HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **BRUCE NATHANIEL GRAY**
Appellant

and

LAVAN (A FIRM)
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise statement of the issues

2. This appeal raises at least eight issues. *First*, whether there can be a total failure of the basis of the transfer of fees in circumstances where both parties accept that there may be repayment at the time of issue of a taxation certificate and payment was on account. *Second*, whether there has been a total failure of the basis of the transfer in respect of the "part" of the fees that has been refunded. *Third*, and related to the first and second issues, whether there is any occasion or legal justification for restitution given the parties' contracts. *Fourth*, if the basis failed, when that failure occurred in this case. *Fifth*, whether the *Legal Practice Act) 2003* (WA) (**Act**) impliedly excludes a right to interest arising from the issue of a certificate of taxation between the date(s) of payment and the date the certificate is issued. *Sixth*, whether a restitutionary claim would redistribute the risks of overpayment for which provision was made by the contracts of retainer. *Seventh*, whether the opportunity to use money is a relevant benefit for the purpose of the requirement that there be some benefit for which restitution must be made. *Eighth*, whether there is any occasion for interest in equity.

3. For the reasons that follow, the effect of entry into the 2018 Settlement Deed, in

respect of the underlying claim for the principal sum, is not to remove the basis on which the parties contracted, and on which the appellant paid the funds. As such, this Appeal should be dismissed.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

4. No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

Part IV: Facts in dispute

5. Contrary to AS [13], the parties did not agree that Lavan had been "overpaid" $900,000. There is no finding to that effect below. Rather, by the 2018 Settlement Deed, the parties acknowledged that this sum represented the amount that would have been ordered to be refunded by the respondent if there had been a taxation of the bills of costs pursuant to the statutory process of taxation, which process never occurred due to the settlement.

Part V: Argument

6. There are eight propositions that the respondent contends should be accepted by the Court: *first*, there has been no failure of basis in the present matter such that the respondent has not been unjustly enriched – that is sufficient to dismiss the appeal; *second*, the basis has not failed for a defined portion of the payments; *third*, there is no gap-filling or auxiliary role for restitution to play given any refund is governed by the parties' contracts; *fourth*, if the appellant's logic that the payments were made on a basis that Lavan was legally entitled to charge and retain the fees is accepted, the claim is time-barred; *fifth*, the interest for which the Act provides should be understood as the only interest available on an amount certified as overpaid; *sixth*, where the initial receipt was an entitlement under the contracts of retainer and the eventual repayment was regulated by a compromise agreement it is incoherent to regard either of those transfers of value as being in any relevant sense normatively defective; *seventh*, to characterise the opportunity to use money as a relevant benefit would contradict the proposition that unjust enrichment is not a principle of direct application and not cohere with the contracts and the possible availability of a right to interest on a plaintiff's claim for money had and received from the time that retention by the defendant of the plaintiff's money becomes unjust; *eighth*, there is no occasion for interest in

equity.

Proposition 1: There has been no failure of consideration

7. The trial judge and the Court of Appeal were correct to hold that in the present matter there has been no failure of basis.[1]

8. The relevant approach is that restitutionary relief should follow if there has been a relevant benefit received by the defendant, at the expense of the plaintiff, where the transfer of that benefit is subject to "a qualifying or vitiating factor" including failure of consideration.[2] "Failure of consideration" in this context means where the payment has been made for a "purpose which has failed as, for example, where a condition has not been fulfilled, or a contemplated state of affairs has disappeared".[3] Put another way, the failure of consideration means "the failure to sustain … the state of affairs contemplated as a basis for the payments".[4]

9. Failure of consideration is judged from the perspective of the payer but looks to the benefit bargained for.[5] It requires objective determination of the "state of affairs, which was within the contemplation of the parties as the basis of their dealings" being "the state of affairs contemplated as a basis for the payments [sought to be recovered]".[6]

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1 *Gray v Lavan* [2024] WASCA 147 at [8] (Buss P and Mitchell JA), [158] (Vandongen JA); *Gray v Lavan* [2022] WASC 417 at [51], [53] (Curthoys J).

2 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [30] (French CJ, Crennan and Kiefel JJ); *Redland City Council v Kozik (**Redland**)* (2024) 98 ALJR 544 at [73] (Gageler CJ and Jagot J), at [183] (Gordon, Edelman and Steward JJ).

3 *Roxborough v Rothmans of Pall Mall Australia Ltd* (***Roxborough***) (2001) 208 CLR 516 at [16] (Gleeson CJ, Gaudron and Hayne JJ).

4 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [31] (French CJ, Crennan and Kiefel JJ); *Roxborough* (2001) 208 CLR 516 at [16] (Gleeson CJ, Gaudron and Hayne JJ; at [104] (Gummow J).

5 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 382 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 351 (Mason CJ), 375 (Deane and Dawson JJ), 386 (Gaudron J), 392 (McHugh J); *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at [239] (Mason P, with Sheller and Hodgson JJA agreeing); *Redland* (2024) 98 ALJR 544 at [86] (Gageler CJ and Jagot J), [185] (Gordon, Edelman and Steward JJ).

6 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at [239] (Mason P, with Sheller and Hodgson JJA agreeing), citing *Roxborough* (2001) 208 CLR 516 at [17] (Gleeson CJ, Gaudron J and Hayne J) and [104] (Gummow J); *Redland* (2024) 98 ALJR 544 at [86] (Gageler CJ and Jagot J), [185] (Gordon, Edelman and Steward JJ); *Anderson v McPherson (No 2)* [2012] WASC 19 at [236] (Edelman J). See also *Roxborough* (2001) 208 CLR 516 at [55] (Gleeson CJ, Gaudron and Hayne JJ); Edelman and Bant, *Unjust Enrichment* (2016, 2nd eds, Hart Publishing) at 262.

10. It was common ground below that the retainers between Dr Gray and Lavan were not written, but were agreements by words and conduct that reflected the terms of earlier written agreements between the appellant and his former solicitors, Bennett & Co (**CA [2], [60]-[61]**). It was also common ground that the non-written retainers obliged the appellant to pay the invoiced amounts to the respondent and entitled the respondent to receive and retain those amounts until required by a taxing officer's certificate to make a repayment to the appellant (**CA [22]**).

11. The Bennett & Co letter of 5 January 2005 enclosed a costs agreement which was duly entered.[7] The letter explained that such an agreement set out the terms of engagement and defined the commercial basis on which that firm acted and rendered fees. The letter informed the appellant that Bennett & Co was entitled to render interim accounts on a monthly basis and that he had a statutory right to have the costs agreement and the invoices rendered by Bennett & Co reviewed for their fairness and reasonableness.[8]

12. Under the costs agreement, there was an obligation to pay invoiced costs (**ABFM 15**). Charges for services would be calculated by reference to time spent and the hourly rate of the person doing the work (cl 1). Payment was required to be made even though not all of the legal services referred to in item 1 of the schedule had been performed (cl 3).[9] Thus this was not an entire contract to bring the action to an end as a condition precedent to Dr Gray's obligation to pay fees.[10] Accounts would be rendered on a regular basis, usually monthly (cl 5), and money could be required to be paid in advance (cl 6). There was provision for an ability to terminate in the event of non-payment (cl 7). And the agreement was stipulated to be binding on both parties (cl 16).

13. The statutory context to these contractual arrangements was that the Act permitted a written costs agreement but did not require them. The existence of a retainer

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7 ABFM at 4.

8 See *Gray v Lavan* [2024] WASCA 147 at [44]-[46] (Vandongen JA).

9 Item 1 set out the naure of the services as "Gray and UWA – Sirtex Medical Ltd" – the action in which the respondent and the former solicitors were initially retained. There is no finding as to the subject matter of the litigation.

10 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 350 (Mason CJ).

was the fundamental source of the entitlement to charge and be paid costs (**CA [11]**).[11] Division 3 of Part 13 of the Act gave the appellant a right to have the invoices of the respondent taxed if necessary.[12] Relevantly, ss 240(3) and 243 provided that interest would accrue on the sum which was disallowed unless and until the amount of an overpayment was returned to that payer.

14. This statutory context is relevant in that it assists in correctly characterising the basis on which the payments were made. The statutory context of the payments does not enable it to be said that the parties agreed that interest would accrue from the time of payment should they be set aside on taxation. That is what the appellant apparently now seeks given the claim for interest runs from 30 June 2008.

15. In short, fees were required to be paid at the amount invoiced, reflecting (unless required upfront) the time spent and hourly rates of the people doing the work. It was no part of the contract between the appellant and the respondent that payment was made on some further condition relating to the success, or otherwise, of a process of taxation. When he paid, the appellant would take the risk that payment may not ultimately be due. The respondent would take the risk that payment may ultimately need to be refunded.

16. The invoices of the respondent were rendered for legal services which had already been provided. It is important that they were rendered retrospectively in that the appellant was able to consider the sum against the services provided before paying. These invoices were paid by the appellant over a two year period (**CA [2], [55]-[57], [156]**). The appellant was able to avail himself of his statutory entitlements under the Act. Rather than not paying and seeking a taxation of the invoices he waited until the Federal Court matter was concluded before raising a dispute.[13]

17. The appellant's case is that as a matter of objective fact, he paid the amounts charged on the basis that Lavan was entitled to retain the fees paid pursuant to the

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[11] See also *Huntingdale Village Pty Ltd v Corrs Chambers Westgarth* (2018) 128 ACSR 168 at [103]-[104], [108], [109]-[110], [143] (Martin CJ) and [174], [180], [189] (Mitchell and Beech JJA).

[12] *Legal Practice Act 2003* (WA) Part 13 Div 3, ss 232(3), 233. *Gray v Lavan* [2024] WASCA 147 at [12]-[14] (Buss P and Mitchell JA). There was no ability to contract out of that process.

[13] *Gray v* Lavan [2022] WASC 417 at [3], [23] (Curthoys J).

invoices, and that this basis failed after the Settlement Sum was agreed (**AS [33]**). However, this construction of the basis does not consider that it was always known between the parties that some amounts paid could be ordered to be repaid once a taxation process had taken place,[14] nor that payment was on account pursuant to a contract.

18. The knowledge of the parties that the appellant was protected by the taxation process under the Act formed part of the basis of the payments. It follows that had the taxation process been finalised, and an amount disallowed as an overpayment, that could not cause the basis for payments to have failed.

10 19. The appellant also seeks to characterise the payments as "conditional" (**AS [29], [30]**).[15] As the basis is the shared objective basis of the parties, if a transfer is conditional it must be clear to both parties.[16] The appellant is unable to point to objective facts which would support this construction of the basis. Where a contractual payment is made conditionally upon the performance of a promise by the payee, the right to retain the moneys after discharge of the contract is dependent on whether the promise has been performed.[17]

20. In circumstances where the respondent has performed its work prior to payment, the general rule is that payments made under such a contract "should be regarded as having been made unconditionally, or no longer the subject of a condition".[18]

20 The appellant is unable to show objective facts which would found an indication to the contrary.

21. The payments were not relevantly conditional. The condition for the transaction here was the payment of fees invoiced pursuant to the parties' retainer (which was accepted to be binding) in exchange for legal services rendered. That transaction is not rendered "conditional" by the fact that the applicable Act reserved to the appellant the right to seek a taxation of costs, as both parties objectively knew

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14 *Gray v Lavan* [2024] WASCA 147 at [23] (Buss P and Mitchell JA), [177]-[181] (Vandongen JA).
15 Referencing *Redland* (2024) 98 ALJR 544 at [183], [185] (Gordon, Edelman and Steward JJ).
16 Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012) at 88 §15(3), approved in *Redland* (2024) 98 ALJR 544 at [185] (Gordon, Edelman and Steward JJ).
17 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 389 (McHugh J).
18 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 391 (McHugh J), see also 351 (Mason CJ), 367 (Brennan J) and 383 (Toohey J).

(**CA [47]**). This was not an advance payment of a debt that could only arise from the execution of the consideration. Instead, there was an obligation to pay the whole of the invoiced costs, and the appellant retained the right to seek a taxation of costs.

22. The basis of, or reason for, the payments made by Dr Gray to Lavan was the performance of legal services and invoicing of Dr Gray for those services. Or, as the Court of Appeal put it:[19]

> the objective basis on which the appellant paid the invoiced amounts to the respondent was that the respondent was entitled to issue the invoices in respect of legal services performed by the respondent, and the appellant was obliged to pay the invoiced amounts, under the terms of the non-written retainers.

23. There was no effect on the basis of the payments occasioned by the subsequent contractual agreement to refund. The Court of Appeal correctly held, consistent with *Roxborough*, that the "substratum of [the] joint relationship" the subject of the retainers, is not "removed" by the 2018 Settlement Deed.[20] The 2018 Settlement Deed created new rights and obligations and contained no admissions. Importantly, there was no agreement that there had been overpayment of $900,000. The basis of that agreement is the payment of the sum to quell the controversy. It does not leave open to the appellant now to rely on the acknowledgment in cl 3.1(a) to argue that the receipt or retention of the Taxation Settlement Sum was unjust.

24. The meaning and effect of cl 3.1(a) is that, for the purpose only of preserving the ability of Dr Gray to agitate a claim that it would be entitled to interest on a $900,000 taxation refund *if* there had been a taxation of the bills, the parties acknowledge that the Taxation Settlement Sum represents the amount that would have been ordered to be refunded if there had been a taxation.

25. It is apparent that the premise that the deed had the "same effect" as a taxation cannot be accepted in all respects. Recital A records that legal services were

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19 *Gray v Lavan* [2024] WASCA 147 at [23] (Buss P and Mitchell JA), see also [162] (Vandongen JA).

20 *Muschinski v Dodds* (1985) 160 CLR 583 at 619-620 (Deane J); *Roxborough* (2001) 208 CLR 516 at [16] (Gleeson CJ, Gaudron and Hayne JJ).

provided and invoices were rendered for those services; disputes arose. Recital C records that the Settlement Deed settles all disputes other than the interest dispute. Clause 2 provides that, subject to clause 3, and without otherwise making admissions, Lavan agrees to make the three payments within six months of the deed date. By cl 3.1(a), the parties acknowledged that the Taxation Settlement Sum represents the amount that would have been ordered to be refunded *if* there had been a taxation. By cl 4, in effect, the appellant released and discharged Lavan from any further allegation or cause of action that Gray had against Lavan other than a claim to recover interest on fees paid by Gray to Lavan that has been agreed are refundable by Lavan to Gray.[21]

26. The purpose of the acknowledgement in cl 3.1(a) is to define the scope of the interest claim that is permitted. It identifies, the sum, and the context, in which a claim for interest could be pursued by the appellant. More specifically, it operates to charactersise the amount of $900,000 as a taxation refund such that the issue of whether interest is owed on payments the subject of a taxation refund exists may be determined. There is no agreement that there was overcharging, and so there is no agreement that the payment of the invoiced amounts by Dr Gray to Lavan, or the subsequent retention of those funds was unjust. There is only a contractual agreement to refund a portion of those funds back to Dr Gray.

27. The appellant seeks to draw support, at AS [32]-[35], from *Roxborough* to the effect that events after payment could cause a failure of consideration. The appellant emphasises that in *Roxborough* the buyer was obliged to pay what the seller invoiced for its performance (the provision of tobacco), yet that did not exclude a failure of consideration. There is no difficulty with this proposition. However, the difference between the present matter and *Roxborough* is that the "expectations" of both parties in that case "were defeated by the supervening illegality of one aspect of those dealings" so that "[t]he state of affairs, which was within the contemplation of the parties as the basis of their dealings, concerning tax liability, altered … in circumstances which permitted, and required, severance of part of the total amount paid for the goods".[22]

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[21] See cl 1.1 of the 2018 Settlement Deed, and the definitions of Further Claim and Interest Claim.
[22] *Roxborough* (2001) 208 CLR 516 at [5], [17] (Gleeson CJ, Gaudron and Hayne JJ).

28. Here, there was no finding of illegality, and the parties always contemplated that their relationship was governed by the Act, which reserved to the appellant the right to seek taxation of costs and to recover any amount certified by the taxing officer. Hence, even if a taxation had occurred resulting in a requirement for repayment of $900,000, neither parties' expectations would be defeated, nor was the parties' contemplated state of affairs altered in any way. No question of unconscionability is revealed by the terms of the 2018 Settlement Deed.[23]

Proposition 2: The basis has not failed for a defined portion of the payments

29. The requirement of a total failure of consideration was set out by Lord Porter in *Fibrosa Spolka Akcyjna v Fairburn Lawson Combe Barbour Ltd*,[24] where his Lordship held that:[25]

> If a divisible part of the contract has wholly failed and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered, but unless this be so there is no restitution under a claim in *indebitatus assumpsit*. A partial failure of consideration gives rise to no claim for recovery of part of what has been paid.

30. The essential criterion is that the consideration is severable, such that no consideration was received (or the basis failed) for the part of what was paid sought to be recovered.[26] In *Baltic Shipping Co v Dillon*, though the cruise ship on which Mrs Dillon was embarked having paid in full for a 14-day cruise, sank on the ninth day, she was not entitled to restitution of the whole fare. This is because the contract was not just for transit, but for the enjoyment of a cruise, and the costs incurred in providing the cruise were not referrable to any particular day.[27] As such, the basis had not totally failed.[28]

31. In *Roxborough*, the tax component of the total price was able to be characterised

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23 *Roxborough* (2001) 208 CLR 516 at [104] (Gummow J).

24 [1943] AC 32.

25 *Fibrosa Spolka Akcyjna v Fairburn Lawson Combe Barbour Ltd* [1943] AC 32 at 77; cited in Edelman and Bant, *Unjust Enrichment* (2016, 2nd eds, Hart Publishing) at 266.

26 *Whincup v Hughes* (1871) LR 6 CP 78 at 81 (Bovill CJ); cited in Edelman and Bant, *Unjust Enrichment* (2016, 2nd eds, Hart Publishing) at 269.

27 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 382 (Deane and Dawson JJ), 388-389 (McHugh J).

28 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 350 (Mason CJ), 386 (Gaudron J).

as a distinct and separate element of the price. The invoices specified separately the amounts of the tobacco licence fee. And the very form of the transactions indicated that the payments made by the appellants could be broken up.[29] That meant that the identified payments could be the subject of a total failure of consideration because there was a particular basis or condition that could be attributed to that part of the purchase price. But that is not the case here where neither particular payments nor particular work can be identified.

32. In *David Securities Pty Ltd v Commonwealth Bank of Australia*, both parties had acknowledged that the consideration could be "'broken up' or apportioned" because the loan agreement charged a particular interest rate and provided for additional amounts for withholding tax by virtue of a separate provision in the loan agreement.[30] That is the payments of withholding tax "were predicated on … discharging [the appellants'] obligation" and were independent of the bank's provision of the loan at the nominated interest rate.[31]

33. The Taxation Settlement Sum is not apportionable from the invoices paid. The invoices were not in evidence (**CA [28], fn 14**). The respondent rendered invoices over an undefined period, and there remains doubt whether the payments of the appellant corresponded to specific invoices (**CA [28], [55]-[58]**). The $900,000 was "a compromise sum representing a portion of the total of an undefined and unknown number of individual payments, or parts of such payments, made by the [appellant] in respect of the Invoices" (**CA [155]; see also CA [144]-[148]**).

34. Regardless of whether the basis for a defined portion of payments may have failed if a taxation took place under the Act, there was here no determination by a taxing officer. The 2018 Settlement Deed is an agreement to refund a sum of money, not an agreement that a particular sum has been overcharged. It does not identify a value of any overpayment by reference to any item of work done, or even by reference to which particular matter or court in which the work was done. In the

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29 *Roxborough* (2011) 208 CLR 516 at [11] (Gleeson CJ, Gaudron and Hayne JJ), [109] (Gummow J) and [196] (Callinan J).

30 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 383-384 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

31 As cited in *Redland* (2024) 98 ALJR 544 at [195] (Gordon, Edelman and Steward JJ); see also [85] (Gageler CJ and Jagot J).

circumstances of this case, there was no defined portion of the payments which has failed (in contrast with the failed portion of the purchase price referable to the unconstitutional tax in Roxborough). It is not now open for this Court to attempt to apportion the payments.[32]

Proposition 3: There is no gap-filling or auxiliary role for restitution to play given any refund is governed by the parties' contracts

35. It is orthodox that "[a] claim for restitution of unjust enrichment requires a defendant to have received some benefit for which restitution must be made" (**AS [38]**). The parties' oral or inferred contracts required payment of the invoiced amounts and permitted retention of the payments until a taxation concluded otherwise (**CAB 41, CA [22]**). There was an obligation on the respondent, on entry into the Settlement Deed, to pay $900,000 pursuant to that deed. Had the matter proceeded to taxation under the Act, it may have been that an amount would have been ordered to be refunded. Either way, there is no gap-filling or auxiliary role for restitution to play in the circumstances.[33] There is no identifiable benefit for which restitution must be made that is not exclusively the subject of contract or the Act. The correct characterisation is that the appellant paid invoices rendered under one contract. Following a dispute, the parties agreed by another contract (the 2018 Settlement Deed), that the respondent would pay the Taxation Settlement Sum to the appellant. A contract (even if unenforceable) that is not rescinded or terminated for breach is a good defence to a restitutionary claim if the defendant has fulfilled (or substantially fulfilled) its contractual obligations.[34]

Proposition 4: On the appellant's logic, the claim is time barred

36. In the event that the appellant is successful in demonstrating a failure of basis, on the appellant's own argument that claim is time barred by the operation of s 13(1) of the *Limitation Act 2005* (WA). The appellant submits (**AS [29]**):

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[32] See *Ferns v Carr* (1885) 28 Ch D 409.

[33] *Lumbers v W Cook Builders Pty Ltd* (in liq) (2008) 232 CLR 635 at [79] (Gummow, Hayne, Crennan and Kiefel JJ); *Roxborough* (2001) 208 CLR 516 at [75] (Gummow J).

[34] See *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 257 (Deane J). See also *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at [14]-[18] (Kiefel CJ, Bell and Keane JJ); *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 All ER 470 at 475 (Goff LJ).

That the payments were made on the objective basis that part of them may have to be returned is to be inferred from the fact that that very consequence was adverted to by the parties.

37. The precise nature of the "basis" that would be inferred if this argument were accepted is that the invoices were legally enforceable, such that Lavan had an indefeasible right to retain those payments unless they were ordered to be returned on a taxation. Because the parties expressed their awareness of their right to taxation – that awareness forms part of the consideration and identification of the basis.

10 38. It follows that the appellant submits that it would cease to be the position that Lavan was legally entitled to charge and retain the fees charged "if and to the extent that the charges did not survive a taxation" (**AS [33]**). However, the submission that the state of affairs the subject of the retainers failed to sustain itself is not consistent with the basis asserted. Rather, were the basis as asserted, the failure of charges to survive a taxation would demonstrate that Lavan never had an indefeasible right to retain the payments and falsify the basis at the time of payment. The contractual right to be paid would not change that.

39. In short, if the first ground of appeal were answered favourably to the appellant, it would follow that the charging and retention was unjust at the time the invoices
20 were paid. This would be because the basis did not accommodate the possibility that payments which were overcharged could be returned – that is not an accurate reflection of the basis in this case. But, if the correctness of the appellant's premise is assumed for the purposes of argument, it follows that the cause of action accrued on the dates of payment. The payments were made for legal services rendered between 1 August 2006 and 29 June 2008 (**CA [2], [56]-[57]**). So the appellant's claim is statute barred by s 13(1) of the *Limitation Act 2005* (WA).

Proposition 5: The interest for which the Act provides should be understood as the only interest available on an amount certified as overpaid

30 40. The Act, on which the appellant relies to establish his primary claim of a failure of basis in respect of the underlying $900,000, provided for interest only from the date of the certification of taxation under s 240(3) (**CA [24], [224]-[228]**). There

has been no taxation in this matter. The provisions of the Act do not govern the claim for interest in this case.

41. Contrary to the assertions at AS [59], on a plain reading of s 240(3), the Act does impliedly exclude a right to interest arising from the issue of a certificate of taxation between the date of payment and the date the certificate was issued.[35] The interest for which the Act provides should be understood as the only interest available on an amount certified as overpaid. The establishment of a statutory "claim for repayment" under ss 240 and 243 of the Act, with a statutory provision for payment of interest from the date of the certificate under s 240(3) but not before, is a powerful indication that is so. By providing for interest only after the date of the certificate, Parliament can be seen to have made a deliberate choice such that the statutory regime excludes any (prior) award of interest.

Proposition 6: As both the payments and the refund were governed by separate contracts, neither was normatively defective

42. As this Court has held and the Court of Appeal noted, the restitutionary considerations which may be present in various areas of the law cannot purport to override statute "by claiming a superior sense of justice to Parliament's".[36] Accordingly, the plurality below was correct to conclude that "[t]he absence of any provision for payment of interest in the period prior to the issue of the taxing officer's certificate was a matter of legislative choice, rather than a gap to be filled by the law of restitution" (**CA [24]**). Similarly, Vandongen JA correctly held that the "existence of any such entitlement would, given the way in which the [appellant] framed his case, purport to override the [Act] by claiming a superior sense of justice in relation to the question of interest to the one provided for by the legislature" (**CA [235]**).

43. The appellant places reliance on the common law for an award of "restitutionary interest", and alternatively relies on equity's auxillary jurisdiction.

44. It has been said that the "starting point in unjust enrichment is that the interest

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35 *Gray v Lavan* [2024] WASCA 147 at [227] (Vandongen JA).

36 For example, *Northern Territory v Griffiths* (2019) 269 CLR 1 at [137] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at [44] (Gaudron J), at [76] (McHugh and Gummow JJ).

runs from the date of the enrichment, which, in cases of receipt of money, is the date of receipt".[37] This appears to reflect the Birksian/Burrows' scheme.[38] One explanation offered for that conclusion is that "[t]his type of award focuses upon the need to reverse completely the transfer due to unjust enrichment by awarding the claimant back the full value of what has been transferred: the money plus the value of its use transferred (compound interest)".[39] However, that reasoning is only applicable in initial (not subsequent) failure of basis cases. Another explanation offered for the conclusion is that the respondent may be unjustly enriched "if it could keep that interest for the [period] leading up to the time the cause of action arose".[40] The appellant (at **AS [49]**) implicitly invites this Court to adopt that theory.

45. However, restitutionary claims must respect contractual regimes and the allocations of risk made under those regimes.[41] An essential step in considering a claim in *quantum meruit*, or money paid, is to ask whether and how that claim fits with any particular contract the parties have made.[42]

46. Given payment is on account, any refund is governed by the contractual obligation to repay any overpayment on the taking of final account. There is "neither occasion nor legal justification for the law to superimpose or impute" a restitutionary claim.[43] There is no contractual obligation on Lavan to pay interest on funds paid by Dr Gray and later ordered to be paid back in the event of a taxation. Nor is there any such right superimposed by statute. That is despite the fact that the parties contracted against the background of the Act and knew that there was a possibility of taxation. Further, the parties did not agree that the

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37 Edelman and Cassidy, *Interest Awards in Australia* (LexisNexis Butterworths, 2003) at 5.8.

38 Enrichment in the Birksian scheme is the generalisation of receipt of money: Birks, *Unjust Enrichment* (Oxford University Press, 2nd eds, 2005) at 10; Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012) at 145 §30(2).

39 Edelman and Cassidy, *Interest Awards in Australia* (LexisNexis Butterworths, 2003) at 5.15.

40 Edelman and Cassidy, *Interest Awards in Australia* (LexisNexis Butterworths, 2003) at 5.9.

41 *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at [14]-[18] (Kiefel CJ, Bell and Keane JJ); see also *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [64] (French CJ, Crennan and Kiefel JJ); citing *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256 (Deane J).

42 *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 at [79] (Gummow, Hayne, Crennan & Kiefel JJ).

43 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256 (Deane J); *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at [19] (Kiefel CJ, Bell and Keane JJ).

Taxation Settlement Sum would attract interest from the date of payment of the invoices. To superimpose an obligation on Lavan to pay interest on amounts received pursuant to valid invoices and later ordered to be paid over under the Act would be to impermissibly rewrite the terms of the parties' bargain.

47. Further, where payment is on account there is no any reason to suppose that interest would run from any date prior to the final taking of account. A restitutionary claim would redistribute the risks of overpayment for which provision had been made (see [16] above). In those circumstances no claim for restitution can exist.[44]

10 48. Further, since *Moses v Macferlan*, the position has been that a defendant "can be liable no further than the money [they] have received".[45] Whether that position was limited to the exclusion of consequential loss and that the practice of not awarding interest was procedural, does not assist the appellant.[46] The authorities in Australia have not recognised or provided such a gloss.[47]

49. In *Northern Territory v Griffiths*, the majority cited *Sempra* among other United Kingdom authorities to the effect that there was some recognition of a free-standing right to interest. However, that right, crucially, arises from "a restitutionary entitlement at law calculated to redress a defendant's unlawful enrichment through use of moneys which the defendant is regarded as having had
20 and received to the use of the plaintiff". Interest under the right to interest on a plaintiff's claim for money had and received does not begin to run unless and

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44 *Anderson v McPherson (No 2)* [2012] WASC 19 at [205], [239] (Edelman J): *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 at [47] (Gleeson CJ), [79] (Gummow, Hayne, Crennan & Kiefel JJ.

45 (1760) 2 Burr 1005 at 1010; cited in *Redland* (2024) 98 ALJR 544 at [62] (Gageler CJ and Jagot J).

46 See *Sempra Metals Ltd v Inland Revenue Comrs* [2008] AC 561 at [171] (Walker LJ); noting the citation of *Dutch v Warren* (1721) 93 ER 598. See Mason, Carter and Tolhurst, *Restitution Law in Australia* (JW Carter Publishing, 5th eds, 2025) at [2803] fn 39.

47 *Commonwealth v SCI Operations* (1998) 192 CLR 285 at 291 (Gummow J, in argument); *Bayne v Stephens* (1908) 8 CLR 1 at 23 (Barton J); *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 75 (Mason CJ); *Roxborough* (2001) 208 CLR 516 at [25] (Gleeson CJ, Gaudron and Hayne JJ); *Redland* (2024) 98 ALJR 544 at [62] per Gageler CJ and Jagot J, at [182] (Gordon, Edelman and Steward JJ). Contrary to AS [46], *Bayne v Stephens* (1908) 8 CLR 1 is not authority for the proposition that interest is available on a claim for money had and received. The plaintiff was entitled to interest in equity from the date of the writ, on the ground that in equity interest ran against an agent who held money which was bound to account for and pay to his principal, and which he refused to hand over: see at 23-24 (Barton J), at 32 (O'Connor J).

until retention by the defendant of the plaintiff's money becomes unjust.[48] This is not satisfied on the facts here by reason of the appellant's acceptance that the retainers entitled the respondent to receive and retain those amounts until required by a taxing officer's certificate to make a repayment (**CA [22]**).

50. As was held by Mason CJ in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd*:[49]

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

51. The present matter may thus provide the opportunity for this Court to consider the authority of the Supreme Court of the United Kingdom in *Prudential Assurance Co Ltd v Revenue and Customs Comrs*.[50] That authority overturned the decision of that Court in *Sempra Metals Ltd v IRC*.[51] Following *Prudential Assurance Co Ltd v Revenue and Customs Comrs*, in the United Kingdom, "[t]here is no right to interest on the basis of unjust enrichment".[52] Restitution is only there available in respect of what can be referred to as the "principal sum" because there has only been one transfer of value.[53]

Proposition 7: Unjust enrichment not being a principle of direct application, there should be no restitution of the use-value of money

52. The appellant advances the proposition that in situations like the present, the

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48 *Peet Ltd v Richmond* (2011) 33 VR 465 at [127] (Nettle JA, with Neave JA and Judd AJA agreeing).

49 (1994) 182 CLR 51 at 75 cited with approval in *Roxborough* (2001) 208 CLR 516 at [25]-[26] (Gleeson CJ, Gaudron and Hayne JJ); *Northern Territory v Griffiths* (2019) 269 CLR 1 at [338] (Edelman J).

50 [2019] AC 929.

51 [2008] AC 561.

52 *Prudential Assurance Co Ltd v Revenue and Customs Comrs* [2019] AC 929 at [71]-[72] (Reid, Hodge and Mance LLJ, with Sumption and Carnwath LLJ agreeing).

53 [2019] AC 929 at [71]-[72] (Lords Reid, Hodge and Mance, with Lords Sumption and Carnwath agreeing); see also C Mitchell KC, P Mitchell and S Waterson (eds) *Goff & Jones on Unjust Enrichment* (2022, 10th ed, Street and Maxwell) at 36-49, 36-50.

recipient is unjustly enriched by the use-value of the principal sum in the period it remains unrepaid. But absent an unjust transfer of value and absent the demonstration of a benefit in a recognised category, there is no unjust enrichment given that is a conclusion reflecting the need "to correct normatively defective transfers of value".[54] That is consistent with what was held by the Supreme Court of the United Kingdom in *Prudential*. Where the initial receipt was an entitlement under the contracts of retainer and the eventual repayment was regulated by a compromise agreement it is incoherent to regard either of those transfers of value as being in any relevant sense normatively defective.

10 53. It may be accepted that there are cases where interest has been awarded from the date of payment where contract has been discharged for breach, repudiation or in exercise of a contractual right.[55] However, these cases do not support the proposition that an opportunity to use money is a benefit for which restitution of unjust enrichment must be made in all cases where a failure of basis accrues later. In *Elder's* – a true rescission case – the contract for the allotment of shares was voidable and the problem with the payment existed from the beginning.[56] In *Lexane Pty Ltd v Highfern Pty Ltd*,[57] instalments were paid on the purchase price of land for which conveyance was not received and the defendant terminated.[58] The plaintiff was held to be entitled to "relief against forfeiture of sums paid".[59]
20 The award of interest was because of the conditional nature of the payment. As above, that is not this case.

54. Where a claim for restitution is based on money received by a defendant from a plaintiff, the relevant *prima facie* benefit is the value of the money paid.[60]

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54 *Prudential Assurance Co Ltd v Revenue and Customs Comrs* [2019] AC 929 at [68] (Reid, Hodge and Mance LLJ with Sumption and Carnwath LLJ agreeing); citing *Investment Trust Companies v Revenue and Customs Comrs* [2018] AC 275 at [42] (Reed JSC).

55 *Heydon v NRMA (No 2)* [2001] NSWCA 445 at [15]; citing *Elder's Trustee and Executor Co Ltd v Commonwealth Homes and Investment Co Ltd* (1941) 65 CLR 603; *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446.

56 *Elder's Trustee & Executor Company Ltd v Commonwealth Homes and Investment Co Ltd* (1941) 65 CLR 603.

57 *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446 at 461–462 (McPherson J).

58 *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446 at 451 (McPherson J).

59 *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446 at 459-460 (McPherson J); save for the amounts the defendant was entitled to by way of damages for breach of contract and reasonable rental.

60 *Redland* (2024) 98 ALJR 544 at [182] (Gordon, Edelman and Steward JJ).

55. In Australia, "unjust enrichment has 'a taxonomical function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another'".[61] The recognition of new 'benefits' as part of the law of obligations to which restitutionary remedies attract should be done in an orthodox fashion,[62] recognising that the law in Australia in this area is well developed and settled. The concept of benefit is not to be applied diffusely, divorced from the rules that have been developed to meet particular categories of case.[63]

56. To accept the appellant's proposition would be to add to its construction of the failure of basis, an award of interest by way of compensation for unproven loss. It would go beyond restoration and seek to "put [the appellant] in the same position as he … would have been in" had the Taxation Settlement Sum not been charged and paid.[64] Restitution "does not seek to provide compensation for loss".[65]

57. Consistent with the proposition that unjust enrichment is not a principle of direct application, and the possible availability of a right to interest on a plaintiff's claim for money had and received from the time that retention by the defendant of the plaintiff's money becomes unjust, the opportunity to use money ought not be characterised as a relevant benefit.

Proposition 8: There is no place for equity to award interest in this matter

58. The appellant also has an alternative claim for "restitutionary interest" to be awarded by equity in its auxiliary jurisdiction. Existing authority is to the effect that equity in its auxiliary jurisdiction will not supplement statutory interest by providing for compound interest.[66]

59. The courts of equity generally only awarded compound interest in cases where

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61 *Redland* (2024) 98 ALJR 544 at [179] (Gordon, Edelman and Steward JJ); citing *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [30] (French CJ, Crennan and Kiefel JJ).

62 *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at [89] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 at [85] (Gummow, Hayne, Crennan and Kiefel JJ); *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 257 (Deane J).

63 *Redland* (2024) 98 ALJR 544 at [180] (Gordon, Edelman and Steward JJ).

64 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 89 (Brennan J).

65 *Northern Territory v Griffiths* (2019) 269 CLR 1 at [339]-[340] (Edelman J).

66 *Commonwealth v SCI Operations* (1998) 192 CLR 285 at [74] (McHugh and Gummow JJ); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 717 (Lord Browne-Wilkinson with whom Lords Slynn and Lloyd agreed).

money was obtained and retained by fraud, or where it had been withheld or misapplied by a trustee or fiduciary.[67] This has been explained on the basis that in order to claim compound interest it is necessary to establish an ongoing fiduciary duty to hold the money received under a trust for the claimant's benefit, so that there is a duty each subsequent day after payment to account for the use value of the money received.[68] That is, a trustee has an obligation to refrain from using a particular right for one's own benefit and this creates the potential duty to account for profits.[69]

60. For equity to award compound interest in its auxiliary jurisdiction on a common law claim when the common law itself would not award interest would be a challenge to the coherence of the law (in a particular sense of the maxim "equity follows the law").[70] That is, if the appellant succeeded on this basis, equity would not be providing a remedy unknown to the common law – rather, it would be providing a remedy which the common law has set its face against.[71]

61. It is no part of the appellant's claim that Lavan acted fraudulently or that there was a breach of fiduciary obligation.[72] So, cases which involve a breach of trust, or fraud or some other underlying equitable cause of action are beside the point.

62. Nor is any express trust, or other trust arising from objective intention to create a trust,[73] claimed or established. No trust is claimed or could be established in

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67 *Northern Territory v Griffiths* (2019) 269 CLR 1 at [125] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Commonwealth v SCI Operations* (1998) 192 CLR 285 at [74] (McHugh and Gummow JJ); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 701-2 (Browne-Wilkinson LJ), at 739 (Lloyd LJ); *President of India v La Pintada Compania Navigacion SA* [1985] AC 104 at 116 (Brandon LJ with whom the other members of the House of Lords agreed). Cf *Hungerfords v Walker* (1989) 171 CLR 125 at 148 (Mason CJ and Wilson J); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 692 (Goff LJ). See also R Stevens, *The Laws of Restitution* (Oxford University Press, 2023) at 64.

68 R Stevens, *The Laws of Restitution* (Oxford University Press, 2023) at 62-64.

69 R Stevens, *The Laws of Restitution* (Oxford University Press, 2023) at 232.

70 J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity* (Lexis Nexis, 5th ed, 2014) at [3-030].

71 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 717-718 (Browne-Wilkinson LJ), 740-741 (Lloyd LJ).

72 A claim for breach of fiduciary duty was deleted from the Statement of Claim: ABFM at 107-8.

73 *Bosanac v Federal Commissioner of Taxation* (2022) 275 CLR 37 at [93]-[94] (Gordon and Edelman JJ); *Anderson v McPherson* [2012] WASC 19 at [96] (Edelman J).

circumstances where Lavan was free to treat the cash as its own.[74]

63. The appellant submits that the respondent was an accounting party (**AS [46]**). That does not mean orders for an account would have been justified. First, it is not open to the appellant to claim an account for the first time in this Court. That claim was not raised below or in the special leave application. Second, before a party can be ordered to account, liability to account must be established.[75] Where a plaintiff seeks the remedy of an account, the plaintiff must generally prove that the defendant has undertaken to be an accounting party, and that in the performance of the defendant's accounting obligations the plaintiff is entitled to some sum from the defendant, although the plaintiff is uncertain of the quantum of that sum.[76] Further, there is no claim that Lavan refused to pay or give an account of money belonging against the respondent or otherwise withheld or misapplied money so as to justify an award of interest.[77]

Part VI: Form of Order

64. The Repondent seeks the following form of orders:

(1) Appeal dismissed.

(2) The appellant pay the costs of the respondent to be taxed or agreed.

Part VII: Time required for presentation of oral argument

65. The respondent estimates that it requires 2 hours to present its oral argument.

Dated 19 June 2025

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74 *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62 at [109]-[111] (Gageler J), [206]-[207] (Keane J); *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at [119] (Bell, Gageler and Keane JJ); R Stevens, The Laws of Restitution (Oxford University Press, 2023) at 234.

75 *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 at [56] (Gaudron, McHugh, Gummow and Hayne JJ).

76 J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity* (Lexis Nexis, 5th ed, 2014) at [26-085]; *Rowe v National Australia Bank Ltd* (2019) 56 WAR 1 at [87]-[88] (Murphy JA and Sofronoff AJA).

77 *Harsant v Blaine, MacDonald & CO* (1887) 56 LJQB 511.

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	*Legal Practice Act 2003* (WA)	Version 01-d0-04 As repealed on 1 March 2009	Parts 1, 13	*Act in force when payments were made for legal services. The Legal Profession Act 2008 (WA) commenced on 1 March 2009. However, by s 616(1) of the Legal Profession Act 2008, Part 13 of the Legal Practice Act 2003 continued to apply as, in this case, Lavan was first instructed before 1 March 2009.*	This Act governed the relationship between the parties at all relevant times.