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FAILURE OF CONSIDERATION

Roxborough v Rothmans

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Introduction

Roxborough v Rothmans,¹ recently decided by the High Court of Australia, is concerned with 'failure of consideration' as the ground for a claim to recover a payment made under a contract, and the characterisation of such a claim as a restitutionary claim based on unjust enrichment. In my view the approach taken is misconceived and is liable to be damaging to the law of contract.

The Business Franchise Licences (Tobacco) Act 1987 (NSW) provided that it was illegal to sell tobacco in New South Wales without a licence. The licence fee was calculated as a percentage of the value of the licensee's tobacco sales over a specified period. Sales of tobacco bought from a licensee were excluded from the assessment, so that a retailer who bought all his tobacco from a licensed wholesaler would not have to pay any licence fee in respect of its sales.² In *Roxborough*, Rothmans was a tobacco wholesaler and Roxborough a retailer supplied by Rothmans. Under the supply contract between them, the price for a consignment of tobacco was broken down into two parts, the price for the tobacco itself, and the 'tobacco licence fee', which was the licence fee payable by Rothmans in respect of the tobacco supplied. Thus the arrangement was that Rothmans would pay the licence fee and pass on the cost to Roxborough, who would of course pass it on to consumers. Because Rothmans was a licensed wholesaler, Roxborough was not liable to pay any further licence fee in respect of its own sales of the tobacco supplied by Rothmans. The payment by Roxborough of a sum representing the

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¹ *Roxborough & Ors v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68. The judgments of the majority were along the same lines, and decisions on which the majority judgments were broadly consistent will be referred to as decisions of the court.

tobacco licence fee 'funded [Rothmans] to meet a cost of continuing in business for ... future licence periods, to the mutual benefit of both wholesaler and retailer'.³

It had previously been held that the licensing scheme was invalid as a disguised excise duty, which the New South Wales Parliament had no power to impose under the Australian Federal Constitution.⁴ The recovery of money paid as licence fees to the government of New South Wales was governed by a separate statute and was not in issue in *Roxborough*. The issue at stake was whether, since it was now known that Rothmans did not have to pay the licence fee, Roxborough could recover the part of the price paid that was attributable to it. Otherwise it would seem that Rothmans would be left with an unjustified surplus from the contract. References below to the recovery of the payment refer to the recovery of this part of the total payment.

The court denied that there was any *contractual* claim to recover the payment. Such a claim, it was thought, would have to be based on an implied term in the contract to the effect that the sum paid in respect of the tobacco licence fee would be repayable if Rothmans was not liable to pay a licence fee. According to the court, it would be 'artificial and unconvincing' to find such a term, because the parties 'made no agreement, express or implied, about what was to happen if the tax was held to be invalid'.⁵ The contingency that arose was not provided for in the contract.

The claim based on failure of consideration as a failure of condition

It was held, however, that there was a non-contractual claim to recover the payment. This was a form of the claim traditionally described as a claim for money had and received, and nowadays as a restitutionary claim, the ground for which in the present circumstances was 'failure of consideration'. This was understood to mean that the payment was made on a basis or a condition or

² Save for a nominal sum.

³ Para 54, per Gummow J; see also para 16, per Gleeson CJ, Gaudron and Hayne JJ.

⁴ *Ha v New South Wales* (1997) 189 CLR 465.

⁵ Gleeson CJ *et al*, para 20; see also Gummow J, para 60; Kirby J, para 157. Similarly, there was no implied term to the effect that Rothmans was obliged to pay the licence fee: see below n 25.

for a purpose that was not fulfilled.⁶ (For convenience, below I will use 'condition' to cover all of these.⁷) It is said that such a claim can arise in a non-contractual situation,⁸ for example where the payor makes a payment subject to the condition that the recipient will get married. But also, according to the court in *Roxborough*, where there is a contract between the parties, a non-contractual, restitutionary claim can arise in respect of a payment under the contract. The court found that the invalidity of the tobacco licensing scheme meant that the tobacco licence fee was paid 'on a basis that later became falsified ...[i.e.] failed to sustain itself',⁹ or for a purpose that failed.¹⁰

'Failure of consideration' is of ancient provenance as a ground for recovering a contractual payment, but the interpretation in terms of failure of condition is modern. This interpretation is very widely accepted, but this seems to be the case not so much because of explicit support for it in the case law, as because it is an aspect of the theory of unjust enrichment as the basis for restitutionary claims.¹¹ The failure of condition is understood as an 'unjust factor' meaning that, on the present facts, the enrichment of Rothmans was unjust and should be reversed in favour of Roxborough.¹² There was some support in the judgments for saying that the claim was based on a general principle of unjust enrichment.¹³

It has always been the rule that the claim to recover a contractual payment arises only if there has been a *total* failure of consideration, which means that the defendant has not performed any part of his side of the contract. Gummow J noted that, where the payment is clearly apportioned by the contract between different parts of the defendant's contractual

⁶ In this respect Gummow J's approach follows the standard approach found in the restitution literature, eg, P. Birks, *Introduction to the Law of Restitution* (Clarendon Press, rev edn 1989), 224. For a recent account, see R.B. Grantham & C.E.F. Rickett, *Enrichment and Restitution in New Zealand* (Hart, 2000), 147-177.

⁷ 'Condition' is not used in the sense of a contractual term breach of which justifies termination.

⁸ See para 16, per Gleeson CJ *et al*; para 102, per Gummow J.

⁹ Para 60, per Gummow J; para 17 per Gleeson CJ.

¹⁰ Para 61, per Gummow J.

¹¹ The approach is found in most restitution books, most importantly Birks, above n 6, and is attributed to *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32. See also at n 49 below.

¹² This is the expression coined by Birks: for a summary of 'unjust factors', see P Birks and R Chambers, *The Restitution Research Resource* (2nd edn, Mansfield Press, 1997).

¹³ See para 26, per Gleeson CJ *et al*, citing *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51. Gummow J was more sceptical: para 72-75.

performance – e.g., where there are phases of the contract to each of which is apportioned a specified part of the overall price – the total failure requirement can be applied separately with respect to each part.¹⁴ Here, because the supply contract explicitly distinguished between that part of the total price that was attributable to the supply of the tobacco itself, and that part that was attributable to the tobacco licence fee, it was possible to say that there was a total failure with respect to the latter part of the payment.

Objections to the non-contractual ‘failure of condition’ analysis

Roxborough explicitly adopts the failure of condition analysis, but in my view there are serious difficulties with this approach, and (as explained below) there is a better way to understand the concept of failure of consideration and to explain the decision. One problem concerns the nature of the condition (or basis, purpose etc) that is said to govern a payment for the purposes of the doctrine of failure of consideration. Is a payment conditional merely because the payor decided that this was to be the case? In a non-contractual situation, can A make a payment to B that is free of any condition agreed to by B, but becomes repayable by B merely because A determined when he made the payment that he was making it subject to a certain condition – e.g. that B is to be married – and this condition was not subsequently fulfilled? This seems sometimes to have been argued,¹⁵ but it is difficult to see how any such principle could be justified. Why should A be able to impose such a condition on B, which may affect him adversely, when A could instead get B’s agreement to the condition before making the transfer?¹⁶ As one might expect, it is generally thought that for the doctrine to apply the condition must

¹⁴ Para 106-107.

¹⁵ See eg P. Birks, ‘In Defence of Free Acceptance’ in A. Burrows ed., *Essays on the Law of Restitution* (Clarendon Press, 1991), 115.

¹⁶ In the case where a payment is made for the purpose of satisfying a supposed liability, but the payor suspects that there may actually be no liability, it is clear that he has no claim to recover the payment if this turns out to be the case, because he assumed the risk of it: *Kelly v Solari* (1841) 9 M&W 54. If he is to recover the payment, the payor must first secure an agreement from the defendant that the payment is to be conditional on the money actually being due. It must follow *a fortiori* that a payor cannot impose a unilateral condition on the payment. The same principle is reflected in the rule that no claim arises in respect of an officiously-conferred benefit: see eg Restatement of Restitution (American Law Institute, 1937), para 2.

be expressed by the payor and accepted by the defendant.¹⁷ But this surely means that the liability for repayment is based on an agreement to repay, not on a separate principle of unjust enrichment (or some other non-contractual basis), and is therefore contractual.¹⁸

In any case, whether or not a non-contractual claim based on failure of a condition can arise in some circumstances, where, as in *Roxborough*, the claimant makes a payment pursuant to a valid contract, it is surely clear that it is made subject to the terms of the contract, and cannot also be subject to a condition imposed by the claimant independently of the contract. A contracting party who receives a contractual payment as such takes it in accordance with the terms of the contract. The payment may be made on a condition, but if so this is the case by virtue of the terms of the contract, explicit or implicit. If the contract provides for such a condition, then a claim arising from the failure of the condition will be a contractual claim. Generally, however, a payment made under a contract will not be conditional; it will be an unconditional, outright payment, made in exchange for the reciprocal performance specified in the contract.¹⁹ In *Roxborough*, although the contract identified part of the price as the tobacco licence fee, it contained no term providing that the payment in respect of the tobacco licence fee was subject to a condition making it repayable in the circumstances that arose. As noted above, *this was specifically found by the court* in connection with the argument for a contractual claim based on an implied term. *Roxborough* is surely inconsistent in holding that a payment duly made and received under a contract can be subject to a condition where the contract provides for the payment to be unconditional; and the inconsistency is not avoided by saying that that the condition (although apparently arising from the contract) takes effect outside it.

The claim as a contractual reliance claim

¹⁷ See eg A. Burrows, *The Law of Restitution* (Butterworths, 1993), 251. And it is clear in *Roxborough* that the court had in mind a condition, basis, purpose etc, that was common to the parties: see eg para 23.

¹⁸ One might say that without repayment the defendant would be 'unjustly enriched', but only because he has failed to satisfy a contractual liability for repayment.

¹⁹ It is sometimes mistakenly thought that making a payment in return for something is the same thing as making a payment conditionally: eg Grantham & Rickett, above n 6, 150.

But this does not rule out the possibility of a claim to recover the payment. Where a payment is made under a contract, if it is justified to require repayment this is because in some respect the contract has not gone as agreed and in consequence the reversal of the payment is the appropriate contractual remedy. The reason why a claim for the reversal of a payment might appear not to be contractual (where there is no contractual provision for repayment in the circumstances) is the assumption that a contractual claim must be for expectation damages. This in turn follows from the assumption that a contractual claim necessarily arises to correct a breach by the defendant of his duty to perform the contract. A breach of duty is aptly remedied by placing the person owed the duty in the position he would have been in if the duty had been fulfilled,²⁰ and so in relation to a breach of contractual duty it should take the form of a claim for expectation damages representing the value of the duty that the claimant was owed.²¹ But it is surely clear also that a contracting party is entitled to act in reliance on a contract by performing at the risk of the other party, in the sense that he should be protected by the other party in respect of reliance loss incurred through performance. It is recognised that a contracting party who incurs expenditure pursuant to a contract has a claim for 'reliance damages'. This is surely the obvious explanation for the recovery of a contractual payment – it is a contractual claim to be protected in respect of loss incurred through reliance on the contract.

Of course, where a contracting party has incurred a reliance loss through a payment to the other party, he should be able to recover the payment only insofar as his loss has not been satisfied by the receipt of the reciprocal benefit that he was due under the contract. Where a contracting party makes a payment and then receives the performance he is due in return, obviously he should have no claim for reliance loss. His net reliance loss is nil, because the benefit he has received from the other party's performance must be taken to be at least equivalent to his loss through the

²⁰ See eg D. Friedman, 'The Performance Interest in Contract Damages' [1995] LQR 195.

²¹ If specific performance is not awarded.

payment, since he agreed to the exchange.²² But if a contracting party has made a payment and not had the benefit of any reciprocal performance at all, he should be able to recover the full amount of the payment as a reliance loss. If he has received only part of the benefit due, it would seem that prima facie he should be able to recover the proportion of his payment attributable to that part of the benefit due that he has not received. The effect of the doctrine of *total* failure is that no such proportionate recovery is allowed unless the contract itself makes an apportionment of the total payment amongst different parts of the reciprocal performance. The claim to recover the payment is not based on a condition governing the payment, whether by virtue of a term of the contract or on some non-contractual basis. It arises from the right of the contracting party to be protected in respect of his reliance on the contract, by virtue of which the reversal of the payment is the appropriate contractual remedy in the circumstances.

This suggests that *Roxborough* should have been approached as follows. Roxborough paid a sum of money in reliance on performance by Rothmans as specified in the supply contract. If it is right to say that the contract distinguished between two parts of Rothmans' contractual performance, viz., (1) the supply of the cigarettes to Roxborough and (2) the payment of the tobacco licence fee, and that the total payment due was apportioned by the contract between these two parts of the defendant's contractual performance, then the part of the payment attributable to the payment of the tobacco licence fee should have been recoverable by way of a reliance claim. The payment by Roxborough of the sum in respect of the tobacco licence fee constituted an outstanding reliance loss, the corresponding reciprocal performance not having been carried out. Thus the crucial issue is to define the contractual performance of Rothmans by construction of the supply contract: did it actually consist of supplying the tobacco and also paying the tobacco licence fee, or was it confined to the supply of the tobacco, the tobacco licence fee being mentioned in the contract merely by way of an explanation for the price demanded? One would think that the separation out of the tobacco licence fee from the rest of the price,

²² ie, the reliance loss is measured in terms of the implicit valuation in the contractual

especially given that the payment of the tobacco licence fee by Rothmans served Roxborough's interests as well as Rothmans',²³ would imply that the payment of the licence fee by Rothmans was indeed part of its contractual performance. This was the decision of the court; as Gummow J held:²⁴ 'The parties contracted not only for the supply of the tobacco products but also ... with respect to the renewal of the wholesaler's licence and the funding for that to take place.' (Gummow J considered this to be relevant to the issue discussed above, i.e., whether the payment was made conditionally, so as to generate a non-contractual claim based on failure of condition.) The position of the claimant in *Roxborough* can be contrasted with that of a customer of the retailer (Roxborough) in the same situation. Here it seems clear that no part of the price paid is apportioned to the payment of tax: the retailer's side of the contract is purely to provide the cigarettes. If this is the position, there should be no question of any recovery of part of the price by the customer.

One might object that if, as was held by the court,²⁵ Rothmans had no contractual *obligation* to pay the tobacco licence fee, then this could not be part of its contractual performance for the purposes of the argument above. But in principle a contract can provide for the exchange of a specified payment for a specified performance, without necessarily implying an obligation to provide the specified performance.²⁶ The effect is that reliance on the specified contractual performance by way of payment is protected through a reliance claim in the event that the performance is not provided. It is not necessary, in other words, for the defendant to have an obligation to do X in order for the claimant to be able to recover for his reliance loss incurred on the assumption that the defendant will do X.²⁷

Another objection might be that in *Roxborough* the receipt of the payment by Rothmans and its consequent enrichment must surely be relevant to the claim (hence the invocation of a principle of unjust enrichment), and yet this reliance analysis seems to depend purely on Roxborough's payment as a

exchange, as discussed in P. Jaffey, *The Nature and Scope of Restitution* (Hart, 2000), 31.

²³ See text at n 3 above.

²⁴ Para 109, per Gummow J. Kirby K took a different view: para 165.

²⁵ Para 60, per Gummow J; para 157, per Cullinan J. But there was said to be a duty to act so as to ensure that Roxborough did not incur a liability for a licence fee: para 56.

²⁶ See further P Jaffey, 'A New Version of the Reliance Theory' [1998] NILQ 107.

²⁷ *ibid* at 136.

reliance loss, and not on its effect in enriching Rothmans. But this is not actually the case. The enrichment is relevant, but as an element of the contractual analysis. This follows from the need to protect the *defendant's* reliance loss as well as the claimant's, where the claim is not based on a breach of duty by the defendant.²⁸ Where the claimant's contractual reliance loss is by way of a payment to the defendant, the satisfaction of the claimant's reliance loss by the return of the payment causes the defendant no net loss relative to its position when it entered the contract – i.e., no contractual reliance loss – because it merely removes an enrichment received through the contract. By contrast, where, for example, the claimant has incurred a reliance loss by way of expenditure pursuant to the contract, not corresponding to any receipt by the defendant, full recovery of the reliance loss would inflict a net loss on the defendant, and so might not be justifiable in the light of the need also to protect the defendant's reliance on the contract.²⁹

Does it matter whether the claim is contractual?

It is important whether the claim to recover the payment under the contract is contractual or not. The characterisation of a claim to reverse a payment under a valid contract as a non-contractual claim based on unjust enrichment or some other principle is liable to subvert the law of contract. To put the point in general terms, it is one of the functions of contract law to determine the rights and liabilities of the parties arising from the non-performance of the contract (including conditions specified in the contract). In principle, the various responses should constitute a coherent set reflecting certain assumptions about the nature of a contract and the interests of the parties. To take out one aspect of this general issue and treat it as governed by separate non-contractual principles is liable to make the overall set of responses to non-performance incoherent.

²⁸ Where both parties are innocent they must both be entitled to protection for their reliance – typically in a case of frustration. The measure of the claimant's claim must reflect this. Protection for the defendant's reliance does not arise in relation to an expectation damages claim based on a breach of duty.

²⁹ Thus, for example, on frustration a claim based on expenditure is limited by the value of the benefit conferred under s.1(3) Law Reform (Frustrated Contracts) Act 1943, and this would presumably also be the case if a claim by a party in breach were allowed, as recommended by the Law Commission (LCR 121, 1983).

More specifically, the contractual allocation of risk may be upset. Under a supply of goods contract, generally the supplier will specify a fixed price for the goods, and he will therefore bear the risk that his costs of making or obtaining the goods will differ from what he estimated when the contract was made, as a result of change of circumstances or misjudgment. If his costs are less than he, and possibly the buyer, expected when the contract was made, he is enriched relative to this expectation.³⁰ The buyer may well think that he has had the worse of the bargain as things have turned out. But this does not mean that an injustice has been done or that the supplier has in some sense been unjustly enriched, because the enrichment of the supplier (relative to the expected position) represents the realisation of a risk that he took under the contract.³¹ To deprive him of this enrichment, on the basis of a non-contractual condition, or more broadly a principle of unjust enrichment, is to undermine the agreed allocation of risk under the contract.³² This is unfair to the parties, and is also likely to cause uncertainty and therefore to hinder contractual negotiation, because contracting parties will be in doubt over whether their agreed allocation of risk will be enforceable.

Similarly, in *Roxborough*, if Rothmans had accepted the payment of the licence fee as a part of its own costs of supplying tobacco, there could presumably be no objection to its unexpected profit (just as it would have had to bear any increase in the licence fee). But in fact the contract treated the payment of the licence fee not as part of the costs of performance but as a distinct part of Rothmans' performance, of benefit to Roxborough in itself. No doubt the possibility that the licence fee might not be payable was not considered, but nevertheless the payment of the licence fee was separated out from the normal costs to be absorbed by Rothmans. The parties intended to treat it as outside the normal contingencies that affect the parties' bargaining over price and other matters.³³ The implication is surely that the

³⁰ The buyer may not be in any position to form a precise expectation, and the two parties may have quite different expectations on this point. Conversely the buyer will bear the risk that the value of the goods will change – for example, he might bear the risk of a fall in their market price on a re-sale, or the risk that it has ceased to be possible for some reason to use the goods in the way he had in mind.

³¹ See para 172-173, per Kirby J.

³² A risk allocation argument was rejected by Gummow J, para 95, but without discussion.

³³ See para 13, per Gleeson CJ *et al.*

risk was shared, so that (since there was no prejudice to Rothmans) the money should be returned to Roxborough if the licence was not payable.³⁴ Furthermore, even if, as the court said, the risk of invalidity of the licensing scheme was not allocated by the contract, it does not follow that the issue is not a matter of contract law. Determining whether there was an allocation of risk, express or implied, and if not how the risk should be allocated as a matter of law, are intrinsically contractual issues,³⁵ to be addressed in a contractual framework using the legal tools developed in this context.³⁶

‘Failure of consideration’

As Gummow J observed, the expression ‘failure of consideration’ does not refer to consideration in the ordinary sense in which it is used in contract law.³⁷ A claim arises to recover a payment by virtue of ‘failure of consideration’ where the contract has not been performed by the defendant, even though the contract is valid and does not lack consideration in the ordinary sense. For the purposes of the claim for failure of consideration, consideration refers to the actual performance of the contract.³⁸ On the approach in *Roxborough*, which reflects the approach in the restitution literature, the relevance of this non-performance is that it constitutes the failure of a condition governing the payment for the purposes of a non-contractual claim, whereas on the reliance approach above the relevance of non-performance is that, in terms of the envisaged contractual exchange, the payment is unreciprocated.

One objection to the reliance interpretation of ‘failure of consideration’ might be that the same expression is used to refer to the ground for

³⁴ Subject to any necessary protection for Rothmans: see n 28. Although the possibility that the licence fee might not be payable was not addressed, the contract did apparently provide that any *increase* in the licence fee after the contract was made would be passed on to Roxborough: see para 10; see also para 13.

³⁵ And even if it is right to overturn a contractual allocation of risk, this is still a contractual issue.

³⁶ In the restitution literature, this issue arises more commonly in connection with the quantum meruit claim for work done under an incompletely-performed contract, which is also supposed to be based on unjust enrichment rather than contract. Here also there is controversy over whether the measure of the claim should be determined by reference to the contract. For a survey of the arguments, see A. Skelton, *Restitution and Contract* (Mansfield Press, 1998).

³⁷ Para 103.

³⁸ This proposition is derived from *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32.

recovering a payment under a void contract.³⁹ This implies that it cannot refer to a contractual reliance claim arising from non-reciprocation under the contract, whereas it is thought that the non-contractual, restitutionary claim can arise in the same way where the contract is void because it is not dependent on the contract.⁴⁰ But it is difficult to accept that the ground of recovery can be the same in relation to valid and void contracts. Where the contract is void, the failure of the performance specified in the contract surely cannot be a ground for recovery, even if it is said to operate as a non-contractual condition.⁴¹ Surely the ground for recovery here is the voidness of the contract (or a mistake as to its voidness by the payor).⁴² It is also understandable that 'failure of consideration' came to be used to refer to voidness as a ground of recovery: here 'consideration' should be understood in the broad, old-fashioned sense by which it signifies a legal basis for enforcing a contract,⁴³ so that absence or failure of consideration means that the contract is void or unenforceable.

It may seem curious that the single expression 'failure of consideration' is used in relation to both valid and void contracts, but in different senses. But there is a possible explanation of this. Where a payment made under a valid contract is recovered on the ground of 'failure of consideration', as mentioned above the traditional requirement is that the defendant has not performed at all. It is possible that in this situation it might originally have been thought that the agreement, being executory,⁴⁴ was inchoate and unenforceable,⁴⁵ and

³⁹ This was in issue recently in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All ER 890. In the HL [1996] AC 669, the point was no longer in issue.

⁴⁰ P. Birks, 'No Consideration: Restitution After Void Contracts' (1993) 12 Univ of W Aust LR 195.

⁴¹ Especially if acceptance of the condition by the defendant is said to be required for the condition to be binding. The restitutionary failure of condition approach implies that if a contract, although void, is fully performed, there can be no claim to reverse a payment, but if the claim is based on the voidness of the contract actual performance is irrelevant. It has been held that full performance is no bar to recovery: *Guinness Mahon v Kensington & Chelsea RBC* [1998] 2 All ER 272.

⁴² This amounts to a vitiating factor – ie, there is no proper exercise of the power to make the payment. This is the implication of *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All ER 890.

⁴³ Referred to by Gummow J, paras 101-103.

⁴⁴ Save for the payment, which is reversible.

⁴⁵ This is understandable on the basis that without reliance the defendant is not prejudiced.

that the basis for the recovery of the payment was the same as that for a void contract.⁴⁶

Restitution, unjust enrichment and reliance

On the argument above, the claim to recover a contractual payment on the ground of 'failure of consideration' should be understood as a contractual reliance claim, and accordingly 'failure of consideration' as failure of contractual reciprocation. One might still wish to say that the claim is 'restitutionary' – this would appear to be an apt way of indicating that it is a claim to reverse a payment. Unfortunately this usage is liable to cause confusion, because the description of a claim as 'restitutionary' is commonly understood to imply not merely that the remedy takes the form of the reversal of a payment, but also that the basis of the claim is non-contractual, and more particularly that it is the principle of unjust enrichment.

In *Roxborough*, the claim based on failure of consideration was held to be a non-contractual, restitutionary claim. This involved interpreting 'failure of consideration' to mean failure of condition, which has been criticised above. Two factors have tended to promote this misconceived approach. The first is the failure to appreciate the role of reliance in contract,⁴⁷ which makes it difficult to explain how the claim to recover a contractual payment (since it is not a claim for expectation damages nor for a contractual debt) can arise in contract.⁴⁸ The second factor is the development of the theory of unjust enrichment, which can be understood to be the theory that all claims for which enrichment is an element, including claims to reverse transfers, are governed by a single principle of unjust enrichment, and so constitute a distinct body of law equivalent to and separate from contract, tort or property.⁴⁹ Although Gummow J expressed scepticism over the theory of unjust enrichment,⁵⁰

⁴⁶ This also explains the total failure requirement.

⁴⁷ This is not the only aspect of contract law that is liable to be misunderstood if reliance is ignored, as a number of commentators have argued. See eg Jaffey, above n 22, 32.

⁴⁸ One might argue that the claim protects the 'restitution interest' as a *contractual* interest, as in L.L. Fuller & W.R. Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 Yale LJ 52 and 373, although on their analysis the restitution interest is indistinguishable from the reliance interest in the case in issue.

⁴⁹ There is no canonical definition of the theory.

⁵⁰ Para 72-75. He preferred to say that restitutionary remedies arose on an *ad hoc* 'gap-filling' basis where appropriate to correct injustice, rather in the manner in which equity at one time

Roxborough nevertheless lends support to the theory by treating a claim to reverse a contractual payment as non-contractual, even though the contract was entirely valid and the payment fully voluntary. In this area, as in others,⁵¹ the theory of unjust enrichment is liable to cause confusion and incoherence.

served to rectify injustices at common law. It seems doubtful whether this approach, which is antithetical to the 'search for principle', will nowadays attract much support.

⁵¹ This argument, referring to other such areas, is outlined in Jaffey, above n 22, Chapter 1.