



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B17/2023

B17/2023

Redland City Council

Appellant

and

John Michael Kozik

First Respondent

Simon John Akero

Second Respondent

Sarah Akero

Third Respondent

Neil Robert Collier

Fourth Respondent

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
STATE OF QUEENSLAND**

Part I: Internet publication

1. This outline of oral submissions is in a form suitable for publication on the Internet.

Part II: Propositions to be advanced in oral argument

A. The defence of good consideration applies to the Respondents' claims (QS [9]–[33])

2. The defence of good consideration applies where (and to the extent that) the defendant recipient of a payment provides value (in good faith) in exchange for the payment (QS [19]–[21]).

- (a) In *David Securities*, the defence failed because the bank had not provided value in exchange for the payments made by the borrowers under the void contractual clause. The borrowers had no liability for withholding tax, nor any liability under the void clause, the discharge of which could form consideration received in exchange for the payments: *David Securities* (1992) 175 CLR 353 at 379–384 [JBA V3, Tab 24, 539 at 565–570].

- (b) In *Ovidio*, the defence succeeded because the landlord had provided value in exchange for the rent: the exclusive possession and enjoyment of the premises: *Ovidio* [2006] VSCA 6 at [13], [20]–[21], [33] [JBA V6, Tab 47, 1669 at 1675–1676, 1678, 1681].

- (c) In *Adrenaline*, the defence again succeeded because the council had provided value in exchange for the fees: the use of the circuit: *Adrenaline* (2015) 97 NSWLR 207 at [78]–[86] [JBA V6, Tab 35, 1323 at 1340–1341].

3. In the defence of good consideration, “consideration” does not mean the state of affairs contemplated as the basis or reason for the payment (as it does in claims based on a failure of consideration) (QS [23]–[28]): *David Securities* (1992) 175 CLR 353 at 390 [JBA V3, Tab 24, 539 at 576]. If it did:

- (a) The defence of “good consideration” would be a defence of “there has not been a failure of consideration”. There is no principled reason why a claim for restitution of a mistaken payment should be defeated because the state of affairs contemplated as the basis or reason for the payment has not failed.

- (b) In many claims for restitution of a mistaken payment it would be necessary to also show that there has been a total failure of consideration: *Ovidio* [2006] VSCA 6 at

[27]–[29] [**JBA V6, Tab 47, 1669 at 1680**]. That would be to make the mistake otiose and conflate two distinct qualifying or vitiating factors.

4. Where the defendant recipient of a payment has provided value (in good faith) in exchange for the payment, it would be inequitable in all the circumstances to require the defendant to make restitution (**QS [13]–[14]**). If the defendant were required to make restitution:
 - (a) the plaintiff payor would be unjustly enriched at the defendant’s expense—they would get back what they had parted with and keep what they had received in return; and
 - (b) the defendant would be made worse off than if the payment had never been made—having provided value in exchange for the payment (and thus no longer being enriched), they would then nonetheless have to return the payment.
5. The Appellant (in good faith) provided value (or a benefit) to the Respondents through the services (**QS [22]**). The statutory scheme makes clear that the services were provided in exchange for the payments: *Local Government Act 2009* (Qld), s 92(3); *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld), reg 28; *Local Government Regulation 2012* (Qld), reg 94.

B. The Respondents do not have an alternative claim under the *Woolwich* principle (QS [34]–[53])

6. The authority of this Court is against the proposition that money paid by a citizen to a public authority pursuant to an *ultra vires* demand is recoverable by the citizen as a matter of right, without having to show mistake, compulsion, or failure of consideration (**QS [51]**):
 - (a) Restitutionary claims against governments in respect of overpayments of tax or tax paid under an invalid law are subject to the same principles as claims between private citizens: *Australian Financial Services and Leasing* (2014) 253 CLR 560 at [19] [**JBA V3, Tab 17, 125 at 143**]; *Roxborough* (2001) 208 CLR 516 at [29] [**JBA V5, Tab 33, 1210 at 1224**]; *Mason* (1959) 102 CLR 108 at 117 [**JBA V5, Tab 30, 1081 at 1090**]; *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137 at 145.
 - (b) *Mason* (1959) 102 CLR 108 [**JBA V5, Tab 30, 1081**] is authority against the

adoption of the *Woolwich* principle or of any special rule for unlawful charges by public authorities.

7. The *Woolwich* principle is unnecessary in Australian law (QS [36]–[49]).
 - (a) Money paid to a public authority pursuant to an *ultra vires* demand can be recovered as having been paid (i) under a mistake of fact or law, (ii) under improper pressure, or (iii) on a consideration that has (totally) failed. This area of law is no longer bedevilled by the limitations and difficulties that caused the House of Lords in 1992 to recognise a new right of recovery in *Woolwich*.
 - (b) Cases involving the recovery of the payment of an invalid tax, including *Woolwich* itself, can be decided on the basis that the money was paid on a consideration that has failed. Absent indications to the contrary, the implicit basis on which every tax is paid is that the payment is due under, and operates to discharge, a valid legal obligation. Where the tax is invalid that basis fails from the outset, and restitution should follow: *Roxborough* (2001) 208 CLR 516 [JBA V5, Tab 33, 1210].
 8. Adopting the *Woolwich* principle would raise myriad questions about its scope and application (QS [53]; CS [10], [12]). Absent demonstrated necessity, this Court should not adopt a qualifying or vitiating factor of uncertain content, scope, and justification. To do so would disrupt the coherence of the Australian law of restitution.
- C. The defence of good consideration applies to any claim under the *Woolwich* principle (QS [54]–[57])**
9. If the defence of good consideration is not available against a claim under the *Woolwich* principle, the plaintiff payor will enjoy a windfall at the public authority’s expense—and, indirectly, at the public’s expense.
 10. The requirements that the public authority have provided the value (i) in good faith and (ii) in exchange for the payment ensure that the defence only applies in a narrow set of circumstances and does not subvert important constitutional values.

Dated: 13 September 2023



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