

SUPREME COURT OF QUEENSLAND

CITATION: *Kozik v Redland City Council* [2019] QSC 109

PARTIES: **JOHN MICHAEL KOZIK**
(applicant)
v
REDLAND CITY COUNCIL
(respondent)

FILE NO/S: No BS11364 of 2018

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 7 May 2019

DELIVERED AT: Brisbane

HEARING DATE: 4 March 2019

JUDGE: Boddice J

ORDER: **1. The application is dismissed.**
2. I shall hear the parties as to further orders and costs.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – GENERALLY – where the defendant is a local government with responsibilities in respect of the levying of rates on all rateable land within Redland City Council – where the defendant resolved to levy special rates and charges on certain rateable land within Redland City – where the owners of that rateable land were given notice of those special charges – where the plaintiff is a rate payer in that area and was issued with such a notice – where the special charges were not validly levied by the defendant – where the defendant repaid to each rate payer a proportion of those special charges but declined to return the balance of the special charges on the basis that those sums had been spent for the benefit of the relevant rate payers – where the plaintiff submits strike out is appropriate on the basis of statutory interpretation and the inapplicability of the pleaded defences to the plaintiff’s framed claim – where the defendant opposes the strike out application on the basis that neither the question of statutory interpretation nor the availability of defences are free of doubt – whether the defendant’s pleading, in the relevant material respects, discloses no reasonable defence, has a tendency to prejudice or delay a fair trial, is

unnecessary, scandalous, frivolous or vexatious or is otherwise an abuse of process

Local Government Act 2009 (Qld)

Local Government (Finance, Plans & Reporting) Regulation 2010 (Qld)

Local Government Regulation 2012 (Qld)

Agar v Hyde (2000) 201 CLR 552

Dey v Victorian Railways Commissioners (1949) 78 CLR 62

General Steel Industries Inc v Commissioner of Railways (NSW) (1964) 112 CLR 125

Mid Brisbane River Irrigators Inc v The Treasurer [\[2014\] QSC 197](#)

Spencer v The Commonwealth (2010) 241 CLR 118

Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] AC 70

COUNSEL: C Wilson for the plaintiff
J M Horton QC with S T Richardson, for the defendant

SOLICITORS: Shine Lawyers for the plaintiff
Gadens Lawyers for the defendant

- [1] The plaintiff, a rate payer in the local government area under the control of the defendant, has commenced class action proceedings seeking the return of special charges incorrectly levied by the defendant.
- [2] The defendant does not dispute the special charges were levied incorrectly. However, it has returned only part of the special charges so levied, on the basis the balance was spent for the benefit of the plaintiff and other group members, the subject of the class action.
- [3] The plaintiff has instituted the class action as a claim framed in debt. In its defence and counterclaim, the defendant has pleaded change of position and other restitutionary defences.
- [4] The plaintiff makes application to strike out those aspects of the defendant's defence and counter claim. At issue is whether, having regard to a proper construction of the relevant legislation and regulations, the defendant has a tenable basis to assert an entitlement to equitable and restitutionary defences in a claim framed in debt.

Background

- [5] The defendant, as the local government for an area described as Redland City, has responsibilities for the levying of rates on all rateable land within Redland City.

- [6] Between June 2011 and June 2016, the defendant resolved, on an annual basis, to levy special rates and charges on certain rateable land within Redland City. The owners of that rateable land were given notice of those special charges via rates notices issued throughout that period. One such rate payer was the plaintiff.
- [7] In making the requisite resolutions and levying the special charges on those rate payers, the defendant did not comply with the relevant Regulations. As a consequence, the special charges were not validly levied by the defendant.
- [8] Subsequently, the defendant repaid to each rate payer a proportion of those special charges. The defendant declined to return the balance of the special charges on the basis those sums had been spent by the defendant for the benefit of the relevant rate payers.

Legislative regime

- [9] The defendant has power to do anything necessary or convenient for the good government of its local government area.¹
- [10] As part of its obligations as the local government for its local government area, the defendant must levy general rates on all rateable land within Redland City.² The defendant may also levy special rates and charges on rateable land.³
- [11] The term “special rates and charges” is defined in s 92(3) of the *Local Government Act 2009* (Qld) in the following terms:
- “(3) **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.”

- [12] Regulations made pursuant to the Act provide for the levying of special rates and charges in certain circumstances. Before it was repealed, regulation 28 of the *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) (“**the 2010 Regulations**”) provided:

“28 Levying special rates or charges

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

Note —

¹ *Local Government Act 2009* (Qld), s 9.

² *Local Government Act 2009* (Qld), s 94(1)(a).

³ *Local Government Act 2009* (Qld), s 94(1)(b)(i).

See the Act, section 92(3) (Types of rates and charges), definition *special rates and charges*.

- (2) For levying rates under subsection (1), the local government may fix a minimum amount of the rates.
- (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.
- (10) The local government may at any time, by resolution, amend –
 - (a) an overall plan; or
 - (b) an annual implementation plan.”

[13] Regulation 94 of the Local Government Regulation 2012 (Qld) (***“the 2012 Regulations”***) now provides:

“94 Levying special rates or charges

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

Note –

See the Act, section 92(3) (Types of rates and charges), definition ***“special rates and charges”***

- (2) 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.
- (3) 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.
- (4) 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.
 - (5) 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.
 - (6) If an overall plan is for more than 1 year, the local government must also adopt an annual implementation plan for each year.
 - (7) 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.
 - (8) 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.
 - (9) The local government may at any time, by resolution, amend –
 - (a) an overall plan; or
 - (b) an annual implementation plan
 - (10) The local government may fix a minimum amount of the special rates or charges.”

[14] Prior to 14 December 2012, regulation 32 of the 2010 Regulations provided for the return of incorrectly levied special rates and charges:

“32 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.”

[15] On 14 December 2012, the 2010 Regulations were repealed when the 2012 Regulations commenced operation. Regulation 98 of the 2012 Regulations provided for the return of special rates or charges incorrectly levied in primarily the same terms as regulation 32 of the 2010 Regulations.

[16] On 4 December 2014, regulation 98 of the 2012 Regulations was amended with effect from 5 December 2014, to add the words, “or should not have been levied” to the end of sub-regulation (1).

Plaintiff’s submissions

- [17] The plaintiff submits that a proper interpretation of regulations 32 of the 2010 Regulation and 98 of the 2012 Regulation, is that the special charges admittedly levied in breach of the Regulations must be returned to the levied rate payer. There is no legislative intention to confer a discretion upon the defendant to retain any of the incorrect levied special rates.
- [18] Alternatively, the plaintiff's claim being framed in debt, neither the defence of change of position, or the other restitutionary defences, have operation.
- [19] The plaintiff submits strike out is appropriate. The question has been determined on the basis of statutory interpretation and the inapplicability of the pleaded defences to the plaintiff's framed claim. In such circumstances, there is a saving of costs and court resources in a summary determination of the issue. There is no need for a trial.

Defendant's submissions

- [20] The defendant submits that strike out at an early stage of the proceeding is inappropriate, as neither the statutory interpretation question nor the availability of defences based on restitution and equity, are free of doubt. Instead, there is a real question to be determined as to the correct statutory interpretation to be placed on the applicable regulations and as to the availability of the pleaded defences.
- [21] The defendant submits that both questions must be determined in the context of the particular circumstances, including the legal principles applicable to a tax payer's claim to have wrongly or overpaid a tax; the defences or justifications available to a taxing authority and the developing nature of defences based on the law of restitution and equity.

Legal principles

- [22] The plaintiff seeks to strike out aspects of the defendant's defence and counter claim. He does not seek orders by way of separate determination of the correct statutory interpretation of the relevant legislation. Accordingly, the appropriate legal principles to be applied in determining the plaintiff's application at this early stage of the pleading, is whether the defendant's pleading, in the relevant material respects, discloses no reasonable defence, has a tendency to prejudice or delay a fair trial, is unnecessary, scandalous, frivolous or vexatious or is otherwise an abuse of process.
- [23] In exercising the power to summarily terminate proceedings, great care must be exercised to ensure a party is not improperly deprived of the opportunity for a trial.⁴ If it appears there is a real question to be determined, whether in fact or law, summary determination is not appropriate.⁵ A litigant ought to be afforded the opportunity to progress a matter to trial except in the "clearest of cases".⁶

⁴ *General Steel Industries Inc v Commissioner of Railways (NSW)* (1964) 112 CLR 125 at 128-130; *Spencer v The Commonwealth* (2010) 241 CLR 118 at [24].

⁵ *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at [91].

⁶ *Agar v Hyde* (2000) 201 CLR 552 at [57].

Discussion

- [24] The need to exercise caution when summarily determining the availability of pleaded defences at an early stage, is particularly important in the present case. The nature of the proceeding, being a class representative proceeding, gives rise to uncertainty about the final shape of the claim at trial and the complexity of the pleaded defences. It is also relevant that the complexity arises in the context of an action for recovery of charges invalidly levied by a statutory authority empowered to raise revenue for the good government of its local government area.
- [25] Having regard to those factors, even if it be accepted, for the purposes of the determination of this application, that regulations 32 of the 2010 Regulations and 98 of the 2012 Regulations (in its unamended and amended forms) place a statutory obligation on the defendant to return invalidly levied special charges, it does not follow that that statutory obligation renders untenable the availability of restitutionary defences in respect of the invalidly levied special rates and charges actually expended by the defendant for the benefit of rate payers.
- [26] Such a conclusion would not be inconsistent with the purpose and policy objectives of the *Local Government Act 2009* (Qld). The provision of a system of local government that is accountable, transparent and consistent with good government may, in an appropriate case, include an entitlement for the local government authority, which has actually spent revenue obtained by it having invalidly levied special rates and charges, to retain those funds expended for the benefit of rate payers. Retention would advantage rate payers as a whole. Otherwise, a burden would be placed on rate payers who did not receive that benefit.
- [27] Such a conclusion also does not detract from a legislative intent that local government authorities refund incorrectly collected special rates and levies. The obligation to refund remains, unless and until, the local government authority establishes it has actually expended those monies for the benefit of the rate payer.
- [28] The fact the plaintiff has framed its claim in debt does not necessarily mean defences of changes of position or other restitutionary defences will be unavailable to the defendant. The special relationship between rate payer and local authority is akin to that of a tax payer. Where, as here, monies invalidly levied are alleged to have been specifically spent for the benefit of the rate payer, the potential for a defence of value may arise.
- [29] The common law in respect of the applicability of restitutionary defences to overpayments to revenue authorities is the subject of continuing debate especially as to the applicability of the decision of *Woolwich Equitable Building Society v Inland Revenue Commissioners*,⁷ as the authors in *Restitution Law in Australia* observed:⁸

“In some cases, the taxpayer who sues to recover an invalidly levied tax may already, directly, and as a member of a specific class of persons, have received in

⁷ [1993] AC 70.

⁸ *Mason & Carter's Restitution Law in Australia*, 2nd edition (2008), LexisNexis Butterworths, Australia at [2041].

the form of grants or services provided by government, the value of the benefit of the monies paid. This could be the case with regard to statutory schemes whereby monies are levied to fund the marketing of a primary product, or some local activity such as the eradication of a weed or pest, and where the taxpayer enjoys the benefit of the expenditure before suing for recovery. Recovery of the (invalid) licence fee, after enjoyment of the right for which it was the consideration, would result in unjust enrichment, not its prevention. Sometimes ultra vires is the result of technical breaches and not fundamental absence of power. Respect for the constitutional principles underlying the usual *Woolwich* situation does not require recovery in this limited class of cases.”

- [30] Finally, the complexities presented by the present proceedings, together with the special relationship of rate payer and local government authority, render the observations of Jackson J in *Mid Brisbane River Irrigators Inc v The Treasurer*,⁹ apposite:

“I note, however, that the scope of restitutionary recovery against a statutorily based charge for a service or facility is not settled in the common law of Australia. In *Meriton Apartments Pty Ltd v Council of the City of Sydney (No 3)*, the NSW Land and Environment Court recognised the development of the common law of England and Wales on recovery of overpayments from the Crown in *Woolwich Equitable Building Society v Inland Revenue Commissioners*, and continued:

‘In Australia, the principal in *Woolwich* has not been recognised by the High Court, although I note that it is the view of the learned authors of Mason & Carter’s *Restitution Law in Australia*, 2nd Ed (2008), LexisNexis Butterworths, Australia, that it will be (at [2020]–[2032]). They also offer the opinion that the principle espoused in *Woolwich*, extends to local government bodies, such as councils (at [2034]). Having said this, the authors go on to note that even if *Woolwich* is applicable in Australia, not all unlawful impost will be recoverable, and more significantly, as is discussed below, some imposts will readily attract defences obviating repayment irrespective of their invalidity” (citations omitted).

Conclusion

- [31] Having regard to the type of proceeding, the complexities presented by the nature of the claim, including the relationship between the plaintiff and the defendant, and the potentially differing relationship within class members, it cannot be concluded the pleaded defences are wholly untenable. That being so, the pleaded defences have neither a tendency to prejudice or delay a fair trial nor constitute an abuse of process.
- [32] The pleaded defences raise real questions, properly to be determined after trial. A summary determination of those questions is not appropriate.

Orders

⁹ *Mid Brisbane River Irrigators Inc v The Treasurer & Minister for Trade of the State of Qld & Ors (No 2)* [2014] QSC 197.

[33] The application is dismissed.

[34] I shall hear the parties as to further orders and costs.