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

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

I. J. HARDINGHAM*

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

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

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

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

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

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1 74 A.T.C. 4034.

2 Id.

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

1 *The Facts in Gorton's Case*

(i) X and Y formed the L Company Pty. Ltd. Each subscribed for one unclassified share. X was the sole director and was given the powers of a governing director.

(ii) At the first meeting of directors the two subscribers' shares were allotted, X being the beneficial owner of both.

(iii) X then sold to the L Company shares in a public company worth £167,500. X's account with the L Company was credited with that sum.

(iv) X later applied for and was allotted 14,998 ordinary shares of £1 each in the L Company for a consideration of £149,980, that amount being made up of £1 per share and a premium of £9 per share. X's account was debited with this amount.

(v) Later an extraordinary general meeting of the members of the L Company passed a special resolution to convert all previously issued shares into preference shares carrying the right to cumulative dividends at 6 per cent and a return of paid-up capital upon a winding-up in priority to all other shares for the time being of the company. Beyond this the holders of such shares were not entitled to participate in any distribution of the L Company's profits or assets.

(vi) Later a further meeting of directors resolved that pursuant to an application from Z (X's nephew) for the issue of ten ordinary shares at a premium of £9 per share, ten ordinary shares should be issued and allotted to Z. Such shares were thereafter allotted.

When Z became the holder of ten ordinary shares he acquired property worth much more than the consideration of £100 which he paid to L Company. X's 15,000 shares had been reduced in value either at the time they were converted or upon the allotment of ten ordinary shares.

2 *The Decision in Gorton's Case*

For gift duty purposes it is necessary for the Commissioner of Taxation to find a disposition of property which is made without fully adequate consideration in money or moneys worth passing from the disponee to the disponor. In *Gorton's* case the Commissioner relied on paragraph (f) of the definition of "disposition of property" contained in the *Gift Duty Assessment Act 1941-1957*. Paragraph (f) provides that a disposition of property includes "any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of his own property and to increase the value of the property of any other person". It was never disputed that there was (a) a transaction (b) the necessary intent and (c) a diminution in the value of the disponor's property. But was there an increase in "the value of the property of any other person"?

For the taxpayer, it was argued that it was not enough to find that the increase in the total wealth of the "disponees" resulted from the acquisition of new property at an undervalue; there must be property, the value of which was augmented by the transaction, in the hands of the donee before the transaction. McTiernan J. accepted this argument at first instance but still found for the Commissioner. He said:

"I think it is correct to say that the transaction must operate to increase the value of an asset already in the hands of the donee . . . However I do think that the transaction in question satisfies this requirement. The scheme contemplated that each nephew pay £100 for the shares allotted to him. This sum was in their hands before the transaction and was converted by the transaction into shares of a much greater value. Thus I am of the opinion that there was an increase in the value of property in the hands of each nephew."[4]

On appeal, Barwick C.J. and Taylor J. also accepted this argument, but they found for the taxpayer. Their joint judgment contains the following passage:

"The effect of each transaction was that in return for the expenditure of £100 each nephew became entitled to 10 shares of a total value far in excess of the amounts expended by them. But it cannot be said that the effect of the transaction was to increase the value of their property; its effect was to vest in each of them, in return for an expenditure of £100 each, 10 shares which at the moment of acquisition were of great value. There was no moment of time when any change in the value of the shares in the hands of the nephews took place."[5]

Windeyer J. dissented. He adopted a literal interpretation of the provision as the folloing quotation illustrates:

"I found my conclusion simply on the words of the Act. To read them as restricted in their application to a determination of the value of a specific item of property and the increase in the value of another item seems to me, with respect to those who think otherwise, to involve reading par. (f) as if the words were not 'his own property' etc. but 'some part of his own property' etc. or 'any of his own property' or some such phrase. If as the result of a transaction one person is worse off and another person is better off than they would have been if the transaction had not occurred . . . then I consider the statutory description is satisfied."[6]

3 *The Period 1965-1969*

The decision in *Gorton's* case had apparently created an enormous loophole whereby vast sums of money could be transferred from one person to another without involving the payment of gift duty. Between them, the Commonwealth Government and the Commissioner of Taxation had three alternatives. Firstly, the Commonwealth Government could have amended paragraph (f) of the definition of "disposition of property" by substituting the words "the total property or the value of the total property of any other person"[7] for the expression "the value of the property of any other person". Such an amendment could have been passed speedily and very few people would have been able to take advantage of the decision in

[4] Ibid. 615.
[5] Ibid. 623-4.
[6] Ibid. 626.
[7] See the definition of "disposition of property" as contained in both the South Australian *Gift Duty Act 1968-69* and the Victorian *Gift Duty Act 1971*.

Gorton's case (which alone cost the Commonwealth Government $144,619.72 in Revenue).

Secondly, the Commissioner of Taxation could have issued assessments against the companies involved in *Gorton's* case by applying paragraph (a) of the definition of "disposition of property". Paragraph (a) provides that a "disposition of property" includes "the allotment of shares in a company". Windeyer J. had given a broad hint that this course of action should be taken, because in his judgment he stated:

> "It seems that the view of the facts of this case taken by the other members of the Court leaves open the question whether, there being no disposition of property by Mrs Abel to her nephews, there were not gifts by the companies to her nephews. But that question does not arise on this appeal.[8]

Instead the Commonwealth Government and the Commissioner of Taxation chose the third alternative. They did nothing, when it cannot be doubted that between them they should have taken remedial action, because, as was stated by Windeyer J.—

> "What occurred on the afternoon of 19th May shows up the unreality and formalism into which the decision in *Salomon's* case [1897] A.C. 22, has lead the law. The utterance of the right, ritualistic phrases in their proper sequence, the signing of documents prepared in advance to record that this was done was, if one ignores the transient transmutations theoretically involved, merely an elaborately occult means of making a gift.[9]

Notwithstanding the remarks of Windeyer J. above,[10] the view was widely held that, whilst Gorton schemes contained a disposition of property under paragraph (a), they would not be dutiable because the consideration paid for the allotment of shares was adequate. This view is exemplified in the following quotation:

> ". . . the traditional view of company lawyers has been that the issue of shares by a company at par is an issue of shares for full consideration . . . and that paragraph (a) of the Commonwealth Act probably refers to those cases where a company issues or allots shares at less than par or issues or allots shares to one person at the direction of another."[11]

The more prudent, however, conceded that the question of inadequacy of consideration was certainly arguable and that Gorton schemes contained a substantial element of risk.[12] These people tended to take advantage of tax havens, such as Norfolk Island, to gain extra-territorial protection. But, with the passage of time and the failure of the Commonwealth Government and the Commissioner of Taxation to act, many people were undoubtedly lulled into a false sense of security because it has been stated

8 (1965) 113 C.L.R. 604, 627.
9 Id.
10 See fn. 8 supra.
11 By J. Daryl Davies and M. J. Walsh in a paper entitled "Commentary on the Gift Duty Act 1971" presented at a Two Day Course held by the Law Institute of Victoria on 19th-20th March 1972—at p. 7.
12 N. H. M. Forsyth, "Some Problems Involved in Estate Reduction", The Australian Accountant, Vol. 43, p. 209.

that "in consequence of [the decision in *Gorton's* case], 'Gorton Schemes' as they were widely known became very familiar, and many millions of dollars were effectively transferred by means of them".[13]

Then, in April, 1969, a Gorton scheme was implemented, through a company Ord Forrest Pty. Ltd., by which an amount of $2,590,480 in value was transferred. The duty on this amount, if properly dutiable, was $772,743-92, and at last the Commissioner of Taxation decided to assess the company as had been suggested by Windeyer J. in *Gorton's* case. Whether the Commissioner would have proceeded if the amounts involved had been more modest is open to question.

4 *The Decision in the Ord Forrest Pty. Ltd. Case*

The importance of the case lies not so much in the decision itself (although as will be seen later, the decision does have far-reaching effects), because a decision in an area of law governed by statute can always be made inoperative in the future by legislative amendment. The importance of the case lies in the fact that the three most recent appointees to the High Court Bench—Stephen J. at first instance and Gibbs and Mason JJ. on appeal—adopted a literal interpretation of the statute and found for the Commissioner. Barwick C.J., with whom McTiernan J. agreed, adopted a restrictive interpretation as he did in *Gorton's* case and it is interesting to speculate that this case may represent the beginning of a change in the interpretation of death and gift duty statutes by the High Court.

The High Court was required to decide whether the allotment of shares was a disposition of property and, if so, whether the particular allotment was for a consideration less than adequate. The definition of "disposition of property" commences as follows:

> " 'disposition of property' means any conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property and, without limiting the generality of the foregoing, includes—(a) the allotment of shares in a company; . . ."

On appeal, the three judges who gave reasoned decisions all agreed that an allotment of shares could not be described as a disposition of property in the ordinary meaning of that expression. There is no transfer, conveyance or alienation of property by the allotment. Before allotment the share does not exist as a piece of property; it is only when it is allotted and issued that the rights which it confers are created.[14]

Clearly then, the allotment did not come within the general words of the definition. But what was the effect of paragraph (a)—"the allotment of shares in a company"? It was here that the judges differed.

Barwick C.J. adopted a restrictive interpretation. He considered that the inclusion of paragraphs (a)-(e) inclusive (he was not sure about paragraph (f)) in the definition of "disposition of property" only gave "examples of various means by which in particular circumstances an alien-

[13] Id.
[14] See 74 A.T.C. 4034, 4038 (Barwick C.J.), 4041 (Gibbs J.) and 4046 (Mason J.).

ation of property, using that term in its widest import to include a transfer of value, may be effected".[15] But there must still be an alienation of property. As the allotment of shares did not involve any alienation of property he concluded that there was no disposition of property.

However, with respect to the learned Chief Justice, such an interpretation leaves little or no meaning for paragraph (a), and it is submitted that his Honour's response to this argument is far from convincing. He said:

> "There are circumstances in which, in association with other transactions, an allotment of shares may effect an alienation of property from one person to another, neither being the company of whose capital the shares form part."[16]

This attitude should be contrasted with the literal interpretation which is best exemplified by the following passage from the judgment of Gibbs J. on appeal:

> ". . . the definition of 'disposition of property' extends to transactions which are not dispositions in the ordinary sense . . .It may now be taken as settled that para. (f) of the definition is intended to include transactions which would not fall within the other parts of the definition . . . and the fact that para. (f) is complete in itself strongly supports the view that it was intended by the Legislature that each of the lettered paragraphs of the definition should be selfcontained. In my opinion, the allotment of shares in a company is a 'disposition of property' within the meaning of the definition, notwithstanding that the allotment could not be described as a 'conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property', or as a 'disposition of property' in the ordinary sense of those words."[17]

Stephen J. at first instance, and Mason J., on appeal, also dealt with the argument that paragraph (a) should be interpreted restrictively. Stephen J. dismissed it in a very peremptory manner. He said:

> "[the words of paragraph (a)] are, I think, clearly applicable to the present case; the meaning they convey cannot be confined, as was suggested, to the procuring by a third party of the allotment of shares by a company; . . . No statutory context has been suggested as requiring any departure from ordinary meaning."[18]

Mason J. dealt with the argument at more length. The basis of the argument that the restrictive interpretation should be adopted was that the statutory definition would, unless restricted in its construction, be productive of far-reaching consequences of such gravity that they could not reasonably be attributed to the Legislature. These "far-reaching consequences" will be considered later. Suffice it to say at this stage that Mason J. considered each of them in some detail and concluded that there was no consequence so extraordinary "that the Court should be deflected

[15] Ibid. 4038.
[16] Ibid. 4039.
[17] Ibid. 4041-2.
[18] 73 A.T.C. 4022, 4024.

from giving effect to the language in which the statutory definition of a 'disposition of property' is expressed".[19]

Barwick C.J., having concluded that there was no disposition of property, did not need to consider whether the consideration was adequate. Nevertheless he did give an indication that he would have adopted a restrictive interpretation in this regard also, as the following passage indicates:

> "it should be observed that the applicant for a share pays or agrees to pay for a share in the company's capital such sum as the company resolves to demand or require for the allotment of that share. There is no sum with which to make a comparison in order to determine adequacy or inadequacy of that sum in any relevant sense. Even in the relationship of the directors to the company, they are not bound to demand on allotment such amount by way of premium as could be justified by the financial situation of the company."[20]

Again, however, Gibbs J., with whom Mason J. agreed on this point, adopted a literal interpretation—

> "The argument that the payment of the par value of a share must necessarily provide full consideration for its allotment is in my opinion impossible to accept. It would be contrary to common commercial experience, and indeed to common sense, to suggest that a share is necessarily worth no more than its nominal value. It is established by many decisions, including a number in this Court, and constantly acted upon in practice, that the value of a share, for purposes of duty, is its real and not its nominal value . . . it does not follow that to pay the amount of the nominal value is to provide fully adequate consideration —if the shares are worth more, the consideration will be inadequate to the extent of the difference."[21]

The main argument for the appellant company was based on some remarks of Williams J. in *Archibald Howie Pty. Ltd.* v. *Commissioner of Stamp Duties*[22] to the effect that "when the person to whom the shares are allotted pays or assumes the liability to pay for the shares in money or in money's worth, full consideration in money or money's worth moves from him to the company for all the rights which he acquires under the memorandum and articles of association".[23] Similar remarks were contained later in his judgment.[24] However, all judges, even Barwick C.J., rejected this argument on the basis that Williams J. was not concerned with the adequacy of the consideration for the issue of the shares, but with the question whether there was consideration for the distribution of money or assets to the shareholders.

5 *Other Ramifications of the Decision in the Ord Forrest Case*

These fall into two categories—prospective and retrospective.

[19] 74 A.T.C. 4034, 4047.
[20] Ibid. 4039.
[21] Ibid. 4044.
[22] (1948) 77 C.L.R. 143.
[23] Ibid. 157.
[24] Ibid. 159.

5.1 *Prospective*

At first glance there are a number of problems or "far-reaching" consequences. For example, what is the position when there is a bonus issue, a new issue to shareholders in proportion to their existing holdings, or a placement to persons who may or may not be shareholders? How can an allottee pay full consideration when the higher the premium the more it will swell the assets of the company and increase the value of the share? Each of these will be considered in turn.

5.1.1 A bonus issue or a new issue to shareholders in proportion to their existing holdings.

Both Gibbs and Mason JJ. considered that no gift would arise in these circumstances. In the words of Mason J.:

> "The shareholders' proportionate right to participate in the distribution of the assets on a winding-up or on a return of capital remains unaffected. In the case of the issue of shares for cash the assets of the company are increased only by the total value of the consideration payable in respect of the allotment. Consequently the amount which the shareholder can expect to receive on a distribution of the assets of the company is increased but it is increased only by the amount of the consideration which he has provided for the allotment of the new shares which he acquired."[25]

5.1.2 A placement to persons who may or may not be shareholders.

This was one matter on which Gibbs and Mason JJ. did not entirely agree. Gibbs J. was of the opinion that such transactions would be dutiable unless exemption could be obtained under section 14(f) as a "gift which is made in the course of carrying on a business, for the purpose of obtaining any commercial benefit . . .". However, Mason J. would not commit himself on this point. He considered it to be "a difficult question on which I express no opinion",[26] although he was willing to assume that gift duty is payable in such cases.

5.1.3 How can an allottee pay full consideration?

It was argued for the appellant that it is impossible in the case of a company whose assets exceed its liabilities to charge a premium on the issue of a share which will bring the value of the share and the amount payable in consideration of its allotment into equilibrium. This argument was also rejected. It was pointed out that the valuation of a share by reference to its "assets backing" is not the normal mode of valuing a share in a company. Where resort properly can be had to market valuation or valuation on an income basis, a company making a new issue may be able to exact a premium which will dispel any suggestion of a gift.

5.2 *Retrospective*

The effect of the decision in the *Ord Forrest* case has been to cause utter confusion and uncertainty. Strictly speaking, the companies involved in *Gorton's* case and all other companies which have been involved in

[25] 74 A.T.C. 4034, 4047.
[26] Id.

and are key provisions for regulating the relationship of the relevant Gorton schemes since 1965 have made dispositions of property, for less than full consideration; and each should have lodged a gift duty return within one month after making the gift.[27] Failure to lodge returns has made the companies liable to maximum penalties of amounts equal to the gift duty assessable in each case.[28] As the distinguishing feature of the Gorton scheme is the allotment of shares at a large premium, no doubt the Commonwealth Taxation Department has been able to locate many of the companies concerned, by searching returns of allotment lodged at the various Companies Registration Offices. The question is—to what extent will the Commissioner of Taxation go back into the past and issue default assessments? At the time of writing, no announcement has been made, a fact which must cause concern to a considerable number of company controllers and their legal advisers.

6 *Summary*

The decision in the *Ord Forrest* case is most welcome. It has made it clear that an apparent loophole which should never have been allowed to appear to exist does not exist. Whilst there are many who would argue that those who indulge in tax avoidance are anti-social and no penalty is too severe for them, it is submitted that the better view is vividly expressed in the following extract from a letter to the "Australian Financial Review" on 26th March 1974:

> "Whether one approves of such devices to avoid duties or not, no reasonable man could possibly approve of the attitude of the department and the Government to the matter—an attitude which let six years go by while they sat on the sidelines and permitted hundreds of people to put their necks in the trap before moving to spring it."

GARRY J. SEBO*

INDUSTRIAL EQUITY LTD. v. TOCPAR PTY. LTD.[1]

The question of the rights and obligations attaching to parties involved in a company takeover has been the subject of important legislation in recent years. In *Industrial Equity Ltd.* v. *Tocpar Pty. Ltd.*,[2] Helsham J. was concerned with the problem of the extent to which the offeror and the offeree company may co-operate in propounding the takeover offer. The specific provisions involved in the case were s. 67(1) and s. 180C(1)(b) of the Companies Act. Both sections are uniform throughout Australia,

[27] See section 19 of the Commonwealth *Gift Duty Assessment Act 1941-1972*—I am here referring only to gifts made in Australia.

[28] Although, it is arguable that if the companies concerned did not know they had made gifts, they should not have been required to lodge returns. The alternative argument is that they should have lodged returns and obtained rulings from the Commonwealth Taxation Department.

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[1] [1972] 2 N.S.W.L.R. 505.

[2] Id.