HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

**Redland City Council**
Appellant

and

**John Michael Kozik**
First Respondent

and

**Simon John Akero**
Second Respondent

and

**Sarah Akero**
Third Respondent

and

**Neil Robert Collier**
Fourth Respondent

# APPELLANT'S SUBMISSIONS

## PART I: PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

## PART II: THE ISSUES

2. The issue on this appeal is whether the defence[1] of value received operates in response to a claim for recovery of wrongly levied public imposts.

3. The Respondents raise the construction of subordinate legislation as compelling return of the charges,[2] and the adoption of the House of Lords decision in ***Woolwich*** *Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 as the 'natural counterpart' of the Australian constitutional system.[3]

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1 The descriptor 'defence' is used throughout these submissions, on the basis that Australian law recognises value received as arising after satisfaction of the elements of the cause of action. Whether, however, it is in truth a defence or a denial that the defendant was 'unjustly enriched' is not specially significant to the Appellant's case.

2 By a Notice of Cross-appeal: CAB 74-75.

3 By a Notice of Contention and Notice of a Constitutional Matter: CAB 78-83.

## PART III: SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

4. The Respondents have given notice of a constitutional matter. No further notice is warranted.

## PART IV: CITATIONS

5. The citations for the decisions below are:

   a. in the Court of Appeal of the Supreme Court of Queensland - *Redland City Council v John Michael Kozik & Ors* [2022] QCA 158;

   b. at first instance in the Supreme Court of Queensland - *Kozik & Ors v Redland City Council* [2021] QSC 233.

## PART V: FACTS

6. The Appellant issued rates notices levying special rates and charges on certain parcels of land between about July 2011 and July 2017.[4] All had water frontage, and many had pontoons. The charges were intended for, and applied to, revetment wall repair, dredging, monitoring and maintenance of the waterways and the like.[5] Lands in the same places with no water frontage were not so levied.

7. Section 94 of the *Local Government Act 2009* (Qld) (**LGA**) authorised the levying of such charges.[6] Section 92(3) of the LGA conferred power to levy special rates and charges for:

> ... services, facilities and activities that have a special association with particular land because –
>
> (a) the land or its occupier –
>
> (i) specially benefits from the service, facility or activity; or
>
> (ii) has or will have special access to the service, facility or activity; or …

8. Subordinate legislation, in the form of the *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) (**2010 Regulation**) and subsequently the *Local Government Regulation 2012* (Qld) (**2012 Regulation**) (collectively, the **Regulations**), set out procedures in connection with the exercise of this power.

9. The Appellant, when resolving to levy those charges, did not have an 'overall plan' that included an estimate of the cost of carrying out the plan or an estimate of the time

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4 Primary Reasons for Judgment (**RJ**)[4] CAB 8.
5 Appeal RJ[18] CAB 45.
6 Consistently with s 65 of the *Constitution of Queensland Act 2001* (Qld), which requires that a requirement to pay a rate be authorised under an Act.

for doing so.[7] That was contrary to the subordinate legislation just mentioned.[8]

10. The levying was thus invalid, but not because the charges were not for things of special benefit to the relevant land or its occupiers, nor through a lack of the necessary 'special association' between the land and the services, facilities and activities. Nor did the invalidity arise because of some fundamental absence of lawful authority to levy charges of that kind in those circumstances. The invalidity arose because procedures required by subordinate legislation were not followed.

11. The landholders paid the charges without protest, but under what is accepted to have been a mistake of law. The Appellant refunded to each landholder (with interest) their portion of what had not been expended. In relation to the charges that had already been spent, each landholder benefitted specially from the expenditure, and to an amount greater than the charges paid. Such was found by the Primary Judge[9] and affirmed on appeal.[10]

12. The Regulations included provisions which validated otherwise invalid rates notices in certain circumstances, namely where special rates or charges:

    a. were '*levied on land to which special charges do not apply*' (between 2011 and December 2014);[11] and

    b. from December 2014, also '*on land to which the special rates or charges … should not have been levied*'.[12]

13. Where those Regulations applied (which was controversial below and remains so here, by reason of the Cross-Appeal) the Appellant '*must, as soon as practicable, return the special rates or charges to the person who paid the special rates or charges*'.[13]

***The proceeding at first instance***

14. The Plaintiffs (being the Respondents in the present appeal), by representative action, sought recovery of the balance of the special charges that they had paid, but which had not been returned to them, in debt under the Regulations and in moneys had and

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7 Appeal RJ[12] CAB 44.

8 *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld), s 28(4)(c) and (d), and *Local Government Regulation 2012* (Qld), s 94(3)(c) and (d).

9 Primary RJ[44]-[45] CAB 17; [96] CAB 25.

10 Appeal RJ[18], [20] CAB 45 (and it was never put in issue by the Plaintiffs on the appeal, or the cross-appeal below).

11 *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) s 32, and the *Local Government Regulation 2012* (Qld), s 98.

12 *Local Government Regulation 2012* (Qld), s 98.

13 *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld), s 32(2) and *Local Government Regulation 2012* (Qld), s 98(2).

received.

15. Each Plaintiff was cross-examined. Each accepted that they benefitted more than the general public and non-waterfront property holders from the works and services.[14]

16. The Plaintiffs made no challenge to the Appellant's expert evidence on visual amenity. It was to the effect that it was clear that a number of different types of maintenance works would result in benefits, because the Plaintiffs enjoy the most direct, ongoing, and proximate visual access, and because the appearance of the water edge and the water bodies are a fundamental aspect of their visual amenity.[15]

17. The expert land valuer called by the Appellant said that the works resulted in an increase of at least 1% to 2% of each property's value,[16] and that, absent the works, each of the properties within the 'benefit area' would have experienced some amount of diminution in value.[17]

18. The Primary Judge found that the Appellant had conferred a benefit on the Plaintiffs and Group Members by the services on which it expended the charges.[18]

19. Notwithstanding this finding, the Plaintiffs' action in debt succeeded,[19] the Primary Judge finding that the Regulations compelled refund of the spent amounts[20] (and ordering that the Appellant pay 'damages' in respect of that amount).[21] A restitutionary defence was denied, including because the obligation to return the special charges under the Regulations ought not be 'cut down' by restitutionary principles.[22]

20. The Plaintiffs' action for moneys had and received failed,[23] the Primary Judge finding that the payments had not been made under a mistake.[24] His Honour held that '[n]o

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14 **Mr Kozik:** Transcript Day 1, p 30 lines 1-9, Appellant's Book of Further Materials (**AFM**) 22. He also asserted that 'if the canals were left to silt up not only will it become a flood problem area again for me and the surrounding properties, but also the values will drop so the Council will also get less in rates and charges, so instead we have to pay to keep the canals open so our and surrounding property values stay higher': Affidavit PLA.003.0005, p 27, AFM 11. He adopted this in cross-examination: Transcript Day 1, p 31 lines 10-45 and p 32 lines 1-5, AFM 23-24. **Mr Collier**: Transcript Day 2, p 10, AFM 26; **Mr Akero**: Transcript Day 2, pp 17-18, AFM 27-28; Mrs Akero: Transcript Day 2, pp 23-24, AFM 29-30.

15 Statement of Evidence of Nicholas McGowan at [31]-[32]. AFM 14.

16 Appeal RJ[18] CAB 45; Transcript Day 2, p 35 lines 41-43, AFM 32.

17 Statement of Evidence of Chris Kamitsis at [28], AFM 18.

18 Primary RJ[44]-[45] CAB 17; [96] CAB 25.

19 Primary RJ[83] CAB 23.

20 Primary RJ[51] CAB 18; [60] CAB 20; [73] CAB 22.

21 Orders of Bradley J dated 30 September 2021, Order 4(a): CAB 31.

22 Primary RJ[90] CAB 24.

23 Primary RJ[110] CAB 27.

24 Primary RJ[108] CAB 27.

issue of unjust enrichment arises'.[25]

***The decision of the Court of Appeal***

21. The Council appealed the Primary Judge's decision. The Plaintiffs cross-appealed the denial of their claim for moneys had and received. The Court of Appeal allowed the Plaintiffs' cross-appeal and allowed the Council's appeal in part.

22. A majority of the Court of Appeal[26] held the Regulations not to have been engaged. Up to December 2014, that was because they protected against administrative error in the process of levying the charge, but not where there was no valid resolution levying the charge.[27] *From* December 2014 (when the 2012 Regulation was amended) they were held to apply where a rates notice had been issued for land which did not have the necessary special relationship with the services, facilities and activities.[28]

23. Having decided (unlike the Primary Judge) that the Regulations did not compel return of the charges already spent to the benefit of the ratepayers, the Court of Appeal considered that the Appellant was not liable to the ratepayers in debt, but in moneys had and received. The Plaintiffs were found to have paid under a mistake of law.[29]

24. The Appellant's defence of value received (raised from the outset) did not succeed. The Court found that the Plaintiffs did not make the payments for good consideration because there was no suggestion they were of the mind to pay the special charges regardless of whether they had to do so.[30] As explained below, the Court of Appeal erred in this respect.

## PART VI: ARGUMENT

### A. Summary

The defence of value received

25. A claim for recovery of wrongly levied imposts can be met with a defence of value received. The defence defeats a claim for moneys had and received (at least insofar as to the extent of the value received), as an action that finds its principled basis in unjust enrichment.

26. The defence, elsewhere referred to as the defence of 'good consideration', was

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25 Primary RJ[111] CAB 27.
26 PD McMurdo JA; Boddice J agreeing. Callaghan J dissented on this point but agreed in the overall result.
27 Appeal RJ[27]-[28] CAB 47.
28 Appeal RJ[31] CAB 48.
29 Appeal RJ[43] CAB 51.
30 Appeal RJ[60] CAB 55.

explained by Goff J in ***Barclays Bank*** *Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 695 and approved by Mason CJ, Deane, Toohey, Gaudron and McHugh JJ in ***David Securities*** *Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 380.

27. The Appellant uses the terminology 'value received' rather than 'good consideration' given the specific meaning ascribed to 'consideration' in contract law. The origins of unjust enrichment lie in quasi-contract. Much of the jurisprudence arises in contractual settings, and therefore uses language applicable in that factual setting. Questions of 'consideration', whether it is 'good' or otherwise, and the nature of what was bargained for, are questions which resonate in the context of ordinary private transactions. They are not apt questions for the operation of the defence in public law.

28. The defence of value received applies to the Plaintiffs' claims. Specifically to this action, where (exceptionally perhaps):

    a. the legislative command was to levy the charges for the special benefit of a particular class of person;

    b. the charges were *actually* expended for the purposes commanded;

    c. doing so was to the Plaintiffs' clear benefit; and

    d. the error in the levying involved not a fundamental absence of power, but a failure to adhere to procedures required by subordinate legislation,

to order recovery of the charges would be to *create*, not to *avoid,* unjust enrichment.

29. A defence of value received was made out below. It was rejected on grounds applicable to ordinary private transactions by fixing on 'consideration' as the matter considered by the payer informing their decision to pay, to the express exclusion of any benefit to the payer.

30. The existence and operation of the defence and the error in the Court of Appeal's treatment of it is addressed in **Part B** of these submissions.

Application of *Woolwich* in Australia?

31. The Respondents' Notice of Contention seeks the adoption of the House of Lords decision in *Woolwich*. This is a change from their approach below.

32. This is not a case in which the question properly arises: its adoption would not alter the result of this matter. English law has in any event moved on from *Woolwich:* later developments in ***Kleinwort Benson*** *Ltd v Lincoln City Council* [1999] 2 AC 349 mean

that, with the abolition there of the fact/law distinction in mistake, where (as here) the payment was made under a mistake it covers all the ground *Woolwich* would cover.[31]

33. Furthermore, *Woolwich* is less the 'natural counterpart'[32] of the Australian constitutional system than this Court's decision in *David Securities*.

34. This is addressed in **Part C** of these submissions.

Construction of the Regulations

35. **Part D** of these submissions addresses the Respondents' Notice of Cross-Appeal to the effect that the Regulations compelled the Appellant to return the wrongly levied imposts to the payers.

## B. Unjust enrichment recognises a defence of value received

Restitutionary recovery: recipient can point to matters making restitution unjust

36. Since *David Securities*, Australian law has recognised that a payment caused by a mistake (whether of fact or law) may give rise to a *prima facie* obligation on the recipient to make restitution.

37. That decision can be seen as marking the end of a traditional reticence to compel recovery of wrongly levied imposts. The reticence had been informed by policies of preserving disruption to the Revenue ('fiscal chaos'), practical difficulties of administration and a resistance to reopening finalised transactions.[33] With doctrinal law refreshed by identification of principled underpinnings, and detached from reliance upon the common law of quasi-contract,[34] came not only a wider basis for recovery, but also the need for defences to evolve.

38. This is evident by the fact that in *David Securities* Mason CJ, Deane, Toohey, Gaudron and McHugh JJ recognised that the right to obtain restitution could be displaced by the recipient of the payment pointing to circumstances which would make an order for restitution unjust:[35]

> The fact that the payment has been caused by a mistake is sufficient to give rise to a prima facie obligation on the part of the respondent to make restitution. Before that prima facie liability is displaced, the respondent must point to circumstances which the

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31 See the observations to this effect by Henderson J in *Test Claimants in the Franked Investment Income Group Litigation v HM Revenue Commissioners* [2008] EWHC 2893 at [260].

32 As is alleged in the Respondents' Notice of a Constitutional Matter: CAB 81.

33 See, eg, Burrows, "Public Authorities, Ultra Vires and Restitution" in Burrows (ed), *Essays on the Law of Restitution* (1991) at 57-58.

34 Each of the majority Justices in ***Roxborough*** *v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516 expressed this view: 525 [15] (Gleeson CJ, Gaudron and Hayne JJ); 553 [95] (Gummow J); 590 [203] (Callinan J). See also *David Securities* at 401 point 7 (Dawson J).

35 *David Securities* at 379. See also ***Australian Financial Services & Leasing*** *Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 605 [106] (Gageler J).

> law recognizes would make an order for restitution unjust. There can be no restitution in such circumstances because the law will not provide for recovery except when the enrichment is *unjust.* It follows that the recipient of a payment, which is sought to be recovered on the ground of unjust enrichment, is entitled to raise by way of answer any matter or circumstance which shows that his or her receipt (or retention) of the payment is not unjust. [emphasis in original]

39. The cause of action for money had and received historically recognised the defendant's entitlement to point to matters which would make it unconscionable or inequitable for the plaintiff to recover. Lord Mansfield stated in *Moses v Macferlan* (1760) 2 Burr 1005 at 1010 [97 ER 676 at 679]:[36]

> One great benefit, which arises to suitors from the nature of this action, is, that the plaintiff needs not state the special circumstances from which he concludes 'that, ex aequo & bono, the money received by the defendant, ought to be deemed as belonging to him:' he may declare generally, 'that the money was received to his use;' and make out his case, at the trial.
>
> This is equally beneficial to the defendant. It is the most favourable way in which he can be sued: he can be liable no further than the money he has received; and against that, may go into every equitable defence, upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, **he may defend himself by every thing which shews that the plaintiff, ex aequo & bono, is not intitled to the whole of his demand, or to any part of it**. [emphasis added]

40. That is, the causative mistake (of fact or law) founds a *prima facie* recovery, meaning that the inquiry is incomplete without an assessment of those circumstances which the defences recognise as informing whether recovery of the funds would avoid or bring about unjust enrichment. To consider only the enrichment of a defendant does not fully assess whether the restitution would be '*unjust*'.

41. There is no reason why this principle applies any differently in the context of a claim for recovery of a wrongly levied impost by a public authority.[37]

Australian doctrine recognises the defence and its operation in a public law context

*Defence of good consideration is a recognised part of Australian law*

42. *David Securities* recognised a defence of 'good consideration', satisfied by the defendant proving the claimants received consideration for the payments they seek to recover.[38] The plurality referred with approval[39] to the following formulation of the defence by Goff J in *Barclays Bank* at 695:

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36 See also *Roxborough* at 548 [83]-[84], 551-552 [90]-[92] (Gummow J); *Australian Financial Services & Leasing* at 579 [20] (French CJ), 592-596 [65]-[76], 602 [96] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

37 *Roxborough* at 530 [29] (Gleeson CJ, Gaudron and Hayne JJ).

38 *David Securities* at 383 point 6 to 384 point 5.

39 *David Securities* at 380. See also *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673.

> If a person pays money to another under a mistake of fact which causes him to make the payment, he is **prima facie** entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if … (b) **the payment is made for good consideration,** in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive and payment) by the payer or by a third party by whom he is authorised to discharge the debt; or …. [emphasis added]

43. Although Goff J was speaking of the defences available in claims for mistake of fact, the effect of *David Securities* is that this statement is now treated as also applying to mistake of law.[40]

44. The defence did not succeed in *David Securities*, because the purpose of the parties in entering into the loan agreement was regarded by the Court as decisive.[41] In particular, the bank could not avail itself of the defence because it was considered to be the party in the best position to order its affairs, and it had deliberately chosen to charge a particular interest rate and seek additional amounts by separate provision in the loan agreement. It was, moreover, aware of the existence of the relevant statutory provision (which, although not appreciated by it, invalidated part of the agreement).[42]

45. The defence of good consideration has subsequently been applied by intermediate courts of appeal.

    a. In ***Ovidio Carrideo*** *Nominees Pty Ltd v The Dog Depot Pty Ltd* [2006] VSCA 6 (Chernov, Nettle and Ashley JJA), a claim by a tenant for recovery of certain rental payments failed. The action for recovery was restitutionary in character, and based upon the *Retail Tenancies Reform Act 1998* (Vic) having rendered a tenancy agreement unenforceable because of a failure of the lessor to give a disclosure statement at least 7 days before the lease was entered into. The tenant had been ignorant of this right. Nevertheless, it had entered into occupation of the premises and received that benefit for a lengthy period. This was found to constitute good consideration for the payment, judged from the position of the payer (here the tenant).[43]

    b. ***Adrenaline*** *Pty Ltd v Bathurst Regional Council* (2015) 97 NSWLR 207 (Leeming JA; Macfarlan and Ward JJA agreeing) concerned an agreement between a motor racing promoter and the Council. The promoter was charged

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40 See also ***Ovidio Carrideo*** *Nominees Pty Ltd v The Dog Depot Pty Ltd* [2006] VSCA 6 at [13] (Chernov JA).

41 *David Securities* at 384 point 3.

42 *David Securities* at 384 point 5.

43 *Ovidio Carrideo* at [20]-[21] (Chernov JA), [31] (Nettle JA).

fees and had paid them over some 5 years, during which time it had access to the motor racing circuit at Mount Panorama. The promoter later alleged that the fees had been calculated other than in compliance with the *Local Government Act 1993* (NSW). The Council accepted as much, but met the action for restitutionary recovery with a defence of good consideration.[44] The promoter was held to have received 'precisely what it bargained for', and that it would:[45]

> … *create* unjust enrichment were [it] having enjoyed the benefit of the Mount Panorama Circuit over five years to recover the fees it agreed to pay and did pay in order to secure that benefit. [emphasis in original]

46. Both the above decisions are, like *David Securities*, ones whose subject matter was ordinary private transactions, albeit based upon statute having rendered invalid some material basis of the agreement. In neither case did the fact of illegality ultimately necessitate recovery. In both, the defence of good consideration (as it was described in the judgments) operated to preclude unjust enrichment.

*The defence applies in the context of wrongly levied imposts*

47. This defence (which, for the avoidance of confusion with contractual principles, the Appellant refers to as 'value received') should (and in the Appellant's submission, already does) apply where the claimant is seeking recovery of a wrongly levied impost.

48. In both *David Securities* and in ***Roxborough*** *v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516, the payer 'got nothing in return'[46] so it is not surprising that the modern jurisprudence stands where it does. The current matter presents the opportunity to apply the already settled principles in a case in which the payers actually benefitted, and where the statutory basis for the impost had that aim.

49. The principles emerge once that which is fact-specific to contractual settings is put to one side, or understood in the different context in which this case arises.

50. *First,* to treat 'good consideration' as requiring something akin to consideration in the contractual sense is inconsistent with this Court's statements that failure of

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44 Terminological differences are evident. For example, in *Ford by his tutor Watkinson v Perpetual Trustees Victoria Ltd* (2009) 75 NSWLR 42, Allsop P and Young JA (referred to with approval in *Adrenaline*) referred to the defence of 'change of position' in a context which could only be taken to mean the very same defence which is raised here, but as value received. The characterisation by Leeming JA of that very same defence uses the descriptor 'good consideration defence': see, eg, *Adrenaline* at 225 [86].

45 *Adrenaline* at 225 [84].

46 Borrowing the language of Nettle JA (as his Honour then was) in *Ovidio Carrideo* at [31].

consideration is not limited to non-performance of a contractual obligation.[47] 'Consideration' ought to be seen as synonymous with 'value'.[48]

51. Consideration serves in cases of private agreements to show correlation between the payment and the value received. Such correlation is part of the principle. But outside the field of private agreement, consideration offers no means to test that factor, because of the absence of mutuality of consensual dealings. When it comes to correlation in cases of wrongly levied imposts, the test is one of paying close attention to: the statutorily-defined purpose of the impost; whether the charges were in fact so spent; and whether, in the case of the particular claimant, they received a benefit of the nature which the statute defined.

52. *Second*, just as the benefit received by the claimant in contractual settings must be referrable to what was bargained for,[49] so too the value in a case of a wrongly levied impost must correlate to the levy; that is, the effective source of that benefit must be the money which the taxpayer later seeks to recover. Or, to use the language of the authors of *Mason & Carter's Restitution Law in Australia*, it must be 'direct and comparable'.[50]

53. *Third,* the Plaintiffs' case below, and the treatment of it by the Court of Appeal, was premised upon there being some principled difference between restitutionary actions involving consensual agreements and those seeking recovery of wrongly levied imposts. It would treat the developments in the doctrinal law expounded in *David Securities* as facilitating *recovery* of wrongly levied imposts, but without recourse to the *defences* that attend recovery in other settings.

54. To do so is at odds with the fundamentals of the action:

    a. the same principles operate in the public law context as those which apply in private law.[51] There is no free-standing public law principle for restitutionary claims by and against the state from the private law of unjustified enrichment

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47 *Roxborough* at 525 [16] (Gleeson CJ, Gaudron and Hayne JJ), 555 [102] (Gummow J); ***Equuscorp** Pty Ltd v Haxton* (2012) 246 CLR 498 at 517 [31]-[32] (French CJ, Crennan and Kiefel JJ). Consistently with this, the vitiating factor of total failure of consideration has been renamed 'failure of basis': ***Mann v Paterson Constructions** Pty Ltd* (2019) 267 CLR 560 at 597 [78] (Gageler J).

48 Mason, Carter and Tolhurst, ***Mason & Carter's Restitution Law in Australia**,* 4th ed (2021) at 986 [2503] and 988 [2507].

49 *David Securities* at 382.

50 *Mason & Carter's Restitution Law in Australia* at 911 [2041].

51 *Roxborough* at 530 [29] (Gleeson CJ, Gaudron and Hayne JJ).

(as is the case in Germany,[52] or Canada,[53] for example);

b. the authors of *Mason & Carter's Restitution Law in Australia*[54] favour the availability of a defence of 'value received' in the context of restitutionary claims against the Revenue:

> Based on analogous considerations, there should be a defence precluding claims by those who pay what turns out to be an invalid licence fee or other impost, and who receive a direct and comparable benefit from a branch of the Executive, where the effective source of that benefit was the money which the taxpayer later seeks to recover. In some cases, the taxpayer who sues to recover an invalidly levied tax may already, directly, and as a member of a specific class of persons, have received in the form of grants or services provided by government, the value of the benefit of the moneys paid. **This could be the case with regard to statutory schemes whereby moneys are levied to fund the marketing of a primary product, or some local activity such as the eradication of a weed or pest, and where the taxpayer enjoys the benefit of the expenditure before suing for recovery**... **Recovery of the (invalid) licence fee after enjoyment of the right for which it was the consideration would result in unjust enrichment, not its prevention**. [emphasis added]

That approach has found favour with lower courts.[55]

55. *Fourth*, Goff J's statement in *Barclays Bank* referred to in paragraph 42 above is not an exhaustive statement marking the metes and bounds of the defence.[56] Even if the defence of value received were not one that is accepted as presently being recognised in cases of wrongly levied imposts, its availability offers coherence in the law by its facilitation of the underlying rationale of the action; that is, the avoidance of *unjust* enrichment.[57] It accords also with the notion, accepted by this Court, that although unjust enrichment is not an 'all-embracing theory of restitutionary rights and remedies', it does not preclude the development of novel occasions justifying

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52 German private law of unjustified enrichment is set out in §§ 812-822 of the Civil Code (*Bürgerliches Gesetzbuch* (BGB)). Restitution claims for overpaid tax in Germany are governed by § 37 II of the Fiscal Code 1977 *Abgabenordnung* (AO). See Nanchalal, "'But We've Spent the Money': Defending Overpaid Tax Claims under English and German Law" (2020) Oxford U Comparative L Forum 3 at ouclf.law.ox.ac.uk, section 2.

53 ***Kingstreet*** *Investments Ltd v Province of New Brunswick* [2007] 1 SCR 3. See further Smith, "Public Justice and Private Justice: Restitution after *Kingstreet*" (2008) 46 *Canadian Business Law Journal* 11 at 16, 18, 20.

54 at 911 [2041].

55 Part at least of this passage in a previous edition of the text was referred to with apparent approval by Leeming JA in *Adrenaline* at 225 [83]. It has been applied by the NSW Land and Environment Court (a Superior Court): *Meriton Apartments Pty Ltd v Council of the City of Sydney (No 3)* (2011) 80 NSWLR 541 at [172]; *Nash Bros Builders Pty Ltd Riverina Water County Council (No 2)* [2015] NSWLEC 156 at [192]-[203] (both Pepper J).

56 *Trimat Holdings Pty Ltd v Investment Club Pty Ltd* (2022) 58 WAR 45 at 63 [90] (Quinlan CJ, Beech and Vaughan JJA).

57 **Edelman and Bant**, *Unjust Enrichment,* 2nd ed (2016) at 365.

restitutionary relief[58] (and, it is submitted, novel defences).[59]

56. For the reasons given above, the *principle* (as distinct from its *application* in cases of private agreement) is not one that is dependent upon there having been some request by the payer for provision of the works or services. The Plaintiffs here submit to the contrary, and the Court below adopted that approach.[60]

a. In a case of wrongly levied imposts, it will almost never be relevant to enquire whether the benefit received was requested. There cannot have been a request for or acceptance of the benefit given the coercive nature of the impost. The whole purpose of the statutory scheme is to oblige all who specially benefit to pay, so consent and request are, necessarily, absent. To require request or acceptance falls into the species of error earlier identified: fixing upon the language and concepts of contract and quasi-contract in a setting invoking neither.

b. For this reason, the line of authority beginning with *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 — that a stranger who carries out works or services, or confers a benefit without request, actual or implied, is not entitled to payment or compensation[61] — does not arise. In any event, that proposition has been described by this Court as 'not unqualified',[62] and this statement should not be read as requiring a request in every instance where restitution is sought for the value of services provided.[63]

c. The policy factors motivating the operation of a defence are different from

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58 *Equuscorp* at 516 [30] (French CJ, Crennan and Kiefel JJ).

59 See, eg, *Kleinwort Benson* at 373 (Lord Goff) ): 'The combined effect is not only that the mistake of law rule can no longer be allowed to survive, but also that the law must evolve appropriate defences which can, together with the defence of change of position, provide protection where appropriate for recipients of money paid under a mistake of law in those cases in which justice or policy does not require them to refund the money'. See also Gummow, "Moses v Macfarlan: 250 years on" (2010) 84 *ALJ* 756 at 760: 'The various references, beginning with the decisions of Lord Mansfield and continuing with the Restatement Third, to circumstances rendering it inequitable to oblige the recipient to provide restitution, wholly or in part, exemplify a striking characteristic of the common law. This is that in the action for money had and received the common law thereby has a means of accommodating both certainty and flexibility when faced with novel situations.'

60 Appeal RJ[62] CAB 55.

61 *Stewart v Atco Controls Pty Ltd (in liquidation)* (2014) 252 CLR 307 at 326 [47]; see also ***Lumbers*** *v W Cook Builders Pty Ltd (in liquidation)* (2008) 232 CLR 635 at 663 [80] (Gummow, Hayne, Crennan and Kiefel JJ).

62 *Lumbers* at 663 [80] (Gummow, Hayne, Crennan and Kiefel JJ).

63 Edelman and Bant at 77; Barker, "Unjust Enrichment in Australia: What Is(n't) It? Implications for Legal Reasoning and Practice" (2020) 43(3) *Melbourne University Law Review* 903 at 927-928. See also *Cadorange Pty Ltd (in liq) v Tanga Holdings Pty Ltd* (1990) 20 NSWLR 26 at 33 (Young J): 'It is now recognised that the nineteenth century cases were decided at a time when there was an over-emphasis on the importance of having to be bound by contract before one could be made liable.'

those informing the existence of a restitutionary claim. Whether a defendant ought to be obliged to account for the value of services received is different from whether a plaintiff's *prima facie* right to restitution ought to be defeated or reduced by reason of the benefit the plaintiff received from the application of those same funds. The former has stronger reasons why some form of request or acceptance ought be shown before an obligation to pay for the value of the services is imposed.

57. The absence of an expressed desire for the provision of works or services does not preclude all inquiry into their objective necessity, or indeed the legislatively-defined purpose for which such charges were levied and on which the funds must be expended. Different means exist to do so.

a. A test has been adopted in Canada, and in some English[64] and Australian[65] cases which requires the benefit to the payer to be 'incontrovertible'. It operates irrespective of any choice on the part of the payer.[66] Canada's Supreme Court adopted this approach in ***Peel*** *(Reg. Municipality) v Canada* [1992] 3 SCR 762 as the 'limited and ... desirable' exception to the need for there to have been a request or free acceptance of the benefit in determining whether a defendant has been enriched.[67] Justice McLachlin (as her Honour then was) cited the extrajudicial remarks of Justice Gautreau of the District Court of Ontario[68] (at 795f-i) that:

> While the principle of freedom of choice is ordinarily important, it loses its force if the benefit is an incontrovertible benefit, because it only makes sense that the defendant would not realistically have declined the enrichment... Likewise, the principle of freedom of choice is a spent force if the benefit covers an expense that the defendant would have been put to in any event, and, as an issue, it is weak if the defendant subsequently adopts and capitalizes on the enrichment by turning it to account through the sale or profitable commercial use.

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64 Goff J (observations made in passing) in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 805D-E; *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co* [1988] 3 All ER 843 at 855 (Hirst J). See also *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449 at [47] (The Chancellor), [66] (Maurice Kay LJ).

65 *Monks v Poynice Pty Ltd* (1987) 8 NSWLR 662 at 664 (the principle was stated to be subject to the additional requirement that it be unconscionable for the defendant to keep the benefit of the service without paying a reasonable sum); *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303 at 313E (both Young J).

66 Burrows, *The Law of Restitution,* 3rd ed (2011) at 47-48; see also *Mason & Carter's Restitution Law in Australia* at 61 [151], in the context of benefit to a defendant.

67 *Peel* at 794h, where McLachlin J refers with apparent approval to Goff and Jones' statement to this effect in *The Law of Restitution*, 3rd ed (1996) at 21-22.

68 Gautreau, "When are Enrichments Unjust?" (1989) *10 Advocates' Q* 258 at 270-271. See also Weinrib, "The Normative Structure of Unjust Enrichment" in Rickett & Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (2008) at 40.

The test is ultimately whether and to what extent the payer had a gain 'of a demonstrable financial benefit'[69]. It is not enough that the benefit might have an incidental beneficial effect of a non-pecuniary nature.[70] Of course, as this Court has cautioned, the use of terms such as 'benefit' ought not to be considered in the abstract and without reference to the particular facts and circumstances of the case.[71]

b. The *Restatement of the Law Third, Restitution and Unjust Enrichment* approaches the question (in a general sense) as one of whether it is reasonable to assume the services would have been desired.[72]

c. The authors of *Mason & Carter's Restitution Law in Australia*, as already explained, frame the connection as a benefit that is 'direct and comparable'.[73]

58. Each of these approaches is directed to the same basic question: whether the value received by the payer is, in truth, a benefit, and properly referrable to what was levied, and in the way the statute lawfully defined as benefitting that person.

*Defence of value received is established here*

59. The defence of value received was established here:

a. the statute permitted the levying of special charges only upon those who had a special association to the services to be provided through the levying of the charges,[74] and it is not disputed that the Plaintiffs fall within this statutory test;

b. the error in the levying of the charges did not affect the essential quality of the charges being to the Plaintiffs' special benefit (it was procedural not fundamental);

c. the money collected through the imposition of levies was in fact spent for the purpose for which they were levied;

d. the findings below (on the unchallenged evidence) show that the Plaintiffs received, by reason of the works and services acquired with the impugned

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69 *Peel* at 794f-g.

70 See, in Canada, *Peel* at 798d-f. German restitutionary law confines recovery to cases of direct benefit: Zweigert and Kötz, *An Introduction to Comparative Law*, vol II, 2nd ed (1987) at 234-235.

71 *Lumbers* at 661 [75] and 662-663 [78] (Gummow, Hayne, Crennan and Kiefel JJ).

72 (2011) §21 pp 295-296. See also *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at 646 [195], n 272 (Edelman J).

73 See above at paragraph 54(b).

74 *Local Government Act 2009* (Qld), s 92(3).

charges:

i. monetarily speaking: increases in the value of their land (in the case of the Plaintiff Kozik actually realised in a sale).[75] These are of sufficient magnitude to found the defence in this case;

ii. non-monetarily: better visual amenity, freedom from odour, and better enjoyment of the waterways the property adjoin;

e. the works and services are ones that incontrovertibly (or directly and comparably) benefitted the Plaintiffs. Their value was safely within the portion of the amount for which the Plaintiffs are out of pocket.

60. This is a case where (perhaps exceptionally) the impost was levied for the specific benefit of those on whom it was levied, and was spent for that purpose. There was a direct correlation between what was paid, and what was received by way of benefit. To order recovery of the special charges that were levied and spent to the benefit of the Plaintiffs would create, rather than avoid, unjust enrichment.

The error below in not applying the defence

61. McMurdo JA in the Court of Appeal (at Appeal RJ[60] and [61] CAB 55), saw as decisive the 'state of affairs' in the Plaintiffs' minds as being that they were obliged to pay the special charges, which led to the conclusion that '[t]heir payments were not made for good consideration in the relevant sense'. His Honour continued:

> … consideration in this context means the matter considered by the payer informing the decision to pay, rather than any benefit to the payer which subsequently ensued.

62. The error below was:

a. importing contractual analysis into public law (i.e., treating consideration as being the same act constituting the mistake of law) when there was no 'bargain' involved in paying the impost. To do so was to treat the principled basis for restitutionary recovery as remaining tied to its historical quasi-contractual origins;

b. treating the mistake of law (here the payers assuming they were obliged to pay) as wholly subsuming the question of what benefit the payers derived;

c. treating the analysis of total failure of consideration as determinative, thereby

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[75] See evidence of Mr Kozik: Transcript Day 1, p 32, line 21, AFM 24; Statement of Evidence of Chris Kamitsis at [32], AFM 18.

removing any occasion to take account of any benefit actually received.

63. The analysis of the Court below failed to recognise that, where (as here) the payment of an impost is made under a mistake, already there is a lack of voluntariness to the transaction,[76] and to inquire into the state of affairs in the mind of the payer beyond that point is to ignore the force of a demand for payment made by public bodies. The levying of the impost and the benefit produced as a result is not something which, unlike contract, can be understood within the conceptual framework of consent or will. It does not, in that context, advance the inquiry in answer to the fundamental question which arises in restitutionary claims for recovery; namely, who has the superior claim?[77]

## C. Is the UK's *Woolwich* the natural counterpart of the Australian Constitutional system?

64. The Plaintiffs allege that a defence of value received in cases of wrongly levied imposts is inconsistent with Australian constitutional arrangements. They frame the point as one which is dependent upon this Court's adoption of *Woolwich*; a case said to be the 'natural counterpart' of the constitutional system at all levels of Australian Government.[78]

65. The Appellant will answer the Plaintiffs' case more fully in its Reply. The following points, however, should be made at the outset.

66. *First*, this case is not the appropriate vehicle for this Court to consider the matters raised in the Notice of Contention.

a. The Plaintiffs have always put their restitutionary case first and foremost as a claim under mistake of law, and that they '*need only resort to the Woolwich principle – which ought be accepted in Australia – if a mistake of law or fact had not been proved by them (which it has)*'.[79] The unchallenged finding by the Court of Appeal was that the Plaintiffs made the payments under a mistake of law.[80] In England, a plaintiff may seek recovery of unlawfully demanded tax under either the *Woolwich* principle *or* mistake of law, and it

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76 See *David Securities* at 373 point 9.
77 *Roxborough* at 529 [27] (Gleeson CJ, Gaudron and Hayne JJ).
78 Notice of Contention, para 2(a): CAB 79.
79 Closing written submissions of the Plaintiffs at first instance, para 38C (AFM 48); see also para 10(aa), AFM 46-47. See also Plaintiffs' Further Amended Statement of Claim, paras 28A and 28B (AFM 6), where only mistake (albeit mistake of fact) is pleaded as the basis for the claim of moneys had and received; and submissions made by the Plaintiffs' Counsel in the Court of Appeal: Transcript p 36 lines 14-29, AFM 54.
80 Appeal RJ[43]-[44] CAB 51.

is a matter for a plaintiff as to which cause of action to pursue.[81] The Plaintiffs ought not be permitted to resile from the way they have always presented their case.

b. *Woolwich* expressly left open the possibilities of defences, as it was unnecessary there to consider the extent to which the common law might provide a public authority with a defence to a claim of money paid pursuant to an ultra vires demand.[82] *Woolwich* is not inconsistent with a defence of value received.[83] Its adoption would not obviate the need for this Court to decide the Appellant's ground of appeal.

c. Consideration of *Woolwich* needs to occur in the context of the *Constitution*, and in particular whether or how the principle might operate where tax is paid pursuant to unconstitutional legislation.[84] In this case, there was no issue with the validity of the legislation under which the special charges were levied. Rather, the special charges were invalidly levied because the statutory procedures attached to their levying had not been satisfied. Given the potential constitutional implications for any adoption of the *Woolwich* principle, consideration of this issue is best left to a case where it squarely arises. In this regard, the Court has already heard *Hornsby Shire Council v Commonwealth* (S202/2021) which raised the adoption of *Woolwich* in connection with tax paid under an allegedly unconstitutional legislative scheme.

67. *Second*, in any event, the *Woolwich* principle ought not be adopted.

a. Recovery under mistake of law, which has been available in Australia since

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81 ***Deutsche Morgan Grenfell*** *Group plc v Inland Revenue Commissioners* [2007] 1 AC 558 at 568 [18] (Lord Hoffman), 579 [51] (Lord Hope of Craighead), 606-608 [136]-[141] (Lord Walker of Gestingthorpe); *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] 2 AC 337 at 356 [16] (Lord Hope of Craighead DPSC), 362-363 [41] (Lord Walker of Gestingthorpe).

82 *Woolwich* at 177 (Lord Goff of Chieveley), 205 (Lord Slynn of Hadley). The tax the subject of *Woolwich* was a general revenue levy on a building society's dividends and interest to members. It was not one capable of satisfying a defence of value received.

83 The UK Law Commission, in its November 1994 report, *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* at [10.47], recommended that one defence which ought apply to the *Woolwich* principle was 'no claimant should recover in an action for the repayment of sums paid under an invalid charging instrument where it can be shown that in all the circumstances of the case, recovery would cause him to be unjustly enriched'. See also *Mason & Carter's Restitution Law in Australia* at 911 [2041].

84 The Notice of Contention alleges that *Woolwich* is the natural counterpart of the constitutional system under which at Commonwealth, State and local government level, appropriation of monies by public authorities for public purposes may only occur under valid statute or instrument: CAB 79. See also *Kingstreet*.

*David Securities,* is adequate to respond to cases where tax is paid pursuant to an unlawful demand. *Woolwich* was decided in very particular factual circumstances: mistake of law was not then a basis for recovery in England,[85] and the evidence was that Woolwich was not in any event mistaken. Since abolition of the mistake of law/fact distinction in *Kleinwort Benson*, mistake of law has been relied on by claimants in England to recover unlawfully demanded tax, particularly as it may permit of more generous limitation periods.[86] The House of Lords has held that tax is taken to have been paid under a mistake of law even though the invalidity may not be discovered until some years later.[87]

b. *David Securities* was decided after, and refers to, *Woolwich*. The treatment by the plurality in *David Securities* of *Woolwich* (at 375) recognises *Woolwich* lent force to the abolition of the mistake of fact / law distinction.[88] The plurality were expressly motivated by the same line of reasoning by Professor Birks as was the House of Lords (Lord Goff specifically) in displacing that rule.

c. There are difficulties applying *Woolwich* in an Australian context. Lord Goff (considered to have given the leading speech) relies on concepts which cannot easily be transplanted into Australian law: matters of 'common justice'[89] (which is inconsistent with this Court's stated principle that unjust enrichment does not permit of general subjective evaluations of what is fair or unconscionable[90]); considerations which lose their persuasive force when there exists a right of recovery for money paid under mistake of law;[91] and

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85 Eg, *Woolwich* at 164 (Lord Goff of Chieveley).

86 Eg, *Deutsche Morgan Grenfell*; *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] 2 AC 337; *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2022] AC 1.

87 *Deutsche Morgan Grenfell* at 570 [23] (Lord Hoffman), 581-582 [59]-[62] (Lord Hope of Craighead), 609 [143] (Lord Walker of Gestingthorpe). Lord Scott of Foscote dissented: 592 [89]; and Lord Brown of Eaton-under-Heywood dissented on when the mistake was discovered: 614-615 [162] and [165].

88 See also *David Securities* at 394 (Brennan J).

89 *Woolwich* at 171-172.

90 *David Securities* at 379; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 156 [150]. See also Kiefel, "Lessons from a 'Conversation' About Restitution' (2014) 88 *ALJ* 176 at 177 (principles of equity do not here operate at large and idiosyncratically) by reference to *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 301 [94]; Weinrib, "The Normative Structure of Unjust Enrichment" in Rickett & Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (2008) at 22; Edelman, "Change of Position: A Defence of Unjust Disenrichment" (2012) 92 *Boston University Law Review* 1009 at 1011-1012.

91 Eg, *Woolwich* at 176.

the desire for consistency with EU law.[92] *Woolwich* also explicitly involved the 'reformulation'[93] of existing authority to give a right of recovery which did not previously exist at common law. This is inconsistent with this Court's approach to unjust enrichment which emphasises incremental development by analogy with decided cases.[94] In this regard, the UK Supreme Court has recently spoken of 'the risks of effecting major changes to the law of restitution by judicial decision'.[95]

## D. Construction of the Regulations

68. The Plaintiffs say (by their Cross-Appeal) that the Regulations compel the return of the charges. They failed on that point below, the Court (McMurdo JA and Boddice J; Callaghan J dissenting on this point) finding that those Regulations concerned, respectively:

a. administrative errors in the process of levying the charge; and

b. (after they were amended) where the land on which the charge was levied did not have the necessary special relationship with the services, facilities and activities.[96]

69. The Appellant respectfully adopts this analysis.

70. Section 32 of the 2010 Regulation stated:

> **Returning special rates or charges incorrectly levied**
>
> (1) This section applies if a rate notice includes special rates or charges that were levied on land to which the special rates or charges do not apply.
>
> (2) The rate notice is not invalid, but the local government must as soon as practicable return the special rates or charges to the person who paid the special rates or charges.

71. On 14 December 2012, the 2010 Regulation was repealed and the 2012 Regulation commenced. Section 98 of the 2012 Regulation was in the same terms as s 32 of the 2010 Regulation.

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92 *Woolwich* at 177.
93 *Woolwich* at 171 (Lord Goff of Chieveley); see also 196 (Lord Browne-Wilkinson).
94 *Mann v Paterson Constructions* at 649 [213] (Nettle, Gordon and Edelman JJ).
95 *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2019] AC 929 at 964 [63] (Lord Reed DPSC, Lord Hodge JSC and Lord Mance).
96 Appeal RJ [27] and [31] CAB 47-48.

72. With effect from 5 December 2014, section 98 of the 2012 Regulation was amended[97] to state:

> **Returning special rates or charges incorrectly levied**
>
> (1) This section applies if a rate notice includes special rates or charges that were levied on land to which the special rates or charges do not apply **or should not have been levied**. [emphasis added]
>
> (2) [As above]

The pre-amendment position (2010 to 4 December 2014)

73. The majority of the Court below found that s 32(1) of the 2010 Regulation was engaged where there was a valid resolution levying special rates or charges on some ratepayers, but where the rates notice in question levied those special rates or charges on other ratepayers.[98] That conclusion is consistent with the ordinary meaning of the words 'special rates or charges … were levied on land to which the special rates or charges do not apply.' The words '*the* special rates or charges' presupposes the existence of 'special rates or charges', levied under s 28.

74. It is also consistent with the statutory context. Under s 28(3), where a local government resolved to levy special rates or charges, the resolution must identify, inter alia, 'the rateable land to which the special rates or charges apply'. Section 32 operates to compel the return of special rates or charges where they were levied on land to which the resolution did not apply.

75. Here, because there was no valid resolution levying special rates or charges, the relevant rates notices were not captured by s 32.

The post amendment position (from 5 December 2014)

76. The amendment to s 98 of the 2012 Regulation (by the insertion of the words 'or should not have been levied') was directed to the problem of incorrectness in the identification of land that benefitted. That is, the land on which the special rates or charges were levied did not have the kind of special relationship required by s 92(3) of the LGA.

77. As part of the same amendments, changes were made to the saving provision in s 94(14) relating to the local government's resolution to levy special rates or charges:

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97 By way of the *Local Government Legislation Amendment Regulation (No. 1) 2014* (Qld), s 21.

98 Appeal RJ[26] CAB 47. McMurdo JA stated 'The ordinary meaning is not that the section applies where a rate notice included what was said to be a special rate or charge, but where there had been no effective resolution to levy that rate or charge on any land'. In light of what his Honour says in the remainder of Appeal RJ [26], [24] and [27], this statement is assumed to be affected by a typographical error.

(14) In any proceedings about special rates or charges, a resolution or overall plan mentioned in subsection (2) is not invalid merely because the resolution or plan—

(a) does not identify all rateable land on which the special rates or charges could have been levied; or

(b) **incorrectly includes rateable land on which the special rates or charges should not have been levied**. [emphasis added]

78. The majority of the Court below correctly construed s 98 in the context of the amendments to s 94(14).[99] This was consistent with the extrinsic material.[100] When that occurs, they can be seen to deal only with the return of rates in respect of land wrongly identified as benefitting. Here, all of the land in question met the test in s 92(3) of the LGA.

The Regulations do not in any event compel return in this case

79. *First*, the Regulations required 'return' of the charges to those who paid them. The charges sought to be recovered had been spent, so 'return' (in a strict sense) could not occur.

80. *Second,* the Regulations do not, in any event, displace recourse to defences.[101]

## PART VII: ORDERS SOUGHT

81. The Appellant seeks the following orders:

a. appeal allowed;

b. set aside Orders 1, 3(e)(ii) and 4 of the Court of Appeal made on 26 August 2022 and in lieu thereof order that the appeal be allowed and that question 5(b) be answered 'yes';

c. the Respondents pay the Appellant's costs of the appeal to this Court and of the Application for Special Leave to Appeal;

d. set aside Order 8 of Bradley J dated 30 September 2021 and Order 5 of the Court of Appeal as to costs, and in lieu thereof order that the Respondents pay the Appellant's costs of the proceeding at first instance and of the appeal to

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99 Appeal RJ[31] CAB 48.

100 The amendments to s 94(14) were said to apply to the situation 'where a local government resolves to impose special rates or charges on lots which receive no benefit'. A 'minor consequential amendment' was proposed for s 98: Queensland, Explanatory Note, *Local Government Legislation Amendment Regulation (No. 1) 2014* (Qld) at 4.

101 They do not overthrow principles or infringe rights in the sense considered by O'Connor J in *Potter v Minahan* (1908) 7 CLR 277 at 304. They fall within the third category identified in that case: *TX Australia Pty Ltd v ACCC* (2021) 287 FCR 92 at 102-103 [49]-[50]. They do not depart from the general system of law and with irresistible clearness.

the Court of Appeal.

## PART VIII: ESTIMATE OF TIME

82. It is estimated that 2 hours will be required for the Appellant's oral argument.

Dated 5 May 2023

…….. ……..

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

**Redland City Council**
Appellant

and

**John Michael Kozik**
First Respondent

and

**Simon John Akero**
Second Respondent

and

**Sarah Akero**
Third Respondent

and

**Neil Robert Collier**
Fourth Respondent

## ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, the Appellant sets out below a list of the provisions and statutes referred to in these submissions.

| No. | Description | Version | Provisions |
|---|---|---|---|
| 1. | *Constitution of Queensland Act 2001* (Qld) | Current | s 65 |
| 2. | *Local Government Act 2009* (Qld) | Current | ss 92, 94 |
| 3. | *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) | Reprint No. 2B<br>(As in force on 1 July 2012) | ss 28, 32 |
| 4. | *Local Government Regulation 2012* (Qld) | Reprint No. 1<br>(As in force on 14 December 2012) | ss 94, 98 |
| 5. | *Local Government Regulation 2012* (Qld) | Current as at 5 December 2014 | ss 94, 98 |
| 6. | *Local Government Legislation Amendment Regulation (No. 1) 2014* (Qld) | - | s 21 |