

IN THE FEDERAL COURT OF AUSTRALIA )  
 )  
AUSTRALIAN CAPITAL TERRITORY )  
DISTRICT REGISTRY ) No. ACT G 52 of 1989  
 )  
GENERAL DIVISION )

BETWEEN: DEPUTY COMMISSIONER OF  
TAXATION

Applicant

AND: TERENCE J CHAMBERLAIN

Respondent

CORAM: WILCOX J  
PLACE: SYDNEY  
DATE: 16 MARCH 1990

CORRIGENDUM

Amendment to reasons for judgment:

Page 11 of judgment, second sentence of new paragraph. Delete "Nor was there any explanation as to how Mr Coles had come to accept a brief to appear in a jurisdiction where he was not admitted."



Peter Menadue  
Associate to Wilcox J  
5 April 1990

CATCHWORDS

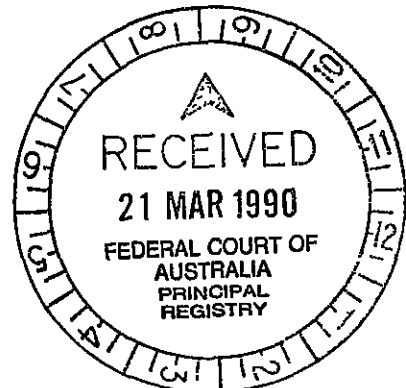
MISTAKE - Consent judgment entered as result of unilateral mistake - Other party knowingly taking advantage of mistake - Prior action in which mistake not alleged - Entitlement of mistaken party to have consent judgment set aside - Discretionary considerations - Conditions.

PRACTICE AND PROCEDURE - Matter transferred from Supreme Court of Australian Capital Territory under cross-vesting legislation.

Income Tax Assessment Act 1936, ss.177, 207, 209.  
Jurisdiction of Courts (Cross-Vesting) Act 1987, s.5.  
Australian Capital Territory Supreme Court Rules, Order 42A.

ACT G 52 of 1989  
DEPUTY COMMISSIONER OF TAXATION v TERENCE J CHAMBERLAIN

Wilcox J  
Sydney  
16 March 1990



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MINUTES OF DIRECTIONS

THE COURT DIRECTS THAT:

1. The further hearing of the matter be adjourned until  
Friday 30 March 1990 at 9.30 am.
2. Counsel for the applicant bring in short minutes of  
orders on that occasion.

IN THE FEDERAL COURT OF AUSTRALIA )  
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CORAM: WILCOX J  
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REASONS FOR JUDGMENT

The proceeding now before the Court is the latest round in a lengthy contest concerning the recoverability of tax assessed against the respondent. This contest has already reached the High Court of Australia, where Mr Chamberlain was successful: see Chamberlain v Deputy Commissioner of Taxation (1988) 164 CLR 502. The present proceeding -- the third between the parties -- was commenced by the Deputy Commissioner in an attempt to overcome the effect of the High Court decision.

The earlier proceedings

The respondent, Terence J Chamberlain, is a solicitor practising in Canberra. He is a member of a firm of solicitors known as Crowley & Chamberlain. During the period 5 April 1976 to 11 August 1983 various assessments and amended assessments were raised against him under the Income Tax Assessment Act 1936, for income tax and additional tax. Some payments were made but, on 4 July 1984, there remained outstanding the sum of \$255,579.20. On 26 July 1984 the Deputy Commissioner issued a specially endorsed writ against Mr Chamberlain out of the Supreme Court of the Australian Capital Territory. The writ was numbered 697 of 1984. The particulars set out in the writ itemised the claim by reference to the various assessments and amended assessments. The particulars also gave credit for the payments which had been made. After those credits, the balance of the items claimed was \$255,579.20. However, in the course of transcription a decimal point was displaced. The actual claim made by the writ was for an amount exactly one-tenth of the true amount, namely \$25,557.92. I shall refer to the proceeding instituted by this writ as "the first action".

The writ was served during the evening of Wednesday, 1 August 1984. Mr Chamberlain perceived the error and determined to take advantage of it. At about 3 pm on Friday,

3 August 1984 Ms Margaret Reid, a solicitor employed by Crowley & Chamberlain, telephoned Ms Joanne Healey, a clerk in the Australian Capital Territory Branch of the Australian Taxation Office. Ms Reid said that she was acting for Mr Chamberlain and that he "would like to pay the total on the writ and costs, subject to a judgment by consent". She asked whether she could come in that afternoon and pay. Ms Healey sought the advice of her supervisor and then agreed to this suggestion. Ms Reid arrived at the taxation office at about 3.45 pm. She brought with her a cheque for the amount claimed on the writ and a document entitled "Terms of Settlement". Ms Healey took her to Mr Geoff Besgrove, Assistant Director of the Enforcement Branch, who signed the Terms of Settlement. This document provided for judgment for the plaintiff in the sum of \$25,577.92 together with costs agreed at \$115. Mr Besgrove had no personal knowledge of the case. He signed the Terms of Settlement only after being informed that the amount being paid was the full amount claimed. The Taxation Office filed the Terms of Settlement on the following Monday, 6 August, when judgment was entered in favour of the Deputy Commissioner in accordance therewith.

Mr Chamberlain had objected to some of the assessments issued against him; namely, the assessments for the years ended 30 June 1978, 1979, 1980, 1981 and 1982. Each of those objections had been disallowed and, on 26 September 1983, Mr Chamberlain had requested that the decisions to

disallow be referred to the Taxation Board of Review. However, by 6 August 1984, that request had not been implemented.

On 6 August 1984 Ms Reid, on behalf of Crowley & Chamberlain, wrote a letter to the Deputy Commissioner in these terms:

"Following upon the settlement negotiated in Supreme Court proceedings No. 697 of 1984 on the 3rd. August, 1984, we confirm that our client has instructed us to formally withdraw all outstanding objections for income tax assessments issued in respect of income earned up to and including the financial year ended 30th June, 1982."

The Deputy Commissioner did not respond to this letter. It appears that, at about the time of its receipt, Ms Healey discovered the error. On 10 August 1984 the Deputy Commissioner issued a second writ out of the Australian Capital Territory Supreme Court, claiming the sum of \$230,021.28 ("the second action"). The particulars of this claim were the same as before, but with credit allowed for the \$25,557.92 payment of 3 August. A defence was filed pleading, amongst other things, that the plaintiff was estopped by the judgment in the first action. The defendant, Mr Chamberlain, failed before Kelly J -- see (1986) 72 ACTR 1 -- and, on appeal, before a Full Court of this Court -- see (1987) 13 FCR 94. However, as already mentioned, he succeeded in a further

appeal to the High Court; although, as the members of that Court pointed out, the true nature of the defence raised by him was res judicata, not estoppel.

While the second action was going through the courts, developments occurred in connection with Mr Chamberlain's request that the Taxation Office refer to the Board of Review the decision to disallow his objections. The Deputy Commissioner did not accept that the letter of 6 August withdrew this request. On 2 April 1986 he formally referred the matter to the Taxation Board of Review No.1. But, on 1 July 1986 the jurisdiction of the Boards of Review was transferred to the Administrative Appeals Tribunal. The applications for review were listed for preliminary conference before Deputy President R K Todd on 4 December 1986, but there was no appearance on behalf of Mr Chamberlain. He may not have received notice of the listing. Mr Todd adjourned the preliminary conference until 17 December 1986. However, prior to that date, a solicitor employed by Crowley & Chamberlain contacted the Tribunal and requested an adjournment pending the delivery of judgment in the Full Federal Court, the appeal against the decision of Kelly J having recently been argued. Accordingly, the preliminary conference was further adjourned, to 9 April 1987. On that day, Mr Chamberlain was represented by one of his partners, Mr W B Loftus. Mr Loftus informed the Tribunal that Mr Chamberlain took the position that he had withdrawn the references. He also referred to the pending



High Court appeal. In the result, the references were removed from the list of matters awaiting hearing, but with liberty granted to either party to apply for their reinstatement to that list.

The High Court decision was announced on 12 May 1988. But no action was taken, by either party, in relation to the Administrative Appeals Tribunal until 23 May 1989. On that day, the Deputy Commissioner wrote to the Registrar of the Tribunal requesting that the references be reinstated to the list of matters for hearing. That request was acceded to and the references were listed for a directions hearing on 29 August 1989. By that time, the Deputy Commissioner had commenced the present proceeding. So the references were again removed from the Tribunal's list, but with liberty for either party to apply for reinstatement. On 29 August Mr Chamberlain was represented by another of his partners, Mr P R Smith. Mr Smith reiterated Mr Chamberlain's position, that he had withdrawn his objections previously lodged, so there were no matters current before the Tribunal. The Tribunal has made no ruling on the correctness of that position.

The present proceeding: the claims made

The present proceeding was instituted on 7 October 1988. On that day, the Deputy Commissioner issued out of the Supreme Court of the Australian Capital Territory a writ, to

which was annexed a Statement of Claim. The Statement of Claim set out details of the various assessments and payments and of a demand made on the respondent (therein referred to as "the defendant"), by letter dated 5 June 1984, for payment of a balance of \$252,449.78. Paragraph 8 contained an allegation that, at 4 July 1984, the balance owing to the applicant ("the plaintiff") was \$255,579.20. In para.9 of the Statement of Claim the applicant alleged the issue of the earlier writ and set out the particulars endorsed therein, the amount of the claim being shown as \$25,557.92. Paragraphs 10 and 11 of the Statement of Claim were as follow:

- "10. The individual sums claimed for income tax and additional tax less the credits allowed for as appearing in the endorsement totalled \$255,579.20 being the full amount of the defendant's unpaid tax.
11. The plaintiff intended by the Writ to claim the full amount of the defendant's unpaid tax but by mistake made in the typing of the Writ the sum actually claimed was only \$25,557.92."

The Statement of Claim then set out allegations as to service of the writ, the circumstances surrounding the signing of the Terms of Settlement and the entry of judgment. It is desirable to reproduce in full the remaining allegations:

- "16. At the time the Writ was issued and at all material times thereafter until after the consent judgment was entered the plaintiff and the plaintiff's solicitors were not aware of the mistake in the form of the Writ and the amount claimed therein and they believed that the amount claimed was the correct amount then owing by the defendant for unpaid tax.

17. On 3 August 1984 at the time the defendant made the offer to consent to judgment for the amount claimed in the Writ, at the time the plaintiff's officer signed the Terms of Settlement and delivered them to the Solicitor for the defendant, and at all material times thereafter until after consent judgment was entered, the plaintiff's officer referred to mistakenly believed that the amount of the debt for which the defendant offered to consent to judgment and the amount of the debt stated in the Terms of Settlement was the correct amount then owing by the defendant for unpaid tax.
18. At all material times the defendant and his Solicitor were aware of the mistakes referred to in paragraphs 11, 16 and 17 hereof and also knew that the plaintiff, the plaintiff's solicitor and the relevant officer of the plaintiff were not aware of such mistakes and that the plaintiff's officer would not have signed the Terms of Settlement and consented to the entry of judgment if he had been aware of such mistakes.
19. The defendant's solicitor made the offer to consent to judgment and then acted with speed to secure the signature of the plaintiff's officer to the Terms of Settlement and the entry of judgment pursuant thereto in order to take unconscionable advantage of the said mistakes to defeat the plaintiff's claim to 90% of the full amount of the defendant's unpaid tax before the plaintiff, his Solicitor or the plaintiff's officer could become aware of such mistakes.
20. In the premises the plaintiff's agreement to the Terms of Settlement and to the consent judgment was vitiated for unilateral mistake known to the defendant and his solicitor and the plaintiff is accordingly entitled to have the Terms of Settlement and the consent judgment set aside or rectified.

21. The plaintiff, so far as may be necessary, hereby elects to rescind the agreement contained in the Terms of Settlement and hereby offers to do or perform all such acts and things as may be necessary or proper to be done or performed in order that the parties to the proceedings may be restored to the positions respectively enjoyed by them prior to the making of the said agreement and the execution of the Terms of Settlement.

AND the plaintiff therefore claims:-

(1) An order that the agreement contained in the Terms of Settlement bearing date 3 August 1984 and filed in proceedings SC No. 697 of 1984 in the Supreme Court of the Australian Capital Territory be set aside and rescinded.

(2) An order that the judgment entered on 6 August 1984 in the said proceedings be set aside.

..."

The respondent did not immediately file a Defence. Instead, on 22 November 1988 he filed a Notice of Motion seeking an order that the "action be forever stayed as an abuse of process."

The Notice of Motion was listed to be heard by me, sitting as a member of the Supreme Court of the Australian Capital Territory, in Canberra on 1 September 1989. However, because of an industrial dispute, air travel was difficult at that time. I was contacted by counsel, most of whom resided in Sydney, and I acceded to their request that the motion be heard in Sydney.

The cross-vested wig

At the commencement of the hearing on 1 September, Mr K R Handley QC announced his appearance with Mr B A Coles as counsel for the Deputy Commissioner. However, Mr Handley immediately added that Mr Coles was not admitted as a practitioner in the Australian Capital Territory. Mr Handley asked me to resolve this embarrassment by making an order for the transfer of the matter to the Federal Court pursuant to s.5(1)(b)(iii) of the Jurisdiction of Courts (Cross-Vesting) Act 1987. That sub-paragraph requires the Supreme Court of a State or Territory to transfer a pending proceeding to the Federal Court when it appears to the Supreme Court that "it is otherwise in the interests of justice to do so". Mr Coles had signed the High Court roll and was, therefore, entitled to appear as counsel in the Federal Court: see Judiciary Act 1903 ss.55B, 55C.

In Bourke v State Bank of New South Wales (1988) 85 ALR 61, at p.77, I suggested that the phrase "the interests of justice", where used in the cross-vesting legislation, should be read widely. I indicated my view that, under that rubric, a court was entitled to consider not only matters of jurisdiction "but also adjectival matters such as the availability of particular evidence, the procedures to be adopted, the desirable venue for trial and the likely hearing

date". Notwithstanding this wide interpretation, if there were any significant countervailing factors, it is doubtful whether the desire of a party to use the services of a particular counsel would justify a conclusion that it was in the interests of justice to transfer a matter to another court. However, in the present case there were no countervailing factors. Counsel for Mr Chamberlain did not object to the proposed transfer. Whether or not the matter was transferred, it would be heard by the same person, sitting in the same courtroom, and with any appeal going to the Full Court of the Federal Court. As Mr Handley frankly spelled out, the only practical effect of a transfer order would be that Mr Coles could participate in the matter as counsel, rather than have to remove his wig and adopt the role of an adviser/assistant. Under the current rules of the New South Wales Bar, Mr Handley would not have been precluded from appearing without a junior counsel, appearing as such.

The case for transfer was less than compelling. Nor was there any explanation as to how Mr Coles had come to accept a brief to appear in a jurisdiction where he was not admitted. But, tenuous as the case was, I thought that, there being no countervailing factors, the advantage to the Deputy Commissioner in having junior counsel of his choice appear, as counsel, justified a conclusion that the transfer of the matter was "in the interests of justice". Accordingly, I made an order for transfer and all subsequent proceedings have been

conducted in the Federal Court rather than in the Supreme Court of the Australian Capital Territory. Mr Coles remained at the Bar table, his wig triumphantly in place.

This little farce illustrates the absurdity of the current requirement of separate admission to practice in the various parts of Australia. Increasingly, Australian lawyers operate as a national profession. Many firms of solicitors have offices in more than one State. Counsel now frequently appear outside their home State. In this Court, in which counsel who have been admitted anywhere in Australia may appear as of right once they sign the High Court roll, it is common to find counsel from different Bars engaged in the one case. Especially having regard to Street v Queensland Bar Association (1989) 63 ALJR 715, the time has surely come to allow a practitioner admitted in any Australian State or Territory to practise in any other State or Territory, without the necessity for formal admission in the latter jurisdiction. There is no problem about professional discipline. Any complaint of misconduct by the practitioner in another State or Territory can be dealt with by the practitioner's home Supreme Court or professional body, in the same way as a complaint of misconduct in a federal court, or in an inferior court of the home State, would be dealt with. No doubt the present system benefits the airlines and some hotels, but it has nothing else to commend it. At a time when the Supreme

Courts are under great pressures of work, they should at least be relieved of the burden of processing applications from, and then formally admitting, interstate practitioners.

#### The Defence

After I dealt with Mr Coles' wig, a question arose as to the future conduct of the case. Although the Notice of Motion had been filed by their client, counsel for Mr Chamberlain indicated some unease about it proceeding in the absence of a Defence. They suggested that it would be difficult to determine whether the proceeding was an abuse of the process of the Court without knowing the issues in the case. This suggestion seemed to amount to an acknowledgement that there was no inherent vice in the proceeding itself, but that the respondent claimed a good defence to it. If that was the position, the Notice of Motion was misconceived and ought to be dismissed. But it was not necessary to determine that question. Both parties preferred that a Defence should be filed and the matter go to trial on the merits, without further reference to the Notice of Motion. I acceded to their wishes and made appropriate directions. The matter was then adjourned to 26 September 1989, for trial.

Pursuant to the directions, a Defence was filed. In it Mr Chamberlain admitted the making of the various taxation assessments and the service upon him of notices thereof. He



did not admit that the amount claimed by those assessments was due and payable, but at the trial the applicant tendered copies of the notices of assessment, so this allegation is established: see s.177 of the Income Tax Assessment Act. The substance of the applicant's allegations regarding service of a notice of demand and the contents of the first writ were also admitted. The respondent put in issue the applicant's allegation, in para.11 of the Statement of Claim, that he (the applicant) intended by the first writ to claim the full amount of the unpaid tax, but that, by a mistake made in the typing of the writ, the sum actually claimed was only \$25,557.92. However, there is unchallenged evidence on both those matters. By para.13 of the Defence, the respondent put forward a slightly different version of the conversations of 3 August 1984. However, the only evidence about these conversations is that contained in the affidavits read on behalf of the applicant. The deponents to those affidavits were not cross-examined or contradicted by other evidence. Consequently, I accept the version of the conversations set out in those affidavits, and which is summarised above.

All of the allegations made in paras.16 to 20 of the Statement of Claim, quoted above, were put in issue by the Defence. But, with one qualification concerning Ms Reid, I find them proved. The evidence led on behalf of the applicant affirmatively establishes that the amount claimed in the first writ was the product of a mistake and that this mistake

continued to operate on the minds of the relevant officers of the Australian Taxation Office until after judgment was entered. I find, also, that Mr Chamberlain was aware of that mistake and that he knew that, but for that mistake, the applicant's officers would not have consented to judgment in the sum of \$25,557.92.

The inference of knowledge is irresistible. The undisputed facts are consistent only with the conclusion that Mr Chamberlain noticed the error in the writ and that he set out to exploit the situation by causing the taxation officers irrevocably to compromise the Deputy Commissioner's position before the error was discovered. A letter of demand had been sent to Mr Chamberlain only a few weeks before the writ was served. Although Mr Chamberlain might not have remembered the exact amount demanded in the letter, the total claimed in the writ was so much smaller than that stated in the letter that he could not have failed to appreciate that it was wrong. Mr Chamberlain acted with speed. Ms Reid contacted the applicant's officers on the second day after the writ was served. She brought Terms of Settlement to the applicant's office 45 minutes after her first telephone call. The inference of care not to expose the error is supported, also, by her choice of language, in speaking of paying the "amount of the writ". It is significant that Ms Reid insisted on judgment being entered. If Mr Chamberlain had been minded merely to pay a proportion of the balance of the assessments,

being the amount for which the Deputy Commissioner appeared now to be pressing, he could have done so without entry of judgment. Mr Chamberlain obviously appreciated the legal significance of a judgment. He must have realised that no officer would knowingly consent to judgment for an amount which represented only 10% of the amount claimed by the Office to be due. No doubt this was the reason why Ms Reid made no reference to the disparity between the amount claimed by the writ and the particulars of the claim. Finally, it is significant that Mr Chamberlain elected not to give evidence. As there is no suggestion that he was unavailable, the Court is entitled to assume that his evidence would not have assisted him to rebut the inference which arises from the matters I have mentioned: see Jones v Dunkel (1959) 101 CLR 298.

Counsel for Mr Chamberlain do not dispute that the Court should infer that their client was aware of the error and of the taxation officers' ignorance of that error. But they argue that no such finding should be made against Ms Reid. Although, in para.18 of the Statement of Claim, the applicant alleges such knowledge by Ms Reid, it seems to me that this is an immaterial allegation. The critical questions are the nature and quality of Mr Chamberlain's conduct. Ms Reid acted only as his agent.

Having regard to the precision of her conduct, it is difficult to believe that Ms Reid was not fully aware of the position. However, it is not inconceivable that Mr Chamberlain used her as a cipher, that her carefully calculated course of conduct and language resulted from uncomprehending obedience to very precise instructions from Mr Chamberlain. As this possibility is open, and as the course taken by Mr Chamberlain involves an element of moral turpitude, I prefer not to make any finding about the extent of Ms Reid's knowledge. Ms Reid is not a party to the proceeding and she has not given evidence. If she had given evidence, I might have gained a different impression of the extent of her knowledge than I presently hold.

In finding that the allegations made in paras.16 to 20 of the Statement of Claim are proved, I do not overlook the claim, in para.19, that Mr Chamberlain and Ms Reid acted "to take unconscionable advantage" of the mistakes of the Deputy Commissioner's officers. "Unconscionable" is a word with strong overtones. It describes an action undertaken without conscience or scruple, but immorally or even dishonestly. To so describe the action of two solicitors is to accuse them of grossly improper conduct. Accordingly, a finding of unconscionable conduct is one not lightly to be made.

However, leaving aside the position of Ms Reid, I have come to the conclusion that the word "unconscionable" does aptly describe the actions of Mr Chamberlain; if, as I

find, he was aware of the error in the writ and that the officers with whom Ms Reid was dealing did not realise the error. Mr Chamberlain intended that the consent judgment would have the effect of limiting recovery by the Deputy Commissioner to the sum stated in the judgment, an amount which was only 10% of the true claim. He knew that no taxation officer would knowingly agree to limit the Deputy Commissioner in such a way. Yet, he caused Ms Reid, with a combination of silence and half-truths amounting to a misrepresentation, to have them do that as quickly as possible before the error was discovered. It was not, of course, for Mr Chamberlain or Ms Reid to advise the Deputy Commissioner; but if the Deputy Commissioner's position was to be compromised, ordinary decency required Mr Chamberlain to have Ms Reid point out the error to the officers, so that they could make an informed decision as to the course which they should take. Not only did Ms Reid not point out the error. On the contrary, she used language calculated to cause the officers to believe that the Deputy Commissioner was giving away nothing, as his claim was being paid in full. It was only because he accepted that assurance that Mr Besgrove, without further inquiry, signed the Terms of Settlement. The course taken on behalf of Mr Chamberlain was the moral equivalent of larceny by a trick. It was unconscionable.

I emphasise that this was not a case where a judgment was required as to the advantages of entering into a particular contract, as for example where a purchaser has a

higher opinion of the value of an article than the vendor. This was a straight matter of computation, a transcription error; cf Stepps Investments Ltd v Security Capital Corp Ltd (1976) 73 DLR (3d) 351 at p.364.

As will be apparent from the above, I accept the factual correctness of the claim made in para.20 of the Statement of Claim, that there was a unilateral mistake by the applicant in connection with the entry of consent judgment, which mistake was known to the respondent. The primary question in the case is whether it follows, as the applicant asserts in that paragraph, that he is entitled to have the Terms of Settlement and the consent judgment set aside or rectified. As the matter has been argued, that question has three aspects: first, whether, in a case such as the present, it is open to a person in the position of the applicant to have the Terms of Settlement and the consent judgment set aside; secondly, whether, if the applicant did have this right, he has lost it by failing to seek this relief in the second action; and, thirdly, whether, as a matter of discretion, relief should be refused. I will deal with each of these issues separately.

#### The claim for rectification

It is clear that, as a matter of principle and leaving aside the second and third issues just stated, a court may set aside an order, made by consent and intended to carry

out an agreement between the parties, upon any ground on which the agreement itself might be set aside. Mistake is such a ground.

The principle is illustrated by Huddersfield Banking Company Limited v Henry Lister & Son Limited [1895] 2 Ch 273. In that case Vaughan Williams J set aside a consent order made in the course of the liquidation of a company. The order dealt with the entitlement of debenture holders to the proceeds of sale of 33 looms. In giving their consent the parties had been unaware that the looms had formerly been affixed to the mills in which they were housed, so as to be subject to a mortgage of the realty. In setting aside the order, Vaughan Williams J stated, at p.277, this principle:

"I believe that the law is that if a party has been induced by a mistake common to both parties to consent to a decree or order, the Court has power to relieve him, and will do so on being satisfied that the mistake existed, and that the conduct of the party himself has not deprived him of the title to relief, and that relief can be given with a due regard to the just rights of others."

The decision of Vaughan Williams J was upheld by the Court of Appeal. At p.280 Lindley LJ summarised the position in the following way:

"Messrs. Lister & Son, Limited, the appellants, contend that there is no jurisdiction to set aside the consent order upon such materials as we have to deal with; and they go so far as to say that a consent order can only be set aside on the ground of fraud. I dissent from that proposition entirely. A consent order, I agree, is an order; and so long as it stands

it must be treated as such, and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that; nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expresses in a more formal way than usual.

If authority for this be wanted, it will be found in two cases which were referred to in the course of the argument, and which I do not propose to examine at any length -- I mean Davenport v Stafford 8 Beav. 503 and Attorney-General v Tomline 7 Ch. D. 388. To my mind, the only question is whether the agreement upon which the consent order was based can be invalidated or not. Of course, if that agreement cannot be invalidated the consent order is good. If it can be, the consent order is bad."

The other members of the Court expressed similar views: see Lopes LJ at p.283 and Kay LJ at p.285.

The views expressed in Huddersfield Banking were applied in Wilding v Sanderson [1897] 2 Ch 534. They were endorsed by the Judicial Committee of the Privy Council in Kinch v Walcott [1929] AC 482. In that case, at p.493, the Board commented that "... the only difference ... between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal". The Board went on to approve a decision of Romer LJ, in Ainsworth v Wilding [1896] 1 Ch 673, to the effect that a consent order may be set aside for mistake only in a separate proceeding instituted for that purpose.



The present case is one of unilateral mistake, not common mistake. In Taylor v Johnson (1983) 151 CLR 422, the High Court considered the circumstances in which an agreement will be set aside due to a unilateral mistake. This case arose out of an agreement for the sale of two adjoining pieces of land, each of about five acres, for a total of \$15,000. The vendor claimed that she had understood the price to be \$15,000 per acre. The trial judge so found and the New South Wales Court of Appeal held that the purchaser was aware that the vendor was acting under a misapprehension as to the price. A majority of the High Court (Mason ACJ, Murphy and Deane JJ) thought that each of the parties believed the other to be operating under a mistake as to price.

The majority judgment in Taylor v Johnson contains an account of the contest between proponents of the subjective and objective theories of the nature of the assent necessary to constitute a valid contract. For present purposes, little turns on that contest. A major practical effect is that, under the subjective theory, a contract is void ab initio for unilateral mistake; whereas under the objective theory, it is merely voidable.

The more significant question dealt with in the majority judgment is the circumstances under which a contract is vitiated by unilateral mistake. At p.430 their Honours

quoted a passage from the judgment of Dixon CJ and Fullagar J in Svanosio v McNamara (1956) 96 CLR 186 at p.195-196 containing the comment "that it is difficult to conceive any circumstances in which equity could properly give relief by setting aside the contract unless there has been fraud or misrepresentation or a condition can be found expressed or implied in the contract". At p.431, their Honours commented that, presumably, Dixon CJ and Fullagar J "were referring to 'fraud' in the wide equitable sense which includes unconscionable dealing. If they were not, we do not share the difficulty to which they referred. To the contrary, it seems to us that the reported cases, including Solle v Butcher [1950] 1 KB 671 itself, readily provide concrete examples of such circumstances". Later on the same page, their Honours noted that the examples given by Denning LJ in Solle v Butcher included the case where "one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake". In the result, the majority upheld the decision of the Court of Appeal setting aside the contract. They did so by reference to a proposition of law "appropriate and adequate for disposing of the appeal" which they stated at p.432:

"It is that a party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate

that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension."

Counsel for the respondent argue that Taylor v Johnson does not avail the applicant because in the present case the mistake was not about the terms of the contract, but about its subject matter. I think that two responses are available to the applicant. First, it would be erroneous to construe the passage from the majority judgment in Taylor v Johnson, which I have just quoted, as if it were an attempt to state exhaustively all of the circumstances under which equity will set aside a contract for unilateral mistake. As their Honours pointed out, their proposition was "narrowly stated" in terms appropriate for disposing of the case then before them. The emphasis of the judgment is upon the wide power of equity to relieve against a unilateral mistake induced by fraud, misrepresentation or other unconscionable dealing. This emphasis is consistent with the underlying rationale that equity operates upon the conscience of a party. This rationale requires attention to the nature of the wrongdoer's conduct and its effect upon the other party. If, by reprehensible conduct, one party has induced operative unilateral mistake in the other, the rationale underlying equity justifies its intervention to relieve against the consequences of the mistake. In terms of principle, there is

nothing to be gained from a nice distinction between mistake as to the terms of the contract and mistake as to its subject matter, which is difficult to draw anyway: see Greig and Davis, "The Law of Contract" at pp.925-926.

What I have just said is consistent with the majority judgment in Taylor v Johnson. It is noteworthy that, until they advanced the "narrowly stated" proposition on p.432, their Honours made no distinction between a mistake as to terms and a mistake as to subject matter. Indeed, at p.431, they referred to both when pointing out that special circumstances need to be shown before it would be unconscionable for one party to enforce a contract against the other. In none of the cases cited by their Honours does the distinction appear as a relevant factor. Two of the English cases given as examples of the circumstances in which equity will relieve against unilateral mistake involved errors as to subject matter. In Torrance v Bolton (1872) LR 8 Ch App 118, the plaintiff had contracted to purchase what he thought was an absolute reversion to a parcel of land. In fact, the vendor had only an equity of redemption in the reversion, the property being subject to three outstanding mortgages. The court examined the circumstances surrounding the making of the contract and granted relief. In Solle v Butcher both parties erroneously believed that a flat, leased by the defendant to the plaintiff, was not rent-controlled. There was no error about the terms of the lease, but an important mistake about

the quality of the subject of the lease. This was a mistake about "value", to use the word adopted in the High Court judgment at p.433 as a synonym for "subject matter". Finally, their Honours cited several United States and Canadian decisions where the entitlement to relief was couched in wide terms, without any distinction between terms and subject matter. After these references, their Honours quoted, without demur or qualification, the summary in Corbin on Contracts (1960) vol.3 at p.692, which speaks without limitation of "the material mistake of one party".

The second answer to the respondent's comment about Taylor v Johnson is that, even concentrating attention upon the particular words in the passage from p.432 which is quoted above, those words in fact cover this case. Their Honours refer to "a serious mistake about [the contract's] contents in relation to a fundamental term". A fundamental term of the agreement entered into by Mr Besgrove on behalf of the Deputy Commissioner was that judgment be entered in the first action in the sum of \$25,557.92 with costs. By entering into that agreement Mr Besgrove intended that the claim made in that action would be transformed into a judgment for \$25,557.92 and costs. But he was mistaken as to the content of what he was agreeing to: he thought that the claim made by the action was for \$25,557.92, whereas it was truly a claim for \$255,579.20. It is true that Mr Besgrove was not under any misapprehension as to what was contained in the document entitled "Terms of

Settlement". But that document had to be read with the writ. Without reference to the writ it was impossible to identify the cause of action which the parties intended by the Terms of Settlement to merge in the judgment. And Mr Besgrove was under a material misapprehension as to the contents of the writ.

Counsel for the respondent contend that Mr Besgrove was merely under a misapprehension as to the value of what he was giving up. They say that it is not open to a party who agrees to sell something at a particular price to obtain rectification upon learning that it was worth more. I agree with the latter proposition, at least in the absence of special circumstances. No-one would deny the right of a businessman, for instance, to take advantage of another businessman's error of judgment, and so obtain a "bargain" for himself. It is the nature of our society for parties to put into competition their expertise and informational resources. But no contest of business judgment is involved where one party unwittingly makes a clerical or arithmetical error and the other party takes advantage of it. This is just a shabby trick and indubitably unconscionable.

The present case is of such a nature. It is a case of error in transcription. Where a clerical or arithmetical error is apparent to the other party at the time of the agreement, or even where it is made known to that party after

the agreement promptly and before that party has altered its position, equity will relieve against the terms of the agreement: see, for an example, Webster v Cecil (1861) 30 Beav. 62 and the discussions in Corbin at para.609, and in Finn Essays on Contract at pp.139-140. Indeed, in such a situation, the contract may be unenforceable at common law: see Hartog v Colin and Shields [1939] 3 All E R 566. A fortiori, it seems to me, relief will be granted where there has been a course of deliberate concealment amounting to a trick.

Finally, it is argued on behalf of the respondent that the agreement embodied in the Terms of Settlement represented a negotiated compromise between the parties and that there can be no rectification where an agreement results from a compromise. To permit rectification in such a case, say counsel, would be to allow parties to reopen litigation if they subsequently decided that the settlement was not to their advantage.

It seems to me that this submission is put too broadly. Most agreements are the product of negotiations, but that is not a reason for refusing rectification. There is nothing special about an agreement resolving litigation. I readily accept that it would not be enough for a party to demonstrate an error of judgment as to the benefits of the

settlement: see Easyfind (NSW) Pty Ltd v Paterson (1987) 11 NSWLR 98 at pp.106-107. But in the present case there was no such error.

In any event, I do not think that it is accurate to describe what happened on 3 August 1984 as a "negotiated compromise" of the first action. The offer put by Ms Reid to the taxation officers was "to pay the total on the writ and costs, subject to a judgment by consent". This was taken as an offer to pay the whole of the claim, an offer of total capitulation by the defendant subject only to a judgment being entered. Mr Besgrove so understood the position when he signed the Terms of Settlement. Nobody in the Taxation Office was asked to consider what might be a reasonable compromise of the claim. Nobody did so.

Before leaving the first issue, I note that no claim is made that the doctrine of res judicata operates to preclude the setting aside of the consent judgment. That doctrine has no application to this case, in which the relief sought is different from that sought in either of the two earlier judgments and is based upon a different matrix of facts.

It seems to me that, as a matter of principle and subject to the second and third issues raised by the respondent, this is a case in which equity will set aside the agreement constituted by the Terms of Settlement and the judgment which is founded upon it.



The effect of the second action

I do not know why the Deputy Commissioner decided against seeking rescission in the second action. But whatever the reason, there was a deliberate decision to that effect. That was made clear at each stage of the case. In the High Court, Deane, Toohey and Gaudron JJ made a comment, at p.507, about mistake:

"Before dealing with the real issue between the parties, it is as well to dispose of one aspect which might be thought to arise. If the amount claimed in the original proceeding was an error and should have read \$255,579.20, why did not the respondent seek to have the earlier judgment set aside as having been entered by mistake? Or again, in the later proceeding why did not the respondent plead mistake by way of reply to the defence of estoppel? These are questions to which we can give no answer for none was provided to us. While not conceding that there was no mistake, the respondent has at all times taken a clear position that the second action brought against the appellant is to be determined without reference to any question of mistake. The appeal must be disposed of accordingly."

Counsel for the respondent argue that, whatever his earlier entitlement to obtain orders setting aside the agreement and the consent judgment, the failure of the Deputy Commissioner to seek this relief in the second action precludes him obtaining it now. The argument is based directly upon the decision of the High Court in Port of Melbourne Authority v Anshun Proprietary Limited (1981) 147

CLR 589. Counsel submit that this case is authority for the proposition that a person may not obtain in a subsequent proceeding against a party relief which he or she might have sought in earlier litigation against that same party. They contend that it would have been open to the Deputy Commissioner to seek the present relief in the second action, in the alternative if he wished, and that, having elected not to do so, he cannot now obtain that relief.

The rule applied in Anshun is often traced back to the following statement of principle by Wigram VC in Henderson v Henderson (1843) 3 Hare 100 at p.115 [67 ER 313 at p.319]:

"... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

This principle has been endorsed in many subsequent decisions, some made by courts of the highest authority. But its application has not always been easy, as is demonstrated in the review of authorities contained in the judgment of Gibbs

CJ, Mason and Aickin JJ in Anshun at pp.599-602. For many years a distinction was drawn between the effect of a failure by a defendant to traverse an allegation made by the plaintiff and his failure to raise an affirmative allegation; the latter failure did not lead to an estoppel precluding subsequent reliance upon that allegation. This distinction was of particular importance in connection with cross-claims. But, with the abandonment of the old system of pleading, it became regarded as obsolete. In Hoystead v Commissioner of Taxation [1926] AC 155 at p.170, the Judicial Committee spoke of the estoppel enuring from a judicial decision extending "to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision". See also Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993.

Since the abandonment of reliance upon pleading criteria there has been some divergence of views as to the limits of the estoppel arising out of a judgment. I feel no need to refer to the pre-Anshun authorities as that case definitively states the rule for Australia. The critical passage is contained at pp.602-603 in the judgment of Gibbs CJ, Mason and Aickin JJ:

"In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected

that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings e.g. expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few."

Their Honours went on to comment that the likelihood that the omission of a party to plead a defence in the earlier action will contribute to the existence of conflicting judgments is "obviously an important factor to be taken into account" in deciding whether the omission will found an estoppel against the assertion of the same matter as a foundation for a cause of action in a second proceeding. This comment was directly apposite to the factual situation with which they were confronted. In a second proceeding, the Port of Melbourne Authority was seeking to rely upon a contractual indemnity given to it by Anshun. If that claim had been successful the resulting judgment would have contradicted a judgment in an earlier claim for contribution.

In the present case there is no possibility of contradictory judgments. In the second action the High Court entered judgment in favour of Mr Chamberlain because the principle of res judicata barred the Deputy Commissioner's claim. But that bar applies only whilst the judgment for \$25,557.92 remains in existence. This was made clear by

Deane, Toohey and Gaudron JJ at p.511 of their judgment: "So long as the respondent chooses, as he does, to take no step to set aside the judgment and to raise no issue in the second action as to the circumstances in which that judgment was obtained, he must accept the consequences of res judicata." The applicant in the present proceeding, if he is successful in having the judgment for \$25,557.92 set aside, intends to amend the claim made in the first action and force that action to trial or default judgment. There is no contradiction between a judgment in the present case setting aside the first judgment and the formal judgment, or the reasons for that judgment, in the second action. Moreover, if the applicant does succeed in obtaining judgment, for an enlarged claim, in the first action, there would be no contradiction between that judgment and the judgment entered in favour of the respondent in the second action. The very concept of res judicata involves the possibility that there will be a judgment in a later action which is different from the terms of a first judgment: see Caird v Moss (1886) 33 Ch D 22 at p.35.

The statement of principle by Gibbs CJ, Mason and Aickin JJ in Anshun, at p.602, is framed in terms of failure to plead a defence. But the principle also applies to a failure to make a claim. This was made clear in Anshun by Brennan J at p.611. His Honour was there discussing the meaning of the term "cause of action". He said:

"If cause of action is taken to mean a right, the rule is stated in terms of the passing of the right into judgment, and the rule precludes a party bound by the judgment from maintaining against another party bound by it any subsequent proceeding to recover a judgment giving a remedy to enforce or to compensate for an infringement of that right. The rule does not preclude litigation seeking a remedy to which a party is entitled in virtue of a different right from that which was first put in suit provided that the facts which support the right sued upon in the second action are not the same facts as those supporting the right which passed into the first judgment: thus in Brunsdon v Humphrey (1884) 14 QBD 141 where the same act of negligence caused damage to the plaintiff's property and injury to the plaintiff's person it was held that different rights were infringed and that an action for damages for personal injury was not barred by recovery of a judgment for damage to property."

See also O'Brien v Tanning Research Laboratories Inc (1988) 84 ALR 221 at p.232 where Kirby P, with whom McHugh JA agreed, applied the Anshun principle to a failure to plead a cross-claim.

However, although Anshun is capable of applying to a case where, in the first proceeding, a plaintiff failed to make an available claim, it may be difficult in such a case to characterise that failure as unreasonable. If the claim is otherwise still open, it must necessarily be a true alternative claim; that is, a claim against which there is no answer by way of estoppel or res judicata. If, as Gibbs CJ, Mason and Aickin JJ contemplated, there may be justifiable reasons for refraining from raising a particular defence in the first proceeding, it is even more likely that there will

exist justifiable reasons for not litigating a separate claim. Although no explanation has been given for the decision not to seek an order in the second action setting aside the consent judgment in the first action, I do not think it is possible to describe that decision as unreasonable. The Deputy Commissioner apparently took the view, presumably on advice, that he was entitled to succeed in the second action notwithstanding the existence of the consent judgment. Although the High Court eventually held that view to be wrong, it was a view endorsed by four judges before the matter reached the High Court. It cannot be said that the Deputy Commissioner's view was plainly erroneous or unarguable. It is true that, in the second action, the Deputy Commissioner might have pressed that view, but added, as an alternative, a claim for an order setting aside the consent judgment. However, this course may have prevented him obtaining an authoritative ruling upon the case which he preferred to put and which concerned the application of s.209 of the Income Tax Assessment Act. As the deputy of the person entrusted with the general administration of that Act -- see s.8 thereof -- the Deputy Commissioner had a special interest in obtaining an authoritative ruling on the relationship between that section and the doctrine of res judicata.

There is substance in the submission that the respondent should not be disadvantaged because of the Deputy Commissioner's desire to obtain that ruling. This raises the third issue previously identified: the matter of discretion.

Discretionary considerations

Counsel for the respondent submit that the letter of 6 August 1984 constitutes a reason why, as a matter of discretion, the Court ought not set aside the consent judgment. The argument is that this letter was sent as a consequence of the "settlement" of 3 August. To set aside the judgment, counsel argue, would be to expose the respondent to a claim for the full \$255,572.92, without the opportunity of contesting his liability to pay that sum.

It seems to me that there are two answers to this submission. Firstly, I have found that the "settlement" was a result of unconscionable activity by Mr Chamberlain. Under those circumstances, it is not open to Mr Chamberlain to complain that the "settlement" has irrevocably compromised his ability to contest the amount of his liability. At the time when his firm wrote the letter of 6 August, Mr Chamberlain knew that the agreement was the product of an error by the taxation officers. He ought to have expected that some action would be taken by the Deputy Commissioner to rectify the situation. It is important to note that the letter of 6 August preceded the commencement of the second action. It is not as if Mr Chamberlain withdrew the objections in the belief that the Deputy Commissioner had decided not to seek to set aside the consent judgment. Nor is it suggested that the



letter of 6 August stemmed from any action of the Deputy Commissioner other than his agreement to the Terms of Settlement. The "objections" were not mentioned in any of the conversations of 3 August. Essentially, Mr Chamberlain's submission amounts to a complaint about being caught in his own trap.

The second answer to the submission is that the letter of 6 August does not prejudice Mr Chamberlain's entitlement to continue the application for review before the Administrative Appeals Tribunal, if he wishes. The letter stated that Mr Chamberlain "has instructed us to formally withdraw all outstanding objections for income tax assessments". In fact there were no such objections. Objections had been lodged, but they had already been dealt with by the Deputy Commissioner. Pursuant to s.187 of the Income Tax Assessment Act, as it then stood, Mr Chamberlain had requested the Deputy Commissioner to refer his decision on the objections to a Board of Review. That request cast upon the Deputy Commissioner an obligation, under s.189 of the Act, to refer the matters to a board. No doubt it would have been possible for Mr Chamberlain to terminate that obligation by a letter withdrawing his request for reference. But the letter of 6 August was not so framed. Nor was it so understood. On the contrary, the letter was treated by the Deputy Commissioner as being of no effect. In due course he did refer the matters to a Board of Review and he has consistently

taken the position that the matters are properly before the Administrative Appeals Tribunal for determination upon their merits. That position was reaffirmed before me by counsel for the Deputy Commissioner. I do not think that there is any basis upon which the Deputy Commissioner might contend, or the Tribunal might hold, that the Tribunal lacks jurisdiction to deal with the references upon their merits.

A further discretionary matter relied upon by the respondent is, to use the words of his counsel, that "he has suffered the additional publicity involved in extra sets of proceedings -- such publicity being necessarily detrimental to a solicitor".

It is implicit in this submission that Mr Chamberlain's conduct, as revealed by these proceedings, is detrimental to his reputation as a solicitor. This submission sits incongruously with his submission that his action in procuring the consent judgment was not unconscionable. But there is no evidence as to the extent of any publicity surrounding these cases or as to any adverse effect upon the reputation or practice of Mr Chamberlain. Certainly, readers of the law reports will have learned of the cases and the circumstances out of which they arise. Perhaps they were thereby caused to think the worse of Mr Chamberlain. But this possibility was inherent in the course which Mr Chamberlain chose to take on 3 August 1984. He could hardly have expected

that the error would remain undiscovered or that, when it was discovered, the Deputy Commissioner would take no action to recover the balance of the claim. It was inevitable that there would be further curial proceedings, so that the events of 3 August would be recited in judgments, and, possibly, referred to in the media.

In the result, I do not think that either of the matters raised by counsel furnishes a reason for refusing relief, as a matter of discretion. But there remains a further contention that the Court ought to impose conditions upon the applicant.

#### Conditions

As is apparent from the terms of para.21 of the Statement of Claim, quoted above, the applicant accepts that, if the consent judgment is set aside, the Court may impose such conditions as are necessary to restore the parties to the positions which they enjoyed prior to the making of the agreement on 3 August 1984. In this connection, two matters have been mentioned on behalf of the respondent. First, it is said that the course taken by the Deputy Commissioner has resulted in a duplication of legal costs. The respondent already has the benefit of an order that the present applicant pay his costs of the second action, but his counsel point out that it is likely that the actual costs, reasonably incurred,

would have exceeded the taxed party/party costs. There is no evidence on this matter, but it is a notorious fact that the actual costs reasonably incurred by litigants usually exceed those recoverable on a party/party basis. If the Deputy Commissioner had chosen in the second action to seek an order setting aside the consent judgment, those solicitor/client costs may not have been incurred. Although, as I have indicated, the Deputy Commissioner's omission to seek a rescission of the consent order in the second action was not unreasonable, I do not think that this omission should be at the expense of Mr Chamberlain.

The matter of costs is plainly a relevant matter in the exercise of any discretion under the Anshun principle. In Anshun itself, at p.615, Brennan J said:

"Upon the hypothesis that the shutting out of the appellant is in the discretion of the court it is difficult to resist the submission that, if the appellant's cause of action has not merged in the judgment and has not been judicially considered, an order for costs can make good any additional expenditure which the respondent might incur by reason of the second action, and the second action should be allowed to proceed."

I regard it as reasonable to require, as a condition of relief in this case, that the Deputy Commissioner give to the Court an undertaking to pay to Mr Chamberlain the whole of the costs reasonably incurred by him in connection with the second action, less any amount already paid pursuant to the

order made in the High Court; any issue as to reasonableness being determined, on application for that purpose, by this Court.

The second matter raised by counsel concerns the delay which has occurred. Had the Deputy Commissioner sought the presently claimed relief in the second action, the dispute between the parties would have been resolved at an earlier date. Under s.207(1) of the Income Tax Assessment Act unpaid tax attracts additional tax by way of penalty at the rate of 20% per annum. Even at the present time this rate is at the upper end of the range of interest rates charged to borrowers by financial institutions. Counsel for the respondent argue that it would be unfair for their client to be called upon to pay additional tax at that rate in respect of the period during which payment was delayed because of the course taken by the Deputy Commissioner.

There is force in this submission. On the other hand, during that period the Deputy Commissioner has been deprived of such moneys as may eventually be held to be recoverable and Mr Chamberlain has had the benefit of those moneys. In the usual run of cases, courts take account of such circumstances by awarding pre-judgment interest calculated in accordance with rates prescribed by Rules of Court. These rates are revised from time to time so as to reflect changes in the general level of interest rates.

Pre-judgment interest is not awarded by way of penalty, but merely to recognise that the party ultimately held entitled to recover particular moneys has been held out of them pending disposition of the case; and, conversely, that the other party has had the temporary benefit of those moneys.

It seems to me that the just course would be to put the Deputy Commissioner in the same position as any other litigant, depriving him of the opportunity to impose additional tax at the rate of 20%, but allowing him to recover pre-judgment interest at the same rate as anyone else. Section 207(1A)(c) empowers the Commissioner of Taxation to remit the additional tax imposed under s.207(1), or any part thereof, where he is satisfied that there are special circumstances by reason of which it would be fair and reasonable to do so. Here there are such circumstances. It would be open to the Commissioner to exercise that power by remitting that part of the additional tax payable under s.207(1) which exceeds the amount of money which would be payable by way of pre-judgment interest pursuant to Order 42A of the Rules of the Australian Capital Territory, as amended from time to time, upon the total of the sum of \$255,579.20 from 4 July 1984 to 3 August 1984 and the sum of \$230,021.28, computed from 3 August 1984 until the date of any future judgment in matter No.697 of 1984.

Although counsel for the Deputy Commissioner have indicated in general terms the willingness of their client to accept conditions along the lines I have outlined, they have not had the opportunity to consider their precise form. Accordingly, I will adjourn the further hearing of the matter until 30 March 1990 upon which day I will expect counsel to bring in short minutes of appropriate undertakings and orders.

I certify this and the forty-three (43) preceding pages to be a true copy of the Reasons for Judgment of his Honour Justice Wilcox.

Associate: *P Menardine*

Date: 16 March 1990

Counsel for the Applicant:	Mr K R Handley QC with Mr B A Coles
Solicitors for the Applicant:	Australian Government Solicitor
Counsel for the Respondent:	Mr D M J Bennett QC with Mr I W Nash
Solicitors for the Respondent:	Gallens Crowley & Chamberlain
Date(s) of hearing:	1, 26 and 27 September 1989