SUPREME COURT OF QUEENSLAND

CITATION:	*Hollis v Atherton Shire Council* [2003] QSC 147
PARTIES:	**STEVEN HOLLIS** (Plaintiff) **ATHERTON SHIRE COUNCIL** (Defendant)
FILE NO/S:	146 of 2001
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	District Court, Cairns
DELIVERED ON:	18 March 2003
DELIVERED AT:	Cairns
HEARING DATE:	7-8 August 2002.
JUDGE:	Jones J
ORDER:	**1. There be judgment for the plaintiff against the defendant in the sum of $216,793.08;** **2. The defendant pay interest at the rate of 10% per annum simple on the amount of the respective overpayments;** **3. The defendant pay the plaintiff's costs of and incidental to the action (including reserved costs) to be assessed on the standard basis.**
CATCHWORDS:	RESTITUTION – MISTAKE: RESTITUTION ARISING FROM A PLAINTIFF'S MISTAKEN ACTIONS – where plaintiff developer, seeks to recover excess money paid to the defendant Council which was not legally entitled to receive it – whether payment of overcharge not recoverable because made voluntarily and for good consideration – whether the developer had "passed on" the cost of the excess contribution – whether Council had acted in good faith – whether to make the payment of a prohibited amount a condition of approval provides another principled ground of recovery *Local Government (Planning and Environment) Act* 1990 (Qld) s 6.1(1)(c), s 6.1(2), s 6.2(6)(a) *Bayview Gardens Pty Ltd v The Shire of Mulgrave* (1987) 1 QdR 1 considered *David Securities Pty Ltd & Ors v Commonwealth Bank of Australia* (1992) 175 CLR 353, followed

Roxborough v Rothmans of Pall Mall Australia Limited (1999) 161 ALR 253, followed.

COUNSEL: Mr. D. Fraser QC with Mr. W. Cochrane for the plaintiff
Mr. J. Douglas QC with Mr. A. Philp for Defendant

SOLICITORS: Williams Graham & Carman for the plaintiff
Lilley Grose & Long for the defendant

[2] The plaintiff seeks to recover $216,793.08 paid to the defendant ("the Council") between March 1994 and May 1995. The plaintiff paid the money as contributions towards the cost of the defendant Council's water supply and sewerage headworks charged pursuant to a Local Government By-law [By-law 18 of Chapter 35 (Subdivision of Land) of the Council's By-laws] in respect of the plaintiff's applications for approval of its development of two subdivisions in Atherton known respectively as the Loder/Grau and Laurel estates.

[3] The subdivisions in these two estates were approved for development following successive applications – 8 lots on 4 November 1993; 9 lots on 7 July 1994 and 28 lots on 31 August 1994. These development applications were thus made after the coming into force of the Local Government (Planning and Environment) Act 1990 in which s.6.2(6) was enacted in the following relevant terms –

> *(6) The amount of any contribution required to be paid to a local government pursuant to this section is –*
>
> *(a) where a prescribed application is to subdivide land and the relevant land was at the relevant date in a zone under a planning scheme which would permit its use for a purpose envisaged by the prescribed application and the water supply headworks or sewerage headworks (or both), as the case may be, are available to service the relevant land – not to exceed the cost (calculated at the approval date determined by the local government under s 5.1(5), 5.2(4) or 5.3(4) to be appropriate) of the works which the local government could lawfully impose by way of any local law that was in existence at the relevant date and which required or may have required the applicant to contribute towards the cost of those works."*

The relevant date for the existence of the by-law was 1 September 1985.

[4] Council's By-law 18 had come into existence on 29 September 1977. It provided that an application for subdivision shall not be approved except subject to the following relevant conditions:-

> "*(b) In the case of every application made for approval to subdivide land to which this By-law applies, the application shall not be approved except subject to the following conditions (unless the Council in its discretion shall consider that by reason of the size, shape, location or topography of the said land or the proposed new allotments or by reason of any prior works or contributions that such conditions or any one or more of them should be imposed) namely:-*
>
> *(i) ...*

(ii) ...

(iii) That the applicant shall contribute towards the cost of the provision of a water supply service to the said land (other than by reticulation) by way of paying to the Council a contribution towards the costs (whether incurred before or after the making of the application) in connection with the construction of mains and the augmentation of existing mains and the construction of pumping stations and the augmentation of existing pumping stations required to be undertaken by the Council for such provision or any of those costs, other than the cost of constructing a main or a pumping station which is in existence at the date of coming into operation of this By-law;

(iv) *...(*contribution to the cost of sewerage service was expressed in identical terms)

...

(e) (i) If the Council shall require an applicant to contribute towards the cost of the provision of a water supply service and the provision of sewerage or the provision of water supply service or the provision of sewerage (other than by reticulation) to the land to be subdivided in accordance with subparagraphs (iii) and (iv) of paragraph (b) of this By-law then the Council shall state in the relevant condition of approval the amount of contribution required (which amount shall be reasonable in the opinion of the Council having regard to the reasonably foreseeable extent of usage of the facility concerned by, through, or as a result of the proposed subdivision) and such contributions shall be paid within the time specified in the relevant condition of approval (which shall not be less than six months except with the consent of the applicant); ...

(ii) If the Applicant shall fail to make payment or give security as required by the Council pursuant to the last preceding subparagraph then the approval of the subdivision shall be deemed to have lapsed and shall be of no force or effect whatever.

(f) *Where the Council has imposed as a condition of approval that the applicant shall contribute towards the cost of the provision of water supply and the cost of provision of sewerage or the cost of provision of water supply or the cost of provision of sewerage as hereinbefore provided the Council shall not endorse its approval on and seal any Plan of Subdivision intended for registration of the Registrar of Titles to which such condition of approval applies until the applicant shall have complied with such condition in the manner hereinbefore provided."*

[5] Until the Council became aware of the Court of Appeal decision in *Townacre Development Pty Ltd v Council of the City of Thuringowa*[1] it had sought to recoup, not only the headworks costs permitted by s 6.2(6), but also the costs that had been incurred historically in setting up a water supply and sewerage system.

[6] As a result the Council sought from the plaintiff contributions for head works totalling $252,701.21, though the contribution should have been calculated as $36,405.20. The plaintiff paid the amount sought and now seeks the $216,386.01 which he overpaid.

The plaintiff's claim

[7] The essence of the plaintiff's claim is the recovery of money paid under a mistake induced by misrepresentation by the Council which misrepresentation was relied upon by the plaintiff. Also he claims that, to the extent the Council received payments in excess of the prescribed contributions, the council's acceptance of that excess was expressly prohibited by s 6.2(6)(a).

Legal principles

[8] The principle, pursuant to which moneys paid under mistake may be recovered, was enunciated by the decision of the High Court in *David Securities Pty Ltd & Ors v Commonwealth Bank of Australia*[2]. Monies are paid under a mistake "where the plaintiff pays moneys to a recipient who is not legally entitled to receive them". (at 376) So, "the payer will be entitled prima facie to recover moneys paid under a mistake if it appears that the moneys were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the moneys or that the payee was legally entitled to payment of the moneys." (at 378)

[9] Whilst unjust enrichment has not been granted formal recognition as a cause of action in its own right[3], it does determine whether a claim in a particular case should succeed[4] .

[10] It is generally accepted that the concept of unjust enrichment requires satisfaction of the following elements –

1. That there was an enrichment;
2. That the enrichment was obtained at the plaintiff's expense;
3. That there is a principled ground of recovery establishing the injustice of retention of the enrichment; and
4. That there is no available defence.

(See *National Australia Bank v Budget Stationery Supplies Pty Ltd*[5])

[11] Since *David Securities* it has been unnecessary to characterise the mistake as one of law or of fact or of both.[6] The principle was stated in the joint judgment (of Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) in the following terms:-

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1 [1996] 2 QdR 296
2 (1992) 175 CLR 353
3 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221
4 *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* (unrep. 23/4/1997) CA NSW 40679 of 1996, Mason P at 18.
5 Ibid per Mason P at p 11. See also *Laws of Australia* ***29.1*** *[15]*
6 (1992) 175 CLR 353

> …The fact that the payment has been caused by a mistake is sufficient to give rise to a prima facie obligation on the part of the [the payee] to make restitution. Before that prima facie liability is displaced, [the payee] must point to circumstances which the law recognises would make an order for restitution unjust. There can be no restitution in such circumstances because the law will not provide for recovery except when the enrichment is *unjust*. It follows that the recipient of the payment, which is sought to be recovered on the ground of unjust 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.[7]"

[12] In the joint judgment there is reference, also, to what constitutes "mistake". At p 369 the judgment reads:-

> "As Winfield makes clear mistake not only signifies a positive belief in the existence of something which does not exist but also may include 'sheer ignorance of something relevant to the transaction in hand.' "

[13] In this matter there appears to be no issue as to whether there was an enrichment of the Council, nor as to whether that enrichment was or was not obtained at the plaintiff's expense.

The facts

[14] The Council approved each of the applications for subdivision subject to conditions. In its letter notifying its approval the Council typically stated the relevant condition in this matter in the following terms:-

> "A contribution shall be paid to the Council for headworks for water supply and sewerage in accordance with By-law 18, Chapter 35, subdivision of land.
>
> The contribution shall be calculated at the rate per allotment applicable at the time of sealing the Plan of Survey by the Council in each subdivision stage…
>
> The rates per allotment applicable as at 12 May 1994
>
> - Water $2,478.91
> - Sewerage $1,535.86."[8]

[15] In his evidence, the plaintiff said he believed he "had to make the payments as a condition to carry on the work and to have land for sale, to do this subdivision".[9] The plaintiff simply calculated the contribution relying upon the rate provided by the Council and multiplying that amount by the number of allotments. That was the procedure followed by the plaintiff in respect of each of the subdivisions before he became aware of the error in the Council's calculation.

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7 Ibid at p 379
8 Ex 2 doc 25 p 3
9 Transcript 21/15

[16] The plaintiff had engaged Mr Lloyd Twine, a surveyor, to act on his behalf. Mr. Twine was first retained after approval had been given for the first subdivision and thereafter he was involved in assisting in making the applications for subsequent subdivisions as well as in the preparation of final plans. In fact in the later subdivisions it was Mr Twine who submitted the application and plans for approval as agent for the plaintiff. The plaintiff also engaged a firm of solicitors to assist in the sale of the new allotments.

[17] In cross-examination the plaintiff acknowledged that he was aware of his rights of appeal to the Planning and Environment Court[10] and that it was open to him to take advice from solicitors and from Mr. Twine about the calculation of headworks contributions. He was asked –

> "It was open to you to ask Mr Montgomery for example about what rights you had in respect to this approval? – It didn't occur to me to do so. I believe that the Council was acting in the - a by-law of what they could charge and there was no reason for me to think otherwise.
>
> And there is no reason for you to challenge their ability to make these charges? Is that what you are telling us? – No. That's correct, yes."[11]

He later said that, if he had believed the Council was charging him in excess of what it should have, then he certainly would have appealed.[12]

Voluntary payment?

[18] The Council contends that the payment of the overcharge was not recoverable because it was made voluntarily and for good consideration. Mr Douglas QC on behalf of the Council relied upon the 1987 Full Court decision of *Bayview Gardens Pty Ltd v The Shire of Mulgrave*[13] to show that the plaintiff's payment was voluntary. He submitted further that the decision was binding upon me unless I came to the view that it had been overruled by the decision of the High Court in *David Securities*.

[19] Firstly, it should be noted that in *Bayview* the payment was not made under any mistake. The payment was made by a developer, who believed the local authority requirements were invalid, but paid them nonetheless for commercial reasons. As Connolly J pointed out (at p 7):-

> "In this case the evidence makes it quite clear that the appellants made a deliberate decision to make the disputed payments and to seek to recover them at a later date in the type of proceedings which they ultimately brought. The only conclusion to which one can come is that this was a commercial decision and the pressures under which they found themselves were those of the market place."

[20] His Honour reached this conclusion pointing out that the developer ran the risk that, if the invalid conditions were to be removed and the application for subdivision were to be reconsidered, the developer might not be granted the approval to

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10 Transcript 25/5
11 Transcript 30/20
12 Transcript 34/15
13 (1987) 1 QdR 1

subdivide. In these circumstances the Full Court applied the principles relevant to an action for monies had and received, which required proof by the plaintiff that the monies were paid by him involuntarily in the legal sense of being the result of some extortion, coercion or compulsion or improper use of power.

[21] I do not find the principle identified in *Bayview Gardens* as applicable in the circumstances of this case. In any event, the law relating to restitutionary claims has undergone very significant development since the time of that Full Court decision. In that regard Mr Douglas QC referred me to passages from the joint judgment in *David Securities* at pp 372-374. In particular he referred to the following passage:-

> "An important feature of the relevant judgments in these three cases is the emphasis placed on voluntariness or election by the plaintiff. The payment is voluntary or there is an election if the plaintiff chooses to make the payment even though he or she believes a particular law or contractual provision requiring the payment is, or may be, invalid, or is not concerned to query whether the payment is legally required; he or she is prepared to assume the validity of the obligation, or is prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment."[14]

[22] Mr. Douglas QC seeks to interpret this passage as presenting four alternative sets of circumstances in which the payment is seen as "voluntary". In fact, the passage relates to one type of conduct which explains the essence of voluntariness – namely, that the payer chooses or elects to make the payment. That is, the payment is not made by way of mistake as to its validity, but rather it is made regardless of whether the payment is valid or not.

[23] The phrase "or is not concerned to query whether the payment is legally required" from the above passage must be considered in its context. To extract the phrase from that context is to omit the essential element of choice which the joint judgment was at pains to highlight. In context the phrase would read:-

> "The payer <u>chooses to make the payment even though</u> he or she is not concerned to query whether the payment is legally required."

[24] But there is another reason. The joint judgment in *David Securities*, having rejected the so-called traditional rule denying recovery in cases of payments made under a mistake of law and also having rejected the alternative formulations of "supposition of legal liability" and "fundamental mistake" makes plain that the critical factor to prima facie liability is the mistaken belief that the payer "was under a legal obligation to pay the monies or that the payee was legally entitled to payment of the monies".[15]

[25] This issue was considered, obiter dicta, by the Court of Appeal in *Mercantile Mutual Health Ltd v Commissioner of Stamp Duties* [16] wherein the staff of the payer did take note of a change in legislative provisions when self-assessing the duty

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14 *David Securities* at p 373-4

15 Op cit at p 378

16 (2002) QCA 356

payable. Two members of the Court of Appeal (McMurdo P and Jerrard JA) indicated support for the view that such payments were made under an operative and causative mistake and were thus recoverable.[17]

[26] I was referred also to the first instance decision of *Roxborough v Rothmans of Pall Mall Australia Limited*[18] where Emmett J identified the need to establish "some causal connection between the payment said to constitute the unjust enrichment and the mistaken belief". His Honour went on to say:-

> "A payment is voluntary and not the result of an operative mistake if the payer chooses to make the payment despite believing that a particular law or contractual provision requiring the payment is, or may be, invalid, or if the payer is prepared to make the payment irrespective of the validity or invalidity of the obligation rather than contesting the claim for payment..."

These propositions are in accord with the principles enunciated in *David Securities*. But the question is whether the payment made by the plaintiff is of this kind.

[27] The facts in *David Securities* involved the recovery by a bank of monies paid pursuant to a loan agreement containing a provision that withholding tax liability of the bank be paid by the borrower contrary to the provisions of s 261 of the *Income Tax Assessment Act* 1936 (Cth). There was an issue as to whether the payment by the appellants was made under a relevant mistake. That issue was not resolved at first instance and was not able, on the evidence, to be resolved in the High Court necessitating a referral back to the trial judge for resolution of the factual issue.

[28] No such difficulty arises on the facts of this case. The plaintiff's evidence referred to above was not directly challenged. Counsel for the defendant, however, sought to persuade me to infer that the plaintiff was unconcerned about the quantum of the contributions because he was keen to market the new allotments regardless of the cost of obtaining subdivision approval.

[29] Given the amount of the overcharge and the fact that the plaintiff intended to pursue the business of land development, I am satisfied that, if the plaintiff had been aware that the contributions were for amounts in excess of the Council's legal entitlement, he would most certainly have challenged the council's right to charge the excess. The fact is he simply relied on the Council to comply with its own by-law and with the provisions of the *Local Government (Planning and Environment) Act*. In my view, it was not unreasonable for him to have so done. Only the Council had the information necessary for making a calculation compliant with the statute. The plaintiff had no source of information except through the Council and, I infer, no experience as to how the calculation would be made. His introduction to these matters was his receipt of the first approval letter from the Council.[19] His evidence reads:-

> "Did you note that as you read the council's response? – Yes, I did. Did you know what a by-law was at that time? – I – It was just a law that I believed that they had to operate within for the calculations of the charges." [20]

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17 Ibid per McMurdo P at para[12]-[14], Jerrard JA [35]-[40]

18 (1999) 161 ALR 253 at 269

19 Ex 2 doc 21

20 Transcript 16/50

[30] I find that the plaintiff has satisfied the onus of showing that the contributions were made under a mistake, such as to give rise to a prima facie right to recover the overpayment. I am satisfied also that the payments were not made voluntarily in the sense referred to above.

Consideration

[31] The Council argues further that, because the plaintiff received good consideration for the payment and the consideration was indivisible, he loses the right to recover. The contention is that the plaintiff paid the contributions sought by the Council and in return received the approved plan of subdivision leading to the creation of the new allotments. If, thereafter, there were to be a variation in the quantum of contributions this would constitute an alteration of conditions and would give rise to a prospect that the approval would have to be reconsidered by Council, or on appeal, by the Planning and Environment Court. See *Bayview Gardens Pty Ltd v Shire of Mulgrave* (supra). Such a prospect would appear unlikely when all that would be raised would be Council's obligation to comply with the law. The scope of the conditions typically applied to these particular subdivisions is seen, for example, in the letter to the Council of 18 May 1994[21] to which previous reference has been made. That document shows conditions relating to 20 different aspects of the subdivision. The condition relating to contributions for headworks was simply a requirement for payment of a fixed sum per allotment. The rectification of the amount per allotment in compliance with the law is not likely to be a matter which would affect the decision to approve the subdivision. In fact, when the error was discovered during a later stage of the Laurel estate's subdivision, that is precisely what happened. The amount of the contribution was varied without a reconsideration of the approval.

[32] I was referred to a number of authorities concerned with the obligation of a party to a contract to fulfil contractual obligations, notwithstanding that the other party had acted *ultra vires*. Re *K L Tractors Ltd; Bunbury-Harvey Regional Council v Giacci Bros Pty Ltd; Mulgrave Shire Council v Red Hills Pty Ltd.*[22] In none of these cases did the contractual obligation arise as a consequence of any relevant mistake. They were concerned simply with performance of a contract that was formed by unexceptional negotiations.

[33] Likewise, *Roxborough v Rothmans of Pall Mall Australia Ltd*[23] was not a case of payment made under mistake. It was concerned with money paid for a specific purpose. The price of the goods purchased included a tobacco licence levy under State government legislation. The respondent had collected this impost on the goods but it did not have to pay it over to the revenue authorities when subsequently the licence fee was held to be invalid. The licence fee was in fact an ad valorem tax upon the goods. Thus it was possible to identify the amount paid by way of tax and the amount in fact paid for the goods. As a result of the changed circumstances the party receiving the price of the goods no longer had the anticipated liability to pay the tax for which it had been remunerated and so there

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21 Ex 2 doc 24

22 (1961) 106 CLR 318; (2000) WASC 223; (1994) 83 LGERA 323.

23 (2001) 76 ALJR 203

was a partial failure of consideration which part was identifiable and severable from the price.

[34] In this case it was the plaintiff's acceptance of the quantum of contributions being calculated according to law that constituted the mistake. It is not a case of the Council performing a contractual obligation for which it had no authority. The Council was unjustly enriched at the moment it received the payment of the contribution in excess of what it was legally entitled to seek. The provision of the final plans was not contemplated until a later date. Had the mistake been identified before the final plans were registered it could have been rectified. The Council's subsequent approval of the final plans, whether it be characterised as performance of contract or of statutory obligation does not, in my view, change the character of the plaintiff's prima facie right to recover what he had paid because of his mistaken belief.

[35] In accordance with the approach that I have taken the question of whether the consideration is indivisible or severable in part does not arise. But, even if I am wrong on this approach, it is the attribute of being "unjust" that is the essential requirement of an action to recover money paid under a mistake.[24] The right to recover a payment so characterised should not, in principle, depend upon whether the consideration can be severed.

Consideration and severability

[36] These were not raised in the pleadings and I am not persuaded they are relevant to the issue of whether there was unjust enrichment for which the plaintiff is entitled to restitutionary relief.

Good faith in the Council

[37] The plaintiff raised as a further ground for recovery, namely, that the Council did not act in good faith in determining the quantum of contributions. This claim was based on the evidence that, by 1985, because of an earlier appeal (by Mr. Cuda), the Council was aware that its method of calculating the contribution was erroneous and subject to challenge. I am asked to infer that the Council would then have taken legal advice on the matter. In any event if not taking advice then, the Council should have taken advice long before it sought the opinion of Mr Ure of counsel after the *Townacre* decision.

[38] I am satisfied that the Council was not aware of the impact of s 6.2(6) until after the decision in *Townacre* came to the attention of its officers. There had been changes in the Council's technical staff and in its elected representatives in the period in question. I accept the evidence of Mr Higgins that contributions sought by the Council were calculated following a periodic review of the costs of providing the infrastructure in question. The Council error arose because it continued to include in the list of infrastructure items some of the structures which were not included in By-law 18. Once the error was identified the policy changed. He said:-

> "…Whereas it's accurate to say, isn't it, that the original calculation that you did in relation to Laurel Estate – and, indeed, in relation to

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[24] *David Securities* (supra) at 391; *ANZ Banking Group Limited v Westpac Bank Corporation* (1987) 164 CLR 662 at 673

> the Loder/Grau subdivision – did not accord with By-law 18? – When I did those calculations, I was not aware that it did not accord with the by-law, that particular by-law…
>
> …But with the benefit of what you now know, do you accept that it was inaccurate? – With the benefit of the advice of Mr Ure and what I now know, I accept that that was inappropriate that some elements were included at that time.
>
> Now, Mr. Douglas, who is the senior counsel for the defendant council in this case, opened that in your evidence you would say that had you known the correct position in relation to Mr. Hollis's applications at the time when they were made, you would've recommended to council that the approval be granted using the correct lower figures. Is that the case? – Yes."[25]

[39] I am not persuaded on all the evidence that the Council did not act in good faith in its calculation of contributions.

Passing on the overcharge

[40] The Council argues that the plaintiff should be denied relief on the basis that he "passed on" the cost of the excess contribution to purchasers of the allotments in circumstances where he has voluntarily submitted to the charges and received the sought-after consideration.

[41] The evidence as to the sales of the allotments suggests that the plaintiff simply recovered what was the market price for the subdivided lots. There is simply no evidence that the price he demanded involved a conscious recovery of costs except in a broad sense. There is certainly no evidence that the sale price for each lot in some way reflected the costs of fulfilling the conditions attached to the approval for each lot.

[42] In any event such a defence has been rejected by two separate decisions of the High Court – *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd*[26] and *Roxborough v Rothmans of Pall Mall Australia Ltd* (supra). In the latter case the joint judgment of Gleeson CJ, Gaudron and Hayne JJ at paras [25-29] relied upon statements from the judgment of Mason CJ and the judgment of Brennan J (with whom Toohey and McHugh JJ agreed) to hold that such a defence was not available. The principle is highlighted in the following remarks of Mason CJ who said (at para 26):-

> "Restitutionary relief, as it has developed to this point in our law, does not seek to provide compensation for loss. Instead, it operates to restore to the plaintiff what has been transferred from the plaintiff to the defendant whereby the defendant has been unjustly enriched. As in the action for money had and received, the defendant comes under an obligation to account to the plaintiff for money which the defendant has received for the use of the plaintiff. The subtraction

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25 Transcript p 56

26 (1994) 182 CLR 51

> from the plaintiff's wealth enables one to say that the defendant's unjust enrichment has been 'at the expense of the plaintiff', notwithstanding that the plaintiff may recoup the outgoing by means of transactions with third parties."

[43] The submission that the plaintiff passed on the excess amount of the contribution is not made out on the evidence and is not, in law, a basis for resisting the plaintiff's claim.

[44] The Council does not seek to resist the claim on the basis of any "change in its position"[27] or of other matters such as compulsion, duress and *colore officio* which were touched on briefly by counsel in address. In the light of my findings such issues do not have relevance here.

Statutory prohibition and *ultra vires*

[45] By his Statement of Claim the plaintiff claims to be entitled to recover the excess contributions on the ground that the Council was prohibited from requiring contribution exceeding the amount calculated in accordance with s 6.2(6) and the relevant by-law. It is not disputed by the parties that the Council is a public authority. In England an *ultra vires* exaction by a public authority is *prima facie* recoverable and this *prima facie* claim is complete without proof of mistake or duress. *Woolwich Equitable Building Society v Inland Revenue Commissioners*[28]. This so-called "*Woolwich* principle" has not yet been adopted into Australian law but there are a number of other authorities relied upon by the plaintiff which demonstrate that an overpayment made in the performance of a statutory duty is recoverable – *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale*[29] and *State Bank of New South Wales Limited v Commissioner of Taxation (Cth)*[30].

[46] On behalf of the Council it is acknowledged that the effect of such a prohibition may give rise to a right of action. Reference was made by way of example to *Marshall v Marshall*[31] However the Council argues that the language of the section does not result in an obligation to refund monies which were paid voluntarily. Mr Douglas QC for the Council argues that, on its proper construction, s 6.2(6)(a) does not impose a prohibition on receipt of an unlawful payment but merely imposes a limit on the amount of contribution that can be lawfully required. With that I agree. But the plaintiff's claim, as I understand it, relies upon s 6.1(2) which clearly prohibits the receipt of "any consideration in respect of a condition" which was unlawful for the government to impose. I regard the requirement, by way of condition, to pay headworks contributions was unlawful as contravening s 6.1(1)(c) in combination with s 6.2(6)(a). In my view to make the payment of a prohibited amount a condition of approval provides another principled ground of recovery.

Conclusion

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27 Transcript p 119

28 (1993) AC 70 per Lord Gough at 177, Lord Browne-Watkinson at 198-9, Lord Slynn at 204

29 (1969) 121 CLR 137

30 (1996) 62 FCR 371 at 376-8

31 (1999) 1 QdR 173 at 176-8

[47] I am satisfied that the plaintiff has established the elements of his claim for restitution and that he is therefore entitled to recover the agreed sum of $216,793.08. The parties have agreed that interest should be allowed at 10% per annum simple from the date of the respective payments which made up that sum.

Orders

[48] I make the following orders that:-

1. There be judgment for the plaintiff against the defendant in the sum of $216,793.08;

2. The defendant pay interest at the rate of 10% per annum simple on the amount of the respective overpayments;

3. The defendant pay the plaintiff's costs of and incidental to the action (including reserved costs) to be assessed on the standard basis.