



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: P7/2025  
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#### Important Information

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BETWEEN:

**BRUCE NATHANIEL GRAY**  
Appellant

and

**LAVAN (A FIRM)**  
Respondent

**APPELLANT'S OUTLINE OF ORAL SUBMISSIONS**

**Part I – Certification**

1. This outline is in a form suitable for publication on the internet.

**Part II – Outline**

**(1) Construction of the settlement agreement (ABFM70; ABFM 47)**

2. The legal effect of the settlement agreement was to put Dr Gray in the same position as any client who has a solicitor's bill of costs taxed; the result of that taxation revealing that the client has paid more than is assessed to be fair and reasonable, thus giving rise to a requirement for the solicitor to refund the overpaid amount: **AS[13], [20]–[24]**.

**(2) There was a failure of basis in respect of the overpaid fees**

3. There is nothing unusual in a plaintiff having alternative claims arising out of the same facts; whether in unjust enrichment, or a statutory claim. In particular, excessive costs may be recovered from a solicitor in a variety of ways: **AS[22], [59]**.

*Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at [198] (**JBA vol 5 tab 14**); *Redland City Council v Kozik* (2024) 98 ALJR 544 at [151] (**JBA vol 6 tab 24**); *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 316–17 (**JBA vol 4 tab 9**); *Woolf v Snipe* (1933) 48 CLR 677 at 678; *Mackowiak v Hagipantelis* [2015] NSWSC 1087 at [104]–[114]; *Legal Practice Act 2003* (WA) ss 240(3) and 243 (**JBA vol 1 tab 3**)

4. In the case of money paid pursuant to a contract, failure of basis is not limited to non-performance of a contractual obligation, although it may include that. The concept embraces payment for a purpose which has failed as, for example, where a condition has not been fulfilled, or a contemplated state of affairs has disappeared: **AS[30]–[36], Reply[4]**.

*Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [16] (**JBA vol 5 tab 17**)

5. Here: (1) the payments were made on a conditional basis – the condition being that the fees were subject to assessment by a court, and the right to retain the fees depended on any such assessment concluding that the amount charged was fair and reasonable; alternatively, (2) the payments were made on the basis of a state of affairs – the legal enforceability of the retainers – which failed to sustain itself in respect of a severable portion of the fees paid: **AS [25]–[30], [33], [41]**.
6. It makes no difference as a matter of principle if the obligation were originally enforceable and later became unenforceable, rather than being invalid from the outset; or if unenforceability of the contract is partial, rather than the entire contract being unenforceable: **AS [25]–[30], [31]–[34]**.

*David Securities Pty Ltd v Commonwealth Bank* (1992) 175 CLR at 381-2 (**JBA vol 4 tab 10**)

*Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256 (**JBA vol 5 tab 17**)

*Mann v Paterson Constructions* (2019) 267 CLR 560 at [75] (**JBA vol 5 tab 14**)

7. The legal enforceability of the obligation on the client to pay the fees paid to the solicitor is a state of affairs that is fundamental to the dealings between lawyer and client. That state of affairs failed to sustain itself.
8. The respondent's reference to 'contractual allocation of risk' is inapt: **RS[2], [45], Reply[2], [11]**.

*Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 236–9 (**JBA vol 5 tab 17**)

*Mann v Paterson Constructions* (2019) 267 CLR 560 at [64] (**JBA vol 5 tab 14**)

9. When a solicitor's costs are assessed not to be fair and reasonable in part, the client has not received consideration for the amount so assessed. That is because, for the legal services provided, the solicitor is found entitled only to the balance of the fees paid. That is an apportionable or separable part of the consideration: **AS[38]–[39]**.

*David Securities* (1992) 175 CLR at 383 (**JBA vol 4 tab 10**)

*Roxborough* (2001) 208 CLR 516 at [21], [107] (**JBA vol 5 tab 17**)

*Barnes v Eastenders Cash & Carry plc* [2015] AC 1 at [114]

**(3) An entitlement to interest arose; being compound interest**

10. The purpose of a claim in unjust enrichment is to restore the parties to their pre-transfer position. Interest is an essential component of restitution, not an additional award: **AS[42]–[45]**.

*Hungerfords v Walker* (1989) 171 CLR 125 at 148–152 (**JBA vol 5 tab 12**); *Menelaou v Bank of Cyprus Plc* [2016] AC 176 at [23]; *Heydon v NRMA Ltd (No 2)* (2001) 53 NSWLR 600 (**JBA vol 6 tab 21**)

11. There is no statutory impediment to recognising that general law entitlement: **AS[47], [54], [57]–[59], Reply[8], [15]**.

*Hungerfords v Walker* (1989) 171 CLR 125 at 148–9 (**JBA vol 5 tab 12**)

12. Of the competing approaches, the analysis of the minority in *Westdeutsche* and in *Sempra* is to be preferred to that in *Prudential*: **AS[48]–[49], [52]–[54], Reply[16]–[17]**.

*Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 672, 691, 696–7, 720 (**JBA vol 6 tab 26**); *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561 at [32]–[33], [41], [52], [92], [102], [112], [114], [151], [178]–[183], [231], [240] (**JBA vol 6 tab 25**); *Prudential Assurance Co Ltd v HM Revenue and Customs* [2019] AC 929 at [69]–[74] (**JBA vol 6 tab 23**)

13. In situations of failure of basis, interest is awarded from the date of payment, notwithstanding that the cause of action arose later<sup>1</sup>: **AS[51], Reply[13]**.

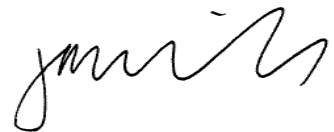
Dated 13 August 2025



Jonathon Moore



Felicity Maher



James McComish

<sup>1</sup> For cases involving the recovery of payments made under a contract that became unenforceable through termination or rescission, with interest calculated from the date of payment, see eg *York Buildings Co v MacKenzie* (1795) 3 ER 432, 450 (HL); *Newbigging v Adam* (1886) 34 Ch D 582, 585 (CA) (affirmed: (1888) 13 App Cas 308); *Re Metropolitan Coal Consumers' Association* [1892] 3 Ch 1, 17 (CA); *Sibley v Grosvenor* (1916) 21 CLR 469, 476 (Griffith CJ); *Brown v Smitt* (1924) 34 CLR 160, 173 (Isaacs and Rich JJ); *Chard v Willett* [1933] St R Qd 182, 188; *Elder's Trustee and Executor Co Ltd v Commonwealth Homes and Investment Co Ltd* (1941) 61 CLR 603, 620 (the Court); *Alati v Kruger* (1955) 94 CLR 216, 230 (the Court); *George Wimpey Canada Ltd v Focal Properties Ltd* (1975) 73 DLR (3d) 387 (Ontario CA); *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446, 457, 461–2; *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378 (Full Ct) 392 (the Court); *Chow v Yang* [2010] SASC 96, [33] (Nyland and Gray JJ; Vanstone J agreeing).