

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, JAGOT AND BEECH-JONES JJ

BRUCE NATHANIEL GRAY

APPELLANT

AND

LAVAN (A FIRM)

RESPONDENT

Gray v Lavan (A Firm)

[2025] HCA 42

Date of Hearing: 13 August 2025

Date of Judgment: 5 November 2025

P7/2025

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation

J P Moore KC with F J Maher and J A G McComish for the appellant
(instructed by Williams + Hughes)

B W Walker SC with S G Stewart and A M Khadra for the respondent
(instructed by Popperwell & Co)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Gray v Lavan (A Firm)

Restitution – Unjust enrichment – Failure of basis or condition – Interest – Where client engaged law firm under retainer agreements – Where retainer agreements imposed binding obligations on client to pay legal costs – Where law firm had no right to retain payment under *Legal Practice Act 2003* (WA) if, and to extent that, payment was found on taxation to exceed amount authorised by certificate from taxing officer – Where, prior to taxation, client and law firm reached settlement – Where settlement deed required repayment of sum as "amount that would have been ordered to be refunded" if there had been taxation – Where settlement deed left open option of litigating further claim for interest on settlement sum – Whether interest available on settlement sum – Whether there had been failure of basis or condition for client's payments of invoices issued under retainer agreements – Whether *Legal Practice Act* formed comprehensive regime for recovery of principal sum paid for legal costs over amount certified by taxing officer, and interest on that sum, to the exclusion of any common law restitutionary claim.

Words and phrases – "basis or condition", "bill of costs", "compound interest", "condition subsequent", "conditional obligation", "deemed taxation", "failure of basis or condition", "fair and reasonable", "interest", "legal costs", "no juristic reason", "no justification", "principal", "restitution", "retainer agreement", "simple interest", "statutory interest", "taxation certificate", "unjust enrichment".

Legal Practice Act 2003 (WA), ss 221, 222, 229(a), 231, 232, 235, 240, 242, 243.

Legal Profession Act 2008 (WA), ss 2(b), 598, 616(1).

Legal Profession Uniform Law Application Act 2022 (WA), s 260.

Supreme Court Act 1935 (WA), s 32.

GAGELER CJ, GORDON, EDELMAN, JAGOT AND BEECH-JONES JJ.

Introduction

1 Legal costs were paid by the appellant, Dr Gray, for work done by the respondent law firm, Lavan, under retainer agreements. The agreements imposed binding obligations upon Dr Gray to pay those costs. Under the *Legal Practice Act 2003* (WA), Lavan had no right to retain any part of any payment if, and to the extent that, the payment was found on a taxation to exceed the amount authorised by a certificate from a taxing officer.

2 Prior to a taxation of costs, in 2018 Dr Gray and Lavan reached a settlement. The settlement deed required repayment by Lavan of \$900,000 as "the amount that would have been ordered to be refunded" to Dr Gray if there had been a taxation. The parties agreed to leave open the option of litigating the question of whether Dr Gray had a claim against Lavan for interest on the \$900,000. Dr Gray commenced proceedings, submitting that Lavan was unjustly enriched by the opportunity to use the \$900,000 over the period from payment until repayment due to the failure of the basis or condition upon which that \$900,000 had been paid. Dr Gray claimed an entitlement to interest (including compound interest) over that period.

3 The primary judge and the Court of Appeal of the Supreme Court of Western Australia rejected Dr Gray's claim for interest (whether compound or simple interest). That conclusion was correct. There is a strong basis to conclude, as Dr Gray submitted in this Court, that as a matter merely of the agreement of the parties, the retainer agreements included a condition subsequent to the effect that Lavan would have no right to retain the amount of any payment to the extent that the payment was more than that authorised by a taxation under the *Legal Practice Act*. Be that as it may, however, the provisions of the *Legal Practice Act* formed a comprehensive regime for recovery of the principal sum paid for legal costs over the amount certified by a taxing officer, and interest on that sum, to the exclusion of any common law claim for restitution. Those provisions did not provide for interest to be payable by a law firm on those excess amounts for the period prior to the grant of a certificate. And those provisions left no room for a common law restitutionary claim for principal or interest consequent upon such excess amounts. The settlement deed aimed to replicate the effect of a taxation pursuant to those provisions and did not create any restitutionary claim.

Gageler CJ
Gordon J
Edelman J
Jagot J
Beech-Jones J

2.

Background

4

The facts from which this dispute arose are uncontroversial. In 2005, the appellant, Dr Gray, retained a law firm, Bennett & Co, to act for him in Federal Court of Australia proceedings against the University of Western Australia (WAD 292). Bennett & Co charged Dr Gray for work done under a written costs agreement. The written costs agreement between Dr Gray and Bennett & Co provided for matters including the hourly rates at which fees would be calculated and various arrangements with respect to billing. The agreement also provided that:

"You must pay for [Bennett & Co's] services in accordance with invoices sent by [Bennett & Co] even though not all of the legal services referred to in Item 1 of the Schedule have been performed.

...

Accounts are rendered on a regular basis, usually monthly. Each account rendered to you by [Bennett & Co] entitles you to exercise any of your statutory rights either to have the account itemised or taxed and you must do so within 30 days of receipt of each account.

[Bennett & Co] acknowledges your right to require [Bennett & Co] to itemise each account for taxation even if you decide to exercise your statutory rights only on receipt of the final account issued by [Bennett & Co]."

The covering letter to Dr Gray accompanying the written costs agreement provided:

"You should be aware that the ***Legal Practitioners Act***^[1] gives you the right to have the Costs Agreement and our invoices reviewed for their fairness and reasonableness even though you have signed the Costs Agreement."

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In March 2006, Bennett & Co ceased its business of providing legal services. In April 2006, Lavan employed the former principals and employees of Bennett & Co in its practice. This included Mr Bennett. Shortly after Lavan had

1 The *Legal Practice Act 2003* (WA) applied at this time. A transitional provision of the *Legal Profession Act 2008* (WA), s 616(1), later continued the application of the relevant provisions of the *Legal Practice Act 2003* (WA). See below at [16].

3.

employed the former principals and employees of Bennett & Co, Dr Gray engaged Lavan to perform legal work in relation to the Federal Court proceedings as well as two separate proceedings in the Supreme Court of Western Australia (CIV 2022 and CIV 2275). Between 1 August 2006 and 29 June 2008, Dr Gray paid Lavan for the provision of legal work.

6 Although the legal work performed by Lavan included work on the same Federal Court proceedings for which Bennett & Co had performed work under a written costs agreement, the legal work done for Dr Gray by Lavan was not performed under a written costs agreement. Nevertheless, there was no dispute at trial or on appeal that the retainer agreements between Dr Gray and Lavan ("the Retainer Agreements") included terms, established orally or by conduct, that: (i) Lavan would provide legal services to Dr Gray; (ii) Lavan would charge Dr Gray on the same basis that Dr Gray had been charged by Bennett & Co; and (iii) Dr Gray would pay Lavan in accordance with invoices rendered by Lavan. Lavan invoiced Dr Gray for the legal services that it provided. Between around September 2006 and 29 June 2008, Dr Gray paid those invoices by a number of separate payments. The total of those payments was \$4,353,707.98 for the Federal Court proceedings and \$123,360.35 for the two Supreme Court proceedings. Disputes arose between, on the one hand, Dr Gray and, on the other hand, Mr Bennett and Lavan. The disputes relevantly concerned the payment of Lavan's invoices, and the taxation of Lavan's fees and disbursements.

7 In March 2015, Dr Gray, Mr Bennett, and Lavan entered a settlement deed which resolved all disputes between them except for a dispute about particular bills of costs concerning the three sets of proceedings. The parties to the 2015 settlement deed anticipated that the dispute about the bills of costs would be resolved by a taxation of the disputed bills of costs in the Supreme Court of Western Australia. It seems to have been assumed that the taxation would not merely be of the costs of the two proceedings in the Supreme Court but also of the costs of the proceedings in the Federal Court. It was an agreed fact at trial that around 29 October 2015, Lavan filed the bills of costs for taxation in the Supreme Court of Western Australia.

8 No taxation of any of the bills of costs took place. Instead, on 13 July 2018, Dr Gray's application for taxation was compromised by a deed of settlement. The 2018 settlement deed recited that the parties "agreed to settle all remaining disputes between them other than the Interest Dispute and how the Interest Dispute is to be litigated or resolved".

9 The 2018 settlement deed included terms in cl 2 (read with the definitions in cl 1.1) for payment by Lavan to Dr Gray of a "Taxation Settlement Sum" of

Gageler CJ
Gordon J
Edelman J
Jagot J
Beech-Jones J

4.

\$900,000, inclusive of costs and disbursements. Clause 2 provided for that sum to be paid in three instalments of \$300,000 and for the obligation expressed to be "without otherwise making any admissions" and subject to cl 3 (dealing with the interest dispute). The final instalment of \$300,000 was to be paid within six months of the date of execution of the 2018 settlement deed.

10 The 2018 settlement deed defined "Interest Dispute" in cl 1.1 as the dispute between the parties referred to in cl 3.1. Clause 3.1 provided:

"Acknowledgments

The Parties acknowledge that:

- (a) the Taxation Settlement Sum represents the amount that would have been ordered to be refunded to Gray by Lavan if there had been a taxation of the Bills;
- (b) the Taxation Settlement Sum does not include interest;
- (c) Gray claims that he is entitled to and therefore has a claim to interest on the Taxation Settlement Sum;
- (d) Lavan disputes that it has any liability to pay interest to Gray on the Taxation Settlement Sum; and
- (e) the issue whether Gray has a claim to interest on the Taxation Settlement Sum remains in dispute between the Parties."

11 By cl 3.2 (read with the definitions in cl 1.1), the parties agreed that, at any time prior to the "Sunset Date" of six months after the 2018 settlement deed took effect, Dr Gray "may commence the Interest Dispute Action" (defined to mean "an action in the Court to litigate the Interest Dispute") but that if that action were not commenced within that six-month period then Lavan would have no liability to Dr Gray for the Interest Claim. By cl 12, the deed took effect upon the parties' exchange of dated and signed counterparts of the deed, which occurred on or about 13 July 2018.

12 "Interest Claim" was defined very broadly as "any allegation, debt, cause of action, liability, claim, contribution, indemnity, proceedings, suit or demand of any nature, whether present or future, fixed or unascertained, actual or contingent, and whether at law, in equity, under statute or otherwise that Gray has against Lavan to recover interest on fees paid by Gray to Lavan that has been agreed are refundable by Lavan to Gray".

5.

13 Clause 3.3 provided that if an Interest Dispute Action were commenced
"(a) then the net amount in legal fees which Lavan would have been obliged to
refund to Gray had there been a taxation is the Taxation Settlement Sum;
(b) the Taxation Settlement Sum is the amount on which Gray claims that interest
is to be calculated for the purposes of the Interest Dispute Action; (c) for the
purposes of the Interest Dispute Action it is agreed that the date of the taxation at
which the Taxation Settlement Sum would have been ordered to be refunded to
Gray by Lavan is the date the final tranche of the Taxation Settlement Sum is paid".
The final tranche of the Taxation Settlement Sum was paid on 13 January 2019.

14 Within the six months contemplated by the 2018 settlement deed, on
21 December 2018, Dr Gray commenced proceedings in the Supreme Court of
Western Australia by writ of summons to recover interest on the \$900,000. In the
Supreme Court proceedings concerning the interest, Dr Gray pleaded, and Lavan
admitted, that "the effect of the entry into the 2018 Settlement Deed was that the
parties agreed to proceed ... as if there had been a taxation of the Bills [and] on the
basis that a taxing officer had certified that Dr Gray had overpaid the Taxation
Settlement Sum to Lavan".

15 Although Dr Gray had made various payments to Lavan, the litigation was
conducted on the simplified basis that, for the purposes of the claim to interest, all
payments had been made on 30 June 2008. Dr Gray claimed compound interest,
or alternatively simple interest, on the \$900,000 over the period from 30 June
2008, which was the simplified date of payment of the fees to Lavan, until
13 January 2019, which was the date of payment of the final tranche of the
\$900,000 and the date at which it was agreed that Lavan should be deemed to have
been required by a taxation to repay \$900,000.

The relevant statutory provisions concerning legal costs

16 At the time of the Retainer Agreements between Dr Gray and Lavan (and
also at the time of the payments under those Retainer Agreements, the last of which
was made on 29 June 2008) the relevant legislation in Western Australia was Pt 13
of the *Legal Practice Act*. Although the *Legal Practice Act* was repealed on
1 March 2009,² a transitional provision of the new legislation continued the

2 *Legal Profession Act 2008* (WA), s 598, read with s 2(b) and *Western Australian Government Gazette*, No 30, 27 February 2009 at 511. The *Legal Profession Act 2008* (WA) was itself repealed by the *Legal Profession Uniform Law Application Act 2022* (WA), s 260.

operation of Pt 13 of the *Legal Practice Act* in circumstances where, as here, "the client first instructed the law practice in the matter before [1 March 2009]".³

17 Part 13 of the *Legal Practice Act* was entitled "Costs". Division 3 of Pt 13 was concerned with "Taxation and recovery of costs". Some provisions of Div 3 were concerned only with written costs agreements,⁴ but Div 3 also covered bills of costs issued pursuant to unwritten costs agreements, such as the Retainer Agreements. The various time requirements in Div 3 were subject to the power of a taxing officer to enlarge time.⁵

18 Section 231(1) provided that a "legal practitioner must include in each bill of costs for a lump sum" a notice that provided:

"Within 30 days of receipt of this account you may require me by notice in writing to provide to you an itemised bill of costs the subject of this account. Within 30 days of receiving an itemised bill of costs, you may require me by notice in writing to submit the bill of costs to a taxing officer of the Supreme Court for review of the amount of costs charged to you, the subject of this account."

19 Where a bill of costs was provided with detailed items, s 232(1) provided that the legal practitioner must include a notice to the person charged in the following form:

"Within 30 days of receiving this account you may require me by notice in writing to submit the bill of cost[s] to a taxing officer of the Supreme Court for review of the amount of costs charged to you, the subject of this bill of costs."

20 Section 232(3) empowered a person charged with a bill of costs that contains detailed items to serve upon the legal practitioner, within 30 days of service of that bill, a written notice of intention to have the bill taxed and, upon service of that notice, to have the bill taxed by a taxing officer. Section 240 governed the approach to be taken on a taxation as follows:

3 *Legal Profession Act 2008* (WA), s 616(1).

4 *Legal Practice Act 2003* (WA), s 235, read with the defined term "costs agreement" in s 221.

5 *Legal Practice Act 2003* (WA), s 229(a).

7.

"Certification, interest, amount, how recovered

- (1) The taxing officer must certify in writing the amount at which a bill of costs, and the costs of and incidental to the taxation of the bill of costs, are respectively allowed by the taxing officer.
- (2) A certificate under subsection (1) is binding and conclusive on both parties.
- (3) A certificate under subsection (1) bears interest, and may be enforced by either party against the person liable to pay, as if it were a judgment of the Supreme Court for the payment of the amount mentioned in the certificate."

21 Section 242 provided for the Supreme Court's power to review the taxation of a bill of costs, with an order made upon review to be enforceable in the same manner as the certificate of a taxing officer. Section 243 was concerned with the restitution of amounts paid which exceeded the amount allowed by the taxing officer:

"Overpayments to be returnable

If a bill of costs is taxed under this Division and, as a result of that taxation, the amount which has been paid or deducted in respect of that bill is more than the amount authorised by the taxation, to the extent of the excess, the person charged has a claim for repayment which may be certified and enforced under section 240 as though allowed under that section."

The proceedings and decisions in the Supreme Court and the Court of Appeal

22 The basis of Dr Gray's claim for compound interest in the courts below was clarified as the proceedings progressed, although at all stages his claim has relied heavily upon the provisions of the *Legal Practice Act*.

23 In Dr Gray's case (as initially pleaded), Dr Gray relied upon a primary claim that "at no time was Lavan entitled to charge Dr Gray the Taxation Settlement Sum" (relevantly defined in the 2018 settlement deed as "the sum of \$900,000.00"). Alternatively, Dr Gray claimed that Lavan's entitlement to charge Dr Gray the "Taxation Settlement Sum" ceased when the parties entered into the 2018 settlement deed. But Dr Gray's case at trial did not rely on his primary claim. Instead, his case at trial accepted that the Retainer Agreements between Dr Gray and Lavan "entitled Lavan to charge and obliged Dr Gray to pay the [invoiced]

Gageler CJ
Gordon J
Edelman J
Jagot J
Beech-Jones J

8.

fees".⁶ Dr Gray's case at trial was limited to a claim that the entry into the 2018 settlement deed "removed the legal justification of Lavan to charge and retain" \$900,000 of the invoiced and paid amounts.⁷ Lavan was said to have been unjustly enriched when the parties entered into the 2018 settlement deed.⁸

24 The primary judge in the Supreme Court of Western Australia (Curthoys J) dismissed Dr Gray's claim. His Honour held that there had been no failure of basis or condition for Dr Gray's payments of invoices issued under the Retainer Agreements and that the entry into the 2018 settlement deed and the payment of \$900,000 under that deed did not involve any unjust enrichment.⁹ His Honour also held, in any event, that compound interest was not generally available in a restitutionary claim, either at common law or in equity,¹⁰ and that, unlike this case, those authorities which had recognised such general availability had required that the principal be retained unjustly.¹¹

25 In the Court of Appeal, Dr Gray's case was further refined. Dr Gray submitted that the legal basis for his payment of \$900,000 failed at the time of the "deemed taxation" under the 2018 settlement deed. The date of the deemed taxation was the date of payment of the last tranche of repayments under the 2018 settlement deed.¹² Dr Gray relied upon the failure of the legal basis for payment of \$900,000 of the invoiced amounts for his claim that Lavan was required to make restitution to Dr Gray of both the principal sum of \$900,000 as well as interest (including compound interest) for the period of time from payment by Dr Gray of the amounts comprising the \$900,000.

6 *Gray v Lavan (A Firm)* [2022] WASC 417 at [21].

7 *Gray v Lavan (A Firm)* [2022] WASC 417 at [32]-[34]. See also *Gray v Lavan (A Firm)* [2024] WASCA 147 at [88]-[89].

8 *Gray v Lavan (A Firm)* [2022] WASC 417 at [41].

9 *Gray v Lavan (A Firm)* [2022] WASC 417 at [38]-[55].

10 *Gray v Lavan (A Firm)* [2022] WASC 417 at [78]-[92].

11 *Gray v Lavan (A Firm)* [2022] WASC 417 at [99]-[100], referring to *Lahoud v Lahoud* [2010] NSWSC 1297 at [151] and *Heydon v NRMA Ltd [No 2]* (2001) 53 NSWLR 600.

12 *Gray v Lavan (A Firm)* [2024] WASCA 147 at [168]-[170].

9.

26 The Court of Appeal dismissed Dr Gray's appeal. In a joint judgment, Buss P and Mitchell JA held that there was no failure of the basis or condition of payments under the Retainer Agreements. Their Honours held that, at least in the circumstances where the invoiced work had been performed and the amounts invoiced were not shown to exceed any applicable costs determination, Lavan "had a contractual entitlement to issue the invoices" which Dr Gray "had a contractual obligation to pay". There was no failure of the basis of the payment under that obligation; the retainers entitled Lavan to "receive and retain [the payments] until required by a taxing officer's certificate to make a repayment to [Dr Gray]".¹³ Further, the regime for the payment of interest in the *Legal Practice Act* left no room for the "gap-filling and auxiliary role of restitutionary remedies".¹⁴

27 In separate reasons, Vandongen JA likewise held that the appeal should be determined on the basis, accepted by the parties, that at the time Lavan rendered the invoices it was lawfully entitled to charge those fees and Dr Gray was obliged to pay them under the terms of the Retainer Agreements.¹⁵ Some aspects of the reasoning of Vandongen JA—particularly his reasoning that any basis or condition of the payments had not failed¹⁶ and that the *Legal Practice Act* was the exclusive source of any claim for interest¹⁷—were consistent with the reasoning of Buss P and Mitchell JA. But Vandongen JA also dismissed the appeal for two independent reasons which were not reflected in the approach of Buss P and Mitchell JA. First, Vandongen JA held that there was no failure of basis in relation to the \$900,000 because the total of the payments of the invoices was an indivisible amount and there was no relevant payment or transaction by which the \$900,000 was paid by Dr Gray to Lavan.¹⁸ Secondly, his Honour considered that Dr Gray did not make payments to Lavan on a basis or condition that Lavan had been legally entitled to

13 *Gray v Lavan (A Firm)* [2024] WASCA 147 at [20]-[23].

14 *Gray v Lavan (A Firm)* [2024] WASCA 147 at [24]. See *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 545 [75].

15 *Gray v Lavan (A Firm)* [2024] WASCA 147 at [142].

16 *Gray v Lavan (A Firm)* [2024] WASCA 147 at [192].

17 *Gray v Lavan (A Firm)* [2024] WASCA 147 at [234]-[235].

18 *Gray v Lavan (A Firm)* [2024] WASCA 147 at [155]-[157].

charge and retain that money.¹⁹ Neither of these reasons was the subject of a notice of contention and it is unnecessary to address them specifically.

The issues in this Court

28 In this Court, Dr Gray sought to have orders substituted for the orders of the Court of Appeal, to the effect of requiring Lavan to pay him \$1,450,680.82, as "compound interest on the sum of \$900,000 for the period between 30 June 2008 and the dates of repayment of that sum". Dr Gray also sought further simple interest on that amount of compound interest at 6% under s 32 of the *Supreme Court Act 1935* (WA) from the dates of repayment of the \$900,000 to the date of judgment.

29 Dr Gray relied upon two grounds of appeal, both of which are necessary for him to succeed. First, he asserted that the Court of Appeal erred in holding that there had been no failure of the basis at common law leading to the unjust enrichment by Lavan in its *receipt* of the \$900,000. That ground of appeal requires Dr Gray to establish that he had a common law restitutionary remedy for \$900,000. Secondly, Dr Gray asserted that the Court of Appeal erred in holding that, if he had a common law right to restitution of the \$900,000, Lavan's retention and use of the \$900,000 did not give rise to an obligation at common law to pay interest.

30 Dr Gray's submission on the first ground of appeal was further refined during the oral hearing in this Court. The submission became as follows: Lavan had been unjustly enriched by the opportunity to use \$900,000 of the payments of legal costs made by Dr Gray (from the simplified date of Dr Gray's payment on 30 June 2008 until the dates of repayment) because that \$900,000 had been paid pursuant to a conditional obligation in each Retainer Agreement to pay the fees charged, and the condition of that obligation had subsequently failed. Dr Gray submitted that the condition of Lavan's legal entitlement to retain the fees charged would have failed to the extent that the fees were not certified as allowed costs upon a taxation of the bills of costs under s 240(1) of the *Legal Practice Act*. Dr Gray then submitted that the effect of entry into the 2018 settlement deed was to place the parties in the same position as if a taxation had occurred by which \$900,000 of the payments made by Dr Gray had not been allowed. Dr Gray accepted at trial, as he did in this Court, that any common law claim for restitution from Lavan of the principal sum of \$900,000 could arise only when the condition

19 *Gray v Lavan (A Firm)* [2024] WASCA 147 at [181].

11.

failed because, until that point, the Retainer Agreements "provided a legal justification for [the] payments".²⁰

31 Dr Gray's second ground of appeal asserted that complete restitution of all benefits obtained by Lavan required (subject to defences) the repayment not merely of the amount of the principal sum received but also the value of the opportunity to use that money, quantified as interest, from the time when Lavan was not entitled to retain the payment until it was ordered to be repaid. That reasoning, in broad terms, is supported by the decision of a majority of the House of Lords in *Sempre Metals Ltd v Inland Revenue Commissioners*.²¹ The decision in *Sempre Metals* was overturned by the Supreme Court of the United Kingdom in *Prudential Assurance Co Ltd v Revenue and Customs Commissioners*.²² There has been considerable controversy about these decisions²³ and the position in Australia is not settled.²⁴

32 For the reasons below, Dr Gray's submissions on the first ground of appeal should not be accepted. In those circumstances, it would not be appropriate for this Court to determine, in the abstract, the large question of principle raised by the second ground. It is also unnecessary to consider the notice of contention relied upon by Lavan which asserted that any award of interest prior to the parties' entry into the 2018 settlement deed would have been statute barred pursuant to the *Limitation Act 2005* (WA).

20 *Gray v Lavan (A Firm)* [2022] WASC 417 at [33].

21 [2008] AC 561.

22 [2019] AC 929.

23 See Burrows, "In Defence of Unjust Enrichment" (2019) 78 *Cambridge Law Journal* 521 at 538-541; Georgiou, "In Defence of *Sempre*" [2019] *Lloyd's Maritime and Commercial Law Quarterly* 38; Mitchell, "End of the Road for the Overpaid Tax Litigation?", in Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (2019) 225 at 238-241; Mitchell, Mitchell and Watterson (eds), *Goff & Jones on Unjust Enrichment*, 10th ed (2022) at 960-961 [36-52]. Compare Stevens, *The Laws of Restitution* (2023) at 64-65.

24 Compare *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 316-317 [72]-[76] and *Northern Territory v Griffiths* (2019) 269 CLR 1 at 72 [122], 78 [136], 139-140 [339]. See also *Heydon v NRMA Ltd [No 2]* (2001) 53 NSWLR 600 at 604-606 [15]-[16].

Gageler CJ
Gordon J
Edelman J
Jagot J
Beech-Jones J

12.

No common law restitutionary remedy for the \$900,000 principal or for its use

The proper sequence of analysis

33 Dr Gray correctly identified the starting point to assess whether, at common law, he was entitled to interest (including compound interest) representing the value of Lavan's opportunity, between 30 June 2008 and various dates ending on 13 January 2019, to use the payments of principal amounting to \$900,000. That starting point is whether and when, at common law, Dr Gray was entitled to restitution from Lavan of the *principal* amount of \$900,000. If Dr Gray was not entitled at common law to restitution of the principal of \$900,000, then he could not be entitled at common law to restitution of the use value of that principal of \$900,000.

34 An immediate problem for Dr Gray's submissions is that, even on his own case, the payments amounting to \$900,000 were made to Lavan under conditional obligations where the condition in each Retainer Agreement did not fail until 13 January 2019 (the date of the deemed, or fictitious, taxation). Lavan could not have been unjustly enriched by its *receipt* of money that it was entitled to receive. Hence, even if Dr Gray had a common law claim for restitution on 13 January 2019, it is difficult to see how a recipient of money could be liable to the payer at common law to make restitution of the value of the opportunity to use the money during the period in which the recipient was entitled to retain that money.

35 But Dr Gray's submission that he was entitled to restitution of the principal sum of \$900,000 at common law should be rejected for a more fundamental reason. The content of the conditions subsequent upon which Dr Gray relied for his common law claim for restitution depends upon the provisions of the *Legal Practice Act* set out above. Those provisions included a regime for recovery of both principal and interest in circumstances where an amount paid which is referable to a lodged bill of costs exceeded the amount certified on a taxation. That statutory regime did not operate in tandem with a common law claim for failure of basis or condition. There is no room for the existence of a separate common law claim for restitution where, as here, the obligation to repay relies on provisions of the statutory regime itself to establish a failure of basis or condition of part of the payment obligations.

36 The exclusion of any common law restitutionary claim for principal or interest based upon a condition subsequent in each Retainer Agreement arising from the *Legal Practice Act* means that Dr Gray's appeal cannot succeed. The 2018 settlement deed put the parties in the same position as if there had been a taxation

certificate issued under the *Legal Practice Act* on 13 January 2019 authorising Dr Gray's recovery of \$900,000 and that deemed circumstance could not give rise to any common law restitutionary consequences.

Restitution at common law for failure of basis or condition

37 In *Redland City Council v Kozik*,²⁵ the categories of restitution of unjust enrichment were described as including "unjustified payments of money or performance of services that benefit another in circumstances where the benefit was the result of mistake, undue influence, duress, or an absence or failure of consideration". For centuries, an element of a claim for restitution in such cases has been that there is no justification—that is, no juristic reason—for the defendant to retain (or "detain[]"²⁶) the benefit.²⁷ In cases involving restitution of money paid on an (objective) basis or condition that initially or subsequently fails, this Court has emphasised the additional requirement that the defendant "no longer has any right to retain" the money,²⁸ that the defendant has "no title to retain the moneys",²⁹

25 (2024) 98 ALJR 544 at 578 [179]; 418 ALR 1 at 42. See also (2024) 98 ALJR 544 at 557 [61]; 418 ALR 1 at 14.

26 Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 9 at 162.

27 See, eg, *Price v Neal* (1762) 3 Burr 1354 at 1357 [97 ER 871 at 872]; *Sadler v Evans* (1766) 4 Burr 1984 at 1986 [98 ER 34 at 35]; *Dale v Sollet* (1767) 4 Burr 2133 at 2134 [98 ER 112 at 113]; *Clarke v Shee* (1774) 1 Cowp 197 at 199-200 [98 ER 1041 at 1042]; *Kelly v Solari* (1841) 9 M & W 54 at 59 [152 ER 24 at 26]. See also Kremer, "Recovering Money Paid Under Void Contracts: 'Absence of Consideration' and Failure of Consideration" (2001) 17 *Journal of Contract Law* 37.

28 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 393. See also at 379. See also *Redland City Council v Kozik* (2024) 98 ALJR 544 at 580 [185]; 418 ALR 1 at 44-45, quoting Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012) at 86 §15(2)(b).

29 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 529 [27]. See also at 528-529 [24]. See also *Redland City Council v Kozik* (2024) 98 ALJR 544 at 557 [62]; 418 ALR 1 at 14, quoting *Moses v Macferlan* (1760) 2 Burr 1005 at 1010 [97 ER 676 at 679].

or that there be an "unconscientious retention by the defendant".³⁰ Whatever description is used, in these cases of an absence or failure of the condition upon which money was paid, restitution is awarded also because the obligation under which the money was paid can no longer justify the defendant retaining the money: the retention of the money was dependent upon the absent or failed basis or condition of the obligation.³¹

38 An example of restitution in the context of an absent basis or condition of the obligation is *Roxborough v Rothmans of Pall Mall Australia Ltd*.³² In that case, the appellants paid amounts representing licence fees to the respondent under valid contracts, albeit under an obligation that was conditional upon a statutory obligation owed to the Commonwealth to pay a licence fee. The invalidity of the licence fee obligation owed to the Commonwealth also meant that the basis or condition upon which the money was paid for the licence fee under the contracts was absent.³³ Hence, referring to the "conditional nature of the licence fee payments",³⁴ Gummow J observed that the appellants' obligation to pay had been dependent upon the "renewal of the wholesaler's licence and the funding for that to take place".³⁵

39 The same is true where there is a (subsequent) failure of a condition upon which a payment is made. An example is where the money is paid upon the condition of subsequent performance. If the performance will not be received, then the plaintiff will be entitled to restitution: "[t]he payment was originally

30 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 551 [89], citing *South Australian Cold Stores Ltd v Electricity Trust of South Australia* (1957) 98 CLR 65 at 75.

31 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 389. See also *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321 at 355 [235]; *Barton v Morris* [2023] AC 684 at 716-717 [78], quoting *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2022] 1 All ER (Comm) 1244 at 1263 [79].

32 (2001) 208 CLR 516.

33 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 527-528 [21], 529 [27].

34 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 538 [58].

35 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 558 [109].

conditional. The condition of retaining it is eventual performance. Accordingly, when that condition fails, the right to retain the money must simultaneously fail."³⁶ Thus, in *McDonald v Dennys Lascelles Ltd*,³⁷ Dixon J said:

"When a contract stipulates for payment of part of the purchase money in advance, the purchaser relying only on the vendor's promise to give him a conveyance, the vendor is entitled to enforce payment before the time has arrived for conveying the land; yet his title to retain the money has been considered not to be absolute but conditional upon the subsequent completion of the contract."

Dixon J continued, quoting from *Palmer v Temple*³⁸ to the effect that once the conveyance will not occur the vendor "from that moment" holds the money advanced for the use of the purchaser.

The basis or condition of the Retainer Agreements

40 In this Court, Dr Gray's submissions concerning the relevant basis or condition of payments under the Retainer Agreements were refined to assertions that the obligations in the Retainer Agreements to pay the invoiced amounts were subject to conditions subsequent that either: (i) a taxation of the costs established that "the amount charged was fair and reasonable"; or (ii) the Retainer Agreements continued to be legally enforceable.

41 Any basis or condition for Dr Gray's obligations to make payments under the Retainer Agreements must be determined objectively by reference to the terms and circumstances of the Retainer Agreements. The objective terms and circumstances of the Retainer Agreements included the term that Lavan would charge Dr Gray on the same basis that Dr Gray had been charged by Bennett & Co, and the term of the Bennett & Co retainer that reiterated Dr Gray's statutory right "either to have the account itemised or taxed". The parties would also have been reasonably aware from the correspondence concerning the Bennett & Co

36 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 65. See also *Towers v Barrett* (1786) 1 TR 133 at 135 [99 ER 1014 at 1016].

37 (1933) 48 CLR 457 at 477. See also *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 389.

38 (1839) 9 Ad & E 508 at 520-521 [112 ER 1304 at 1309].

Gageler CJ
Gordon J
Edelman J
Jagot J
Beech-Jones J

16.

retainer that Dr Gray had a right to have bills of costs "reviewed for their fairness and reasonableness".

42 There is therefore a strong basis to conclude that the parties had agreed that each of the Retainer Agreements included a condition subsequent, giving effect to the terms of the *Legal Practice Act*, to the effect that Lavan would have no right to retain the amount of any payment to the extent that the payment was more than the amount authorised by a taxation under the *Legal Practice Act*. But, even independently of the objective agreement of the parties, that condition subsequent would have been imposed on the Retainer Agreements by the terms of the *Legal Practice Act* itself. The parties could not contract out of the provisions of the *Legal Practice Act*, set out above, although s 235 requires that effect must be given to a written costs agreement when taxing an itemised bill of costs (subject to review under s 222).

43 The content of the condition subsequent that governed Dr Gray's obligation to pay under each of the Retainer Agreements, and Lavan's right to retain any payments of invoices under those Retainer Agreements, was therefore, as Dr Gray accepted, contained in the *Legal Practice Act*. The content of those conditions subsequent cannot be confined to the consequences of a taxation under s 240 of the *Legal Practice Act*. For instance, s 240 was itself subject to, and inseparable from, the power of review under s 242. Section 240 was also inseparable from the statutory claim for repayment under s 243, which therefore also forms part of the conditions subsequent governing Lavan's entitlement to retain the money paid under the invoices issued to Dr Gray.

44 Importantly, in their operation as conditions subsequent to the Retainer Agreements, the provisions of Pt 13 of the *Legal Practice Act* did not invalidate those agreements. The Retainer Agreements were consistent with the operation of Pt 13. As conditions subsequent their effect was, prospectively, to require, as s 243 was entitled, "[o]verpayments to be returnable".

The Legal Practice Act provided the exclusive remedies for the conditions subsequent in the Retainer Agreements

45 The content of the condition subsequent in each of the Retainer Agreements was determined by the regime in Pt 13 of the *Legal Practice Act*. Contrary to Dr Gray's submissions, it is not possible to sever the operation of some provisions of Pt 13 from others, to create a common law restitutionary regime that depends in part upon Pt 13 and in part upon the common law. The provision by ss 240 and 243 for a statutory right of recovery by a certificate, together with interest from the date of the certificate, formed a comprehensive regime for recovery of the principal and

17.

interest arising from the operation of s 240(1) to the exclusion of any common law claim for restitution.

46 The regime in ss 240 and 243 imposed a statutory duty to make restitution of that which the recipient no longer has any right to retain: the principal sum paid for legal costs over the amount certified by the taxation together with statutory interest from the time of the certificate. Those provisions did not provide for interest to be payable by a law firm on the principal sum for the period prior to the grant of a certificate. Rather, the premise of ss 240 and 243 was that the recipient of money paid for work done, under invoices referable to a bill of costs, was entitled to retain that money, and was not required to pay interest for its use of that money, until the issue of the certificate. Further, Pt 13 did not give the recipient any restitutionary defence that might be available at common law, such as change of position. The statutory consequences can "neither be cut down nor enlarged by resort to the general law or to restitutionary principles".³⁹

The effect of the 2018 settlement deed

47 The 2018 settlement deed was intended, by deeming provisions, to replicate the effect of a taxation of the bills of costs and the issue of a certificate by a taxing officer of the Supreme Court certifying that the amount allowed on taxation was \$900,000 less than the amounts charged by Lavan to Dr Gray, with the date of the issue of the deemed certificate being the date at which the final repayment instalment was paid by Lavan under the 2018 settlement deed (namely, 13 January 2019).

48 In effect, by the 2018 settlement deed the parties agreed that the conditions subsequent governing Lavan's right to retain \$900,000 from the amounts paid by Dr Gray under invoices sent by Lavan would be deemed to have failed because of the deemed issue of a taxation certificate on 13 January 2019. Lavan's admission on the pleadings was, in effect, that under the 2018 settlement deed the parties had agreed that Lavan had lost its right to retain \$900,000 of the amounts paid by Dr Gray, on the basis of a fiction that a taxation certificate had been issued on 13 January 2019.

49 No provision of the 2018 settlement deed provided for any liability of Lavan for interest, including compound interest, for any period of time before 13 January 2019. Indeed, this was the very matter that remained in dispute between the parties. The fiction underlying the 2018 settlement deed was limited to the principal sum

39 *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 306 [44].

Gageler CJ
Gordon J
Edelman J
Jagot J
Beech-Jones J

18.

of \$900,000, with repayment in the agreed manner. But even on the assumption, admitted by Lavan in its defence, that the 2018 settlement deed had the effect of deeming that there had been a taxation and that a taxing officer had certified that Dr Gray had overpaid \$900,000 to Lavan, no common law restitutionary remedies existed based on Lavan's retention of the \$900,000. Part 13 of the *Legal Practice Act* excluded any such common law restitutionary consequences.

Conclusion

50 The circumstances of this appeal are narrow. They involve fees paid for work that was done under the Retainer Agreements the terms of which are consistent with the operation of the relevant statutory scheme in Pt 13 of the *Legal Practice Act*. In those circumstances, there is no space for a regime of restitution at common law to operate concurrently with the conditions of the statutory scheme, including for the statutory recovery of amounts paid in excess of the amount certified following taxation of a bill of costs, and interest.

51 The appeal must be dismissed with costs.

