REVISITING THE DOCTRINE OF TOTAL FAILURE OF CONSIDERATION: THE FEDERAL COURT DECISION IN *LIM SWEE CHOO & ANOR V ONG KOH HOU @ WON KOK FONG AND ANOTHER APPEAL*

by Rosli Dahlan & Ho Yu Fei

The landscape of Malaysian restitutionary law has, for over a decade, been defined by a significant doctrinal knot. Following the Federal Court decision in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd)* v *M Concept Sdn Bhd* [2010] 1 MLJ 597, our jurisprudence grappled with a conflation of the statutory right to terminate a contract for breach and the equitable right to seek restitution for a total failure of consideration. This conceptual overlap created a legal conundrum where the distinct tests for repudiation and unjust enrichment were collapsed into a single and often confusing legal framework.

In *Lim Swee Choo & Another v Ong Koh Hou @ Won Kok Fong* [2025] 6 MLJ 327, the Federal Court was presented with a timely opportunity to confront this disarray. By expressly overruling *Berjaya Times Square*, the Federal Court made a deliberate effort to untangle the conceptual confusion surrounding the doctrine of total failure of consideration, restating the proper test and clarifying the relationship between rescission and restitution.

Background Facts

The Appellants entered into a Sale and Purchase Agreement (SPA) dated 23 June 2015 with DA Land Sdn Bhd (DA Land) for the purchase of four parcels of land in Rawang (Rawang 4) for a total consideration of RM23 million. At the material time, both parties were aware that one of the four parcels was subject to a private caveat lodged by a third party. Under the SPA, the obligation to procure the removal of the caveat and to deliver vacant possession free from encumbrances rested with DA Land.

On 20 October 2015, the Appellants executed an Assignment Agreement to assign all their rights, title and interests in Rawang 4 to the Respondents for a purchase price of RM25.5 million with the consent of DA Land. Pursuant to an undated Supplemental Assignment Agreement, the consideration was to be paid in the following manner:

- RM20 million (being the sum paid by the Appellants to DA Land under the SPA) was to be set off against an existing debt owed by the 1st Appellant to the Respondent;
- RM3 million was to be paid by the Respondent directly to the Appellants; and
- RM2.5 million shall be treated as the Appellants' investment in Rawang 4, representing 4.5% of the value of the lands.

(The Assignment Agreement and the Supplemental Assignment Agreement are collectively referred to as the "Assignment Agreements")

On 24 May 2016, the Respondent entered into a SPA with DA Land, which was backdated to 1 October 2015, for the repurchase of three parcels of Rawang 4 (excluding the parcel encumbered by the caveat) for a purchase price of RM84 million ("Rawang 3") without the Appellants' knowledge. In that transaction, the Respondent declared the RM25.5 million consideration under the Assignment Agreements, of which RM23 million had been paid by the Appellants to DA Land under the SPA, as the deposit payable to DA Land.

A dispute subsequently arose between the Respondent and DA Land where the learned High Court judge held that DA Land was entitled to terminate the SPA and forfeit the RM23 million deposit due to the Respondent's failure to pay the outstanding balance of RM61 million by the completion date and his failure to seek any extension of time.

In that suit, the High Court further found that the Respondent was an unlicensed moneylender and the supplementary agreements entered into between the Respondent and DA Land which formed part of the SPA were sham transactions tainted with illegality. The Respondent's appeal to the Court of Appeal was dismissed, and his subsequent application for leave to appeal to the Federal Court was also refused (Suit).

On 15 June 2020, the Appellants commenced the present proceedings seeking, inter alia, a declaration that the Respondent had breached the Assignment Agreements and claiming the outstanding sum of RM2.5 million as special damages. The Respondent, on the other hand, counterclaimed for the return of RM23 million.

The Parties' Contention

The Appellants' case rested upon the Respondent's purported breach of the Assignment Agreements by entering into a separate SPA with DA Land for the purchase of Rawang 3 at RM84 million without their knowledge. The Appellants argued that this unilateral act had caused the diminution of the Appellants' RM2.5 million investment in Rawang 4 given that the Respondent subsequently lost all rights, interest and title in Rawang 3 pursuant to the High Court's findings in the Suit.

The Respondent argued that he had been induced into executing the Assignment Agreements by the Appellants' failure to disclose a prior sale of one of the parcels within Rawang 4 to a third party. The Respondent claimed that such concealment

compelled him to sever his dealings with the Appellants and to independently enter into the RM84 million SPA with DA Land in order to safeguard his own interests.

The Respondent further contended that the SPA between the Appellants and DA Land was a sham transaction intended to disguise an illegal moneylending arrangement where Rawang 4 was used as a collateral for an unlawful loan of RM20 million. On this footing, the Respondent argued that the Appellants possessed no lawful or assignable rights under the SPA from the outset. Consequently, the Assignment Agreements, which were the products of the illegal moneylending transaction, were illegal and void.

High Court & Court Of Appeal Findings

The High Court dismissed both the Appellants' claim and the Respondent's counterclaim. Dissatisfied, both parties filed their respective appeals to the Court of Appeal. The Court of Appeal subsequently dismissed the Appellants' appeal while allowing the Respondent's appeal.

Read together, the decisions of the High Court and Court of Appeal established the following findings:

a) The Appellants' SPA with DA Land dated 23 June 2015 and the Assignment Agreements executed between the Appellants and the Respondent were valid and binding as the Respondent failed to discharge his burden of proof to show that the said SPA and the Assignment Agreements were tainted by illegal moneylending activities; and

b) Both courts relied heavily upon the precedents of Berjaya Times Squares and Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464 in dismissing the Appellants' claim against the Respondent on the basis of total failure of consideration given that the Respondent was no longer able to acquire the entirety of Rawang 4.

Leave Questions Before The Federal Court

The Federal Court granted leave to the Appellants to appeal on the following questions of law:

1. whether the Respondent could invoke the doctrine of total failure of consideration to recover RM23 million which sum had previously been adjudged irrecoverable as part of an illegal moneylending transaction where the Respondent was found to be an unlicensed moneylender?;

2. whether the doctrine of total failure of consideration could be invoked to recover RM23 million where the Respondent himself was found by the High Court to have caused the loss on which the Respondent had based his claim?;

3. whether the doctrine of total failure of consideration could be invoked in circumstances where there has been performance or part-performance of the

contract and where the claimant has received benefit from the contract?;

4. whether the correct test of a total failure of consideration is as stated by the House of Lords in *Stocznia Gdanska SA v Latvian Shipping Co* and others [1998] 1 All ER 883, namely *'whether the promisor has performed any part of the contractual duties in respect of which payment is due'* and not the test of *'whether the party in default has failed to perform his promise in its entirety'* applied in *Berjaya Times Squares?;*

5. whether the Federal Court in *Berjaya Times Square* is no longer a good law as it has wrongfully conflated the right of rescission of a contract with the right to seek restitution?; and

6. whether the doctrine of total failure of consideration is inapplicable where there has only been a partial failure of performance, or where the claimant has derived some benefit from the contract, thereby confining the claimant to a remedy in damages rather than restitution, consistent with the cases of *Phang Quee v Virutthasalam & Ors* [1965] 2 MLJ 166 and *Baltic Shipping Co v Dillon* (1993) 111 ALR 289.

Decision Of The Federal Court

Restatement Of The Law On Termination And Total Failure Of Consideration

In *Lim Swee Choo*, the Federal Court took a bold step of expressly overruling its earlier decision in *Berjaya Times Square* which had wrongfully conflated the right to terminate a contract for breach with the right to claim restitution. In restoring analytical clarity, the Federal Court held that:

> *"[74] In our considered view, the right to terminate a contract for repudiation under s 40 does not depend on the question whether there is a total failure of consideration but rather the test is whether the actions of the party in default would lead a reasonable person to conclude that he no longer intends to be bound by the contract (Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291 (SC)). To our mind, the notion of total failure of consideration should not inform the interpretation of s 40.*
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> *[75] Only after resolving the issue of termination under s 40 does it become relevant to consider whether the innocent party may bring an action in restitution for money had and received, and in this respect, whether there has been a total failure of consideration. It seems to us that the doctrine of total failure of consideration is confined to cases concerning the availability of restitutionary relief rather than being used to determine whether the innocent party has a right to terminate a contract for breach and for claim in damages for breach. Therefore, in our considered view, the cause of action in contract for fundamental breach giving rise to a right to terminate is separate and independent of the cause of action in restitution for the recovery of monies where there is a total failure of consideration."*

In essence, the Federal Court reinstated that breach of contract or repudiation giving rise to the right to terminate is governed by its own test and set of principles that are entirely distinct from those of restitution based on unjust enrichment. The question of whether an innocent party may recover monies paid on the basis of a total failure of consideration arises only after the issue of termination has been determined.

Leave Questions 1 & 2

The Federal Court affirmed the concurrent findings of the High Court and Court of Appeal that the Respondent failed to prove that the Appellants' SPA with DA Land dated 23 June 2015 was an illegal moneylending transaction or that the Assignment Agreements were tainted by such illegality. As the agreements were valid and binding, the parties' rights and liabilities continued to be governed by their contractual terms, thereby leaving no room for restitutionary relief.

The Federal Court also found that the Respondent had entered into the Assignment Agreements with full knowledge of the existence of the private caveat. Accordingly, the Respondent could not rely on the private caveat as a pretext to circumvent the legal effect of the Assignment Agreements and to justify the subsequent execution of a separate SPA with DA Land.

The Respondent was thus precluded from invoking the doctrine of total failure of consideration to recover the RM23 million as that sum had previously been held to be non-recoverable in earlier proceedings where the Respondent was declared an unlicensed moneylender. Further, the Respondent is not entitled to pursue recovery on the same equitable principle where the Respondent was the party who had caused the loss on which his claim for total failure of consideration was founded.

For these reasons, the Federal Court answered Leave Questions 1 and 2 in the negative.

Leave Questions 3 & 6

The Federal Court reiterated the settled principle that there can be no refund of monies paid under a contract where there has not been a total failure of consideration. In Lim Swee Choo, there was no total failure of consideration as there had been performance or part performance by the Appellants of their contractual duties by assigning all their rights, title and interest in Rawang 4 and in the SPA to the Respondents with DA Land's knowledge and consent. The Respondent was said to have received the contractual benefit for which the RM25.5 million consideration was due.

The Federal Court further held that the Respondent had breached the Assignment Agreements by entering into the SPA with DA Land for Rawang 3 which was later found to be an illegal moneylending transaction and which, in turn, resulted in the Respondent losing all rights, interest and title to the lands in Rawang 3. The Respondent's breach had deprived the Appellants of the RM2.5 million investment benefit forming part of their consideration under the Assignment Agreements.

Any purported failure of consideration was thus self-induced, and the Respondent could not invoke the equitable doctrine of total failure of consideration to recover monies lost by virtue of his own misconduct.

The Federal Court accordingly answered Leave Questions 3 and 6 in the negative.

Leave Questions 4 & 5

The Federal Court observed that, following *Berjaya Times Square* and *Damansara Realty*, the Malaysian jurisprudence had taken a doctrinal turn by conflating the doctrine of total failure of consideration with the right to rescind or terminate a contract for breach, thereby leaving the applicable tests governing both areas of law in a state of uncertainty.

The Federal Court also held that *Berjaya Times Square* had adopted an erroneous formulation of the test for determining whether there has been a total failure of consideration, namely "*whether the party in default has failed to perform his promise in its entirety.*" Relying on the House of Lords' decision in *Stocznia Gdanska*, the Federal Court reaffirmed the proper test is "*whether the promisor has performed any part of the contractual duties in respect of which the payment is due*". Accordingly, *Berjaya Times Square* can no longer be regarded as good law.

The Federal Court therefore answered Leave Questions 4 and 5 in the affirmative.

Commentary

The decision in *Lim Swee Choo* marks a watershed moment in Malaysian restitutionary jurisprudence. For years, the decisions in *Berjaya Times Square* and *Damansara Realty* had unwittingly created a doctrinal fog by conflating the principles governing contractual termination with those governing restitution for a total failure of consideration. As a result, courts and practitioners alike were left navigating a framework where the doctrinal signposts no longer pointed in clear or coherent directions.

In unravelling this doctrinal knot, the Federal Court in *Lim Swee Choo* has restored the proper boundaries between these two areas of law and realigns Malaysian jurisprudence with well-established common-law principles. It is a decision that will undoubtedly guide practitioners, influence future litigation strategy, and serve as an authoritative reference on the doctrine of total failure of consideration for years to come.

Rosli Dahlan | *Partner*
Dispute Resolution
rosli@rdslawpartners,com

Ho Yu Fei | *Associate*
Dispute Resolution
yufei@rdslawpartners.com