HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B17/2023
File Title:	Redland City Council v. Kozik & Ors
Registry:	Brisbane
Document filed:	Form 27C - Intervener's submissions
Filing party:	Interveners
Date filed:	23 Jun 2023

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **REDLAND CITY COUNCIL**
Appellant

and

JOHN MICHAEL KOZIK
First Respondent

SIMON JOHN AKERO
Second Respondent

SARAH AKERO
Third Respondent

NEIL ROBERT COLLIER
Fourth Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PART I: CERTIFICATION

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

PARTS II AND III: INTERVENTION

2. The Attorney-General of the Commonwealth intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of neither party.

PART IV: ARGUMENT

3. ***The respondents' reliance on the Constitution***: By notice of contention, the respondents submit that this Court should adopt the principle established in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 as part of the common law of Australia (**RS [43]**). The principle is described by the respondents as a basis for recovery of "invalidly levied public imposts" (**RS [2]**), which relevantly includes the "special rates and charges" levied by the appellant

under s 92 of the *Local Government Act 2009* (Qld) sought to be recovered in this proceeding. This contention is raised in the alternative to the respondents' primary argument, that they are entitled to restitution of the charges they paid on the ground of mistake and that the appellant is not able to establish any defence; specifically, the "value received" defence.

4. The respondents do not contend that there is a right of recovery founded in the Constitution (**RS [52]; fns 90, 99**). They instead claim that the *Woolwich* principle:

   (a) is "supported by … broader constitutional considerations" (**RS [54]**);

   (b) "is the natural counterpart of the constitutional system under which appropriation of monies by public authorities may occur only under valid statute or instrument" (**RS [45(d)]**), and has the same "rationale" as the *Auckland Harbour Board* principle (which permits the recovery of moneys paid *by* the Executive without statutory authority)[1] (**RS [62]**);

   (c) is "consistent with the fundamental principle of public law … that no tax can be levied by the executive government without parliamentary authority" (**RS [59]**); and

   (d) involves the common law being "shaped by, and adapt[ing] to, values found or reflected in the Constitution" (**RS fn 90**).

5. ***Scope of intervention***: Having regard to the respondents' reliance on "constitutional considerations", the Commonwealth intervenes to make three submissions:

   (a) *first*, the Court should only decide the status of *Woolwich* as a matter of Australian law – including whether or not that principle derives any support from the Constitution – if it is necessary to do so;

   (b) *secondly*, the Constitution neither provides positive support for, nor stands against, the recognition of the *Woolwich* principle as part of the common law of Australia; and

   (c) *thirdly*, if an equivalent to the *Woolwich* principle is recognised in the common law of Australia, the starting point is that ordinary restitutionary

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[1] Named after the decision in *Auckland Harbour Board v The King* [1924] AC 318.

defences are available, but the availability of defences other than the "value received" defence should not be decided in this case.

First Submission: The need to decide the status of *Woolwich*

The circumstances in which the status of Woolwich *must be decided*

6. Generally speaking, "an appellate court should confine itself to determining only those issues which it considers to be dispositive of the justiciable controversy raised by the appeal".[2] In the present case, given the respondents' reliance on "constitutional considerations", the Court should approach the resolution of the status of *Woolwich* consistently with its "cautious and restrained" approach to the resolution of constitutional questions.[3] As this Court has recently emphasised on a number of occasions,[4] "[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties".[5] For the purposes of this appeal, the resolution of the status of the *Woolwich* principle will be "dispositive of the justiciable controversy", and therefore "necessary to decide", only in a narrow set of circumstances.

7. If the respondents are successful in their cross-appeal, it will be unnecessary to consider whether they are entitled to restitution at common law at all. The respondents would be entitled to restitution of the levy they paid under statute, and it would not be necessary to decide whether they would also be entitled to recovery of the levy at common law; whether on the basis of mistake or the *Woolwich* principle.

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2 *Boensch v Pascoe* (2019) 268 CLR 593 at [7] (Kiefel CJ, Gageler and Keane JJ). See also *Tabet v Gett* (2010) 240 CLR 537 at [97]-[98] (Heydon J).

3 *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at [57]-[58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at [38] (McHugh, Gummow and Hayne JJ), citing *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [248]-[252] (Gummow and Hayne JJ).

4 See, eg, *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490 at [90] (Kiefel CJ, Keane and Gleeson JJ); *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432 at [21] (the Court); *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655 at [20] (Kiefel CJ and Keane J), and at [114] (Gordon J).

5 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ on behalf of the Court).

8. If the cross-appeal is dismissed and the Court is required to consider whether the respondents are entitled to restitution at common law, it is common ground that the respondents are *prima facie* entitled to restitution on the basis of mistake.[6] In this proceeding, a recognised unjust factor supplies a reason of interpersonal justice that founds restitution. Recourse to reasons external to the parties, motivated by considerations of policy, is unnecessary.[7] The only dispute is whether or not the appellant is entitled to rely on a defence to resist restitution. Accordingly, the need to decide whether the *Woolwich* principle is part of Australian law for the purposes of this case, turns on whether the recognition of that principle affects the availability of a defence.

9. It will only be necessary for the Court to resolve the status of *Woolwich,* if the Court were to uphold the appeal and find that the appellant is entitled to succeed on the basis of a defence of "value received". If that defence fails, the respondents would be entitled to restitution on the basis of mistake. A possible entitlement to restitution on the basis of the *Woolwich* principle would be academic. However, if the "value received" defence succeeds in relation to the mistake claim, it would be necessary for the Court to consider two issues, each of which may give rise to various sub-issues.

10. *First*, whether the *Woolwich* principle should be adopted in Australian law. In this connection, sub-issues which may arise for consideration include: (a) whether the *Woolwich* principle is a "qualifying or vitiating factor falling into some particular category" that renders an enrichment "unjust";[8] (b) the types of public, or other, bodies to which the principle applies;[9] (c) the range of imposts to which the principle

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6 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 67-68 (Mason CJ).

7 James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) ch. 13; Charlie Webb, "Reasons for Restitution" in Steven Elliott et al (eds), *Restitution of Overpaid Tax* (Hart Publishing, 2013) 93 at 94-7; Simone Degeling, "Understanding Policy-Motivated Unjust Factors" in Charles Rickett & Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008) 267 at 274-5.

8 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [150] (the Court). See also *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at [20] (French CJ).

9 Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) at 98-100; Andrew Burrows, "Public Authorities, Ultra Vires and Restitution", in Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon Press, 1991) 39 at 62; Peter Birks, "Restitution from Public Authorities" (1980) 33 *Current Legal Problems* 191 at 205.

applies (discussed further below); (d) the reach of the principle, and whether, for example, it extends to unlawfulness grounded in failure to comply with legislative procedures;[10] (e) the interaction of the principle with other public policies, be they founded in the common law or legislation. A particular question may arise as to the interaction between the *Woolwich* principle and the policy of the law to uphold bargains and enforce compromises freely entered into, a policy which has been said to extend to "voluntary" payments generally; that is, "payment[s] made in satisfaction of an honest claim".[11]

11. *Secondly*, and assuming the answer to the first question is resolved in the affirmative, whether the "value received" defence is available to defeat a *Woolwich* claim. In this connection, sub-issues which may arise for consideration include: (a) whether the public law policy which enlivens the *Woolwich* principle informs other aspects of a claim to restitution thereunder, including available defences;[12] (b) whether it would be necessary (or appropriate) to recognise, or preclude, any particular defences in response to a *Woolwich* claim.[13]

12. It may also be necessary to consider the relationship between the *Woolwich* principle and existing categories of unjust enrichment. It is clear that there would be substantial overlap between the unjust factor of mistake and the *Woolwich* principle in the case of imposts paid by mistake.[14] It is less clear how much overlap there would be between the unjust factor of duress and the *Woolwich* principle in the case of imposts

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[10] James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) at 308. See also *R (Hemmings) v Westminster City Council* [2013] EWCA Civ 591 at [110], [120], [131] (Beatson LJ; Dyson MR and Black LJ agreeing at [145] and [146]); cf *Vodafone v Office of Communications Ltd* [2020] QB 857 (discussed in Niamh Connolly, "Counterfactual Arguments in Unjust Enrichment" [2020] *Cambridge Law Journal* 408 at 410-411). See also: Jack Beatson, "Restitution of Taxes, Levies and Other Imposts: Defining the Limit of the *Woolwich* Principle" (1993) 109 *Law Quarterly Review* 410; *Deutsche Morgan Grenfell plc v Inland Revenue Commissioners* [2007] 1 AC 558; *British Steel plc v Customs and Excise Commissioners* [1997] 2 All ER 366; *Jax Tyres Pty Ltd v Commissioner of Taxation* (1986) 5 NSWLR 329 at 333 (Hunt J).

[11] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 374 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Hookway v Racing Victoria Ltd* (2005) 13 VR 444 at [22]-[45], esp [44]-[45] (Ormiston JA; Warren CJ and Harper AJA agreeing at [1]-[3] and [104]). See also *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 382 (Lord Goff). See generally James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) at 309.

[12] See Keith Mason et al, *Mason & Carter's Restitution Law in Australia* (Lexis Nexis, 4th ed, 2021) at 884, [2004]-[2005].

[13] See Tania Voon, "Restitution from Government in Australia: Woolwich and its Necessary Boundaries" (1998) 9 *Public Law Review* 15 at 19-24.

[14] See, eg, *Commissioner of State Revenue (Vic) v Royal Insurance Ltd* (1994) 182 CLR 51 at 69 (Mason CJ).

paid under protest.[15] In this regard, in *Mason v New South Wales*,[16] there was a difference of view as to whether the mere existence of penal provisions in the relevant legislation was sufficient to constitute illegitimate pressure amounting to duress.[17] In addition, it is unclear whether the unjust factor of total failure of consideration would have any overlap with the *Woolwich* principle.[18] As noted by the respondents, the extent of any overlap may be relevant to issues such as limitation periods and available defences (**RS [53]**).

The need to characterise the relevant impost

13. In light of the "constitutional considerations" relied on by the respondents, there is a further reason why the status of *Woolwich* ought only be resolved in a case where it is necessary to do so. In determining the relevance of the Constitution to the existence of the *Woolwich* principle, whether or not the impost at issue is properly characterised as a "tax" in the constitutional sense may be relevant. That is because the Constitution treats taxes differently from other kinds of imposts. The Commonwealth Parliament has a specific power to make laws with respect to taxation (s 51(ii)). Parliament must follow specific rules in the enactment of laws imposing taxation (ss 53, 55). Section 53 provides that laws are not taken to impose

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[15] In *Woolwich* [1993] AC 70, Lord Goff said that "[w]e may expect that in any event the common law principles of compulsion … will continue to develop in the future" (at 173). In addition, Lord Slynn said that while "the facts do not fit easily into the existing category of duress or of claims colore officii, they shade into them" and that "[t]here is a common element of pressure which by analogy can be said to justify a claim for repayment" (at 204). See also Jack Beatson, "Duress as a Vitiating Factor in Contract" (1974) 33(1) *Cambridge Law Journal* 97 at 110, quoted in Peter Birks, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights" in P D Finn (ed), *Essays on Restitution* (Law Book Co, 1990) 164 at 192; Andrew Burrows, "Public Authorities, Ultra Vires and Restitution" in Andrew Burrows (ed), *Essays on the Law of Restitution* (1991) 39 at 43.

[16] (1959) 102 CLR 108. Leading academic commentators have said that this decision is "best viewed" as an example of duress of goods: Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011) at 501; Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985) at 296; Peter Birks, *Unjust Enrichment* (2nd ed, 2005) at 133.

[17] Kitto J and Menzies J seemed to regard the existence of penal provisions as sufficient (at 129 and 133). However, Windeyer J took the opposite view (at 144-146) (see also Fullagar J at 123-124 and Taylor J at 129-130). In addition, while Dixon CJ decided the case on the basis that the plaintiffs' goods would be seized if the levy was not paid, his Honour suggested that such a finding may not have been necessary (at 117). See also Peter Birks, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights" in P D Finn (ed), *Essays on Restitution* (Law Book Co, 1990) 164 at 188-190.

[18] I M Jackman, *The Varieties of Restitution* (Federation Press, 2nd ed, 2017) at 96; Greg Weeks, "The Public Law of Restitution" (2014) 38 *Melbourne University Law Journal* 198 at 211; Simone Degeling, "Restitution of Unlawfully Exacted Tax in Australia: The *Woolwich* Principle" in Stephen Elliott et al, *Restitution of Overpaid Tax* (Hart Publishing, 2013) 313 at 319-320. In *Woolwich* [1993] AC 70, Lord Browne-Wilkinson said, referring to the *Woolwich* principle, that there was a "close analogy to the right to recover money paid under a contract the consideration for which has wholly failed" (at 197).

taxation if they impose other kinds of impost, such as a fee for services. That express distinction between taxes and other kinds of impost in the text of the Constitution may be relevant either to the existence, or the scope, of any *Woolwich* principle in Australian law. In this regard, the constitutional context in which *Woolwich* was decided was different.[19]

14. The question whether an exaction of money is a tax involves an exercise in characterisation.[20] Contrary to **RS [34]**, it is not the case that taxation is involved "by definition" where a service is not requested. According to the "classic" (albeit not exhaustive) description, a tax is a "compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered".[21] A fee for services, while definitionally not a tax, can be a compulsory exaction.[22] In *Air Caledonie International v Commonwealth*,[23] this Court said that a fee for services is a fee "exacted for particular identified services provided or rendered individually to, *or* at the request or direction of, the particular person required to make the payment". This Court has previously held that "financial burdens placed upon 'users' to fund the maintenance of public assets and the provision of public services" were properly characterised as fees for services.[24]

15. The difference between taxes and fees for services may be significant. For example, the respondents submit that, "[a]s to policy, it is preferable to distribute loss fairly across the public rather than the individual taxpayer bearing the burden of

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[19] This Court has on various occasions observed that, in constitutional matters, Australia cannot easily be compared with England: see, eg, *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [20]-[22] (Gaudron and Gummow JJ), [138] (Kirby J), [162] (Hayne J); *Momcilovic v The Queen* (2011) 245 CLR 1 at [19] (French CJ), [146(i)] (Gummow J). In *Combet v Commonwealth* (2005) 224 CLR 494, Kirby J referred to the control of public money residing in the Parliament and observed that, while the "allocation of functions and responsibilities is not atypical of the arrangements existing in many countries that derive their constitutional traditions from England", relevant provisions of the Constitution (including ss 53 and 54) "are peculiar to Australia" (at [228]).

[20] *Luton v Lessels* (2002) 210 CLR 333 at [10] (Gleeson CJ), [49] (Gaudron and Hayne JJ).

[21] *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 276 (Latham CJ) recently referred to with approval in *Hornsby Shire Council v Commonwealth* [2023] HCA 19 at [28] (the Court). This Court considered the need for a tax to be exacted by a public authority and to be exacted for public purposes in *Australian Tape Manufacturers Association v Commonwealth* (1993) 176 CLR 480.

[22] See, eg, *Harper v Victoria* (1966) 114 CLR 361 at 377 (McTiernan J).

[23] (1988) 165 CLR 462 at 470 (the Court) (emphasis added).

[24] *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2011) 244 CLR 97 at [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), referring to *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133.

Government's mistake" (**RS fn 101**). It may be that the policy justification for the *Woolwich* principle has less force where the relevant public authority has provided a particular service to the payer of the levy individually.

16. The courts below did not need to consider whether or not the "special rates and charges" levied by the appellant were correctly characterised as a tax or a fee for services. Accordingly, if it were necessary to resolve the status of *Woolwich* in Australian law, and in particular the relevance of the "constitutional considerations" relied upon by the respondents, this Court would be called upon to characterise the impost for the first time in this appeal. It may be that the "special rates and charges" are properly characterised as a "fee for services", given they were for "services, facilities and activities that have a special association with particular land" for certain specified reasons, including where the land or its occupier "specially benefits from the service, facility or activity".[25] In this regard, there was a finding of fact, unchallenged on appeal, that the expenditure of funds by the appellant "had a beneficial effect on the land owned by [the respondents]".[26] Further, where all of the "special rates or charges" have not been spent, the local government must pay the unspent special rates or charges to the current owners of the land on which the special rates or charges were levied.[27] In those circumstances, there may be a "sufficient relationship" between a service provided by the appellant and the charges that were paid by the respondents.[28] If the "special rates and charges" were properly characterised as a fee for services, the provisions in the Constitution relating to taxation may have no, or only limited, bearing on the existence of a common law cause of action to recover those charges. Whether that is so need only be resolved if the status of *Woolwich* must be decided in this case.

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[25] *Local Government Act 2009* (Qld), s 92(3)(a)(i). In *Leake v Commissioner of Taxation (WA)* (1934) 36 WALR 66, which was cited in *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 (at 639), Dwyer J said that "particular fees, local assessments and tolls are not commonly regarded as included in the general term 'taxes', *no doubt on account of their restricted incidence*" (at 68) (emphasis added).

[26] *Redland City Council v Kozik* [2022] QCA 158 at [20] (McMurdo JA).

[27] *Local Government (Finance, Plans and Reporting) Regulations 2010* (Qld), reg 30; *Local Government Regulation 2012* (Qld), reg 97(2).

[28] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 568 (Mason CJ, Deane, Toohey and Gaudron JJ).

Second Submission: The Constitution provides no positive support for *Woolwich*

No constitutional right of recovery

17. As noted above, the respondents do not submit that there is a right of recovery founded in the Constitution. That position accords with long-standing authority of this Court that the Constitution does not create private causes of action.[29] In *Kruger v Commonwealth*,[30] Brennan CJ said:

> The Constitution creates no private rights enforceable directly by an action for damages. It "is concerned with the powers and functions of government and the restraints upon their exercise", as Dixon J said of s 92 in *James v Commonwealth*. The Constitution reveals no intention to create a private right of action for damages for an attempt to exceed the powers it confers or to ignore the restraints it imposes. The causes of action enforceable by awards of damages are created by the common law (including for this purpose the doctrines of equity) supplemented by statutes which reveal an intention to create such a cause of action for breach of its provisions.

18. Consistent with this general principle, in four cases, members of this Court have described the cause of action to recover a tax paid pursuant to legislation later held to be unconstitutional as arising at common law, rather than under the Constitution.

19. *First*, in *Antill Ranger & Co Pty Ltd v Commissioner of Motor Transport*,[31] the plaintiffs claimed restitution of money paid pursuant to a tax later held to be invalid by reason of s 92 of the Constitution. Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ said that "[t]he cause of action to which the plaintiff thus became entitled is not for infringement of some right given to him by s 92".[32] While the

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[29] See *James v Commonwealth* (1939) 62 CLR 339 at 362 (Dixon J); *McClintock v Commonwealth* (1947) 75 CLR 1 at 19 (Latham CJ); *Northern Territory v Mengel* (1995) 185 CLR 307 at 352-353 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ; Deane J relevantly agreeing at 373); *Aid/Watch Inc v Commissioner for Taxation* (2010) 241 CLR 539 at [44] (French CJ, Gummow, Hayne, Crennan, and Bell JJ). There may be narrow qualifications to this position, such as ss 48, 84, 89(iii) and 93(ii) of the Constitution: see *Commonwealth v Mewett* (1997) 191 CLR 471 at 547 (Gummow and Kirby JJ); *Flint v Commonwealth* (1932) 47 CLR 274 at 278 (Dixon J).

[30] (1997) 190 CLR 1 at 46 (citations omitted); see also 93 (Toohey J), 125-126 (Gaudron J), 146-148 (Gummow J).

[31] (1955) 93 CLR 83.

[32] (1955) 93 CLR 83 at 99.

plaintiff's cause of action was "the consequence of s 92", it was "given by the common law".[33] To similar effect, Fullagar J said:[34]

> The plaintiff's action is for money had and received. … The right asserted is a common law right, but an essential element in the cause of action is that the moneys in question were unlawfully exacted from it.

20. *Secondly*, in *British American Tobacco Australia Ltd v Western Australia*,[35] the plaintiff company had commenced proceedings against the State of Western Australia and the Commissioner of State Taxation seeking recovery of licence fees it had paid that were later held invalid by reason of s 90 of the Constitution. This Court had to consider whether s 6(1) of the *Crown Suits Act 1947* (WA), which imposed requirements for timely notice of any action and a limitation period, was applied by s 79 of the *Judiciary Act 1903* (Cth). In resolving that question, members of the Court made observations in relation to the nature of the claim brought by the plaintiff. Gleeson CJ said:[36]

> The claim for repayment of the licence fees is a claim for moneys payable by the first respondent to the appellant for moneys had and received by the first respondent to the use of the appellant. It is based upon the principles stated by this Court in *Mason v New South Wales* and *David Securities Pty Ltd v Commonwealth Bank of Australia*. …
>
> The legal foundation of the appellant's claim consists in a combination of the common law principles considered in *Mason* and *David Securities*, and the distribution of legislative powers amongst the polities of the Commonwealth made by the Constitution and, in particular, s 90. By reason of s 90, the purported imposition of a duty of excise by the Parliament of Western Australia was unconstitutional and invalid. This action is brought by a taxpayer which was subjected to such an unconstitutional imposition, and which claims, according to common law principles, to be entitled to recovery money unlawfully exacted under colour of authority. …
>
> … The Constitution provides that the Parliament of Western Australia has no power to impose taxes of a certain kind: duties of excise. The common law of Australia is to the effect that, at least in certain circumstances, when

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[33] (1955) 93 CLR 83 at 99.

[34] (1955) 93 CLR 83 at 102.

[35] (2003) 217 CLR 30.

[36] (2003) 217 CLR 30 at [5]-[7].

> a public authority purports to impose, and collects, a tax which is beyond power, a taxpayer may sue to recover the tax.

21. McHugh, Gummow and Hayne JJ accepted that the plaintiff's action "arose under" the Constitution for the purpose of attracting federal jurisdiction under s 76(i) of the Constitution.[37] However, their Honours then immediately said:[38]

> To conclude that the action for moneys had and received "arises under" the Constitution is not to accept that any liability on the part of the State to effect repayment springs without more from s 90 of the Constitution. …
>
> Rather, in the present case, the common law action attracts federal jurisdiction, in accordance with the decisions construing the phrase "arising under" in s 76(i) and (ii) of the Constitution because it is the operation of s 90 upon the Franchise Act which is said to render the retention of the moneys against conscience.

22. Finally, Callinan J said:[39]

> Even though the action arises out of a constitutional breach it is not an action for a breach of a constitutional duty or rule. Nor is it an action or claim of a kind peculiar to a governmental activity legitimately undertaken, or one which a government has abstained from taking. It is a claim in common law.

23. *Thirdly*, in *Roxborough v Rothmans of Pall Mall Australia Ltd*,[40] after referring to the decision in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*,[41] Gleeson CJ, Gaudron and Hayne JJ said:

> It is impossible to explain those judgments, or that decision, upon the ground that there is some constitutional reason for treating restitutionary claims against governments differently from claims against private citizens.

24. *Finally*, in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*,[42] French CJ said that this Court has "held restitutionary claims against governments in respect of overpayments of tax or tax paid under an invalid law to be

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37 (2003) 217 CLR 30 at [39] (citations omitted).

38 (2003) 217 CLR 30 at [40]-[41].

39 (2003) 217 CLR 30 at [168]. Kirby J states that the other members of the Court view BAT's action "as an action at common law that arises 'under [the] Constitution', or involv[es] its interpretation": at [137].

40 (2001) 208 CLR 516 at [29].

41 (1994) 182 CLR 51.

42 (2014) 253 CLR 560 at [19].

subject to the same general principles and has discussed those principles in that context".

25. The respondents correctly place no reliance on the Supreme Court of Canada's decision in *Kingstreet Investments Ltd v New Brunswick*[43] as providing support for a constitutional right of recovery (**RS fn 90**). Since 1982, the Canadian Constitution has contained an entrenched Charter of Rights and Freedoms, which expressly provides for the availability of "appropriate and just" remedies against the State by persons whose rights under the Charter have been infringed or denied (s 24(1)). The recognition of a constitutional cause of action for restitution in *Kingstreet* was not an unusual development, given it sits alongside other kinds of constitutional causes of action. By contrast, the recognition of a constitutional cause of action in Australian law would be wholly inconsistent with long-standing authority of this Court.[44]

26. As a common law principle, the availability of a restitutionary claim based on an equivalent to the *Woolwich* principle would be subject to modification by legislation. The scope for legislative intervention addresses concerns about "fiscal chaos" capable of resulting from a finding that a tax has been invalidly imposed.[45] As Mason CJ said in *Royal Insurance*,[46] "[t]he remedy for any disruption of public finances occasioned by the recovery of money in conformity with the law of restitution lies in the hands of the legislature". Of course, any legislation would be subject to relevant constitutional limitations, such as s 51(xxxi) of the Constitution. In this regard, the Commonwealth Parliament can validly enact legislation that provides for an adjustment of competing rights, claims or obligations, which may be required where a tax or other impost has been held invalid.[47]

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43 [2007] 1 SCR 3.

44 As Gibbs J said about decisions of the Supreme Court of the United States, in terms that apply equally to decisions of the Supreme Court of Canada, "it must never be forgotten that [those decisions] are often given against a different constitutional, legal and social background from that which exists in Australia": *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 530.

45 *Woolwich* [1993] AC 70 at 200 (Lord Slynn of Hadley).

46 (1994) 182 CLR 51 at 68. See also *Thiess v Collector of Customs* (2014) 250 CLR 664 at [31] (the Court), discussing *Sargood Bros v Commonwealth* (1910) 11 CLR 258.

47 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155.

The Constitution does not otherwise favour the recognition of Woolwich

27. As noted above, the respondents rely on "broader constitutional considerations" as "supporting" the recognition of *Woolwich*.

28. It may be accepted that the development of the common law in Australia, to include the *Woolwich* principle, would not run counter to constitutional imperatives, and is accordingly not inconsistent with them.

29. However, to the extent that the respondents go further and submit that the Constitution provides positive support for the recognition of *Woolwich*, or that the common law should recognise the *Woolwich* principle in order to protect and vindicate Constitutional values, that submission should be rejected. More particularly, neither of the constitutional reasons relied upon by the respondents (see [4](b) and (c) above) correctly analysed, "supports" the recognition of *Woolwich*.

30. *First*, at the Commonwealth level, s 83 of the Constitution provides that "[n]o money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law". As is clear from the text, that provision is concerned with the payment of moneys *out* of the Consolidated Revenue Fund. It says nothing about the payment of moneys *into* the Revenue. While it may be apt to describe the *Woolwich* principle as the "natural counterpart" of the *Auckland Harbour Board* principle (**RS [45(d)]**), nothing in the constitutional text supports the recognition of *Woolwich*.

31. In this regard, in *Sims v Commonwealth*,[48] the New South Wales Court of Appeal held that the right of recovery, known as the *Auckland Harbour Board* principle, arises at common law. The Court rejected an argument that the principle had been "constitutionalised" by implication from ss 81 and 83 of the Constitution.[49] If that is so (and the Commonwealth accepts that it is), *a fortiori* the Constitution provides no support for the existence of a right of recovery of moneys paid in.

32. *Secondly*, it may be accepted that the *Woolwich* principle is consistent with "the fundamental principle of public law … that no tax can be levied by the executive government without parliamentary authority" (**RS [59]**). However, that principle of public law does not support the existence of a right of recovery of the breadth

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[48] (2022) 109 NSWLR 546.

[49] (2022) 109 NSWLR 546 at [96] (Bell CJ; White JA agreeing at [153]).

contended for by the respondents. That is because s 51(ii) of the Constitution does not refer to "public imposts" generally.[50] It refers to taxes. In addition, the "related doctrines" referred to in **RS [61]** are all concerned only with taxes. Accordingly, the "fundamental principle of public law" relied upon by the respondents *prima facie* could not support the existence of a *Woolwich* principle broader than an entitlement to recover an invalidly imposed tax. Even then, consistently with the long-standing authority discussed above, the fact that the Constitution provides that taxes can only be levied by Parliament does not support the existence of a private cause of action for the recovery of taxes levied inconsistently with s 51(ii).

Third Submission: Only the availability of a "value received" defence may arise for determination

33. The respondents submit that "different defences may apply" where the claim is based on the *Woolwich* principle (**RS [58]**). If the Court were to decide that the respondents are also entitled to restitution on the basis of an equivalent to the *Woolwich* principle, the only question would be whether the appellant is entitled to rely on a "value received" defence. Whether any other defence is available should be resolved in a case in which that question arises for determination.

34. If the Court recognises an equivalent to the *Woolwich* principle as a new qualifying or vitiating factor that gives rise to an obligation to make restitution, the starting point should be that the relevant defendant is able to rely on any defence that would ordinarily be available to a defendant in an action for restitution flowing from unjust enrichment.[51] Like other defendants, public authorities are entitled to displace a *prima facie* liability "by circumstances which the law recognises would make an order for restitution unjust".[52]

35. It may be that the respondents implicitly submit that this Court should follow authority of the High Court of England and Wales to the effect that the defence of

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[50] In *Woolwich* [1993] AC 70, Lord Goff referred to money paid consequent on an unlawful demand from "a public authority" (at 177), while Lord Browne-Wilkinson referred to "some public officer" (at 198). This suggests that neither conceived of the unjust factor as being restricted to revenue authorities, and hence did not consider the factor to be based in art 4 of the *Bill of Rights 1689*. See also Greg Weeks, "The Public Law of Restitution" (2014) 38 *Melbourne University Law Review* 198 at 228.

[51] Keith Mason et al, *Mason & Carter's Restitution Law in Australia* (Lexis Nexis, 4th ed, 2021) at 907 [2037].

[52] *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [30] (French CJ, Crennan and Kiefel JJ).

change of position is not available to answer a *Woolwich* claim (see **RS [51]**). Consistently with the above, given the appellant has disclaimed reliance on a change of position defence,[53] the Court should not resolve whether or not that defence would be available in some other, future proceeding. In any event, the English authority should not be followed for two reasons. *First*, it is inconsistent with the decision of Mason CJ in *Royal Insurance*.[54] *Secondly*, it would create incoherence in the law.[55] More particularly, it would be incoherent either for the defence to be available to a mistake claim but not a *Woolwich* claim based on the same facts, or for the defence only to be available to defeat a mistake claim *sometimes* (contingent on the identity of the defendant).[56]

PART V: ESTIMATED TIME

36. The Commonwealth estimates that up to 15 minutes will be required for oral argument.

Dated 23 June 2023

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53 *Redland City Council v Kozik* [2022] QCA 158 at [48].

54 (1994) 182 CLR 51 at 65. See also *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [168]-[171] (the Court).

55 See, eg, *Sullivan v Moody* (2001) 207 CLR 562 at [55] (the Court); *Tame v New South Wales* (2002) 211 CLR 317 at [123] (McHugh J); *Miller v Miller* (2011) 242 CLR 446 at [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [23], [34] (French CJ, Crennan and Kiefel JJ).

56 This issue of whether the defence is available to defeat a claim based on mistake where a tax has been paid by mistake arose, but was not decided, in *Test Claimants in the FII Group Litigation v HRMC [No 2]* [2014] EWHC 4302 (Ch) at [316]-[341] (Henderson J). See also Charles Mitchell et al, *Goff & Jones on Unjust Enrichment* (Sweet & Maxwell, 10th ed, 2022) at 829 [27-75].

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **REDLAND CITY COUNCIL**
Appellant

and

JOHN MICHAEL KOZIK
First Respondent

SIMON JOHN AKERO
Second Respondent

SARAH AKERO
Third Respondent

NEIL ROBERT COLLIER
Fourth Respondent

ANNEXURE TO THE ATTORNEY-GENERAL OF THE COMMONWEALTH'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Commonwealth sets out below a list of the constitutional provisions and statutes referred to in his submissions.

No	Description	Version	Provision(s)
Constitutional provisions			
1.	*Australian Constitution*	Current	ss 51(ii), 76, 81, 83, 90, 92
2.	*Constitution Act 1982* (Can)	Current	Pt 1, s 24
Statutory provisions			
3.	*Crown Suits Act 1947* (WA)	14 April 1971 to 8 May 2003.	s 6

4.	*Judiciary Act 1903*	18 February 2022 to date. Compilation No. 49 [C2022C00081]	s 79
5.	*Local Government Act 2009* (Qld)	1 March 2023 to date.	s 92
Subordinate legislation			
6.	*Local Government (Finance, Plans and Reporting) Regulations 2010* (Qld)	1 July 2012 to 14 December 2012.	reg 30
7.	*Local Government Regulation 2012* (Qld)	Current	reg 97