Partial Failure of Consideration

JOHN TARRANT*

The common law has long made a distinction between total failure of consideration and partial failure of consideration. In contrast to total failure of consideration where the doctrine of accrued rights provides for full recovery, the doctrine of accrued rights prevents recovery for partial failure of consideration as a debt. In this paper the author examines partial failure of consideration in the broader context of partial performance and the quantum meruit principle. The bar on recovery for partial failure of consideration only operates to deny a remedy to a party in breach because an innocent party has a choice of damages or quantum meruit. The author argues that the courts should, in certain limited circumstances, allow a party in breach to recover for partial failure of consideration or partial performance based on the quantum meruit principle and the equitable doctrine of unconscionability. Such an approach can be justified by analogy with relief against forfeiture.

In the contractual context partial failure of consideration is concerned with situations where there has been only partial performance of a contractual obligation. As a result of partial performance a party to the contract has not received full performance for a payment made, or a payment due to be paid, under the contract. Courts have traditionally been reluctant to allow recovery for partial failure of consideration. Instead the parties are limited to any accrued rights under the contract including damages. In addition an innocent party might be entitled to a non-contractual remedy of quantum meruit but this remedy is not available to a party in breach. In a contract for services this can lead to injustice if a significant advance payment has been made by a party in breach that far exceeds the value of the services received under the contract. The purpose of this paper is to explore the different treatment by the courts of innocent parties and parties in breach and

* Senior Lecturer, University of Western Australia. An earlier draft of this paper was initially prepared as part of the requirements towards a degree of Doctor of Juridical Science at the University of Western Australia. I would like to thank Professor Paula Baron for supervising that part of my doctoral studies and her helpful comments throughout and Robyn Carroll for her helpful comments included in her examiner's report of the research paper forming an earlier version of this paper. I am also indebted to an anonymous referee for comments on an earlier draft of this paper. Any remaining errors are my own.

argue that the courts should, in certain limited circumstances, allow a party in breach to recover for partial failure of consideration or partial performance based on the quantum meruit principle and the equitable doctrine of unconscionability.

In the contractual context total failure of consideration refers to a situation where a payment is made but the payer does not receive any of the promised goods or services related to that payment. By contrast partial failure of consideration arises where there has been some performance but the contract is structured in a way that the payments made do not exactly match the goods or services provided by the other party. This will generally be the case where the contract is terminated before full performance by both parties. An unexpected termination before full performance can mean that a party might have paid more than the value of the services received or that a party has provided services but is unable to identify any accrued right to be paid.

The approach of the courts to partial failure of consideration can only be understood by recognising the difference between total failure of consideration and partial failure of consideration. The critical difference is that where there is total failure of consideration there has been *no performance* of the relevant contractual obligation. By contrast where there is partial failure of consideration there has been *some performance* of the relevant contractual obligation. Where there is a total failure of consideration the contractual doctrine of accrued rights resolves the issue within the law of contract and parties are entitled to recover regardless of any breach.[1] But when the issue is partial failure of consideration the doctrine of accrued rights acts to *prevent* any party claiming a contractual remedy for that partial failure of consideration. Whereas total failure of consideration is understood within the context of the doctrine of accrued rights, partial failure of consideration is concerned with the quantum meruit principle. Where there is partial failure of consideration the doctrine of accrued rights may provide an accrued right in the form of damages but this will not assist a party in breach. This paper is concerned with partial failure of consideration in the contractual context and cases where services are provided pursuant to a contract but a party seeks a non-contractual remedy of quantum meruit because they have no claim under the contract.[2]

This paper is divided into two parts. In Part A the position of a party not in breach will be examined. It will be shown that an innocent party has a choice of a remedy for damages, if there has been a breach, and a remedy in quantum meruit where the innocent party has provided services for which payment has not accrued under the contract. These principles are well established and not contentious but it is important to outline the position of an innocent party because it demonstrates how the doctrine of accrued rights operates in the law of contract to deal with partial performance.

1. See J Tarrant, 'Total Failure of Consideration' (2006) 33 UWAL Rev 132, 134–36.
2. For other circumstances where total or partial failure of consideration arises, see J Edelman & E Bant, *Unjust Enrichment in Australia* (South Melbourne: Oxford UP, 2006) 241–68.

In Part B the reluctance of the courts to provide a remedy to a party in breach where there is a partial failure of consideration or partial performance by the party in breach will be examined. It will be argued that there are indications that the courts have recognised that in some cases this may be unjust. There are two circumstances where it will be argued that the courts should consider a remedy for a party in breach. First where the defaulting party has made instalment payments in excess of the performance received. Secondly, where the defaulting party has performed services but has no accrued right to payment under the contract. The first circumstance is an example of partial failure of consideration whereas the second circumstance concerns partial performance.

PART A: CLAIMS BY A PARTY NOT IN BREACH

1. Innocent party seeking damages

Where a contract for services is breached an innocent party entitled to receive the promised services cannot claim both damages for breach and also recover the full payment made for the services. If a payment is made in advance, and only some of the promised services are received, then the innocent party only has a claim for damages.

This situation arose in *Baltic Shipping Co v Dillon*.[3] Mrs Dillon paid for a 14 day cruise but the ship sank after 10 days. Accordingly she did not receive full performance under the contract and Baltic Shipping refunded to Mrs Dillon $787 of the $2,205 fare paid. But Mrs Dillon claimed damages and full recovery of the fare. The High Court of Australia held that Mrs Dillon was not entitled to full recovery of the fare as well as damages. Mason CJ explained that there were several reasons for this.[4] First the payment of the fare was required so as to obligate the recipient to perform the services under the contract.[5] As a result the plaintiff's right to claim damages for deficiencies in performance 'was conditional on payment by the plaintiff'.[6] In addition Mason CJ observed that the plaintiff 'will almost always be protected by an award of damages for breach of contract, which in appropriate cases will include an amount for substitute performance'.[7]

In this case the Baltic Shipping Company had already repaid Mrs Dillon for the portion of the cruise that she did not receive. If they had not already repaid her that sum she would have been entitled to damages for that amount which would have enabled her to seek substitute performance. If the only substitute performance available exceeded the amount refunded then that additional amount would also be an appropriate claim in damages. Accordingly an innocent party is not entitled

3. (1993) 176 CLR 344.
4. Ibid 359 (Mason CJ).
5. Ibid.
6. Ibid.
7. Ibid.

to recover for total failure of consideration where part of the services have been received. In addition any claim for that part of the services not received is a claim in damages and not a claim for partial failure of consideration. The claim for damages is an accrued right arising from the breach. As a result there is no need for an innocent party to receive a remedy based on partial failure of consideration.

2. The quantum meruit principle

Different considerations arise if an innocent party is the party providing services under a contract. If there is an enforceable contract that has been breached, after there has been partial performance by the innocent party, then the innocent party has a choice of two remedies. The innocent party can pursue their contractual accrued right for damages or the alternative non-contractual remedy of quantum meruit. It is important to appreciate that there are two categories of cases where the quantum meruit principle operates. The first category involves cases where there is an enforceable contract but the parties have not specified a price for the services to be provided. The court will simply imply that a reasonable price be paid.[8] This claim for quantum meruit is a contractual claim.

The second category includes cases where there is no enforceable contract and cases where there is an enforceable contract but the contract does not specifically provide for payment for partial performance of an obligation. The claim for quantum meruit in this circumstance is a restitutionary claim. Depending on the circumstances such a restitutionary claim may be justified on the basis of the unifying principle of unjust enrichment or on some other basis such as relief against forfeiture. Support for the proposition that there are two distinct types of quantum meruit is found in *British Steel Corp v Cleveland Bridge and Engineering Co Ltd*[9] where Goff J held that a quantum meruit claim 'straddles the boundaries of what we now call contract and restitution'.[10]

The second category involves cases like *Pavey & Matthews Pty Ltd v Paul*[11] where the plaintiff cannot rely on an enforceable contract. Mrs Paul contracted with Pavey & Matthews to complete some building work. The contract was held to be unenforceable because of a statutory provision requiring the contract to be in writing and signed by both parties. The builder was able to recover on a quantum meruit claim independent of contract. A claim in this category has been referred

8. See *Horton v Jones (No. 2)* (1939) SR (NSW) 305, 319. See also *Amantilla Ltd v Telefusion plc* (1987) 9 Con LR 139.
9. [1984] 1 All ER 504.
10. Ibid, 509. The two types of quantum meruit have been expressly recognised in Australia: see *Coleman v Seaborne Pty Ltd* (2007) 23 BCL 303.
11. (1987) 162 CLR 221. For discussion of the case, see D Ibbetson, 'Implied Contracts and Restitution: History in the High Court of Australia' (1988) 8 Oxford J Legal Studies 312; JW Carter & HO Hunter, 'Quantum Meruit and Building Contracts' (1989) 2 J Contract Law 95; G Jones, 'Restitution: Unjust Enrichment as a Unifying Concept in Australia?' (1988) 1 JCL 8

to as restitutionary quantum meruit.[12] This paper is concerned with this second category of quantum meruit.

A quantum meruit claim can also arise where services are provided in anticipation of a contract.[13] The anticipated contract cases can be argued as falling within contract on the basis that the pre-contractual work is performed pursuant to a separate contract implied from the conduct of the parties.[14] However, that issue is beyond the scope of this paper and will not be considered in any detail here. It is primarily an issue of formation of contract.

3. Innocent party seeking quantum meruit

Where the price is specified in a contract to provide services but the innocent party is denied the ability to fully perform there will be no accrued right to be paid if full performance is required before payment is due. The amount cannot be recovered as a debt as it is not a sum certain. The innocent party therefore has no right to be paid under the contract and must seek a remedy outside of contract.

In *Planche v Colburn*[15] the plaintiff had been commissioned to write a book to be published by the defendant. The plaintiff was able to recover on a quantum meruit when the defendant repudiated the contract before the plaintiff had completed the book.[16] A similar situation arose in *Segur v Franklin*[17] where an arbitrator provided his services under a contract which provided that payment was due to him once the arbitration was completed. The contract was terminated as a result of breach by the defendant and before the arbitration was completed. The plaintiff sought payment based on quantum meruit. The trial judge determined that on the basis of the contract the right to payment had not accrued. This conclusion was upheld by Jordan CJ on appeal to the District Court.[18] Jordan CJ held that the innocent arbitrator who was prevented from completing performance was entitled to 'maintain an action to recover a *quantum meruit* for the services which he has rendered under the contract before it came to an end'.[19]

A similar approach was adopted by the New South Wales Court of Appeal in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*.[20] The Court of Appeal

12. See Ibbetson, ibid 318.
13. *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932. For a recent discussion of these types of claims, see K Barker, 'Coping with Failure – Reappraising Pre-Contractual Remuneration' (2003) 19 JCL 105.
14. See P Jaffey, *The Nature and Scope of Restitution* (Oxford: Hart Publishing, 2000) esp 116–20; P Jaffey, 'Restitution, Reliance, and Quantum Meruit' [2000] Restitution L Rev 270.
15. (1831) 131 ER 305.
16. For an alternative analysis of this case as a sui generis claim, see Edelman & Bant, above n 2, 113–4.
17. (1934) 34 SR (NSW) 67.
18. Ibid 71.
19. Ibid 72.
20. (1992) 26 NSWLR 234.

upheld the decision of Cole J that a quantum meruit remedy was an alternative to a damages remedy.[21] Cole J had previously addressed this issue in some detail in *Jennings Construction Ltd v QH & M Birt Pty Ltd*.[22] In that case he held that the contract price should not provide a ceiling on a quantum meruit claim because the claim was independent of the contract. Cole J relied on the judgment of Deane J in *Pavey & Matthews* that a quantum meruit claim was independent of contract.

The right to pursue either damages or a non-contractual claim in quantum meruit was recently upheld by the Court of Appeal of the Supreme Court of Queensland. In *Len Lichtnauer Developments Pty Ltd v James Trowse Constructions Pty Ltd,*[23] McPherson JA held that in circumstances where a contract had been breached 'the plaintiff is entitled to recover the value of the work done at the date when the contract was terminated'.[24] McPherson JA went on to opine that alternatively the plaintiff 'is entitled to recover the value of that work as damages flowing from the defendant's breach by repudiating the contract'.[25] But McPherson JA noted a possible complication because the services had not been directly provided by the plaintiff. The plaintiff had contracted for another party to provide the services to the defendant. Rather than resolve whether the plaintiff was entitled to a remedy of quantum meruit in circumstances where they had not actually provided the services themselves McPherson JA held that the plaintiff could succeed based on the alternative remedy of damages for breach of contract. Keane JA agreed with McPherson JA.[26] McMurdo J agreed with McPherson JA that the alternative remedies were generally available but did not agree that the award in this case should be for damages for breach of contract because the plaintiff had not pleaded for that remedy. Instead McMurdo J held that the plaintiff's claim was for quantum meruit 'to recover the value of the services which it has performed or caused to be performed'.[27]

Where the innocent party does have a right to damages because there has been a breach of contract the quantum meruit principle provides them with an additional non-contractual remedy. Based on *Pavey & Matthews Pty Ltd v Paul,*[28] this non-contractual remedy can be justified as based on the unifying principle of unjust enrichment. This can be an advantage for the innocent party because it opens the possibility of obtaining a higher price for the services provided. The advantage exists because the courts have been reluctant to modify the quantum meruit principle to limit the remedy to the contractual price agreed by the parties.

21. Ibid 277 (Meagher JA).
22. (Unreported, Supreme Court of NSW, Cole J, 16 Dec 1988, BC8801198).
23. (2005) 21 BCL 430. For a discussion of the case, see M Turrini & I Briggs, '*Len Lichtnauer Developments Pty Ltd v James Trowe Constructions Pty Ltd*' (2006) 18 Aust Construction Law Bulletin 11.
24. *Len Lichtnauer Developments v James Trowse Constructions,* ibid 434 (McPherson JA).
25. Ibid.
26. Ibid 435 (Keane JA).
27. Ibid 436 (McMurdo J).
28. (1987) 162 CLR 221.

4. Innocent party can claim overpayments

In some circumstances an innocent party may have made a progress payment in excess of the services received at a time when the party providing the services repudiates the contract. This occurred in *DO Ferguson & Associates v M Sohl.*[29] The plaintiff, Ferguson, had agreed to provide building services to the defendant. Before the work was completed the plaintiff left the site after disputes with the defendant. The plaintiff then claimed for amounts allegedly due for the work completed. The defendant counter-claimed for excess payments made to the plaintiff on the basis that the plaintiff had repudiated the contract.

Judge Hicks QC agreed with the defendant that the plaintiff had repudiated the contract. His honour also concluded that the plaintiff had been overpaid. An instalment of £6,268.75 had been paid to the plaintiff prior to repudiation and Judge Hicks QC concluded that the defendant had only received part of the value of these services and that there had been an overpayment of £4,673. The defendant as the innocent party was entitled to recover the overpayment as well as damages for breach which amounted to only nominal damages of £1 because the unfinished work was completed by another contractor at less than the original contract price. On appeal to the Court of Appeal Nourse and Hirst LJJ agreed with Judge Hicks QC.

PART B: CLAIMS BY A PARTY IN BREACH

As the law currently stands a party in breach has no ability to claim payment where there is a partial failure of consideration[30] or partial performance.[31] Partial failure of consideration will arise where a party in breach is to be the recipient of services under the contract and they make an advance payment that exceeds the value of services that they ultimately receive. Partial performance is an issue where a party in breach provides services but no right to be paid has accrued under the contract before it is terminated for breach. It will be argued that the equitable doctrines of unconscionability and relief against forfeiture can justify recovery in both of these circumstances. A remedy outside the law of contract is required because a party in breach has no contractual right to recover an excess payment or to be paid for services provided.

It should be noted that unconscionability can be used in a number of different contexts. As Parkinson[32] has outlined, these include the exploitation of vulnerability or weakness; the abuse of positions of trust or confidence; the insistence upon rights in circumstances which make such insistence harsh or oppressive; the inequitable

29. (1992) 62 BLR 95.
30. *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129.
31. *Sumpter v Hedges* [1898] 1 QB 673.
32. P Parkinson 'The Conscience of Equity' in P Parkinson (ed), *The Principles of Equity* (Sydney: Lawbook Co, 2nd edn, 2003).

denial of obligations; and the unjust retention of property.[33] A particular case may fall into a number of the categories identified by Parkinson. This paper is concerned with unconscionability when it relates to the unconscionable insistence on the enforcement of rights in the context of forfeiture.

The case law to be examined below suggests that the courts are sympathetic to possibly allowing recovery for partial failure of consideration (where a party has made an advance payment in excess of the value of services received) but not for cases of partial performance by a party in breach.

1. Relief against forfeiture

Relief against forfeiture provides a useful analogy for the possible recovery by a party in breach. In *Stockloser v Johnson*[34] the issue was whether the plaintiff could obtain relief against the forfeiture of various instalment payments. Denning LJ described relief against forfeiture as 'an equity of restitution which a party in default does not lose simply because he is not able and willing to perform the contract'.[35] Denning LJ also opined that the equity operates 'not because of the plaintiff's default, but because it is in the particular case unconscionable for the seller to retain the money'.[36]

A similar position was adopted by the High Court of Australia in *Stern v McArthur,*[37] where a purchaser of land had paid a number of instalments and erected a house on the land before defaulting. The issue was whether the purchaser could obtain relief against forfeiture of the instalments already paid as well as the value of the house. Deane and Dawson JJ concluded that 'a person should not be permitted to use or insist upon his legal rights to take advantage of another's special vulnerability or misadventure for the unjust enrichment of himself'.[38] Mason[39] has commented that this approach represents a 'link drawn between equitable intervention to preclude the exercise of contractual rights and the concept of unjust enrichment and restitution'.[40]

These cases provide an analogy to justify a party in breach having a non-contractual remedy for partial performance and partial failure of consideration.

33. Ibid 35.
34. [1954] 1 QB 476. For comment on the case, see PM Fox 'The Right of the Defaulting Purchaser to the Return of Instalments' (1954) 28 ALJ 67.
35. Ibid 492 (Denning LJ).
36. Ibid.
37. (1988) 165 CLR 489. For comment on the case, see K Nicholson *'Stern v McArthur* – The Jurisdiction to Relieve against Forfeiture and Instalment Contracts' (1989) 2 JCL 148.
38. Ibid 527 (Deane & Dawson JJ).
39. K Mason, 'Commentary on 'Conduct after Breach: The Position of the Party not in Breach'' (1991) 3 J Contract Law 232.
40. Ibid.

2. Party in breach seeking a quantum meruit for partial performance

Where a party in breach seeks payment on a quantum meruit for work completed before breach the courts have consistently refused a remedy. In *Cutter v Powell,*[41] a sailor hired for a voyage was to be paid a fixed amount for completion of the voyage. He died during the voyage and the court held that his estate could not recover any payment for the sailor's partial performance under the contract. In cases like *Cutter v Powell* the plaintiff has forfeited any legal right to be paid because they have no accrued rights under the contract if it was terminated following their breach. In such cases the claim by the plaintiff is conceptually similar to relief against forfeiture.

A similar result was reached in *Sumpter v Hedges.*[42] A builder partially performed an entire lump sum building contract and was denied payment for the work performed prior to termination of the contract. Smith LJ outlined the position that where there is a contract to do work for a lump sum, 'until the work is completed the price of it cannot be recovered'.[43] Accordingly the plaintiff could not recover on the original contract. This strict approach that denies a party in breach any payment for partial performance can be justified on the basis that the parties have agreed to that method of payment.[44] However, despite that justification it can lead to significant injustice.

Burrows[45] has noted the similarity with relief against forfeiture in these cases. He has observed that the parties in *Sumpter v Hedges,* by providing that the builder would only be paid on completion, 'were deciding that, in the event of the builder's breach, work done would be forfeited'.[46] He notes that 'in many and probably most entire contracts the parties have not thought about the restitutionary consequences for the part performer'.[47]

Burrows is not suggesting that the plaintiff should fail in these cases. He argues that the plaintiff should recover a fair value for their services. Burrows argues that the appropriate remedy is restitution based on unjust enrichment. However, it is submitted that in these cases the appropriate remedy should be in equity and based on a similar basis as relief against forfeiture is generally approached. The courts should consider the merits of a plaintiff's claim and then decide on a discretionary basis whether the plaintiff should be paid for partial performance. Given the conceptual similarity with relief against forfeiture a principled basis

41. (1795) 101 ER 573.
42. [1898] 1 QB 673. See also *Bolton v Mahadeva* [1972] 1 WLR 1009.
43. Ibid 674 (Smith LJ).
44. See B McFarlane & R Stevens, 'In Defence of *Sumpter v Hedges*' (2002) 118 LQR 568, 571.
45. A Burrows, *The Law of Restitution* (London: Butterworths, 2nd edn, 2002).
46. Ibid 356.
47. Ibid.

for relief could be developed by adopting the same approach and considering the same factors that arise in relief against forfeiture cases. This is not to suggest that there should be widespread recovery in these cases. It might only be in exceptional cases that the courts should exercise discretion in favour of payment for partial performance.

It is important to note that if a party providing services negotiates for payment in advance of performance but breaches the contract before fully performing their obligations then they will obtain payment for their partial performance. This can be seen from *Baltic Shipping Co v Dillon* discussed earlier. Because Mrs Dillon paid for the cruise in advance Baltic Shipping received payment for the part of the cruise that they did provide. Mrs Dillon was prevented from recovering the full fare paid. However, if the terms of the contract are negotiated so that payment is to be made after the services have been provided then the party providing the services is at a major disadvantage if they fail to perform. *Sumpter v Hedges* provides an example of the inability to be paid for partial performance. On the issue of partial performance the only difference between *Baltic Shipping* and *Sumpter v Hedges* is that the Baltic Shipping Company obtained payment before partially performing the contract and therefore they were paid for their partial performance. Critically that result arises because of the doctrine of accrued rights that ensures that they keep the advance payment and the innocent party receives substitute performance of the unperformed services in the form of damages.

3. Party in breach seeking recovery of an excess instalment payment

In some cases the party in breach will not be the party providing the services. Instead they may be the party paying for services provided by the other party. For example, they may have engaged the innocent party to construct a ship or build a factory. In such cases the contract may be constructed in such a way that payments will be made in advance to provide the builder with funds to acquire materials and engage contractors and employees to commence the work under the contract. If the contract is terminated prematurely, because of breach by the purchaser, the advance payments made may be far in excess of the work performed by the builder. But the doctrine of accrued rights provides no remedy for the party paying for the services in these cases. If the payment was due before termination, and has been paid, the builder can retain the payment. If the payment was due before termination and remains unpaid the builder can sue for the amount as a debt and also recovery from any party who has provided a guarantee for payment of these sums. This can obviously lead to injustice in some circumstances if the advance payment is out of all proportion to the work completed. The construction of a contract in this way effectively amounts to forfeiture by the party in breach for the amount paid that exceeds the work completed up until the time of termination.

But this situation is very different from cases where a party in breach has provided the services. Here the party in breach has made an advance payment which is in

excess of the services provided to them. This scenario is a clear example of partial failure of consideration. There would appear to be no justification for allowing the recipient to retain the excess payment which in some cases could be substantial. Advance payment of hundreds of thousands of dollars or more could be paid under some contracts. If the recipient has only performed a small amount of work before the other party breaches the contract, in such a manner that the contract might be terminated, then the recipient stands to retain a large windfall.

In *Commonwealth v Amann Aviation Pty Ltd*[48] Deane J noted that injustice could arise in these cases. His Honour delivered a dissenting judgment but his comments on partial failure of consideration were not inconsistent with the position of the majority. Deane J opined that, where an innocent party made payments in excess of the value of services actually received, the doctrine of unjust enrichment would justify recovery by the innocent party 'if the circumstances are such that it would be unconscionable conduct on the part of the guilty party to retain the excess'.[49] Deane J was only considering the position of the party in breach retaining an excess payment. He was not considering the party in breach claiming recovery of an excess payment made to the innocent party. However, it is submitted that Deane J was acknowledging that partial failure of consideration can result in injustice if the party has no remedy. The appropriate remedy could be developed if the value of the work performed was offset against the instalment payment so that the party in breach would be able to recover the excess amount paid.

To recover on such a basis a contracting party would need to argue that the value of the services provided should be calculated and offset against the advance payment. The leading case which highlights the injustice of the party in breach having to pay the whole advance payment, without any ability to recover the excess over the value of the services performed, is *Hyundai Heavy Industries Co Ltd v Papadopoulos.*[50] The case involved a contract for the construction of a ship. The contract was terminated when the purchaser failed to make an instalment payment due under the contract. An instalment had fallen due before the contract was terminated and the shipbuilder took action against the defendant who had guaranteed the payments under the contract. The guarantors argued that, as the writ was issued after the contract was terminated, the shipbuilder had no accrued right to take action against them. The House of Lords held that the instalment was an accrued right and must be paid by the guarantors. This is entirely consistent with the accrued rights approach.[51]

For the guarantors to have succeeded in *Hyundai Heavy Industries Co Ltd v Papadopoulos*, they would have needed to argue that their liability should have been limited to the value of the work performed by the shipbuilder prior to

48. (1991) 174 CLR 64.
49. Ibid 117 (Deane J)
50. [1980] 1 WLR 1129.
51. See Tarrant, above n 1.

termination. That is, if the advance payment had already been paid, then they should have been able to recover the excess amount paid. As the instalment had not been paid, they could have argued that they should only pay a fair value for the work completed. However, the guarantors did not argue on this basis but only on the narrower basis that they were not obliged to pay the guaranteed amount at all because they claimed it was not an accrued right. Having failed on that argument they were required to pay the full amount of the instalment payment. The case however does demonstrate the injustice that can arise if a party in breach, or their guarantor, has made, or is required to make, a payment in excess of the benefit received.

This issue has also arisen in Australia. In *McCosker v Lovett*[52] Young J identified that in some cases where a building contract is terminated an innocent party may be overpaid for the work they performed prior to termination. In *McCosker v Lovett* the plaintiff was a builder who had partially performed a contract before it was terminated because an instalment payment of $25,000 was not made by the defendant. The contract provided that the plaintiff builder be granted a charge for the amount of any unpaid instalment and enabled the builder to lodge a caveat to support the charge. The immediate issue before Young J was whether the builder was entitled to lodge a caveat over the defendant's land after the contract had been terminated. For present purposes the comments of Young J regarding the advance payment made by the owner are relevant. At the time of the decision relating to the caveat it was not clear whether the builder had been paid an amount exceeding the work completed. The evidence only suggested that the owner might have a claim for work badly done or not done of about $22,000. Young J suggested that if it was later determined that the builder had been paid amounts exceeding the value of the work completed prior to termination then an equitable set off may be the appropriate way to deal with the issue.

Young J relied on the decisions of Lord Mansfield in *Green v Farmer*[53] and *Dale v Sollet*[54] for the proposition that a defendant may deduct claims arising from the same transaction because of natural equity. In *Dale v Sollet* Lord Mansfield held that based on good conscience and equity a plaintiff could recover 'no more than what remains after deducting all just allowances which the defendant has a right to retain out of the very sum demanded'.[55] In *McCosker v Lovett* Young J concluded that further evidence might suggest that 'the builder was owed less than $25,000'.[56] It is clear that the builder had an accrued right to be paid the $25,000 and that the owner might have a claim for any work badly done. Such a claim would be in damages. But the owner would not have a contractual claim for damages for work not done by the builder under the contract because it was the

52. (1995) 12 BCL 146.
53. (1767) 96 ER 379.
54. (1767) 98 ER 112.
55. Ibid 113.
56. *McCosker v Lovett,* above n 52, 149.

owner who prevented the builder from completing performance by defaulting in the payment of an instalment due under the contract. The contract was terminated for that breach by the owner and therefore the builder was discharged from any further obligation to perform. Accordingly there was no suggestion that the builder was in breach for not completing performance. The only way the owner could recover in such circumstances would be to claim the excess payment made to the builder. But this would not be a contractual claim. It is significant that Young J considered that such a claim might be available by way of an equitable set off and based on the principles of good conscience and equity.

However, the courts have been reluctant to assist a party in breach in these cases. Whether the courts will depart from this approach in an exceptional case is far from clear. In *Heckenberg v Delaforce,*[57] Mason P noted the requirement for total failure of consideration and opined that a 'compelling case exists to reconsider it in cases where apportionment and counter-restitution are possible'.[58] However, the reluctance of the courts to allow recovery in these cases is echoed in the comments of Kirby J in his dissenting judgment in *Roxborough v Rothmans of Pall Mall Australia Ltd*[59] where he warned of the dangers of providing a remedy in cases of partial failure of consideration. His Honour opined that as a matter of legal policy courts 'should be extremely slow before introducing an entitlement to restitution in a case where total failure of consideration cannot be shown but only partial failure'.[60] His honour was of the view that allowing recovery for partial failure of consideration might not be desirable because 'the brake on legal claims that has hitherto been imposed will be released'.[61] His honour noted that the common law had resisted such claims and concluded that the 'imperium of restitution should not be extended to reverse such settled law'.[62] However, if the law was to develop to only allow a remedy for partial failure of consideration in exceptional cases then Kirby J's concerns will not be realised. Such a development would not provide for a remedy in all cases but only in cases where there is a clear injustice.

It is submitted that the appropriate response is not to allow these as common law claims available as of right. The preferred approach is to allow a claim by analogy with relief against forfeiture in appropriate cases. This allows the court to exercise discretion so as to only allow a claim in an exceptional case. This would allow recovery in cases where it would be unconscionable of the recipient to retain the excess payment as referred to by Deane J in *Amann Aviation.* Such an approach would ensure that a contracting party that made advanced payments far in excess of the services they received would not be denied a remedy. As the law currently stands if a party makes an advanced payment under a contract for

57. [2000] NSWCA 137.
58. Ibid [41].
59. (2001) 208 CLR 516.
60. Ibid 579 (Kirby J).
61. Ibid.
62. Ibid.

$3,000,000 and receives benefits of only $250,000, then they cannot recover the excess in circumstances where the contract is terminated because of their breach. This undesirable outcome is achieved solely because the courts will not allow recovery for partial failure of consideration. It is difficult to see why the courts will assist a person through relief against forfeiture but not assist a contracting party in circumstances where that person has forfeited their right to recover an excess contractual payment solely because they have failed to consider what would happen if they breached the contract before receiving full performance from the other party.

CONCLUSION

Partial failure of consideration has been examined in the broader context of cases concerned with partial performance and the quantum meruit principle. It has been argued that this approach is necessary because cases of partial failure of consideration can only be determined by reference to the quantum meruit principle. By contrast cases concerned with total failure of consideration are concerned with the doctrine of accrued rights and are not concerned at all with the quantum meruit principle. This is because where there is total failure of consideration there has been no relevant performance and therefore the quantum meruit principle has no application.

It was shown that a party in breach has no right to payment for partial performance unless a right to payment accrues under the contract because that party has bargained for payment before full performance. In addition a party in breach, unlike an innocent party, has no right to damages. The courts have long recognised this position and have consistently refused a remedy to a party in breach in these cases. Unless the law develops to allow a party in breach payment for partial performance the appropriate course is for a party providing services to negotiate for payment in advance. This will protect them if they later fail to fully perform. The courts have shown no interest in protecting these parties and therefore it is in their interests to negotiate appropriate contractual terms that ensure they do get paid for partial performance.

However some cases suggest that the courts may be willing, in appropriate cases, to assist a party who has made payments in excess of the value of the services received. This would be particularly appropriate in building and construction contracts where materials and services provided might far exceed any progress payments made prior to termination. Dicta from a number of cases highlight that the courts have recognised that this is an issue that needs to be addressed and the courts may be willing to provide some equitable relief to a party in breach in appropriate cases. It would be very desirable for the courts to develop this area of the law to allow recover in exceptional cases because great injustice can be suffered from the rigid application of the rule refusing recovery for partial failure of consideration.