Total Failure of Consideration

JOHN TARRANT†

Failure of consideration can be either total or partial. In this paper the author examines the doctrine of accrued rights and the role it plays in relation to total failure of consideration in the contractual context. The doctrine of accrued rights is well established in Australian contract law. Rights that accrue prior to termination of a contract survive termination and can therefore be enforced after termination. The author argues that when there is a total failure of consideration the doctrine of accrued rights operates to create a debt for the amount that is the subject of the total failure of consideration. The obligation to pay the debt arises within the law of contract. This conclusion will be contrasted with those who argue that an action for recovery, and the corresponding obligation to make payment, are independent of contract.

T O T A L failure of consideration can arise in a number of circumstances. For example, many contracts involve payments by one party before they have received full performance for that payment. This can arise where instalments are made towards a purchase price and the item being purchased is conveyed when payment is made in full. The item may never be conveyed if, for example, the contract is frustrated before conveyance. In other circumstances a contract may involve the payment of a number of components of a purchase price and the consideration paid for one of these components might fail. In cases where there is a total failure of consideration the law allows the party who has made the payments to pursue a claim to recover the payments made. The purpose of this paper is to explore the theoretical basis that underpins the right to recover where there is a total failure of consideration.

The central argument is that recovery for total failure of consideration in the contractual context can be resolved according to contractual principles. This claim

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FAILURE OF CONSIDERATION

is in direct contrast to a widely held view that recovery for failure of consideration is based on an independent action in unjust enrichment or restitution, that is, an obligation arising independently of contract. The law of unjust enrichment developed to explain the doctrinal basis for a number of cases involving the old forms of actions including the action for money had and received. Those who support the unjust enrichment basis for recovery for failure of consideration argue that the old forms of action masked a source of obligations based on unjust enrichment. This source of obligations is said to be independent of obligations arising from contract. That is certainly the case but it does not follow that every cause of action formerly pleaded as an action for money had and received is a claim in unjust enrichment. It will be argued that a claim based on total failure of consideration is a claim within contract and the source of the obligation is the contract.

It will be argued that the unjust enrichment approach to total failure of consideration is doctrinally unsound. Despite the support of many academics for the unjust enrichment basis for total failure of consideration there has been little support in the High Court of Australia. Initial support for the unjust enrichment approach can be found in the judgments of Deane J in both Foran v Wight and Baltic Shipping Company v Dillon and the judgment of Dawson J in Baltic Shipping. Baltic Shipping is a turning point in the High Court’s approach to total failure of consideration because the approach taken by Mason CJ, and McHugh, Brennan and Toohey JJ, is consistent with a contractual right to recover for total failure of consideration. The rejection of the unjust enrichment approach was taken a significant step further in Roxborough v Rothmans of Pall Mall Australia Limited where a number of members of the High Court rejected the usefulness of the doctrine of unjust enrichment. It will be argued that the rejection of an unjust enrichment approach to total failure of consideration by the High Court is soundly based.

An historical analysis will show that where there was a total failure of consideration sums paid in advance were initially recoverable by an action in debt. The action for money had and received became an alternative action for the action of debt. Recent decisions will be examined in the light of this historical analysis. It will be argued that a correct understanding of the relationship between accrued rights and total failure of consideration shows that recovery for total failure of consideration is a

common law contractual claim and that amounts recoverable for total failure of
consideration are recoverable as a debt. This argument will be supported by an
analysis of Australian case-law that is consistent with the argument that recovery is
based on a contractual right to recover.

The jurisdictional basis for the recovery based on total failure of consideration is
not just of academic interest. It has practical implications. The basis of recovery is
important because of the availability of the defence of change of position which is
currently available for claims based on unjust enrichment but may not be available
for contractual claims. It is also important in the context of the assignment of
contractual rights.5

This paper is divided into two parts. Part I examines accrued rights and explains the
critical characteristics of an accrued right. Part II examines the alternative theories
supporting recovery for total failure of consideration.

I. IDENTIFICATION OF ACCRUED RIGHTS

1. Categories of accrued rights

Accrued rights arise from the construction of the express and implied terms of a
contract. When a contract is terminated prior to complete performance the task of
the court is to determine what rights have accrued to the parties. There are two
categories of accrued rights. The first category comprises rights that accrue under
the terms of the contract and are rights that are found within the express and implied
terms of the contract. Whether a right corresponding to a primary obligation has
accrued is determined by an interpretation of the terms of the contract.6 The most
common accrued right is the right to bring an action for a debt which is a liquidated
sum under the contract. This first category of accrued rights also includes terms
such as confidentiality clauses and arbitration clauses that survive termination.
These non-monetary accrued rights are beyond the scope of this paper and will not
be discussed. The second category of accrued rights comprises rights that accrue
from a breach of contract. They may have arisen from breaches prior to termination,
or the breach that led to termination, or both. They most commonly are characterised
as giving rise to the award of compensatory damages.

2. The requirement that rights accrue unconditionally

It is now well established that accrued rights are rights that have accrued
unconditionally either before the contract has been terminated or accrue at the

5. Carter & Tolhurst above n 1.
6. This will be illustrated by reference to McDonald v Dennys Lascelles Ltd (1933) 48 CLR
   457 and Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd (in
   liq) (1936) 54 CLR 361.
moment of termination. In *McDonald v Dennys Lascelles Ltd*, Dixon J, in a much cited passage, outlined the position as follows:

Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been *unconditionally* acquired. Rights and obligations which arise from the *partial execution* of the contract and causes of action which have accrued from its breach alike continue unaffected.7

Unconditionally acquired rights are rights that have unconditionally accrued based on the construction of the terms of the contract. *Westralian Farmers Limited v Commonwealth Agricultural Service Engineers Limited*8 provides an important example of how rights can sometimes accrue in two stages. The contractual arrangements between the parties were contained in an October 1923 agreement which was varied by an agreement in August 1924. Clause 5 of the October 1923 agreement provided for the payment of commission on the sale of the tractors. Clause 24 of the August 1924 agreement provided that this commission was to be paid when the tractors arrived in Fremantle. Under the arrangements the defendant took possession of the tractors in the United States and paid for them at that time. It was only the payment of the commission to the plaintiff that was in issue.

Latham CJ held that the commission was not payable because on his construction of the contract the obligation to pay the commission only arose when the tractors arrived in Fremantle.9 Latham CJ saw the obligation as a *single* obligation which arose upon a specified event. By contrast, the other members of the court all held that the *obligation* to pay the commission arose independently of the *time* specified for its payment. This construction was possible because the obligation to pay and the time specified for payment were contained in separate clauses. Because the contract was expressed in this way, Starke J was able to split the obligation to pay the commission (contained in clause 5 of the October 1923 agreement) from the condition required for payment to be made, that is the arrival of the tractors in Fremantle (contained in clause 24 of the August 1924 agreement). He concluded that this latter clause –

merely delays or postpones payment of the percentage until arrival of the goods at Fremantle.... It does not affect the liability to pay the percentage arising out of an obligation which had arisen before the termination of the contract.10

Dixon and Evatt JJ adopted a similar approach but took the analysis further by highlighting the fact that the arrival of the tractors in Fremantle was an event

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10. Ibid, Starke J 375.
independent of the contract because there was no obligation on either party to transport the tractors to Fremantle. Based on this analysis they concluded that:

The fact that the right to payment is future or is contingent upon some event, not involving further performance of the contract, does not prevent it maturing into an immediately enforceable obligation. The right to payment, no doubt, was at the time of the termination of the agreement contingent but it was a debt otherwise completely vested in the respondent company as creditor. The termination of the agreement did not prevent it becoming absolute on the occurrence of the contingency.\(^{11}\)

This is an important distinction because it means that a right can be unconditionally acquired from the other party but at the same time be contingent in that it depends on some independent event or condition being met. This approach recognises that a right to sue can become absolute by a two stage process. The first stage is that, as between the parties, the amount has accrued unconditionally. At this stage the right has vested but is still conditional. The important point is that it is conditional on an event independent of the performance of either party under the contract. Therefore, as between the parties, it is an accrued right but it is not yet enforceable and is best described as a conditional accrued right. The second stage is the happening of the particular event or condition specified in the contract. Once this condition has been met the right to sue for the amount is absolute. McTiernan J explained the position in *Westralian Farmers* in the following terms:

The arrival of the goods at Fremantle was not dependent on the subsistence of the contract after the goods were consigned to that port. Payment of the ‘percentages’ could not be demanded before that time, but all conditions necessary to create the plaintiff’s right to payment were fulfilled in accordance with the contract while it was still in existence.\(^{12}\)

It is clear from *McDonald v Dennys Lascelles* and *Westralian Farmers* that the terms of the contract should be the crucial focus in determining whether a right has accrued and whether it remains conditional. Recent cases continue to apply the accrued rights requirement in a consistent manner.\(^{13}\)

In Part II it is argued that where there is a total failure of consideration the right to recover is an accrued right. This is critical to the central argument that the right to recover arises within the law of contract.

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12. Ibid, McTiernan J 386.
II. ALTERNATIVE THEORIES

The focus of this section will be on the doctrinal basis for recovery of payments where there has been a total failure of consideration. There are four possible doctrinal explanations for the recovery of such monies: an action in debt; an action based on an implied term to repay the money; a common law action based on unjust enrichment; and an action in equity. It will be argued that as a result of the operation of the doctrine of accrued rights money paid in advance where there is total failure of consideration should be recoverable as of right as a debt. The action of money had and received became an alternative for an action of debt in cases of total failure of consideration, not a substitute for it. The action of debt is the appropriate action for recovery of such sums and reflects the fact that the amount is recoverable as of right.

The various doctrinal explanations will be examined in detail with particular reference to the High Court decision in *Roxborough v Rothmans* where a number of judges considered alternative explanations for recovery for a total failure of consideration. The historical basis for the action of debt will be analysed and compared with modern definitions of what constitutes a debt to support the proposition that recovery should be based on an action of debt. A number of High Court cases will be examined and it will be argued that these cases support the proposition that the recovery for a total failure of consideration is recoverable within contract as a debt.

1. The approach based on debt

(a) The forms of action

The essence of the approach based on debt is that total failure of consideration is a contractual doctrine. Since the mid-16th century the recovery of money paid where there is a total failure of consideration is by an action for money had and received. This form of action was historically part of indebitatus assumpsit. However, prior to the development of indebitatus assumpsit, the original action for recovery of money based on a failure of consideration was an action in debt. As Stoljar observed:

> It has been thought that failure of consideration was a quasi-contractual doctrine; indeed Winfield regarded it as of a ‘pure’ or ‘genuine’ kind. Needless to say, this confused the reason for an action with the wider uses an action might have. Moreover, since failure of consideration could only arise from the collapse of an otherwise enforceable bargain its ‘contractual’ aspect could hardly be denied.¹⁴

Pollock and Maitland¹⁵ identify a case in 1294 where the action of debt was available where there was a total failure of consideration. It was held in the case that where a

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purchaser of land ‘pays his money and the vendor will not enfeoff him then an 
action of debt will lie’.16 Jackson commented on the same case as follows:

In 1294 Metingham CJ was clear that if one covenants to convey land for money 
paid, and the land is not conveyed, ‘in that case I may choose whether I will 
demand the money by writ of debt, or demand by writ of covenant that he perform 
his covenant’.17

At the end of the 16th century and during the 17th century indebitatus assumpsit 
came to be an alternative action to the action of debt.18 However, Holdsworth 
documentsthe reluctance of Holt CJ at the end of the 17th century to extend the 
action of indebitatus assumpsit to cases of total failure of consideration. Referring 
to Holt CJ’s reluctance in such cases, Holdsworth observed that he ‘seemed to 
imply that the liability was somehow contractual’.19 Holt CJ held that ‘where there is 
a bargain, tho’ a corrupt one … I will never allow an indebitatus’.20 Holt CJ eventually 
allowed indebitatus assumpsit in cases of total failure of consideration but it is clear 
that he did so with some reluctance. In Holmes v Hall, he allowed the action but 
remarked that: ‘Indeed, these cases of indebitatus for money received to use have 
been carried too far, and nobody would more willingly check them than I would’.21

In Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited,22 Lord 
Wright referred to Holmes v Hall and noted that the recovery for total failure of 
consideration in earlier times was in an action for debt, account or case.23 These 
cases demonstrate that the historical basis for recovery for total failure of 
consideration was an action for debt.

(b) Definition of debt

To determine whether amounts claimed to be recoverable for failure of consideration 
should be recoverable as debts it is necessary to examine the historical and modern 
definitions of debt. Maitland described a debt as ‘[a]n action for a fixed sum of 
money due for any reason’.24 Ames described a debt as arising when the defendant 
‘was conceived of as having in his possession something belonging to the plaintiff’

16. Ibid, 211.
17. RM Jackson The History of Quasi-Contract in English Law (Cambridge: CUP, 1936), 19-20 
(emphasis added).
Vol 3, 428.
21. Holmes v Hall (1705) 87 ER 918.
22. [1943] AC 32.
24. FW Maitland The Forms of Action at Common Law (Cambridge: CUP, 1936) 63 (emphasis 
added).
which he might not rightfully keep, but ought to surrender’. Justice Priestley, writing in the Journal of Contract Law, provided the following modern definition of a debt as –

a sum of money owed by one person to another, the amount of which is fixed by a transaction between them before or at the time of the sum becoming owing by one to the other.

It will be shown in the discussion below that the right of a recipient to retain money received in advance is conditional on performance. Because of the doctrine of accrued rights where money is paid on a conditional basis and the condition fails, it becomes a sum owing by the recipient to the payer. It therefore falls within both the early definition of debt and the modern definition outlined above.

(c) The right to retain

There is a fundamental difference between the right to sue for an amount due under a contract and the absolute right to retain money once it is received. The right to sue may be unconditional but it will be shown that the right to retain money is conditional on performance. Where there is a total failure of consideration in relation to a particular sum the right to sue for that amount, if it was due before termination, also falls away. The focus of the inquiry must be on the right to retain. By contrast, the approach based on unjust enrichment or restitution focuses on whether the recipient has been unjustly enriched by the receipt of the money. However, it will be shown that in cases of total failure of consideration the focus should be on performance by the payee not on receipt of the benefit by the payer. It is the performance by the payee that is the essential element in the test to determine whether the payee has the right to retain the money.

The crucial question as to whether the right to enforce payment of an instalment payment after termination or to retain an instalment payment is whether there has been any performance of the relevant contractual obligation by the party seeking to retain the money. Once there has been some performance then the recipient can treat the money as their own and they have an absolute right to keep it. In McDonald v Dennys Lascelles Dixon J held that the right to retain the instalment was only a conditional right:

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27. See B Kremer ‘The Action for Money Had and Received’ (2001) 17 JCL 93 for a detailed analysis of the focus of the courts on the right to retain in actions of money had and received. See also B Kremer ‘Recovering Money Paid Under Void Contracts: “Absence of Consideration” and Failure of Consideration’ (2001) 17 JCL 37.
When a contract stipulates for payment of part of the purchase money in advance, the purchaser relying only on the vendor’s promise to give him a conveyance, the vendor is entitled to enforce payment before the time has arrived for conveying the land; yet his title to retain the money has been considered not to be absolute but conditional upon the subsequent completion of the contract.28

In support of this proposition Dixon J quoted the following passage from *Palmer v Temple*:

But the very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser.29

Commenting on advance payments in *Automatic Fire Sprinklers Pty Ltd v Watson*, Dixon J noted that an advance payment is the –

payment of a debt in advance, a debt that can only arise from the execution of the consideration. Up till then it is a promise to pay money which if fulfilled or enforced, results in a provisional payment defeasible by the subsequent failure, for any cause, of the real consideration. It is a payment made in advance to await application in discharge of an indebtedness which arises immediately the consideration is executed.30

The recipient of the funds does not have an absolute right to retain the funds. If they treat those funds as their own, prior to the commencement of performance, then they accept the risk of any loss of those funds. This flows from the nature of the condition. The recipient knows that they do not have an absolute right to retain the funds unless they commence performance under the contract. On this basis it is clear that the vendor can sue for the amount of a debt when it is an accrued right. However, the accrued right is limited to suing for the debt. The accrued right has not yet extended to having an absolute right to retain the money. This right only accrues when performance commences under the contract. There is no doubt that the recipient of the funds receives property in those funds as soon as they are mixed with their own funds. On this basis they can treat the money as their own. But the title to the money is not defeasible if there is a total failure of consideration. Total failure of consideration creates an obligation to repay the money: it does not revest title to the money.

In *Baltic Shipping*, McHugh J said that where a contractual payment is made ‘conditionally upon the performance of a promise by the payee, the right to retain the moneys after discharge of the contract is dependent on whether the promise has been performed’.31 He also specifically addressed the issue as to when a conditional

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payment becomes unconditional. He held that the right of the defendant to retain the money paid in advance became unconditional once the defendant performed work or incurred expense:

If the payment has been made before the work has been performed or expense incurred, it should be regarded as becoming unconditional once work is performed or expense incurred. In that situation, the advance payment is ordinarily made in order to provide a fund from which the payee can meet the cost of performing the work or services or meeting the expenditure incurred ... before the completion of the contract.32

Mason CJ also held that the ‘defendant’s right to retain the payment is conditional upon the performance of his or her obligations under the contract’.33 Both Brennan J34 and Toohey J35 agreed with Mason CJ.

The position taken by these judges in Baltic Shipping is consistent with the earlier authority of Dixon J in McDonald v Denny’s Lascelles and Automatic Fire Sprinklers. McHugh J has, however, provided a broader definition of what triggers the right to retain the money. It can be performance or the incurring of expense if the incurring of the expense can be considered performance under the contract. A similar conclusion was reached by Lord Goff in Stocznia Gdanska SA v Latvian Shipping Company:

The test is not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due.36

It is clear from these authorities that the determination of whether monies can be sued for or recovered requires a two stage assessment. If the contract has been terminated the first stage involves an assessment of whether the right accrued prior to termination. The outcome of this inquiry will determine whether the party to be paid the money can sue for it as a debt. The second stage requires a different examination focusing on the performance by the recipient of the money. The outcome of this inquiry will determine whether the recipient has the right to retain the money or sue for it if it has not yet been paid.

(d) Contractual interpretation

An implication of the proposition that an amount recoverable for total failure of consideration is recoverable as a debt is that the basis of the recovery is to be found

32. Ibid, McHugh J 391 (emphasis added).
33. Ibid, Mason CJ 351.
34. Ibid, Brennan J 367.
35. Ibid, Toohey J 383.
in the correct interpretation of the terms of the contract, not an implied term. If Dixon J’s comments in *Automatic Fire Sprinklers* are correctly understood there is no need for an implied term. Advance payments are made on condition and if that condition fails then the money cannot be retained.

In *Stocznia*, Lord Goff suggested that the claim of the buyer to recover advance payments is contractual. Lord Goff referred to a number of cases including *McDonald v Dennys Lascelles* in relation to the buyer’s right to recover advance payments and commented that in such cases ‘it has been held that the buyer’s remedy is contractual, the seller’s title to retain the money being conditional upon his completing the contract’.37 Carter argues that this is a ‘surprising suggestion’.38 He argues that:

> It amounts to the proposition that there is a term of the contract which confers on the buyer a contractual right to recover the prepayment…. To treat the recovery of a payment made prior to a total failure of consideration as based on the intention of the parties is fictional. If the parties have said nothing on the matter, application of a contractual analysis must ultimately rely on an implied term.39

Carter suggests that Lord Goff misunderstood Dixon J in *McDonald v Dennys Lascelles* because Dixon J, when referring to the recovery of instalments paid, spoke in terms of an ‘implication made at law’.40 Thus the critical question is what his Honour meant by ‘an implication made at law’. Dixon J described the right to recover as arising out of the ‘nature of the contract itself’.41 It is submitted that Dixon J meant by this that the implication made at law is an implication made from the nature of the contract and the way the terms of the contract are constructed. If the contract is constructed on the basis that the party can only retain an instalment if they perform under the contract, it necessarily follows from the nature of such a condition that if they do not perform then they cannot retain the money. That is, it is the inference to be drawn from the express terms of the contract that is the focus, not the implication of an additional term.

This approach to construction can be seen in *Crediton Gas Co v Crediton Urban District Council*42 which concerned a contract for the supply of gas. The issue was the duration of the contract in circumstances where the parties had not specified a duration. Russell J concluded that ‘the nature of the contract involves an implication that either party can terminate it by notice’.43 As Carnegie has observed this type of construction is not an ordinary exercise of construction ‘but a quite sophisticated

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37. *Stocznia Gdanska* ibid, 589.
40. *McDonald v Dennys Lascelles* above n 6, Dixon J 478.
41. Ibid, Dixon J 479.
42. [1928] Ch 174.
43. Ibid. An appeal to the Court of Appeal was dismissed: see *Crediton Gas Co v Crediton Urban District Council* [1928] 1 Ch 447.
exercise’. It is a sophisticated form of construction because it is not the words used in the contract that are being interpreted but the wider context of the intention of the parties. This is evident from the decision in Re Spenborough Urban District Council’s Agreement where Buckley J opined that:

Since ex hypothesi such an agreement contains no provision expressly dealing with determination by the party who asserts that this should be inferred, the question is not one of construction in the narrow sense of putting a meaning on language which the parties have used, but in the wider sense of ascertaining, in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in the agreement, what the common intention of the parties was in the relevant respect when they entered into the agreement.

These cases dealing with the issue of duration suggest there is a wider exercise of construction which does not involve the implication of terms. This wider exercise of construction looks at the express terms of the contract as a whole. The same applies in cases of total failure of consideration. Although there may be no express term providing for repayment where there is a total failure of consideration, a right to recover will be inferred by looking at the contract as a whole to determine the common intention of the parties. Thus no implied term is necessary to create an obligation to repay.

It is thus essential to appreciate the distinction between what is implicit in the terms of a contract and the implication of an additional term. Jaffey suggests that the ‘payment may be made on a condition, but if so this is the case by virtue of the terms of the contract, explicit or implicit’. The difference between an explicit agreement and an implicit agreement can be seen from the following example. If I agree to sell you Blackacre then all I have explicitly agreed to do is to sell you Blackacre. But I can only sell you Blackacre if I do not sell Blackacre to somebody else. So I have implicitly agreed not to sell Blackacre to somebody else even though the contract does not specifically say that. Further, if you advance money to me on the condition that I perform the contract and transfer Blackacre to you, then it is legitimate to conclude that I have implicitly agreed, by accepting the money on this condition, that I will return the money to you if the condition fails. That is, I have implicitly agreed to repay the money to you even though the contract does not explicitly say that. It is the correct construction of the terms of the contract that allows the court to reach that conclusion.

This argument is supported by dicta of Deane J in Hewett v Court. The case involved the construction of a prefabricated house. The building company went into liquidation before the construction was completed and the issue was whether

45. Re Spenborough Urban District Council’s Agreement [1968] 1 Ch 139, 147.
46. Jaffey above n 4, 287.
47. (1983) 149 CLR 639.
the purchaser had an equitable lien over the partially completed house to secure progress payments they had made towards the purchase. In the course of determining the issue of the equitable lien, Deane J made some observations on the nature of progress payments. He noted that:

In the instant case, the company [the builder] was the legal owner of the partly completed home. It was a potential debtor of the appellants [the purchasers] in that, in the event that it [the builder] repudiated the contract and the appellants accepted the repudiation, it would be liable to repay the deposit and the first instalment which the appellants had paid to it.... The potential debt was the potential liability to repay the deposit and the instalment of purchase price which had been paid as the price of work and materials for the construction of that particular home.\(^{48}\)

It is clear from the above passage that Deane J considered that while the building company continued the construction of the house it at all times remained a potential debtor for the amount of the deposit and the instalment. Once the builder completed the house that potential debtor situation would cease and the builder would be entitled to payment for the balance due on the house. However, in the event that the builder did not complete the house, there would be a total failure of consideration and the potential debt would become an actual debt. In the particular case this situation did not arise because the parties renegotiated the contract so that the purchaser acquired the partially completed house. It is submitted that the reasoning of Deane J is entirely consistent with the position advocated in this paper that if there is a total failure of consideration then any advance payment immediately becomes repayable to the payer as a debt due. The conclusion that the money becomes repayable as a debt is to be determined from correctly interpreting the terms of the contract.

Gyles J adopted this approach in his dissenting judgment in the Full Federal Court decision in *Roxborough v Rothmans of Pall Mall Australia Limited*.\(^{49}\) At issue was the recovery of monies paid by a retailer to a wholesaler for a licence fee that was found to be unconstitutional. The plaintiff sought to recover amounts that had been paid and were still held by the wholesaler. Gyles J considered that the right to recover was found by the correct interpretation of the terms of the contract. He said that:

> I do not regard the conclusion that there was a promise by the respondent to pay the licence fee to be the implication of a term in the sense that that process is usually understood. Rather, it is a factual conclusion as to the agreed terms of the

\(^{48}\) Ibid, Deane J 669 (emphasis added).

bargain deducted or inferred objectively from a course of conduct as well as from the formal documents, against the background of the operation of the legislation. 50

It is submitted that this is entirely consistent with the position adopted by Dixon J in *McDonald v Dennys Lascelles* that the implication is evident from the nature of the contract itself.

It is important in such cases to be clear about what can legitimately be inferred. Gyles J considered that it could be inferred that ‘identifiable amounts were paid over [to the wholesaler] on the basis that an equivalent amount would be paid as licence fees in due course’. 51 This is an entirely reasonable inference. That inference was sufficient to cover the amounts in dispute, which were amounts still held by the wholesaler. However, in relation to amounts previously collected and paid to the government pursuant to the invalid legislation it would not be legitimate to infer that these should be repaid to the retailers. To reach such a conclusion it would be necessary to infer that the amounts were paid on the basis that the legislation was valid. But this would be taking the inference too far and be truly implying a term. As Gyles J correctly concluded the money was paid on the condition that it was to be paid to the government. It was for this reason that the money was recoverable. The money was not paid on the condition that the legislation was valid.

*Guardian Ocean Cargoes Ltd v Banco do Brasil SA* 52 provides another example supporting a contractual analysis. In *Guardian Ocean*, Hirst J held that monies paid in advance for a consideration that later failed were at all times held on that condition. At the time the condition failed the money was then held on behalf of the plaintiff. 53 Again this is consistent with the position advanced in this paper.

However, Birks 54 argues that recovery for failure of consideration cannot be resolved by a contractual analysis. He argues that in cases where the contract ends by frustration there is no breach and ‘without a breach the restitutionary right cannot be described as a remedial alternative to compensatory damages’. 55 However, when it is considered that the advance payment is made conditionally under the contract, the ability to recover the money depends on whether the condition is met, not on whether the contract is breached. It is simply irrelevant whether there is a breach. The breach may have led to a total failure of consideration but other factors can also result in a total failure of consideration. These factors include frustration and the determination that a statute is unconstitutional. The focus of the court is on whether there has been a total failure of consideration. This can only be determined by first referring to the terms of the contract. It is here that the conditions attaching to the

50. Ibid, Gyles J 352 (emphasis added).
51. Ibid, Gyles J 355.
53. Ibid, 200.
55. Ibid, 152.
payment of the money will be found. It is then a factual matter as to whether the condition has failed. The money can be recovered as of right because it was made conditionally and is recoverable when that condition fails. The money was not paid on the basis that it would only be recoverable if the contract was terminated for breach.

The analysis in this section has shown that the right to recover for a contractual total failure of consideration can be explained on the basis that a debt arises because of the implicit promise made by the person that has received a payment prior to their performance under the contract. Once they commence performance relative to that payment they are entitled to retain the money. If there is a total failure of consideration they must repay the money because it is implicit from the terms of the contract that they could only retain the money if they commenced performance of the relevant obligation under the contract.

2. The implied terms approach

The approach based on the implication of a term that money should be repaid was considered by the High Court in *Roxborough v Rothmans*. Gleeson CJ, Gaudron and Hayne JJ noted that the appellant had tried to invoke an implied agreement that the money should be refunded. They rejected this approach. Kirby J also expressly rejected the use of an implied term on the facts of the case.

Only Callinan J considered the implied terms approach may have some merit. However, he did not rely on the implied terms approach to justify his decision. Instead he held that the appellants could recover ‘on the basis that relevantly there has been a total failure of consideration, that is to say, a failure in respect of a discrete, clearly identified component of the consideration’. In relation to an implied terms approach Callinan J observed that:

> It might also be appropriate to imply a term in favour of the appellants for repayment of the relevant sums. The term is that in the event that it is not necessary or possible to pay the tax, the sum represented by it would not be kept by the respondent but would be returned to the appellants.

Although I would agree with Callinan J that it would be appropriate to imply a term if that was necessary, the arguments presented above obviate any need to rely on an implied term. Nevertheless, the implied terms approach is consistent with the debt approach to the extent that contractual principles provide the basis for recoverability for total failure of consideration.

59. Ibid, Callinan J 590 (emphasis added).
3. The unjust enrichment approach

An approach based on unjust enrichment assumes that a total failure of consideration causes the enrichment of the defendant at the expense of the plaintiff. A number of actions now said to be actions in unjust enrichment were historically actions for money had and received. Actions for money had and received covered a number of different types of claims. These claims were decided on the basis of whether the defendant had a right to retain the money.\(^{60}\) However, it does not follow that in all such cases the rationale for the retention should be the same. The action for money had and received is also used for the recovery of money paid by mistake. In cases of mistake, where a change of position defence is available, it is arguable that the defendant’s right to retain is influenced by consideration of issues such as any change of position. However, in cases of total failure of consideration the change of position defence may not be available. The defendant is aware that the money is retained on a conditional basis. The recipient can mix the money with their own and effectively treat the money as their own but they do so at their own risk. They know that their right to retain the money is conditional upon the commencement of performance under the contract. If they change their position before performance commences, for example if the funds are invested unwisely, then they have accepted the risk of any loss.

There are two general approaches to explaining an unjust enrichment action. The first is the unjust factors approach and the second is the absence of basis approach. The unjust factors approach to restitution for unjust enrichment is reflected in the decision in *David Securities Pty Ltd v Commonwealth Bank of Australia* where the High Court held that ‘recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality’.\(^{61}\) But Professor Birks has argued that the House of Lords abandoned the unjust factors approach in *Westdeutsche Landesbank Girozentrale v Islington LBC*\(^{62}\) embracing instead a single ‘absence of basis’ approach.\(^{63}\) Professor Birks argued that as a result absence of basis ‘is now the only unjust factor in English law’.\(^{64}\)

But the adoption of a single absence of basis approach removes any distinction between contractual payments and non-contractual payments. In the process the doctrine of accrued rights is ignored. However, the doctrine of accrued rights is critical to understanding the contractual cases. In the broader non-contractual context accrued rights have no role to play. Instead it is the failure or absence of basis that is important.

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60. See Kremer ‘The Action for Money Had and Received’ above n 27.
63. Birks above n 1, 110-111.
64. Ibid, 115.
A useful example of a failure of basis in the non-contractual context is *Masters v Cameron*. In *Masters v Cameron*, a preliminary agreement was signed for the sale and purchase of a property. A sum of money was paid as a ‘deposit’. The High Court held that a contract had not been formed by the parties to the preliminary agreement. The appellants claimed the repayment of a ‘deposit’ of £1 750 paid to the respondent’s agent. The respondent claimed that the amount was a deposit that had been forfeited. As a contract had not been formed the High Court held that the ‘so-called deposit’ was a sum that would ‘take on the character of a deposit upon the making of a contract’. The sum had been paid ‘on terms which required that if a formal contract should be executed the amount should be applied and treated as a deposit on the purchase so contracted for, and that otherwise it should be returned to the appellants’. This is a clear case where there was a basis for the payment but the reason or basis ultimately failed. The obligation to repay is imposed independently of contract because no contract was formed between the parties. The amount paid never took on the character of a deposit.

Although an absence of basis approach may very well be valid for cases of mistaken payments that does not of itself mean that the absence of basis approach is relevant where there is a failure of consideration in a contractual context. The very existence of a contract means that the relevant payment has been made pursuant to that contract. The central argument outlined in this paper is that the combined operation of the doctrine of accrued rights and the implicit (not implied) promise to repay any amount in the absence of the commencement of performance of the promised consideration, means that where there is a total failure of consideration the obligation to repay arises within the law of contract. It becomes unnecessary for the law of unjust enrichment to create an obligation to repay; the recipient is not unjustly enriched for the very reason that the recipient is under a contractual obligation to repay.

The unjust enrichment approach initially found some support in the High Court. It was favoured by Deane J in *Foran v Wight*. In *Foran v Wight*, the High Court held that the purchasers of a property had validly terminated the contract for breach by the respondents. The appellants sought recovery of their deposit. Deane J held that their claim for the return of the deposit was not founded on the contract but failure of consideration based on unjust enrichment. Brennan J also held that the claim for recovery of the deposit ‘was not founded on the contract’. In *David Securities Pty Ltd v Commonwealth Bank of Australia* Brennan J noted that:

> When a plaintiff has paid money for a consideration that has totally failed, the defendant’s unjust enrichment consists in his retaining money which, when the

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65. (1954) 91 CLR 353.
68. *Foran v Wight* above n 2, Deane J 438.
69. Ibid, Brennan J 432.
consideration fails, he no longer has any right to retain. Enrichment is unjust because the defendant has no right to receive or, as the case may be, to retain the money or property which the plaintiff has paid or transferred to him.\textsuperscript{70}

It is submitted that this passage should be treated with caution. Everything in the passage is correct but it omits reference to the fact that the payment was always conditional. This passage can give the impression that the retention of the money is absolute until the condition fails and then there is no right to retain it. The true position is that the recipient holds the money conditionally at all times until performance is commenced at which time the recipient has an absolute right to retain it. If the condition fails, then the recipient’s position changes from having a conditional right to retain it to having no right to retain it. The extract above suggests that the recipient goes from having an absolute right to retain it to a conditional right to retain it.

The unjust enrichment approach also found favour with Deane and Dawson JJ in \textit{Baltic Shipping}. Consistent with Deane J’s reasoning in \textit{Foran v Wight} they described the right to recover for a total failure of consideration as a claim being an ‘action in unjust enrichment’ and ‘not a claim on the contract’.\textsuperscript{71} Deane and Dawson JJ reached this conclusion on the basis that the historical antecedent of a claim for total failure of consideration was in ‘the old indebitatus count for money had and received to the use of the plaintiff’ and that the ‘modern substantive categorisation is as an action in unjust enrichment’.\textsuperscript{72} However, as argued earlier, it is not necessarily the case that all actions forming part of the action of money had and received are justified on the basis of unjust enrichment.

Carter and Phillips also consider that the recovery is based on unjust enrichment and not contractual principles:

\begin{quote}
\textit{The test for whether an instalment payment can be recovered is the restitutionary principle of unjust enrichment. The … payee … would receive a benefit (money) at the defendant’s expense in circumstances where it would be unjust for the payee to retain it. The traditional expression of the injustice element is the requirement of a ‘total failure of consideration’.}\textsuperscript{73}
\end{quote}

It is submitted that the approach based on unjust enrichment is inconsistent with the position outlined by Dixon J in \textit{McDonald v Denny Lascelles} and \textit{Automatic Fire Sprinklers}. The approach fails to appreciate the difference between the right to unconditionally sue for an amount due and at the same time only have a conditional right to retain the money. The distinction is critical. As the recipient only has a

\begin{itemize}
\item \textsuperscript{70} \textit{David Securities v Commonwealth Bank} above 61, Brennan J 393.
\item \textsuperscript{71} \textit{Baltic Shipping} above n 3, Deane & Dawson JJ 375.
\item \textsuperscript{72} Ibid.
\end{itemize}
conditional right to retain the money the recipient cannot be said to be unjustly enriched when the condition fails. In fact the position is quite the reverse. When the condition fails the recipient’s position changes from having only a conditional right to retain the money to having no right to retain the money.

A significant difference between the structure proposed in this paper and the restitutionary model concerns the change of position defence. Under the model advocated here, the right to recover where there is a total failure of consideration is an absolute right. The reason for this is that while the retention of a payment is conditional the recipient accepts the risk when they receive the money. They have the right to treat the money as their own but if they change their position while they only have a conditional right to retain the money then they will have accepted the risk of any loss from that change of position. However, under the restitutionary model total and partial failure of consideration are seen as unjust factors and both are potentially subject to the change of position defence. In Goss v Chilcott, Lord Goff held that the change of position defence is widely applicable at common law. However, given Lord Goff’s later comments in Stocznia discussed earlier he may have reached the view that a change of position defence would not be available for a total failure of consideration.

4. The equitable approach

In Roxborough v Rothmans, Gummow J rejected the unjust enrichment approach to recovery for failure of consideration. Gummow J suggested that equitable notions may explain the reason for restitution rather than unjust enrichment. Justice Finn, in a passage adopted by Gummow J in Roxborough v Rothmans, commented on the concept of unjust enrichment in the following terms:

To the extent that it directs attention to outcomes and to the character to be attributed to them, it is capable of concealing rather than revealing why the law would want to attribute a responsibility to one party to provide satisfaction to the other.

Gleeson CJ, Gaudron and Hayne JJ also considered that equitable notions lay behind actions for money had and received. However, it is not clear whether their honours viewed the claim for repayment in the case as based in equity or unjust enrichment.

76. Roxborough v Rothmans above n 4, Gleeson CJ, Gaudron & Hayne JJ 525. They referred with approval to Deane J’s comments in Muschinski v Dodds (1985) 160 CLR 583, 619-620.
77. Different interpretations of the judgment have emerged. Beatson and Virgo conclude that the majority joint judgment viewed ‘the foundation of the claim as equitable’: above n 4,
However, one difficulty with the equitable approach for total failure of consideration is that it potentially introduces discretion in the considerations regarding recoverability. It is submitted that where money is paid on condition, and the condition fails, the money should be recoverable as of right. In addition the members of the High Court in *Roxborough v Rothmans* who suggested the equitable basis for the recovery for total failure of consideration did not address Dixon J’s decision in *McDonald v Dennys Lascelles*. That case is arguably the leading case on accrued rights and how these rights interact with total failure of consideration. In *McDonald v Dennys Lascelles*, Dixon J made it clear that the right to recover was at law and not in equity when he said that ‘the purchaser has a legal right to the return of the purchase money already paid which makes it needless to resort to equity’. Consistent with this Dixon J held that if the instalments had been paid then the ‘right so to recover it is legal and not equitable. It arises out of the nature of the contract itself’.

In *Westdeutsche*, Hobhouse J, at first instance, concluded that where there is a total failure of consideration the law ‘provides a common law remedy governed by rigid rules granted as of right’. This is consistent with *Heywood v Wellers* where Lord Denning MR held that a plaintiff who could recover money paid on a consideration which had totally failed was ‘entitled to recover it as of right’.

It is submitted that any suggestion that the approach to total failure of consideration should be based on equitable principles should be questioned to the extent that it does not accord with the leading High Court cases on accrued rights. It is submitted that if there is a total failure of consideration then the correct interpretation of the terms of the contract will show that the money is recoverable as a debt. There should be no need to resort to equitable principles.

5. **Conclusion**

The discussion and analysis in this paper has focussed on the doctrine of accrued rights and why the doctrine is important in understanding the basis for recovery for total failure of consideration in the contractual context. It has been shown that the


78. *McDonald v Dennys Lascelles* above n 6, Dixon J 478 (emphasis added). See also *Dies v British and International Mining and Finance Corporation Ltd* [1939] 1 KB 724, Stable J 743.

79. *McDonald v Dennys Lascelles* above n 6, Dixon J 479 (emphasis added).


law in relation to defining accrued rights is well settled and uncontroversial. The controversial issues involve the recovery of monies paid where there is a total failure of consideration. In relation to total failure of consideration it was argued that if an advance payment is made on the condition that the recipient commences performance under the contract, then if there is no performance by the recipient prior to termination it is implicitly agreed that the advance payment will be returned to the payer.

There are five conclusions drawn from the analysis. First, recovery for total failure of consideration can be resolved within the law of contract without recourse to an independent action in unjust enrichment. Secondly, total failure of consideration is a legal claim and not an equitable claim. Thirdly, the right to recover is not based on an implied contractual term creating an obligation to repay. The obligation arises from the conditional nature of the payment and is implicit in the contract. Fourthly, an amount recoverable for a total failure of consideration is recoverable as a debt. The analysis to support this conclusion included an historical analysis of the action of debt and recent cases dealing with the modern definition of a debt. It was argued that the conclusion that recovery for total failure of consideration is available by way of an action of debt is consistent with a number of decisions of the High Court of Australia. Finally, because there is an absolute right to recover a claim for total failure of consideration may not be subject to the change of position defence.