



Supreme Court
New South Wales

Case Name: Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council

Medium Neutral Citation: [2023] NSWSC 262

Hearing Date(s): 7, 8 March 2023

Date of Orders: 27 March 2023

Decision Date: 27 March 2023

Jurisdiction: Common Law

Before: Basten AJ

Decision: (1) Dismiss the class 4 proceeding transferred from the Land and Environment Court with costs, including costs incurred in that Court.

(2) Order that the defendant pay the plaintiff an amount based on the last payment made by the plaintiff on 27 May 2021, including interest, to be calculated by the parties.

(3) Direct that, subject to order 4, the plaintiff pay the Council's costs of the proceedings commenced in this Court.

(4) Grant the plaintiff leave to file submissions within 28 days as to any proposed variation of order 3, with the Defendant having 14 days to file a written submission in response.

Catchwords: LIMITATION OF ACTIONS – statute limiting recovery of rates paid to Council – Recovery of Imposts Act 1963 (NSW), s 2(1) – limitation period 12 months from date of payment – whether s 2(1) disapplied – challenge to validity of impost, but no recovery claimed under Local

Government Act – whether Local Government Act allowed a claim for recovery of overpayment – whether different limitation period specified

LOCAL GOVERNMENT – rates and charges – challenge to Council’s categorisation of land as “mining land” – consent orders filed in Land and Environment Court – land recategorised as “farm land” – claim for recovery of rates paid to council calculated as for mining land

RESTITUTION – statutory claim for repayment of rates – action at common law based on restitution – proceedings seeking relief in separate courts – reasonable doubt as to correct court – no abuse of process – defence of Anshun estoppel

Legislation Cited:

Civil Procedure Act 2005 (NSW), s 149B
Commonwealth Constitution, s 90
Environmental Planning and Assessment Act 1979 (NSW), s 94
Interpretation Act 1987, s 21
Land and Environment Court Act 1979 (NSW), ss 16, 20, 71
Local Government Act 1993 (NSW), Ch 7, Pt 1, s 220; Ch 15, Pt 3, ss 520, 521, 522, 525, 526, 527, 546, 560; Pt 8, ss 577, 578, 593, 594, 646; Ch 17, ss 672, 674, 675
Recovery of Imposts Act 1963 (NSW), ss 1A, 2, 3, 5, 6, 7
State Revenue Legislation Further Amendment Act 1995 (NSW), s 2(1); Sch 6

Explanatory Note for the State Revenue Legislation Further Amendment Bill 1995
New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 27 October 1994

Cases Cited:

Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd (2014) 253 CLR 560; [2014] HCA 14
Baulkham Hills Shire Council v Wrights Road Pty Limited [2007] NSWCA 152; (2007) 153 LGERA 219
Bayside Council v Karimbla Properties (No 3) Pty Ltd (2018) 99 NSWLR 66; [2018] NSWCA 257

Boensch v Pascoe (2019) 268 CLR 593; [2019] HCA 49
Capital Duplicators Pty Ltd v Australian Capital Territory
[No 2] (1993) 178 CLR 561; [1993] HCA 67
Champerslife Pty Ltd v Manojlovski (2010) 75 NSWLR
245; [2010] NSWCA 33
Commissioner of State Revenue (Victoria) v Royal
Insurance Australia Ltd (1994) 182 CLR 51; [1994] HCA
61
David Securities Pty Ltd v Commonwealth Bank of
Australia (1992) 175 CLR 353; [1992] HCA 48
Frevcourt Pty Ltd v Wingecarribee Shire Council [2005]
NSWCA 107; (2005) 139 LGERA 140
Hookway v Racing Victoria Ltd (2005) 13 VR 444;
[2005] VSCA 310
Karimbla Properties v Council of the City of Sydney
(2017) 222 LGERA 385; [2017] NSWLEC 75
Kuru v State of New South Wales (2008) 236 CLR 1;
[2008] HCA 26
Mangoola Coal Operations v Muswellbrook Shire
Council [2021] NSWCA 46
Meriton Apartments Limited v Council of the City of
Sydney (2011) 80 NSWLR 541; [2011] NSWLEC 65
Port of Melbourne Authority v Anshun Pty Ltd (1981)
147 CLR 589; [1981] HCA 45
Queensland Alumina Ltd v Alinta DQP Pty Ltd [2007]
QCA 387
Roxborough v Rothmans of Pall Mall Australia Ltd
(2001) 208 CLR 516; [2001] HCA 68
The Queen v Guode [2020] 267 CLR 141; [2020] HCA
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Texts Cited: K Mason, JW Carter, GJ Tolhurst, Mason & Carter's
Restitution Law in Australia (4th ed, 2021, LexisNexis)

Category: Principal judgment

Parties: Mangoola Coal Operations Pty Limited (Plaintiff)
Muswellbrook Shire Council (Defendant)

Representation: Counsel:
Mr A Galasso SC / Mr C Ireland (Plaintiff)
Mr P Tomasetti SC / Mr T To (Defendant)

Solicitors:
Johnson Winter Slattery (Plaintiff)

File Number(s): 2022/00153777
2022/00202595

JUDGMENT

- 1 **BASTEN AJ:** In 2018 the plaintiff, Mangoola Coal Operations Pty Limited, (“the plaintiff”) commenced proceedings in the Land and Environment Court challenging the basis on which the defendant, Muswellbrook Shire Council (“the Council”), had assessed rates on land owned by the plaintiff over five financial years from 2016/17 to 2020/21. The rates were calculated by reference to the categorisation of the plaintiff’s land as “mining”. The plaintiff applied unsuccessfully to the Council to have the categorisation of the land changed to “farmland”. On 7 August 2018, the plaintiff commenced proceedings in the Land and Environment Court seeking to review the Council’s categorisation decision in relation to the 2016/17 and 2017/18 rating years. The Court dismissed the application and the plaintiff successfully appealed to the Court of Appeal, which set aside the judgment below and remitted the matter to the Land and Environment Court. On 15 September 2021, consent orders were filed in the Land and Environment Court upholding the plaintiff’s appeal with respect to each of the two years.
- 2 On 27 May 2020, the plaintiff commenced two fresh proceedings, one in the class 4 jurisdiction of the Land and Environment Court (“class 4 proceeding”) and one in this Court (“common law proceeding”). In each, the plaintiff sought to recover the difference between the rates it had paid assessed on mining land, and the rates which should have been assessed had the land been categorised as farmland. The Land and Environment Court proceedings have been transferred to this Court.

Nature of proceedings

- 3 It is convenient to explain at the outset the nature of the two proceedings and, indeed, why there are two proceedings seeking identical relief. Normally, to commence two proceedings seeking identical relief would be an abuse of process. However, the class 4 proceeding alleged that the Council’s failure to refund overpaid rates was a breach of an environmental law, namely Chapter

15 of the *Local Government Act 1993* (NSW), and fell within the exclusive jurisdiction of the Land and Environment Court, as defined in s 20(3)(a) of the *Land and Environment Court Act 1979* (NSW) (“Court Act”). Proceedings to enforce a right, obligation or duty conferred or imposed by a planning or environmental law cannot be pursued in the Supreme Court, as stated in the Court Act, s 71. That jurisdiction is, however, subject to the power of either Court to transfer proceedings before it to the other Court pursuant to the *Civil Procedure Act 2005* (NSW), s 149B. An order was made to transfer the Land and Environment Court proceedings to this Court. The common law proceeding was essentially a claim for money had and received by the Council which it was not entitled to retain. It sought a money judgment for some \$3.7m.

- 4 The nature of the class 4 proceeding is best explained by reference to the relief sought. The first item of relief was as follows:

“1 A declaration that the [Council] received the sum of \$3,071,518 in overpaid rates for the rating years commencing 1 July 2016 to 1 July 2020 from the [plaintiff] for parcel 113969 by reason of the rates being paid in response to Rates and Charges Notices issued by the [Council] categorising the parcel as mining, a categorisation set aside by the consent orders made in matter No 242761 of 2018 by Moore J on or about 15 September 2021.”

- 5 Certain aspects of this proposed declaration require clarification. First, the sum identified was not a single amount, nor was it in fact the sum of individual amounts paid by the plaintiff to the Council. Rather, it was the sum of the amounts by which each payment based on the categorisation of the land as mining exceeded that which would have been paid had the land been categorised as farmland. In fact, 16 separate payments were made between 6 September 2017 and 27 May 2021.
- 6 Secondly, it may be doubted whether the consent orders made in the Land and Environment Court, following remittal by the Court of Appeal, “set aside” one categorisation and imposed another. There were two orders, one in respect of the year commencing 1 July 2016 and one with respect to the year commencing 1 July 2017. The orders were identical except as to the period; the first read:

“1 The appeal against the failure of the respondent to recategorise assessment parcel 113969 as farmland for the period commencing 1 July 2016 is upheld.”

7 Any rights or obligations which flowed from such an order are unstated. Pursuant to s 526(3) of the *Local Government Act*, the Court on an appeal “may declare the date on which a declaration is to take effect or the category for the land, or both, as the case requires”. It appears that the application in the Land and Environment Court may indeed have sought such declarations, but the orders made were not in that form. Nevertheless, the points of claim pleaded, and the points of defence admitted:

“18 The Consent Orders had the effect that the [Council's] mining categorisation of the Land for the 2016 and 2017 rating years (as declared by the [Council] in its letter dated 4 August 2017, ...) was set aside and replaced by the farmland categorisation.

19 The Consent Orders constituted a declaration within the meaning of section 526(3) of the LG Act that the category of the Land was farmland with this declaration to take effect on and from 1 July 2016.”

8 The basis on which the consent orders were so construed is by no means self-evident. However, no issue as to the jurisdiction of the Court is raised by any doubts as to that matter and the Court is entitled to proceed on the basis of the agreement between the parties. The parties also agreed as to the amount identified in declaration 1 as the difference between the two calculations.

9 The second declaration was in the following terms:

“2 A declaration that the [Council] has not made an appropriate adjustment of rates paid by the [plaintiff] for the rating years commencing 1 July 2016 to 1 July 2020 following a change in category of parcel 113969 (as per the consent orders...), by way of either a refund of the amount of overpaid rates (being the difference between the applicable mining and farmland rates in each rating year) paid by the [plaintiff] to the [Council] for those rating years, or a credit for that amount.”

10 The language of this declaration reflected s 527 of the *Local Government Act* which provides:

527 Adjustment of rates following change in category

A council must make an appropriate adjustment of rates paid or payable by a rateable person following a change in category of land.

11 With respect to prayer 2, the points of claim asserted:

“24 Following the entry of the Consent Orders by the Land and Environment Court, the [Council] was required under section 527 of the LG Act to make an appropriate adjustment of the rates paid by the Plaintiff for the rating years commencing 1 July 2016 to 1 July 2020 by refunding the amount of overpaid rates paid by the Plaintiff to the [Council] for those rating years.”

- 12 The Council denied the contents of that paragraph, although there were a number of aspects which might have been addressed separately. As the case was run, there was a critical disagreement as to the operation of s 527 and what the reference to “an appropriate adjustment of rates” meant. The Council denied that an adjustment of rates was made by “refunding” overpaid rates.
- 13 Prayer 2 involved an alternative form of relief, namely either a refund or a “credit”. The alternatives were separately formulated as orders 3 and 4 in the summons. The entitlement to orders in those terms was said to arise from s 674 of the *Local Government Act* which permitted any person to bring proceedings in the Land and Environment Court “for an order to remedy or restrain a breach of this Act”. An appropriate alternative to a refund was said to be a credit against future rates obligations.
- 14 In addition to denials to the claimed entitlement to relief, the points of defence raised five further answers to the claims, namely:¹
- “(a) the plaintiff could have, but did not, seek any orders for refund in the Class 3 proceedings;
 - (b) at all material times the Plaintiff made payments of rates voluntarily and without protest;
 - (c) the [Council] ... changed its position such that any repayment (if otherwise available, which is denied) would be unjust;
 - (d) the Plaintiff’s claim is barred by the operation of the *Recovery of Imposts Act 1963*;
 - (e) ... the plaintiff is estopped from making any claim for a recovery of rates.”
- 15 The pleadings in (a) and (e) were both identified in the course of submissions as giving rise to a claim of *Anshun* estoppel. Thus, there were in effect four defences raised. Each of the matters relied on by way of defence was denied by the plaintiff, but in terms from which it in part departed in the course of the proceedings and therefore need not be set out here.
- 16 The common law proceeding was commenced by statement of claim filed on the same day as the class 4 proceeding (27 May 2022) and claimed an entitlement to be paid the same amount as moneys had and received by the Council, having been paid to it under a mistake of law.² As the Council

¹ Points of defence 1 September 2022, par 13.

² Statement of claim, par 19.

submitted, whether the mistake was one of law, fact or both, may not matter. In its defence, the Council made the same admissions and denials and provided the same answers to the whole of the claim as it did in the class 4 proceeding.

Factual background

- 17 The land in question surrounded an open cut coal mine and had in earlier years been categorised as farmland. However, it had not been used for grazing in the two years leading up to the change in categorisation in August 2017. Part of the land was subject to an easement for supplying water and electricity to the mine and, as a condition of the mine's approval, was subject to two "off set" areas, one for the purpose of Aboriginal cultural heritage, the other for habitat enhancement. The *Local Government Act 1993* (NSW) required categorisation of the land by reference to its "dominant use". The Land and Environment Court accepted that in the years in question the dominant use had not been grazing, but mining.
- 18 In a judgment delivered in March 2021, the Court of Appeal allowed an appeal: *Mangoola Coal Operations v Muswellbrook Shire Council*.³ The Court held that a particular use did not necessarily terminate because no physical activity was undertaken during a particular period. Grazing had ceased because of the drought, but the land nevertheless remained subject during that period to an access agreement between the plaintiff and a grazing company. The primary judge erred in accepting that the hiatus in the presence of cattle on the property was determinative that grazing was not the dominant use for that period. In any event, the evidence did not support a conclusion that mining was the dominant use. An easement for mining purposes affected, in a limited sense, less than 1% of the land. Further, the two off-set areas, which were of significant size, were manifestly inconsistent with those parts of the land being used for mining purposes. The fact that the protection of the areas had been a condition of the grant of the mining lease did not mean that they were used for mining. The judgment was set aside and the matter was remitted to the Land and Environment Court.

³ [2021] NSWCA 46.

Recovery of Imposts Act

- 19 For reasons which will be explained below, the outcome of these proceedings turns on the engagement of the *Recovery of Imposts Act 1963* (NSW) (“Imposts Act”).
- 20 The operative provisions of the Imposts Act are ss 2 and 5, which state:

2 Limitation on time for the bringing of proceedings to recover taxes

(1) No proceedings shall be brought to recover from the Crown or the Government or the State of New South Wales or any Minister of the Crown, or from any corporation, officer or person or out of any fund to whom or which it was paid, the amount or any part of the amount paid by way of tax or purported tax and recoverable on restitutionary grounds (including but not limited to mistake of law or fact):

(a) in the case of a payment made before the commencement of this Act, after the expiration of the time within which such proceedings but for the enactment of this Act might have been brought or the expiration of twelve months after the date of the commencement of this Act, whichever period first expires, or

(b) in the case of a payment made subsequent to the commencement of this Act, after the expiration of twelve months after the date of payment.

(2) Subsection (1) does not apply to any proceedings brought pursuant to any specific provisions of any Act:

(a) providing for the mode of challenging the validity or for the recovery of the whole or any part of any tax actually paid, and

(b) specifying a different period within which such proceedings must be brought.

(3) Without affecting the generality of this section, and for the avoidance of doubt, it is declared that this section applies to proceedings for the recovery of money (paid by way of tax or purported tax) on the ground of, or on grounds that include, the invalidity of taxation legislation.

...

5 Ending of right of recovery

If because of this Act money paid by way of tax or purported tax ceases to be or is not recoverable, the right to recover the money is extinguished.

- 21 The term “tax” is defined in s 1A to include “a fee, charge or other impost”. Although in its pleaded reply the plaintiff stated that rates paid are not a tax or purported tax within the meaning of the Imposts Act, that assertion was not relied upon at the hearing: the plaintiff expressly conceded that the rates were an “impost” within the definition in s 1A and therefore a “tax”. That concession

was undoubtedly correct: as noted by Spigelman CJ in *Baulkham Hills Shire Council v Wrights Road Pty Limited*:⁴

“16 The word ‘impost’ extends, in my opinion, to a requirement to make a payment for a public purpose imposed, pursuant to statutory authority expressly providing for monetary payment, as a condition for the exercise of a statutory power.”

- 22 There is curiosity about *Wrights Road*: it related to a payment made on 4 July 2003, sought to be recovered by way of proceedings commenced on 21 February 2006. The form of s 2(1) of the *Imposts Act* in force at that time was the current form, which commenced on 1 January 1996.⁵ However, the version set out in the judgment in *Wrights Road* was an earlier version under which s 2(1) addressed the amount “of any tax paid, under the authority or purported authority of any Act”.⁶ It will be necessary in a different context to consider the effect of the 1995 Amendment Act on the scope and operation of s 2 of the *Imposts Act*.
- 23 The plaintiff also asserted in its pleading in reply that the Council was not a “person” for the purposes of s 2(1). At the hearing, the plaintiff resiled from that proposition conceding that the Council was a “person” for that purpose. That concession, too, was correctly made: as explained by Pepper J in *Meriton Apartments Limited v Council of the City of Sydney*⁷, s 21 of the *Interpretation Act 1987* defines a “person” to include “an individual, a corporation and a body corporate or politic”. A council is a “body politic” and not a “body corporate” but a law of the State applies to and in respect of a council “in the same way as it applies to and in respect of a body corporate”: *Local Government Act*, s 220.
- 24 The plaintiff ultimately resisted the engagement of the *Imposts Act* on a number of grounds which may be summarised as follows:
- (a) the claim in the class 4 proceeding was a statutory claim and did not involve “restitutionary grounds”;
 - (b) s 2(2) disapplied subs (1) because the *Local Government Act* provided a mode for challenging the validity of the impost, which

⁴ [2007] NSWCA 152; 153 LGERA 219 (McColl JA and Gzell JA agreeing).

⁵ State Revenue Legislation Further Amendment Act 1995 (NSW) (“1995 Amendment Act”), s 2(1); Sch 6.

⁶ The error may have arisen because the Court was dealing with the pamphlet version of the Act; the government continued this service up until about 2010, but the *Imposts Act* was not reprinted after the 1995 Amendment Act.

⁷ (2011) 80 NSWLR 541; [2011] NSWLEC 65 at [136].

was subject to a specified limitation period with which the plaintiff had complied; and

- (c) further, if the 12-month limitation period applied, the proceedings were commenced within 12 months because the cause of action did not arise until orders were made in the Land and Environment Court.

Each of these grounds will be addressed below.

- 25 A further defence raised by the Council was that the plaintiff was estopped from bringing the fresh proceedings for recovery of overpaid rates on the basis of an estoppel in accordance with principles identified in *Port of Melbourne Authority v Anshun Pty Ltd.*⁸ The plaintiff's response to that defence was that (a) the right to recovery did not arise until the land had been recategorised, (b) the recategorisation proceedings were in the class 3 jurisdiction of the Land and Environment Court, whereas the recovery proceedings were brought in the class 4 jurisdiction, and (c) in those circumstances it was not reasonable to expect that orders of the kind now sought should have been sought in the recategorisation proceeding. These grounds raise issues which are also relevant to the disengagement of s 2(1) of the Imposts Act and will be addressed in part as they arise in that context.

Legislative history

- 26 In order to address the plaintiff's submissions it is necessary to have regard to the history of the Imposts Act. Although it is a brief statute, when first enacted it was limited, in effect, to predecessors to subss 2(1) and (2). Significant amendments came in 1993 pursuant to the *Limitations of Actions (Recovery of Imposts) Amendment Act 1993* (NSW). One amendment changed the name of the Act (the original form of which appears in the title to the *1993 Act*) to its present form. A second introduced a definition section which included the definition of "tax" to be found in the current Act. A third removed references to an "action or proceeding" in the chapeau of s 2(1) and replaced it with the term "proceedings" which were defined to include "proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief".

⁸ (1981) 147 CLR 589; [1981] HCA 45.

- 27 The breadth of the prohibition, so identified, is significant: in the class 4 proceeding, the plaintiff relied upon the standing conferred on “any person” by s 674(1) of the *Local Government Act* to bring proceedings in the Land and Environment Court “for an order to remedy or restrain a breach of this Act”. It will be necessary to return to that language shortly, but it immediately casts doubt on the proposition that the Imposts Act does not apply to proceedings in the Land and Environment Court.
- 28 As originally enacted, the chapeau in s 2(1) sought to prevent recovery of an amount “paid, under the authority or purported authority of any Act”. That language was not varied in 1993, although its syntax was awkward. Rather than a taxpayer relying on statutory authority to make a payment, the agency receiving the payment relies upon statutory authority to require it. That language was ultimately varied by amendments in 1995, to which it will be necessary to refer shortly.
- 29 The main purpose of the *1993 Amendment Act* was to avoid the potential financial disaster for state revenue raising if licence fees on steps in the production and sale of goods up to the point of sale to the consumer were to be invalidated as contrary to the exclusive power of the Commonwealth to levy excise duties, pursuant to s 90 of the Constitution. At the time the legislation was introduced, the High Court had reserved judgment in what became *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]*.⁹ The concern of the amendments was therefore to limit the circumstances in which the State could be required to repay licence fees (which were a major part of State revenue at the time) by reason of what was described in a new s 3 as “non-legislative change of the law”.
- 30 Two further subsections were added to s 2 in the following terms:

2 Limitation on time for the bringing of proceedings to recover taxes

...

(3) Without affecting the generality of this section, and for the avoidance of doubt, it is declared that this section applies to proceedings for the recovery of money (paid by way of tax or purported tax) on the ground of, or on grounds that include, the invalidity of taxation legislation.

⁹ (1993) 178 CLR 561; [1993] HCA 67.

(4) This section does not apply to money that is not recoverable because of section 3.

31 Section 3(2) provided that money paid by way of tax or purported tax before the non-legislative change of the law, was not recoverable on grounds identified in subs (3), which stated:

(3) The grounds are:

(a) the ground of invalidity of any taxation legislation, or

(b) the ground of mistake (whether of law or of fact) as to the validity or invalidity of any taxation legislation, or

(c) any other restitutionary ground relating to the validity or invalidity of any taxation legislation.

32 There was a further exclusion, so that even if proceedings were able to be brought under ss 2 or 3(4), because other legislation so provided, such proceedings were further barred where the claimant could not demonstrate that the amounts had not been reimbursed by third parties. In addition, the 1993 Amendments inserted ss 5, 6 and 7. Section 5 has been set out above and extinguished a time-barred debt. Sections 6 and 7 read:

6 Characterisation of this Act

The provisions of this Act are to be regarded as part of the substantive law of the State.

7 Application

(1) This Act applies to money paid whether voluntarily or under compulsion, and applies whether or not the payment was made under protest, and applies whether or not the payment was made under the authority or purported authority of any Act.

(2) This Act has effect despite the provisions of any other Act.

(3) The amendments made to this Act by the *Limitation of Actions (Recovery of Imposts) Amendment Act 1993* apply to money paid, and proceedings commenced, whether before or after the commencement of that Act.

(4) Sections 1A and 2 (1)–(3) of this Act as amended by the *Limitation of Actions (Recovery of Imposts) Amendment Act 1993* have effect for all purposes, and are taken always to have had effect for all purposes, as from the commencement of this Act.

33 The grounds specified in s 3(3) were clearly intended to be comprehensive: all related to the validity or invalidity of the taxation legislation in question, but par (c) included “any other restitutionary ground” relating to that matter. That

was the first appearance of the language on which the plaintiff now seeks to rely.

- 34 The next set of amendments occurred in 1995. The 1995 Amendment Act effected changes to a number of licensing and taxing statutes, as well as the Imposts Act. As the Explanatory Note for the State Revenue Legislation Further Amendment Bill 1995 indicated, in relation to amendments to the Imposts Act, the intention was to overcome the decision of the High Court in *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd.*¹⁰ There were two aspects of *Royal Insurance* which limited its potential operation in New South Wales. First, it was a Victorian case and concerned legislation similar to the Imposts Act in its pre-1993 amendment form. Secondly, the case involved a retrospective amendment of stamp duties legislation in Victoria which created a new category of overpaid duties. Nevertheless, the Explanatory Note stated:

“The decision in *Royal Insurance* suggests that the words ‘under the authority or purported authority of any Act’ do not apply to mistaken payments resulting from a misreading of a statute.”

- 35 That concern picked up language used in the reasoning of Mason CJ and Dawson J.¹¹ Brennan J, in whose judgment Toohey and McHugh JJ agreed, adopted a somewhat different form of reasoning. Brennan J referred to three categories of payments, none of which was “paid under a provision of the Act which imposed or purported to impose a duty to pay the amount so paid”. As to the fourth category, where an amount which was at the time it was paid due and owing, and therefore paid under the authority of an Act, the limitation period would have been engaged were it not for the conclusion that the limitation provision was to that extent impliedly repealed by the retrospective legislation.¹² More importantly for present purposes, both judgments discussed what were identified in express terms as restitution principles.¹³ Although the reasoning referred to principles of the general law, it is clear that the reasons addressed those principles, as applicable to statutory claims for repayment.

¹⁰ (1994) 182 CLR 51; [1994] HCA 61.

¹¹ At pp 80 and 103 respectively.

¹² *Royal Insurance* at 92.

¹³ *Royal Insurance* at 66 and 99-100 respectively.

- 36 The Explanatory Note to the 1995 Amendment Act was tabled at the time of the second reading of the bill. The second reading speech of the Minister made no express reference to amendment of the Imposts Act. The Minister stated that the bill implemented matters announced in the earlier State budget “as well as a number of minor amendments ... and some minor matters in the nature of statute law amendments”. All that can be said on the basis of the legislative history is that the intention of the 1995 Amendment Act was to improve the protection provided for government revenue; there was no intention to limit the operation of the Imposts Act as then in force.
- 37 The 1995 Amendment Act made three amendments of present relevance. First, in the chapeau to s 2(1), the words “of any tax paid, under the authority or purported authority of any Act” were omitted and replaced by the words which currently appear, namely “paid by way of tax or purported tax and recoverable on restitutionary grounds (including but not limited to mistake of law or fact)”. That the change was meant to extend the operation of the Act, rather than restrict it, appears from the second relevant amendment, which added at the end of s 7(1) the words “and applies whether or not the payment was made under the authority or purported authority of any Act”. Thus, those words, from being a criterion of engagement, became a neutral criterion which did not need to be satisfied.
- 38 The third amendment recast s 2(2). Prior to that recasting, that provision read:
- (2)** Subsection (1) shall not apply to any proceedings brought pursuant to any specific provision of any Act providing for the mode of challenging the validity, or for the recovery of the whole or any part of any tax actually paid.”
- 39 The new provision added an additional criterion regarding a limitation period, which is to be found in the current form of s 2(2) set out above.

Restitutionary grounds

- 40 It is now convenient to return to the plaintiff’s claim that its class 4 proceeding relied upon a statutory entitlement to enforce a remedy, and not upon “restitutionary grounds”. There are several answers to that proposition.
- 41 First, if satisfaction of the phrase “restitutionary grounds” is a necessary condition for the engagement of s 2, other provisions of the Imposts Act will

have little or only limited operation. For example, the definition of “proceedings” to include forms of what were once known as prerogative relief would be inapt. Such relief is not dependent upon general law principles of restitution. Similarly, the removal of the reference to an amount paid under the authority or purported authority of a statute, but its inclusion as an immaterial consideration in s 7(1), would also seem to be inapt. Further, the disengagement (in particular cases) of subs (1) by subs (2) assumes that subs (1) is engaged where statutory remedies are sought.

42 Secondly, there was no suggestion in *Royal Insurance* that restitutionary principles were not relevant to a statutory obligation of the Commissioner of State Revenue to make repayments.

43 Thirdly, as a matter of principle, statutes may limit or create circumstances where principles of restitution did or could operate. The principles will operate with respect to discretionary powers or may accurately describe a statutory obligation. Thus, Mason, Carter and Tolhurst state:¹⁴

“Where a statute confers power to order the repayment of money it seems fairly clear that, where the order is made otherwise than by way of compensation, it is an order for restitution Of more general importance are the discretionary powers conferred by the Australian Consumer Law to make orders where the defendant engaged in conduct prohibited by the legislation. Although the range of orders is not restricted to the refund of money, it is clear that an order for pecuniary restitution may be made where the conduct engaged in caused the plaintiff to confer a benefit on the defendant.”

44 It will be necessary to say more shortly about the nature of the claim made under the *Local Government Act*, but it is sufficient for present purposes to note that it would not be consistent with the legislative scheme to treat the phrase “on restitutionary grounds” as excluding claims made under statute. Rather, read with the words in parenthesis which follow “restitutionary grounds”, the primary purpose of the new terminology was to acknowledge the change in law effected by *David Securities Pty Ltd v Commonwealth Bank of Australia*,¹⁵ that restitution might be available in circumstances where the causative ground on which the payment was made was a mistake of law.

¹⁴ K Mason, JW Carter, GJ Tolhurst, Mason & Carter’s Restitution Law in Australia (4th ed, 2021, LexisNexis) at [229], p 113 (“Restitution Law”).

¹⁵ (1992) 175 CLR 353; [1992] HCA 48.

An alternative limitation regime: s 2(2)

- 45 The plaintiff sought to read par (a) in s 2(2) distributively, in reliance on the disjunctive “or”. The result, in the plaintiff’s submission, is that if there be a statutory provision in the *Local Government Act* providing for the mode of challenging the validity of the impost actually paid, and that provision specifies a limitation period of other than 12 months, then subs (1) is disapplied. The consequence, that there is no limitation period with respect to proceedings seeking recovery of the payment (other than, perhaps, the six-year period under the *Limitation Act 1969* (NSW)) is accepted as the consequence of this reading, but not as a basis for adopting a different reading.
- 46 The Council challenged this construction on two broad bases. The first was that there is in fact no provision in the *Local Government Act* which fulfills the first limb of the condition, namely providing a mode of challenge to the validity of the payment, whilst specifying a different limitation period. Secondly, as a matter of construction of subs (2), even if there were such a provision, the purpose of subs (2) is to require that there be a specific limitation period, other than 12 months, on recovery of the payment. The plaintiff’s reading would not promote that purpose, but rather would conflict with it. It is convenient to deal with the constructional argument first.

Constructional argument

- 47 As a matter of purposive construction, the approach adopted by the plaintiff is unpersuasive. In its original form, the *Imposts Act* was known as the *Limitation of Actions (Recovery of Imposts) Act 1963*. The title reflected the sole legislative purpose, equally assumed in the second reading speech,¹⁶ which was to limit the time for recovery of wrongly paid taxes, so as to allow the government to know what funds it had available to expend. That purpose should govern both the primary provision (s 2(1)) and the exception (s 2(2)). It would contradict that purpose if s 2(2) disapplied the primary provision in circumstances where there was no limitation period on proceedings for recovery of a payment actually made.

¹⁶ New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 27 October 1994, p 4935.

- 48 Further as a matter of construction, the plaintiff submitted that the term “such proceedings” in par (b) envisages that there may be two separate sets of proceedings available pursuant to par (a). That reading should not be accepted for two reasons. First, the word “proceedings” is not necessarily (or generally) used to indicate that there are two separate sets of proceedings before the Court, or available to a plaintiff. There are in fact two sets of proceedings before this Court, but it would be consistent with conventional use of the term to speak of the “proceedings” had there only been the summons filed in this Division.
- 49 Contrary to the plaintiff’s submission, the term “such proceedings” in par (b) is not simply a reference to two possible separate proceedings which may be available under par (a). Indeed, par (a) does not refer to proceedings at all, but to the content of “provisions in any Act”. The relevant “proceedings”, referred to in the chapeau to subs (2), are the proceedings which may not be brought pursuant to subs (1). Those are not proceedings challenging the validity of an impost, but are proceedings “brought to recover... the amount or any part of the amount paid by way of tax or purported tax”. It follows that it is the recovery proceedings which must be the subject of a provision specifying a time limit other than 12 months from the date of payment.
- 50 There are further difficulties with the plaintiff’s construction of par (a), which was not explored in submissions. Separating the two limbs means that the first identifies a provision for “challenging the validity ... of the whole or any part of any tax actually paid”. The object of invalidity must be the tax actually paid, which would be an inapt use of the term “validity”, taken in isolation. This supports the view that there is a single concept which may involve a challenge to the assessment and a consequential order for repayment. (The plaintiff’s argument also assumed that an erroneous assessment is included in the concept of validity.)

Alternative statutory limitation period

- 51 To the extent that the plaintiff relied upon the statutory cause of action the subject of the class 4 proceeding, it is necessary to identify the basis upon which s 2(1) is said to be disapplied. (With respect to the cause of action for

money had and received under the general law, there can be no disapplication of subs (1) by the provisions in the *Local Government Act*.) It is therefore appropriate to turn to the structure of the argument relying upon the *Local Government Act*.

- 52 As noted above, in dealing with the pleading, the orders sought by way of repayment turned on s 674 of the *Local Government Act* and a failure to comply with the obligation to repay imposed by s 527 of that Act.
- 53 Section 674 confers a power on any person to bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the *Local Government Act*. Section 672 defines a “breach of this Act” as meaning a contravention of or failure to comply with this Act. Section 675 imposes a time limit of three months, but only with respect to challenges to approvals under Ch 7, Pt 1, which is not engaged in the present case. It is common ground that there is no other provision in Ch 17 (enforcement) which imposes a limitation on the time at which proceedings under s 674 are to be commenced.
- 54 Section 527, which is the provision with which it is submitted the Council failed to comply, requires the Council to “make an appropriate adjustment of rates paid or payable ... following a change in category of land”. There are issues as to what is meant by the term “adjustment of rates” and what is encompassed by the words “paid or payable”. These will be separately addressed below. However, assuming for present purposes that s 527 imposes an obligation on the Council to repay overpaid rates, it is the failure of the Council to comply with that obligation which is the subject of the proceedings brought under s 674. There is no time limit specified in s 527 as to when the repayment or refund is to be made (if there is an obligation in that section to make such a payment), nor is there any specification of a period within which proceedings to enforce that obligation must be commenced.
- 55 The plaintiff’s response to that difficulty is to rely upon earlier provisions relating to the categorisation of land. Pursuant to s 520(1) the Council is to give notice to a rateable person of “the category declared for each parcel of land for which the person is rateable”. The declaration is to specify the date on which the categorisation takes effect: s 521. The declaration ceases to have effect

when a subsequent declaration takes effect: s 522. The provision for challenging a change of category (as occurred in the present case on 4 August 2017) is found in the following provisions of s 525:

525 Application for change of category

(1) A rateable person (or the person's agent) may apply to the council at any time—

(a) for a review of a declaration that the person's rateable land is within a particular category for the purposes of section 514, or

(b) to have the person's rateable land declared to be within a particular category for the purposes of that section.

(2) An application must be in the approved form, must include a description of the land concerned and must nominate the category the applicant considers the land should be within.

(3) The council must declare the land to be within the category nominated in the application unless it has reasonable grounds for believing that the land is not within that category.

(4) If the council has reasonable grounds for believing that the land is not within the nominated category, it may notify the applicant of any further information it requires in order to be satisfied that the land is within that category. After considering any such information, the council must declare the category for the land.

(5) The council must notify the applicant of its decision. The council must include the reasons for its decision if it declares that the land is not within the category nominated in the application.

(6) If the council has not notified the applicant of its decision within 40 days after the application is made to it, the council is taken, at the end of the 40-day period, to have declared the land to be within its existing category.

56 According to the plaintiff, because the Council has only 40 days within which to notify an applicant of its decision, the first step in the process is limited by that period. Section 526 then provides that if the rateable person is dissatisfied with the declaration of the Council under s 525 it may appeal to the Land and Environment Court, but such an appeal "must be made within 30 days after the declaration is made": s 526(2). It follows, the plaintiff submitted, that these provisions provide a period other than 12 months within which proceedings challenging the validity of the impost must be made.

57 For reasons set out above, a provision which provides a time limit within which a challenge to validity may be made, but says nothing about a time limit within which proceedings for recovery of the payment must be made, does not, as a

matter of construction, result in the disapplication of s 2(1). However, even if a provision allowing a challenge to the validity of an assessment were able and sufficient under par (a) to disapply s 2(1), the condition in par (b) is not satisfied in the present case, for two reasons. First, the commencement of the process is an application by the rateable person to the Council for review of a declaration, under s 525(1). However, there is no time limit upon the making of such an application: rather it may be made “at any time”. (The significance of this fact was noted by the Court of Appeal in *Bayside Council v Karimbla Properties (No 3) Pty Ltd*, discussed below at [63].)

58 Secondly, because it is the underlying assumption of this submission that the second limb of par (a) (“for the recovery of any tax ... actually paid”) is not engaged, there is no other basis for finding a limitation on recovery proceedings.

59 There are thus two missing elements in the specification of a period within which to commence proceedings for recovery of a payment. The first is the time within the initial step must be taken in pursuing such a challenge; the second is the time within which a challenge may be brought to have the Council remedy its breach of an obligation to make a payment by way of refund.

60 Before turning to the unresolved issues relating to the proper construction of s 527, read in its context, it is convenient to deal with one further claim raised by the plaintiff.

Period from which time runs

61 One aspect of the plaintiff’s case which did not receive extensive treatment in its submissions was that even if the 12-month limitation period pursuant to s 2(1) were engaged, that period could not commence to run until the recategorisation of the land, which did not occur until orders were made by consent in the Land and Environment Court in the class 3 proceeding.

62 That submission elided to two steps in the plaintiff’s case. It assumed that, for limitation purposes, its cause of action accrued upon the occurrence of a retrospective recategorisation. For the purposes of asserting a breach by the Council under s 527, that may have been correct. (The argument would need

to take into account the retrospective effect of the recategorisation of the land to 1 July 2016.) However, that is in substance a restatement of the proposition that s 2(1) is not engaged: if it were engaged, the limitation period runs from the date a payment is made, in relation to that payment. If s 2(1) is not engaged, there is no need to rely upon the fact that proceedings were commenced within 12 months of the consent orders. The submission supported the view that the class 3 proceeding created a right of recovery, but did not pursue such a right. Accordingly, the irrelevance of any time limit said to attach to those proceedings was unrelated to the limitation on recovery of actual payments. The chronology revealed that the proceedings for recovery of the payments were not commenced until almost five years after the first and largest payment was made.

Nature of proceedings under the Local Government Act

- 63 The Council took issue with the plaintiff's construction of Ch 15, Pt 3 of the *Local Government Act* dealing with "Ordinary rates" and, in particular, with the construction of s 527. The Council's submissions relied both on the language of s 527 read in its statutory context, and the reasoning of the Court of Appeal in *Bayside Council v Karimbla Properties (No 3) Pty Ltd*.¹⁷
- 64 With respect to the construction of s 527,¹⁸ the Council observed that it does not contain the words "refund" or "repayment", nor any similar terminology. In that respect, it is to be contrasted with other parts of Ch 15 which do contain such language, in particular Pt 8 dealing with concessions. Under s 577, the Council may direct that a ratepayer is an "eligible pensioner"; if it gives such a direction, it may further "give such directions as to refunding any rates or charges that have been paid ... as the Council thinks fit": s 578(2). Similarly, in a case where payment of rates is postponed, the Council "must refund to a rateable person any amount of rates paid by the person which exceeds the amount of the rates remaining after part of the rates is postponed": s 593. Where a zoning is changed, there is power to redetermine the attributable part of the land and "adjust amounts payable for rates" so that any amounts paid in

¹⁷ (2018) 99 NSWLR 66; [2018] NSWCA 257 at [135]-[152]; McColl JA at [1] and White JA at [62] agreeing.

¹⁸ Set out at [10] above.

excess “are to be refunded and amounts short-paid are recoverable as arrears of rates”: s 594.

- 65 Secondly, the Council addressed the phrase used in s 527, “adjustment of rates”, language which was also used in s 594, in contradistinction to refund or recovery. The concepts are to be distinguished. Importantly, it submitted, the liability to pay rates is imposed on the owner of land on which a rate is levied: s 560(1). A rate is “levied on the land specified in a rates and charges notices by the service of the notice”: s 546(1). The notice may be served at any time after July in the year for which the rate is made or in a subsequent year: s 546(2). Finally, s 546(3) provides that, “[a] notice that is required to effect an adjustment of rates or charges may be served in the year for which the rate or charge is made or a subsequent year.”
- 66 The language used in a particular chapter of the *Local Government Act* should be read consistently so as to give effect to the legislative scheme. Accordingly, the reference to “appropriate adjustment of rates” in s 527 is to the taking of a step involving the service of a notice which is required to affect an adjustment of rates. It is the service of the notice which gives rise to the legal obligation on the owner to pay rates. The levying of rates is undertaken on an annual basis. If a notice is given in the course of the year it may deal with amounts which are payable but as yet unpaid (for example, where a quarterly instalment has not fallen due) or it may deal with rates which have already been paid. So much is consistent with the reference in s 527 to an adjustment of rates “paid or payable”. The simple point is that s 527 is not concerned with the recovery of unpaid rates which are payable, nor with any possible refund of overpaid rates.
- 67 These submissions as to the construction of s 527 should be accepted.
- 68 The operation of this provision was addressed in *Bayside* in terms largely consistent with the Council’s analysis. The principal issue in *Bayside* was whether the categorisation of particular land changed from “business” to “residential” during the construction of residential accommodation on the land. The respondent argued in favour of such a change, as the otherwise applicable “business” category carried rates at a higher tariff. The Land and Environment Court upheld the developer’s argument. An appeal was upheld by the Court of

Appeal on the basis that until residential occupation occurred, the land was not properly categorised as “residential”. Because the land had been properly categorised according to the decision of the Court of Appeal, a subsidiary argument by the developer that it was entitled to a refund of rates paid in excess of those which should have been paid on a correct categorisation, did not need to be determined. In fact, there were three appeals before the Court, each raising a similar set of issues. However, with respect to land in the North Sydney Council area, an issue as to the refund of overpaid rates was “fully argued” and the Court considered it appropriate to address the arguments.¹⁹

69 Emmett AJA stated the issues in following terms:

“143 In its Notice of Appeal, North Sydney Council contends that his Honour erred in holding that s 527 of the Local Government Act provided a statutory right for the recovery of a refund, or repayment of rates, and that the L&E Court had jurisdiction to order a refund or repayment. North Sydney Council also asserts that the primary judge erred in holding, first, that the words ‘must make an appropriate adjustment’ in s 527 imposed an obligation on a local council to make an appropriate refund or repayment and, secondly, that s 527 affords a statutory right for the recovery of such a refund or repayment.”

70 After noting the language of s 546(3) considered above, Emmett AJA continued:

“147 If the change in category results in a lower rate, the amounts payable will be reduced. If an instalment has already been paid, the records of the council will record that the amounts payable have been reduced by the amount of the instalments that have been paid. That will require an adjustment in the record required to be kept by the council under s 602. That is to say, the record will be adjusted in relation to both the category and the rate made by the council in respect of each parcel of land in the council’s area.

148 Section 527 makes no reference to a refund, repayment or any other means for recovery by a rateable person of overpaid rates. North Sydney Council contends that the absence of such a provision is consistent with the legislative scheme of the Local Government Act. Thus, the rating year is from 1 July to 30 June and, ordinarily, a rate notice will be served before 1 August. Because of the importance of the categorisation of land in the rating process, a rateable person is required by s 524 to notify the council within 30 days after land changes from one category to another. An appeal in respect of a rates notice, other than in respect of a change of category, must be brought within 30 days after service of the rate notice. Those time limits are important in the context of the raising of funds by a council for the purposes of its operations.

149 North Sydney Council then points to the absence of any requirement for promptness in making an application under s 524 for a review of a declaration that rateable land is within a particular category or to have rateable land

¹⁹ Bayside at [134].

declared to be within a particular category for the purposes of s 514. Such an application may be made **at any time**, notwithstanding that the rateable person may be in breach of obligations imposed under s 524 to notify the council of a change of category within 30 days of the change. Accordingly, a rateable person would have an incentive to comply with the obligation imposed by s 524 and make a prompt application under s 525 if the change of category would lead to a lower rate. If there has been no change of category declared before an instalment of the rates is payable, the rateable person will have an obligation to pay the rates. The absence of an entitlement to a refund is consistent with the statutory context and scheme, as well as the language of s 527 itself.”

- 71 Even if I considered that the reasoning in *Bayside* was erroneous, I am bound to follow it. However, for the reasons already explained in considering the legislative scheme, I do not consider it erroneous, but rather correct. It follows that the class 4 proceeding was in any event based on an erroneous premise. Although s 527 says nothing about whether, and in what circumstances, a refund may be payable, and there was reference to the Imposts Act in *Bayside* in the hearing in the Land and Environment Court, there was no reference to it in the judgment of the Court of Appeal. As Emmett AJA noted at [152], it was neither necessary nor desirable to embark on a consideration of whether the developer “may have had a basis for pursuing a claim against North Sydney Council”. The operation of the Imposts Act might have arisen in that context.
- 72 Finally in this context, it is convenient to note that in its written submissions the plaintiff relied upon a finding by Sheahan J in the Land and Environment Court in the judgment the subject of the appeal in *Bayside*, that s 2 of the Imposts Act did not apply because the developer’s claims “are based on statutory rights (ss 526-527), and not on ‘restitutionary grounds’”. The judge also stated that if the Imposts Act did apply, “the circumstances would enliven s 2(2) so as to negate s 2(1)”.²⁰
- 73 Because the premise of these observations was a misapplication of s 527, the statements of principle cannot stand as authority. Even were that not the case, those two paragraphs, each of a sentence, contained no reasoning. Nor were any submissions with which the judge agreed set out in the judgment. To the extent that they were otherwise authoritative, I would conclude that those two

²⁰ *Karimbla Properties v Council of the City of Sydney* (2017) 222 LGERA 385; [2017] NSWLEC 75 at [102]-[103].

sentences are clearly wrong and should not be followed, for the reasons given above.

Conclusions – class 4 proceeding

- 74 It follows that the attempt in the class 4 proceeding to obtain a refund by alleging a breach of Council's obligation under s 527 must be dismissed with costs.
- 75 But even were that not the case, the 12-month limitation period, running from the date of a payment, applies, rendering all payments except for a part of the last payment unrecoverable. Those debts have been extinguished by s 5 of the Imposts Act.

Common law proceeding

- 76 These findings are also sufficient to dispose of the plaintiff's common law proceeding. The statement of claim in this Court sought recovery of the payment of rates as moneys had and received by the Council having been paid to the Council under a mistake of law. There could be no doubt that that was a cause of action based on restitution. It therefore fell within the relevant criterion of engagement in the chapeau of s 2(1) of the Imposts Act.
- 77 The pleadings with respect to the operation of the Imposts Act were identical to those raised in relation to the class 4 proceeding. For the reasons given above, the submissions that s 2(1) was disapplied by s 2(2) must be rejected. It follows that, except for the last payment, the plaintiff had no right of recovery of amounts paid based on the categorisation of the land as "mining".
- 78 The Council concedes that part of the last payment, in the order of \$68,000, being the difference between the land categorised as "mining" and as "farmland", is refundable. There will be judgment for the plaintiff against the Council for that amount together with interest. The parties will have leave to calculate the amount and file a consent order in due course.
- 79 As noted above, the common law proceedings could be dismissed as an abuse of process. However, in circumstances where there was real doubt as to the correct court in which to proceed for recovery of overpayment of rates, the commencement of separate proceedings was not an abuse of process.

Nevertheless, subject to a small amount, for reasons given above it should be dismissed on the ground that the debts have been extinguished by the Imposts Act. That leaves a question as to whether the court should address the other defences raised by the Council.

- 80 The discussion in *Kuru v State of New South Wales*²¹ as to the obligations of intermediate courts of appeal to deal with all issues raised before them was accorded some greater level of flexibility in *Boensch v Pascoe*.²² Similar principles apply with respect to trial courts, especially where witnesses have been called and cross-examined. It would generally be inefficient to require that process to be repeated in the event that there was error in the ruling as to the dispositive grounds.
- 81 That applies with respect to the change of position defence raised by the Council which was the subject of oral evidence, albeit brief and largely uncontroversial. The defence was pleaded in relation to the Class 4 proceeding and the common law proceedings. It is also appropriate to explain the context of the Council's defence based on *Anshun* estoppel.

Anshun estoppel

- 82 When the concession as to part of the last payment was made, senior counsel for the plaintiff seized upon it as involving an implicit acceptance that the defence based on *Anshun* estoppel was not available. However, counsel for the Council stated that the concession did not involve a waiver of that defence in relation to the common law proceedings.²³
- 83 The Council's defence with respect to *Anshun* estoppel asserted that the plaintiff was, in effect, splitting its case and that it should have pursued a claim for recovery of overpayments in the proceedings commenced in the class 3 jurisdiction of the Land and Environment Court commenced on 7 August 2018. (Although the application in the class 3 proceedings was not in evidence in this Court, it appears to have been common ground that no such order was sought in those proceedings: certainly, no such order was made.)

²¹ (2008) 236 CLR 1; [2008] HCA 26 at [12]; *The Queen v Guode* [2020] 267 CLR 141; [2020] HCA 8 at [62].

²² (2019) 268 CLR 593; [2019] HCA 49 at [8].

²³ Tcpt, 08/03/23, p 84.

- 84 The plaintiff raised a number of matters in resistance to that defence. Some had greater claims to merit than others. Although raised after the class 3 proceedings had been commenced, and on an adjournment application, the plaintiff said that senior counsel for the Council had in effect conceded that if there was an amount due and payable by the Council to the plaintiff, it would be paid with interest. The precise language of the concession, which appears in the transcript without attention being paid to it, either in that context or subsequently as it appears, was the subject of dispute and analysis. A concession that a party need not bring forward a request for consequential relief in dealing with its primary case might in some circumstances mean it was not unreasonable for the moving party not to claim consequential relief. However, it is far from clear that the somewhat limited concession in a particular circumstance caused the plaintiff to eschew seeking consequential relief.
- 85 Such a doubt arises in part from the separate claim that such relief was not available in class 3 proceedings seeking recategorisation of the land. That in turn led in this Court to discussion of the ancillary jurisdiction of the Land and Environment Court, consideration of the scope and operation of s 16(1A) of the Court Act, and reference to a number of authorities, both in the Land and Environment Court and in the Court of Appeal.
- 86 There was also a dispute as to whether there was any difficulty in joining a claim in the class 3 jurisdiction of the Court with consequential relief which, on one view, was only available in the class 4 jurisdiction.
- 87 On the basis that the class 4 proceeding did not provide a foundation for a claim for repayment of the rates paid on the basis of a wrong categorisation of the land, it is not clear that there was any express conferral of jurisdiction on the Land and Environment Court to make an order by way of refund or repayment. Such jurisdiction as it may have would appear to fall within the ancillary jurisdiction conferred by s 16(1A) of the Court Act. The uncertainty as to the scope of that jurisdiction in these circumstances permits the finding that

it was not unreasonable of the plaintiff not to seek such an order in the class 3 proceedings: see *Champerslife Pty Ltd v Manojlovski*.²⁴

- 88 There are other reasons for not upholding the defence in the present case. First, decisions of the Court of Appeal, including *Frevcourt Pty Ltd v Wingecarribee Shire Council*,²⁵ cast doubt on the power of the Land and Environment Court to order a refund of overpaid rates or contributions (in that case contributions under s 94 of the *Environmental Planning and Assessment Act 1979* (NSW)). Secondly, the risk that the Imposts Act would prevent the plaintiff recovering overpaid rates after a 12-month period from the date of payment might have encouraged the plaintiff, in its own interests, to commence proceedings for repayment of rates, or at least seek such an order in the proceedings it had commenced in the Land and Environment Court. In other words, it was a victim of its own inaction. Accordingly, this is not a case in which a question of *Anshun* estoppel determines the outcome and the availability of the defence need not be determined.

Change of circumstance

- 89 The Council relied upon the fact that the moneys received from the plaintiff had been expended on the general services and activities of the Council in the relevant years. The Council also submitted that there would be a significant level of hardship in relation to the delivery of services if it were required to repay an amount of \$3m plus interest, which totalled some \$3.7m on the unchallenged evidence of the plaintiff's financial controller, Ian Gough.
- 90 The plaintiff tendered the Council's financial statements for the years from that ending 30 June 2016 through to a preliminary draft of its financial statement for 30 June 2022. As senior counsel for the plaintiff appreciated, there was a limit to the use that could be made of the financial statements without some expert accounting advice as to the significance of various items. In broad terms, he sought to make good the following propositions.
- 91 First, the statements of cash flow demonstrated significant discrepancies between budgeted receipts and actual receipts in a financial year. Thus, in the

²⁴ (2010) 75 NSWLR 245; [2010] NSWCA 33.

²⁵ [2005] NSWCA 107; 139 LGERA 140.

year 30 June 2017, the budgeted receipts from rates and annual charges were \$2m greater than the actual receipts. (On the other hand, “grants and contributions” provided more than \$6m beyond the budget. Similarly, “user charges and fees were \$2m below budget”.) The following year, being the year when the larger payments were made by the plaintiff, actual receipts from rates and annual charges were \$3m above the budgeted amount.

- 92 Secondly, the financial statements indicated that there was a net operating surplus in each of the more recent years. However, there was no indication of how the Court should understand that fact. For example, in the year ending 30 June 2021, the operating result showed a surplus of some \$21m. However, the net operating result, excluding grants and contributions provided for capital purposes, was less than \$1m. I do not infer that an order to repay an amount of \$3.7m would not have a material effect on the Council’s finances.
- 93 Thirdly, the plaintiff relied on the accounts to challenge the evidence of the acting general manager of the Council, Derek Finnigan, that a reduction of the magnitude required to repay the overpaid rates would, even if spread over a period of three years, present “severe consequences for Council’s financial position and would likely result in reduction of projects and services for the community”.²⁶
- 94 Fourthly, and more powerfully, the plaintiff relied upon the Council’s knowledge that at all stages the plaintiff was challenging the correctness of the categorisation of its land and that Council had received advice to the effect that the outcome was, to put it neutrally, by no means assured. In those circumstances, the plaintiff submitted, a responsible Council would have put aside funds to guard against a contingency that it would be required to repay the overpaid rates in the event of the land being recategorised by the Court.
- 95 So far as the principle has application to the common law claim, the Court’s attention was drawn to statements in two cases in intermediate courts of appeal.

²⁶ Affidavit, Derek Finnigan, 12 September 2022, par 67.

96 The first case, a decision of the Victorian Court of Appeal in 2005, was *Hookway v Racing Victoria Ltd*.²⁷ The leading judgment was given by Ormiston JA (with whom Warren CJ and Harper AJA relevantly agreed). *Hookway* involved an attempt by Racing Victoria to recover payment of a prize which had been awarded to the second-place horse in a race on the basis that the horse which was first past the post had been disqualified. The disqualification was overturned on appeal. However, the owner of the horse that ran second refused to repay the prize money. The judgment involved an extensive discussion of the circumstances in which a claim for restitution could be resisted on the basis that the payment had been “voluntary” or made in settlement of an honest claim. It was not relied upon for the defence of change of position.

97 The second case was a decision of the Queensland Court of Appeal in *Queensland Alumina Ltd v Alinta DQP Pty Ltd*.²⁸ The action was again one between private parties. The appellant sued to recover payments made under a Gas Transportation Agreement which were said to have been made mistakenly and in breach of the maximum tariff and the rate cap prescribed by certain “access principles” for pipeline licences granted under the *Petroleum Act 1923* (Qld). Holmes JA stated in *Queensland Alumina*, by reference to *Hookway*:

“70 It is not entirely clear whether voluntariness is a prerequisite to a claim for restitution of a payment made under mistake of law or whether it provides a defence to such a claim.”

98 Although neither of these cases concerned the defence of change of position, the judgment of the High Court in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*²⁹ did so. French CJ in *Hills Industries* adopted the reasoning of the Court in *David Securities* at 385, holding that:

“The defence of change of position is relevant to the enrichment of the defendant precisely because its central element is that the defendant has acted to his or her detriment on the *faith of the receipt*.”

²⁷ (2005) 13 VR 444; [2005] VSCA 310.

²⁸ [2007] QCA 387 (Holmes JA, McMurdo P and Fryberg J agreeing).

²⁹ (2014) 253 CLR 560; [2014] HCA 14.

99 French CJ continued, referring to *Roxborough v Rothmans of Pall Mall Australia Ltd*:³⁰

“19 This Court has subsequently held restitutionary claims against governments in respect of overpayments of tax or tax paid under an invalid law to be subject to the same general principles and has discussed those principles in that context. In *Roxborough*, Gleeson CJ, Gaudron and Hayne JJ quoted with approval the observation of Mason CJ in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* that:

‘Restitutionary relief, as it has developed to this point in our law, does not seek to provide compensation for loss. Instead, it operates to restore to the plaintiff what has been transferred from the plaintiff to the defendant whereby the defendant has been unjustly enriched.’ [Footnotes omitted.]

100 The joint reasons in *Hills Industries* adopted a test requiring an enquiry “as to whether it is unconscionable for the recipient to retain the moneys” rendering it necessary, in some cases, “to consider what was done by the recipient in reliance upon the receipt”.³¹ To an extent, *Hills Industries* is more readily applied for what it decried as unnecessary, or an extension of the principles applicable in Australia, than for its definition of precisely what exercise of assessment was required. Thus, the joint reasons stated that “a mathematical assessment of enduring economic benefit does not determine the availability of restitutionary remedies”.³² In broad terms, the Court accepted the position adopted in *David Securities* with respect to the defence of change of position.

101 Mason, Carter and Tolhurst state, relevantly for present circumstances:³³

“It will normally be necessary for the payee to show that ‘the receipt of the money operated on his mind and caused him to act as he did’. In other words, the Court asks whether ‘the defendant would have acted differently if he had not mistakenly believed that he was richer than he was, that because of his mistake, he had... altered his position’. A defendant who knows that a benefit was conferred on a conditional basis cannot assume the interest is absolute and take a risk.

...

As an element of the defence, proof of good faith lies on the defendant. Bad faith will negate reliance on the defence, both at common law and in its statutory form. Negligence is not the same as bad faith, but the failure to make an obvious enquiry (especially where commercial practice dictates) may enable the court to infer want of good faith.”

³⁰ (2001) 208 CLR 516; [2001] HCA 68.

³¹ *Hills Industries* at [81] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

³² *Hills Industries* at [84].

³³ *Restitution Law* at [2417] (footnotes omitted).

102 In the present case, it is somewhat artificial to describe the payments made by the plaintiff as made whilst harbouring under a mistake as to the facts or the law. The payments resulted from a change in the categorisation of the land made by the Council. At all relevant times, the Council knew that the plaintiff disagreed with the categorisation and, whilst the Council was undoubtedly entitled to form the view that it did, it was also aware that the new categorisation was open to doubt, and that, given the amounts of money involved, it was likely that the plaintiff would seek to review it in the Land and Environment Court. Indeed, a number of payments were made after the plaintiff had informed the Council of its intent to seek, and then during the process of, review. There was no mistake by either party; there was a genuine difference of opinion as to the correct categorisation of the land and at all stages both parties understood that the matter would probably be determined by a third body, namely the Land and Environment Court. The plaintiff made payments whilst that process was underway, in recognition of its legal obligation to make such payments, until the Council's decision was reversed. The Council was entitled to assume that reversal was a real possibility and that, if it occurred, the Council would have a legal obligation to refund moneys, at least if proceedings were commenced within time.

103 It is likely that an obligation not to expend funds will only arise in rare circumstances where the Imposts Act is engaged, because the Act is designed to limit the period of uncertainty as to the resources available to the government (including for present purposes a council) by restricting the time within which claims for repayment can be made to 12 months from the date of payment. That is, change in circumstances by continuing routine operations is consistent with the general purpose of the Imposts Act. Whether, in that context, there is room for an additional common law defence may be doubted. The issue was not squarely addressed in the submissions in this Court and therefore should not be decided in circumstances where its determination will not be dispositive.

104 If a defence of change of position under the general law is available, it should not be upheld in the present case.

Costs

105 As noted above, the class 4 proceeding was based on a misconception as to the operation of s 527 of the *Local Government Act* and should be dismissed for that reason. The plaintiff must pay the Council's costs of that proceeding.

106 As to the common law proceedings, the plaintiff has succeeded, but for an amount which is some 2.5% of the total claim (putting interest to one side). As senior counsel for the plaintiff fairly accepted:³⁴

"I'm not here for the purposes of a judgment debt of \$86,000, but there is potentially that amount on a reckoning of time."

107 I infer from that that the plaintiff would have pursued its claim even if the final amount had been conceded at an earlier stage. (And it appears to be less than \$86,000.) Accordingly, as no more has been recovered, subject to an order for that recovery, my tentative view is that the common law proceedings should otherwise be dismissed with costs. If the plaintiff seeks some other costs order, he will have 28 days to put on a notice of motion seeking to vary the order, unless agreement is reached as to an appropriate adjustment.

Orders

108 The Court makes the following orders:

- (1) Dismiss the class 4 proceeding transferred from the Land and Environment Court with costs, including costs incurred in that Court.
- (2) Order that the defendant pay the plaintiff an amount based on the last payment made by the plaintiff on 27 May 2021, including interest, to be calculated by the parties.
- (3) Direct that, subject to order 4, the plaintiff pay the Council's costs of the proceedings commenced in this Court.
- (4) Grant the plaintiff leave to file submissions within 28 days as to any proposed variation of order 3, with the Defendant having 14 days to file a written submission in response.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that

³⁴ Tcpt, 07/03/23, p 16(10).

material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.