SUPREME COURT OF QUEENSLAND

CITATION:	*In the matter of Bexalaw Pty Ltd (in liq)* [2018] QSC 13
PARTIES:	**GERALD THOMAS COLLINS AND MATTHEW LESLIE JOINER AS JOINT AND SEVERAL LIQUIDATORS OF BEXALAW PTY LTD (IN LIQUIDATION) ACN 075 575 209** (applicant) **v** **BEXALAW PTY LTD (IN LIQUIDATION) ACN 075 575 209** (first respondent/not a party to proceedings) **ANTONY TALBOT HUGHES** (second respondent) **SONTEL PTY LTD ACN 105 098 762** (third respondent) **JULIE DOBSON** (fourth respondent) **DEPUTY COMMISSIONER OF TAXATION** (fifth respondent)
FILE NO/S:	No 6527 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	9 February 2018
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2017
JUDGE:	Davis J
ORDER:	**1. It is declared that:** **(a) the proceeds of the settlement of proceeding BS5998 of 2010, held in Gadens Lawyers trust account (the Balance Settlement Sum) is held by Bexalaw Pty Ltd (in liquidation) ACN 075 575 209 (Bexalaw):** **(i) in its capacity as trustee of the Gladstone Unit Trust; and** **(ii) on constructive trust for the parties to a Joint Venture Agreement dated 11 August 2003 between Bexalaw Pty Ltd as trustee for the Gladstone Unit Trust, the Portland Downs Pastoral Company Pty Ltd, Ms Julie**

Dobson and Sontel Pty Ltd as trustee for the Sontel Discretionary Trust (the Joint Venture Agreement); and

(b) Bexalaw is indebted to Antony Hughes in the sum of $17,302.08, being remuneration for services rendered in the preparation of the claim by Bexalaw against Rider Levitt Bucknall Qld Pty Ltd (previously Rider Hunt Queensland Pty Ltd).

2. It is directed that the Applicants are authorised to deal with the Balance Settlement Sum as follows:

(a) to retain the sum of $152,181.70 on account of their remuneration in administering the assets held on trust pending determination of the Applicants' entitlement to that money;

(b) to pay, after making the retention authorised by order 2(a), the following to the persons, and in the priorities, as follows:

(i) $135,629.90 to themselves in respect of their costs of the present application;

(ii) $17,302.08 to Antony Hughes being remuneration for services rendered in the preparation of the claim by Bexalaw against Rider Levitt Bucknall Qld Pty Ltd (previously Rider Hunt Queensland Pty Ltd);

(iii) "Project Expenses" as defined by the Joint Venture agreement:

(A) $58,544.95 to Sontel Pty Ltd and Julie Dobson, being costs pursuant to orders of P D McMurdo J (as his Honour then was) on 21 August 2009;

(B) $52,991.21 to the Australian Taxation Office, being Goods and Services Tax and interest thereon;

(C) $32,781.31 to H & P Services Pty Ltd trading as "Ham & Partners" for accounting services rendered to Bexalaw as trustee for the Gladstone Unit Trust;

(iv) the following amounts be paid parri passu from such funds as remain held by the liquidators following the payments or retentions made pursuant to directions (2)(a)

and (2)(b)(i), (ii) and (iii):

(A) $94,220.50 to Sontel Pty Ltd and Ms Julie Dobson in respect of their legal costs of and incidental to this proceeding;

(B) $167,383.41 to Sontel Pty Ltd and Ms Julie Dobson as reimbursement of professional fees and disbursements or outlays in respect of Supreme Court Proceedings BS 5998 of 2010 and 7925 of 2010;

(C) $85,744.25 to Sontel Pty Ltd as interest on the professional fees and disbursements referred to at subparagraph (B) above;

(D) $90,185.54 to Ms Julie Dobson as interest on the professional fees and disbursements referred to at subparagraph (B) above.

3. The Applicants have liberty to apply for an order increasing the sum specified in direction 2(a) to include any further remuneration or costs associated with complying with these directions. If no application is filed by 4 pm on 23 February 2018, the Applicants shall distribute the money as directed by these orders.

4. Any sum being the difference between the sum retained under order 2(a) and the actual remuneration to the liquidators in administering the assets held in trust shall fall to be distributed under order 2(b)(iv).

5. There shall be no order as to costs between the second and fourth respondents.

CATCHWORDS: CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – APPLICATIONS TO COURT FOR DIRECTIONS OR ADVICE – where the company in liquidation had been a trustee until it went into liquidation – where that company as trustee entered into a joint venture agreement – where assets were recovered after liquidation arising from the role of the company in liquidation as trustee – whether those assets were gained in capacity as trustee and held on trust

CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – APPLICATIONS TO COURT FOR DIRECTIONS OR ADVICE – where creditors

funded litigation to recover from a third party by whose fault the company in liquidation had overpaid contractors – where those creditors provided security for costs for that litigation – where that litigation settled and the company in liquidation recovered a sum – whether the creditors should be reimbursed for costs incurred with interest

CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – APPLICATIONS TO COURT FOR DIRECTIONS OR ADVICE – where a person did work for the company in liquidation that allowed to company to recover assets in litigation – where that person has made a claim to be paid from the trust fund – whether that person has a claim

CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – RANKING OF CLAIMS – PRIORITIES – where some creditors had funded litigation at cost to themselves – where another creditor did work without being paid – whether priority should be afforded to the claim of the creditor who did work

PROFESSIONS AND TRADES – ARCHITECTS – GENERALLY – where a person had previously been registered as a practising architect – where they had since become registered as a "non-practising architect" within the meaning of the *Architects Act* 2002 (Qld) – where only an "architect" is entitled to charge for services under s 140 of the *Architects Act* 2002 (Qld) – whether a "non-practising architect" is entitled to charge for services or does not fall within the meaning of "architect" in s 140 of the *Architects Act* 2002 (Qld)

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – WHOLE ACT TO BE CONSIDERED – where only an "architect" is entitled to charge for services under s 140 of the *Architects Act* 2002 (Qld) – where the *Architects Act* 2002 (Qld) provides for registration as a "practising architect" or a "non-practising architect" – whether a "non-practising architect" is entitled to charge for services or does not fall within the meaning of "architect" in s 140 of the *Architects Act* 2002 (Qld)

Architects Act 2002 (Qld) s 9, s 20, s 140

Australian Securities and Investment Commission v Karl Suleman Enterprises Pty Ltd [2003] NSWSC 400, cited
Australian Securities and Investment Commission v Nelson [2003] NSWSC 129, cited
Bastion v Gideon Investments Pty Ltd (in liq) (2000) 35

ACSR 466, cited
13 Coromandel Place v CL Custodians Pty Ltd (in liq) (1999) 30 ACSR 377, cited
Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (in liq) (2015) 108 ACSR 1, applied
Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64, cited
Deputy Commissioner of Taxation v Vintage Gold Investments Pty Ltd (in liq) [2009] FCA 967; (2009) 27 ACLC 1393, cited
Environmental Business Strategies Pty Ltd (in liq) v Phyto Services Pty Ltd [2003] VSC 371, applied
Household Financial Services Pty Ltd v Chase Medical Centre Pty Ltd (1995) 18 ACSR 294, cited
Lumbers v W Cook Builders Pty Ltd (in liq) (2008) 232 CLR 635, applied
Mier v Racemoon Pty Ltd (in liq) [2003] QSC 136, applied
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355, applied
Ray Teese Pty Ltd v Syntex Australia Ltd [1998] 1 Qd R 104, cited
Re North Food Catering Pty Ltd [2014] NSWSC 77, cited
Re Enhill Pty Ltd (1983) 1 VR 561, cited
Re Universal Distributing Co Ltd (in liq) (1933) 48 CLR 171, distinguished
Stewart v Atco Controls Pty Ltd (in liq) (2014) 252 CLR 307, cited
SunWater v Drake Coal Pty Ltd [2016] QCA 255; [2017] 2 Qd R 109, applied
Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd (1977) 16 ALR 23, distinguished
The Portland Downs Pastoral Company P/L & Ors v Bexalaw P/L (in liq) [2009] QSC 272

COUNSEL: Mr M O Jones for the applicant
Mr S C Fisher for the second respondent
Mr L M Copley for the third and fourth respondent on some issues
The fourth respondent appeared in person
A J Evans for the fifth respondent

SOLICITORS: Gadens Lawyers for the applicant
Shand Taylor Lawyers for the third respondent
ATO Dispute Resolution for the fifth respondent

[1] By an amended application filed by leave before me, the liquidators of Bexalaw Pty Ltd (in liq) (Bexalaw) seek declarations and directions concerning the distribution of money held by them. Apart from costs, the dispute between the parties only concerns the validity of a claim by the second respondent, Mr Antony Hughes (Mr Hughes), and the priority which that claim takes if allowed. Mr Hughes claims $382,700 and submits that claim should take priority to all other claims. Mr Hughes claims costs as against the money held by the liquidators and the fourth respondent (Ms Dobson) claims costs against Mr Hughes. Mr Hughes claims as against Ms Dobson his costs of defending her costs application against him. Those three claims for costs are contested.

[2] Apart from Mr Hughes' claim and the arguments about costs, the parties are agreed as to the fate of the money held by the liquidators. However, for the reasons which follow, I am not prepared to make directions in the terms sought jointly by the parties. Different directions are appropriate.

Background

[3] Bexalaw was the trustee of the Gladstone Unit Trust (the Gladstone Trust).[1]

[4] In its capacity as trustee of the Gladstone Trust, Bexalaw, on 11 August 2003, entered into a joint venture agreement (the JV Agreement) with three other entities; the Portland Downs Pastoral Company Pty Ltd (the Portland company), Ms Dobson and Sontel Pty Ltd as trustee for the Sontel Discretionary Trust (Sontel).[2]

[5] Sontel is a company which, for present purposes, can be regarded as being controlled by Mr Hughes. The Portland company played no part in the proceedings before me. It is in fact now deregistered.[3]

[6] The purpose of the joint venture was to develop land in Gladstone by construction of a residential unit block. This was to be achieved by way of funds borrowed by Bexalaw and by funds contributed by each of Bexalaw, Ms Dobson and Sontel (called in the JV

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1 Trust Deed of the Gladstone Unit Trust: Affidavit of Gerald Thomas Collins, filed 29 June 2017, CFI 2, ex GTC-3.
2 Joint Venture Agreement: Affidavit of Gerald Thomas Collins, filed 29 June 2017, CFI 2, ex GTC-3.
3 Affidavit of Gerald Thomas Collins, filed 29 June 2017, CFI 2 at [7].

Agreement, and here, "Equity Contributions"). The overarching intent evidenced by the JV Agreement was that the interest of Bexalaw in the project was to be 65 per cent and the interest of the Portland company, Ms Dobson and Sontel was together to be 35 per cent.[4] Bexalaw was the manager of the project and its functions included causing the construction of the unit block.[5]

[7] The JV Agreement defined "Project Expenses" as "the actual capital and operating costs, charges, expenses, fees, taxes, including any GST applicable to any sales and/or transfers (other than income or capital gains tax) and other payments and expenditures of and incidental to the conduct of the project as agreed by the participants".[6]

[8] The JV Agreement dealt with the payment of Project Expenses and the repayment of Equity Contributions[7] but, as will be seen, the JV Agreement was varied.

[9] In February 2004, Bexalaw entered into a contract with Kennedy Constructions (Qld) Pty Ltd (Kennedy Constructions), whereby Kennedy Constructions agreed to construct the unit block (the building contract).[8] Rider Hunt Queensland Pty Ltd, which is now called Rider Levitt Bucknall Qld Pty Ltd (Rider Hunt), was retained to assess progress claims made by Kennedy Constructions under the building contract.[9]

[10] By March 2005, Securcorp, the third party funder from whom Bexalaw borrowed money to fund the project, had suspended payment of further advances. On 23 March 2005, an agreement (the Variation Agreement) was entered into whereby Bexalaw borrowed a substantial sum from Sontel, Ms Dobson and a company, Flinders Property Investment Pty Ltd. The Variation Agreement varied the operation of some of the terms of the JV Agreement.[10]

[11] The building of the unit block proceeded, and Bexalaw paid progress claims to Kennedy Constructions consistently with certifications issued by Rider Hunt.

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4 Joint Venture Agreement cl 5.
5 Joint Venture Agreement recital E, cl 1 definition of "manager", cl 11.
6 Joint Venture Agreement cl 1.
7 Joint Venture Agreement cls 4 and 5.
8 Affidavit of Gerald Thomas Collins, filed 29 June 2017, CFI 2 at [11].
9 At [14], ex GTC-5.
10 *The Portland Downs Pastoral Company P/L & Ors v Bexalaw P/L (in liq)* [2009] QSC 272, where the relevant background is recited and the relevant provisions of the variation agreement are analysed; see [7].

[12] On 12 September 2008, Bexalaw was placed into liquidation. By cl 17(11) of the Trust Deed of the Gladstone Trust, Bexalaw was automatically removed as trustee of the trust upon its being placed into liquidation.[11]

[13] By 2009, a dispute had arisen as to the way money was to be distributed under the terms of the JV Agreement as now varied by the Variation Agreement. The Portland company, Ms Dobson and Sontel sought declarations as to the proper construction of the agreements (the JV proceedings).

[14] The JV proceedings came before McMurdo J (as his Honour then was) who declared:

> "It will be declared that upon the proper construction of the joint venture agreement between the parties, as varied by a loan agreement made on 23 March 2005,[12] at the conclusion of the joint venture, evidenced by the completion of the sale or transfer of all lots and after payment of all outstanding Project Expenses within the meaning of that term in the joint venture agreement, the remaining funds of the joint venture should be paid as follows:
>
> (a) first, in paying the Equity Contribution of $1 million made by the plaintiffs[13] to the joint venture;
>
> (b) second, in paying the Equity Contribution made by the defendant[14] to the joint venture;
>
> (c) third, in paying the balance to the parties to be divided as to 35 per cent to the plaintiffs and as to 65 per cent to the defendant."[15] (emphasis added)

[15] The "plaintiffs" referred to in his Honour's declarations were Sontel and Ms Dobson, and the "defendant" was Bexalaw. The effect of the declarations was to recognise that the Variation Agreement operated so as to alter the priority in which the parties would be repaid their Equity Contributions. Of some importance is the fact that the declarations recognise that the distribution of Equity Contributions only occurs after payment of the Project Expenses to those creditors (Project Expenses creditors).

[16] Bexalaw was ordered to pay the costs incurred by the Portland company, Ms Dobson and Sontel in the JV proceedings.

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[11] Affidavit of Gerald Thomas Collins, filed 29 June 2017, CFI 2, ex GTC-3 at 78.
[12] The agreement referred to in this judgment as "the Variation Agreement".
[13] The Portland company, Ms Dobson and Sontel.
[14] Bexalaw.
[15] *The Portland Downs Pastoral Company P/L & Ors v Bexalaw P/L (in liq)* [2009] QSC 272 at [15].

[17] By the middle of 2010, the liquidators had decided that Bexalaw should commence proceedings against Rider Hunt. Through the work of Mr Hughes and Ms Dobson it had been discerned that progress claims by Kennedy Constructions had been overpaid through the fault of Rider Hunt.[16] Mr Hughes' claim in the application before me is for remuneration for the work he performed. Proceedings against Rider Hunt were, in due course, commenced (the Rider Hunt proceedings).[17]

[18] Naturally enough, the liquidators were not prepared to undertake the Rider Hunt proceedings without some protections in place. Ms Dobson and Sontel agreed to pay Bexalaw's costs of the Rider Hunt proceedings, with an understanding that the money would be recovered in the event of success in the proceedings. Ms Dobson provided the liquidators with an indemnity against any costs orders which might be made against them.[18]

[19] Rider Hunt sought security for their costs in the Rider Hunt proceedings. That was understandable given that the plaintiff was Bexalaw, a company then in liquidation. Sontel and Ms Dobson provided a bank guarantee in the sum of $100,000 by way of security.[19]

[20] The Rider Hunt proceedings were ultimately settled. The liquidators were paid the sum of $975,000 with interest, and recovered other smaller sums through costs orders and the refund of fees paid to the Court.[20]

[21] Some funds were released to pay money still owing to Shand Taylor, the solicitors who had represented Bexalaw in the Rider Hunt proceedings. The sum held on the liquidators' behalf at the time of the hearing before me was $707,880.34.[21]

The present application

[22] The liquidators seek both declarations and directions. There are unsecured creditors of Bexalaw who were not represented at the hearing before me. For reasons I later

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16 This was common ground between the parties before me: Transcript at 1-22 to 1-23.
17 Affidavit of Gerald Thomas Collins, filed 29 June 2017, CFI 2 at [34].
18 At [41] and [42(a)].
19 At [42(b)].
20 At [45]–[57].
21 At [56] and Gadens' trust investment ledger: ex GTC-12 at 140–142.

explain, the money presently held by the liquidators is held on trust. It is not money which falls into the liquidation of Bexalaw. There are some creditors who have claims against the trust money. There are some who do not. However, all the unsecured creditors were given notice of the application.[22] Ms Dobson, Sontel, Mr Hughes and the Deputy Commissioner of Taxation (a creditor claiming against the trust money) all appeared. H & P Services Pty Ltd (Ham & Partners) have a claim against the funds, but did not appear on the application.

[23] Ms Dobson and Mr Hughes (through Sontel) had some common ground but there was dispute between them concerning Mr Hughes' claim for remuneration for professional services rendered in relation to the Rider Hunt proceedings. Mr Copley of counsel appeared for the joint interests of Ms Dobson and Sontel. In essence, Ms Dobson and Sontel sought to be compensated for their efforts in funding the Rider Hunt proceedings. Those issues were settled with the liquidators who agreed that each of Sontel and Ms Dobson should receive an amount for interest on the sums they paid to fund the Rider Hunt proceedings.[23]

[24] The main dispute before me concerns Mr Hughes' claim for remuneration, which is opposed not only by Ms Dobson but also by the liquidators. Mr Copley did not appear for either Mr Hughes or Ms Dobson in that contest and played no active part in the application save that he called Mr John Leslie Saunders for cross-examination. Mr Saunders is a solicitor employed by Shand Taylor, whose role is of some importance and is explained later.

[25] There are three Project Expenses creditors named in the amended application: Ham & Partners,[24] a firm of accountants; the Australian Tax Office (ATO);[25] and Ms Dobson and Sontel (jointly).[26]

[26] Mr Fisher of counsel appeared on the application for Mr Hughes. As already observed, Ms Dobson opposed Mr Hughes' claim (as did the liquidators) and Ms Dobson

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22 See Affidavit of Grace Sarah Macrae, filed 25 July 2017, CFI 8.
23 This is reflected in the direction sought at paragraphs 2(e) and 2(f) of the amended application set out later in these reasons.
24 See the direction sought at paragraph 2(g)(iii) of the amended application.
25 See the direction sought at paragraph 2(g)(ii) of the amended application.
26 See the direction sought at paragraph 2(g)(i) of the amended application.

appeared for herself in that respect. Mr Jones appeared for the liquidators. Ms Evans appeared for the ATO and read an affidavit of Leonard Jamble.[27] That affidavit swore to the indebtedness of Bexalaw to the ATO. Ms Evans was, on her application, excused[28] and the ATO took no further part. As mentioned earlier, Ham & Partners did not appear. They were the only party who, on the evidence before me, may have a claim to the trust money but did not appear.

[27] Three witnesses were called and cross-examined on affidavits they had sworn: Mr Saunders, who at various times had represented the Dobson-Sontel interests and also the liquidators, Mr Hughes, and one of the liquidators, Mr Collins.

[28] The declarations sought by the liquidators in the amended application are:

> "1. Declarations that the proceeds of the settlement of proceeding BS5998 of 2010, held in Gadens Lawyers trust account at the date of this Originating Application (the Balance Settlement Sum) is held by Bexalaw Pty Ltd (In Liquidation) ACN 075 575 209 ("Bexalaw):
>
> (a) in its capacity as trustee of the Gladstone Unit Trust; and
>
> (b) on constructive trust for the parties to a Joint Venture Agreement dated 11 August 2003 between Bexalaw Pty Ltd as trustee for the Gladstone Unit Trust, the Portland Downs Pastoral Company Pty Ltd, Ms Julie Dobson and Sontel Pty Ltd as trustee for the Sontel Discretionary Trust ('the Joint Venture Agreement')."[29]

[29] Proceeding BS5998 of 2010 is one of the Rider Hunt proceedings, the other being BS7925 of 2010. Proceeding 7925 of 2010 can be largely disregarded for present purposes. That was an application for leave to utilise documents obtained in other proceedings for the purposes of the claim against Rider Hunt. The claim against Rider Hunt was made in proceeding BS5998 of 2010.[30]

[30] Even though Bexalaw had ceased to be the trustee of the Gladstone Unit Trust by the time it received the proceeds of the Rider Hunt proceedings, the cause of action against Rider Hunt accrued to Bexalaw in that capacity. Clearly, then, the money received is held on trust on the terms of the Trust Deed and the JV Agreement as varied by the

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27 Affidavit of Leonard Jamble, filed 29 September 2017, CFI 21.
28 Transcript at 1-2.
29 Amended originating application, filed by leave, 27 October 2017.
30 Affidavit of Gerald Thomas Collins, filed 29 June 2017, CFI 2 at [34]–[35].

Variation Agreement.[31] No party before me argued to the contrary. No party contested the making of the declarations.

[31] The fact that the matters the subject of the proposed declarations are not contentious is a discretionary factor suggesting against the making of the declarations. On the other hand, the liquidation has been, and is, contentious in other respects and the liquidators are in my view reasonably looking for certainty and protection. There is, at least, a theoretical possibility that an unsecured creditor could allege that the money presently held is not held on trust, but falls into the liquidation. Although it does seem unlikely such a claim would be made, it is appropriate to make the declarations sought and I will do so.

[32] In addition to the declarations, directions were sought by the liquidators as follows:

> "2. Directions that the liquidators are justified in distributing the Balance Settlement Sum as follows:
>
> (a) $152,181.70 to the liquidators in respect of their remuneration;
>
> (b) $135,629.90 to the liquidators in respect of their costs of and incidental to this proceeding;
>
> (c) $94,220.50 to Sontel Pty Ltd and Ms Julie Dobson in respect of their legal costs of and incidental to this proceeding;
>
> (d) $167,383.41 to Sontel Pty Ltd and Ms Julie Dobson as reimbursement of professional fees and disbursements or outlays incurred in respect of Supreme Court Proceedings 5998 of 2010 and 7925 of 2010;
>
> (e) $85,744.25 to Sontel Pty Ltd as interest on the professional fees and disbursements referred to at subparagraph (d) above;
>
> (f) $90,185.54 to Ms Julie Dobson as interest on the professional fees and disbursements referred to at subparagraph (d) above;
>
> (g) The following amounts as 'Project Expenses' within the meaning of the Joint Venture Agreement parri passu from such funds as remain held by the liquidators following the payments referred to at subparagraphs (a) to (f) above:
>
> (i) The sum of $58,544.95 claimed by Sontel Pty Ltd and Ms Julie Dobson pursuant to the costs order of P McMurdo J dated 21 August 2009;

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[31] See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96–7; *Chan v Zacharia* (1984) 154 CLR 178.

(ii) The sum of $52,991.21 claimed by proof of debt by the Australian Taxation Office in respect of Goods and Services Tax and General Interest Charge thereon, payable by Bexalaw in respect of the performance of the Joint Venture Agreement;

(iii) The sum of $32,781.31 claimed by proof of debt by H & P Services Pty Ltd trading as 'Ham & Partners';

3. A direction that no further or other amount be paid to Sontel Pty Ltd or Mr Antony Hughes in respect of services allegedly performed by them in the winding up of Bexalaw or in relation to the conduct of proceeding BS6356 of 2008.

4. An order that the costs of and incidental to this Originating Application of the liquidators and of Sontel Pty Ltd and Ms Julie Dobson be costs of the winding up and be paid in the manner set out at paragraph 2 above."

[33] The proposed directions seek to categorise various sums for the purposes of priorities. The first category consists of those payments due to the liquidators. They are the subject of proposed directions paragraphs 2(a) and 2(b) being the remuneration of the liquidators and the liquidators' costs of the present proceedings.

[34] The second category consists of monies due to Sontel and Ms Dobson (other than Project Expenses). They are the subject of proposed directions in paragraphs 2(c), (d), (e) and (f). Those are payments to Sontel and Ms Dobson being reimbursement of costs paid on behalf of Bexalaw in the Rider Hunt proceedings, interest on costs paid, and the costs of the present proceedings.

[35] All those amounts in the second category have been described as "costs of the winding up". The term "costs of the winding up" was used liberally in both the written and oral submissions. It is somewhat misleading, because what is relevant to the fate of the money held by the liquidators is not the winding up of Bexalaw, and the costs associated with the winding up, but rather the costs of bringing in of the assets held by the Gladstone Trust and the distribution of that trust money; in other words, the costs of winding up the trust. The trust money does not fall into the liquidation, and the trust money does not bear the costs of the winding up of Bexalaw, except to some limited extent analysed later.

[36] The third category consists of three sums said to be Project Expenses as that term is defined in the JV agreement. These sums are the subject of the proposed directions in paragraphs 2(g)(i), (ii) and (iii) of the amended application.

[37] Paragraph 3 of the application seeks an order denying Mr Hughes' claim, and paragraph 4 seeks an order making it clear that the proposed costs orders in favour of Sontel and Ms Dobson are costs in the winding up. What is really sought by paragraph 4 are orders recognising that the costs of the application before me are borne by the trust property in priority to the Project Expenses.

[38] The proposed directions seek to prioritise the payments from the trust money in the order that the three categories of debts appear in the proposed directions. The effect, then, of the orders, if made, would be that the liquidators' remuneration and the costs of the present application would be paid in priority, then the various sums to Sontel and Ms Dobson would be paid, with the Project Expenses creditors (which includes a further claim by Sontel and Ms Dobson) ranking behind that.

[39] Given the money available for distribution, being $707,880.34, the practical effect of the proposed directions would be that the Project Expenses creditors would not be paid.

[40] As already observed, the position of the liquidators and Ms Dobson is that Mr Hughes should receive nothing. Mr Hughes submits that not only should his claim succeed, but it should rank above all other claims.

[41] The liquidators' position is that if all or part of Mr Hughes' claim succeeds then his claim ranks as what has been described a cost of the winding up and sits in the second category of claims as I have identified them.

[42] Before considering Mr Hughes' claim, there are preliminary issues.

What is the source of the power to make the directions and is it appropriate to determine Mr Hughes' claim in the present application?

[43] There is no doubt about the jurisdiction to make the declarations.[32] As to the power to give directions, the liquidators point to s 479 and s 511 of the *Corporations Act* 2001 (Cth) and s 96 of the *Trusts Act* 1973 (Qld).

[44] Sections 479 and 511, both now repealed, of the *Corporations Act* provided as follows:

> "**479 Exercise and control of liquidator's powers**
>
> (1) Subject to this Part, the liquidator must, in the administration of the property of the company and in the distribution of the property among its creditors, have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and, in case of conflict, any directions so given by the creditors or contributories override any directions given by the committee of inspection.
>
> (2) The liquidator may convene general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and he or she must convene meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by at least one-tenth in value of the creditors or contributories.
>
> (3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.
>
> (4) Subject to this Part, the liquidator must use his or her own discretion in the management of affairs and property of the company and the distribution of its property."
>
> "**511 Application to Court to have questions determined or powers exercised**
>
> (5) The liquidator, or any contributory or creditor, may apply to the Court:
>
> (a) to determine any question arising in the winding up of a company; or
>
> (b) to exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court.
>
> …
>
> (6) The Court, if satisfied that the determination of the question or the exercise of p[33]ower will be just and beneficial, may accede wholly or partially to any such application on such

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[32] *Civil Proceedings Act* 2011 (Qld) s 10.

[33] See the direction sought at paragraph 2(g)(iii) of the amended application.

> terms and conditions as it thinks fit or may make such other order on the application as it thinks just."

[45] Section 511 was contained in Part 5.5, which governs voluntary winding up. The evidence shows that Bexalaw was placed into liquidation by resolution of its creditors.[34] Presumably, that resolution was made pursuant to s 497 and therefore, for the purposes of Part 5.5, the winding up of Bexalaw is a voluntary winding up. Consequently, the power to make directions comes from s 511, not s 479. Section 479 is contained within Part 5.4B, which concerns winding up in insolvency pursuant to an order made under s 459P.[35]

[46] Sections 479 and 511 were repealed by the *Insolvency Law Reform Act* 2016 with effect from 1 September 2017. By transitional provisions, s 511 remains available to the liquidators as a source of the Court's jurisdiction to make directions.[36]

[47] Section 96 of the *Trusts Act* provides as follows:

> "**96 Right of trustee to apply to Court for directions**
>
> (1) Any trustee may apply upon a written statement of facts to the Court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.
>
> (2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the Court thinks expedient."

[48] As already observed, the property the subject of the applications before me is trust property and is not property which is available to the general creditors of Bexalaw. The powers of liquidators[37] clearly enough concern the management of property of the company in liquidation. Trust property is not property "in the winding up of a company",[38] and therefore it is not obvious that s 511 of the *Corporations Act* authorises the giving of directions in relation to property held by Bexalaw on trust. It is

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34 Affidavit of Gerald Thomas Collins, filed 29 June 2017, CFI 2 at [2].
35 *Corporations Act* 2001 s 459A.
36 *Insolvency Law Reform Act* 2016; s 1605 and s 1617.
37 *Corporations Act* 2001 ss 477, 506.
38 *Corporations Act* s 511.

also not obvious that questions as to how trust property ought to be dealt with are questions "arising under the winding up"[39] for the purposes of s 479.

[49] However, in *Bastion v Gideon Investments Pty Ltd (in liq)*,[40] s 479(3) was used as the source of jurisdiction to determine whether or not particular property was or was not held on trust by a company in liquidation. Section 511 authorises the Court to determine any "question arising in the winding up of a company" and s 479(3) authorises the Court to give directions "in relation to any particular matter arising under the winding up". While the power under s 479(3) might be wider than the power given under s 511,[41] in the context of this case, that difference is of no moment. A dispute between competing claims to trust property held by a company in liquidation was determined upon a s 479(3) application in *Australian Securities and Investment Commission v Rowena Nominees Pty Ltd*[42] and a similar approach was taken in *Australian Securities and Investment Commission v Karl Suleman Enterprises Pty Ltd*.[43]

[50] In *Mier v Racemoon Pty Ltd (in liq)*,[44] Jones J heard an application by a liquidator of a company which was the trustee of a discretionary trust. The liquidator sought directions as to the exercise of the discretion to distribute trust money. His Honour proceeded on the basis that the Court had jurisdiction either under s 479(3) of the *Corporations Act* or s 96 of the *Trusts Act*. In *Australian Securities and Investment Commission v Nelson*,[45] Austin J took the view that both s 479 of the *Corporations Act* and s 63 of the *Trusts Act* 1995 (NSW), which is an equivalent provision to s 96 of the Queensland Act, gave jurisdiction to give directions as to the liquidator's dealings with property held by a company in liquidation on trust.

[51] There is no inconsistency, relevantly here, between s 511 of the *Corporations Act* and s 96 of the *Trusts Act*.[46] There is nothing to suggest that the scope of the jurisdiction given under either section would not authorise the directions sought here and there is no reason that any discretion under s 511 should be exercised differently to any discretion

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39 *Corporations Act* s 479(3).
40 (2000) 35 ACSR 466.
41 From the extension by the words "in relation to".
42 [2003] WASC 112.
43 [2003] NSWSC 400.
44 [2003] QSC 136.
45 [2003] NSWSC 129.
46 Section 109 of the *Constitution* is not under consideration.

under s 96. I will therefore proceed consistently with the approach taken by Jones J in *Mier v Racemoon Pty Ltd (in liq),*[47] that the Court has jurisdiction to make the directions and that the jurisdiction comes from either s 511 or s 96. I should also note that the written statement of facts required by s 96 of the *Trusts Act* has been tendered.[48]

[52] The exercise of the jurisdiction granted by s 511 of the *Corporations Act* and s 96 of the *Trusts Act* is subject to discretionary limitations. When third party rights are disputed those rights should normally be determined by claim and trial.[49]

[53] The approval of the liquidators' remuneration, the approval of payments to Sontel and Ms Dobson, the authorisation of the costs payments, and directions as to priorities could, and should, in my view, all be made under a directions provision such as s 511 of the *Corporations Act* or s 96 of the *Trusts Act*. However, Mr Hughes' claim raises different considerations. His claim is disputed by the liquidators and Ms Dobson and that dispute involved contested evidence and extensive legal argument.

[54] The only parties interested in Mr Hughes' claim are the liquidators, the beneficiaries of the Gladstone Trust and the Project Expenses creditors. Apart from the Portland company, which is deregistered, all beneficiaries were represented before me. The ATO appeared and elected not to participate, save from reading a short affidavit, and Ham & Partners was given notice of the application,[50] but did not appear. No party submitted that Mr Hughes' claim could or should not be heard without pleadings. No party claimed the need for disclosure or access to other interlocutory procedures which would be available had Mr Hughes' claim been the subject of separate proceedings. All parties were content to present evidence relevant to Mr Hughes' claim by affidavit and to cross-examine some witnesses.

[55] In *Environmental Business Strategies Pty Ltd (in liq) v Phyto Services Pty Ltd,*[51] Hansen J (as his Honour then was) heard an application for directions under s 479(3) of the

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47 [2003] QSC 136.
48 Exhibit 1 before me.
49 *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at 104, *Editions Tom Thompson Pty Ltd v Pilley* (1997) 77 FCR 141 at 147–149, *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 679-680 and *Australian Securities and Investment Commission v Landy DFK Securities Ltd* [2002] FCA 1056 at [45].
50 See Affidavit of Grace Sarah Macrae, filed 25 July 2017, CFI 8.
51 [2003] VSC 371.

Corporations Act where there was a contest as to whether shares held by a company in liquidation were held beneficially by the company or were held on trust. His Honour tried that issue, received evidence and heard witnesses who were cross-examined. His Honour then ruled:

> "While in form the application is one for directions, the hearing was conducted in the same manner as the trial of an action. With the exception of the liquidator Horne, who swore two affidavits, all deponents were cross-examined. The issue raised for determination is primarily one of fact. As appears below, the issue was readily identified and the cross-examination was much concerned with matters of credit. The parties concurred in the case being conducted in this way. In view of the clarity of the issue there was no need for pleadings. Furthermore, the extra expense and delay that would have been involved in an action commenced by writ was neither warranted nor desired. At the conclusion of final addresses I informed counsel that I considered it appropriate, in the circumstances, that Phyto be made a respondent to the proceeding. They concurred in that course, and I will so order." [52]

His Honour then determined the issues raised on the application.

[56] I will follow the same approach and determine Mr Hughes' claim on the present application.

Quantum of Mr Hughes' claim

[57] Mr Hughes is an architect by profession, although he is now retired. There is no doubt that Mr Hughes, utilising his skills as an architect, did work in preparing the claim against Rider Hunt. There is also no doubt that the product of his work was of significant assistance to the liquidators in the Rider Hunt proceedings.

[58] In calculating his claim, Mr Hughes has attempted to reconstruct the number of hours work performed by him which he has then costed at the rate of $275 per hour for "architectural services" and $65 an hour for "clerical work".[53] The division between architectural services and clerical work is imprecise. Mr Hughes simply estimates that 75 per cent of the total work that he did was architectural work and that the balance of 25 per cent was clerical.[54]

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[52] At para [4].
[53] Affidavit of Antony Talbot Hughes, filed 30 August 2017, CFI 12 at [59].
[54] Transcript at 1-38.

[59] To justify the claim of $275 per hour, Mr Hughes compares that rate to rates charged by other professionals who rendered services to the liquidators: solicitors, accountants, barristers, and quantity surveyors, as well as that charged by Mr Dudley Wilde, who is an architect.[55] I cannot see how the reasonableness or otherwise of Mr Hughes' claimed hourly rate can be assessed by reference to the charge out rates of professionals other than architects. However, the rate charged by Mr Hughes for architectural services is less than that charged by Mr Wilde[56] and so I find that the hourly rate charged by Mr Hughes for architectural services is reasonable. I make this finding subject to the impact of the *Architects Act* 2002 (Qld) (the *Architects Act*) which is analysed later. The clerical rate of $65 an hour also appears reasonable.

[60] Calculation of the hours actually worked by Mr Hughes is much more difficult. Mr Jones for the liquidators submitted to me that Mr Hughes' claim is framed only as one for a lump sum of $382,700 so unless Mr Hughes makes out his claim in that entire sum, he can recover nothing.[57] I reject that submission. Mr Hughes has made a claim for work done on an hourly rate. He has provided a detailed explanation of the work done. While there are difficulties with that explanation, it seems to me that if he can make out any part of his claim, then he is entitled to succeed on that part which he makes out.

[61] Mr Hughes estimates that he performed 2028 hours work and seeks to charge for 1720 of those hours.[58] Of that total of 1720 hours, he says 1290 hours were spent on architectural work and 430 hours were spent doing clerical work. There are no time sheets. Mr Hughes conceded in evidence that he made no contemporaneous record of the time he spent on the project.[59]

[62] Mr Hughes' claim is however detailed in attachments to three invoices that he sent to the liquidators.[60] In those attachments he set out the exact item of work and the date upon which he did it. The time spent on each item of work is not stated. Mr Hughes

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55 Affidavit of Antony Talbot Hughes, filed 30 August 2017, CFI 12 at [59].
56 Ibid.
57 Transcript at 1-86 to 1-87.
58 Affidavit of Antony Talbot Hughes, filed 30 August 2017, CFI 12, ex TH-01.
59 Transcript at 1-29. See also Affidavit of Antony Talbot Hughes, filed 30 August 2017, CFI 12, ex TH-02 at 26–7.
60 Affidavit of Antony Talbot Hughes, filed 30 August 2017, CFI 12, ex TH-01.

accepts that the records supporting his claim are a reconstruction from other documents such as bills delivered by the solicitors or the liquidators.[61]

[63] The claim is particularised in the invoices as being for work done over three periods:

(i)	29 July 2008 to 6 September 2011	for	$231,400
(ii)	7 September 2011 to 31 December 2013	for	$115,700
(iii)	1 January 2014 to 4 July 2014	for	$35,600

[64] Some of Mr Hughes' work, such as the preparation of his expert reports, was obviously significant. However, much of the work is described as reading emails and other documents prepared by others. The first invoice for the period 29 July 2008 to 6 September 2011 asserts time worked of 1,200 hours although this is discounted to 1,040 hours.[62] The detailed statement supporting the invoice records 625 items of work. If the 1,200 hours is correct then the average time spent on each item is almost two hours. Many of the items would obviously have taken far less than two hours. Even taking into account the more time consuming work such as preparing reports, the sums claimed in the invoices seem to me to be plainly excessive.

[65] Mr Jones, in submitting against Mr Hughes' claim points to the fact that other experts provided reports in the Rider Hunt proceedings, including Mr Wilde the architect, and various quantity surveyors. The total disbursements (including the fees of those experts) was $38,619.63.[63] That might be some indication, so Mr Jones submitted, that Mr Hughes' clam of $382,700 is excessive. However, in fairness to Mr Hughes, his case seems to be that he did much of the time-consuming analysis-type work.

[66] There is a series of correspondence which in my view tells against the quantum of Mr Hughes' claim. On 30 June 2014, Mr Hughes wrote a letter marked "without prejudice" to Ms Dobson. That email is exhibited to Mr Hughes' affidavit of 27 August 2017[64] and it is common ground that any privilege has been waived. In the letter Mr Hughes makes a number of assertions and then says this:

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[61] Transcript at 1-31. See also Affidavit of Antony Talbot Hughes, filed 30 August 2017, CFI 12, ex TH-02 at 25–6.
[62] Affidavit of Antony Talbot Hughes, filed 30 August 2017, CFI 12, ex TH-01 at A5.
[63] Affidavit of Gerald Collins, filed 29 June 2017, CFI 2, at 100, 164.
[64] Affidavit of Antony Talbot Hughes exhibit bundle, filed 30 August 2017, CFI 14 at 775 (ex TH-30).

> "I reiterate: the time and effort I expended to not only preserve but augment capital by way of equity contributions has meant that I have not been able to pursue other income producing activities. I do thank you for the acknowledgement of my role, and now is the opportunity you have to demonstrate gratitude in an appropriate ethical way, and that is to agree that I should be remunerated to the extent of $75,000. It is neither morally nor ethically just for you to get the free benefit of exertions that travelled well outside the confines of the LPA without making an appropriate contribution to those exertions on my behalf.
>
> My offer is open for 14 days after which time I will reassess my claim using accepted professional rates, and will be seeking all legal costs associated with obtaining the remuneration that I believe is fair and reasonable in this matter."

[67] Later, on 30 June 2014, Ms Dobson replied and rejected the offer[65] and then, on 8 October 2014, Mr Hughes sent another email stating that he intended to make "a claim for reimbursement based on professional rates".[66]

[68] Mr Hughes' position has shifted from being prepared to accept $75,000 for his work to now making a claim for $382,700. When cross-examined, it was put to Mr Hughes that the email of 30 June was threatening in its tone, in an attempt to extort acceptance of the $75,000 offer.[67] Mr Hughes denied that proposition and I must say that I do not see anything fundamentally wrong with Mr Hughes asserting that he will make a detailed claim based on professional rates if the without prejudice offer is not accepted. However, the huge disparity between the amount offered and the amount then claimed tells against Mr Hughes.

[69] Further, Mr Hughes was cross-examined by Mr Jones as to differing estimates he had given at different times as to the time he had spent preparing the Rider Hunt claim.[68] I found his answers to be less than convincing. Even during his re-examination, his estimates seemed to vary.[69]

[70] During submissions, I asked Mr Fisher how I ought to quantify Mr Hughes' claim in the event that I did not accept that he was entitled to $382,700. Mr Fisher pointed to "the nature of the work" which is clearly enough a reference to the detail in the documents

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65 Affidavit of Antony Talbot Hughes exhibit bundle, filed 30 August 2017, CFI 14 at 779 (ex TH-31).
66 Affidavit of Antony Talbot Hughes exhibit bundle, filed 30 August 2017, CFI 14 at 781 (ex TH-32).
67 Transcript at 1-35.
68 At 1-28 to 1-29.
69 At 1-29 to 1-30.

attached to the invoices, but of course that does not assist much with the calculation of time actually spent. Mr Fisher submitted that the offer of $75,000 was at least some evidence of the value of the work.[70]

[71] However, even before attempting to quantify Mr Hughes' claim, I observe that his claim faces enormous difficulties. In particular, I am of the view that, because of statutory prohibitions and other factors, any claim by Mr Hughes cannot be made out for work done over the entirety of the period over which he claims to have done work in relation to the Rider Hunt proceedings.

The period over which claimable work was done

[72] On 10 September 2010 Mr Hughes emailed Mr Saunders. But this time Mr Saunders was in the process of preparing the claim against Rider Hunt. This email exchange is analysed in detail later. Suffice at this point to say that Mr Hughes made clear to Mr Saunders that Mr Hughes wished to be paid for his work in the event of recovery against Rider Hunt, and Mr Saunders acknowledged this. For reasons which I state later, it seems to me that Mr Hughes could have no claim against Bexalaw prior to the email exchange of 10 September 2010. Mr Fisher in argument conceded that Mr Saunders' email contained the representation upon which Mr Hughes relied to visit liability upon Bexalaw for the claim based on estoppel.[71] In my view, and for reasons given in detail later, this is the proper date from which all of Mr Hughes' claims should be calculated.

[73] The tax invoices sent to Mr Saunders describe Mr Hughes as an "architect".[72] The profession of architects is governed by the *Architects Act*, which establishes the Board of Architects, and empowers it to regulate the profession through a system of registration of persons who may legally practice as architects.[73]

[74] The Board of Architects advised Ms Dobson:

> "…the Board's records show that Mr Hughes's registration was renewed each year from 2008 to 30 June 2011 as a practising architect.

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70 At 1-113 to 1-116.
71 Transcript of the hearing at 1-69.
72 Affidavit of Antony Talbot Hughes, filed 30 August 2017, CFI 12 at A1–A3, A5, A17, A24 (ex TH-01).
73 *Architects Act 2002* (Qld) pt 5.

> In April 2011 Mr Hughes requested on his renewal of registration form for the year 1 July 2011 to 30 June 2012 to change his category of registration to non-practising architect and declared that he would not practise as an architect in Queensland. The Board approved the change in his registration to non-practising …
>
> The Board at its meeting on 15 June 2016 noted Mr Hughes's advice that he would not be renewing his registration after 30 June 2016 as a non-practising architect because he was retired. Mr Hughes's name was subsequently removed from the Register."[74]

[75] There was no challenge to the truth of what was asserted by the Board and there is no reason why I should not accept what the Board advised Ms Dobson.

[76] Therefore, up to 30 June 2011, Mr Hughes was registered as a "practising architect". From 1 July 2011 to 30 June 2016, he was registered as a "non-practising architect"; and from 1 July 2016, he has held no registration under the *Architects Act*.

[77] Section 140 of the *Architects Act* provides:

> **"140 Performance and carrying out of architectural services by particular entities**
>
> (1) This section applies to—
>
> (a) a person who is not an architect if the person, in performing, or undertaking to perform, architectural services for someone (the client)—
>
> (i) claims, or holds himself or herself out, to be an architect; or
>
> (ii) allows himself or herself to be held out as an architect; or
>
> (b) another person if—
>
> (i) the person, in providing, or undertaking to provide, architectural services for someone (also the client) claims, or holds out, that the services are carried out, or to be carried out, by or under the supervision of an architect; and
>
> (ii) the services are not carried out by or under the supervision of an architect.

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[74] Affidavit of Jacqueline Suzanne Ogden, filed 19 October 2017, CFI 26 at 40 (ex JSO-08); and see transcript at 1-25 ll 36-7.

> (2) Despite any agreement between the person and the client, the person is not entitled to any monetary or other consideration for the performance or carrying out of the architectural services.[75]

[78] The term "architectural services" is defined in the *Architects Act* as "services about architecture ordinarily provided by an architect".[76]

[79] The term "architect" is defined in the *Architects Act* as "a person registered as an architect under this Act".[77]

[80] There are two types of registration as an architect, namely as a "practising architect" and a "non-practising architect".[78] Both practising and non-practising architects must submit an application and be registered under the *Architects Act*.

[81] Reading the definitions into s 140(1)(a), the prohibition in s 140(2) against recovery of remuneration applies to "a person who is not registered as a practising or non-practising architect". On a literal reading, the prohibition does not apply to a registered non-practising architect.

[82] However, the section must be read in the context of the *Architects Act* a whole and with regard to the purpose of the Act and the true meaning discerned, which may or may not accord with the literal or grammatical construction of the words used.[79] It must be, in my view, that the prohibition in s 140(2) applies to all persons except registered "practising architects". In other words, registered non-practising architects are denied remuneration for performing or carrying out architectural services.

[83] Section 8 of the *Architects Act* gives a right to a person to apply for registration. An application under s 8 must be for registration as a "practising architect" or as a "non-practising architect".

[84] Section 9 concerns eligibility for registration, with s 9(2) providing as follows:

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75 Section 140(3) is not engaged here and can be ignored.
76 Ibid sch 2.
77 *Architects Act* 2002 (Qld) sch 2.
78 Ibid s 7A.
79 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46–7 [47].

"(2) Also, an applicant for registration as a non-practising architect is eligible for registration only if the board is satisfied that the applicant will not carry out, or be responsible for the carrying out of, architectural services within the registration period to which the application for registration relates." (emphasis added)

[85] Section 20 then concerns the manner in which an application for renewal of registration is considered and determined. Section 20 provides as follows:

"**20 Deciding application**

(1) The board must consider an accepted application and either renew or refuse to renew the registration as soon as practicable after the last of the following events to happen—

(a) the board receives the application;

(b) the board receives all necessary information to decide the application.

(2) In deciding the application, the board must have regard to—

(a) whether the board considers the applicant is fit to practise as an architect; and

(b) the extent, if any, to which the applicant has satisfied the continuing registration requirements.

(3) Also, for an application for renewal of registration as a non-practising architect, the board must be satisfied that the applicant will not carry out, or be responsible for the carrying out of, architectural services within the registration period to which the application relates.

(4) In considering whether an applicant is fit to practise as an architect, the board may have regard to the same matters to which the board may have regard in deciding whether an applicant for registration is fit to practise as an architect.

Note—

For the matters the board may have regard to in deciding if an applicant for registration is fit to practise as an architect, see section 11 (Fitness to practise as an architect).

(5) In this section—

accepted application means an application made under section 18(2) or an application the board accepts under section 18(4)." (emphasis added)

[86] It can be seen that by both s 9(2) and s 20(3), a non-practising architect can only be registered, or have their registration renewed, upon the satisfaction of the Board that the

non-practising architect will not carry out architectural services.[80] The clear intent is that only persons who are registered as "practising architects" should render "architectural services".

[87] Section 140 refers to the "client" being the person to whom the architectural services are provided. The Act contemplates that a non-practising architect will not have "clients". They will not practise and they will not carry out architectural services.

[88] To construe s 140 so that the prohibition in subsection (2) contemplates non-practising architects charging fees for the provision of architectural services is completely contrary to the distinction drawn consistently in the *Architects Act* between the two types of registration of architects contemplated by s 7A.

[89] In my view, s 140(2) cannot be read literally. Subsection (2) should be read so that no person other than a registered practising architect is entitled to "monetary or other consideration for the performance or carrying out of the architectural services". In other words, the term "architect" in s 140 does not have its defined meaning as including both categories of registered architect. The departure from the defined meaning is justified, as adoption of the defined meaning would be inconsistent with the *Architects Act* construed as a whole.[81] In fact, there are other sections in the Act where the term "architect" is used but the reference must be only to a "practising architect".[82]

[90] Section 140 only prohibits payment for architectural services where the person making the claim "claims or holds himself or herself out to be an architect".[83]

[91] Here, Mr Hughes has clearly held himself out to be an architect in the period after 30 June 2011. Examples of him so doing include:

(i) The report by Mr Hughes dated 22 February 2013, which includes a front sheet bearing the words "Tony Hughes Architect (B. Arch. Melb)".[84]

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[80] See also s 114(2).
[81] *Acts Interpretation Act* 1954 (Qld) s 32A; *Conde v Gilfoyle* [2010] QCA 109; *Special Projects (Qld) Pty Ltd v Simmons* [2012] QCA 205.
[82] Sections 24(2), 35A(2), 35F(2), 35G and 37.
[83] *Architects Act 2002* (Qld) s 140(1)(a).
[84] Affidavit of Antony Hughes exhibit bundle, filed 30 August 2017, CFI 13 at 321 (ex TH-17).

(ii) Various reports prepared by Mr Hughes: one dated 30 November 2013, and amended on 30 January 2014,[85] a further report dated January 2014,[86] a report 27 March 2014,[87] a report 5 April 2014,[88] and a report 8 April 2014.[89] These all describe Mr Hughes as an "architect".

(iii) The tax invoices, which describe Mr Hughes as an "architect".[90]

(iv) The explanatory statement to the tax invoice of 18 December 2014[91] describes Mr Hughes as "architect". The passage in that document headed "AIM OF STATEMENT" includes the following:

> "The primary aim of this Statement is to substantiate the claim for remuneration by Tony Hughes (*Hughes*), architect, for his professional services provided to assist with litigation undertaken on behalf of Bexalaw Pty Ltd (in liquidation), against Rider Hunt …".[92]

[92] Mr Hughes' case is that the services he rendered were "professional services", which in context means "architectural services". The work done was to analyse work done by quantity surveyors to ascertain whether progress payments had been properly calculated during the construction of the residential unit block. That work is in my view clearly services "ordinarily provided by an architect" and therefore are "architectural services".[93]

[93] As already observed, Mr Hughes says that he costed his work at $275 per hour for what are "architectural services" and $65 per hour for "clerical work". However, the clerical work was part of the provision by him of the architectural services. Therefore the total of his claim is, in my opinion, for remuneration for architectural services.

[94] The *Architects Act* therefore prohibits Mr Hughes from claiming "monetary or other consideration" for the work done for Bexalaw from the time he ceased to be registered

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85 Ibid 324 (ex TH-18).
86 Ibid 338 (ex TH-19).
87 Ibid 532 (ex TH-20).
88 Ibid 563 (ex TH-21).
89 Ibid 697 (ex TH-22).
90 Affidavit of Antony Talbot Hughes, filed 30 August 2017, CFI 12, ex TH-01, A1–A3, A5, A17, A24.
91 At ex TH-02.
92 At 2.
93 *Architects Act* 2002 (Qld) s 7 and sch 2.

as a practising architect which was 30 June 2011.[94] Although s 140 appears not to have previously been judicially considered, such a provision in my view excludes claims for remuneration made on a restitutionary basis for work done upon request (which seems to me to be the real basis of Mr Hughes' claim) at any time when he did not hold registration as a practising architect.[95]

[95] Therefore, Mr Hughes' claim, at best for him, must be limited to work done in the period between 10 September 2010 and 30 June 2011.

Work performed in the period 10 September 2010 to 30 June 2011

[96] The work is particularised in the exhibits to Mr Hughes' affidavit.[96] The relevant items claimed are reproduced below. The column headed "Time" has been added by me.

			Time
"Sept '10	10	Compose email to Saunders re 'costs' for reimbursement for professional services	10 minutes
	10	Read email from Saunders re reimbursement for undertaking work on report	5 minutes
	15	Compose email to Saunders re service of Rider Hunt by end of week	10 minutes
	16	Read email from Saunders to PKF re service of documents on RH	5 minutes
	16	Compose email to Saunders re lack of progress	10 minutes
	16	Read email from Saunders incl. letter to PKF	5 minutes
	16	Compose email to Saunders in response to letter to PKF	10 minutes
	17	Compose email to Saunders incl. query p.2 letter to PKF	10 minutes
*	17	Read email from Saunders re explanation of letter to PKF[97]	10 minutes
	17	Compose brief email response to Saunders	10 minutes
	20	Compose email to Saunders re progress	10 minutes
	20	Read email from Saunders re service of Claim on Rider Hunt	5 minutes
	20	Compose email to Saunders requesting copy of Statement of Claim	10 minutes

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94 By virtue of s 140(2).

95 ie, a claim otherwise available on bases identified in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; see cases such as *Sutton v Zullo Enterprises Pty Ltd* [2000] 2 Qd R 196 as explained in *Cook's Construction Pty Ltd v SFS 007.298.633 Pty Ltd* [2009] QCA 75.

96 Affidavit of Antony Talbot Hughes, filed 30 August 2017, CFI 12 at A12-A15 (ex TH-01).

97 See Affidavit of Antony Talbot Hughes, filed 30 August 2017, CFI 12 at 141 (ex TH-10w).

	24	Amend p.39 Report	1 hr
	24	Email amendment to Report to Saunders& email to Saunders	nil
	24	Further request for copy of Statement of Claim served on RH	nil
	25	Read email from Saunders incl. Claim & Statement of Claim served on Rider Hunt	30 minutes
Oct'10	05	Compose email to Saunders re Woodbry Statement & PKF	10 minutes
	05	Read email from Saunders re funding bankruptcy case of Glenwood Homes	5 minutes
	05	Read email from Saunders re Woodbry & PKF	5 minutes
	09	Correct p.39 Report	30 minutes
	11	Compose email to Saunders re revisions to report & RH knowledge of Kennedy rumours	10 minutes
	11	Read email response from Saunders	5 minutes
	13	Compose email to Saunders re approach to PKF	10 minutes
	14	File note – Jottings on Algeja	10 minutes
	15	Compose email to Saunders on being pro-active re Algeja	10 minutes
	18	Read email from Saunders incl. request for extension from RH solicitors	5 minutes
	18	Read email from Saunders to RH solicitor	5 minutes
	18	Compose email to Saunders requesting action	10 minutes
	20	Read email from Saunders confirming meeting with Collins & PKF legal advice	5 minutes
	21	Read email from Saunders re meeting with PKF	5 minutes
	21	Read further email from Saunders to RH solicitors	5 minutes
	21	Read email from Saunders incl. advice from Gardens lawyers to PKF	5 minutes
	21	Read email from Saunders incl. letter to Nilsson	5 minutes
	25	Compose email to Saunders re relationship between Algeja & Rider Hunt claim	10 minutes
	23	Compose draft answers to questions from RH solicitors	30 minutes
	25	Read email from Saunders incl. Rider Hunt Defence	5 minutes
*	26	Read email from Saunders incl. comments re Defence & amendment to Claim by Tucker[98]	30 minutes
	27	Compose email to Saunders inc. comments re Amended Claim	10 minutes
	27	Read Amended Defence & other documents from RH solicitors	30 minutes
	28	Read email from Saunders incl. Request for Further & Better Particulars from RH solicitors	30 minutes

[98] At 143 (ex TH-10x). This email was in fact apparently sent on 27 October 2010.

*	28	Read email from Saunders requesting comments on RH Statement of Claim against Matovic[99]	30 minutes
	29	Compose email to Saunders incl. answers to RH solicitor's questions	10 minutes
	29	Compose email to Saunders incl. amended answers	10 minutes
*	29	Compose email to Saunders incl. comments on RH Statement against Matovic[100]	10 minutes
	29	Read email from Roberts re Matovic certificate no.1	5 minutes
	29	Read Amended Defence 28.10.10 from Saunders	30 minutes
	29	Compose email to Saunders requesting copy of amended Tucker Claim incl. Kennedys	10 minutes
*	29	Read email from Saunders to Tucker incl. Hughes comments[101]	5 minutes
	30	Compose email to Dobson w/ request to check figures	10 minutes
	30	Read email from Saunders incl. Word format Statement of Claim as files	5 minutes
	30	Compose email to Saunders re amended answers to RH solicitors questions (14p)	10 minutes
	30	Compose email to Saunders re request for urgent discussion	10 minutes
	30	Amend p.44 graphic re comparison GRC & RH estimates	1 hr
	31	Undertake further revision of p.44 Graphic	30 minutes
	31	Compose emails to Saunders incl. revised Schedules 3,7 & 8 for Amended Claim	1 hr
	31	Compose email to Saunders incl. further suggestions to Amended Statement of Claim	10 minutes
Nov.'10	01	Compose email to Saunders incl. simplified Schedule 8	10 minutes
	01	Read email from Roberts re Matovic certificate no.2	5 minutes
	03	Read email from Saunders re refusal of Jaffe to co-operate	5 minutes
*	26	Read email from Saunders incl. Further & Better Particulars of Statement of Claim (13p) & letter from Nilsson[102]	30 minutes
	29	Read email from Saunders incl. Amended Statement of Claim & Request for Further & Better Particulars	5 minutes
	29	Read email from Saunders re meeting w/ Tucker	5 minutes
	30	Read email from Saunders incl. Further & Better Particulars as amended from Saunders	5 minutes
	30	Compose & email comments to Saunders Further & Better Particulars	10 minutes

[99] At 144 (ex TH-10y). This email was in fact apparently sent on 29 October 2010.
[100] At 145 (ex TH-10z).
[101] At 148 (ex TH-10aa).
[102] At 147 (ex TH-10aa).

		30	Revise pp.17-18 Report	1 hr
		30	Revise pp.29-30 Report	1 hr
		30	Revise pp.47-48 Report	1 hr
		30	Revise frontispiece to Report	1 hr
		30	Compose email to Saunders incl. revised pages to Main Report v6 (49p)	10 minutes
Dec.	'10	06	Compose email to Saunders incl. further amended table comparing Rider Hunt & GRC estimates	10 minutes
		06	Attendance at office of Tucker w/ Saunders	1 hr
		07	Compose email to Saunders re re-working of RH costings and numbering of lists	10 minutes
		07	Compose email to Saunders requesting documents in Word format to enable modification	10 minutes
		08	Read email from Saunders incl. schedule 5 in Word format	10 minutes
		09	Compose email to Saunders incl. revised schedule 6 & request for comments	10 minutes
		09	Read email from Saunders re missing pages from Bendell report	5 minutes
		10	Amend graphic re comparison GRC & RH estimates of value of work completed	1 hr
		10	Revise Table 17 in Report	10 minutes
		10	Revise Table 26 in Report	10 minutes
		10	Compose email to Roberts re methodology of Main RH Report	10 minutes
	*	10	Compose email to Saunders incl. revised documents for Tucker[103]	1 hr
	*	10	Read email conformation from Tucker re methodology[104]	10 minutes
		13	Revise Table 15b in Report	10 minutes
		14	Revise graphic GRC vs RH estimates in Report	10 minutes
		14	Revise Table 22 in Report	10 minutes
		14	Compose email to Saunders incl. fully revised Main Report v7	10 minutes
		14	Compose email to Saunders with corrections to previous email & outline to revisions	10 minutes
		14	Complete & email revised graphic to Saunders	10 minutes
		15	Compose email to Saunders incl. fully revised "Adjusted Progress Certificates"	10 minutes
	*	20	Read email from Saunders advising delay in receipt of documentation from Tucker[105]	5 minutes
		23	Revise table 26 in Report	1 hr

[103] At 150 (ex TH-10bb).
[104] At 149 (ex TH-10bb).
[105] At 152 (ex TH-10dd).

	23	Read email from Saunders re security for costs	5 minutes
*	23	Read email from Saunders incl. Further & Better Particulars[106]	1 hr
	23	Compose & email comments on Further & Better Particulars to Saunders	1 hr
	23	Compose & email Table annexure to Saunders	10 minutes
	24	Read email from Saunders incl. Further & Better Particulars as for scrutiny	5 minutes
	24	Compose email to Saunders in response to amended Further & Better Particulars	10 minutes
	24	Read email from Saunders re further review of all documents	5 minutes
Jan'11	01	Read "List of Documents" from Saunders	10 minutes
	25	Compose email to Saunders re processing of Claim	10 minutes
Feb'11	08	Read letter from RH solicitors & Further & Better Particulars SOC	1 hr
	18	Read email from Saunders incl. further legal documents	5 minutes
	22	Prepare report "History of the Demise of Kennedy Constructions & the instalment of RPM as Project Management as Builder"	1 hr
Mar'11	08	Compose email to Saunders re timeframe for response from Rider Hunt	10 minutes
	11	Read email from Saunders advising on delay receiving advice from Tucker	5 minutes
	16	Compose email to Saunders re lack of progress	10 minutes
	29	Attendance at offices of Shand Taylor w/ Saunders	1 hr
April'11	01	Complete s 12 "Conclusion" to Report	1 hr
	10	Prepare table "Comparison of GRC Trade Tables"	1 hr
	11	Revise Table 2 & description in Report	1 hr
	12	Prepare draft Calculation of Adjusted Trade Values	1 hr
	12	Revise GRC graphic in Report	1 hr
	12	Compose email to Bendell w/ request to check calculations	10 minutes
	18	Revise Calculation of Tradework in Report	1 hr
	19	Revise Table 17, Comparison of Trade Valuations in Report	1 hr
	21	Revise Table 16 in Report	1 hr
	22	Revise Sec. 8.04.03 in Report	1 hr
	22	Revise Schedule 5 in Report	1 hr
	22	Revise Schedule 6 in Report	1 hr
	23	Revise Index in Report	1 hr
May '11	02	Revise Table 29 in Report	1 hr

[106] At 153 (ex TH-10ee).

	02	Compose email to Saunders re complexities of Report & Securcorp's reliance of RH certifications	10 minutes
	03	Revise Table 26a in Report	1 hr
	05	File note re Matovic Statement	10 minutes
	06	Compose email to Saunders re Securcorp contact	10 minutes
	08	Revise Table 22 & notes in Report	1 hr
	09	Revise Table 17 in Report	1 hr
	11	Compose email & Statement to Zielke re extent of Carpentry contract	10 minutes
	11	Read email from Bendell re extent of Zielke carpentry contract	5 minutes
	13	Revise "Aim" and prepare initial thoughts on "Conclusion" to Report	10 minutes
	13	Compose email to Saunders re revised Aim & Conclusion to Report	10 minutes
	14	Compose email to Saunders incl. part revised Report Version 8	10 minutes
	16	Read email from Saunders re Report & statement for Robinson, Securcorp	5 minutes
	16	Compose email to Saunders incl. further revisions to Report & request for comments	10 minutes
	16	Compose email to Saunders incl. latest Report	10 minutes
	17	Draft Table 20 in Report	1 hr
	21	Prepare s 14 "Proof of Payments", incl. Table 29	1 hr
	22	Revise Table 19 in Report	1 hr
	22	Revise Table 20 in Report	1 hr
	23	File note re Matovic Certificate no.7	10 minutes
	24	Create new table re Payments to Builder in Report	1 hr
	24	Complete amendments to Main Report	1 hr
	24	Compose email to Saunders w/descriptions of modifications	10 minutes
	25	Compose email to Saunders re modifications to Report & Securcorp	10 minutes
	25	Combine Sections 6 & 6 in Report	10 minutes
	25	Revise s 5.04 in Report	1 hr
	25	Prepare amended "Summary of Argument of Claim"	1 hr
	25	Compose email to Saunders incl. Summary of Argument of Claim	10 minutes
	26	Revise tables 13 & 14 in Report	1 hr
	26	Revise table 17 in Report	1 hr
*	28	Complete amendments to Main Report & email to Saunders[107]	1 hr

[107] Affidavit of Antony Hughes exhibit bundle, filed 30 August 2017, CFI 14 at 788 (ex TH-35).

*	29	Read email from Saunders re Report & Tucker[108]	15 minutes
	30	Complete further amendments to Main Report v8	1 hr
	30	Compose email to Saunders incl. corrected Report (77p) up to & incl s 12, "Conclusion""	10 minutes

[97] Many of the items concern Mr Hughes either reading or drafting documents: emails, schedules to reports, etcetera. Very few of these documents are in evidence. Where the document relating to a particular item is in evidence, I have marked that item with an asterisk.

[98] There is a real paucity of evidence from which to make findings as to the time spent by Mr Hughes performing the relevant items of work. However, this is not a situation like *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd*,[109] where there was no sufficient evidentiary material upon which any assessment of the quantum of the claim could be made. I have therefore done my best to calculate the quantum of the claim based on the evidence available.[110] Where the documents referred to in the bills are in evidence I have considered the documents and made some assessment of the minimum[111] time it must have taken Mr Hughes to perform the tasks. Where the documents are not in evidence, the assessment become even more problematic. Many of the items relate to either reading emails received or composing emails that were sent. I have assumed that it must have taken Mr Hughes at least 5 minutes to read an email and at least 10 minutes to draw an email. Where there is no other detail, I have allowed those times.

[99] There are various items of work which refer to documents which are in evidence.[112] In that case, I have taken the document into account when making the assessment of time. An example is the item claimed on 25 September 2010. The email is not in evidence but the pleading referred to in the email is. I have had regard to the pleading when considering the time taken by Mr Hughes to read the email (and attachment).

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[108] At 788 (ex TH-35).
[109] (1977) 16 ALR 23
[110] *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 82–83; *Ray Teese Pty Ltd v Syntex Australia Ltd* [1998] 1 Qd R 104; and for a case where a similar approach was taken to calculation of a sum payable other than an assessment of damages, see *Devpro (a firm) v Seamark* [2007] QCA 241 at [54]–[59].
[111] The onus to prove the claim is on Mr Hughes.
[112] Eg, 25 September 2010; 27 October 2010; 28 October 2010; 29 November 2010.

[100] Many items concern revising parts of reports or schedules to claims,[113] or proofing or amending graphs or tables.[114] It seems unlikely that any such work could be done in less than an hour, so I have allowed one hour for those tasks. There are also items claimed for meetings attended by Mr Hughes.[115] These items illustrate the shortcoming in Mr Hughes' case. In a claim said to be calculated by reference to professional time spent on tasks performed, I could locate no evidence of the time spent by Mr Hughes at these meetings. I have assumed that any meeting would (with travelling time) have taken at least an hour, and I have allowed an hour for those items.

[101] The column headed "Time" records my findings of time spent on each item. My findings show a total time spent of 62 hours and 55 minutes. The work I can find that Mr Hughes has done seems to me to be all professional (as opposed to clerical) work.

[102] I have then multiplied the time found by the professional hourly rate to come to a figure of $17,302.08.

The legal basis of Mr Hughes' claim

[103] Mr Fisher put Mr Hughes' case on five separate bases. As described in Mr Fisher's written submissions:

> "A. The *Universal Distributing* principle, as refracted through *Stewart v Atco Controls Pty Ltd (in Liquidation)* [2014] HCA 15, (2014) 252 CLR 307.
>
> B. *Corporations Act 2001*, s 564.
>
> C. A restitutionary claim for incontrovertible benefit.
>
> D. Equitable lien.
>
> E. Estoppel."[116]

[104] Each of the five grounds were presented in submissions as a basis upon which Mr Hughes could claim money from Bexalaw. However, it became apparent in argument that some of the grounds could, at best, promote the priority of any claim that Mr

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[113] Eg, 24 September 2010; 9 October 2010; 30 November 2010; 22 April 2011.
[114] Eg, 31 October 2010; 10 December 2010; 10 April 2011; 22 May 2011.
[115] Eg, 6 December 2010; 29 March 2011.
[116] Submissions on behalf of Antony Hughes, filed 29 September 2017, CFI 19 at [15].

Hughes might otherwise establish. It is necessary to consider each of these grounds in some detail.

The Universal Distributing ground

[105] The principle in *Re Universal Distributing Company Limited (in liquidation)*[117] is both well established and well known. The principle concerns the priority which a liquidator's claims for costs and expenses have in relation to secured creditors.[118] The principle does not concern a claim for remuneration by a party other than a liquidator. However, Mr Fisher submits that the principle can be applied "by analogy" for Mr Hughes' benefit. Mr Fisher's submission is that the application of the principle to the present case both establishes a right in Mr Hughes to remuneration and promotes the claim to a priority over all other claims.

[106] *Universal Distributing* is a decision of Dixon J (as his Honour then was) sitting alone. In exercise of original jurisdiction, the High Court had ordered the winding up of the company whose registered office was in the Australian Capital Territory. The liquidator had presented his accounts to the Deputy Registrar of the Court for approval. A secured creditor of the company claimed that its secured debt ranked in priority to the liquidator's costs and expenses. The priorities issue was then referred to a judge of the Court by the Deputy Registrar.

[107] Following *In Re Oriental Hotels Co; Perry v Oriental Hotels Co*[119] and referring to other authorities,[120] Dixon J expressed the principle in this way: "The security is paramount to the general costs and expenses of the liquidation, but the expenses attendant upon the realization of the fund affected by the security must be borne by it."[121] And then later:

> "The question in the present case is whether the liquidator can charge against the fund passing through his hands as between himself and the person to whom it is payable, so much of the remuneration fixed for work done in the winding up as is referable to the calling in and conversion of the

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[117] (1933) 48 CLR 171.
[118] *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (in liq)* (2015) 108 ACSR 1 at [124].
[119] (1871) LR 12 Eq 126.
[120] *In re Regent's Canal Ironworks Co; ex parte Grissell* (1875) 3 Ch D 411 and *Batten v Wedgwood Coal & Iron Co* (1884) 28 Ch D 317
[121] *Re Universal Distributing Co Ltd (In Liq)* (1933) 48 CLR 171 at 174.

> assets producing the fund. I see no reason why remuneration for work done for the exclusive purpose of raising the fund should not be charged upon it."[122]

[108] In 2014, the High Court considered the *Universal Distributing* principle in *Stewart v Atco Controls Pty Ltd.*[123] In that case, there were two related companies. Newtronics Pty Ltd (Receivers and Managers appointed) (in liq) was a wholly owned subsidiary of Atco Controls Pty Ltd (in liq). Atco held security over Newtronics' assets. The commercial activity of Newtronics was financially underpinned by a promise by Atco of financial support to meet its trading obligations. Atco appointed receivers of Newtronics under a mortgage debenture held over Newtronics. Proceedings were brought by Newtronics against both Atco and the receivers. Ultimately, Atco was successful, but the receivers settled their proceedings with Newtronics upon the basis that the receivers paid the settlement sum of $1.25 million. The liquidators of Newtronics claimed a charge over the settlement sum based on the *Universal Distributing* principle, namely that the settlement sum was brought into the liquidation by the efforts of the liquidator and his costs were thereby secured over the fund. Atco claimed that its security gave it priority over the liquidator's costs.

[109] The High Court analysed the *Universal Distributing* principle for the purpose of identifying circumstances under which an equitable charge would arise in favour of a liquidator and would rank in priority to a registered charge.[124]

[110] Then, the Court described the principle in this fashion:

> "22 The principle in *Universal Distributing* is stated at some length, no doubt because Dixon J was concerned to identify its sources. It may be more shortly stated as: a secured creditor may not have the benefit of a fund created by a liquidator's efforts in the winding up without the liquidator's costs and expenses, including remuneration, of creating that fund being first met. To that end, equity will create a charge over the fund in priority to that of the secured creditor.
>
> 23 The circumstances in which the principle will apply are where: there is an insolvent company in liquidation; the liquidator has incurred expenses and rendered services in the realisation of an asset; the resulting fund is insufficient to meet both the liquidator's costs and expenses of realisation and the debt due to a secured creditor; and the

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[122] At 175.
[123] (2014) 252 CLR 307.
[124] See [11], [13] and [17].

> creditor claims the fund. In these circumstances, it is just that the liquidator be recompensed. To use the language of Deane J in *Hewett v Court* [(1983) 149 CLR 639 at 668-669], it might be said that a secured creditor would be acting unconscientiously in taking the benefit of the liquidator's work without the liquidator's expenses being met. However, such a conclusion is avoided by the application of the principle stated in *Universal Distributing*."[125]

[111] Mr Fisher for Mr Hughes submitted that Mr Hughes' position was like that of a liquidator. The submission was that Mr Hughes had performed professional work which had in fact led to money from the Rider Hunt claim coming into the liquidation. Mr Hughes thereby acquired (so the submission went) an equitable interest in the fund generated by his work and that claim took priority over all other claims. The submission was that the *Universal Distributing* principle was available to give a right of recovery (with priority) to any person who in fact contributed to the available fund.[126]

[112] No authority for such a proposition was cited to me. Mr Fisher seemed to accept that his submissions extended the *Universal Distributing* principle beyond the way it had been applied over the last 85 years since the case was decided.[127] None of the authorities cited by Mr Fisher as supporting the submission did so.

[113] In *Blairgowrie Trading Ltd v Alco Finance Group Ltd (Receivers and Managers appointed) (in liq)*[128] (*Blairgowrie Trading*), one of the cases relied upon by Mr Fisher, representative proceedings had been commenced in the Federal Court. Details of the claims made in the action are not relevant here. However, the litigation was to be funded through a litigation funder. The representative parties agreed to pay certain amounts to the litigation funder in consideration of the litigation funder then funding the litigation. The representative parties sought an order from the Federal Court that any sums paid by them to the litigation funders were repayable from any judgment or settlement achieved against the defendants in the action, and that sum would be charged against the fund in priority to all other claims.

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125 At [22]–[23].
126 Transcript at 1-63 to 1-64.
127 At 1-104 to 1-105.
128 (2015) 108 ACSR 1.

[114] The application brought by the representative parties faced various difficulties.[129] However, the application was based on what was submitted to be an analogy between the position of the representative parties to that of a liquidator. It was then submitted that the principles in *Universal Distributing* applied to give the representative parties priority. In rejecting that submission, Wigney J observed that the features of a liquidator which were critical to the decision in *Universal Distributing* are not present in a representative party. The representative parties have no right to deal with the company's property; the representative parties have no obligations under the *Corporations Act*; the representative parties have no rights to distribute the company's funds.[130]

[115] It seems to me that Mr Hughes is also not in a position like that of a liquidator. Nothing in *Universal Distributing*, or *Stewart v Atco Controls Pty Ltd* in any way supports the proposition that a party with no contractual right to remuneration acquires some right merely because the work for which remuneration is claimed in fact resulted in, or contributed to, a fund available to a liquidator. The reasoning of Wigney J in *Blairgowrie Trading* is in fact inconsistent with the existence of the principle for which Mr Fisher contends.

Section 564 of the **Corporations Act**

[116] Section 564 of the *Corporations Act* provides as follows:

> "**564 Power of Court to make orders in favour of certain creditors**
>
> Where in any winding up:
>
> (a) property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of money or the giving of indemnity by creditors; or
> (b) expenses in relation to which a creditor has indemnified a liquidator have been recovered;
>
> the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.

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[129] See [51]–[61]
[130] See [118]–[124].

[117] Mr Fisher, in his written submissions,[131] says, "[s]ection 564 comes into play by analogy…"

[118] Section 564 is a provision which confers a power on a court to vary the order of priority of payments to creditors. That power arises in certain specific circumstances. The preconditions to the conferral of that power either exist or they do not. If they do, then the Court is empowered to make orders. If not, then the Court is not so empowered. No power arises "by analogy".

[119] Reliance by Mr Fisher on the so-called "analogy" is at least recognition that s 564 does not, on its terms, apply here. The section clearly concerns property in the winding up and creditors in the winding up.[132] As previously observed, the property the subject of the present application is not property which is available to the creditors of Bexalaw. The property in question here is trust money.

[120] Mr Fisher, in his written submissions, submitted:

> "…section 564 is available to support an order from a Court to authorise the payment of money from funds presently controlled by the Liquidators to compensate Mr Hughes for the quantum or value of his services."[133]

This and other submissions by Mr Fisher suggest that s 564 (by analogy) is relied upon as a basis of liability of Bexalaw to pay Mr Hughes' claim. Of course, s 564, if it applied at all here, would only concern the priority of the payment of established claims. Mr Hughes finds no support for his claim in s 564.

[121] As appears later in these reasons, I have found that Mr Hughes has established a claim for remuneration for his services to the amount of $17,302.08. That sum would rank (subject to what I later explain about the payment of Equity Contributions that have already been made to Sontel and Ms Dobson before payment of all Project Expenses) after payment of the liquidators' remuneration and their costs of this application,[134] and

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131 Submissions on behalf of Antony Hughes, filed 29 September 2017, CFI 19 at [32].
132 See cases such as *Fuji Xerox Australia Pty Limited v Tolcher & Ors* [2004] NSWCA 284; (2004) 60 NSWLR 696 at [7], [13].
133 Submissions on behalf of Antony Hughes, filed 29 September 2017, CFI 19 at [40].
134 The sums referred to in paragraphs 2(a) and 2(b) of the amended application.

would rank with the repayment of money advanced by Sontel and Ms Dobson to fund the Rider Hunt proceedings and the interest on those monies.

[122] If s 564 did confer a discretion to elevate the priority of Mr Hughes' claim, or if some discretion arose "by analogy", I would not exercise the discretion in favour of Mr Hughes to elevate his claim above that of the liquidators. The liquidators are independent parties with no commercial interest in the Gladstone project. To the extent that the liquidators have a claim for remuneration against the trust assets, there is no reason to postpone that claim behind any claim by Mr Hughes. The same can be said of the liquidators' costs of this application, the bringing of which was clearly a step reasonably taken by the liquidators.

[123] There is also no reason to elevate Mr Hughes' claim above those of Sontel and Ms Dobson (if a discretion to do so existed). Many factors have been considered to be relevant to the exercise of discretion under s 564,[135] but two significant factors are the extent of the assistance given by the competing parties and the risk.[136] The financial contributions by Ms Dobson and Sontel, and the contribution of labour and expertise by Mr Hughes, all contributed to the recovery against Rider Hunt. While Mr Hughes ran the risk of not being remunerated for work done, Sontel and Ms Dobson risked the loss of substantial sums of money.

The claim for "restitution for incontrovertible benefit" and estoppel

[124] These can be conveniently considered together as they both, in my view, have as their genesis the email exchange between Mr Saunders and Mr Hughes on 10 September 2010.[137] Before turning to that correspondence, it is necessary to explain Mr Saunders' involvement in the liquidation.

[125] In 2009, Mr Saunders was a partner of Shand Taylor Lawyers. In 2009, Shand Taylor, through Mr Saunders, acted for Sontel and Ms Dobson. He received instructions in late 2009 from Sontel and Ms Dobson to consider the possibility of Bexalaw suing Rider

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[135] See cases such as *Jarbin Pty Limited v Clutha Limited (in liq)* [2004] NSWSC 28; (2004) 180 FLR 393.

[136] *Household Financial Services Pty Ltd v Chase Medical Centre Pty Ltd* (1995) 18 ACSR 294; *Deputy Commissioner of Taxation v Vintage Gold Investments Pty Ltd (in liq)* [2009] FCA 967; (2009) 27 ACLC 1393.

[137] Affidavit of Antony Talbot Hughes, filed 30 August 2017, CFI 12 at 141, ex TH-23.

Hunt.[138] Then, in early 2010, on instructions from Sontel and Ms Dobson, he commissioned experts to provide reports, and he otherwise investigated the claim.[139] Because of a concern about a limitation period, Mr Saunders obtained instructions from the liquidators to commence the Rider Hunt proceedings. Those proceedings were filed on 9 June 2010.[140] What then followed were negotiations between Mr Saunders and the liquidators with a view to settling upon an arrangement whereby Sontel and Ms Dobson would fund the Rider Hunt proceedings and indemnify the liquidators. This was achieved. While the final arrangements do not seem to have been documented,[141] the Rider Hunt proceedings were conducted on the understanding that they would be funded by Sontel and Ms Dobson, the liquidators would be indemnified and Sontel and Ms Dobson would be repaid from any money recovered from Rider Hunt.

[126] The liquidators accept that Mr Saunders was their solicitor for the purposes of conducting the Rider Hunt proceedings.[142] While there may have been negotiations about the final terms of the retainer up until about 16 September 2010,[143] Shand Taylor were acting on behalf of the liquidators (albeit in a limited capacity) from, at the latest, early June 2010, when instructions were received to commence the proceedings.[144] As already observed, there was no formal retainer agreement. However there was a letter sent by Shand Taylor to the liquidators on 16 September 2010 setting out a funding proposal. Relevantly, paragraph 2 of that letter provides as follows:

> " 2. As previously advised and discussed on 18 August 2010, our clients' proposal, going forward, in relation to the damages claim against Rider Hunt, is as follows:-
>
> (a) Our clients will fund the litigation in all respects, including the payment of legal fees, counsel's fees, expert's fees and any other necessary outlays, and the provision of security for costs, as required;
>
> (b) Julie Dobson will provide to the liquidators an indemnity against any adverse costs orders which may be made personally against the liquidators. In that regard, we attach copy of a further deed of indemnity dated 28 August 2010 signed by Ms

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[138] Affidavit of John Lesley Saunders, filed 1 September 2017, CFI 16 at [17].
[139] At [19]–[22].
[140] At [25].
[141] At [35]–[36].
[142] Affidavit of Gerald Thomas Collins, filed 29 June 2017, CFI 2 at [6], [40]; Affidavit of Gerald Thomas Collins, filed 22 September 2017, CFI 18 at [35]–[36].
[143] Affidavit of John Lesley Saunders, filed 1 September 2017, CFI 16 at [35].
[144] At [24]–[25].

> Dobson. Please arrange for the deed to be countersigned and a copy returned to us (by fax or email is fine). As requested, we also attach an asset and liability statement of Ms Dobson in support of the worth of her indemnity;
>
> (c) The proceeds of a successful claim against Rider Hunt will be dealt with in the following manner, on the basis that the funds recovered are funds of the joint venture, namely:
>
> (i) Firstly, to reimburse our clients for the legal costs and outlays actually incurred in prosecuting the proceedings;
>
> (ii) Secondly, payment of a sum of money to our clients being the difference between the priority amount of $1m and the funds already received from the proceeds of sale of the remaining units as per the judgment and orders made by Justice McMurdo on 21 August 2009;
>
> (iii) Thirdly, in accordance with an order made by the Court following an application under section 564 of the *Corporations Act 2001* (Cth)" (emphasis and references removed)[145]

[127] Mr Collins could not find in his records any written acceptance of that proposal, but thought that Sontel and Ms Dobson would in due course make an application under section 564 to obtain priority for the repayment of funds advanced to meet the costs of the Rider Hunt proceedings.[146]

[128] It can be seen then that Sontel (Mr Hughes) and Ms Dobson were very much the driving force behind the Rider Hunt proceedings. In essence, the proceedings were proposed by them to the liquidators who then retained Mr Saunders and, through him, prosecuted the proceedings. The fact that Mr Saunders acted originally for Ms Dobson and Sontel, and probably continued to act for them over the course of the JV proceedings, does not alter the fact that Mr Saunders was acting for the liquidators. His retainer, to the extent that the terms can be ascertained, clearly included taking steps to prepare the claim so as to prosecute the proceedings. Prima facie, the liquidators are bound by Mr Saunders' actions within his retainer.

[129] I then come to the exchange on 10 September 2010. Those emails passing between Mr Hughes and Mr Saunders are as follows:

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[145] Ex JLS-1 at 236.
[146] Affidavit of Gerald Thomas Collins, filed 22 September 2017, CFI 18 at [14].

From Mr Hughes to Mr Saunders:

> "John,
>
> In our claim for damages we need to include costs for Paul Roberts, Tony Hughes reports. Also, what about Dudley Wilde, was he involved with deciding to sue RH ?
>
> I am in the process of preparing a chronology of 'goings-on' in regard to my preparation of a report into Rider Hunt and its professional conduct. This may take a while (really painstaking!!!), so I will try to assess my 'costs' either today or in weekend, depending on your program of sending our claim to Rider Hunt – please advise.
>
> Regards,
>
> Tony Hughes."[147]

Then, from Mr Saunders to Mr Hughes, and copied to Ms Dobson and Nina Hughes:

> "Tony
>
> I was not aware until very late yesterday that Phil[148] was not going to be in his chambers today. However, he can see me on Monday, and I've locked an appointment in for 11:30 am.
>
> I know full well this delay in serving the claim on RH is very frustrating for you (Julie and Nina), but as I said the other day, I have to be absolutely sure there is nothing fatal for us arising out of the fact that Bexalaw is in liquidation and was also the trustee of the Gladstone Unit Trust, and that is what I need to speak to Phil about.
>
> Once I have Phil's ok, then I advise PKF of the legal position we are taking, and unless Gerry raises a problem, which he shouldn't, because we will be answering the query he raised with me, we can then serve the claim on RH straight after that - hopefully on Tuesday.
>
> Re the costs of Paul Roberts, Dudley Wilde and yourself, these are not part of the damages claim as such, but form part of the outlays and expenses we would seek to recover, together with legal fees, at the end of the matter. Accordingly, they are not put in the statement of claim now, but brought up later once we know RH will accept liability and therefore have to pay costs associated with bringing and preparing the case.
>
> However, you should still prepare the assessment of your costs of the report now, while your memory is fresh. It's just that this claim will not be made against RH now.
>
> Talk to you on Monday.
>
> Regards

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147 Affidavit of Anthony Talbot Hughes exhibit bundle, filed 30 August 2017, CFI 14 at 759 (ex TH-23).
148 Apparently a reference to Mr Philip Tucker of counsel.

John Saunders…"[149]

[130] Critically, the email from Mr Saunders to Mr Hughes identifies "costs" (really a reference to remuneration) of Mr Hughes as "part of the outlays and expenses we would seek to recover". That has to be looked at in light of the later letter of 16 September 2010 sent to the liquidators where the proposal that is put is that a first claim on any proceeds of the Rider Hunt proceedings will be "the legal costs and outlays actually incurred" of Sontel and Ms Dobson.[150] In context, the "outlays" include remuneration to Mr Hughes for his work.

[131] The emails of 10 September appear to be the first time that Mr Hughes raises the prospect of him being paid for the work, as opposed to him simply doing the work and then sharing (through Sontel) in the proceeds of the action.

[132] In argument before me, I put to Mr Fisher that the email of 10 September 2010 from Mr Saunders to Mr Hughes was the first representation that he could rely upon for the purposes of the estoppel argument. Mr Fisher agreed with that proposition.[151]

[133] Mr Fisher argued that because there was a representation made on 10 September 2010 that Mr Hughes would be paid, and Mr Hughes relied upon that representation to his detriment, he therefore was entitled to be paid not only for work done from 10 September 2010 but also work up to 10 September 2010. There are of course enormous difficulties with that submission. The estoppel, if it arises, only serves to compensate for detriment. There is no need to go beyond *Commonwealth v Verwayen*[152] as authority for such a principle. Detriment could only be founded upon the work done in reliance of the representation after 10 September 2010.

[134] For reasons which I explain below, any restitutionary claim is based on requests by the liquidators, through Mr Saunders, to Mr Hughes to perform work. Up until 10 September 2010, there is no suggestion of Mr Hughes having any expectation of payment for his work; at least, there is no evidence that such an expectation was communicated to the liquidators or anyone on their behalf.

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[149] At 760 (ex TH-24).
[150] Affidavit of John Lesley Saunders, filed 1 September 2017, CFI 16, ex JLS-1 at 236. Extracted above.
[151] Transcript at 1-73 l 1 to 1-74 l 5.
[152] *Commonwealth v Verwayen* (1990) 170 CLR 394.

[135] It is for those reasons that any estoppel claim and any restitutionary claim can in my view only be for work performed after 10 September 2010. It is for those reasons that my calculation of quantum of Mr Hughes's claim ignores work done before 10 September 2010.

[136] Mr Fisher, in his written submissions, put the elements of Mr Hughes's restitutionary claim as follows:

> "A schematic of the elements of restitution may be presented as follows: (1) The defendant receives a benefit (2) at the expense of the plaintiff (3) in such circumstances that it would be unjust to allow the defendant to retain the benefit (*BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 839 per Goff J) and (4) there is no juristic reason such as a defence or counterveiling factor requiring that restitution should be denied in whole or in part: *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 382-3, 388, 393."[153]

[137] It is well established that unjust enrichment is not a principle of general application underpinning restitutionary rights and remedies.[154] Rather, it is a principle which unifies identified causes of action.[155] As became apparent in argument, Mr Hughes' real claim is for remuneration for work done at the request of the liquidators (through Mr Sanders). Since at least *Pavey and Matthews Pty Ltd v Paul*,[156] it has been recognised that a claim for reasonable remuneration for work performed on request is a claim based on restitutionary principles, not upon an implied contract.[157]

[138] The Court of Appeal has recently considered the nature of the cause of action for money claimed for work done upon request. That case is *SunWater v Drake Coal Pty Ltd*.[158] There, the appellant had claimed that it was owed money under a contract entered into with the respondent, which obliged the appellant to construct a water pipeline. Alternatively, the appellant claimed a lesser sum than the contract sum on a restitutionary basis, being the value of its work in constructing the pipeline at the respondent's request. The respondent pleaded a number of factors said to

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153 Submissions on behalf of Antony Hughes, filed 29 September 2017, CFI 19 at [43].
154 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 516 approved in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 595 [74].
155 *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 at 665 [85].
156 (1987) 162 CLR 221.
157 At 227.
158 [2016] QCA 255; [2017] 2 Qd R 109 ('*SunWater*').

disentitle the appellant to its restitutionary claim. It is not necessary to describe those factors, save that they were said to render the claim "inequitable in all the circumstances".[159] The appellant applied to strike out the paragraphs of the defence which raised those grounds on the basis that they were irrelevant to the claim. The appellant's argument was unsuccessful at first instance, but successful on appeal.

[139] Philip McMurdo JA, after considering *Pavey and Matthews Pty Ltd v Paul*,[160] *Australian Financial Services and Leasing Pty Ltd v Hills Leasing Pty Ltd*,[161] *Lumbers v W Cook Builders Pty Ltd (in liq)*[162] (*Lumbers*), and a South Australian case of *Angelopoulos v Sabatino*,[163] which was disapproved in *Lumbers*, then said:

> "For present purposes, there are two points of principle which are explained in that passage.[164] The first is that the necessary elements of the presently relevant right of action[165] are that the plaintiff has performed work and at the request of the defendant. In those circumstances there is a right to be paid a reasonable price for the work. The second is that if those elements are established, it is "neither necessary nor appropriate" to consider any of the other circumstances listed in Angelopoulos "in deciding whether [the plaintiff can] recover a fair price for the work …". In particular, it is neither necessary nor appropriate to consider whether the defendant benefited from the plaintiff's work or whether there is any "particular circumstance (such as change of position) by virtue of which it would be unjust to require [the defendant] to remunerate [the plaintiff]."[166]

[140] It is not necessary to consider whether in the circumstances it would be "unjust to allow [Bexalaw] to retain the benefit". General questions of unconscionability are also irrelevant. It is simply a case of identifying the elements of an established cause of action and then ascertaining whether that cause of action has been proven. The fact that the relief claimed may be restitutionary in nature is really beside the point and certainly does not give rise to considerations of general unconscionability or inequitability.

[141] Of course, there may be reasons why liability is not visited upon Bexalaw. There are bases of course upon which a restitutionary claim based on work done upon request

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[159] At [5].
[160] (1987) 162 CLR 221.
[161] (2014) 253 CLR 560.
[162] (2008) 232 CLR 635.
[163] (1995) 65 SASR 1.
[164] A reference to a passage in *Lumbers* at 666–667 [89]–[90].
[165] A restitutionary claim for remuneration.
[166] *SunWater* at [41].

could be defeated. A statutory provision may operate so as to defeat the claim or part thereof. For the reasons already expressed, this is such a case. Section 140 of the *Architects Act* defeats much of Mr Hughes' claim. If, for example, there had been no recovery in the Rider Hunt proceedings and Mr Hughes sought to recover from Bexalaw, he would no doubt have been met with a claim of estoppel based upon his involvement in the representation to the liquidators that costs and outlays of Sontel and Ms Dobson would only be payable if money was recovered from Rider Hunt. There might also be circumstances in which an estoppel could otherwise arise against such a claim. However, they are matters which have to be raised and proven by the party attempting to resist the claim.[167]

[142] Therefore, all Mr Hughes need prove are the elements:

(i) He was requested to do the work; and
(ii) He did the work.

He would then be entitled to a reasonable sum for it.

[143] The liquidators, through Mr Saunders, were aware, as and from 10 September 2010, that Mr Hughes expected to be paid for his work. Nothing, in my view, turns upon the fact that the email of 10 September 2010 pre-dates the letter of 16 September 2010 whereby Sontel and Ms Dobson propose funding the Rider Hunt proceedings. By 10 September 2010, Mr Saunders was acting for the liquidators.

[144] Mr Saunders, from 10 September 2010, requested Mr Hughes do work in preparing for the Rider Hunt claim.[168]

[145] Mr Hughes is, in my view, entitled to a reasonable sum for that work done from 10 September 2010 up until 30 June 2011. Thereafter, any work could not, by force of the *Architects Act*, be subject of a claim for remuneration. The value of the work over the relevant period is assessed at $17302.08.

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[167] *SunWater* at [45].
[168] Affidavit of Antony Talbot Hughes, filed 30 August 2017, CFI 12 at ex TH-10.

Equitable lien

[146] Mr Fisher submitted that Mr Hughes had the benefit of an equitable lien over the funds held by the liquidators to the value of his claim. In the written submissions, the establishment of an equitable lien was put as a basis to support Mr Hughes' claim for remuneration.[169]

[147] However, an equitable lien is a charge on property which secures a liability.[170] There must be some basis upon which the underlying liability arises. To the extent that Mr Fisher submits that some claim to the trust money arises because (without more) Mr Hughes has contributed to the funds being acquired by the liquidators, that submission is directly inconsistent with what the High Court held in *Lumbers*.[171]

[148] Nothing in Mr Fisher's submissions relating to the "equitable lien" establishes any liability to pay Mr Hughes remuneration for the work he did on the Rider Hunt claim. The real question is whether a lien arises to secure the claim that Mr Hughes has established ($17,302.08) in priority to the liquidators' claim[172] and the claims of Sontel and Ms Dobson.[173]

[149] The liquidators have the benefit of an equitable lien to secure the money owed to them. Nowhere in any of Mr Fisher's lengthy written or oral submissions is there advanced any real argument as to why an equitable lien would arise in Mr Hughes' favour to defeat the priority enjoyed by the liquidators.[174] Indeed, Mr Fisher's submissions seem to recognise the liquidators' lien.[175]

[150] Mr Fisher, when pressed, based Mr Hughes' claim to priority on the fact (which seems not to be contentious) that Mr Hughes' activities had contributed to the recovery from Rider Hunt.[176] Of course, both Ms Dobson and Sontel also contributed. They paid the lawyers to bring the Rider Hunt proceedings. I reject Mr Fisher's submission.

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169 Submissions on behalf of Antony Hughes, filed 29 September 2017, CFI 19 at [53].
170 *Hewett v Court* (1983) 149 CLR 639 at 663.
171 At [81] and following. See the analysis of that decision by McMurdo JA in *SunWater* at [37]–[41].
172 Paragraphs 2(a) and (b) of the amended application.
173 Paragraphs 2(c), (d), (e) and (f) of the amended application.
174 Apart from the *Universal Distributing* argument, which I have rejected.
175 Submissions on behalf of Antony Hughes, filed 29 September 2017, CFI 19 at [62(XIV)], [62(XV)] and [63].
176 Transcript at 1-63 l 10; 1-64 l 40 to 1-65 l 5; 1-111 l 45 to 1-112 l 35.

The liquidators' remuneration and costs of the application

[151] As already observed, the remuneration is the sum referred to in paragraph 2(a) of the amended application.

[152] There appears to be no dispute in relation to the quantum of the liquidators' remuneration. However, whether the remuneration should be paid from the money presently held raises difficult questions because the funds are held on trust and do not fall into the liquidation of Bexalaw. The liquidators made the following written submissions:

> "24. As the liquidators have previously submitted, the proceeds of the Rider Hunt Proceeding are held on trust.
>
> 25. In the case of a winding up of a corporate trustee, liquidators are entitled to be indemnified out of trust assets for reasonably acting to identify or attempt to identify trust assets; recover or attempt to recover trust assets; realise or attempt to realise trust assets; protect or attempt to protect trust assets (see e.g. 13 *Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377, 384).
>
> 26. It is well established that, in an appropriate case, "liquidators are entitled to be paid their remuneration, whether for administering the trust assets or for general liquidation work, out of the trust assets' where 'the company has no assets other than trust assets".[177]
>
> 27. The liquidators' work, described in the report to creditors, answers that description."[178]

[153] However, Bexalaw's activities were not confined solely to that of trustee of the Gladstone Unit Trust. In the report to creditors dated 16 October 2016, this was said:

> "2.8 Classification of creditors
>
> There are at least four classifications of creditors in the liquidation of the Company, which are as follows:
>
> 1. the Company in its own right;
>
> 2. the Company as trustee of the Gladstone Unit Trust;
>
> 3. the Company as manager of the Barney Point Project (in respect of any Joint Venture expenses); and
>
> 4. the Company in its capacity as trustee of other trusts.

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[177] The submissions here refer to *Re North Food Catering Pty Ltd* [2014] NSWSC 77 and *Re Enhill Pty Ltd* [1983] 1 VR 561.

[178] Written submissions of the liquidators, filed 23 October 2017, CFI 28.

> From my investigations to date, there is unlikely to be a recovery for creditors who are in categories one (1) or four (4).
>
> As to categories two (2) and three (3), there may be a potential return for these creditors from the settlement proceeds depending on the outcome of the Court's determination of the liquidators' section 564 application referred to at 2.6 above and the outcome of any separate claim which may be brought by Mr Hughes (referred to at 2.5 above) or any other party."[179]

[154] The "section 564 application referred to at 2.6 above" refers to the proposed application, now brought by the liquidator, that Ms Dobson and Sontel should receive some compensation for funding the Rider Hunt action and, of course, the reference to "any separate claim which might be brought by Mr Hughes" is a reference to the claim which Mr Hughes has now brought.

[155] What is obvious, though, is that Bexalaw's activities were not confined to that of trustee of the Gladstone Unit Trust. Indeed, it was the trustee of other trusts.

[156] When a trustee company, in liquidation, has conducted business other than as trustee of the trust which holds the assets, or has been the trustee of other trusts, then the right of indemnity of the liquidator for remuneration and costs is limited to the extent that the remuneration and expenses relate to the administration of the trust which holds the assets.[180] That this is so is because the claim by the liquidator for indemnity against the trust assets is based upon the principles explained by Dixon J (as his Honour then was) in *Universal Distributing*.[181]

[157] Here, there is no evidence which identifies that part of the liquidators' remuneration which relates solely to the work which would attract the right of indemnity. I therefore refuse to direct that the remuneration claimed may be paid from the trust assets.

[158] The liquidators' costs of the application before me[182] are, clearly enough, costs for which the liquidators should have indemnity against the trust assets. The costs were

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[179] Affidavit of Gerald Thomas Collins, filed 29 June 2017, CFI 2, ex GTC-21 at 209.

[180] *Re Sutherland; French Caledonia Travel Service Pty Ltd (in liq)* [2003] NSWSC 1008; *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377 at 385; *Glazier Holdings Pty Ltd (in liq) v Australian Men's Health Pty Ltd (in liq)* [2006] NSWSC 1240 at [43] and the authorities there cited; *Erskine v Elan Media Partners Pty Ltd* [2016] VSC 493 at [78]–[92].

[181] (1933) 48 CLR 171.

[182] Paragraph 2(b) of the application, in the sum of $135,629.90.

incurred primarily in defending the fund against Mr Hughes' claim and otherwise seeking directions as to how the trust fund ought to be distributed.

[159] Given that the liquidators do not seem to have appreciated that their claim for indemnity against the trust assets for remuneration is limited in the way I have earlier explained, I am not convinced that all monies already paid to the liquidators from the trust fund are monies to which the liquidators were entitled. If monies have been overpaid, then the extent of any overpayment would have to be set off against any further payments (including payments and costs of the proceeding) to the liquidators. Until there is proper identification of that part of the liquidators' remuneration and expenses which relate solely to the administration and preservation of the trust assets, I am not prepared to sanction further payments to the liquidators.

[160] The beneficiaries of the Gladstone Trust may consent to the payment of the sum claimed or some other sum. However, I am not convinced that when the parties came before me and consented to the payments to the liquidators, they fully appreciated the true position.

The payments to Sontel Pty Ltd and Ms Dobson

[161] The costs of Sontel and Ms Dobson of the present application appear to me, clearly enough, to be costs of the winding up of the trust, as opposed to the winding up of Bexalaw's affairs in general. Therefore, consistently with the authorities, payment of those expenses would take priority to payment of the Project Expenses.

[162] I am satisfied that the amounts claimed in paragraphs 2(c), (d), (e) and (f) are payments to be borne by the trust assets in priority to the Project Expenses.

[163] However, I am not prepared to authorise the liquidators to pay those amounts from the assets presently held in priority to the Project Expenses.

[164] As already observed, McMurdo J (as his Honour then was) construed the JV agreement and held that the order of payments should be:

(i) Project Expenses first;

(ii) Equity Contribution made by Sontel and Ms Dobson second;

(iii) Equity Contribution made by Bexalaw third;

(iv) The balance to be divided as to 35 per cent to Sontel and Ms Dobson, and 65 per cent to Bexalaw.[183]

[165] The liquidator, Mr Collins, in his affidavit swears, on information belief, that each of Sontel, Ms Dobson and the Portland company made Equity Contributions of $333,334.51.[184] Then, he swears in his affidavit;

> "I am informed by John Saunders of Shand Taylor Lawyers and verily believe that Portland, Sontel and Dobson had been repaid their equity contribution referred to at paragraph 16 above from the proceeds of the sales of units 8, 6 and 15 of the Barney Point Project."[185]

[166] Therefore, contrary to the terms of the JV Agreement as varied by the Variation Agreement, repayment of the Equity Contributions has been made before payment of Project Expenses. The Project Expenses creditors ought, by now, to have been paid.

[167] While the payments now due to Sontel and Ms Dobson may be of a category which would ordinarily take priority over the payments to the Project Expenses creditors, the fact is that Sontel and Ms Dobson have been paid their Equity Contributions wrongly in priority to the Project Expenses. That should be redressed by the liquidators now making payments of the Project Expenses creditors in priority to the payment of any further monies owed to Sontel and Ms Dobson.

The Project Expenses creditors

[168] There are three of these.[186]

[169] The debt to the ATO of $52,991.21[187] is a Goods and Services Tax liability arising from the construction and sale of the Gladstone building units. The debt to Ham & Partners is evidenced by invoices which clearly enough identify the work done as services

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[183] *The Portland Downs Pastoral Co Pty Ltd & Ors v Bexalaw Pty Ltd (in liq)* [2009] QSC 272.
[184] Affidavit of Gerald Thomas Collins, filed 29 June 2017, CFI 2 at [16].
[185] At [32].
[186] Paragraph 2(g) of the amended application.
[187] Paragraph 2(g)(ii) of the amended application.

rendered to Bexalaw as trustee of the Gladstone Unit Trust relating to the "Regent Place Project", which is obviously a reference to the Gladstone building units.[188] Both these claims concern "Project Expenses" as that term is defined in the JV Agreement.[189] No party before me contended to the contrary.

[170] The third amount is the sum of $58,544.95 being costs due to Sontel and Ms Dobson pursuant to the costs order made on 21 August 2009.[190]

[171] The costs order in favour of Sontel and Ms Dobson was made in the JV proceeding.[191] The question then is whether the costs on an application to declare rights of the parties under the JV Agreement as varied by the Variation Agreement is a "payment" or "expenditure" which is "of and incidental to the conduct of the project…". His Honour's orders concerned the distribution of money under the terms of the JV Agreement as varied by the Variation Agreement. The cost of determination of a dispute between the parties to the joint venture as to the distribution of money generated by the project is, in my view, an expenditure at least "incidental" to "the conduct of the project" and the costs are therefore a "Project Expense".

The orders which should be made

[172] As already indicated, I intend to make declarations in terms of paragraph 1 of the amended application.

[173] For the reasons given, Mr Hughes has made out a claim to the extent of $17,302.08. I will make a declaration to that effect and will not therefore make a direction in terms of paragraph 3 of the amended application.

[174] The position of the liquidators' remuneration is awkward. I have found that the liquidators have not, on the material before me, established that the full sum claimed as remuneration should be paid from the trust money. However, there is no suggestion that the liquidators have done anything to disentitle themselves to the benefit of their lien, so that must be preserved. I have assumed that the liquidators will not seek to

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[188] Affidavit of Gerald Thomas Collins, filed 22 September 2017, CFI 18, ex GTC-5, cl 1.
[189] Joint Venture Agreement cl 1: Affidavit of Gerald Thomas Collins, filed 29 June 2017, CFI 2, ex GTC-3.
[190] Paragraph 2(g)(i) of the amended application.
[191] *The Portland Downs Pastoral Company P/L & Ors v Bexalaw P/L (in liq)* [2009] QSC 272.

burden the trust with any further costs or expenses associated with further establishing their claim to remuneration, but that assumption may not be correct.

[175] I intend to direct the liquidators to retain the sum of $152,181.70, or any further sum which might be ordered on account of their remuneration until the entitlement to pay that sum from the trust money is established. I will direct the payment of the other sums leaving the liquidators with $152,181.70, over which they will have a lien. If the liquidators wish to retain any further amount, then it will be incumbent upon them to apply for such a direction pursuant to a limited grant of liberty to apply which I shall order. That liberty will be limited in time to 14 days.

[176] I will then authorise payment of the various other amounts claimed in order of priority. The first will be the liquidators' costs before me.[192] As Sontel and Ms Dobson have inappropriately been paid their Equity Contributions before the payment of the Project Expenses, their claims made other than as Project Expenses creditors should be postponed behind those creditors. Obviously, the claim made by Sontel and Ms Dobson as Project Expenses creditors will rank with the other two Project Expenses creditors. Mr Hughes' claim is a cost of the winding up of the trust, so he should be paid after the liquidators, followed by the Project Expenses creditors, followed by Ms Dobson and Sontel. There will be insufficient funds for those last claims to be paid in full so they will be paid *parri passu*.

Costs

[177] The liquidators concede that the costs of Sontel and Ms Dobson of this application should be allowed against the trust fund,[193] but submits that Mr Hughes' costs should not.

[178] Mr Hughes seeks a costs order in his favour.

[179] Ms Dobson claims costs against Mr Hughes in the sum of $54,419.65. Ms Dobson's claim was supported by some material including a bundle of tax invoices delivered to

[192] Proposed direction 2(b) of the amended application.
[193] Proposed direction 2(c) of the amended application.

her by her solicitors Coves and Co.[194] The invoices include legal work performed in responding to the liquidator's application, in the course of which Mr Hughes' claim was mounted.

[180] I gave leave to Mr Hughes to deliver written submissions in defence of Ms Dobson's application for costs. Submissions were filed[195] as was a short affidavit in support sworn by Mr Hughes.[196]

[181] Mr Hughes now seeks costs against Ms Dobson in the sum of $1500, being Mr Fisher's fees in drawing and settling the written submissions and the affidavit in reply to Ms Dobson's claim for costs against Mr Hughes.

[182] Ms Dobson's application faces obvious difficulties. The application before me was brought by the liquidators, not Mr Hughes. Much of her costs relate to the application generally, not specifically to Mr Hughes' claim.[197]

[183] There is no doubt that Mr Hughes' conduct added to the costs of the application. He made a claim for $382,700 on numerous bases, some of which were not clear even after oral argument. Some of the submissions were clearly misconceived.[198] Much of Mr Hughes' claim was excluded by s 140 of the *Architects Act*.

[184] In the end, Mr Hughes achieved partial success. It was unfortunate that Mr Hughes filed long, complicated submissions, putting his claim on a number of different bases when none of that was necessary. The most obvious foundation for Mr Hughes' claim was for remuneration for work done upon request, and the principles governing such a claim had been fully analysed and explained by the Court of Appeal only a year before the application was heard by me.

[185] It is inappropriate to speculate as to whether the liquidators would have conceded a modest, solidly founded claim by Mr Hughes if it had been made to them. However, it

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194 Exhibit 3 before me.
195 Filed 2 November 2017, CFI 30.
196 Filed 2 November 2017, CFI 29.
197 Exhibit 3; the tax invoices and analysis of those in Affidavit of Antony Talbot Hughes, filed 2 November 2017, CFI 29 at [7]–[15].
198 The *Universal Distributing* claim and the argument based upon s 564 of the *Corporations Act*.

can be said that they had no real alternative but to oppose the claim that Mr Hughes did make. I decline to make a costs order in favour of Mr Hughes.

[186] It was obviously necessary for the liquidators to seek directions as to the distribution of the trust money. Therefore, both Ms Dobson and Mr Hughes (through Sontel) would necessarily have been involved in litigation even if Mr Hughes did not mount the claim that he did. While Ms Dobson may legitimately complain as to Mr Hughes' conduct of his case, he was partially successful, so the bringing of his application has been, at least in part, vindicated. On balance, no orders as to costs should be made in favour of Ms Dobson.

[187] Mr Hughes' has successfully resisted Ms Dobson's claim for costs. However, I do not intend to make an order for costs against Ms Dobson in Mr Hughes' favour. Ms Dobson made her application for costs in relation to Mr Hughes' claim for $382,700. It was not an unreasonable application to make and is not rendered unreasonable by Mr Hughes' success in the claim to the limited extent of $17,302.08. Mr Hughes should bear his own costs of defending Ms Dobson's application for costs.

ORDERS

[188] The order of the Court is as follows:

1. It is declared that:
   (a) the proceeds of the settlement of proceeding BS5998 of 2010, held in Gadens Lawyers trust account (the Balance Settlement Sum) is held by Bexalaw Pty Ltd (in liquidation) ACN 075 575 209 (Bexalaw):
      (i) in its capacity as trustee of the Gladstone Unit Trust; and
      (ii) on constructive trust for the parties to a Joint Venture Agreement dated 11 August 2003 between Bexalaw Pty Ltd as trustee for the Gladstone Unit Trust, the Portland Downs Pastoral Company Pty Ltd, Ms Julie Dobson and Sontel Pty Ltd as trustee for the Sontel Discretionary Trust (the Joint Venture Agreement); and
   (b) Bexalaw is indebted to Antony Hughes in the sum of $17,302.08, being remuneration for services rendered in the preparation of the claim by Bexalaw against Rider Levitt Bucknall Qld Pty Ltd (previously Rider Hunt Queensland Pty Ltd).
2. It is directed that the Applicants are authorised to deal with the Balance Settlement Sum as follows:

(a) to retain the sum of $152,181.70 on account of their remuneration in administering the assets held on trust pending determination of the Applicants' entitlement to that money;

(b) to pay, after making the retention authorised by order 2(a), the following to the persons, and in the priorities, as follows:

(i) $135,629.90 to themselves in respect of their costs of the present application;

(ii) $17,302.08 to Antony Hughes being remuneration for services rendered in the preparation of the claim by Bexalaw against Rider Levitt Bucknall Qld Pty Ltd (previously Rider Hunt Queensland Pty Ltd);

(iii) "Project Expenses" as defined by the Joint Venture agreement:

(A) $58,544.95 to Sontel Pty Ltd and Julie Dobson, being costs pursuant to orders of P D McMurdo J (as his Honour then was) on 21 August 2009;

(B) $52,991.21 to the Australian Taxation Office, being Goods and Services Tax and interest thereon;

(C) $32,781.31 to H & P Services Pty Ltd trading as "Ham & Partners" for accounting services rendered to Bexalaw as trustee for the Gladstone Unit Trust;

(iv) the following amounts be paid parri passu from such funds as remain held by the liquidators following the payments or retentions made pursuant to directions (2)(a) and (2)(b)(i), (ii) and (iii):

(A) $94,220.50 to Sontel Pty Ltd and Ms Julie Dobson in respect of their legal costs of and incidental to this proceeding;

(B) $167,383.41 to Sontel Pty Ltd and Ms Julie Dobson as reimbursement of professional fees and disbursements or outlays in respect of Supreme Court Proceedings BS 5998 of 2010 and 7925 of 2010;

(C) $85,744.25 to Sontel Pty Ltd as interest on the professional fees and disbursements referred to at subparagraph (B) above;

(D) $90,185.54 to Ms Julie Dobson as interest on the professional fees and disbursements referred to at subparagraph (B) above.

3. The Applicants have liberty to apply for an order increasing the sum specified in direction 2(a) to include any further remuneration or costs associated with complying with these directions. If no application is filed by 4 pm on 23 February 2018, the Applicants shall distribute the money as directed by these orders.

4. Any sum being the difference between the sum retained under order 2(a) and the actual remuneration to the liquidators in administering the assets held in trust shall fall to be distributed under order 2(b)(iv).

5. There shall be no order as to costs between the second and fourth respondents.