SUPREME COURT OF QUEENSLAND

CITATION:	*Crystal Creek P/L v Cairns City Council* [2003] QCA 318
PARTIES:	**CRYSTAL CREEK PTY LTD** ACN 010 193 325 (plaintiff/respondent) **v** **CAIRNS CITY COUNCIL** (defendant/appellant)
FILE NO/S:	Appeal No 11048 of 2002 SC No 164 of 1995
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from interlocutory decision
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	24 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	24 July 2003
JUDGES:	de Jersey CJ, Mackenzie and Helman JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed, with costs of and incidental to the appeal reserved until further order**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – where respondent relied on doctrine of unjust enrichment to claim restitution of amounts overpaid to appellant – where respondent's statement of claim alleged that appellant had constructive knowledge of overpayment – where appellant applied for order striking out reference to constructive knowledge in respondent's statement of claim – whether constructive knowledge relevant to doctrine of unjust enrichment *Uniform Civil Procedure Rules* 1999 (Qld), r 171 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, applied *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1987) 188 CLR 241, considered *Port of Brisbane Corporation v ANZ Securities Ltd* [2002] QCA 158; Appeal Nos 11577 and 11596 of 2001, 10 May 2002, considered
COUNSEL:	P J Lyons QC, with K Holyoak, for the appellant D B Fraser QC for the respondent

SOLICITORS: MacDonnells for the appellant
Hopgood Ganim for the respondent

THE CHIEF JUSTICE: The respondent sued the appellant for approximately $345,000 by way of restitution of amounts overpaid for headworks charges pursuant to subdivisional approval. In paragraph 12 of the statement of claim the respondent alleges that the relevant local authority, "knew or ought to have known", that the amount charged was not properly calculated and not lawfully exacted.

The respondent relies on the doctrine of unjust enrichment on the ground the money was paid because of a mistake. Following David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353 and 378, the respondent is entitled to recover the amount of the overpayment unless, as presently relevant, the appellant establishes, by way of defence, that having received the money in good faith and on the faith of that receipt, acted to its detriment. See David Securities at pages 384 to 5 and Port of Brisbane Corporation v ANZ Securities Ltd [2002] QCA 158.

The appellant applied for an order striking from paragraph 12 of the statement of claim the words, "or ought to have known". In so doing, the appellant relied particularly on the decision of Port of Brisbane, where McPherson JA, in paragraph 22, referred to substantial authority excluding constructive knowledge from relevance to the common law action for restitution, with only good faith being required of the payee.

Having regard to the onus of proof, the allegations in paragraph 12 were, to my mind, more aptly included in a reply to a defence raising change of position, but that point was not taken, the appellant's objection was more fundamental.

The learned primary Judge declined to exercise his discretion to strike the words from the pleading. His Honour said:

> "'Unjust enrichment' is an essential requirement of the action to recover money [paid] under a mistake...
>
> A consideration of whether unjust enrichment has been established takes into account many factors. In particular, questions of receiving a benefit in good faith and whether the payee has, on the faith of the receipt of the money, acted to its detriment seem to me to be matters where knowledge, or constructive knowledge, of the payee could be material.
>
> Issues such as these are not without their subtleties and are certainly not matters for determination on an application to strike out."

Yet the appellant contends that constructive knowledge is so clearly irrelevant to the determination of such a claim that by his declining to make the orders sought the learned Judge's discretion miscarried.

Certainly Port of Brisbane points very strongly in that direction. It is fair to observe however, as did counsel for the respondent in his submissions, that the action for restitution following unjust enrichment is newly developing. Some aspects arguably remain unclear, to the extent that they have not been the subject of a direct ruling by the Court of Appeal in this State or exposition of principle in the High Court.

I include, as taken from the submissions for the respondent, whether what a payee ought to have known and the question of comparative responsibility as between payer and payee, as raised in Kiriri Cotton Co Ltd v. Dewani [1960] AC 192 at 204, are considerations rendered irrelevant by David Securities; and whether an examination of comparative fault, on the broad basis raised in Larner v. London County Council [1949] 2 KB 683 at 688 to 9, could, if applicable to this case, embrace the issue of what the appellant should have known in addition to what it actually knew. In David Securities at page 386 the High Court eschewed any "detailed explication of the defence" in that case.

The application was brought under rule 171 of the Uniform Civil Procedure Rules on the ground the challenged words were unnecessary or their inclusion could prejudice or delay the fair trial of the proceeding.

On an application to strike out a part of a pleading, the approach counselled in Esanda Finance Corporation Limited v. Peat Marwick Hungerfords (1997) 188 CLR 241 at 271 and 293 to 4, is as relevant as it is to an application to strike out a pleading in its entirety.

Actual knowledge in the payee will need to be explored. It is, to me, difficult to see that an exploration of an issue of constructive knowledge would appreciably expand the proceeding.

Notwithstanding the considerable strength of the indication in Port of Brisbane, since it has not in terms addressed the instant points, being points effectively left open by the High Court in David Securities, the respondent should, in my view, be permitted to ventilate them, even if that should lead to a determination of their irrelevance by the trial Judge should this matter ultimately proceed to that point.

In my view, the appellant has not demonstrated that the learned Judge erred in the exercise of his discretion or that this Court should, in what is essentially a matter of practice and procedure, intervene on appeal. I would dismiss the appeal and order that the costs of and incidental to the appeal be reserved until further order. The intention basing that costs order is that the issue of the disposition of these costs would first be ventilated in the trial Judgment.

MACKENZIE J: I agree.

HELMAN J: I agree.

THE CHIEF JUSTICE: The orders are as I have indicated.
