Restitution for a Total Failure of Consideration: When a Total Failure is not a Total Failure

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The doctrine of total failure of consideration, now part of the distinct law of restitution, has, from its inception, always been regarded as only applicable where the failure of the promised performance is complete or total. Any partial performance has always been seen as a complete bar to recovery under this doctrine. This work examines recent decisions, which over the last five years, have consistently allowed restitution for a total failure of consideration despite part performance in terms of conferral of a monetary benefit. It is now argued that logic, consistency and equity demand that the total failure of consideration doctrine now encompass a partial failure of consideration. It is argued that such a doctrine must extend to benefits received, either monetary or non-monetary and that the High Court is now in a position where this must necessarily be accepted.

The Traditional Position

The law of restitution in both England and Australia, for the last 50 years, has refused to recognise recovery in restitution, on the ground of total failure of consideration where the plaintiff has received consideration in part.[1] This position has always been apparent, with courts and commentators in this area constantly referring to the leading statement of Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[2]

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1 *Baltic Shipping v Dillon* (1993) 176 CLR 344 decided on this very basis. See also *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 1 WLR 912, at 923.

2 [1943] AC 32; Overruling *Chandler v Webster* [1904] 1 KB 493.

("Fibrosa"), that a recovery of money paid, or the monetary value of services rendered, is available on the grounds of a total failure of consideration where "the consideration, if entire, has entirely failed, or where, if it is severable, it has entirely failed as to the severable residue."[3] Where these considerations are satisfied, courts have ordered return of the money paid, made a quantum meruit or quantum valebant award for the fair value of goods or services rendered.

It should be noted, at the outset, that when considering restitution for a total failure of consideration as Viscount Simon LC stated in *Fibrosa* "... it is ... not the promise which is referred to as the failure of the consideration, but the performance of the promise."[4] This statement was relied on by the High Court of Australia in *Davids Securities Pty Ltd v Commonwealth Bank of Australia*[5] *("Davids Securities")* and in *Baltic Shipping v Dillon*[6] *("Baltic")*.

The traditional insistence that a failure of consideration must be total was noted in the most recent High Court decision in this area, in the majority joint judgment in *Davids Securities*. The majority stated that:

> "...there has been an insistence that the failure of consideration be total. The law has traditionally not allowed recovery of money if the person who made the payment has received any part of the 'benefit' provided for in the contract."[7]

Partial Failure Of Consideration In The United States

Consider a common situation where, for example, in a building contract a builder, A, performs much of the construction work required under an entire contract with B. In the process of performing this work, the builder, A, receives several part payments of the total contract price from B. Suppose that this contract is then breached by B, and A terminates the contract for B's breach.[8] It is clear that A can recover contractual damages which would include the value of the work done up until the breach, as well as expected profits. However, it may be that A has made a bad bargain and that the value of A's work at the time of breach exceeds the contract price. A will wish to sue in restitution for the value of the work

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3 Id at 64-65.
4 Id at 48.
5 (1992) 175 CLR 353, at 382.
6 (1993) 176 CLR 344, 351 (per Mason CJ), 379 (per Deane and Dawson JJ), 381(per Toohey J), 389 (per McHugh J).
7 (1992) 175 CLR 353, 382, per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.
8 This essay concentrates on the situation where the contract is terminated by the plaintiff and it is the defendant who is in breach. Although it may be argued that it should make no difference to the analysis whether the party claiming restitution is the party in breach, courts have traditionally not allowed this and it will not be considered within the scope of this essay.

done, rather than the contract price.[9]

The issue is whether restitution should be available in this circumstance.[10] As the High Court recognised in *Baltic*,[11] restitution for a total failure of consideration is available when the contract is at an end, and none of the consideration (in the sense of the bargained for benefit) has been received by the claimant. In the absence of any other unjust factor, it would appear in the above example that restitution should not be available. The claimant, B has certainly received part of the benefit, being part payments of the final contract price.

This example is not confined to the hypothetical. In *Boomer v Muir*[12] *("Boomer")*, B terminated a contract after 18 months (which the court found was rightful, as the other party had failed to provide materials on time) for breach by the other party. At the time of termination, B had received all but $20,000 of the contract price. However, B was awarded an additional $258,000 in restitution. This case is referred to by Burrows, who argues that this means that in this case the law now recognises that "failure need only be partial and not total."[13]

However, it may be that *Boomer* and other similar United States cases[14] are based simply on the principle that a plaintiff can rescind ab initio a contract for a defendant's breach. On this analysis, the question is really whether restitutio in integrum is possible, and not a question of total failure of consideration. Palmer,[15] in considering *Boomer* in fact *assumes* that the Californian Court based their reasoning on rescission for breach in *Boomer*. Unfortunately the judgment in *Boomer* was not specific on this point and whether restitution was allowed for a 'total' failure of consideration or simply due to rescission of the contract remains uncertain. *Boomer*, thus, cannot be of any persuasive weight because in Australian or English cases, because, since *Johnson v Agnew*[16] and *McDonald v Dennys Lascelles Ltd*[17] the House of Lords and High Court of Australia respectively, have recognised that a contract is not rescinded ab initio for breach.

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9 It is assumed that B, the party in breach, cannot point to the fact that the remainder of the contract would have lost money and that this should be deducted from the award. It has been held in the United States that to allow this in principle would be to allow a defendant to benefit from a breach of contract: *Bush v Canfield* 2 Conn 485 (1818) to support this view. However, there is sparse case authority and in fact Judge Learned Hand reached the opposite conclusion in *L Albert &Son v Armstrong Rubber Co* 178 F2d 182 (2d Cir 1949).

10 Whether this award should be limited to the contract price will not be considered here the issue examined will be whether restitution should be available at all.

11 Above note 6.

12 24 P2d 570 (Cal App 1933).

13 A Burrows, *The Law of Restitution*, London: Butterworths, 1993, at 261.

14 P Palmer "Contract Price as Limit on Restitution on Defendant's Breach" (1959) 20 *Ohio State LJ* 264, 272 notes numerous US decisions allowing restitution where there have been part payments.

15 Above note 14, at 273.

16 [1980] AC 367, at 396.

17 (1933) 48 CLR 457, at 476-477.

The Anomaly in Australian Law

State Supreme Courts

Despite this obvious defect in applying United States reasoning from such cases to Australian law, State Supreme Courts in Australia have in several decisions in fact reached the same result whilst referring to and relying upon *Boomer* with no reference to the US acceptance of (and Australian and English refusal to allow) rescission for breach. This can be seen in the decisions of Cole J in the Commercial Division of the Supreme Court of New South Wales in *The Minister for Public Works v Renard Constructions Pty Ltd*[18] and *Jennings Construction Ltd v QH and M Birt Pty Ltd*[19] (both of which were approved on this point by the Court of Appeal[20]) and the decision of the Court of Appeal in the Supreme Court of Queensland in *Watkins Pacific Pty Ltd v Lezzi Constructions Pty Ltd ("Watkins")*.[21] In each case a quantum meruit was awarded to a builder where the owner (the head contractor under a sub-contract in *Watkins*) was in breach but where significant progress payments had already been made.

The High Court

The decision of the High Court in *Pavey & Matthews v Paul*[22] ("Pavey") also appears to suffer from the same difficulty. If it is accepted that the unjust factor in this case is failure of consideration[23] then the problem arises with the fact that the defendant Mrs Paul had paid $36,000 under an unenforceable contract for renovations at the market price. However the High Court allowed a quantum meruit claim by the builder for more than $62,000.

One possible explanation consistent with the concept of a *total* failure of consideration is to argue that the payment was in fact conditional on

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[18] Supreme Court of New South Wales (26 October 1989, unreported).

[19] Supreme Court of New South Wales (16 December 1988, unreported).

[20] *Renard Constructions v Minister for Public Works* [1992] 26 NSWLR 234; *Jennings Construction Ltd v QH and M Birt Ltd* (Supreme Court NSW Court of Appeal, 31 January 1989, unreported).

[21] Supreme Court of Queensland (Full Court 1993, unreported). *See also Pohlmann v Harrison* (Queensland Court of Appeal, 3 Feb 1993, unreported).

[22] (1986) 162 CLR 221.

[23] Both Birks and Burrows accept that this is the unjust factor: Burrows, note 13 at 302); Birks, "In Defence of Free Acceptance" in Burrows (ed), *Essays on the Law of Restitution*, Oxford: Clarendon Press, 1992, at 111-112. However, it should be noted that the judgments of both Mason CJ and Wilson J and Deane J make explicit reference to the requirement of acceptance (see *Pavey* at pages 228 and 269), a reference which Burrows argues must be "wrong".

entire performance of the contractual obligations.[24] As the condition fails the money must be returned and there has thus been a total failure of consideration. This argument was considered in the High Court in *Baltic* by Mason CJ who dismissed its application arguing that;

> "...where the payee is required to perform work and incur expense before completing ... unless the contract manifests a contrary intention it would be unreasonable to hold that the payee's right to retain the payment is conditional on performance of the entire contractual obligations".[25]

It could be argued in any case that the contract does manifest a contrary intention, as the contractual intention would surely not be to exclude a restitutionary claim for the services performed, thus there must be an intention that the payment is conditional. However this reasoning is both artificial and circular.[26] In addition, the conditional payment theory could not provide an explanation in cases where part of a *non-monetary* benefit is conferred but cannot be returned.

It seems then, that these cases appear to be anomalies within the principle of total failure of consideration, yet consistency and coherency within the law of restitution demands some explanation of them.

Acceptance Of Partial Failure When Counter-Restitution Is Relatively Simple.

The explanation provided by Birks[27] is almost as a throwaway line. Birks argues that "it has never been suggested that receipt of such a prepayment would obstruct the quantum meruit."[28] This is because it can either be deducted from the award or made repayable as a condition of the award. Birks argues further that "the requirement of total failure of consideration disappears when counter-restitution is easy."[29] Burrows[30] simply refers to *Boomer* as an exception to the general principle and recognises that part payments of the contract price do not bar restitution.

The majority joint judgment in *Davids Securities* adopted this explanation, obiter dicta, without any further explanation. In the joint judgment their Honours stated that:

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[24] Although this would not explain *Pavey* where the bargained-for performance was complete.

[25] Id note 6 at 352-353.

[26] It assumes that the availability of a restitutionary remedy determines whether the payment is conditional and thus whether the remedy is available.

[27] P Birks, *An Introduction to the Law of Restitution*, Oxford: Clarendon Press, 1990, at 242.

[28] Ibid.

[29] Ibid.

[30] Above note 13.

> "...[I]n cases where consideration can be apportioned or where counter-restitution is relatively simple, insistence on total failure of consideration can be misleading or confusing.... In circumstances where both parties have impliedly acknowledged that the consideration can be "broken up" or apportioned in this way, any rationale for adhering to the traditional rule requiring total failure of consideration disappears."[31]

It would appear that requiring that counter-restitution be easy in cases of partial consideration implicitly involves accepting that if the parties can be placed into the situation as if there was a total failure of consideration, there would be no need for the initial requirement that the failure of consideration be total. But what is the rationale behind the requirement that a failure of consideration be total and not partial? It would seem that the concept of total failure of consideration has traditionally required a *total* failure because, as Burrows[32] argues, the very basis for the plaintiff's conferral of the benefit has been undermined. So why is it that, in these cases, this rationale disappears? Further, when is counter-restitution relatively simple - is this solely limited to cases of money payments or does it extend further? In leaving these questions open the High Court has shown an intention to take an incremental approach to determination of these questions. This approach was recognised recently by Lord Goff in *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [33], where his Lordship stated that signs of the reformulation of the rule requiring a total failure of consideration, on a more principled basis "are appearing in judgments throughout the common law world, as appropriate cases arise for decision."[34] The problem with the difficulty of these unanswered questions is that most commentators continue to rely upon the notion that a failure of consideration be *total* without considering these now-accepted exceptions and their implications.[35]

When Is Counter Restitution Not 'Relatively Simple' ?

It would seem then, the converse of the reasoning of the majority in *Davids Securities* is that the only time a partial failure of consideration would not be recognised would be when counter-restitution is not easy. Without clarification of when counter-restitution is *not* easy, it may seem that this is the case in situations such as in *Baltic* where the benefit partly received is

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[31] Above note 5 at 383; Approved in *Goss v Chilcott* (Privy Council, unreported 23 May 1996).

[32] Above note 13 at 251.

[33] [1996] 2 All ER 961, at 967.

[34] Ibid.

[35] For example K Mason and J Carter, *Restitution Law in Australia*, Sydney: Butterworths, 1995, at 288.

non- monetary. In *Baltic* however, none of the High Court explained why counter-restitution was not easy, with most of the court simply stating that none of the fare could be recovered as the failure was not total. Instead Mason CJ (with whom Toohey and Brennan JJ agreed) simply stated that there cannot be a total failure of consideration if the incomplete performance results in any party receiving and retaining "any substantial part of the benefit received under the contract."[36] Mason CJ did not explain what it was about the situation in *Baltic* that prevented the court from counter- restitution so that Mrs Dillon could be considered not to have retained "any substantial part of the benefit received". Further, McHugh J, ignoring the High Court's limited acceptance of partial failure in *Davids Securities* stated that none of the fare was recoverable as "the common law has **no** doctrine of apportionment in respect of a partial failure of consideration [my emphasis]."[37] It is only in the reasoning of Deane and Dawson JJ that the possibility of partial failure was acknowledged. Deane and Dawson JJ stated that this was not a case of partial failure as Mrs Dillon sought the return of *all* of the fare and there was no need to consider whether the proportion of the fare representing the period of the cruise not received could be refunded.[38] Their Honours were satisfied that the *whole* of the fare could not be refunded as some "benefits, which were of real value had been provided, accepted and enjoyed."[39] It is different to say that the *whole* of the fare could not be recovered, from saying that *none* of the fare could be recovered. The question then, is what it is about the facts in *Baltic* that would prevent partial restitution of the fare?

It is submitted, however, that on the facts of *Baltic* it was not the fact that the benefit received was non-monetary *per se* that made counter-restitution difficult, but that the benefit was, of its very nature, a very subjective one, being as Deane and Dawson JJ stated a "holiday experience".[40] After the cruise ship *The Mikhail Lermontov* sank it would make determination of the partial value (for counter-restitution) of the "holiday experience" extremely difficult. There is support for the fact that monetary and non-monetary benefits are not to be simply distinguished in the isolated statement of Deane J in *Commonwealth of Australia v Amann Aviation Pty Ltd*[41] that in cases of partial failure of consideration restitution may "found a direct action for the excess of money paid ... over the value of consideration actually received."[42]

The question which then arises, is in which situations where the partial consideration received is a non-monetary benefit, is counter-restitution easy. Suppose that the situation in *Pavey* was reversed. The builders had

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36 Above note 6 at 350.
37 Above note 6 at 388-389.
38 Above note 6 at 375.
39 Above note 6 at 379.
40 Above note 6 at 378.
41 (1991) 174 CLR 64.
42 Above note 41 at 117.

completed half of the renovations but had already been paid the full price. Mrs Paul would want to recover at least half of the money paid. However the consideration has not totally failed- she has received part of what she bargained for in the form of a partly renovated house and would not be able to recover any of the money in restitution. Birks[43] rationalises this on the basis that a non-monetary benefit cannot be easily valued in monetary terms. But why not? When payment is being assessed on a quantum meruit basis for a total failure of consideration (or in the above cases of partial failure of consideration) the court is determining the value by this very means of market valuation. Why should it be any harder to value half a building (in order to make counter-restitution to the defendant) than a whole building (in order to award restitution to the plaintiff)? The only difference is that the defendant is not receiving back what was given (money, in the above cases of partial failure of consideration) but the monetary value of a non-monetary benefit.

The Benefits Of A Partial Failure

The recognition of a restitutionary remedy for a partial failure of consideration where the defendant has received either a monetary or non-monetary benefit also has several further benefits in addition to the need for coherency in the law. It could only operate to achieve more just results and would bring the common law in line with legislative developments in New South Wales, South Australia and Victoria which have now followed the English example of legislating to allow restitution for partial failure of consideration in the context of frustrated contracts.[44]

In addition, as Burrows also notes, this would avoid the possibility of "artificially narrow"[45] interpretations of what the bargained for benefit was in order to allow restitution for a total failure of consideration, to achieve an equitable result. For example, in *Rowland v Divall*[46] the Court of Appeal held that there had been a total failure of consideration when a buyer who purchased a car did not receive good title to it, despite the fact that he had driven it for two months.[47]

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[43] Above note 27 at 243.

[44] *Law Reform (Frustrated Contracts) Act 1943 (UK)* , s1(2). Unfortunately, the UK Law Commission in its Report on 'Pecuniary Restitution on Breach of Contract' No 121 (1983) decided not to endorse their initial recommendation (Working Paper No 65 (1975)) that an innocent party should be entitled to restitution of money paid to a contract breaker for partial as well as total failure of consideration.

[45] Above note 13 at 260.

[46] [1923] 42 KB 1041. Arguably also in *Rover International Ltd v Cannon Film Sales* [1989] 1 WLR 912.

[47] The artificiality of this approach is that the buyer has clearly derived some benefit in fact by driving the car for two months. It would seem that this should logically be partial consideration being one of the benefits derived from good title!

Conclusion

In conclusion, it seems that the recognition of restitution for 'partial failure of consideration' where counter-restitution is easy is a major erosion of the requirement that failure of consideration be total. The only factor, it would seem, inhibiting the courts from recognition now of a restitutionary remedy in all cases where there is a partial failure of consideration is a reluctance to enter into valuation of non-monetary benefits. It is submitted however that courts engage in these very exercises in the principal restitution when ascertaining any quantum meruit or quantum valebant claim, in addition to everyday valuations in all other areas of the law. Recognition of a partial failure of consideration as part of the restitutionary doctrine of total failure of consideration is not only necessary in terms of logic and consistency, but would also operate to achieve more equitable results. The door of the total failure of consideration doctrine has now been opened and it is time for courts and commentators to welcome inside the doctrine of a partial failure of consideration.