BERJAYA TIMES SQUARE REVISITED

What's in a Name?[1]

The Federal Court's decision in *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 has not added clarity to the law or certainty to the outcome in a common dispute over a common transaction. It is necessary to revisit the decision. The discharge of a contract for breach or repudiation following termination and the ensuing damages claim are determined by their own set of principles. The legal response of restitution to an unjust enrichment after the discharge of contract also has its own principles. Names of these incidents may differ, but it is understood what principles they attract. Conflation of established principles is to be avoided. Since there is already a body of doctrines applicable in these areas of the common law, this article is a call to return to their orthodox application.

David **FUNG** Yin Kee
SJD (Syd); Advocate and Solicitor (Sabah, Malaysia);
Partner, Messrs Alex Pang & Co.

What's in a name? That which we call a rose,
By any other name would smell as sweet.[2]

I. Introduction

1 This article to revisit the Federal Court's decision in *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd*[3] ("*Berjaya Times Square*") after almost a decade is felt necessary because its controversial parts on breach of contract and remedies are having a negative effect on the way this area of law is understood. Being a Federal Court decision on a common area of dispute and traversing an area of law requiring the application of general principles, it would have much influence on the court itself and is of course binding on the courts below, which means that its true reach should be fully understood.

1 First published in the *Journal of the Malaysian Judiciary*: January [2019] JMJ 169. Reproduced with permission.
2 William Shakespeare, *Romeo and Juliet*.
3 [2010] 1 MLJ 597; [2010] 1 CLJ 269.

2 It is hoped that this article will provide clarity and a way to deal with the various doctrinal issues that were in fairness not created solely by the decision but were certainly stirred up in its wake. There are five parts to this article. Part II identifies the dispute and the issues involved and furnishes the present understanding of the decision, including the views of its fiercest critic.[4] Part IV, by far the longest one, submits what the decision actually decides and its limits by using five chosen criteria: (a) different bases for discharge of contract; (b) breach of contract (and fundamental breach); (c) repudiation; (d) election of rights and remedies; and (e) unjust enrichment.[5] Part V concludes by heralding the virtues of the consistent use of the most commonly understood names and the pathway that such usage produces.[6]

II. The dispute, issues and present understanding of the decision

A. The dispute in a common fact situation

3 The dispute arose from a sale transaction in a scenario common to many who have bought a landed property off-plan. The appellant/defendant was a developer of a mixed development in Kuala Lumpur known as Berjaya Times Square Sdn Bhd. Commercial units of shop-lots were opened to the public to purchase and own. By a sale and purchase agreement dated 24 August 1995, the appellant agreed to sell the shop-lot duly completed and with vacant possession to the purchaser, the respondent/plaintiff, at the price of RM1,149,771 within 36 months. This was expressly provided in cl 22. The same clause also provided an automatic extension period of three months, failing which liquidated agreed damages were payable for the period of delay until vacant possession of the property was delivered. Under cl 32, time was of the essence for the contract. The last day for vacant possession of the property was 23 November 1998. The appellant did not deliver within time but could only do so four years and four months later.

4 Despite the appellant's failure to deliver the property, the respondent continued to pay the instalments towards the purchase price through a loan with a financial institution as and when they were due. There were meetings and correspondence between representatives of the parties in which assurances were given that delivery would be by end of 2001. On 27 December 2001, the respondent's solicitors wrote to terminate the sale agreement and asked for a refund of the instalments paid. The

4 See paras 3–16 below.
5 See paras 27–74 below.
6 See paras 75–79 below.

appellant quickly denied that the respondent was entitled to terminate the agreement but only to payment of liquidated agreed damages for the period of delay. Another assurance was given on 1 October 2002 that it would be done by year-end 2002. None of the assurances were kept. The appellant was only able to deliver vacant possession on 1 July 2003. By the time the respondent commenced action against the appellant, the purchase price had been fully paid.

5 In the action, the respondent claimed for a declaration that the agreement was validly terminated by the appellant's breach of contract on 27 December 2001, refund of the purchase price, and damages sustained for loan costs. The appellant did not dispute it had breached the agreement in its failure to complete and deliver the property within time but contended that this breach did not give rise to the respondent's right to terminate and it would only be liable to pay the liquidated agreed damages for the period of delay.

B. The courts' decisions in the case

6 The High Court[7] found in favour of the respondent and awarded all its different heads of claim. Mohd Hishamudin Mohd Yunus J (as he then was) found the failure of the appellant to deliver the property after an unreasonably long period of delay, over four years, was a fundamental breach of the contract and this entitled the respondent to terminate the agreement. The appellant had breached its obligation to deliver vacant possession of the property within the stipulated period when time was of the essence. The breach of this obligation to perform within time where time was of the essence under the agreement entitled the respondent to terminate the contract under s 56(1) of the Contracts Act 1950.[8] There was also the appellant's argument that the respondent was estopped from terminating the agreement because of the respondent's conduct in continuing to pay the instalments as they became payable and in allowing more time. The court rejected this argument since the appellant was in breach and had come to equity with unclean hands. However, without further deliberation on the remedies claimed, the court awarded all the respondent's remedies.[9]

7 On the appellant's appeal, the Court of Appeal[10] unanimously confirmed the High Court decision. Zaleha Zahari JCA (as she then was) and Raus Sharif JCA (as he then was) gave one judgment affirming the

7 *M-Concept Sdn Bhd v Berjaya Times Square Sdn Bhd* [2004] 4 CLJ 852.
8 Act 136.
9 *M-Concept Sdn Bhd v Berjaya Times Square Sdn Bhd* [2004] 4 CLJ 852 at 855–856.
10 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 CLJ 309.

High Court decision for the same reasons.[11] They referred in particular to the High Court decisions in *Tan Yang Long v Newacres Sdn Bhd*[12] and *Law Ngei Ung v Tamansuri Sdn Bhd*[13] in support of their decision.[14] They also noted that another two High Court decisions in *Chye Fook v Teh Teng Seng Realty Sdn Bhd*[15] ("*Chye Fook*") and *Kang Yoon Mook Xavier v Insun Development Sdn Bhd*[16] ("*Xavier Kang*") decided similarly.[17] In a separate judgment, Abdul Malik Ishak JCA also referred to *Chye Fook* and *Xavier Kang* to support the respondent's right to terminate the agreement, and emphasised that since time was expressed to be of the essence, the respondent could terminate as provided under s 56(1) of the Contracts Act 1950 and also claim liquidated agreed damages for the delay.[18]

8 The Federal Court disagreed with both the High Court and the Court of Appeal, and reversed and set aside their respective orders. The Federal Court dismissed the respondent's action. Gopal Sri Ram FCJ gave the main judgment, with whom Zulkefli Ahmad Makinudin FCJ (as he then was), who also gave a short judgment in support, and Mohd Ghazali Yusoff FCJ agreed.

9 At this stage of the article, only the bare decision of the Federal Court, without any comment, will be stated. Their Lordships, as justified by the facts of the case, applied s 40 of the Contracts Act 1950 read together with s 56(1) in determining whether the respondent had the "common law right to rescind" and they decided that it did not. In doing so, they read the words "fails to do any such thing" in s 56(1) with "any such thing" as referring to the "promise in its entirety" stated in s 40. Since they had already interpreted "the promise in its entirety" to mean that the promisor's performance must have been a total failure of consideration, a concept used in the law of restitution, they were able to reason that there was no total failure of consideration on the facts to entitle the promisee, the respondent, to "rescind" the contract under the common law.[19] This is the most controversial part of the decision and is discussed in greater detail below.[20] The Federal Court also found, as a matter of construction, that time was not of the essence of the agreement and the respondent

11 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 CLJ 309 at 314–319.
12 [1992] 1 MLJ 289; [1992] 1 CLJ 211.
13 [1989] 2 CLJ 181.
14 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 CLJ 309 at 317–318.
15 [1989] 1 MLJ 308.
16 [1995] 2 MLJ 91; [1995] 2 CLJ 471.
17 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 CLJ 309 at 318.
18 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 CLJ 309 at 328–329.
19 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 597 at 604, 609–610 and 611–612; [2010] 1 CLJ 269 at 277, 282–284 and 285–287.
20 See paras 27–74 below.

had wrongfully terminated the agreement under s 56(1) of the Contracts Act 1950. Although time was expressed under cl 32 to be of the essence, the appellant's obligation to complete and deliver the property within the stipulated time was not of the essence since its obligation to pay liquidated agreed damages under cl 22 showed that the contract parties did not intend it to be of essence. Consequently, the respondent's action was dismissed.

C. Professor Sinnadurai's critique

10 Writing shortly after the Federal Court's decision in *Berjaya Times Square*, Prof Visu Sinnadurai gave it extensive treatment.[21] In dealing with the case, he helpfully surveyed the many decisions on this issue of "whether a purchaser may rescind a sale and purchase agreement and recover the purchase price in the event of late delivery of the property by the vendor", which he described as commonplace.[22] He lamented that although the Federal Court had acknowledged that for the past 150 years there had been much discussion on this question and the cases decided during this period have settled the principles, the court had then proceeded to restate these settled principles and in so doing the judgment as applied in subsequent cases indicated "the difficulties in following the exact principles of law enunciated by the Federal Court".[23] After he had carefully traced the trilogy of earlier Court of Appeal decisions in *LSSC Development Sdn Bhd v Thomas a/l Iruthayam*[24] ("*LSSC Development*"), *Tan Ah Chong v Chee Pee Saad*[25] ("*Tan Ah Chong*") and *Araprop Development Sdn Bhd v Leong Chee Kong*[26] ("*Araprop Development*") which laid the foundation,[27] he proceeded to show the confusion that parts of the Federal Court's judgment had caused (and as his critique is quite extensive, only the ones that are most pertinent will be set out here).

11 First, he said the Federal Court's approach was wrong. There was no necessity to restate principles with regard to termination of a contract. The Malaysian courts may have referred to termination as "rescission",

21 V Sinnadurai, *Law of Contract* vol 2 (Kuala Lumpur: LexisNexis, 4th Ed, 2011) at pp 1003–1052.

22 V Sinnadurai, *Law of Contract* vol 2 (Kuala Lumpur: LexisNexis, 4th Ed, 2011) at p 1003.

23 V Sinnadurai, *Law of Contract* vol 2 (Kuala Lumpur: LexisNexis, 4th Ed, 2011) at pp 1003–1004.

24 [2007] 4 MLJ 1; [2007] 2 CLJ 434, *per* Gopal Sri Ram JCA.

25 [2010] 6 CLJ 560, *per* Gopal Sri Ram JCA.

26 [2008] 1 MLJ 783; [2008] 1 CLJ 135, *per* the dissenting judgment of Zaleha Zahari JCA (as she then was).

27 V Sinnadurai, *Law of Contract* vol 2 (Kuala Lumpur: LexisNexis, 4th Ed, 2011) at pp 1021–1028.

but the judges knew the two different senses of the word "rescission". In the first sense, as rescission *ab initio* in which the contract is set aside for vitiating factors of free consent in the formation of the contract such as misrepresentation, duress, coercion or fraud and the remedy sought is *restitutio in integrum,* the parties being restored *status quo ante* as though the contract was never entered into. And, in the second sense, in the promisee terminating the contract for the promisor's breach of contract where the promisor had committed a "fundamental breach" or "breach going to the root of the contract" by electing to bring the contract to an end and claiming damages suffered, or affirming the contract and claiming specific performance.[28] Having surveyed the Malaysian High Court decisions in the cases as cited, he listed the typical reliefs (*ie*, remedies) granted following a rescission (*ie*, termination) of the contract as the following: (a) declaration that the purchaser is entitled to rescind (*ie*, terminate) the contract; (b) refund of the purchase price paid to the vendor; and (c) damages, either general or liquidated as provided in the agreement, for late delivery.[29]

12 There was therefore no necessity for the Federal Court to delve into these settled principles, and in so doing, the Federal Court had confused rather than clarified those principles. For instance, the discussion of terms such as "common law right to rescind", "equitable right to rescind" and "total failure of consideration", in the context of a claim for damages arising from termination of a contract for breach of contract, was bewildering. He noted that even in identifying the issue, Gopal Sri Ram FCJ had confusingly said that since breach of contract was admitted by the appellant and the only remaining issue was whether the respondent was "entitled to rescind the contract, that is to say, to have the parties restored to a position where they will stand as if the contract had never been made". As for s 40, its scope has already been firmly established for over 100 years since the Contracts Act 1950 and its predecessor have applied in Malaya.[30]

13 Second, Prof Sinnadurai showed that the scope of s 40 was wrongly restricted by the Federal Court's undue emphasis on the words "refused to perform its promise in its entirety" by taking the view that a party is only entitled to terminate the contract for breach under s 40 if there is no performance at all. He explained that on this view, any part performance of contract obligation, no matter how defective, would not

28 V Sinnadurai, *Law of Contract* vol 2 (Kuala Lumpur: LexisNexis, 4th Ed, 2011) at pp 1028–1031.

29 V Sinnadurai, *Law of Contract* vol 2 (Kuala Lumpur: LexisNexis, 4th Ed, 2011) at pp 1030.

30 V Sinnadurai, *Law of Contract* vol 2 (Kuala Lumpur: LexisNexis, 4th Ed, 2011) at pp 1032–1033.

allow the promisee to terminate the contract under s 40. And as there is no precedent for this view, the Federal Court then "erroneously equated this interpretation to the doctrine of total failure of consideration".[31]

14 Third, he observed that before the trilogy of Court of Appeal cases of *LSSC Development, Tan Ah Chong* and *Araprop Development* and the Federal Court's judgment in *Berjaya Times Square*, the concept of total failure of consideration would not be part of the discussion when the issue is on breach of contract. The concept of total failure of consideration belongs to the law of restitution and only enters into the discussion when the issue arises as to whether restitution should be awarded after an agreement has become void. He therefore remarked that the Federal Court "went off tangent".[32] He then showed the several inconsistencies displayed by the Federal Court and by his Lordship Gopal Sri Ram JCA (as he then was) in *LSSC Development* when they tried to explain past decisions with this restitutionary concept.[33]

15 Fourth, he remarked that the fact that the Federal Court had in the context of s 56(1) interpreted the agreement which contained a time stipulation of completion and delivery of vacant possession of the property expressed to be of the essence together with an obligation to pay liquidated damages for any delay to mean that time is not of essence, should not be taken to say that "in every situation" such similar agreements would be similarly construed. He noted that their Lordships' construction was based on the strength of one precedent, the Indian Supreme Court judgment in *Hind Construction Contractors v State of Maharashtra*[34] ("*Hind Construction*"). He noted that this is an exception to the general rule that where time is expressed to be of the essence in the performance of a contract the breach of this condition would give rise to the right to terminate the contract and that in *Hind Construction* there was no express provision making time of the essence.[35]

16 In conclusion, he said that the decision and grounds of the Federal Court's judgment are flawed and it would have been "more convenient to relegate the decision to as a mere footnote" were it not for

31 V Sinnadurai, *Law of Contract* vol 2 (Kuala Lumpur: LexisNexis, 4th Ed, 2011) at p 1034.
32 V Sinnadurai, *Law of Contract* vol 2 (Kuala Lumpur: LexisNexis, 4th Ed, 2011) at pp 1038–1039.
33 V Sinnadurai, *Law of Contract* vol 2 (Kuala Lumpur: LexisNexis, 4th Ed, 2011) at pp 1040–1043.
34 AIR 1979 SC 720; (1979) 2 SCC 70.
35 V Sinnadurai, *Law of Contract* vol 2 (Kuala Lumpur: LexisNexis, 4th Ed, 2011) at p 1045.

it being a decision of the Federal Court on an important area of contract law.[36]

III. *Damansara Realty*: Federal Court's *obiter dicta* on *Berjaya Times Square*

17 In *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd*[37] ("*Damansara Realty*"), the dispute over the right to terminate a property development agreement ("the PDA") after a long period of inactivity provided an opportunity for the Federal Court to reconsider its decision in *Berjaya Times Square*.

18 By the PDA, the plaintiff/appellant allowed the defendant/respondent 15 years to develop a track of land measuring 15.5 acres. When after 13½ years the plaintiff had not commenced any development of the land, the defendant sent a termination notice giving the plaintiff a 30-day notice that the PDA would be terminated for the plaintiff's material breach and/or repudiation of the PDA as it had not commenced any work to develop the land. It was only after the termination notice was received that the plaintiff took some steps to initiate development works. The plaintiff disputed that the defendant had the right to terminate since the plaintiff's stance was that it had the liberty as and when it wished to develop the land so long as it commenced work within the allocated 15-year period. The defendant's stance was that the plaintiff was obligated to continuously develop the land within the span of 15 years. The plaintiff commenced an action against the defendant and others for wrongful termination of the PDA. The High Court dismissed the plaintiff's action and the Court of Appeal by a majority upheld the decision. It was decided that the termination notice was valid and had effectively discharged the contract.

19 The Federal Court dismissed the appeal and affirmed the decision that the termination notice was valid and had discharged the PDA. One of the other issues that arose in the course of argument was whether the principle enunciated in *Berjaya Times Square* should be applied to the case. The plaintiff contended that it should and the defendant that it should not. The issue considered was whether or not the innocent party (the promisee) could treat the contract as having been repudiated.

36 V Sinnadurai, *Law of Contract* vol 2 (Kuala Lumpur: LexisNexis, 4th Ed, 2011) at p 1046.

37 [2011] 9 CLJ 257.

20 Richard Malanjum CJ (Sabah and Sarawak) (as he then was), who gave the judgment for the court, understood the principle in *Berjaya Times Square* to be the evaluation of whether there has been a total failure of consideration in the plaintiff's performance of the PDA. This evaluation is made in the context of whether the plaintiff has performed "his promise in its entirety" as those words are contained in s 40 of the Contracts Act 1950.[38] He was of the view that although the decision in *Berjaya Times Square* could be supported on its facts, "the stand that there can be no total failure of consideration so long as part of the promise has been fulfilled" cannot be right.[39]

21 His Lordship explained that ultimately whether there is a total failure of consideration or not is a question of fact to be resolved by looking at the circumstances of the case, and each case would be different. He illustrated this by the example of a promisor who had completed the foundation of a building, which is of no good to the promisee, and this would mean the promise has not been performed in its entirety.

22 His Lordship then noted that *Berjaya Times Square* did not rule as wrong the conclusion reached by the cases considered by it (*Tan Yang Long*, *Chye Fook* and *Law Ngei Ung*) where it was found that though the works were partly completed the contract was correctly terminated. He then expressed the view that the principle of total failure of consideration should be viewed from the perspective of "a reasonable and commercially sensible man".[40] If this omnibus person views the performance of the promise as of some value then there is no total failure of consideration. It then follows that there is no failure to perform the promise in its entirety, and hence no right to terminate the contract. On the contrary, if the performance was viewed by this omnibus person to be of no value, there is total failure of consideration, leading to failure to perform the promise in its entirety, and hence a right to terminate the contract.

23 His Lordship then noted that the factual matrix of *Berjaya Times Square* where work was almost completed but delayed in completion was so different from the case at hand – no work done for 13½ years within the 15-year period – that it could not answer the question whether this delay before the time expired amounted to a fundamental breach.

24 His Lordship had to turn to the doctrine of repudiation, which includes the incident of anticipatory breach, to answer the question whether the prolonged delay before expiry of the 15-year period

38 *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd* [2011] 9 CLJ 257 at 279.
39 *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd* [2011] 9 CLJ 257 at 280.
40 *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd* [2011] 9 CLJ 257 at 280.

amounted to a refusal or disability of the appellant to perform the PDA.[41] Following the orthodoxy of the doctrine of repudiation, as explained by Cockburn CJ in *Frost v Knight*,[42] he found that the appellant was in repudiation of the PDA, had committed a fundamental breach, and was also in anticipatory breach.[43] The appellant's conduct – prolonged delay for 13½ years – was evidence that it was not ready and able to perform the promise in its entirety, which was to develop the land under the PDA. The appellant had refused to perform its contractual promise in repudiation of the contract.

25 This author would respectfully submit that the inability to use the concept of total failure of consideration to determine whether there is valid termination to discharge a contract for repudiation in *Damansara Realty* is testament to it being, in the first place, inappropriately inducted as a test for this purpose. It is a very unfortunate consequence of the Federal Court's decision in *Berjaya Times Square*.

26 It is to be regretted that the Federal Court did not address the question of whether total failure of consideration can in the first place be used as a principle to determine the issue of a repudiation or breach of contract that entitles the promisee to elect termination of the contract. By simply applying the principle to the issue of the right of termination for repudiation or breach of contract, the Federal Court in *Damansara Realty* indicated that such use is correct albeit difficult to apply to the facts at hand. It is plain that the courts below had understood *Berjaya Times Square* to enunciate the concept of total failure of consideration as a principle to apply *in general* to a case in which the right to terminate a contract for breach of contract or repudiation is in issue.[44]

41 *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd* [2011] 9 CLJ 257 at 280–284.
42 (1872) LR 7 Ex 111.
43 *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd* [2011] 9 CLJ 257 at 281–284.
44 For example, see the following: *Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo* [2010] 5 CLJ 427; *Seven Seas Computers Sdn Bhd v Puteri Hotels Sdn Bhd* [2011] 1 LNS 22; *Swiss-Garden International Vacation Club v Swiss Marketing Corp Sdn Bhd* [2011] 9 CLJ 581; *Foo Yee Construction Sdn Bhd v Vijayan Sinnapan* [2014] 8 CLJ 979 (reversing the High Court); *Medallion Development Sdn Bhd v Bukit Kiara Development Sdn Bhd* [2015] 4 MLJ 350 (reversing the High Court); *Paramaha Enterprise Sdn Bhd v The Government of the State of Sabah* [2015] 2 CLJ 268; *Mok Yii Chek v Sovo Sdn Bhd* [2015] 1 LNS 448; *TDDI Jaya Sdn Bhd v Yew Hong Teng* [2017] 1 CLJ 436 (reversing the High Court); *Tan Kok Siang v Kemuning Setia Sdn Bhd* [2018] 8 CLJ 546 (reversing the High Court).

IV. What *Berjaya Times Square* actually decided and its limits

27 The names used for different doctrines, which used in a distinct context would yield different remedies, have been employed in a manner that led to the confusion witnessed in *Berjaya Times Square* and the other cases in this context. To avoid heartbreak in litigation and for certainty in discourse, this article proposes to understand what in fact was decided in *Berjaya Times Square* by employing the five criteria indicated in the introduction.

A. Different bases for discharge of contract

28 Discharge of contract was the main issue in *Berjaya Times Square* and the other cases considered in this context. This was also the main issue in *Damansara Realty* save it was the plaintiff there who contended the termination was invalid. In these cases, the plaintiff would pray for a declaration that the contract is rescinded (more accurately, terminated) for breach of contract or repudiation on the defendant's part. Then the plaintiff would normally pray for the remedies or relief following on from such a declaration depending on what loss he had sustained.

29 A contract has to be performed by the contract parties unless and until it is discharged. A contract, of course, can be discharged by full performance. In the life of a contract containing reciprocal promises which are dependent on each other in their performance (contracts in this fact situation), at different stages of the contract some would have been performed and others to be performed in the future. By discharge of contract, it is meant that the contract parties are discharged of their respective obligations under the contract to be performed in the future, that is, those yet to be performed. For those that have been performed by the promisor, accrued right or rights could have vested in the promisor for which she has a claim against the promisee.

30 The contract can be discharged by a breach of contract or repudiation. It can also be discharged by frustration of the contract by a supervening event, without default by any of the contract parties, making it impossible for the contract to be performed. These principles are established under the common law since at least the middle of the 19th century. The Contracts Act 1950, a progeny of the Indian Contract Act 1872,[45] encapsulates these principles except for minor differences. For the promisee's right to terminate the contract for breach of contract or repudiation, the Contracts Act 1950 could use words to this effect: "put

45 R R Sethu, "The History, Impact and Influence of the Indian Contracts Act 1872" (2011) 28 JCL 31.

an end to the contract", "becomes voidable at the option of", "rescinds it", "becomes void".[46] Where the contract is discharged for frustration the contract is automatically discharged, that is, there is no requirement for termination by a contract party.[47]

B. Breach of contract (and fundamental breach)

31 As seen above, *Berjaya Times Square* started life as one of termination of contract based on a breach of an obligation for which time was of the essence. The appellant had delayed the completion and delivery of the shop-lot for over four years and breached cl 22 of the agreement. Since s 56(1) of the Contracts Act 1950 states that the promisee in this situation has the right to elect whether to terminate the contract or affirm the contract, the appellant elected to terminate by its letter dated 27 December 2001 and claimed a refund of the money paid. The appellant promptly stated its position that the respondent had no right to terminate and only a right to claim liquidated damages for the delay as provided in the agreement.

32 In a jurisdiction where the courts would habitually and systemically follow an analysis based on the tripartite classification of contract terms – conditions, warranties, and intermediate (innominate) – it would have found, as a matter of construction, that the contract obligation to perform on time where time is essential is a breach of a condition. It would then follow, being a condition, the promisee has the right to terminate if he so chooses. In *Eng Mee Yong v V Letchumanan,*[48] Lord Diplock in the Privy Council on a Malaysian appeal treated the time of essence stipulation in the sale agreement for payment of purchase price to be a condition, breach of which entitled the vendor to terminate the contract. A breach of warranty would not give rise to a right to terminate the contract. There are terms which cannot be classified as either a condition or a warranty but are treated as intermediate (or innominate) terms which may give rise to the right to terminate by looking at the contract terms and the breach in the manner done by the English Court of Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha*

46 See ss 40, 56(1), 65, 66, and 76 of the Contracts Act 1950 (Act 136). See also s 40, illustration (a), s 66, illustration (c), and s 76; and J W Carter, "Fundamental Breach and Discharge for Breach under the Contracts Act 1950 (Malaysia)" (2011) 28 JCL 85 at 95–97.

47 The contract "becomes void": Contracts Act 1950 (Act 136) s 57(2); *Hirji Mulfi v Cheong Yue Steamship Co Ltd* [1926] AC 497 at 503 and 505; *H A Berney v Tronoh Mines Ltd* [1949] MLJ 4 at 5.

48 [1979] 2 MLJ 212 at 218.

Ltd[49] ("*Hongkong Fir*"). The question is determined, in essence, from the perspective of the consequences of breach upon the whole contract.[50]

33 The approach taken in *Hongkong Fir*, which was contained in the separate judgments of Upjohn and Diplock LJJ, was fully adopted by the Malaysian Court of Appeal in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd*[51] ("*Ching Yik Development*") and *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus*.[52] In *Ching Yik Development*, Gopal Sri Ram JCA (as he then was) adopted and followed the *Hongkong Fir* doctrine when he stated:[53]

> In *Hong Kong Fir Shipping (supra),* the same test was propounded, by Upjohn LJ in the following way (at p 64):
>
> > In my judgment the remedies open to the innocent party for breach of a stipulation which is not a condition strictly so called, *depend entirely upon the nature of the breach and its foreseeable consequences.* Breaches of stipulation fall, naturally, into two classes. First there is the case where the owner by his conduct indicates that he considers himself no longer bound to perform his part of the contract; in that case, of course, the charterer may accept the repudiation and treat the contract as at an end. The second class of case is, of course, the more usual one and that is where, due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with the terms of the contract try he ever so hard to remedy it. In that case the question to be answered is, *does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated?* If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only. (Emphasis added.)
>
> In the same case, Diplock LJ formulated the test in these words (at p 70):
>
> > There are, however, many contractual undertakings of a more complex character which cannot be categorised as being "conditions" or "warranties," if the late 19th century meaning adopted in the Sale of Goods Act 1893, and used by Bowen LJ in *Bentsen v Taylor, Sons*

49 [1962] 2 QB 26.

50 See *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287 at 296–298; *Abdul Razak Datuk Abu Samah v Shah Alam Properties Sdn Bhd* [1999] 3 CLJ 231 at 236; *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus* [2008] 4 MLJ 157 at 177–179.

51 [1997] 1 CLJ 287, *per* Gopal Sri Ram JCA (as he then was).

52 [2008] 4 MLJ 157, *per* Zainun Ali JCA (as she then was).

53 *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287 at 297–298.

> *& Co* [1893] 2 QB 274, at p 280 be given to those terms. Of such undertakings all that can be predicated is that ***some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract***; and *the legal consequences of a breach of such a undertaking, unless provided for expressly in the contract depend upon* ***the nature of the event to which the breach gives rise*** *and do not follow automatically from a prior classification of the undertaking as a "condition" or a "warranty"*. For instance, to take Bramwell B's example in *Jackson v Union Marine Insurance Co Ltd* LR 10 CP 125, at p 142 itself, breach of an undertaking by a shipowner to sail with all possible dispatch to a named port does not necessarily relieve the charterer of further performance of his obligation under the charterparty, but if the breach is so prolonged that the contemplated voyage is frustrated it does have this effect. (Emphasis added.)

[emphasis in bold italics added]

34 The *Hongkong Fir* doctrine, therefore, comprises an approach to determine the right to terminate, and hence discharge the contract, for breach of a contract obligation by considering three factors: (a) the nature of the breach; (b) its foreseeable consequences; and also (c) the occurrence of an event resulting from the breach which will have an impact on the future performance of obligations under the contract.

35 Of the third factor, Diplock LJ in *Hongkong Fir* explained it as follows:[54]

> The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

36 The *Hongkong Fir* doctrine is a doctrine of general application in the context of breach of contract. By a metaphor such as a breach of a term which goes "to the root of the contract", or words such as breach of "fundamental terms" or "fundamental breach", the reference is to a serious breach or a breach of such serious consequences which will give the promisee a right to terminate the contract and claim damages.[55] In such instances, it is most likely that the approach to be taken by the Malaysian courts is to apply the *Hongkong Fir* doctrine or elements of it as a basis

54 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 66.

55 J W Carter, *Carter's Breach of Contract* (Sydney, Australia: LexisNexis Butterworths, 2011) at pp 234–235.

for the contract to be discharged by the election to terminate and claim damages. In *Berjaya Times Square*, this is what would have been done after the Federal Court followed the Indian Supreme Court's decision in *Hind Construction*. After construing the whole contract, Gopal Sri Ram FCJ found, despite the expression that time was of the essence of the contract, that the contract obligation to pay agreed liquidated damage for each day of delay meant the parties did not intend time to be of the essence for the promise which was breached. The respondent therefore could not rely on s 56(1) to terminate the contract, and if the respondent was to be able to terminate for the breach it would have to show a fundamental breach of the contract which the Federal Court, unlike the two courts below, found not to be established.[56]

37 The more pertinent point concerning this discourse on the promisee's right to terminate the contract for breach of contract (and fundamental breach), however, is that Gopal Sri Ram FCJ in *Berjaya Times Square* had conflated the right to restitution of the benefit conferred for a consideration which had failed, as was recognised in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[57] ("*Fibrosa*"), with the Diplock test for fundamental breach in *Hongkong Fir*, as the basis for what he named "the common law right to rescind" and which he expounded as follows:[58]

> 17 That said, it is now settled that there is, at common law, a right to rescind a contract in very limited circumstances. In essence it is the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration. *In Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 48, Viscount Simon LC said:
>
> > … in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.
> >
> > If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of

56 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 at [27] and [37]–[44].

57 [1943] AC 32.

58 *Berjaya Times Squares Sdn Bhd v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 at [17]–[18] and [20].

> consideration, in cases where the promise was given but could not be fulfilled …

18 What has to be added to the learned Lord Chancellor's view is the qualification:

> … that failure of consideration does not depend upon the question whether the promisee has or has not received anything under the contract … but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due (*Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883 per Lord Goff of Chieveley).

In other words, when deciding whether there is in a given case total failure of consideration, the court must first interpret the promise as a whole and next view the performance of the promise from the point of view of the party in default. The test is not whether the innocent party received anything under the contract. The test is whether the party in default has failed to perform his promise in its entirety. …

…

20 Absent a total failure of consideration, the common law right to rescind does not exist. Goff & Jones *The Law of Restitution* (6th Ed) which is the leading text on the subject has this to say at p 502, para 20-007:

> A breach of contract may be so fundamental that it deprives the "party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings" (*Hong Kong Fir Shipping Co Ltd v Kawasaki Kaisen Kaisha Ltd* [1962] 2 QB 26). The innocent party has then an election. He may affirm the contract or he may bring it to an end. In the latter event, if he has paid money to the defendant under the contract, he can, *as an alternative to claiming damages*, sue for recovery of the money *provided that the consideration for the payment has wholly failed*; *if the consideration has partially failed*, his only action is for damages. (Emphasis added.)

In other words, where there has been a total failure of consideration, the innocent party has the alternative remedy of suing to recover monies paid under the contract to the guilty party. But he can under no circumstances have his money returned and claim damages. And if the consideration has only partially failed, he may only claim damages. What is important is that this limited common law right to rescind should never be equated with the equitable remedy of rescission earlier discussed. I may add for completeness that in this country the equitable remedy of rescission has received statutory force. See, ss 34 to 37 of the Specific Relief Act 1950.

[emphasis added by the court]

38 It would seem that the *right to terminate* a contract for breach of contract under the *Hongkong Fir* doctrine and the *right to claim damages*

or alternatively restitution have been, with respect, in a manner not in accordance with the established principles, collapsed into one named the "common law right to rescind" to restore the contract parties to the *status quo ante*. Five points are referenced to show this was what was done and why it ought to be avoided.

39 First, by the term, "the common law right to rescind", his Lordship could have meant one of three things. It could simply mean, by another name, the right to restitution of the benefit conferred upon a consideration which had failed. In short, the right to restitution of benefit conferred under the contract following the discharge of the contract. The second possible meaning could be the common law version of the right to restore the parties to the position as if the contract was never made, rescission *ab initio*, for which equity grants such relief to achieve *restitutio in integrum* so that the parties are restored to their *status quo ante*. Lastly, it could mean that the right to terminate the contract for breach *and* a right to restitution are combined into one "common law right to rescind", in which the contract is "rescinded" in the sense that the contract is terminated and discharged, and restitution of the benefit also effected, but the rights are conflated as a basis for remedies to restore the contract parties to their *status quo ante* (*ie*, as if the contract had never been made).

40 In the author's view, it is unlikely that his Lordship meant the first two senses of the right he was purportedly exercising. If he had meant the first sense, the right to restitution, he would only need to call it that and end with the citation of *Fibrosa*. If he had meant the second sense, the right to rescind the contract, rescission *ab initio*, and achieve *restitutio in integrum*, he would have relied on neither *Fibrosa* nor *Hongkong Fir* since both are *not* authorities for what he had sought to establish. He had also distanced the "common law right to rescind" from equity's jurisdiction to rescind *ab initio* a contract vitiated by factors affecting free consent.

41 The third sense is the most likely meaning of the ambiguous term. The extensive use of authorities on the termination of contract for breach together with authorities on the right to restitution upon a total failure of consideration as support for the proposition that there "is, at common law, a right to rescind a contract in very limited circumstances"[59] point to this as his focus. The right to terminate for breach of contract under s 56(1) of the Contracts Act 1950 is an issue for the appeal. Moreover, he had also framed the issue for determination in the appeal as one as to whether the respondent can rescind the contract, that is, "to have the

59 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 at [17].

parties restored to a position where they will stand as if the contract had never been made".[60] Zulkefli Ahmad Makinudin FCJ (as he then was), in agreeing with the views of Gopal Sri Ram FCJ, would have understood the phrase to mean the third sense when he remarked:[61]

> A reference to ss 40 and 56(1) of the Act clearly showed that *the right to rescind a contract by way of termination* only arises when there has been a total failure of consideration. [emphasis added]

42 Second, the principles governing the right to terminate a contract for breach of contract or repudiation cannot be emasculated to accommodate the remedy that was sought. The issue whether the promisor's breach is one that would give the promisee the right to terminate the contract is one to be independently handled from the issue of the type of remedy which is appropriate in the context of the cause of action. Since the issue of termination, following the approach of the Malaysian courts and also as stated in the passage from *Goff & Jones*,[62] was guided by the *Hongkong Fir* doctrine, all that was required was for the principles established there to be applied. The concept of total failure of consideration, therefore, ought not to have been applied to the question of whether the breach gave rise to the right to terminate the contract.

43 Third, the common law as it stands now in fact does not recognise a "common law right to rescind" as espoused by the Federal Court in *Berjaya Times Square*. To say that there is such a right to rescind, as the quoted passages above show, his Lordship relied on *Fibrosa* and *Stocznia Gdanska SA v Latvian Shipping Co*[63] ("*Stocznia Gdanska*"). There is no issue on the right to terminate in *Fibrosa* since the contract was automatically discharged for frustration caused by the supervening event of the Second World War. In *Stocznia Gdanska*, the right to terminate the design-and-build contract for the vessel following termination under the contract clause was not in issue. The issue concerned was if the shipbuilder could claim for instalment payments under the contract as an accrued right prior to termination, then it would be an unjust enrichment in its hand since there was a total failure of consideration for its retention. It follows that their Lordships' speeches in both *Fibrosa* and *Stocznia Gdanska* on the application of the concept of total failure of consideration were in respect of the right of restitution of the money paid *after* the contract was discharged. Therefore, those speeches do not lay out any legal proposition

60 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 at [12].

61 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 at [4].

62 *Goff & Jones: The Law of Restitution* (Sweet & Maxwell, 6th Ed, 2002).

63 [1998] 1 WLR 574; [1998] 1 All ER 883.

under the common law which says there is a right to rescind based on a merger of contract principles governing the right to terminate a contract for breach or repudiation with restitutionary principles as a response to an unjust enrichment.

44 Fourth, in some cases it might well be that there is also a total failure of consideration on the facts but that is a result after breach and not a test for "fundamental breach" or breach of a fundamental term or breach of a term which goes "to the root of the contract" that would give the promisee the right to terminate if he so elects. The emphasis is on the nature of the breach, foreseeable consequences of the breach, and any event resulting from the breach which would have deprived the promisee from obtaining a substantial part of the benefit if the contract obligations *in futuro* were not performed under the *Hongkong Fir* doctrine. One would discern that for the third factor, the focus is on *the promisee not obtaining the benefit of the contract* because of the breach. Whereas, for the test of total failure of consideration, the focus is on whether it is unjust if *the benefit already conferred on the promisor is retained* since the basis (or condition or consideration, all synonyms in this context) for the transfer of the benefit by the promisee has failed, or failed totally for those who insist on a total failure of consideration.

45 Fifth, the Federal Court's examination of the words in ss 40 and 56(1) of the Contracts Act 1950 for justifying its application of the concept of total failure of consideration in a context where the issue is whether the events there give rise to the right to terminate or affirm the contract. Sections 40 and 56(1) do not even vaguely touch on whether a benefit ought to be returned. By interpreting the words "in its entirety" unnecessarily restrictively to accommodate the concept of total failure of consideration in a discharge of contract context is unjustified and has also added confusion to the application of the doctrine of repudiation expressed in s 40. This will be dealt with immediately below.

C. Repudiation

46 The doctrine of repudiation deals with the idea of what can be done by a promisee where a promisor refuses or will refuse to perform the contract. Since the performance of contract obligations in a bilateral contract of reciprocal promises is mutually dependent, the promisor must be ready and willing to perform his contract obligations. That is to say, he must not refuse to perform his part of the contract.[64] Upjohn LJ's first example in the passage already quoted is a good description of

64 J W Carter, *Carter's Breach of Contract* (Sydney, Australia: LexisNexis Butterworths, 2011) at p 298.

repudiation.[65] Repudiation as an incident of contract occurs when a promisor shows that he is not ready and willing to perform the contract and the common law gives the promisee the choice either to accept the repudiation and terminate or to affirm the contract. If he elects to accept the repudiation (*ie*, terminate the contract), the contract parties are discharged from performing the contract obligations to be performed in the future and the promisee can claim loss-of-bargain damages suffered as a result of the promisor's conduct in refusing to perform the contract.

47 If the incident of repudiation happens at a time prior to the arrival or expiry of the time for performance of the promisor's obligation and the promisee validly terminates the contract, an anticipatory breach occurs.[66] If the incident occurs when the promisor ought to have performed or started performing his contract obligation, a breach of contract, and, depending on the seriousness of the breach and its consequences, a fundamental breach or *Hongkong Fir*-type of breach, might have occurred.[67]

48 The language of s 40 of the Contracts Act 1950 allows for the incidents of contract related above to occur.[68] Section 40 reads:

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

49 Quite apart from the argument presented above that breach of contract giving rise to the right to terminate is determined by its own body of doctrine, the use of the concept of total failure of consideration had been employed to interpret the phrase "his promise in its entirety" in s 40 by the Federal Court in *Berjaya Times Square*. After quoting from the relevant passages in the speech of Lord Wilberforce in *Johnson v Agnew*[69] and the separate speeches of Lords Wilberforce and Diplock in *Photo Production Ltd v Securicor Transport Ltd*[70] on the legal effects of

65 *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287 at 297–298.
66 J W Carter, *Carter's Breach of Contract* (Sydney, Australia: LexisNexis Butterworths, 2011) at pp 300–301.
67 J W Carter, *Carter's Breach of Contract* (Sydney, Australia: LexisNexis Butterworths, 2011) at pp 234–235.
68 J W Carter, "Fundamental Breach and Discharge for Breach under the Contracts Act 1950 (Malaysia)" (2011) 28 JCL 85 at 96.
69 [1980] AC 367.
70 [1980] AC 827.

terminating a contract for breach,[71] Gopal Sri Ram FCJ declared that the position in Malaysia is no different and that s 40 is a restatement of the English common law position. However, he had also remarked:[72]

> Special attention should be paid to the phrase 'his promise in its entirety'. Under the section the right in a non-defaulter to repudiate a contract only accrues *when the defaulter has refused to perform or has disabled himself or herself from performing* ***the whole of his promise****. If there is* ***part performance by the defaulting party****, the innocent party may not put an end to the contract*. [emphasis added in italics and bold italics]

50 With respect, this is a statement that does not represent English and Malaysian common law on the doctrine of repudiation. Three points must be made.

51 First, although his Lordship did not mention the concept of total failure of consideration by name, it is plain that the legal proposition made is that, for repudiation to be established, the promisor must have refused to perform the whole of his promise; and therefore if he had partly performed the promise, the promisee cannot terminate the contract. In other words, unless there is a total failure of consideration – consideration being equated to performance by his Lordship – on the promisor's part, there is no refusal to perform the contract and thus no repudiation, and the promisee has no right to terminate the contract.

52 The author is, with respect, unable to agree with the legal proposition presented, for the phrase "his promise in its entirety" in the context of the doctrine of repudiation does not mean whole or total non-performance of his promise. Instead, the idea behind the phrase emphasises that the promisor had refused to perform the contract in the sense of the substance bargained for under the contract. It is also relevant that under the Contracts Act 1950, an accepted offer constitutes a promise, central to contract.[73] The promise is the substance of the bargain. Illustration (a) under s 40 communicates this idea well. The promise or contract (and it means the same thing in this context) is for *A* to sing at *B*'s theatre at an agreed rate for each performance for two nights each week for the next two months. After five performances, *A* refused to perform on the sixth night. Although she had partly performed her contract, by the sixth

71 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 at [27] and [37]–[44].

72 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 at [24].

73 Contracts Act 1950, s 2(b); D Fung, "Contracts for the Benefit of Third Parties in Malaysia" in *Studies in the Contract laws of Asia Vol II: Formation and Third* Party *Beneficiaries* (M Chen-Wishart, A Loke & S Vogenauer eds) (Oxford: Oxford University Press 2017) ch 7 at p 146.

night she was not ready or willing to perform her entire contract, *ie*, to perform twice a week for a period of two months, and thus *B* is entitled to elect to terminate the contract. With the termination, both *A* and *B* are discharged from performing their contract obligations in the future: *A* is not obligated to sing every two nights of the week for the remainder of the two months and *B* is not obligated to keep that performance place for her and pay for her remaining performances. Of course, *B*, the promisee, can claim for any loss suffered, *ie*, loss-of-bargain damages, arising from *A*'s repudiation: see the same illustration used under s 76 of the Contracts Act 1950 which states the common law principle of compensation for the promisee following lawful termination of the contract.

53 Illustration (b) under s 40 emphasises the point that if *B* elects to affirm the contract (or acquiesces in its continuance), which he did by assenting to *A* singing on the seventh night, then the contract obligations remain binding on the contract parties – as the contract is not discharged – and both *A* and *B* have to perform their obligations in the future (the eighth night and onwards until the two months are up), but for the breach of obligation to sing on the sixth night, *B* can claim damages resulting from that breach of contract.

54 The editor of the classic text on the Indian Contract Act 1872, in *Pollock & Mulla: The Indian Contract and Specific Relief Acts*[74] ("*Pollock & Mulla*"), commenting on the phrase "promise 'in its entirety'" in the identical Indian provision, s 39, remarked:[75]

> A refusal to perform any part of a contract, however small, is a refusal to perform the contract 'in its entirety'; but the kind of refusal contemplated in this section is one which *affects a vital part of the contract, and prevents the promisee from getting, in substance, what he bargained for.* [emphasis added]

55 So far it is clear that the phrase focuses on the promisor's refusal to perform his contract (or promise). The focus on "his promise in its entirety" therefore captures the element that for there to be a repudiation of the contract, he refuses to perform his promise which strikes at the substance of what was bargained for. However, it was not of help to introduce the concept of total failure of consideration in what is already a crowded and difficult area of law. A case on point is the recent Court of Appeal's decision in *Tan Kok Siang v Kemuning Setia Sdn Bhd*[76] ("*Tan Kok Siang*"). Mary Lim Thiam Suan JCA (as she then was) had applied

74 N Bhadbhade, *Pollock & Mulla: The Indian Contract and Specific Relief Acts* vol 1 (Bombay: LexisNexis, updated 14th Ed, 2013).

75 N Bhadbhade, *Pollock & Mulla: The Indian Contract and Specific Relief Acts* vol 1 (Bombay: LexisNexis, updated 14th Ed, 2013) at p 785.

76 [2018] 6 MLJ 652; [2018] 8 CLJ 546.

the comment from *Pollock & Mulla* on s 40 to say that it is relevant to examine the importance of the term in the agreement to see if the refusal to perform is superficial or substantial on the part of the defaulting party. She then rightly reasoned that if the term concerned is not a fundamental term and there is substantial performance then there is no right to terminate. Her Ladyship referred to the passage on part performance from *Berjaya Times Square* for support. However, the passage from *Berjaya Times Square* says part performance would mean the promisee has no right to terminate. In any event, not having been influenced by that passage, she was correctly directed by her reason on substantial performance and found that the manager of the project, the appellant, had on the evidence substantially performed the oral employment contract with the respondent and even if, which she agreed, he had breached his contract in leaving his employment earlier, the respondent did not have a right to terminate the contract for repudiation under s 40 because of the appellant's substantial performance.

56 Second, the passage on part performance in *Berjaya Times Square* is *obiter*, not supported by either Malaysian or English authorities, and it is better not to follow it as the reasoning does not assist in determining the issue whether the breach of contract gives rise to the right to terminate. This has been seen in *Damansara Realty* and *Tan Kok Siang*. In *Berjaya Times Square* itself, the useful summary of the English position on repudiation represents the law. Malaysian authorities from the highest court which follow the orthodoxy are *Ban Hong Joo Mines Ltd v Chen and Yap Ltd*,[77] *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd*[78] and *Damansara Realty*.

57 Third, if the orthodox doctrine of repudiation had been applied to the facts of *Berjaya Times Square*, it would have yielded the result that the appellant did not repudiate the contract. An absolute refusal by the appellant to perform its contract would be hard to establish. The way the doctrine operates is to determine whether there is evidence that the appellant was ready and willing to perform the contract. The evidence showed a much-delayed performance of the contract. However, this would have been insufficient to show that the appellant did not intend to perform the contract, for by the time the action was filed, 90% of the contract had been performed. At the time of the purported termination of the contract, the appellant had quickly responded to the notice to terminate by stating its readiness and willingness to perform the contract, and for its delay, would pay the respondent the liquidated agreed damages.

77 [1969] 2 MLJ 83.
78 [1985] 2 MLJ 291.

D. Election of rights and remedies

58 Since the Federal Court had most likely used the term, "the common law right to rescind", in the third sense explained above, what had started life as a cause of action for determination of the right to terminate the contract for breach and damages consequent on the breach of contract, had metamorphised into an astonishing hybrid. It is one perceived by the Federal Court as where the respondent was claiming for termination of the contract and seeking for remedies to be placed in a position as if the contract never existed but by relying on a right to restitution as a response to an unjust enrichment. From the perspective of election of rights, this simply cannot be achieved as inconsistent rights have been merged to innovate "the common law right to rescind". There are three reasons.

59 First, the right to rescind *ab initio* the contract is not a right to terminate the contract for breach of contract or repudiation. This much has been acknowledged at numerous places in Gopal Sri Ram FCJ's judgment.[79] They are inconsistent rights, *ie*, mutually exclusive.[80] By rescission *ab initio*, the contract is vitiated or set aside from inception as if it had never existed. By termination of a contract for breach of contract or repudiation, the contract is acknowledged and only rights *in futuro* are discharged from the date of termination and the right to damages resulted from the contract. Moreover, accrued rights under the contract are recognised and not divested by the termination.[81] Since the reasoning employed by his Lordship is one which merges the inconsistent rights, there is thus no occasion for election.

60 Second, and following from the first, the fact that that is a merger, or in another word, conflation, of inconsistent and alternative rights into one "common law right to rescind" demonstrates that that right cannot work in logic or practice. *A priori* the "right" cannot exist. It is unstable.

61 Third, there remains to be considered a different type of election: the election between alternative remedies which is presented to the plaintiff at the time she enters final judgment for the cause of action.[82] In *Berjaya Times Square*, the fact situation which gave rise to the remedies

79 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 at [13]–[16].

80 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641–642, *per* Stephen J.

81 J W Carter, *Carter's Breach of Contract* (Sydney, Australia: LexisNexis Butterworths, 2011) at pp 600–601.

82 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 30, *per* Lord Atkin; *Mahesan v Malaysian Government Officers' Co-operative Housing Society* [1978] 1 MLJ 149; *Tan Man Sit v Capacious Investments Ltd* [1996] 1 AC 514.

remained as one for breach of cl 22 of the sale and purchase agreement which the respondent claimed gave rise to the right to terminate the contract which it did by notice of termination dated 27 December 2001 and the remedies of refund of purchase price paid and loan costs wasted. It is at once noted that the damages claimed following from the breach of contract is not the normal contract measure, *ie*, loss of bargain damages.

62 However, it should also be noted that although loss of bargain is the normal measure of damages claimed after termination of the contract for breach or repudiation, this need not be the only measure.[83] The promisee may wish to recover his losses incurred in reliance on the promise and this would include the money paid under the contract. In this instance, the money paid being a loss incurred by the promisee corresponds exactly to a benefit received by the promisor.[84] The promisee will be entitled to establish and prove his claim for damages on this compensatory basis as a remedy. In this instance, there is no election to be made but the amount claimed in damages would entail no recovery in restitution to prevent double recovery for the same sum.[85] In any event, there was no claim for restitution in *Berjaya Times Square* as the respondent had claimed for damages caused by the appellant's breach of contract. Any lingering confusion caused by the use of the word "refund" of money paid with the right of restitution can be avoided by dropping the use of that word and naming that part of the damages as a loss incurred in performing the contract. The High Court through David Wong Dak Wah J (as he then was) in *Trade Mode Sdn Bhd v A C Property Development Sdn Bhd*[86] did not have any problem assessing the purchaser's loss, comprising part payment of the purchase price, as damages claimed in accordance with the compensation principle following a breach of contract under s 76 of the Contracts Act 1950.

83 J W Carter, *Carter's Breach of Contract* (Sydney, Australia: LexisNexis Butterworths, 2011) at pp 626 and 679–680; K Mason, J W Carter & G J Tolhurst, *Mason & Carter's Restitution Law in Australia* (Sydney, Australia: LexisNexis Butterworths, 3rd Ed, 2016) at paras 1809–1811.

84 K Mason, J W Carter & G J Tolhurst, *Mason & Carter's Restitution Law in Australia* (Sydney, Australia: LexisNexis Butterworths, 3rd Ed, 2016) at paras 1405, 1410 and 1819.

85 K Mason, J W Carter & G J Tolhurst, *Mason & Carter's Restitution Law in Australia* (Sydney, Australia: LexisNexis Butterworths, 3rd Ed, 2016) at paras 1405, 1410 and 1819.

86 [2010] 10 CLJ 628.

E. Unjust enrichment

63 Gopal Sri Ram FCJ had highlighted and analysed the Privy Council decision in *Muralidhar Chatterjee v International Film Co Ltd*[87] ("*Muralidhar Chatterjee*") since the respondent relied on it but there was no rendition of what the respondent's argument was. Given that the case's main legal proposition was that the promisor (or defaulting party) can have restitution of benefit conferred under the contract discharged for breach of contract by the promisee (or innocent party) under s 64 of the Indian Contract Act 1872 (Malaysian s 65), it is assumed that this case was used by the respondent in *Berjaya Times Square* to support its argument on restitution of the money paid on the contract. At the outset, it ought to be noted that the utility of the principle embodied in the section is that despite the breach which led to the discharge of the contract, the defaulting party may yet have a right to restitution of the benefit conferred under the contract. In *Berjaya Times Square*, the fault of the party was the other way round as it was the appellant who had breached because it had delayed performance of its obligation. Despite this fact, the relevance for the present purpose is that the Federal Court's understanding of *Muralidhar Chatterjee*, though *obiter*, would be troubling if it were to be applied in future cases calling for the application of the principle contained in s 65.

64 *Muralidhar Chatterjee* was a case where the plaintiff, a distributor of films in India for showing in cinemas, had a contract with the defendant, a company which had the right to import films into India. Under the contract the plaintiff had to pay an advance payment to the defendant for each film he requested and intended to show in India. He had paid the advance payment of approximately Rs2,000 each at different times for two films he intended to show. A dispute occurred between them and after only one film was delivered to the plaintiff, he proceeded to terminate the contract for the defendant's alleged breach and claim refund of the Rs4,000 advance payment, costs expended, and general damages. It was conceded in the legal proceedings that the plaintiff's termination of contract was wrongful, and which consequently constituted his repudiation of the contract that was duly accepted by the defendant with the attendant right to claim damages for repudiation against the plaintiff. The issue on appeal to the Privy Council was whether the plaintiff, nevertheless, was entitled to claim restitution of the advance from the defendant.

65 The advice of the board was delivered by Sir George Rankin. In resolving the issue, the board recognised that ss 39 and 64 of the Indian Contract Act 1872 were particularly relevant. Since the Contract Act

87 AIR 1943 PC 34.

1872 uses the language of "voidable", "put an end to", "becomes void" and "rescinds" in various parts of the Act, their Lordships had to be satisfied that s 64 is not restricted to the incidents where the contract is rescinded *ab initio* for lack of free consent because consent was vitiated by fraud, undue influence and so on. Illustration (c) in s 65 also appears in ss 39 and 75. Their Lordships found that the illustration is a prominent feature of the Act and would also be applicable to s 64. And s 53 is also relevant to show that if one party to the contract prevents the other from performing his promise, the contract "becomes voidable at the option of the party" who may "elect to rescind" and is entitled to claim damages. It is also the same with s 55 where if the breach of the time stipulation is of the essence, the contract "becomes voidable at the option of the promise". They were of the view that s 64 (Malaysian s 65) applies to a contract that was put an end to, *ie*, terminated, under s 39 (Malaysian s 40) by the innocent party, and if he has received any benefit from the defaulting party, the latter is entitled to restitution of the benefit. They were also of the view that the innocent party, the defendant, is entitled to claim damages against the defaulting party, the plaintiff, for repudiation of the contract. Their Lordships, therefore, declared that the plaintiff had the right to restitution of the money paid of Rs4,000 subject to the defendant's right to set off such amount of damages as found to have been suffered by it.

66 In *Berjaya Times Square*, Gopal Sri Ram FCJ, after having correctly stated that the Privy Council in an appeal from Malaysia in *Linggi Plantations Ltd v Jagatheesan*[88] had agreed with and followed *Muralidhar Chatterjee* on its reasoning concerning the equivalent Malaysian ss 65 and 75, proceeded to consider two separate decisions of the Madras High Court of India, *VK Kumaraswami Chettiar v PASV Karuppuswami Mooppaner*[89] and *Rama Rao v Bashu Khan Saheb*.[90] However, he did not consider the Federal Court's decision in *Yong Mok Hin v United Malay States Sugar Industries Ltd*[91] ("*Yong Mok Hin*") which approved of and followed the principle recognised in *Muralidhar Chatterjee,* that following termination of the contract for breach, s 40 applies and if the innocent party has received any benefit under the discharged contract, restitution of the benefit should be rendered to the defaulting party as provided under s 65, with the added observation that under s 66 the right to restitution is extended to not only the defaulting party but the other party who had conferred a benefit under the contract.

88 [1972] 1 MLJ 89.
89 AIR 1953 Mad 380.
90 [1998] 2 CTC 363.
91 [1967] 2 MLJ 9 at 15.

67 Gopal Sri Ram FCJ, whilst not saying *Muralidhar Chatterjee* was wrong, sought to restrict the principle of restitution contained in s 65 of its general application by reasoning that it only applied to the facts of *Muralidhar Chatterjee* where the defendant there, having terminated the contract for the plaintiff's breach, had a damages claim and the contract-breaker plaintiff was then entitled to have the money paid (not being a deposit) set off against the damages he had to pay. His Lordship reasoned that were it otherwise the contract breaker would be in a position to take advantage of his own wrong and this was against principle and the policy of the law.

68 There are three points to make concerning what is, the author respectfully submits, the unwarranted restriction to the principle of restitution contained in s 65 of the Contracts Act 1950.

69 First, in *Muralidhar Chatterjee*, their Lordships in the Privy Council were fully aware that they would be making the declaration on the contract breaker having a right to restitution against the innocent party on the strength of the words of s 65 and the nascent recognition of the right to restitution at the time. Sir George Jenkin reasoned:[92]

> *Their lordships are not concerned to make the Act agree in its results with English law*. It may be that in such a case as the present the defendants could not in England be made liable to refund any portion of the Rs4,000 paid on account, even upon proof that they had sustained no damage by the plaintiff's breaches. That the matter is not quite clear may be inferred in *dicta* in *Mayson v Clouet* [1924] AC 980, 987 and in *Dies v British and International Mining and Finance Ltd* [1939] 1 KB 724. It is at least certain that if the party who rightfully rescinds a contract can recover damages from the party in default and have been afforded proper facilities of set-off, the Indian legislature might well have thought his just claims have been met. The fact that a party is in default affords good reason why he should pay damages, *but further exaction is not justified by his default*. Where a payment has been made under a contract which has – ***for whatever reason*** – become void *the duty of restitution would seem to emerge*. ***A cross claim for damages stands upon an independent footing***, though it arises out of the same contract and can be set off. [emphasis added in italics and bold italics]

70 This passage beautifully portrays the delicate position of the common law in England and, at the time its colony, India, which might be different because of the provisions in the Contract Act 1872. What is clear from the language of s 65 (Indian s 64) read in the context of the Act is as follows: (a) termination of a contract for breach or repudiation means the contract parties do not have to perform contract obligations yet to be performed in the future for the contract is discharged in this

92 *Muralidhar Chatterjee v International Film Co Ltd* AIR 1943 PC 34 at 39.

respect; and (b) if a benefit has been transferred from the defaulting party in performance of the contract, restitution of the benefit should be rendered from the innocent party who had terminated the contract in accordance with restitutionary principles.

71 What it does not say is that the innocent party has a right to claim damages against the defaulting party for the breach of contract or repudiation. The common law of England and the expression of it in ss 40, 54, 56 and 76 of the Contracts Act 1950 have amply provided for the right of the innocent party (the promisee) to claim damages as a result of the breach of contract or repudiation. And as expressed and judicially explained in *Yong Mok Hin*, the right of restitution is also provided for in relation to each party to the contract under s 66.[93]

72 Second, the English common law development of the law of restitution – and it is now preferable to refer to it by its causative event, unjust enrichment – has had a chequered history. Undoubtedly, *Goff & Jones*,[94] and the late Prof Peter Birks's immensely important analytical work to understand the subject's internal structure, have contributed immeasurably to its continual development and we have now seen in England the firm recognition of the law of unjust enrichment as the third of the three common law bases for the private law of obligations. There have long been proponents of the view that the prevention of unjust enrichment by a legal response of restitution of the benefit conferred lies behind the legal response contained in ss 65, 66, 71, and 73 of the Contracts Act 1950.[95] By implication, these provisions, which are curt legal statements that a right to restitution can be afforded in the fact situation contained in those sections, suggest that such a right is protected and recognised under the common law. The Federal Court, in its decision in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*[96] ("*Dream Property*"), put paid to this notion, for his Lordship Azahar Mohamed FCJ declared: "[T]here is now no longer any question that unjust enrichment law is a new developing area of law which is recognised by our courts."[97]

73 Third, with the common law's recognition of unjust enrichment as a basis for legal obligation, it is of critical importance that the elements

93 See also *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 at 431.

94 The first edition was published in 1966. It is now in its ninth edition (2016) with a change of title from the eighth edition by substituting "Restitution" for "Unjust Enrichment".

95 N Bhadbhade, *Pollock & Mulla: The Indian Contract and Specific Relief Acts* vol 2 (Bombay: LexisNexis, 14th Ed, 2013) at pp 1041–1044.

96 [2015] 2 CLJ 453.

97 *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 at [118].

of the cause of action named unjust enrichment are understood and coherently developed. As part of the law of obligations, unjust enrichment is understood in its subtractive sense: the value being subtracted from the plaintiff and unjustly retained by the defendant is to be transferred back to the plaintiff. It would not help at all if the elements in unjust enrichment are indiscriminately used and conflated with contract principles developed for breach of contract and repudiation. The four basic elements which would inform any inquiry on a cause of action in unjust enrichment giving rise to the legal response called restitution are as follows:[98]

(a) Is the defendant enriched (*ie*, did he receive a benefit)?

(b) Is the benefit transferred at the expense of the plaintiff?

(c) Is the defendant's retention of the benefit unjust (*ie*, one transferred on the absence of basis)?

(d) Does the defendant have a defence which will extinguish or reduce his liability to render restitution?

74 As to the third element, the concept of total failure of consideration is used to establish that the retention of the benefit is unjust. At present the preponderance of opinion is that failure of consideration is preferred. And what "total" seeks to achieve can be off set with counter-restitution from the defendant/recipient to the plaintiff when restitution of the benefit is granted.[99] This is very much an intuitive argument and the law is very likely to develop in this manner. Following *Dream Property*, the High Court in *Monument Lining Sdn Bhd v Emas Kehidupan Sdn Bhd*[100] granted restitution of the money paid to the promisor (contract breaker) by the promisee who had rightly terminated the contract for breach of contract. Restitution was granted because the benefit was retained on an absence of basis: the "near total failure of consideration" for the money paid meant restitution for its value is granted. The High Court decision illustrates how the right to restitution after a discharge of contract has worked in a coherent manner.

V. Conclusion: Names and pathways

75 To hope for uniformity of terminology in this area of contract law may be to "cry for the moon".[101] To not try would be to resign oneself to the

98 *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 at 492–496.

99 A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012) at pp 88–89 and 128–129.

100 [2016] 8 CLJ 109 at 134, *per* Lim Chong Fong JC (as his Lordship then was).

101 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 844.

present morass. In this article, the term "termination" for the discharge of the contract for breach of contract or repudiation has been used to mean the contract parties are discharged of their obligations to be performed in the future. If one still insists on using "rescind" for terminating the contract or putting an end to the contract, then one has to be careful in ensuring that this use of the word is to be distinguished from rescinding *ab initio* for lack of free consent in formation of the contract. The Federal Court adopting and following the clear explanation of termination of a contract for breach or repudiation by Lord Wilberforce and also by Lord Diplock in *Photo Productions* and *Johnson v Agnew* is good as the passages followed show the unity of principles developed by the common law in the Commonwealth.

76 The doctrine of repudiation should be seen as embedded in s 40 of the Contracts Act 1950. The recitation of the history of the development of the doctrine by the Federal Court in *Berjaya Times Square* is useful[102] and that part is not affected by what followed afterwards in the court's, with respect, misjudged development of what was named "the common law right to rescind".

77 However, the use of "the common law right to rescind" in the manner done by the Federal Court in *Berjaya Times Square* and by the Court of Appeal in *LSSC Development* and *Tan Ah Chong* is not supported by authority. It was the unprincipled merger of principles governing breach of contract and repudiation, in particular the *Hongkong Fir* doctrine, with principles governing restitution as a legal response to an unjust enrichment. The Federal Court did this through the deployment of the restitutionary concept of total failure of consideration into an analysis for whether there is a breach of contract or repudiation which gives rise to a right of termination. This must be avoided. The spate of reported cases post-*Berjaya Times Square* which showed an inordinate volume of litigation on a common transaction yielding inconsistent decisions is perhaps further evidence that the concept of total failure of consideration is not the test to be used in the determination of whether there is a right to terminate the contract and achieve *status quo ante* for the contract parties.

78 The use of the concept of total failure of consideration in the determination of whether there is a breach of contract or repudiation has the effect of wrongly curtailing the ambit of both ss 40 and 56 of the Contracts Act 1950. This is extremely harmful as these doctrines have

102 *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 at [13].

separate ancestry and principles to determine the question of whether the right to terminate is available.

79 The Federal Court's decision in *Berjaya Times Square* is to be strictly restricted to the fact situation where the promisee wants to rescind *ab initio* a contract for breach of contract or repudiation so that the contract parties would be restored to a position as if the contract had never been made. Only such a case would attract "the common law right to rescind" espoused by the Federal Court in *Berjaya Times Square* and prior to that by the Court of Appeal in *LSSC Development* and *Tan Ah Chong*. However, it has been argued here that that legal proposition is unstable: an erroneous merger of two inconsistent rights. The innovation is also not needed, for orthodoxy already supplies the answers.