



Federal Court Clarifies Total Failure Of Consideration And Restitution

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The Federal Court delivered a significant clarification of the doctrine of total failure of consideration, restoring analytical discipline to an area of law that had drifted into uncertainty. In *Lim Swee Choo & Anor v Ong Koh Hou & Another Appeal* [2025] 10 CLJ, the Court disentangled restitutionary principle from contractual termination and, in doing so, has reset the architecture of Malaysian unjust enrichment jurisprudence.

At issue was a deceptively technical question: when may a party recover money on the basis that consideration has wholly failed? The answer matters far beyond this property dispute. It defines the boundary between contract and restitution between enforcing bargains and unwinding them.

A Transaction Unravels

The dispute arose from a series of assignments relating to four parcels of land in Rawang, Selangor. The plaintiffs had agreed to purchase the land for RM 23 million. They subsequently assigned their rights under that agreement to the defendant for RM 25.5 million, structured through a set-off, partial payment and a residual investment component.

What followed was commercially aggressive and legally precarious. After a consent judgment in separate proceedings left the plaintiffs without any caveatable interest in the land, the defendant entered into a fresh agreement with the original vendor to acquire three of the four parcels for RM 84 million, declaring the same RM 23 million as deposit. That transaction collapsed. The vendor treated the deposit as forfeited. Later litigation found that no monies had in fact been paid by the defendant and that elements of the arrangement were tainted by illegality.

The defendant nevertheless counterclaimed against the plaintiffs for RM 23 million, arguing total failure of consideration. The Court of Appeal agreed, relying on two earlier apex Court authorities *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 CLJ 269 FC and *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd* [2011] 9 CLJ 257 FC and ordered restitution.

The Federal Court reversed the Court of Appeal's ruling.

Untangling Contract From Unjust Enrichment

The Federal Court's reasoning is doctrinally important. It held that the earlier authorities had conflated two distinct concepts:

- recovery of money for total failure of consideration (a restitutionary claim), and
- recovery following termination or rescission for breach (a contractual remedy).

That conflation, the Court observed, had left the law in "a state of uncertainty". To the extent those cases merged the doctrines, they were no longer good law.

The clarification is both conceptual and practical. A claim for total failure of consideration, the Court held, does not ask whether the claimant ultimately received the expected commercial benefit. Nor does it depend on whether a contract has been terminated. The question is narrower: has the promisor performed any part of the contractual obligation for which the payment was made?

If some part has been performed, the claim fails. Restitution is all-or-nothing.

This reframing aligns Malaysian law more closely with orthodox common law principle. Total failure means total. It is not a vehicle for reallocating risk after a transaction turns sour.

The Risk Of Rewriting Bad Bargains

Applying that test, the Court found no total failure. The plaintiffs had assigned all their rights under the original sale and purchase agreement. That assignment whatever its later commercial fate constituted performance of their contractual obligation. The defendant received what he bargained for: the chose in action embodied in the assignment.

The Court was notably unsympathetic to the defendant's subsequent manoeuvres. It described as "rather striking" his decision to abandon the binding assignment and negotiate a new deal at a "staggering" RM 84 million. If loss followed, it was self-inflicted. Restitution, the Court suggested, is not an insurance policy against commercial overreach.

Equally telling was the Court's treatment of unconscionability. The Court of Appeal had framed restitution as necessary to prevent injustice. The Federal Court inverted that logic: it would be "manifestly unconscionable" to allow recovery of RM 23 million when the defendant had not actually paid those monies to the vendor. Equity does not operate in abstraction; it operates on facts.

A Quieter Doctrinal Shift

The broader significance of the judgment lies in its insistence on doctrinal boundaries. Modern commercial litigation frequently blurs contract and unjust enrichment, inviting Courts to do "practical justice". But the two regimes rest on different foundations. Contract allocates risk *ex ante*. Restitution corrects enrichment without basis. To merge them is to unsettle both.

By restoring analytical separation, the Federal Court has strengthened predictability in commercial dealings. Parties who terminate contracts must look to contractual remedies. Parties seeking restitution must meet the stricter test of total failure.

That clarity will matter in property development disputes, structured finance transactions and distressed deals, areas where large deposits and assignments are common and where parties often attempt to recast failed ventures as restitutionary claims.

The judgment does not expand the law. Instead, this ruling contracts it back to principle. And in commercial jurisprudence, contraction can be a form of discipline.

With this ruling, the message is clear: restitution is not a backdoor appeal against a bad bargain.

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