



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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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

BRUCE NATHANIEL GRAY

Appellant

and

10

LAVAN (A FIRM)

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

20 *Total failure of consideration*

1. The settlement deed did not render the previous retainers, and the payments made, invalid or unenforceable. It did not establish that the respondent was not entitled to the settlement sum prior to the dates for payment under the settlement deed: **RS [5], [23], [52]; [55]**. The charging of fees was not prohibited by statute and was permitted under the parties' contracts of retainer which were not rendered ineffective at some earlier point in time: **CA [9]-[22]**. There is no claim against the respondent as a fiduciary (cf **AR [2]**) and no claim against it to account.

2. Unjust enrichment requires more than an ineffective contract: **RS [8], [55]**. *Redland* (2024) 98 ALJR 554 (**Tab 24**) has reaffirmed the taxonomical function and the two-
30 staged approach to such claims. A failure of consideration in this context means a

“failure to sustain itself of the state of affairs contemplated as a basis for the payments the appellants seek to recover”: RS [9], [22], [27].

3. A contract (even if unenforceable) not rescinded, or terminated for breach, is a defence to a restitutionary claim if the defendant has wholly or substantially fulfilled its contractual obligations: RS [33], [35], [45]. The contract continues to provide a “juristic reason” for the transfer and retention of “use value”.
4. The asserted basis, that the respondent was entitled to charge and retain, is not made out as it was always known that some amounts could be ordered to be repaid and performance was received: RS [16]-[18], [27]-[28]. Payment was received
10 unconditionally under the contracts: RS [12], [19]-[21]. This was not an advance payment: RS [15]-[16], [19]-[21]. No contractual right to repayment would arise should a taxation not occur: RS [15]. Completion of a taxation is contemplated by the agreement of the parties. It follows that the settlement could not cause the basis for the payments (or the contract) to fail.
5. Payment was subject to a taking of account pursuant to the exercise of statutory rights to have the account itemised (s 231) or (if detailed items were provided) taxed (s 232): RS [11]-[12], [17]; CA [46]-[47]; cl 5 (ABFM at 15). The contract expressly stipulated circumstances that must occur in order to impose a legal obligation on one party to pay, and so necessarily excludes any obligation to pay in the absence of those
20 circumstances: RS [14]-[16], [45]-[47].
6. To recover any payment it must be a divisible sum attributable to a divisible consideration that failed: RS [21], [29]-[33]; CA [185]-[191]. The settlement sum represented an indivisible portion of the total of all payments made over the relevant period: RS [33]-[35], [52]; CA [155]-[157]. There was nothing about the parties’ dealings capable of establishing the existence of any severable parts of those payments for which refund is claimed: RS [31]; CA[208]-[209]. The settlement deed did not falsify the basis on which Dr Gray made any specific or individual payment: RS[34]; CA[193]-[196].

Interest

- 30 7. There cannot be an obligation to pay unless something that might be labelled “enrichment” is at the claimant’s expense. The relevant benefit is the money received: RS [54]-[55].

8. *Sempra* [2008] 1 AC 561 (**Tab 25**) is distinguishable. It recognised a right to interest on a common law claim for mistaken payment in respect of “advance corporation tax” payments made early that could no longer be recovered: **RS [49]**. Interest under any right to interest on a plaintiff’s claim for money had and received does not begin to run unless and until retention by the defendant becomes unjust: **RS [49], [52], [57]**.
9. There is no scope in this case for a restitutionary right to interest bearing in mind the statutory right to repayment on issue of a certificate of taxation: **RS [41]-[42]; CA [24], [224]-[235]**.
10. The parties’ agreement for payment on account does not entail the running of interest from any date prior to the final taking of account: **RS [47]**.
11. There is no equitable jurisdiction to award compound interest absent fraud or pleaded breach of fiduciary duty. No question of compound interest to ensure profits are disgorged, or of equity’s auxiliary jurisdiction, arises – the claim is for interest *as* restitution not interest *on* a common law claim: **RS [59]-[60]**.

Dated: 13 August 2025



Bret Walker