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RECONSIDERING "TOTAL" FAILURE

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ABSTRACT. *The law has long recognised a right to recover an enrichment transferred on a consideration which has failed. However, the consideration has to fail totally. Much ink has been spilled arguing that the limit is a bad one. Less has been written about quite what a total failure of consideration actually is. In this paper, it is argued that the best understanding of the total failure rule is that it prevents restitution when the failure is insubstantial; only substantial failures justify restitution. This shows that the limit is integral to the justification of the award of restitution.*

KEYWORDS: *Failure of consideration; total failure; substantial failure; apportionment; restitution; unjust enrichment; contract.*

INTRODUCTION

In *Moses v Macferlan*, Lord Mansfield gave a list of cases where a claimant is entitled "to recover back money which ought not in justice to be kept".[1] One such case was where money is paid "upon a consideration which happens to fail".[2] It is well established that the consideration must *totally* fail; a "partial failure of consideration gives rise to no claim for recovery".[3] Discussion usually focuses on whether the total failure requirement is justified. This article examines the logically prior question of what the total failure rule actually means. The best understanding of the total failure rule is argued to be that when a claimant transfers an enrichment to a defendant subject to a condition, the claimant can recover only if a substantial part of the condition fails. In other words, the total failure rule bars recovery for insubstantial failures of the condition of the transfer. The total failure rule can then be seen to be justifiable as a matter of principle. The article then

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[1] *Moses v Macferlan* (1760) 2 Burr. 1005, 1010 (Lord Mansfield).

[2] Ibid., at p. 1012 (Lord Mansfield). It is assumed that failure of consideration is part of the law of unjust enrichment: for more detail on the debate, see F. Wilmot-Smith, "§38 and the Lost Doctrine of Failure of Consideration" in C. Mitchell and W. Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Oxford 2013).

[3] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32, 77 (Lord Porter), H.L.

examines two related areas which some have considered a challenge to the total failure rule. Properly understood, neither is relevant to the meaning of total failure.

Understanding Failure of Consideration

Failure of consideration provides for the recovery of enrichments transferred conditionally. For instance, in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd.* the claimants made an advance payment of £1,000 towards the purchase of £4,800 worth of machinery from the defendants.[4] When war broke out between England and Germany, the contract was frustrated and the claimants sought restitution of the money paid. The House of Lords held that the money paid was in principle recoverable for a failure of consideration. Lord Wright was the clearest in expressing the reasoning:

> 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.[5]

The condition to which Lord Wright refers cannot be a contractual condition: not only had the contract in question been frustrated, the doctrine can apply even when there is no contract at all.[6] The defendant may or may not make a contractual undertaking to satisfy the condition. If there is such an undertaking and the condition fails, there may be a concurrent action for breach of contract. However, that is irrelevant to the law of unjust enrichment: the condition is either satisfied or it fails. If the condition fails, a power to effect restitution is awarded.

In *Fibrosa*, the money was paid conditionally upon performance. Viscount Simon L.C. said that "generally speaking" the condition is "the performance of the promise".[7] The caveat is important.[8] Failure of consideration is not coterminous with failure of counter-performance; instead, failure of counter-performance is one instance of a broader principle.[9] The principle is that transfers can be conditional and on failure of the condition a power to effect restitution is awarded.

[4] Ibid.
[5] Ibid., at p. 65 (Lord Wright). See, further, P. Birks, "Restitution and the Freedom of Contract" (1983) 36 C.L.P. 141, 151.
[6] For instance, in *Guinness Mahon Co.. Ltd. v Chelsea and Kensington Royal London Borough Council* [1999] Q.B. 215 C.A. the contract in question was void and yet the Court of Appeal awarded restitution for a failure of consideration.
[7] *Fibrosa v Fairbairn* [1943] A.C. 32, 48 (Viscount Simon L.C.); P. Mitchell, "Artificiality in Failure of Consideration" (2010) 29 University of Queensland Law Journal 191, 198–99.
[8] F. Wilmot-Smith, "Replacing Risk-Taking Reasoning" (2011) 127 L.Q.R. 610, 618.
[9] A. Skelton, *Restitution and Contract* (Oxford 1998), p. 6; P. Mitchell, "Artificiality in Failure of Consideration" at pp. 196–200. Compare *Giedo van der Garde BV v Force India Formula One Team Ltd. (formerly Spyker F1 Team Ltd. (England))* [2010] EWHC 2373 (Q.B.) Q.B.D., at [261] (Stadlen J.).

A transfer can be conditional upon any range of facts. For example, if a gift is made in anticipation of a future marriage, and the marriage does not take place, the donor can recover her gift.[10] There, the condition is that the marriage takes place. Equally, if a payment is made to a company on the condition of its solvency, if the company is insolvent restitution will be awarded.[11] A transfer can even be conditional upon the creation of legal rights or upon the imposition of, or release from, legal obligations.[12]

In the academic literature, there is a debate about how best to label this phenomenon. The language with the best pedigree is failure of *consideration*. This is apt to confuse as it implies false parallels with the law of contract.[13] In response, some commentators have preferred the label failure of *basis*.[14] Yet others have preferred the language of failure of *condition*.[15] This article will use the language of failure of condition. However, it does so purely for ease of expression; nothing of substance turns on the choice. That is because this debate is ultimately "a question of which is the more apt terminology; it does not have any legal significance".[16] Regardless of the preferred label, all commentators agree on two points of importance. First, that the conceptual structure of the doctrine in question concerns conditional transfers.[17] Secondly, that the consideration (or condition) must fail totally if restitution is to be awarded. The next section turns to that requirement.

Understanding The Total Failure Requirement

A. Introduction

It is well known that the condition of a transfer must fail totally if restitution is to be awarded. The House of Lords upheld this requirement relatively recently.[18] However, they did so noting that the

[10] *Re Ames' Settlement* [1946] Ch. 217, 223 (Vaisey J.). T. Krebs, *Restitution at the Crossroads: A Comparative Study* (London 2001), 113–14 and 163–65; T. Baloch, *Unjust Enrichment and Contract* (Oxford 2009), 90; A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford 2011), 398–9.

[11] *Neste Oy v Lloyds Bank Ltd., The Tiiskeri, Nestegas and Enskeri* [1983] 2 Lloyd's Rep. 658, 666 (Bingham J.).

[12] *Fibrosa v Fairbairn* [1943] A.C. 32, 56 (Lord Russell) and 82 (Lord Roche). For an excellent summary, see P. Mitchell, "Artificiality in Failure of Consideration" at pp. 200–8.

[13] For an explanation of these problems, see C. Mitchell, P. Mitchell and S. Watterson, *Goff and Jones: The Law of Unjust Enrichment* (8th ed., London 2011) at [12–12].

[14] E.g. ibid., at [12–10].

[15] *Anderson v McPherson [No. 2]* [2012] WASC 19 at [235] (Edelman J.).

[16] *Haugesund Kommune v Depfa ACS Bank* [2011] EWCA Civ 33; [2012] Bus. L.R. 230, at [62] (Aikens L.J.). His Lordship was discussing the distinction between absence and failure of consideration; however, the point is the same.

[17] E.g., G. Virgo, *The Principles of the Law of Restitution* (2nd ed., Oxford 2006), 306, where 'consideration' is defined as 'the condition which formed the basis for the claimant transferring a benefit to the defendant.' C. Mitchell, P. Mitchell and S. Watterson, *Goff and Jones: The Law of Unjust Enrichment*, at [12–01]: 'the recipient's right to retain [the enrichment] is conditional.'

[18] *Stocznia Gdanska v Latvian Shipping Co.* [1998] 1 W.L.R. 574, 590 (Lord Goff), H.L.; see also *Goss v Chilcott* [1996] A.C. 788, 797 (Lord Goff), P.C.

requirement "has been subject to considerable criticism".[19] There is constant pressure to abolish the requirement from both academics[20] and some judges.[21] However, the definition of the requirement is generally assumed without argument. This section addresses that deficiency. It examines the deficiencies of three interpretations of the total failure rule that commentators have offered. Then, with reference to history, precedent and principle, the best interpretation of the rule is shown to be that the claimant can recover only if a substantial part of the condition fails. This rebuts the criticisms of the total failure rule: total failure, properly understood, is a good rule for the law to adopt.

B. Three Flawed Interpretations

In the cases and academic literature, three interpretations of the total failure rule have been offered. Each is flawed. The first interpretation arises out of *Stocznia Gdanska v Latvian Shipping Co*.[22] The case concerned a contract to build and supply a ship with the payment in instalments. The defendants had paid the first instalment and the claimants commenced construction of the vessel. However, the vessel had not been delivered when the claimants terminated the contract (as the defendants had failed to pay the second instalment). One argument in the House of Lords was whether payment of the second instalment would be immediately recoverable for a total failure of condition. Lord Goff, in rejecting this argument, said of the total failure doctrine:

> 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.[23]

Although there are some formulations in older cases to the effect that any performance prevents a total failure,[24] Lord Goff's formulation "cannot be regarded as an exclusive definition".[25] That is because, as we have just seen, the conditions attaching to a transfer extend beyond the requirement that the defendant perform a promise. For instance, in *Re Ames' Settlement*, a settlement was made on anticipation of a future marriage.[26] The marriage never materialised. Vaisey J called it "a simple case of money paid on a consideration which failed".[27] The settlement

[19] *Stocznia Gdanska v Latvian Shipping Co.*. [1998] 1 W.L.R. 574, 590 (Lord Goff).
[20] E.g. E. McKendrick, "Total Failure of Consideration and Counter-Restitution: Two Issues or One?" in P. Birks (ed), *Laundering and Tracing* (Oxford 1995), 230–31; A. Burrows, *The Law of Restitution*, pp. 333–35.
[21] Most recently, *Giedo van der Garde v Force India* [2010] EWHC 2373, at [367] (Stadlen J.).
[22] *Stocznia Gdanska v Latvian Shipping Co.* [1998] 1 W.L.R. 574.
[23] Ibid., at p. 588d (Lord Goff).
[24] E.g. *Whincup v Hughes* (1870–71) L.R. 6 C.P. 78, 85 (Montague Smith J.).
[25] G. Virgo, *The Principles of the Law of Restitution*, p. 316. Virgo is here arguing that Lord Goff cannot be defining the conditions of a transfer; however, the point is essentially the same.
[26] *Re Ames' Settlement* [1946] Ch. 217.
[27] Ibid., at p. 223 (Vaisey J.).

was on the condition that a specific legal state of affairs, the marriage, would come into existence. The settlement did not create any obligations and so talk of part performance of duties appears inapposite.[28]

We should reformulate Lord Goff's analysis in more abstract terms. In *Stocznia*, the defendants alleged that the claimants had failed to render sufficient counter-performance. For that reason, Lord Goff's observations are confined to situations where the condition is a failure of performance. His Lordship appears to suggest that partial satisfaction of the condition of the transfer prevents a total failure. So we could conceive of the test in these terms:

> **(A)** When C transfers an enrichment to D subject to a condition, C cannot recover from D if any aspect of the condition is satisfied.

In *Re Ames*, the condition was binary: it could not partially fail. However, not all contingent conditions are binary. For instance, suppose that C gives D an umbrella and says that she (D) can keep it so long as it rains for the next three days. It rains for two days and then it stops raining. The condition on which D can retain the umbrella is that it rains for three days. As it has rained for two days, one can say that there has been a partial satisfaction of this condition. Therefore, (A) would suggest that C could not recover the umbrella.

(A) appears to be popular amongst commentators.[29] In his *Introduction to the Law of Restitution*, Birks appears to endorse it. He asks "What constitutes total failure?" and responds:

> once the defendant has done something which is not preliminary to but part of the performance of the condition it can no longer be said that the consideration has wholly failed.[30]

Virgo is also clear in his endorsement of (A): "Restitution can be awarded where no part of the condition on which the transfer of a benefit to the defendant is contingent has been fulfilled."[31] The editors

[28] The analysis here assumes that the total failure rule must apply to those cases where the condition is other than performance. Burrows has claimed that the total failure rule simply does not apply in such cases: A. Burrows, *The Law of Restitution*, at p. 322 fn21. However, there is no suggestion in the cases that the total failure rule is peculiar to conditions concerning the defendant's performance: compare G. Virgo, *The Principles of the Law of Restitution*, at p. 315.

[29] Beyond the references below, see J. Edelman, "Restitution for a Total Failure of Consideration: When a Total Failure Is Not a Total Failure" (1996) 1 Newcastle Law Review 57, 57; R. Stevens, "Is There a Law of Unjust Enrichment?" in S. Degeling and J. Edelman (eds), *Unjust Enrichment and Commercial Law* (Pyrmont, N.S.W. 2008) 11, 27; E. Peel, *Treitel on the Law of Contract* (13th ed., London 2011) at [22–003]; A. Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford 2012), 88. Barker appears to, but is imprecise about the definition of total failure: K. Barker, "Restitution of Passenger Fare: The Mikhail Lermontov" [1993] L.M.C.L.Q. 291, 293. See also *Rover International Ltd. v Cannon Film Sales Ltd. (No 3)* [1989] 1 W.L.R. 912, 924 (Kerr L.J.).

[30] P. Birks, *An Introduction to the Law of Restitution* (Oxford 1985), 245.

[31] G. Virgo, *The Principles of the Law of Restitution*, p. 310.

of *Goff and Jones* also seem to endorse (A). They say that "[i]f even a very small part of the benefit which formed the [condition] for the [transfer] has been conferred, no action will lie".[32]

Despite this support, (A) is a problematic interpretation of the law. It cannot explain a key distinction the total failure rule draws. Where an enrichment is transferred on the condition that the defendant render performance, the satisfaction of a "collateral" obligation or the rendering of "incidental" performance will not bar restitution.[33] For instance, in *Giedo Van der Garde BV v Force India Formula One Team Ltd.*, the claimant, a prospective (now current) Formula 1 driver, paid the defendant, a Formula 1 team, $3 million.[34] In return, the defendant promised to provide various benefits to the claimant. There were two principal benefits. First, that the claimant would "drive a Formula One racing car in testing and/or practising and/or racing for a minimum of 6,000 km".[35] Secondly, that the claimant would gain a right to take part in the Friday morning testing sessions (contingent on him obtaining an F.I.A. Licence).[36] Beyond these two benefits, the claimant received various other entitlements: for instance, the use of a double room on the days he performed tests, sponsorship places on the racing car and the driver's suit, travel expenses and paddock passes.[37] The claim for recovery of the $3 million for a total failure of condition was not barred by receipt of the latter benefits: Stadlen J. said these benefits were "an incidental or collateral benefit rather than part of the essential bargain contracted for".[38] Receipt of such incidental benefits does not prevent restitution for a failure of condition.[39] However, if the condition of the transfer is the defendant's performance of the obligations arising under the transfer, this is inconsistent with (A).

Of course, commentators have noticed the inconsistency. Their usual response is that disregarding collateral benefits is simply inconsistent with the concept of total failure. For instance, although Virgo is clear in endorsing (A),[40] he calls the collateral benefits doctrine

[32] C. Mitchell, P. Mitchell and S. Watterson, *Goff and Jones: The Law of Unjust Enrichment*, at [12–16].

[33] *Rowland v Divall* [1923] 2 K.B. 500 C.A.; *Karflex Ltd. v Poole* [1933] 2 KB 25 DC; *Warman v Southern Counties Car Finance Co. Ltd.* [1949] 2 K.B. 576; *Heywood v Wellers [a firm]* [1976] Q.B. 446, 458–9 (Lord Denning M.R.); *Rover International Ltd. v Cannon Film Sales Ltd. (No 3)* [1989] 1 W.L.R. 912; *Baltic Shipping Co. v Dillon, The "Mikhail Lermontov"* (1993) 176 C.L.R. 344, 378 (Deane and Dawson JJ.) (H.C.A.); *Barber v N.W.S. Bank plc* [1996] 1 W.L.R. 641 CA.

[34] *Giedo van der Garde v Force India* [2010] EWHC 2373; noted D. Winterton and F. Wilmot-Smith, "Steering a Course on Contract Damages and Failure of Consideration" (2012) 128 L.Q.R. 23.

[35] *Giedo van der Garde v Force India* [2010] EWHC 2373 at [3] (Stadlen J.).

[36] Ibid., at para. [177] and [331] (Stadlen J.).

[37] Ibid. at para. [337] (Stadlen J.). See 1.2(i)–(ii) of the Fee Agreement, excerpted at [10] of Stadlen J.'s judgment.

[38] Ibid. at para. [337] (Stadlen J.).

[39] Equally, failure to perform any of these collateral obligations cannot precipitate a failure of condition.

[40] See note 31 above.

"a covert manipulation of" the total failure rule.[41] On this analysis, where collateral benefits are received there is in truth no *total* failure of the condition; however, the law allows the benefits to "be discounted [such as to] prevent the consideration from failing totally".[42] When analysed in this manner, there is much to Burrows' claim that there is "artificiality in applying the 'total failure' requirement".[43]

However, another move is open to us. Judges appear to view the collateral benefits doctrine as consistent with, and not an exception to, the total failure rule. For instance, in *Rowland v Divall* the claimant paid the defendant money to buy a car.[44] The defendant transferred possession in the car to the claimant. The defendant did not have the best title to the car and it was eventually repossessed. Although the transfer of possession was part of the defendant's obligations, the Court of Appeal held that receipt of this benefit did not prevent a total failure. Scrutton L.J. said that "the [claimant] is entitled to recover the whole of the purchase money as for a total failure of consideration".[45] There is no suggestion that the benefit received is a difficulty for that proposition.[46] This gives us reason to revise (A). In response, two further interpretations of the total failure rule have been offered, both of which are consistent with the collateral benefits doctrine. The first ((B)) suggests that the total failure rule is about counter-restitution; the second ((C)) suggests that the total failure rule precludes restitution where any essential obligation is part performed.

Consider first:

(B) When C transfers an enrichment to D subject to a condition and the condition fails, C must make counter-restitution of any benefits received from D prior to the failure of condition.

In some formulations, this is how Birks interpreted the requirement. For instance, Birks claimed that:

> when the plaintiff's reason for restitution is that the [condition] for his transfer has totally failed, the word 'totally' indicates no more than that this cause of action, like others, is subject to the general principle … [that the defendant must] make counter-restitution.[47]

[41] G. Virgo, *The Principles of the Law of Restitution*, pp. 320 and 351. Further, A. Burrows, "The English Law of Restitution: A Ten-Year Review" in J. Neyers, M. McInnes and S. Pitel (eds), *Understanding Unjust Enrichment* (Oxford 2004) 11, 29; *Giedo van der Garde v Force India* [2010] EWHC 2373, at [236] (Stadlen J.).

[42] G. Virgo, *The Principles of the Law of Restitution*, p. 319. A similar claim is made in *Giedo van der Garde v Force India* [2010] EWHC 2373 at [339] (Stadlen J.).

[43] A. Burrows, *The Law of Restitution*, p. 324. Similarly, Beatson calls total failure "arbitrary" as it ignores "real benefits received": J. Beatson, "Discharge for Breach: The Position of Instalments, Deposits and Other Payments Due before Completion" (1981) 97 L.Q.R. 389, 406.

[44] *Rowland v Divall* [1923] 2 K.B. 500.

[45] Ibid., 506 (Scrutton L.J.).

[46] See also ibid. p. 503 (Bankes L.J.), 506 (Atkin L.J.).

[47] P. Birks, "Failure of Consideration" in F. Rose (ed), *Consensus Ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel* (London 1996) 179, 180–81. For an earlier example of this

Some support for this formulation can be found in *David Securities*, where the High Court of Australia said that "[i]n cases where … counter-restitution is relatively simple, insistence on total failure of consideration can be misleading or confusing".[48] (B) can explain the collateral benefits cases: the claimant simply has to make counter-restitution of the collateral benefits received at the defendant's expense.

However, there are three problems with (B). First, the interpretation fails to take the total failure rule seriously on its own terms. The total failure rule is understood as an epiphenomenon of a separate requirement, of counter-restitution. We should first seek an interpretation that explains the requirement as it is presented by the law, i.e. as partly constitutive of a principle which can justify restitution of a transfer. This point does not make (B) an invalid interpretation; it simply means that it will be defeated by any interpretation that can account for the way the law draws the distinctions it does.

Secondly, (B)'s failure to take the law seriously on its own terms means that the interpretation cannot explain the distinctions the total failure rule is used to draw. Sometimes the receipt of benefits will bar a claim; sometimes it will not. (B) cannot explain why these distinctions are drawn. Even more problematic is that there is sometimes no total failure even if the claimant receives no benefit at all. That was the situation in *Stocznia*, described above: the mere performance of contractual duties defeated the claim.[49]

Finally, the interpretation places the total failure rule at the wrong stage of the inquiry. Proving that the condition of the transfer has totally failed is something the claimant must make out to get liability off the ground; without such proof, the defendant has nothing to answer for. Accordingly, an explanation of the total failure requirement should show how the requirement is thought to help determine why the transfer is unjust.[50] That is, it should explain why it would be unjust if the claimant were *not* awarded restitution. But, on (B), the total failure rule is concerned with a different kind of injustice. It is concerned with the possible injustice if the claimant *is* awarded restitution: that the claimant will be enriched unjustly at the defendant's expense.[51] This concern is not about the injustice of the transfer itself;

claim, see F. Reynolds, "Warranty, Condition and Fundamental Term" (1963) 79 L.Q.R. 534, 551. Compare P. Birks, *Introduction*, p. 242, where Birks says the requirement of total failure "disappears" when counter-restitution is possible. On the relationship described here see E. McKendrick, "Total Failure of Consideration and Counter-Restitution", p. 217.

[48] *David Securities Pty Limited v. Commonwealth Bank of Australia* (1992) 175 C.L.R. 353 HCA, 383 (Mason C.J., Deane, Toohey, Gaudron and McHugh JJ.). Further, J. Edelman and E. Bant, *Unjust Enrichment in Australia* (Oxford 2006), 258–60.

[49] *Stocznia Gdanska v Latvian Shipping Co.* [1998] 1 W.L.R. 574, 588d (Lord Goff).

[50] This formulation leaves room for the law being mistaken about the merits: the point is that an interpretation should explain why one might think that the total failure rule serves these ends.

[51] *Spence v Crawford* [1939] 3 All E.R. 271, 288–9 (Lord Wright).

it is about the injustice of unwinding the transfer. For this reason, (B) fails to locate correctly the place of the total failure rule in constituting the reasons to reverse the transfer.

Consider instead:

(C) When C transfers an enrichment to D subject to a condition, C cannot recover from D if any essential aspect of the condition is satisfied.

This is the best way to state the orthodox view of (A), adjusted for the collateral benefits doctrine. (C) does not view the collateral benefits doctrine as an exception to the rule; instead, it sees the doctrine as defining the rule. In that respect, it takes the total failure rule seriously. The interpretation conceives of conditions as complex, composed of various aspects, but with an essential core. The total failure rule concentrates on that core. For instance, in *Giedo van der Garde* the essential elements of the defendant's obligations were the provision of the miles in the Formula 1 car and the right to Friday morning testing. The provision of paddock passes was inessential. The receipt of those paddock passes did not defeat the claim; the receipt of the right, being essential, did.[52] Beyond *Giedo van der Garde*, the extent of support for (C) in the cases is unclear. It might be the interpretation of Mason C.J. in *Baltic Shipping v Dillon*, who said that "receipt … of any part of the bargained-for benefit" would preclude a total failure.[53]

(C) might also seem to be the best way of reconciling *Hunt v Silk* with the collateral benefits cases.[54] In *Hunt v Silk*, the defendant agreed to let a house to the claimant for £10. The premises were to be repaired by the defendant. The claimant paid the £10 and took possession. The lease was not executed within 10 days and the repairs were not carried out. The claimant left the house "some days"[55] later and sought to recover the £10. The claim was denied. The word "total" does not feature once in the report of the case. Nevertheless, *Hunt v Silk* has subsequently been interpreted by commentators as the source – and so the definition – of the total failure rule. It is said that recovery was denied because an essential aspect of the obligations was performed. Under (C), the case can be reconciled with the collateral benefits cases because the benefit received was part of the essential bargain contracted for. Despite this, we should not endorse (C). Instead, we should endorse:

(D) When C transfers an enrichment to D subject to a condition, C can only recover from D if a substantial part of the condition is unsatisfied.

[52] *Giedo van der Garde v Force India* [2010] EWHC 2373, at [366]–[367] (Stadlen J.).
[53] *Baltic Shipping Co. v Dillon* (1993) 176 C.L.R. 344, 350 (Mason C.J.).
[54] *Hunt v Silk* (1804) 5 East 449 K.B.
[55] Ibid., p. 450.

There are three crucial steps in the argument that (D) is the best interpretation of the total failure rule. First, explaining why *Hunt v Silk* is not an objection to (D); secondly, demonstrating why the key claim of (D), the requirement of "substantial" failure of the condition, is the best interpretation of the law (and, in particular, showing that it is better than (C)); finally, justifying the rule as a matter of principle. The next sub-section makes these three steps.

C. Reconsidering Total Failure

1. The myth of Hunt v Silk

Hunt v Silk is widely assumed to be the foundation of the total failure rule.[56] This reading of the case has been crucial to support for (A) and (C). But, as Paul Mitchell has convincingly demonstrated, the case is about a quite different point.[57] The question was whether the contract in question could be rescinded ab initio for the defendant's breach. Lord Mansfield noted this requirement in *Moses v Macferlan*. Describing the result of *Dutch v Warren*, his Lordship said that when money is paid under an agreement that the recipient refuses to perform, the payor may "disaffirm the agreement ab initio by reason of the [failure of condition], and bring an action for money had and received to his use".[58] *Hunt v Silk* said that possession would prevent this rescission. For example, Lord Ellenborough C.J. said:

> Where a contract is to be rescinded at all, it must be rescinded in toto, and the parties put in statu quo. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded.[59]

However, the requirement that rescission be ab initio faded in the nineteenth century.[60] *Fibrosa* made it clear that a contract did not need to be rescinded ab initio before a claim for restitution could be brought.[61] Therefore:

> *Hunt v Silk* … can be seen as an important contribution to the early nineteenth century law on when a contract could be rescinded ab initio … However, the case had nothing to say about the concept of failure of consideration.[62]

[56] E.g., R. Goff, "Reform of the Law of Restitution" (1961) 24 M.L.R. 85, 89.
[57] P. Mitchell, "Artificiality in Failure of Consideration" (2010) 29 University of Queensland Law Journal 191, 193–96. My analysis of the case owes much to Mitchell's paper. Further, R. McGarvie, "The Common Law Discharge of Contracts Upon Breach" (1964) 4 Melbourne University Law Review 305, 308.
[58] *Moses v Macferlan* (1760) 2 Burr 1005, 1011 (Mansfield C.J.). This report of the case is more detailed than the report of the case itself: (1720) 1 Strange 406.
[59] *Hunt v Silk* (1804) 5 East 449, 452 (Lord Ellenborough C.J.).
[60] See T. Baloch, *Unjust Enrichment and Contract*, p. 124–28. See, in particular, *Maclean v Dunn* (1828) 4 Bing. 722, 728; 130 E.R. 947.
[61] *Fibrosa v Fairbairn* [1943] A.C. 32.
[62] P. Mitchell, "Artificiality in Failure of Consideration" at p. 196.

2. The origin of the total failure rule

To understand the meaning of the total failure rule we need to look elsewhere. The foundations of the doctrine remain murky. A particular difficulty arises because of the unfortunate ambiguity of the word "consideration".[63] However, the distinction between total and partial failures seems to be drawn first in *Morgan v Richardson* and *Tye v Gwynne*.[64] In both cases, an action was brought on a bill of exchange, and the acceptor replied that the goods supplied were below the stipulated quality. Lord Ellenborough denied that this prevented enforcement of the bill; instead, the acceptor had to bring a claim for damages.[65]

The distinction being drawn, which is borne out in the cases that followed, is between those cases where there had been sufficient performance by the defendant to earn the debt in question and those where performance was insufficient.[66] Where the debt was not earned, the bill could not be enforced and pre-payments could be recovered; where it was earned, the bill could be enforced and pre-payments could not be recovered (but damages could still be claimed).[67] This position is well expressed by Lord Tenterden C.J.:

> [a] party holding bills given for the price of goods supplied can recover upon them, unless there has been a total failure of consideration. If the consideration fails partially, as by the inferiority of the article furnished to that ordered, the buyer must seek his remedy by a cross action.[68]

As the inquiry was into whether the bill could be enforced, the question was not whether there was *any* part performance; instead, the inquiry was into the nature and extent of the performance rendered.[69] In this way, the total failure rule was used to distinguish between

[63] E.g. *Smith v Scott* 141 E.R. 654, 659; (1859) 6 C.B. N.S. 771, 783 (Byles J.).

[64] *Morgan v Richardson* (1806) 7 East 482n, 1 Camp. 40n, 3 Smith K.B. 487n; *Tye v Gwynne* (1810) 2 Campbell 346, 170 E.R. 1179, 412; W. Barnes, *Bayley's Summary of the Law of Bills of Exchange, Cash Bills and Promissory Notes*, 3rd ed. (London 1813), 235.

[65] *Tye v Gwynne* (1810) 2 Campbell 346, 347; 170 E.R. 1179.

[66] *Wells v Hopkins* (1839) 5 M. & W. 7, 9–10; 151 E.R. 3, 5 (Parke and Alderson BB.); *Oxford v Provand* (1867–69) L.R. 2 P.C. 135, 156 (Sir William Erle).

[67] Importantly, this ensures that the ultimate allocation of the enrichment does not depend on the mere fact of when the money was to be paid. Further, *Mann v Lent* 109 E.R. 674, 677; (1830) 10 B. & C. 877, 884 (Lord Tenterden C.J.); *Trickey v Larne* (1840) 6 M. & W. 278, 278 (Parke B), 281 (Alderson B).

[68] *Obbard, assignees of Blofeld (a bankrupt) v Bentham* (1830) M. & M. 483, 486 (Lord Tenterden C.J.). There is some irony, then, in the allegation that it is "in defiance of established principle … to dress up as a claim for damages what was really a claim based on a partial "failure of consideration": *White Arrow Express Ltd. v Lamey's Distribution Ltd.* [1995] C.L.C. 1251, 1254 (Sir Thomas Bingham M.R.).

[69] *Obbard, assignees of Blofeld (a bankrupt) v Bentham* (1830) M. & M. 483, 486 (Lord Tenterden C.J.). Compare *Whincup v Hughes* (1870–71) L.R. 6 C.P. 78, 81 (Bovill C.J.), where Bovill C.J. flattens this important distinction.

substantial failures (where the debt was not earned) and insubstantial failures (where it was). This is why the origins of the total failure rule show (D) to be the best interpretation of the requirement.

This analysis is supported by reference to the development of the law of contract through the eighteenth century.[70] The effect of a breach of contract depended on whether the duties of the parties were construed as dependent or independent. The rules in this field were, for various reasons, decided to be unsatisfactory.[71] The law, largely through Lord Mansfield's judgments in *Kingston*[72] and *Boone*,[73] took a different approach to the construction of the parties' bargain. Where there was an insubstantial failure to perform, the parties' promises were held to be independent. The promisee was obliged to perform but could bring an action for breach of contract to remedy the promisor's defective performance.[74] However, where there was a substantial failure to perform by the other party, the promises were held to be dependent. The promisee was therefore excused from her own performance and could claim restitution. In the language of the time, a party could terminate a contract for breach and bring a claim for restitution where there was a "substantial failure of consideration".[75] For instance, in *Behn v Burness*, Williams J. stated the law in this way:

> If … [the claimant] has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition … and becomes a warranty in the narrower sense of the word – viz., stipulation by way of agreement, for the breach of which a compensation must be sought by damages[.][76]

The texts aligned the question of total failure with that of whether a contract could be terminated for breach. For instance, Story's *Treatise on the Law of Contracts* says that "[w]here the consideration

[70] In addition to the following references, see A. Beck, "The Doctrine of Substantial Performance: Conditions and Conditions Precedent" (1975) 38 M.L.R. 413, 421.

[71] T. Baloch, *Unjust Enrichment and Contract*, pp. 98–100.

[72] *Kingston v Preston* (1772) cited in argument in *Jones v Barkley* (1781) 2 Doug. 684; 99 E.R. 434.

[73] *Boone v Eyre* cited in argument in *Duke of St Albans v Shore* 1 H. Bl. 270, 273; 126 E.R. 160.

[74] Notice that rule three of Serjeant Williams' notes to *Boone* in his note to *Pordage v Cole* (1669) 1 Wms. Saund. 219, 85 E.R. 449, refers to whether "breach of such covenant may be paid for in damages" as relevant where "a covenant goes only to a part of the consideration", and thus the covenants would be treated as independent.

[75] The language is from T. Baloch, *Unjust Enrichment and Contract*, p. 111, but it represents a helpful summary of the analysis of the era. See, further, S. Stoljar, "The Doctrine of Failure of Consideration" (1959) 75 L.Q.R. 53, 72: "the failure of consideration had to be material or substantial or important before restitution … could be allowed."

[76] *Behn v Burness* (1863) 3 B. & S. 751, 755–6; 122 E.R. 281. Notice that the word "warranty" is used to describe what today we would call a "condition": "a warranty that is to say a condition" (755). See further *Chanter v Leese* (1839) 5 M&W 698; 151 E.R. 296: Tindal C.J. refers to *Boone v Eyre* in his reasoning that there was a total failure 701–02 (M&W); 297–98 (E.R.).

only partially fails, it will not afford a ground to rescind the contract". The text goes on to add that:

> where a contract is not entire, and the failure is not in respect to a material point touching the essence of the contract, so that there may be a compensation in damages for this deficiency, the contract cannot be rescinded, but the party is put to his special action thereon for damages.[77]

Important to this passage is the close link between termination[78] and total failure.[79] The distinction the total failure rule drew was between cases where the defendant had substantially performed and those where she had not. In synallagmatic contracts, an action for money had and received could be brought whenever there was a substantial failure of performance; where the failure was insubstantial, the contract could not be terminated and restitution of the sums paid could not be claimed. This demonstrates that (D) was the key idea motivating the total failure rule. Contrary to current orthodoxy, it was not just *any* failure of performance which prevented restitution being awarded but only *substantial* failures.[80]

3. Subsequent development

Despite the fact that (D) fits the genesis of the total failure rule, it would not be a good interpretation of the law if it could not explain subsequent cases. Textbook writers soon began to misunderstand the origins of the total failure rule. For instance, by Addison's 7th edition in 1878 an interpretation similar to (A) is recognisable, including a reference to *Hunt v Silk* as the basis of the doctrine.[81] Nevertheless, (D) remains the best interpretation of the law. This much is clear from three sets of cases: collateral benefits cases, entire obligations cases, and cases where the defendant's obligation is the payment of money.

The first set of cases demonstrating that the law remains committed to (D) is the collateral benefits cases, discussed above.[82] When the obligation performed by the defendant is collateral only, by definition the performance is not substantial: the language of collaterality is used to indicate just that. Therefore, where there is performance of only a

[77] W Story, *A Treatise on the Law of Contracts Not Under Seal* (Boston, 1844), §480. Further, (2nd edn, 1847) §480–81; (3rd edn, 1874) §480.

[78] The language of "rescission" is used, but the terms are here meant to denote the same event.

[79] The insufficiency of compensation may also be important to the justification of the award: see below, at 430–31. See *Roberts v Brett* 141 E.R. 595; (1859) 6 C.B. N.S. 611, 632 (Crompton J.).

[80] Compare *Havelock v Geddes* (1809) 10 East 555, 564; 103 E.R. 886, 890 (Lord Ellenborough C.J.). This may be best read as endorsing (C).

[81] C.G. Addison and L.W. Cave, *Addison on Contracts: Being a Treatise on the Law of Contracts*, 7th ed. (London 1875), 233–34. Previous editions had no such passage, though there may be a precursor: C.G. Addison, *A Treatise on the Law of Contracts*, 5th ed. (London 1862), 347. Compare C.G. Addison, *A Treatise on the Law of Contracts and Rights and Liabilities Ex Contractu*, 2nd ed. (London 1849) 322.

[82] See 419–20.

collateral obligation, a substantial part of the condition remains unsatisfied and restitution is rightly awarded.

The second set of cases demonstrating that the law remains committed to (D) is where a defendant's obligations are "entire". In these cases, part performance of an essential aspect of the defendant's obligations will not prevent a total failure. For instance, in *Sumpter v Hedges* the claimant agreed "to build two houses and stables on the defendant's land for a lump sum".[83] The claimant did half the building, but ran out of money and was unable to complete the work. The claimant sought to recover (amongst other things) the value of the work done. The Court of Appeal rejected the claim. In the words of A.L. Smith L.J., "where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered".[84] One could quibble with A.L. Smith L.J.'s construction of the contract. One could also query the premise that the condition precedent to the defendant's obligation to pay the contractual sum determined the condition as a matter of the law of unjust enrichment.[85] But suppose that his Lordship was correct in the individual case about the construction of the transfer. Now consider a counter-factual case, where the claimant paid the money in advance to the builder. Could the landowner have recovered the money for a failure of condition? Although the point is not entirely uncontroversial,[86] the better view is that he could have. As Gaudron J. said, in *Baltic Shipping*, "consistency requires that, unless some special provision governs the question, a party who has paid a deposit or paid in advance should be entitled to a refund in those same circumstances".[87] If (D) is the correct interpretation of the total failure rule, the question in the counter-factual case is whether "a substantial part of the condition" remains unsatisfied. Although "substantial" does not always mean "entire", in *Sumpter v Hedges* (and so in the counter-factual case) performance was insubstantial. Therefore, (D) can explain the entire obligations cases; no other interpretation of total failure can.[88]

The final set of cases which supports (D) are those where restitution of the value of goods or services is made notwithstanding the fact that the defendant has been paid part of the contract price.[89] For instance, in

[83] *Sumpter v Hedges* [1898] 1 Q.B. 673, 674 (A.L. Smith L.J.).
[84] Ibid.
[85] The critics of *Sumpter v Hedges* are often best read as making this claim, which concerns the best way to construe conditions in the law of unjust enrichment: see A. Burrows, *The Law of Restitution*, pp. 356–58.
[86] E.g. Law Com. W.P. No. 65 (1975), at [20].
[87] *Baltic Shipping Co. v Dillon* (1993) 176 C.L.R. 344, at [4] (Gaudron J.).
[88] Compare (C): an "essential aspect of the condition" would have been satisfied. To build a house, it is essential to lay its foundations.
[89] E.g. *Ebrahim Dawood Limited v Heath (Est. 1927) Limited* [1961] 2 Lloyd's Rep 512 Q.B.; *Lusty Architects v Finsbury Securities* (1991) 58 B.L.R. 66 C.A.

Pavey and Matthews v Paul the claimants worked as builders on the defendant's house.[90] The contract, which entitled the claimant to the market rate, was unenforceable.[91] The claimants were paid $36,000. They thought that their work was worth more than that. They brought a claim seeking $27,000 more. The High Court of Australia allowed the claim. The unjust factor was not an issue and was not argued, but it is most readily analysed as failure of condition.[92] It was once controversial to claim that failure of condition could be an unjust factor in cases of restitution for the value of services. While there was undoubted historical support for this view,[93] the contrary arguments of principle were always stronger.[94] As Keener recognised, over a hundred years ago:

> [Whether] the plaintiff … [sues] for work, labor, and material furnished, [or] for money lent, must be entirely immaterial, since the basis of recovery in either case, is that the defendant has received value from the plaintiff in exchange for which he ought in good conscience to return an equivalent.[95]

The matter is now settled authoritatively: the House of Lords has recognised a claim for a failure of consideration for services rendered.[96] The difficulty is in explaining why part-payment does not defeat a claim for total failure. Some are forced to say that the total failure bar simply does not apply in this area.[97] Others think it clear that restitution is being granted for a partial failure in such cases.[98] However, (D) can easily explain the result as consistent with principle. Under (D), part payment will only bar a claim for failure of condition where the condition is substantially performed. If A has a duty to pay a lump sum, partial payment will normally be insufficient to satisfy that obligation.

[90] *Pavey & Matthews Pty Ltd. v Paul* (1987) 162 C.L.R. 221 H.C.A.

[91] s. 45 of the Builders Licensing Act 1971 (N.S.W.) required such contracts to be "in writing signed by each of the parties".

[92] A. Burrows, "Free Acceptance and the Law of Restitution" [1988] 104 L.Q.R. 576, 592; P. Birks, "In Defence of Free Acceptance" in A. Burrows (ed), *Essays on the Law of Restitution* (Oxford 1991), 111. See now *Equuscorp Pty Ltd. v Haxton & Others* (2012) 86 A.L.J.R. 296; [2012] HCA 7, [33] (French C.J., Crennan & Kiefel JJ.), [134] (Heydon J.).

[93] Though not unanimous: compare *Pulbrook v Lawes* (1876) 1 Q.B. 284, 289 (Blackburn J.).

[94] P. Birks, *Introduction*, pp. 226–34; E. McKendrick, "Total Failure of Consideration and Counter-Restitution", p. 182; K. Barker, "Coping With Failure – Re-Appraising Pre-Contractual Remuneration" (2003) 19 Journal of Contract Law 105, 114, 116. For a nuanced analysis, see T. Baloch, *Unjust Enrichment and Contract*, pp. 167–74.

[95] W.A. Keener, *A Treatise on the Law of Quasi-Contracts* (New York 1893), 327. Despite the reference to "conscience", Keener is clear, at p. 19, that the basis of the obligation is that "a man shall not be allowed to enrich himself unjustly at the expense of another." See, further, S. Williston, "Repudiation of Contracts" (1901) 14 Harvard Law Review 317, 320.

[96] *Yeoman's Row Management Ltd. v Cobbe* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [43] (Lord Scott). See, further, C. Mitchell, P. Mitchell and S. Watterson, *Goff and Jones: The Law of Unjust Enrichment* at [12–03]–[12–05].

[97] E.g. C. Mitchell, P. Mitchell and S. Watterson, *Goff and Jones: The Law of Unjust Enrichment*, at [12–16].

[98] A. Burrows, *The Law of Restitution*, p. 333.

It follows that partial payment is insubstantial and that this set of cases is consistent with (D).[99]

The only real argument against (D) is the accusation that it does not fit *Stocznia*.[100] We have already seen that Lord Goff cannot have meant his formulation to define total failure; after all, in some cases the defendant has no obligation to perform at all. Lord Goff's formulation is best understood as a particular interpretation of the total failure rule applied to the contract in question. The House of Lords decided that the instalment was earned by the laying of the keel (rather than delivery of the ship): that is, the laying of the keel was, in the relevant sense, substantial. This means that the result is perfectly consistent with (D). Those few cases that have interpreted *Stocznia* in the broad sense of defining the total failure rule must, in this respect, be regarded as incorrectly decided.[101]

D. The Justification of the Total Failure requirement

As McKendrick has said, "[i]t is rare for the courts to adopt a requirement, such as the total failure requirement, without having good reason for doing so".[102] Nevertheless, a recurring argument is that the total failure rule is irrational.[103] Therefore, it is worth exploring the reasons in favour of the rule, understood as (D). Only then can we know if the rule is justified. This section argues that the total failure rule ensures that restitution is only awarded when there is sufficient reason to award it. In this way, the doctrine ensures that the law of unjust enrichment does not undermine the law of contract.[104]

To understand the value of the total failure rule, we must first examine why there is ever a reason to award restitution. When there is a deficiency in a transfer, the law will often try to undo or repair the deficiency. For instance, when there is a breach of contract the claimant can seek damages to be put "in the same situation … as if the contract had been performed".[105] These damages aim to repair the harm done by the breach. Failure of condition is different. It awards the claimant restitution. This remedy does not try to make good

[99] No other interpretation of the total failure rule can even plausibly explain such cases.
[100] See, for instance, *Giedo van der Garde v Force India* [2010] EWHC 2373, at [287] (Stadlen J.).
[101] The cases are very few and far between: ibid. and *John Grimes Partnership Ltd. v Gubbins* Unreported County Court (Exeter), 16 March 2012, at [206] (H.H. Judge Cotter Q.C.) may be the only cases which have adopted the wide reading of Lord Goff's formulation to dispose of a question in a case. However, see, further: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All E.R. 890, 925 (Hobhouse J.) D.C.
[102] E. McKendrick, "Total Failure of Consideration and Counter-Restitution", p. 221.
[103] E.g. K. Barker, "Restitution of Passenger Fare" [1993] L.M.C.L.Q. at p. 293; F. Maher, "A New Conception of Failure of Basis" [2004] Restitution Law Review 96, 105–06.
[104] Beyond the theoretical point made in this section, the practical result of (D) is that arbitrary results are avoided: the time when performance is rendered under a contract does not, of itself, affect the ultimate distribution of losses and gains between the two parties. See above note 67.
[105] *Robinson v Harman* (1848) 1 Ex. 850, 855 (Parke B).

the deficiency in the transfer; instead, it reverses the transfer. Why? That question forces us to consider the values that a doctrine of failure of condition serves. Although there is not enough space in this paper to address the question in its entirety, the orthodox analysis suffices for our purposes. It claims that failure of condition encompasses cases of qualified consent to a transfer. For instance, as Birks argued:

> the plaintiff specified the condition for retaining the enrichment; the condition has failed; in the events which have happened he did not mean the defendant to have the benefit.[106]

In these circumstances, undoing the transfer makes sense: where the claimant does not accept the consequences of her undertaking with sufficient voluntariness, undoing those consequences is the best way to tackle the problem. However, this shows that restitution only makes sense when there is a dissonance between the position that the claimant anticipated and the position that she is actually in. The closer the claimant's position is to the one that she anticipated, the weaker the reasons for restitution. This point demonstrates the value of the total failure rule. It prevents restitution where the failure of the condition is insubstantial. In so doing, it seeks to ensure that restitution is granted only when its award is justified.

This argument has particular importance in the contractual context. When a claimant transfers an enrichment in the expectation of contractual counter-performance, and where the defendant fails to perform, the law has (at least) two remedial possibilities. It could reverse the transfer, awarding the claimant restitution; or, it could remedy the deficiency itself, awarding compensation for the breach of contract. To see why restitution is sometimes the appropriate response, it is important to see that damages will not always adequately represent what the claimant sought from the transaction. Williston gives this example:

> when a buyer buys a horse, warranted sound, the real thing he is after is a sound horse … He does not want an un-sound horse, worth half the money, and the difference in damages.[107]

When damages are an inadequate substitute for performance, the claimant cannot be put in the position she sought to achieve. In this situation, the award of restitution is readily justifiable. However, the obverse is that it is harder to justify restitution when damages are

[106] P. Birks, "Restitution and the Freedom of Contract" (1983) 36 C.L.P. 141, 158.
[107] S. Williston, "Rescission for Breach of Warranty" (1903) 16 Harvard Law Review 465, 472. Further, D. Friedmann, "The Performance Interest in Contract Damages" (1995) 111 L.Q.R. 628, 632.

adequate.[108] The moral case for restitution is simply not present. The claimant *can* be put in the position that she sought to achieve; any defect in the transfer is precipitated by her own intransigence. This argument is unpopular amongst restitution scholars, perhaps because of McKendrick's worry that it proceeds from:

> a Holmesian perspective of contract law namely that a contracting party does not accept a duty to perform his promise, rather he has a choice either to perform or to pay damages for not performing.[109]

But the flaw of the Holmesian analysis is not to say that damages for breach might be as good as performance itself. Sometimes damages might do just as well. The flaw is to read from this fact the normative proposition that there was no duty to perform in the first place.[110]

When damages are sufficient to give the claimant what she sought to achieve by contracting (and the claimant can still claim damages), the award of restitution would serve no purpose. A claimant would only seek it when it would relieve her of a bad bargain. To ensure that restitution is only granted when there is good reason for its award, the law could have barred restitution where damages are adequate. But it did not do so. This function is achieved by the total failure rule: when the condition of a transfer is substantially performed, restitution is barred.

E. Conclusion

This section has argued that the best interpretation of the total failure rule is:

> **(D)** When C transfers an enrichment to D subject to a condition, C can only recover from D if a substantial part of the condition is unsatisfied.

Although this interpretation is controversial in academic circles, the cases have been reasonably consistent since the inception of the rule. The interpretation also shows that the total failure rule is justified, preventing restitution where there is insufficient reason to grant it.

This analysis shows that the power to claim restitution for a failure of condition overlaps substantially with the common law power to terminate a contract for breach. The latter power sometimes arises where the defendant's breach deprives the claimant of "substantially

[108] *Taylor v Motability Finance Ltd.* [2004] EWHC 2619 (Comm), at [26] (Cooke J.). This formulation is agnostic on *when* a deficiency can be adequately compensated. Compare K. Barker, "Restitution of Passenger Fare" at p. 294.

[109] E. McKendrick, "Total Failure of Consideration and Counter-Restitution" at p. 223.

[110] See J. Gardner, "Obligations and Outcomes in the Law of Torts" in P. Cane and J. Gardner (eds.), *Relating to Responsibility: Essays for Tony Honoré* (Oxford 2001), 140–41.

the whole benefit" of the contract.[111] This formulation overlaps almost precisely with (D). However, the law also allows the claimant the power to terminate whenever a term classified as a condition is breached. As Lord Roskill has said, this applies to "terms the breaches of which do *not* deprive the innocent party of substantially the whole of the benefit which he was intended to receive from the contract".[112] Therefore, there may be some breaches of contract sufficient to give the innocent party a power to terminate but insufficient to allow her to claim restitution for failure of condition. A key question in this area is whether the law should eliminate this distinction.[113] The question is whether the increase in certainty this move would bring makes up for the fact that the rationale for restitution is not as strong when the failure of performance is insubstantial.

Two Related Questions

The previous section established the meaning of the total failure requirement. This section argues, first, that transfers can be subject to more than one condition. A total failure of any one condition suffices for restitution. Next, it demonstrates that the doctrine of apportionment is conceptually separate to the total failure requirement. These claims are related to the total failure rule, though both are distinct aspects of failure of condition doctrine. They belong in this paper because the subject matter of each claim has been thought to assail the total failure rule.

A. Multiple Conditions

In the 1980s, a number of interest rate swap transactions were entered into between local authorities and financial institutions. In performing the swap, each party made payments to the other. The swaps were void ab initio.[114] The banks argued that the money had been paid on a condition that failed and sought restitution.[115] Hobhouse J claimed that:

> The phrase 'failure of consideration' is one which in its terminology presupposes that there has been at some stage a valid contract which has been partially performed by one party.[116]

[111] *Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26 CA, 66 (Diplock L.J.).

[112] *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711 at 724 (Lord Roskill); G.H. Treitel, *Some Landmarks of Twentieth Century Contract Law* (Oxford 2002) 109–11; E. Peel, *Treitel on the Law of Contract*, pp. 866–74.

[113] F. Reynolds, "Warranty, Condition and Fundamental Term" (1963) 79 L.Q.R. 534, 551: "It might be expected that restitution would be obtainable in the same circumstances as those under which a contract can be repudiated".

[114] *Hazell v Hammersmith & Fulham London Borough Council* [1992] 2 A.C. 1, H.L.

[115] Mistake was initially thought unavailable as the mistake was of law. Compare *Kleinwort Benson Ltd. v Lincoln City Council* [1999] 2 A.C. 349, H.L.

[116] *Westdeutsche (DC)* [1994] 4 All E.R. 890, 924 (Hobhouse J.).

His Lordship granted restitution, arguing that there was instead an "absence of consideration".[117] However, it is now widely acknowledged that that phrase is simply another way to describe the concept of failure of condition. The question is "no more than a matter of which is the apter terminology".[118]

Once this is recognised, however, the swaps cases seem to present a problem for the total failure rule. Virgo has said that they are "simply inconsistent" with the rule.[119] Similarly, Burrows claims that 'these cases … show that, at least where both parties' performance comprises making payments, restitution for partial failure of consideration will be granted.'[120] For these commentators, the inconsistency arises in part because they endorse (A) as an interpretation of the total failure rule. However, even on (D), some cases can appear problematic. In *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal LBC*, the legal status of the swap was not established till the transaction had run its course. In other words, the swap was "closed"; full performance had been rendered. Nevertheless, the Court of Appeal granted restitution. [121] If the condition of the transfer is that the defendant renders counter-performance, the case is inconsistent with the total failure rule: there was *complete* performance. However, the mistake is in thinking that the condition of the transfer which failed related to performance. *Guinness Mahon* demonstrates that the condition which failed *cannot* have been that counter-performance be rendered. Instead, the Court of Appeal accepted an argument made at first instance in *Westdeutsche*, that "the bank bargained for … payments which would discharge a legal obligation".[122] As Morritt L.J. said: "the consideration for each swap was the benefit of the contractual obligation".[123] The notion that the condition of a transfer can be the creation or transfer of a right is not new.[124] This explains Lord Browne-Wilkinson's claim that

[117] Ibid. at p. 924 (Hobhouse J.).

[118] *Guinness Mahon Co. Ltd. v Chelsea and Kensington Royal London Borough Council* [1999] Q.B. 215, 239–40 (Robert Walker L.J.); J. Edelman and A. Briggs, "Restitution and not-so-local Authority Swaps" (2010) 126 L.Q.R. 500, 503. Compare G. Virgo, "Restitution of Void Loans" (2010) 69 C.L.J. 447, 448.

[119] G. Virgo, *The Principles of the Law of Restitution*, p. 374; further, p. 371.

[120] A. Burrows, *The Law of Restitution*, p. 332. In this sentence, Burrows is referring to the annuity cases; however, he refers to the swaps cases in the same paragraph and would make the same claim about them.

[121] *Guinness Mahon Co. Ltd. v Chelsea and Kensington Royal London Borough Council* [1999] Q.B. 215.

[122] Submission of Mr Jonathan Sumption Q.C., cited *Westdeutsche (DC)* [1994] 4 All E.R. 890, 928 (Hobhouse J.). For a more extensive argument to this effect see F. Maher, "*Failure of Basis*" (DPhil thesis, University of Oxford 2008) Chapter 2; J. Edelman, "Liability in Unjust Enrichment where a Contract Fails to Materialise" in A. Burrows and E. Peel (eds.), *Contract Formation and Parties* (2010) 159, 167–68.

[123] *Guinness Mahon Co. Ltd. v Chelsea and Kensington Royal London Borough Council* [1999] Q.B. 215, 227 (Morritt L.J.) (emphasis removed).

[124] As well as the cases cited by P. Mitchell, "Artificiality in Failure of Consideration" (2010) 29 University of Queensland Law Journal 191, see *Chapman v Speller* (1850) 14 Q.B. 621, 624 (Patteson J.): "the true consideration was the assignment of the right … that the defendant had acquired by his purchase at the sheriff"s sale; … this consideration has not failed."

"[t]he failure of consideration was *not* partial … the swap moneys were paid on a consideration that wholly failed".[125]

When this is recognised, an important point about failure of condition become clear. Suppose that the swaps transactions had been legally valid. If the bank had performed its part of the bargain, but the public authority made no payments, there would obviously be a failure of condition for the failure of the contractual reciprocation.[126] Given that the performance of the swap was also a condition of the transfer, it follows that at least two conditions attached to the transfer: that the performance will be legally due and that the performance will be rendered.[127] The recognition of the possibility of multiple conditions attaching to a transfer is nascent,[128] but extremely important. Transfers can be subject to more than one condition. A total failure of any one condition suffices for restitution.

B. Apportionment

In *Stevenson v Snow*, the claimant paid the defendant for insurance cover over the course of a voyage.[129] Part of the voyage was not completed, and the claimant sought back the part of the premium related to a part of the voyage that the claimant did not complete. Lord Mansfield granted restitution, arguing that the "insured received no consideration for this proportion of this premium".[130] This exemplifies the doctrine of apportionment.[131] In *Goss v Chilcott*, Lord Goff said that "at least in those cases in which apportionment can be carried out without difficulty, the law will allow partial recovery on the ground".[132] Some have argued that Lord Goff's approach replaces total failure with partial failure as the ground of recovery.[133] Stadlen J. described the doctrine of apportionment itself as "a means by which the full rigour of the general principle may be mitigated".[134] Virgo claims that apportionment and total failure are

[125] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A.C. 669, 710 (Lord Browne-Wilkinson).
[126] This is entirely orthodox: e.g. *Giles v Edwards* (1797) 7 Term Rep. 181.
[127] Further proof of this point can be found in cases on the sale of goods: see C Mitchell "Unjust Enrichment" in A Burrows (ed) *English Private Law* (forthcoming), para 18.88.
[128] P. Mitchell, "Artificiality in Failure of Consideration" at pp. 209–10; C Mitchell "Unjust Enrichment" in A Burrows (ed.), *English Private Law* at paras 18.87–88.
[129] *Stevenson v Snow* (1761) 3 Burr. 1237, 97 E.R. 808.
[130] Ibid. at p. 1240 (Lord Mansfield C.J.).
[131] Notice that these cases are inconsistent with the claim that the contract must be set aside before restitution is ordered: see T. Baloch, *Unjust Enrichment and Contract*, pp. 128–9; 147–51.
[132] *Goss v Chilcott* [1996] A.C. 788, 798 (Lord Goff).
[133] *Minister of Sound (Ireland) Limited v World Online Ltd.* [2003] EWHC 2178; [2003] 2 All E.R. (Com) 823, at [63] (Nicholas Strauss Q.C.); *Giedo van der Garde v Force India* [2010] EWHC 2373 (QB), at [298] (Stadlen J.).
[134] *Giedo van der Garde v Force India* [2010] EWHC 2373, at [262] (Stadlen J.), echoing G. Virgo, *The Principles of the Law of Restitution*, p. 320.

antipathetic: the doctrine "will inexorably lead to recognition of partial failure of consideration".[135]

These claims make it important to reassess the doctrine of apportionment. This section argues that while the breadth of the doctrine is contestable, the doctrine of apportionment does not threaten the total failure rule; it is a quite separate principle. A clear statement of the ability of the courts to apportion a transfer is found in *Whincup v Hughes*.[136] The claimant paid money to the defendant for a five-year apprenticeship. The defendant died after two years. The claimant sought the recovery of the premium. Although the claim failed, Bovill C.J. said that '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'.[137] Montague Smith J. thought this consistent with the total failure rule.[138] He claimed that:

> an action for money had and received can only be brought when there is a total failure of consideration, with the exception of a few cases which, on being analyzed, hardly prove to be exceptions[.][139]

The best understanding of apportionment is as part of the process of construction of the transfer, whereby the court aims to discover the conditions upon which a particular benefit may be retained. A lump sum paid for numerous benefits can be divided such that payment of individual portions of the sum is conditional upon discrete benefits being transferred. This means that the ability to apportion does not threaten the total failure rule: for each benefit, the condition must totally fail. For instance, in *Biggerstaff v Rowatt's Wharf Ltd.* the parties specified the price per barrel in the purchase of 7,000 barrels of oil.[140] There was a shortfall of roughly 4,000 barrels. It was argued that the failure of consideration was not total. However, because "the contract is severable … [t]here is a total failure of consideration as regards the barrels not delivered".[141] Similarly, in *Fibrosa* Lord Porter said that "[i]f a divisible part of the contract has wholly failed and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered".[142]

The simple point is this: when a contract is apportioned, recovery can be made for total failure of the apportioned part. There is an

[135] G. Virgo, *The Principles of the Law of Restitution*, p. 322. I avoid saying inconsistent as Virgo only claims that apportionment will "lead to" partial failure.
[136] *Whincup v Hughes* (1870–71) L.R. 6 C.P. 78.
[137] Ibid., at p. 81 (Bovill C.J.).
[138] Compare ibid., at p. 81 (Bovill C.J.). However, Bovill C.J. misunderstands the total failure rule, interpreting it as (A).
[139] Ibid., at p. 85 (Montague Smith J.).
[140] *Biggerstaff v Rowatt's Wharf Ltd.* [1896] 2 Ch. 93 C.A.
[141] Ibid., at p. 103 (Lopes L.J.); further, pp. 100 (Lindley L.J.), 105 (Kay L.J.). See, further, *Agra & Masterman's Bank Ltd. v Leighton* (1866–67) L.R. 2 Ex. 56, 65 (Channell and Pigott BB.).
[142] *Fibrosa v Fairbairn* [1943] A.C. 32, 77 (Lord Porter).

intensely difficult question of construction regarding the breadth of apportionment.[143] The legitimate extent of apportionment remains extremely controversial.[144] However, the principle itself is not only orthodox[145] but is perfectly consistent with the total failure rule.[146]

Conclusion

Although the total failure rule has been subjected to a great deal of criticism, its meaning has been the subject of less analysis. This paper has tried to remedy that deficiency. The best understanding of the rule was argued to be that when a claimant transfers an enrichment to a defendant subject to a condition, the claimant can recover only if a substantial part of the condition fails. In other words, restitution will be barred only when the failure of condition is insubstantial. When the rule is understood in this manner, the requirement of a total failure is justifiable: it ensures that restitution is not granted when there is insufficient reason for its award.

It is important to see that this analysis does not mean the requirement must retain its label. The language of total failure has led so many astray for so long that it is time to jettison it. The best way forward is to maintain the requirement described above, but to incorporate it into the definition of what it is for a condition to fail.[147] In other words, we should say that a condition only fails if it substantially fails.

[143] For an indication of the difficulties, see the discussion in *Giedo van der Garde v Force India* [2010] EWHC 2373 at [292]–[373] (Stadlen J.).

[144] For instance, Virgo regards the apportionment suggested by Lord Goff in *Goss v Chilcott* [1996] A.C. 788 is a step too far: G. Virgo, *The Principles of the Law of Restitution*, p. 322.

[145] *Whincup v Hughes* (1870–71) L.R. 6 C.P. 78, 83 (Willes J.), 85 (Montague Smith J.) and 86 (Brett J.); *Fibrosa v Fairbairn* [1943] A.C. 32, 65 (Lord Wright); *Ebrahim Dawood Limited v Heath (Est. 1927) Limited* [1961] 2 Lloyd's Rep 512; Sale of Goods Act 1979, s.30(1); *Baltic Shipping Co. v Dillon* (1993) 176 C.L.R. 344, 375 (Deane and Dawson J.J.); *Roxborough v Rothmans of Pall Mall Australia Ltd.* (2001) 208 C.L.R. 516 H.C.A., at [199] (Callinan J.).

[146] J. Edelman and E. Bant, *Unjust Enrichment in Australia*, pp. 256–7.

[147] This lexical twist would not, of course, need the imprimatur of authority. By way of contrast, those who claim that restitution should be granted for a partial failure must await a ruling of the Supreme Court: House of Lords authority stands in the way of any lower court making such a ruling.