The ghost of implied contract as the basis for restitution may indeed have been exorcised following the decision of this Court in *Pavey & Matthews Pty Ltd v Paul*[272]. But it is still necessary to demonstrate a legal foundation for any enforceable obligation to make restitution. Relevantly, the retailers propounded a partial failure of consideration for the contracts they entered with the wholesaler. But when this proposition fails, by reference to the analysis of the evidence and of the applicable legal principles, what is left? To establish an entitlement to restitution, at the least, some requirement in law and justice must be shown to displace the clear legal obligation that the retailers assumed to pay the wholesaler in full a price, meaning the entire price, for the supply of the goods duly received.

172 When failure of consideration is seen as inapplicable in this case, no other legal basis of restitution exists to give rise to recovery. Restitution arose as a remedy "to avoid unjust results in specific cases"[273]. By no means does the present case involve an unjust result. The retailers rejected any obligation to reimburse their consumers, who carry the ultimate burden of the licence fees. There has been no *unjust* enrichment of anyone at the expense of the retailers. It is true that the wholesaler has secured a "windfall". But that is by operation of law upon the consequences of the valid and enforceable contracts agreed between the parties. Those parties should be held to those contracts.

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272 (1987) 162 CLR 221; see Jones, "Restitution: Unjust Enrichment as a Unifying Concept in Australia?", (1989) 1 *Journal of Contract Law* 8 at 14.

273 Laycock, "The Scope and Significance of Restitution", (1989) 67 *Texas Law Review* 1277 at 1278.

173 As a matter of legal policy, this Court should be extremely slow before introducing an entitlement to restitution in a case where total failure of consideration cannot be shown but only a partial failure. The reasons for such caution are obvious. In many bargains, parties recover less than they expected. If in every case (or even many cases) courts could be inveigled into judging an alleged partial failure of consideration, on the footing that it entitles a disappointed contracting party to recover the loss of which it complains by way of restitution, the brake on legal claims that has hitherto been imposed will be released. Even more than at present, and without statutory authority, there will then be transferred into courts of law arguments that are substantially about economic disappointment. Until now, the common law has resisted such claims. The imperium of restitution should not be extended to reverse such settled law.

Conclusion and order

174 The "windfall" should remain with the wholesaler to await the legislative measures (if any) for disgorgement to the benefit of users of tobacco products, or otherwise, as the Federal Parliament may enact. No constructive trust, nor implied term, nor restitutionary principle requires, or permits, disturbance of this position.

175 The appeal should be dismissed with costs.

176 CALLINAN J. In this appeal the issue is whether a tobacco retailer can recover part of the price paid to a wholesaler for tobacco bought and sold, when payment of that part was made under the common misapprehension that State legislation rendering both parties apparently liable to pay a tax on the tobacco sold was not invalid as a duty of excise.

Facts

177 The appellants sold tobacco by retail in New South Wales in 1997. They held licences as retailers under the *Business Franchise Licences (Tobacco) Act* 1987 (NSW) ("the Act"). The respondent held a wholesaler's licence under the Act and made wholesale sales of tobacco to the appellants.

178 Part 4 of the Act (ss 27A to 33A), among other things, made it an offence to carry on a business of tobacco wholesaling (s 34(a)) or tobacco retailing (s 34(b)) without a licence. A licence under the Act had a currency of one month. Licences ordinarily expired at the end of the 27th day of each month (s 39).

179 A person seeking a licence was required to make an application accompanied by payment of a licence fee as assessed under Pt 5 of the Act. If, however, before expiry of a licence, the licensee paid the fee assessed for a further licence, the licensee was taken to have applied for a renewal and was taken to have been granted a renewed licence from the expiration of the previous licence, unless otherwise notified (s 40(1)). If the payment of the licence fee was made after the end of the 27th day, the Chief Commissioner for Business Franchise Licences (Tobacco) was authorised to direct that the licence be regarded as having been renewed from the date the previous licence expired (s 40(2)).

180 Section 41 of the Act made provision for the calculation of licence fees. The relevant sub-sections were as follows:

> "(1) The fees to be paid for licences are as follows:
>
> (a) for a wholesaler's licence – a fee of $100 together with an amount equal to 100 per cent of the value of tobacco sold by the applicant in the course of tobacco wholesaling during the relevant period, other than tobacco sold to the holder of a wholesaler's licence …
>
> (c) for a retailer's licence – a fee of $100 together with an amount equal to 100 per cent of the value of tobacco sold by the applicant in the course of tobacco retailing during the relevant period, disregarding any such tobacco purchased from a licensee …

(3) For the purposes of subsection (1)(c) and (d), the value of tobacco purchased from the holder of a wholesaler's licence … is to be disregarded only if the holder of the licence has paid or is liable to pay a licence fee in respect of that tobacco."

181 The relevant period in relation to a licence referred to in s 41 was defined in s 3(1) of the Act as "the month commencing 2 months before the commencement of the month in which the licence expires."

182 An applicant who had not carried on business in the whole or any part of the relevant period as so defined could request the Chief Commissioner to assess the licence fee under s 43(1). An applicant for a licence who had carried on business in the whole of the relevant period but had difficulty in accurately assessing the quantity or value of tobacco sold during the period could likewise seek an assessment by the Chief Commissioner (s 43(2)).

183 On 9 June 1988, the Minister made a determination of the value of tobacco as follows:

"1. In accordance with section 45 of the Act, the Minister has determined the value of tobacco to be the wholesale list price for tobacco as published from time to time by tobacco manufacturers and importers, excluding:

(i) Any amount included in the selling price in consideration of a licence fee;

(ii) the selling price of tobacco sold to duty free stores where the tobacco was intended for sale to travellers proceeding overseas;

(iii) the selling price of tobacco sold to airlines, shipping companies, providers of airlines or shipping companies and service bodies where the tobacco was intended for sale to passengers and/or crews proceeding overseas;

(iv) the selling price of tobacco sold to service bodies where the tobacco was intended for sale to service personnel serving overseas; and

(v) the selling price of tobacco sold to overseas residents.

2. Rebates granted by wholesalers must not be deducted from the wholesale list price of tobacco when calculating licence fees payable."

184 The practical operation of the Act involved these steps. A wholesaler was required to renew a licence on or before midnight on the 27th of each month by paying a licence fee of $100 plus an amount equal to 100 percent of the value of the tobacco sold by the wholesaler in the month ending one month before the date the licence was required to be renewed. The licence fee for a period 28 June to 27 July was assessed by reference to the monetary value of sales that the wholesaler had made in the period 28 April to 27 May. The sales were calculated on the basis of the wholesaler's list price.

185 Similarly, a retailer wishing to renew a licence in respect of the same period was required to pay a licence fee of $100 together with an amount equal to 100 percent of the sales made in the period 28 April to 27 May. This amount, however, was calculated by reference to the wholesaler's price, rather than the actual retail price or other price received. The calculation excluded the value of tobacco sold which the retailer had purchased from a licensed wholesaler, subject to the provisions of s 41(3).

186 The respondent from time to time published price lists for the tobacco which it sold by wholesale. The price list at the relevant time contained five columns. In the first column there was a description of the brand of cigarettes. The second column showed the quantity of cigarettes of that brand contained in a carton. The third column, headed "Wholesale price per 1000", set out the wholesale list price, being the value of tobacco upon which the licence fee was to be calculated. The fourth column was headed "Cost at wholesale including State licence fees 100%" and showed the wholesale list price per carton to which was added the 100 percent licence fee. The final column was headed "Recommended retail price per packet including State licence fees 100%".

187 Each of the appellants agreed to comply with the respondent's trading terms and conditions as follows:

> "1. In these conditions of sale:
>
> (a) 'Company' and 'Seller' means [Rothmans].
>
> (b) 'Purchaser' means the person, firm or company placing an order with the Seller in respect of the supply of goods …
>
> (c) 'Goods' means all goods and merchandise supplied by Seller pursuant to these conditions to the Purchaser or as the Purchaser may direct.
>
> …
>
> 4. The prices charged by the Company as set out in the Company's applicable list may be altered without notice and any resulting increase shall be added to the purchase price. Such price or prices

quoted on purchases from the Company *are subject to any increase in the amount of excise duty, sales tax, freight or insurance* between the date of order and the date of delivery and any such amount shall be added to the purchase price and be payable by the Purchaser to the Company.

…

6. The Purchaser shall pay for all Goods delivered within 7 days from the date of receipt of the Goods ('Due Date') …

7. On the happening of any one or more of the following events, namely:

(a) the Purchaser fails to pay the Seller as and when due and payable any moneys comprised in the Purchaser's debt (such moneys being due and payable at the time expressly agreed between the Purchaser and the Seller herein and in default of such agreement according to the normal terms of trade of the Seller or, in respect of amounts not covered by the Seller's ordinary terms of trade, on demand by the Seller);

…

the Seller may at its option exercise all or any of the following rights …

(i) demand payment of the whole of the Purchaser's debt then outstanding, and the Purchaser agrees to pay the same accordingly.

…

10. [U]ntil payment is made in full to the Seller for the Goods:

(a) property in the Goods remains with the Seller and the Purchaser agrees to hold the Goods in a fiduciary capacity as bailee for Seller …" (emphasis added)

188 When a retailer ordered cigarettes or tobacco the respondent issued an invoice[274]. Each invoice was divided into eight columns. The first showed a

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274 Section 66(2) of the Act required the respondent to issue an invoice for any sale of tobacco. Invoices were to be numbered consecutively and a copy was to be kept for six years. In addition, reg 14(1) of the Business Franchise Licences (Tobacco) Regulation 1995 required a tobacco wholesaler to keep separate records showing

(Footnote continues on next page)

code relevant to the particular products, the second the recommended retail price per packet of cigarettes, and the third, the number of cigarettes per carton sold and cigarettes in each packet in the carton. The fourth column contained a description of the brand. The fifth and sixth columns referred to the number of cartons which were the subject of sale and the quantity of cigarettes in total respectively. The final two columns were headed "Wsle/Unit" and "Value". Under the former of these headings was shown the wholesale price per unit. This sum represented, in respect of cigarettes, the wholesale price per 1000 cigarettes (in the case of cigars the price was calculated by reference to 100 cigars) and was identical to the amount shown on the published price list. The latter column contained the total sale price charged for each particular sale of the brand in question before discounts were taken into account. The invoice then made provision for a deduction for discounts and in the last column was set out an amount referred to as "Sales sub total" and "Invoice sale sub total" which was, in each case, the same. Under this amount, there was a line which read "Tobacco Licence Fee". This sum was 100 percent of the total sales calculated at the list price before allowing discounts. The amount was then added to the final column to produce a "Net total", this being the amount which the retailer was required to pay.

189 In *Dennis Hotels Pty Ltd v Victoria*[275], this Court held that licensing provisions in the *Licensing Act* 1958 (Vic), other than a provision which fixed fees for certain temporary licences, did not impose a duty of excise. In *Dickenson's Arcade Pty Ltd v Tasmania*[276], the Court held that the *Tobacco Act* 1972 (Tas) validly imposed a scheme of licensing of sales of tobacco in which the fee payable was calculated by reference to tobacco sales in a period of 12 months ending six months before the commencement of the period in respect of which the licence was granted.

190 In *Philip Morris Ltd v Commissioner of Business Franchises (Vict)*[277], the Court disapproved the reasoning in *Dickenson's Arcade*. The decision in *Philip Morris* was open to an interpretation that a fee payable under a licensing scheme would not be a duty of excise, if the imposition of the licence fee were an element in regulatory legislation controlling the sale and distribution of the particular commodity. The licensing scheme under consideration here reflected an understanding of *Dennis Hotels* that, in the field of sales of alcohol and

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the quantity and value of each brand of tobacco sold. A retailer was also required to retain the invoice supplied to it in relation to its purchases for six years (s 66(3)).

275 (1960) 104 CLR 529.

276 (1974) 130 CLR 177.

277 (1989) 167 CLR 399.

tobacco, a licence fee which might otherwise be regarded as a duty of excise would not be so treated if the fee could be characterised as a fee for carrying on a business, and if it were calculated by reference to sales made during a period other than the period of the licence.

191 This understanding was rejected by the Court in *Ha v New South Wales*[278]. The majority (Brennan CJ, McHugh, Gummow and Kirby JJ) referred to the legislation in question here as "a simple device in legislative drafting"[279]. The "licence fee" was held to be a duty of excise not lawfully leviable by a State. It followed that the appellants had paid, and the respondent had received, substantial sums of money on account of a tax which was not in fact lawfully leviable.

192 The appellants brought proceedings in the Federal Court to recover such amounts paid to the respondent in respect of sales during the relevant period as were identified in the respondent's invoices as "Tobacco Licence Fee".

193 The appellants' claim was dismissed by Emmett J at first instance and an appeal to the Full Court of the Federal Court (Hill and Lehane JJ; Gyles J dissenting) was also dismissed.

The appeal to this Court

194 The appellants argue in this Court that the Federal Court should have allowed their claim on a number of bases: as money had and received by reason of a total failure of consideration; as money had and received because of the failure of the purpose for which the amounts were paid; as a breach of an implied term; and as money held on constructive trust for the benefit of the appellants.

195 In his dissenting judgment in the Full Court, Gyles J made five points about the item identified in the invoice as "Tobacco Licence Fee"[280]:

> "1. It is an amount which is calculated by reference to the value of the particular goods included in the invoice.
>
> 2. It is the precise amount which will be required to pay the licence fee which will be calculated in due course by reference to those goods.

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278 (1997) 189 CLR 465.

279 (1997) 189 CLR 465 at 497.

280 (1999) 95 FCR 185 at 210 [92].

3. That amount of licence fee will not be payable by the respondent for some weeks.

4. Payment of the licence fee referable to the goods involved in the transaction evidenced by the invoice is the best means of ensuring that the retailer in question receives the benefit of s 41(3) of the Act.

5. It cannot be assumed that the retailer in question will have received from its customers the amount paid to the respondent on account of the licence fee at the time of payment of the invoice according to ordinary terms of trade."

His Honour went on to say this[281]:

> "The commonsense conclusion from the evidence is that the retailer agreed to pay the identified price of the goods and also agreed to, and did, fund the amount of the licence fee to be paid in respect of them, in return for which the wholesaler supplied the goods and promised to pay that licence fee in due course, as it had in the past. As was said by Dixon and McTiernan JJ in *Commonwealth Quarries (Footscray) Pty Ltd v Commissioner of Taxation (Cth)*[282]:
>
> > 'In a contract under which for a single lump sum of money a party undertakes to do various things, including the transfer of property in goods, it is quite true that the entire money consideration or contract price cannot be regarded as the amount for which the goods are sold. In such a case the amount for which the goods were sold could not be ascertained from the transaction except by allocating part of the consideration to the other acts or things to be done by the seller.'
>
> In the present case, the amount sought and paid is expressly apportioned and identified. See also *Tanu Pty Ltd v Commissioner of Taxation (Cth)*[283].
>
> To use the expression of Gibbs J in *Stephens v The Queen*[284], the amount identified as the 'Tobacco Licence Fee' in the invoice is thereby

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281 (1999) 95 FCR 185 at 211-212 [95]-[100].

282 (1938) 59 CLR 111 at 121.

283 (1999) 160 ALR 227.

284 (1978) 139 CLR 315 at 333.

earmarked for that purpose, rather than as payment to the respondent for value received by the appellants from it.

The point as to earmarking is well illustrated by an American case, the facts of which are rather like the present. The case was cited by counsel for the appellants on the constructive trust argument, but its significance is by no means limited to that. It casts light upon the analysis of the contract.

In *123 East Fifty-Fourth Street Inc v United States*[285], a restaurant owner had collected taxes (subsequently held not to be payable) from its patrons and paid the amount so collected to the revenue authority. The case was between the restaurant owner and the revenue authority. Learned Hand J (in dissent) said[286]:

> '… I shall assume that, when the plaintiff charged its guests with the amount of the tax for which it supposed itself liable, it added the amount as a separate item and described it as a tax which it must pay, and which it was apparently collecting from the guests in order to pay it to the Treasury. If the plaintiff wishes to dispute this, I should allow it to do so, because I regard the distinction as crucial whether it made the charge in that form, or merely included in the bills rendered the amount of the supposed tax without saying anything about it. If it said nothing, I should agree with my brothers that the guests had no legally recognizable interest in the money collected, which gave them any claim to it superior to the plaintiff's; and in that case some statute would be necessary to deprive the plaintiff of its right to recover. On the other hand, if the plaintiff collected the money under what the guests must have understood to be a statement that it was obliged to pay it as a tax, and that it meant to do so, the money was charged with a constructive trust certainly so long as it remained in the plaintiff's hands. For example, if, before the plaintiff had paid it, the Treasury had declared that the tax was not due, the plaintiff could not have successfully resisted the guests' demand that it be turned back to them, the very purpose for which they had paid it having then become incapable of execution.'

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285 157 F 2d 68 (1946).

286 157 F 2d 68 at 70-71 (1946).

In *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*[287], Mason CJ said:

> 'I would accept so much of Learned Hand J's analysis in *123 East Fifty-Fourth Street* as leads to the conclusion that the restaurant owner was a constructive trustee of the amount of the tax received from its patrons if the owner charged the separate amount of the tax to its patrons. The tax so received was received by the owner as a fiduciary on the footing that it would apply the money in payment of the tax. If that purpose failed or could not be effected because the tax was not payable then the owner held the moneys for the benefit of the patrons who paid the moneys. The same result would ensue if the owner recovered payments from the revenue authority made as and for tax which was not payable. And, in my view, the patrons who paid the tax to the owner would have a right of recovery, as Learned Hand J makes clear, against the revenue authority so long as it retained the payments which it was not entitled to retain.'

This analysis of the effect of describing an item in a bill as tax by Learned Hand J, approved by Mason CJ, is most persuasive. Whatever problem there may be about the remedy of constructive trust (and I do not mean to imply that I think there is one) does not detract from this reasoning. I should mention that the majority in *123 East Fifty-Fourth Street* allowed the possibility of common law recovery by the patrons against the restaurant owner in the event of non payment of the taxes. It seems to go without saying that Learned Hand J (and Mason CJ) would have allowed recovery at common law in the present circumstances. In *123 East Fifty-Fourth Street* the constructive trust was required to provide a basis for the return to the restaurant owner of taxes paid to the revenue authority and subsequently found not to have been payable. That complication does not exist here."

196 I would respectfully adopt what his Honour said in the passages I have quoted. It is consistent with what was said by Lord Porter in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[288]. The relevant sums paid by the appellants were shown as separate items ascribed to a particular component of the total sum payable. They answered his Lordship's description of separate parts of money payable for or on account of a divisible part of a contract[289]:

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287 (1994) 182 CLR 51 at 77-78.

288 [1943] AC 32.

289 [1943] AC 32 at 77.

> "Under that system money had and received to the plaintiff's use can undoubtedly be recovered in cases where the consideration has wholly failed, but unless the contract is divisible into separate parts it is the whole money, not part of it, which can be recovered. If a divisible part of the contract has wholly failed and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered, but unless this be so there is no room for restitution under a claim in indebitatus assumpsit."

In the same case Viscount Simon LC explained the principle in this way[290]:

> "In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act – I am excluding contracts under seal – and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.
>
> If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled[291]. In this connexion the decision in *Rugg v Minett*[292] is instructive. There the plaintiff had bought at auction a number of casks of oil. The contents of each cask were to be made up after the auction by the seller to the prescribed quantity so that the property in a cask did not pass to the plaintiff until this had been done. The plaintiff paid in advance a sum of money on account of his purchases generally, but a fire occurred after some of the casks had been filled up, while others had not. The plaintiff's action was to recover the money he had paid as money received by the defendants to the use of the plaintiffs. The Court of King's Bench ruled that this cause of action succeeded in respect of the casks which at the time of the fire had not been filled up to the prescribed quantity."

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290 [1943] AC 32 at 48-49.

291 See the notes in Bullen and Leake, *Precedents of Pleadings*, 9th ed (1935) at 263.

292 11 East 210 [103 ER 985].

197 I would reject the respondent's submission that it is only in cases in which contracts have been frustrated, discharged for breach, or held to be unenforceable, or otherwise avoided, that a party may obtain restitution. Gyles J answered that submission, correctly, in my opinion, in this way[293]:

> "The contract [here] has been executed in all respects save for payment of the licence fee by the respondent. The licence fee is no longer payable. It cannot and will not be paid by the respondent. That is the end of the matter. Performance is no longer possible. If formal termination by the appellants is necessary, then bringing these proceedings is sufficient."

198 This is also a case of the kind referred to by Mason CJ, Deane, Toohey, Gaudron and McHugh JJ in *David Securities Pty Ltd v Commonwealth Bank of Australia*[294]:

> "In cases where consideration can be apportioned or where counter-restitution is relatively simple, insistence on total failure of consideration can be misleading or confusing. In the present case, for instance, it is relatively simple to relate the additional amounts paid by the appellants to the supposed obligation under cl 8(b) of the loan agreements. The appellants were told that they were required to pay withholding tax and the payments that they made were predicated on the fact that, by doing so, they were discharging their obligation. Such an approach is no different in effect from the cases under the old statutes of usury whereby a borrower could recover from the lender the *excess interest* which the lender was prohibited from stipulating or receiving." (original emphasis)

199 Accordingly, I am of the opinion that the appellants have made out a case for the recovery of the money paid on the basis that relevantly there has been a total failure of consideration, that is to say, a failure in respect of a discrete, clearly identified component of the consideration.

200 There is one further matter in respect of the appellants' entitlement to recover the money paid under the head of money had and received that I should discuss. In argument the respondent sought to makes these points: the appellants' claim was a claim in equity because the cause of action had its foundation in equity; the appellants were, therefore, not entitled to relief in equity as they had not offered to do equity by repaying or undertaking to repay to purchasers of tobacco the component of the licensing fee that was contained in the retail price.

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293 (1999) 95 FCR 185 at 214 [106].

294 (1992) 175 CLR 353 at 383 (footnote omitted).

201 There are two answers to this. The licensing component of the retail price was not shown in an invoice or elsewhere, or charged or paid as a discrete part of the retail price of tobacco bought and sold.

202 But, in any event, the money claim made here is not an equitable claim. It is true that the following comments of Lord Mansfield in *Moses v Macferlan* can be taken to suggest that a claim for money had and received is an equitable one[295]:

> "This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex aequo et bono, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy … because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.
>
> In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

203 However Lord Mansfield's comments may be interpreted, subsequent authority makes it clear that the claim is not an equitable one. This much is apparent from the speech of Lord Sumner in *Sinclair v Brougham*[296]. His Lordship there explained that the action for money had and received was a form of assumpsit; that Lord Mansfield probably had never conceived that the action was to be administered as "an equity", as the term was understood in the Court of Chancery; and that Pollock CB had bluntly declared that the notion that the action was an equitable one had been "exploded"[297]. His Lordship's conclusion is worth quoting[298]:

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295 (1760) 2 Burr 1005 at 1012 [97 ER 676 at 680-681].

296 [1914] AC 398.

297 [1914] AC 398 at 454-456.

298 [1914] AC 398 at 456.

> "[A]llusions have been made from time to time to the connection between this cause of action and equity or the aequum et bonum … but I take them all to be merely descriptive of the undoubtedly wide scope of this essentially common law action. There is now no ground left for suggesting as a recognizable 'equity' the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer."

204 It is not necessary for me to deal with the other arguments of the appellants, although I would be inclined to agree with the conclusion of Gyles J that it might also be appropriate to imply a term in favour of the appellants for repayment of the relevant sums. The term is that in the event that it is not necessary or possible to pay the tax, the sum represented by it would not be kept by the respondent but would be returned to the appellants. The appellants almost certainly would only have paid the sums in question upon the underlying common understanding that those sums would of legal necessity be payable by the respondent to the revenue authority. An implication of the kind that I have stated, in those circumstances, could fairly readily be made by the hypothetical officious bystander whose opinion the courts invoke in a case of this kind. That bystander is assumed to be a person who draws attention to a matter not the subject of express reference by the parties in their contract. A question, "What if you (the respondent) cannot, or are not required to, pay this amount to the revenue authority?" would likely have provoked an insistence by the appellants that money not so paid be refunded to the appellants. This is even more obviously an answer that might be given in the circumstances also imputedly known to the bystander, that the appellants here had a personal, contingent liability to pay the sums themselves. Such a term would appear necessary to give business efficacy to the contract between the parties. Efficacy means no more than power or capacity to effect an intention. Business efficacy would ordinarily require that money effectively demanded and paid in anticipation of its payment to a revenue authority would be so paid. Such an implied term, subject to one possible qualification, would be both reasonable and equitable, and it certainly contradicts no other term[299]. The only question is whether the respondent, confronted with a stipulation by the appellants of a term in the language that I have stated, might regard it as unreasonable to be bound by such a term unless the appellants undertook to refund to purchasers from them the licence fees forming part of the retail price, that amount otherwise being a windfall to the appellants. Because I would allow the appeal for the reasons earlier stated, I need not express any concluded opinion on this question.

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299 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 282-283; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 347 per Mason J.

205 I would allow the appeal with costs and enter judgment in favour of the appellants in the amounts paid by the appellants to the respondent in respect of tobacco products sold to the appellants during the period 1 July 1997 to 5 August 1997 and identified in the respondent's invoices as "Tobacco Licence Fee". I would also order that the respondent pay to each appellant interest pursuant to s 51A of the *Federal Court of Australia Act* 1976 (Cth), and that the respondent pays the appellants' costs of the action and the appeal to the Full Court.