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## Restitution on a Partial Failure of Basis

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### **Abstract**

For a claimant to receive restitution for the unjust factor of a failure of basis, the traditional rule requires the failure to be total. However, recent case law has questioned whether this requirement is still necessary. This article examines the current law to show that adherence to the total failure rule has been abrogated by several exceptions. After a careful analysis of the reasons for the rule, and the reasons for allowing recovery on a partial failure, it is argued that a better approach would be to allow recovery on a partial failure of basis where counter-restitution can be made of any received benefit and where restitution would not upset the contractual allocation of risk.

### **Keywords**

claimant, unjust

# Restitution on a Partial Failure of Basis

THOMAS CAMP\*

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## Abstract

*For a claimant to receive restitution for the unjust factor of a failure of basis, the traditional rule requires the failure to be total. However, recent case law has questioned whether this requirement is still necessary. This article examines the current law to show that adherence to the total failure rule has been abrogated by several exceptions. After a careful analysis of the reasons for the rule, and the reasons for allowing recovery on a partial failure, it is argued that a better approach would be to allow recovery on a partial failure of basis where counter-restitution can be made of any received benefit and where restitution would not upset the contractual allocation of risk.*

## I Introduction

A claim for a failure of consideration vitiates an agreed or conditional transaction where the basis for it has failed, allowing for restitution of the unjust enrichment.<sup>1</sup> This quaint summary belies the challenges of the area, which Edelman and Bant have noted ‘is intensely difficult — one of the most difficult and controversial of all the unjust factors’.<sup>2</sup> One major controversy is that traditionally for a restitutionary claim, where there has been a failure of consideration, the failure must be total.<sup>3</sup> This means the plaintiff cannot have the benefit of any part of the basis contemplated as the reason for undertaking performance.<sup>4</sup>

This requirement has been accused of many things; it has been criticised as retention of a ‘doctrinal relic’<sup>5</sup> and ‘very old-fashioned’.<sup>6</sup> In the English case of *Giedo van der Garde BV v Force India Formula One*

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<sup>1</sup> *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 517 [31] (French CJ, Crennan and Kiefel JJ) (*‘Equuscorp’*); *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 (*‘Roxborough’*); *Moses v Macferlan* (1760) 2 Burr 1005, 1012 (Lord Mansfield).

<sup>2</sup> James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Oxford University Press, 2006) 242.

<sup>3</sup> *Roxborough* (2001) 208 CLR 516, 557 [105] (Gummow J); *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 388 (McHugh J) (*‘Baltic’*); *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited* [1943] AC 32 (*‘Fibrosa’*); *Hunt v Silk* (1804) 5 East 449; see *Re St Gregory’s Armenian School Inc* [2015] NSWSC 1465 (7 October 2015) [188]–[189] (Black J).

<sup>4</sup> *Roxborough* (2001) 208 CLR 516, 557 [105] (Gummow J); *Baltic* (1993) 176 CLR 344, 388 (McHugh J).

<sup>5</sup> Michael Bryan, ‘Peter Birks and Unjust Enrichment in Australia’ (2004) 28(3) *Melbourne University Law Review* 724, 729.

<sup>6</sup> Peter Birks, *Unjust Enrichment* (Oxford University Press, 2<sup>nd</sup> ed, 2005) 121.

*Team Ltd* ('*Giedo*') Stadlen J stated the rule is unsatisfactory and liable to work injustice.<sup>7</sup> Mason, Carter and Tolhurst see the requirement of a total failure as the major problem associated with the concept of failure of consideration as a vitiating factor.<sup>8</sup> The High Court of Australia and the United Kingdom Supreme Court were recently confronted by the question of whether a failure of consideration must be total. However, the question was left open by both courts.<sup>9</sup>

This article presents the legal and policy case for allowing restitution on a partial failure. By presenting the law of failure of consideration and the 'exceptions' to the total failure rule, it uses this analysis to present a detailed, coherent and principled foundation to support recovery on a partial failure. The article also considers the impact of recent case law and the growing influence of equitable considerations in Australian unjust enrichment law.

The article unfolds as follows: Part II defines key terms and concepts; Part III examines failure of consideration in the law and the requirement that a failure must be total; Part IV considers existing and purported 'exceptions' to the total failure rule which provide evidence of a history of abrogation suggesting a willingness and ability to remove the effect of the total failure rule; Part V argues that the rule lacks compelling justification especially as there is a requirement of counter-restitution of received benefits, and a limit of when restitution will be available on a subsisting contract; and Part VI explains that reasons of uniformity and principle support allowing for restitution on a partial failure, and offers some opinion as to how courts should approach restitution in those cases. Decisions and commentary from similar common law jurisdictions are considered where appropriate.

## II Terminology

### A *Consideration as Basis*

Stoljar notes that failure of consideration as a legal term of art has three meanings.<sup>10</sup> The first two meanings relate to the law of contract; describing either a situation where a contract cannot be formed because the consideration is illusory, insufficient or formally void, or where a promisor breaches a contract due to a failure to perform.<sup>11</sup> The third

<sup>7</sup> [2010] EWHC 2373 (QB) (24 September 2010) [367]; See also Joachim Dietrich, *Restitution: A New Perspective* (The Federation Press, 1998) 135; Law Reform Commission of New South Wales, *Frustrated Contracts*, Report No 25 (1976) [5.8].

<sup>8</sup> K Mason, J W Carter and G J Tolhurst, *Mason & Carter's Restitution Law in Australia* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2008) 331 [922].

<sup>9</sup> *Equuscorp* (2012) 246 CLR 498, 518 [33] (French CJ, Crennan and Kiefel JJ); *Barnes v Eastenders Cash & Carry plc* [2015] AC 1, 43 [114] (Lord Toulson, with whom Baroness Hale DP, Lord Kerr, Lord Wilson and Lord Hughes agreed).

<sup>10</sup> Samuel Stoljar, 'The Doctrine of Failure of Consideration' (1959) 75 *Law Quarterly Review* 53, 53.

<sup>11</sup> *Ibid.*

meaning — with which this article is concerned — relates to a claim — and the basis for that claim — where part of an agreed exchange does not eventuate.<sup>12</sup>

The term ‘consideration’ in the context of unjust enrichment has evolved beyond the concept of contractual consideration.<sup>13</sup> Birks noted the continued use of ‘consideration’ has been a source of confusion, causing ‘something close to an intellectual breakdown’.<sup>14</sup> Accordingly, it is now trite to suggest that this area is addled by its terminology.<sup>15</sup> As will be discussed, ‘consideration’ in unjust enrichment is concerned with the basis for which a contract was entered or a benefit provided.<sup>16</sup> The terminology of failure of basis ‘is more apt’<sup>17</sup> and is already being widely used.<sup>18</sup> Failure of basis is therefore preferred in this article instead of failure of consideration.

## B *Unjust Enrichment*

Restitution is a remedy which restores to the claimant what the respondent has gained from them.<sup>19</sup> Restitution may restore the value of the benefit rather than the benefit itself.<sup>20</sup> Historically, the availability of restitution required a recognised form of action, such as *indebitatus*

<sup>12</sup> Ibid.

<sup>13</sup> *Roxborough* (2001) 208 CLR 516, 525 [16] (Gleeson CJ, Gaudron and Hayne JJ), 556–7 [103]–[104] (Gummow J); *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd* [No 3]/[2014] WASC 162 (7 May 2014) 29 [98] (Edelman J).

<sup>14</sup> Birks, above n 6, 117.

<sup>15</sup> Ibid 117–19; Mason, Carter and Tolhurst, above n 8, 46–7 [145], 324–31 [916]–[923]; Andrew Burrows, *The Law of Restitution* (Oxford, 3<sup>rd</sup> ed, 2011) 319–20; Paul Mitchell, ‘Artificiality in Failure of Consideration’ (2010) 29 *University of Queensland Law Journal* 191, 191; Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8<sup>th</sup> ed, 2011) 366–8 [12-10]–[12-15]; Carmel McLure, ‘Failure of Consideration and the Boundaries of Restitution and Contract’ in James Edelman and Simone Degeling (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters, 2008) 209, 211–13; Charles Mitchell, ‘Unjust Enrichment’ in Andrew Burrows (ed), *English Private Law* (Oxford University Press, 3<sup>rd</sup> ed, 2013) 1057–8.

<sup>16</sup> *Roxborough* (2001) 208 CLR 516, 525 [16] (Gleeson CJ, Gaudron and Hayne JJ), 556–7 [103]–[104] (Gummow J); *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd* [No 3]/[2014] WASC 162 (7 May 2014) [98] (Edelman J). See below Part III.

<sup>17</sup> *Barnes v Eastenders Cash & Carry plc* [2015] AC 1, 42 [105]–[106] (Lord Toulson, with whom Baroness Hale DP, Lord Kerr, Lord Wilson and Lord Hughes agreed).

<sup>18</sup> Birks, above n 6, 117–19; Paul Mitchell, above n 15, 191; Mitchell, Mitchell and Watterson (eds), above n 15, 366–8 [12-10]–[12-15]; Kit Barker and Ross Grantham, *Unjust Enrichment* (LexisNexis Butterworths, 2008) ch 9; Greg Weeks, ‘The Public Law of Restitution’ (2014) 38(1) *Melbourne University Law Review* 198; Charles Mitchell, above n 15, 1057–8; Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3<sup>rd</sup> ed, 2015) 308; Ralph Cunnington, ‘Failure of Basis’ [2004] *Lloyds Maritime and Commercial Law Quarterly* 234; *Roxborough* (2001) 208 CLR 516, 525 [16] (Gleeson CJ, Gaudron and Hayne JJ), 557 [104] (Gummow J); *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd* [No 3]/[2014] WASC 162 (7 May 2014) [98] (Edelman J).

<sup>19</sup> *Roxborough* (2001) 208 CLR 516, 529 [25]–[26] (Gleeson CJ, Gaudron and Hayne JJ); *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 75 (Mason CJ); *Mason v New South Wales* (1959) 102 CLR 108, 146 (Windeyer J).

<sup>20</sup> *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (‘Pavey’); *Barnes v Eastenders Cash & Carry plc* [2015] AC 1.

*assumpsit* or money had and received.<sup>21</sup> The High Court rejected this conceptualisation of restitutionary rights in Australia in *Pavey*.<sup>22</sup> It has been replaced in part by recognition of the legal concept of unjust enrichment.<sup>23</sup> This theoretical breakthrough has been labelled as a ‘revolution in the approach to the subject’.<sup>24</sup>

Although unjust enrichment is a unifying legal concept in Australia,<sup>25</sup> it is not a legal principle capable of direct application.<sup>26</sup> Nor can it be used to remove or change settled doctrine and principles.<sup>27</sup> Unjust enrichment captures some but not all situations of restitutionary relief in Australia.<sup>28</sup>

A claim for restitution of an unjust enrichment requires four considerations.<sup>29</sup>

1. The defendant must be enriched; and
2. That enrichment must be at the plaintiff’s expense; and

<sup>21</sup> See *Pavey* (1987) 162 CLR 221. In *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 29 Lord Atkin colourfully proclaimed ‘when these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred’.

<sup>22</sup> (1987) 162 CLR 221, 227 (Mason CJ and Wilson J), 256–7 (Deane J); see also *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

<sup>23</sup> See *Equuscorp* (2012) 246 CLR 498, 515 [29] (French CJ, Crennan and Kiefel JJ); *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ). Thus there is no reason a claim for money had and received should always be treated as separate for a claim based on unjust enrichment; *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3]* [2014] WASC 162 (7 May 2014) [45]–[48] (Edelman J); cf *Perpetual Trustees Victoria Ltd v Burns* [2015] WASC 234 (30 June 2015) [261] (Em Heenan J).

<sup>24</sup> K Mason and J W Carter, *Restitution Law in Australia* (Butterworths, 1st ed, 1995) 4 [102].

<sup>25</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 375 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), 389, 406 (Dawson J) (*‘David Securities’*); *Pavey* (1987) 162 CLR 221, 256–7 (Deane J).

<sup>26</sup> *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 302 [97] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) (2007) 230 CLR 89, 156 [150] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

<sup>27</sup> *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 302 [96]–[98] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) (2007) 230 CLR 89, 156 [151] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 375 [9-120]; cf *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101, 111 (Mason CJ, Deane, Dawson and Toohey JJ).

<sup>28</sup> *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 596–7 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ); *Roxborough* (2001) 208 CLR 516, 544 [72] (Gummow J); *Equuscorp* (2012) 246 CLR 498, 516 [30] (French CJ, Crennan and Kiefel JJ); Birks, above n 6, 17.

<sup>29</sup> *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3]* [2014] WASC 162 (7 May 2014) 18 [52]–[55] (Edelman J); *Alexiadis v Zirpiadis* (2013) 302 ALR 148, 154–5 [30] (Kourakis CJ); *Ethnic Earth Pty Ltd v Quoin Technology Pty Ltd [No 3]* (2006) 229 ALR 615, 629–35 [65] (Bleby J); *Spangaro v Corporate Investment Australia Funds Management Ltd* (2003) 47 ACSR 285, 300 [48] (Finkelstein J); see also *David Securities* (1992) 175 CLR 353, 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 619 [141] (Gageler J); *Equuscorp* (2012) 246 CLR 498, 516 [30] (French CJ, Crennan and Kiefel JJ).

3. There must be a qualifying or vitiating factor — sometimes called an unjust factor<sup>30</sup> — giving rise to an obligation to make restitution.<sup>31</sup> The categories of unjust factors are still open.<sup>32</sup>
4. This obligation can be displaced in circumstances where the law recognises that an order for restitution would be unjust.<sup>33</sup>

The focus of this article is on the unjust factor of failure of basis. The nature of unjust factors was described by Campbell J in *Wasada Pty Ltd v State Rail Authority of New South Wales [No 2]* as follows:

‘Unjust’ is the ‘generalisation of all the factors which the law recognises as calling for restitution’. Because we need to search for recognised factors ... the reference to ‘injustice’ as an element of unjust enrichment, is not a reference to judicial discretion.<sup>34</sup>

Therefore, to identify an unjust enrichment for the purposes of this article, the third consideration looks to the existence of a failure of basis without asking whether that failure is somehow unjust.

### C Failure of Basis

Failure of basis as a vitiating factor makes the retention of a benefit *prima facie* unjust.<sup>35</sup> It is not a contractual concept,<sup>36</sup> nor is it confined to situations involving contracts or unformed contracts.<sup>37</sup> Dodds-Streeton JA in the Federal Court noted that the High Court has not definitively stated ‘the precise scope of and principles governing a claim to restitution based on total failure of consideration in Australian law.’<sup>38</sup>

A claim for restitution on a failure of basis requires three key features.

<sup>30</sup> *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd* [No 3] [2014] WASC 162 (7 May 2014) 18 [52]–[55] (Edelman J); *Lahoud v Lahoud* [2010] NSWSC 1297 (10 November 2010) [152] (Ward J); *Alexiadis v Zirpiadis* (2013) 302 ALR 148, 154–5 [30] (Kourakis CJ); *David Securities* (1992) 175 CLR 353, 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 619 [141] (Gageler J).

<sup>31</sup> *Equuscorp* (2012) 246 CLR 498, 516 [30] (French CJ, Crennan and Kiefel JJ); *David Securities* (1992) 175 CLR 353.

<sup>32</sup> *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 570 [6] (French CJ); *Equuscorp* (2012) 246 CLR 498, 516 [30] (French CJ, Crennan and Kiefel JJ); *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 665 [85] (Gummow, Hayne, Crennan and Kiefel JJ).

<sup>33</sup> *Equuscorp* (2012) 246 CLR 498, 516 [30] (French CJ, Crennan and Kiefel JJ); *David Securities* (1992) 175 CLR 353.

<sup>34</sup> [2003] NSWSC 987 (14 October 2003) [16], quoting Mason and Carter, above n 24, pp 59–60; *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 619 [141] (Gageler J).

<sup>35</sup> *Equuscorp* (2012) 246 CLR 498, 517 [31] (French CJ, Crennan and Kiefel JJ).

<sup>36</sup> *Ibid* 517 [32] (French CJ, Crennan and Kiefel JJ); *Roxborough* (2001) 208 CLR 516, 556–7 [103]–[104] (Gummow J).

<sup>37</sup> *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; *Muschinski v Dodds* (1985) 160 CLR 583; *Roxborough* (2001) 208 CLR 516, 525 [16] (Gleeson CJ, Gaudron and Hayne JJ).

<sup>38</sup> *Management 3 Group Pty Ltd v Lenny’s Commercial Kitchens Pty Ltd [No 2]* (2011) 281 ALR 482, 513 [213].

1. There must have been an agreement or conditional transfer between the parties; and<sup>39</sup>
2. There must have been some performance by the claimant, which they wish to recover; and<sup>40</sup>
3. Most importantly, the basis on which the agreement or transfer was entered must have failed.<sup>41</sup>

This action, like others that aim to prevent unjust enrichment, is rooted in the common law and equity, meaning that notions of good conscience and unconscionability are relevant to its application.<sup>42</sup>

### III Characterising Failure of Basis

#### A *The Rationale for Restitution on a Failure of Basis*

The unjust factor of failure of basis allows for restoration of what the claimant has transferred to the unjustly enriched defendant.<sup>43</sup> When a benefit is provided to a recipient on a conditionally agreed basis, it is unjust for the recipient to retain the benefit if that basis is ultimately unfulfilled.<sup>44</sup>

It is an unjust factor because, as Birks noted, where a claimant specifies a condition for retaining an enrichment which fails ‘he did not mean the defendant to have the benefit’.<sup>45</sup> It is not due to a party’s fault,<sup>46</sup> or any implied contract,<sup>47</sup> it is simply because what was meant to occur has not.<sup>48</sup> The requirement of restitution is imposed by the law to prevent

<sup>39</sup> *Roxborough* (2001) 208 CLR 516; *Baltic* (1993) 176 CLR 344.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*; *Fibrosa* [1943] AC 32; *Goss v Chilcot* [1996] AC 788 (‘*Goss*’).

<sup>42</sup> *Equuscorp* (2012) 246 CLR 498, 517 [32] (French CJ, Crennan and Kiefel JJ); *Baltic* (1993) 176 CLR 344, 376 (Deane and Dawson JJ); *Roxborough* (2001) 208 CLR 516, 525 [16] (Gleeson CJ, Gaudron and Hayne JJ), 557 [104] (Gummow J); *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 593–6 [68]–[74] (Hayne, Crennan, Kiefel, Bell and Keane JJ); *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 75 (Mason CJ).

<sup>43</sup> *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 75 (Mason CJ); *Roxborough* (2001) 208 CLR 516, 529 [26] (Gleeson CJ, Gaudron and Hayne JJ).

<sup>44</sup> *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 (‘*McDonald*’); *Anderson v Mcpherson [No 2]* [2012] WASC 19 (25 January 2012) [205] (Edelman J); Mason, Carter and Tollhurst, above n 8, 67–8 [170]; Mitchell, Mitchell and Watterson (eds), above n 15, 363 [12-01]; Frederick Wilmot-Smith, ‘Reconsidering “Total” Failure’ (2013) 72 *Cambridge Law Journal* 414, 430.

<sup>45</sup> Peter Birks, ‘Restitution and the Freedom of Contract’ (1983) 36 *Current Legal Problems* 141, 158.

<sup>46</sup> *Fibrosa* [1943] AC 32.

<sup>47</sup> *Pavey* (1987) 162 CLR 221, 227 (Mason CJ and Wilson J), 255 (Deane J); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 710 (Lord Browne-Wilkinson); *Fibrosa* [1943] AC 32, 63–4 (Lord Wright).

<sup>48</sup> James Edelman, ‘The New Doctrine of Partial Failure of Consideration’ (1996) 15 *Australian Bar Review* 229.

unjust enrichment.<sup>49</sup> As Lord Wright in *Fibrosa* held, if the basis fails ‘the right to retain the money must simultaneously fail’.<sup>50</sup>

### B The Meaning of Consideration

Consideration in this context is best understood as ‘basis’. The uneasy relationship between the unjust enrichment nomenclature of consideration and its contractual counterpart may have contributed to it being ‘easier to illustrate than to define’<sup>51</sup>. Historically, due to the association with the contractual term, a failure of basis could only occur under a contract that was void ab initio.<sup>52</sup> It was also thought that consideration referred to the promise of performance.<sup>53</sup> Yet it is a term unique to its field.<sup>54</sup> In unjust enrichment, it is now recognised that consideration generally refers to the performance of the promise.<sup>55</sup> Indeed, because failure of basis refers to any promised counter-performance, the basis need not be contractual.<sup>56</sup>

This has lent itself to becoming more similar to what Birks believed was the original meaning of consideration in Roman law and early common law, which was the reason, ground or basis for entering a bargain or making a transfer.<sup>57</sup> The High Court has, multiple times,<sup>58</sup> used Birks’ statement that failure of basis relates to the ‘state of affairs contemplated as the basis or reason for the payment’<sup>59</sup>.

In *Roxborough*, the High Court adopted this language, referring to consideration as the basis or purpose for entering a transaction,<sup>60</sup> such as a condition or contemplated state of affairs motivating the transfer.<sup>61</sup> The contemplated basis of the payment in question was the requirement to pay a tax.<sup>62</sup> As it includes a contemplated state of affairs, a basis is not limited

<sup>49</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 710 (Lord Browne-Wilkinson); *Pavey* (1987) 162 CLR 221.

<sup>50</sup> [1943] AC 32, 65.

<sup>51</sup> Ian Jackman, *The Varieties of Restitution* (The Federation Press, 1998) 44.

<sup>52</sup> *Chandler v Webster* (1904) 1 KB 493 (‘Chandler’).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Roxborough* (2001) 208 CLR 516, 525 [16] (Gleeson CJ, Gaudron and Hayne JJ), 556–7 [103]–[104] (Gummow J); *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd* [No 3]/[2014] WASC 162 (7 May 2014) 29 [98] (Edelman J).

<sup>55</sup> *Fibrosa* [1943] AC 32, 48 (Lord Simon LC).

<sup>56</sup> *Roxborough* (2001) 208 CLR 516, 525–6 [16] (Gleeson CJ, Gaudron and Hayne JJ), 555–6 [102]–[103] (Gummow J); *Spangaro v Corporate Investment Australia Funds Management Ltd* (2003) 47 ACSR 285; *Anderson v Mcpherson* [No 2]/[2012] WASC 19 (25 January 2012) [233] (Edelman J); *Muschinski v Dodds* (1985) 160 CLR 583; *Rover International Ltd v Cannon Film Ltd* [1989] 1 WLR 912 (‘Rover’); *Martin v Andrews* (1856) 119 ER 1148, 1149 (Lord Campbell CJ).

<sup>57</sup> Birks, above n 6, 118.

<sup>58</sup> *David Securities* (1992) 175 CLR 353, 382 (Mason CJ, Deane, Toohey, Gaudron, McHugh JJ); *Baltic* (1993) 176 CLR 344, 389 (McHugh J); *Roxborough* (2001) 208 CLR 516, 525 [16] (Gleeson CJ, Gaudron and Hayne JJ), 555 [104] (Gummow J).

<sup>59</sup> Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, revised ed, 1989) 223.

<sup>60</sup> (2001) 208 CLR 516, 556–7 [103]–[104] (Gummow J).

<sup>61</sup> *Ibid* 525 [16] (Gleeson CJ, Gaudron and Hayne JJ).

<sup>62</sup> *Ibid.*

to a promise that has not been fulfilled.<sup>63</sup> The plurality in *Roxborough* stated failure of basis ‘is not limited to non-performance of a contractual obligation, although it may include that’.<sup>64</sup> Therefore, even in contractual cases it is not simply a matter of identifying received contractual benefits.

The basis is determined by considering the shared objective purpose for an agreement or transfer.<sup>65</sup> What constitutes the basis is therefore limited only by the minds of the parties, and it has included: receiving legal title,<sup>66</sup> the right to profit,<sup>67</sup> the enjoyment of a leisure cruise,<sup>68</sup> as well as the creation of a valid contract.<sup>69</sup>

As failure of basis looks to the benefit bargained for and not just benefits that have been received in fact,<sup>70</sup> if some reciprocation or counter-performance is received which is not part of the basis it will be merely incidental.<sup>71</sup> For instance, in *Fibrosa* the basis was the delivery of machines built for an order.<sup>72</sup> This is contrasted with *Stocznia Gdanska v Latvian Shipping Co* (‘*Stocznia*’) where the basis included the work on and delivery of a ship.<sup>73</sup> Although both bases required work to be undertaken, only *Stocznia* contemplated the work as part of the basis.<sup>74</sup>

Charles Mitchell suggests it may be possible for a transfer to have multiple bases.<sup>75</sup> Mitchell argues this is evident in *Guinness Mahon Co Ltd v Chelsea & Kensington Royal London Borough Council* (‘*Guinness*’)<sup>76</sup> as either a failure of performance or a failure to form a valid contract which could constitute a failure of basis in the circumstances of that case.<sup>77</sup> However the basis in *Guinness* was found to be a valid contract for interest rate swaps.<sup>78</sup> It is respectfully submitted that the correct action in the case of a failure to perform that contract would be another remedy. The basis was the benefit of the contractual

<sup>63</sup> Ibid 556–7 (Gummow J); *Barnes v Eastenders Cash & Carry plc* [2015] AC 1, 42 [106] (Lord Toulson, with whom Baroness Hale DP, Lord Kerr, Lord Wilson and Lord Hughes agreed).

<sup>64</sup> *Roxborough* (2001) 208 CLR 516, 525–6 [16] (Gleeson CJ, Gaudron and Hayne JJ).

<sup>65</sup> *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 218 ALR 166, 252 [239] (Mason P), 261 [293] (Sheller JA), 261 [294] (Hodgson JA); *Roxborough* (2001) 208 CLR 516, 526 [17] (Gleeson CJ, Gaudron and Hayne JJ), 557 [104] (Gummow J); *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [286] (Stadler J); *contra The State Of Western Australia v Hartmann-Nieto* [2014] WADC 70 (22 May 2014) [192] (Stevenson DCJ); cf *David Securities* (1992) 175 CLR 353, 381–382 (Mason CJ, Deane, Toohey, Gaudron, McHugh JJ).

<sup>66</sup> *Rowland v Divalf* [1923] 2 KB 500 (‘*Rowland*’).

<sup>67</sup> *Rover* [1989] 1 WLR 912.

<sup>68</sup> *Baltic* (1993) 176 CLR 344.

<sup>69</sup> *Guinness* [1999] QB 215; cf Cunningham, above n 18, 239–40.

<sup>70</sup> *David Securities* (1992) 175 CLR 353, 382 (Mason CJ, Deane, Toohey, Gaudron, McHugh JJ).

<sup>71</sup> See *Rover* [1989] 1 WLR 912; *Rowland* [1923] 2 KB 500; *ibid*.

<sup>72</sup> *Fibrosa* [1943] AC 32.

<sup>73</sup> [1998] 1 WLR 574.

<sup>74</sup> *Fibrosa* [1943] AC 32; *ibid*.

<sup>75</sup> Charles Mitchell, above n 15, 1059.

<sup>76</sup> [1999] QB 215.

<sup>77</sup> See Charles Mitchell, above n 15, 1059; *ibid*.

<sup>78</sup> *Guinness* [1999] QB 215.

obligation, and not the performance of that obligation.<sup>79</sup> The better view is that there cannot be multiple bases; an entire payment can only secure one basis, although that basis may encompass several events or conditions.

### 1 *Conditions and Bases Entire*

It is possible for a basis to only be capable of entire performance or a basis may also be capable of partial performance. Some transfers may be based on non-promissory conditions which are either fulfilled or fail. Such a condition could relate to a future or past situation; such as a gift for life after marriage<sup>80</sup> or a gift on the basis that a party was already married. There cannot be partial performance of such conditions. Finkelstein J in the federal court noted that it does not matter whether the condition is based on a promise or belief, because in either case the ‘the defendant's enrichment is the same in that ... the basis for the claimant's conferral of the benefit is undermined’.<sup>81</sup> As the basis is the shared objective basis of the parties,<sup>82</sup> if a transfer is conditional it must be clear to both parties.

It is also important to distinguish between bargained for benefits that are entire and those which are capable of partial performance. Where the basis is entire — like a conditional transfer — it will either be fulfilled or fail. This can be seen in *Guinness* where the basis was a legally binding contract.<sup>83</sup> As the contract was not binding the basis failed in full notwithstanding both parties exchanged all of the contractual benefits.<sup>84</sup>

In *Baltic* the basis was a 14 day pleasure cruise which was capable of partial performance.<sup>85</sup> Although the destination was not reached, nor the contract entirely performed, some of the basis had been fulfilled when the ship sank on the ninth day of the cruise because the passenger had the benefit of some of the bargained for leisure.<sup>86</sup> There was no total failure of basis.<sup>87</sup> Similarly in *Goss*, a lender recovered funds advanced under a mortgage which was invalidated although there had been two payments of interest, because the basis was only the repayment of the capital sum.<sup>88</sup>

<sup>79</sup> *Ibid*; Charles Mitchell, above n 15, 1059.

<sup>80</sup> *See Re Ames Settlement* [1946] Ch 217.

<sup>81</sup> *Spangaro v Corporate Investment Australia Funds Management Ltd* (2003) 47 ACSR 285, 302 [51]; quoting Andrew Burrows, *The Law of Restitution* (Butterworths, 2<sup>nd</sup> ed, 2002) 407.

<sup>82</sup> *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 218 ALR 166, 252 [239] (Mason P), 261 [293] (Sheller JA), 261 [294] (Hodgson JA).

<sup>83</sup> *Guinness* [1999] QB 215; Charles Mitchell, above n 15, 1059–1060.

<sup>84</sup> *Guinness* [1999] QB 215; a similar situation occurred in *Rowland* [1923] 2 KB 500; See Paul Mitchell, above n 15, 192; *Baltic* (1993) 176 CLR 344, 351 (Mason CJ).

<sup>85</sup> (1993) 176 CLR 344.

<sup>86</sup> *Baltic* (1993) 176 CLR 344, 353 (Mason CJ), 367 (Brennan J), 375 (Deane and Dawson JJ), 383 (Toohey J), 386 (Gaudron J), 392 (McHugh J); cf Edelman and Bant, above n 2, 255.

<sup>87</sup> *Baltic* (1993) 176 CLR 344.

<sup>88</sup> [1996] AC 788.

The Privy Council acknowledged that if some of the capital sum had been paid, this would have been a partial failure.<sup>89</sup>

## 2 *Broad and Narrow Meanings*

There are some who believe that ‘partial failure of basis’ is a misnomer. Birks distinguished a failure of basis from a failure of reciprocation.<sup>90</sup> He also held that the basis is always required to be fulfilled *in toto*.<sup>91</sup> Where the basis for a transaction is not entirely fulfilled, it fails irrespective of whether there has been partial reciprocation.<sup>92</sup> Therefore Birks believed ‘there is no such thing as a partial failure of basis’.<sup>93</sup> This is the narrow conception of basis.

Birks argues that in *Baltic* the basis had failed because the claimant intended to experience a fourteen day pleasure cruise; but only received eight.<sup>94</sup> Yet as the claimant insisted on an entire refund the fact she received some contractual reciprocation meant she was not entitled to recover the ticket price.<sup>95</sup> It was only for this reason the claimant needed to show she had received nothing.<sup>96</sup>

Edelman and Bant suggest that ‘once “consideration” is understood in this way, then there should be no difficulty with a rule requiring a total failure’.<sup>97</sup> This is similar to recognising that all bases or contemplated states of affairs are only capable of entire performance. This is an intellectually attractive position and such a change in approach would be welcome because it recognises that when people agree on a particular basis that is conditional, even when it is partially fulfilled the condition will not be satisfied.

However the prevailing orthodoxy takes a wider view of the basis of the transfer and if there has been any performance relating to that basis, recovery will be precluded.<sup>98</sup> The fact the claim is often labelled a ‘total failure of consideration’ also supports this view.<sup>99</sup> The Privy Council decision of *Goss* held that the basis for a loan was repayment of the

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<sup>89</sup> Ibid.

<sup>90</sup> Birks, above n 6, 120–1, 125.

<sup>91</sup> Ibid 120–1.

<sup>92</sup> Ibid 120–1; *Roxborough* (2001) 208 CLR 516, 526 [17] (Gleeson CJ, Gaudron and Hayne JJ), 525 [16].

<sup>93</sup> Birks, above n 6, 122.

<sup>94</sup> Ibid 121; *Baltic* (1993) 176 CLR 344.

<sup>95</sup> Birks, above n 6, 121.

<sup>96</sup> Ibid.

<sup>97</sup> Edelman and Bant, above n 2.

<sup>98</sup> *Baltic* (1993) 176 CLR 344, 388–9 (McHugh J); *Roxborough* (2001) 208 CLR 516, 578 [167] (Kirby J); Mason, Carter and Tolhurst, above n 8, 329–330 [920]; Burrows, *The Law of Restitution*, above n 15, 322–5; Virgo, above n 18, 306–7; Mitchell, Mitchell and Watterson (eds), above n 15, 379 [13-05]; Keith Mason, ‘Strong Coherence, Strong Fusion, Continuing Categorical Confusion: The High Court’s Latest Contributions to The Law of Restitution’ (2015) 39 *Australian Bar Review* 284; McLure, above n 15, 209, 215.

<sup>99</sup> *Baltic* (1993) 176 CLR 344, 388 [194] (Callinan J); *Management 3 Group Pty Ltd (in liq) v Lenny’s Commercial Kitchens Pty Ltd [No 2]* (2011) 281 ALR 482; *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2005] NSWCA 248 (4 August 2005); see also *Equuscorp* (2012) 246 CLR 498, 515 [28] (French CJ, Crennan and Kiefel JJ).

loaned sum, and any payment on the capital sum would have constituted partial satisfaction of the basis.<sup>100</sup> This is also the conception of the rule that is apparent in many of the decisions of the lower courts in Australia,<sup>101</sup> and evident in English cases such as *Stocznia* and *Giedo*.<sup>102</sup> This article assumes that the broad view of basis prevails.

Some lower court judgments suggest that Australia now recognises the narrow view of basis.<sup>103</sup> It may be that the modernising of the language of failure of basis will lead to recognition that a partial failure is impossible. The total failure rule would therefore be defined out of existence. This article's discussion will still be of utility as rules of law do not exist by mere chance,<sup>104</sup> and it would be unwise for courts to eliminate such a rule without good reason. Further, the arguments in this article for how a court should respond when benefits have been received or where a contract subsists are equally applicable whether the benefits are characterised as part of or incidental to the basis.

### C The Requirement of Total Failure

Notwithstanding the disquiet surrounding the rule, the traditional view is that a failure of basis must be total.<sup>105</sup> As Lord Porter said in *Fibrosa* 'a partial failure of consideration gives rise to no claim for recovery of part of what has been paid'.<sup>106</sup> In cases where the basis is entire this doctrine plays no role, as a basis will either fail or be fulfilled. However where the basis is capable of partial performance, the total failure rule will bar restitution if some part of the bargained for benefit is received.<sup>107</sup>

To test for a total failure one must be careful to identify the basis of a transfer to distinguish between the 'benefit bargained for by the claimant rather than any benefit which might have been received in fact'.<sup>108</sup> As Kerr LJ stated in *Rover*, the test therefore 'is whether or not the party

<sup>100</sup> [1996] AC 788.

<sup>101</sup> *Ethnic Earth Pty Ltd v Quoin Technology Pty Ltd [No 3]* (2006) 229 ALR 615, 632 [78] (Bleby J); *Nea Pty Ltd v Magenta Mining Pty Ltd* [2005] WASC 106 (1 June 2005) ('*Nea*'); *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2005] NSWCA 248 (4 August 2005); *Ovidio Carrideo Nominees Pty Ltd v Dog Depot Pty Ltd* [2006] VSCA 6 (8 February 2006) [21] (Chernov JA).

<sup>102</sup> *Stocznia* [1998] 1 WLR 574; *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [299] (Stadlen J).

<sup>103</sup> *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3]* [2014] WASC 162 (7 May 2014) [112] (Edelman J); see also *Ovidio Carrideo Nominees Pty Ltd v Dog Depot Pty Ltd* [2006] VSCA 6 (8 February 2006) [31] (Nettle JA).

<sup>104</sup> Ewan McKendrick, 'Total Failure of Consideration and Counter-Restitution: Two Issues or One?' in Peter Birks (ed), *Laundering and Tracing* (Clarendon, 1995) 217, 221.

<sup>105</sup> *Baltic* (1993) 176 CLR 344, 388–9 (McHugh J); *Roxborough* (2001) 208 CLR 516, 557 [105] (Gummow J), 578–9 [167]–[173] (Kirby J); *Fibrosa* [1943] AC 32; *Hunt v Silk* (1804) 5 East 449.

<sup>106</sup> *Fibrosa* [1943] AC 32, 77.

<sup>107</sup> *Ibid*; *Baltic* (1993) 176 CLR 344, 388–9 (McHugh J).

<sup>108</sup> *David Securities* (1992) 175 CLR 353, 382 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

claiming total failure of consideration has in fact received any part of the benefit bargained for'.<sup>109</sup>

The benefit does not need to be physically received by the claimant. This is apparent when considering agreements that may contemplate work as well as delivery; such as the shipbuilding contract in *Stocznia*.<sup>110</sup> Thus Lord Goff in *Stocznia* said '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'.<sup>111</sup> It is important to emphasise that not all contractual duties will constitute part of the basis of the transfer.<sup>112</sup> Thus in *Rover* recovery was allowed notwithstanding substantial performance of the contractual duties.<sup>113</sup> The duties must be part of the basis of the transaction.<sup>114</sup>

#### IV Common Law Exceptions to the Total Failure Rule

Even though a failure must generally be total to vitiate a transfer, the rule has been abrogated in certain circumstances. The High Court has shown on numerous occasions that it is willing and able to disregard the rule in order to provide more just results.<sup>115</sup> This part will further explore the circumstances where, despite some counter-performance, recovery will still be allowed for a total failure, while also examining whether a party can recover after a partial failure of basis.

##### A Apportionment

The principle 'exception' to the total failure rule is the ability to apportion aspects of a payment to particular benefits, treating parts of it as severable and separate. Lord Porter in *Fibrosa* noted that apportionment can occur where it is possible to attribute part of the consideration solely to a divisible part of the transaction.<sup>116</sup>

In such a case, insistence on total failure can be confusing or misleading.<sup>117</sup> Where it can be discerned that a portion of the payment was made for a particular basis within the transaction, that identification does not circumvent the total failure rule.<sup>118</sup> The majority in *David Securities* explained apportionment is available 'where both parties have impliedly acknowledged that the consideration can be "broken up" or

<sup>109</sup> (1989) 1 WLR 912, 923; quoted in *David Securities*, *ibid*.

<sup>110</sup> *Stocznia* [1998] 1 WLR 574.

<sup>111</sup> *Ibid* 588 (Lord Goff).

<sup>112</sup> See *Roxborough* (2001) 208 CLR 516; *Rover* [1989] 1 WLR 912.

<sup>113</sup> *Rover* [1989] 1 WLR 912.

<sup>114</sup> *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [299] (Stadlen J); *Roxborough* (2001) 208 CLR 516.

<sup>115</sup> *Roxborough* (2001) 208 CLR 516, 557–8 [106] (Gummow J); *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Equuscorp* (2012) 246 CLR 498, 552 [136] (Heydon J).

<sup>116</sup> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 77.

<sup>117</sup> *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>118</sup> Mason, Carter and Tollhurst, above n 8, 498 [1221].

apportioned'<sup>119</sup>. In those circumstances, 'any rationale for adhering to the traditional rule requiring *total* failure ... disappears'.<sup>120</sup>

Stadlen J in *Giedo* clarified that the majority 'was not saying that it is only in cases where the parties have impliedly acknowledged that the consideration may be apportioned by the structure of the transaction that apportionment will be possible'.<sup>121</sup> Although present in *David Securities*, apportionment is not reliant on an implicit agreement.<sup>122</sup> Instead, as the majority in *Haxton v Equuscorp Pty Ltd* ('*Haxton*') noted, Australia and England take a liberal approach to apportionment.<sup>123</sup>

The availability of apportionment depends on an 'analysis of the nature of the subject matter of the consideration and the circumstances in which it is to be delivered or performed'.<sup>124</sup> This contextual approach was borne out in *Roxborough* where under a fully performed contract the High Court found part of a lump sum payment was severable and apportionable to a tax element of the contract.<sup>125</sup> The money was recoverable on a failure of basis because the tax was invalid.<sup>126</sup> Only Gummow J in his judgment noted there was an indication in the contract that the payments could be apportioned.<sup>127</sup>

The plurality in that decision found that despite a lump sum payment in the contract, the tax amount represented a distinct part of the payment and it was treated 'as separate from the wholesale price of the goods sold'.<sup>128</sup> In such a case, the court is simply identifying separate bases for distinct parts of a payment.

Apportionment is also allowed where it is simple to do so. In *Whincup v Hughes* ('*Whincup*') Bovill CJ stated 'if there were a contract to deliver ten sacks of wheat and six only were delivered, the price of the remaining four might be recovered back. But there the consideration is clearly severable'<sup>129</sup> because apportionment of the payment to each unit is simple.

## 1 *Apportionment on a Partial Failure*

It is also possible for apportionment to be undertaken on a partial failure of basis. The Privy Council in *Goss* said that although the basis had totally failed, if the basis had partially failed

<sup>119</sup> *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid*; *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [300] (Stadlen J).

<sup>122</sup> *David Securities* (1992) 175 CLR 353; *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [300] (Stadlen J).

<sup>123</sup> *Haxton v Equuscorp Pty Ltd* (2010) 28 VR 499, 501 [1] (Ashley JA), 502 [5] (Neave JA), 535 [178] (Dodds-Streton JA); affd *Equuscorp* (2012) 246 CLR 498.

<sup>124</sup> *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [304] (Stadlen J).

<sup>125</sup> *Roxborough* (2001) 208 CLR 516.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid* 558 [109] (Gummow J).

<sup>128</sup> *Ibid* 524 [13] (Gleeson CJ, Gaudron and Hayne JJ).

<sup>129</sup> (1871) LR 6 CP 78, 81.

the law would not hesitate to hold ... the balance ... recoverable on the ground of failure of consideration; for at least in those cases in which apportionment can be carried out without difficulty, the law will allow partial recovery on this ground.<sup>130</sup>

This was favourably referred to in *Giedo* where Stadlen J suggested that courts should approach such a situation with common sense.<sup>131</sup>

Another situation of a partial failure is exemplified in *D O Ferguson & Associates v Sohl* ('*Ferguson*') where the English Court of Appeal found a purchaser had paid \$26,738 for work that was only worth \$22,065, leading to a total failure of \$4,673.<sup>132</sup> However the overpayment was not a separate payment.<sup>133</sup> Thus the basis of the payment for the work had only partially failed. Further, there was no suggestion that the payments were for distinct aspects of the work.<sup>134</sup> This decision was noted by the United Kingdom Supreme Court as reflecting 'commercial reality'.<sup>135</sup>

Stadlen J in *Giedo* stated that *Ferguson* 'is a good example of the willingness of the court to adopt a flexible and robust approach so as to avoid, if consistent with existing principle, leaving a victim of unjust enrichment without an effective remedy'.<sup>136</sup> Yet *Ferguson* is noted as an example of how recovery on a partial failure could operate.<sup>137</sup> In *Goff & Jones* it is suggested that *Ferguson* may establish that payments can be considered severable to single units of currency, effectively meaning that the total failure rule has disappeared.<sup>138</sup>

It is submitted that this may be open in Australia. Deane J in *Commonwealth v Amann Aviation Pty Ltd* ('*Amann*') said 'even in a case where the consideration has not failed completely, it would seem that that doctrine will found a direct action for the excess of money paid ... over the value of any consideration actually received'.<sup>139</sup> Some lower court decisions support the possibility of apportionment on a partial failure.<sup>140</sup> Yet the position is unclear after the dicta of McHugh J in *Baltic*

<sup>130</sup> *Goss* [1996] AC 788, 798 (Lord Goff on behalf of Lord Jauncey, Lord Steyn, Lord Hoffmann and Lord Cooke).

<sup>131</sup> *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [299]–[300] (Stadlen J).

<sup>132</sup> (1992) 62 BLR 95.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Barnes v Eastenders Cash & Carry plc* [2015] AC 1, 43 [114] (Lord Toulson, with whom Baroness Hale DP, Lord Kerr, Lord Wilson and Lord Hughes agreed).

<sup>136</sup> *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [323] (Stadlen J); *Ferguson* (1992) 62 BLR 95.

<sup>137</sup> Peter Birks, 'Failure of Consideration' in Francis Rose (ed), *Consensus Ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel* (Sweet & Maxwell, 1996) 179, 199–0; Gerard McMeel, 'Construction and Failure of Consideration — The Primacy of Contract' [1998] *Lloyds Maritime and Commercial Law Quarterly* 308, 311 n 20; *Ferguson* (1992) 62 BLR 95.

<sup>138</sup> Mitchell, Mitchell and Watterson (eds), above n 15, 376 [12–31]; *Ferguson* (1992) 62 BLR 95.

<sup>139</sup> (1991) 174 CLR 64, 117.

<sup>140</sup> *Clarke v Great Southern Finance Pty Ltd* [2014] VSC 516 (11 December 2014) [4166] (Croft J); *Wasada Pty Ltd v State Rail Authority of New South Wales [No 2]* [2003] NSWSC 987 (15 December 2003) [20] (Campbell J); see also *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] 2 All ER (Com) 823, 845 (Strauss QC).

that ‘the common law has no doctrine of apportionment in respect of a partial failure of consideration’.<sup>141</sup> The dissenting judgment of Kirby J in *Roxborough* also denied any ability to recover on a partial failure.<sup>142</sup> For reasons that will be expanded upon, it is submitted that apportionment on a partial failure should be open to Australian courts.

### **B Where Counter-Restitution is Relatively Simple**

The majority in *David Securities* said, ‘in cases where counter-restitution is relatively simple, insistence on total failure of consideration can be misleading or confusing’.<sup>143</sup> This suggests that similar to Birks, the High Court saw a claimant’s right to restitution limited not by the total failure rule, but instead by the inability of a claimant to make counter-restitution.<sup>144</sup>

Counter-restitution is where a party claiming relief has received some benefit from another, and must return that benefit before restitutionary relief will be granted. It need not be the precise benefit received, and can instead be its value.<sup>145</sup> The effect of an exception based on the availability of counter-restitution is described in Goff & Jones. The authors ask whether a person has received a benefit:

If he has and he is not in a position to make counter-restitution, then his restitutionary claim must fail. Conversely, if he has received no part of the consideration, or if it is still possible for him to make counter-restitution in respect of the part which he received, then his restitutionary claim should succeed.<sup>146</sup>

The words in *David Securities* were thought to have heralded the end of the thorn in the side of failure of basis, which is the requirement of total failure.<sup>147</sup> Birks thought ‘“Total” will now fade away’ and instead the court will ask whether counter-restitution can be made.<sup>148</sup>

Support for this exception can be found in Australian decisions,<sup>149</sup> the Privy Council in *Goss*,<sup>150</sup> and arguably the judgment of Lord Goff in

<sup>141</sup> *Baltic* (1993) 176 CLR 344, 388–9; cf *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>142</sup> *Roxborough* (2001) 208 CLR 516, 578 [167].

<sup>143</sup> *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>144</sup> Birks, *An Introduction to the Law of Restitution*, above n 59, 242, 423–4; Birks, ‘Failure of Consideration’, above n 137; see also McKendrick, above n 104.

<sup>145</sup> *Ovidio Carrideo Nominees Pty Ltd v Dog Depot Pty Ltd* [2006] VSCA 6 (8 February 2006) [20] (Chernov JA), [47]–[48] (Nettle JA).

<sup>146</sup> Baron Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 6<sup>th</sup> ed, 2002) 488 [19-005].

<sup>147</sup> McKendrick, above n 104; Peter Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26(1) *University of Western Australia Law Review* 1, 78; Edelman, ‘The New Doctrine’, above n 48; *David Securities* (1992) 175 CLR 353.

<sup>148</sup> Birks, ‘Equity in the Modern Law’, above n 147, 78.

<sup>149</sup> *David Securities* (1992) 175 CLR 353; *Fensford Pty Ltd v Nour Pty Ltd* [2006] VSCA 118 (1 June 2006) [40] (Nettle JA), [1] (Chernov JA), [76] (Ashley JA) *Australia & New Zealand Banking Group Ltd v Londish* [2013] NSWSC 1423 (26 September 2013) [25] (Hall J).

*Westdeutsche Landesbank Girozentrale v Islington LBC*.<sup>151</sup> However, later judgments have cast doubt on this possible exception, and *Baltic* is sometimes cited as returning the Court to the requirement of total failure.<sup>152</sup>

It is submitted that when the judgments in *Baltic* are analysed in their particular context, this may not be so. In *Baltic* the plaintiff sought total restitution of her payment, and therefore required a total failure of basis.<sup>153</sup> Thus the judgment of McHugh J found that the payment became unconditional upon the provision of *any* of the contemplated basis and therefore the claim was not for partial restitution.<sup>154</sup>

In considering whether there was a total failure, Mason CJ focused not on receipt of a benefit by the plaintiff, but instead ‘receipt and retention’.<sup>155</sup> Indeed there was an absence of any offer of counter-restitution despite the receipt of some reciprocation by the plaintiff.<sup>156</sup> Mason CJ noted the Court of Appeal’s observation of a requirement of counter-restitution to avoid over-compensation, and that the nature of the claim required the basis to have wholly failed.<sup>157</sup> In those circumstances the claimant could not recover.<sup>158</sup> Brennan and Toohey JJ agreed with those reasons.<sup>159</sup> Similarly, Deane and Dawson JJ noted this was not a case where partial failure was argued and instead the claim was for the whole of the fare, the argument being that the basis had wholly failed.<sup>160</sup>

The judgments in *Baltic* are specific to its facts; a partial failure was not pleaded, leaving open the possibility that in a case of partial failure the offer of counter-restitution could allow recovery.<sup>161</sup> Although in *Roxborough* Kirby and Gummow JJ noted the total failure requirement,<sup>162</sup> the plurality focused on apportionment and was not drawn on the counter-restitution point.<sup>163</sup> Notably, Callinan J recognised that *David Securities* relaxed the total failure rule.<sup>164</sup>

The position may be different in England. In *Giedo*, Stadlen J also stated that the ‘receipt of even a small part of that consideration is

<sup>150</sup> *Goss* [1996] AC 788, 798 (Lord Goff on behalf of Lord Jauncey, Lord Steyn, Lord Hoffmann and Lord Cooke); *David Securities* (1992) 175 CLR 353.

<sup>151</sup> [1996] AC 669, 682 (Lord Goff); *David Securities* (1992) 175 CLR 353.

<sup>152</sup> Edelman and Bant, above n 2, 260; McLure, above n 15, 209, 211–13; Mason, above n 98; *Baltic* (1993) 176 CLR 344.

<sup>153</sup> *Baltic* (1993) 176 CLR 344.

<sup>154</sup> *Ibid* 388–9.

<sup>155</sup> *Ibid* 350–1.

<sup>156</sup> *Ibid*.

<sup>157</sup> *Ibid* 348–9 (Mason CJ).

<sup>158</sup> *Ibid* 353 (Mason CJ).

<sup>159</sup> *Ibid* 367 (Brennan J), 383 (Toohey J).

<sup>160</sup> *Ibid* 375.

<sup>161</sup> See Edelman, ‘The New Doctrine’, above n 48; James Edelman, ‘Restitution for a Total Failure of Consideration: When a Total Failure is not a Total Failure’ (1996) 1(3) *The Newcastle Law Review* 57, 61–4; Birks, ‘Failure of Consideration’, above n 137, 200–1; Birks, above n 6, 120–1; *Baltic* (1993) 176 CLR 344.

<sup>162</sup> *Roxborough* (2001) 208 CLR 516, 558 [107]–[109] (Gummow J), 579 [173] (Kirby J).

<sup>163</sup> *Ibid* 527 [20] (Gleeson CJ, Gaudron and Hayne JJ).

<sup>164</sup> *Ibid* 588–9 [198] (Callinan J); *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

inconsistent with' proof of total failure.<sup>165</sup> Goff & Jones stated that Stadlen J was denying the availability of this exception.<sup>166</sup>

In any case, even if this exception does exist in Australian law, it has not been applied. Although it was pleaded before the High Court in *Equuscorp*,<sup>167</sup> only the joint judgement of Bell and Gummow JJ referred to counter-restitution; noting the previous reluctance of the High Court to engage with abstract concepts,<sup>168</sup> and cautioning that 'the term "counter-restitution" has been used in this Court but, without further analysis, is an unfortunate expression for several reasons ... which provides a framework for analysis at too high a level of abstraction'.<sup>169</sup> Unfortunately, that judgment did not add clarity to the debate.

Although it initially seemed clear, the obiter relating to counter-restitution by the majority in *David Securities* has not yet been precisely explained or applied.<sup>170</sup> This has led to a withdrawal of support from commentators who believed that the judgment allowed for recovery on a partial failure.<sup>171</sup> However, unless and until a majority of the High Court give further guidance, it appears open to a claimant to plead for restitution on a partial failure of basis where counter-restitution would be relatively simple.

### C Where No Satisfactory Remedy Exists

Heydon J in *Equuscorp* noted that, as

Sir Guenter Treitel says, the supposed requirement that there be a total failure of consideration is now much qualified. One of these qualifications supports the view that it 'should ... no longer apply where the [payer] has *no* remedy, or no satisfactory remedy, for breach'.<sup>172</sup>

Gummow J in *Roxborough* also supported this exception.<sup>173</sup> Gummow J agreed with Sir Treitel that part of the merit of the total failure rule is that restitution for a partial failure could allow a party to escape from a bad bargain and 'cut across the compensatory principle'.<sup>174</sup> The challenge of apportioning payments made under a contract was another reason he

<sup>165</sup> *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [304], [359], [366]–[367] (Stadlen J).

<sup>166</sup> Mitchell, Mitchell and Watterson (eds), above n 15, 730 [31-04] n 5.

<sup>167</sup> *Equuscorp*, 'Appellant's Submissions', Submission in *Equuscorp Pty Ltd v Haxton*, M 128/2010, 1 February 2011, 16 [91]–[92].

<sup>168</sup> *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635.

<sup>169</sup> *Equuscorp* (2012) 246 CLR 498, 545 [114].

<sup>170</sup> *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>171</sup> Edelman, 'The New Doctrine', above n 48; Goff and Jones, above n 146, 488 [19-005]; cf Edelman and Bant, above n 2, 260; Mitchell, Mitchell and Watterson (eds), above n 15, 729–30 [31-04].

<sup>172</sup> *Equuscorp* (2012) 246 CLR 498, 552 [136]; quoting Edwin Peel (ed), *Treitel on the Law of Contract* (Sweet & Maxwell, 13<sup>th</sup> ed, 2011) 1132–4 [22-004].

<sup>173</sup> *Roxborough* (2001) 208 CLR 516, 558 [105]–[106].

<sup>174</sup> *Ibid* 558 [105] (Gummow J); Peel (ed), above n 172, 1132–3 [22-004].

found for the rule.<sup>175</sup> Where those reasons do not apply, or no satisfactory compensation is otherwise available, Gummow J thought it would be appropriate to allow a court to circumvent the total failure rule.<sup>176</sup>

The Victorian Court of Appeal in *Haxton* thought that while

Gummow J appeared to approve modification of the traditional insistence on totality where the claimant had no alternative remedy or the transaction was relevantly severable, both factors were present in that case. It is not clear that his Honour viewed each as an independent basis for restitutionary relief even if the claimant had received some of the benefit bargained for.<sup>177</sup>

On appeal, Heydon J found that where the claimant had no satisfactory remedy available 'it was not necessary that there be a total failure of consideration'.<sup>178</sup> Heydon J adopted the position of Sir Treitel and held that where either apportionment is available or there is no other satisfactory remedy, then a court can jettison the requirement of total failure.<sup>179</sup>

With one judge of the High Court supporting the qualification in obiter and another applying the reasoning of Sir Treitel, the question of whether this exception applies is live.<sup>180</sup>

Seriously considered dicta of the High Court has significant persuasive value.<sup>181</sup> Yet lower courts should not too eagerly apply High Court obiter to remove an existing requirement.<sup>182</sup> Thus this exception may not be available in Australia without further guidance. It is submitted that in any case it would be preferable to allow for recovery on a partial failure where apportionment is possible or counter-restitution is relatively simple,<sup>183</sup> making this exception largely unnecessary.

### D *Incidental and De Minimis Benefits*

Incidental benefits are any benefits that are not part of the basis of the transaction. Thus this is truly a closer examination of the basis rather than an exception to the total failure rule. Yet the law was not always so discerning.<sup>184</sup> The majority in *David Securities* said that:

<sup>175</sup> *Roxborough* (2001) 208 CLR 516, 557–8 [106] (Gummow J); Peel (ed), above n 172, 1132–3 [22-004].

<sup>176</sup> *Roxborough* (2001) 208 CLR 516, 558 [107]–[109] (Gummow J); Peel (ed), above n 172, 1132–3 [22-004].

<sup>177</sup> *Haxton* (2010) 28 VR 499, 501 [1] (Ashley JA), 502 [2] (Neave JA), 536 [182] (Dodds-Streeton JA), affd *Equuscorp* (2012) 246 CLR 498.

<sup>178</sup> *Equuscorp* (2012) 246 CLR 498, 552–3 [136]–[137] (Heydon J); see 518 [33] (French CJ, Crennan and Kiefel JJ), 544 [112] (Gummow and Bell JJ).

<sup>179</sup> *Ibid* 552–3 [136]–[137] (Heydon J); Peel (ed), Peel (ed), above n 172, 1132–3 [22-004].

<sup>180</sup> *Equuscorp* (2012) 246 CLR 498, 552 [136] (Heydon J); *Roxborough* (2001) 208 CLR 516, 557–8 [106] (Gummow J).

<sup>181</sup> See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) (2007) 230 CLR 89, 150–151 [134], 155 [148] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

<sup>182</sup> *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604.

<sup>183</sup> See below Part VI.

<sup>184</sup> *Hunt v Silk* (1804) 5 East 449; *Whincup* (1871) LR 6 CP 78. Cf Paul Mitchell, above n 15; *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [279].

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. However ... the notion of total failure of consideration now looks to the benefit bargained for by the plaintiff rather than any benefit which might have been received in fact’.<sup>185</sup>

In *Baltic* Deane and Dawson JJ used the example of someone who boards a flight in order to reach a destination, but the plane returns to the departure airport after service of meals without any alternative transport to the destination being provided.<sup>186</sup> Although a benefit is provided, it is merely incidental to the basis of the payment.<sup>187</sup>

In *Nea*, Heenan J stated ‘partially executed contracts will not produce a situation of total failure of consideration’.<sup>188</sup> With respect, such a statement is not correct after *David Securities*.<sup>189</sup> Receipt of part of the contractual benefit will not always mean there is not a total failure of basis.<sup>190</sup> One must look to the basis of the transaction, not just the contract.

Whether a benefit is incidental does not depend on whether it is of negligible value. In Australia the authorities favour a *de minimis* exception to the rule,<sup>191</sup> yet incidental benefits may be of substantial value. *Rowland*,<sup>192</sup> *Butterworths v Kingsway Motors Ltd*<sup>193</sup> and *Warman v Southern Counties Car Finance Corp Ltd*<sup>194</sup> are all cases where a claimant has had the benefit of the use of a car under a purported transaction for four, over 11, and seven months respectively. Although of substantial value, the use was merely incidental to the actual basis. In the former two cases the basis was to acquire lawful possession of the car,<sup>195</sup> and in the latter it was to acquire an option to purchase a car.<sup>196</sup> In these cases restitution was ordered without counter-restitution being given for the use of the cars.<sup>197</sup> This article submits that this is unsatisfactory and

<sup>185</sup> *David Securities* (1992) 175 CLR 353, 382 (Mason CJ, Deane, Toohey, Gaudron, McHugh JJ); see *Hunt v Silk* (1804) 5 East 449; *Whincup* (1871) LR 6 CP 78.

<sup>186</sup> *Baltic* (1993) 176 CLR 344, 378 (Deane and Dawson JJ).

<sup>187</sup> *Ibid.*

<sup>188</sup> [2005] WASC 106 (1 June 2005) [128]; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 687.

<sup>189</sup> *David Securities* (1992) 175 CLR 353; Edelman and Bant, above n 2, 260.

<sup>190</sup> *Roxborough* (2001) 208 CLR 516; *Mulkearns v Chandos Developments Pty Ltd [No 3]* [2005] NSWSC 504 (30 May 2005) [31] (Young CJ in Eq).

<sup>191</sup> *Baltic* (1993) 176 CLR 344, 350 (Mason CJ); *Re Hair Industrie Penrith Pty Ltd, Hair Industrie Merrylands Pty Ltd* [2015] NSWSC 1578 (27 October 2015) [50] (Black J); *Luo v Zhai* [2015] FCA 350 (17 April 2015) [36] (Perram J); Mason, Carter and Tolhurst, above n 8, 333 [926]. See also Jack Beatson, *The Use and Abuse of Unjust Enrichment* (Clarendon Press, 1991) 58; Virgo, above n 18, 672. The position in England appears to be different; *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [287] (Stadlen J); H G Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 31<sup>st</sup> ed, 2012) vol 1, 2065 [29-057] n 323.

<sup>192</sup> *Rowland* [1923] 2 KB 500.

<sup>193</sup> [1954] 1 WLR 1286.

<sup>194</sup> [1949] 2 KB 576.

<sup>195</sup> *Rowland* [1923] 2 KB 500.

<sup>196</sup> *Warman v Southern Counties Car Finance Corp Ltd* [1949] 2 KB 576, 582 (Finnemore J).

<sup>197</sup> *Ibid.*; *Rowland* [1923] 2 KB 500; *Butterworths v Kingsway Motors Ltd* [1954] 1 WLR 1286.

argues, in Part V, that even where a benefit is incidental the law should require counter-restitution before ordering restitution.<sup>198</sup>

### E *Rejecting a Benefit*

Generally where a party has a legal right to reject a benefit it is still possible to claim for total failure. For instance, the *Australian Consumer Law* gives a person a right to reject defective goods where there is a ‘major failure’.<sup>199</sup> This may enliven a situation of failure of basis.

As restitution on an unjust enrichment is not fault based, even if a party rejects a benefit and thereby breaches a contract they can still receive restitution.<sup>200</sup> In *Dies v British and International Mining & Finance Corp Ltd* (‘*Dies*’) a buyer part paid for arms and ammunition and later refused to take delivery, resulting in the defendant repudiating the contract.<sup>201</sup> Although otherwise decided, it has been used as authority for the proposition that a party whose breach has brought about the failure of basis may still make a restitutionary claim.<sup>202</sup>

As McHugh J opined in *Baltic*, once ‘the condition for retaining the money has failed the fact that it failed in response to the payer’s own breach does not matter’.<sup>203</sup> Any initial unfairness is countered by the fact that other remedies such as damages will likely be open to the defendant.

### F *Operation of the Rule*

The total failure rule is subject to limitations, including the historical exception of apportionment on a total failure. A party can also recover where they have received incidental benefits, and may be able to recover where counter-restitution of part of the basis is possible. There is also the possibility that where no satisfactory remedy is available a party may receive restitution notwithstanding only a partial failure has occurred. As has been noted, if apportionment on a partial failure or counter-restitution of received benefits is to be allowed, then the total failure rule would effectively be excised from the law. Why the rule exists at all must now be considered, before it can be concluded that recovery should be allowed on a partial failure.

## V Rationale Behind the Total Failure Rule

It is clear from the preceding part that courts are willing and able to depart from ‘total failure’ in numerous circumstances. This part will

<sup>198</sup> See Jim Davis (ed), *Contract: General Principles — The Laws of Australia* (Thomson Reuters, 2<sup>nd</sup> ed, 2012) 839 [7.9.2010].

<sup>199</sup> *Competition and Consumer Act 2010* (Cth) sch 2 s 259.

<sup>200</sup> *McDonald* (1933) 48 CLR 457; *Fibrosa* [1943] AC 32.

<sup>201</sup> *Dies* [1939] KB 724.

<sup>202</sup> *Rover* [1989] 1 WLR 912, 931 (Kerr LJ); *Baltic* (1993) 176 CLR 344, 390 (McHugh J).

<sup>203</sup> *Baltic* (1993) 176 CLR 344, 390, quoting Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985) 236–8.

examine the historical and contemporary sources supporting the requirement that a failure of basis be total. In considering the reasons why this rule is necessary, counter-arguments mitigating the importance of those reasons will also be explored.

### A *Traditional Valuation Problems*

An oft-cited reason for the requirement of a total failure is that courts are unwilling to reopen a transaction and value its different aspects.<sup>204</sup> For this reason Viscount Simon LC in *Fibrosa* said that the ‘common law does not undertake to apportion a prepaid sum’.<sup>205</sup> Yet as discussed, apportionment is at least available where a payment is implicitly capable of being ‘broken up’.<sup>206</sup>

The reasons why apportionment was not always available are exemplified in *Whincup* where a master died one year into an apprenticeship contract and the apprentice’s father tried to bring an action for a failure of basis.<sup>207</sup> It was noted that apportionment would be unfair where the recipient relied on the receipt of an entire payment.<sup>208</sup> However, the acceptance of the defence of change of position deals with that problem.<sup>209</sup> That defence protects a defendant who has irreversibly changed their position in reliance of the receipt of a benefit, when that decision was made in good faith.<sup>210</sup>

Apportionment was also rejected in *Whincup* because of the difficulty of valuing each time period, as the apprentice would initially require more intensive training and would provide little value to the master, whereas the later stages of his apprenticeship would see this reversed.<sup>211</sup> For those reasons payment was found to be whole and indivisible.<sup>212</sup>

Yet throughout the law, and particularly unjust enrichment, courts are willing to conduct difficult valuations. Burrows reminds us that ‘simplicity is hardly justice’<sup>213</sup> and difficult valuations occur for restitution on unjust enrichments where counter-restitution is required in cases of mistake, necessity, or where a contract is discharged for breach, is void, or unenforceable.<sup>214</sup> Similarly claimants are entitled to restitution on an unjust enrichment as a *quantum meruit* for in kind performance,

<sup>204</sup> *Roxborough* (2001) 208 CLR 516, 557–8 [106] (Gummow J), 579 [173] (Kirby J); Law Commission of England and Wales, *Pecuniary Restitution on Breach of Contract*, Report No 121 (1983) [3.9].

<sup>205</sup> *Fibrosa* [1943] AC 32, 49 (Viscount Simon LC).

<sup>206</sup> *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>207</sup> *Whincup* (1871) LR 6 CP 78.

<sup>208</sup> *Ibid* 82 (Bovill CJ), 84 (Willes J); Jack Beatson, *The Use and Abuse of Unjust Enrichment* (Clarendon Press, 1991).

<sup>209</sup> See McKendrick, above n 104, 220–5.

<sup>210</sup> *David Securities* (1992) 175 CLR 353; *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560.

<sup>211</sup> *Whincup* (1871) LR 6 CP 78, 81 (Bovill CJ).

<sup>212</sup> *Ibid*.

<sup>213</sup> Burrows, *The Law of Restitution*, above n 15, 331.

<sup>214</sup> *Ibid*; see also Birks, above n 6, 228.

and the courts are willing and able to value such claims for goods delivered or work done.<sup>215</sup> Such valuations are not dissimilar to those which would need to be made on a partial failure of basis, evidencing the transparency of this objection.

Mason, Carter and Tolhurst also point out that it is not consistent with the law around the unjust factors of misrepresentation and undue influence, where difficult valuations are required to allow for substantial counter-restitution of any benefit received.<sup>216</sup> This is the same requirement for a rescinded contract,<sup>217</sup> where the right to counter-restitution is premised on unjust enrichment.<sup>218</sup> The unjust factor of failure of basis is therefore the exception.

In the major reports on the law of frustration, this concern was seen as insufficient to maintain the current rule.<sup>219</sup> Further, it would only be exceptional cases where it would be impossible to substantially value a partial benefit conveyed to the plaintiff.<sup>220</sup> In those exceptional cases it would therefore be impossible to make counter-restitution and restitution should not be allowed. To hold otherwise would be to demand the court undertake guesswork.<sup>221</sup> Such complication may also suggest that the parties never intended the contract to be capable of being broken-up. However, problems relating to valuation are exaggerated and the fact it may rarely be impossible to value partial performance should not support a bar preventing restitution on a partial failure where valuation is possible.

### **B Undermining Contracts and Escaping Bad Bargains**

Cases of failure of basis often involve contracts, and considerations of the law of contract are used to support the total failure requirement.<sup>222</sup> For

<sup>215</sup> *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932; *Pavey* (1987) 162 CLR 221; *Way v Latilla* [1937] 3 All ER 759; *Competition and Consumer Act 2010* (Cth) s 40(2); Burrows, *The Law of Restitution*, above n 15, 331.

<sup>216</sup> Mason, Carter and Tolhurst, above n 8, 327 [918]; see *Maguire v Makaronis* (1997) 188 CLR 449; *Spence v Crawford* [1939] 3 All ER 271, 288–9 (Lord Wright).

<sup>217</sup> *Maguire v Makaronis* (1997) 188 CLR 449; *Spence v Crawford* [1939] 3 All ER 271, 288–9 (Lord Wright).

<sup>218</sup> *Foran v Wight* (1989) 168 CLR 385, 438 (Deane J); *Akron Securities Ltd v Illiffe* (1997) 41 NSWLR 353, 370 (Mason P), 371 (Priestly JA), quoting Gunter Treitel, *The Law of Contract* (Sweet & Maxwell/Stevens and Sons, 9<sup>th</sup> ed, 1995).

<sup>219</sup> Law Reform Committee of South Australia, *Relating to the Doctrine of Frustration in the Law of Contract*, Report No 71 (1983); Law Reform Commission of New South Wales, above n 7, [6.4]; The Law Reform Commission of British Columbia, *Report on the Need For Frustrated Contracts Legislation in British Columbia*, Project No 8 (1971); *Law Reform (Frustrated Contracts) Act 1943* (UK); *contra* Law Commission of England and Wales, *Pecuniary Restitution on Breach of Contract*, Report No 121 (1983); but see Andrew Burrows, 'Law Commission Report on Pecuniary Restitution on Breach of Contract' (1984) 47(1) *Modern Law Review* 76.

<sup>220</sup> Virgo, above n 18, 324–5.

<sup>221</sup> See *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); McKendrick, above n 104; *ibid*.

<sup>222</sup> McMeel, above n 137, 311.

instance, Kirby J dissenting in *Roxborough* noted the importance of preserving the parties' bargain as a reason for the total failure rule.<sup>223</sup>

It is desirable that restitutionary relief does not upset the contractual allocation of risk or allow a claimant to escape from a bad bargain. This is best understood as protecting the will of the parties, rather than making restitutionary relief subsidiary to the law of contract.<sup>224</sup>

Yet there are many ways to protect a contractual arrangement outside the total failure rule. The most obvious is by agreement. In *Whincup* the contract provided that 'the master undertakes to teach, and the apprentice undertakes to serve for a period of six years if they both shall live so long'.<sup>225</sup> After the master's death the apprentice's father could not recover, and two judges held that to allow an action for failure of basis would undermine the parties' intentions.<sup>226</sup> The judges implied that the payment was to be retained irrespective of the death of a party.<sup>227</sup>

If parties do agree to allow for retention regardless of performance, there can be no failure of basis. Such an agreement, express or implied, may be rare,<sup>228</sup> yet McHugh J in *Baltic* found that an agreement existed permitting Baltic to unconditionally retain the fare once performance began.<sup>229</sup>

Where the parties incorporate a clause relating to their rights and remedies, it would be wrong for a court to subvert this by awarding restitution.<sup>230</sup> However, it is not the case that the mere availability of damages will preclude restitution.<sup>231</sup> Nor will the absence of a contractual remedy deny recovery for unjust enrichment, because it is a free-standing concept.<sup>232</sup>

As well as stopping the subversion of a contract, courts are unwilling to allow an escape from a bad bargain. If a party can make out a claim for restitution on a failure of basis, they may subsequently be able to escape a bad bargain. This is because restitution allows a party to recover the sum they paid; if they have agreed to a price that is more than the performance is truly worth, they escape the obligation to pay the excess. They may

<sup>223</sup> *Roxborough* (2001) 208 CLR 516, 579 [173].

<sup>224</sup> Angus O'Brien, 'The Relationship between the Laws of Unjust Enrichment and Contract: Unpacking *Lumbers v Cook*' (2011) 32 *Adelaide Law Review* 83, 97–9; *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 654–5 [46] (Gleeson CJ), 674 [124]–[127] (Gummow, Hayne, Crennan and Kiefel JJ).

<sup>225</sup> *Whincup* (1871) LR 6 CP 78, 83 (Willes J), 84 (Montague Smith J), 86 (Brett J).

<sup>226</sup> *Ibid* 81 (Willes J), 84 (Montague Smith J), 86 (Brett J).

<sup>227</sup> *Ibid* 81.

<sup>228</sup> Mitchell, Mitchell and Watterson (eds), above n 15, 370 [12–19].

<sup>229</sup> *Baltic* (1993) 176 CLR 344, 388–9, 392.

<sup>230</sup> *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 655 [47]–[48] (Gleeson CJ), 663 [79] (Gummow, Hayne, Crennan and Kiefel JJ); *Pavey* (1987) 162 CLR 221, 238 (Brennan J), 256 (Deane J); *Chen v Cui* [2015] NSWSC 1480 (12 October 2015) [16]–[18] (Fagan J); see also McKendrick, above n 104, 223–4; O'Brien, above n 224, 90.

<sup>231</sup> See *Baltic* (1993) 176 CLR 344; *Rowland* [1923] 2 KB 500; *Warman v Southern Counties Car Finance Corp Ltd* [1949] 2 KB 576; cf *Taylor v Mobility Finance Ltd* [2004] EWHC 2619 (Comm Ct) (12 November 2004) [23] (Cooke J).

<sup>232</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; *Pavey* (1987) 162 CLR 221; *David Securities* (1992) 175 CLR 353.

also recover more than is available from contractual damages.<sup>233</sup> Two High Court judges have recently noted this as a leading reason why there is insistence that a failure of basis must be total.<sup>234</sup>

In its 1983 report, the Law Commission of England and Wales observed that restitution for a total failure of basis ‘does not have as its purpose the provision of an escape route from a bad bargain’ as the parties are only ‘incidentally entitled to escape from a bad bargain’.<sup>235</sup> As Burrows notes, restitution on a partial failure is based on the same purpose as that of a total failure; to stop the unjust enrichment of one party against another.<sup>236</sup>

The only reason that this is more of a problem for restitution on a partial failure is the possibility of more claims allowing a party to escape a bad bargain. Kirby J in *Roxborough* assumed the removal of the rule would mean ‘the brake on legal claims that has hitherto been imposed will be released’.<sup>237</sup>

Yet the law already has a way of limiting restitutionary claims in the context of contracts. There is a general but not absolute rule that requires a contract be ineffective before restitution is awarded.<sup>238</sup> As explained by Mason P in *Coshott v Lenin*, this rule is qualified insofar that it allows a court to order restitution on a valid contract where it would not ‘subvert or undermine the contractual allocation of risk’.<sup>239</sup> The operation of such a consideration can be seen in *Roxborough* where the plurality noted that ‘to permit recovery of the tax component would not result in confusion between enforcing a contract and claiming a right by reason of events which have occurred in relation to a contract’<sup>240</sup> because *inter alia*, it was

<sup>233</sup> See *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) NSWLR 234, affd *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 20 Legal Rep SL 1; Edelman and Bant, above n 2, 260–4; Beale (ed), above n 191, vol 1, 2068–9 [29-061].

<sup>234</sup> *Equiscorp* (2012) 246 CLR 498, 552 [136] (Heydon J); *Roxborough* (2001) 208 CLR 516, 557 [105] (Gummow J); see also Law Commission of England and Wales, above n 204, [3.9].

<sup>235</sup> Law Commission of England and Wales, above n 204, [3.9].

<sup>236</sup> Burrows, ‘Law Commission Report’, above n 219, 85–6.

<sup>237</sup> *Baltic* (1993) 176 CLR 344, 579 [173].

<sup>238</sup> *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 QB 459; *The Olanda* (1917) (1919) 2 KB 728; *Re Richmond Gate Property Co Ltd* [1965] 1 WLR 335; see also *Roxborough* (2001) 208 CLR 516, 579 [172]–[173] (McHugh J); *Alexiadis v Zirpiadis* (2013) 302 ALR 148, 152 [19] (Kourakis CJ); Beale (ed), above n 191, vol 1, 2068 [29-060]; Mitchell, Mitchell and Watterson (eds), above n 15, 375 [12-30]; Burrows, *The Law of Restitution*, above n 15, 328–31.

<sup>239</sup> [2007] NSWCA 153 (20 June 2007) [10]; see also *Anderson v Mcpherson [No 2]* [2012] WASC 19 (25 January 2012) [205], [239] (Edelman J); *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 655 [46] (Gleeson CJ), 663 [79] (Gummow, Hayne, Crennan and Kiefel JJ); Peter Birks ‘Failure of Consideration and its Place on the Map’ (2002) 2 *Oxford University Commonwealth Law Journal* 1; Jack Beatson, ‘The Temptation of Elegance: Concurrence of Restitutionary and Contractual Claims’ in W Swadling and G Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, 1999) 143, 151–3.

<sup>240</sup> *Roxborough* (2001) 208 CLR 516, 528 [21] (Gleeson CJ, Gaudron and Hayne JJ).

not part of the contractual negotiations and was a mandatory statutory scheme.<sup>241</sup>

This can be contrasted with the situation in *Re Richmond Gate Property Co Ltd* where a managing director was to be paid for work at a rate to be fixed by the board. The company went into liquidation after work had been completed but before this payment was made.<sup>242</sup> Restitution for the work would be unavailable because it was always possible that the board would fix no value to it.<sup>243</sup> Such a requirement ensures an appropriate and principled limit on claims for restitution and protects contracts.

The total failure rule is an inefficient way of limiting claims. That task is already performed far more discriminately by the general rule limiting recovery on a subsisting contract.<sup>244</sup> McKendrick also argues that the recognition of the change of position defence means the defences available in unjust enrichment will prevent an overabundance of restitutionary claims.<sup>245</sup> Courts can be tasked with the responsibility of ensuring that contracts are not subverted by restitutionary relief.<sup>246</sup> This is similar to the role played by judges in the overlap of tort and contract.<sup>247</sup>

It is also questionable whether holding someone to a bad bargain in this context is justifiable in any case. Since a contract cannot be subsisting, or restitution upon it needs to not upset the contractual risk, there seems no good reason to reward a party the amount that party would have gained over the performance price had the contract not come to an end. To use this to support the total failure rule protects someone who strikes a good bargain above protecting the basis of the bargain itself.

The absurdity of this can be seen by the fact that in many jurisdictions where a contract has been frustrated — i.e. no party is at fault — a claimant will be allowed to escape from a bad bargain on a partial failure,<sup>248</sup> but otherwise the total failure rule would not allow a claimant to recover even when the other party is at fault. Thus, due to the total failure rule, a party who benefits from a bad bargain is in a better restitutionary position when they breach a contract compared to when it is frustrated. Although unjust enrichment is not fault based, such a result seems anomalous.

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<sup>241</sup> Ibid; O'Brien, above n 224, 93–5.

<sup>242</sup> [1965] 1 WLR 335.

<sup>243</sup> *Barnes v Eastenders Cash & Carry plc* [2015] AC 1, 44 [115] (Lord Toulson, with whom Baroness Hale DP, Lord Kerr, Lord Wilson and Lord Hughes agreed).

<sup>244</sup> Burrows, *The Law of Restitution*, above n 15, 330–1; Virgo, above n 18, 324–5.

<sup>245</sup> McKendrick, above n 105, 220–5.

<sup>246</sup> Virgo, above n 18, 324.

<sup>247</sup> See *Brookfield Multiplex v Owners Corporation Strata Plan 61288* (2014) 313 ALR 408; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

<sup>248</sup> *Fair Trading Act 1999* (Vic) s 32ZG; *Frustrated Contracts Act 1988* (SA) s 12; *Frustrated Contracts Act 1978* (NSW) s 12; *Law Reform (Frustrated Contracts) Act 1943* (UK).

### C *Open Contracts*

One historical reason for the rule was that where there was an unperformed contract with the possibility of damages for breach the contract was seen as open.<sup>249</sup> No liability could lie outside of the contract until performance was rendered or compensation paid.<sup>250</sup> Thus the plaintiff would only be entitled to relief if the contract was rescinded *ab initio*.<sup>251</sup>

*Fibrosa* overturned the requirement from *Chandler*<sup>252</sup> that a contract must be rescinded *ab initio*.<sup>253</sup> Furthermore, the decision of *Roxborough* allowed for restitution on a failure of basis, notwithstanding the contract had been fully performed.<sup>254</sup> Discharged contracts can also support a claim for failure of basis.<sup>255</sup> This reason no longer has any force.

### D *Discharged Contracts and Counter-Restitution*

Another historical reason for the requirement of a total failure was the fact that the common law did not hold a discharged contract returned the property rights to the original owner.<sup>256</sup> However since rescission now requires substantial counter-restitution this concern no longer lies.<sup>257</sup> It also relies on the relic of insistence of rescission *ab initio*.

However, the idea that a party may be left with no recompense for partial performance of a basis does still linger. This is exemplified by the words of Heenan J in *Nea* that

the inapplicability of relief for total failure of consideration in these circumstances is also justified by the fact that to treat this as a total failure of consideration case, would leave the plaintiff with no form of recompense for the work and labour done ... because restoration of the value of that work would not occur.<sup>258</sup>

Heenan J did not explicitly explain why this was the case.<sup>259</sup> It is worth noting that his Honour seemed to have limited difficulty valuing some of the work that was completed.<sup>260</sup> Therefore it is respectfully suggested that following *David Securities*, parties could be provided with counter-restitution in such cases.<sup>261</sup>

Irrespective, the lack of compensation would be a failing of the law which is not restricted to cases of partial failure. In many cases where a

<sup>249</sup> See *Gompertz v Denton* (1832) 149 ER 376, 377.

<sup>250</sup> Mason, Carter and Tolhurst, above n 8, 327 [918].

<sup>251</sup> *Ibid.*

<sup>252</sup> (1904) 1 KB 493.

<sup>253</sup> *Fibrosa* [1943] AC 32; see also *Baltic* (1993) 176 CLR 344, 355–6 (Mason CJ).

<sup>254</sup> *Roxborough* (2001) 208 CLR 516.

<sup>255</sup> *Pavey* (1987) 162 CLR 221; *David Securities* (1992) 175 CLR 353.

<sup>256</sup> *Street v Blay* (1831) 2 B & AD 456.

<sup>257</sup> *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102.

<sup>258</sup> *Nea* [2005] WASC 106 (1 June 2005) [129].

<sup>259</sup> *Ibid* [127] (EM Heenan J).

<sup>260</sup> *Ibid* [117]–[120] (EM Heenan J).

<sup>261</sup> *David Securities* (1992) 175 CLR 353.

total failure has been found despite incidental counter-performance — such as *Rover* and *Rowland* — the party who has proffered that benefit goes uncompensated.<sup>262</sup> It seems odd that while restitution for a failure of basis will be ordered in such cases, there is no restitution for the incidental benefit provided even if that incidental benefit is of substantial value.<sup>263</sup> A requirement of counter-restitution eliminates the possible injustice of ordering restitution on a partial failure.

### 1 Counter-Restitution as a Requirement

It is submitted that, as in New Zealand,<sup>264</sup> counter-restitution is a precondition of restitutionary relief in Australia, at least in respect of incidental benefits. In Australia the equitable standard of substantial counter-restitution applies,<sup>265</sup> so even where valuation is imprecise, a claim may succeed.<sup>266</sup> It does not need to be counter-restitution *in specie* (the precise benefit) but simply substantial counter-restitution of the value of the benefit.<sup>267</sup>

Substantial counter-restitution of received benefits in the restitutionary context has been considered and ordered in numerous decisions of superior courts,<sup>268</sup> and it was considered but not required in the High Court by Brennan J in *David Securities*, and by Mason CJ in *Baltic*.<sup>269</sup> This draws upon a long history of substantial *restitutio in integrum* being ordered as the price of rescission or discharge.<sup>270</sup>

In arguing against the requirement of a total failure, Birks saw ‘total’ as a reference to a general requirement of counter-restitution of any

<sup>262</sup> *Rover* [1989] 1 WLR 912; *Rowland* [1923] 2 KB 500.

<sup>263</sup> *Rover* [1989] 1 WLR 912; *Butterworths v Kingsway Motors Ltd* [1954] 1 WLR 1286; *Warman v Southern Counties Car Finance Corp Ltd* [1949] 2 KB 576; *Fibrosa* [1943] AC 32; see also Davis, above n 198, 925–6 [7.9.2810].

<sup>264</sup> *Equiticorp Industries Group Ltd (in stat man) v The Crown (No 47)* [1998] 2 NZLR 481, 641–58 (Smellie J).

<sup>265</sup> *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102; see, eg, *Supreme Court Act 1935* (WA) ss 23–5.

<sup>266</sup> *Erlanger v New Sombbrero Phosphate Co* (1878) 3 App Cas 1218, 1278 (Lord Blackburn); *O’Sullivan v Management Agency & Music Ltd* [1985] QB 428; *Alati v Kruger* (1955) 94 CLR 216; *Maguire v Makaronis* (1997) 188 CLR 449.

<sup>267</sup> *Alati v Kruger* (1955) 94 CLR 216; *Equiticorp Industries Group Ltd (in stat man) v The Crown (No 47)* [1998] 2 NZLR 481, 641–58 (Smellie J).

<sup>268</sup> *Heckenberg v Delaforce* [2000] NSWCA 137 (8 June 2000) [34] (Mason P), [87] (Beazley JA); *Anderson v Mcpherson [No 2]* [2012] WASC 19 (25 January 2012) [209]–[210] (Edelman J); *Sydney Water Corporation Ltd v Industrial Relations Commission of NSW* (2004) 61 NSWLR 661, 671 [39] (Mason P), 677 [79] (McColl JA); *Fensford Pty Ltd v Nour Pty Ltd* [2006] VSCA 118 (1 June 2006) [40] (Nettle JA), [1] (Chernov JA), [76] (Ashley JA); *Ovidio Carrideo Nominees Pty Ltd v Dog Depot Pty Ltd* [2006] VSCA 6 (8 February 2006) [20] (Chernov JA) [47]–[48] (Nettle JA); *Baltic Shipping Company v Dillon ‘Mikhail Lermontov’* (1991) 22 NSWLR 1, 26 (Kirby P), rev *Baltic* (1993) 176 CLR 344; *National Mutual Life Association of Australasia Ltd v Walsh* (1987) 8 NSWLR 585, 596 (Clarke J); cf *Shipp v Cameron* [1999] NSWSC 997 (9 July 1998) [619]–[623] (Einstein J).

<sup>269</sup> *David Securities* (1992) 175 CLR 353, 388, 400 (Brennan J); *Baltic* (1993) 176 CLR 344, 348–9 (Mason CJ).

<sup>270</sup> *Maguire v Makaronis* (1997) 188 CLR 449; *Alati v Kruger* (1955) 94 CLR 216; *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102.

benefits received.<sup>271</sup> Notably, a leading Australian text on restitution has removed a previous statement that ‘there is no general rule requiring counter-restitution as the price of restitution’.<sup>272</sup>

Edelman and Bant take the same approach as Birks and appropriate the comments of the majority in *David Securities* for this purpose.<sup>273</sup> However, the words of the majority relied upon are that ‘in cases where consideration can be apportioned or where counter-restitution is relatively simple, insistence on total failure of consideration can be misleading or confusing’.<sup>274</sup>

With respect, those words are unlikely to have the meaning the learned authors suggest. This is especially so considering the preceding paragraphs approve of the English cases of *Rover* and *Rowland* where restitution was allowed notwithstanding counter-restitution was not ordered of substantial incidental benefits received.<sup>275</sup> Stadlen J in *Giedo* noted in England after those cases, the receipt of an incidental benefit will not prevent recovery on a total failure of basis.<sup>276</sup>

Although those words in *David Securities* may not mean what those authors suggest, this does not suggest that the rule as explained by Edelman and Bant is wrong, as it is supported by other Australian case law.<sup>277</sup> However, this likely suggests a divergence with English law.

Although a requirement, it would be erroneous to hold that receipt of benefits incidental to the basis means there is not a total failure of basis.<sup>278</sup> Because of this, in Australia the requirement of counter-restitution is better understood as a condition of relief,<sup>279</sup> the fourth consideration for restitution of an unjust enrichment - where the prima facie obligation to make restitution is displaced where it would be unjust.<sup>280</sup>

Inability to make substantial counter-restitution will be rare and likely limited to when a party is impecunious.<sup>281</sup> This is because the court must only come to a close valuation of the benefit and, as discussed, courts are

<sup>271</sup> Birks, ‘Failure of Consideration’, above n 137.

<sup>272</sup> Mason, Carter and Tolhurst, above n 8, 328 [918]; cf Mason and Carter, above n 24, 290 [918].

<sup>273</sup> Edelman and Bant, above n 2, 258–60; *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>274</sup> *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); Edelman and Bant, above n 2, 258–60.

<sup>275</sup> *David Securities* (1992) 175 CLR 353, 382–3 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Rover* [1989] 1 WLR 912; *Rowland* [1923] 2 KB 500.

<sup>276</sup> *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [236], [281], [339].

<sup>277</sup> See *Heckenberg v Delaforce* [2000] NSWCA 137 (8 June 2000) [34] (Mason P), [87] (Beazley JA); *Anderson v Mcpherson [No 2]* [2012] WASC 19 (25 January 2012) [209]–[210] (Edelman J); *Sydney Water Corporation Ltd v Industrial Relations Commission of NSW* (2004) 61 NSWLR 661, 671 [39] (Mason P), 677 [79] (McColl JA); *David Securities* (1992) 175 CLR 353, 388, 400 (Brennan J); *Baltic* (1993) 176 CLR 344, 348–9 (Mason CJ).

<sup>278</sup> *Giedo* [2010] EWHC 2373 (QB) (24 September 2010); see *Rover* [1989] 1 WLR 912; see also *Rowland* [1923] 2 KB 500; *David Securities* (1992) 175 CLR 353.

<sup>279</sup> Barker and Grantham, above n 18, 489 [15.26].

<sup>280</sup> *Equuscop* (2012) 246 CLR 498, 516 [30] (French CJ, Crennan and Kiefel JJ).

<sup>281</sup> Burrows, *The Law of Restitution*, above n 15, 250.

able to value complicated benefits. It is also possible an incidental benefit will have no value attached and no adjustment will need to be made.<sup>282</sup> In all other circumstances there will be a requirement of adjustment before restitution is made.<sup>283</sup>

This is in accordance with first principles, discussed by Lord Wright in *Spence v Crawford* generally:

If a plaintiff...seeks to have the contract annulled and his money or property restored to him, it would be inequitable if he did not also restore what he had got under the contract from the defendant. The defendant...must not be robbed, nor must the plaintiff be unjustly enriched, as he would be if he both got back what he had parted with and kept what he had received in return.<sup>284</sup>

To not order counter-restitution is to recognise unjust enrichment on a failure of basis for the plaintiff while at the same time ignoring that they have been unjustly enriched at the expense of the defendant.<sup>285</sup> A party should not be 'left with the fruits of the transaction of which they complain'.<sup>286</sup>

This requirement can be removed by legislation.<sup>287</sup> In lieu of that, it should be recognised that there is a general rule that when restitution is granted each side must give back what it receives. This ensures fair results, and allows for recovery of benefits provided under a partial failure.

### **E *The Total Failure Rule***

It is submitted that the total failure rule is therefore too blunt an instrument to undertake the work it has been set. The requirement that a restitutionary claim should not undermine the contractual allocation of risk and the ability of a court to apportion or order counter-restitution are better ways of dealing with the concerns that are used to justify the total failure rule.

Further, its removal would help make the law around a failure of basis more uniform and in line with the award of restitution for other unjust factors, as well as the requirement of counter-restitution for rescission

<sup>282</sup> See *Luo v Zhai* [2015] FCA 350 (17 April 2015) [47] (Perram J).

<sup>283</sup> Mason, Carter and Tolhurst, above n 8, 845 [2325]; Mitchell, Mitchell and Watterson (eds), above n 15, 729 [31-02].

<sup>284</sup> [1939] 3 All ER 271, 288–9; *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1994) 62 SASR 150, 156–7, affd *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102.

<sup>285</sup> See *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, 370 (Mason P), 371 (Priestly JA); *Spence v Crawford* [1939] 3 All ER 271, 288–9 (Lord Wright); *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1994) 62 SASR 150, 156–7, affd *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102; see Burrows, *The Law of Restitution*, above n 15, 250.

<sup>286</sup> *Maguire v Makaronis* (1997) 188 CLR 449, 475 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

<sup>287</sup> *Cook's Construction Pty Ltd v SFS Pty Ltd* (2009) 254 ALR 661, 681–2 [72]–[76] (Keane JA), 697–8 [143]–[146] (Fraser JA), 700 [160] (Daubney J).

which is part of the legal concept of unjust enrichment. The justifications used to support the total failure requirement can and should be overcome.

## VI Partial Failure of Basis

The concerns underpinning the total failure rule are dealt with by other means. The rule requiring a total failure of basis can lead to arbitrary results and can act as a block to the more principled development around the vitiating factor of a failure of basis. This is why commentators and judges alike have called for the rule's demise.<sup>288</sup> This part will show that courts do have the power to remove the total failure requirement as well as analysing the benefits of allowing for restitution on a partial failure. It will also conceptualise when recovery should be available.

### A *Can Common Law Reform Occur?*

Deane and Dawson JJ in *Baltic* said 'artificial constraints imposed by the old forms of action can, unless they reflect coherent principle, be disregarded where they impede the principled enunciation and development of the law'.<sup>289</sup> It has been shown that the reasons behind the total failure rule do not reflect coherent principle. In line with those words, it should be disregarded.

Although it was suggested in *Fibrosa* that any change to the total failure rule needed to be undertaken by parliament,<sup>290</sup> the widely held and better view is that it is open to the courts to enact such a change.<sup>291</sup> This is evidenced by the multiplicity of judgments in Australia and throughout the common law world which have already abrogated the total failure rule, or show the appetite and willingness for change.<sup>292</sup> Decisions of the High Court and the United Kingdom Supreme Court suggest whether the total failure rule still operates is a question that they could answer in an

<sup>288</sup> *NSW v Commonwealth Bank of Australia* (2001) 217 ALR 691, 713 [151] (Young CJ in Eq); *Heckenberg v Delaforce* [2000] NSWCA 137 (8 June 2000) [41] (Mason P), [87] (Beazley JA); *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [367] (Stadlen J); Burrows, *The Law of Restitution*, above n 15, 322–6; Paul Mitchell, above n 15; Charles Mitchell, above n 15, 1059, 1060; Peel (ed), above n 172, 1132–3 [22-004].

<sup>289</sup> *Baltic* (1993) 176 CLR 344, 376.

<sup>290</sup> *Fibrosa* [1943] AC 32.

<sup>291</sup> Mitchell, Mitchell and Watterson (eds), above n 15, 376 [12-31]; Birks, *An Introduction to the Law of Restitution*, above n 59, 243–4; Virgo, above n 18, 326; contra Beatson, *The Use and Abuse of Unjust Enrichment*, above n 191, 74–5.

<sup>292</sup> *New South Wales v Commonwealth Bank of Australia* (2001) 217 ALR 691, 713 [151] (Young CJ in Eq); *Equuscorp* (2012) 246 CLR 498, 552 [136] (Heydon J); *Roxborough* (2001) 208 CLR 516, 557–8 [106] (Gummow J); *Heckenberg v Delaforce* [2000] NSWCA 137 (8 June 2000) [41] (Mason P), [87] (Beazley JA); *Giedo* [2010] EWHC 2373 (QB) (24 September 2010) [367] (Stadlen J); *Goss* [1996] AC 788, 798 (Lord Goff on behalf of Lord Jauncey of Tullichettle, Lord Steyn, Lord Hoffmann and Lord Cooke of Thorndon); *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 682 (Lord Goff); *Ferguson* (1992) 62 BLR 95; *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] 2 All ER (Com) 823, 845 (Nicholas Strauss QC).

appropriate case.<sup>293</sup> As Heydon J in *Equuscorp* noted, the common law has already ‘much qualified’ the total failure rule.<sup>294</sup>

Indeed, the total failure rule in Australia has been consistently subject to abrogation. Initially it was limited by the apportionment exception,<sup>295</sup> before incidental<sup>296</sup> and de minimis benefits<sup>297</sup> were disregarded. There are also cases which contemplate apportionment on a partial failure<sup>298</sup> or recovery on a partial failure where counter-restitution is relatively simple.<sup>299</sup> Recovery on a partial failure may also be available if no satisfactory remedy exists.<sup>300</sup> It is submitted that piecemeal change should be replaced by an excise of the total failure rule.

Although distinguishing the action for a ‘failure of consideration’ from the concept of ‘total failure of consideration’ the plurality in *Equuscorp* did not consider the status of the total failure rule in detail.<sup>301</sup> However, Keith Mason has suggested that there are strong hints in *Equuscorp* that failure of consideration need not be total.<sup>302</sup> Not only *can* the High Court answer whether recovery should be available on a partial failure, they *should*. In light of several judgments of judges of that Court,<sup>303</sup> as well as other common law decisions which either appear to allow for recovery on a partial failure, or suggest that such a claim could be supported,<sup>304</sup> there is confusion surrounding the total failure rule.<sup>305</sup> Some lower court judges

<sup>293</sup> *Equuscorp* (2012) 246 CLR 498, 518 [33] (French CJ, Crennan and Kiefel JJ); *Barnes v Eastenders Cash & Carry plc* [2015] AC 1, 43 [114] (Lord Toulson, with whom Baroness Hale DP, Lord Kerr, Lord Wilson and Lord Hughes agreed).

<sup>294</sup> *Equuscorp* (2012) 246 CLR 498, 552 [136]; quoting Peel (ed), above n 172, 1132–4 [22-004].

<sup>295</sup> *Roxborough* (2001) 208 CLR 516; *Whincup* (1871) LR 6 CP 78. (1871) LR 6 CP 78, 81 (Bovill CJ).

<sup>296</sup> *David Securities* (1992) 175 CLR 353; *Giedo* [2010] EWHC 2373 (QB) (24 September 2010); *Rover* [1989] 1 WLR 912; *Rowland* [1923] 2 KB 500.

<sup>297</sup> *Baltic* (1993) 176 CLR 344, 350 (Mason CJ); *In the matter of Hair Industrie Penrith Pty Ltd, Hair Industrie Merrylands Pty Ltd* [2015] NSWSC 1578 (27 October 2015) [50] (Black J); *Luo v Zhai* [2015] FCA 350 (17 April 2015) [36] (Perram J); Mason, Carter and Tolhurst, above n 8, 333 [926].

<sup>298</sup> *Ferguson* (1992) 62 BLR 95; *Goss* [1996] AC 788, 798 (Lord Goff on behalf of Lord Jauncey of Tullichettle, Lord Steyn, Lord Hoffmann and Lord Cooke of Thorndon); *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>299</sup> *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>300</sup> *Roxborough* (2001) 208 CLR 516, 557–8 [106] (Gummow J); *Equuscorp* (2012) 246 CLR 498, 552 [136] (Heydon J).

<sup>301</sup> *Equuscorp* (2012) 246 CLR 498, 518 [33] (French CJ, Crennan and Kiefel JJ); similarly, in the United Kingdom Supreme Court Lord Toulson noted the ‘lively academic debate’ about the total failure rule, before deciding he need not decide on whether the total failure rule is still a part of the modern law; *Barnes v Eastenders Cash & Carry plc* [2015] AC 1, 42 [114] (Lord Toulson, with whom Baroness Hale DP, Lord Kerr, Lord Wilson and Lord Hughes agreed).

<sup>302</sup> Mason, above n 98.

<sup>303</sup> *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Equuscorp* (2012) 246 CLR 498, 518 [33] (French CJ, Crennan and Kiefel JJ), 552 [136] (Heydon J); *Roxborough* (2001) 208 CLR 516, 558 [105] (Gummow J); *Amann* (1991) 174 CLR 64, 117 (Deane J).

<sup>304</sup> *Ferguson* (1992) 62 BLR 95, 106; *Goss* [1996] AC 788; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 682 (Lord Goff).

<sup>305</sup> See *Luo v Zhai* [2015] FCA 350 (17 April 2015) [36] (Perram J).

have even suggested that there is already no requirement of total failure.<sup>306</sup>

## B Uniformity in Unjust Enrichment

### 1 Equitable Notions of Good Conscience

The High Court in *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* reiterated that restitutionary recovery is based upon equitable notions of good conscience.<sup>307</sup> Although restitution is not premised on judicial discretion, equitable principles can inform its application.<sup>308</sup> The continued influence of equitable principles within unjust enrichment means regard should be had to ‘matters of substance over technical form’.<sup>309</sup> Where only partial counter-performance of the basis has been provided, the plaintiff’s intention that the defendant has a benefit will be vitiated.<sup>310</sup> The defendant’s retention is the same type of injustice as for a total failure.<sup>311</sup> Substance demands recognition of the vitiation in both cases.

This is particularly important in Australia where restitutionary relief turns on ‘*who* should properly bear the loss and *why*’.<sup>312</sup> If the claimant bears the loss of a partially unfulfilled basis or condition, this would protect the defendant’s right to a benefit in circumstances where they were never intended to benefit. The equitable ‘conscience spoken of here is a construct of values and standards against which the conduct of ‘suits’— not only defendants — is to be judged’.<sup>313</sup> As such considerations underlie restitutionary relief for an unjust enrichment, it is submitted that it offends conscience that a party is able to retain a benefit in those circumstances.

<sup>306</sup> *Clarke v Great Southern Finance Pty Ltd* [2014] VSC 516 (11 December 2014) [4166] (Croft J); *Wasada Pty Ltd v State Rail Authority of New South Wales [No 2]* [2003] NSWSC 987 (15 December 2003) [20] (Campbell J); see also *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] 2 All ER (Com) 823, 845 (Nicholas Strauss QC); see also Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012) 88–9.

<sup>307</sup> (2014) 253 CLR 560, 568 [1], 573 [12] (French CJ), 593–5 [68]–[74] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 618 [138] (Gageler J); See also *Equuscorp* (2012) 246 CLR 498, 516, 517 [32] (French CJ, Crennan and Kiefel JJ); *Roxborough* (2001) 208 CLR 516, 556–7 [103]–[104] (Gummow J); *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ); *Moses v Macferlan* (1760) 2 Burr 1005.

<sup>308</sup> *Baltic* (1993) 176 CLR 344, 376 (Deane and Dawson JJ); *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560; *Equuscorp* (2012) 246 CLR 498.

<sup>309</sup> *Baltic* (1993) 176 CLR 344, 376 (Deane and Dawson JJ).

<sup>310</sup> *Virgo*, above n 18, 324; Charles Mitchell, above n 15, 1060.

<sup>311</sup> Burrows, *The Law of Restitution*, above n 15, 331.

<sup>312</sup> *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 596–7 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>313</sup> *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 400 [16] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ); quoted in *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 596 [76] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

Counter-restitution is required of benefits in a restitutionary context, and is based on the same principles as the requirement of counter-restitution in the context of rescission. As Heydon, Leeming and Turner note ‘equity does not demand a total failure of consideration’ in the context of counter-restitution.<sup>314</sup> The link between equity and unjust enrichment noted in *ASFL* suggest the same standards should apply.<sup>315</sup> Indeed, recovery on a partial failure for unjust enrichment was contemplated by Deane J in *Amann*:

Even...where the consideration has not failed completely, it would seem that that doctrine will found a direct action for the excess of money paid by the innocent party to the other party over the value of any consideration actually received if the circumstances are such that it would be unconscionable conduct on the part of the guilty party to retain the excess.<sup>316</sup>

Unconscionability in this context refers to the requirement of a vitiating factor,<sup>317</sup> exemplifying that ‘contemporary legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience’.<sup>318</sup> Just as there is no total failure requirement for counter-restitution, substance and uniformity suggest that there should be no total failure requirement for a failure of basis.

## 2 Recovery at General Law

The inability of a court to provide for restitution on a partial failure of basis has contributed to a fragmentation of the law. There is a strand of case law clearly representing unjust enrichment for a failure of basis, but the right to recovery is treated as distinct.<sup>319</sup> These are cases where payments have been made before a contract is terminated. It is exemplified in the case of *Dies* where a buyer paid for a tranche of arms and ammunition but refused delivery.<sup>320</sup> The buyer received nothing for his money, and Virgo points out that this is an ‘archetypal case of total failure of consideration’.<sup>321</sup>

<sup>314</sup> Heydon, Leeming and Turner, above n 27, 596 [18-130]; see also *Real Estate Securities Ltd v Kew Gold Links Estate Pty Ltd* [1935] VLR 114.

<sup>315</sup> *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560.

<sup>316</sup> *Amann* (1991) 174 CLR 64, 117.

<sup>317</sup> *Equuscorp* (2012) 246 CLR 498, 518 [32] (French CJ, Crennan and Kiefel JJ); quoting *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156 [150] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

<sup>318</sup> *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

<sup>319</sup> *Dies* [1939] KB 724; *Intertransport International Private Ltd v Donaldson* [2005] VSCA 303 (15 December 2005) [29] (Chernov JA), [45] (Eames JA); *Moffet Farms v Pauls Services* (1991) 7 SR (WA) 351 (‘Moffet’); *Vandyke v Vandyke* (1976) 12 ALR 621, 637; *Turner v Californian Cars & Sports Trucks Pty Ltd* [2002] NSWSC 666 (2 August 2002) [22] (Davidson AJ); *Mulkearns v Chandos Developments Pty Ltd* [2003] NSWSC 1132 (3 December 2003) [51]–[54] (Young CJ in Eq).

<sup>320</sup> *Dies* [1939] KB 724.

<sup>321</sup> Virgo, above n 18, 335.

However, Sable J in *Dies* expressly stated that ‘the real foundation of the right ... is not a total failure of consideration ... but the right of the purchaser derived from the terms of the contract and the principle of law applicable to recover back his money’.<sup>322</sup> This approach is explicable by the fact that Sable J was bound by *Chandler* which held restitution could not occur unless a contract was void *ab initio*,<sup>323</sup> so an action for failure of basis was impossible.<sup>324</sup>

In *Baltic* McHugh J said that the buyer’s right to recover outside of any damages claim should have been based on a failure of basis, as have Birks, Lord Goff, Jones, Mason, Carter and Tolhurst.<sup>325</sup> Cases have also used it as an example of a failure of basis.<sup>326</sup> However, Mason CJ and Gaudron J in *Baltic* adopted the reasoning of Beatson that the right to recover rests upon a construction of the contract.<sup>327</sup> Thus there is an alternative rule occasionally invoked for recovery outside of a failure of basis. This allows for recovery of a payment due to the terms of the contract, though there is no express term allowing for recovery.<sup>328</sup>

In Australia, *Moffët* involved delivery of a cultivator which was cancelled by the purchaser after they had made partial payment.<sup>329</sup> Hammond DCJ decided in accordance with Beatson’s interpretation of *Dies*.<sup>330</sup> Similarly, in *McDonald* the payee was able to recover instalment payments that were made when the contract for the sale of land was discharged for a repudiatory breach before performance was rendered.<sup>331</sup> It has sometimes been suggested that, akin to *Moffët*, the right of

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<sup>322</sup> *Dies* [1939] KB 724, 744.

<sup>323</sup> *Chandler* (1904) 1 KB 493.

<sup>324</sup> See *Cadogan Petroleum Holdings Ltd v Global Process Systems* [2013] CLC 721, 733–4 [23] (Eder J); Burrows, *The Law of Restitution*, above n 15, 3354–5; Mitchell, Mitchell and Watterson (eds), above n 15, 58–9 [3-36]–[3-39]; Birks, *An Introduction to the Law of Restitution*, above n 203, 236–7; Virgo, above n 18, 335.

<sup>325</sup> *Baltic* (1993) 176 CLR 344, 390; Birks, *An Introduction to the Law of Restitution*, above n 203, 236–7; Mitchell, Mitchell and Watterson (eds), above n 15, 58–9 [3-36]–[3-39]; Virgo, above n 18, 335; Mason, Carter and Tolhurst, above n 8, 424 [1125]; Contra John Tarrant, ‘Total Failure of Consideration’ (2006) 33 *University of Western Australia Law Review* 132, 144.

<sup>326</sup> *Rover* [1989] 1 WLR 912; *PCE Investors Ltd v Cancer Research UK* [2012] EWHC 884 (Ch); *Dr Bronte Douglass v Lawton Pty Ltd* [2007] NSWCA 89 (18 April 2007); *Cadogan Petroleum Holdings Ltd v Global Process Systems* [2013] CLC 721; *Omar v El-Wakil* [2001] EWCA Civ 1090 (11 July 2001); *Quirkco Investments Ltd v Aspray Transport Ltd* [2011] EWHC 3060 (Ch) (23 November 2011).

<sup>327</sup> *Baltic* (1993) 176 CLR 344, 352–3 (Mason CJ), 386 (Gaudron J); Beatson, *The Use and Abuse of Unjust Enrichment*, above n 191.

<sup>328</sup> *Turner v Californian Cars & Sports Trucks Pty Ltd* [2002] NSWSC 666 (2 August 2002); *Moffët* (1991) 7 SR (WA) 351; *Dies* [1939] KB 724.

<sup>329</sup> (1991) 7 SR (WA) 351.

<sup>330</sup> *Ibid* 355–6; *Dies* [1939] KB 724; Beatson, *The Use and Abuse of Unjust Enrichment*, above n 191.

<sup>331</sup> *McDonald* (1933) 48 CLR 457.

recovery was contractual.<sup>332</sup> However, the widely held position that these cases exemplify recovery on a failure of basis is the better view.<sup>333</sup>

Beatson appreciates the ‘intellectual attraction’ in the approach based on failure of basis but prefers the approach based on construction largely because a claim based on a failure of basis ‘requires consideration to have totally failed’<sup>334</sup> and ‘the artificiality of the concept of total failure of consideration... suggest that in its current state of development it cannot provide a satisfactory general solution’.<sup>335</sup> He also lamented the fact that where there has been substantial performance outside of the basis the performing party will have no recompense under a failure of basis.<sup>336</sup> Thus, for Beatson, the parallel right to recover combats the injustice of the total failure rule.

Yet each of these situations could be remedied. Performance that is not the basis must be compensated by counter-restitution. Further, allowing for restitution on a partial failure will allow a party to recover when they have received some counter-performance of the basis. This would allow these two rights of recovery to be brought together as the current major difference is that the approach based on construction allows recovery on a partial failure.<sup>337</sup> The unification could be achieved without detriment; where both have pleaded that a person is able to recover their money on either.<sup>338</sup>

The rule in *Dies* is sometimes thought to have come from equity.<sup>339</sup> Yet Beatson thought that gave too much scope for judicial discretion.<sup>340</sup> An approach based on failure of basis gives a principled foundation for recovery which better incorporates equitable considerations. It also avoids the problem that the contractual construction approach skirts dangerously close to reviving the rejected fallacy of the implied contract theory of restitution.<sup>341</sup> Therefore it should be recognised that the right to recover in

<sup>332</sup> Ibid; See *Stoczni* [1998] 1 WLR 574, 589 (Lord Goff); Beatson, *The Use and Abuse of Unjust Enrichment*, above n 191; *Mulkearns v Chandos Developments Pty Ltd* [2003] NSWSC 1132 (3 December 2003).

<sup>333</sup> *Geeveekay Pty Ltd v Director of Consumer Affairs Victoria* (2008) 19 VR 512, 530–1 [79]–[81] (Bell J); J W Carter and G J Tolhurst, ‘Conditional Payments and Failure of Consideration: Contract or Restitution?’ (2001) 9 *Asia Pacific Law Review* 1; J W Carter, *Carter’s Guide to Australian Contract Law* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2011) 485 [30–12]; N C Seddon, R A Bigwood and M P Ellinghaus, *Cheshire & Fifoot: Law of Contract* (LexisNexis Butterworths, 10<sup>th</sup> ed, 2012) 1239 [26.4]; J W Carter, Elisabeth Peden and G J Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2007) 892 [37–35], 894 [37–38]; Mitchell, Mitchell and Watterson (eds), above n 15, 363 [12–01].

<sup>334</sup> Ibid 71; See *Dr Bronte Douglass v Lawton Pty Ltd* [2007] NSWCA 89 (18 April 2007).

<sup>335</sup> Beatson, *The Use and Abuse of Unjust Enrichment*, above n 191, 71.

<sup>336</sup> Ibid 74–7; *Rover* [1989] 1 WLR 912.

<sup>337</sup> Beatson, *The Use and Abuse of Unjust Enrichment*, above n 191, 74–7.

<sup>338</sup> *Turner v Californian Cars & Sports Trucks Pty Ltd* [2002] NSWSC 666 (2 August 2002) [22] (Davidson AJ); *Mulkearns v Chandos Developments Pty Ltd* [2003] NSWSC 1132 (3 December 2003) [51]–[54] (Young CJ in Eq).

<sup>339</sup> *Geeveekay Pty Ltd v Director of Consumer Affairs Victoria* (2008) 19 VR 512, 530–1 [79]–[81] (Bell J); *Mulkearns v Chandos Developments Pty Ltd* [2003] NSWSC 1132 (3 December 2003) [51]–[54] (Young CJ in Eq).

<sup>340</sup> Beatson, *The Use and Abuse of Unjust Enrichment*, above n 191, 50–1.

<sup>341</sup> Carter and Tolhurst, above n 333, 10.

cases like *Dies* and *Moffet* is truly a right to restitution on a failure of basis. Allowing recovery on a partial failure of basis would allow this to happen.

Failure of basis can also explain the associated rule as to why a party will be unable to reclaim a deposit made in similar transactions.<sup>342</sup> The law to determine whether a payment is a deposit asks questions similar to those asked when determining the basis of a transaction.<sup>343</sup> Further, the basis of a deposit will almost always be as an earnest or security for a contract,<sup>344</sup> which will not fail where the contract is formed and subsequently fails. It is a payment to secure formation of a contract, not its performance.<sup>345</sup>

### 3 *Quantum Meruit*

An analysis of the case law surrounding *quantum meruit* also evidences why the coherency of the law requires recognition of restitution for a partial failure. It has been acknowledged by the High Court that *quantum meruit* is based on a claim for restitution and hence can be based on unjust enrichment,<sup>346</sup> and therefore a failure of basis.<sup>347</sup> Such an interpretation has been applied to the High Court's reasoning in *Pavey*, where building work was carried out on an unenforceable oral agreement.<sup>348</sup> In such a case the basis for doing the work is understood as payment of a reasonable sum, this will fail if payment is an unreasonably low amount or nothing.<sup>349</sup>

In the same sense that a part payment of a capital sum can constitute partial performance of a basis,<sup>350</sup> *quantum meruit* claims have been suggested as evidencing restitution on a partial failure of basis.<sup>351</sup> Yet it is difficult to understand how a payment can be partially reasonable, enlivening a partial failure. The better view is that a requirement of reasonableness is only capable of entire performance.<sup>352</sup> In this regard it is crucial to remember that counter-performance does not always equal partial performance of the basis.

<sup>342</sup> *Gibbon v Lutton* [2002] QB 902, 920–1 [59]–[62] (Robert Walker LJ); *Howe v Smith* (1884) 27 Ch D 87.

<sup>343</sup> *Stephens v The Queen* (1978) 139 CLR 315.

<sup>344</sup> *Farr Smith & Co Ltd v Messers Ltd* [1928] 1 KB 397.

<sup>345</sup> See *Lloyd v Nowell* [1895] 2 Ch 744.

<sup>346</sup> *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 664 [83] (Gleeson CJ); *Pavey* (1987) 162 CLR 221, 227 (Mason CJ and Wilson J), 255–6 (Deane J).

<sup>347</sup> *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3]* [2014] WASC 162 (7 May 2014); Burrows, *The Law of Restitution*, above n 15, 346, 347; Virgo, above n 18, 308; Bryan, above n 5.

<sup>348</sup> *Pavey* (1987) 162 CLR 221; Andrew Burrows, 'Free Acceptance and the Law of Restitution' (1998) 104 *Law Quarterly Review* 576; Edelman and Bant, above n 2, 258.

<sup>349</sup> Burrows, 'Free Acceptance', above n 348; Edelman and Bant, above n 2, 258.

<sup>350</sup> *Goss* [1996] AC 788.

<sup>351</sup> Mitchell, Mitchell and Watterson (eds), above n 15, 2077 [29-071] n 425; Burrows, *The Law of Restitution*, above n 15, 333; Beale (ed), above n 191, vol 1, 2073 [29-066].

<sup>352</sup> See also Edelman and Bant, above n 2, 258–9.

However, there may be other circumstances in a claim where the basis is capable of part performance and acceptance of partial failure as a vitiating factor will improve the uniformity of judgments concerning unjust enrichment.<sup>353</sup> This is not least because *quantum meruit* is an example of undertaking complicated valuations, exposing the transparency of some of the arguments against recognising restitution on a partial failure.<sup>354</sup>

#### 4 Statute

Allowing recovery on a partial failure of basis would also bring the common law into line with provisions within the national *Australian Consumer Law*,<sup>355</sup> and the frustrated contracts Acts in New South Wales, South Australia and Victoria.<sup>356</sup> Although other acts incidentally deal with a partial failure of consideration, it suffices to note these acts.<sup>357</sup>

It is now well established that common law can be informed by statute,<sup>358</sup> and generally the development of the common law should parallel legislative reform.<sup>359</sup> It has been noted in the High Court that this will only be appropriate when there is pattern of federal statute law or a consistent pattern of state legislation,<sup>360</sup> and established authority should only be disturbed after careful consideration of earlier decisions and the consequences.<sup>361</sup>

Related statute law is piecemeal, as unjust enrichment is one of the common law's last great domains. Careful analysis of the authorities and rationale behind the total failure rule shows the legislature has been

<sup>353</sup> Burrows, *The Law of Restitution*, above n 15, 333.

<sup>354</sup> See *Pavey* (1987) 162 CLR 221; *British Steel Corp v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All ER 504; *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932; *Way v Latilla* [1937] 3 All ER 759; *Competition and Consumer Act 2010* (Cth) s 40(2); Burrows, *The Law of Restitution*, above n 15, 331.

<sup>355</sup> *Competition and Consumer Act 2010* (Cth) ss 243(d), 278, 280; *Fair Trading (Australian Consumer Law) Act 1992* (ACT); *Fair Trading Act 1987* (NSW); *Consumer Affairs and Fair Trading Act* (NT); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1989* (SA); *Australian Consumer Law (Tasmania) Act 2010* (Tas); *Fair Trading Act 2010* (WA); *Australian Consumer Law and Fair Trading Act 2012* (Vic).

<sup>356</sup> *Frustrated Contracts Act 1959* (Vic); *Frustrated Contracts Act 1978* (NSW) pt 3; *Frustrated Contracts Act 1988* (SA) pt 3; See also *Law Reform (Frustrated Contracts) Act 1943* (UK); Edelman, 'When a Total Failure is not a Total Failure', above n 161.

<sup>357</sup> See generally Mason, Carter and Tolhurst, above n 8, 69 [172], 450 [1147].

<sup>358</sup> *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 201 CLR 49, 62–3 [25]–[28] (Gleeson CJ, Gaudron and Gummow JJ); see also *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414; *R v L* (1991) 174 CLR 379; *Warnink v J Townend & Sons (Hull) Ltd* [1979] AC 731, 743 (Lord Diplock); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 843; *Moragne v States Marine Lines Inc* (1970) 398 US 375; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants Investigations Ltd* [1992] 2 NZLR 282.

<sup>359</sup> *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731, 743 (Diplock J).

<sup>360</sup> *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 201 CLR 49, 62–3 [25]–[28] (Gleeson CJ, Gaudron and Gummow JJ).

<sup>361</sup> *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 201 CLR 49, 71 [55] (Gleeson CJ, Gaudron and Gummow JJ).

correct to remove it.<sup>362</sup> This was noted by Young CJ in Equity in *New South Wales v Commonwealth Bank of Australia* where he said that the distinction between total and partial failure is ‘really a rather awkward concept that would best be forgotten for many reasons and, indeed, under the *Sale of Goods Act 1923* (NSW) it has been abrogated’.<sup>363</sup>

As Robert Goff J said of the Act which the Victorian frustration legislation is modelled, ‘underlying the Act ... is prevention of unjust enrichment of either party to the contract at the other’s expense’.<sup>364</sup> The same rationale supporting partial failure as a vitiating factor in those statutory contexts apply more generally to the common law. The common law should also allow for recovery on a partial failure.

### C Artificial Distinction

The application of the total failure rule has been perceived as artificial.<sup>365</sup> That perception has been challenged,<sup>366</sup> but irrespective, the distinction between incidental and bargained for benefits can be artificial.

*Rowland* is one case argued to show this artificiality.<sup>367</sup> A car was purchased and used for two months before it was reclaimed due to it having been stolen.<sup>368</sup> The Court of Appeal held that there was a total failure of basis because there was no transfer of title.<sup>369</sup> The use and enjoyment of the car was held not to have been part of the basis of the transfer, although the use of the car would clearly have resulted from the transfer.<sup>370</sup> In *Rover* the benefits received were held to not be bargained for benefits, although their delivery was essential for the satisfaction of the basis.<sup>371</sup> In both cases, where the incidental benefits were directly linked to the basis of the transfer, the distinction can appear contrived.

Burrows suggests cases such as *Rowland* and *Rover* exemplify an artificial view of total failure.<sup>372</sup> However with respect, the better view is

<sup>362</sup> *Competition and Consumer Act 2010* (Cth) s 243(d); *Fair Trading (Australian Consumer Law) Act 1992* (ACT); *Fair Trading Act 1987* (NSW); *Consumer Affairs and Fair Trading Act* (NT); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1989* (SA); *Australian Consumer Law (Tasmania) Act 2010* (Tas); *Fair Trading Act 2010* (WA); *Australian Consumer Law and Fair Trading Act 2012* (Vic); *Frustrated Contracts Act 1959* (Vic); *Frustrated Contracts Act 1978* (NSW) pt 3; *Frustrated Contracts Act 1988* (SA) pt 3; See also *Law Reform (Frustrated Contracts) Act 1943* (UK); see *Toll FGCT Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 182–3 [48] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

<sup>363</sup> (2001) 217 ALR 691, 713 [151].

<sup>364</sup> *BP Exploration Co (Libya) Ltd v Hunt [No 2]* [1979] 1 WLR 783, 799, affd *BP Exploration Co (Libya) Ltd v Hunt* [1981] 1 WLR 232; *Law Reform (Frustrated Contracts) Act 1943* (UK); *Frustrated Contracts Act 1959* (Vic).

<sup>365</sup> Burrows, *The Law of Restitution*, above n 15, 324; Virgo, above n 18, 324; Contra Paul Mitchell, above n 15, 193–6; Wilmot-Smith, above n 44.

<sup>366</sup> Paul Mitchell, above n 15, 193–196; Wilmot-Smith, above n 44, 420.

<sup>367</sup> *Rowland* [1923] 2 KB 500.

<sup>368</sup> *Ibid.*

<sup>369</sup> *Ibid.*

<sup>370</sup> *Ibid.*

<sup>371</sup> *Ibid.*

<sup>372</sup> Burrows, *The Law of Restitution*, above n 15, 325; Burrows, *A Restatement*, above n 306, 88–9.

that these cases show the incidental benefits can be substantial and important. This highlights the fact that distinguishing between incidental benefits and bargained for benefits can disregard the importance and substantial value of the former.

Such a distinction is entirely artificial considering the rationale behind the total failure rule is spurious, and the requirement of counter-restitution can operate with incidental and non-incidental benefits. The law has the mechanisms in place so that the right to recover need no longer be reliant on the distinction between incidental benefits and bargained for benefits, and instead can focus on when a transfer is vitiated.

### **D Recovery on a Partial Failure**

It is submitted that the best course of reform would be to recognise recovery on a partial failure. The dicta of the majority in *David Securities*,<sup>373</sup> indicates that this can be achieved by apportioning payments to various aspects of the contract and ordering counter-restitution to the defendant where required. The common law is sophisticated enough to ensure the protection of the contractual risk.

Some commentators have suggested that recovery on a partial failure should require that the failure is substantial in order to justify restitution,<sup>374</sup> leaving no scope for a narrow view of basis.<sup>375</sup> Considering recovery will require counter-restitution and will rarely be available on a subsisting contract this is unnecessary as recovery will only be open on a partial failure in justifiable circumstances. This will also remove any need for a court to decide when a partial failure can be said to be 'substantial'. The focus should be on when a transfer is vitiated, and not constrained by considerations of totality or substantiality which confuse the reason for relief in such cases.

The removal of the total failure rule without a need for substantiality also allows for a narrower conception of basis to be adopted in Australia—leaving no room for a partial failure. The effect would be the same, and the same considerations would still drive relief, absent any examination of partial failures. Either reform would lead to the law being more uniform, flexible and better able to work justice.

It is important to examine what a court would require before restitution would be allowed. It is submitted that restitution should be allowed for an unjust enrichment due to a failure of basis where:

1. A party is enriched.
2. The enrichment is at the other party's expense.

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<sup>373</sup> *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>374</sup> Wilmot-Smith, above n 44, 429–31; Mason, Carter and Tolhurst, above n 8, 333–4 [926].

<sup>375</sup> *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3]* [2014] WASC 162 (7 May 2014) [112] (Edelman J).

3. The basis on which the agreement or transfer was entered must have failed in part or in full.<sup>376</sup>
4. Restitution will be recognised as unjust in the circumstances where:
  - a. The contract is subsisting and awarding restitution would alter the fundamental allocation of risk.<sup>377</sup>
  - b. There has been some performance by the respondent and the claimant cannot provide substantial counter-restitution of the benefit.<sup>378</sup>

Thus, where it would be just to do so, restitution would be ordered with adjustments made for apportioned parts of a payment,<sup>379</sup> and/or an accompanying order of counter-restitution for partial or incidental performance.<sup>380</sup>

## VII Conclusion

Parts II, III and IV of this article explore when and how a party can receive restitution for a failure of basis, and the circumstances where the total failure rule does not or may not apply. This evidenced a history of abrogation. Part V established that the justification for the requirement of a total failure is lacking. It also established that generally in unjust enrichment there is and should be a requirement of counter-restitution, and a limit of when restitution will be allowed on a subsisting contract. Part VI established that reform is possible, that it should be undertaken, and that this would make restitution on an unjust enrichment more uniform. It also explained the ease with which this could occur.

This article has shown that the rule requiring a total failure has in many cases been circumvented. The general requirement of counter-restitution and limit of restitution on subsisting contracts are more effective ways to deal with the concerns justifying the total failure requirement. The case for it is limited and the case for recovery on a partial failure is compelling. In cases of a partial failure, there is an unjust retention of a benefit in the sense of an unfulfilled basis or condition. It would be wrong to make the claimant bear this loss. This highlights the

<sup>376</sup> *Roxborough* (2001) 208 CLR 516; *Baltic* (1993) 176 CLR 344; *Fibrosa* [1943] AC 32; *Goss* [1996] AC 788.

<sup>377</sup> *Roxborough* (2001) 208 CLR 516; *Baltic* (1993) 176 CLR 344; *Anderson v Mcpherson* [No 2] [2012] WASC 19 (25 January 2012) [205], [239] (Edelman J); *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 (2008) 232 CLR 635, 655 [46] (Gleeson CJ), 663 [79] (Gummow, Hayne, Crennan and Kiefel JJ); *Coshott v Lenin* [2007] NSWCA 153 (20 June 2007).

<sup>378</sup> *Roxborough* (2001) 208 CLR 516; *Baltic* (1993) 176 CLR 344; *Goss* [1996] AC 788; *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>379</sup> See *Ferguson* (1992) 62 BLR 95.

<sup>380</sup> *David Securities* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Heckenberg v Delaforce* [2000] NSWCA 137 (8 June 2000); *Goss* [1996] AC 788.

oddity of the artificial bar that is the total failure rule. It is therefore submitted that the total failure rule should be removed.

It is important to note that, if this occurs, the improvement on substance does not mean that all technical form will be lost. It has been shown that allowing recovery on a partial failure in specific circumstances simply takes advantage of existing technical form in unjust enrichment. Recovery after a partial failure would provide a more principled approach to unjust enrichment and failure of basis that focuses on vitiation of a transfer and equitable considerations. The removal of the total failure requirement will give the courts more flexibility without opening them to a litany of new claims. The requirement of a total failure should be dispensed with, and the law will be better for it.