

**SHORT PARTICULARS OF CASES**  
**APPEALS**

**PERTH**  
**AUGUST 2025**

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**BED BATH 'N' TABLE PTY LTD (ACN 005 216 866) v**  
**GLOBAL RETAIL BRANDS AUSTRALIA PTY LTD**  
**(ACN 006 348 205) (M32/2025)**

Court appealed from: Full Court of the Federal Court of Australia  
[2024] FCAFC 139

Date of judgment: 31 October 2024

Special leave granted: 3 April 2025

The appellant and the respondent are both homewares retailers. The appellant has traded under the trade mark 'BED BATH 'N' TABLE' ("BBNT") since 1976, specialising in 'soft' homewares, which includes bed linen and bathroom products. The respondent has operated its retail stores under various trade marks incorporating the word 'House' since 1978, selling primarily 'hard' homewares, which includes kitchenware. In May 2021, the respondent began operating a new soft homewares business using the 'House BED & BATH' ("House B&B") mark.

The appellant brought a proceeding against the respondent, alleging that by using the House B&B mark it had infringed three of its registered BBNT trade marks in contravention of the *Trade Marks Act 1995* (Cth), and also engaged in misleading or deceptive conduct contrary to the *Australian Consumer Law* ("the ACL")<sup>1</sup> and the tort of passing off.

On 14 December 2023, Rofe J held that whilst not infringing on the appellant's trade marks, the respondent's use of the House B&B mark was misleading or deceptive within the meaning of the ACL, and the respondent had engaged in the tort of passing off. Her Honour found that while the words 'Bed' and 'Bath' were descriptively used, the appellant had a strong reputation as the only retailer in the soft homewares market using the words 'Bed' and 'Bath' in that order, and that some consumers would question if there was some kind of association between the two brands, and applied *Australian Woollen Mills Pty Ltd v F S Walton & Co Ltd* (1937) 58 CLR 641 ("*Woollen Mills*"). In *Woollen Mills*, it was held that if a mark is chosen for the purpose of appropriating part of the trade or reputation of a rival, it should be presumed to be 'fitted for purpose', and therefore likely to deceive or confuse. Rofe J held that the respondent's conduct in adopting the words 'Bed & Bath' was done with either intention or a wilful blindness as to the possibility of confusion.

The respondent successfully appealed to the Full Court of the Federal Court (Nicolas, Katzmann and Downes JJ). On 31 October 2024, the Full Court set aside the declarations and injunctions ordered, finding that the primary judge had erred in considering the claim under the ACL by not giving effect to the finding that the appellant had no independent reputation in 'BED BATH' or 'BED & BATH'. The Full Court held that this was inconsistent with the primary judge's conclusion that the use of the House B&B mark was likely to lead ordinary and reasonable consumers to believe that the store was associated in some way with stores that operated under the BBNT name. Further, the Full Court held that the words 'bed' and 'bath' were common descriptive words used to signal bedroom or bathroom products, and that it was very unlikely for a consumer to draw the

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<sup>1</sup> As contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

inference that there was some association between the two businesses. The Full Court also considered the intentions of representatives of the respondent were not useful in determining whether misleading or deceptive conduct had been engaged in, finding that knowing that some confusion will occur is not the same as intending it to occur, since trade names that include descriptive words frequently give rise to such confusion.

Before this Court, the appellant firstly raises the issue of what is the role of reputation established through longstanding use of a mark in considering claims for misleading or deceptive conduct under the ACL or claims of passing off; and secondly, how the '*fitted for purpose test*' in *Woollen Mills* applies in assessing such claims and whether wilful blindness is sufficient. The respondent contends that it was appropriate for the Full Court to conclude that the appellant had no reputation, nor is entitled to a monopoly, in the descriptive words 'bed' and 'bath', and therefore the use of those words in an obviously different trade mark could not mislead or deceive. The respondent also submits that there is no '*fitted for purpose test*', and rather *Woollen Mills* merely provides that where a trader who is accused of misleading or deceptive conduct did intend to mislead or deceive consumers, the Court may take that into account, but that wilful blindness is not enough.

The grounds of appeal are:

- The Full Court erred (at AJ [79] – [84], [97] – [107]) in overturning the Primary Judge's assessment of reputational based claims of passing off and misleading or deceptive conduct under section 18 of the ACL, which were made in light of findings (unchallenged on appeal: AJ [41]) as to the appellant's reputation which included, inter alia, its extensive reputation in its brand 'BED BATH 'N' TABLE' accumulated over 40 years' use in the soft homewares market.
- The Full Court erred (at AJ [86] – [89]) in overturning the Primary Judge's reliance on the evidence of representatives of the Respondent which she found (unchallenged on appeal) was '*wilfully blind*' and therefore was a reliable and expert opinion in the assessment of whether the Respondent's conduct was likely to mislead or deceive within the meaning of the '*fitted for the purpose*' test articulated in *Australian Woollen Mills Pty Ltd v F S Walton & Co Ltd* (1937) 58 CLR 641 at 657.

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**GRAY v LAVAN (A FIRM) (P7/2025)**

Court appealed from: Supreme Court of Western Australia  
Court of Appeal  
[2024] WASCA 147

Date of judgment: 28 November 2024

Special leave granted: 3 April 2025

From about 4 April 2006, the respondent law firm provided legal services to the appellant in relation to litigation he was involved in, in the Federal Court of Australia (“FCA”) and the Supreme Court of Western Australia (“WASC”). The respondent rendered several invoices to the appellant for the legal services provided in respect of the FCA and WASC proceedings. There was no written costs agreement between the appellant and the respondent in relation to the provision of any of those legal services. However, there were three, non-written, informal retainer agreements in place.

Between 2006 and 2008, the appellant paid \$4,477,068.33 in fees to the respondent firm for the legal services provided. Disputes arose between the parties about the provision of the legal services, including disputes about the invoices. The parties agreed that the respondent would file bills of costs for taxation in the WASC, in an attempt to settle these disputes. The bills related to all of the work that was carried out by the respondent for the appellant. Sometime after the filing of the bills, the parties entered into a settlement deed (“the 2018 Settlement Deed”). Under the terms of the 2018 Settlement Deed, the taxation did not proceed. The respondent agreed to pay the appellant a total of \$900,000 (“the Taxation Settlement Sum”), in three tranches of \$300,000. It was expressly agreed by the parties that the Taxation Settlement Sum represented the amount that would have been ordered to be refunded to the appellant if there had been a taxation of the bills filed. By the terms of the 2018 Settlement Deed, the parties acknowledged that the appellant claimed he was entitled to, and had a claim to interest on, the Taxation Settlement Sum. The parties also agreed that the respondent disputed that claim.

The 2018 Settlement Deed provided for the appellant to commence the primary proceedings in which he claimed interest on the Taxation Settlement Sum. The appellant’s claim for interest was premised on him establishing a restitutionary claim for repayment of the Taxation Settlement Sum, on the basis that the respondent had been unjustly enriched at the appellant’s expense because there was a failure of basis (sometimes referred to as a total failure of consideration) in relation to the appellant’s payment of the Taxation Settlement Sum. The appellant contended that the respondent had been unjustly enriched by its retention of the Taxation Settlement Sum, and separately, by the opportunity to use the Taxation Settlement Sum from the dates the appellant made payments of the invoices to the date the respondent paid the final tranche of the Taxation Settlement Sum. If this restitutionary claim was established, the appellant claimed that the right to restitution included a right to compound interest either as a matter of common law or in equity.

The primary judge held that the appellant had no restitutionary claim for the Taxation Settlement Sum on grounds of failure of basis or otherwise, and that the claim for interest necessarily failed for that reason. Accordingly, the primary judge dismissed the appellant's claim to interest. The primary judge also held that, even if he was wrong in that conclusion, the appellant had no restitutionary claim to interest and that, even if the appellant had an entitlement to interest, there would be no basis for payment of compound interest. The appellant appealed the decision of the primary judge to the Court of Appeal of the WASC.

Buss P and Mitchell JA of the Court of Appeal considered 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. The fact the parties agreed under the 2018 Settlement Deed that the respondent would pay the Taxation Settlement Sum to the appellant, and that the Taxation Settlement Sum represented the amount that would have been ordered to be refunded to the appellant by the respondent if there had been a taxation of the bills, does not falsify the basis on which the payments were made. Accordingly, Buss P and Mitchell JA determined that the appellant's claim for restitution on the ground that the basis for payment of the invoices ceased to exist in relation to the Taxation Settlement Sum on the parties' entry into the 2018 Settlement Deed is not established, and the absence of a provision for interest in the *Legal Practice Act 2003* (WA) (repealed) was a legislative choice, rather than a gap to be filled by the law of restitution.

Vandongen JA of the Court of Appeal determined that the respondent was not unjustly enriched by its receipt and retention of the Taxation Settlement Sum for two reasons: (1) the appellant failed to establish any payment, or any severable part of a payment, the consideration or basis for which could be said to have totally failed; and (2) the appellant failed to establish that his payments to the respondent were made on the basis he alleged. Further, even if the respondent was unjustly enriched by the Taxation Settlement Sum, the appellant was not entitled to restitution of interest on that sum. That is because such a claim would subvert the statutory scheme, elements of which were the foundation of the claim. Accordingly, the Court of Appeal dismissed the appeal with costs.

On 3 April 2025, the appellant was granted special leave to appeal to the High Court from the whole of the judgment of the Court of Appeal.

The grounds of appeal are:

- The Court of Appeal erred in holding that there had been no failure of basis in respect of \$900,000 excessively charged by the respondent solicitors and paid by the appellant client, and that accordingly the respondent was not unjustly enriched by its receipt of that sum.
- The Court of Appeal erred in holding that the respondent's retention and use of the sum excessively charged for a period of some ten years between the dates of payment and the dates of repayment did not give rise to any obligation to pay interest to the appellant.