Before the High Court

Fault Lines in the Law of Obligations: *Roxborough v Rothmans of Pall Mall Australia Ltd*

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1. Introduction

> Take ... a Sydney-based person (A) who agrees to organise the importation of goods for an acquaintance (B) who lives in the country. A asks for, and receives from B, a cheque in his favour for the amount of duty which he estimates will be levied and become payable to secure the release of the goods. Assume further that A simply pays this cheque into his ordinary account. Then assume that, prior to payment of the duty, the Customs tariff is amended so that no duty is levied for the release of the goods. A claim by B against A at common law, for money had and received for the amount paid, could hardly be resisted, quite apart from any fiduciary duties that might arise. It was simply money received for a purpose which wholly failed. It would be brave to suggest that A could retain monies beneficially for himself.[1]

This scenario was devised by Gyles J as a variant of the facts of *Roxborough v Rothmans of Pall Mall Australia Ltd*, now on appeal to the High Court from the Federal Court. B stands for tobacco retailers who had agreed to buy tobacco from a wholesaler, Rothmans (A). In addition to buying cigarettes for resale, B agreed, as a separate component of each contract of sale, to pay an amount in respect of a licence which A was required to take out under the *Business Franchise Licences (Tobacco) Act* 1987 (NSW) ('*Tobacco Act*'). The amount of the fee was assessed by reference to past sales of cigarettes and was paid to A before the date on which A became liable to pay the licence fee. After B had paid A amounts representing the licence fee, but before A had taken out the relevant licences, the High Court handed down decisions[2] declaring A's obligation to pay the fee unconstitutional on the ground that it constituted an excise of duty which could not be levied by the New South Wales government. A majority of the Full Federal Court held that B was not entitled to restitution of the amount paid to enable A to take out the licence.

The decision is counter-intuitive. If Gyles J's assumption that B is entitled to restitution on the non-contractual scenario set out above is correct, why should B be denied restitution simply because the payment was made pursuant to a contract? The High Court's invalidation of the legislative scheme for tobacco licensing was

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1 *Roxborough v Rothmans of Pall Mall Australia Ltd* (1999) 167 ALR 326 at 357 (Gyles J dissenting) (hereinafter *Roxborough*).

2 *Ha v State of New South Wales, Walter Hammond & Associates Pty Ltd v State of New South Wales* (1997) 189 CLR 465.

not part of the contractual risk assumed by B. We find the logic of his dissenting judgment irresistible, and the purpose of this article is to explore how the application of contractual and restitutionary doctrines in the majority judgment have somehow managed to subvert that logic.

That judgment[3] throws into sharp relief some of the obstacles to the principled development of the law of restitution in Australia. A distinguished commentator has applauded the High Court in *Pavey and Matthews Pty Ltd v Paul*[4] for having exorcised the ghost of implied contract as the basis of restitution.[5] But even if restitutionary obligations are no longer rationalised in terms of a fictional implied contract to repay, the symbiotic relationship between contract and restitution cannot be ignored. Where payment has been made pursuant to a valid contract the availability of restitution on the grounds of mistake and failure of consideration is largely determined by the specifications of the contract, notwithstanding that it is invalid or has been terminated. It is true that distinctions between obligations imposed by agreement and restitutionary obligations imposed by law can be too sharply drawn: the injustice to which the law of restitution responds will very often be intelligible only in terms of the bargain concluded by the parties.[6] The majority judgment, however, goes much further than this: it deduces liability to make restitution from the existence of an implied term to make payment, in the absence of any express obligation to do so. It does so by applying what, in our opinion, is a flawed methodology for the implication of terms, with the predictable result that the time-honoured 'officious bystander' determines the outcome.

The decision also invites reconsideration of a principle that governs the inter-relationship of contractual and restitutionary claims: the principle that, as between contracting parties, the termination of the contract is a precondition for restitution. As *Roxborough* demonstrates, this does not always make good sense, and it is our view that termination should not always be required.

Finally, the judgment demonstrates the price Australian law pays for its compartmentalisation of common law and equitable doctrine, even where the case for moderate and sensible integration is overwhelming. The principles governing recovery of money for total failure of consideration are analysed separately from discussion of the *Quistclose*[7] trust and the constructive trust imposed in cases of failed joint venture[8] without awareness that, at least in this context, the concepts are functionally identical. The judgment even raises the disturbing spectre of awarding restitutionary equitable compensation for a failed joint venture. If available, such relief would go a long way towards rendering the common law action to recover money paid upon a total failure of consideration redundant. It is

3 Hill & Lehane JJ.

4 (1987) 162 CLR 221.

5 Gareth Jones, 'Restitution: Unjust Enrichment as a Unifying Concept in Australia?' (1988–89) 1 *Journal of Contract Law* 8 at 14.

6 Compare Peter Birks, 'Misnomer' in William Cornish (ed), *Restitution Past, Present and Future — Essays in Honour of Gareth Jones* (1998) at 7–8.

7 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (hereinafter *Quistclose*).

8 *Muschinski v Dodds* (1985) 160 CLR 583.

to be hoped that the High Court will clarify the circumstances, if any, in which a claim for equitable compensation can be made for failure of consideration (for that is really all that a failed joint venture amounts to).

We turn to the principal[9] grounds for disallowing the plaintiff's claim to restitution of the amount paid in respect of the licence fee.

2. *The Implied Term Argument*

For historical as well as conceptual reasons the various forms of civil liability or 'causes of action', although they emanate from separate sources and serve distinguishable objectives, can overlap or intersect in their application to a particular situation. It has become commonplace for litigants to rely on more than one of them in conjunction. An act or omission by a party may be simultaneously a tort, a breach of contract, a breach of a duty to make restitution, and a breach of an equitable duty (for example, a fiduciary duty), superimposed on which there may also be statutory liability (for example, misleading conduct under the *Trade Practices Act* 1974 (Cth)). *Roxborough* itself exemplifies this: the plaintiffs' claim was based on contract, restitution, constructive trust, and statutory misleading conduct.

In such cases a problem arises if the resolution of the claim differs according to which category of liability is applied. Australian law has not so far found any thoroughgoing solution to this problem. It is a difficult one, which requires a much fuller elucidation of the relationship of the various causes of action (including statutory causes of action), and possibly also the reconceptualisation of the law of remedies.[10]

At the same time, the cultivation of overlap in a particular case can sometimes seem redundant or artificial. One of us has argued in another place that implied term reasoning should not have played a part in the resolution of the claim in *Roxborough* on the basis that the law of restitution provides the more appropriate point of reference.[11] However, both the majority and Gyles J took it for granted that recovery could at least potentially be justified on either basis. For present

9 The following issues discussed by the Federal Court will not be considered in this note: the construction of s41(3) of the *Tobacco Act*, as to which there was no judicial disagreement; the argument that automatic restitution, without proof of an unjust factor, should be recognised 'by analogy' with the House of Lords decision in *Woolwich Equitable Building Society v Inland Revenue Commissioners (No 2)* [1993] 1 AC 70, acceptance of which is barred for the time being by decisions such as *Esso v Gas and Fuel Corporation of Victoria* [1993] 2 VR 99 which have refused to extend the principle beyond direct claims brought against public authorities; and the claim under s52 of the *Trade Practices Act* 1974 (Cth) that Rothmans had engaged in misleading and deceptive conduct.

10 The dilemma has prompted a movement towards discretionary remedialism — the view that judges should have 'a strong discretion to apply the remedy which they consider to be most appropriate in the circumstances': see Peter Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 *Western Australian Law Review* 1 at 3; see Paul Finn, 'Equitable Doctrine and Discretion in Remedies' in Cornish, above n7 at 251.

11 Michael Bryan, 'Where the Constitutional Basis for Payment has Failed' [2000] *Restitution Law Review* 218 at 221.

purposes we will assume the legitimacy of this point of view, so as to allow us to examine on its own terms the treatment given by the court to the implied term argument.

A. The Two Implied Terms

The plaintiffs' claim rested on the implication of not just one, but of two terms. In the first place, the plaintiffs argued that it was an implied term of each contract of sale of cigarettes by Rothmans to retailers that the amount 'identified in the invoice as the amount of the licence fee referable to the sale would be refunded in full ... if the amount were not paid ... as licence fees'. (We shall refer to this term as 'the obligation to refund'.) It followed from the implication of such a term that by refusing to refund the money in question Rothmans were in breach of contract.[12]

In the second place, the plaintiffs argued that each contract of sale also contained an implied term that Rothmans would pay the amount 'identified in the invoice as the amount of the licence fee referable to the sale ... by way of licence fees'. (We shall refer to this term as 'the obligation to pay'.) The point of this argument was not to establish a right to sue for breach of such an obligation, but rather to establish a total failure of consideration and therefore a basis for recovery under the law of restitution. If Rothmans were under an implied obligation to pay the amount identified in the invoice to the licensing authority, it had failed to do so and could no longer do so. Thus it had failed to supply the consideration for the plaintiffs' payment of the money, and must make restitution.

The claim for restitution on the basis of failure of consideration is taken up in section 4 of this paper. It will there be argued that restitution for failure of consideration is not based on any implied term, but rests on an independent and broader base. However, whether Rothmans were under an implied obligation to pay to the NSW government the amounts received from retailers in respect of licence fees is an issue of contract law. In this part of our article we will consider this contractual dimension of the retailers' argument, both in relation to the first implied term (to refund) and the second implied term (to pay).

The majority rejected both implied terms. According to the majority, they fell to be decided by reference to the question whether an officious bystander would have regarded the term as obviously necessary to give the contract business efficacy. Both failed to satisfy this standard.

We will argue that the majority's treatment of this issue is flawed in two main respects. In the first place it endorses the application, in terms of what is called 'implication in fact', of a concept (the officious bystander) which we believe should be jettisoned or at least reconceived. In the second place it fails to consider altogether what we consider to be the more appropriate basis for implying the two terms in question, 'implication by law'.

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12 Although the court did not address this issue, the appropriate remedy would presumably have been an order for specific performance: compare *Turner v Bladin* (1951) 82 CLR 463. Alternatively the amount in question might be recoverable as damages, perhaps together with damages for the loss of its use during the period of its unjustified retention: compare *Hungerfords v Walker* (1989) 171 CLR 125.

B. Implication on Implication

Our criticisms of the majority's use of the 'officious bystander', and of its neglect of 'implication by law', apply equally in respect of both implied terms put forward by the plaintiffs. Before proceeding to the elaboration of our argument on these points, however, it should be noted that the majority adduced a further reason for rejecting the second implied term (the obligation to pay). It is a specious one. The majority proposed that the second term was related to the first one in such a way as to involve 'implication upon implication'. Such a process, it asserted, is not warranted by the authorities. However, this assertion, which is itself quite unsupported by authority, is not correct. To demonstrate this it is necessary to investigate more closely what the majority meant by 'implication upon implication'. What it meant emerges from the following passage:

> The hypothetical dialogue between the parties and the officious bystander does not proceed by stages, arriving first at a term and then, through a process of further hypothetical discussion, adding qualifications and exceptions. What is to be implied must ... appear fully fledged.

The majority did not say explicitly in what sense the second implied term (to pay) involved a qualification of or exception to the first implied term (to refund). At first sight the reverse seems to be true: the obligation (if any) to pay the amounts invoiced as licence fees to the government may be thought of as qualified by the obligation (if any) to refund the money if licence fees were no longer payable. But to enter on such a path of analysis serves only to show how problematic the banning of 'implication on implication' would be. Such a ban would introduce a useless technicality into the process of implication. Moreover, and contrary to the majority's assertion, it is not defensible in light of the authorities, among which it is not difficult to find examples of implication on implication. For instance, in *Helicopter Sales (Australia) Pty Ltd v Rotor-Work Pty Ltd*[13] a helicopter crashed because of a defective part supplied by the defendant, an aeronautical engineering firm which serviced the helicopter. The owner sued for breach of contract. The court conceded that a contract for work and materials normally includes implied warranties of quality and fitness. But in this case such terms were impliedly excluded, because the plaintiff had specified that only manufacturer's parts in sealed packs certified by the Department of Civil Aviation were to be used by the defendant, and knew that the defendant could not practicably test their quality. The case is therefore one in which one implied term is qualified by another, in other words a case of 'implication upon implication'.[14]

C. The Role of the Officious Bystander

The basis on which the majority rejected both implied terms was that they failed to comply with the test for 'implication in fact'[15] laid down in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* ('*BP Refinery*'). According to this much-cited test:

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13 (1974) 132 CLR 1.

> for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract ...; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.[16]

The majority concluded, in relation to the first implied term (to refund): 'Applying, as we must, the ... conditions listed in *BP Refinery* ... we do not see how it can be said that the implied term pleaded is either necessary to give the contract business efficacy or so obvious that "it goes without saying"'.[17] It objected to the second implied term (to pay) on the same grounds.[18]

In the case of the first implied term (to refund) the reason for rejecting it, according to the majority, was to be found in 'the legislative and commercial context of the dealings between the parties'. Under the scheme sponsored by the *Tobacco Act*, Rothmans passed on the cost of licence fees to retailers, and the retailers in turn passed the fees on to their customers, the consumers. It followed that

> [t]he Retailers' commercial expectations would be fulfilled if they, in turn, recovered from their purchasers the amount they had paid Rothmans (including the amount for tax) together with their margin. Once that is seen, it is evident, in our view, that *the officious bystander's question*, "but what if Rothmans have received an amount for tax from a retailer and it turns out that neither Rothmans nor the retailer has an obligation to pay tax to the government?" does not admit of a clear answer and would be *unlikely to elicit a unanimous one*. Rothmans might well have replied that, in the circumstances contemplated, the Retailers would not be deprived of anything for which they had bargained or which they reasonably expected, so that there was no reason why they should be entitled to a refund. The Retailers would very likely have given a different answer.[19]

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14 Compare *Breen v Williams* (1996) 186 CLR 71 (hereinafter *Breen*), in which the High Court recognised that the implied duty of a doctor to exercise reasonable care and skill in the treatment of a patient may provide the basis for the further implication of a duty to provide information from (though not access to) medical records: at 80, 97, 124. Indeed, every case in which a court finds that there has been a breach of an implied obligation formulated in general terms — an obligation to co-operate, to act reasonably, to act in good faith, to make best efforts, and so on — can be regarded as a case of implication on implication, since such a finding must rest on the identification of a specific obligation derived from the general term. So, for example, in *Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 (hereinafter *Secured*), the implied obligation of each party to a contract 'to do all such things as are necessary on his part to enable the other party to have the benefit of the contract' led to the further implication that the respondent was not entitled to refuse to grant a lease to the appellant unless it was reasonable to do so: at 607, 610.

15 Implication in fact is implication by reference to the presumed or hypothetical intention of the parties. There is also implication by law, considered further below.

16 (1977) 180 CLR 266 at 283.

17 Above n1 at 340.

18 Id at 341.

19 Id at 340 (emphasis added).

It will be apparent that the reasoning of the majority here turns on the utilisation of the 'officious bystander' as the vehicle for reaching its conclusion. This is true also of the majority's argument relating to the second implied term (the obligation to pay).[20]

The precise relationship of the 'officious bystander' to the criteria separately listed in the *BP Refinery* case (which together make up what is often called the 'business efficacy' test) is not entirely unproblematic, but this is not an issue which needs to be pursued here. We are content, for present purposes, to accept the view that '[t]he "business efficacy" test is the more general statement of principle which thus serves as the basic *theoretical* guideline. The "officious bystander" test, on the other hand, provides the *practical* mode for *effecting* the general principle.'[21]

The majority's reasoning is based on what is admittedly the prevalent conception of the role of the officious bystander. This view conceives of him as a helpful interrogator of the parties. In this role he can be imagined as attending at the formation of the contract. In imagination he asks the parties what provision should be made in the contract if contingency X should happen. If their response is instantaneous and unanimous, there is an implied term to that effect. But if their answers differ, there is no implied term. In either case the bystander's role is merely that of an interviewer of the parties, whose imagined response is the decisive element in determining whether a term should be implied and what form it should take.

This conception of the bystander is graphically illustrated by the majority opinion in the *BP Refinery* case itself. The plaintiff company, a subsidiary of BP Australia, operated an oil refinery in the defendant Shire. A contract between the

20 '[T]he legislation provided that if the wholesaler did not pay tax in respect of the goods which it sold to the retailer, then the retailer was obliged (if it wished to remain in business) to pay the tax. In those circumstances it might well be supposed that *the parties' common answer to the officious bystander* would have been that Rothmans undertook some obligation. But what ... was the particular obligation required to give business efficacy to the contract between respondent and appellant? Surely not an obligation to pay to the government the precise amount paid by the appellant ... whatever the extent of Rothmans' liability (in theory, at least, the rate of tax might have increased or decreased) and whether or not the payment was in fact necessary to relieve the appellant of its own liability to pay ad valorem tax. Nor is it obvious that the answer to the bystander would have been that in return for the payment Rothmans undertook to pay whatever sum it might have been required to pay in order to renew its wholesaler's licence. Perhaps the only term which would meet the test would be one by which Rothmans undertook to pay to the government so much as might be required of, but no more than, the sums for "licence fee" received from retailers in order to entitle it to continue to trade or, alternatively, to relieve its retailers of a liability to pay tax should they wish to continue to trade. But a term in that form does not require payment to the government in circumstances where no payment is due': id at 341 (emphasis added).

21 Andrew Phang, 'Implied terms revisited' [1990] *Journal of Business Law* 394 at 397 (emphases in the original). Professor Phang seems since to have developed some reservations about this proposition: see Andrew Phang, 'Implied terms, business efficacy and the officious bystander' [1998] *Journal of Business Law* 1 at 21 n30. A more restricted role for the bystander seems to be envisaged in the *BP Refinery* itself, in which he appears as an adjunct merely to one of the five criteria of implication, 'it must be so obvious that "it goes without saying"': see D W Greig & J L R Davis, *The Law of Contract* (1987) at 554.

Shire and the company (the rating agreement) provided for preferential rates to be paid by the company for 30 years. After five years BP Australia transferred the site to another BP subsidiary. The Shire claimed that it was an implied term of the rating contract that it should come to an end if BP Refinery ceased to occupy the refinery site. The majority said, 'If an officious bystander had asked the appellant company at the time the rating agreement was negotiated whether that was what was intended he would have been suppressed with "Of course not!"'[22] The reason for this was that the rating agreement between the Shire and the company had been made in consequence of an agreement (the refinery agreement) made a year earlier between the State of Victoria and BP Australia, by which the latter had agreed to build the refinery in return for various incentives offered by the former. That agreement contained a clause allowing for its assignment by BP Australia to any company in which it held 30 per cent of the issued share capital. The majority held that an equivalent term should be implied in the rating contract. In the light of the refinery agreement, 'if an officious bystander had asked whether that was the common intention of the parties the answer would have been "Of course" '.[23]

Although this has become what may be called the 'official' model of the officious bystander, it is hardly a workable one. In truth, it makes 'implication in fact' practically impossible. Since the interests of the contracting parties are often divergent, there are many points on which their response to the bystander would be neither instantaneous nor unanimous. That, more probably than not, is why the parties have landed in court. One asserts and the other denies the implied term in question, because of adverse consequences which would follow if the term were or were not implied.[24]

It is instructive to find that the ostensible creator of the officious bystander was himself only too acutely aware of his limitations in this respect. The officious bystander is usually traced back to the following passage in the judgment of MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd*:[25]

> If I may quote from an essay I wrote some years ago, I then said: 'Prima facie that which in any contract is left to be implied ... is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!"'

The indefatigable efforts of Professor Phang have uncovered the fact that the passage quoted by MacKinnon LJ from his own essay written some years earlier was, in that essay, followed almost immediately by this sentence:

22 Above n16 at 285.

23 Id at 286.

24 See *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 257–258 (hereinafter *Renard*) (Priestley JA).

25 [1939] 2 KB 206 at 227 (affd [1940] AC 701). Earlier origins of the bystander are proposed in Phang, 'Implied terms, business efficacy and the officious bystander', above n21. The history of the concept is fully discussed in Wolfgang Grobecker, *Implied terms und Treu und Glauben* (Berlin, 1999) at 117–128.

> But in most ... cases the Court has ... to find ... the obvious common agreement upon a matter as to which it must have the strongest suspicion that neither party ever thought of it at all, and that, if they had, they would very likely have been in hopeless disagreement what provision to make about it.[26]

Thus in the present case, as the majority itself pointed out, a question from the bystander 'what if license fees paid for in advance by retailers should cease to be payable?' might well have caused the parties to advance different solutions. But inquiry should surely not cease at this point. The parties, having stated their differing responses, might or might not thereafter proceed to negotiate a consensus. To the extent to which the presumed intention of the parties should play a role in the process of implication at all, it is surely the hypothesis of such a negotiated consensus, rather than that of an instantly ejaculated unanimity, which should be the focus of the court's inquiry. If the court must refuse to imply a term because it would not have been immediately consented to by the parties, there will be almost no scope for 'implication in fact'. It will be difficult, in fact, to separate this sort of implication from rectification.[27]

The obstacle posed by the 'officious bystander' as conceived of in the *BP Refinery* case, and by the majority in *Roxborough*, is the most likely reason for the relative paucity of cases in which a term has been 'implied in fact'. It is the motivating force behind a growing number of statements in the High Court suggesting that all five elements of the *BP Refinery* test of implication need to be satisfied only in the case of formal contracts, and that in other contexts a simple test of objective necessity may be applied.[28] It is also behind the suggestion that there is a category of factual inference which is different from implication.[29]

But even where it does not prevent implication, the hypothetical unanimity of the parties relied on by the court is often transparently artificial, for example in *BP Refinery* itself. A moment's reflection will surely lead to the realisation that the Shire would *not* have instantly said 'Of course' to the proposal that it should be bound to give preferential rates not just to the entity with which it was contracting, but to any other company in which BP Australia held 30 per cent of the issued share capital. The contract was expressly drawn up with a specific company. A provision allowing for its assignment was not provided for in the legislation authorising preferential rating agreements.[30] The purposes for which possession of

26 See Phang, above (1998) *Journal of Business Law* 1 at 15.

27 Many, if not most, contracts that come before the courts are in writing. If a particular term would immediately have been consented to if proposed by a bystander, its omission from the contract must often be the result of a mistake, in which case rectification should be available.

28 This suggestion, first made by Deane J in *Hawkins v Clayton* (1988) 164 CLR 539 at 573 (hereinafter *Hawkins*) has since been taken up several times in the High Court, most recently in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 422, 442 (hereinafter *Byrne*); *Associated Alloys Pty Limited v ACN 001 452 106 Pty Ltd* [2000] HCA 25 (2000) 74 ALJR 862 at 873 (Gaudron, McHugh, Gummow, Kirby & Hayne JJ) (hereinafter *Associated Alloys*).

29 *Hawkins*, id at 570; see *Byrne*, id at 422; *Breen*, above n14 at 91. In *Roxborough* the conclusion of Gyles J that Rothmans were obliged to pay the licence fee to the government seems to be based on inference rather than implication: see Nick Seddon & Manfred Ellinghaus, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, 1997) at 337.

the refinery site might, over the ensuing 30 years, be transferred to another company in which BP Australia had an interest were incalculable. Why should the Shire, even if aware of the assignment provision in the refinery agreement (between BP Australia and the State of Victoria), consent without more than a moment's reflection to the inclusion of an equivalent provision in the rating agreement?

It is important to bear in mind that in asking, via the bystander, what the parties would have decided had they addressed the issue the court is asking a hypothetical question. It is not inquiring into the actual intention of the parties. If it can be shown that the parties actually intended to include a term in their contract there will be no need to imply that term; it is included by virtue of their agreement. If there is a written document from which the term has been omitted, that document will be rectified so as to include it. 'Implication' begins where the ascertainment of intention leaves off. It assumes that the parties did not actually have any agreed intention on the point in issue. So the matter has to be resolved by hypothesis.

Once this is clearly understood, an alternative conception of the bystander suggests itself. It is that of the 'reasonable bystander', or in other words the reasonable person, on whom the law traditionally relies when hypotheses about human conduct are called for. Substituting the 'reasonable bystander' for the 'officious bystander' involves a reversal of the roles of the bystander and the parties. The bystander's role is no longer that of an interrogator who elicits from the parties whether they would have instantaneously agreed on the term sought to be implied by one of them. Rather the bystander replaces the parties as the source of any implied term. The bystander does not ask for a response from the parties, but rather decides what, if anything, reasonable parties would have agreed on in the circumstances.

As already noted, this is not the prevailing conception of the bystander. The approach of the majority in *Roxborough* in treating the bystander as an officious inquirer rather than a reasonable responder is also the approach of most Australian judgments, including those of the High Court.[31] However, the consensus is not complete. There are decisions which quite clearly embrace the alternative conception of the reasonable bystander advocated above. For example, in *Hart v Jacobs*[32] the court held that a contract of employment between the parties contained an implied term entitling the employer to direct the employee to adopt a reasonable standard of dress. Smithers J said:

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30 Above n16 at 289.

31 See *Psaltis v Schultz* (1948) 76 CLR 547 at 556; *Harvey v Harvey* (1970) 120 CLR 529 at 557; *L J Hooker Ltd v W J Adams Pty Ltd* (1977) 138 CLR 52; *Interstate Express Parcel Co Pty Ltd v Time-Life International (Nederlands) BV* (1977) 138 CLR 534 at 548; *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 (hereinafter *Codelfa*); *Associated Alloys*, above n28 at 873. It should be noted that (except for *Codelfa*) references in these cases to the 'officious bystander' do not rise above the level of routine invocation, and certainly do not address the issue presently under discussion.

32 (1981) 57 FLR 18.

> [I]t is necessary to show that the officious bystander ... would say that there is a term in the contract to that effect. ... It is not a question of what stipulation either party, looking back, believes it would have made. On that basis they might never have been ad idem and the contract never have eventuated. [33]

Smithers J went on to quote from *Heimann v Commonwealth*:

> In order to justify the importation into a contract of an implied term ... it ... must be clearly necessary. And the test of whether it is clearly necessary is whether the express terms of the contract are such that both parties, treating them as reasonable men — and they cannot be heard to say that they are not — ... would certainly have included it, if the contingency involving the term had suggested itself to their minds ...[34]

Although the judgment of Smithers J retains the adjective 'officious', it is clear that the 'reasonable' bystander is intended. The bystander, acting as an objective outsider, decides whether reasonable parties would have included the term. This approach has also been used in a number of other cases.[35]

In assessing the strength of authority for the official conception of the bystander it is also relevant to note that he is by no means always invoked in deciding whether a term should be implied ad hoc or in fact. The High Court in particular has given him only perfunctory attention. In most cases it has reached a decision on whether a term should be implied 'in fact' unmediated by resort to the bystander.[36]

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33 Id at 28.

34 (1938) 38 SR (NSW) 691 at 695. In so far as it suggests that the implication of a term must be derived from the express terms of the contract, *Heimann* was disapproved of by the majority of the High Court in *Codelfa*, above n31 at 353. But no criticism of *Heimann* was made as regards reasonableness.

35 See *Bradford House Pty Ltd v Leroy Fashion Group Ltd* (1983) 68 FLR 1; *Futuris Industrial Products Pty Ltd v Arrow Industries Pty Ltd* (Federal Court, Wilcox J, 22 June 1993) at 69; *Re The Australian Telecommunications Commission and Hart* (1982) 65 FLR 41; *Pondcil Pty Ltd v Tropical Reef Shipyard Pty Ltd* (Federal Court, Cooper J, 15 July 1994) at 56; *Renard*, above n24 at 258; *Novawest Contracting Pty Ltd v Taras Nominees Pty Ltd* (Supreme Court of Victoria, Gillard J, 23 December 1998) at 48, compare 55; *Royal International (WA) v William Thomas John Valli* [1998] WAIRComm 55; compare *Australian Racing Drivers Club Limited v Grice* (Supreme Court of NSW, Meagher JA, Handley JA, Beazley JA, 12 August 1998).
It is interesting to note that this alternative conception of the bystander also continues to lead an 'unofficial' existence in England and Canada. So Treitel, while asserting that 'the test of implication under the officious bystander test is subjective', concedes that 'the contrary is sometimes suggested' (citations omitted): Guenter Treitel, *The Law of Contract* (8th ed, 1991) at 187; compare Anthony Guest (ed), *Chitty on Contracts* (27th ed, 1994) at 621: 'A term will not ... be implied unless the court is satisfied that both parties would, *as reasonable men*, have agreed to it had it been suggested to them.' (Emphasis added.) See also Grobecker, above n25 at 156–164. The Canadian position is put as follows by Gerald Fridman, *The Law of Contract* (3rd ed, 1994) at 476: 'The theory ... is that had the "officious bystander" drawn the attention of the parties to the matter in issue, they would have agreed ... But another way of expressing the doctrine is in terms of making the contract have real meaning and effect, *perhaps regardless of the parties' underlying intentions.*' (Emphasis added.)

It is also striking to note that the objective conception of the bystander is applied when the inclusion of an express term of the contract is in issue. For example, whether a statement of the parties is promissory is decided according to the objective judgment of the reasonable (or 'intelligent') bystander.[37] There is no obvious reason why implied terms should be treated differently.

In our view, the time has come to give the 'officious' bystander, conceived of as the interrogator of the contracting parties, 'a decent burial',[38] and to replace him (if he is to be retained at all) with an unequivocally 'reasonable' bystander, conceived of as the objective arbiter of what reasonable parties would have accepted (or would now accept)[39] as appropriate in the circumstances. The failure of the 'officious' bystander to figure prominently or at all in the most recent decisions of the High Court on implication in fact may indicate that this process of interment or replacement is already under way.

What would be the result if the objective conception of the bystander were applied to the facts in *Roxborough*? In relation to the first implied term (to refund), it is surely unlikely that reasonable parties would have agreed that, in the event that licence fees were invalidated, Rothmans should keep all the money prepaid to them by the retailers in respect of such fees. It would, rather, be reasonable for the retailers to take the position that they might be subject to claims from consumers and that the money should therefore be refunded to them to provide for such claims. Or if the possibility of such claims was remote, it would be reasonable, perhaps, to divide the money. Least reasonable of all is the position that Rothmans should keep all the money for itself. An implied term to refund, at least in part, is therefore the most probable result of applying the reasonable outsider to these facts.

As Gyles J (dissenting) put it:

> If ... the question were asked "What should happen to the money if it is not necessary or, indeed, possible to pay it as a licence fee?", in my opinion no reasonable person, whether a party to the contract or a bystander, could have any other response than that it must be returned to the retailer.[40]

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36 Of some 30 High Court cases involving implication in fact, only those mentioned in n28, above, mention the bystander. In the last two major cases on the point, the High Court dealt with implication in fact without mention of the bystander: *Byrne*, above n28; *Breen*, above n14. In *Associated Alloys*, above n28 at 873, the bystander received no more than a one-line allusion.

37 See, for example, *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 61–62 (Gibbs CJ); compare *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523 at 530, 531, 535, 536.

38 Greig & Davis, above n21 at 556.

39 Putting the bystander in the position apparent at the time of formation can be done only at the cost of some artificiality. As Priestley JA has pointed out, the question whether a term should be implied 'will only come up when a dispute has arisen about the way a contract is to work, and one party is saying that a term needs to be implied which will produce what that party claims is a fair (or reasonable, or proper, or just) way of resolving the dispute, and the other party is saying that the contract can work (which implicitly means 'for practical purposes' or fairly, reasonably, properly or justly) without the claimed implied term. In such cases the opposing parties will adopt different views of what amounts to effectiveness so far as their contract is concerned': *Renard*, above n24 at 457.

40 Above n1 at 356.

Gyles J also accepted the second implied term (to pay):

> The common sense conclusion is that the retailer agreed to pay the identified price of the goods and also agreed to, and did, fund the amount of the licence fee to be paid in respect of them, in return for which the wholesaler supplied the goods and promise to pay that licence fee in due course ... [T]he conclusion that there was a promise by the respondent to pay the licence fee is ... deduced or inferred objectively.[41]

While the implication of a term to pay is certainly objectively justified to this extent, the majority were right in pointing out that such a promise to pay cannot be understood as a promise to pay in any event. To say that Rothmans were by implication obliged to pay the government even if licence fees were no longer required would make no sense and, in fact, imposes an obligation impossible to perform. Moreover, it would conflict with the first implied term, to refund the money in the event that licence fees ceased to be payable. Hence the application of the reasonable bystander would not in our view justify the implication of such a term. However, as we indicated at the outset and discuss in Section 4 below, we do not think it follows from this (as the majority in *Roxborough* concluded) that there was no failure of consideration and therefore no restitutionary basis for recovery.

D. The Need to Consider Implication by Law

It is well established in the law of contract that there are two bases on which terms are implied. One is the presumptive or hypothetical intention of the parties. The other is the law itself, which may impose terms on the parties in the absence (or in some cases irrespective) of their own actual or hypothetical agreement. The law embodies this basic premise in the distinction between 'implication in fact' (already considered) and 'implication by law'. The dividing line between the two kinds of implication is not always easy to draw, and if the point were still open a good deal might be said in favour of abandoning the distinction.[42] However, it is by now so well entrenched in the judgments and the literature that we must probably live with it.

However, the recognition of separate categories of implication in fact and implication by law does not entail any thesis of mutual exclusivity. It is well established that each may be relied on simultaneously or cumulatively with the other to support the implication of a term. For example, in *Hughes Aircraft Systems International v Airservices Australia*[43] an unsuccessful tenderer sued the principal for breach of contract in failing to conduct the tender process in accordance with the terms of a document signed by the parties. The tenderer argued successfully

41 Id at 351–352.

42 See Seddon & Ellinghaus, above n29 at 348–349. The difficulty of maintaining the distinction is often conceded in the judgments, leading to the suggestion that implication in fact and implication in law overlap: see, for example, *Renard*, above n24 at 255, 260 (Priestley JA); *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 at 38 (hereinafter *Hughes*).

43 Ibid.

that the document recorded a contract which contained, in addition to the terms expressed in it, an implied term that the principal 'would conduct its evaluation fairly'. Finn J held that such a term could be justified (a) on the basis of implication in fact, according to the criteria specified in the *BP Refinery* case; (b) on the basis of implication by law, as a generic term incidental to the type or class to which the contract belonged ('tender process contracts'); (c) on the basis of implication by law of a universal term implied in all contracts requiring good faith and fair dealing. Similarly, in *Breen v Williams*,[44] although the court rejected an argument that a contract between doctor and patient confers on the patient an implied right of access to medical records, it considered both whether such a term was implied in fact and whether it was implied by law, on the clear supposition that either or both were potentially a basis for its implication.[45]

The majority in *Roxborough*, therefore, by confining itself to implication in fact, left its task incomplete. It did not exhaust the possible grounds of implication. It should have considered whether the terms put forward by the plaintiffs could be implied by law. But this was entirely forgotten.[46]

Two kinds of terms are implied by law. First, terms that arise 'from the nature, type, or class of the contract in question.'[47] These may be called generic terms. Second, terms implied in all contracts. These may be called universal terms. Can either of these categories of terms implied by law be drawn on to support the implication of the two terms (to refund and to pay) put forward by the plaintiffs in *Roxborough*?

E. Terms Implied in Classes of Contracts

Can it be said here that the contract belongs to a type or class which carries with it either or both of these two terms? This depends on what we mean by a class or type of contract. Contracts are most commonly classified not by reference to their specific terms, but by reference to the transaction which they effectuate: thus we have contracts of sale (of land, of goods, of shares), contracts for the supply of services, contracts of employment, insurance, agency, loan, building contracts, and so on. However, it is also possible to classify contracts by reference to specific terms which recur in a variety of different transactions. One could say, for example, that there is a class of contracts in which one party pays money to the other which is earmarked for some purpose (in this case the purpose of discharging a liability to pay a licence fee levied on sales of tobacco).[48] There is no intrinsic reason why categorisation should not proceed by reference to recurrent terms (or other recurrent features) as well as recurrent transaction types. Priestley LJ comes

44 Above n14.

45 See also *Renard*, above n24; *Byrne*, above n28.

46 It may be that the plaintiffs did not argue implication by law. If so, the court was surely entitled to raise the issue of its own motion. If the law implies a term in a contract, the court must have the right to enforce it, notwithstanding the failure of the parties to put it in issue. An analogous principle applies to illegal contracts: *Neal v Ayers* (1940) 63 CLR 524.

47 *Breen*, above n14 at 103.

48 Gyles J seems to accept this notion: above n1 at 351.

close to this in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*.[49] In that case a contract which would 'transactionally' be classified as a 'construction contract' contained a clause empowering the principal to terminate the contract for any default by the contractor in the performance of any stipulation unless the contractor showed cause why the power to terminate should not be exercised. Priestley LJ held that a term should be implied that the power to terminate could only be exercised reasonably. Such a term could be implied not only 'in fact', but also 'by law', as intrinsic to the class to which the contract belonged.

> This is the class of contract in which one party promises to build a work of some size for the other party for a price fixed by the contract, which sets out to regulate the carrying out of the contract, and in doing so provides for a number of eventualities (slow work, unsatisfactory work, financial problems of the contractor, method of payment, settement of disputes, to name a few) which experience has shown it is prudent to provide for.

The truth is that the criteria by which contracts are to be classified for the purpose of implying terms by law have received only passing attention by judges or commentators. In that state of affairs a court might well find a way of classifying the contract between the plaintiffs and Rothmans in such a way as to provide a basis for implying the obligations to refund and to pay on which the former relied. It may thus be possible to identify a class of contracts which involves the payment by one party to another of a sum ear-marked for a purpose, and to imply a term implied by law in all such contracts which requires that the recipient must apply the sum to the intended purpose, as well as a term requiring a refund if that purpose fails.

Indeed, would such an analysis not be closely analogous to the reasoning employed by the High Court in the classic case of *McDonald v Dennys Lascelles Ltd*?[50] In that case it was held, in relation to a contract for the sale of land, that the seller's right to retain instalments of the price paid by the buyer was conditional on the completion of the contract, so that a refund was required if the contract went off before completion (even if this was the result of the buyer's breach). Dixon J (with whom Rich and McTiernan JJ agreed) referred to the right of the buyer to recover instalments as resting (at least in the absence of contrary agreement) on 'an implication made at law'[51] arising 'out of the nature of the contract itself'.[52] The 'nature of the contract' here must surely be that of a contract providing for payment of the price by instalments; that is, the relevant nature (or class) of the

49 Above n24 at 261–262. Compare *Australis Media Holdings Pty Ltd v Telstra Corporation* (1998) 43 NSWLR 104 at 118, 123 (hereinafter *Australis*) (suggesting 'contracts requiring personal performance', 'contracts providing for something to be done which requires that the parties concur', and 'contracts dependent on the continuance of a state of affairs' as classes of contract for the purpose of implication by law).

50 (1933) 48 CLR 457.

51 Id at 478.

52 Id at 479.

contract is established by reference not to the transaction which it effectuates (sale of land), but to a specific aspect of its operation (payment of instalments in advance of transfer). And it is not unrealistic to regard an instalment as a payment of money to be applied to a purpose (payment of the price) which fails if the subject-matter for which it is paid (in this case the title to land) is not delivered. If the rationale of *McDonald* is put in this way it is but a small step to apply it to the situation in *Roxborough*, which also involved the payment of a sum ear-marked for a particular purpose which failed.

In an often cited passage in *Simonius Vischer & Co v Holt & Thompson*[53] Samuels JA said, '[t]he imposition of terms as a matter of law amounts to no more than the imposition of legal duties in cases where the law thinks that policy requires it.' As will be argued below, the law clearly subscribes to a policy requiring restitution of money paid for a failed purpose; it is that policy which underwrites the law of restitution in so far as it provides recovery of money paid for a consideration which has failed. An alternative or rather complementary formula provides for implication by law when a term is necessary 'to prevent the enjoyment of the rights conferred by the contract being ... seriously undermined'.[54] It can equally be argued that the payor's rights are seriously undermined if money paid under a contract for application to a specified purpose can be retained by the payee notwithstanding that it can no longer be applied as intended. The upshot is that the result in *Roxborough* would likely have been different, if the court had asked itself whether the first or second implied term relied on by the plaintiffs in *Roxborough* could be regarded as 'a legal incident of a particular class of contract'.[55]

F. Universal Duty to Co-operate

In addition to implying terms into classes of contracts, the law aspires to formulate terms which are implied in all contracts. A number of universally implied terms have been proposed over time. It is not appropriate here to give a comprehensive account of a topic not free from controversy. We will consider only the two most prominent universal terms, the duty to co-operate and the duty to act in good faith.[56]

The best-established universally implied term in Australian law is that expressed in the following statement drawn from *Butt v McDonald*:[57] 'It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the

53 [1979] 2 NSWLR 322 at 348. The passage has been most recently referred to in *Hughes*, above n42 at 39 and *Australis*, above n49 at 123. Compare *Breen*, above n14 at 103 (Gaudron & McHugh JJ).

54 Ibid. See also *Byrne*, above n28 at 450; *Hughes*, above n42 at 38; *Australis*, above n49 at 124.

55 *Breen*, above n14 at 90.

56 Other universally implied terms are considered in Seddon & Ellinghaus, above n29 at 350–352.

57 (1896) 7 QLJ 68 at 70–71 (Griffith CJ, then Chief Justice of the Supreme Court of Queensland and later the first Chief Justice of the High Court).

benefit of the contract.' This rule has been endorsed in several modern High Court decisions and in numerous decisions of other Australian courts.[58] It has a long history in the common law.[59] The implied duty which it imposes on contracting parties has become known as 'the duty to co-operate', although this phrase obviously gives only an approximation of its content.

The duty to co-operate is anchored in the transmission of 'the benefit of the contract'.[60] Much depends, therefore, on defining that benefit in a particular case. It might be said that in *Roxborough* the relevant benefit to the plaintiffs of their contracts with Rothmans was the discharge of their tax liability by the performance of Rothmans' promise to obtain and pay for the required licence. Rothmans therefore had an implied obligation to do what was reasonably necessary[61] to achieve that benefit. This would clearly encompass the second of the implied obligations relied on by the plaintiffs (the obligation to pay). However, as already conceded, such an obligation could hardly extend beyond the date on which the licence fees ceased to be payable. As from that date, only an obligation to refund could reasonably be required of Rothmans.

Such an obligation hardly relates to the achievement of the benefit identified above, at least in a strict sense. The achievement of that benefit, the discharge of the retailers' tax liability, was no longer necessary or possible. This may, however, be an unduly pedantic approach to the issue. It would be strange, after all, if the duty to co-operate required the transmission of the retailers' prepayment to the licensing authority so long as licence fees were payable, but not the return of the money should licence fees cease to be payable. A more generous conception of the 'benefit' which the retailers were to have under their contracts with Rothmans may be appropriate in such a context. According to Stoljar, for example, 'the requirement of co-operation may turn into a distinctly positive duty ... to take all such necessary or additional steps in the performance of the contract that will either materially assist the other party or will generally contribute to the full realization of the bargain.'[62] If the obligation is put in such expansive terms, it is by no means clear that Rothmans' failure to refund the money in question was not a breach of their implied obligation to co-operate in bringing about the intended benefit of the bargain.

58 The modern endorsement of the rule begins with *Secured*, above n14. See Seddon & Ellinghaus, above n29 at 349. For a recent discussion of the rule, see *Australis*, above n49 at 123–124.

59 See Samuel Stoljar 'Prevention and co-operation in the law of contract' (1953) 31 *Canadian Bar Review* 231; John Burrows, 'Contractual Co-operation and the Implied Term' (1968) 31 *Mod LR* 390.

60 Compare *Australis*, above n49 at 125.

61 That a party must do only what is *reasonably* necessary to enable the other party to have the benefit of the contract was emphasised in *Secured*, above n14 at 609–615.

62 Stoljar, above n59 at 231–232.

G. Universal Duty to Act in Good Faith

In Europe and in the United States it has long been established that the parties to a contract are obliged to act in good faith towards each other in performing and enforcing their contract. In the United States both the *Uniform Commercial Code* #1-203 (adopted by legislation in all American states) and *Restatement (2nd) Contracts* #205 (adopted by the American Law Institute and generally applied in the courts as an authoritative statement of the law) contain provisions imposing a duty of good faith on contracting parties. #205 of the *Restatement* states succinctly: 'Every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement.'

Recent decisions in the NSW Supreme Court and the Federal Court have made it clear that Australian law has, after some years of hesitation, embarked on the adoption of this rule.[63] And indeed, given its explicit recognition in other major legal systems, there is a compelling pragmatic case for such a development in Australia.[64] Although its imprimatur is as yet lacking, it is difficult to imagine that the High Court will decline to endorse a principle so firmly advocated by the two most powerful commercial courts in the country (other than itself).[65]

On the assumption that Australian law recognises an implied term requiring contracting parties to act in good faith, such a duty, in our view, gives strong support to the plaintiffs' case in *Roxborough*. If a party to a contract receives money from the other party to pay a tax, and the tax is abolished before payment, refusing to repay the money cannot be regarded as acting in good faith. To claim

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63 *Renard*, above n24; *Hughes*, above n42; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (Federal Court, Finkelstein J, 2 July 1999); *Aiton Australia Pty Ltd v Transfield Pty Ltd* (Supreme Court of NSW, Einstein J, 1 October 1999); *Hungry Jack's Pty Ltd v Burger King Corporation* (Supreme Court of NSW, Rolfe J, 5 November 1999); *South Sydney District Rugby League Football Club v News Ltd* [2000] FCA 1541 (unreported, 3 November 2000, Finn J) at 393–394 and 426–428. The rule has now also been endorsed by the Supreme Court of Victoria; in *Far Horizons Pty Ltd v Rodney Hackett Australia Ltd* [2000] VSC 310 at 115 Byrne J held that he 'was not at liberty to depart from the considerable body of authority in this country which has followed the decision of the NSW Court of Appeal in *Renard Constructions*'. It should also be noted that the *Trade Practices Act* 1974 (Cth) s51AC (introduced in 1998), which prohibits unconscionable conduct in business transactions, provides that in determining whether there has been unconscionable conduct the court may have regard to the extent to which the parties acted in good faith: ss51AC(3)(k), 51AC(4)(k).

64 All European civil codes have good faith provisions, as do the *UNIDROIT Principles of International Commercial Contracts* (Rome 1994) and *The Principles of European Contract Law* (Commission of European Contract Law 1995). This is also true of Asian countries which have adopted codes based on European models. A recent and important example is the *Contract Law of the People's Republic of China*, adopted in 1999, which has far-reaching provisions which recognise 'that parties to a transaction should act in good faith at every stage of their transactions': see Wang Liming & Xu Chuanxi, 'Fundamental Principles of China's Contract Law' (1999) 13 *Columbia Journal of Asian Law* 1 at 17. Among common law jurisdictions both Canada and New Zealand have moved towards the judicial adoption of good faith as a standard of conduct to which contracting parties must conform: see generally Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *LQR* 66.

65 A former Chief Justice of the High Court, Sir Anthony Mason, has recently argued that 'the application of specific good faith and fair dealing duties, based on the reasonable expectations of the parties, might advance the interests of justice': Mason, id at 94.

the benefit of a 'windfall' in such circumstances is to act in *bad* faith, for the money was deposited in the recipient's hand not by the wind, but by the other party.[66]

H. Dividing the Spoils?

However, in *Roxborough* the issue between payor and payee was complicated by an unusual aspect of the situation. The retailers had passed (or would pass) the cost of the tax on to their customers, as a component of the price of cigarettes to consumers. It was therefore possible for Rothmans to argue that the retailers would incur no loss if Rothmans retained the money in dispute. Conversely, if the money was returned, it would be the retailers who would receive the 'windfall' which they were striving to deny to Rothmans. This argument is (more or less) equally relevant to all three forms of implication by law considered above. Thus it could be said that since the retailers recouped the cost of the tax from consumers, retention of the money by Rothmans did not undermine the rights conferred on them by the contracts of sale, or amount to deprivation of a benefit protected by the duty to co-operate, or constitute a failure to act in good faith. In relation to the last point, in particular, Rothmans could argue that the retailers, in claiming the return of the money, were themselves acting in bad faith, since ultimately the money had been or would be paid by the consumers of cigarettes.

This line of argument quite clearly played a role in the majority's decision in favour of Rothmans. Although the majority acknowledged that the High Court, in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*,[67] indicated, in an analagous context, that the 'windfall factor' was irrelevant to the determination of the issue between payor and payee, it stressed nevertheless (as we saw earlier) that 'the retailers' commercial expectations would be fulfilled if they, in turn, recovered from their purchasers the amount they had paid Rothmans (including the amount for tax) together with their margin', and advanced this point

66 A considerable literature exists on the 'meaning' of good faith. Leaving aside those who complain that it has no ascertainable meaning (see, for example, Michael Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith' (1984) 9 *Canadian Business Law Journal* 385), the spectrum of opinion ranges from those who give good faith no single, or only a very general, meaning, enabling it to function as a loosely defined integrator of a variety of more specific obligations originating not only in contract law, but also in tort, restitution, equity and statute (see, for example, Hein Koetz, 'Towards a European Civil Code: The Duty of Good Faith' in Peter Cane & Jane Stapleton (eds), *The Law of Obligations* (1998) at 243), to those who would give it a more definite meaning capable of application to concrete cases (see, for example, Jane Stapleton, 'Good Faith in Private Law' [1999] *Current Legal Problems* 1). For Australian private law, which is built on discrete categories of liability, but at the same time also on established general standards of conduct (for example, unconscionability), both approaches raise problems which as yet await resolution. We make no attempt to pursue these matters here. But in our view, whatever its meaning, good faith requires that a party who receives money from another, not for his own benefit, but for application to a specified purpose, cannot in good faith refuse to refund it if the purpose fails. To this extent (but only to this extent) the law of implied terms and the law of restitution rest equally on good faith foundations. Compare Mason, above n64 at 94: 'The cause of action in unjust enrichment may also be described as a reflection of good faith and fair dealing standards.'

67 (1994) 182 CLR 51 at 90–91 (Brennan J).

as the reason for deciding that the officious bystander would not have received a unanimous answer from the parties had they been asked what should happen to money pre-paid to Rothmans if licence fees should cease to be payable.[68]

The majority did not say why the *Royal Insurance* case could be brushed aside in this fashion. In addition to raising this point of precedential etiquette, the majority's argument necessarily rests on a somewhat dubious assumption: namely, that the retailers could or would not be compelled by consumers to disgorge the amounts charged to them to cover the cost of licence fees. We shall return to this point presently. But let us for the moment accept the majority's assumption as correct. This would certainly provide a reason for not giving the money to the retailers. But why should it be given to Rothmans? It is as much a windfall in their hands as it would be in the retailers'. No reason other than the formal one, that it was due and paid under a contract, can be advanced for favouring the wholesalers over the retailers in respect of the money saved from the grasp of the licensing authority. It would seem, therefore, that at best, the majority's assumption leads to the conclusion that the money should be divided between the contenders. No doubt this could be achieved by formulating an implied term accordingly, whether on the basis of the reasonable bystander's hypothetical response or on that of a generic or universal implication by law.

However, attractive as such an outcome might seem at first sight, it does some violence to the strength of principle in this area. As we tried to demonstrate at the outset of this article, there is a strong intuition that in general, money paid to another party, not for his or her benefit, but for application to a particular purpose, must be returned if it cannot in fact be applied to that purpose, and this is so whether or not the money was paid under a contract. The law should be reluctant to accept qualifications of this principle.

This is particularly the case where, as here, the assumption that the parties are the only potential beneficiaries of a windfall rests on such insecure foundations. For the assumption that consumers will not make a claim against the retailers, no matter how plausibly rooted in commercial and legal practicality, is nevertheless merely an assumption, and as such is simply not a sufficient basis for a refusal to apply what we consider to be a basic principle.

Whether, and to what extent, the retailers should be actively required to redistribute the money to consumers, or whether they should deal with the money in some other way reflecting potential liability to consumers, can only be decided after weighing economic, industrial and political factors which are not revealed in the report of the case. We tend to think, however, that the most practical solution is to award the money unconditionally to the retailers, leaving them to deal with claims by consumers should they be made. But with or without conditions safeguarding the interests of consumers, an order that Rothmans repay the retailers is, in our opinion, the principled solution in the circumstances. It is what the reasonable bystander would most likely favour. It is also what the implied duties of co-operation and good faith dictate.

68 Above n1 at 340 (Hill & Lehane JJ).

3. *Restitution for Mistake*

Some of the retailers argued that they were entitled to restitution on the basis that the payments to Rothmans had been made under a mistake, namely that 'they were legally obliged to pay these amounts to Rothmans and that Rothmans was legally obliged to and would pay those amounts to the Commissioner'.[69] In *David Securities Pty Ltd v Commonwealth Bank of Australia* the majority judgment had held that, subject to the application of restitutionary defences, there is 'a prima facie entitlement to recover moneys paid when a mistake of law or fact has caused the payment'.[70] In reliance on this proposition, the retailers argued that their mistake had caused them to make the payments in respect of licence fees to Rothmans.

Two reasons were assigned by the majority in *Roxborough* for rejecting this ground of restitution, one convincing, the other less so. The weaker ground was based on an inference drawn in the majority judgment from the fact that the retailers continued to make the payments even after they became aware of the constitutional challenge to the validity of the *Tobacco Act*. The inference was that the retailers preferred to pay the contractual amounts rather than run the risk of a dispute with Rothmans.[71] Reliance was placed on a dictum of Brennan J in the *David Securities* case:

> If the payer would not have paid the money had the payer known all the relevant circumstances, both legal and factual, the defendant is unjustly enriched by the receipt. In principle, there seems to be no reason — though there are cases to the contrary — why the donor should not be entitled to restitution in such a case.[72]

In the opinion of the majority judgment, the retailers did not satisfy this test of causation. It appeared that they continued to pay Rothmans even though genuine doubt existed as to whether the legislative scheme on which the payments were premised was valid.

The *David Securities* decision certainly recognises the existence of a bar to recovery of this kind, although the judgments are ambiguous as to whether the bar should be rationalised in terms of absence of causation or characterised as a defence of voluntary submission to an honest claim, applicable even where a plaintiff 'believes a particular law or contractual provision is, or may be, invalid, or is not concerned to query whether payment is legally required'.[73] On either view its scope is controversial.[74] The adjective 'voluntary' is among the most

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69 Above n1 at 347.

70 (1992) 175 CLR 353 at 376 (Mason CJ, Deane, Toohey, Gaudron & McHugh JJ) (hereinafter *David Securities*).

71 Above n1 at 348.

72 *David Securities*, above n70 at 392–393 (Brennan J). Perhaps the majority judgment should in fairness have added the next sentence of Brennan J's judgment at 293: 'It is not necessary to decide that question now'.

73 Id at 373 (Mason CJ, Deane, Toohey, Gaudron & McHugh JJ).

74 Michael Bryan, 'Mistaken Payments and the Law of Unjust Enrichment' (1993) 15 *Syd LR* 461 at 475–484.

treacherous and conclusory in the vocabulary of restitution. It seems, with respect, implausible to find that the retailers in *Roxborough* 'voluntarily' submitted to the Rothmans' claim, the validity of which depended on the vagaries of constitutional law adjudication. Even though they could, as they in fact did, 'pass on' the amount representing the statutory fee to purchasers of cigarettes, they were nonetheless compelled, by the statutory scheme as much as by their contracts with Rothmans, to make the payments to the latter in respect of licence fees.[75]

But there was a stronger ground for rejecting restitution on the ground of mistake. The payment was made under a valid and enforceable contract, and therefore was not recoverable as being paid under a mistake. *Roxborough* is distinguishable from the facts of *David Securities* on this point. In the *David Securities* case, statute had rendered void the borrower's contractual obligation to pay the lender amounts under the loan agreement in respect of income tax on the interest payable.[76] The borrower's mistake in that case was its own ignorance of the statutory provision. In *Roxborough*, on the other hand, the High Court decisions invalidating the tobacco licensing scheme did not strike down any contracts to pay amounts calculated by reference to the licence fees: no term of the contract between B (retailer) and A (wholesaler) had been rendered void by the decisions. Translated into the language of causative mistake, the cause of B's payment to A was its own obligation enforceable under a valid contract with A. No legislation or High Court judgment had impaired the validity of that contract.[77]

This ground for rejecting the mistake claim is also the rejoinder to a more intriguing argument that might otherwise have been raised. Could the retailers have argued that they had paid Rothmans the sums representing tobacco licence fees in the mistaken belief that the tobacco licensing scheme had been validated by earlier High Court authority[78]which had been later overruled by the *Ha* and *Walter Hammond* decisions, or at any rate that they had acted on a settled understanding of the law based on those earlier decisions? This argument may have been foreshadowed in the statement of claim of some of the retailers that they were entitled to restitution of money paid 'in the belief that they were legally obliged to pay these amounts to Rothmans and that Rothmans was legally obliged to and would pay those amounts to the Commissioner. That belief was mistaken'.[79] This statement might be construed as an argument that a payment made pursuant to a judicial decision which is later overruled has been made under a mistake entitling the payor to restitution. Australian courts have not yet had to confront this hotly debated question. A majority of the House of Lords, in the recent decision of *Kleinwort Benson Ltd v Lincoln City Council*,[80] has held that a payment made in reliance on a settled understanding of the law, later held to be erroneous, was made

75 Under the *Tobacco Act* the retailers were liable to pay the fee in default of payment by the wholesaler. See above n1 at 340.

76 *Income Tax Assessment Act* 1936 (Cth) s261(1).

77 Andrew Burrows, *The Law of Restitution* (1993) at 126–138.

78 *Dennis Hotels Pty Ltd v the State of Victoria* (1960) 104 CLR 529; *Dickenson's Arcade Pty Ltd v The State of Tasmania* (1974) 130 CLR 177.

79 Above n1 at 347.

80 [1999] 2 AC 349 (hereinafter *Kleinwort Benson*).

under a mistake giving rise to a right of restitution. As the judges were well aware, and commentators quick to point out, it is impossible to decide a case of this nature without making some sort of statement on theories of judicial law-making.[81] Acceptance of the proposition that the retailers had made a mistake in relying on High Court decisions which were later overruled by the *Ha* and *Walter Hammond* decisions might be interpreted as resurrecting the discredited notion that courts of ultimate authority declare an immanent law and do not develop it in response to social change.[82]

Can the *Roxborough* claim be characterised as one of mistake based on reliance on overruled judicial authority? The answer is 'not exactly'. In the *Kleinwort Benson* case the plaintiff bank had entered into a contract (the 'swaps contract') in the belief, apparently shared by those providing legal advice on this type of financial transaction, that the contract was valid. That belief was falsified by later judicial decision[83] which held that the swaps contract was void as being ultra vires the statutory contractual capacity of one of the parties entering into it. Accordingly, the plaintiff had made a mistake as to the validity of the contract, entitling it, in the view of the majority, to restitution. In *Roxborough*, on the other hand, the *Ha* and *Walter Hammond* decisions did not hold that contracts to pay licence fees under the invalid scheme were themselves invalid. The contracts entered into by the retailers were valid on any view of the proper definition of excises of duty. Even if Australian law were to accept the *Kleinwort Benson* decision, the decision could only be applied to the facts of *Roxborough* by way of extension of its ratio: that the retailers had paid money under their contracts on the mistaken assumption that payment was required by Rothmans to discharge its own statutory liability to the New South Wales government. The extension, however, proves too much: it would be inconsistent with the simple and good reason for rejecting the mistake claim, namely that the payments were made pursuant to a valid contract. It was the binding force of that contract, and not a mistaken view of the constitutionality of the tobacco licence legislation, which caused the payments to be made.

4. *Restitution for Total Failure of Consideration*[84]

We now reach the critical ground of restitution. The retailers argued that they were entitled to restitution on the basis of a failure of consideration. The premise of the argument was that failure of consideration necessitated a failure to perform a contractual obligation. For the majority of the Full Federal Court, the question was whether the contract included a term requiring Rothmans to pay the licence fee to

81 J M Finnis, 'The Fairy Tale's Moral' (1999) 115 *LQR* 170; Sonja Meier & Reinhard Zimmerman, 'Judicial Development of the Law, Error Iuris, and the Law of Unjustified Enrichment — a View from Germany' (1999) 115 *LQR* 556.

82 But as J M Finnis (ibid) points out, acceptance of the argument that the plaintiffs have made a mistake does not inevitably entail acceptance of a descriptive declaratory theory based on a fixed view of legal principles. Declaratory theory has a normative, as well as descriptive, aspect which requires judges to develop doctrine by differentiating instant cases convincingly from established authority.

83 *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1.

the government: if not, there could be no failure of consideration. In the absence of an express provision to this effect, the issue was whether there was an implied promise to do so. As we have seen,[85] the majority declined to imply such a promise. It followed that there was no failure of consideration.

The dissenting judgment of Gyles J rejected this conclusion. The promise to pay the licence fee was not deducible from any implied term, as that concept is usually understood, but was 'a factual conclusion as to the agreed terms of the bargain deduced or inferred objectively from a course of conduct as well as from the formal documents, against the background of the operation of the legislation'.[86] Rothmans had promised to pay the equivalent of the amount received by it from the retailers as a tobacco licence fee. Failure to fulfill that promise, for whatever reason, entitled the retailers to restitution for failure of consideration.

To this extent, the argument of Gyles J is not inconsistent with the principle adopted by the majority, that failure of consideration is defined by reference to the express and implied terms of the contract. He differs from the majority only in accepting rather than rejecting an implied term to pay the licence fee. But there are also passages in his Honour's opinion which suggest a wider meaning of 'failure of consideration':

> [W]here moneys paid under a contract on the basis that they will be applied for a particular purpose, while ever that purpose might be fulfilled there can be no failure of consideration. But the situation here is quite different. ... The licence fee is no longer payable. It cannot and will not be paid by the respondent. That is the end of the matter.[87]

> In the present case, identifiable amounts were paid over on the basis that an equivalent amount would be paid as licence fees in due course. As that cannot be done, there has been, and will be, no performance of the promise, and the payer has received no benefit from it. This is ... a perfectly conventional case of failure of divisible consideration ... Such a claim is quasi-contractual or restitutionary ... While it may be defeated by express contractual provision, it does not depend upon the terms of the contract once failure of consideration is established. It is not relevant to discuss such a claim in terms of an ad hoc implied term.[88]

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84 This is not the place to join debate on whether failure of consideration need be total although, as we note later, *Roxborough* provides ammunition for critics of this requirement. The authority of *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 (hereinafter *Baltic Shipping*) on this point is accepted for the purposes of discussion. See Keith Mason & John Carter, *Restitution Law in Australia* (1995) at 918. Compare Ewan McKendrick, 'Total Failure of Consideration and Counter-Restitution: Two Issues or One?' in Peter Birks (ed), *Laundering and Tracing* (1995) at 217.

85 See text at n12.

86 Above n1 at 352. Gyles J seems to mean that the promise could be *inferred* rather than *implied*. The boundaries between implication, inference and interpretation are not always easy to draw: see Seddon & Ellinghaus, above n29 at 337.

87 Above n1 at 354.

88 Id at 355.

While these passages are not entirely free from ambiguity, they seem to put forward a basis for restitution for 'failure of consideration' which is quite independent of the terms of the contract. 'Failure of purpose', and perhaps 'failure of benefit', are also regarded as forms of 'failure of consideration'.[89]

To define 'failure of consideration' exclusively as 'failure of contractual performance' effectively confines this category of restitution to contracting parties, and as between those parties further confines it to cases of failure of an express or implied obligation. It is difficult to see how, thus confined, 'failure of consideration' has any basis in the law of restitution at all: conceived in this way it belongs more properly to the law of contract, since the obligation to make restitution arises (expressly or impliedly) from the contract itself.

The modern law of restitution in Australia rests on a decision which expressly recognised the separate identity of contractual and restitutionary obligations: *Pavey & Matthews Pty Ltd v Paul.*[90] In that case the client was made to pay a reasonable remuneration to the builder because 'an obligation or debt imposed by law' arose from having taken the benefit of the work done.[91] By analogy it could be said, in *Roxborough*, that an obligation imposed by law arose from having accepted money to be applied to a particular purpose which could no longer be fulfilled. It makes little sense to require an implied term as a precondition of recovering money which *has* been paid under a contract, when it is not required to recover money which has *not* been paid under a contract.

Moreover it does not follow from the truism that the obligation to perform a contract depends upon the construction of the terms of contract that, in default of an express provision for repayment, restitution must depend on the finding of an implied term to repay. For example, while a deposit will not be recoverable by a purchaser who has defaulted under the contract, other advance payments to secure a transfer of land will entitle the purchaser to restitution even when in breach. In the oft-repeated words of Dixon J, in such a case 'the money has been considered not to be absolute but conditional upon the subsequent completion of the contract'.[92]

The judgments in *Baltic Shipping* make clear that this is a 'default rule' imposed on contracting parties not by virtue of an implied term but by the law of restitution. Mason CJ expressed it in the following terms:

> [W]here the language used in a contract is neutral, the general rule is that the law confers on the purchaser the right to recover his money, and that to enable the seller to keep it he must be able to point to some language in the contract from which the inference to be drawn is that the parties intended and agreed that he should.[93]

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89 This construction is, arguably, supported by the citations of the judgments of Lord Porter and Viscount Simon LC in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, and by the analysis of *Baltic Shipping Co v Dillon*, above n84: above n1 at 353–354 (Gyles J).

90 Above n4.

91 Id at 255 (Deane J).

92 Above n50 at 477 (Dixon J).

These principles have been developed without reference to the 'officious bystander'. They create presumptions of restitution, or in some cases of denial of restitution, for different types of contract. It follows from *Baltic Shipping*, and the authorities there relied upon, that advance payments are in principle recoverable, with some exceptions of which the most significant are deposits paid 'as earnest' by purchasers of land and goods. Payors are not in general expected to show, according to the exacting standards of the officious bystander, that an implied term entitles them to repayment in the event of a total failure of consideration. On the contrary, they are entitled to restitution on this ground unless the payment can be brought within a recognised exception to recovery, or the right to restitution is negatived by the terms of the contract. No burden should have rested on the retailers to establish their right to be repaid the contractual amounts in respect of licence fees; it was for Rothmans to show, by reference to the contract as it operated within the framework of the statutory licensing scheme, that it was not liable to make restitution.[94]

5. *The Requirement that the Contract be Terminated*

Most authorities accept that termination of a valid contract is a precondition for restitution except where termination is impossible, for example, because the contract is void or has been frustrated. So, according to Mason and Carter, '... the fundamental point is that, as a general rule, restitutionary issues arise in respect of ineffective rather than effective contracts. Only rarely will the law of restitution operate in the context of an effective contract.'[95] The learned authors recognise two categories of ineffective contracts, those invalid from the outset, and those which have been discharged or terminated. From this it follows that:

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93 Above n84 at 352, citing *Dies v British and International Mining and Finance Corp* [1939] 1 KB 724 at 742 (Stable J), a case where a party in breach of contract was held to be entitled to recover an advance payment. Compare McHugh J, in *Baltic Shipping* at 391. Note also his proviso, relying on *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 All ER 29, that advance payments made in order to provide a fund to enable the payee to meet the costs of performance will also generally not be recoverable. See now *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574.

94 Even if we can reject implied term analysis, however, a plaintiff must nonetheless establish the ingredients of a claim based on total failure of consideration. See above n84. A critical requirement is that the failure must be total. This is a somewhat battle-scarred requirement by now, but the necessity for a total failure of consideration was confirmed by the High Court in *Baltic Shipping*. Any potential for injustice has, however, been minimised, though not wholly eliminated, by the recognition that consideration can be apportioned between severable parts of a contract: *David Securities*, above n70 at 382–383; *Goss v Chilcott* [1996] AC 788 at 797–798 (Privy Council). Apportionment raised no difficulty for retailers in *Roxborough*. The amounts paid to Rothmans in respect of the tobacco licence fee were a discrete and identifiable item of the overall contract to purchase cigarettes, and there was no argument that the retailers had received any consideration, in the sense of bargained-for performance, for the payment of those amounts.

95 Mason & Carter, above n84 at 315. Beatson has shown that this principle is also accepted in England, Scotland, Canada, Germany and the United States: Jack Beatson, 'Restitution and Contract: Non-Cumul?' (2000) 1 *Theoretical Inquiries in Law* 83 at 88–92.

> Although, in some cases, particularly under the doctrine of frustration, a contract may be discharged automatically on the occurrence of an event, discharge of an effective transaction for breach or repudiation is rarely automatic. Accordingly, where the contract is alleged to be ineffective by reason of discharge, the general rule is that in order to claim restitution an election to discharge the contract must be proved.[96]

Applying these propositions, it would not be hard to establish on the facts of *Roxborough* that the retailers had elected to treat the contract as terminated. As Gyles J pointed out: 'If formal termination by the appellants is necessary, then bringing these proceedings is sufficient'.[97] On what basis the retailers were entitled to do so is perhaps less clear, unless (contrary to the majority's view) there was an implied term obliging Rothmans to pass on the money paid to them or to repay it, constituting a condition or other essential term of the contract, so that a breach of it justified termination.

It can also be argued that in the circumstances of the case termination of the contract had occurred in the relevant sense without any formal election on the part of the retailers. As Gyles J pointed out:

> The contract has been executed in all respects save for the payment of the licence fee by the respondent. The licence fee is no longer payable. It cannot and will not be paid by the respondent. That is the end of the matter. Performance is no longer possible.[98]

These are the short answers, but we cannot leave this question of termination without some more general discussion of its role in determining the availability of contractual and restitutionary claims. Professor Jack Beatson has recently argued cogently that to deny absolutely the availability of restitution in the absence of termination 'may neglect a small but theoretically important category of case'.[99] *Roxborough* falls into that category and demonstrates at the same time that it is not merely a theoretical one.

Beatson inquires into the rationale for the supposed termination requirement with some particularity. That rationale is commonly expressed in the notion that restitution before discharge 'subverts' the contract. He points out that this proposition is valid only to the extent to which a contract allocates the risk inconsistently with any duty to make restitution:

> If the reason for not allowing concurrence of action between restitutionary and contractual claims before discharge is to do with not subverting risk allocation ... then doctrine should be directly focused on those factors and not on the

96 Mason & Carter, above n84 at 905. See also Lord Goff & Gareth Jones, *The Law of Restitution* (4th ed, 1993) at 412.

97 Above n1 at 354. The majority did not have to deal with the point, since it decided on other grounds that restitution was not available. However, it apparently agreed that termination or vitiation of the contract is a prerequisite of restitution: id at 342.

98 Ibid.

99 Beatson, above n95 at 86.

> discharge of the contract. Except in the case of speculative contracts, it should not be assumed ... that all risks have been distributed to one side or the other. Where all risks have not been so distributed, there will be a gap in the contractual allocation and there is room for adjustment either by applying the principle of unjust enrichment or some other principle.[100] ... It should, in principle, be possible to bring a restitutionary claim where it would not reallocate risks or reassign value as an alternative to an action for breach of contract even before discharge.

In *Roxborough* it could hardly be claimed that the contract allocated the risk that the tobacco licensing scheme might turn out to be unconstitutional. This was 'a gap in the contractual allocation' which allowed room for 'applying the principle of unjust enrichment', even if the contract was still operative.

We labour this point because the termination requirement has played an inglorious role in ensuring that restitution of benefits conferred under an ineffective contract is rarely considered, as it should be, as part of the larger topic of benefits conferred under ineffective transactions. The disjunction between contracts and other transactions, such as conditional gifts and bailments, is exposed by the hypothetical example proposed by Gyles J, set out at the head of this article: B pays A a cheque in order to settle a claim to customs duty which turns out not to be payable. Gyles J here assumes that no contract has been entered into between A and B. In his opinion, with which we wholly concur, the existence or absence of a contract should make no difference to B's right to restitution. We would only add that if the relationship is contractual B should be entitled to restitution from A without having to take the purely formal step of terminating the contract.

100 Id at 94.

6. *The Constructive Trust Case*

The retailers argued under this head that Rothmans should be held liable as constructive trustees for having failed to carry out the purpose for which the money had been received, the appropriate remedy being an award of equitable compensation for breach of trust.[101] The precise type of constructive trust that was being invoked is not entirely clear, but the retailers placed at the forefront of their argument the dissenting judgment of Learned Hand J in *123 East Fifty-Fourth Street Inc v United States*,[102] which has gained currency in Australian law following its approval by Mason CJ in *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd.*[103] Learned Hand J held that where the owner of a restaurant had collected a separate amount in respect of tax from its customers in order to pay a State cabaret tax which was ultimately held to be inapplicable, it held any money repaid by the Treasury on constructive trust for the customers. The factual similarity between the United States decision and *Roxborough* understandably held an appeal for the retailers, although, as the majority judgment in the latter case noted, comparison of the cases runs the risk of role confusion.[104] Rothmans was in the position of the restaurant owner in *123 East Fifty-Fourth Street* while the retailers stood in the shoes of the patrons of the restaurant in that case.

The majority of the Full Federal Court rejected the application of this version of the constructive trust, partly because it amounted in substance to an application of the *Quistclose* trust which was conceded by the retailers (possibly too generously) to be inapplicable on these facts, and partly because Rothmans could only be held to account as trustee if 'in accordance with established principle, equity would regard Rothmans' retention of these sums as unconscionable'.[105] The retailers failed to establish any equitable basis for holding Rothmans accountable.

The constructive trust argument is in fact a red herring, though an instructive specimen of that metaphorical fish. The retailers had no ground for claiming a proprietary constructive trust. There was no identifiable property represented by their payments over which a trust could be imposed. Furthermore, there was no special reason, such as the defendant's insolvency, calling for the award of proprietary relief. The amphibolous characteristics of the constructive trust have, however, been well documented and it is recognised that the trust can operate as a formula for personal, as well as proprietary, relief.

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101 It was conceded that Rothmans had not received money on the terms of an express (or resulting) trust of the kind which arose in *Quistclose*, above n7. See above n1 at 343. The concession was based on the fact that the retailers were under no obligation to keep separate the amounts in respect of tax. Although the loan paid in the *Quistclose* case was paid into a separate bank account this fact assumed no special significance in the House of Lords judgments and is a doubtful ground for distinguishing that case from *Roxborough*. A stronger ground is that a resulting trust will not be imposed upon failure of consideration where the recipient has received the money beneficially. This would have required the Court to find that while the retailers had paid money to Rothmans so that the latter could pay the licence fee, they had not necessarily intended that the money *itself* should be applied in discharge of the licence fees. See Robert Chambers, *Resulting Trusts* (1997) at 143–151.

102 (1946) 157 F 2d 68.

103 Above n67.

104 Above n1 at 345.

105 Id at 347.

The constructive trust recognised by Learned Hand J in *123 East Fifty-Fourth Street* can be translated into two Australian models of constructive trust. The models are not mutually exclusive. The first is the constructive trust imposed upon a fiduciary who must account to her principal for property received which falls within the scope of the fiduciary obligation. Applying this model, the restaurant proprietor owes a limited fiduciary obligation[106] to the customers as their agent to account for money paid in respect of the cabaret tax. On this reasoning equity might impose a limited fiduciary obligation on Rothmans to account as agents to the retailers for money which had been paid in order to discharge its tax liability but which had not been applied for that purpose. Such an analysis is certainly not beyond the realms of possibility, although the commercially antagonistic nature of the relationship between wholesaler and retailer – essentially that of vendor and purchaser – suggests that a finding of even a limited fiduciary relationship is unlikely.

A more plausible model, adverted to by the majority judgment in *Roxborough*,[107] would hold Rothmans accountable as constructive trustee for having received money 'on the basis of some consensual joint relationship or endeavour which fails without attributable blame'.[108] On this analysis Rothmans and the retailers were engaged in the joint endeavour of satisfying the requirements of the tobacco licensing scheme so that cigarettes could be sold to the retailers for resale. The invalidation of that scheme by the High Court caused a failure of the endeavour, as far as the crucial matter of payment of the licence fee was concerned. Equity responds by holding Rothmans accountable as constructive trustee. That the species of constructive trusteeship based on a failed joint venture can give rise to personal, as well as proprietary, accountability is amply supported by the authorities.[109]

There can therefore be no objection, on principle or precedent, to holding a defendant personally accountable as constructive trustee for money contributed to a failed joint venture. But this part of the *Roxborough* decision squarely raises for discussion an issue which has been concealed in the shadows since *Muschinksi v Dodds* was decided, namely the doctrinal relationship between equitable accountability and common law recovery for failure of consideration in the overall scheme of restitution. In *Muschinski v Dodds* Deane J drew on common law authorities permitting recovery of benefits under frustrated contracts[110] and equity decisions ordering refunds of premiums upon dissolution of a partnership[111] in formulating this model of constructive trusteeship. Later decisions, in contrast,

106 Compare the limited fiduciary relationship found by Mason J, dissenting, in *Hospital Products Ltd v United States Surgical Corp*, above n37 at 96–107.

107 Above n1 at 346–347.

108 *Muschinski v Dodds*, above n8 at 618 (Deane J).

109 The authorities are helpfully collected and discussed by Pamela O'Connor in 'Happy Partners or Strange Bedfellows: the Blending of Remedial and Institutional Features in the Evolving Constructive Trust' (1996) 20 *MULR* 735 at 745–751.

110 Above n8 at 618, citing *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, above n89, *Denny, Mott and Dickson Ltd v James B Fraser and Co Ltd* [1944] AC 265.

111 *Atwood v Maude* (1868) 3 Ch App 369.

have been content to keep these bundles of authority securely locked up in separate compartments. Continued reliance on the old forms of action has perpetuated some illogical distinctions in this area. For example, where money and shares have been transferred for a commercial purpose which has failed, recent authority confirms that the money is recoverable as having been paid for a consideration which wholly failed, whereas restitution of the shares will be effectuated by way of a resulting trust for the transferor.[112] A distinction between grounds of restitution based solely on the nature of the property conveyed has little to commend it. In this case the distinction is the legacy of the old common law forms of action as well as of the failure to integrate functionally identical legal and equitable doctrine.

Equitable personal accountability where property including money has been transferred for a joint venture which has failed enjoys a number of obvious advantages over its common law counterpart. The claim need not be confined to money; the venture need not be contractual; the failure of consideration need not be total; and, where the basis of the venture was a contract between the parties, termination is arguably not a precondition for recovery where the contract has been broken. To set against the attractions of the equitable solution is its unavailability where an equitable defence or other discretionary factor precludes relief. The balance of advantage nonetheless clearly leans in favour of equitable accountability.

The judgments in *Roxborough* provide no guidance as to where the fences between common law restitution and equitable accountability should be erected. The majority judgment contains one cryptic sentence which does not take matters very far: 'It would be wrong, in our view, to equate the contractual relations between the retailers and Rothmans with a joint endeavour or relationship to which those principles apply'.[113] But this serves only to deepen the mystery. To adapt the example posed by Gyles J with which this article began, suppose that A has applied some, but not all, the money received to discharge a customs tariff. Why should B succeed in recovering the money not so applied if no contract subsisted between A and B, by invoking the equitable 'failed joint venture' doctrine, whereas the existence of a contract will prevent B from recovering because the consideration for the payment will not have totally failed? These inconsistencies in the majority judgment strengthen the case for a clear articulation by the High Court of a set of principles, integrating common law and equitable doctrine,[114] governing recovery of money or other property where the purpose for which the property was transferred (the consideration, joint relationship or endeavour, or whatever other label is employed) has wholly or partly failed. As matters stand, the majority judgment in *Roxborough* can only appeal to students with a morbid interest in the baleful effects of doctrinal compartmentalisation.

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112 *HCK China Investments Ltd v Solar Honest Ltd* (1999) 165 ALR 680.

113 Above n1 at 347.

114 And including principles governing the availability of proprietary restitution, admittedly not easy to formulate, as *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] AC 669 and its attendant academic literature demonstrates.

7. *Conclusion*

Roxborough shows that the law of obligations in Australia still lacks clarity on some fundamental issues. How are the various forms of civil liability — tort, contract, restitution, equitable obligation, statutory prohibition — related to each other? What degrees of concurrence exist, and what barriers segregate one from the other? Should each develop in isolation from the other, obeying its own inner logic in defining liability, and spawning its own defences and remedies? Or should they be developed in alignment with and by conscious reference to each other, avoiding technicalities and unnecessary restrictions on concurrence?

More specifically, *Roxborough* illustrates that the extent to which contracting parties are entitled to restitutionary relief concurrently with relief for breach of contract remains uncertain. In denying restitutionry relief to the plaintiffs the majority, in our view, arrived at the wrong conclusion by taking too narrow an approach to 'failure of consideration' and the implication of terms. On these points we find the judgment of Gyles J more compelling.

The overall impression gained from a reading of the majority judgment is one of straining to find reasons for refusing restitution. The policy informing this attitude is not hard to find. Emphasis was placed at several points in the judgment on the fact that the retailers had recouped the amount they had paid in respect of tax from cigarette purchasers.[115] Even though Rothmans enjoyed a windfall at the expense of the retailers the latter had recovered most of that amount from their own customers. In other words, the retailers had 'passed on' the amounts paid in respect of licence fees to the customers. Leaving to one side the factual question whether the amounts had been fully passed on, the argument misconceives the nature of the passing on inquiry in the law of restitution.[116] The proper scope of 'pass it on' is not to bar a restitutionary claim in its entirety but to identify the proper plaintiff or beneficiary of a restitutionary claim. This was recognised by Mason CJ in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* who indicated that a party in the position of the retailers 'should be required to satisfy the court, by undertakings or other means, that it will distribute the moneys to the patrons from whom they were collected, thereby recognising the beneficial ownership of those moneys'.[117] It is also reflected in some federal and state legislation which applies the 'pass it on' principle, not to defeat a claim to repayment of a tax wrongly imposed, but to ensure that it is repaid to those who have actually paid the cost of its imposition.[118] The customers' right to restitution of money from the retailers was not, however, in issue in *Roxborough*. 'What obligations (if any) the appellants may have in relation to monies returned to them,

115 Above n1.

116 Mitchell McInnes, '"Passing On" in the Law of Restitution: A Re-Consideration' (1997) 19 *Syd LR* 179. As already noted in the text at n68, application of the defence was rejected in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*, above n67.

117 Id at 78.

118 See Mason & Carter, above n84 at 2038 n230 for a summary of the legislation on this topic. It is fair to add, however, that not all 'pass it on' legislation redistributes wealth rather than bars claims. See, for example, *Recovery of Imposts Act* 1963 (NSW) s4.

and whether, and how, they may have been or will be acquitted, is irrelevant'.[119] The moral force of the 'windfall' aspect of the case pervades the majority judgment, supplying the pretext for the application of a particularly restrictive and inappropriate test for implying terms and for reading down the criteria for the award of restitution. In *David Securities Pty Ltd v Commonwealth Bank of Australia* the High Court insisted that 'it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable'.[120] It is hard to dispel the notion that *Roxborough* was ultimately decided on the basis of the majority's aversion to conferring a perceived windfall on the retailers by judicial decision. It is to be hoped that the High Court will not permit this consideration to deflect attention from more fundamental questions of contractual and restitutionary doctrine.

119 Above n1 at 357.

120 Above n70 at 379.