HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 23 Jun 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

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

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. 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

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

2. These submissions are in a form suitable for publication on the Internet.

PART II: Basis of intervention

3. The Attorney-General for Queensland (**Queensland**) intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the Appellant.

PART IV: Submissions

SUMMARY OF ARGUMENT

4. There are **four** issues before the Court.

5. **First**, does each Respondent have a statutory right to the return of the special charges? Queensland does not make any submissions on this issue.

6. **Second**, if the answer is "no", does the Appellant have a defence to each Respondent's claim for restitution of money paid under a mistake of law? Queensland submits that the answer is "yes". The Council can establish the defence of good consideration because, in the case of each Respondent, it has provided value in exchange for (part of) the mistaken payment. Recognising the defence in the circumstances of this case avoids the unjust enrichment of the Respondents at the Appellant's expense (and, indirectly, at the public's expense), and is consistent with, and indeed would further, the purpose underlying the statutory scheme. It is a principled application of the good consideration defence. The Respondents' submissions, by contrast, have the effect of collapsing mistake and failure of consideration, which are distinct qualifying or vitiating factors.

7. **Third**, if the Appellant has a defence of good consideration, does each Respondent have an alternative claim under the principle recognised in *Woolwich Equitable Building Society v Inland Revenue Commissioners*?[1] Queensland submits that the answer is "no". The *Woolwich* principle is unnecessary in Australian law because money paid to a public authority pursuant to an ultra vires demand can be recovered through a number of existing claims. In particular, almost all such payments are recoverable as payments made on a consideration that has failed. *Woolwich* itself could today be decided on that basis.

[1] [1993] 1 AC 70 (***Woolwich***).

Further, adopting the *Woolwich* principle would not be a principled development of the common law of Australia.

8. **Fourth**, if each Respondent has a *Woolwich* claim, does the Appellant's defence also apply to that claim? Queensland submits that the answer is "yes". The defence of good consideration should be available to a public authority faced with a *Woolwich* claim. The defence, which is both plaintiff- and defendant-sided, ensures that the payor cannot use the *Woolwich* principle to obtain a benefit from the public authority—and, indirectly, from the public—for nothing.

STATEMENT OF ARGUMENT

Issue 2: Does the Appellant have a defence to the Respondents' claims for restitution?

9. In *David Securities Pty Ltd v Commonwealth Bank of Australia*,[2] the plurality explained that the prima facie obligation on the recipient of a mistaken payment to make restitution can be displaced by "circumstances which the law recognizes would make an order for restitution unjust" and that the recipient 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".[3] Consistently with that, the plurality in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*[4] explained that the relevant inquiry is whether it would be inequitable *in all the circumstances* to require the recipient to make restitution.

10. This case involves the following (exceptional) circumstances:

(a) a person has paid money to a public authority under a statutory scheme which involves (i) the public authority raising money from a particular person (or class of persons of which they are a member) and (ii) spending the money for the benefit of that person (or class of persons of which they are a member);

(b) due to a failure by the public authority to follow the procedural requirements of the scheme (rather than a fundamental absence of power), the person was not in fact

---

2 (1992) 175 CLR 353 (***David Securities***) at 379 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ). See also *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 (***Westpac***) at 673 (the Court); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 (***Equuscorp***) at [30] (French CJ, Crennan, and Kiefel JJ); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 (***Hills***) at [16] (French CJ), [67] (Hayne, Crennan, Kiefel, Bell, and Keane JJ), [106], [131] (Gageler J).

3 *David Securities* (1992) 175 CLR 353 at 379 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ).

4 (2014) 253 CLR 560 at [65]–[76] (Hayne, Crennan, Kiefel, Bell, and Keane JJ).

under a valid legal obligation to pay the money; and

(c) before learning of the procedural defect, the public authority has spent some or all of the money for the benefit of the person (or class of persons of which they are a member) in accordance with the statutory scheme.

11. This Court should recognise that, if those circumstances are established, it would be inequitable to require the public authority to repay the money to the extent that it has been spent. The public authority should, to that extent, have a defence.

12. There are good reasons of principle and policy to recognise such a defence.

13. **First**, if the public authority has no defence to the rate-payer's[5] claim for restitution of the payment, the rate-payer will benefit twice: once when money is spent for their benefit, and then again when they recover the payment. That would be to *create* unjust enrichment, rather than to reverse it.[6] The injustice is that identified by Lord Wright in *Spence v Crawford*[7] (in the rescission context):

> Though the defendant has been fraudulent he must not be robbed, nor must the plaintiff be unjustly enriched, as he would be if he both got back what he had parted with and kept what he had received in return.

14. Without a defence, the rate-payer would recover the money after it had already been spent for their benefit. It would in those circumstances be inequitable to require the public authority to make restitution. But it is important to be clear about the objection. It is not simply that, before restitution, the rate-payer has no longer suffered a loss. Nor is it that, after restitution, the rate-payer will obtain a windfall. Such objections would be inconsistent with this Court's rejection of the defence of passing on.[8] Instead, the objection is that the rate-payer will obtain a windfall *at the public authority's expense* (and, indirectly, at the public's expense). As between the rate-payer and the public authority, the public authority has the superior claim to the money.[9]

---

5 For convenience, these submissions refer to the payor as the "rate-payer".

6 Mason, Carter, and Tolhurst, *Mason & Carter's Restitution Law in Australia* (LexisNexis, 4th ed, 2021) (**Mason & Carter**) at [2041]; *Adrenaline Pty Ltd v Bathurst Regional Council* (2015) 97 NSWLR 207 (***Adrenaline***) at [83] (Leeming JA; Macfarlan and Ward JJA agreeing); *Meriton Apartments Pty Ltd v Council of the City of Sydney (No 3)* (2011) 80 NSWLR 541 (***Meriton***) at [172] (Pepper J).

7 [1939] 3 All ER 271 at 288–289.

8 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (***Royal Insurance***); *Roxborough v Rothmans of Pall Mall* (2001) 208 CLR 516 (***Roxborough***).

9 *Roxborough* (2001) 208 CLR 516 at [27] (Gleeson CJ, Gaudron, and Hayne JJ).

15. **Second**, recognition of the defence would be consistent with, and indeed would further, the purpose underlying the statutory scheme. The point is a general one, but it can be illustrated by reference to the statutory scheme here.

16. Chapter 4, Part 1 of the *Local Government Act 2009* (Qld) concerns rates and charges, which the Act defines as levies imposed on land for services, facilities, or activities supplied or undertaken by (or on behalf of) the local government.[10] The Act distinguishes between those rates and charges that benefit the public in general and those that benefit particular people:[11]

    (a) "General rates" are for services, facilities, and activities supplied or undertaken "for the benefit of the community in general (*rather than a particular person*)" (emphasis added).[12] The local government must levy general rates on *all* rateable land within the local government area.[13]

    (b) "Special rates and charges" are for services, facilities, and activities that benefit a particular person (or class of persons).[14] Thus, they may only be levied where the service, facility, or activity has a special association with particular land for certain reasons.[15] The local government is not compelled to levy such rates and charges,[16] but may (by definition) only levy them on *that* land.

17. The Act thus (i) recognises that some services[17] benefit the public at large, and provides for their cost to be borne by the public at large, and (ii) recognises that other services benefit particular persons, and provides for their cost to be borne by those persons. If the public authority has no defence to the rate-payer's claim for restitution of their payment, the rate-payer will take the benefit of the services that benefit them in particular, but leave the cost of those services to be borne by the public at large.[18] But if the public authority has the defence advanced above, the rate-payer will take the benefit of the services *and*

---

10 *Local Government Act 2009* (Qld), s 91(2).
11 There are also "utility charges", which are for certain utilities such as waste management and gas, and "separate rates and charges", which are for other services, facilities, or activities: see s 92(1), (4), (5).
12 *Local Government Act 2009* (Qld), s 92(1), (2).
13 *Local Government Act 2009* (Qld), s 94(1)(a).
14 *Local Government Act 2009* (Qld), s 92(1), (3).
15 *Local Government Act 2009* (Qld), s 92(3).
16 *Local Government Act 2009* (Qld), s 94(1)(b).
17 For convenience, these submissions use "services" as shorthand for services, facilities, and activities.
18 Because the cost of the services will presumably then need to be recovered through a levy on the public at large (for example, general rates).

bear their cost, as the statutory scheme intended.

18. **Third**, it is true that the failure to follow the procedural requirements means that the statutory scheme will not have been validly engaged. But because the defect is procedural only, the policy behind the statute should still inform the common law's response to the defect. The procedural defect does not undermine the fact that (i) the service was one that the public authority was entitled to carry out, (ii) the service was one that benefited the rate-payer in particular, and (iii) the statute intended that the cost of the service be borne by the rate-payer. Put another way, the defect was not so serious that:

    (a) the rate-payer should be left with the *benefit* of the service without bearing the *burden* that the statute intended them to bear; or

    (b) the public authority (and, indirectly, the public at large) should be left to bear the *burden* of the service without receiving the *benefit* of the service.

19. Contrary to the Respondents' submissions, the defence advanced above would be a principled application of the defence of "good consideration" recognised by Robert Goff J in *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd*[19] and approved by this Court in *David Securities Pty Ltd v Commonwealth Bank of Australia*.[20] Properly understood, that defence applies where (and to the extent that) the defendant recipient of the payment provides value (in good faith) in exchange for the payment. It may be that the principle operates as a denial of an element of the plaintiff's claim rather than as a defence to the claim, but nothing turns on that in this appeal.

20. What Robert Goff J meant by "good consideration" is the subject of "ongoing speculation".[21] In some decisions where the language is deployed, it is a proxy for other defences or principles.[22] In other decisions, the denial of restitution can be explained both on the basis that the defendant has given value in exchange and on another basis, such as that the defendant had a legal right to the benefit.[23] But there are cases where the operation of

---

19 [1980] QB 677 at 695.

20 (1992) 175 CLR 353 at 380 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ). See also *Westpac* (1988) 164 CLR 662 at 673 (the Court); *Hills* (2014) 253 CLR 560 at [16] (French CJ), [100]–[102] (Hayne, Crennan, Kiefel, Bell, and Keane JJ).

21 Edelman and Bant, *Unjust Enrichment* (Hart, 2nd ed, 2016) (**Edelman and Bant**) at 364.

22 Edelman and Bant at 364–365.

23 *Aiken v Short* (1856) 1 H & N 210; 156 ER 1180 and *Lloyds Bank Plc v Independent Insurance Co Ltd* [2000] QB 110 are examples.

the defence can only be explained on the basis that the defendant provided value to the plaintiff in exchange for the payment. For example:[24]

(a) In *National Mutual Life Association of Australasia Ltd v Walsh*,[25] the plaintiff life insurance company paid commissions and bonuses to the defendant divisional sales manager on the basis that they were properly due to him as a consequence of the submission of certain proposals for insurance that the plaintiff believed to be authentic. In fact, the proposals had been procured fraudulently (though not by the defendant), and so the plaintiff had paid under a mistake of fact. Clarke J held that the plaintiff had a prima facie right to restitution, but that the defendant had made out the defence of good consideration because the money represented payment for the performance of his duties as divisional sales manager. Clarke J said:[26]

> In this case I have no hesitation in concluding that consideration did move from the defendant and that the claim against him should fail. There is no dispute that he worked diligently, and for long hours, for his employer and, in that sense, provided real consideration for his remuneration. The fact that he was unwittingly servicing rogues is not to the point. Nor is it pertinent that the employer did not receive genuine proposals.

In other words, the fact that value had moved from the defendant to the plaintiff in exchange for the payments was sufficient to make out a defence to the claim. That was so despite the defendant having no contractual right to the payments.

(b) *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd*[27] is another example. The parties entered into a lease agreement, but the landlord did not provide a statutory disclosure statement for some years. The consequence of that failure was that, under the statute, the tenant was not liable to pay rent during that period. The tenant, having paid rent in ignorance of its rights, claimed restitution on the basis that it had made the payments under a mistake. The Victorian Court of Appeal held that the landlord had a defence of good consideration to the claim. Chernov JA referred to "valuable consideration" amounting to a defence to a claim for money paid under a mistake,[28] and said that "the tenant here received good consideration for the

---

24 See also *Meriton* (2011) 80 NSWLR 541 at [172] (Pepper J).
25 (1987) 8 NSWLR 585 (***Walsh***).
26 *Walsh* (1987) 8 NSWLR 585 at 596.
27 [2006] VSCA 6 (***Ovidio***).
28 *Ovidio* [2006] VSCA 6 at [13].

money it paid, namely, exclusive possession of the premises that were obviously of use and benefit to it".[29] Nettle JA said that "the [tenant] got the benefit of the use and occupation of the demised premises in return for the rent which it paid".[30] The defence succeeded despite the landlord having no right to the rent.

(c) In *Adrenaline Pty Ltd v Bathurst Regional Council*,[31] a motor-racing promoter entered into an agreement with a local council to hire a racing circuit to hold an annual event over five years. It became apparent that the council had acted beyond power in setting the fees, and the promoter sought restitution on the basis that it had made the payments under a mistake. The New South Wales Court of Appeal held that the council had a defence of good consideration to the claim. Leeming JA (with whom Macfarlan and Ward JJA agreed) held that: "It would *create* unjust enrichment were [the promoter] having enjoyed the benefit of the … circuit over five years to recover the fees it agreed to pay and did pay in order to secure that benefit" … [The promoter] obtained good consideration for the fees it paid each year."[32]

21. The same focus on the defendant providing value to the plaintiff in exchange for the payment can be seen in the Privy Council's decision in *DD Growth Premium 2X Fund (in liquidation) v RMF Market Neutral Strategies (Master) Ltd*,[33] where Lord Sumption and Lord Briggs said that "[i]t is fundamental that a payment cannot amount to enrichment if it was made for full consideration". It can also be seen in the Supreme Court of Canada's decision in *BMP Global Distribution Inc v Bank of Nova Scotia*,[34] where Deschamps J, applying the good consideration defence set out in *Simms*, explained that the payee had given no consideration because of "the trial judge's finding of fact that [the payee] gave no value for the [cheque]".

22. Here, as in the cases discussed above, the Appellant (in good faith) provided value in exchange for the payments received from the Respondents. It should therefore have a defence. In cases involving contractual bargains, it is the bargain that demonstrates that the benefit (or value) in question was received in exchange for the payment. Where the

---

29 *Ovidio* [2006] VSCA 6 at [21].
30 *Ovidio* [2006] VSCA 6 at [33].
31 (2015) 97 NSWLR 207.
32 *Adrenaline* (2015) 97 NSWLR 207 at [84], [86].
33 [2017] UKPC 36 (***DD Growth***) at [62].
34 [2009] 1 SCR 504 at [61].

payment is made, and the benefit conferred, under a statutory scheme, the statute plays that role. Here, the regulations show that the services were provided in exchange for the special rates or charges. They provide that the overall plan must identify both the land on which the special charges or rates will be levied and the services to be provided.[35] And they provide that where there are unspent special rates or charges after the overall plan is carried out or cancelled, they must be returned.[36]

23. The Respondents submit that the above analysis of the defence of good consideration is flawed. They submit that in the defence, "consideration" bears the same meaning as in restitutionary claims for (total) failure of consideration: the state of affairs contemplated as the basis or reason for the payment (RS [14]–[15], [17]). They argue that the prima facie obligation on the recipient of a mistaken payment to make restitution can be displaced by showing that the state of affairs contemplated as the basis or the reason for the payment has not failed. But for the reasons given below, that cannot be correct.

24. If the Respondents were correct, a plaintiff would not be able to recover a mistaken payment unless they could *also* show that the money was paid on a consideration that had failed. But that would be to conflate and collapse two independent qualifying or vitiating factors, each of which is sufficient to give rise to a prima facie obligation to make restitution. In *Moses v Macferlan*[37] itself, Lord Mansfield said that the action for money had and received lay "for money paid by mistake; or upon a consideration which happens to fail". And in *Equuscorp Pty Ltd v Haxton*,[38] French CJ, Crennan, and Kiefel JJ recognised that mistake and failure of consideration were independent qualifying or vitiating factors.

25. When *David Securities* was decided, there was a question whether "the true basal principle which enables recovery of money paid under a mistake … is 'failure of consideration'".[39] But it is now clear that mistake and failure of consideration are independent—

---

35 *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld), reg 28; *Local Government Regulation 2012* (Qld), reg 94.

36 *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld), regs 30, 31; *Local Government Regulation 2012* (Qld), regs 96, 97.

37 (1760) 2 Burr 1005 at 1012; 97 ER 676 at 681.

38 (2012) 246 CLR 498 at [30]. See also *David Securities* (1992) 175 CLR 353 at 388 (Brennan J) ("[p]ayments made under a mistake and payments made for a consideration that has totally failed are distinct categories").

39 *David Securities* (1992) 175 CLR 353 at 380 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ), quoting Butler, "Mistaken Payments, Change of Position and Restitution" in Finn (ed), *Essays on Restitution* (The Law Book Company Limited, 1990) 87 at 88.

mistake concerns the *vitiation* of consent, while failure of consideration concerns the *qualification* of consent. As a majority of the Supreme Court of the United Kingdom recently said: "[w]hilst failure of [consideration] ranks alongside the unjust factors of mistake, duress and undue influence as a factor negativing consent, it differs in that it is concerned with qualification of consent, as opposed to impaired or vitiated consent".[40]

26. The effect of the Respondents' analysis of the defence would be to conflate and collapse mistake and failure of consideration. The seeds of this are already evident in *Ovidio*. Chernov JA said that "[t]he question of what might amount to a good defence of consideration to a restitutionary claim was … considered in *Roxborough*" and that the respondent wholesaler's defence in that case was that "it had provided good consideration in the form of provision of tobacco products, or an agreement to do so".[41] But *Roxborough* (discussed below) was not a claim for restitution of a mistaken payment, Emmett J at first instance having decided that the retailers did not make the payments under a causative mistake.[42] Nor was *Roxborough* a case about the defence of good consideration.

27. Nettle JA carried the reasoning to its logical conclusion and held that a claim for restitution of a mistaken payment could not succeed unless the plaintiff *also* established that the money had been paid on a consideration that had failed:[43]

> In seeking to recover the money which the respondent paid as rent pursuant to the lease, the respondent in effect invokes the reasoning in *David Securities* and *Roxborough v Rothmans of Pall Mall*. It claims that it paid rent under the lease in the mistaken belief that it was bound in law to pay it, and therefore, because of the mistake, it is entitled now to recover it. But, as has been seen, in order to succeed in that claim the respondent must establish that it paid the rent as upon a total failure of consideration.

That would make the qualifying or vitiating factor of mistake otiose. That cannot be correct, but it is the effect of the Respondents' analysis.

28. The comments in *Ovidio*, and the Respondents' submission, illustrate the danger in not keeping two meanings of "consideration" separate.[44] In the defence of good

---

40 *Barton v Gwyn-Jones* [2023] 2 WLR 269 (***Barton***) at [78] (Lady Rose; Lord Briggs and Lord Stephens agreeing), quoting *Dargamo Holdings Limited v Avonwick Holdings Limited* [2021] EWCA Civ 1149 (***Dargamo***) at [79] (Carr LJ; Sir Timothy Lloyd and Asplin LJ agreeing).

41 *Ovidio* [2006] VSCA 6 at [17].

42 *Roxborough v Rothmans of Pall Mall Australia Ltd* (1999) 161 ALR 253 at [71].

43 *Ovidio* [2006] VSCA 6 at [29].

44 The conflation also appears in RS [29]–[30].

consideration, "consideration" means the value provided by the recipient of the payment in exchange for the payment. In failure of consideration, "consideration" means the state of affairs contemplated as the basis or reason for the payment. Brennan J accepted this distinction in *David Securities*.[45] Understood in this way, the reason the defence of good consideration succeeded in *Ovidio* was that the landlord had provided value to the tenant (exclusive possession) in exchange for the rent. It was *not* that the tenant had paid the rent on a consideration that had not failed.

29. The Respondents rely on the fact that the Appellant was required by statute to perform the works (RS [24], [39]). But the fact that the value received in return for the payment was provided pursuant to a legal obligation is no bar to the good consideration defence. If it was, the defence would have failed in *Ovidio*, where the landlord was contractually obliged to provide exclusive possession of the premises. After noting that the tenant received good consideration in the form of that exclusive possession, Chernov JA said: "[I]t it is irrelevant that the landlord might have been under an obligation to provide the premises under the lease. The question is not whether the landlord was under such an obligation, but rather whether the tenant gained or accepted a *benefit* in the form of exclusive use of the premises (as a *quid pro quo* for the payments in question)."[46]

30. The Respondents submit that the defence should not be recognised because Australian law does not recognise a general right to remuneration for work that increases the value of another's property (RS [15], [25], [36]). There are **two** responses to this.

31. **First**, even if the rule means that the Appellant does not have freestanding restitutionary claims against the Respondents, that does not necessarily rule out a defence. Broader considerations may be taken into account when formulating defences.[47] *Greenwood v Bennett*[48] is an example. H purchased a damaged car which, unbeknownst to him, had been stolen from B. H spent money on labour and materials to repair the car. In interpleader

---

45 *David Securities* (1992) 175 CLR 353 at 390 (Brennan J). One qualification is needed: there is no need for the consideration (in the defence) to have been provided at or before the payment. It is sufficient that it is provided after the payment, as long as the consideration is given in *exchange* for the payment.

46 *Ovidio* [2006] VSCA 6 at [21].

47 See, eg, *Equuscorp* (2012) 246 CLR 498 at [114] (Gummow and Bell JJ) ("the degree of flexibility in fashioning the just measure of recovery on an action such as that for money had and received, given that … the action is a liberal action in the nature of a bill in equity"); Gummow, "*Moses v Macferlan*: 250 years on" (2010) 84 ALJ 756 at 760.

48 [1973] QB 195.

proceedings between B and H, the County Court made an unconditional order for specific delivery of the car in favour of B. The Court of Appeal held that the order for specific delivery should have been conditional on B compensating H for the money spent improving the car. B objected on the basis of the rule referred to above, and the majority held that no freestanding claim was possible, but that did not rule out a condition on B's right of recovery.[49] Nor should it rule out a defence in this case.

32. **Second**, the rule is "not unqualified".[50] Underlying it are the principles that (i) "a person should not be made worse off by being required to pay for unrequested actions of others that the person might not have wanted" and (ii) "the law should not encourage the officious creation of liabilities".[51] It is appropriate to recognise an exception to the rule where those underlying principles have little force.[52] That is so in this type of case. As to the first principle, the lack of a request is irrelevant because statute authorises the provision of the services without a request, and in any event the rate-payer will not be made worse off by the defence because the money will have been spent for *their benefit*. And as to the second principle, the defence will not encourage the officious creation of liabilities. It will only apply where public authorities attempt to apply a statutory scheme in good faith, but fail to comply with a procedural requirement.

33. Finally, the defence of good consideration as analysed above is consistent with the "counter-restitution principle" in English law, which requires a claimant to give credit for benefits "which are sufficiently closely connected with the benefits provided to the defendant that justice requires him to do so".[53] The English Court of Appeal has recently explained that one possible basis for that principle (depending on the facts of the case in which it arises) is that it is "a condition of the claimant recovering in unjust enrichment for benefits conferred that he must give credit for benefits received in exchange".[54] The analysis above is also consistent with the *Restatement Third, Restitution and Unjust Enrichment*.

---

49 See also *Plan B Trustees Ltd v Parker [No 2]* [2013] WASC 216 at [87]–[91] (Edelman J); Edelman and Bant at 365–366.

50 *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 (***Lumbers***) at [80] (Gummow, Hayne, Crennan, and Kiefel JJ).

51 *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 (***Brewster***) at [194] (Edelman J).

52 *Brewster* (2019) 269 CLR 574 at [195] (Edelman J).

53 *School Facility Management Ltd v Governing Body of Christ the King College* [2021] 1 WLR 6129 (***School Facility Management***) at [83] (Popplewell LJ; Dingemans and Nicola Davies LJJ agreeing). See also *Equuscorp* (2012) 246 CLR 498 at [114] (Gummow and Bell JJ).

54 *School Facility Management* [2021] 1 WLR 6129 at [34](4), [78] (Popplewell LJ; Dingemans and Nicola Davies LJJ agreeing).

It recognises a defence of "Recipient Not Unjustly Enriched", which applies where, although "the claimant has conferred a benefit that results in the unjust enrichment of the recipient when viewed in isolation", the recipient can show that "some or all of the benefit conferred did not unjustly enrich the recipient when the challenged transaction is viewed in the context of the parties' further obligations to each other".[55]

Issue 3: Do the Respondents have alternative claims under *Woolwich*?

34. In *Woolwich*, the House of Lords held that "money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right"[56] (***Woolwich* principle**). The *Woolwich* principle has not yet been adopted in Australia.

35. The *Woolwich* principle should not be adopted in Australia, for **two** reasons:

    (a) **First**, the *Woolwich* principle is unnecessary in Australia because money paid to a public authority pursuant to an ultra vires demand can be recovered through several existing claims. In particular, almost all such payments are recoverable as payments made on a consideration that has failed. *Woolwich* itself could, in light of later developments in the law of failure of consideration, today be decided on that basis.

    (b) **Second**, it would not be a principled development of the common law. In Australia, recovery depends on a recognised qualifying or vitiating factor, but none was identified in *Woolwich*. In any event, development of new factors must occur by the ordinary processes of incremental development. The step taken in *Woolwich* was anything but incremental, and raises questions best left to the legislature.

Woolwich principle is unnecessary in Australian law

36. In *Woolwich*, Lord Goff spoke of "[c]ommon justice" requiring that tax paid in response to an ultra vires demand be repaid.[57] In 1992, when that case was decided, the English law of restitution did not provide an adequate answer to that "simple call of justice".[58]

---

55 American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment* (2011) at §62. The defence applies where "the claimant alleges facts supporting a prima facie claim in unjust enrichment—typically a payment by mistake—but the recipient is able to show that the resulting enrichment is not unjust, in view of the larger transactional context within which the benefit has been conferred" (comment (a)).

56 *Woolwich* [1993] 1 AC 70 at 177 (Lord Goff).

57 *Woolwich* [1993] 1 AC 70 at 172.

58 *Woolwich* [1993] 1 AC 70 at 172.

There was no right to restitution of money paid under a mistake of law: that rule was not discarded until *Kleinwort Benson Ltd v Lincoln City Council*[59] was decided in 1998.[60] And the law relating to failure of consideration was under-developed, *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[61] and *Roxborough v Rothmans of Pall Mall*[62] not being decided until 1996 and 2001.

37. The position in Australia in 2023 is very different. There are (at least) three established categories of claim by which money paid to a public authority pursuant to an ultra vires demand can be recovered: (i) restitution of money paid under a mistake of fact or law, (ii) restitution of money paid under improper pressure, and (iii) restitution of money paid on a consideration that has failed. In particular, the cases and commentary on *Woolwich* have not appreciated the breadth of failure of consideration in this context. In light of developments since *Woolwich*, almost all payments to public authorities pursuant to ultra vires demands will be recoverable as having been made on a consideration that has failed.

38. *Mistake*. Since this Court's decision in *David Securities Pty Ltd v Commonwealth Bank of Australia*,[63] it has been clear that there is a prima facie entitlement to recover money paid when the payment has been caused by a mistake of fact or law. "Mistake" includes not only a "positive belief in the existence of something which does not exist", but also "sheer ignorance of something relevant to the transaction in hand".[64]

39. It has also been clear since this Court's decision in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*[65] that the same principles apply in respect of overpayments of tax or tax paid under an invalid law.[66] In that case, some of the payments were made in ignorance of legislative amendments, and therefore under a mistake of law.[67] Brennan J (with whom Toohey and McHugh JJ agreed) said that these payments were

---

59 [1999] 2 AC 349.

60 *David Securities* (1992) 175 CLR 353, which held that the rule did not form part of the common law of Australia, was not decided until several months after *Woolwich*.

61 [1996] AC 669 (***Westdeutsche***).

62 (2001) 208 CLR 516.

63 (1992) 175 CLR 353 at 378–379 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ).

64 *David Securities* (1992) 175 CLR 353 at 369, 374 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ).

65 (1994) 182 CLR 51.

66 See also *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at [43] (McHugh, Gummow, and Hayne JJ). This was not made clear in English law until *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558. See *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] 2 AC 337 at [165]–[168] (Lord Sumption).

67 Payments in categories (i) and (ii)(b) of Brennan J's categorization (see at 83) and categories 1(b) and 3 of Mason CJ's categorization (see at 63).

"recoverable under the general law of restitution".[68] Mason CJ was of the same view.[69]

40. *Improper pressure*. Money may be recovered where it has been paid under improper pressure. This includes money paid under duress or in response to a demand made *colore officii* (when a public officer demands and is paid money they are not entitled to, or more than they are entitled to, for the performance of their public duty).[70] These principles will apply where the legislation in question attaches consequences to non-payment beyond a liability to be sued,[71] at least where there is evidence of actual threat or coercion.[72]

41. *Failure of consideration*. Money may be recovered where it has been paid on a consideration that has (totally) failed. In this context, "consideration" means "the state of affairs contemplated as the basis or reason for the payment".[73] This Court has said that the concept "embraces payment for a purpose which has failed as, for example, where a condition has not been fulfilled, or a contemplated state of affairs has disappeared".[74] And this Court has approved Professor Birks's statement that failure of the consideration for a payment means "that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself".[75] It may be that "failure of basis" or "failure of condition" is a more appropriate label.[76]

42. In almost all cases involving money paid to a public authority pursuant to an ultra vires demand, the money will have been paid on the basis that the payment is due under, and

---

68 *Royal Insurance* (1994) 182 CLR 51 at 89.

69 *Royal Insurance* (1994) 182 CLR 51 at 67.

70 See, eg, *Sargood Brothers v Commonwealth* (1910) 11 CLR 258 (***Sargood***); *Mason v New South Wales* (1959) 102 CLR 108 (***Mason***).

71 *Mason* (1959) 102 CLR 108 at 126–127 (Kitto J), 144–145 (Windeyer J).

72 *Mason* (1959) 102 CLR 108 at 117 (Dixon CJ), 123–124 (Kitto J), 129–130 (Taylor J), 133 (Menzies J), 144–146 (Windeyer J). Notwithstanding their narrow view of the legal principle, each member of the majority found duress on the facts, despite scant evidence beyond the mere fact that the Act was being administered in its usual course. The additional requirement goes little further than Kitto J's conclusion that improper pressure may be identified by reference to the statute itself.

73 *David Securities* (1992) 175 CLR 353 at 382 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ).

74 *Roxborough* (2001) 208 CLR 516 at [16] (Gleeson CJ, Gaudron, and Hayne JJ).

75 Birks, *An Introduction to the Law of Restitution* (revised edition, 1989) at 223. See *David Securities* (1992) 175 CLR 353 at 382 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ); *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 389 (McHugh J); *Roxborough* (2001) 208 CLR 516 at [16] (Gleeson CJ, Gaudron, and Hayne JJ), [104] (Gummow J); *Equuscorp* (2012) 246 CLR 498 at [31] (French CJ, Crennan, and Kiefel JJ); *Mann* (2019) 267 CLR 560 at [168] (Nettle, Gordon, and Edelman JJ).

76 *Mann* (2019) 267 CLR 560 at [173] (Nettle, Gordon, and Edelman JJ). See also *Barnes v Eastenders Cash & Carry plc* [2015] AC 1 at [103]–[107] (Lord Toulson; Baroness Hale, Lord Kerr, Lord Wilson, and Lord Hughes agreeing); *Dargamo* [2021] EWCA Civ 1149 at [77]–[80] (Carr LJ; Sir Timothy Lloyd and Asplin LJ agreeing); *Barton* [2023] 2 WLR 269 at [78]–[79] (Lady Rose; Lord Briggs and Lord Stephens agreeing).

operates to discharge, a valid legal obligation.[77] That basis fails from the outset because the money is not due under a valid legal obligation, and restitution should follow. The few cases where the money will not be recoverable in this way are those where the plaintiff makes the payment to close the transaction or chooses to accept the risk of the demand (or obligation to pay) being ultra vires.[78] In these cases the plaintiff chooses to make payment irrespective of the validity or invalidity of the demand (or obligation to pay), and the money is therefore not paid on the basis that it is due under a valid legal obligation. It therefore (justifiably) cannot be recovered.

43. This Court's decision in *Roxborough v Rothmans of Pall Mall*[79] is an example of money being recovered on the basis set out above, albeit in the context of a claim between private citizens. Retailers purchased cigarettes from a wholesaler for a price which included a component referable to a tax payable by the wholesaler to the New South Wales government. That component of the price was paid on the basis that the wholesaler would be under a valid legal obligation to pay the tax. When this Court held the legislation unconstitutional, it became clear that that basis had failed from the outset, and restitution of that component of the price followed. Importantly, the claim succeeded despite a finding that the payments were not made under a causative mistake.

44. The same result would have followed had the wholesaler paid the tax to the New South Wales government before the legislation was held unconstitutional and then sought to recover it from the government. The wholesaler would have paid the tax on the basis that it was due under, and would operate to discharge, a valid legal obligation. When this Court declared the legislation unconstitutional, it would have become clear that the basis had failed from the outset, and restitution would have followed.

45. Were *Woolwich* to be decided today (in Australia or England), it could be argued and decided as a failure of consideration case.[80] Woolwich paid on the basis that the payment was due under, and would operate to discharge, a valid legal obligation. The fact that it paid under protest and despite its belief that the relevant regulations were ultra vires may

---

77 See Jackman, *The Varieties of Restitution* (Federation Press, 2nd ed, 2017) (**Jackman**) at 97 ("the self-evident proposition that people ordinarily pay a tax only because of the assertion by the public authority that the demand for the tax is lawful, and that the payment will therefore discharge a legal liability").

78 *David Securities* (1992) 175 CLR 353 at 373–374 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ); *Woolwich* [1993] 1 AC 70 at 165 (Lord Goff).

79 (2001) 208 CLR 516.

80 See also Maher, "A New Conception of Failure of Basis" (2004) 12 *Restitution Law Review* 96 at 108–109.

have been fatal to any claim based on mistake, but it made clear that the basis for the payment was the validity of those regulations. When the House of Lords decided that the regulations were ultra vires, it became clear that the basis had failed from the outset, and restitution ought to have followed.

46. The case was not argued as a failure of consideration claim,[81] but there are hints in the speeches that it could have been decided on failure of consideration grounds.[82] Lord Goff, in summarising the "formidable argument" developed by academic lawyers that he ultimately accepted, said that "money paid to a public authority pursuant to an ultra vires demand should be repayable … on the simple ground that there was no consideration for the payment".[83] And Lord Browne-Wilkinson noted that "money paid on the footing that there is a legal demand is paid for a reason that does not exist if that demand is a nullity", and said there was a "close analogy to the right to recover money paid under a contract the consideration for which has wholly failed".[84]

47. *Woolwich* was (presumably) not argued or decided as a failure of consideration case because of the law at the time: "failure of consideration" was generally understood to mean failure of contractual counter-performance.[85] It did not become apparent until the "swaps cases"[86] that the invalidity of an obligation to pay could be a failure of consideration. But that is now clear.[87] And although those cases concerned contractual obligations, the same analysis applies to statutory obligations to pay money to public authorities.[88]

48. The existing restitutionary claims are thus sufficient to allow the recovery of money paid to a public authority pursuant to an ultra vires demand, and adoption of the *Woolwich* principle is unnecessary. The Respondents have not identified any Australian case where

---

81 But see the hints in the argument for Woolwich: *Woolwich* [1993] 1 AC 70 at 145.

82 See also *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 at 959–960 (Dillon LJ); Jackman at 96 ("[t]he principal strand of reasoning in the majority judgments … is that restitution for an unlawful exaction is available on the ground of total failure of consideration").

83 *Woolwich* [1993] 1 AC 70 at 166.

84 *Woolwich* [1993] 1 AC 70 at 197. See also 198 ("The money was demanded and paid for tax, yet no tax was due: there was a payment for no consideration.").

85 *Fibrosa Spolka Akcyjna v Fairburn Lawson Combe Barbour Ltd* [1943] AC 32 at 48 (Viscount Simon LC).

86 For example, *Westdeutsche* [1996] AC 669 and *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215.

87 *DD Growth* [2017] UKPC 36 at [60] (Lord Sumption and Lord Briggs; Lord Carnwath agreeing). See also *Equuscorp* (2012) 246 CLR 498 at [33] (French CJ, Crennan, and Kiefel JJ) (unenforceability of contractual obligation may amount to failure of consideration).

88 Mitchell, Mitchell, and Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 10th ed, 2022) (**Goff & Jones**) at [13-43].

recovery was denied on orthodox grounds but would have been allowed under the *Woolwich* principle. What is more, the fact that it has taken over 30 years for this issue to reach this Court itself suggests that there is no pressing need for adoption of the *Woolwich* principle. Finally, this case itself does not demonstrate any such need: the Respondents wish to invoke the *Woolwich* principle not because they would otherwise have no right of recovery, but to (attempt to) disable the Appellant from relying on a defence.

49. The Respondents argue that there are practical reasons to adopt the *Woolwich* principle (RS [53]). They say that its adoption would obviate the need for a plaintiff to plead and prove mistake of law, which would be beneficial in class actions. But that an existing claim may not be well-suited for class actions is not a reason to recognise a new claim.[89] The Respondents then say that the *Woolwich* principle would apply in cases of retrospective amendment. But such a claim succeeded on traditional grounds in *Royal Insurance*,[90] on the basis that the amending legislation created a right of recovery[91] or that the payments were made under a mistake.[92] Finally, the Respondents say that a claim under the *Woolwich* principle might have a different limitation period or different defences. But the claim would be subject to the same limitation period as other restitutionary claims.[93] And the only defence to which a *Woolwich* claim is (possibly) not subject, change of position, is also unlikely to be a defence to failure of consideration claims.[94]

Adoption of Woolwich would not be a principled development of the common law

50. In Australian law (as in English law), recovery of restitution for unjust enrichment depends on the existence of a recognised "qualifying or vitiating factor".[95] But Lord Goff did not identify any such factor in *Woolwich*. That may explain why subsequent cases and commentary typically refer to the "*Woolwich* principle" and formulate it in a way that

---

89 And in any event, this proceeding involved a class action and mistake-of-law claims.

90 Payments in category (ii)(a) of Brennan J's categorization (see at 83) and category 1(a) of Mason CJ's categorization (see at 63).

91 *Royal Insurance* (1994) 182 CLR 51 at 89–90 (Brennan J; Toohey and McHugh JJ agreeing).

92 *Royal Insurance* (1994) 182 CLR 51 at 67 (Mason CJ).

93 In Queensland, s 10 of the *Limitation of Actions Act 1974* (Qld).

94 See Goff & Jones at [27-68]–[27-70].

95 *David Securities* (1992) 175 CLR 353 at 379 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [150] (the Court); *Equuscorp* (2012) 246 CLR 498 at [30] (French CJ, Crennan, and Kiefel JJ); *Hills* (2014) 253 CLR 560 at [20] (French CJ), [73] (Hayne, Crennan, Kiefel, Bell, and Keane JJ); *Mann* (2019) 267 CLR 560 at [168] (Nettle, Gordon, and Edelman JJ).

"does no more than restate the conclusion reached by their Lordships in that case".[96] Subsequent cases and commentary have focused on the constitutional principle of "no taxation without Parliament", but Lord Goff did not base his reasoning on this principle; he only deployed it as a secondary argument.[97] And the other members of the majority, Lord Browne-Wilkinson and Lord Slynn, did not mention it at all.[98]

51. In any event, such a qualifying or vitiating factor, which applies only against public authorities, is inconsistent with this Court's acceptance that 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.[99] It is also inconsistent with this Court's decision in *Mason v New South Wales*,[100] which is authority for the proposition that, to recover such payments, it is not sufficient to show that the demand was ultra vires.[101] It also sits uncomfortably with the fact that this Court is yet to recognise any distinct "policy-motivated" qualifying or vitiating factors.[102]

52. While the list of qualifying or vitiating factors is not closed, development of new factors must occur by the "ordinary processes of legal reasoning":[103] by incremental development, by analogy with the existing law, and by reference to the general considerations referred to in *Moses v Macferlan*.[104] But that is not how the House of Lords proceeded in *Woolwich*. The development was anything but incremental. Lord Goff acknowledged that the question was whether the House should "reformulate the law" in accordance with a principle of justice he identified,[105] and that Woolwich's submission was that the House

---

96 Webb, "Reasons for Restitution" in Elliott, Häcker, and Mitchell, *Restitution of Overpaid Tax* (Hart, 2013) 93 (**Webb**) at 96.

97 Webb at 97–100.

98 Though Lord Browne-Wilkinson also agreed with Lord Goff's reasons.

99 *Hills* (2014) 253 CLR 560 at [19] (French CJ). See also *Mason* (1959) 102 CLR 108 at 117 (Dixon CJ), 125 (Kitto J); *Roxborough* (2001) 208 CLR 516 at [29] (Gleeson CJ, Gaudron, and Hayne JJ).

100 (1959) 102 CLR 108.

101 *Esso Australia Resources Ltd v Gas and Fuel Corporation of Victoria* [1993] 2 VR 99; Mason & Carter at [2023].

102 See also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [150] (the Court) ("the unjust factors are commonly concerned with vitiation or qualification of the intention of a claimant").

103 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 257 (Deane J).

104 (1760) 2 Burr 1005; 97 ER 676. See *Roxborough* (2001) 208 CLR 516 at [95] (Gummow J); *Lumbers* (2008) 232 CLR 635 at [85]–[86] (Gummow, Hayne, Crennan, and Kiefel JJ); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at [89] (the Court); *Equuscorp* (2012) 246 CLR 498 at [30] (French CJ, Crennan, and Kiefel JJ); *Mann* (2019) 267 CLR 560 at [213] (Nettle, Gordon, and Edelman JJ).

105 *Woolwich* [1993] 1 AC 70 at 168.

should "despite the authorities … reformulate the law".[106] Lord Jauncey spoke of "making new law",[107] and Lord Keith noted that "[t]o give effect to Woolwich's proposition would … amount to a very far reaching exercise of judicial legislation".[108]

53. The quasi-legislative nature of the step taken in *Woolwich* is also demonstrated by the myriad questions that will have to be answered if it is adopted in Australia. Does the principle extend beyond ultra vires laws to erroneous constructions of valid laws? Does it extend to levies other than taxes, such as licence fees? Does it require a demand by the public authority? Does it apply where tax is self-assessed? What public authorities are subject to the principle? Does it extend to non-governmental bodies standing in a position of public power or duty?[109] Is there a defence where a claim (or particular class of claims) would cause fiscal disruption to the government?[110] Such questions are best left to the legislature. As Lord Keith said in *Woolwich*, "formulation of the precise grounds upon which overpayments of tax ought to be recoverable and of any exceptions to the right of recovery, may involve nice considerations of policy which are properly the province of Parliament and are not suitable for consideration by the courts".[111]

Issue 4: Does the Appellant have a defence to the Respondents' claims under *Woolwich*?

54. The Respondents submit that, if the *Woolwich* principle is adopted in Australia, the Appellant has no defence to their claims (RS [51], [63]–[64]). They rely on first instance English authority that the change of position defence is not available against a *Woolwich* claim because it would stultify the policy reason for ordering restitution.[112] But even if that is correct in Australian law, the defence of good consideration is different.[113]

---

106 *Woolwich* [1993] 1 AC 70 at 171. See also 196 ("reinterpret the principles lying behind the authorities"); *Royal Insurance* (1994) 182 CLR 51 at 68 ("reformulated the principles").

107 *Woolwich* [1993] 1 AC 70 at 193, 195.

108 *Woolwich* [1993] 1 AC 70 at 161.

109 Compare the debate about *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] QB 815.

110 See, eg, *Sargood* (1910) 11 CLR 258 at 303 (Isaacs J); *Thiess v Collector of Customs* (2014) 250 CLR 664 at [31]–[32] (the Court). Compare *Royal Insurance* (1994) 182 CLR 51 at 68 (Mason CJ).

111 *Woolwich* [1993] 1 AC 70 at 161. See also 196 (Lord Jauncey) ("I mention these matters because they show that to accept the Woolwich principle in one or other of its forms would appear to involve a choice of what the law should be rather than a decision as to what it is.").

112 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2014] EWHC 4302 (Ch) at [309]–[315] (Henderson J).

113 See also *Stiassny v Commissioner of Inland Revenue* [2013] 1 NZLR 453 at [67] (Supreme Court of New Zealand accepted that good consideration defence was available against a *Woolwich* claim). If good consideration operates as a denial of an element of the plaintiff's claim rather than as a defence, the argument that it applies to *Woolwich* claims is even stronger.

55. **First**, the change of position defence is entirely defendant-sided. The good consideration defence is different: it is necessarily linked to both the plaintiff (who has received the consideration) and the defendant (who has given the consideration). It is therefore a stronger reason for denying the prima facie right to restitution. It affects the justice of the plaintiff's claim, rather than simply protecting the defendant against injustice.

56. **Second**, were change of position to be allowed as a defence to a *Woolwich* claim, the rate-payer would be forced to bear the burden of the public authority's mistake. But were good consideration to be allowed as a defence to a *Woolwich* claim, the rate-payer would not bear any burden. They would simply be denied the windfall they would enjoy—at the public authority's expense and, indirectly, at the public's expense—if the defence was not open to the public authority.[114]

57. **Third**, this issue arises in the limited class of case where, as a result of a good faith attempt to invoke a statutory scheme, the rate-payer has paid money to the public authority without an obligation to do so, and has received a benefit from the public authority in exchange. If the public authority is denied the defence of good consideration, the rate-payer will be able to use the *Woolwich* principle to obtain a benefit from the public authority—and, indirectly, from the public—for nothing. That should not be permitted.[115]

PART V: Time estimate

58. It is estimated that Queensland will require 20 minutes for oral argument.

Dated: 23 June 2023

. . . . . .
G J D Del Villar
Solicitor-General for Queensland
Telephone: 07 3175 4650
Facsimile: 07 3175 4666
solicitor.general@justice.qld.gov.au

. . . . . .
Felicity Nagorcka
Counsel for the Attorney-General for Queensland
Telephone: 07 3031 5616
Facsimile: 07 3031 5605
felicity.nagorcka@crownlaw.qld.gov.au

. . . . . .
Mohammud Jaamae Hafeez-Baig
Counsel for the Attorney-General for Queensland
Telephone: 07 3008 3927
jaamae@level27chambers.com.au

114 See also Mason & Carter at [2041].
115 Particularly where the irregularity is procedural only.

Annexure 1

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. 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

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Statutes and Statutory Instruments referred to in the submissions

Pursuant to *Practice Direction No. 1 of 2019*, Queensland sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
1.	*Limitation of Actions Act 1974* (Qld)	Current	s 10
2.	*Local Government Act 2009* (Qld)	Current	ss 91, 92, 94
3.	*Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld)	Reprint No. 2B (As in force on 1 July 2012)	regs 28, 30, 31
4.	*Local Government Regulation 2012* (Qld)	Reprint No. 1 (As in force on 14 December 2012)	regs 94, 96, 97
5.	*Local Government Regulation 2012* (Qld)	Current as at 5 December 2014	regs 94, 96, 97