

FAILURE OF CONSIDERATION AS A BASIS FOR QUANTUM MERUIT FOLLOWING A REPUDIATORY BREACH OF CONTRACT

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I INTRODUCTION

In *Renard Constructions (ME) Pty Ltd v Minister for Public Works*, the New South Wales Court of Appeal affirmed the right of a builder to elect to sue for *quantum meruit*, as an alternative to a claim for contract damages, following a repudiation by the principal.¹ The Court also held that, in assessing a claim for *quantum meruit* in this context, the contract price does not limit the amount which the builder is entitled to recover.² Both aspects of the decision were subsequently followed by the Queensland Court of Appeal in *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd*,³ and the Victorian Court of Appeal in *Sopov v Kane Constructions Pty Ltd [No 2]*.⁴ Whilst the law in this area can therefore be regarded as settled, the jurisprudential basis for the availability of *quantum meruit* in this context remains unclear.

In *Pavey & Matthews Pty Ltd v Paul*, a majority of the High Court of Australia held that an award of *quantum meruit* is restitutionary in nature, and that the claimant's entitlement to restitution rests upon the concept of unjust enrichment.⁵ However, as has been emphasised in a number of subsequent cases, unjust enrichment is not a direct source of liability in Australia.⁶ Rather, it has been described as a legal category which may assist in explaining the variety of situations in which the law has historically imposed an obligation upon one party to make restitution of a benefit received at the expense of another.⁷ Thus, the High Court has said that a party seeking restitution must establish the existence of some 'qualifying or

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1 (1992) 26 NSWLR 234, 276–7 (*'Renard'*).

2 Ibid 276.

3 (1995) 2 Qd R 350, 370–1 (*'Iezzi'*).

4 (2009) 24 VR 510, 518, 528 (*'Sopov'*). For ease of reference, *Renard* and the cases in which it has been followed will hereafter be referred to collectively as 'the election authorities'.

5 (1987) 162 CLR 221, 227, 255–7 (*'Pavey'*).

6 *AFSL* (2014) 253 CLR 560, 596 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 616 [135] (Gageler J).

7 *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3]* [2014] WASC 162 (7 May 2014) [50]–[51] (Edelman J) (*'Lampson'*).

vitiating factor' which the law recognises as warranting an award of restitution.⁸ To adopt the language of unjust enrichment, there must be an 'unjust factor'.⁹

In this context, two related criticisms have been levelled at the election authorities. First, that allowing a claim for *quantum meruit* in respect of work performed under a contract undermines the fundamental principle that restitution respects contractual bargains. Secondly, that the unjust factor which warrants the award of restitution in these cases has never precisely been identified or explained. The prima facie legitimacy of these criticisms was acknowledged in *Sopov*.¹⁰ Despite that, the Victorian Court of Appeal ultimately concluded that the relevant principles were too well settled to be disturbed.¹¹

In recent times, however, a new theory has emerged which purports to explain the jurisprudential basis of the election authorities. That theory rests upon the proposition that the factor which warrants the award of restitution in these cases is failure of consideration.¹² The doctrine of failure of consideration is said to provide an answer to both of the criticisms referred to above. First, because failure of consideration is a recognised basis for restitution with historical roots in the common law, it satisfies the need to identify an 'unjust factor'. Secondly, the requirements of the doctrine itself are said to provide an internal logic for allowing a party to claim in restitution notwithstanding the existence of an underlying contract. In other words, it is said that where the doctrine of failure of consideration applies, the award of restitution cannot, by definition, undermine any subsisting contractual allocation of risk.¹³

Whilst the failure of consideration theory constitutes an admirable attempt to bring coherence to what is a highly problematic area of the law, this article argues that it ultimately fails in that attempt. In particular, it is argued that the theory rests upon two false premises which are outlined below. As a consequence, it is submitted that the election authorities remain 'so essentially flawed as to be incapable of theoretical explication'.¹⁴

The article is structured as follows. Part II will examine more closely the fundamental objections to the availability of *quantum meruit* in the context

8 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156 [150].

9 *AFSL* (2014) 253 CLR 560, 622 [149]. The place of unjust enrichment in the law of restitution continues to be the subject of debate. In *AFSL*, a majority of the High Court of Australia stated that equitable principles, rather than the concept of unjust enrichment, provide the basis for restitutionary relief in Australia: at 596–7 [78]. However, confusion remains as to how this statement is to be reconciled with earlier decisions of the Court and what, if any, ongoing role there is for unjust enrichment: see 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. The implications of *AFSL*, insofar as the election authorities are concerned, are considered in Part VI of this article.

10 (2009) 24 VR 510, 512–18.

11 *Ibid* 514 [11].

12 See Daniel Morris, 'Restitution Sans Rescission: Exposing the Myth of a Fallacy' (2015) 89 *Australian Law Journal* 117; Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011); James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Oxford University Press, 2006).

13 Burrows, above n 12, 329.

14 Morris, above n 12, 121.

of repudiated contracts. Part III will examine how the failure of consideration theory purports to overcome these objections. The focus will be to identify the two essential premises of the theory which warrant closer scrutiny. Part IV will critically evaluate the first of those premises — that a builder’s obligation to perform work under a construction contract is ‘presumptively entire’.¹⁵ Part V will examine the second premise — that the basis upon which a builder renders performance under a construction contract is the receipt of actual counter-performance from the principal (that is, payment of the contract price), rather than the mere promise of counter-performance. The sixth, and final, part of this article will consider the implications of the recent decision of the High Court of Australia in *AFSL*.¹⁶ It will be argued that the High Court’s movement away from the unjust enrichment theory of restitution, to one based solely upon equitable principles, has little impact upon the argument presented in this article. Whereas the focus throughout will be on claims for restitution made by an innocent builder, the article will conclude with some observations regarding the application of the failure of consideration theory to claims made by a builder in default.

II RESTITUTION IN THE CONTEXT OF TERMINATED CONTRACTS

It is trite law that restitution will not be awarded where it would be inconsistent with the rights and obligations of the parties under a valid and subsisting contract.¹⁷ The logic behind this rule is clear. The obligation to make restitution is one imposed by law in order to prevent the inequitable retention of a benefit received by one party at the expense of another.¹⁸ Where the relevant benefit has been bargained for by the recipient, and conferred pursuant to a voluntarily assumed legal obligation, absent any factor vitiating the parties’ consensual dealing, there is generally no basis for finding that the retention of the benefit is inequitable. This is so whether the basis of the law of restitution is said to lie in the concept of unjust enrichment¹⁹ or, as the majority of the High Court of Australia has held more recently, principles of equity.²⁰

A fundamental objection to the builder’s right to sue in *quantum meruit* following a repudiation by the principal is that such a claim undermines the parties’ contractual bargain. This is said to be the case because the amount a builder may recover on a *quantum meruit* basis is determined by reference to the reasonable

15 Ibid 131.

16 (2014) 253 CLR 560.

17 *Pavey* (1987) 162 CLR 221, 256; *Trimis v MINA* (2000) 16 BCL 288, 296 [54]; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, 156 (*‘GEC Marconi’*); *Coshott v Lenin* [2007] NSWCA 153 (20 June 2007) [10]–[11]; *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (12 November 2004); *Pan Ocean Shipping Ltd v Creditcorp Ltd* [1994] 1 All ER 470, 473.

18 *AFSL* (2014) 253 CLR 560, 568 [1] (French CJ).

19 *Pavey* (1987) 162 CLR 221, 227 (Mason and Wilson JJ), 255 (Deane J).

20 *AFSL* (2014) 253 CLR 560, 596–7 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ). The implications of this decision are considered later in Part VI.

value of the work performed, not the contract price. Thus, in circumstances where the builder has agreed to a contract price which is lower than the actual cost of performing the work, a *quantum meruit* claim will enable it to circumvent, what is from its perspective, a bad bargain.²¹

This claim has, however, been refuted by some advocates of the failure of consideration theory. Burrows, for example, has argued that ‘unwarranted subversion of contract by unjust enrichment is already prevented by the general insistence that the contract be discharged before restitution can be claimed’.²² The reasoning underlying this view appears to be that once a contract has been discharged, whether for breach, frustration or some other reason, the parties’ own allocation of risk becomes ineffective, and ‘the imposed standards set by the law of unjust enrichment should step in’.²³

Three points can be made regarding this argument. First, although a repudiatory breach (if accepted) renders the contract ineffective, it does not impugn the parties’ contractual allocation of risk.²⁴ That is because, where a contract has been breached, the law imposes upon the defaulting party a secondary obligation to pay damages. The manifest purpose of that secondary obligation is to give effect to the contractual bargain of the parties — that is, to put the parties in the position they would have been in had the contract been performed.²⁵ To put the matter another way, in imposing a secondary obligation to pay damages in the event of breach or repudiation, the law implicitly recognises that the underlying bargain of the parties remains extant, and is capable of being given effect, post-termination.

Secondly, the argument overlooks the fact that contracting parties have a legitimate interest in being able to estimate, at the outset of the contract, the amount for which they will become liable in the event of breach. As Brennan J said in *Baltic Shipping Co v Dillon*:

The institution of contract, by which parties are empowered to create a charter of their rights and obligations inter se, can operate effectively only if the parties, at

21 See *Renard* (1992) 26 NSWLR 234, 276; *Boomer v Muir* 24 P 2d 570 (Cal, 1933). Historically, the law’s answer to this objection lay in what has come to be known as the ‘rescission fallacy’: Morris, above n 12, 121. That term described the outdated theory that, where a contract was terminated following a repudiation by one of the parties, the effect was to render the contract void ab initio. Accordingly, neither party could maintain an action on the contract after termination, and no inconsistency with restitution could arise. The rescission fallacy was expunged from the law in *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 476–7 from which time it has been recognised that ‘contractual promises remain effective for the purpose of assessing pecuniary remedies’ following the acceptance of a repudiatory breach: I M Jackman, ‘Promissory Obligations in the Law of Restitution’ (1995) 69 *Australian Law Journal* 614, 623.

22 Burrows, above n 12, 349.

23 Ibid 328.

24 K Mason, J W Carter and G J Tolhurst, *Restitution Law in Australia* (LexisNexis Butterworths, 2nd ed, 2008) 604–5.

25 *Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365. See also *Moschi v Lep Air Services Ltd* [1973] AC 331, 350, where Lord Diplock observed that the secondary obligation to pay damages ‘is just as much an obligation arising from the contract as are the primary obligations that it replaces’.

the time when they create their charter, can form some estimate of liability in the event of default in performance.²⁶

The relevant point for present purposes is that the price specified under a building contract must be regarded as playing an important role, at the time of contract formation, in defining the potential exposure of the principal in the event of a subsequent default. Permitting a builder to disregard the contract price, and bring a claim for *quantum meruit* instead, exposes the principal to a liability that was entirely indeterminate at the time the contract was entered into. As Brennan J recognised, such an outcome subverts the legitimate expectations of the parties, and undermines the institution of contract.

Thirdly, it has been suggested that at least some of the cases in which a builder has been permitted to claim *quantum meruit* following a repudiation of the contract by the principal are consistent with the judgment of Deane J in *Pavey*.²⁷ In particular, those cases are said to be consistent with his Honour's statement that the obligation to make restitution will only arise 'in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable'.²⁸

Morris, for example, appears to argue that the reference to restitution being available where the relevant contract is 'unenforceable' is broad enough to encompass cases where the contract, having been discharged for breach, does not give the builder an enforceable right to payment.²⁹ One example is *Iezzi*.³⁰ The claimant in that case sought payment for work performed pursuant to two subcontracts. Each of the subcontracts contained a clause which provided that the subcontractor's right to payment was 'entirely dependent upon the [head contractor] having already actually received from the [principal] payment in respect of the work' the subject of the subcontractor's claim.³¹ The principal subsequently became insolvent, and the head contractor repudiated the subcontracts. The issue was whether the subcontractor could recover *quantum meruit* for work it had performed under the subcontract, but in respect of which the head contractor had not been paid by the principal. All three members of the Court upheld the subcontractor's *quantum meruit* claim. Both Fitzgerald P and McPherson JA were prepared to do so even assuming that the relevant clause meant that the subcontractor had no entitlement to payment under the contract.³²

Morris seeks to draw an analogy between *Iezzi*³³ and the decision in *Pavey*.³⁴ In the latter case, the High Court allowed a claim for *quantum meruit* in respect of

26 (1993) 176 CLR 344, 369.

27 (1987) 162 CLR 221.

28 Ibid 256.

29 Morris, above n 12, 123–4.

30 (1995) 2 Qd R 350.

31 Ibid 354.

32 Ibid 350, 359–62.

33 (1995) 2 Qd R 350.

34 (1987) 162 CLR 221.

work done pursuant to an oral contract which was rendered unenforceable by a statute requiring such contracts to be in writing.³⁵ Morris argues that:

in both [*Pavey* and *Iezzi*], the plaintiff contractor was forced to resort to a claim for restitutionary relief, not by the invalidity of the subject contract, but by the unenforceability of the contractual provision for payment. The payment provision was unenforceable in *Pavey*, because the contract was not in writing in circumstances where applicable legislation required it to be; and in *Iezzi*, because the majority held that the contract subjected the [subcontractor's] right to be paid to a condition which had failed. Contrary to Mulheron's observations, then, the court's reasoning was no more misdirected by the rescission fallacy in *Iezzi* than it was in *Pavey*.³⁶

The flaw in this analysis is that it fails to appreciate an important difference between a contract which is rendered ineffective by reason of the unanticipated operation of a statute, and a contract of the kind considered in *Iezzi*. In the former case, the statute which renders the contract ineffective also impugns the underlying bargain. That is because it renders unenforceable the rights and obligations agreed by the parties. However, in cases like *Iezzi*, what precludes the claimant's entitlement to be paid are the terms of the contract itself. Plainly, this is not a circumstance which vitiates the 'genuine agreement'³⁷ of the parties such that, consistently with the principle enunciated by Deane J, restitution can step in. Accordingly, in the absence of some other explanation which answers the objections previously outlined, Mulheron's criticism of *Iezzi*³⁸ remains valid.³⁹

III THE FAILURE OF CONSIDERATION THEORY

The foregoing discussion has sought to demonstrate the prima facie validity of the traditional objection to the builder's right to sue in *quantum meruit* following a repudiatory breach by the principal, namely, that such a right undermines the parties' contractual bargain. The focus of the discussion which follows is to examine how the failure of consideration theory purports to overcome this objection.

The doctrine of failure of consideration has long been recognised as a 'vitiating factor' which makes the retention of a benefit prima facie unjust.⁴⁰ Failure of consideration in this context means that 'the state of affairs contemplated as the

35 Ibid.

36 Morris, above n 12, 123 citing Rachael Mulheron, 'Quantum Meruit upon Discharge for Repudiation' (1997) 16 *Australian Bar Review* 150 (citations omitted).

37 *Pavey* (1987) 162 CLR 221, 256.

38 (1995) 2 Qd R 350.

39 Mulheron, above n 36, 162–3.

40 *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676 ('*Moses*'); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 517 [31] ('*Equuscorp*').

basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself'.⁴¹

As the above definition suggests, the doctrine has historically been applied in the context of claims for the restitution of payments via an action for money had and received. In recent times, however, it has been recognised that it applies equally in respect of claims for the restitution of services.⁴²

A useful starting point in considering how the doctrine of failure of consideration has been applied to explain the election authorities is the analysis propounded by Edelman and Bant.⁴³ That analysis is based upon the authors' central insight that, where work is performed pursuant to a contract under which the builder's right to payment is conditional upon the works being completed (in other words, where the builder's obligation is an 'entire' one), a failure of consideration occurs if the principal repudiates the contract prior to the specified time for completion. In such cases, it is said that the basis upon which the builder performed the work was that it would be permitted to complete the job so as to earn the contract price.⁴⁴ That basis having failed as a result of the principal's repudiation of the contract, the builder is *prima facie* entitled to restitution.⁴⁵

So conceived, the learned authors contend that the election authorities are readily reconcilable with the principle that restitution respects the sanctity of contract. After referring to the traditional criticism of these cases, the authors state:

These criticisms are misconceived because ... provided the basis for the plaintiff's performance has totally failed, there will not be any interference with the risk allocation of the contract. That risk allocation was premised upon a particular basis: if the basis does not exist, then neither can the risk allocation.⁴⁶

Similarly, in defending the principle that the contract price does not impose a ceiling upon the amount that may be claimed by way of *quantum meruit*, the authors comment:

there is a strong argument that in such cases of entire obligations, the contract price should not form a ceiling on restitutionary recovery by the plaintiff because the allocation of price and risk was on the basis that the contract could be entirely performed. The plaintiff might have included in the contract price non-price benefits of entire performance such as reciprocal treatment by the defendant, further contracts, or reputation. The better approach is that the contract price

41 Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, revised ed, 1989) 223, quoted in *Equuscorp* (2012) 246 CLR 498, 517 [31].

42 *Barnes v Eastenders Cash & Carry plc* [2015] AC 1, 42 [108]; *Lampson* [2014] WASC 162 (7 May 2014) [92]–[96].

43 Edelman and Bant, above n 12.

44 *Ibid* 262. Although the learned authors note that identifying the 'basis' of a transaction in any given case is ultimately a matter of construction, their defence of *Renard* (1992) 26 NSWLR 234 is premised on their observation that 'the repudiation by the defendant prevented the plaintiff from earning any of the contract price and the basis for the work totally failed'.

45 *Ibid* 262–3. See also Ben McFarlane and Robert Stevens, 'In Defence of *Sumpter v Hedges*' (2002) 118 *Law Quarterly Review* 569, 577.

46 Edelman and Bant, above n 12, 267.

should be a powerful guide, although not a determinative one, to measuring the restitutionary award of the fair value of the work done.⁴⁷

On its face, this analysis is compelling, and difficult to fault. However, there are two aspects of it which warrant closer scrutiny.

The first is a qualification recognised by the authors themselves. It is that the obligation of the builder to carry out the work under the relevant contract is ‘entire’.⁴⁸ On this point, Edelman and Bant suggest that in large building contracts the builder’s obligation to perform the work is ‘invariabl[y] severable’, not entire.⁴⁹ For that reason, they ultimately conclude that the correctness of decisions such as *Renard* is doubtful.⁵⁰

Morris, however, has disputed this conclusion.⁵¹ He contends that the election authorities can be justified precisely because large building contracts are, as a matter of law, construed as being ‘presumptively entire’.⁵² That is said to be so even in cases where the contract apportions the consideration for the work by providing for progress payments. These contentions are evaluated in Part IV of this article.

The second aspect of the Edelman and Bant analysis that requires close scrutiny is the way in which the learned authors characterise the ‘basis’ upon which a builder performs work under a construction contract. That issue is, of course, of central importance, given that it is the failure of the putative basis of the transaction which warrants the award of restitution.

Determining the ‘basis’ or ‘condition’ upon which a benefit has been transferred from one party to another is a matter of construction. As Wilmot-Smith has observed, ‘[t]here is, in theory, no limit to the number or range of conditions which may attach to a transfer’.⁵³ However, in cases where restitution is sought in respect of services provided pursuant to contract, and where the event relied upon as giving rise to the restitutionary claim is the non-performance by the recipient of its contractual obligations, it is submitted that the relevant basis of the transfer can be characterised in one of only two ways. On the one hand, it could be characterised as the future receipt of *actual counter-performance* from the opposing party of its own contractual obligations. On the other, it could be

47 Ibid 262–3 (citations omitted).

48 Ibid 263.

49 Ibid.

50 Ibid 264.

51 Morris, above n 12.

52 Ibid 126, 131–3.

53 Frederick Wilmot-Smith, ‘Replacing Risk-Taking Reasoning’ (2011) 127 *Law Quarterly Review* 610, 619.

characterised as the receipt of the *enforceable promise* of counter-performance from the opposing party.⁵⁴

The distinction is critical because it is only if the former view prevails that the analysis proffered by Edelman and Bant may be accepted. If the basis of the builder's performance is actual counter-performance (ie the payment of the contract price), that basis could be said to have failed where the principal has repudiated the contract, and thus prevented the builder from completing the work so as to earn the contract price. If, however, the basis for the builder's performance is merely the principal's promise to perform (ie the promise to pay the contract price), the basis does not fail upon repudiation of the contract — the promise remains enforceable by way of an action for contract damages.

It follows that, in order to assess whether the failure of consideration theory does, in fact, overcome the traditional objection to the election authorities, two questions must be examined. First, is the builder's obligation under a construction contract 'presumptively entire' as Morris contends? Secondly, is the basis upon which the builder performs that obligation the receipt of actual counter-performance from the principal or the mere promise of counter performance? It is convenient to deal with each of these questions in turn.

IV ARE BUILDING CONTRACTS 'PRESUMPTIVELY ENTIRE'?

A contractual obligation may be described as entire where complete performance of it is a condition precedent to the obligor becoming entitled to receive the bargained for counter-performance.⁵⁵ The question of whether a builder's obligation is entire therefore depends upon whether the contract, properly construed, makes the builder's entitlement to be paid the contract price, or any portion of it, contingent upon the works being completed.

54 See generally Carmel McLure, 'Failure of Consideration and the Boundaries of Restitution and Contract' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook, 2008) 209, 211–15. Cf Wilmot-Smith, above n 53, 619, where the author notes that the basis of a transfer is not limited to counter-performance (or the promise of counter-performance), but may variously consist of a non-promissory contingency, the creation of legal rights or the incurrance of legal obligations. However, none of those possibilities could ground a builder's *quantum meruit* claim in the scenario with which we are concerned.

55 *GEC Marconi* (2003) 128 FCR 1, 164 [703].

There are a number of authorities which have considered how a builder's obligation under a construction contract should be construed.⁵⁶ As those cases reveal, an important distinction can be drawn between contracts which provide for progress payments to be made to the builder during the course of construction, and those that do not.

Where the contract does not provide for progress payments, there is little difficulty in accepting the contention put forward by Morris⁵⁷ that the builder's obligation has generally been found to be entire.⁵⁸ In that regard, Morris' rationalisation of the cases which appear to cast doubt upon this proposition⁵⁹ is persuasive. As he points out,⁶⁰ rather than contradicting the so-called 'presumption of entire contract'⁶¹ in this context, those cases simply illustrate that, under some contracts, substantial performance, rather than strict and absolute completion, will be sufficient to satisfy the pre-condition for payment.⁶²

The position is more complicated where the contract does provide for progress payments (which is almost invariably the case in large building contracts). In that situation, the applicable principle was articulated by Finn J in *GEC Marconi*:

If a contract or obligation is to be found to be entire notwithstanding that the contract or obligation provides for payment by instalments, the contract on its proper construction must indicate that the instalments are nonetheless conditional upon complete performance of the contract or obligation, that is, that they are refundable if this does not occur because of the default of the party that is to render the performance.⁶³

56 See, eg, *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 ('*Gilbert-Ash*'); *Hoenig v Isaacs* [1952] 2 All ER 176; *Nguyen v Luxury Design Homes Pty Ltd* (2005) 21 BCL 46 ('*Nguyen*'); *GEC Marconi* (2003) 128 FCR 1; *ACN 002 804 702 Pty Ltd (formerly Brooks Building Pty Ltd) v McDonald* [2009] NSWSC 610 (3 July 2009); *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2005] NSWCA 248 (4 August 2005) ('*Brewarrina*'); *Chalet Homes Pty Ltd v Kelly* [1978] Qd R 389; *Ownit Homes Pty Ltd v Batchelor* [1983] 2 Qd R 124 ('*Ownit Homes*'); *Ettridge v Vermin Board of the District of Murat Bay* [1928] SASR 124 ('*Ettridge*'); *McLachlan v Nourse* [1928] SASR 230.

57 Morris, above n 12, 117–18.

58 *Nguyen* (2005) 21 BCL 46, 51 [27] (McColl JA). Cf *McFarlane and Stevens*, above n 45, 595–7 (where the authors argue that '[t]he postponement of payment until full performance should not be conclusive evidence that an obligation is entire'). An interesting question not considered in this article is how the characterisation of a builder's obligation may be affected by the existence of a statutory right to progress payments arising under the various security of payment legislation operating in each state. See, eg, *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 (31 March 2010) where Vickery J considered how a builder's right to progress payments under a contract ought to be characterised in a context where the builder sought payment under the *Building and Construction Industry Security of Payment Act 2002* (Vic).

59 See, eg, *Hoenig v Isaacs* [1952] 2 All ER 176, 180; *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* (2013) 29 BCL 329, 345–6; *ACN 002 804 702 Pty Ltd (formerly Brooks Building Pty Ltd) v McDonald* [2009] NSWSC 610 (3 July 2009) [100]–[108]; *Nguyen* (2005) 21 BCL 46, 56–7 (Einstein J); *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576, 589 (Young CJ in Eq).

60 Morris, above n 12, 131–2.

61 *Ibid* 119.

62 *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* (2013) 29 BCL 329, 345–6; *ACN 002 804 702 Pty Ltd (formerly Brooks Building Pty Ltd) v McDonald* [2009] NSWSC 610 (3 July 2009) [100]–[108].

63 (2003) 128 FCR 1, 165 [706].

Whether or not a ‘presumption of entire contract’ applies in relation to this question of construction is a point on which the authorities are not entirely clear. However, contrary to Morris’ observations, it is submitted that the better view is that no such presumption arises.

Morris refers to the decision of the House of Lords in *Gilbert-Ash* as establishing the presumption. He contends that this decision has been ‘authoritatively applied in Australian courts’, citing *GEC Marconi* and McColl JA’s judgment in *Nguyen*.⁶⁴

In *Gilbert-Ash*, Lord Diplock said:

a building contract is an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done.⁶⁵

Two points can be made in relation to this. First, the statement must be regarded as obiter dicta. The issue in *Gilbert-Ash* was whether the relevant contract, properly construed, entitled the defendant to deduct from progress payments due to the contractor amounts representing losses it had sustained as a result of delay and defective work. The question whether the relevant contract was entire was, in that sense, ancillary to the central issue in the case. Secondly, it is significant that the contract itself made clear that all ‘interim payments [were] on account only’ and did not signify approval of the work.⁶⁶ Words of this kind have commonly been understood as manifesting a clear intention of the parties that the builder’s obligation is to be entire.⁶⁷ Accordingly, there was no need for the House of Lords to resolve the matter by reference to any presumption.⁶⁸

The Australian authorities cited by Morris do not appear to advance the position. In fact, Finn J’s judgment in *GEC Marconi* makes clear that *Gilbert-Ash* does not establish a presumption of entirety in cases where the contract provides for payment by instalments. After citing that case as authority for the proposition that building contracts ‘have commonly been regarded, prima facie, as entire or “lump sum” contracts’, his Honour immediately qualifies the proposition by observing that ‘such contracts commonly provide to the contrary by ... apportioning the consideration’.⁶⁹ He goes on to note:

64 Morris, above n 12, 126, citing *Gilbert-Ash* [1974] AC 689; *GEC Marconi* (2003) 128 FCR 1; *Nguyen* (2005) 21 BCL 46, 48–54.

65 [1974] AC 689, 717.

66 Ibid 723.

67 See *Brewarrina* [2005] NSWCA 248 (4 August 2005) [76]; *Ownit Homes* [1983] 2 Qd R 124, 134–5; *Nguyen* (2005) 21 BCL 46, 52 (McColl JA); cf *Einstein J*: at 56–7.

68 One interpretation of Morris’ argument is that the ‘presumption of entire contract’ only arises where the contract does, in fact, specify that progress payments are to be ‘on account only’. However, it is inaccurate to speak of a ‘presumption’ arising in such cases. The position is simply that a specification to the effect that payments are to be ‘on account only’ is a strong indication of the parties’ intention. In accordance with ordinary principles of contract interpretation, this will generally warrant the conclusion that the builder’s obligation is entire (unless, of course, there is stronger evidence of a contrary intention).

69 *GEC Marconi* (2003) 128 FCR 1, 164 [704] (emphasis added).

Once the right to [an instalment] payment has accrued it is enforceable as a debt ... and that right is not lost notwithstanding that the contract is subsequently terminated because of the default of the party possessing the right to payment.⁷⁰

McColl JA's judgment in *Nguyen* similarly does not assist the argument. For one thing, her Honour in that case cited and approved Finn J's analysis in *GEC Marconi*.⁷¹

Whilst it is true that McColl JA did express agreement with Lord Diplock's statement in *Gilbert-Ash*, the context in which she did so is instructive. Her Honour relied upon the statement to counter a submission that a requirement to make progress payments necessarily *prevents* a contract from being construed as entire.⁷² In other words, *Gilbert-Ash*, and the other authorities to which her Honour referred,⁷³ were cited not in support of a presumption of entire contract,⁷⁴ but to rebut the existence of a presumption to the contrary. As to the proper basis upon which the question of entirety was to be decided, her Honour said only that 'the effect a provision for progress payments has in the characterisation exercise turns upon the terms of the particular contract'.⁷⁵

This last observation points toward a second answer to the proposition that building contracts are presumptively entire. By definition, a presumption only has work to do in circumstances where the intention of the parties cannot objectively be discerned from the contract itself. However, when considering the question of entirety, courts have almost invariably discerned the parties' intention through close scrutiny of the terms of the relevant contract, without recourse to any presumption of law.⁷⁶

Assuming, then, that the matter is to be determined purely by reference to the terms of the particular contract, two relevant issues remain to be considered. First, how have courts approached this question of construction? Secondly, can the election authorities be reconciled with that approach?

70 Ibid 165 [705] (citations omitted).

71 *Nguyen* (2005) 21 BCL 46, 50–1 [24].

72 *Nguyen* (2005) 21 BCL 46, 49–52 [30]–[41].

73 *Tharsis Sulphur and Copper Co v McElroy & Sons* (1878) 3 App Cas 1040; *Banbury v Daniel* (1884) 54 LJ Ch 265; *Re Sanders Constructions Pty Ltd* [1969] Qd R 29; *Dawnays Ltd v FG Minter Ltd* [1971] 2 All ER 1389; *Chalet Homes Pty Ltd v Kelly* [1978] Qd R 389; *Egan v State Transport Authority* (1982) 31 SASR 481; *Ownit Homes* [1983] 2 Qd R 124. These authorities are cited for the proposition that 'there is no necessary inconsistency between a lump sum contract price and progress payments': *Nguyen* (2005) 21 BCL 46, 52 [38], citing *Besser Industries (NT) Pty Ltd v Steelcon Constructions Pty Ltd* (1995) 129 ALR 308, 311 (Branson J).

74 *Contra* Morris, above n 12, 131.

75 *Nguyen* (2005) 21 BCL 46, 51 [32].

76 See generally the Australian authorities, above n 56.

A Construing the Builder's Obligation under a Construction Contract

As noted previously, there is a large body of case law in which courts have considered whether a builder's obligation under a construction contract is entire. In a number of those cases, the relevant contract was in the form of a standard contract commonly used in the building industry. It is therefore possible to formulate some general propositions regarding the way in which certain contractual expressions have commonly been construed in relation to the question of entirety.

Of particular relevance is the interpretation of clauses which provide for progress payments to be paid 'on account only'. A stipulation of this kind has generally been treated as manifesting a clear intention that the builder's obligation to perform the work is entire. That is because, by definition, a payment on account is conditional, and subject to adjustment at the end of the contract. Accordingly, even if the contractual conditions for a payment on account have been satisfied, a builder will generally not be regarded as having an accrued right to retain the payment in the event the contract is terminated prior to completion.⁷⁷

On the other hand, where the contract provides for progress payments, but does not stipulate expressly that such payments are to be on account, the position is far less clear. A contract of this kind was considered in *Ettridge*.⁷⁸ In that case, it was held that the builder's right to progress payments was acquired unconditionally upon completion of the portion of the work to which the progress payments related, and that such right survived a subsequent termination of the contract.⁷⁹ The same conclusion was reached by Finn J in *GEC Marconi*.⁸⁰ His Honour considered that the 'various devices used in [the relevant contract in that case] to protect [the principal] against ... possible delay or default' by the builder (such as provisions for the payment of liquidated damages and the furnishing of bank guarantees) strengthened the conclusion that the builder's right to progress payments was intended to be unconditional, and the payments so received non-refundable.⁸¹

To opposite effect is the decision by Thomas J in *Ownit Homes*.⁸² In that case, his Honour held that the builder's right to progress payments under the contract

77 See above n 67.

78 [1928] SASR 124.

79 Ibid. See also *McLachlan v Nourse* [1928] SASR 230; *GEC Marconi* (2003) 128 FCR 1, 166–7; *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 (31 March 2010) [150]. In both *Ettridge* and *McLachlan v Nourse*, the contract was described as being 'entire', notwithstanding the court's finding that the builder had an accrued right to payment in respect of work performed prior to termination. This simply reflects the 'difficulties of terminology' which have been said to arise in relation to entire obligations: see *ACN 002 804 702 Pty Ltd (formerly Brooks Building Pty Ltd) v McDonald* [2009] NSWSC 610 (3 July 2009) [101]–[102].

80 (2003) 128 FCR 1, 167 [715].

81 Ibid 166–7 [713]–[714].

82 [1983] 2 Qd R 124.

in question ‘more closely resemble[d] a right to a payment on account than an accrued right to final payment’.⁸³

The different outcomes in *Ettridge* and *GEC Marconi* on the one hand, and *Ownit Homes* on the other, are perhaps explicable when regard is had to the terms of the relevant payment clause in each case. In both *Ettridge* and *GEC Marconi*, the progress payments were apportioned by reference to the nature of the work performed, and were conditional upon the work being certified by or on behalf of the principal. By contrast, the contract in *Ownit Homes* did not contain any procedure for the review or certification of the builder’s work. This perhaps explains Thomas J’s finding that the progress payments were ‘obviously to be provisional and subject to adjustment at the end of the contract’.⁸⁴

B Revisiting the Election Authorities

In light of the principles just discussed, the critical question is whether the election authorities can be justified on the basis that the builder’s obligation under the contracts considered in each of those cases was entire.

In *Sopov*,⁸⁵ the relevant contract stipulated clearly that progress payments were to be made ‘on account only’.⁸⁶ Accordingly, the builder’s obligation in that case was probably entire, such that a failure of consideration analysis would have been available.

By contrast, the contract in *Iezzi* did not specify that progress payments were to be on account only. The relevant clause provided as follows:

- (a) The [head contractor] shall pay the Subcontractor the Contract Sum by periodic progress payments at the frequency stated in the Second Schedule if such payments become due under the following provisions of this Clause. Otherwise the Contract Sum or the balance thereof unpaid and payable (subject to this Contract) shall be payable on the satisfactory completion of the Works.⁸⁷

Sub-clauses (b) and (c) provided for the subcontractor to submit progress claims containing certain prescribed information, and for those claims to be paid by the head contractor within 14 days of payment having been received by it from the principal. Sub-clause (d) provided that the subcontractor’s right to payment was ‘entirely dependent’ upon the head contractor having received payment in respect of the relevant work from the principal. Sub-clause (e) further provided that ‘the Subcontractor [was] not entitled to receive payment if ... a claim or set off [was] sought’ by the principal against the head contractor in respect of the works.⁸⁸

83 Ibid 135.

84 Ibid 134.

85 (2009) 24 VR 510.

86 *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237 (30 June 2005) 307 [1029].

87 (1995) 2 Qd R 350, 353.

88 Ibid 353–4.

There is a strong prima facie case that this clause should have been construed as conferring upon the builder an unconditional right to receive the progress payments, once the requirements of the clause had been satisfied. Such a construction is suggested by the fact that the clause only entitled the builder to progress payments if the head contractor had itself received payment from the principal; specifically disentitled the builder to payment if any claim or set-off had been sought by the principal, but not otherwise; required the builder to submit detailed progress claims for review by the head contractor (and presumably the principal); and referred to the payments as becoming 'due' without any indication that they were to be 'on account'.

In any event, in light of the principles previously discussed, *Iezzi* is certainly not a case in which it could safely be assumed that the builder's obligation was entire notwithstanding the absence of an express finding of the Court to that effect. It follows that the award of *quantum meruit* in that case must be regarded as questionable.

Turning finally to *Renard*,⁸⁹ the issue is complicated by the fact that the Court's judgment does not indicate whether the relevant contract permitted the builder to claim progress payments and, if so, whether such payments were to be on account only. Accordingly, all that can be said about the case is that an entire obligation/failure of consideration analysis may theoretically have been available (although the Court plainly did not decide the case on that basis).

V CHARACTERISING THE BASIS OF THE TRANSACTION: COUNTER-PERFORMANCE OR COUNTER-PROMISE?

The foregoing discussion has sought to demonstrate that a builder's obligation under a construction contract is not presumptively entire, and that each case will depend upon the particular terms of the contract. Assuming, however, that the relevant obligation in a given case is entire, such that no accrued right to payment for work performed prior to termination exists, can the election authorities be justified by reference to failure of consideration?

The answer to this question depends upon the legitimacy of a second proposition which was identified in Part III as underpinning the failure of consideration analysis. That is, that the basis upon which the builder renders performance

89 (1992) 26 NSWLR 234.

under a construction contract is the receipt of actual counter-performance from the principal, rather than the mere promise of counter-performance.⁹⁰

The reasoning which underlies this proposition has not always been clearly articulated. However, the foundation for it appears to be the decision of the House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*.⁹¹ It will be necessary to examine that case shortly. It is convenient to begin our analysis with some first principles.

A Identifying the ‘Consideration’

As previously noted, the concept of ‘consideration’ under the doctrine of failure of consideration refers to the state of affairs contemplated as the reason or basis for the conferral of a benefit.

The preponderance of authority indicates that the relevant basis is to be determined objectively.⁹² In *Fostif*, Mason P stated the applicable principle as follows:

The failure is judged from the perspective of the payer. That person is the party to the contract who is seeking restitution. But, for present purposes, the critical point is that it is the benefit bargained for as distinct from that subjectively contemplated by the plaintiff/payer that is critical. In other words, one must determine, in a contractual situation, what was ‘... [t]he state of affairs, which was within the contemplation of the parties as the basis of their dealings’.⁹³

As McLure has observed, where restitution is sought in respect of benefits conferred pursuant to a contract, the test for identifying the basis of the transaction is essentially the same as that applied to the interpretation of contracts.⁹⁴ In both instances, the task of the court is to ascertain objectively the common intention of the parties.⁹⁵

This insight is important as it points toward the law of contract as potentially providing a fertile field of inquiry in determining how the basis of a transaction ought to be characterised. In that regard, guidance may be sought from what has

90 McLure, above n 54, 212–14. Edelman and Bant note that ‘[i]n contractual cases, the basis upon which a performance is rendered is usually the receipt of counter-performance’ and that ‘[i]n cases involving performance of a service under an entire obligation another basis will be that the defendant will not prevent the plaintiff from completing the service and earning the price’: Edelman and Bant, above n 12, 250, 252. Morris’ characterisation of the relevant basis is slightly different. He contends that the basis of the builder’s performance is the indebtedness of the principal to pay the contract sum, which, under an entire contract, arises only upon completion of the work: Morris, above n 12, 128. Even on this analysis, however, the same question emerges: why should the basis of the builder’s performance not instead be characterised as the principal’s promise to pay?

91 [1943] AC 32 (*Fibrosa*).

92 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, 252 (*Fostif*); *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 525–6; *Heckenberg v Delaforce* [2000] NSWCA 137 (8 June 2000) [36]–[37]; *Giedo Van der Garde BV v Force India Formula One Team Ltd* [2010] All ER (D) 122 (Sep).

93 (2005) 63 NSWLR 203, 252 [239] (citations omitted).

94 McLure, above n 54, 218; cf Wilmot-Smith, above n 53, 622.

95 McLure, above n 54, 218. See also *Giedo Van der Garde BV v Force India Formula One Team Ltd* [2010] All ER (D) 122 (Sep) [285]–[286].

been described as ‘a principal theme in the history of the law of contract’ — the distinction between dependent and independent obligations.⁹⁶

B Jurisprudence on Dependent and Independent Contractual Obligations

Contractual obligations are regarded as dependent where the performance of one obligation is conditional upon counter-performance of the other. Conversely, an obligation is regarded as independent where the requirement to perform it is not conditional upon counter-performance of a corresponding obligation.⁹⁷

The classification of an obligation as dependent or independent depends upon the intention of the parties, to be ascertained objectively by construing the contract.⁹⁸ The question commonly arises in two contexts. The first is in determining the order of performance of the parties’ respective obligations where no time for performance is specified under the contract. The second is in determining whether the non-performance by a plaintiff of one of its own obligations precludes it from enforcing an obligation which has not been performed by the defendant.⁹⁹

At least in the first context,¹⁰⁰ it is submitted that the inquiry as to whether an obligation is dependent or independent mirrors the inquiry as to whether the basis for one party’s performance is the receipt of actual counter-performance, or the mere promise of counter-performance, from the other. More specifically, it is submitted that the corollary of a finding that an obligation is dependent upon another is that the basis for performance of the former is *actual counter-performance* of the latter. Conversely, the corollary of a finding that an obligation is independent of another must be that the basis for performance of the former is the *promise of performance* of the latter. This very point was recognised recently by the New South Wales Court of Appeal in *Hillam* when Leeming JA¹⁰¹ said:

Was Mr Hillam’s obligation to pay that amount dependent upon Mr and Mrs Iacullo having complied with their obligation to advance the final \$75,000? Or were they independent obligations? Another way of posing the same question is to ask whether the promised payment by Mr Hillam was for the *performance* of the promised loan, or was for the *promise* by Mr and Mrs Iacullo to lend the \$75,000.¹⁰²

96 S J Stoljar, ‘Dependent and Independent Promises: A Study in the History of Contract’ (1957) 2 *Sydney Law Review* 217, 217.

97 *Highfield Property Investments Pty Ltd v Commercial & Residential Developments (SA) Pty Ltd* [2012] SASC 165 (24 September 2012) 37 [209]–[210] (‘*Highfield*’); J W Carter, *Carter’s Breach of Contract* (LexisNexis Butterworths, 2011) 7.

98 *Burton v Palmer* [1980] 2 NSWLR 878, 895 [76]; *Hillam v Iacullo* [2015] NSWCA 196 (16 July 2015) [93] (‘*Hillam*’); Carter, above n 97, 7.

99 Stoljar, above n 96, 218–20; Carter, above n 97, 9.

100 The test for the second context is stated in *Newcombe v Newcombe* (1934) 34 SR (NSW) 446, 450 (Jordan CJ).

101 Basten and Ward JJA agreeing.

102 *Hillam* [2015] NSWCA 196 (16 July 2015) [92] (emphasis in original).

It follows that the question with which we have so far been concerned — whether the basis for a builder’s performance is counter-performance or the promise of counter-performance — can be re-conceptualised as being whether the builder’s obligation is dependent on, or independent of, the principal’s obligation to pay the contract price.

So conceived, it is submitted that the jurisprudence on dependent and independent obligations provides a clear answer to the question — the builder’s obligation must be independent. This conclusion flows as a logical consequence of the fact that, under an entire contract, the builder is required to render complete performance before the principal becomes obliged to pay the contract price. The builder’s obligation is therefore plainly not conditional upon the principal’s performance. Rather, the contract requires the builder to render performance on the faith of the principal’s promise to pay. This, quite classically, fits the definition of an independent obligation.

The above analysis is supported by longstanding authority. For example, it is consistent with the first rule set out in the notes to the seminal case of *Pordage v Cole*.¹⁰³ So far as relevant, that rule provides:

If a day be appointed for ... doing any ... act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the ... act, is to be performed, an action may be brought for ... not doing such ... act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent ...¹⁰⁴

Though the language is somewhat convoluted in its application to the present context, the essence of this passage is consistent with what has been stated: namely, that where an obligation is to be performed prior to the time appointed for the performance of the act which is the consideration for that obligation, then the obligation is an independent one. The logic of the rule, as indicated in the last sentence of the passage quoted, is that by not making counter-performance a condition precedent to his or her own performance, the obligor must have intended to rely only upon his or her remedy (ie a claim for contract damages) in the event of non-performance by the obligee.

The point emerges even more explicitly from the following statement of Leeming JA in *Hillam*:

The difficulty faced by Mr and Mrs Iacullo is that the parties by their formal written contract have made express provision for the time of the performance of the obligations to advance \$75,000 and to procure a charge. The obligation to advance had already accrued, and was to be regarded as a matter of law as immediately falling due. *That is necessarily earlier than, and therefore independent of,* the obligation to procure a charge in a reasonable time.¹⁰⁵

103 *Pordage v Cole* (1669) 1 Saund 319; 85 ER 449.

104 *Ibid* 320; 450 (emphasis in original). This rule still represents the common law in Australia: *Geeveekay Pty Ltd v Director of Consumer Affairs Victoria* (2008) 19 VR 512, 529–30 (Bell J).

105 [2015] NSWCA 196 (16 July 2015) [82] (emphasis altered).

The conclusion, then, is that because a builder's obligation to perform is antecedent to the principal's obligation to pay the contract price, the builder should prima facie be regarded as having bargained merely for the principal's promise to pay, not the performance of that promise. It follows that no failure of consideration will arise so long as the principal's promise to pay the contract price continues to be enforceable by way of an action for damages.¹⁰⁶

There remains to be considered one potential objection to this analysis. That objection concerns the authorities regarding the recovery of advance payments.

C Recovery of Advance Payments

There is a long-line of authority in which it has been held that money paid in advance for goods or services is recoverable in the event that the contract is terminated before the goods or services are delivered. An early example is *Palmer v Temple*.¹⁰⁷ In that case, a purchaser who had defaulted under a contract for the sale of land was permitted to recover instalments that he had paid prior to the contract being terminated. The basis for the decision was that, the contract having come to an end, 'the very idea of payment [fell] to the ground ... and from that moment the [vendor held] the money advanced to the use of the purchaser'.¹⁰⁸

Palmer was applied in *McDonald v Dennys Lascelles Ltd*.¹⁰⁹ In his seminal judgment, Dixon J said:

When a contract stipulates for payment of part of the purchase money in advance, the purchaser relying only on the vendor's promise to give him a conveyance, the vendor is entitled to enforce payment before the time has arrived for conveying the land; yet his title to retain the money has been considered not to be absolute but conditional upon the subsequent completion of the contract.¹¹⁰

To similar effect is the statement of Stable J in *Dies v British and International Mining and Finance Corporation Ltd*:

where the language used in a contract is neutral, the general rule is that the law confers on the purchaser the right to recover his money, and that to enable the seller to keep it he must be able to point to some language in the contract from which the inference to be drawn is that the parties intended and agreed that he should.¹¹¹

106 If the builder has rendered full performance prior to the repudiation, he or she will have an action in debt to recover the contract price: see John Tarrant, 'Total Failure of Consideration' (2006) 33 *University of Western Australia Law Review* 132, 137–8. However, where the contract has been repudiated prior to completion of the work, no debt arises, and the builder must instead seek damages for breach of contract: see John Tarrant, 'Partial Failure of Consideration' (2008) 34 *University of Western Australia Law Review* 59, 63.

107 (1839) 9 Ad & El 508; 112 ER 1304 ('Palmer').

108 Ibid 520–1; 1309.

109 (1933) 48 CLR 457.

110 Ibid 477.

111 [1939] 1 KB 724, 743.

In other words, the cases appear to stand for the proposition that, in the absence of evidence to the contrary, an obligation to pay money will generally be construed as being dependent. That is so even where the money is required to be paid in advance of the relevant consideration being received. Mason, Carter and Tolhurst summarise the position as follows:

The presumption in relation to contractual obligations under an executory bilateral contract, since the end of the eighteenth century, is that they are dependent. Accordingly, the terms of the contract must always be considered against the background ('default') rule that an obligation to pay money is a conditional one. ... Even where there is an obligation to pay money in advance of the other party's performance, as where a purchaser agrees to pay for land by instalments, the obligation to pay may be dependent on the readiness, willingness and ability of the other party to perform.¹¹²

D The Decision in *Fibrosa*

It is against this background that the decision of the House of Lords in *Fibrosa*¹¹³ stands to be considered. In that case, an English company had contracted to build and deliver textile machinery to a company in Poland. Before the machines could be delivered, World War II broke out in Poland and the contract was frustrated. The issue was whether the Polish company could recover its deposit in those circumstances.

The House of Lords unanimously held that the money was recoverable on the basis of a failure of consideration. In doing so, it overturned earlier authority which had held that money paid under a subsequently frustrated contract was not recoverable. In what has come to be regarded as a classic statement of the law, Viscount Simon LC said:

This conclusion seems to be derived from the view that, if the contract remains good and valid up to the moment of frustration, money which has already been paid under it cannot be regarded as having been paid for a consideration which has wholly failed. The party who has paid the money has had the advantage, whatever it may be worth, of the promise of the other party. That is true, but it is necessary to draw a distinction. In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act ... and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration, *but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.*¹¹⁴

112 Mason, Carter and Tolhurst, above n 24, 414 [1113] (citations omitted). See also *Highfield* [2012] SASC 165 (24 September 2012) [212].

113 [1943] AC 32.

114 *Ibid* 48 (emphasis added).

As the emphasised words are apt to demonstrate, the logic of this statement is essentially the same as in the advanced payment cases previously discussed. In particular, his Lordship's observation that the 'money was paid to secure performance' appears simply to be another way of saying that the obligation to pay the money was conditional or dependent upon the consideration for it subsequently being received.

The similarity between *Fibrosa* and the advanced payment cases is not surprising. Although a claim to recover an advance payment on the basis that the condition for its retention has failed and a claim to recover money for failure of consideration might theoretically constitute separate causes of action (the former arising in contract; the latter in restitution),¹¹⁵ at least where the claimant is not the defaulting party¹¹⁶ the two actions are, in truth, entirely coextensive.¹¹⁷ The point comes across clearly in the judgment of Lord Wright, who explained the basis for the plaintiff's right of recovery in *Fibrosa* in the following terms:

The right in such a case to claim repayment of money paid in advance must in principle, in my judgment, attach at the moment of dissolution. The payment was originally conditional. The condition of retaining it is eventual performance. Accordingly, when that condition fails, the right to retain the money must simultaneously fail. It is not like a claim for damages for breach of the contract ... nor is it a claim under the contract. It is in theory and is expressed to be a claim to recover money, received to the use of the plaintiff.¹¹⁸

The critical question is therefore whether the logic of the decision in *Fibrosa*, steeped as it is in the jurisprudence regarding advance payments, can be extended to cases involving the restitution of non-monetary benefits.

E The Application of *Fibrosa* to Non-Monetary Benefits

Before considering this question, it may be useful to recapitulate the points that have so far sought to be established. They can be stated briefly. First, the election authorities may be justified under the failure of consideration theory only if the basis upon which the builder renders performance is said to be the receipt of counter-performance from the principal, rather than the mere promise of counter-performance. Secondly, the former view can prevail only if the contract contemplates that the builder's obligation to perform is dependent, or conditional, upon the principal's obligation to pay the contract price. Thirdly, the fact that a builder's obligation to perform the works under a construction contract is antecedent to the principal's obligation to pay for them is a strong prima facie indication that the builder's obligation is independent, and not conditional. Finally, the countervailing view relies upon the logic of *Fibrosa* being transposed to cases involving the restitution of non-monetary benefits.

115 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 350–2 (Mason CJ). Cf Tarrant, 'Total Failure of Consideration', above n 106.

116 Cf *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 351–2 (Mason CJ).

117 See, eg, McLure, above n 54, 219, 224.

118 *Fibrosa* [1943] AC 32, 65.

Returning to the question at hand, it is submitted that there are two powerful reasons why Viscount Simon LC's statement in *Fibrosa* should not be applied to cases involving the restitution of non-monetary benefits.

First, as has been seen, the availability of restitution in a contractual context depends upon an inference being drawn that the parties intended the relevant benefit to be conditional. This inference is far more readily drawn where the benefit in respect of which restitution is sought is the payment of money. That is because money can easily be refunded. By contrast, the provision of a service, particularly one as complex as the construction of a building, is a far more difficult transaction to reverse. It requires the value of the work to be translated into monetary terms. As the cases on *quantum meruit* demonstrate, this will almost invariably be a complex, uncertain and contentious task. Indeed, it will often require adjudication by a neutral arbiter. This fact, of itself, militates strongly against an inference that the parties will have intended the provision of a non-monetary benefit to be conditional upon receipt of a subsequent consideration.

The second reason why it is submitted that Viscount Simon LC's statement in *Fibrosa* should not apply to non-monetary benefits relates to the central criticism of the election authorities which was identified at the start of this article, namely, that they permit a claim in *quantum meruit* to subvert the parties' contractual bargain. As we have seen, this subversion is said to occur because the claim in *quantum meruit* disregards the agreed contract price, and exposes the principal to a liability which it cannot reasonably predict at the time the contract is entered into.¹¹⁹ However, neither of those concerns arise where what is sought to be restored is the payment of money. The point may be illustrated by reference to an example referred to by Edelman and Bant:

X contracts with Y for the sale of 10 bags of wheat at \$100 a bag. X pays the full price of \$1000 in advance. But X has made a bad bargain. The market price of a bag of wheat is \$50. Y only delivers six bags and X terminates the contract. If X sues for breach of contract for the failure to deliver four bags, the only financial loss he has suffered is \$200, because he made a bad bargain. That is the additional cost of purchasing four bags. However, X can argue that the basis upon which the \$1000 was paid was apportioned to \$100 per bag. Therefore, the basis for \$400 of the payment has totally failed, as four bags have not been received and restitution should be made of \$400.¹²⁰

As in the case of a builder who claims for *quantum meruit* following a repudiation by the principal, the claimant in this context ('X') is permitted to recover an amount in excess of what it could have recovered by way of damages. However, the proposition that this outcome subverts the contractual bargain of the parties is much more difficult, if not impossible, to maintain. That is because the defendant ('Y') in this scenario is being required to pay no more or less than the amount which it had agreed represented the value of the goods or services to be supplied under the contract. Moreover, there can be no objection to X's claim on the basis that it exposes Y to indeterminate liability, or undermines Y's

119 See discussion in Part II above.

120 Edelman and Bant, above n 12, 261.

legitimate expectations regarding its potential liability in the event of breach. The quantum of Y's liability, being equivalent to the contract price, is both fixed and ascertainable at the outset of the contract.

VI IMPLICATIONS OF AN APPROACH TO RESTITUTION BASED ON EQUITABLE PRINCIPLES

To this point, the argument has proceeded on the basis that the doctrine of failure of consideration is properly located within the concept of unjust enrichment, and that that concept underlies the action for *quantum meruit*. However, those propositions are not universally accepted. For example, in the context of the action for money had and received, Kremer has argued that the touchstone for restitutionary liability has always been the equitable notion of conscience, not unjust enrichment.¹²¹ On his analysis, the relevant inquiry is not whether the defendant has been enriched in circumstances which the law regards as unjust, but whether the defendant has received a benefit which it would be 'against conscience' for him or her to retain. Whereas the former inquiry focuses upon the identification of a recognised 'unjust factor', the latter is said to focus upon the ability of the defendant to prove a 'right to retain' the benefit.¹²²

This view appears now to have been endorsed by a majority of the High Court of Australia. In *AFSL*, a case which concerned the availability of a defence of change of position to an action for money had and received, the plurality said: 'There can be no denying the equitable roots of the principle by which a claim for restitution of money had and received to the use of the payer is to be determined.'¹²³ Their Honours had earlier identified the relevant inquiry in such cases as being whether the retention of the money was 'unconscionable'.¹²⁴ In relation to unjust enrichment, their Honours declared that 'the concept of unjust enrichment is not the basis of restitutionary relief in Australian law'.¹²⁵

The place of unjust enrichment in the law of restitution has, of course, long been debated.¹²⁶ Resolving that debate is beyond the scope of this article. However, in light of *AFSL*, one question that is worth considering is whether the equitable conception of restitution advanced by Kremer, and seemingly endorsed in *AFSL*,

121 Ben Kremer, 'The Action for Money Had and Received' (2001) 17 *Journal of Contract Law* 93, 106–9.

122 The requirement to prove a 'right to retain' is said to be the means by which the law gives expression to the notion of 'conscience' in an action for money had and received: *ibid* 93–4, 96.

123 *AFSL* (2014) 253 CLR 560, 593 [68] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

124 *Ibid* 592–3 [65].

125 *Ibid* 596 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

126 Even since *AFSL*, a diversity of views have been expressed regarding the ongoing relevance of unjust enrichment in determining restitutionary claims: see *Lampson* [2014] WASC 162 (7 May 2014) [50], [86]–[88]; *Southage Pty Ltd v Vescovi* (2015) 321 ALR 383, 395; *Toll Global Forwarding Pty Ltd v Theiss Pty Ltd* [2015] WASC 364 (2 October 2015) [235]. See also Mason, above n 9; Graham Virgo, 'Conscience or Unjust Enrichment?: The Emperor's Old Clothes: *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*' on Melbourne Law School, *Opinions on High* (19 May 2014) <<http://blogs.unimelb.edu.au/opinionsonhigh/2014/05/19/virgo-hills-industries/>>.

requires a different analysis of the election authorities to the one which this article has attempted.

The answer to that question appears, quite clearly, to be ‘no’. First, whatever be the precise meaning of the phrase ‘against conscience’,¹²⁷ it is doubtful in this context that it bears a meaning which is substantively different to the term ‘unjust’. Indeed, in *AFSL* itself, the plurality appeared to equate the two concepts when, in reference to the Court’s earlier decision in *David Securities Pty Ltd v Commonwealth Bank of Australia*,¹²⁸ their Honours observed:

Before that prima facie liability is displaced, *the recipient must point to circumstances which would make an order for restitution unjust*. In words which echo those of Lord Mansfield in *Moses v Macferlan*, it was said that, in order to show *that retention of the payment is not unjust*, the recipient is entitled to raise ‘by way of answer any matter or circumstance’.¹²⁹

The reference in the passage quoted to Lord Mansfield’s judgment in *Moses*¹³⁰ points to a second reason why the shift from an unjust enrichment theory of restitution, to an equitable one, is unlikely to change substantively the analysis of the election authorities.¹³¹ In order to understand why that is the case, it is necessary to first recognise a second similarity between the two approaches. That similarity relates to the process by which the relevant inquiry in each case is to be conducted. In neither case is the relevant question — being whether the enrichment is unjust, or whether the retention of the benefit is against conscience — at large. Rather, both approaches require the relevant question to be determined by reference to established categories of liability, with those categories being extended to cover novel fact situations through ‘the ordinary process of legal reasoning’.¹³²

Returning then to *Moses*, it is significant that both the unjust enrichment and equitable theories of restitution regard Lord Mansfield’s judgment in that case as providing the foundation from which the modern law of restitution has developed.¹³³ More specifically, the non-exhaustive list of factors which his Lordship identified in that case as warranting a claim for money had and received

127 See Rohan Havelock, ‘Conscience and Unconscionability in Modern Equity’ (2015) 9 *Journal of Equity* 1.

128 (1992) 175 CLR 353.

129 *AFSL* (2014) 253 CLR 560, 593 [67] (emphasis added). Gageler J made the point even more explicitly, describing the terms ‘unjust’, ‘unconscionable’ and ‘unconscientious’ as ‘synonyms’: at 618 [140].

130 (1760) 2 Burr 1005; 97 ER 676.

131 Kremer himself acknowledges that ‘[v]ery little of [his analysis] involves a great change in propositions of law or matters of substance’: Kremer, above n 121, 119.

132 *Pavey* (1987) 162 CLR 221, 257. See also *AFSL* (2014) 253 CLR 560, 579 [20] (French CJ), 596 [76] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 619 [141] (Gageler J); Kremer, above n 121, 109.

133 See *AFSL* (2014) 253 CLR 560, 592–3 [65]; *Lampson* [2014] WASC 162 (7 May 2014) [54]. See also Kremer, above n 122, 97; Mason, Carter and Tolhurst, above n 24, 17–18 [117]; Warren Swain, ‘Unjust Enrichment and the Role of Legal History in England and Australia’ (2013) 36 *University of New South Wales Law Journal* 1030.

are still recognised, both on an unjust enrichment and equitable analysis, as defining the established categories of restitutionary liability.¹³⁴

Against this background, two further points assume significance. The first is that the doctrine of failure of consideration was one of the factors identified by Lord Mansfield in *Moses* as justifying a claim for money had and received. It follows that this article's analysis of that doctrine, insofar as it has been deployed to justify the election authorities, can be quarantined from the broader debate about the conceptual basis of restitution in Australia.

Secondly, it is submitted that the ultimate contention of this article — that the election authorities lack a valid jurisprudential foundation — is not undermined by the shift from an unjust enrichment theory of restitution, to an equitable one. As has been noted, the equitable approach (at least on Kremer's analysis) focuses upon whether the defendant can establish a 'right to retain' the benefit in question. In order to discharge that requirement, it is clear that the defendant may point to any circumstance which shows that he or she has a 'valid legal, equitable or moral claim' to the benefit received.¹³⁵ In the context of the election authorities, it is submitted that the corollary of accepting that a repudiation by the principal does not result in a failure of consideration in respect of the work partially performed by the builder prior to the repudiation is that the principal will invariably have an obvious circumstance to which it can point in order to defeat the restitutionary claim — namely, that the work was performed pursuant to a valid contractual obligation. In other words, absent a failure of consideration, the existence of an enforceable contract, governing both the performance of the work, and the builder's right to compensation, precludes the possibility that the principal's retention of the benefit of the work would be 'against conscience'.¹³⁶

VII CONCLUSION

This article has sought to demonstrate the limitations of the failure of consideration theory in explaining the basis for a builder's right to sue for *quantum meruit* following a repudiatory breach by the principal. It has been argued that the theory rests upon a misconception of the nature of a builder's obligation under a typical construction contract, and the basis upon which that obligation is performed. This misconception appears to be attributable to a false assumption that the jurisprudence regarding the restitution of a payment for failure of consideration can be transposed to cases involving the restitution of non-monetary benefits.

134 *Lampson* [2014] WASC 162 (7 May 2014) [54]; Kremer, above n 121, 99, 115. Although the list of factors identified in *Moses* were never intended to be exhaustive, Edelman J has observed that '[a] quarter of a millennium later ... there is only limited judicial recognition of unjust factors beyond those in this list': *Lampson* [2014] WASC 162 (7 May 2014) [55].

135 Kremer, above n 121, 109. See also *AFSL* (2014) 253 CLR 560, 593 [66]–[67].

136 See *Pavey* (1987) 162 CLR 221, 256 where Deane J observed 'if there was a valid and enforceable agreement governing the claimant's right to compensation, there would be neither occasion nor legal justification for the law to superimpose ... an obligation ... to pay a reasonable remuneration'. See also Kremer, above n 121, 111.

In any event, it has been argued that the theory ultimately fails, and that the traditional objection to the election authorities remains unanswered.

Two final observations can be made in conclusion. First, although the discussion has largely been confined to the building context, the criticisms which have been outlined in this article can be articulated at a more general level. In particular, the argument which has been made in Part IV (that the consideration for a builder's performance under a construction contract is the principal's promise to pay the contract price, not the performance of that promise) is not limited to the award of *quantum meruit* in respect of building work. To the contrary, the analysis is likely to apply wherever restitution is sought in respect of complex, non-monetary benefits provided pursuant to a contract which has been discharged for breach.

Secondly, this article has focussed upon the right of an innocent builder to sue for *quantum meruit* following a repudiation by the principal. Some commentators have argued that the failure of consideration theory applies equally where the builder has itself repudiated the contract, and seeks *quantum meruit* against the innocent principal.¹³⁷

The criticisms which have been made regarding the theory of failure of consideration in its application to claims for *quantum meruit* by an innocent builder would apply with equal force to claims made by a builder who has repudiated the contract. However, there is an additional reason why a claim in restitution¹³⁸ cannot succeed in these circumstances. As has been pointed out, in assessing whether a failure of consideration has occurred in a contractual context, the basis of the relevant transaction must be ascertained objectively by reference to the common intention of the parties. Where a builder's obligation is entire, the intention of the parties is plainly that the builder should have no right to payment unless it completes the work. Accordingly, it is difficult to see how the basis of the transaction can be said to have failed where the builder does not complete the work, and is refused payment on that basis.

As Edelman and Bant point out, where the claim for restitution is made by an innocent party, and putting to one side the criticisms which have been made in Part V of this article, this problem can be overcome on the ground that an additional basis for the transaction must have been that the principal would not prevent the builder from completing the project.¹³⁹ Such a conclusion makes obvious commercial sense. One can readily understand why a builder who has

137 See Morris, above n 12; Burrows, above n 12. Proponents of this view argue that *Sumpter v Hedges* [1898] 1 QB 673, a case which has come to be regarded as firmly establishing the absence of any right to claim *quantum meruit* in such circumstances, was wrongly decided. See further *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* (2013) 29 BCL 329, 363–4; *Austman Pty Ltd v Mount Gibson Mining Ltd* (2013) 29 BCL 154, 219.

138 That is not to say that a claim brought on some basis other than restitution for failure of consideration should not be available. For example, Tarrant has argued that a discretionary, equitable remedy, developed by analogy with the principle of relief against forfeiture, should be available to a plaintiff in cases of this kind: see generally Tarrant, 'Partial Failure of Consideration', above n 106. Cf McFarlane and Stevens, above n 45, 578–581.

139 Edelman and Bant, above n 12, 252. See also McFarlane and Stevens, above n 45, 577.

agreed to forgo a right to payment until completion would only do so on the footing that it would, in fact, be permitted to complete.

The position is, however, altogether different where the work cannot be completed as a result of the builder's own breach. In that situation, there is no reason to qualify the prima facie basis upon which the transaction was entered into, namely, that the builder would only be paid if it completed the works. It follows that, to adopt the words of Mason CJ, there can be no failure of consideration where 'the plaintiff's unwillingness or refusal to perform the contract on his or her part is the cause of the defendant's non-performance'.¹⁴⁰

140 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 352.