FROM BERJAYA TIMES SQUARE TO LIM SWEE CHOO: REVISITING THE TOTAL FAILURE OF CONSIDERATION DOCTRINE

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At the heart of every commercial dispute lies a fundamental question: who gets the money?

The law, therefore, must provide clear and predictable answers for commercial entities to deal with confidence.

For fifteen years, the legal principles governing contract termination and restitution in Malaysia have been guided by the Federal Court's decision in *Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd.*[1] This ruling, while intended to bring clarity, inadvertently created a degree of uncertainty by intertwining the distinct doctrines of termination for breach and restitution for unjust enrichment.

This period of ambiguity has now been addressed. The Federal Court's recent ruling in *Lim Swee Choo & Anor v Ong Koh Hou @ Won Kok Fong and another appeal* has revisited these principles, offering a welcome clarification that restores doctrinal precision to Malaysian contract law. [2]

Termination

A contract, in its essence, is an exchange of promises. If one reneges on that promise, the other party should be able to walk away. Premised on this principle, s.40 of the Contracts Act 1950 (CA) provides as follows:

> *When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct his acquiescence, in its continuance.*

Section 40 is rooted in common law.[3] It allows an injured party to terminate a contract in three key situations:

i. Breach of condition

A condition is an essential term — the very heart of the contract. Breaching it strikes at the contract's root and justifies termination. A warranty, by contrast, is a collateral term; its breach only supports a claim for damages.

In *Hwa Chea Lin & Anor v Malim Jaya (Melaka) Sdn Bhd*,[4] the plaintiffs bought a house. However, the building delivered was laden with defects, requiring

1 *[2010] 1 MLJ 597*
2 *[2025] MLJU 3155*
3 *Hwa Chea Lin & Anor v Malim Jaya (Melaka) Sdn Bhd [1996] 4 MLJ 544*
4 *[1996] 4 MLJ 544.*

complete reconstruction. The Court found this to be a fundamental breach. The developer had not just delivered a faulty product; it had failed to deliver the very thing promised.

ii. Breach of an innominate term

The case *Hongkong Fir Shipping* introduced the test for innominate terms.[5] The test focuses on the severity of the breach. If the breach undermines the very purpose of the contract, it allows the innocent party to terminate. If it is minor and fixable, only damages are available.

This principle prevents absurd outcomes. As Lord Upjohn noted: *should a charterer be allowed to cancel an entire shipping contract over a single missing nail? Of course not*.[6]

iii. Repudiation

Repudiation occurs when one party, through their words or conduct, shows they no longer intend to be bound by the contract.

a) By Words: An explicit refusal to perform, even before the performance date is due *(Hochster v De La Tour)*. [7]

b) By Conduct: Actions that make performance impossible, like selling promised goods to a third party *(Lovelock v Franklyn)*. [8]

The test is objective:[9] would a reasonable person conclude the defaulting party no longer intends to be bound?

Remedy

After a valid termination, the injured party stands at a crossroads. It must choose one of two available paths: damages or restitution. It cannot take both.

This is the crucial, often-missed distinction. The legal principles for terminating a contract are entirely separate from those governing the remedy that follows.

Damages are meant to compensate for the loss caused by the breach. Its goal is to place the injured party in the same position they would have been in if the contract had been performed. The law protects two interests:

- Expectation Interest: The value the injured party expected to receive from the contract.
- Reliance Interest: The loss suffered in performing the contract prior to the termination.

Typically, damages aim to protect the expectation interest. This inherently includes any reliance loss, as money spent in reliance was an investment toward the expected return. Only when expectation losses are too speculative to prove will

5 *[1962] 2 QB 26*

6 *[1962] 2 QB 26*

7 *(1853) 2 El & Bl 678; 118 ER 922*

8 *(1846) 8 QBD 371; 115 ER 916.*

9 *Rasiah Munusamy v. Lim Tan & Sons Sdn. Bhd. [1985] 2 MLJ 291*

the court fall back to protecting the reliance interest, aiming simply to restore the claimant to their pre-contract position.

Restitution, on the other hand, is based on unjust enrichment. Its purpose is not to compensate for a lost future, but to restore benefits conferred. It aims to return the parties to their pre-contract positions, as though the deal never occurred. Restitution, in particular, only becomes available when there has been a total failure of consideration. The test is strict: did the promisor perform any part of the contractual duty for which it was paid? If it performed even minimally, restitution fails.

Hence, the sequence is clear: first termination, then remedy.

The doctrine of total failure of consideration has no role in deciding whether a party can terminate. That question is answered solely by Section 40 and the principles of fundamental breach. The "total failure" test applies only after termination, to determine whether an injured party can get its money back.

As observed in *Kartar Singh v. Pappa:*[10]

> ***The truth is that an action for money had and received has nothing in common with an action in contract.*** *In the case of contract the obligation arises from the agreement of the parties and in the present case it was for the performance of this obligation that the security was given.* ***In the case of an action for money had and received, the obligation is created by operation of law once certain facts which do not include agreement between the parties are established.***

Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd

A property developer, Berjaya Times Square, failed to deliver vacant possession of a shop lot on time. The purchaser, M Concept, wanted out — to rescind the contract and get its money back.

The Federal Court ruled that M Concept was not entitled to rescind the contract.

In doing so, it ruled that Section 40 represents the common law right of rescission, which can only be exercised when there is a total failure of consideration. The phrase *"his promise in its entirety"* was interpreted strictly. As a result, the Court concluded that a non-defaulting party cannot terminate the contract if there has been any part performance by the defaulting party.

In the court's words, the test is:

> *"Whether the party in default has failed to perform his promise in its entirety."*

In essence, the Court held that the innocent party cannot end the contract if there has been part performance, even if that performance is incomplete or unsatisfactory.

10 [1954] 1 MLJ 193

While the Court's intention to provide clarity was evident, the ruling created tension with two key aspects of contract law.

a) The Guidance of Statutory Illustration.

The decision did not engage with Illustration (a) to Section 40, which provides a clear example of termination following part-performance. The illustration permits a theatre manager to dismiss a singer after she misses one performance, even though she performed for five previous nights. This suggests that the legislative intent behind "in its entirety" was not to require absolute non-performance, but to address a failure that goes to the root of the contractual bargain.

b) The Scope of Precedent

The Court relied on the UK case of *Stocznia Gdanska SA v Latvian Shipping Co* to support its linking of termination with total failure of consideration.[11]

However, in *Stocznia*, the right to terminate the contract was never in dispute. The court's analysis focused exclusively on a separate issue: the right to the restitution of money paid after the contract had been discharged.

The "total failure of consideration" doctrine in that case was confined to determining the availability of that specific restitutionary remedy, not the right to terminate itself.

The *Berjaya* decision thus had the effect of merging two distinct legal questions: the right to terminate for breach, and the right to restitution for unjust enrichment.

This interpretation led to challenging outcomes in practice. It created a situation where any degree of part-performance by a defaulting party could potentially bar termination, even for a fundamental breach. This presented commercial parties with a difficult dilemma, as it limited their ability to cleanly exit agreements that were no longer serving their intended purpose.

Damansara Realty Bhd v Bungsar Hills Holdings Sdn Bhd & Anor

In *Damansara Realty*[12], the Federal Court attempted to distinguish Berjaya on the facts:

> *[58] In Berjaya Times Square Sdn Bhd it was held as long as some work has been done indicating that the development or construction had commenced, there would be no total failure of consideration because the promise had been performed although not in its entirety. On the facts of that case the decision may be supportable.* ***But we do not agree with the stand that there can be no total failure of consideration so long as part of the promise has been fulfilled.***

11 *[1998] 1 All ER 883*

12 *[2011] 6 MLJ 464*

> *[59] In our view, whether or not there has been total failure of consideration is a question of fact which can be resolved by looking at the circumstances of the case. Each case has its own peculiar facts. No two cases can be said to be identical although they may be similar. We are inclined to take the view that minimal works such as getting development permission orders or taking possession over the land for development purposes may not in most instances fall on the same side as Berjaya Times Square Sdn Bhd.* ***This is simply because such an interpretation does not make commercial sense. What good is a mere foundation of an office building to a company? In such circumstances, it must be taken as if the promise had not been fulfilled in its entirety.***

This passage reveals that the Court accepts and develops from the premise laid down in Berjaya Times Square. On that basis, the Federal Court formulated the following test:

> *[60] ...* ***As such the principle should therefore be this. There is a total failure of consideration (and a failure to perform a promise in its entirety) where a reasonable and commercially sensible man would look upon the project of having little or no value at all. If the reasonable and commercially sensible man sees the performance of the contract of having some value, it should be taken that there has been no total failure of consideration and accordingly the promise has been performed in part. In the earlier instance, there is a right to terminate the contract, but not in the latter instance.***

While this test introduced a welcome element of commercial practicality, it was important to note that it was constructed upon the same foundational premise as Berjaya — it continued to link the right to terminate directly to the restitutionary doctrine of total failure of consideration. This new test, though well-intentioned, represented a departure from established precedent.

The Correction: *Lim Swee Choo* Resets The Law

The Plaintiffs had purchased four parcels of land and assigned their rights to the Defendant for RM25.5 million. The Defendant paid RM23 million of this sum.

The Defendant then orchestrated a separate, illegal deal directly with the original landowner for three parcels of land.

When the courts later declared this side deal void, the Plaintiffs then sued the Defendant for the outstanding RM2.5 million. The Defendant counterclaimed, demanding a full refund of the RM23 million already paid, arguing there had been a "total failure of consideration" — that he had received nothing of value for his money.

The Federal Court took this opportunity to make three crucial clarifications:

i. Restoring the Correct Test for Repudiation

The Court reinstated the correct test for repudiation: whether the actions of the defaulting party would lead a reasonable person to conclude they no longer intend to be bound by the contract.

This objective test focuses on the breaching party's conduct and its impact on the contractual relationship, not on whether consideration had totally failed.

ii. Untangling Termination from Restitution

The Court drew a bright line between termination and restitution. It held that the "total failure of consideration" doctrine applies only to restitutionary claims. It has no role in determining the right to terminate a contract for breach.

A restitution claim arises only after a contract is voided or terminated, and only if the claimant has received no benefit whatsoever. Any partial performance, however small, defeats a claim of total failure.

The Court established the proper sequence:

a) First, determine the right to terminate under Section 40.
b) Only after valid termination, consider a restitution claim.

The cause of action for breach (termination) is entirely separate from the cause of action for unjust enrichment (restitution).

iii. Clarifying the test of total failure of consideration

The Court went a step further. It corrected the substantive test for what constitutes a "total failure of consideration." It explicitly rejected the formulation in *Berjaya Times Square* and instead reinstated the authoritative test from *Stocznia Gdanska*.

The *Berjaya* test asked: "whether the party in default has failed to perform his promise in its entirety."

The *Stocznia* test asks: "whether the promisor has performed any part of the contractual duties in respect of which the payment is due."

The difference is critical.

Under the correct *Stocznia* test, any performance by the promisor — however minimal — negates a total failure of consideration. If they did anything they were paid to do, a full refund is off the table.

In contrast, the *Berjaya* logic implied that only complete performance would preclude it. This would mean that in nearly every cases of breach — where a party by definition has not performed "in its entirety"— there would be

a total failure. This would make restitution the default remedy (once a contract has been terminated), thereby undermining the entire structure of contractual damages.

The Court reaffirmed the established common law principle: restitution is a drastic remedy reserved for the rare case where a claimant has received absolutely nothing for their payment. The weight of authority has always denied recovery where the claimant derived any benefit, however small.

Further, to preserve legal certainty and prevent the re-litigation of past cases decided under *Berjaya*, the Federal Court ruled that this clarified legal principle would apply prospectively from this decision onward.

Conclusion: Clarity Restored

The Federal Court's ruling in *Lim Swee Choo* has successfully resolved the legal uncertainty created by *Berjaya Times Square*. By untangling termination from restitution, the Court restored clarity to Malaysian contract law. The right to walk away from a broken contract is now once again separate from the right to demand a full refund. This return to legal precision ensures commercial parties can navigate disputes with the certainty and confidence the law requires.

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