

THE COMMON LAW OF RESTITUTION

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CONTRACTUAL BENEFITS

Where the plaintiff has him/herself conferred the benefit on the defendant.

Where the plaintiff conferred a benefit under an ineffective transaction.

Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] A.C. 669

Benefit conferred in accordance with contract.

Recovery usually inherent in action to escape from the contract e.g. misrep.

Some situations- breach-may be separate stage.

CONTRACT DISCHARGED BY BREACH

Restitution only once contract has been terminated.

Money recovered only if there's been a total failure of consideration.

Services- action for *quantum meruit* and no problem with unwanted benefit defence- benefit obviously requested under contract.

(i) The innocent party

money -

Action for money had and received. Can recover if total failure of consideration.

Giles v. Edwards

Defendant had contracted to sell to plaintiff all the corded wood growing on a particular estate- defendant had all wood and corded some and plaintiff paid 20 guin. Defendant didn't cord all and plaintiff recovered none of the wood. Court held that plaintiff would recover because total failure of consideration. Consideration must wholly fail.

If work abandoned half-way-through- can't terminate contract and seek contract price paid- just to pursue remedy in breach.

No objection to restitutionary claim on grounds that it enables plaintiff to escape a bad bargain.

Wilkinson v. Lloyd

Plaintiff agreed to buy shares in a mining co from defendant. Plaintiff paid shares but before transfer, directors passed resolution preventing any transfer of shares in defendant's name. Breach on defendant's part because should have sought consent of directors first. Market value of shares fell so rather than damages or specific performance - plaintiff tried to recover money paid. Allowed and therefore escaped the consequences of bad bargains. Total failure of consideration. Compare with confinement of reliance based damages in contract.

chattels-

Difficult problem- where delivery of chattel- does intermediate enjoyment of chattel prevent plaintiff from claiming total failure of consideration.

e.g. *Hunt v. Silk*.

A had agreed for £10 to let a house to B. A was to execute repairs and draw up lease within 10 days. In meantime B paid £10 and went into occupation. A didn't do repairs, nor execute the lease. A tried to recover £10. court said couldn't recover and had to sue for breach. Intermediate enjoyment meant party couldn't be restored to status quo.

In relation to chattels – where defeat as to title then will be a total failure of consideration.

Rowland v. Divell

Plaintiff bought car from defendant- used for several months- discovered defendant hadn't got good title- gave it up to actual owner & claimed purchase price. C/A allowed – rejected *Hunt v Silk*. L.J. Atkin- plaintiff hadn't got what bargained for lawful possession of car- had only got de facto possession.

Contrast with *Yeoman Credits v. Apps*

Def bought car on HP from dealer, term excluded all liability for worthiness. Defendant- kept car- refused to pay further instalment. Car taken off him by HP company and he was sued. Defendant counter-claimed in restitution.

C/A- was fundamental breach but not failure of consideration.

Here no defect as to title but only as to quality.

Law Commission No. 65- recommended change in law.

Where defective title to chattels- whilst P could recover price paid, ought to account for amount of enjoyment or use made.

Rec only in working paper.

Why a requirement of total failure of consideration?

Explanation- court reluctant to apportion money paid against benefit conferred- probably because of complexity. Led into problem of valuing benefit. Reasons not very convincing- court provision to apportion and value benefit under frustration.

Law Commission- Part 3- failed to substantially perform but has conferred benefit- Innocent party should recover money paid- subject to reasonable value for benefits conferred being given.

Following Law Commission Report No 121- changed mind and rejected proposal. Leave law unchanged, but didn't explain why.

services rendered -

Damages always available for breach and if contract severable into parts- can recover the agreed sum for severed part in normal contractual claim.

Problem where contract is entire. Agreed sum only available after complete performance.

Quantum meruit for value of services rendered but unclear authority.

Planche v. Colburn

Defendant had engaged plaintiff to write a book. Plaintiff ready and willing to complete - when had done part defendant said terminated series of which book was to be part and refused to pay.

Court said plaintiff could recover quantum merit even though hadn't handed out book that he'd written.

Could be an example of status quo, reliance based damages.

Very difficult to say basis of claim is unjust enrichment because no enrichment – no part of book ever received.

Chandler v. Boswell

Contract to build excavation tunnel. After much of work done-contractors not allowed to complete.

Held- could recover either damages for breach of contract or quantum merit for the value of work done.

De Barnardy v Harding

Defendant right to advertise and sell tickets for seats to view funeral of Duke of Wellington.

Plaintiff incurred expenses in preparing advertisement when, in breach, defendant told him not to proceed.

Albeit described as *quantum meruit*- but equally could be reliance based damages.

Plaintiff can use restitution action to get more than he would get in damages, *Lodder v. Slower*.

Good example in the American case:

Boomer v. Muir

Boomer a sub-contractor of Muir, engaged in building a large dam. Terms of contract- Boomer to receive monthly progress payment on an agreed schedule- but after 18 months- argument & Boomer left site.

Court- fundamental breach by Muir in failing to provide materials & Boomer entitled to walk off site and treat contract as terminated.

£258,000 dollars on a quantum merit- even though only extra £20,000 if he'd stayed on and completed.

Innocent party can recover more on *quantum meruit* than under contract law.

Fairer to give proportion of contract price.

(ii) The Party in breach

money -

If innocent party has terminated for breach can party in breach recover payment already paid under terms of contract.

General rule not entitled to bring an action on grounds of total failure of consideration.

Remedy depends on distinction between part payment and earnest payment.

Was money as deposit or in guarantee and security for performance of contract?
Earnest payment is guarantee, part-payment is any other money.

Howe v. Smith General rule earnest payment not recoverable, whereas part-payments are.

Dies v. British & International Mining & Finance

- Part-payment of purchase price-deposit is recoverable subject to the innocent party's right to set-off a claim in damages. Mr J Stable:

Matter of construction which category payment is in and is dependent on intention of parties.

More likely to be construed as earnest payment where expressed as forfeiture clause.

Cases where an earnest payment will also be recoverable if it's shown to be so penal that it's unconscionable for the other person to return the benefit.

Stockloser v. Johnson

Plaintiff agreed to buy plant & machinery from defendant. Purchase by instalments and if defaulted for more than 28 days clause said seller could terminate, keep instalments and retake possession of plant and machinery. Defendant did this.

Plaintiff brought action for return of instalments because was forfeiture clause was penal.

Equity should grant relief as with penalty clause. C/A refused on the facts but majority reasoning of Denning L.J. and Somerville L.J.J.:

- in principle such relief would be available.
- An equity of restitution

Denning L.J. two conditions must be satisfied

- 1) Clause must be penal in nature – what is forfeited must be out of all proportion must be out of all proportion to loss suffered.
- 2) Must be unconscionable to retain the money.

Both acknowledged that unjust enrichment of innocent party at expense of party in breach.

Minority reasoning – L.J. Rimer more than just inequitable before earnest payment can be recovered- should be fraud or sharp practice.

Authority doubted in *Galbraith v. Mitchenall* but –

Dubious authority, relied on CA authority on agreed damages, which was subsequently overruled by the HoL anyway.

Some support in *Shilo Spinners v. Harding*

Obiter dicta of Lord Simon:

“unfettered and unlimited jurisdiction to relieve against contractual forfeitures and penalties”

Lord Diplock in *Scandinavian Trading v. Tankeer Co v. Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 2 A.C. 694 Lord Diplock rejected this view as a “a beguiling heresy”

services rendered -

Can party in breach recover for the value of his services prior to breach.
Have to distinguish between severable and entire contract.

Normal contractual action for agreed sum if severable.

Entire contract- won't be able to bring action for agreed sum.

Classic case is *Sumpter v. Hedges*

Plaintiff builder contracted to erect buildings for lump sum of £565. Entire contract.

After work done to the value of £330 became insolvent and told defendant couldn't complete.

Defendant accepted as repudiatory breach - got somebody else to finish work using materials which plaintiff had left.

Plaintiff claimed *quantum meruit*.

Plaintiff couldn't recover in respect of work done- defendant had **no choice** but to accept. Therefore, no incontrovertible benefit.

Fact that work had been done couldn't be used as evidence of a new contract to pay for work actually done.

Plaintiff could recover payment for building materials left behind- *quantum valebat*.

Practically- defendant could retain building for little money.

Injustice of rule perhaps illustrated in *Bolton v. Mahadeva*?

Plaintiff agreed for £560- to install central heating. Central heating system did not work properly so defendant terminated.

Could plaintiff agree on *quantum meruit* for value of work done?

CA - entire contract and therefore no recovery for *quantum meruit*.

Rejected view that contract had been substantially performed.

Defendants would have to pay £174 to put the central heating system right. - so defendants got cheap central heating system for £174.

Hoening v. Isaacs

Exception - rule of contract- where performance substantial - can claim agreed sum subject to set-off.

(e.g. install effective radiators but fail to paint them)

Is this present position satisfactory?

3 policies underlying

- 1) would encourage party in breach to break entire contract.
- 2) If entire- then to allow remedy before completion - would go entirely to party's intentions or agreed allocation of risk.
- 3) Negatives any question of unjust enrichment by very fact of breach.

Counter arguments

- 1) damages a sufficient deterrent to breach as normal.
- 2) Parties haven't consciously dealt with the issue of part performance.

Law commission Report 121- present law unsatisfactory - Party should be entitled to *quantum meruit* whilst leaving intact innocent party's right to claim damages. Would depend on whether party in breach had conferred a benefit.

Note four points:

- 1) Wider scope of remedy- doesn't just apply to party in breach of entire contract – also apply to each stage of a severable contract.

Would extend to part-performer who isn't in breach but has no remedy under existing law.

- 2) Remedy won't apply where contract is still on foot - it must be terminated by innocent party.

- 3) Remedy won't apply subject to one exception where already has remedy under existing law. Exception is *Sumpter v Hedges, quantum valebat*.

- 4) Won't apply- where parties have contracted out of it- i.e. they've made clear where risk of part performance lies.

- 5) Won't apply to contracts for sale of goods and carriage of goods by sea.

- 6) What's meant by benefit and how valued - unlike Law Reform (Frustrated Contracts) Act, s.163 – proposal is that benefit should not be considered 'valuable' benefit. Valuable considered to be too vague. Nor should there be restriction to substantial benefit. Valuation largely left to court.:

"party who has conferred a benefit shall be entitled to a sum representing the value of what he's done to the person who has the benefit of it"

- shouldn't be linked to pro-rata contract principle - but if excludes pro-rata-would allow contract breaker to be better off by partial rather than complete performance.

Commission, therefore, recommended that should be on upper limit of a pro-rata proportion of contract price.

- 7) Question of set off or counter-claim for damages - Commission clear that innocent party would be able to claim.

Report gives some hypothetical examples:

- a) Party in breach, Y, makes bad bargain.

Y agrees to do work for X for £4,500.

Does 2/3 of work then, in breach, refuses to continue.

Market value of work already done is £5,000.

Had Y completed the work done would have been worth £7,500.

Although the value of the work done is £5,000, the pro-rata contract price provides the upper limit.

2/3rds of 4,500, upper limit- 2/3rd of that £3,000.

Most he can recover is £3,000- but set off damages.

The contract damages available to X is measured as £2,500 - £1,500 = £1,000.

£2,500 represents the price X needs to complete (£7,500- £5,000)

£1,500, the costs saved, represents the difference between the contract price and the value adjudged under this provision.- which are costs of completion £2,500 minus costs saved £1,500 (represents difference between contract price and value under this provision i.e. £4,500 & £3,000)

Upper limit £3,000 - £1,000 = £2,000.

b) Party in breach (Y) makes good bargain.

Agrees to do work for X for £19,000.

Does 2/3rds work and refuses to continue.

Value of work done is £15,000 but if he'd completed value of work done if work would only have been £7,500

Can recover £5,000- because upper limit i.e. 2/3rds of contract price is actually set at £6,000.

No offset contractual damages for X - because would only have to pay £2,500 to complete.

Report not yet implemented- but restitutionary analysis has been used. Ch does seem to be unsatisfactory remedy.

Remember- not taking account of any consequential loss- all based on fact that innocent party can mitigate.