SUPREME COURT OF QUEENSLAND

CITATION:	*Redland City Council v Kozik & Ors* [2022] QCA 158
PARTIES:	**REDLAND CITY COUNCIL** (appellant) **v** **JOHN MICHAEL KOZIK** (first respondent) **SIMON JOHN AKERO** (second respondent) **SARAH AKERO** (third respondent) **NEIL ROBERT COLLIER** (fourth respondent)
FILE NO/S:	Appeal No 11735 of 2021 SC No 11364 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2021] QSC 233 (Bradley J)
DELIVERED ON:	26 August 2022
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2022
JUDGES:	McMurdo JA and Boddice and Callaghan JJ
ORDERS:	**1. Allow the appeal in part.** **2. Allow the cross appeal.** **3. Set aside the answers to the agreed questions common to the group members and substitute the following answers:** **a. Question 1: No;** **b. Question 2: No;** **c. Question 3:** **(i) 3(a): No; and** **(ii) 3(b): No.** **d. Question 4:** **(i) 4(a): Not necessary to answer;** **(ii) 4(b): Not necessary to answer.** **e. Question 5:**

(i) 5(a): Yes, at the point of payment of the special rate and charge levied; and

(ii) 5(b): No.

4. Otherwise dismiss the appeal.

5. The appellant pay the respondents' costs of the appeal and the cross appeal.

CATCHWORDS: REAL PROPERTY – RATES AND CHARGES – RATING OF LAND – RECOVERY OF RATES – GENERALLY – where the respondents owned waterfront residences on land within the Redland City Council ("the Council") local government area – where the Council purported to pass resolutions levying special charges upon the respondents' land to fund waterway services – where the respondents paid the special charges and the Council expended a portion of those charges on the services – where the resolutions did not comply with mandatory provisions in the relevant local government regulations and were therefore invalid – where the Council refunded to the respondents the amount of the special charges that had not been expended on the services – where the applicable local government regulations contained provisions obliging the Council to return special charges in certain situations (the "return regulations") – whether the return regulations were engaged

EQUITY – GENERAL PRINCIPLES – MISTAKE – RECOVERY OF MONEY PAID OR EXPENDED – UNJUST ENRICHMENT – GENERAL PRINCIPLES – where the respondents paid the special charges in the belief that they were legally obliged to do so – where this belief was a mistake of law – where the respondents were entitled, *prima facie*, to the return of the special charges unless the Council could point to circumstances which would make an order for restitution unjust – where the Council contended that repaying the special charges would unjustly enrich the respondents – where the Council contended that the special charges were paid "for good consideration", being the provision of the services which benefited the respondents' land – where consideration, in this context, means the matter considered by the payer informing the decision to pay rather than any benefit to the payer which subsequently ensues – where the state of affairs existing in the respondents' minds was that they were obliged to pay the special charges as levied – whether there was a failure of consideration – whether the respondents were unjustly enriched

Local Government Act 2009 (Qld), s 92, s 92(3), s 96
Local Government (Finance, Plans and Reporting) Regulation 2010 (Qld), s 28, s 32
Local Government Regulation 2012 (Qld), s 94, s 98

Adrenaline Pty Ltd v Bathurst Regional Council (2015) 97 NSWLR 207; [2015] NSWCA 123, considered
Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd [1980] QB 677, cited
BMW Australia Ltd v Brewster (2019) 269 CLR 574; [2019] HCA 45, cited
Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51; [1994] HCA 61, cited
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353; [1992] HCA 48, applied
E Cocco and Sons Investments Pty Ltd v Gold Coast City Council [2014] QSC 10, cited
Linville Holdings Pty Ltd v Fraser Coast Regional Council [2017] QSC 252, cited
Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd [2006] VSCA 6, considered
Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516; [2001] HCA 68, cited
Stewart v Atco Controls Pty Ltd (In liq) (2014) 252 CLR 307; [2014] HCA 15, cited
Whiting v Somerset Regional Council [2010] QSC 200, cited
Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] AC 70, cited

COUNSEL: J M Horton QC, with S T Richardson, for the appellant
G J Gibson QC, with P D Hay, for the respondents

SOLICITORS: Gadens Lawyers for the appellant
Shine Lawyers for the respondents

[1] **McMURDO JA:** The respondents are the plaintiffs in a representative action in the trial division against the appellant Council, seeking the return of monies paid by them as ratepayers for charges which were wrongly levied by the Council over a six year period from 2011. The Council accepts that the charges were wrongly levied, but has refused to repay such part of the charges as the Council has expended for the particular benefit of the group of ratepayers in this case represented by the respondents.

[2] The parties agreed that there were five questions which raised issues of law and fact which were common to the group members and which should be determined. In the judgment under appeal[1] those questions were answered in the respondents' favour, with the result that the Council was to repay the disputed monies.

[3] The respondents' case was that the disputed amounts had to be repaid pursuant to the terms of the *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) (the 2010 Regulation) and the *Local Government Regulation 2012* (Qld) (the 2012 Regulation),[2] or alternatively under the general law of restitution.

[4] The Council's case was that neither Regulation obliged the Council to repay the disputed monies, and that the respondents' claim, whether under the Regulations or the general law, was precluded by the fact that the enjoyment and value of their

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1 *Kozik & Ors v Redland City Council* [2021] QSC 233 (Judgment).
2 Which I will call the Regulations.

lands had been enhanced by the Council's provision of services which were funded by the monies in question. By that second argument, it was said that the return of the disputed monies to the respondents and other group members would cause *them* to be unjustly enriched.

[5] The primary judge (Bradley J) determined that the Regulations, upon their proper construction, required the Council to repay the monies notwithstanding what he accepted was the benefit to the respondents and other group members of the expenditure of the funds.[3] For the reasons that follow, I agree that the Council is bound to repay the monies. However I respectfully disagree with the primary judge as to the legal basis of that liability. Upon the proper construction of the Regulations, neither was engaged by the facts and circumstances of this case, and the basis of the Council's liability is that the monies were paid to it by the respondents and the group members under a mistaken belief that they were legally obliged to do. The Council's defence should be rejected. The repayment of the monies would not result in an unjust enrichment of the payers where the consideration for the payments, as consideration is meant in this context, was that they were discharging their legal obligation and that consideration failed.

[6] On my conclusions, the appeal must be allowed in part, because some of the common questions must be answered differently. However the judgment for the repayment of the monies should stand.

The special charges in this case

[7] The appellant, as a local government under the *Local Government Act 2009* (Qld) (LGA), has a statutory authority to impose and levy rates and charges. A local government must levy general rates on all rateable land within its area, and it may levy special rates and charges, utility charges and separate rates and charges.[4]

[8] By s 92(3) of the LGA, 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."

[9] By a resolution at the local government's budget meeting for a financial year, a local government must decide what rates and charges are to be levied for the year,[5] and this is a power which may not be delegated by it.[6]

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3 Judgment [45].
4 LGA s 94(1).
5 LGA s 94(2).
6 LGA s 257(3).

[10] The Regulations were made under a power conferred by s 96 of the LGA. They prescribed conditions for the exercise of a local government's power to levy special rates or charges, and provided for the return of special rates or charges incorrectly levied in certain circumstances.

[11] The Council passed resolutions to levy special charges in June 2011 and July 2012, under the 2010 Regulation which relevantly provided:

> "**28 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) 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.
>
> …
>
> **29 Carrying special rates or charges forward to a later financial year**
>
> (1) This section applies if a local government does not spend all of the special rates or charges that are raised in a financial year in carrying out an annual implementation plan.

(2) The local government may carry the unspent special rates or charges forward for spending under an annual implementation plan in a later financial year.

30 Surplus special rates or charges after plan is carried out

(1) This section applies if—

(a) a local government implements an overall plan; and

(b) the local government has not spent all the special rates or charges.

(2) The local government must 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.

(3) The payments to the current owners must be in the same proportions as the special rates or charges were last levied.

31 Surplus special rates or charges after plan is cancelled

(1) This section applies if—

(a) a local government decides to cancel an overall plan before it is carried out; and

(b) the local government has not spent all the special rates or charges.

(2) The local government must 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.

(3) The local government must pay the current owners—

(a) if the overall plan identifies the beneficiaries of the plan—in the proportions that the local government, by resolution, decides; or

(b) if the overall plan does not identify the beneficiaries of the plan—in the same proportions as the special rates or charges were last levied.

(4) The local government must decide the proportions having regard to—

(a) the proportions in which the special rates or charges were last levied; and

(b) the extent to which the rateable land, or the owners of the rateable land, will benefit from or have access to the service, facility or activity.

(5) The beneficiaries of the plan are the owners of the rateable land that will benefit from or have access to the service, facility or activity.

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."

[12] In each of the 2011 and 2012 resolutions of the Council, an "overall plan" was identified. However that plan did not include an estimate of the cost of carrying out the plan or an estimate of the time for doing so. Consequently, it was not an overall plan as required by s 28.

[13] With effect from 14 December 2012, the 2010 Regulation was repealed and the 2012 Regulation commenced. As the primary judge observed, initially the relevant sections of the 2012 Regulation were identical to those of its predecessor.[7] In the 2012 Regulation, s 94(1) to (9) and (15) were relevantly identical to the former s 28(1) and (3) to (11) and s 94(10) was the equivalent of s 28(2). Sections 95 to 98 were in relevantly the same terms as ss 29 to 32 of the 2010 Regulation.

[14] Initially, the 2012 Regulation included s 94(14) as follows:

"(14) 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."

[15] With effect from December 2014, the initial s 94(14) was omitted and replaced with the following:

"(14) 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 to 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.)

[16] At the same time, the original s 98 was omitted and replaced with the following:

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

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7 Judgment [52].

> (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.)

[17] For each of the four years commencing 1 July 2013, the Council passed resolutions to levy special charges. Again, each resolution identified a document as the overall plan, but the plan did not contain estimates of the cost of carrying it out or the time for doing so. Again therefore, in non-compliance with the Regulation, the resolution did not identify an overall plan for the service, facility or activity to which the special charge was said to apply.

The services provided from the special charges

[18] The resolutions which were passed over these six years were for the levying of special charges on rateable land adjacent to the Aquatic Paradise Canal Reserve, the Sovereign Waters Lake Reserve and the Raby Bay Canal Reserve. It is unnecessary to detail the works which were to be funded by the special charges, beyond saying that they involved capital and operational expenditure on geotechnical works, rock armour replacement, work on revetment walls and the dredging, monitoring and maintenance of the waterways. The primary judge received evidence that the lands of all group members would benefit from those services, and that the value of the lands would increase by more than 1 or 2 per cent. There was evidence that the occupiers of the land would benefit from an improved visual amenity. The primary judge accepted that there was the requisite connection between the purported special charges and the lands upon which they were to be levied such that the lands were "susceptible" of a special charge.[8]

[19] As it happened, the Council did not spend all of the funds which it collected by the special charges. That which the Council did not spend was returned to the ratepayers concerned, including the respondents. The Council calculated the percentage of the total amount received which it had not expended on the services, before realising the defects in its resolutions, and refunded to each ratepayer who had paid the special charge that same percentage of their payment (with interest).

[20] The primary judge found that "[a]lthough the Council did not spend all the funds it collected by the Special Charges, the funds it did spend had a beneficial effect on the land owned by the plaintiffs and the other group members [and that] [i]t may be assumed that this benefit accrued to Mr Collier and other group members "more than the general public and non-waterfront property owners"."[9]

The resolutions were invalid

[21] It was common ground that all six resolutions were invalid. The primary judge said that it was "appropriate to regard them as of no effect from the beginning and incapable of ever having produced legal effects", save to the extent, he said, that any effect was given by a specific statutory provision such as that in s 32(2) of the

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8 Judgment [44].
9 Judgment [45].

2010 Regulation.[10] That conclusion of invalidity is not challenged and is supported by the text of the Regulations and by authority.[11]

Repayment under the 2010 Regulation

[22] The primary judge held that s 32 was engaged, with the consequences, according to s 32(2), that the rate notices were not invalid but the Council was obliged to return the charges to the persons who had paid them. Because there was no expressed qualification to that obligation, he held the Council was not excused from failing to return the charges to the respondents by the fact that they had benefited from the use of their monies.

[23] The first question, of course, was whether s 32 was engaged. It is convenient to set out again s 32(1):

> "(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."

[24] By s 28(3) a resolution to levy special rates or charges had to identify the rateable land to which the special rates or charges applied, and that land had to be identified within the overall plan.[12] The circumstance addressed by s 32 was not a deficiency in an overall plan or the resolution to levy special rates or charges. It was a deficiency in the process of levying the special rate or charge in accordance with the local government's resolution, by other landowners being levied.

[25] The judge rejected an argument from the Council that the phrase "land to which the special rates or charges do not apply" should be construed as if it read "land to which the special rates or charges could not apply".[13] The judge said that this would change the effect of the provision and that there was nothing in the ordinary meaning itself or in the surrounding provisions of the Regulation or the LGA which required or supported that change.[14] His Honour continued:

> "[47] On the Council's interpretation, only if the Council could not have resolved to levy the rate or charge on the land would the rate notice be validated. If this were so, then those landowners – whom the Council could not have validly resolved to levy with the rate or charge – would be obliged to pay the special rate or charge. The rate notices for all other landowners – whose land could have been the subject of a valid resolution but was not – would not be validated; and to recover even the general rates and charges from such landowners, the Council may have to issue revised rate notices excluding the special rate or charge.
>
> [48] The evident purpose of s 32 was to preserve rate notices from invalidity that would otherwise follow the inclusion of a

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10 Judgment [39].

11 *Whiting v Somerset Regional Council* [2010] QSC 200 at [32]-[33]; *E Cocco and Sons Investments Pty Ltd v Gold Coast City Council* [2014] QSC 10 at [80]-[100]; *Linville Holdings Pty Ltd v Fraser Coast Regional Council* [2017] QSC 252 at [49].

12 s 28(4)(b).

13 Judgment [43].

14 Ibid.

> special rate or charge levied on land to which it does not apply. In short, the inclusion of one or more errant special rates or charges in a single rate notice did not render the rate notice invalid. The regulation allowed a local government to recover the whole amount it levied by the rate notice, including the special rates or charges that did not apply to the relevant land. The other effect of s 32(2) was that the local government was required to return the amount of the special rates or charges – that were levied on land to which they did not apply – to the person who paid them.
>
> [49] This beneficial effect of the validating provision would be severely limited if the provision had the meaning for which the Council contended. There is no reason to treat these types of landowners differently in this respect – validating the rate notices for those who could not have been levied with the special charge, and leaving invalid the rate notices for those who could have been the subject of a valid resolution, but were not. The proposed limitation would be contrary to common sense.
>
> [50] The Council's interpretation would introduce uncertainty with otherwise unnecessary hypothetical enquiries, such as, "Could the Council have validly resolved to levy the special rate or charge on this land?""

[26] In my respectful opinion, the Council's submission appears to have distracted the judge from what I can see as the ordinary meaning of the text of s 32. The ordinary meaning is not that the section applies where a rate notice included what was said to be a special rate or charge, but where there had been no effective resolution to levy that rate or charge on any land. Section 32(1) contains the premise that there was a special rate or charge which by the terms of a valid resolution was able to be levied on some ratepayers. It is engaged where in that circumstance, the charge or rate was levied on other ratepayers.

[27] That interpretation produces no unusual consequence. The validity of the rate notice was protected in the event of an administrative error in the process of levying the charge, but not where there was no charge which could be levied against any ratepayer.

Repayment under the 2012 Regulation

[28] For the same reasons, s 98 of the 2012 Regulation was not engaged. Originally, s 98 was in identical terms to s 32 of the 2010 Regulation, and its meaning was not affected by the original s 94(14), for which there was no equivalent in the 2010 Regulation.

[29] I agree with the primary judge that "the evident purpose of [s 94(14)] was to preserve from invalidity a resolution or overall plan that fails to identify some land to which the relevant special rates or charges could have been applied".[15]

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15 Judgment [58].

[30] Consequently the circumstances did not engage the original s 94(14).

[31] The same applies to the 2012 Regulation as amended from 2014. Section 94(14) as amended preserved the validity of a resolution or plan which incorrectly included rateable land on which the special rates or charges should not have been levied. Section 94(14) was thereby extended to a case where the special rates or charges should not have been applied, according to the required "special relationship with particular land" as defined in s 92(3) of the LGA.[16] In such a case, s 98 as amended preserved the validity of a rate notice, issued in accordance with the resolution and overall plan, on land which did not have that special relationship.

The common questions for determination

[32] The questions which were answered by the primary judgment were as follows:

1. In respect of any rate notice issued before 14 December 2012, in consequence only of the pleaded admitted invalidity of the relevant resolution, did the rate notice, pursuant to section 32(1) of the Local Government (Finance, Plans and Reporting) Regulation 2010 (Qld) (2010 LGR), include special rates or charges that were levied on land to which the special rates or charges did not apply?

2. In respect of any rate notice issued on or after 14 December 2012, in consequence only of the pleaded admitted invalidity of the relevant resolution, did the rate notice, pursuant to section 98(1) of the Local Government Regulation 2012 (Qld) (2012 LGR), include special rates or charges that were levied on land to which the special rates or charges did not apply?

3. In respect of any rate notice issued after 5 December 2014, did the rate notice, pursuant to section 98(1) of the 2012 LGR, include special rates or charges that:

    a. were levied on land to which the special rates or charges did not apply; or

    b. should not have been levied?

4. To the extent that the answer to any of questions 1, 2 or 3 above is "yes" in respect of any of the estates:

    a. in respect of the amount of the special rates and charges levied, pursuant to subsection (2) of the same provision of the 2010 LGR or 2012 LGR respectively, was the defendant, upon issue of such rate notice (or alternatively at any point thereafter, and if so at what point), liable to the levied landowner under a cause of action in debt?

    b. if "yes to (a), is recovery of such debt, for the unrefunded balance of such amount, obviated or diminished (and if the latter, to what extent) by the defendant having expended such unrefunded amount in carrying out works in and about the relevant area of such land as pleaded by the defendant in its amended defence and counterclaim and evidenced in this proceeding?

5. To the extent that the answer to any of questions 1, 2 and 3 above is "no" in respect of any of the estates:

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16 As set out above at [8].

a. in respect of the amount of the special rates and charges levied, was the defendant, upon issue of such rate notice (or alternatively at any point thereafter, and if so at what point), liable to the levied landowner under a cause of action for moneys had and received to the use of the landowner?

b. if "yes" to (a), is recovery of such monies, for the unrefunded balance of such amount, by the levied landowner one obviated or diminished (and if the latter, to what extent) by the defendant having expended such unrefunded amount in carrying out works in and about the relevant area of such land as pleaded by the defendant in its amended defence and counterclaim and evidenced in this proceeding?

[33] Because the judge held that s 32(1) and s 98(1) were engaged, he answered questions 1 and 2 "yes". For the above reasons, they should be answered "no".

[34] Question 3 concerned a rate notice issued after 5 December 2014, which is when the amendments to s 94(14) and s 98(1) of the 2012 Regulation took effect. Question 3(a) was answered "yes" by the primary judge. For the same reasons, it should be answered "no". Question 3(b) addressed the words which were added by the 2014 amendment to s 98(1). The trial judge answered question 3(b) "yes", upon the basis that the special charges should not have been levied because there was no effective resolution for them to be levied. For the above reasons, question 3(b) should be answered as "no".

[35] Consequently, it is not necessary to answer questions 4(a) or (b). I go then to the alternative claim for monies had and received and the defence argued by the Council.

Mistake

[36] The respondents pleaded that each of them and each of the group members paid the special charges "in the mistaken belief that they were obliged to pay the same as being lawfully charged and demanded".[17] They further pleaded, if different, that the payments "were made under a mistake, namely that the Plaintiffs and Group Members mistakenly believed that the Council was entitled to levy the Special Charges when, in fact, the Council was not so entitled to levy the special charges whatsoever".[18] And they pleaded that but for that last mentioned mistake of fact, the Plaintiffs and group members would not have made their payments.[19]

[37] By its pleading, curiously the Council did not admit the allegations that the respondents paid in the mistaken belief that they were obliged to pay the same as being lawfully charged and demanded,[20] whilst admitting the corresponding allegation in respect of the group members.[21]

[38] The distinctly pleaded allegation, that the payments were made by the respondents and group members in the mistaken belief that the Council was entitled to levy the special charges, was admitted as to the respondents, without any plea as to the group

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17 Further amended statement of claim, paragraphs 11A, 11(c), 11(e) and 12A.
18 Further amended statement of claim, paragraph 28A.
19 Further amended statement of claim, paragraph 28B.
20 First further amended defence, paragraphs 20, 22 and 24.
21 First further amended defence, paragraph 26.

members.[22] The allegation that the plaintiffs and group members would not have made their payments but for that (second) mistake of fact was the subject of a non-admission.[23]

[39] Whilst the pleadings were not perfectly clear, ultimately there seems to have been no real controversy as to the states of mind affecting the respondents and the group members when making their payments. The absence of that controversy is reflected in the Reasons of the primary judge. It is also reflected in the absence of a reference to it in the oral or written submissions for the Council to the primary judge.

[40] The judge held that a relevant mistake was not established, not because of any factual controversy as to the actual state of mind of any payer, but because he considered that the pleaded mistakes were not mistakes, according to the Regulations as he construed them. The primary judge said:

> "[107] The plaintiffs did plead an alternative claim for money had and received. It is based on an incorrect premise that the plaintiffs and the group members paid the Special Charges under a mistake:
>
> > "28A. …namely that the Plaintiffs and Group members mistakenly believed that the Council was entitled to levy the Special Charges when, in fact, the Council was not so entitled to levy the Special Charges whatsoever.
> >
> > 28B. But for the mistake of fact referred to in paragraph 28A above, the Plaintiffs and Group Members would not have made the payments …"
>
> [108] The payments were not made under a mistake as to the Council being entitled to levy the Special Charges. The rate notices, by which the Council levied the Special Charges, were not invalid. This was the effect of s 32(2) and s 98(2). The plaintiffs and the other group members paid the Special Charges in circumstances where they were due and payable. The group members could not lawfully have refused to make the payments.
>
> [109] The relevant mistake was a presumption about the validity of the Resolutions. The plaintiffs and the group members did not know the Council had failed to comply with s 28 of the 2010 LGR and s 94 of the 2012 LGR. The consequence of this mistake was that the plaintiffs and group members were ignorant of their right to challenge the validity of the Resolutions and ignorant of the Council's statutory obligation to return the Special Charges to those who paid them.
>
> [110] The plaintiffs' alternative claim – to recover the balance of the Special Charges as money had and received – fails."
>
> (Footnote omitted.)

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22 First further amended defence, paragraph 45.

23 First further amended defence, paragraph 46.

[41] In paragraph [108] in that passage, the judge found that there was no mistake as the respondents had pleaded, because in truth the special charges were due and payable. That was the consequence of his Honour's construction of s 32(2) and s 98(2) which I have rejected.

[42] In paragraph [109], the judge did find that the respondents and the group members had mistakenly presumed that the Council had observed the legal requirements for the imposition of the special charges. His Honour added that they were also "ignorant of the Council's statutory obligation to return the Special Charges to those who paid them". Again, that reflected the judge's construction of the Regulations which I have rejected.

[43] Nevertheless, it sufficiently appears that his Honour accepted that the respondents and group members made their payments in the belief that they were legally obliged to do so. That was a mistake of a law by them.

[44] Subject to the defence which I am about to discuss, the claims of the respondents and group members for recovery on the basis of a payment under a mistake, were established.

[45] In *David Securities Pty Ltd v Commonwealth Bank of Australia*,[24] Mason CJ, Deane, Toohey, Gaudron and McHugh JJ said:[25]

> "[T]he payer will be entitled prima facie to recover moneys paid under the 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. …
>
> The respondent's submission that the appellants must independently prove 'unjustness' over and above the mistake cannot therefore sustained. 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 respondent to make restitution. Before that prima facie liability is displaced, the respondent must point to circumstances which the law recognizes would make an order for restitution unjust. There can be no restitution in such circumstances because law will not provide for recovery except when the enrichment is *unjust*. It follows that the recipient of a 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".

[46] Restitution claims against governments in respect of overpayments of tax or tax paid under an invalid law have been held to be subject to the same principles: see *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*.[26]

[47] Before going to the defence for which the Council contends, it is necessary to say something of the principle formulated by the House of Lords in *Woolwich Equitable*

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24 (1992) 175 CLR 353 at 378.

25 (1992) 175 CLR 353 at 378-379.

26 (1994) 182 CLR 51 at 75 per Mason CJ; see also *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 529 [26] per Gleeson CJ, Gaudron and Hayne JJ; and *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at [19] per French CJ.

Building Society v Inland Revenue Commissioners.[27] It was there held that there was a general right of recovery of money paid in response to an invalid demand for tax, subject to defences. Unlike the present case, the payments in that case were made under protest, rather than under a mistake as to the validity of the Regulations by which the revenue had demanded them. This principle has yet to be adopted by the High Court. The monies claimed in this case would be recoverable under the *Woolwich* principle, again subject to defences; and there is no basis for considering that the Council's defence here would be any stronger as an answer to claims under the *Woolwich* principle.

The Council's defence

[48] The Council disavowed a defence of change of position. The Council's case was that the monies in dispute were applied by the Council for the benefit of those who paid them, so that to repay the monies claimed would unjustly enrich the claimants.

[49] In *David Securities*,[28] the plurality accepted what they said was the well known formulation of Goff J in *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd*, as follows:[29]

> "(1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) 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 and payment) by the payer or by a third party by whom he is authorised to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so".

[50] The Council's submission is that the disputed monies were paid "for good consideration", namely the provision of the services which benefited the respondents' land.

[51] In this context, "good consideration", or conversely, a failure of consideration has a particular meaning and as Gummow J observed in *Roxborough v Rothmans of Pall Mall*,[30] it need not involve the context of a contract.

[52] In *David Securities*, the plurality said that in the context of this defence the question is what the payer, in all the circumstances, thought they were receiving as consideration for their payment. Their Honours said that the failure of consideration had to be judged from the perspective of the payer and that

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27 [1993] AC 70.

28 (1992) 175 CLR 353 at 380 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.

29 *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 695.

30 (2001) 208 CLR 516 at 555 [102] citing *Martin v Andrews* (1856) 7 EL & BL 1 [119 ER 1148], where that was a successful claim for money had and received to recover conduct money tendered with a subpoena where the case was settled before trial.

"consideration means the matter considered in forming the decision to do the act, 'the state of affairs contemplated as the basis or reason for the payment'."[31]

[53] A defence of "good consideration" was not made out in *David Securities*. The payments there were made under a mistake of law – namely that there was a legal obligation to make them, whereas in truth s 261 of the *Income Tax Assessment Act 1936* (Cth) rendered void the contractual provision under which the payments were required to be made. The Court rejected the bank's argument that it had agreed to lend money to the appellants at a certain rate, upon the basis of the recoverability of the payments in question. The plurality held that the true situation being that the liability for payment of withholding tax fell upon the lender and that s 261 avoided any attempt to pass this burden onto a borrower, the appellants had no indebtedness in respect of withholding tax, the discharge of which could form consideration for the payments in question.[32] Because the appellants formed their decision to make the payments upon a "state of affairs" existing in their minds that the withholding tax was their liability, in the absence of that liability, the payments were not made for good consideration and the defence failed.

[54] The Council's argument relies particularly upon the decision of the Victorian Court of Appeal in *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd*[33] and the New South Wales Court of Appeal in *Adrenaline Pty Ltd v Bathurst Regional Council.*[34]

[55] In the Victorian case, the parties entered a lease agreement for a retail shop without the lessor providing a disclosure statement as required by a statute.[35] The statutory consequence of that omission was that the lessee was entitled to withhold payment of rent until the end of seven days after receiving a copy of the disclosure statement, was not liable to pay the rent attributable to the period before then and was able to terminate the agreement at any time before the end of that seven days. In ignorance of its rights, the lessee paid the rent reserved by the lease from the commencement of the tenancy until shortly after it received the disclosure statement, when it stopped paying rent but did not terminate the lease. It brought a proceeding to recover what it had paid to the landlord in the mistaken belief that it was required to do so. The lessee's action was for money had and received.[36] The Court of Appeal held that the lessor had a defence of "good consideration" to the claim for restitution of the money paid to it.

[56] Chernov JA considered that, speaking broadly, it would not be unjust or unconscionable for the lessor to retain the money in question, because the lessee had received good consideration for the money it paid, namely exclusive possession of the premises that were obviously of use and benefit to it. The lessee had gained or accepted a benefit in the form of exclusive use of the premises as a *quid pro quo* for its payments.[37] His second and additional reason for allowing the lessor to retain the money was that the lessor had a sound claim against the lessee for use and occupation of the premises for the relevant period, in amount broadly equal to the

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31 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 382.
32 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 381.
33 [2006] VSCA 6.
34 (2015) 97 NSWLR 207.
35 *Retail Tenancies Reform Act 1998* (Vic) s 8.
36 [2006] VSCA 6.
37 [2006] VSCA 6 [21].

rent reserved under the lease.[38] Nettle JA held that in order to succeed, the lessee had to establish that it paid the rent as upon a total failure of consideration, in that the lessee did not receive the benefit for which it bargained. In his view, the lessee failed to establish that fact.[39]

[57] In *Adrenaline Pty Ltd v Bathurst Regional Council*, the appellant contracted with the respondent Council to conduct motor racing events on the Mount Panorama motor racing circuit for a yearly fee of the order of $250,000. Two years into the life of the agreement, the appellant claimed that it was entitled to be repaid the amounts it had paid because, mistakenly, it had believed that the Council had complied with its statutory obligations in setting the yearly fee. The Court of Appeal, unlike the trial judge, accepted the appellant's argument that the Council had been obliged to comply, and had not complied, with those obligations.[40] However the Court held that the Council had a good defence to the appellant's restitutionary claim because the appellant obtained good consideration for the money which it paid, by being able to conduct the events in the relevant years.

[58] The principal judgment was given by Leeming JA with whom the other members of the Court agreed. Leeming JA reasoned as follows: [41]

> "[83] The authors of Mason and Carter's *Restitution Law in Australia* (2nd ed, 2008, LexisNexis Butterworths) write at par [2041] that "[r]ecovery of the (invalid) licence fee after enjoyment of the right for which it was the consideration would result in unjust enrichment, not its prevention". That passage was applied by Pepper J in Meriton at [172] to conclude that the developer's recovery of fees would be inequitable where Meriton had enjoyed the benefit of the exclusive use of the kerb and road for its construction.
>
> [84] So too here. Trackcorp received precisely what it bargained for. True it is that at trial Trackcorp contended that council was in breach and that it had been misled, but these claims have fallen away. Indeed, Trackcorp prepared a budget which projected a profit despite the $250,000 fee it paid. It would *create* unjust enrichment were Trackcorp 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.
>
> [85] The only possible point of distinction between this appeal and *Ovidio* is the fact that half of the first year's track hire fee was paid prior to the Track Hire Agreement being executed. But nothing turns on that. That payment was expressly treated by the parties (in cl 3.5(a)) as "the first instalment of 50% of such fees from the Promoter in respect of the first Event", and evidently was part of the consideration for what Trackcorp

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38 [2006] VSCA 6 [22].
39 [2006] VSCA 6 [29].
40 Established by the *Local Government Act 1993* (NSW).
41 *Adrenaline Pty Ltd v Bathurst Regional Council* (2015) 322 ALR 180 at 197; (2015) 97 NSWLR 207 at 225.

> received in December 2007. It is in the same category as the payments made after the agreement had been executed.
>
> [86] Accordingly, Trackcorp must be taken to have received precisely what it bargained for (for it did not seek to reagitate its failed claims for breach and rectification on appeal). It obtained good consideration for the fees it paid each year. Irrespective of whether its claim was extinguished by the *Recovery of Imposts Act*, there can be no injustice in Council retaining the moneys paid by Trackcorp for services bargained for and received by Trackcorp."
>
> (The references to "Trackcorp" were to the appellant)

[59] *Ovidio Carrideo Nominees* was applied by this Court in *Cook's Construction Pty Ltd v SFS 007.298.633 Pty Ltd.*[42]

[60] In the present case, what was the consideration for the payment of the disputed monies in the sense of the "state of affairs contemplated as the basis or reason for the payment"?[43] The "state of affairs" existing in the payers' minds was that they were obliged to pay the special charges as the Council had levied. There was no suggestion in this case that any of the respondents or group members was of the mind to pay the relevant monies regardless of whether they had to do so, and because their land was to benefit by the expenditure of their monies and the funds provided by other ratepayers. In this case, there was a failure of consideration for the payments, relevantly the same as that in *David Securities*. Their payments were not made for good consideration in the relevant sense.

[61] Because in this context, the "failure of consideration … is judged from the perspective of the payer",[44] it is immaterial that the Council spent the money providing services for the payers' benefit. The consideration in this context means the matter considered by the payer informing the decision to pay, rather than any benefit to the payer which subsequently ensued.[45]

[62] There is another feature of the Council's argument which also makes it unpersuasive. Australian law does not recognise a general right to remuneration for work that increases the value of another's property, without a request, actual or implied, to do so: *Stewart v Atco Controls Pty Ltd (In liq)*;[46] *BMW Australia Ltd v Brewster*.[47] Unlike the successful landlord in *Ovidio Carrideo Nominees,* the Council could have no sound claim against the ratepayer for services provided for the ratepayer's benefit.[48]

[63] The respondents and group members could not be said to be unjustly enriched by a repayment of the monies in dispute, and the defence fails.

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42 [2009] QCA 75; (2009) 254 ALR 661 at 695-696 [136]-[140] per Fraser JA and 700 [160] per Daubney J.
43 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 382.
44 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 382.
45 Ibid.
46 (2014) 252 CLR 307 at 326 [47] per Crennan, Kiefel, Bell, Gageler and Keane JJ.
47 (2019) 269 CLR 574 at 646 [194] per Edelman J.
48 cf *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd* [2006] VSCA 6 [22] per Chernov JA.

[64] Returning to issue number 5, the question should be answered as follows:

(a) yes, at the point of payment of the special rate and charge levied;

(b) no.

Orders

[65] I would order as follows:

1. Allow the appeal in part.
2. Allow the cross appeal.[49]
3. Set aside the answers to the agreed questions common to the group members and substitute the following answers:
    a. Question 1: No;
    b. Question 2: No;
    c. Question 3:
        i. 3(a): No; and
        ii. 3(b): No.
    d. Question 4:
        i. 4(a): Not necessary to answer;
        ii. 4(b): Not necessary to answer.
    e. Question 5:
        i. 5(a): Yes, at the point of payment of the special rate and charge levied; and
        ii. 5(b): No.
4. Otherwise dismiss the appeal.
5. The appellant pay the respondents' costs of the appeal and the cross appeal.

[66] **BODDICE J:** I agree with McMurdo JA.

[67] **CALLAGHAN J:**

Background

[68] The respondents are owners of waterfront[50] land within the Redland City local government area. The land requires certain services – such as geotechnical works, dredging, and navigational beacon pile maintenance – that are provided by the appellant Council.

[69] The appellant resolved to fund such services by levying special charges on this land.

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[49] A cross appeal sought to vary the judge's answer to question 5(a) to "yes" if the statutory basis for recovery was rejected.

[50] Canal or lake.

[70] It was empowered to impose such levies by:

(a) the power of the State of Queensland to impose taxation, which is limited by s 65 of the *Constitution of Queensland 2001* to requirements authorised under an Act;

(b) the authorisation contained in s 94(1) of the *Local Government Act 2009* (Qld) (**LGA**), which confers the power to levy general, but also special rates and charges; and

(c) section 96 of the LGA, which confers a power to make regulations and "any matter connected with rates and charges".

[71] Pursuant to its own resolutions, the appellant levied charges, issued notices and received payment from the respondents. Some of that money was applied to the services required. However, the resolutions were revealed to be defective, so the respondents argued for the return of the entire amount that they had paid. That argument went to trial, and the learned trial judge agreed with the respondents. His Honour made orders which reflected the proposition that, having obtained the money by way of non-compliant resolutions, a statutory debt was owed by the appellant to the respondents.[51] The appellant now challenges that decision.

Legislation

[72] Special rates and charges are defined in s 92(3) of the LGA:

> "***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; […]

[73] The events which are the subject of this proceeding spanned a period in which two sets of regulations are relevant: the *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) (**2010 LGR**) and the *Local Government Regulation 2012* (Qld) (**2012 LGR**).

[74] Within those regulations, and of specific importance in this case, are ss[52] 28 and 32 of the 2010 LGR. They include:

> "**28 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—

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51 *Kozik & Ors v Redland City Council* [2021] QSC 233 at [116] (Bradley J).

52 The 2010 LGR and 2012 LGR refer to their provisions as "sections".

(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.

[…]

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."

[75] The 2010 LGR was repealed by the 2012 LGR, effective 14 December 2012. Sections 94(2), (3) and (4) of the 2012 LGR were identical to ss 28(3), (4), and (5) of the 2010 LGR respectively. Section 98 of the 2012 LGR reproduced s 32 of the LGR.

[76] Section 94 of the 2012 LGR also contained new subsections, including s 94(14):

"**94 Levying special rates or charges**

[…]

(14) 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.

[…]"

[77] In essence, the relevant provisions were amended twice. First, to include a provision that preserved the validity of a resolution or plan in circumstances where, for example, the Council made a mistake – such as failing to identify with precision the particular parcels of land that might have benefited from a special levy, with the

consequence that one (or more) was omitted from a resolution. An obverse problem – also a consequence of "misidentification" – might present if a parcel of land which did not in fact benefit from the special charge was included in a resolution that levied one. This problem was addressed by the inclusion of a provision that became effective on 5 December 2014, such that s 94(14) came to read:

> "**94 Levying special rates or charges**
>
> […]
>
> (14) 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)
>
> […]"

[78] Section 98 of the 2012 LGR was also amended (effective 5 December 2014) to include the clause emphasised below:

> "**98 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)

Defective resolutions

[79] In purported exercise of the powers vested by statute, the appellant Council passed a number of resolutions between June 2011 and July 2016. These levied special charges on land, including land owned by the respondents.

[80] Pursuant to those resolutions, between about July 2011 and about July 2017, the Council issued rate notices to the owners of the land to which the special charges applied. Upon receipt of these notices the respondents paid the rates, including the special charges, which were used to fund the sorts of services described above.

[81] In all cases these notices were predicated upon resolutions that were defective. The resolutions did, as required by s 28(3)(b) of the 2010 LGR, identify a document that was said to be an "overall plan". However, the document did not – as required by s 28(4)(c) of the 2010 LGR – state an estimated cost, nor – as required by subsection 4(d) – did it state an estimated time for carrying out the plan.

[82] These elementary defects give rise to these proceedings. It is accepted that, by reason of the absence of time or cost estimates from the plan, the resolutions were invalid.[53] As a result, it was also accepted by the Council that some of the special charges had to be returned to the ratepayers.[54] The Council did not, however, return that part of the special charge said to have been spent on the purposes for which it was raised – that is, the services performed on the canals and lake. To do so would mean, it was said, that the respondents were "unjustly enriched".[55]

[83] The respondents,[56] as plaintiffs in the trial, sued for return of the balance. They argued, successfully, that upon application of s 32(2) of the 2010 LGR and s 98(2) of the 2012 LGR, the Council was required to "return" the special charges. That requirement is apparently unqualified. These "return regulations" created a debt. It followed, so the argument ran, that the creation of this statutory debt operated to exclude the potential operation of what the Council argued were applicable "restitutionary principles".[57]

[84] The argument at first instance was framed by reference to a series of questions. The effect of the answers given by the learned trial judge was:

(a) the resolutions had no legal effect, and so the Council was obliged to return the full amount of the special charge;

(b) nothing in either the amendments of 2012 or 2014 altered this conclusion; and

(c) the Council was liable for this sum in a debt, which was not obviated or diminished by reason of the fact that it had already spent at least part of the money.

Structure of the appeal

[85] The notice of appeal contains three grounds:

1. *The learned primary Judge erred in construing the Local Government (Finance, Plans and Reporting) Regulation 2010 s 32(1) and the Local Government Regulations 2012 s 98(1):*

    a. *by reason of the words 'to which special rates and charges do not apply', as applying other than where the relevant land or its owner did not specially benefit from the planned expenditure;*

    b. *as displacing the Appellant's recourse to the doctrine of unjust enrichment.*

2. *The learned primary Judge erred in construing and applying, for the period from 5 December 2014, s 98(1) of the Local Government Regulation 2012, the*

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53 Transcript at 1-3.

54 Ibid at 1-5.

55 Ibid at 1-14.

56 The plaintiffs brought their claim as representative parties under Part 13A of the *Civil Proceedings Act 2011* (Qld). The group members, the nature of the claims made, and relief sought on their behalf are described in the Further Amended Claim filed 31 January 2020: AR Volume 1 at 7. As each plaintiff had standing to start proceedings on their own behalf against the Council, they had sufficient interest to start this proceeding on behalf of the group members: see *Kozik & Ors v Redland City Council* [2021] QSC 233 at [11] (Bradley J). His Honour was satisfied (at [15]) that "*the substantial common issues raised by the common questions are common to all group members*".

57 Appellant's Amended Outline of Submissions filed 31 March 2022, at [38]-[39].

words '... or should not have been levied' as being referable other than to a situation in which not all land that specially benefitted from the planned expenditure had been so levied.

3. *The learned primary Judge erred in finding:*

   a. *the basis for any liability of the Appellant to be in debt and not money had and received; and, consequently,*

   b. *the Appellant to be precluded from recourse to the doctrine of unjust enrichment.*

[86] In neither the appellant's written submissions nor in argument before the Court did the appellant address particular arguments under the heading of specific grounds. Rather, its argument was put on the basis that the first issue for determination was whether the "return regulations" were engaged.

[87] The "second critical point"[58] for consideration was said to be the question of whether, even if a return regulation was engaged, it displaced "the operation of the general law, in effect, the system of law, which includes a defence of unjust enrichment".[59]

[88] The appeal will therefore be dealt with by reference to the arguments as presented.

Were the "return regulations" engaged?

[89] It was first said that the regulations[60] which required the return of the charge had no application in the particular circumstances that presented. This is because they were directed "to a very particular problem"[61] and confined in their application to that circumstance.

[90] The problem in question was said to be that of accurately identifying all (and no more) of the land that was going to benefit from the application of a special charge.[62] In effect, it was submitted that when the 2010 LGR came into existence, it should have been understood that into s 28(3) should be read the words "because the land was not identified in the resolution or the overall plan mentioned in s 28(3) as land to which the special rates or charges applied".[63]

[91] If no special reason to perform this exercise presented at the time the regulation came into force, so the argument runs, the amendments made clear that it should be done. The 2012 amendment was said to address one circumstance of "misidentification", and in 2014, the inclusion[64] of the words "should not have been levied" enabled s 98 to deal with another, as discussed in [77] above.[65] This

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58 Transcript at 1-6.
59 Ibid.
60 *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) s 28(2); *Local Government Regulation 2012* (Qld) s 98(2).
61 Appellant's Amended Outline of Submissions filed 31 March 2022, at [15].
62 Ibid at [26], [28].
63 Transcript at 1-24.
64 In 2014, of both ss 94(14)(b) and 98(1) of the 2012 LGR.
65 Appellant's Amended Outline of Submissions filed 31 March 2022, at [30].

amendment, described as "minor",[66] was said to have been made in order to "bed down"[67] the particular problem at which this provision was always directed. Indeed, implicitly at least, it was said that this was the only mischief at which the provision was directed. It therefore ought not, so it is said, be given any wider meaning that that, and so was not engaged in the manner for which the respondents contend.

[92] The appellant's argument was supported by drawing attention to the similarity in language between provisions that related to the levying of special rates and charges, which made it clear that the land in question had to be identified both in the resolution and in the overall plan.[68] The appellant also argued that the Explanatory Notes provided relevant context, and the fact that ss 94(14) and 98(1) of the 2012 LGR were amended at the same time with the same terminology demonstrates that the regulations should be interpreted as suggested in [90] above.[69]

[93] The amendments themselves can be interpreted as having that effect and the Explanatory Notes do demonstrate that. They included the observation that, "it is sometimes difficult to accurately levy special rates and charges on certain lots and from time to time anomalies occur".[70] Accordingly, ss 94(14) and 98(1) of the 2012 LGR provide that in any proceedings, a local government resolution or overall plan for special rates and charges is not invalid merely because the resolution or plan inadvertently omit lots from the special rate or charge. There is a connection between the amendments – both ss 94(14)(b) and 98 of the 2012 LGR were amended in 2014 to include the phrase "should not have been levied". The form of words used might well be effective in "bedding down" particular problems attributable to the mischief of "misidentification".

[94] That much can be accepted, but the need to "bed down" a particular problem does not create a further need for that amendment to be given a wider import. It is an elementary requirement of charging rates on land that the land be identified, and there are only so many ways in which that requirement can be expressed. The unremarkable language used to do so does not demand that the plain words used in the balance of the section should be given a restricted interpretation.

[95] It remains that no change was ever made to that part of s 98(1) of the 2012 LGR which was engaged when a rate notice included rates or charges that simply did "not apply" to the land on which they were levied. The words "do not apply" were – and always remained after amendment – unqualified by the attachment of any reason that explained or even suggested a restriction on the reasons why the charges might be thought "inapplicable".

[96] It can also be accepted that the amendments in 2014 were intended to be "'minor', confirmatory, and "consequential"'.[71] They could be all of those things without

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66 See Explanatory Notes, Local Government Legislation Amendment Regulation (No. 1) 2014 (Qld) at 4. Also described in the Explanatory Notes as "consequential". Also referred to by the Appellants as "confirmatory": Appellant's Amended Outline of Submissions filed 31 March 2022, at [32].

67 Transcript at 1-11.

68 Appellant's Amended Outline of Submissions filed 31 March 2022, at [25]-[26]; [35]. See also [90] above.

69 Ibid at [34].

70 Explanatory Notes, Local Government Legislation Amendment Regulation (No.1) 2014 (Qld) at 4, as cited in the Appellant's Amended Outline of Submissions filed 31 March 2022, at [30].

71 Appellant's Amended Outline of Submissions filed 31 March 2022, at [32].

disturbing the pre-existing meaning of the section. To discern that meaning, it is only necessary to focus on the provision itself. The "return regulations" save the notice; they do nothing for the resolution nor the plan. They do not, even whilst saving that notice, purport to say anything about the charges, or make any alteration to the way in which they might be levied.

[97] Had the ambition been to ensure that the provision be interpreted in the manner for which the appellant contends, it would have been simplicity itself to achieve. The words "do not apply" could have been removed. Conspicuously, those words were left intact even as amendments were made around them. If the appellant is correct, and the provision was aimed only at a specific problem that had to be "bedded down", their retention could only distract. The provision clearly received a lot of attention between 2010 and 2014; it can be inferred that it was a deliberate decision to keep these words in the section, in that form.

[98] It is worth noting that the first part of s 98(2) of the 2012 LGR – namely that part which provides that, "[t]he rate notice is not invalid…" – is one that might offer significant assistance to the Council. It creates a legal fiction that validates a document which is created after the Council has done something without adhering to an elementary – but fundamental – legislative requirement. On one view, that is an exceptionally beneficial provision. The Council would, should it ever be contested, no doubt insist upon an interpretation that gave effect to the words as they appear. The balance of the sub-regulation should be interpreted in the same way.

[99] There is no other provision that creates a statutory obligation on the Council to return money that has been taken without lawful authority. There is insufficient reason to suspect that the lawmakers intended only to impose such an obligation on the Council in a case of "misidentification". The requirement to return money taken without authority is not so limited, and the form of words used is fit for the purpose of ensuring that it happens.

[100] It follows, in my view, that when the Council insisted on payment without first having complied with its obligations, the "return regulations" were engaged. I would have affirmed the primary judge's decision – and dismissed the appeal – on this basis.

[101] McMurdo JA and Boddice J are of a different view, and have decided the case on a different basis.[72] Even if it is accepted that, for the reasons explained by McMurdo JA, the view that I formed is incorrect, then the balance of that which his Honour has written should also be accepted. The effect is, as his Honour has indicated,[73] that the Council is bound to repay the monies. For that reason, and given the consensus between McMurdo JA and Boddice J, there is no need for me to propose any order.

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72 See [5] & [33] of McMurdo JA's reasons above.

73 At [5].