# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Kozik & Ors v Redland City Council* [2021] QSC 233 |
| PARTIES: | **JOHN MICHAEL KOZIK**<br>(first plaintiff)<br>**SIMON JOHN AKERO**<br>(second plaintiff)<br>**SARAH AKERO**<br>(third plaintiff)<br>**NEIL ROBERT COLLIER**<br>(fourth plaintiff)<br>**v**<br>**REDLAND CITY COUNCIL**<br>(defendant) |
| FILE NO: | BS 11364 of 2018 |
| DIVISION: | Trial |
| PROCEEDING: | Civil |
| DELIVERED ON: | 13 September 2021 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 14, 15 and 17 June 2021 |
| JUDGE: | Bradley J |
| ORDER: | **1. Pursuant to s 103X of the *Civil Proceedings Act (2011)* (Qld), the group members affected by this judgment are all the registered owners of rateable land, including building units, in the Redland City local government area who paid the Raby Bay Tidal Works (Community Title Scheme) Special Charge, Raby Bay Tidal Works (Non Community Title Scheme) Special Charge, the Raby Bay Marina Special Charge, the Aquatic Paradise Marina Special Charge, the Aquatic Paradise Special Charge, or the Sovereign Waters Lake Special Charge levied by the defendant between June 2011 and July 2016, excluding:**<br>**(a) related bodies corporate, associated entities and officers of the defendant;**<br>**(b) judges of this court; and**<br>**(c) officers, employees, and legal practitioners of or engaged by the solicitors for the plaintiffs.**<br>**2. The answers to the amended agreed questions common to the group members are:**<br>**(a) Question 1: Yes;** |

**(b) Question 2: Yes;**

**(c) Question 3**

**(i) 3(a): Yes; and**

**(ii) 3(b): Yes;**

**(d) Question 4:**

**(i) 4(a): Yes; and**

**(ii) 4(b): No; and**

**(e) Question 5:**

**(i) 5(a): No; and**

**(ii) 5(b): Not necessary to answer.**

CATCHWORDS: LOCAL GOVERNMENT – POWERS, FUNCTIONS AND DUTIES OF COUNCILS GENERALLY – POWERS GENERALLY – ULTRA VIRES OR ILLEGAL EXERCISE OF POWER– where the plaintiffs owned waterfront residences on land within the Redland City local government area – where the defendant local Council passed resolutions to levy special charges to fund lake and canal works and services ('the services') – where the resolutions were passed without compliance with mandatory provisions in the relevant regulations – where the Council refunded the amount of the special charges that had not been spent on the services – where the Council contends that it is not lawfully obliged to return the spent portion of the special charges – whether the plaintiffs are entitled to recover the balance of the special charges

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – CLASS ACTIONS OR GROUP PROCEEDINGS – where the claim is a representative action under Part 13A of the *Civil Proceedings Act 2011* (Qld) – where the plaintiffs bring their claim on behalf of a group of registered home owners in the local government area who paid the special charges ('the group members') – where the Court is to decide five questions of law or fact common to the claims of the group members

REAL PROPERTY – RATES AND CHARGES – RATING OF LAND – RECOVERY OF OVERPAID RATES – where the Council passed invalid resolutions for special charges – where the special charges were paid in rate notices – whether the Council is obligated to return the percentage of invalid special charges

EQUITY – GENERAL PRINCIPLES – UNJUST ENRICHMENT – where the Council contends that if it were to return the spent amount would be to unjustly enrich the

plaintiffs and group members – where by reason of the invalid resolutions, the Council had no right to make, use or retain any part of the special charges – where the services have conferred some benefit on the plaintiffs and group members – whether the Council can avoid its statutory obligation to return the balance of the special charges by defence that to do so would unjustly enrich the plaintiffs and group members

RESTITUTION – INVOLVING CROWN OR PUBLIC AUTHORITIES – CLAIMS AGAINST CROWN OR PUBLIC AUTHORITIES – whether the plaintiffs can recover the balance of the special charges as money had and received

*Constitution of Queensland 2001*, s 65, s 71
*Civil Proceedings Act 2011* (Qld), s 1, s 103B, s 103C, s 103F, s 103V
*Local Government Act 2009* (Qld), s 3, s 8, s 9, s 11, s 12, s 28, s 92, s 94, s 95, s 96, s 257
*Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld), s 28, s 32, s 52
*Local Government Regulation 2012* (Qld), s 4, s 80, s 94, s 98, s 104, s 105, s 132

*Air Caledonie International v The Commonwealth* (1988) 165 CLR 462, cited
*Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, cited
*Commissioner of State Revenue (Victoria) v Royal Insurance Australia Limited* (1994) 182 CLR 51, distinguished
*Commonwealth v SCI Operations Pty Limited* (1998) 192 CLR 285, followed
*E Cocco & Sons Investments Pty Ltd v Gold Coast City Council* [2014] QSC 10, considered
*Island Resorts (Apartments) Pty Ltd v Gold Coast City Council* [2021] QCA 19, considered
*Lewiac Pty Ltd v Gold Coast City Council* [1995] 1 Qd R 38, cited
*Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208, cited
*National Banking Corporation of Australia Ltd v Batty* (1986) 160 CLR 251, considered
*Ostwald Accommodation Pty Ltd v Western Downs Regional Council* (2015) 2 Qd R 14, considered
*Potter v Minahan* (1908) 7 CLR 277, cited
*Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, distinguished
*Royal Bank of Canada v The King* [1913] AC 283, cited
*Whiting v Somerset Regional Council* [2010] QSC 200, cited

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

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| COUNSEL: | R J Douglas QC, with J K Meredith, for the plaintiffs<br>J M Horton QC, with S T Richardson, for the defendant |
| SOLICITORS: | Shine Lawyers for the plaintiffs<br>Gadens Lawyers for the defendant |

[1] John Kozik, Simon Akero, Sarah Akero and Neil Collier are the plaintiffs in a representative action against the Redland City Council (the **Council**). The Council, as its name suggests, is a local government responsible for the Redland City local government area.[1]

**Overview**

[2] During the period from 1 July 2011 to 30 June 2017, the plaintiffs owned rateable land within the Redland City local government area. Mr Kozik owned land at Birkdale with a frontage to the John Goleby Canal. The canal is part of the Aquatic Paradise Canal Reserve. Mr Akero and Ms Akero owned land at Wellington Point with a frontage to Sovereign Lake. The lake is part of the Sovereign Waters Lake Reserve. Mr Collier owned a lot in a strata title building on land at Cleveland with a frontage to Columbus Canal. The canal is part of the Raby Bay Canal Reserve. Mr Kozik, and Mr & Mrs Akero lived in houses on their respective land. Mr Collier lived in his unit.

[3] Between June 2011 and July 2016, the Council passed resolutions (the **Resolutions**) to levy special charges[2] (the **Special Charges**) applying to land adjacent to the Aquatic Paradise Canal Reserve, the Sovereign Waters Lake Reserve and the Raby Bay Canal Reserve (the **Reserves**), including the land owned by the plaintiffs, and land in the Aquatic Paradise Marina and Raby Bay Marina (the **Marinas**).[3] The Special Charges were to fund capital and operational expenditure on services (the **Services**) relating to the Reserves.[4]

[4] Between about July 2011 and about July 2017, the Council issued rate notices to the owners of land described as subject of the Special Charges in the Resolutions, including the plaintiffs. As well as general rates and utility charges, the rate notices included the Special Charges. The plaintiffs paid the amount noted on each of the rate notices they received, including the amount of the Special Charges.[5]

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1 *Local Government Act 2009* (Qld) (**LGA**), s 8; *Local Government Regulation 2012* (Qld) (**2012 LGR**), s 4, schedule 1.

2 These were the Raby Bay Tidal Works (Community Title Scheme) Special Charge, Raby Bay Tidal Works (Non Community Title Scheme) Special Charge, the Raby Bay Marina Special Charge, the Aquatic Paradise Marina Special Charge, the Aquatic Paradise Special Charge, and the Sovereign Waters Lake Special Charge.

3 The Aquatic Paradise Marina is located in the Aquatic Paradise Canal Reserve and the aby Bay Marina is located in the Raby Bay Canal Reserve.

4 The Reserves are land owned by the Crown within the Redland City local government area.

5 Over the period, Mr Kozik paid $10,193.64 in Special Charges, Mr and Mrs Akero paid $2,529.75, and Mr Collier paid $6,297.92.

[5] In or before March 2017, the Council became aware that each of the Resolutions was passed without compliance with mandatory provisions in the relevant regulations.

[6] For each of the Special Charges, the Council calculated the percentage of the total amount paid that the Council had not expended on the related Services. The Council refunded to each of the persons who had paid the Special Charges that same percentage of the amount paid by the person to the Council for the Special Charges. The Council also paid each person interest on the refunded amount.[6]

[7] In this proceeding, the plaintiffs seek to recover the balance of the Special Charges they paid, which was not refunded by the Council.

[8] The Council contends it is not obliged to return the 'spent' portion of the Special Charges. In short, it says this amount was spent on Services for the benefit of all the those who paid the Special Charges, including the plaintiffs. The Council contends that if it were to refund the 'spent' portion of the Special Charges, then these ratepayers would benefit twice.

**Representative proceeding**

[9] The plaintiffs bring their claim as representative parties under Part 13A of the *Civil Proceedings Act 2011* (**CPA**). The persons they represent (the **group members**) are described in the further amended claim,[7] as are the nature of the claims made and the relief sought on behalf of the group members.[8]

[10] The parties agreed on five questions raising substantial common issues of law and of fact raised by the claims of the group members (the **common questions**).[9] A document stating the common questions has been filed.[10] The common questions are set out and answered at the conclusion of these reasons. The group members affected by the judgment answering the common questions are all the registered owners of rateable land, including building units, in the Redland local government area who paid the Special Charges, excluding related bodies corporate, associated entities and officers of the Council, judges of this court, and officers, employees, and legal practitioners of or engaged by the solicitors for the plaintiffs.

[11] Each of the plaintiffs had standing to start proceedings on their own behalf against the Council, and so had sufficient interest to start this proceeding on behalf of the group members.[11]

[12] Immediately before the plaintiffs commenced the proceeding, there were more than seven persons who were group members.[12] Between the start of the proceeding and the hearing, some 652 persons, who were group members, by notice opted out of the proceeding. The claims of all the group members are in respect of, or arise out of the

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6 The total amount the Council paid to Mr Kozik was $8,347.35 (on 18 October 2017), to Mr and Mrs Akero was $89.95 (in November 2017) and to Mr Collier was $2,784.39 (in November 2017).
7 Filed 31 January 2020.
8 CPA, s 103F(1)(a), (b).
9 Filed by leave on 15 June 2021.
10 CPA(1)(c).
11 CPA, s 103C(1), (2).
12 CPA, s 103B(1)(a).

same or similar circumstances,[13] being the conduct of the Council in levying the Special Charges and retaining the 'spent' portion of the Special Charge each of the group members paid.

[13] The substantial common issues raised by the common questions concern rate notices issued by the Council that included special rates or charges the subject of the Resolutions. These include the Aquatic Paradise Marina Special Charge levied on owners of berths in the Aquatic Paradise Marina and the Raby Bay Marina Special Charge levied on owners of berths in the Raby Bay Marina. The Council submitted that the claim of group members who owned these berths cannot be decided because none of the plaintiffs was levied with or paid those specific Special Charges (the **Marina Special Charges**).

[14] In this proceeding, the court can decide the issues common to all group members. The Council accepts that the Resolutions to levy these Marina Special Charges shared the common defects with the other Special Charges. The position the Council has taken with respect to the return of money paid for the Marina Special Charges has been the same as for the return of the money paid for the other Special Charges. No different issue of law or fact has been identified in any respect.

[15] In the circumstances, I am satisfied that the substantial common issues raised by the common questions are common to all group members including the owners of berths in the marinas who were levied and paid the Marina Special Charges.

[16] Before turning to the common questions and answers, it is convenient to consider the legal framework in which the Council operated and the events that occurred relating to the Special Charges, as those matters inform the reasons for the answers to the common questions.

**The powers of a local government**

[17] Despite their generic title, local governments have no status or power of their own. They exist and derive their powers from State legislation. They are created by the State as subordinate bodies. The State may:

> "hand over to them the care of local interest, and give them such powers of raising money by rates or taxes as may be necessary for the proper care of these interests. But in all such cases these powers are exercised by the subordinate body as agent of the power that created it."[14]

[18] A local government in Queensland is an elected body charged with the good rule and local government of its local area of responsibility.[15] The *Local Government Act 2009* (Qld) (**LGA**) provides for the constitution of local government and the nature and extent of a local government's responsibilities and powers. It provides for a "system of local government" that is "accountable, effective, efficient and sustainable."[16]

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13 CPA, s 103B(1)(c).
14 *Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208, 240 (O'Connor J).
15 *Constitution of Queensland 2001*, s 71.
16 LGA, s 3.

[19] Each local government is an incorporated body, comprising elected representatives (**councillors**) responsible for a designated local government area. The councillors must represent the interests of the residents. They have responsibilities, including to ensure the local government discharges its responsibilities complying with all laws and to participate in council meetings and policy development for the benefit of the local government area.[17]

[20] Each local government has the "power to do anything that is necessary or convenient for the good rule and local government of its local government area."[18]

[21] In *Ostwald Accommodation Pty Ltd v Western Downs Regional Council*,[19] Jackson J observed there are "many limits" to this apparently plenary power, "starting with the express provision that a local government can only do something that the State can validly do."[20]

[22] In that respect:

> "The power of the State of Queensland to impose taxation, subject to the operation of *The Constitution* of the Commonwealth, is regulated by the constitutional precept, accepted as settled since the fourth declaration contained in the *Bill of Rights* of 1688 or 1689, that taxation must be imposed only under the authority of legislation. As a delegated and limited repository of the State's legislative power, a local government's power of taxation is also limited by s 65 of the Constitution of Queensland 2001 that a requirement to pay a rate must be authorised under an Act."[21]

[23] The Parliament has authorised a local government to levy rates and charges by s 94(1) of the LGA. While a local government must levy general rates,[22] it has a discretion whether to levy a special rate or charge.[23] These are defined in s 92(3) of the LGA by reference to their purpose:

> "***Special rates and charges*** are for services, facilities and activities that have a special relationship 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

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17 LGA, s 12(1), (3).

18 *Ostwald Accommodation Pty Ltd v Western Downs Regional Council* (2015) 2 Qd R 14, [24] (Jackson J).

19 (2015) 2 Qd R 14.

20 (2015) 2 Qd R 14, [26].

21 *Island Resorts (Apartments) Pty Ltd v Gold Coast City Council* [2021] QCA 19, [37] (Jackson J). His Honour made reference to the exposition of the legal and constitutional history of taxation in the Australian States by McHugh and Gummow JJ in *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, 466-467.

22 LGA, s 94(1)(a).

23 LGA, s 94(1)(b)(i).

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

[24] The power to levy a special charge must be exercised by a resolution of the councillors.[24] They cannot delegate this function.[25] Such a resolution must be made at the local government's budget meeting for each financial year.[26]

[25] By the LGA, Parliament conferred a regulation-making power on the Governor in Council that relevantly extends to "any matter connected with rates and charges".[27] During the period material to this proceeding, there were two such regulations: *Local Government (Finance, Plans and Reporting) Regulation 2010* (the **2010 LGR**); and *Local Government Regulation 2012* (Qld) (the **2012 LGR**). By these, the Governor in Council has provided for many matters about making and levying of rates and charges.

[26] The only mechanism by which a local government can levy rates and charges (including special charges) is the giving of a rate notice to a landowner.[28] More than one rate or charge may be levied by a single rate notice. Usually, by service of a single rate notice, a local government levies general rates and charges and any special rates and charges for the same subject land. Many of the common questions concern rate notices issue by the Council to levy the Special Charges on the plaintiffs and other group members.

[27] A levied rate or charge enjoys a special status. If an owner of rateable land does not pay the rates and charges levied in a rate notice, the overdue rates and charges[29] are a statutory charge on the relevant land.[30]

**Question 1: rate notices issued before 14 December 2012**

[28] The first question concerns any rate notice issued by the Council before 14 December 2012. It raises the substantial common issue of whether, in consequence only of the pleaded invalidity of the relevant resolution, did the rate notice include special rates or charges that were levied on land to which the special rates and charges did not apply.

[29] On 28 June 2011 and on 12 July 2012, the Council passed resolutions to levy Special Charges the subject of this proceeding. These included the Raby Bay Tidal Works (Community Title Scheme) Special Charge on certain rateable land (including the building unit owned by Mr Collier). It and the Raby Bay Tidal Works (Non Community Title Scheme) Special Charge were to fund capital and operational

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24 LGA, s 94(2); LGR, s 80. At common law, a decision of a statutory corporation, including a local government, is ordinarily to be given by resolution at a duly convened meeting. See:*Lewiac Pty Ltd v Gold Coast City Council* [1995] 1 Qd R 38, 43 (Macrossan CJ, McPherson JA and Dowsett J), modifying the effect of *Russell v Brisbane City Council* [1955] St R Qd. 419, 431.

25 LGA, s 257(3).

26 LGA, s 94(2).

27 LGA, s 96.

28 2010 LGR, s 38(1), 40(b); 2012 LGR, s 104(1), s 106(b).

29 By 2010 LGR, s 52, a local government was required to decide the date by which (or period within which) rates and charges must be paid and do so by resolution at its annual budget meeting. By 2012 LGR, s 132, rates and charges are overdue if not paid by the due date for payment stated in the rate notice.

30 LGA, s 95.

expenditure on geotechnical works, rock armour replacement, certain services to revetment walls in the Raby Bay Canal Reserve and the Raby Bay laydown area. Those services were also to be funded by the Raby Bay Marina Special Charge, as well as dredging, monitoring, and maintenance in the Raby Bay Canal Reserve. The Aquatic Paradise Marina Special Charge was to fund dredging, dredging planning, a silt bag trial, canal maintenance, and navigational beacon pile maintenance and an environmentally relevant activities report in or in relation to the Aquatic Paradise Canal Reserve.

[30] The Council gave rate notices to Mr Collier and other group members who owned land (including units) adjacent to the Raby Bay Canal Reserve, in the Raby Bay Marina and in the Aquatic Paradise Marine. These rate notices included the Special Charges.

[31] In this period, the Council's non-compliance was with s 28 of the 2010 LGR. It was in these terms:

> "**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."

[32] In each of the 2011 and 2012 Resolutions, the Council identified a document as the "overall plan". That document did not state the estimated cost of carrying out the overall plan. Nor did it state the estimated time for carrying out the overall plan. So, in each Resolution, the document identified as the "overall plan" did not comply with the requirements in s 28(4)(c) and (d) of the 2010 LGR.

[33] It is common ground that, by reason of these defects, the Council omitted to adopt an overall plan before, or at the same time as, the Council resolved to levy the Special Charges. Its actions were contrary to s 28(3)(b) and s 28(5) of the 2010 LGR.

[34] Section 28 was the first provision in Part 6 of Chapter 2 of the 2010 LGR. The balance of Part 6 comprised ss 29 to 32:

> "**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."

[35] These provisions make the "overall plan" a central feature of the regulatory scheme for special rates and charges. They are the context in which the requirements in ss 28(3)(b), 28(4) and 28(5) operate.[31]

[36] It is common ground that each of Resolutions to levy a Special Charge was invalid, including those resulting in charges on rate notices before 14 December 2014. The plaintiffs contend that each of the Resolutions was a nullity. The Council contended that the "incorrectness or unlawfulness" of the levying of the Special Charges "resulted from technical breaches of the statutory provisions" and "not from a fundamental absence of power." In submission the Council's failures were described as "a technical error". These expressions can mean no more than that the Council could have validly resolved to levy the Special Charges, had it complied with ss 28(3)(b), (4)(c) and (d) and (5), by including a time and cost estimate in each identified and adopted "overall plan". The Council submits that the answers to the common questions, are not affected by the status of the Resolutions.

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31 No party challenged these regulations as within the scope of the statutory power to make delegated legislation.

[37] The requirement in s 28(3(b) that a local government's resolution identify an overall plan is mandatory. To fulfill this requirement, the document identified and adopted by the local government must satisfy s 28(4). If a local government fails to do all these things, its failure will prevent the operation of ss 30 and 31, in particular by rendering it impossible for the local government to comply with those provisions. Each provision in Part 6 advances part of the purpose of the LGA: to provide for a system of local government that is accountable, effective, efficient and sustainable.[32] A failure to comply with ss 28(3)(b) and (4)(c) and (d) diminishes and may defeat that purpose. As well, ss 30, 31 and 32 require a local authority to make payments to landowners in certain circumstances. The right of such persons to be paid under each provision would be adversely affected, if not defeated, if a local government were to fail to comply with s 28, including ss 28(3)(b) and (4)(c) and (d).

[38] In the context of the LGA and Part 6 of Chapter 2 of the 2010 LGR, ss 28(3) and (4) are statutory preconditions to the exercise of the authority to resolve to levy a special rate or charge, conferred on the local government by LGA, s 94(1)(b)(i). A resolution of a local government to levy a special rate or charge, which does not comply with the requirements in s 28(3)(b) and (4)(c) and (d), is beyond the scope of that authority. It lacks the characteristics necessary for it to have force and effect by the statute pursuant to which the local authority purported to make it.[33]

[39] Owing to the Council's failure to comply with s 28(3)(b), the 2011 and 2012 Resolutions to levy Special Charges lacked legal authority. No evidence was adduced that any person acted on those Resolutions assuming them to be valid, other than the Council and the owners of the relevant land. The now common acceptance that each of the Resolutions was invalid makes it appropriate to regard them as of no effect from the beginning and incapable of ever having produced legal effects. It is of no legal effect – save to the extent that it is given any effect by a specific statutory provision, such as that in s 32(2).

[40] The rate notices, by which the Council levied rates and charges including the Special Charges, might otherwise have been invalid also, but they were preserved from invalidity and so given effect by s 32(2) of the 2010 LGR. As valid rate notices, they attracted the operation of the statutory provisions concerning rate notices. The group members, including Mr Collier, who were given rate notices that included Special Charges were obliged to pay them by the due date.

[41] The regulatory provision saves the rate notice. It does not validate or give effect to a purported resolution to levy the special rate or charge that is invalid and of no effect.

[42] The 2011 and 2012 Resolutions were invalid. They were of no effect as resolutions to levy the special charges. The Special Charges the subject of the invalid Resolutions did not apply to any land. They did not apply to the land owned by Mr Collier and other group members. On the ordinary meaning of s 32(1), the Special Charges included in the rate notices were levied on land to which they do not apply.

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32 LGA, s 3(b).

33 The legislative history of the earlier provisions, of which these regulations are the successors, was considered by Wilson J on *E Cocco & Sons Investments Pty Ltd v Gold Coast City Council* [2014] QSC 10 at [14]-[15]. They provide for a transparency and accountability commensurate with the power to make and levy special rates and charges.

[43] The Council submitted 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". The change of language would change the effect of the provision. Nothing in the ordinary meaning of the provision itself or in the surrounding provisions in Part 6 or in the 2010 LGR or the LGA requires or even supports such a change.

[44] The Council explained its interpretation by reference to the facts of the present proceeding. According to the Council, the land owned by Mr Collier and other group members "was susceptible to being levied with special rates and charges". Mr Collier owned land with a frontage to one of the Reserves. His land (and land owned by other group members) would benefit from the Services to be provided to the relevant Reserve. All would benefit from a resulting increased value of their land by more than 1% or 2%.[34] The occupiers of the land would benefit from the improved, but more difficult to quantify, visual amenity resulting from the Services.[35] In this way, the Services, to be funded by the Special Charges, had a special association with the particular land because, in each case, the land or its occupier would specially benefit from those Services. It follows that the Council could have lawfully resolved to levy each of the Special Charges. In the Council's words, the relevant land was "susceptible" of a special charge.

[45] All this may be accepted. The Council led evidence of its expenditure on services of the kind outlined in each "overall plan" referred to in the Resolutions. Although 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. It may be assumed that this benefit accrued to Mr Collier and other group members "more than the general public and non-waterfront property owners."

[46] Despite these facts, the Council's interpretation of s 32 must be rejected.

[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 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.

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34 This evidence was given by Mr Kamitsis, a registered valuer.

35 This evidence was given by Mr Ehrsam and Mr McGowan.

[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?"

[51] It follows that, before 14 December 2012, the rate notices issued by the Council levying the Special Charges included special charges that were levied on land and units to which those special charges did not apply within the meaning of s 32 of the 2010 LGA. The answer to common question 1 is "Yes".

**Question 2: rate notices issued after 14 December 2012**

[52] With effect from 14 December 2012, the 2010 LGR was repealed, and the 2012 LGR commenced. In the 2012 LGR, s 94(1) to (9) and (15) were relevantly identical to the former s 28(1) and (3)-(11) and s 94(10) is the equivalent of s 28(2). One relevant difference is considered at [56][59] below. In ss 95 to 98, the Governor in Council made regulations in relevantly the same terms as ss 29 to 32 of the 2010 LGR.

[53] Each year, between June 2013 and July 2016, the Council passed Resolutions to levy the other Special Charges the subject of this proceeding. These included:

(a) the Sovereign Waters Lake Special Charge levied on certain land (including the land owned by Mr and Ms Akero) to fund capital and operational expenditure on services in the Sovereign Waters Lake Reserve;[36]

(b) the Aquatic Paradise Special Charge levied on certain land (including the land owned by Mr Kozik) and the Aquatic Paradise Marina Special Charge to fund capital and operational expenditure on services in the Aquatic Paradise Canal Reserve;[37]

(c) the Raby Bay Tidal Works (Community Title Scheme) Special Charge levied on certain rateable land (including the unit owned by Mr Collier), the Raby Bay Tidal Works (Non Community Title Scheme) and the Raby Bay Marina Special Charge to fund capital and operational expenditure on services in the Raby Bay Canal Reserve.[38]

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36 These services included, from time to time, dredging, water quality monitoring, maintenance and cleaning works certain, dredge and disposal planning, and environmental monitoring.

37 These services included, from time to time, dredging, dredging planning, canal maintenance and navigational beacon pile maintenance. The Aquatic Paradise Marina Special Charge was also to fund a silt bag trial, and cleaning of the canal and revetment walls, improvements and navigational aids as required.

38 These services included, from time to time, dredging, dredging planning, canal maintenance, navigational beacon pile maintenance, monitoring revetment walls, revetment wall upgrades, revetment wall stabilisation, rock armour replacement, canal bed leveling, canal planning and a new repair trial. The Raby Bay Marina Special Charge was also to fund expenditure on monitoring revetment walls, canal planning and rock armour replacement.

[54] The Council gave rate notices to Mr and Mrs Akero, Mr Kozik, Mr Collier, and other group members who owned land (including units) adjacent to the Reserves, in the Raby Bay Marina or in the Aquatic Paradise Marine. These rate notices included these Special Charges.

[55] In this period, the Council's non-compliance was with ss 94 of the 2012 LGR. Each time the Council resolved to levy these Special Charges, it identified a document as the "overall plan". In each of the Resolutions, the document identified did not comply with the requirements in s 94(3)(c) and (d)[39]. It is common ground that, in resolving to make each of the Special Charges, the Council did not comply with the requirements in s 94(2)(b) of the 2012 LGR.[40]

[56] In one relevant respect, the provisions in Part 6 of Chapter 4 of the 2012 LGR differed from those in the former 2010 LGR. When first made, the 2012 LGR included a s 94(14), in these terms:

> "(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."[41]

[57] By s 94(14) the Governor in Council introduced into the 2012 LGR language similar to that proposed by the Council as the proper interpretation of s 32 of the 2010 LGR and s 98 of the 2012 LGR. It does so, not in the context of the validation of rate notices, but resolutions to levy special rates and charges and overall plans identified in such resolutions.

[58] The evident purpose of this provision 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. It might be said to address the possibility that an owner of land levied with a special rate or charge might challenge the validity of the resolution (or the overall plan to which it refers) on the ground that the special rates or levies were for services, facilities or activities that also have a special relationship with other particular land[42] the owners of which were not levied with the rate or charge. The effect of s 94(14) is to validate the resolution or overall plan that did not include the land that could have been included. It does not alter the Council's resolution to include the other land. It does not make the special rate or levy apply to the other land. It does not relevantly alter the operation of s 98 of the 2012 LGR.

[59] Having considered s 94(14) and the extent of its operation and effect, its inclusion in the 2012 LGR does not alter my conclusions about the proper construction of s 32 of the 2010 LGR or its twin s 98 of the 2012 LGR.

[60] For the reasons set out above, after 14 December 2012 the rate notices issued by the Council levying the Special Charges included special charges that were levied on land

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39 Relevantly the same as s 28(4)(c) and (d) of the former 2010 LGR.

40 Relevantly the same as s 28(3)(b) of the former LGR 2010.

41 This provision was omitted, and new subsection inserted, with effect from 5 December 2014. The provision in the 2012 LGA as amended is considered under common question 3.

42 Because the land or its occupier specially benefits from it, or has or will have special access to it, or the land or the occupier is or will be used in a way that specially contributes to the need for it.

and units to which those special charges did not apply within the meaning of s 98 of the 2012 LGR. The answer to common question 2 is "Yes".

**Common question 3 – after 5 December 2014**

[61] From its commencement on 14 December 2012 until 4 December 2014, the 2012 LGR included a section 98 in identical terms to the former s 32 of the 2010 LGR:

> **"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.
>
> (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."

[62] With effect from 5 December 2014, the former section 98 of the 2012 LGR was omitted and the following inserted in its place:

> **"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."

[63] The only additional words are those added at the end of s 98(1) "or should not have been levied". These seem intended to enlarge the scope of s 98 to apply also to a rate notice that includes special rates or charges that "should not have been levied" on the relevant land as well as those that do not apply to the land.

[64] At the same date and by the same amending instrument,[43] the former s 94(14) was omitted and a new s 94(14) inserted. Immediately before this amendment, s 94(14) was in the form extracted at [56] above. The inserted ss 94 (14) reads 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:
>
> (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."

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[43] *Local Government Legislation Amendment Regulation (No 1) 2014* SL No 290. The amendment to s98 was by s 21, and that to s 94 was by s 20.

[65] The whole of paragraph (b) was added by this amendment.

[66] I accept the Council's submission that the concurrence and similarity of the amendments to ss 98(1) and ss 94(14) indicate a common context for the changes. This is moderated to some extent by the different subject matters: ss 94(14) deals with the validity of a resolution or overall plan; and ss 98(1) deals with the validity of a rate notice. I am content to adopt the Council's submission that the additional words "are not directed at being a widespread corrective in any case in which there was a failure to follow procedures in levying of special rates and charges."

[67] I also accept the Council's submission that the additional words do not comprehend the situation of the plaintiffs and other group members.

[68] I do not adopt the Council's interpretation of the additional words as limited to a case where the Council lacked the power to levy special rates or charges, in the sense of it not being possible, by any lawful means, for the Council to do so. That construction may be too confined. It goes beyond what is in issue in this proceeding, and so it is not necessary to reach a conclusion on it.

[69] The 2012 LGR does not exhibit the strictest of standards with respect to consistent word usage. However, it maintains a clear distinction between a resolution by which a local government may resolve to levy a rate or charge and a rate notice by which a local government actually levies a rate or charge. The first engages the statutory authorisation to exercise a taxation power. The second engages the statutory mechanism to make the tax due and payable.

[70] Reading s 98(1) in the context of s 94(14), the expression "special rates or charges that were levied on land to which the special rates or charges ... should not have been levied" refers to rates or charges erroneously levied on land. This comprehends special rates or changes that have already been paid by the landowners, those for which persons were liable when they lived or did not live on the land and have since changed residence (and notified the relevant record keepers), or where, due to some other error, they should not have been included in the rate notice and thereby levied.

[71] The circumstances in which special rates or charges "should not have been levied" could include where the land does not have a special association with the services, facilities, and activities for which the special rates or charges are to be levied. This is the Council's more limited interpretation of the phrase.

[72] The Council did not erroneously include the relevant land of the plaintiffs and the other group members in a resolution. The land had a special association with the services the Special Charges were intended to fund. However, as the Resolutions were invalid, the inclusion of that land in the Resolutions had no legal effect, save for the preserved effect of the rate notices by which the Council levied the Special Charges amongst other rates and charges.

[73] It follows that, after 5 December 2014, the rate notices issued by the Council levying the Special Charges included special charges that:

(a) were levied on land and units to which those special charges did not apply; and

(b) should not have been levied.

within the meaning in reg 98(1) of the 2012 LGR.

[74] The answer to common question 3 is "Yes".

**Common question 4 – action in debt for unreturned Special Charges, any obviation or diminishment by it having been spent**

[75] The fourth common question has two parts. It is convenient to consider the parts sequentially.

***Is the Council liable under a cause of action in debt?***

[76] The first part concerns the cause of action the plaintiffs and other group members have against the Council, for failing to return the "spent" portion of the amounts they paid for the Special Charges.

[77] For the reasons set out above, the Council is obliged to return the Special Charges it received to the persons who paid them, and to do so as soon as practicable.

[78] The Council submitted that the regulations should be read as if the obligation to return the amounts paid for inapplicable special rates and charges was limited to "circumstances in which the error is one made known soon after the levying, and in which the money has not been spent."

[79] It is not obvious that the ordinary words of the provisions should be qualified in this way. No such limitation is expressed in the provisions. It is inconsistent with the ordinary meaning of the words, and with the requirement that the local government return the amounts paid "as soon as practicable".

[80] Had the Governor in Council intended to qualify the obligation in the manner the Council submitted, it could have done so by an express provision to that effect. Neither version of the regulations confers a discretion on the Council to decide whether to return the amount paid for the inapplicable special rates or charges. The statutory provisions considered in *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Limited* (1994) 182 CLR 51, to which the Council's submissions referred, were different in this respect.

[81] The Council has been in breach of s 32(2) of the 2010 LGR for the return of payments made of rate notices issued before 14 December 2012 and in breach of s 98(2) of the 2012 LGR for return of payments made of rate notices issued after that date. Each of its breaches commenced at the time it became practicable to return the 'spent' balance of the Special Charges paid by the plaintiffs and the group members. The Council led no evidence of any fact, matter or thing that rendered it impracticable to return the balance of the Special Charges to those who paid them at any time.[44]

[82] The regulations requiring the return of the payments for the Special Charges were otherwise unqualified. Neither made any provision for the means by which a person in the position of the plaintiffs and the other group members may obtain any redress or compensation from the Council for a breach. In the absence of any contrary

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[44] In the circumstances, no relevant issue arises about any time delay between the issue of the rate notices, their payment and obligation to return the amount paid.

provision, each of the regulations may be taken as conferring on each of the plaintiffs and the other group members a right to the funds, enforceable by an action for debt.[45]

[83] It follows that, in default of returning the balance of the amounts paid for Special Charges by group members "as soon as practicable", the Council is liable to each of those landowners under a cause of action in debt. The answer to the first part of the fourth question is "Yes."

***Is the unjust enrichment contention available?***

[84] The second part of Question 4 is whether the recovery of the debt owed to the group members for the unrefunded balance of the Special Charges they paid is "obviated or diminished" by the Council having expended that amount in carrying out works in and about the Reserves.

[85] The Council contended that to pay to the plaintiffs (and the other group members) the amount they contributed towards the Services that the Council has spent would be to unjustly enrich them. This part of the question concerns whether unjust enrichment contention is available to the Council to obviate or diminish the recovery by the group members of the debt.

[86] I reject the Council's submission that the regulations do not "by express language or necessary intendment, displace or curtail the Council's recourse to equitable and restitutionary grounds in answer to" the plaintiffs' claim.

[87] The Council's obligation to return the funds does not arise in isolation. Each relevant regulation operated to give the Council the legal power to collect all the rates and charges in the validated rate notices, notwithstanding the invalidity of the Resolutions and the Special Charges that were included. This meant the Council could collect all the rates and charges without issuing new and corrected rate notices.

[88] In protecting the rate notices from invalidity, the regulations affected the rights of the plaintiffs and the other group members. They could not challenge the rate notices or refuse to pay the total amount levied by each notice, merely because it included an invalid Special Charge. By the validating regulations, the group members lost what might have been a right to set aside the notice or to ask the court to declare it to be of no effect. In place of those rights, by the same provisions, the Governor in Council created the obligation of the local government to return the funds paid for the Special Charges that did not apply to, and perhaps later should not have been levied on, their land.

[89] By validating rate notices that included invalid special rates or charges, the regulations might be said to have "overthrown" principles and "infringed" rights, to adopt the expressions used by O'Connor J in *Potter v Minahan*.[46] The same clear language in each regulation compels the return of the relevant sums paid to those who paid them. The intention is unambiguous.

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45 *Commonwealth v SCI Operation* (1998) 192 CLR 285, 305 [40] (Gaudron J), 313 [65] (McHugh and Gummow JJ), each citing *Mallinson v Scottish Australian Insurance Investment Co Ltd* (1920) CLR 66, 70. See also: *Booth v Trail* (1883) XII QBD 8, 10 (Lord Coleridge CJ), 11 (Stephen J).

46 (1908) 7 CLR 277, 304.

[90] The public policy evident in the regulations balances the rights and obligations of local governments and ratepayers. The executive's choice in exercising its delegated regulatory power would be disregarded by merely allowing local governments the validating effect on their rate notices. The obligation to return the payments for the Special Charges to the landowners who paid them is an essential element of the regulatory scheme. It may not be "cut down" by resort to restitutionary principles.[47] Effect can be given to the regulations only by enforcing the group members' right to a return of the Special Charges they paid.

[91] In making a restitutionary defence, the Council presumes it had a just right to retain some part of the Special Charges. This part of its defence rests on the Council having spent funds on some of the works set out in the relevant overall plan.

[92] The Council's power to make and levy special rates and charges is authorised by the Parliament. While the Council had other general powers,[48] the power to make and levy a special rate or charge is conferred for specific purposes and is subject to the associated statutory requirements, including the requirement for an overall plan with time and cost estimates. They are prerequisites to the validity of a resolution making a special charge and so to a notice levying it. These requirements give effect to a legislative intention "to limit a special rate or charge according to a transparent correlation with certain work at a certain cost" over a certain time.[49]

[93] The Council may not give itself a power to levy and retain special charges beyond the scope of the legislative grant. Nor may it avoid compliance with the statutory prerequisites for the exercise of the power. This would be the effect of the Council's defence, were it to be allowed.

[94] The Council cannot demand that the plaintiffs do equity as a condition of being granted relief the regulations command. The Resolutions, and so the Special Charges, were invalid. It follows that the Council had no right to retain the amount paid for the Special Charges. If it keeps any of payments made for the Special Charges, the Council will be enriched. As it has no legal right to keep any of the payments, by retaining some it will be unjustly enriched.

[95] The Council had no right to use or retain any part of the Special Charges. Its right to levy them in a rate notice (and the group members' attendant obligation to pay them) was conferred at the price of the Council being obliged to return them to the payers as soon as practicable. The Council's liability to return the moneys is statutory.[50]

[96] The Council contends it has conferred some benefit on the plaintiffs (and group members) by the services on which it expended the outstanding portion of the Special Charges. That may be accepted. By spending the funds on works in the canals or the lake, the Council could not create an equity preventing the plaintiffs and the other group members from enforcing the Council's statutory obligation to return them. It has retained funds to which it has no entitlement.

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47 See *obiter*: *Commonwealth v SCI Operations Pty Limited* (1998) 192 CLR 285, 306 [43]-[44] (Gaudron J).

48 LGA, s 9(1) "the power to do anything that is necessary or convenient for the good rule and local government of its local government area."

49 *Whiting v Somerset Regional Council* [2010] QSC 200, [32] (McMurdo J).

50 cf: *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 89 (Brennan J).

[97] It is defenceless in the face of a demand by the plaintiffs (and the group members) that the remaining funds they paid be returned.

[98] Although this is a representative proceeding, the plaintiffs assert private rights against the Council. In the face of the regulatory scheme, the court should not decline to grant the plaintiffs relief. It should not decline to grant relief to save an invalid special charge – beyond the extent to which the regulation does so.

[99] The Council cannot avoid or diminish its statutory obligation to return the amount of the Special Charges to each person who paid them, by a defence that the payers will be unjustly enriched by the return.

[100] The answer to the second part of the fourth common question is No.

***Question 5 - Are the outstanding balances of the Special Charges recoverable in an action for money had and received? Is the claim obviated or diminished by the funds having been spent?***

***Are they recoverable in an action for money had and received?***

[101] The Council sought to characterise the plaintiffs' claim as one for money had and received, having been paid under a mistake as to the validity of the Special Charges. This is the cause of action by which retailers of tobacco products had recovered amounts they paid to wholesalers for invalid State taxes in *Roxborough v Rothmans of Pall Mall Australia Ltd.*[51]

[102] As Mr Horton QC and Mr Richardson noted in their written submissions, in *Roxborough,* Gleeson CJ, Gaudron and Hayne JJ recorded the basis of the plaintiff retailers' case, in part, on "the principles underlying the common indebitatus count for money had and received" by the defendant wholesalers to the use of the plaintiff retailers. Their Honours quoted, with apparent approval, the view of the authors of *Restitution Law in Australia*, that although the implied contract analysis was no longer to be applied, the cases decided on those principles "form the precedents which make up the legal matrix of restitution law".[52]

[103] Counsel also cited part of the judgment of Gummow J in *Roxborough.*[53] There, his Honour quoted, with apparent approval, the following passage from Viscount Haldane LC in *Royal Bank of Canada v The King*:

> "It is a well-established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant for the use of the plaintiff, the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid for a consideration that has failed."[54]

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51 (2001) 208 CLR 516.
52 524-525 at [14]-[15], citing the 1995 edition by Mason and Carter at p 95.
53 639-640 at [62]-[63].
54 [1913] AC 283, 296.

And the following (*obiter dicta*) observations of Gibbs CJ in *National Banking Corporation of Australia Ltd v Batty*,[55] about the action for money had and received:

> "Whether the action is based on an implied promise to pay, or on a principle designed to prevent unjust enrichment, the emphasis on justice and equity in both old and modern authority on this subject supports the view that the action will not lie unless the defendant in justice and equity ought to pay the money to the plaintiff."

[104] In short, on the Council's case, it could raise restitutionary defences to a claim for money had and received because the cause of action "brings with it equitable and restitutionary notions".

[105] These issues fall away, once it is seen that the legislative framework authorising the Council to make and levy special rates and charges contains within it not only the prerequisites for validly doing so, but also a validating provision for rate notices including otherwise invalid special rates and charges, and a specific obligation arising when the Council is paid for special rates and charges levied on land to which they do not apply.

[106] As noted above, there is a statutory obligation to return the moneys paid and the plaintiffs' claim is brought as a cause of action in debt.

[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 ..."[56]

[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.

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55 (1986) 160 CLR 251, 268.

56 Further amended statement of claim filed 31 January 2021.

[110] The plaintiffs' alternative claim – to recover the balance of the Special Charges as money had and received – fails.

[111] In the circumstances, it is not necessary to consider whether and to what extent the *Woolwich* principle[57] applies. It is not appropriate to do so. Here, a local government included invalid special charges in rate notices. The notices were protected from invalidity by the regulations. The Council's right to collect the Special Charges levied by the rates notices was within the power granted by the regulations, notwithstanding the resolutions to levy the special charges were themselves invalid. In the now superseded form of analysis, there was no assumed contractual relationship between the Council and the group members, no complete failure of consideration, and no quasi-contract. No issue of unjust enrichment arises.

[112] In default of the Council returning amounts paid by the plaintiffs and group members for the Special Charges "as soon as practicable", the amounts are not recoverable by them in an action against the Council for money had and received.

[113] The answer to the first part of common question 5 is "No."

[114] As the answer to the first part of question 5 is "No", it is not necessary to answer the second part of the question. For completeness, I note that the considerations addressed in paragraphs [86] to [99] above the recovery of the balance of the monies paid by the group members for the Special Charges is not obviated or diminished by the Council having expended the unrefunded amount in carrying out works in and about the relevant land.

[115] I will hear the parties as to further steps that ought to be taken to finalise the proceeding.

**Answers to the amended agreed questions common to claims of group members**

[116] For the reasons set out above, pursuant to s 103V(1)(a) and (b) of the CPA, the decision of the court on the common questions should be 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?

   **Yes.**

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?

   **Yes.**

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[57] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 - that a revenue authority must repay a tax or levy imposed beyond power.

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

   **Yes.**

   (b) should not have been levied?

   **Yes.**

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?

   **Yes.**

   (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?

   **No.**

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:

   (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?

   **No.**

   (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?

   **Not necessary to answer.**