Taming Horses in the Wild, Wild West: *Patel v Mirza* [2016] UKSC 42[1]

I. Introduction

1. The interplay between law and policy has long been a bone of contention in the courts, underpinned by the famous declaration that public policy is an "unruly horse" – once you are astride it, it may lead you astray from the sound law.[2] This could be said to be particularly pertinent to the defence of illegality – where a person claiming restitution has premised his case upon an illegality, public policy has traditionally dictated that his claim be barred (the "**illegality defence**", or "**defence of *ex turpi causa***").[3]

2. Though traditionally strictly applied as a principle of law, the illegality defence has come under scrutiny and controversy in the UK in recent years, pushed into the spotlight by cases such as *Les Laboratoires Servier v Apotex Inc*[4] and *Bilta (UK) Ltd v Nazir (No 2)*,[5] with judicial opinion divided on whether to afford the illegality defence a greater degree of flexibility.

3. Recently, the Supreme Court in *Patel v Mirza*[6] has attempted to make some sense of this controversy, by holding that a more flexible approach be taken. At the same time, however, it has recommended a structured framework within which the defence is to operate. Thus, the court appears to have gotten astride the unruly horse, but taken firm hold of the reins. The question is, will this prevent the horse from going astray?

II. The illegality defence: A crossroads in the law

4. Traditionally, a claim for restitution could be barred on grounds of illegality, provided that the parties were *in pari delicto* – that is, they were equally blameworthy with regards to the illegal nature of the contract.[7] This is unless the parties had voluntarily

---

[1] Kara Quek, 4th Year LL.B Student, Singapore Management University's School of Law
[2] *Richardson v Mellish* (1824) 2 Bing 229 at 252.
[3] Andrew Phang Boon Leong (gen ed), *The Law of Contract in Singapore* (Academy Publishing, 2011) at para 13.115.
[4] *Les Laboratoires Servier v Apotex Inc* [2015] AC 430.
[5] *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1.
[6] *Patel v Mirza* [2016] UKSC 42 ("***Patel***")
[7] Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8th Ed, 2011) at [35-01].

repudiated the contract in a timely manner (this is known as the doctrine of *locus poenitentiae*).[8]

5. The troubles with the illegality defence began with the case of *Tinsley v Milligan*,[9] a case concerning two joint owners' respective entitlements to their house. There, the English Court of Appeal rejected the "public conscience" test – that relief would be denied if it were an "affront to the public conscience" to grant it[10] – and held that *reliance* on illegality to found a claim would lead to the operation of defence.[11] In other words, the court would be more concerned with the procedure of the matter, rather than the substance.[12]

6. Following *Tinsley v Mulligan*, the Law Commission undertook a comprehensive review of the illegality defence, citing the potential for arbitrary application of the illegality defence.[13] The Commission identified five key policy considerations underpinning this defence:
   a. furthering the purpose of the rule which the claimant's illegality had infringed;
   b. consistency of the law;
   c. preventing the claimant from profiting from his wrongdoing;
   d. deterrence; and
   e. maintaining the legal system's integrity.[14]

7. Despite the clear roots of the illegality defence in public policy, cases such as *Tinsley v Milligan* had complicated the issue, by basing the illegality defence on the procedural consideration of whether the claim *relied* on the illegality. The concept of "reliance", however, remained ill-defined, giving rise to a much higher potential for arbitrary judgments.[15]

---

[8] *Kearley v Thomson* (1890) 24 QBD 742 at 747; *Tribe v Tribe* [1996] Ch 107 at 135.
[9] *Tinsley v Milligan* [1994] 1 AC 340 ("***Tinsley***").
[10] *Id*, at 365.
[11] *Id*, at 375.
[12] *Id*, at 374.
[13] Law Commission, *The Illegality Defence* (LAW COM No 320) at para 2.13.
[14] Law Commission, *The Illegality Defence: A Consultative Report* (Consultation Paper 189) at paras 2.5-2.31.
[15] Law Commission, *supra* n 13, at paras 2.13–2.15.

8. As a result of such confusion, the law is presently at a "crossroads",[16] with two distinct "camps", or positions, being taken on the issue. The first support a rule-based conception of illegality, involving the strict application of a "master rule",[17] where any claim for restitution falling within the ambit of the rule would automatically be denied. The second, more flexible approach is the "range of factors" approach – the illegality of the act would only be one of several factors taken into account by the court, in deciding what an appropriate response to the claim for restitution should be.[18] There thus may be cases where restitution would be granted notwithstanding an illegality, if factors such as the centrality of the illegality to performance militate towards granting the claim

9. It is within this conflict that the Supreme Court in *Patel v Mirza* had to decide the case before them.

III. Facts and holding

10. The facts of the case are fairly straightforward. Patel transferred money to Mirza for the purpose of betting on the price of Royal Bank of Scotland shares, relying on insider information regarding a government announcement that would impact the share price. However, Patel was mistaken about the insider information, and the betting never took place. Despite this, Mirza refused to return the money. Patel then brought the present claim, seeking the return of this sum.

11. At trial, the principle in *Tinsley v Milligan* was applied to bar Patel's claim, on grounds that his claim for recovery relied on the illegality of the arrangement with Mirza. Further, the doctrine of timely repudiation would not apply, as Patel had not voluntarily withdrawn himself from the scheme. The Court of Appeal, while agreeing that Patel had relied on his illegality to found his claim, held that the non-execution of the scheme should be enough to allow Patel's claim to succeed.

[16] *Patel*, *supra* n 6, at [83].
[17] *Patel*, *supra* n 6, at [84].
[18] *Patel*, *supra* n 6, at [93], [94].

12. The Supreme Court held unanimously that Patel's claim should be allowed, upholding the Court of Appeal's decision. However, the judges differed in their construction of the applicable law – a majority held that the illegality defence should be conceived in terms of the "range of factors" approach, while the minority found favour in the proposition that a stricter, "rule-based" approach should be the appropriate treatment for this defence.

IV. The case for a "range of factors" approach: Toulson's framework

13. The lead judge for the majority, Lord Toulson, noted that the *raison d'être* of the illegality defence was that the public interest would militate against granting the claim, as to do so would produce disharmony and inconsistency in the law.[19] In determining how exactly the public interest would decide the case, it would be essential to refer to the nature and circumstances of the illegality, as well as relevant policy considerations.[20] To do otherwise would be to adopt a mechanistic approach "capable of producing results which may appear arbitrary, unjust or disproportionate".[21]

14. Lord Kerr, agreeing with Lord Toulson, noted that *ex turpi causa* has been recognised in the UK as an "expression of policy", rather than a strict legal principle.[22] Indeed, Lord Neuberger agreed that attempting to lay down a hard and fast principle in the area of illegality would lead to difficulties, as proven by "experience and common sense".[23] The concern would then be whether allowing for a flexible, policy-based approach to the illegality defence would be giving the courts too much discretion in determining such cases.

15. The majority agreed that the framework developed by Lord Toulson did not afford too wide a discretion, and instead represented a structured approach to the illegality defence.[24] This framework requires the court to consider three factors when deciding if illegality would operate to bar a claim for restitution. These are:

---

[19] *Patel*, *supra* n 6, at [100].
[20] *Patel*, *supra* n 6, at [109].
[21] *Patel*, *supra* n 6, at [120].
[22] *Patel*, *supra* n 6, at [126].
[23] *Patel*, *supra* n 6, at [161].
[24] *Patel*, *supra* n 6, at [175].

a. the underlying purpose of the prohibition that has been "transgressed";
b. any relevant public policies which may be rendered ineffective, or less effective, if the claim is denied; and
c. the possibility of "overkill" if the law is not applied in a proportional manner.[25]

V. Adherence to a rule-based approach

16. As counterargument, the minority [WHO? HOW MANY JUDGES? FN IS FINE] pointed out that the present approach to the illegality defence is already limited in its application such that it is not applied rigidly and indiscriminately. Denial of recovery for reasons of illegality is limited to "well-defined circumstances",[26] and represents an approach that accords with the principle underpinning the illegality defence.[27]

17. In particular, Lord Sumption criticised the majority's framework as conferring something akin to a judicial discretion,[28] requiring judges to make a value judgment based on the facts of the case.[29] Rather than directly applying the suggested factors, it was suggested that these factors be kept as a representation of the policy rationale underpinning the illegality defence, rather than actual considerations that the judge is bound to take into account.[30] To use them to determine a case would be to introduce an element of uncertainty to the entire process, as the weight afforded to each factor would doubtless depend on the judge's subjective perception of the facts, and it would be difficult to distil what exactly constituted an "illegal" act barring restitution claims.[31]

VI. The impact of *Patel v Mirza* in Singapore

18. In Singapore, the law is much less developed on this point, and has yet to escalate to the point of controversy that it had achieved in the UK. The general rule appears to be that a claim for restitution founded on an illegality will be barred unless:

---

[25] *Patel*, *supra* n 6, at [101].
[26] *Patel*, *supra* n 6, at [214].
[27] *Patel*, *supra* n 6, at [239].
[28] *Patel*, *supra* n 6, at [258].
[29] *Patel*, *supra* n 6, at [206].
[30] *Patel*, *supra* n 6, at [261].
[31] *Patel*, *supra* n 6, at [263].

a. the parties are not *in pari delicto*;

b. the claimant has repudiated in a timely manner; or

c. an independent cause of action can be founded.[32]

19. The approach in *Tinsley v Milligan* also remains the approach used in Singapore: it is the *reliance* on the illegality that bars a claim for restitution.[33]

20. How will the Singapore court react to the decision in *Patel v Mirza*? Though the issue of the "range of factors" approach has yet to come up before our courts, Andrew Phang JA has stated (extrajudicially) that the reliance principle in *Tinsley v Milligan* is rather "artificial".[34] Instead, the Australian approach in *Nelson v Nelson*[35] may be more agreeable, as it avoids the draconian outcome of complete denial of relief where the illegality may not be serious.[36]

21. *Nelson v Nelson* held that a court should not refuse a claim for restitution on grounds of illegality if such refusal would not further the purpose of the statute, or would be disproportionate to the illegal conduct.[37] These same considerations appear in Lord Toulson's framework in *Patel v Mirza*, and indeed Lord Toulson cited *Nelson v Nelson* with resounding approval.[38] If Singapore law is agreeable to the propositions in *Nelson v Nelson*, therefore, it is quite possible that the decision in *Patel v Mirza* will be followed – or perhaps adapted – for application in local jurisprudence.

22. With respect, it is submitted that this approach would be preferable to *Tinsley v Milligan*, as the present distinction, based on "reliance", is arbitrary and ill-defined. In advancing the policy considerations encapsulated within the *ex turpi causa* defence, it should be necessary to ensure that every decision made accords with such policy, rather than engaging in a blind application of the law. Courts should not seek certainty for certainty's sake – especially where ideas of policy are concerned, close scrutiny must

---

[32] Andrew Phang Boon Leong, *supra* n 3, at [13.126]–[13.128].
[33] *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2011] 1 SLR 657 at [204].
[34] Andrew Phang Boon Leong, *supra* n 3, at [13.149]–[13.150].
[35] *Nelson v Nelson* (1995) 184 CLR 538 ("***Nelson***").
[36] Tey Tsun Hang, "Reforming Illegality in Private Law" (2009) 21 SAcLJ 218 at [61]; Andrew Phang Boon Leong (gen ed), *The Law of Contract in Singapore* (Academy Publishing, 2011) at [13.149]–[13.150].
[37] *Nelson*, *supra* n 35, at 612–613.
[38] *Patel*, *supra* n 6, at [109].

be paid to the application of the defence in every case in order to ensure a more just result.