HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

BRUCE NATHANIEL GRAY
Appellant

and

LAVAN (A FIRM)
Respondent

APPELLANT'S REPLY

Part I – Certification

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

Part II – Reply

2. The respondent's reframing of the issues misses the point of the appeal. It is not apt to ask 'whether a restitutionary claim would redistribute the risks of overpayment for which provision was made by the contracts of retainer' (RS[2], cf RS[45]). If there is a failure of basis requiring restitution of a payment made under a contract, there is no point in separately asking whether that would 'redistribute risks': the very thing that has failed is a condition of, or a state of affairs contemplated as a basis for, the payment. But even if that were the right question, the 'risk' of remedying an overpayment plainly lies with the lawyer who overcharged, and not with the lay client who overpaid, and who never agreed to confine recovery to the nominal sum overpaid.

3. RS[5] cavils at labels, and is in any event wrong. The parties agreed that Lavan was obliged to repay $900,000 representing the amount that would have been ordered to be refunded to Dr Gray by the firm had there been a taxation of the bills. When costs are taxed and found to be repayable, it is because the charges are determined not to be fair and reasonable. Charging more than is fair and reasonable is properly described as overcharging, even if the charges were made consistently with a contract enforceable at the time, but no longer so. On the pleadings, Lavan admitted being 'overpaid'.[1]

4. In light of *Roxborough*, RS[9] implies an unduly narrow expression of the applicable principle. There, 'the benefit bargained for' by the retailers could on one view be seen as the sale of cigarettes; but that did not exhaust the concept of 'basis' or 'consideration' that might fail. The same is true in this case: the 'benefit bargained for' involved the

[1] Further Amended Statement of Claim [13] (ABFM, 103), admitted in Second Further Amended Defence, [19] (ABFM, 115).

provision of legal services; but Dr Gray's payments were also made on a basis that the contracts of retainer were legally enforceable, such that Lavan was entitled to retain the payments. As *Roxborough* shows, 'a transfer may have more than one basis'.[2] Failure of one may found a right to restitution.[3]

5. A degree of conceptual confusion is apparent in RS[12]. It is simultaneously said that 'this was not an entire contract' (RS[12]), yet also that Dr Gray's 'payment was on account' (RS[2], RS[45]), and that Lavan rendered 'interim accounts' (RS[11]). If this were not an 'entire contract', why are the payments said to be 'on account'? But even if the payments *were* made on account, why is that relevant to the question of failure of basis? This is not a case about whether Lavan had accrued an unconditional contractual right to payment, notwithstanding that the legal services had not been completely performed.[4] Rather, it is about the client's restitutionary (not contractual) right to repayment in the case of failure of basis. If the language of conscience is relevant (cf RS[28]), it is unconscionable for a firm to retain the use-value of fees found not to be fair and reasonable, by repaying only the nominal value of the overcharged fees, years after they were paid, without any interest whatsoever.

6. This is not a case in which *the Court* is being asked to apportion the payments (cf RS[34]). Apportionment has already occurred.

7. It is difficult to understand the sense of RS[36]–[39], which appear to raise a different limitation argument than that put by Lavan in the courts below. Regardless, the answer to the limitation question remains straightforward. A restitutionary claim arising from a failure of basis accrues when the basis fails, not earlier.[5]

8. As to whether s 240(3) of the *Legal Practice Act* 'does impliedly exclude a right to interest' (RS[41]), the remarks of Mason CJ and Wilson J in *Hungerfords v Walker* are apposite. Referring to the general interest provision in the relevant state *Supreme Court*

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2 *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 (CA) [52] (citing with approval *Goff & Jones: The Law of Unjust Enrichment* (9th ed, 2016), see now the 10th ed, 2022 (***Goff & Jones***), at [13-15]). *Benzline* at [52] was cited with approval in *School Facility Management Ltd v Governing Body of Christ the King College* [2020] EWHC 1118 (Comm) at [421] (Foxton J), aff'd [2021] 1 WLR 6129 (CA).

3 J Edelman and E Bant, *Unjust Enrichment* (2nd edn, 2016), 262-3; *Goff & Jones*, [13-15]-[13-16] (citing, in particular, *Rowland v Divall* [1923] QB 500, and *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215).

4 Cf *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560.

5 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 389 (Brennan J); *Nu Line Construction Group Pty Ltd v Fowler* [2012] NSWSC 587 at [276]–[289] (Ward J); *Mason & Carter's Restitution Law in Australia* (5th ed, 2025) at [2723]; *Goff & Jones* at [33-17]; Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012) at 145.

Act, their Honours observed that 'the section is not intended to erect a comprehensive and exclusive code governing the award of interest.'[6] *A fortiori* here. The *Legal Practice Act* said nothing about interest between the date of payment of overcharged fees and the date of repayment and, in particular, simply did not attempt to regulate the payment of interest in respect of restitutionary claims. No negative implication could arise, let alone the 'clear language'[7] needed for exclusion.

9. Contrary to the suggestion in RS[45], this is not a case like *Lumbers v W Cook Builders Pty Ltd (in liq)*, where the restitutionary claim was at odds with an enforceable contract between other parties.[8] The answer to Lavan's question about 'whether and how that claim [for money paid] fits with any particular contract the parties have made', is that with respect to an amount of fees found not to be fair and reasonable, the retainer contract is unenforceable. Put simply, a firm could no longer contractually oblige a client to pay more than is found to be fair and reasonable.

10. RS[46] raises two related false issues, in respect of both the contracts of retainer and the settlement deed. Under the contracts of retainer, Dr Gray's payments were not made 'on account'; and there was no *contractual* right in Dr Gray to recover the overpaid sums. The retainers simply referred to the right to have costs taxed (a right which could not be excluded by contract). They did not purport to make that right a contractual term. But as Lavan rightly acknowledges, 'the parties contracted against the background of the Act and knew that there was a possibility of taxation' (RS[46]). That was the very reason why the ability of the payments to the firm to survive a taxation was a basis of the payments; and one which failed. As has been said in another context, 'in the absence of … agreement, the law must decide'.[9]

11. Second, in respect of the settlement deed, it is simply wrong to assert that recognising a restitutionary entitlement to interest would 'impermissibly rewrite the terms of the parties' bargain' (RS[46]). The agreement providing for the repayment of the Taxation Settlement Sum expressly permitted a claim to be made for interest. To recognise the validity of that claim is to vindicate, not to rewrite, the terms of the parties' agreement.

12. RS[48] begs the question. The very issue in dispute is the value of what the respondents

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6 (1989) 171 CLR 125 at 147–8.

7 *Tabcorp Holdings Pty Ltd v Victoria* (2016) 328 ALR 375 (HCA) at [68] (the Court).

8 (2008) 232 CLR 635.

9 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 43 (Viscount Simon LC), quoted in *Mann* (2019) 267 CLR 560 at [197] (Nettle, Gordon and Edelman JJ).

'have received', and for which they should make restitution. The speech of Lord Walker in *Sempra* cited by Lavan (RS[48] fn 46) does not support any assertion that interest is not available on restitutionary claims. To the contrary, the very point of his Lordship's speech was to endorse the availability of compound interest, in the exercise of the court's equitable jurisdiction.[10] More generally, the availability of interest in restitutionary claims has been affirmed by appellate courts many times in the centuries since *Moses v Macferlan*.[11]

13. *Peet Ltd v Richmond* provides no support for Lavan's claim that an entitlement to interest 'does not begin to run unless and until retention by the defendant of the plaintiff's money becomes unjust' (RS[49]). *Peet* was a case about *quantum meruit*; not about payments made on a basis that fails. The point with which the respondent does not grapple is that, in cases like the present involving a subsequent failure of basis, the payment will occur — and the recipient will obtain the use-value of the payment — at some point before the basis fails. That is why interest runs from the time of receipt; which is properly acknowledged in RS[44] as 'the starting point in unjust enrichment', and which Lavan accepts to be so in similar types of cases (RS[53]). To the extent it is necessary to show (in Lavan's words) that 'the problem with the payment existed from the beginning' or 'the conditional nature of the payment' (RS[53]), the now-established overcharging reveals the existence of such a 'problem', and the objective context established such a condition.

14. Further conceptual confusion arises in RS[56]. This case has never been a claim for compensation: it has always been a claim for restitution. Anything said in *Northern Territory v Griffiths*[12] about compensatory claims is thus of no direct relevance. The true measure of restitution takes account of the time value of money. To say, as the firm does, that 'the opportunity to use money ought not be characterised as a relevant benefit' (RS[56]) ignores commercial reality. Interest perfects the award of restitution, and avoids an 'unjustified betterment'.[13] It does not convert a restitutionary remedy into a

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10 *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561 at 629–30 [184]–[188] (Lord Walker).

11 See, e.g. *State Bank of New South Wales Ltd v Commissioner of Taxation* (1995) 62 FCR 371; *Idemitsu Queensland Pty Ltd v Agipcoal Australia Pty Ltd* [1996] 1 Qd R 26; *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627; *Heydon v NRMA Ltd (No 2)* (2001) 53 NSWLR 600; *Roads and Traffic Authority v Ryan (No 2)* [2002] NSWCA 91; *Cornwall v Rowan (No 2)* [2005] SASC 122; *Chow v Yang* [2010] SASC 96.

12 (2019) 269 CLR 1.

13 *Chow v Yang* [2010] SASC 96 (Full Ct) at [35] (Nyland and Gray JJ, with whom Vanstone J agreed).

compensatory one.

15. No question arises here of equity 'supplementing statutory interest' (RS[58]). As the principal sum was repaid before this proceeding was commenced, Dr Gray has no right to statutory interest under s 32 of the *Supreme Court Act 1935* (WA).

16. RS[60] is inaccurate: about the availability of interest at common law; about the availability of compound interest in equity; and about the maxim that 'equity follows the law'. Far from 'setting its face' against the award of interest (including compound interest) in restitutionary claims, the existence of such common law awards is well-attested, including in the early authorities of this Court.[14] The same is true of compensatory awards of compound interest at common law.[15] Equally, it remains the case that the firm stood in a fiduciary relationship with its client. If interest were not to be awarded, the firm will have received from that relationship a substantial benefit — the use of $900,000 of overcharged fees for ten years — without the fully informed consent of the client. In those circumstances, an equitable award of compound interest is available.

17. Plainly, the maxim of 'equity following the law' does not mean that equitable intervention is somehow forbidden, if there were felt to be a gap or deficiency in the common law. Quite aside from the firm's inaccurate and incomplete description of the common law, it remains the case that equity follows the law 'not slavishly, nor always'.[16] As Lord Walker showed in *Sempra*, the auxiliary jurisdiction of equity is one means — but not the only means — of doing justice in the circumstances of this case.[17]

Dated 10 July 2025

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14 *Bayne v Stephens* (1908) 8 CLR 1 at 15 (Griffith CJ), 23–4 (Barton J), 31–2 (O'Connor J); referring to *Harsant v Blaine Macdonald & Co* (1887) 56 LJQB 511.

15 See, e.g. *Hungerfords v Walker* (1989) 171 CLR 125.

16 *Graf v Hope Publishing Corp*, 254 NY 1, 9 (1930) (Cardozo CJ). *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* (5th ed, 2015) at [3-040].

17 [2008] 1 AC 561 at 629–30 [184]–[188] (Lord Walker).