HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD AND JAGOT JJ

REDLAND CITY COUNCIL APPELLANT

AND

JOHN MICHAEL KOZIK & ORS RESPONDENTS

Redland City Council v Kozik
[2024] HCA 7
Date of Hearing: 13 & 14 September 2023
Date of Judgment: 13 March 2024
B17/2023

ORDER

1. *Appeal dismissed with costs.*

2. *Special leave is granted to the respondents to cross-appeal from the judgment of the Court of Appeal of the Supreme Court of Queensland given on 26 August 2022.*

3. *Cross-appeal dismissed with costs.*

On appeal from the Supreme Court of Queensland

Representation

J M Horton KC with E Hoiberg for the appellant (instructed by Gadens Lawyers)

J T Gleeson SC and A M Hochroth for the respondents (instructed by Shine Lawyers)

R C A Higgins SC with J G Wherrett for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

G J D del Villar KC, Solicitor-General of the State of Queensland, with F J Nagorcka and M J Hafeez-Baig for the Attorney General of the State of Queensland, intervening (instructed by Crown Law (QLD))

CATCHWORDS

Redland City Council v Kozik

Statutes – Construction – Statutory debt – Local government – Special rates and charges – Where appellant empowered by *Local Government Act 2009* (Qld) ("Act") to levy special rates and charges in respect of rateable land – Where appellant purported to levy special charges on respondents' land – Where special charges levied pursuant to invalid resolutions – Where respondents paid special charges contained in rate notices – Where regulations made pursuant to Act provided for return of special rates or charges levied on land to which special rates or charges did not apply – Whether provision in regulations providing for return of special charges applicable where resolution levying special rates invalid.

Restitution – Unjust enrichment – Defence of good consideration – Where respondents paid special charges to appellant under mistake of law – Where appellant spent funds levied on works conducted on waterways adjacent to respondents' land – Where appellant statutorily obliged to conduct relevant works – Whether appellant had defence to respondents' claim for restitution.

Words and phrases – "benefit", "failure of consideration", "good consideration", "local government", "mistake of law", "money had and received", "recipient not unjustly enriched", "regulations", "restitution", "special rates and charges", "statutory construction", "statutory debt", "unjust enrichment".

Local Government Act 2009 (Qld), ss 91, 92, 93, 94.
Local Government (Finance, Plans and Reporting) Regulation 2010 (Qld), ss 28, 32.
Local Government Regulation 2012 (Qld), ss 94, 98.

1 GAGELER CJ AND JAGOT J. In the Preface to the second edition of *Mason and Carter's Restitution Law in Australia*, the authors referred metaphorically to the "restitution common of the law" being "tended by judges". They encouraged preparedness on the part of judges to "tear out weeds, however ancient".[1] In the factual circumstances giving rise to the present case, Redland City Council ("the Council") tore out actual weeds from part of the actual common – in the form of waterways – within its local government area. The Council also dredged and removed silt, rubbish, and debris from the waterways, repaired revetment walls protecting the banks of the waterways from erosion and preventing subsidence, and improved the quality of the water in the waterways ("the works").

2 The Council was required to undertake the works in the discharge of its statutory functions as a local government authority under the *Local Government Act 2009* (Qld) ("the Local Government Act") and the *Coastal Protection and Management Act 1995* (Qld) ("the Coastal Protection and Management Act"). The Council also had a statutory entitlement to fund the works by levying "special charges" under the Local Government Act on land in its local government area which specially benefited from the works.

3 The Council in fact funded part of the overall cost of the works by purporting to levy special charges on land which adjoined the land on and waters in which the works were carried out. The Council funded the balance of the costs of the works from its general revenue.

4 After the Council had completed the works, it discovered that it had failed to comply with a condition of the prescribed process for the levying of special charges under the Local Government Act, as a consequence of which its levying of the special charges was invalid. The Council refunded to landowners so much of the total amount invalidly levied on and paid by them as remained unspent, but it refused to refund so much as it had spent on the works.

5 Representatives of a group of landowners who had paid the invalidly levied special charges ("the Landowners") brought a proceeding in the Supreme Court of Queensland against the Council for recovery of the unrefunded portion of the amount of the special charges each had paid. Their claim was put on alternative bases. First, it was put as a claim to a statutory debt due by way of refund under regulations made under the Local Government Act providing for the return of "special rates or charges incorrectly levied". Second, it was put as a common law claim in restitution for moneys paid under a mistake of law.

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1 Mason, Carter and Tolhurst, *Mason and Carter's Restitution Law in Australia*, 2nd ed (2008) at xvi.

6 By way of defence (and counterclaim for a negative declaration), the Council pleaded that the claim was defeated by each Landowner having received a "direct and comparable benefit" from the Council in connection with the payment of the special charges because of the Council undertaking the works.

7 The parties agreed on stating common questions for determination in the proceeding. The primary judge (Bradley J) made orders which answered each of those questions. The effect of the primary judge's answers was that the Landowners succeeded in their claim to a statutory debt but failed in their claim in restitution at common law.[2]

8 On appeal and cross-appeal, the Court of Appeal of the Supreme Court of Queensland (McMurdo JA and Boddice J, Callaghan J dissenting in part) substituted different answers. The effect of the answers as substituted was that the Landowners failed in their claim to a statutory debt but succeeded in their claim in restitution at common law.

9 In answering the common questions, the primary judge made three important findings. These findings were not disturbed on appeal to the Court of Appeal and were not sought to be disturbed in this Court. The first finding was that each Landowner paid the special charges in the mistaken belief that the Landowner had a legal obligation to do so.[3] The second finding was that the land of each Landowner specially benefited from the undertaking of the works.[4] One benefit was both quantifiable and quantified: an increase in the value of the land (or a prevented diminution of value) of at least one to two per cent, an amount which greatly exceeded the amount mistakenly paid by the Landowner as special charges. Another benefit was unquantified even if quantifiable: an increase in visual amenity. The third important finding was that the special benefit to each Landowner resulting from the works was sufficient to render each Landowner's land "susceptible" to the levy of special charges under the Local Government Act.[5]

10 The Council appeals by special leave from so much of the orders of the Court of Appeal as substituted answers to the effect that the Landowners succeeded in their claim in restitution at common law. For their part, the Landowners seek

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2 *Kozik v Redland City Council* [2021] QSC 233.

3 *Redland City Council v Kozik* (2022) 11 QR 524 at 542 [43].

4 *Kozik v Redland City Council* [2021] QSC 233 at [44]-[45]. See also *Redland City Council v Kozik* (2022) 11 QR 524 at 536 [18]-[20].

5 *Kozik v Redland City Council* [2021] QSC 233 at [44]. See also *Redland City Council v Kozik* (2022) 11 QR 524 at 536 [18].

special leave to cross-appeal from so much of those orders as substituted answers to the effect that the Landowners failed in their claim to a statutory debt.

11 The proposed cross-appeal depends on discrete issues of statutory construction which would render the appeal moot if resolved in the Landowners' favour. For that reason, it is appropriate for special leave to cross-appeal to be granted and for the cross-appeal to be considered in advance of the appeal. Adopting that course, we would dismiss the Landowners' cross-appeal and allow the Council's appeal.

12 We consider that the answers substituted by the Court of Appeal to the effect that the Landowners failed in their claim to a statutory debt were right. On the proper construction of the regulations made under the Local Government Act, providing for the return of special charges incorrectly levied, the Landowners are not entitled to a refund.

13 We consider that the answers substituted by the Court of Appeal to the effect that the Landowners succeeded in their claim in restitution at common law were wrong. The Council had a statutory entitlement to fund the works by the levy of special charges payable by the Landowners. The Landowners cannot recover from the Council so much of the moneys as they paid and as the Council spent undertaking the works because, to that extent, the Council was not unjustly enriched at the expense of the Landowners.

14 The Council's statutory entitlement to fund the works by the levy of special charges payable by the Landowners, and its levy and expenditure in good faith of the special charges on undertaking the works (that is, the Council honestly believing that it had complied with the statutory requirements enabling it to levy and spend the special charges on those works), is an answer to the Landowners' prima facie entitlement to recover moneys paid by them under an operative mistake of law. These circumstances would also answer any prima facie entitlement of the Landowners to recover under the principle formulated in *Woolwich Equitable Building Society v Inland Revenue Commissioners*[6] – 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" – if that principle were to be imported into the common law of Australia. Whether the *Woolwich* principle should be imported into the common law of Australia is raised by the Landowners' notice of contention and was the subject of submissions by the Attorney-General of the Commonwealth and the Attorney-General of Queensland but, given that the circumstances described

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6 [1993] AC 70 at 177.

would answer any such prima facie entitlement to restitution, that question need not be determined.

15 Before explaining our reasoning to these conclusions on the cross-appeal and on the appeal, it is appropriate to set out the applicable statutory provisions and record some background facts.

Statutory provisions

16 The statutory provisions which obliged the Council to undertake the works and which entitled the Council to fund the works by levying special charges on the Landowners' land were at all relevant times to be found in the Coastal Protection and Management Act and the Local Government Act, both of which are to be understood against the background of the *Constitution of Queensland 2001* (Qld) ("the Queensland Constitution").

17 The regulations made under the Local Government Act which prescribed the process by which those special charges could be levied in order to be valid, and which provided for the return of special charges invalidly levied, were consecutively: the *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) ("the 2010 LGR"), the *Local Government Regulation 2012* (Qld) ("the 2012 LGR"), and the *Local Government Legislation Amendment Regulation (No 1) 2014* (Qld) ("the 2014 Amendment LGR").

Queensland Constitution

18 Expressing in modern terms a principle of parliamentary government traceable to the *Bill of Rights 1688*,[7] s 65 of the Queensland Constitution provides that a "requirement to pay a tax, impost, rate or duty of the State must be authorised under an Act".

19 Section 70(1) of the Queensland Constitution provides that there "must be a system of local government in Queensland". By s 71(1), a "local government[8] is an elected body that is charged with the good rule and local government of a part of Queensland allocated to the body". By s 71(2), an Act other than the Queensland Constitution "may provide for the way in which a local government is constituted and the nature and extent of its functions and powers".

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7 (1 Will & Mar sess 2 c 2). See *Luton v Lessels* (2002) 210 CLR 333 at 366-367 [99].

8 Defined in Sch 1 to the *Acts Interpretation Act 1954* (Qld), given effect by s 36 of that Act, as, relevantly, a local government under the *Local Government Act 2009* (Qld).

Coastal Protection and Management Act

20 Section 121 of the Coastal Protection and Management Act provides that a local government must maintain and keep clean each "canal" in its area. Within the meaning of that section, a "canal" is an "artificial waterway" surrendered to the State under the Coastal Protection and Management Act (or a predecessor statute) or under the *Land Act 1994* (Qld).

Local Government Act

21 The purpose of the Local Government Act, as set out in s 3, is to provide for "the way in which a local government is constituted and the nature and extent of its responsibilities and powers" and to provide for "a system of local government in Queensland that is accountable, effective, efficient and sustainable". By s 4(1)(a) and (b), performance of responsibilities under the Local Government Act is to be in accordance with, and any action that is taken under the Local Government Act is to be taken in a way that is consistent with, the "local government principles". By s 4(2), the local government principles include: (a) "transparent and effective processes, and decision-making in the public interest"; (b) "sustainable development and management of assets and infrastructure, and delivery of effective services"; and (c) "good governance of, and by, local government".

22 Chapter 2 of the Local Government Act deals in Pt 1 with "Local governments and their constitution, responsibilities and powers". Under s 8(1), a "local government" is an "elected body that is responsible for the good rule and local government of a part of Queensland". Under s 8(2), a "part of Queensland that is governed by a local government" is called a "local government area". By s 9(1), a "local government has the power to do anything that is necessary or convenient for the good rule and local government of its local government area". By s 11, a local government is a body corporate with perpetual succession, has a common seal, and may sue and be sued in its name.

23 Chapter 4 of the Local Government Act concerns "Finances and accountability". Part 1 of Ch 4 concerns "Rates and charges". Section 91(2) provides that "[r]ates and charges" are levies that a local government imposes on land for a service, facility or activity that is supplied or undertaken by the local government or someone on behalf of the local government. Section 92(1) identifies four types of rates and charges, being general rates, special rates and charges, utility charges, and separate rates and charges. By s 92(2), "general rates" are for services, facilities and activities that are supplied or undertaken for the benefit of the community in general (rather than a particular person). Section 92(3) provides:

> "***Special rates and charges*** are for services, facilities and activities that have a special association with particular land because –

(a) the land or its occupier –

(i) specially benefits from the service, facility or activity; or

(ii) has or will have special access to the service, facility or activity; or

(b) the land is or will be used in a way that specially contributes to the need for the service, facility or activity; or

(c) the occupier of the land specially contributes to the need for the service, facility or activity."

24 Under s 93(1), rates may be levied on "rateable land". By s 93(2), "[r]ateable land" is any land or building unit, in the local government area, that is not exempted from rates.

25 Section 94 provides:

"**Power to levy rates and charges**

(1) Each local government –

(a) must levy general rates on all rateable land within the local government area; and

(b) may levy –

(i) special rates and charges; and

(ii) utility charges; and

(iii) separate rates and charges.

...

(2) A local government must decide, by resolution at the local government's budget meeting for a financial year, what rates and charges are to be levied for that financial year."

26 Section 96 provides that a regulation, made under the general regulation-making power conferred by s 270, may provide for any matter connected with rates and charges. The 2010 LGR, the 2012 LGR, and the 2014 Amendment LGR were each such a regulation.

2010 LGR

27 Chapter 2 of the 2010 LGR concerned "Rates and charges". Part 6 of Ch 2 concerned "Special rates and charges". Section 28 of the 2010 LGR provided:

"**Levying special rates or charges**

(1) This section applies if a local government decides to levy special rates or charges.

...

(3) The local government's resolution to levy special rates or charges must identify –

(a) the rateable land to which the special rates or charges apply; and

(b) the overall plan for the service, facility or activity to which the special rates or charges apply.

(4) The ***overall plan*** is a document that –

(a) describes the service, facility or activity; and

(b) identifies the rateable land to which the special rates or charges apply; and

(c) states the estimated cost of carrying out the overall plan; and

(d) states the estimated time for carrying out the overall plan.

(5) The local government must adopt the overall plan before, or at the same time as, the local government first resolves to levy the special rates or charges.

(6) Under an overall plan, special rates or charges may be levied for 1 or more years before any of the special rates or charges are spent in carrying out the overall plan.

(7) If an overall plan is for more than 1 year, the local government must also adopt an annual implementation plan for each year.

(8) An ***annual implementation plan*** for a financial year is a document setting out the actions or processes that are to be carried out in the

financial year for the service, facility or activity to which the special rates or charges apply.

(9) The local government must adopt the annual implementation plan before or at the budget meeting for each year of the period for carrying out the overall plan.

... "

28 Section 30 provided that if a local government had implemented an overall plan and not spent all the special rates or charges, it had to as soon as practicable pay the unspent special rates or charges to the current owners of the land on which the special rates or charges were levied in the same proportions as levied.

29 Section 32 provided:

"**Returning special rates or charges incorrectly levied**

(1) This section applies if a rate notice includes special rates or charges that were levied on land to which the special rates or charges do not apply.

(2) The rate notice is not invalid, but the local government must as soon as practicable return the special rates or charges to the person who paid the special rates or charges."

30 Section 61(1)(a) provided that the current owner of land was liable to pay the rates and charges.

31 Chapter 3 of the 2010 LGR concerned "Financial sustainability and accountability". Part 7 of Ch 3 concerned "Local government funds and accounts". Section 147 required a local government to establish an operating fund and to pay into that fund all money it received other than trust money (which had to be paid into a trust account under s 145). By s 148, a local government could create a "reserve" in its operating fund either by including the reserve in its annual budget or by resolution.

2012 LGR

32 The 2012 LGR repealed the 2010 LGR. Sections 94, 96 and 98 of the 2012 LGR substantially reproduced ss 28, 30 and 32 of the 2010 LGR. Section 94(14), however, was an additional provision stating:

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

> resolution or plan does not identify all rateable land to which the special rates or charges could have been levied."

33 Section 127(1)(a) of the 2012 LGR substantially reproduced s 61(1)(a) of the 2010 LGR in providing that the current owner of land was liable to pay the rates and charges. Part 8 of Ch 5 of the 2012 LGR substantially reproduced Pt 7 of Ch 3 of the 2010 LGR concerning local government funds and accounts.

2014 Amendment LGR

34 The 2014 Amendment LGR amended the 2012 LGR in two relevant respects. First, it inserted a new s 94(14) in these terms:

> "In any proceedings about special rates or charges, a resolution or overall plan mentioned in subsection (2) is not invalid merely because the resolution or plan –
>
> (a) does not identify all rateable land on which the special rates or charges could have been levied; or
>
> (b) incorrectly includes rateable land on which the special rates or charges should not have been levied."

35 Second, it amended s 98(1) by adding to the end of the sub-section "or should not have been levied", so that s 98 thereafter provided:

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

Facts

The land and waters

36 The Council's local government area included canals and lakefront reserves for which it was legally responsible under s 121 of the Coastal Protection and Management Act and as an aspect of its general responsibility under s 8(1) of the

Local Government Act in conformity with the local government principles set out in s 4(2) of that Act.

37 The lakefront reserves included the Raby Bay Canal Reserve, the Aquatic Paradise Canal Reserve, and the Sovereign Waters Lake Reserve. Above the high-water mark adjoining each waterway was privately owned residential land, including land owned by the Landowners.

Overall plan

38 In each financial year from 2011 to 2016, the Council had an "overall plan" which identified the services, facilities and activities it proposed to carry out in that year and the rateable land on which the Council proposed to levy the special charges to fund the carrying out of those services, facilities and activities. Against the background of s 92(3) of the Local Government Act, the special charges and rateable land identified in the overall plan were charges the Council decided would have a special association with the identified rateable land because the land or its occupier would specially benefit from the service, facility or activity resolved to be provided or carried out.

39 The services, facilities and activities so identified included the works. The rateable land included that of the Landowners, whose land fronts the waterways where the works were to be carried out.

The special charges

40 In each financial year from 2011 to 2016, the Council resolved to levy special charges on the rateable land of the Landowners in accordance with its overall plan for services, facilities or activities which included the works.

41 In each financial year from 2011 to 2016, the Council issued rate notices to the Landowners which included the special charges on their land in accordance with the resolution of the Council for that year. The special charges were identified in the rate notices. The Landowners paid the notified rates and charges, including the special charges, in accordance with the notices.

The carrying out of the works

42 Nearly all of the works were carried out either in the waterways or on the land below the high-water mark. The exception was works described as "private revetment walls" in respect of the Raby Bay Canal Reserve and the Aquatic Paradise Canal Reserve. These were described as revetment walls immediately adjacent to the Landowners' land intended to prevent erosion of the embankments to which the revetment walls were connected.

Payment for the works

43 The Council created three reserves in its operating fund in which it deposited money received from the special charges applicable to each planned area of works. The Council paid for the works in part from its general account (comprised of income other than trust income, such as general rates, grants, loans and the like) and in part from one of the three reserves as relevant to the area of the works.

44 From its general account, the Council paid 34 per cent of the total cost of the works relating to the Aquatic Paradise Canal Reserve, 74 per cent of the total cost of the works relating to the Raby Bay Canal Reserve, and 22 per cent of the total cost of the works relating to the Sovereign Waters Lake Reserve. Accordingly, the respective Landowners in each area paid: 66 per cent of the total cost of the works relating to the Aquatic Paradise Canal Reserve, 26 per cent of the total cost of the works relating to the Raby Bay Canal Reserve, and 78 per cent of the total cost of the works relating to the Sovereign Waters Lake Reserve.

45 The Council did not end up spending all of the funds raised from the special charges it levied for the works. As required by s 32 of the 2010 LGR and s 98 of the 2012 LGR, the Council refunded to each Landowner the special charges that the Landowner had paid to the extent that the Council had not spent those special charges on the works.

Overall plan invalid

46 The Council levied, received and spent the special charges for the works assuming in good faith that it was empowered to do so.

47 In or about 2017, the Council realised that, contrary to its prior assumption, it had not complied with s 28(3)(b) of the 2010 LGR or s 94(2)(b) of the 2012 LGR in that each resolution to levy the special charges failed to identify "the overall plan for the service" to which the special charge applied consistently with the definition of an "overall plan" in s 28(4) of the 2010 LGR and s 94(3) of the 2012 LGR. The problem was that the "overall plan" adopted by the Council, although describing the works and identifying the rateable land to which the special charges applied (in compliance with these requirements), did not state the estimated cost of or estimated time for carrying out the overall plan as required by s 28(4)(c) and (d) of the 2010 LGR and s 94(3)(c) and (d) of the 2012 LGR respectively.

48 On this basis, it was common ground in the proceeding at first instance, and remains common ground, that each resolution of the Council from 2011 to 2016 to levy the special charges was invalid.

The cross-appeal: no statutory debt

49 The cross-appeal depends on the construction of s 32 of the 2010 LGR and s 98 of the 2012 LGR.

50 It will be recalled that s 32(1) of the 2010 LGR and s 98(1) of the 2012 LGR in its unamended form provided that the obligation of a local government under s 32(2) of the 2010 LGR or s 98(2) of the 2012 LGR (as relevant) to "return" special rates or charges to the person who paid them arose only "if a rate notice include[d] special rates or charges that were levied on land to which the special rates or charges [did] not apply". In so providing, those provisions recognised that the rate notice itself created the obligation to pay.

51 For the purposes of s 32(1) of the 2010 LGR and s 98(1) of the 2012 LGR in its unamended form, it is necessarily the resolution of the local government that identifies the land to which the special rates or charges do or do not apply. This follows from the provision of s 94(2) of the Local Government Act that a local government must decide, by resolution at the local government's budget meeting for a financial year, what rates and charges are to be levied for that financial year and from the provisions of s 28(3)(a) of the 2010 LGR and s 94(2)(a) of the 2012 LGR that a local government's resolution to levy special rates or charges must identify "the rateable land to which the special rates or charges apply".

52 Sections 32(1) of the 2010 LGR and 98(1) of the 2012 LGR in its unamended form accordingly identify land to which special rates or charges included in a rate notice do not apply as land not identified in a resolution under s 94(2) of the Local Government Act in accordance with s 28(3)(a) of the 2010 LGR or s 94(2)(a) of the 2012 LGR. Nothing more is required than to compare the land identified in a relevant resolution, being the land to which the special rates or charges apply, to the land the subject of the rate notice levying the special rates or charges. If the land in the resolution is the land in the rate notice, then s 32(1) of the 2010 LGR and s 98(1) of the 2012 LGR in its unamended form are not engaged, as the land is not land to which the special rates or charges do not apply. If the land in the resolution is not the land in the rate notice, then those provisions are engaged.

53 No determination of the validity or invalidity of the local government's resolution to levy the special rates or charges is required. Indeed, given that s 32(2) of the 2010 LGR and s 98(2) of the 2012 LGR each provided that the rate notice is not invalid, the validity or invalidity of the resolution authorising or purporting to authorise the levying of the special rates or charges is irrelevant. The beginning and the end of the operation of s 32(1) of the 2010 LGR and s 98(1) of the 2012 LGR in its unamended form involves asking only if the rate notice included special rates or charges levied on land identified in the local government's resolution as the rateable land to which the special rates or charges apply. If the

answer to that question is "yes", there was no scope for s 32(2) of the 2010 LGR or s 98(2) of the 2012 LGR to operate. If the answer to that question is "no", those provisions operate according to their terms.

54 In the present case, the land on which the special charges were levied, as referred to in s 32(1) of the 2010 LGR and s 98(1) of the 2012 LGR in its unamended form, was all "rateable land to which the special ... charges appl[ied]". The fact that the Council's resolutions to levy the special charges, and the rate notices themselves, were invalid to the extent they included the special charges is immaterial to the operation of those provisions. Whether valid or invalid, the resolutions in fact identify the rateable land to which the special charges applied. The resolutions enable the identification of "land to which the special rates or charges [did] not apply" under s 32(1) of the 2010 LGR and s 98(1) of the 2012 LGR respectively. The statutory obligation to return the special rates or charges applied only to land the relevant resolutions did not identify as the rateable land to which the special rates or charges applied.

55 The 2014 Amendment LGR does not alter this outcome. The Explanatory Notes for the 2014 Amendment LGR explained that, while the previously existing provisions protected an overall plan and resolution from invalidity which omitted land where the requirement for a "special association" with that land as set out in s 92(3) of the Local Government Act was satisfied, they did not protect an overall plan and resolution from invalidity when the local government incorrectly included land where the requirement for a "special association" with that land as set out in s 92(3) of the Local Government Act was not satisfied.[9] According to the Explanatory Notes, s 94(14) of the 2012 LGR was amended to protect an overall plan and resolution from invalidity in "the converse situation where a local government resolves to impose special rates or charges on lots which receive no benefit". Further, according to the Explanatory Notes, the "minor consequential amendment" was made to s 98 of the 2012 LGR to "clarify that if a rates notice includes special rates that do not apply, or should not have applied, the rates notice is not invalid but the local government must, as soon as practicable, return the special rates to the person who paid the special rates".[10]

56 Sections 94(14) and 98(1) of the 2012 LGR, as amended by the 2014 Amendment LGR, accorded with the objects of the amendments as explained in the Explanatory Notes. Section 94(14) was extended to protect from invalidity an overall plan and resolution which included land that, in fact, did not satisfy any

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9 Queensland, Legislative Assembly, *Local Government Legislation Amendment Regulation (No 1) 2014*, Explanatory Notes at 4.

10 Queensland, Legislative Assembly, *Local Government Legislation Amendment Regulation (No 1) 2014*, Explanatory Notes at 4.

type of "special association" between the special rates or charges and the land as provided for in s 92(3) of the Local Government Act. The additional words in s 98(1) of the 2012 LGR ("or should not have been levied") recognised that land that, in fact, did not satisfy any type of "special association" between the special rates or charges and the land as provided for in s 92(3) of the Local Government Act should not have been included in an overall plan, a resolution, or a rate notice as the subject of a levy of special rates or charges. The additional words in s 98(1) extended a local government's obligation in s 98(2) to return special rates or charges levied on such land to the person who paid those special rates or charges because those are special rates or charges which "should not have been levied". This extension does not call for a comparison between the land in the resolution and the land in the rate notice (as did the words "to which the special rates or charges do not apply") because, for the extension to operate, the land would be in the resolution. The extension calls for a determination of fact as to whether the special rates or charges "should not have been levied" on the land. In context, this means that, as a matter of fact, the "special association" required by s 92(3) of the Local Government Act between the special rates or charges and the land does not exist.

57 Neither limb of s 98(1) of the 2012 LGR, as amended by the 2014 Amendment LGR, is engaged on the facts of the present case. Contrary to the terms of s 98(1) of the 2012 LGR as amended, the land on which the special charges for the works were levied is all land to which the special charges applied (as identified in the resolutions) and, on the primary judge's unchallenged factual finding, there is a "special association" between the special charges levied and the land as required by s 92(3) of the Local Government Act because that land specially benefited from the works.

58 The admitted invalidity of the resolutions and the rate notices to the extent they included the special charges does not have the result of making s 32(1) of the 2010 LGR and s 98(1) of the 2012 LGR, as made or as amended, applicable to the special charges in this case.

59 For these reasons, the Landowners' cross-appeal should be dismissed.

The appeal: no restitution at common law

The method and structure of analysis

60 The common law of restitution developed out of and is informed by the principles which underlay the form of action known as *indebitatus assumpsit* "for money had and received" by the defendant to the use of the plaintiff expounded in

Moses v Macferlan.[11] Lord Mansfield there described the action as one for the "refund" of money pursuant to a "debt" which "the law implies" and which was "founded in the equity of the plaintiff's case".[12] He said that the "gist" of the action was that "the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money".[13]

61 Illustrating the point that the action lay "only for money which, ex aequo et bono [in equity and conscience], the defendant ought to refund", Lord Mansfield said:[14]

> "[I]t does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances."

62 Where the action lay, such as for payment by mistake, Lord Mansfield said of the position of the defendant to the action:[15]

> "It is the most favourable way in which he can be sued: he can be liable no further than the money he has received; and against that, may go into every equitable defence, upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing which shews that the plaintiff, ex aequo & bono, is not intitled to the whole of his demand, or to any part of it."

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11 (1760) 2 Burr 1005 [97 ER 676].

12 (1760) 2 Burr 1005 at 1008 [97 ER 676 at 678].

13 (1760) 2 Burr 1005 at 1012 [97 ER 676 at 681].

14 (1760) 2 Burr 1005 at 1012 [97 ER 676 at 680-681] (footnote omitted).

15 (1760) 2 Burr 1005 at 1010 [97 ER 676 at 679].

63 Lord Mansfield returned to the theme of equity and conscience in *Bize v Dickason*:[16]

> "[T]he rule had always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. So where a man has paid a debt, which would otherwise have been barred by the Statute of Limitations; or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled the payment, yet the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action."

64 Over the ensuing 250 years, the principles established in *Moses v Macferlan* and *Bize v Dickason* have become "more or less canalized or defined, but in substance the juristic concept [has remained] as Lord Mansfield left it".[17] The common law of restitution has not, and especially not in this country, become separated from its "equitable roots".[18]

65 The principled answer to the claim of the Landowners to be entitled under the common law of Australia to restitution from the Council of the unrefunded portion of the moneys they mistakenly paid as special charges involves a contemporary appreciation and application of the equitable foundations of the action explained in *Moses v Macferlan* and *Bize v Dickason*.

66 The continuing vitality of the equitable foundations of the common law action for restitution was emphasised by Gibbs CJ in *National Commercial Banking Corporation of Australia Ltd v Batty*[19] and elaborated upon by Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd*.[20] Gummow J referred in *Roxborough* to the development of the common law of restitution as an

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16 (1786) 1 TR 285 at 286-287 [99 ER 1097 at 1098].

17 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 63.

18 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 593 [68].

19 (1986) 160 CLR 251 at 268.

20 (2001) 208 CLR 516 at 545-555 [76]-[100].

example of "the absorption or adoption by the common law of equitable notions".[21] Illustrations of that absorption or adoption of equitable notions into the common law of restitution given by Gummow J[22] included statements in the Supreme Court of the United States in *Myers v Hurley Motor Co*[23] and in *Atlantic Coast Line Railroad Co v Florida*.[24]

67 In *Myers*, Sutherland J said of the action for money had and received:[25]

> "Such an action, though brought at law, is in its nature a substitute for a suit in equity; and it is to be determined by the application of equitable principles. In other words, the rights of the parties are to be determined as they would be upon a bill in equity. The defendant may rely upon any defense which shows that the plaintiff, in equity and good conscience is not entitled to recover in whole or in part."

68 In *Atlantic Coast Line Railroad Co*, with reference to *Moses v Macferlan* and *Bize v Dickason*, Cardozo J described a "cause of action for restitution" as "a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function", and continued:[26]

> "The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it."

69 The stress Cardozo J placed in *Atlantic Coast Line Railroad Co* on the circumstances of the individual case determining whether the court would "lend its aid" or "stay its hand and leave the parties where it finds them"[27] has been pointed out in the United States to reflect central features of equity jurisdiction:

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21 (2001) 208 CLR 516 at 554 [99].

22 (2001) 208 CLR 516 at 548-549 [85]-[86].

23 (1927) 273 US 18.

24 (1935) 295 US 301.

25 (1927) 273 US 18 at 24.

26 (1935) 295 US 301 at 309-310 (citations omitted).

27 (1935) 295 US 301 at 314.

the "ability to assess all relevant facts and circumstances and tailor appropriate relief on a case by case basis" and "to mould each decree to the necessities of the particular case", "the hallmarks of equity [having] long been flexibility and particularity".[28]

70 The centrality of these features of equity jurisdiction to the common law of restitution in Australia is apparent in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* ("*ANZ v Westpac*")[29] where Mason CJ, Wilson, Deane, Toohey and Gaudron JJ identified that "contemporary legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience". In *Equuscorp Pty Ltd v Haxton*,[30] Gummow and Bell JJ also stressed the need for principled consideration of "the degree of flexibility in fashioning the just measure of recovery on an action such as that for money had and received, given that, while it is a legal action not an equitable suit, it is settled in Australia that the action is a liberal action in the nature of a bill in equity".[31]

71 These equitable foundations inform both the content of the concept of "unjust enrichment" as adapted into the common law of restitution in Australia in *Pavey & Matthews Pty Ltd v Paul*,[32] *ANZ v Westpac*[33] and *David Securities Pty Ltd v Commonwealth Bank of Australia*[34] and the analytical framework utilising that concept set out in *ANZ v Westpac*[35] and *David Securities*.[36]

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28 *Texaco Puerto Rico Inc v Department of Consumer Affairs* (1995) 60 F 3d 867 at 874, quoting *Rosario-Torres v Hernandez-Colon* (1989) 889 F 2d 314 at 321, *Hecht Co v Bowles* (1944) 321 US 321 at 329, and *Lussier v Runyon* (1995) 50 F 3d 1103 at 1110.

29 (1988) 164 CLR 662 at 673.

30 (2012) 246 CLR 498.

31 (2012) 246 CLR 498 at 545 [114], referring to *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 231.

32 (1987) 162 CLR 221.

33 (1988) 164 CLR 662.

34 (1992) 175 CLR 353.

35 (1988) 164 CLR 662 at 673.

36 (1992) 175 CLR 353 at 378-379.

72 Unjust enrichment was said in *David Securities*,[37] quoting *Pavey & Matthews*,[38] to constitute not "a definitive legal principle according to its own terms" but "a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case". The concept of unjust enrichment has since been said to perform a "taxonomical function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another",[39] without founding or reflecting any "all-embracing theory of restitutionary rights and remedies".[40]

73 The analytical framework for a common law action for restitution set out in *ANZ v Westpac* and refined in *David Securities* involves a two-stage inquiry into the entitlement of a plaintiff to recover from a defendant an amount of money paid by the plaintiff to the defendant. At the first stage, it is sufficient to give rise to a prima facie entitlement to restitution that the plaintiff point to a recognised "qualifying or vitiating factor", such as mistake or duress, having operated on the making of the payment.[41] At the second stage, it is open to a defendant to displace the prima facie entitlement of the plaintiff by pointing to "circumstances which the law recognizes would make an order for restitution unjust".[42] For that purpose, "the recipient of a payment, which is sought to be recovered on the ground of unjust

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37 (1992) 175 CLR 353 at 378-379.

38 (1987) 162 CLR 221 at 256-257.

39 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 516 [30].

40 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 516 [30], quoting *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544 [72]. See also *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 595 [74], 615 [130], 617 [136], 618-619 [139]-[141]; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 642 [199].

41 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379; *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673. See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 156 [150].

42 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379.

enrichment, is entitled to raise by way of answer *any matter or circumstance* which shows that his or her receipt (or retention) of the payment is not unjust".[43]

74 This analytical framework accordingly draws a clear distinction between a specific qualifying or vitiating factor giving rise to the prima facie entitlement to restitution and the circumstances which may enable a "defence" to be established. *ANZ v Westpac* and *David Securities* provide no reason for considering that the range of circumstances which may enable a defence to be established to the whole or some part of a prima facie entitlement to restitution should be narrowly confined. The equitable underpinning of the common law action for restitution provides every reason for considering that it should not.

The prima facie entitlement

75 The common law entitlement of a taxpayer to recover from a taxing authority moneys paid by the taxpayer for which the taxpayer is later found not to have been liable has traditionally been understood to be governed by the same principles as would render those moneys "recoverable as between subject and subject".[44]

76 Qualifying or vitiating factors recognised as potentially available to found a prima facie entitlement on the part of a taxpayer to recover such moneys in an action for restitution have traditionally been recognised to include duress arising from the conduct of the taxing authority or from the operation or purported operation of the taxing statute, and mistake of fact.[45] To those two factors, since *David Securities*, has been added mistake of law.[46]

77 The third of those qualifying or vitiating factors, mistake of law, is engaged in the present case by the finding of the primary judge that each Landowner paid the special charges in the mistaken belief that the Landowner had a legal obligation to do so. There is accordingly no dispute as to the prima facie entitlement of the

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43 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379 (emphasis added).

44 *Mason v New South Wales* (1959) 102 CLR 108 at 117.

45 See *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 67, referring to *Sargood Bros v The Commonwealth* (1910) 11 CLR 258, and *Mason v New South Wales* (1959) 102 CLR 108.

46 See *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 67, 100.

Landowners to recover the invalidly levied special charges as moneys paid under an operative mistake of law.

78 The Landowners' attempt to invoke the *Woolwich* principle as an additional reason for them to have a prima facie entitlement to recover the invalidly levied special charges must be resisted. Whether the *Woolwich* principle should be imported into the common law of Australia is a large question. Answering that question in an appropriate case would involve consideration not only of the continuing authority of *Mason v New South Wales*[47] and *South Australian Cold Stores Ltd v Electricity Trust of South Australia*[48] but also of the scope and content of the prescription in s 64 of the *Judiciary Act 1903* (Cth) that "[i]n any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same ... as in a suit between subject and subject".[49] As the Attorney-General of the Commonwealth submitted, answering the question whether the *Woolwich* principle should be imported into the common law of Australia should await a case in which it would be determinative.

79 Neither in *Woolwich* nor in any case in England or elsewhere in which the *Woolwich* principle has been applied does it appear to have been suggested that the entitlement of a taxpayer to recovery on the *Woolwich* principle is other than prima facie.

80 In *Woolwich* itself, Lord Goff left open the development of potential defences to a *Woolwich* claim, saying that if tax has been paid pursuant to an unlawful demand, "[c]ommon justice seems to require that tax to be repaid, unless special circumstances or some principle of policy require otherwise"[50] but that it was not "necessary to consider for the purposes of the present case to what extent the common law may provide the public authority with a defence to a claim for the repayment of money so paid".[51] The reasoning of Henderson J in *Test Claimants in the FII Group Litigation v Commissioners for Her Majesty's Revenue &*

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47 (1959) 102 CLR 108. Compare *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 172-173.

48 (1957) 98 CLR 65. See *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 372-374. Compare *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2012] 2 AC 337 at 374-375 [76]-[79].

49 See *Mason v New South Wales* (1959) 102 CLR 108 at 125. Compare *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 at 407 [150]-[151].

50 [1993] AC 70 at 172.

51 [1993] AC 70 at 177.

Customs concerning the unavailability of the defence of change of position to a *Woolwich* claim on the basis that the taxing authority was a "wrongdoer" in levying invalid taxes was not endorsed on appeal.[52] His Honour later reworked his reasoning to reflect the view that a better basis for excluding the defence was the potential stultification of the "high principles of public policy which led to recognition of the *Woolwich* cause of action as a separate one in the English law of unjust enrichment, with its own specific 'unjust factor'", but did so in circumstances where the availability of the defence had not been put in contest.[53]

81 In considering the same "high principles of public policy" underlying the *Woolwich* principle, Mason CJ in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* referred to the "fundamental principle of public law that no tax can be levied by the executive government without parliamentary authority, a principle which traces back to the *Bill of Rights 1688* (Imp)" and described the applicable principle in terms consistent with a prima facie, not an absolute, right to recovery in these terms:[54]

> "In accordance with that principle, the Crown cannot assert an entitlement to retain money paid by way of causative mistake as and for tax that is not payable *in the absence of circumstances which disentitle the payer from recovery*. It would be subversive of an important constitutional value if this Court were to endorse a principle of law which, *in the absence of such circumstances*, authorized the retention by the executive of payments which it lacked authority to receive and which were paid as a result of causative mistake."

82 In *Roxborough*, Gleeson CJ, Gaudron and Hayne JJ observed that it was "impossible" to explain the decision in *Royal Insurance* "upon the ground that there is some constitutional reason for treating restitutionary claims against governments differently from claims against private citizens".[55]

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52 *Test Claimants in the FII Group Litigation v Commissioners for Her Majesty's Revenue & Customs* [2008] EWHC 2893 (Ch) at [336]-[346]; *Test Claimants in the Franked Investment Group Litigation v Commissioners of the Inland Revenue* [2010] EWCA Civ 103 at [189]-[193].

53 *Test Claimants in the FII Group Litigation v Commissioners for Her Majesty's Revenue & Customs* [2014] EWHC 4302 (Ch) at [249], [307], [309]-[315].

54 *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 69 (emphasis added).

55 (2001) 208 CLR 516 at 530 [29].

83 Accordingly, whether or not the Australian law of restitution recognises a *Woolwich* claim is not determinative of the issues on the appeal. The determinative question in the present case is whether a defence to the Landowners' prima facie entitlement to recovery is available and, if available, established.

The defence of payment for good or valuable consideration

84 In *ANZ v Westpac*, an example given of a circumstance recognised to displace a prima facie entitlement to restitution of a payment of money was "that the payment was made for good consideration such as the discharge of an existing debt".[56] On the authority of *ANZ v Westpac*, "the 'defence' of valuable consideration" was acknowledged in *David Securities* to form part of the common law of Australia.[57]

85 Despite acknowledging the existence of the defence, *David Securities* rejected an argument that the defence was established by a lender so as to displace a prima facie entitlement of borrowers to restitution of mistaken payments made by the borrowers to the lender under a void provision of a loan agreement on the basis that the lender would have negotiated a higher interest rate on the loan had it known that the provision was void.[58] The reasons given for the rejection of the argument involved two propositions of general significance. The first was that the availability of the defence turned not on a counterfactual or hypothetical analysis of whether the borrowers' payments were absolute (in the sense of intended, irrespective of the void provision) or conditional (in the sense of dependent on the validity of the void provision) but on an examination of the actual rights and obligations of the parties.[59] The second was that payment being made for "consideration" received in this context referred to "the state of affairs contemplated [by the payer] as the basis or reason for the payment".[60] As such, "consideration" includes but is not confined to contractual counter-performance. The severability of the void provision of the loan agreement under which the borrowers made the mistaken payments meant that the lender failed to establish

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56 *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673. See *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 695.

57 (1992) 175 CLR 353 at 380. Compare Burrows, "Good Consideration in the Law of Unjust Enrichment" (2013) 129 *Law Quarterly Review* 329 at 331-332.

58 (1992) 175 CLR 353 at 380.

59 (1992) 175 CLR 353 at 381.

60 (1992) 175 CLR 353 at 382, quoting Birks, *An Introduction to the Law of Restitution* (1989) at 223.

the defence because it failed to prove that the borrowers "received consideration for the payments which they [sought] to recover".[61]

86 In *Roxborough*, Gleeson CJ, Gaudron and Hayne JJ also conceived of a failure of consideration as a "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".[62] Gummow J in *Roxborough* identified a failure of consideration as "the failure to sustain itself of the state of affairs contemplated as a basis for the payments the appellants seek to recover".[63] The relevant "purpose" of or "basis" for the payment, although assessed from the perspective of the payer, is objectively and not subjectively determined.[64]

87 Since *David Securities*, the defence of good consideration has been held to be available to displace a prima facie entitlement to restitution of payments of money in two decisions of intermediate courts of appeal in Australia. The correctness of these decisions is not in dispute. In each case, the good consideration was contractual counter-performance by the payee.

88 In *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd*,[65] a tenant who had taken possession of premises paid the rent due to the landlord under a lease agreement unaware of a statutory entitlement to withhold the payment of rent for so long as the landlord failed to provide a statutorily prescribed disclosure statement. The prima facie entitlement of the tenant to restitution of the rent as money paid under a mistake of law was held by the Victorian Court of Appeal to be defeated by the tenant having "received good consideration for the money it paid, namely, exclusive possession of the premises that were obviously of use and benefit to it".[66]

89 In *Adrenaline Pty Ltd v Bathurst Regional Council*,[67] the promoter of an annual racing event paid to a local council an annual fee for the right to use a racing

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61 (1992) 175 CLR 353 at 383 (emphasis omitted).

62 (2001) 208 CLR 516 at 525 [16].

63 (2001) 208 CLR 516 at 557 [104].

64 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 252 [239], 254 [250].

65 (2006) V Conv R 54-713.

66 (2006) V Conv R 54-713 at [21]. See also at [33].

67 (2015) 97 NSWLR 207.

circuit and for ancillary services under an agreement with the council, mistakenly believing that the council had complied with its statutory obligations in setting the fee. The prima facie entitlement of the promoter to restitution of the annual fee as money paid under a mistake of law was held by the New South Wales Court of Appeal to be defeated by the promoter having received "good consideration" being "precisely what it bargained for".[68]

90 Likening the scheme of the Local Government Act and the Coastal Protection and Management Act to a contract between the Council and the Landowners, the Council argued that its performance of the works to the benefit of the Landowners should be treated as equivalent to the contractual performance treated as good consideration in each of *Ovidio* and *Adrenaline*. The lack of agreement by the Landowners to the performance of the works means that the analogy is imperfect, even allowing for the expansive notion of "consideration" adopted in *David Securities*. The imperfect analogy points, however, to another, potentially overlapping, category of circumstances in which the law recognises the making of an order for restitution to be unjust.

Another defence?

91 The American Law Institute's *Restatement (Third) of Restitution and Unjust Enrichment* treats the mistaken payment of a statute barred debt[69] (to which Lord Mansfield referred both in *Moses v Macferlan* and in *Bize v Dickason*[70]), counter-performance by a payee of an unenforceable agreement[71] (of which *Ovidio* is an instance[72]), and counter-performance by a payee of an agreement beyond the statutory authority of the payee[73] (of which *Adrenaline* can be treated as an

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68 (2015) 97 NSWLR 207 at 225 [86].

69 *Restatement (Third) of Restitution and Unjust Enrichment* §62 (Illustration 1). See also *Clifton Mfg Co v United States* (1935) 76 F 2d 577 at 581; *Span v Maricopa County Treasurer* (2019) 437 P 3d 881 at 887.

70 See [60]-[63] above.

71 *Restatement (Third) of Restitution and Unjust Enrichment* §62, referring to *Restatement (Third) of Restitution and Unjust Enrichment* §31(1).

72 See [88] above.

73 *Restatement (Third) of Restitution and Unjust Enrichment* §62, referring to *Restatement (Third) of Restitution and Unjust Enrichment* §32(2). See also, in the context of municipal corporations, *Restatement (Third) of Restitution and Unjust Enrichment* §33(1).

instance[74]) each as a type of "defence" which it labels "Recipient Not Unjustly Enriched".

92 The *Restatement* propounds the defence in the following terms:[75]

> "Even if the claimant has conferred a benefit that results in the unjust enrichment of the recipient when viewed in isolation, the recipient may defend by showing 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."

93 The *Restatement* founds the defence squarely on the "baseline of unjust enrichment" understood in accordance with the principles of equity expounded in *Moses v Macferlan* and elaborated in *Bize v Dickason*.[76] Comment within the *Restatement* explains the defence to have "practical application" in a "limited class of cases" different from cases in which it is "a proper answer (and not an affirmative defense) to plead 'no unjust enrichment'" or "in which the recipient of a benefit has suffered a detrimental change of position". The class to which the defence is applicable is explained to comprise cases which "arise when 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".

94 The defence as so propounded in the *Restatement* looks to the transaction or dealing within which the prima facie entitlement of the payer to restitution has arisen and to the entirety of the circumstances relating to the transaction or dealing including those arising subsequent to the making of the payment or the conferring of the benefit the defendant's entitlement to which is vitiated or qualified by some operative factor. It admits of the prima facie entitlement of the payer to restitution being negated or reduced by reference to other rights and obligations of the payer and payee. Accordingly, the "standard application" of the defence is "to a case in which a payment by the claimant, viewed in isolation, creates unjust enrichment

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74 See [89] above.

75 *Restatement (Third) of Restitution and Unjust Enrichment* §62. See also, in the context of municipal corporations, *Restatement (Third) of Restitution and Unjust Enrichment* §33.

76 *Restatement (Third) of Restitution and Unjust Enrichment* §62.

of the recipient and a prima facie right to recovery in restitution",[77] but the larger transactional circumstances disclose otherwise.

95 The breadth and specificity of the inquiry posited reflects the traditional technique of equity: "[a] court of law works its way to short issues, and confines its views to them ... [a] court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case".[78]

96 Application of that technique in the context of the common law of restitution in Australia accords with the equitable nature of that common law doctrine already discussed. For example, in *Fitzgerald v F J Leonhardt Pty Ltd*,[79] to which Gummow and Bell JJ referred in *Equuscorp Pty Ltd v Haxton*,[80] McHugh and Gummow JJ observed that "it was held long ago that where a borrower had paid interest in excess of the rate permitted by statute, whilst the debtor could not recover the whole back, an action would lie to recover the surplus". In support of this proposition their Honours cited *Smith v Bromley*, in which it was said that the assistance of equity was the source of the entitlement to recover the amount paid over and above the amount "the debtor was obliged, in natural justice, to pay".[81]

97 Understanding "unjust enrichment" as a unifying legal concept as distinct from a definitive legal principle[82] and understanding "defence" to refer to a category of circumstances in which the law recognises the making of an order for restitution to be unjust,[83] the inquiry posited by the defence involves no "direct application" of the concept of unjust enrichment but rather indicates circumstances which can operate to deny an "occasion[] of unjust enrichment supporting claims

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77 *Restatement (Third) of Restitution and Unjust Enrichment* §62.

78 *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 119, quoting *The Juliana* (1822) 2 Dods 504 at 521 [165 ER 1560 at 1567].

79 (1997) 189 CLR 215 at 231.

80 (2012) 246 CLR 498 at 545 [114].

81 See *Jones v Barkley* (1781) 2 Dougl 684 at 697 [99 ER 434 at 444].

82 Compare [72] above with *Restatement (Third) of Restitution and Unjust Enrichment* §1, §62.

83 Compare [73] above with *Restatement (Third) of Restitution and Unjust Enrichment* Introductory Note to Ch 8 and §62.

for restitutionary relief".[84] It therefore fits comfortably within the second stage of the analytical framework for determining the entitlement of a payer to recover money from a payee set out in *ANZ v Westpac* and *David Securities*.

98 In answering the essential question whether an enrichment resulting from a payment is not "unjust" in view of the larger transactional and related context within which the payment has occurred, the required evaluation is qualitative but does not invoke a subjective view of "what is fair or unconscionable".[85] The relevant quality of unjustness, or its lack, is to be understood in a sense that is "descriptive, accumulative and incremental".[86] The quality of unjustness required is also not to be evaluated "by reference to some preconceived formula framed to serve as a universal yardstick" but rather "involves a 'real process of consideration and judgment' in which the ordinary processes of legal reasoning by induction and deduction from settled rules and decided cases are applicable but are likely to be inadequate to exclude an element of value judgment in a borderline case".[87]

99 The defence can accordingly be treated as broadly descriptive of categories of circumstances in which Australian law might recognise the making of an order for restitution to be unjust when receipt and retention of a payment affected by a vitiating factor, such as mistake or duress, is viewed in the context of other rights and obligations of the payer and payee.

100 There is no need to examine whether every illustration of the defence propounded in the *Restatement* would be treated as illustrative of a category of circumstances in which Australian law would recognise the making of an order for restitution to be unjust. For the purposes of the present case, it is sufficient to note a number of related illustrations for which analogues can readily be found in decided cases in other jurisdictions.

101 The *Restatement* provides the following illustration of the defence operating in the context of the unauthorised levying of municipal taxes ("[t]ax"

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84 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 579 [20].

85 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379.

86 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 619 [141].

87 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 619 [140], quoting *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 441, 445 (citation omitted).

meaning, in this context, "every form of imposition or assessment collected under color of public authority"[88]):[89]

> "City assesses a property tax on a nondiscriminatory basis. The tax is subsequently determined to be improperly authorized and void. In response to Taxpayers' suit against City to recover the tax collected from them, City demonstrates that the revenues illegally collected were spent exclusively on ordinary municipal services benefiting Taxpayers among other residents. Under the circumstances, the court may find that neither City nor its residents have been unjustly enriched at Taxpayers' expense."

102 The illustration is explained to be based on the decision of the Supreme Court of Florida in *Dryden v Madison County*.[90] The informing principle affirmed in that decision was that "[w]here an invalid tax scheme applies across the board and confers a commensurate benefit ... 'equitable considerations' may preclude a refund".[91] These considerations were identified as "(1) the assessments were nondiscriminatory, ie, they applied across the board to all property owners; (2) the assessments conferred a commensurate benefit on the taxpayers, ie, in return for the assessments, the taxpayers were provided with garbage collection and disposal, landfill closure, ambulance service, and fire protection; and (3) the assessments were enacted in good faith".[92] The requirement of "good faith" is to be understood as an honest belief on the part of the authority that it was empowered to exact the imposts.[93]

103 Another illustration in the *Restatement* better illustrates the operation of the defence in the broader context of the unauthorised demand and receipt of moneys by a public authority in relation to the provision of services by the public authority. That illustration is introduced by the following commentary:[94]

> "If a regulation affecting prices has been set aside as procedurally defective, buyers and sellers who have either paid too much or received too little – in

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88 *Restatement (Third) of Restitution and Unjust Enrichment* §19.

89 *Restatement (Third) of Restitution and Unjust Enrichment* §19 (Illustration 17).

90 (1999) 727 So 2d 245, affirming *Dryden v Madison County* (1997) 696 So 2d 728.

91 *Dryden v Madison County* (1997) 696 So 2d 728 at 730.

92 *Dryden v Madison County* (1999) 727 So 2d 245 at 247, fn 2.

93 See *Dryden v Madison County* (1997) 696 So 2d 728 at 730, fn 4.

94 *Restatement (Third) of Restitution and Unjust Enrichment* §62.

> consequence of interim compliance – have a prima facie claim to restitution ... Subsequent proceedings may reveal, however, that an invalid regulation established a correct price, measured by substantive criteria. In such a case the court may find that transactions carried out in compliance with the invalid regulation did not result in unjust enrichment; or that the extent of any unjust enrichment was less than the whole of the price differential in question."

104 The commentary describes the "[s]ubsequent proceedings" as "collateral circumstances, outside the scope of prior transactions between claimant and recipient", but the example in both the previous illustration and this illustration are best understood as being "a specific application of the more general rule", applying to the levy of all imposts (be they taxes in the strict sense[95] or not), that recovery in such a case is confined by the fact and to the extent of the unjustness of the enrichment.[96]

105 The illustration given is of an unauthorised fare increase by a municipal transit authority:[97]

> "Agency charged with regulation of municipal transit system authorizes a 50-cent fare increase. After the new fares have been in effect for some time, it is established on judicial review that Agency's action was improperly authorized and therefore illegal. Acting this time in compliance with legal requirements, Agency rescinds its previous order and authorizes a 30-cent fare increase instead. Transit passengers have a prima facie claim in restitution ... but they will not necessarily recover the whole of the increased fares collected under the illegal order. Restitution in such a case is measured, not by the amount improperly exacted, but by the amount of the recipient's unjust enrichment. If the court finds that Agency might properly have authorized a 30-cent fare increase for the whole of the period in question, it will restrict any recovery to the remaining 20 cents of the contested fares."

106 The illustration is explained to be based on the decision of the Court of Appeals for the District of Columbia Circuit in *Williams v Washington Metropolitan Area Transit Commission*.[98] There, it was said that "[o]rdinarily ...

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95 See *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 276.

96 *Restatement (Third) of Restitution and Unjust Enrichment* §62.

97 *Restatement (Third) of Restitution and Unjust Enrichment* §62 (Illustration 6).

98 (1968) 415 F 2d 922. See also *Moss v Civil Aeronautics Board* (1975) 521 F 2d 298.

the proper disposition on setting aside a rate increase unlawfully ordered by the Commission would be to compel the regulated company to restore the entire difference between the higher fares collected under the invalid order and the amount that it would have received from the fare schedule previously in effect".[99] Treating the proper disposition as "governed by the equitable considerations which apply to suits for restitution generally" as explained by Cardozo J in *Atlantic Coast Line Railroad Co*,[100] however, the conclusion reached was stated in terms that "in the circumstances of this case it clearly does not offend 'equity and good conscience' to permit Transit to retain that part of the fare increase essential to avoidance of an undisputedly unfair return".[101]

107 In *Atlantic Coast Line Railroad Co*,[102] to which it will be recalled Gummow J drew specific attention in *Roxborough*,[103] a regulated railroad carrier had collected freight charges from customers in accordance with an order of the Interstate Commerce Commission setting applicable rates which was found invalid for "procedural mistake" with the result that the collection of those freight charges was unlawful.[104] The freight charges actually collected by the carrier were not shown to be other than reasonable rates within the range which the Commission would have been lawfully entitled to prescribe by a procedurally valid order. The "field of inquiry", the reasonableness of the rates, was accepted to be "one in which the search for certainty [would be] futile" and "[o]pinions will differ as to the qualifications of experts, the completeness of their inquiry into operating costs, the accuracy of their methods of computation, the soundness of their estimates".[105] The fact that the Commission subsequently prescribed the same rates pursuant to a second order that did not suffer from the procedural error affecting the first order was adjudged, however, to demonstrate valid rates within the "zone of reasonableness within which judgment is at large".[106] Cardozo J observed that the claimants for restitution could not succeed by demonstrating that other rates (as recommended by a master appointed for that purpose in the proceedings) were

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99 (1968) 415 F 2d 922 at 944.

100 (1968) 415 F 2d 922 at 944-945. See [68]-[69] above.

101 (1968) 415 F 2d 922 at 946.

102 (1935) 295 US 301.

103 See [66] above.

104 (1935) 295 US 301 at 305, 316.

105 (1935) 295 US 301 at 317.

106 (1935) 295 US 301 at 317.

reasonable. Rather, the claimants had to demonstrate that the rates as subsequently and validly determined by the Commission were unreasonable.[107] His Honour concluded that "[i]n the absence of such a showing the carrier does not offend against equity and conscience in standing on its possession and keeping what it got" pursuant to the first, invalid order.[108] No part of the unlawfully collected freight charges was therefore to be subjected to an order for restitution. Instead, Cardozo J said, "in the light of its present knowledge the court will stay its hand and leave the parties where it finds them".[109]

108 Other illustrations of circumstances giving rise to a complete or partial defence along these lines can be found in the case law of comparable common law jurisdictions.

109 An early illustration is *Steele v Williams*,[110] which has been regarded as a paradigm case of restitution of money paid to a public official under duress.[111] There, a parish clerk demanded that an attorney pay a specified total amount for searching the parish register and taking extracts.[112] The clerk was entitled by statute to charge for the search but not for the taking of the extracts. The attorney recovered from the clerk not the whole of the amount demanded and paid but rather so much of that amount as exceeded the permissible fee for the search.[113]

110 Yet another early illustration is *Great Western Railway Co v Sutton*,[114] where a railway company was found to have exceeded its statutory authority by demanding and being paid more for the carriage of goods of the plaintiff than it charged for the carriage of the goods of other persons in like circumstances. The plaintiff was held to be entitled to restitution not of the whole of the sum demanded

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107 (1935) 295 US 301 at 318.

108 (1935) 295 US 301 at 318.

109 (1935) 295 US 301 at 314.

110 (1853) 8 Ex 625 [155 ER 1502].

111 See *Mason v New South Wales* (1959) 102 CLR 108 at 140-141; *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137 at 145-146.

112 (1853) 8 Ex 625 at 630-631 [155 ER 1502 at 1504-1505].

113 (1853) 8 Ex 625 at 625, 631 [155 ER 1502 at 1502, 1505].

114 (1869) LR 4 HL 226.

and paid for the carriage of his goods but the amount by which that sum exceeded the permissible non-discriminatory charge.[115]

111 The decision of the House of Lords in *South of Scotland Electricity Board v British Oxygen Co Ltd*,[116] which concerned an impermissibly discriminatory charge by an electricity authority for the provision of electricity to industrial consumers, was to similar effect: the consumers were held to be entitled to restitution of "whatever sum they may be able to prove was in excess of such a charge as would have avoided undue discrimination against them".[117]

112 A more recent illustration is the decision of the Privy Council on appeal from the Court of Appeal of New Zealand in *Waikato Regional Airport Ltd v Attorney-General*.[118] There the New Zealand Ministry of Agriculture and Forestry had a statutory responsibility to provide biosecurity controls at international airports and had a statutory entitlement to recover its costs of doing so "in accordance with the principles of equity and efficiency".[119] The Ministry sought to recover costs from regional airports according to a methodology which was held by the primary judge not to be in accordance with the applicable principles of equity and efficiency because it did not result in a charge that was fair and proportionate as between regional and metropolitan international airports.[120] Hence, the charge which the Ministry in fact imposed on the regional airports was unauthorised by statute.[121] The plaintiff regional airports were held by the Privy Council to be entitled to restitution in accordance with the *Woolwich* principle. In answer to an argument by the Ministry that the plaintiffs had received consideration for the charge in the form of the provision of the biosecurity controls, the Privy Council said that "[t]here was no consideration in any normal commercial sense" and that it saw "no reason to deny a restitutionary remedy on that ground".[122] Importantly, however, the Privy Council said that it also saw no ground

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115 (1869) LR 4 HL 226 at 246.

116 [1959] 1 WLR 587; [1959] 2 All ER 225.

117 [1959] 1 WLR 587 at 596; [1959] 2 All ER 225 at 233.

118 [2004] 3 NZLR 1.

119 Section 135 of the *Biosecurity Act 1993* (NZ).

120 *Waikato Regional Airport Ltd v Attorney-General* [2001] 2 NZLR 670 at 699-700 [111]-[115], 704-707 [130]-[138].

121 [2004] 3 NZLR 1 at 20 [54], 22 [63], 25 [74].

122 [2004] 3 NZLR 1 at 26 [80].

for departing from the decision of the primary judge "to allow partial recovery only (that is, of the excess over what would have been a fair and proportionate charge)".[123] The decision of the primary judge endorsed by the Privy Council was that "[i]t would be unjust not to allow [the Ministry] to retain a reasonable portion of [the plaintiffs'] payments to it (reasonable based on a proper [statutory] assessment)".[124] In so concluding, the primary judge called "[c]areful attention ... to the distinction between cases where there was no lawful authority at all for the demand, and cases such as this where authority did exist, but was not used or was used incorrectly".[125]

113 As recognised by the Court of Appeal of England and Wales in *Vodafone Ltd v Office of Communications*,[126] the endorsement by the Privy Council in *Waikato Regional Airport* of the decision of the primary judge to limit the measure of restitution to the difference between the charge invalidly imposed and what would have been a valid charge was consistent with *British Oxygen* in limiting the recoverable enrichment to the amount by which the charge invalidly imposed exceeded the charge which could validly have been imposed under applicable legislation.[127] Like *Great Western Railway Co* and *British Oxygen*, the Privy Council's endorsement of the primary judge's conclusion turned on recognising as the just measure of restitution the difference between the amount that a payee actually demanded and received as a result of a purported but unlawful exercise of an existing statutory power and the amount that the payee was entitled to demand and receive in the lawful exercise of that statutory power.[128] That is to say, restitution was denied of that part of the amount actually demanded and received which could have been validly charged notwithstanding that no part of the amount actually demanded and received was in fact validly charged.

114 *Atlantic Coast Line Railroad Co*, *Williams v Washington Metropolitan Area Transit Commission*, *Great Western Railway Co*, *British Oxygen* and *Waikato Regional Airport* all serve to illustrate that, if a payee demanded payment and provided a service or conferred a benefit in connection with which the demand for

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123 [2004] 3 NZLR 1 at 27 [84].

124 *Waikato Regional Airport Ltd v Attorney-General* [2001] 2 NZLR 670 at 713 [177]. See also at 718 [208].

125 [2001] 2 NZLR 670 at 713 [179]. See also Mason, Carter and Tolhurst, *Mason & Carter's Restitution Law in Australia*, 4th ed (2021) at 911 [2041].

126 [2020] QB 857 at 879-880 [71], 880 [73], 882 [82], 886 [100].

127 [2020] QB 857 at 884 [92].

128 [2020] QB 857 at 880 [73], 882 [82], 884-885 [92]-[93], 886 [100], 887 [105].

payment was made in good faith, a prima facie entitlement of a payer to restitution of money which the payee lacked authority to demand or receive can be defeated if and to the extent that the payee had an underlying entitlement to demand and receive such payment, even if the payee failed validly to exercise that entitlement. If the service or benefit in connection with which payment was demanded has been provided or conferred in good faith, then the defence does not require that the payee, after the invalid demand and receipt, validly re-exercised the relevant powers to make a valid demand for the same amount.

115 The defence is not defeated by the payer establishing that the provision of the service or the conferral of the benefit cost more than the amount paid under the invalid demand so that only part of the total cost of the service or benefit can be said to be referable to the payment received without authority.[129] The defence is also not defeated by the payer establishing that the service could have been provided or the benefit could have been conferred at some lesser cost.[130]

116 In essence, the present case is an instance of a category of circumstances in which the making of an order for restitution would be unjust. It is a case in which a restitutionary claim to repayment of money unlawfully demanded or mistakenly paid based on unjust enrichment of the payee at the expense of the payer is answered by the payee establishing that its retention of the whole or some part of the money paid is not unjust when viewed in light of its underlying entitlement to demand and receive payment for a service or benefit which it in fact provided or conferred in good faith.

Applying the defence of underlying entitlement in the present case

117 The statute authorising the levy of special charges was not invalid. The Council did not fail to identify the works for which it was levying the special charges. The Council was not wrong in deciding that the works would specially benefit the land of the Landowners. The Council did not spend the special charges on something other than the identified works. The Council did not levy or spend the special charges knowing that it had failed to comply with two requirements to state matters in its overall plan. The Council acted in good faith from the time of the imposition of the levy to the expenditure of the money for the public purpose for which the levy was imposed.

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129 See, eg, *Atlantic Coast Line Railroad Co v Florida* (1935) 295 US 301 at 313 ("[t]he carrier's position takes on an added equity when the fact is borne in mind that the charges ... are less than compensatory").

130 *Atlantic Coast Line Railroad Co v Florida* (1935) 295 US 301 at 318.

118 This is also not a case in which the Council seeks to recover from the Landowners the value of benefits which the Council gratuitously or serendipitously conferred on them.[131] The Council did not act gratuitously in undertaking the works, the Council was not bestowing a gift on the Landowners at the expense of its other ratepayers, the benefit which the works conferred on the land of the Landowners was not serendipitous, and the Council seeks to recover nothing from the Landowners. Whether the Council has any entitlement to restitution against the Landowners is therefore not to the point; it may be accepted that the Council does not.

119 This is a case in which the Landowners have established a prima facie entitlement to restitution of moneys they mistakenly paid to the Council as special charges to fund the works. And it is a case in which the Council seeks to establish a defence to that prima facie entitlement by demonstrating that its retention of so much of the moneys as it spent on the works would not result in it being unjustly enriched.

120 When the Council's receipt of the moneys and undertaking of the works are viewed within the broader context of the statutory obligations and entitlements of the Council and of the Landowners under the scheme of the Local Government Act and the Coastal Protection and Management Act, the circumstances which mean that the Council's retention of the moneys cannot be characterised as unjust are as follows.

121 First, the Council was obliged to undertake the works by the Coastal Protection and Management Act and the Local Government Act. So much has never been in issue.

122 Second, the works resulted in special benefit to the land of the Landowners within the meaning of s 92(3) of the Local Government Act sufficient to entitle the Council to resolve under s 94(1)(b)(i) and (2) to levy special charges for the works payable by the Landowners to the Council under s 61(1)(a) of the 2010 LGR and the equivalent provision of the 2012 LGR. So much is established by the findings of the primary judge that the land of each Landowner specially benefited from the undertaking of the works (by an increase in value, or a prevented diminution of value, and by an increase in visual amenity) and therefore was "susceptible" to the levy of special charges.

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131 Compare *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 at 663 [80]; *Stewart v Atco Controls Pty Ltd (In liq)* (2014) 252 CLR 307 at 326 [47]; *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275 at 298-301 [52]-[58].

123 Third, the Council in fact resolved to levy special charges for the purpose of funding the works in the amounts notified to the Landowners in rate notices and paid by the Landowners to the Council. The Council's resolutions were invalid not because they exceeded the authority conferred by s 94(1)(b)(i) and (2) to levy special charges within the meaning of s 92(3) of the Local Government Act. The Council's resolutions were invalid only because the document which the Council treated as its overall plan for the works did not meet the definition of an "overall plan" in s 28(4) of the 2010 LGR and the equivalent provision of the 2012 LGR with the result that the resolutions failed to identify "the overall plan for the service" to which the special charge applied as required by s 28(3)(b) of the 2010 LGR and the equivalent provision of the 2012 LGR. The invalidity of each resolution did not arise from a lack of statutory power to levy the special charges in fact levied and paid but from an error in the process by which that power was purportedly exercised.

124 Fourth, the Council in fact used the moneys paid to it by the Landowners as special charges exclusively for the purpose of funding the works, refunding the surplus to the Landowners in accordance with s 32 of the 2010 LGR and the equivalent provision of the 2012 LGR.

125 Fifth, it has never been suggested that the Council did other than act at all times in good faith, honestly believing that it had complied with the processes required to levy the special charges and spend so much of them as necessary on the carrying out of the works.

126 In sum: the moneys the Landowners mistakenly paid to the Council as special charges were in amounts which the Council had a statutory entitlement to levy for the purpose of funding the works, which the Council had a statutory obligation to undertake; the Council spent so much of those moneys as remain unrefunded for that purpose and none other; and the Landowners have received a special benefit from that expenditure of the moneys in accordance with the requirement of s 92(3)(a)(i) of the Local Government Act. For the Council now to be compelled to make restitution to the Landowners of the unrefunded portion of the moneys it has so spent would be unjust.

127 There remains only to deal with the argument of the Landowners that to recognise the Council as having a defence to their prima facie entitlement would "stultify" the provisions of the statutory scheme, noncompliance with part of which resulted in the invalidity of the resolutions. The Landowners' approach assumes that the mere fact of illegality (the Council's failure to ensure that its overall plan stated the estimated cost of and time for the carrying out of the overall plan) proves the undermining or stultification of the law. The fact of the illegality, however, is the reason the question of possible stultification of the law arises; it does not determine the answer to the question.

128 What does stultification of the statutory scheme mean in this case? To say that the imposition of common law liability in restitution would "stultify" a statutory scheme is to say that common law liability in restitution would undermine the fulfilment of the legislative purpose and intended efficacy of that scheme.[132] To say, as do the Landowners, that the availability of a common law defence to a common law liability in restitution would "stultify" a statutory scheme is to say that the statutory scheme depends on common law liability in restitution for the fulfilment of the legislative purpose and efficacy of that scheme.

129 The provisions of the 2010 LGR and of the 2012 LGR which resulted in the invalidity of the resolutions operated to impose statutory limits on the exercise of the statutory power to levy special charges conferred by s 94(1)(b)(i) and (2) of the Local Government Act. The scope and purpose of the statutory scheme do not indicate that the Court intervening to require the Council to pay to the Landowners amounts equivalent to the unrefunded special charges as spent on the works providing special benefit to the land of the Landowners is necessary to avoid stultifying the operation and public policy embodied in the statutory scheme. A mistaken belief of the Council that it has complied with the law, in circumstances where had it so complied it would have been empowered to impose the same levy in the same amount and to spend the money levied as it in fact did, does not call for remedy by the Court to prevent unjust enrichment at the expense of those who paid under the same mistaken belief that the Council had complied with the law.

130 The declaration and enforcement of the statutory limits in the 2010 LGR and in the 2012 LGR to the exercise of the power to levy special charges in s 94(1)(b)(i) and (2) of the Local Government Act does not depend on the Council being exposed to common law liability in the event of their breach. To the contrary, common law liability in restitution, where it arises in the event of breach, is a collateral consequence of statutory invalidity. The liability is exposure only to a prima facie entitlement to restitutionary relief. There is no "stultification" in the Court staying its hand in the face of the defence which is established in this case.

Conclusion and orders

131 The prima facie entitlement of the Landowners to restitution of moneys they mistakenly paid to the Council as special charges is defeated by demonstration that the retention of so much of those moneys as remain unrefunded does not result in the Council being unjustly enriched when viewed in the context of the statutory obligations and entitlements of the Council and of the Landowners under the

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132 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 518-519 [34]-[36], 522-523 [45]. See also *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 261-263; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 227.

scheme of the Local Government Act and the Coastal Protection and Management Act.

132 The Council acted at all times in good faith, honestly believing that it had complied with the processes required to levy the special charges. The Council, in good faith and honestly believing it had validly levied the special charges, spent so much of the special charges as necessary on the carrying out of the works for which it had levied the special charges. Given that the works specially benefited their land as required by s 92(3)(a)(i) of the Local Government Act and given the Council's power to levy special charges under s 94(1)(b)(i) and (2) of that Act, the Landowners paid to the Council no more than the Council would have been entitled to levy as special charges on their land in the lawful exercise of its powers under that Act.

133 The orders which should be made are that special leave to cross-appeal be granted and the cross-appeal be dismissed. The appeal should be allowed. The orders of the Court of Appeal should be varied to reflect the conclusions above.

GORDON, EDELMAN AND STEWARD JJ.

Introduction

134 A local council demands, and is mistakenly paid, money by ratepayers. The local council failed to comply with the statutory requirements to demand or to receive the money. Can the local council keep the money on the basis that it has performed a service, despite the service being one that it was required to perform in any event, and despite the service being one which was not requested by the ratepayers, was not freely accepted by the ratepayers, and may even have been of no financial advantage to the ratepayers? The answer is "no".

135 That answer is reinforced by the undisputed circumstance that without a new, and lawful, charge by the local council (which never occurred) any ratepayers who refused to, or did not, make the payments could not have been compelled to do so. Whatever might be said of the deep foundations of the law of unjust enrichment in equity and natural justice, there is nothing equitable or just about a rule concerning payments that are not owed that, on the one hand, would deny a local council the ability to enforce payment from ratepayers who did not pay but, on the other hand, would permit the local council, without any change in its position, to retain money which other ratepayers paid by mistake. The proceeds from an invalid statutory charge cannot be retained by a local council on the basis that the local council might have validly imposed the charge, but did not do so.

136 The appellant, Redland City Council ("the Council"), levied special charges upon the respondents and other persons who owned land with water frontage in the Redland City local government area. The Council later became aware that each of its resolutions to levy the special charges was invalid. The Council refunded the unspent portion of the special charges, but refused to refund the remainder on the basis that it had been spent on services which the Council said were to the benefit of those who had paid. The respondents, who are plaintiffs in a representative action on behalf of group members, sought the repayment of the remainder of the funds.

137 The primary judge in the Supreme Court of Queensland held that the rate notices by which the Council levied the special charges were not invalid but that the respondents were entitled to recover the remainder of the funds as a debt, under regulations passed pursuant to the *Local Government Act 2009* (Qld) and, given that conclusion, that the respondents had not paid under a mistake of law so as to give rise to a common law claim for restitution of the remainder of the funds. The majority in the Court of Appeal of the Supreme Court of Queensland held that the payments made by the respondents and the other group members were *not* recoverable in debt pursuant to the regulations but that they were recoverable as

restitution on the ground of a mistake of law. The Council's asserted defence of "good consideration" was refused.

138 By an application for special leave to cross-appeal to this Court, the respondents challenge the first conclusion of the Court of Appeal which denied that the regulations created a debt requiring repayment of the remainder of the funds. By its appeal, following a grant of special leave, the Council challenges the second conclusion of the Court of Appeal. The Council submits that although the respondents and other group members had a prima facie claim for restitution of the remainder of the funds, the Council had a complete defence to that claim based on "good consideration" or, as the Council came to describe it, "value received". For the reasons below, we would grant leave to the respondents to cross-appeal but we would dismiss both the appeal and the cross-appeal with costs.

Background to the appeal and cross-appeal

139 The Council is a local government within the meaning of s 8(1) of the *Local Government Act*,[133] responsible for the Redland City local government area. During the period from 1 July 2011 to 30 June 2017, the respondents owned rateable land in the Redland City local government area, adjacent to waterways which formed part of one of three reserves owned by the Crown—the Aquatic Paradise Canal Reserve, the Sovereign Waters Lake Reserve and the Raby Bay Canal Reserve ("the Reserves").

140 Under the *Local Government Act*, the Council has the power to levy rates on rateable land.[134] One type of rates and charges that it can levy is "special rates and charges".[135] Between June 2011 and July 2016, the Council purported to pass resolutions to levy special charges applying to land adjacent to the Reserves ("the Resolutions").[136] Between about July 2011 and about July 2017, the Council purported to levy the special charges by giving rate notices to the owners of the land described as the subject of the special charges in the Resolutions, including

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133 See also *Constitution of Queensland 2001* (Qld), ss 70, 71.

134 *Local Government Act 2009* (Qld), ss 93(1), 94(1)(b).

135 *Local Government Act 2009* (Qld), ss 92(1)(b), 92(3), 94(1)(b)(i).

136 The Council also passed resolutions to levy special charges applying to owners of berths in the Aquatic Paradise Marina and Raby Bay Marina, which were located in the Aquatic Paradise Canal Reserve and Raby Bay Canal Reserve, respectively.

the respondents.[137] The respondents paid the amount stated on each of the rate notices. On receipt of the payments, the Council paid the special charges into specific reserves within its operating fund.

141 The special charges were to fund capital and operational expenditure on services relating to the Reserves ("the relevant works"). The relevant works may be divided by reference to three areas. The Aquatic Paradise works included, from time to time, dredging, dredging planning, a silt bag trial, canal maintenance, and navigational beacon pile maintenance and an environmentally relevant activities report. The Raby Bay works included, from time to time, geotechnical works, rock armour replacement, certain services to revetment walls in the Raby Bay Canal Reserve and the Raby Bay laydown area, as well as dredging, monitoring, and maintenance. The Sovereign Waters works included, from time to time, dredging, water quality monitoring, maintenance and cleaning works, dredge and disposal planning, and environmental monitoring.

142 The Council admitted before the primary judge that it was statutorily obliged—not merely empowered—to, and did, carry out the relevant works.[138] It was not part of the Council's case that, but for the special charges, it would not have undertaken the relevant works. Rather, the levying of the special charges was a source of funds to defray in part the costs of the relevant works. The Council contributed, from its general funds or from funds obtained from a loan, 34 per cent of the cost of the Aquatic Paradise works, 22 per cent of the cost of the Sovereign Waters works and 74 per cent of the cost of the Raby Bay works. The balance was met by the special charges paid by the respondents (and other landowners in the same position).

143 In or before March 2017, the Council became aware that, for reasons explained below, each of the Resolutions did not comply with mandatory provisions in the *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) ("the 2010 Regulations") or the *Local Government Regulation 2012* (Qld) ("the 2012 Regulations") (collectively, "the Regulations"). The 2010 Regulations were in force during the relevant period up until 14 December 2012, when they were replaced by the 2012 Regulations. There were two versions of the 2012 Regulations in issue in the proceeding — the "2012 Regulations (as

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137 As well as the special charges, the rate notices included general rates and utility charges.

138 Under the *Coastal Protection and Management Act 1995* (Qld), s 121 in respect of the Aquatic Paradise Canal Reserve and Raby Bay Canal Reserve and the *Local Government Act 2009* (Qld) in respect of the Sovereign Waters Lake Reserve.

made)" (in force between 14 December 2012 and 4 December 2014) and the "2012 Regulations (as amended)" (in force from 5 December 2014).

144 After becoming aware that the Resolutions had not complied with the Regulations, the Council calculated the percentage of the total amount paid by way of special charges that the Council had not spent on the relevant works, and refunded to each person who had paid a special charge that same percentage of the amount paid by the person, plus interest. The Council did not repay the "spent" special charges.

145 The respondents, by representative proceedings under Pt 13A of the *Civil Proceedings Act 2011* (Qld) in the Supreme Court of Queensland, sought repayment of the spent special charges they had paid to the Council, but which had not been refunded, both in debt under the Regulations, and as money had and received.

146 The Council accepted that the Resolutions were invalid, but contended that it was not obliged to return the "spent" special charges because the funds were in fact spent on services for the benefit of all those who paid the special charges, including the respondents. In short, the Council's case was that it was not obliged to repay the spent special charges, and that the respondents' claim for repayment under the Regulations or the general law was precluded, because the enjoyment and value of the lands of the respondents had been enhanced by the Council's provision of the relevant works, which were funded by the spent special charges.

147 Before the primary judge, the respondents' debt action succeeded. The primary judge held that the s 32 of the 2010 Regulation and s 98 of the 2012 Regulations (together, "the return provisions"), upon their proper construction, required the Council to repay the amount of the spent special charges even though the expenditure of those funds was of benefit to the respondents and other group members. The respondents' action for money had and received failed, with the primary judge finding that the payments had not been made under a mistake. The Council was ordered to repay the spent special charges to the respondents.

148 The reference to the spent special charges being of "benefit" to the respondents and other group members needs to be explained. The primary judge held that the waterfront land of the respondents and group members was susceptible under the *Local Government Act* to being levied with special rates and charges to fund the relevant works, because the works had the necessary "special association" with the land because the land or its occupier would "specially

benefit" from the works.[139] But the relevant works were not to the sole benefit of the respondents and other group members. The relevant works were also for the benefit of the general public in the Redland City local government area. There was no finding—nor any available inference—that the respondents (or any of the group members) requested the Council to carry out the relevant works, or freely accepted the works, or paid the special charges in exchange for, or to obtain the benefit of, the relevant works. The evidence was that the specific "benefit" of the relevant works to the respondents was not only difficult to determine but that some of the specific benefits may have gone largely unnoticed. In seeking to value the benefit of the relevant works to the respondents, a separate exercise was not undertaken for each respondent. The evidence of the valuer was that if the relevant works had *not* been carried out, the respondents' land would have experienced some diminution in value in the order of one to two per cent and that objectively qualifying the enhancement was not possible. It was not suggested that the diminution was uniform and, of course, to the extent that there was a benefit for any respondent (or group member), the special charges paid only for a portion of the relevant works that gave rise to that benefit.

149 The Council appealed to the Court of Appeal. The respondents cross-appealed the rejection of their claim for money had and received. The Court of Appeal allowed the respondents' cross-appeal and allowed the Council's appeal in part. A majority of the Court of Appeal held that the return provisions were not engaged and the Council was not liable to the respondents in debt. The Council was, however, held liable for restitution at common law. The respondents were found to have paid the special rates under a mistake of law; namely, they made their payments under the mistaken belief that they were legally obliged to do so. The Council's defence of good consideration was rejected. The Court of Appeal found that the respondents did not pay the special rates for good consideration because there was no suggestion that any of the respondents (or group members) was of the mind to pay the special rates regardless of whether they had to do so or that they considered their land was to benefit by the expenditure of their funds and the funds provided by other ratepayers.

The appeal and the cross-appeal in this Court

150 The Council appealed, by special leave, to this Court. In this Court, there was no dispute that the Resolutions to levy the special charges were invalid due to the failure to comply with the Regulations. The sole issue was whether, in answer to the respondents' claim to recover from the Council the spent special charges they had paid by way of wrongly levied charges, it was open to the Council to deny

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139 *Local Government Act 2009* (Qld), s 92(3)(a)(i).

recovery on the ground that the respondents had received good consideration from the Council.

151 The respondents also sought special leave to cross-appeal to contend that the payments made by the respondents and the group members were recoverable in debt pursuant to the return provisions in the Regulations. The application for special leave to cross-appeal is the starting point for these reasons because if there is a statutory right of recovery then that right will usually apply to the exclusion of any common law claim for restitution. For instance, in *The Commonwealth v SCI Operations Pty Ltd*,[140] it was held that the particular statutory right of recovery could "neither be cut down nor enlarged by resort to the general law or to restitutionary principles"[141] and that restitutionary principles could not "override statute by claiming a superior sense of injustice to Parliament's".[142] These reasons therefore commence with a consideration of the statutory scheme and the question whether there is a statutory right of recovery in the circumstances of the cross-appeal. For the reasons below, there is not. Special leave should be granted to cross-appeal but the respondents' cross-appeal should be dismissed. On the other hand, the respondents' submission that the Council has no defence of good consideration to the respondents' prima facie claim for restitution should be accepted. Although that defence was expressed in various ways by the parties, the proper starting point is the articulation of the defence by this Court in *David Securities Pty Ltd v Commonwealth Bank of Australia*.[143] As articulated in that decision, the Council has no defence.

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140 (1998) 192 CLR 285.

141 (1998) 192 CLR 285 at 306 [44].

142 (1998) 192 CLR 285 at 317 [76], quoting *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* (1997) 217 ALR 365 at 371.

143 (1992) 175 CLR 353 at 380, quoting Butler, "Mistaken Payments, Change of Position and Restitution", in Finn (ed), *Essays on Restitution* (1990) 87 at 88. See also Kremer, "Recovering Money Paid Under Void Contracts: 'Absence of Consideration' and Failure of Consideration" (2001) 17 *Journal of Contract Law* 37 at 38-40.

The statutory scheme

152 "A requirement to pay a tax, impost, rate or duty" in Queensland "must be authorised under an Act".[144] The Parliament of Queensland has authorised the Council to levy rates and charges in Pt 1 of Ch 4 of the *Local Government Act*. "Rates and charges" are defined in the *Local Government Act* as levies that a local government imposes on land "for a service, facility or activity that is supplied or undertaken by—(i) the local government; or (ii) someone on behalf of the local government".[145] Rates may be levied on "rateable land" which is "any land or building unit, in the local government area, that is not exempted from rates".[146] There was no dispute that the respondents' land was rateable land. There are four types of rates and charges: general rates; special rates and charges; utility charges; and separate rates and charges.[147] This appeal is concerned with special charges.

153 The power of the Council to levy rates and charges is addressed in s 94 of the *Local Government Act*. The Council *must* levy general rates on all rateable land within its local government area.[148] General rates are "for services, facilities and activities that are supplied or undertaken for the benefit of the community in general (rather than a particular person)".[149] The Council *may* levy special rates and charges.[150] Special rates and charges are "for services, facilities and activities that have a *special association* with *particular land* because", among other things, the land or its occupier "specially benefits from the service, facility or activity".[151]

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144 *Constitution of Queensland 2001* (Qld), s 65. That reflects the fundamental constitutional principle that no tax can be levied without parliamentary authority, which traces back to the *Bill of Rights 1688* (1 W & M sess 2 c 2).

145 *Local Government Act 2009* (Qld), s 91(2).

146 *Local Government Act 2009* (Qld), s 93(2).

147 *Local Government Act 2009* (Qld), s 92(1).

148 *Local Government Act 2009* (Qld), s 94(1)(a).

149 *Local Government Act 2009* (Qld), s 92(2).

150 *Local Government Act 2009* (Qld), s 94(1)(b)(i).

151 *Local Government Act 2009* (Qld), s 92(3) (emphasis added).

154 A local government must decide, by resolution at its budget meeting for a financial year, what rates and charges are to be levied for that financial year.[152] If the local government decides it will levy special rates or charges, then the Regulations provide the process that the local government must adopt.[153] The relevant sections of the Regulations are s 28 of the 2010 Regulations and s 94 of the 2012 Regulations. But for the addition of s 94(11) to (14) in the 2012 Regulations (as made), and an amendment to s 94(14) in the 2012 Regulations (as amended), the relevant sections of the Regulations are in substantially the same form and impose the same requirements on a local government.

155 The Council's resolution to levy special rates or charges must identify two things: (a) the rateable land to which the special rates or charges apply; and (b) the overall plan for the service, facility or activity to which the special rates or charges apply.[154] The overall plan is a document that: (a) describes the service, facility or activity; (b) identifies the rateable land to which the special rates or charges apply; (c) states the estimated cost of carrying out the overall plan; and (d) states the estimated time for carrying out the overall plan.[155] The Council must adopt the overall plan before, or at the same time as, the Council first resolves to levy the special rates or charges.[156] If an overall plan is for more than one year, the Council must also adopt an annual implementation plan for each year.[157]

156 The making of a resolution to levy special charges must be distinguished from the actual levying of special charges. The only mechanism by which the Council may levy rates and charges (including special charges) is by the giving of a rate notice to the owner of rateable land.[158] The owner is then liable to pay the rates and charges.[159] If the owner of rateable land does not pay the rates and charges

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152 *Local Government Act 2009* (Qld), s 94(2).

153 See *Local Government Act 2009* (Qld), s 96.

154 2010 Regulations, s 28(3); 2012 Regulations, s 94(2).

155 2010 Regulations, s 28(4); 2012 Regulations, s 94(3).

156 2010 Regulations, s 28(5); 2012 Regulations, s 94(4).

157 2010 Regulations, s 28(7); 2012 Regulations, s 94(6).

158 2010 Regulations, ss 38(1), 40(b); 2012 Regulations, ss 104(1), 106(b).

159 2010 Regulations, s 61; 2012 Regulations, s 127.

levied in a rate notice, the overdue rates and charges are a statutory charge on the relevant land.[160]

157 The Regulations contain provisions relating to what a local government must do with unspent or surplus special rates. There are regulations that: permit a local government to carry unspent special rates or charges forward for spending under an annual implementation plan in a later financial year;[161] require a local government to pay unspent special rates or charges to the current owners of land where the local government implements the overall plan but does not spend all the special rates or charges;[162] and require a local government to pay surplus special rates or charges to current owners if the local government decides to cancel an overall plan before it is carried out.[163]

158 The Regulations also each include a provision headed "Returning special rates or charges incorrectly levied". Section 32 of the 2010 Regulations provided:

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

159 Section 98 of the 2012 Regulations (as made) was identical to s 32 of the 2010 Regulations. However, there was a relevant substantive change in the 2012 Regulations (as made) to the section governing the making of resolutions to levy special charges. Section 94 of the 2012 Regulations replaced s 28 of the 2010 Regulations. Section 94(14) of the 2012 Regulations (as made) provided:

> "In any proceedings about special rates or charges, a resolution or overall plan mentioned in subsection (2) is not invalid merely because *the resolution or plan does not identify all rateable land* to which the special rates or charges could have been levied."

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160 *Local Government Act 2009* (Qld), s 95.

161 2010 Regulations, s 29(2); 2012 Regulations, s 95(2).

162 2010 Regulations, s 30; 2012 Regulations, s 96.

163 2010 Regulations, s 31; 2012 Regulations, s 97.

(emphasis added)

160 The 2012 Regulations were then amended in December 2014. Two amendments are of particular significance. The original return provision, s 98 (which was headed "Returning special rates or charges incorrectly levied") was amended by adding the italicised words:

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

(emphasis added)

161 Section 94(14) was also amended by adding the italicised words:

> "In any proceedings about special rates or charges, a resolution or overall plan mentioned in subsection (2) is not invalid merely because the resolution or plan—
>
> (a) does not identify all rateable land on which the special rates or charges could have been levied; or
>
> (b) *incorrectly includes rateable land on which the special rates or charges should not have been levied*."

(emphasis added)

The question of construction

162 In this case, there was no dispute that the Resolutions to levy the special charges were invalid because the Resolutions did not identify an overall plan which stated the estimated cost of carrying out, or the estimated time for carrying out, the overall plan. As has been noted, despite the invalidity of the Resolutions, the Council purported to levy special charges on the land of the respondents (and other group members) by issuing rate notices.

163 The question is whether the return provisions—s 32 of the 2010 Regulations, s 98 of the 2012 Regulations (as made), and s 98 of the 2012 Regulations (as amended)—preserved the validity of the rate notices, obliged the respondents to pay the special charges and provided the respondents with a

statutory entitlement to recover the special charges from the Council. The answer is no. The respondents' contrary contention is rejected.

164 The return provisions have a dual operation in respect of the rate notices to which they apply: first, the rate notice is preserved from invalidity (meaning that the person to whom it is issued is liable to pay the amount in that notice); and secondly, the local government is obliged to return the amount of the special rates or charges to the person as soon as practicable.

165 This case concerns the construction of the first sub-section of each of the return provisions, which sets out the circumstances in which the provision applies. In the 2010 Regulations and 2012 Regulations (as made), the return provision applied "if a rate notice includes special rates or charges that were levied on land to which the special rates or charges do not apply". In the 2012 Regulations (as amended), the return provision applied "if a rate notice includes special rates or charges that were levied on land to which the special rates or charges do not apply or should not have been levied".

166 The respondents submitted that the return provisions leave "entirely open" the reasons why the special rates or charges do not apply to the land or should not have been levied. They submitted that, where there is a resolution to levy special rates or charges which is passed invalidly and is thus of no legal effect, rate notices which include those special rates or charges are aptly described as including "special rates or charges that were levied on land to which the special rates or charges do not apply".

167 The Council submitted that the proper construction of the return provisions, as adopted by a majority of the Court of Appeal, is that they are directed to a deficiency in the *process* of levying the special rate or charge in accordance with the local government's resolution, that is, an error of levying landowners other than those whose land was identified in the resolution. The Council submitted that the return provisions are predicated on the existence of a valid resolution to levy special rates or charges that identifies land to which the special rates or charges apply.

168 The return provisions are, as indicated by their heading, concerned with the return of special rates or charges "incorrectly levied". As is evident, errors might occur at the stage of *resolving* to levy the special charges, or at the stage of actually *levying* the special charges. It is necessary to distinguish between the two stages. At the stage of *resolving* to levy the special charges, the *resolution* or *overall plan*

may fail to comply with the regulatory scheme. Depending on the error, that may result in invalidity of the resolution.[164]

169 There was, however, one express circumstance in the Regulations in which an error would not result in the invalidity of a resolution or overall plan — s 94(14) in the 2012 Regulations. That sub-section provided that in proceedings about special rates or charges, a resolution or overall plan would *not* be invalid merely because the resolution or plan did not identify all rateable land that *could* have been made to pay the special charges. So, for example, if there was neighbouring land not included in the resolution that also specially benefited from the services to be funded by the special charges, the resolution would not be invalidated for failure to identify that land. In s 94(14) of the 2012 Regulations (as amended), a resolution or overall plan would also not be invalid merely because the resolution or plan incorrectly included rateable land on which the special charges *should* not have been levied. This appears directed to the circumstance where land is incorrectly included in the resolution that would not, for example, specially benefit from services to be funded by the special rates. In sum, the Regulations did not expressly preserve the validity of a resolution or a plan that did not comply with the prescribed mandatory requirements except in the most limited of circumstances. None of the limited circumstances was applicable in the present case. It is common ground in this case that the Resolutions were invalid for failure to comply with the Regulations.

170 Of course, the rate notice *levying* the charge may also contain errors. For example, it might levy a wrong amount of special rates or charges, or it might levy the special rates or charges on the wrong land. An error in the rate notice will not result in invalidity where s 32 of the 2010 Regulations and s 98 of the 2012 Regulations (as made) applied, namely where the rate notice includes charges *levied on land to which the special rates or charges do not apply*. Similarly, the rate notice will not be invalid where s 98 of 2012 Regulations (as amended) applied, namely, the rate notice includes special rates or charges *levied on land to which the special rates or charges do not apply or should not have been levied*.

171 As it was accepted that the Council did not validly *resolve* to levy the special rates or charges, the question was whether, although the Resolutions were invalid, the validity of the rate notices was preserved because of s 32 of the 2010 Regulations or s 98 of the 2012 Regulations. The question, and answer, are important because if the rate notices were valid under one of those return provisions, the respondents were *legally obliged* to pay the full amount of the rate

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164 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-391 [91]-[93].

notices,[165] and then had a statutory right to recover the "special rates or charges" paid.

172 As we have seen, the return provisions apply "if a rate notice includes special rates or charges that were levied on land to which the special rates or charges do not apply". Two aspects of the text and context are important. First, the sections assume the existence of "special rates or charges". Secondly, the text reflects the requirements, respectively, in s 28(3) and (4)(b) of the 2010 Regulations and s 94(2) and (3)(b) of the 2012 Regulations (as made and as amended), for the Council's resolutions and overall plan to identify "the rateable land to which the special rates or charges apply".

173 The words "land to which the special rates or charges do not apply" contemplate the existence of a valid resolution to levy the special charges. That language is predicated on the existence of "special rates or charges" that are capable of being levied on land, but which were levied (by the giving of a rate notice to a landowner) on land to which the special rates or charges did not apply. In those circumstances, the return provisions provide that the rate notices levying those charges are valid (and thus are enforceable) but impose an obligation on the Council to return the special rates or charges as soon as practicable to the person who paid them. This can be seen as a practical mechanism to ensure that administrative errors in the process of levying a special charge in accordance with the Council's resolution do not invalidate an entire rate notice (which would also include other rates or charges, such as general rates and utility charges), while ensuring that landowners would be refunded the special rates or charges that did not, according to that resolution, apply to their land.

174 As noted earlier, s 98 in the 2012 Regulations (as amended) applied "if a rate notice includes special rates or charges that were levied on land to which the special rates or charges do not apply *or should not have been levied*" (emphasis added). This language reflects the requirements in s 94(2)(a) and (3)(b) of the 2012 Regulations (as amended) for the Council's resolutions and overall plan to identify "the rateable land to which the special rates or charges apply", and the statement in s 94(14) that a resolution or overall plan is not invalid merely because it "incorrectly includes rateable land on which the special rates or charges should not have been levied".

175 Like the other return provisions, s 98 of the 2012 Regulations (as amended) contemplates the existence of a valid resolution to levy the special charges. Section 98 preserves the validity of rate notices that levied special rates or charges on land to which the special rates or charges "do not apply". It also now preserves

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165 2010 Regulations, s 61; 2012 Regulations, s 127.

the validity of rate notices that levied special rates or charges that "should not have been levied". This amendment is directed to circumstances where the validity of a resolution has been preserved under s 94(14) in the 2012 Regulations (as amended). That is, the resolution incorrectly included rateable land on which the special rates or charges should not have been levied because, for example, the land or its occupier would not specially benefit from the service, facility or activity.[166] Where that is the case, the resolution is not invalid merely because of this error (s 94(14)); nor is the rate notice (s 98(2)). However, a landowner who has been issued with a rate notice levying special rates or charges that should not have been levied will be entitled to the return of that money under s 98.[167]

176 The return provisions should therefore be construed as directed to the circumstance where there is a valid resolution *to levy* the special charges, but the special charges were incorrectly *levied* on the landowner in the rate notice or, in the case of s 98 in the 2012 Regulations (as amended), the Council incorrectly included the particular parcel of land in the resolution. As the majority of the Court of Appeal stated, the premise of the return provisions 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". But here, none of the Resolutions was valid. The Council lacked power to levy the special charges in the absence of a valid resolution. There was nothing to which the rate notices issued by the Council to the respondents could attach or which authorised the levying of any special charges, whether on the land of the respondents and the other group members or any other land.

177 That construction should be preferred to the broader construction contended for by the respondents in this Court — that the return provisions apply to any rate notice that purports to levy something called "special rates or charges", even where there is no underlying valid Council resolution to levy special rates or charges.[168] That construction would make ratepayers liable to pay rate notices including so-

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166 See *Local Government Act 2009* (Qld), s 92(3)(a)(i).

167 See also Queensland, Legislative Assembly, *Local Government Legislation Amendment Regulation (No 1) 2014*, Explanatory Notes at 4.

168 Herzfeld and Prince, *Interpretation*, 2nd ed (2020) at 273-275 [10.150] (Construction in Favour of Taxpayer); Pearce, *Statutory Interpretation in Australia*, 9th ed (2019) at 344-356 [9.42]-[9.59] (Taxing or Fiscal Provisions). See also Noonan, "Section 75(v), No-Invalidity Clauses and the Rule of Law" (2013) 36 *University of New South Wales Law Journal* 437, discussing *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 and *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

called "special rates or charges" in the absence of any valid underlying Council resolution to levy special rates or charges, and in circumstances where failure to pay rates creates a statutory charge on the relevant land.[169] Such an outcome is unlikely in the absence of clear words in the Regulations. And there were no such words.

178 For these reasons, the majority of the Court of Appeal was correct to conclude that the return provisions were not engaged and the Council was not liable to the respondents in debt. The majority of the Court of Appeal was therefore also correct in holding that the respondents were mistaken in their belief that they were legally obliged to pay the special rates or charges. The remaining issue is therefore whether the Council had a defence of good consideration to the respondents' and other group members' prima facie claim at common law for restitution of the special charges.

The respondents' prima facie claim at common law

Unjust enrichment

179 In Australian common law, unjust enrichment has a "taxonomical function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another".[170] During the historical period in which cases were pleaded by forms of action, these categories of case were forced, by the use of fictions, into forms (rather than causes) of action, including counts of money had and received, quantum meruit and quantum valebat.[171] Today, as causes of action, the categories include unjustified payments of money or performance of services that benefit another in circumstances where the benefit was the result of mistake, undue influence, duress, or an absence or failure of consideration.[172] Since unjust

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169 *Local Government Act 2009* (Qld), s 95.

170 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 516 [30].

171 Bullen and Leake, *Precedents of Pleadings in Personal Actions in the Superior Courts of Common Law*, 3rd ed (1868) at 35-37, 44-50. See Baker, "The History of Quasi-Contract in English Law", in Cornish et al (eds), *Restitution: Past, Present and Future* (1998) 37 at 37-56.

172 See *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 374, 379; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 156 [150]-[151]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 516 [30].

enrichment expresses only the conclusion that follows the exposed process of reasoning within these categories of case, it has repeatedly been said in this Court that "unjust enrichment" is not a premise that is capable of direct application.[173]

180 At a high level of generality it can sometimes assist when considering the boundaries of a particular category of case to structure a common law enquiry into whether a defendant has been unjustly enriched by asking what benefit a defendant has received, whether the benefit is at the plaintiff's expense, whether the circumstances render the provision of that benefit unjust, and whether any defences apply.[174] But these well-known concepts such as "benefit" or "unjust" are not to be applied in the abstract, divorced from the rules that have been developed in particular categories of case.[175] In this category of case, the relevant benefit is the receipt of money by the Council and the "injustice" arises because the payments by the respondents and other group members were made by mistake of law and without obligation to do so. Those matters were not controversial in this Court.

181 The issue that arises consequent upon the respondents' prima facie claim at common law is whether the Council has a defence of good consideration based on the Council's performance of the relevant works. In short, the Council submits that it can resist restitution because: (i) the "consideration" or basis for its receipt of the payment was that it confer a corresponding benefit upon the respondents and group members, and (ii) that it did so. As will be seen, both submissions are wrong. It is convenient to begin with the concept of "benefit" and the concept of "consideration" in the context of failure of consideration as a ground for a prima facie claim for restitution of unjust enrichment before considering "good consideration" as a defence to restitution.

Benefit

182 A claim for restitution of unjust enrichment requires a defendant to have received some benefit for which restitution must be made. Unlike compensation or loss, and unlike the prophylactic principle of accounting for and disgorging a

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173 *Friend v Brooker* (2009) 239 CLR 129 at 141 [7]; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 299 [85]; *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 579 [20], 618 [139].

174 *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 648-650 [212]-[213]. See also *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 516 [30].

175 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-257; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 598 [81]. See also at 648-649 [212].

defendant's net profits, restitution of unjust enrichment focuses upon the benefit of the transaction between the plaintiff and the defendant. Where a claim for restitution is based on money received by a defendant from a plaintiff, the relevant prima facie benefit is the value of the money paid rather than any profit generated by the defendant from it.[176] Where the plaintiff's claim is based upon a service performed at the request of, or freely accepted by, the defendant, the relevant prima facie benefit to the defendant is generally the value of the service performed rather than the loss to the plaintiff or the enhancement of the defendant's wealth that the service generates for the defendant.[177] Hence, in *Brenner v First Artists' Management Pty Ltd*,[178] Byrne J said that "in a case where the services were requested and accepted, the law will not stop to enquire whether they were, on any other basis, of benefit to the party requesting and accepting them".

Mistake and failure of consideration as grounds for restitution

183 In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[179] this Court said that restitutionary recovery for unjust enrichment "depends on the existence of a qualifying or vitiating factor falling into some particular category", giving examples of such factors that included mistake. Another such factor is failure of consideration. The language of failure of consideration is difficult. As Gummow J has observed, "consideration" is a word with different meanings in different contexts.[180] In the law of contract, consideration is generally any act (including a promise), advantage conferred, or detriment suffered that is "a *quid pro quo*" for

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176 *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 75; *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1 at 12 [9]; *Atlantic Lottery Corporation Inc v Babstock* [2020] 2 SCR 420 at 444-445 [24].

177 *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at 1773 [40]-[41]; [2008] 4 All ER 713 at 736. See also Stevens, *The Laws of Restitution* (2023) at 65-70.

178 [1993] 2 VR 221 at 258-259.

179 (2007) 230 CLR 89 at 156 [150]. See also *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379.

180 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 556 [103].

another's act, advantage conferred or detriment suffered.[181] In the law of trusts, family relationships were described as "good consideration".[182] In the law of unjust enrichment, where "consideration" is concerned with a reason for a transaction, the concept has another, quite different, meaning.[183] It means a "basis",[184] "purpose",[185] or "condition"[186] for a transaction by which one party confers a benefit upon another. That basis, purpose, or condition for the transaction might be a factual or legal state of affairs.

184 The basis of a transaction might fail immediately at the time of the payment or conferral of the benefit, such as in cases of payments described as being made for an "absence of consideration",[187] "no consideration",[188] or "without" consideration if a basis for the payment was the enforceability of promissory

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181 *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424 at 456-457.

182 Maitland, *Equity: A Course of Lectures* (1936) at 33. See also *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 556 [103].

183 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 525 [16], 557 [104]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 517-518 [31]-[32], 552 [134].

184 *Muschinski v Dodds* (1985) 160 CLR 583 at 620; *Barnes v Eastenders Cash & Carry plc* [2015] AC 1 at 42 [105]; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 627 [168]. See also Stoljar, "The Doctrine of Failure of Consideration" (1959) 75 *Law Quarterly Review* 53 at 53; Mitchell, Mitchell and Watterson (eds), *Goff & Jones on Unjust Enrichment*, 10th ed (2022), chs 12, 13, 14.

185 *Martin v Andrews* (1856) 7 El & Bl 1 at 4 [119 ER 1148 at 1149]; *Muschinski v Dodds* (1985) 160 CLR 583 at 620.

186 *Towers v Barrett* (1786) 1 TR 133 at 135 [99 ER 1014 at 1016]; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 65.

187 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 at 924; *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215 at 220.

188 *Bostock v Jardine* (1865) 3 H & C 700 at 705 [159 ER 707 at 709]; *Walker v Liscarray* (1807) 6 Esp 98 at 99 [170 ER 842 at 842]; *Re Phoenix Life Assurance Co* (1862) 2 J & H 441 at 448 [70 ER 1131 at 1134].

obligations, some or all of which were void.[189] Or the basis might fail subsequent to the time of payment, such as where a basis for a payment is later performance of an obligation but that obligation will not be performed.[190]

185 Where the transaction is a contract, a basis that fails need not be an express or implied promise in the contract; it can be "an event or a state of affairs that was not promised".[191] Of course, the transaction might not be a contract between the parties at all.[192] And the benefit conferred might take different forms. The benefit conferred on another by a transaction upon a basis that fails might be the payment of money.[193] It might be the performance of a service.[194] Or it might be the provision of goods. In each case, the basis, purpose, or condition upon which the benefit is conferred is determined objectively, not according to some subjective uncommunicated belief of either party.[195] The objective basis is therefore

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189 *Jaques v Golightly* (1776) 2 Black W 1073 at 1075 [96 ER 632 at 632]; *Strickland v Turner* (1852) 7 Ex 208 at 219 [155 ER 919 at 924]; *Hudson v Robinson* (1816) 4 M & S 475 at 478; [105 ER 910 at 911]; *Flood v Irish Provident Assurance Co Ltd* [1912] 2 Ch 597 at 600.

190 See *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 48; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 638 [193].

191 Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012) at 86 §15(2)(b). See *Muschinski v Dodds* (1985) 160 CLR 583 at 618-620; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 525-526 [16].

192 *Martin v Andrews* (1856) 7 El & Bl 1 at 4 [119 ER 1148 at 1149]; *Muschinski v Dodds* (1985) 160 CLR 583; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 555-556 [102]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 517-518 [32].

193 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

194 *Benedetti v Sawiris* [2014] AC 938 at 979 [86]; *Barnes v Eastenders Cash & Carry plc* [2015] AC 1 at 42 [108]; *Barton v Morris* [2023] AC 684 at 758 [232].

195 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 252 [239]; *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321 at 355 [236]; *Barton v Morris* [2023] AC 684 at 758 [232]. See also *Burgess v Rawnsley* [1975] Ch 429 at 442; Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012) at 88 §15(3); Mitchell, Mitchell and Watterson (eds), *Goff & Jones on Unjust Enrichment*, 10th ed (2022) at 477-478 [13-02].

independent of mistakes of fact or law as the reason for recovery of those benefits conferred upon another party which the other has no right to retain.

The prima facie claim of the respondents and other group members

186 As explained above, the principal basis upon which the respondents asserted that the Council had been unjustly enriched was that the respondents and other group members had paid the special charges in the mistaken belief that they were obliged to pay the charges as lawfully charged and demanded. That was the basis upon which the Court of Appeal held that the respondents had a prima facie claim for restitution of the spent special charges from the Council.

187 In *David Securities*,[196] five members of this Court raised the possibility, but did not decide, that failure of consideration was "the true basal principle which enables recovery of money paid under a mistake". On that view, the existence of a mistake would be surplusage in cases where the objective basis upon which a benefit is conferred upon another does not exist or subsequently fails. The respondents made a similar submission in this case to the effect that an alternative, and simpler, basis for their right to restitution would have been the failure of consideration for their payments of the special charges. That submission was not explored in any of the courts below and was not the subject of any substantial response by the Council in this Court. Nothing turns upon this point in this case and it need not be considered further.

188 The common ground between the parties in this Court that mistake of law provides the respondents with a prima facie ground for restitution, together with our conclusion that the asserted defence to this claim cannot succeed, also means that it is not necessary to consider the related submission by the respondents that Australian law should recognise the *Woolwich* principle, set out by Lord Goff in *Woolwich Equitable Building Society v Inland Revenue Commissioners*.[197] One strand of Lord Goff's reasoning might be readily accepted as part of Australian law to the extent that it describes recovery for an absence or failure of consideration as described above, namely, his Lordship's comment that restitutionary recovery in that case might rest "on the simple ground that there was no consideration for the

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196 (1992) 175 CLR 353 at 380, quoting Butler, "Mistaken Payments, Change of Position and Restitution", in Finn (ed), *Essays on Restitution* (1990) 87 at 88. See also Kremer, "Recovering Money Paid Under Void Contracts: 'Absence of Consideration' and Failure of Consideration" (2001) 17 *Journal of Contract Law* 37 at 38-40.

197 [1993] AC 70.

payment".[198] But the dispositive part of his Lordship's reasoning, which reflects the present English law,[199] involves the different approach of a new common law ground for restitutionary recovery unique to a claim for restitution of taxes unlawfully exacted.[200] In the United States, such claims have therefore been said to take "on a significant federal constitutional dimension".[201] There are large questions that would need to be confronted before that policy-based ground could be accepted as part of Australian law.

The defence of "good consideration"

The different conceptions of "good consideration"

189 In *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd*,[202] Goff J described a defence to a mistaken payment as arising when "the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt". In *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation*,[203] this Court recognised that "good consideration" was a defence to a prima facie "common law action for recovery of the value of the unjust enrichment".

190 The nature of what Goff J meant by good consideration has been a matter of dispute. On one view, based upon a case to which Goff J referred,[204] he was recognising a "very controversial" defence that the receipt of the benefit led to the

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198 [1993] AC 70 at 166.

199 *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2012] 2 AC 337.

200 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 172.

201 *Restatement (Third) of Restitution and Unjust Enrichment* §19.

202 [1980] QB 677 at 695.

203 (1988) 164 CLR 662 at 673.

204 *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 695, citing *Aiken v Short* (1856) 1 H & N 210 [156 ER 1180].

defendant discharging a debt owed by a third party.[205] It is unnecessary in this case to explore the different possible meanings of the defence because the Council in this appeal relied upon the "good consideration" defence as expounded by this Court in *David Securities* and then sought further to expand that defence. The defence of "good consideration" was described by Brennan J in that case as one of "counter-restitution".[206] For the reasons below, the Council cannot succeed on the basis of the defence of good consideration as recognised in *David Securities.*

191 At points in the submissions of the Council, and the State of Queensland, there were attempts to develop a defence that extended more broadly, under the label "value received". But to the extent that any further expansion of the good consideration defence, as it applies in Australia, is justified or to the extent that any related defence should be recognised, it was common ground that the Council would need to establish that each respondent and group member had benefited (in the relevant sense) from the relevant works. For the reasons below there was no such benefit so any further expansion of the defence or creation of a related new defence does not arise.

The decision of this Court in David Securities

192 In *David Securities*,[207] the appellants sought to recover an amount representing withholding tax ("withholding tax") that was paid to the respondent bank. The appellants had paid the money to the bank under what they claimed to be a mistaken belief that there was a legally binding contractual obligation to do so. The effect of s 261(1) of the *Income Tax Assessment Act 1936* (Cth) was that the relevant provision of the contract was void. This Court recognised that a mistake of law afforded a prima facie claim for restitution of a payment to another. The Court also considered whether any defences were available to that prima facie claim. Ultimately, the proceeding was remitted for consideration of whether the appellants could prove that they were mistaken and, if so, whether the bank had a

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205 See Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012) at 135. Compare *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 406.

206 (1992) 175 CLR 353 at 388.

207 (1992) 175 CLR 353.

defence of change of position.[208] The Court rejected another defence raised by the bank, namely "good consideration".

193 In the joint judgment of Mason CJ, Deane, Toohey, Gaudron and McHugh JJ, their Honours introduced the bank's defence of good consideration by reference to the bank's argument that "the appellants, having accepted the benefit of performance by the [bank], now seek to recover part of the consideration promised for that performance, namely, the payments made referable to the withholding tax".[209] The bank argued that the basis upon which it agreed to lend money to the appellants was that the appellants would pay the withholding tax. Without the payment of withholding tax, the bank argued, it would have negotiated a higher interest rate.[210] That is, the consideration (basis, purpose, or condition) for the receipt of the withholding tax was the bank not charging a higher interest rate.[211] In short, the bank's defence was that the appellants sought restitution of the withholding tax that they paid without offering to account for the benefit that the appellants obtained from the bank, namely, the bank's agreed provision of the loan money at a lower interest rate than it would otherwise have required.

194 The joint judgment considered the applicability of this defence by "examin[ing] closely the terms of the loan agreement and the course of events preceding its signing".[212] What those events revealed was that the payment by the appellants of the withholding tax was not "conditional" upon the bank offering the nominated interest rate, particularly because the bank had represented that the reason or basis for the withholding tax was that borrowers had an obligation to pay it. In other words, if restitution of the withholding tax were made, there would not be any failure of the condition or basis of the bank's provision of the loan at the nominated interest rate. The appellants' payments of the withholding tax "were therefore not made for good consideration within the terms of the defence".[213]

195 The joint judgment explained the meaning of "consideration" in the context of this defence by reference to cases concerning "failure of consideration" as a

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208 (1992) 175 CLR 353 at 386.

209 (1992) 175 CLR 353 at 380.

210 (1992) 175 CLR 353 at 380.

211 (1992) 175 CLR 353 at 380.

212 (1992) 175 CLR 353 at 381.

213 (1992) 175 CLR 353 at 381.

prima facie ground for restitution.[214] It is, their Honours said, "the state of affairs contemplated as the basis or reason for the payment".[215] The joint judgment thus concluded that the bank "must prove that the appellants are not entitled to restitution because they have received consideration for the payments which they seek to recover".[216] The bank's defence failed because the payments of withholding tax "were predicated on ... discharging [the appellants'] obligation" and were independent of the bank's provision of the loan at the nominated interest rate.[217] Hence, it could not be said that the basis for the bank's provision of the loan at the nominated interest rate was the appellants' payment of the withholding tax.

196 The joint judgment also explained that this conclusion that the defence of good consideration could not succeed was reinforced by the point that if the defence were allowed then "the policy of [the statutory provision avoiding the obligation to pay withholding tax] would be defeated".[218] The exclusion of a claim or defence on the basis that it is contrary to the policy of a statute is sometimes described as "avoiding self-stultification" or "maintaining coherence in the law".[219]

197 Contrary to the submissions of the State of Queensland, the approach of Brennan J in *David Securities* was no different in relation to the defence of good consideration. Brennan J said that "[n]o question of counter-restitution arises" because "[t]he only consideration [the appellants] received was performance by the Bank of the loan agreements and ... [the appellants] were entitled to that without payment of the [withholding tax]".[220] In short, the basis for the bank's performance to the appellants did not fail.

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214 (1992) 175 CLR 353 at 382-383, citing *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 at 923; [1989] 3 All ER 423 at 433 and *Rowland v Divall* [1923] 2 KB 500.

215 (1992) 175 CLR 353 at 382, quoting Birks, *An Introduction to the Law of Restitution* (1989) at 223.

216 (1992) 175 CLR 353 at 383 (emphasis altered).

217 (1992) 175 CLR 353 at 383.

218 (1992) 175 CLR 353 at 384, citing *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192 at 204.

219 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 520 [38]. See also at 523 [45].

220 (1992) 175 CLR 353 at 400.

198 The point upon which Brennan J dissented was that his Honour would not have remitted to the trial judge any question concerning the defence of change of position. His Honour recognised a broader defence — receipt in satisfaction of an honest claim of right — but held that this defence was subject to the operation of the relevant statute which, in that case, would have been frustrated by the recognition of the defence.[221] No party or intervener sought, in this appeal, to have this Court recognise a new defence of receipt in satisfaction of an honest claim of right. Nor, in light of the mistake of law made by the respondents in this case, did any party seek to rely on the different defence, recognised by the joint judgment in *David Securities*, of a voluntary choice, or compromise, by a plaintiff who pays "irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment".[222]

199 In summary, therefore, the decision in *David Securities* established the defence of good consideration as one by which the quantum of a plaintiff's claim for restitution against a defendant is reduced if an order for restitution would cause a failure of the basis upon which the defendant conferred a benefit upon the plaintiff by some counter-performance. Although this defence of good consideration in the sense of counter-restitution has been described as a "counterclaim",[223] the better view is that it is not a separate claim but is instead a defence that recognises that respective benefits must be "netted off".[224] As Lord Wright said in a different context, the plaintiff would be unjustly enriched if they "both got back what [they] had parted with and kept what [they] had received in return".[225]

Application of the defence of "good consideration" after David Securities

200 Two decisions after *David Securities*, which were the focus of submissions by the parties, illustrate this operation of the defence. The first is the decision of the Court of Appeal of the Supreme Court of Victoria in *Ovidio Carrideo*

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221 (1992) 175 CLR 353 at 399-400.

222 (1992) 175 CLR 353 at 374. See also at 372-373, discussing *Werrin v The Commonwealth* (1938) 59 CLR 150, *South Australian Cold Stores Ltd v Electricity Trust of South Australia* (1957) 98 CLR 65, and *J & S Holdings Pty Ltd v NRMA Insurance Ltd* (1982) 41 ALR 539.

223 Burrows, *The Law of Restitution*, 3rd ed (2011) at 569.

224 Mitchell, Mitchell and Watterson (eds), *Goff & Jones on Unjust Enrichment*, 10th ed (2022) at 867-868 [31-16]-[31-17].

225 *Spence v Crawford* [1939] 3 All ER 271 at 289.

Nominees Pty Ltd v The Dog Depot Pty Ltd.[226] In that case, a tenant entered a retail lease but, by oversight of the landlord, was not given a disclosure statement for nearly three years. The tenant was not legally obliged to pay rent for that period[227] but, being unaware of its rights, the tenant paid rent. It sought to recover the rent on the basis of mistake of law. The Court of Appeal recognised that the tenant had a prima facie claim for recovery of the rent payments on the basis of mistake of law.[228] The landlord relied on a defence of good consideration.

201 The Court of Appeal held that the defence of good consideration succeeded. The landlord had provided exclusive use and occupation of the premises to the tenant on the basis of the receipt of rent payments by the tenant. As the Court of Appeal concluded, the tenant "got what it had bargained to pay for",[229] namely, the exclusive use and occupation of the premises. If the landlord were required to make restitution of the rent, then the basis for its provision of the use and occupation of the premises would fail. As Nettle JA explained, the landlord had an entitlement to "counter restitution" which "is pro tanto an answer to a claim for restitution".[230] Hence, the landlord had a "right to retain so much of the rent paid as does not exceed the amount of a reasonable satisfaction ... for use and occupation".[231] The defence was entire in that case because the only evidence of the reasonable value of use and occupation was "the lease itself".[232]

202 The second decision is *Adrenaline Pty Ltd v Bathurst Regional Council*.[233] In that case, a motor-racing promoter entered an agreement with a local council to hire a circuit at Mount Panorama for motor racing. For five years the promoter paid the agreed amount and used the Mount Panorama circuit. Then the promoter commenced an action to recover the money it had paid on the ground of mistake

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226 (2006) 1 BFRA 612.

227 (2006) 1 BFRA 612 at 614-615 [2], 623-624 [22], 625 [26], 633 [53]. See *Retail Tenancies Reform Act 1998* (Vic), s 8(2).

228 (2006) 1 BFRA 612 at 617 [8], 625-626 [27], 633 [55].

229 (2006) 1 BFRA 612 at 633 [56]. See also at 623 [21], 627 [33].

230 (2006) 1 BFRA 612 at 632 [49].

231 (2006) 1 BFRA 612 at 627 [34].

232 (2006) 1 BFRA 612 at 632 [50].

233 (2015) 97 NSWLR 207.

of law, alleging that the agreement was contrary to the *Local Government Act 1993* (NSW) and was void.[234]

203 The Court of Appeal of the Supreme Court of New South Wales concluded that even if the agreement were void (which it was not necessary to decide), the council would have a good consideration defence to the promoter's claim for restitution based on mistake of law. Leeming JA (with whom Macfarlan and Ward JJA agreed) said that the promoter had "received precisely what it bargained for"[235] and that "[i]t would *create* unjust enrichment were [the promoter] having enjoyed the benefit of the Mount Panorama circuit over five years to recover the fees it agreed to pay and did pay in order to secure that benefit".[236] In other words, there was a complete defence to any claim by the promoter for restitution of its payments because restitution would require accounting for the value of the benefit the promoter received in exchange for, or on the basis of, those payments.

The Council has no defence of good consideration

204 There are three independent reasons why the Council's defence of good consideration must fail. First, restitution of the special charges by the Council would not cause any failure of the basis upon which the relevant works were performed by the Council. Secondly, the particular individual respondents and other group members did not benefit from the relevant works in the sense in which the concept of benefit operates in the law of unjust enrichment. Thirdly, to recognise a defence of good consideration based on a benefit to the respondents would stultify the operation of the *Local Government Act.*

(1) No failure of the basis for the relevant works

205 The Council's defence does not satisfy the requirement for the defence of good consideration that restitution of the special charges must cause the basis of the Council's performance of the relevant works to fail. At certain points in the submissions of the Council and the State of Queensland this requirement was accepted, and described as being a requirement that the relevant works were "correlate[d]" with or provided "in exchange for" the payment.

206 The Council's performance of the relevant works was not done objectively on the basis that the works would be funded by the special charges because, as

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234 (2015) 97 NSWLR 207 at 209-210 [3].

235 (2015) 97 NSWLR 207 at 213 [23], 225 [86].

236 (2015) 97 NSWLR 207 at 225 [84] (emphasis in original).

explained in the background section above, it was admitted at trial that the Council was obliged by statute to perform the relevant works. The Council's obligation to perform the works was independent of the levying or receipt of special charges. On this appeal, the Council ultimately accepted that this admission had been made at trial and did not seek to re-open the admission. Indeed, as also explained above, for each of the Aquatic Paradise works, Sovereign Waters works and Raby Bay works the special charges had only been used to defray, respectively 66 per cent, 78 per cent, and 26 per cent of the cost.

207 At one point in oral submissions, the Council appeared to deny any requirement for the defence of good consideration that the performance by the Council was in "exchange" for, or on the basis of, the payment of the special charges. The acceptance of that submission would require recognition of a different defence, or an adaptation of the defence of good consideration by reference to a broad notion of counter-restitution. However, even if the requirement were not one of exchange but were more broadly one of sufficiently close connection,[237] it was common ground that the defence would still require that the respondents or group members obtained a benefit in the sense recognised by the common law. They did not.

(2) No benefit to the respondents or group members

208 It may be accepted, consistently with the primary judge's unchallenged finding, that the respondents and other group members, or their land, "specially benefit[ed]" from the relevant works within the meaning of that phrase in the *Local Government Act*. But the relevant works did not benefit the respondents or other group members in the sense in which benefit must be established to satisfy a defence of good consideration. As explained above, it is usually sufficient for a benefit that a person merely performed non-gratuitous services that the other party had requested, or for which the other party freely accepted a liability to pay.[238] Conversely, it is not generally a benefit to receive a service that is not requested and is not freely accepted with an opportunity to reject.[239] As Pollock CB said in

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237 See *School Facility Management Ltd v Governing Body of Christ the King College* [2021] 1 WLR 6129 at 6163 [83].

238 *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2009] 1 WLR 1580 at 1597 [47].

239 *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 at 663 [80], quoting *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 at 248; *Stewart v Atco*

argument in *Taylor v Laird*,[240] "One cleans another's shoes; what can the other do but put them on? ... The benefit of the service could not be rejected without refusing the property itself."

209 Perhaps due to the absence of any request for, or free acceptance of, a liability to pay for the relevant works by the respondents, the Council submitted that the benefit to the respondents and other group members was not the value of the service but was, effectively, a net accretion to the wealth of the respondents and group members by an asserted increase in the value of their land by one to two per cent. Apart from the problem that this misunderstands the relevant meaning of benefit, the Council's submission is factually inaccurate. As explained in the background section of these reasons, the relevant works were performed on public land. The evidence was that any incidental benefit for the land of the respondents and group members was not an increase in the value of that land but an avoidance of a diminution in value on the basis that *no* work was carried out. Even then, the enhancement was not uniform and the evidence was that objectively quantifying the enhancement was not possible for any individual respondent or group member. Even assessed by reference to the colloquial, and incorrect, meaning of "benefit" as a net accretion to the wealth of a recipient, no individual respondent or group member was shown to have benefited.

210 Furthermore, the Council could not justify the law of unjust enrichment treating as a benefit an increase in the value of an owner's land and dwelling, in circumstances in which the owner has no intention to sell the land or to use it in order to obtain a loan. It was not suggested, for example, that the Council should be limited to a lien over the land of each respondent or group member, realisable only upon sale of the land.[241]

(3) A defence of good consideration would stultify the operation of the Regulations

211 The final reason that the Council has no defence of good consideration is that the application of such a defence would stultify the operation of the Regulations, just as the joint judgment and Brennan J in *David Securities* considered that allowing the bank a defence of good consideration would stultify

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Controls Pty Ltd (In liq) (2014) 252 CLR 307 at 326-327 [47]-[48]. See also *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 542 [106].

240 (1856) 25 LJ Ex 329 at 332.

241 Mitchell, Mitchell and Watterson (eds), *Goff & Jones on Unjust Enrichment*, 10th ed (2022) at 97-98 [4-39]; Cooney, "Restitution for Unrequested Improvements to Land" (2023) 139 *Law Quarterly Review* 179 at 183.

the purpose of the statutory provision that rendered void any contractual obligation that required a borrower to pay withholding tax.[242]

212 The Resolutions to levy the special charges were invalid because the Resolutions did not comply with the requirement in the Regulations to identify an overall plan which stated the estimated cost of carrying out, and the estimated time for carrying out, the overall plan. As the respondents submitted, the purpose of these cost and time safeguards in a plan is to ensure that care is taken by a local council before incurring substantial costs that will ultimately be borne by a section of the community. In the course of allowing a claim for restitution in *Kiriri Cotton Co Ltd v Dewani*,[243] a case to which the joint judgment referred on this point in *David Securities*,[244] the Privy Council said that "[t]he duty of observing the law is firmly placed ... on the shoulders of the landlord for the protection of the tenant".[245] So too, in this case, the duty of compliance with the Regulations in respect of the cost and time safeguards in a plan is firmly placed on the shoulders of the Council for the protection of those members of the community within its area of government. The common law defence of good consideration, if it applied here as a defence to restitution of the payments, would need to be excluded to avoid undermining the purpose of the Regulations.

No separate defence of "Recipient Not Unjustly Enriched" should be recognised

213 The State of Queensland made passing reference in its written submissions to the defence in §62 ("Recipient Not Unjustly Enriched") of the *Restatement (Third) of Restitution and Unjust Enrichment* ("the *Restatement*"),[246] but neither in written nor in oral submissions did it or the Council analyse the content of the defence or suggest that some principle of that kind should be applied in this case. Nor did the Council or the State of Queensland refer to any commentary, cases or illustrations in the *Restatement* concerning the defence or seek to develop or subsume the Australian defence of good consideration by reference to the premise

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242 (1992) 175 CLR 353 at 384, 400.

243 [1960] AC 192.

244 (1992) 175 CLR 353 at 384.

245 *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192 at 205.

246 *Restatement (Third) of Restitution and Unjust Enrichment* §62.

in the *Restatement* that the defence can apply the concept of unjust enrichment directly.

214 Although, as will be seen in the next section of these reasons, the *Restatement* defence of "Recipient Not Unjustly Enriched" includes elements of the Australian good consideration defence, the absence of submissions on these matters may have been because the *Restatement* defence is inconsistent with Australian law in three respects. Each of those inconsistencies is addressed below.

The United States defence in §62 of the Restatement

215 In §62 of the *Restatement*,[247] the American Law Institute introduces a defence, not recognised in Australian law, of "Recipient Not Unjustly Enriched". That defence is said to arise where the defendant 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".

216 The *Restatement* describes "*[t]he baseline of unjust enrichment*" for the purposes of the defence in the following terms:[248]

> "The standard application of § 62 is to a case in which a payment by the claimant, viewed in isolation, creates unjust enrichment of the recipient and a prima facie right to recovery in restitution. Examples include payments by mistake, payments under duress, and payments under illegal contracts. *The defendant answers that the question of unjust enrichment between the parties can only be judged in light of the further relations between them*. The baseline from which unjust enrichment is measured, in other words, is not the moment before the challenged payment but a point preceding other transactions between them."
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> (emphasis added)

(1) Australian law does not recognise "unjust enrichment" as a premise capable of direct application

217 First, as explained above, it has repeatedly been said in this Court that "unjust enrichment" is a conclusion of a process of reasoning, not a premise that is capable of direct application. A claim for restitution that seeks directly to invoke "unjust enrichment" should be struck out as disclosing no cause of action if it is

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247 *Restatement (Third) of Restitution and Unjust Enrichment* §62.

248 *Restatement (Third) of Restitution and Unjust Enrichment* §62, comment b.

not pleaded by reference to an established category for restitution (including a payment that is not due and is made by mistake; a payment that is not due and made on a basis that fails). So too a defence that pleads "no unjust enrichment" as a premise of direct application, without reference to the content of the substantive defence, should be struck out.

218 With only a loose sense of the "parties' further obligations to each other" (which the illustrations reveal not always to involve obligations legally owed to each other) and with the vagueness of the notion of the parties' "further relations", the notion in §62 that the defendant is "not unjustly enriched" appears to use the concept of unjust enrichment as a premise of direct application. To the extent that §62 of the *Restatement* suggests a premise of direct application, it does not represent Australian law.

219 Indeed, the circumstances of this case are a good illustration of the effect of applying the §62 defence in a manner that involves a direct application of unjust enrichment. As explained above, the Council was statutorily obliged to carry out the relevant works, the relevant works were for the benefit of the general public in the Redland City local government area, and there was no finding nor any available inference that any of the respondents or group members requested the works or freely accepted the benefit of them.[249] The relevant works performed by the Council were not performed as part of any obligation owed to any of the respondents, nor was the Council involved in any transaction with the respondents. If the §62 defence were to be deployed in the circumstances of this case, it would amount to invoking unjust enrichment based upon the perceived injustice of a local council not being remunerated for performance of a statutory obligation in circumstances where it was not entitled to remuneration.

(2) The general recognition of the §62 defence would lead to results inconsistent with Australian law

220 Secondly, the general recognition of the §62 defence would lead to results that are inconsistent with Australian law. As Professor Kull, the Reporter for the *Restatement*, frankly acknowledged,[250] the "US point of view" of the "baseline of unjust enrichment" (to which §62 refers) requires rejection of the result in decisions which have allowed restitution following full performance under a void agreement such as *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal*

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249 Above at [142], [148].

250 Kull, "Consideration Which Happens to Fail" (2014) 51 *Osgoode Hall Law Journal* 783 at 787, 810-811.

London Borough Council[251] (to which Gummow J referred in *Roxborough v Rothmans of Pall Mall Australia Ltd*[252]). By contrast, in Australian law,[253] as in English law,[254] a prima facie claim for restitution of unjust enrichment (subject to any statutory policy against recovery) is recognised where the enforceability of a fully performed void agreement is a basis upon which payment or performance is made.

221 A general recognition of the §62 defence may also lead to results that are inconsistent with Australian law by application of the illustrations given in the *Restatement*. Those illustrations generally concern circumstances which include where the mistaken payment or performance by the plaintiff was due, or where it was believed by all parties to be due, or where it was assumed to be due under an "honest wager" binding only in honour.[255] The recognition of a defence in some of the illustrations would be controversial in Australian law. In others, the result might reflect Australian law not as a defence but rather because there is not usually a prima facie claim for restitution where a payment or performance is made under a valid contract. Even then, however, there are instances in Australian law where restitution can be ordered if performance was due, but not enforceable, under a contract but the basis for that performance failed.[256]

(3) Australian law rejects the basis for the §62 defence, being a direct appeal to "equity"

222 It can be accepted that the foundations of the law of unjust enrichment lie in the principles of natural justice and equity. Those foundations were present

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251 [1999] QB 215.

252 (2001) 208 CLR 516 at 556 [103].

253 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 515 [28], 518 [33].

254 *DD Growth Premium 2X Fund (In liq) v RMF Market Neutral Strategies (Master) Ltd* [2018] Bus LR 1595 at 1611 [60], citing Mitchell, Mitchell and Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016), ch 13. See also Mitchell, Mitchell and Watterson (eds), *Goff & Jones on Unjust Enrichment*, 10th ed (2022) at 490-491 [13-27]-[13-28].

255 *Restatement (Third) of Restitution and Unjust Enrichment* §62, illustrations. See also Sheehan, "Natural obligations in English law" [2004] *Lloyd's Maritime and Commercial Law Quarterly* 172.

256 See, eg, *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

when, using an "idea plucked from the supermarket shelf of Roman law",[257] Lord Mansfield famously spoke in *Moses v Macferlan*[258] of claims that are now seen as restitution being "founded in the equity of the plaintiff's case, as it were upon a contract ('quasi ex contractu,' as the Roman law expresses it)" and added that the "gist" of the common law form of action in indebitatus assumpsit for money had and received was that "the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money". Lord Mansfield described the form of action as a "liberal action in the nature of a bill in equity".[259]

223 Although the principles of natural justice and equity might provide an abstract description of the reasoning process from which rules of law developed, it has long been accepted that they do not themselves form the basis for direct application any more than the general principle of "unjust enrichment" is a direct source of obligation. As Professor Ibbetson observed:[260]

> "Despite his obvious attempt to generalize the basis of the action, Lord Mansfield himself later recognized the difficulty and danger of doing so.[261] While the reason for imposing liability might have been that the defendant ought equitably to hand over money to the plaintiff, there was a list—if not a closed list—of circumstances in which that liability arose."

224 In 1922, Scrutton LJ considered whether restitution of a mistaken payment could be ordered on the basis of "large principles of equity" and assertions that the defendant "cannot conscientiously hold the money".[262] He described that history

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257 Ibbetson, "Unjust Enrichment in English Law", in Schrage (ed), *Unjust Enrichment and the Law of Contract* (2001) 33 at 49. See D 50.17.206 (Pomponius); cf D 12.6.14 (Pomponius).

258 (1760) 2 Burr 1005 at 1008, 1012 [97 ER 676 at 678, 681].

259 *Clarke v Shee* (1774) 1 Cowp 197 at 199 [98 ER 1041 at 1042].

260 Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) at 272.

261 eg *Weston v Downes* (1778) 1 Doug 23. Contrast his earlier, more expansionist, approach in *Decker v Pope* (1757) L1 MS Misc 129 (unfol).

262 See *Holt v Markham* [1923] 1 KB 504 at 513, quoting *Sadler v Evans* (1766) 4 Burr 1984 at 1986 [98 ER 34 at 35].

of the form of action for money had and received as "well-meaning sloppiness of thought"[263] and adopted the words of Lord Sumner:[264]

> "To ask what course would be ex aequo et bono to both sides never was a very precise guide, and as a working rule it has long since been buried ... Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'."

225 In *Roxborough v Rothmans of Pall Mall Australia Ltd*,[265] after a lengthy excursus[266] that considered the decision in *Moses v Macferlan* and subsequent cases that described the deep equitable foundations of a claim for money had and received,[267] Gummow J turned to "The law in Australia". His Honour referred to specific instances described by Lord Mansfield where restitution is now recognised to be available including money paid by mistake or "upon a consideration which happens to fail" and explained that "[u]sually, recourse to that particular body of authority will be sufficient", although when considering novel cases at the "boundaries of the established categories" it is permissible to do so by reference to notions of equity.[268]

226 The statement by Gummow J about the development of the law of restitution in novel cases cannot be taken to be a suggestion that Australian law should regress to the state of English law some time before 1849[269] where notions of equity, conscience and natural justice might have been seen as premises capable of direct application. Rather, it was no more than a reference to the basic notions

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263 *Holt v Markham* [1923] 1 KB 504 at 513.

264 *Baylis v Bishop of London* [1913] 1 Ch 127 at 140.

265 (2001) 208 CLR 516.

266 (2001) 208 CLR 516 at 545-551 [76]-[89].

267 Including *Myers v Hurley Motor Co* (1927) 273 US 18 at 24; *Atlantic Coast Line Railroad Co v Florida* (1935) 295 US 301 at 309.

268 (2001) 208 CLR 516 at 552-553 [93]-[95].

269 Swain, "Unjust Enrichment and the Role of Legal History in England and Australia" (2013) 36 *University of New South Wales Law Journal* 1030 at 1046, discussing *Miller v Atlee* (1849) 13 Jur 431 at 431. See also *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 553 [96] and *Sinclair v Brougham* [1914] AC 398 at 455-456.

of justice that motivate the development of established legal rules by reference to the underlying principles.[270] As this Court has repeatedly emphasised, restitutionary claims and defences do not today involve "a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate" but instead require "determination, by the ordinary processes of legal reasoning" of whether an obligation arises to make restitution.[271] "[I]t is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable."[272]

227 An instance of a discretionary or equitable approach to the defence of "Recipient Not Unjustly Enriched" that is cited by the *Restatement* is the decision of the Supreme Court of the United States in *Atlantic Coast Line Railroad Co v Florida*.[273] In that case, a railroad carrier collected freight charges from its customers for the performance of carriage services. An order for increased carriage charges made by the Interstate Commerce Commission was held to be invalid for a period during which it was not supported by proper findings. The Supreme Court of the United States held that the customers were not entitled to restitution of any part of their payments.

228 The result of that case is plainly correct and consistent with present Australian law. In terms of Australian law, assuming that the invalidity of the charges removed any contractual obligation to pay and that restitution would not stultify the statutory policy, the carrier had given good consideration for the payments. The carrier had performed on the basis of payment by customers who had requested, and received, that performance by the carrier. In determining the value of the counter-performance by the carrier, the Supreme Court noted that the later, appropriate findings by the Commission had "looked into the very years covered by the claims for restitution". The Court treated those higher rates as

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270 See also *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 73 [43].

271 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-257. See also *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 378-379; *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 at 664-665 [83]-[85]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 515-516 [29]; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 649-650 [213].

272 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379.

273 (1935) 295 US 301.

applicable as they were based on "the opinion of a body of experts upon matters within the range of their special knowledge and experience".[274]

229 Although the result of the decision in *Atlantic Coast Line Railroad Co* is consistent with Australian law, the reasoning is not. Cardozo J sought to rely directly upon general principles of equity as though they were capable of direct application, adding that "[r]estitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it".[275] As explained earlier in these reasons, in Australian law, restitution is not a matter of judicial discretion by reference to notions of equity or fairness. Restitution is not a gift that can be bestowed by the court in the application of judicial discretion. It is not legitimate to assess whether restitution should be ordered by reference to subjective evaluation of fairness or conscience.[276]

230 Indeed, to the extent that the *Restatement* supports such a discretionary approach to a defence of "Recipient Not Unjustly Enriched", the first section of the *Restatement* expressly recognises substantial objections and dangers in doing so, in terms that could be adopted directly in Australia:[277]

> "[T]he purely equitable account of the subject is open to substantial objections. Saying that liability in restitution is imposed to avoid unjust enrichment effectively postpones the real work of definition, leaving to a separate inquiry the question whether a particular transaction is productive of unjust enrichment or not. In numerous cases natural justice and equity do not in fact provide an adequate guide to decision, and would not do so even if their essential requirements could be treated as self-evident. Unless a definition of restitution can provide a more informative generalization about the nature of the transactions leading to liability, it is difficult to avoid the objection that sees in 'unjust enrichment', at best, a name for a legal conclusion that remains to be explained; at worst, an open-ended and potentially unprincipled charter of liability."

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274 (1935) 295 US 301 at 312, 317.

275 (1935) 295 US 301 at 310.

276 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379.

277 *Restatement (Third) of Restitution and Unjust Enrichment* §1.

Elements of "good consideration" in the §62 defence

231 There is, nevertheless, one respect in which the §62 defence has strong echoes in Australian law. In the comment to the §62 defence, the American Law Institute explains that "a specific application of the more general rule of this section" is the defence to restitution of the value of performance under an unenforceable agreement that "[t]here is no unjust enrichment if the claimant receives the counter-performance specified by the parties' unenforceable agreement".[278] That is, in broad substance, an example of the Australian defence of good consideration.

232 One illustration given in the discussion concerning §62 is capable of falling within the defence of good consideration:[279]

> "Agency charged with regulation of municipal transit system authorizes a 50-cent fare increase. After the new fares have been in effect for some time, it is established on judicial review that Agency's action was improperly authorized and therefore illegal. Acting this time in compliance with legal requirements, Agency rescinds its previous order and authorizes a 30-cent fare increase instead. Transit passengers have a prima facie claim in restitution by the rule of §18 [judgment subsequently reversed or avoided], but they will not necessarily recover the whole of the increased fares collected under the illegal order. Restitution in such a case is measured, not by the amount improperly exacted, but by the amount of the recipient's unjust enrichment. If the court finds that Agency might properly have authorized a 30-cent fare increase for the whole of the period in question, it will restrict any recovery to the remaining 20 cents of the contested fares."

233 There is an ambiguity in this illustration concerning the effect of the judicial review decision on the obligations of the parties. That ambiguity is not resolved by the reasoning in the case upon which it is based.[280] The passengers had an agreement with the municipal transport company (regulated by the Agency) by which the passengers paid money in exchange for being provided with their requested transport. If the effect of the invalidation of the fare increase were that the obligation of passengers to pay the price for the transport was void or

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278 *Restatement (Third) of Restitution and Unjust Enrichment* §31(1), §62, comment a.

279 *Restatement (Third) of Restitution and Unjust Enrichment* §62, illustration 6.

280 *Williams v Washington Metropolitan Area Transit Commission* (1968) 415 F 2d 922.

unenforceable, then the passengers might have had a prima facie claim for restitution if they had paid on the basis that the fare was owed. For the reasons that we have explained,[281] the municipal transport company would then have a defence of good consideration because it provided the passengers with the benefit of a service that had been requested on the basis that the service would be remunerated. The valuation of that benefit, according to the illustration, might include a 30-cent (rather than 50-cent) increase over previous fares if that reflected its objective value at the time.

234 On the other hand, if the effect of the judicial review decision in the illustration were merely to invalidate the 50-cent fare increase, leaving the passengers with a contract with the municipal transport company for transport at the previous price, then, in Australia, the courts could have no role effectively to rewrite that contract on the basis that the municipal transport company, in a counterfactual world, might have charged (but, in the real world, did not charge) fares that were 30 cents more. In this scenario, the passengers received what they paid for at the price that had validly been agreed. Their contract was valid and enforceable. They were not overcharged.

235 In any event, cases of overcharging have nothing to do with a defence of good consideration. No defence of good consideration applies in such cases. This point requires further explanation.

Cases to which a good consideration defence does not apply

236 No questions of good consideration or valuation of counter-performance will arise in response to a claim for restitution of excess payments made for a service provided under an agreement or other obligation. If the agreement or obligation provides for a particular price for a service and the amount paid exceeds that price then the claim for restitution will itself be limited to the excess of the agreed price. No issue of defences to a claim for restitution will arise because the excess is the only amount as to which the basis for the payment will have failed and it is the only amount which the defendant was not entitled to receive. As Willes J said in *Great Western Railway Co v Sutton*,[282] when a person pays more than they are bound to pay for a service they are "entitled to recover the excess" and "[t]his is every day's practice as to excess freight". So too, "[i]f a person is

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281 Above at [200]-[203].

282 (1869) LR 4 HL 226 at 249. See also *South of Scotland Electricity Board v British Oxygen Co Ltd* [1959] 1 WLR 587.

authorised to receive money by virtue of an Act of Parliament, it is like a contract between the parties, that the sum allowed shall be all which he is to receive".[283]

237 An example of this principle in operation is the decision of the Privy Council in *Waikato Regional Airport Ltd v Attorney-General*.[284] In that case, the Ministry of Agriculture and Forestry entered into an agreement with Waikato Regional Airport Ltd by which the latter agreed to pay charges for biosecurity services calculated in accordance with s 135 of the *Biosecurity Act 1993* (NZ), which required the charges to be "recovered in accordance with the principles of equity and efficiency".[285] The charges imposed by the Ministry exceeded those that were permitted by s 135 of the *Biosecurity Act* because they went beyond what was required by principles of "fairness" and "proportionate sharing".[286] The Ministry was required to make restitution of the excess. Although the primary judge spoke in terms of a "reverse-restitutionary" obligation upon the Ministry,[287] there was no need for a defence of good consideration. The basis for the payment by Waikato Regional Airport Ltd had failed only to the extent of the excess payment, in part because the contract itself was not found to be ultra vires.[288] By the time the case reached the Privy Council, this point was disposed of in a single sentence: "Their Lordships can see no ground for departing from the Judge's decision to allow partial recovery only (that is, of the excess over what would have been a fair and proportionate charge)".[289]

238 The same principle was applied as Scottish law by the House of Lords in *South of Scotland Electricity Board v British Oxygen Co Ltd*.[290] In that case, a Scottish electricity board supplied consumers with electricity and was required by

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283 *Steele v Williams* (1853) 8 Ex 625 at 632 [155 ER 1502 at 1505].

284 [2004] 3 NZLR 1.

285 *Waikato Regional Airport Ltd v Attorney-General* [2001] 2 NZLR 670 at 676 [11], 709 [151], [153].

286 *Waikato Regional Airport Ltd v Attorney-General* [2004] 3 NZLR 1 at 22-23 [64], 25 [74].

287 *Waikato Regional Airport Ltd v Attorney-General* [2001] 2 NZLR 670 at 713 [177].

288 *Waikato Regional Airport Ltd v Attorney-General* [2001] 2 NZLR 670 at 709 [155].

289 *Waikato Regional Airport Ltd v Attorney-General* [2004] 3 NZLR 1 at 27 [84].

290 [1959] 1 WLR 587.

s 37(8) of the *Electricity Act 1947* (UK) to charge consumers by reference to a tariff that did not show "undue preference" or "undue discrimination". Section 37(8) did not have the effect that no tariff at all was required if undue preference or discrimination was shown. Rather, to the extent that there was undue preference or discrimination, the consumers had been "charged more than is warranted by the statute". Any amount beyond that was an amount by which the consumers had been "overcharged".[291] The consumers were found to be entitled to restitution of the excess. No question of good consideration arose and no defence was considered.

239 Any doubt about this principle, and its independence from a defence of good consideration, was removed by the decision of the Court of Appeal for England and Wales in *Vodafone Ltd v Office of Communications*.[292] In that case, mobile network operators paid licence fees to the appellant, the Office of Communications ("Ofcom"), by reference to 2015 regulations that were subsequently, and retrospectively, quashed. The effect of quashing the 2015 regulations was that the 2011 regulations had been in force at the time of the payments. The 2011 regulations obliged the mobile network operators to pay lower amounts to Ofcom than had been paid under the 2015 regulations. Vodafone succeeded on the simple proposition that it was entitled to restitution of the difference between what it paid (by reference to the 2015 regulations) and what it was required to pay (by reference to the 2011 regulations).[293] Ofcom had "no claim for counter-restitution"[294] and Ofcom could not defend Vodafone's claim for the amount paid in excess of that which was due by arguing a counter-factual concerning the amount which would have been properly charged by a regulation that had been validly enacted in 2015.[295]

240 Importantly, in each of these cases, restitution was allowed only of the excess that was paid over the amount that was lawfully due. If no payment had been lawfully due then full restitution should have been made: a taxing authority cannot "justify taking a taxpayer's money without Parliamentary authority by

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291 [1959] 1 WLR 587 at 596. See also at 599.

292 [2020] QB 857.

293 [2020] QB 857 at 886 [100], 888 [109], 889 [111].

294 [2020] QB 857 at 872 [27].

295 [2020] QB 857 at 885 [96].

saying that they could alternatively have taken the money in an authorised way".[296] As Underhill LJ said in *Vodafone Ltd v Office of Communications*,[297] allowing restitution for the excess of the amount paid over the amount "lawfully authorised at the time of payment" is a "necessary consequence of upholding the principle of legality"; namely, "the Government can always seek to validate the payment retrospectively by primary legislation".

No defence of fiscal chaos or change of position

241 The *Restatement* recognises other possible defences to a claim for restitution of tax independently of the defence of "Recipient Not Unjustly Enriched". One of those separate defences recognised in §19 is where restitution would "disrupt orderly fiscal administration".[298] Elsewhere, this has been described as a defence concerned with "fiscal chaos".[299] In the comment to §19, it is suggested that this defence is a broader application of the defence of change of position. In Australian law the defence of change of position to a restitutionary claim requires an "adverse"[300] or "irreversible"[301] change of position by the recipient in good faith and in reliance upon the payment. But, in the *Restatement*, a taxing authority is treated as having a unique advantage in that it is said that a defence of change of position by a taxing authority does not need to be "irrevocable". In other words, the defence of fiscal chaos "is potentially broader

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296 Mitchell, Mitchell and Watterson (eds), *Goff & Jones on Unjust Enrichment*, 10th ed (2022) at 728 [22-35]. See also Stevens, *The Laws of Restitution* (2023) at 60; Bhandari, "Undoing Transactions for Tax Purposes: The *Hastings-Bass* Principle", in Elliott et al (eds), *Restitution of Overpaid Tax* (2013) 149 at 163-164.

297 [2020] QB 857 at 888-889 [109]-[110].

298 *Restatement (Third) of Restitution and Unjust Enrichment* §19(2).

299 See *Kingstreet Investments Ltd v New Brunswick* [2007] 1 SCR 3 at 21 [29].

300 *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 384.

301 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 582 [24]-[25], 602 [95], 604 [102]. See also Bant, *The Change of Position Defence* (2009) at 130-143.

than in the typical contest between private parties, because of judicial concern for the stability of public revenues".[302]

242 One illustration of this point which the *Restatement* gives is based on the decision of the Supreme Court of Florida in *Dryden v Madison County*,[303] where a City tax is found to be void but the "City demonstrates that the revenues illegally collected were spent exclusively on ordinary municipal services benefiting Taxpayers among other residents". The comment in the *Restatement* relies upon this case as justifying a broader defence of change of position in §19(2) in the context of payments of tax where restitution "would disrupt orderly fiscal administration or result in severe public hardship" so that "the court may on that account limit the relief to which the taxpayer would otherwise be entitled".[304]

243 The *Restatement* does not seek to justify the result of *Dryden v Madison County* on the terms expressed by the Supreme Court of Florida in its original decision in that proceeding.[305] The original decision was appealed to the Supreme Court of the United States, which granted certiorari, vacated the judgment and remanded the matter back to the Supreme Court of Florida.[306] The *Restatement* focuses instead upon the decision made on remand, which was not quashed.[307] The reasoning of the Supreme Court of Florida in the earlier, quashed decision had suggested that "[w]here an invalid tax scheme applies across the board and confers a commensurate benefit ... 'equitable considerations' may preclude a refund".[308] But when the Supreme Court of the United States quashed that decision it did not engage with what was meant by "commensurate benefit" to taxpayers or "equitable considerations". The Supreme Court did, however, remand the decision for reconsideration in a manner that did not prejudice the complainant merely because

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302 *Restatement (Third) of Restitution and Unjust Enrichment* §19, comment f.

303 (1999) 727 So 2d 245.

304 *Restatement (Third) of Restitution and Unjust Enrichment* §19(2).

305 *Dryden v Madison County* (1997) 696 So 2d 728.

306 *Dryden v Madison County* (1998) 522 US 1145.

307 *Restatement (Third) of Restitution and Unjust Enrichment* §19, reporter's note f.

308 *Dryden v Madison County* (1997) 696 So 2d 728 at 730 [2].

the complainant (like the respondents in this appeal) did not refuse to pay but instead paid the tax and later sought restitution.[309]

244 No defence of change of position is available in this case, directly or indirectly, for two reasons. First, and most importantly, no defence of change of position was pleaded by the Council. In the Court of Appeal, as McMurdo JA observed, "[t]he Council disavowed a defence of change of position".[310] In this Court, the Council again disavowed such a defence.

245 Secondly, it would be a very large step for this Court to recognise, especially without argument and without evidence, an extended defence of change of position and fiscal chaos that applies only to taxing authorities. The recognition of this extended defence in the United States was said to take "on a significant federal constitutional dimension".[311] In England, a defence based on fiscal chaos was abandoned by Her Majesty's Revenue and Customs Commissioners,[312] and was rejected by the Law Commission on the basis of "fundamental questions of fairness to taxpayers" and the "substantial investment of discretion in a tribunal or court to afford it power to deny [a right of recovery] on the basis of expediency".[313] In the Supreme Court of Canada it has been held that in relation to a rule permitting restitution of invalid taxes, "[c]oncerns about fiscal chaos and inefficiency should not be incorporated into the applicable rule".[314] If an extended change of position defence based on fiscal chaos were to be considered in Australia, then it would also be necessary to confront notions of constitutional equality between private

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309 See *Newsweek Inc v Florida Department of Revenue* (1998) 522 US 442 at 444-445.

310 *Redland City Council v Kozik* (2022) 11 QR 524 at 543 [48].

311 *Restatement (Third) of Restitution and Unjust Enrichment* §19, comment b.

312 *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2014] 2 CMLR 10 at 378 [166].

313 Law Commission, *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (1994) at 126 [11.6]. See also Williams, *Unjust Enrichment and Public Law* (2010) at 157-159.

314 *Kingstreet Investments Ltd v New Brunswick* [2007] 1 SCR 3 at 21 [29].

parties and government that have underpinned much of the development of the common law.[315]

Conclusion

246 The Council's appeal should be dismissed with costs. The respondents should be granted special leave to cross-appeal but the cross-appeal should be dismissed with costs.

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315 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 215. See *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 530 [29].