HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 22 May 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	P7/2025
File Title:	Gray v. Lavan (A Firm)
Registry:	Perth
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	22 May 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

BRUCE NATHANIEL GRAY
Appellant

and

LAVAN (A FIRM)
Respondent

APPELLANT'S SUBMISSIONS

Part I – Certification

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

Part II – Issues Arising

2. Was there a failure of basis in respect of the $900,000 excessively charged by the respondent solicitors and paid by the appellant client, such that the respondent was unjustly enriched by its receipt of that sum?

3. Did the firm's retention and use of the sum excessively charged for a period of some ten years between the date of payment and the date of repayment give rise to an obligation to pay interest to the applicant? If so, was the obligation to pay compound interest?

Part III – Section 78B Notice

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

Part IV – Citations

5. The primary judgment is unreported. The medium neutral citation is: *Gray v Lavan (a Firm)* [2022] WASC 417.

6. The judgment of the Court of Appeal is unreported. The medium neutral citation is: *Gray v Lavan (a Firm)* [2024] WASCA 147.

Part V – Facts

7. Between 2006 and 2008, the respondent firm, Lavan, represented the applicant, Dr Gray, in litigation in the Federal Court and the Supreme Court of Western Australia (CAB 9, SC[16]–[18]; CAB 36, 48, CA[2], [56]). Over that period Lavan invoiced, and Dr Gray paid, $4,477,068.33 towards legal work (CAB 7, SC[1]; CAB 36, 43, 48, CA[2], [29], [57]).

8. While there were informal retainer agreements between the parties, there was no written agreement (CAB 7, 9, SC[2], [21]; CAB 36, 47, CA[2], [52]), nor any costs agreement within the meaning of s 221 of the *Legal Practice Act 2003* (WA) (CAB 9, SC[19]; CAB 39, 66, CA[13], [128]). There was an earlier written costs agreement with the firm of Bennett + Co (CAB 8, SC[13]; CAB 46–7, CA[43]–[48]),[1] whose principals were subsequently engaged by Lavan (CAB 8–9, SC[16]; CAB 47, CA[50]–[51]).

9. Both the original costs agreement with Bennett + Co and the invoices issued by Lavan explicitly referred to Dr Gray's right to obtain a taxation (CAB 46–7, 78, CA[43]–[49], [179]–[180]).

10. In June 2008, a dispute arose between Dr Gray and Lavan about the amount the firm had invoiced (CAB 7, SC[3]). Lavan commenced proceedings against Dr Gray for recovery of unpaid fees. Dr Gray counterclaimed in respect of the services rendered to him and the extent of his obligation to pay the amounts claimed by Lavan.[2] On 14 December 2009, Dr Gray filed an application for an order to extend the time to give notice to tax the relevant bills.[3]

11. Part of those disputes was settled in March 2015, when Dr Gray and Lavan, and Mr Bennett (a former principal of Bennett + Co) entered into a settlement deed (the ***2015 Settlement Deed***) (CAB 49, CA[64]).[4] Recital G stated that the parties had narrowed the issues in dispute 'to the intent that thereafter the only matter remaining for resolution is the taxation of the Bills.'[5]

---

1 Bennett + Co costs agreement dated 6 January 2005 (appellant's book of further materials (**ABFM**) at 14) and accompanying letter dated 5 January 2005 (ABFM at 3).

2 This was Supreme Court action CIV 2237 of 2009.

3 Originating Summons filed 14 December 2009 (ABFM at 20).

4 2015 Settlement Deed (ABFM at 57).

5 2015 Settlement Deed, p 2, Recital G (ABFM at 58).

12. By a consent order of 16 September 2015, the parties agreed to extend the time for Dr Gray to serve Lavan with a written notice of his intention to have the bills taxed.[6] Consistently with that order, on 14 October 2015, Dr Gray gave notice of his intention to have the invoices taxed (CAB 9, SC[23]),[7] and around 29 October 2015 Lavan filed the bills for taxation (CAB 9, SC[23]; CAB 49, CA[64]–[65]).[8]

13. Rather than completing a formal taxation, the parties agreed to resolve their dispute as to the extent to which Lavan was entitled to retain costs paid. On 13 July 2018, Dr Gray and Lavan entered into a further settlement deed (the ***Settlement Deed***) (CAB 9–10, SC[24]; CAB 36, 43, 49, CA[3], [31], [66]).[9] The basis of the settlement was that Lavan paid Dr Gray $900,000 (clause 2(a)), which represented the amount that would have been ordered to be refunded to Dr Gray by Lavan if there had been a taxation of the Bills (clause 3.1(a)) (CAB 9–10, SC[24]; CAB 50, CA[68]–[71]). That is to say, Lavan agreed that it had been overpaid $900,000 which would, on the taxation, have been found not to have been fair and reasonable.[10]

14. Lavan had the use of the $900,000 overpayment for the whole ten-year period between 2008 (when Dr Gray last made payment of the fees charged by Lavan) and 2018 (when Lavan was obliged to repay the sum) (CAB 7, 9–10, SC[8], [24]; CAB 52, CA[76]). The settlement expressly excluded any payment in respect of interest. It recorded that Dr Gray claimed and Lavan denied a right to interest, and that Dr Gray's claim could be pursued (CAB 10, SC[25]; CAB 51–2, CA[71]–[74]). Accordingly, in December 2018 Dr Gray instituted proceedings for the recovery of interest.[11]

15. In the Supreme Court, Curthoys J considered that Lavan was not unjustly enriched by the receipt of the overpaid sum or the opportunity to use it on the ground of failure of basis. The judge considered that, given the terms and effect of the Settlement Deed, there was no failure of basis when the parties entered into that deed (CAB 55, SC[55]);

---

6 Consent Order of 16 September 2015 (ABFM at 22).

7 Statement of Agreed Facts, [16] (ABFM at 124).

8 Lavan's Bills of Costs for Taxation, 29 October 2015 (ABFM at 23, 30 and 36).

9 2018 Settlement Deed (ABFM at 46). A more legible, but unexecuted, copy of the same document was also in evidence (ABFM at 69).

10 See *Pryles & Defteros (A Firm) v Green* (1999) 20 WAR 541 at 548–9 [26]–[27] (Parker J).

11 Writ of Summons (ABFM at 83); Further Amended Statement of Claim (ABFM at 97); Second Further Amended Defence (ABFM at 108).

that no restitutionary right to interest was engaged (CAB 18, SC[66]); and that Dr Gray would not have been entitled to compound interest (CAB 24, SC[103]).

16. The Court of Appeal dismissed Dr Gray's appeal. Buss P and Mitchell JA considered that there had not been a failure of basis (CAB 41–2, CA[23], [26]) and that the absence of a provision for interest in the *Legal Practice Act* was a 'legislative choice, rather than a gap to be filled by the law of restitution' (CAB 42, CA[24]). Vandongen JA also considered that there had been no failure of basis (CAB 86, CA[214]); and that a claim to interest would be inconsistent with the *Legal Practice Act*, even if a general law claim were otherwise available (CAB 89–91, CA[234]–[237]).

10 **Part VI – Argument**

17. The result in the lower courts is surprising. A law firm acknowledged that it had charged its client unjustifiably high fees. Roughly ten years after the fees were paid, the law firm was compelled to repay the excessive portion to the client. Given the passage of time, what the client then received was worth significantly less in real terms than the excessive amount the law firm had originally charged and retained for the whole period.

18. In the circumstances, and for the reasons set out below, the lower courts ought to have held that the general law provides a remedy for the client to account for the substantial time value of money, and that there was no decision by Parliament to extinguish the right to that remedy.

20 *First Ground of Appeal – Failure of Basis*

19. In the relevant context here — the provision of legal services to a lay client, and unreasonable overcharging by the solicitors — the general law and statute have consumer protective purposes. The law aims 'to secure that the solicitor, as an officer of the court, is remunerated properly, *and no more*, for work he does as a solicitor'.[12]

20. An initial issue is whether, by the Settlement Deed, the parties contracted out of any claim for restitution of interest. An explicit purpose of the Settlement Deed was to preserve Dr Gray's ability to pursue the interest claim; to provide an agreed process by which that could be done; and to record that the interest claim remained in dispute between the parties. Specifically, the Settlement Deed settled the parties' dispute,

---

12 *Electrical Trades Union v Tarlo* [1964] Ch 720 at 734 (Wilberforce J) (emphasis added). See too *Harrison v Tew* [1990] 2 AC 523 at 532 (Lord Lowry); *Hartnett v Bell* (2023) 112 NSWLR 463 (CA) at [123(16)] (Bell CJ).

except as to interest, as if there had been a taxation, and on the basis that a taxing officer had certified that Dr Gray had overpaid the Taxation Settlement Sum to Lavan – or in other words, that the taxing officer had found that Lavan was not entitled to retain the Taxation Settlement Sum.[13]

21. To say, as the primary judge did, that Dr Gray's claim to interest 'fails at the outset having regard to the terms of the Settlement Deed' (CAB 15, SC[55]) involved an inapt construction of the Settlement Deed. More particularly, to say that 'Dr Gray's right to a taxation of the invoices arising from retainers merged in the Settlement Deed'; that 'Dr Gray's right to the Taxation Settlement Sum arose from the Settlement Deed'; and that '[t]here was no failure of basis' because 'Lavan paid a debt – the Taxation Settlement Sum – created by the Settlement Deed' (CAB 14–15, SC[50], [51]) involved significant elision and ellipsis, and construed the Deed as having failed to do the one thing the parties expressly intended it to do: namely, to preserve Dr Gray's ability to bring the Interest Claim, which remained in dispute.

22. That was not a natural construction of a document whose express purpose was to preserve rights, and to narrow — but not to abrogate — the issues that remained in dispute between the parties. It is not natural to say that the parties' rights 'merged' into, or thereafter solely arose from, an agreement that expressly sought to prevent that from occurring. Dr Gray had an anterior right to obtain a taxation — which arose from the Supreme Court's inherent jurisdiction,[14] from statute, and from the terms of the underlying costs agreement — and a right to obtain the return of funds paid exceeding what was fair and reasonable. That the parties agreed that there *had* been an overpayment, and agreed the quantum of the principal sum overpaid, did not mean that there was any 'merger' of Dr Gray's claim to interest, which expressly remained unresolved and reserved from the terms of any release.

23. It is of course true to say, as the primary judge observed, that the Settlement Deed created a debt that Lavan was contractually bound to pay, and that Dr Gray's right to the Taxation Settlement Sum arose from the deed (CAB 14–15, SC[48], [50], [51]). But that does not deny the correctness of the analysis on which Dr Gray relies. By creating

---

13 This was admitted by Lavan: Further Amended Statement of Claim at [13] (ABFM at 102); Second Further Amended Defence at [19] (ABFM at 114). See the Settlement Deed (ABFM at 46).

14 *Woolf v Snipe* (1933) 48 CLR 677 at 678-9 per Dixon J: 'The superior Courts of law and equity possess a jurisdiction to ascertain, by taxation, moderation, or fixation, the costs, charges, and disbursements claimed by an attorney or solicitor from his client'.

those rights and preserving those obligations in the parties, the Settlement Deed provided the mechanism for Dr Gray to recover the amount which, it was agreed, he had overpaid and Lavan could no longer retain. The Settlement Deed therefore operated in the same way as the certification by a taxing officer of the amount overpaid under s 240 of the *Legal Practice Act*. Importantly, the Settlement Deed provided that Dr Gray's claim for interest would be determined on the assumed basis that there had been a taxation.

24. Once the proper effect of the Settlement Deed is understood — namely, that it preserved, and did not 'merge' or abrogate Dr Gray's claim to interest, based on his underlying right to taxation of costs — Dr Gray's claim in unjust enrichment stands to be assessed on its merits. The Settlement Deed expressly operated as a deemed taxation. It put the parties in precisely the same position as if Lavan had been ordered on a taxation to refund the Taxation Settlement Sum to Dr Gray.

25. In the same way as an actual taxation, that deemed taxation invalidated the retainers to the extent of the Taxation Settlement Sum. Thereafter, the retainers were unenforceable to that extent. In relation to the Taxation Settlement Sum, the objective legal basis for Dr Gray's payments to Lavan failed.

26. The matter may be tested this way. Suppose a retainer between solicitor and client contractually required the payment of $4.5m worth of fees for legal services already supplied, but only $3.6m had been paid. When the solicitor threatens to sue the client for the balance of $900,000, the client has the solicitor's invoices taxed. On the taxation, a taxing officer taxes the invoices down to $3.6m. Could the solicitor then sue the client to recover as a contractual debt the $900,000? The answer is no.[15] The taxation invalidates the retainer to that extent, which is thereafter unenforceable as to the amount taxed off.

27. Enforceability of the retainer was fundamental to the dealing between Dr Gray and Lavan. To the extent of $900,000, that state of affairs failed to sustain itself.

28. The document that recorded (but did not constitute) the retainers between Dr Gray and Lavan — namely, the written costs agreement between Dr Gray and Bennett + Co — and the relevant invoices themselves expressly referred to the right to have costs taxed

[15] *Branson v Tucker* [2012] NSWCA 310 at [128] (Barrett JA; Beazley JA agreeing).

(CAB 46–7, 78, CA[43]–[49], [179]–[180]). As Vandongen JA noted (CAB 78 CA [178]-[179]), 'it may be readily inferred that the respondent well appreciated that the appellant had a right conferred by the relevant provisions of the Legal Practice Act, to have the reasonableness and fairness of the costs charged in any invoice rendered reviewed by way of a taxation … It may also be inferred that the appellant knew that he had this right'.

29. It is implicit in the references to taxation and the right to have fees reviewed for fairness and reasonableness that Dr Gray had a right to be repaid any fees found not to be fair and reasonable. 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. It was thus paradoxical to say, as Vandongen JA did (CAB 78, CA[177]–[181]), that precisely because the parties *had* drawn attention to it, that scrutiny through taxation of the fairness and reasonableness of Lavan's charges was *not*, objectively, a basis or condition on which the parties dealt with each other. The contrary was the case.

30. Failure of basis is a ground for restitution because, on an objective analysis,[16] the payer's intention to make the payment was qualified: that is, it was conditional.[17] Objectively, the plaintiff's intention to benefit the defendant by the payment was subject to a condition that has now failed. An alternative explanation of the principle is that failure of basis is a ground for restitution because, objectively, the parties jointly understood and agreed that the payer's intention to benefit the defendant by the payment was qualified.[18] On this analysis, restitutionary awards for a failure of condition give effect to but do not enforce an agreement. Either rationale supports a right to restitution here.

---

16 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at [225]–[233], [238]–[239] (Mason P; Sheller and Hodgson JJA agreeing); *Anderson v McPherson (No 2)* [2012] WASC 19 at [236] (Edelman J). See also *Nu Line Construction Group Pty Ltd v Fowler* [2012] NSWSC 587 at [324] (Ward J).

17 *Redland City Council v Kozik* (2024) 98 ALJR 544 at 579–80 [183], [185] (Gordon, Edelman and Steward JJ).

18 *Barton v Morris* [2023] AC 684 at [78] (Lady Rose; Lords Briggs and Stephens agreeing). See also *Spaul v Spaul* [2014] EWCA Civ 679, [46]–[47] (Rimer LJ); *Hellfire Entertainment Ltd v Acimar Ltd* [2021] EWHC 1077, [64] (Snowden J); *School Facility Management Ltd v Governing Body of Christ the King College* [2020] WLR(D) 289, [419] (Foxton J); *Swynson Ltd v Lowick Rose LLP* [2018] AC 313 at [30] (Lord Sumption); T Pilkington, *Restitution for failure of a condition* (2023, unpublished DPhil thesis, University of Oxford) at 243–4.

31. A relevant objective basis for a payment can be factual or legal.[19] The failure of the legal basis for a transfer will suffice to ground restitution, even if the factual basis does not fail.[20] The question is whether there was ***a*** relevant basis that subsequently failed.

32. Determining the basis for a payment is, effectively, a question of construction. Similar principles apply as apply in the construction of contracts. In *Roxborough v Rothmans of Pall Mall Australia Ltd*, this Court approached the question of whether there had been a failure of basis in respect of part of a payment via the usual approach to contractual construction.[21]

33. Here, as explained above, Dr Gray made payments to Lavan that were, on an objective analysis, jointly understood to have been made on a basis that the retainers were legally enforceable, in the sense that Lavan was legally entitled to charge and retain the fees charged. That would cease to be the position if and to the extent that the charges did not survive a taxation. Accordingly, on the deemed taxation under the Settlement Deed, that basis ceased to be satisfied in relation to the $900,000 overpayment.

34. Contrary to the reasoning of the Court of Appeal, the issue was not whether the basis of the payment was *retrospectively* 'falsified' (CAB 40–1, 80–1, CA[19], [23], [192]–[193]): it is simply that the contemplated state of affairs — that the retainer was legally enforceable in respect of the firm's actual charges — failed to sustain itself.

35. In the present case, the Court of Appeal misconstrued the basis upon which the payments were made. It is not correct to say, as Buss P and Mitchell JA did (CAB 41, CA[23]), that 'the objective basis on which [Dr Gray] 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 [Dr Gray] was obliged to pay the invoiced amounts'. The equivalent was also true in *Roxborough* — the seller was entitled to issue invoices for the full amount, and the buyer was obliged to pay what the seller invoiced. Yet that did not exclude the existence of a failure of consideration. Both here and in *Roxborough*, the complaint about overpayment was a restitutionary claim about failure of basis. In *Roxborough*, it made no difference that the failure of basis — and hence the

---

19 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 526 [17] (Gleeson CJ, Gaudron and Hayne JJ).

20 J Edelman and E Bant, *Unjust Enrichment* (2nd edn, 2016), 262-3; C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (10th edn, 2022) [13-15]–[13-16].

21 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [18]-[24] (Gleeson CJ, Gaudron and Hayne JJ).

fact of overpayment — was revealed by a litigious process extrinsic to the contract,[22] or that the ground of that failure was a constitutional defect. Here, likewise, it was irrelevant that the fact of overpayment was revealed through the process of taxation of costs, or that the ground of the failure was the (accepted) unreasonable or unfair overcharging to the extent of $900,000.

36. The lower courts took an unduly narrow view of the relevant basis that failed, by applying a concept of 'transaction' that appeared to focus narrowly on contractual exchange (CAB 55, 72, 74, CA[86], [154], [157]). *Roxborough* demonstrates why that was in error: in that case, it did not suffice to characterise the 'transaction' merely as 'the sale of tobacco', and to say that *that* basis had not failed.[23] The same was true here: the fact that legal services were indeed provided was the start, but not the end, of the inquiry.

37. Any requirement that there be a *total* failure of basis was also satisfied. On a taxation, the amount due to a client represents the taxing officer's determination that some items of work, or the costs charged for work, were unfair or unreasonable, and that a portion of the fees paid must be refunded.[24] The value of the overpayment is thus identified, and hence apportionable, even if the costs charged for that work cannot be matched with particular payments, or parts of payments, made by the client to the solicitor (cf CAB 73, CA[157]). Here, the objective legal basis for each payment made by Dr Gray was the same: the legal enforceability of the retainers in respect of those costs. The effect of a deemed taxing officer's determination is that that basis for a defined portion of those payments, having an identifiable value, failed totally. In the events that happened, Lavan was legally entitled only to some $3.6m for the work it performed for Dr Gray. For the additional $900,000 that Dr Gray paid, he received nothing. There was a total failure of consideration for that portion of the fees paid.

38. There was thus no disconnect between the identified failure of basis, and the amounts to be restored. That is why it was wrong to say, as Vandongen JA did (CAB 72, 74, CA[154], [157]), that the $900,000 overpayment was only an 'indivisible portion' of

---

22 Cf *Ha v New South Wales* (1997) 189 CLR 465; *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 252 [239] (Mason P; Sheller and Hodgson JJA agreeing).

23 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 525 [16] (Gleeson CJ, Gaudron and Hayne JJ), 538–9 [60], 557 [104] (Gummow J).

24 See, e.g. *Pryles & Defteros (A Firm) v Green* (1999) 20 WAR 541 at 548 [26] (Parker J).

the total paid. To the contrary, the $900,000 was the identified value — referable to the process of taxation — of those payments received by Lavan that were *not* fair or reasonable. Claimants bringing a personal claim in unjust enrichment are not obliged to undertake an elaborate tracing exercise. What matters is that the defendant has 'received some benefit for which restitution must be made',[25] and that, as here, the value of the unjustified benefit received by the defendant can be identified.

39. As *Roxborough* itself illustrates, a payment made under a contract can be apportioned by acts or matters external to, and after the conclusion of, the contract. Here, the taxation of legal costs (effected by the Settlement Deed as a deemed taxation), gave rise to the relevant apportionment. What was thereby identified was a separable or apportionable sum — the $900,000 overpaid by the client and unjustly received by the firm — thus meeting any requirement that the failure of basis be 'total'.[26]

40. Equally, it was not right to suggest, as Vandongen JA did, that if Dr Gray's claim was correct, Dr Gray would be entitled to restitution of *all* the invoiced costs (CAB 79, CA[182]). That would only be so if the basis for payment of the full amount of legal costs failed. But that was not what occurred: the basis for Dr Gray's payments failed only to the extent of the $900,000 overpayment.

41. Similarly, the trial judge was wrong to fear that Dr Gray's claim would upset *all* settlements (CAB 14, SC[43]). Dr Gray's claim specifically concerned the restitution of overpaid sums of money in the context of a taxation of costs that was accepted to reveal unjust charging, but it was not generically about 'a right accruing earlier' (CAB 14, SC[44]). His claim said nothing about, and could not apply to, settlements generally. The Settlement Deed made clear that there was no compromise of Dr Gray's interest claim. The basis that failed did not concern the terms of any settlement agreement. Rather, the continued existence of the interest claim was expressly affirmed, so that it could be determined on its merits. And the basis that failed concerned a condition underlying the retainer agreement: namely, that Lavan could only retain those fees that were fairly and reasonably charged.

---

25 *Redland City Council v Kozik* (2024) 98 ALJR 544 at 579 [182] (Gordon, Edelman and Steward JJ).

26 *Roxborough* (2001) 208 CLR 516 at 527 [21] (Gleeson CJ, Gaudron and Hayne JJ), 557–8 [105]–[107] (Gummow J).

Second Ground of Appeal – Award of Interest

42. The second ground of appeal concerns an important point on which other ultimate appellate courts have expressed conflicting approaches: namely, whether there is a restitutionary right to interest under the general law, whether or not 'free-standing' of repayment of the principal sum, arising where the defendant has been enriched through the receipt of funds on a basis that has failed.

43. That question arises here in a situation that is common enough: (1) a recipient receives, and has the use of, a significant sum of money for a substantial period of time; (2) the basis on which the money was transferred fails, or is shown to be mistaken (or another ground for restitution arises); (3) whether or not court proceedings are commenced, the recipient acknowledges the legitimacy of the payer's claim, and refunds the principal sum; yet (4) a dispute remains about whether interest is also payable in addition to return of the principal sum. The courts have rightly held, in a variety of circumstances, that recipients in such circumstances should pay interest to the payer, notwithstanding the return of the principal sum, reflecting the proper measure of the defendant's enrichment.[27]

44. Interest is available at common law on a principal amount awarded by way of restitution, calculated from the date of payment, whether by reason of mistake,[28] judgments reversed on appeal,[29] or contracts that become ineffective through rescission[30] or discharge.[31] Consistent principle demands that interest be available at common law where the principal amount is repaid before judgment in the proceedings,[32] or where there is otherwise no extant claim for the principal amount at the time of commencing proceedings.[33]

---

27 See, e.g. *State Bank of New South Wales Ltd v Commissioner of Taxation* (1995) 62 FCR 371; *Heydon v NRMA Ltd (No 2)* (2001) 53 NSWLR 600; *Chow v Yang* [2010] SASC 96; *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70; *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627; *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561.

28 *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662.

29 *Heydon v NRMA Ltd (No 2)* (2001) 53 NSWLR 600.

30 *Alati v Kruger* (1955) 94 CLR 216, 230 (the Court).

31 *Sandeman v Wilson* (1880) 1 LR (NSW) Eq 1 at 11 (Hargrave J); *Chard v Willett* [1933] St R Qd 182 at 188 (EA Douglas J); *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446 at 461–2 (McPherson J); *Delbridge v Low* [1990] 2 Qd R 317 at 335 (Derrington J).

32 See, e.g. *State Bank of New South Wales v Commissioner of Taxation* (1995) 62 FCR 371; *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* (1997) 217 ALR 365.

33 See, e.g. *Sempra* [2008] 1 AC 561.

45. Where a recipient has gained — and the payer correlatively has been deprived of — the use-value of the principal sum, mere return of the principal sum alone does not reverse the full extent of the recipient's unjust enrichment. The restitutionary remedy must take account of the time value of money.

46. Here, the recipient stood in a fiduciary relationship to the payer as solicitor and client; and was an accounting party in equity.[34] A claim that a solicitor has, through unfair or unreasonable charging, wrongfully retained funds at the client's expense bears an obvious resonance to a claim for breach of the solicitor's fiduciary duties. The existence of a power to award interest in equity against a defaulting fiduciary is undoubted.[35] In addition, early authority in this Court establishes that where a common law claim for money had and received could — as here — also have been brought as an equitable claim, then interest is available on the sum due as money had and received.[36] The continuing vitality of equity's jurisdiction to award interest has itself been a basis for some judges on which to discern a wider principle.[37]

47. Nothing said by some members of this Court in *Commonwealth v SCI Operations Pty Ltd* controverts, as a matter of ratio, the availability of a 'free-standing' interest claim.[38] To the contrary, the potential availability of such a claim was affirmed by this Court in *Northern Territory v Griffiths*.[39] Critically, the present case — unlike *Griffiths* — *does* involve 'a claim for restitution of benefits unjustly obtained' and 'calculated to redress a defendant's unlawful enrichment through use of moneys which the defendant is regarded as having had and received to the use of the plaintiff'.[40]

48. The question has been considered by the final appellate court in the United Kingdom on two occasions. In 2007, in *Sempra Metals Ltd v Inland Revenue Commissioners*,[41] the House of Lords held that there is a restitutionary right to interest. However, that

---

34 *Makepeace v Rogers* (1865) 34 LJCh 396.

35 See, e.g. *Hungerfords v Walker* (1989) 171 CLR 125 at 148 (Mason CJ and Wilson J); *Wallersteiner v Moir (No 2)* [1975] QB 373 at 388, 397, 406.

36 *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.

37 *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561 at 629 [184] (Lord Walker); 652–3 [238]–[240] (Lord Mance).

38 (1998) 192 CLR 285 at 316–17 [72]–[75] (McHugh and Gummow JJ).

39 (2019) 269 CLR 1 at 77–9 [134]–[138] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

40 Ibid.

41 [2008] 1 AC 561.

position was rejected by the Supreme Court in 2018 in *Prudential Assurance Co Ltd v HM Revenue and Customs*.[42] These two decisions reflect different ways of analysing this question, and the law of unjust enrichment more generally. In *Sempra*, the House of Lords considered that an award of interest was available as a restitutionary remedy. A plaintiff who transfers money to the defendant necessarily also transfers the opportunity to use that money, and that opportunity is itself enriching. Interest from the date of payment is necessary to reverse the true value of the defendant's enrichment. The measure of the defendant's enrichment is the objective cost to the defendant of acquiring an equivalent sum of money in the market — that is, interest.[43] Without the award of interest, the defendant would receive a 'massive interest-free loan'.[44]

49. By contrast, in *Prudential* the Supreme Court considered that the opportunity to use money is not directly transferred to the defendant; and that a causal link between the defendant's gain and the plaintiff's loss is not sufficient to constitute a transfer of value. Accordingly, the opportunity to use the money is not an enrichment 'at the expense of' the plaintiff.[45] With respect, that reasoning ignores the time value of money, and takes an artificially narrow view of what it means for a benefit to be received by the defendant at the plaintiff's expense. It has been criticised by academic and other commentators.[46]

50. In situations like the present, the payer has been deprived of the very thing by which the recipient is unjustly enriched: namely, the use-value of the principal sum in the period it remains unrepaid. That is a straightforward expression of the broader idea that restitutionary remedies — including the award of interest — are available in a variety of recognised circumstances to reverse the unjust enrichment of a recipient at a payer's expense.

51. In many cases of failure of basis, the payment will be made at some time before the point at which the failure of basis is revealed. The proper starting point for interest in

---

42 [2019] AC 929.

43 *Sempra Metals* [2008] 1 AC 561 at 581–9 [17]–[41] (Lord Hope), 602–6 [101]–[119] (Lord Nicholls), 627–30 [178]–[187] (Lord Walker).

44 *Sempra Metals* [2008] 1 AC 561 at 602 [102] (Lord Nicholls).

45 *Prudential Assurance* [2019] AC 929 at 965–7 [68]–[75] (Lords Reed, Hodge and Mance).

46 Alexander YS Georgiou, 'In Defence of *Sempra*' [2019] *Lloyds Maritime and Commercial Law Quarterly* 38, 42-3; Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78(3) *Cambridge Law Journal* 521, 538-541; Charles Mitchell, 'End of the Road for the Overpaid Tax Litigation' (2017–18) *UK Supreme Court Year Book* 225, 239-41; K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (5th ed, 2025) at [2803], [2824] (who 'strongly disagree' with the decision).

such situations is the date of payment; not the date on which the basis fails. That is because the recipient has benefited from the use of the funds in the meantime.[47] The law's ability to identify the proper starting point for interest is a 'principled outworking of the unjust enrichment concept',[48] and is consistent with the award of interest in cases of, for example, rescission or the statutory avoidance of contracts,[49] or contracts discharged *in futuro*.[50] In each such case, the gap between payment and avoidance (or repayment) requires that interest be awarded from the earlier point.

52. While this Court has not yet explicitly addressed the issue,[51] there is a compelling argument in principle for recognising a common law power to award compound — rather than merely simple — interest under a restitutionary award; as has been recognised by a number of other courts.[52] In *Hungerfords v Walker*, this Court explicitly accepted the availability of compound interest in common law claims for damages. The Court said that compound interest is available as damages for breach of contract and negligence because simple interest does not reflect accurately the true extent of the plaintiff's loss.[53] The same reasoning applies here: compound interest should be available as restitution, because simple interest does not reflect accurately the true extent of the defendant's gain.[54] In a restitutionary claim, an award of interest reverses the defendant's unjust enrichment and is the measure of that enrichment. Interest is the objective value of the defendant's gain, namely, the opportunity to use the plaintiff's

---

47 J Edelman and D Cassidy, *Interest Awards in Australia* (2003) at [5.8]–[5.9].

48 K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (5th ed, 2025) at [2814].

49 *Alati v Kruger* (1955) 94 CLR 216 at 220, 230; *Elder's Trustee and Executor Co Ltd v Commonwealth Homes and Investments Co Ltd* (1941) 65 CLR 603. K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (5th ed, 2025) at [2821].

50 *Sandeman v Wilson* (1880) 1 LR (NSW) Eq 1 at 11 (Hargrave J); *Chard v Willett* [1933] St R Qd 182 at 188 (EA Douglas J); *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446 at 461–2 (McPherson J); *Delbridge v Low* [1990] 2 Qd R 317 at 335 (Derrington J).

51 Cf *Northern Territory v Griffiths* (2019) 269 CLR 1 at [113] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

52 *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561 at [42]-[49] (Lord Hope) [116]-[119] (Lord Nicholls) [184]-[187] (Lord Walker); *Idemitsu Queensland Pty Ltd v Agipcoal Australia Pty Ltd* [1996] 1 Qd R 26 at 32 (Fitzgerald P), 47 (Pincus JA), 52 (Davies JA); *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSC 76 at [245] (Sloss J). See also: K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (5th ed, 2025) at [2804], [2809], [2813], [2815], [2824].

53 (1989) 171 CLR 125 at 149 (Mason CJ and Wilson J).

54 J Edelman, 'Claims to Compound Interest in Restitution: Awakening the Sleeping Giant' (1999) 27 Australian Business Law Review 211 at 215; J Edelman and D Cassidy, *Interest Awards in Australia* (2003) at [5.5], [5.6].

money. That value is the defendant's saved expense of going into the market and acquiring an equivalent sum of money. As a matter of commercial reality, the defendant could only do so on terms that compound interest was paid. Only an award of compound interest completes, or perfects, the plaintiff's restitutionary claim.[55]

53. Given the jurisprudential basis for the right, this should be so irrespective of whether the Court's equitable jurisdiction is engaged. But if it matters, equity's auxiliary jurisdiction is also enlivened in the present circumstances. The origin of equity's auxiliary jurisdiction is said to be in the maxim 'Equity will not suffer a wrong to be without a remedy'.[56] It is founded on the 'demands of justice' and is available to allow a 'complete remedy' where the remedy available at common law is inadequate.[57] In the exercise of equity's auxiliary jurisdiction, the remedy of compound interest is available in a common law claim where the award would achieve these aims.[58] This will typically be so in a claim for restitution. Only an award of compound interest can effect full restitution, as the true measure of the defendant's gain. A plaintiff awarded only simple interest will not receive a just remedy.[59]

54. There are two further reasons why there should be an exercise of equity's auxiliary jurisdiction to award compound interest in this case. First, as noted above, Lavan owed fiduciary duties to Dr Gray. A long line of cases demonstrates equity's willingness to award compound interest against a defaulting fiduciary in the exercise of its exclusive jurisdiction.[60] Even in the absence of a claim for breach of fiduciary duty, the existence of the fiduciary relationship goes to the 'demands of justice' on which the auxiliary jurisdiction is founded. Lavan, who seeks to retain the benefit of what was in substance

---

55 K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (5th ed, 2025) at [2807], [2809], [2824].

56 McGhee et al, *Snell's Equity* (35th ed, 2025) at [5-002]–[5-005]; Meagher, Gummow & Lehane's Equity: Doctrines and Remedies (5th ed, 2015) at [3-010]–[3-025].

57 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 697 (Lord Goff); *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561 at [184]-[187] (Lord Walker), [236]-[240] (Lord Mance, dissenting in the result).

58 *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 695-7 (Lord Goff); *Sempra Metals Ltd v Inland Revenue* [2008] 1 AC 561 at [184]-[187] (Lord Walker), [236]-[240] (Lord Mance).

59 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 695-7 (Lord Goff) 720-4 (Lord Woolf); *Sempra Metals Ltd v Inland Revenue* [2008] 1 AC 561 at [184]-[187] (Lord Walker), [236]-[240] (Lord Mance).

60 See for example: *Wallersteiner v Moir* (No. 2) [1975] 2 QB 373 at 388 (Lord Denning MR) 397-9 (Buckley LJ) 406 (Scarman LJ); *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 316 (McHugh and Gummow JJ).

a 10-year interest-free loan of $900,000 from Dr Gray, was a solicitor who stood in a fiduciary position to its client. That should not be permitted. Secondly, Dr Gray has no statutory right to interest between the dates of payment of the Taxation Settlement Sum and the date of the Settlement Deed. Section 32(1) of the *Supreme Court Act 1935* (WA) has no application, as the nominal amount of the overpaid fees was repaid before the commencement of these proceedings so there was no judgment in respect of that sum.

55. Dr Gray's interest award should be calculated at the rates at which, objectively, Lavan could have borrowed the Taxation Settlement Sum in the market.[61] The best evidence of that cost is the Reserve Bank's interest rate tables, setting out the indicator lending rates for business lending on overdrafts.[62] Lavan is a business which, the Court may readily infer (and Lavan has never disputed), has structured its business so that borrowings occur pursuant to an overdraft facility.

56. As noted, on a taxation that results in a solicitor repaying fees to a client, the taxing officer has no statutory power to award interest from the date of payment.[63] But the absence of a statutory power to award interest does not, without more, mean that there is no general law (common law or equity) power to award interest, or that a right at general law to interest has been excluded. A statutory power to award *post*-judgment interest says nothing about the absence of any power to award *pre*-judgment interest.

57. First, this case does not involve any statutory scheme that expressly limits the circumstances in which interest is due on a sum to be repaid. Where there is such an express provision, then the statute will prevail,[64] but that is not this case. The statute is simply silent on the point. Indeed, the very existence of such explicit statutory schemes for interest to be calculated from the date of payment — especially concerning the repayment of overpaid tax — is a strong reason that this Court should not unduly confine the general law principles of unjust enrichment so far as the time-value of money is concerned. Statutory regulation, rather than the manipulation of the general

---

61 *Sempra Metals Ltd v Inland Revenue* [2008] 1 AC 561 at [50] (Lord Hope), [103], [116]-[119] (Lord Nicholls), [188] (Lord Walker); *Cornwall v Rowan (No 2)* [2005] SASC 122, [39] (the Court).

62 See affidavit of Andrew Gordon McDade sworn 16 May 2022, annexure AGM1 (ABFM at 129).

63 *Golden West Resources Ltd v Maxim Litigation Consultants* [2016] WASC 384; cf *Legal Practice Act 2003* (WA) s 240.

64 See, e.g. *Commonwealth v SCI Operations Pty Ltd*; *Qantas Airways Ltd v Commissioner of Taxation* (2001) 115 FCR 288; *Littlewoods Ltd v Revenue and Customs Commissioners* [2018] AC 869.

law — as, with respect, seems to have occurred in *Prudential Assurance* — is the proper means of avoiding concerns about 'fiscal chaos' or over-broad liability.

58. Second, the existence of statutory powers to award interest under s 32 of the *Supreme Court Act 1935* (WA) (and interstate equivalents) does not exclude the application of other statutory or non-statutory powers to award interest.[65] No negative implication arises from the positive grant of such statutory powers.

59. Third, and more particularly, the silence of the *Legal Practice Act* on the question of interest did not amount to a legislative exclusion (cf CAB 42, CA[24]).[66] The consumer-protective purposes of that legislation — which equally underly the general law regulation of the solicitor-client relationship — make it very unlikely that the legislature would, *sub silentio*, have preferred the interests of overcharging solicitors to those of their overpaying clients. There is nothing unusual about common law contractual or restitutionary remedies existing in interaction with a statutory scheme.[67] On the contrary:

(a) The statute here assumed the concurrent existence of general law remedies, most obviously — but not exclusively — in respect of the contract of retainer between solicitor and client.[68] The absence of a statutory power to award interest would prevent recourse to any general law power only if the statute in question expressly or impliedly excluded that power. Here, the *Legal Practice Act* did not do so. That the Act is silent on the question of interest for the period before the taxing officer's certificate says nothing about the client's right to restitutionary interest.

(b) The *Legal Practice Act* did not codify a client's right to recover overpaid fees from a solicitor. For one thing, the Supreme Court's inherent jurisdiction to order the repayment of excessive costs remained.[69] For the same reason, the Act

---

65 *Woolf v Snipe* (1933) 48 CLR 677 at 678 (Dixon J); *Hungerfords v Walker* (1989) 171 CLR 125 at 148 (Mason CJ and Wilson J); *Wallersteiner v Moir (No 2)* [1975] QB 373 at 388, 397, 406; *Landsal Pty Ltd (in liq) v REI Building Society* (1993) 41 FCR 421 at 427 (Keely, Burchett and Drummond JJ).

66 See, e.g. *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 539 [43]–[44] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

67 See, e.g. *Mann v Paterson Constructions* (2019) 267 CLR 560; *Building and Construction Industry (Security of Payment) Act 2021* (WA) s 55.

68 See, e.g. *Huntingdale Village Pty Ltd v Corrs Chambers Westgarth* (2018) 128 ACSR 168 at [143] (Martin CJ); *Pryles & Defteros (A Firm) v Green* (1999) 20 WAR 541 at 549–51 [28]–[30] (Parker J).

69 *Landsal Pty Ltd (in liq) v REI Building Society* (1993) 41 FCR 421 (Full Ct) at 427: 'The true rule is that a Court may exercise its inherent or implied powers in a particular case, even in respect of matters that

did not create a right to recover overpaid fees which had no counterpart in the general law. There is nothing in the legislative history of the Act to indicate any parliamentary intention to exclude general law rights.

(c) While one of course accepts that 'if there is a statutory right of recovery then that right will usually apply to the exclusion of any common law claim for restitution',[70] there is here no statutory right to interest for the period before the taxing officer's certificate. So, there is no question of the existence of a statutory right to recovery impliedly excluding a common law restitutionary right.

Part VII – Orders

10 60. The appellant seeks the following orders:

1. The appeal be allowed with costs.

2. The orders of the Court of Appeal made on 28 November 2024 be set aside, and in their place it be ordered that:

(a) Appeal allowed.

(b) The appellant pay the respondent's costs of the appeal to be assessed if not agreed on a party-party basis.

(b) Set aside the orders made by Justice Curthoys on 16 December 2022.

(c) In their place, order that:

(i) The defendant pay the plaintiff $1,450,680.82, being compound
20 interest on the sum of $900,000 for the period between 30 June 2008 and the dates of repayment of that sum.

(iii) The defendant pay the plaintiff simple interest on the amount of $1,450,680.82 pursuant to s 32 of the *Supreme Court Act 1935* (WA) at the rate of 6% from the dates of repayment of the sum of $900,000 to the date of judgment.

(iii) The defendant pay the plaintiff's costs of the proceeding.

---

are regulated by a provision of a statute or rules of Court, so long as it can do so without contravening any such provision.'

70 *Redland City Council v Kozik* (2024) 98 ALJR 544 at 573 [151] (Gordon, Edelman and Steward JJ).

Part VIII – Time Estimate

61. It is estimated that up to 2 hours will be required for the appellant's oral argument (including reply).

Dated 22 May 2025



	Jonathon Moore	Felicity Maher	James McComish
T	(03) 9225 8946	(08) 9460 5258	(03) 9225 6827
E	jpmoore@vicbar.com.au	fmaher@quaysidechambers.com	jmccomish@vicbar.com.au

ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
1.	*Building and Construction Industry (Security of Payment) Act 2021* (WA)	Version 00-e0-00 1 Feb 2024	s 55	Illustrative	Current
2.	*Legal Practice Act 2003* (WA)	Version 01-d0-04 1 Mar 2009	Part 1, Part 13	Act in force when Lavan provided legal services to Dr Gray	2006–2008
3.	*Supreme Court Act 1935* (WA)	Version 09-f0-02 3 Nov 2018	s 32	Act in force when Dr Gray commenced these proceedings	2018