HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 30 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 27E - Reply
Filing party:	Appellant
Date filed:	30 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

BETWEEN:

Redland City Council
Appellant

and

John Michael Kozik
First Respondent

and

Simon John Akero
Second Respondent

and

Sarah Akero
Third Respondent

and

Neil Robert Collier
Fourth Respondent

APPELLANT'S REPLY

PART I: PUBLICATION

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

PART II: REPLY

2. The Respondents characterise the effect of the Appellant's argument as being to permit a public authority to retain the benefit of *ultra vires* taxation on the basis only that the money had been spent for the ostensible purpose for which it was collected: RS[10]. That is to misstate it. That the funds were spent for the purpose for which they were collected is a necessary (but not sufficient) condition for the defence of value received. The defence operates here because the special rates or charges were ones permitted by statute to be imposed on those who specially benefitted, they were in fact levied on such persons (there being no challenge by the Respondents that they specially benefitted) and spent accordingly. Crucially, the Respondents make no reference to s 92(3) of the *Local Government Act 2009* (Qld) (**LGA**) in their denial of the defence.

3. The Respondents point to the Appellant's statutory functions to provide the works and undertake the services as somehow disentitling it to a restitutionary defence, by saying that the Appellant led no evidence to show that, without the levies, the works and services would not have been carried out: RS[9], [24]. However, the functions of the Appellant must be seen in light also of its *powers*, and specifically the legislative intent that those who benefit from the exercise of a local government's functions to a greater degree than the general body of ratepayers can be required to bear the cost.

4. At a more fundamental level, the Respondents' case fixes upon an absence of voluntariness in the decision to pay, the absence of any request for the services, and the illegality in the process of the levying. To do so leaves no room for a defence to a restitutionary claim for levies wrongly imposed by public authorities. That the claimant paid under a mistaken legal obligation would, on the Respondents' argument, subsume the availability of the defence of value received: see RS[23]. Public authorities, who are amenable to restitutionary *claims*, would be kept out of *defences*, and in this sense the 'prima facie' entitlement spoken of by this Court in ***David Securities*** *Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 would become absolute.

Terminology: value received or good consideration?

5. The Appellant adopts the term 'value received' to describe the defence which it contends already subsists, but in a context which has no analogy to contract or quasi-contract: see AS[28]. To permit the terminology of 'consideration' to govern the

question of whether a *prima facie* liability to make restitution is displaced, is to treat this Court's principled formulation of that question in *David Securities* as forever tied to contractual contexts. It imports a restriction not found in the Justices' statement of principle there.

Respondents' conception of 'good consideration'

6. Central to the Respondents' case is that they did not provide 'good consideration': e.g., RS[16], [17]. Although they accept that consideration is not limited to strict contractual consideration (RS[14]), the notion is nonetheless urged as 'not synonymous with "value" or "benefit"': RS[17]. The Respondents' approach is incapable of principled extension, because the language of their posited test is inextricably linked to its quasi contractual origins. As confirmation of this, the cases upon which the Respondents rely (RS[14]-[15]) are all concerned with 'consideration' in contractual contexts.

7. The Respondents offer several reasons why the notions embedded in 'consideration' must be brought to bear upon the availability of the defence. Each, however, is satisfied here, once it is recognised that the context is public law not contract.

   a. **Respondents' contention 1**: The benefit must be contemplated as the reason for making the payment: RS[17], [28]-[30]. The special charges were included in the rates notices for the relevant landowners.[1] The provision of the works and services was in return for the payment made. The 'contemplation' here is not diluted by the fact the payment was made under compulsion: it was nevertheless referrable directly and singularly to the works and services of special benefit.

   b. **Respondents' contention 2**: The benefit must be assessed from the payer's point of view: RS[19]; see also [14]. The Respondents seek to distinguish ***Ovidio Carrideo*** *Nominees Pty Ltd v The Dog Depot Pty Ltd* [2006] VSCA 6 on the basis that the tenant obtained not simply *any* benefit, but the benefit for which it bargained. Again, the language of 'bargain' focuses on contractual consideration. Here, particular benefit to the payer is what the statute demands, thus satisfying the question of benefit. The only 'point of view' is the objective one: of a statutory purpose of special benefit, and a discharge of it.

   c. **Respondents' contention 3**: The value received must have formed the basis on which the payments were made: RS[22]. Here, the payment and the benefit are part of the same transaction. The fact the payers were obliged to make the

[1] Primary RJ[4] CAB 8; [30] CAB 13; [54] CAB 19.

payments does not weaken the direct link between payment and benefit: they are two sides of the same coin. The basis for the payment was what was actually done.

8. To say (as the Respondents do) that the consideration totally failed because their only reason for making the payments was in discharge of their legal liability to do so (RS[23]), is to ignore these matters. Whether described in terms of 'correlation' or otherwise, to put it colloquially: the Respondents got what they paid for.

9. Insofar as the Respondents contend that applying the defence of 'value received' would involve the Courts in contestable assessments of 'benefit' which are more properly for the Legislature and Executive (RS[10], [31]), that issue does not arise here. Benefit is unchallenged. The way the defence might operate in other posited factual scenarios need not be resolved.[2]

Need for a counter-restitutionary claim?

10. The Respondents point to the absence of any good counter-restitutionary basis for the Appellant to have sued for its expense in carrying out the works: RS[21], [24]-[25].

11. This point is correct, taken on its own. But it offers no answer to the application of the defence. By 'counter-restitution' the Respondents appear to mean the Appellant's ability to bring a standalone claim in restitution for the value of the services provided. No part of the formulation of the principle in *David Securities* imposes such a requirement. In *Ovidio Carrideo* the availability of counter-restitution was treated as a separate ground to the defence of good consideration.[3] And the term 'counter-restitution' was disavowed by Gummow and Bell JJ in *Equuscorp*, their Honours noting that an action for money had and received, being a liberal action in the nature of a bill in equity, allows for a degree of flexibility in the just measure of recovery.[4]

A benefit cannot be conferred against a person's will?

12. The Respondents raise as a general objection to the operation of the defence that the Appellant conferred a benefit on the Respondents without their consent, request or acquiescence: RS[25], [36]. This is another example of will-based thinking (central to

---

2 Consistently with the incremental development of the law of restitution: e.g., *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 597 [76] (Gageler J), 649 [213] (Nettle, Gordon and Edelman JJ).

3 *Ovidio Carrideo* at [21] (Chernov JA), [52] (Ashley JA); see also [47] (Nettle JA).

4 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 545 [114]. In the UK there are differing views on the juridical basis of 'counter-restitution', namely whether it operates as a cross-claim or a condition on recovery (among others): *School Facility Management Ltd v Governing Body of Christ the King College (Nos 1 & 2)* [2021] 1 WLR 6129 at 6144 [34]-[35], 6160-6162 [75]-[78] (Popplewell LJ).

the law of contract) which is no necessary part of the principle the Court is being asked to recognise.

13. The idea, expressed as a generality, that a benefit conferred by a gratuitous giver cannot be used to resist liability that the giver might otherwise have, has an attraction. But that general principle loses its persuasive force[5] where the benefit not only has a direct connection to the levies, but the statutory regime responds to the very problem of who should pay. That is, the works and services needed to be provided and undertaken. They are things for which all who specially benefit ought pay. The statutory regime enlists, in that obligation (and for the sound policy reason of avoiding free-riders), each landholder who so benefits. Denial of a restitutionary defence here means that the cost of undertaking works that benefit a particular class would be borne by a much wider one, most of whom do not have as much to gain as those with (as here) water frontages.

Adoption of *Woolwich* in Australia

14. It is not apparent that the adoption of ***Woolwich*** *Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 falls to be decided on this appeal, it being described as an 'additional' basis on which the appeal should be dismissed: RS[43]. The 'compelling practical reasons' for this Court to consider *Woolwich* now (RS[53]) are general ones unconnected to the particular circumstances of this case. It is not submitted by the Respondents that the *Woolwich* principle precludes the availability of *any* defences, such that it provides the Respondents with greater rights.

15. To the contrary, the Respondents accept that *Woolwich* may permit defences, save 'extraordinar[il]y narrow' ones: RS[64]. The concession of the availability of defences is correctly made in light of the statement by Mason CJ in *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Limited* (1994) 182 CLR 51 at 69. The policy underlying *Woolwich* (to the extent relevant)[6] does not preclude the operation of the defence of value received in the circumstances here: cf RS[63]-[64]; also [51].

16. In particular, the Respondents' reliance upon the principle of no taxation without parliamentary authority (RS[59]) does not assist. In this case, Parliament authorised the imposition of taxes in the form of special charges. The illegality in the levying of special charges resulted from a failure to comply with the procedural requirement to have an overall plan, not because of some illegality in the statute's conferral of power.

---

5 See *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at 646 [194]-[195] (Edelman J).

6 The injustice of Woolwich's situation which Lord Goff of Chieveley found motivating (see *Woolwich* at 171-172) is distinctly different from that of the Respondents here.

The Cross-Appeal: construction of the Regulations

17. The Respondents' approach to construction is flawed:

    a. it fails to confront the significance of the words 'to which the special rates or charges do not apply' in the context of a statutory regime that attaches particular importance to the land to which such charges may be applied, and it gives a strained interpretation to the ordinary meaning of those words;

    b. it does not result in an interpretation which is consistent with the Regulations as a whole;[7]

    c. it fails, at RS[75] to understand that the Majority's focus at Appeal RJ[26] (CAB 47) was upon there having been no effective *resolution*. The premise of s 32(1) of the *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld), the Majority observed, was 'that there was a special rate or charge which by the terms of a valid resolution was able to be levied on some ratepayers…';

    d. it takes no account at all of the extrinsic material, or of the provisions passed concurrently with the 2014 amendments (ie s 94(14) of the *Local Government Regulation 2012* (Qld)).

18. The construction adopted by the Majority does not defeat the purpose of the section: RS[76]. Rather, it reflects a legislative intention that there should be a statutory right of recovery for a landowner who is burdened with special rates or charges when that landowner does not fall within the class of persons prescribed by s 92(3) of the LGA. Where special rates or charges have not been validly levied in the first place, the legislation does not seek to preserve the validity of the corresponding rates notice.

Dated 30 June 2023

……..
Jonathan Horton KC
(07) 3211 3134
jhorton@qldbar.asn.au

……..
Emma Hoiberg
(07) 3052 0006
ehoiberg@qldbar.asn.au

Counsel for the Appellant

[7] Including s 28(3) of the *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) and s 94(2) of the *Local Government Regulation 2012* (Qld).