ILLEGALITY AND STATUTE IN HONG KONG
The Hochelaga Lecture 2017

by

The Hon Mr Justice William Gummow
Non-Permanent Judge of the Court of Final Appeal

Introduction*

1. A Life in the Law entails much attention to the terms and operation of statute and delegated legislation. Long gone are the times when, as Sir Owen Dixon declared when speaking in 1933:

> "[F]or the most part […] the daily relations of man and man are governed by the common law … disfigured but little by statute."[1]

2. To the contrary, today there is a growing judicial appreciation that the common law is not a self-contained source of principle which is wholly distinct from statute law. Rather as Gleeson CJ put it: "Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship."[2] Thus, in *Commonwealth Bank of Australia v Barker*[3]

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[1] "Science and Judicial Proceedings" in *Jesting Pilate*, Woinarski (ed) 1965, at 13.

[2] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [31]; [2001] HCA 29.

[3] (2014) 253 CLR 169 at [17]-[18], [91]-[95], [118]-[119]; [2014] HCA 32; *Cf Malik v Bank of Credit and Commerce International SA (In liq)* [1998] AC 20.

the High Court held that common law principles respecting terms of employment should not be developed (eg by implying a term of mutual trust and confidence) insensitively to the interaction with an applicable statutory industrial relations regime.

3. Many statutory regimes impose, either absolutely or conditionally, restrictions upon actions otherwise falling in the sphere of the common law as developed over time by the case law. The common law developed its own categories of illegality, whether, for example, to do with contracts in restraint of trade or what Lord Toulson described in *Patel v Mirza*[4] as "certain aspects of public morality, the boundaries of which have never been made entirely clear". But it would be passing strange were principles respecting illegality in the areas of contract, trust, tort and restitutionary money claims to be developed without close attention to any statute which imposed a relevant norm of conduct. Indeed, it may be observed that in the classic decision of *Holman v Johnson*[5], Lord Mansfield emphasised that the sellers of the goods, who succeeded in assumpsit for goods sold and delivered, were "not guilty of any offence, nor have they transgressed against the provisions of any Act of Parliament". Neither *Patel v Mirza* itself nor any of the other more modern authorities to be considered in what follows, turned upon "pure" common law or equity; in all of them there

[4] [2017] AC 467 at [120].
[5] (1775) 1 Cowp 341 at 343; 98 ER 1120 at 1121.

had been some significant "disfigurement" by statue. Hence the title of this Lecture.

4. In *Ryder Industries Ltd v Chan Shui Woo*[6], Lord Collins NPJ referred to what he regarded as the then unsatisfactory state of the English authorities "on the scope of application of the illegality defence" and Ma CJ[7] indicated his dissatisfaction with criteria for assessing illegality which involved "some kind of judicial discretion to be exercised" rather than resting on "firmer principle and policy".

What is to be done?

5. Bearing in mind the pervasive incidence of illegality sourced in statute, the case law across the common law world offers at least three possibilities. The first is to adhere to, or to qualify, the approach of the House of Lords in *Tinsley v Milligan*[8]. The second possibility is to adopt the reasoning, particularly of Sir Anthony Mason, in *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd*[9], which was adopted in later cases including *Nelson v Nelson*[10] and in England was of "greatest assistance" to Kerr LJ in *Phoenix*

[6] (2015) 18 HKCFAR 544 at [29].
[7] (2015) 18 HKCFAR 544 at [1].
[8] [1994] 1 AC 340.
[9] (1978) 139 CLR 410 at 423-427; [1978] HCA 42.
[10] (1995) 184 CLR 538 at 552, 594, 613-614; [1995] HCA 25.

General Insurance Co of Greece SA v Halvanon Insurance Co Ltd[11]. The third is to accept the recent formulation of principle by Lord Toulson, speaking for six Justices in *Patel v Mirza*[12].

6. In evaluating these possibilities, several generally expressed cautions are to be borne in mind. The first concerns the care to be exercised lest the judicial function becomes that of a law reform agency. The court may not be equipped to undertake a complicated task of assessing and adjusting the competing social and financial interests which appear to be involved. As Sir Anthony Mason put it in *State Government Insurance Commission SA v Trigwell*[13]:

> "The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities."

7. The second matter is the countervailing consideration that the present state of the case law in the forum may neither promote the predictability of judicial decision nor facilitate the giving of advice to settle or avoid litigation[14].

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[11] [1988] QB 216 at 270-274; Senior Counsel for the successful party was Nicholas Phillips QC. See also *Fuji Finance Inc v Aetna Life Insurance Co* [1997] Ch 173 at 194, 196-197.
[12] [2017] AC 467 at [101].
[13] (1979) 142 CLR 617 at 633-4; [1979] HCA 40. See further, Sir Anthony Mason, "Lord Sumption and the Limits of Law" (2017) 47 *Hong Kong Law Journal* 633 at 653.
[14] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [107]-[108]; [2001] HCA 512.

8. Finally, if there is to be a judicial reformulation of principle then recent observations of Lord Reed are on point. Speaking, for example, of a "unified theory of unjust enrichment based on the application of a simple structure described in very broad language", Lord Reed saw this as having "in practice permitted judges to apply rather subjective approaches and [as having] resulted in a degree of uncertainty", with the need "to develop more strictly defined principles"[15] . It should be noted that Lord Reed did not sit on *Patel v Mirza*.

9. With these matters in mind, it is convenient to return to the three possibilities which have been mentioned above.

Tinsley v Milligan

10. This decision given in 1993[16] stands for the immediate proposition that a claimant to an interest (legal or equitable) in property may recover it if not obliged to plead or rely on an illegality and that this is so even if that title was acquired in the course of carrying out an illegal transaction. The instant illegality was the perpetration of frauds on the Department of Social Security.

[15] "Comparative Law in the Supreme Court of the United Kingdom", paper given on 13 October 2017 at the Centre for Private Law, University of Edinburgh, at page 4-5, referring to *HMRC v The Investment Trust Companies* [2017] UKSC 29 at [38]-[39]; *Lowick Rose LLP v Swynson* [2017] UKSC 32 at [22].

[16] [1994] 1 AC 340.

As Lord Walker of Gestingthrope was to observe[17] the case "raised issues of equitable interests in property and the equitable and "clean hands" doctrine". The appeal was decided on the basis that if A purchases land in the name of B, A may enforce the resulting trust against B without there being any need to rely on the reason A had in purchasing in the name of B, even though the reason was A's illegality.

11. In deciding *Tinsley* the House of Lords was influenced by *Bowmakers Ltd v Barnet Instruments Ltd*[18]. The illegality alleged in *Bowmakers* lay in contraventions of war-time regulations fixing prices for the sale of machine tools produced in the United Kingdom. The plaintiff was entitled to recover damages for conversion, as du Parcq LJ put it[19]:

> "… even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim." (emphasis added)

12. In *Best Sheen Development Ltd v Official Receiver*[20] these English cases were applied by the High Court in a dispute arising from a scheme to misrepresent that the bankrupt (as he later became) was the true owner of land in the New Territories so as to enable the plaintiff developers to obtain the

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[17] *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 at [130].
[18] [1945] 1 KB 65 at 71.
[19] [1945] 1 KB 65 at 71.
[20] [2001] 1 HKLRD 866 at 874-875. See also *Wu Wai Sum Stella v Man Ting Chu* [2010] 5 HKLRD 125 at [25].

concessionary terms in building licences granted to individual indigenous villagers under the Small House Policy. Yuen J held that a declaration that the plaintiff was the beneficial owner of the land did not amount to enforcement of the illegal contract.

13. The difficulties inherent in the approach taken in *Bowmakers* and *Tinsley* were in 1995, identified by McHugh J in *Nelson v Nelson*[21]as follows:

> "The *Bowmakers* rule has no regard to the legal and equitable rights of the parties, the merits of the case, the effect of the transaction in undermining the policy of the relevant legislation or the question whether the sanctions imposed by the legislation sufficiently protect the purpose of the legislation. Regard is had only to the procedural issue; and it is that issue and not the policy of the legislation or the merits of the parties which determines the outcome. Basing the grant of legal remedies on an essentially procedural criterion which has nothing to do with the equitable positions of the parties or the policy of the legislation is unsatisfactory, particularly when implementing a doctrine which is founded on public policy."

14. The upshot was that *Tinsley* was not followed in *Nelson*, with the reasons attracting favourable discussion by Professor Prentice in the Chapter on "Illegality and Public Policy" he contributed to the thirty-second edition of "Chitty on Contracts."[22] More recently, in the United Kingdom itself, among all nine judges who sat on *Patel v Mirza*[23], at least the majority were agreed that *Tinsley* should no longer be followed.

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[21] (1995) 184 CLR 538 at 609; [1995] HCA 25.

[22] 2015, Volume 1, General Principles, §16-200, 16-201. See also Burrows "Illegality as a Defence in Contract" in Degeling, Edelman and Goudkamp (eds) Contract in Commercial Law, 2016, 435 at 439-440; Edelman and Bant "Unjust Enrichment" 2nd Ed (2016) at 159-160, 303-304.

[23] [2017] AC 467 at [110], [144], [164], [209], [221], [238].

15. However, in Hong Kong on several occasions the Court of Appeal has ruled that it is only by the Court of Final Appeal that conflict between the reasoning in *Nelson* and *Tinsley* is to be resolved[24]. In *HKSAR v Lau Kam Ying* [25] when giving in 2013 its reasons for refusing leave, the Appeal Committee of the Court of Final Appeal indicated agreement with the approach relying on *Tinsley* which had been taken by Yuen J in *Best Sheen Development Ltd v Official Receiver*[26], but said that it was then unnecessary to come to a concluded view on the matter. Finally, in *Tse Chun Wai v Leung Kwok Kin Joseph*[27] Bebe Chu J indicated, after *Patel*, that *Tinsley* remained the present authority in Hong Kong.

16. Before turning to consider what is offered by *Patel*, it is convenient to consider the approach taken in *Nelson*, which applied *Yango*.

Yango

17. *Yango*, decided in 1978, held that neither a mortgage nor guarantee given to a corporation carrying on banking business without the licence required by statute was void or unenforceable by that corporation[28]. First, the terms of the statute did not prohibit the making of the contact of loan which had been

[24] *Loyal Luck Trading Ltd v Tam Chun Wah* [2008] 4 HKLRD 681 at [48]; *Kan Wai Chung v Hau Wun Fai* [2016] 5 HKC 585 at [8.7].
[25] (2013) 16 HKCFAR 595 at [20]-[21].
[26] [2001] 1 HKLRD 866 at 874-875.
[27] [2017] 4 HKLRD 563 at [64].
[28] (1978) 139 CLR 410; [1978] HCA 42.

secured to the lender by the mortgage and guarantee. Secondly, neither as a matter of necessary inference nor implication, did the statute go beyond penalising the party who contravened its prohibition on carrying on an unlicensed business, so as to prohibit contracts the making of which constituted the conduct of that business; to do so would deny recovery by innocent depositors. Thirdly, considerations of public policy did not support any different outcome.

18. With respect to the second situation, Mason J gave examples of *Cope v Rowlands*[29] and *Cornelius v Phillips*[30], and with respect to the third Jacobs J referred to *Archbolds (Freightage) Ltd v S Spanglett Ltd*[31]. So it cannot be said that in *Yango Pastoral* their Honours regarded themselves as writing on a blank slate.

19. Thereafter, in *Nelson v Nelson*[32], *Yango* was described as drawing a distinction between:

> "(i) an express statutory provision against the making of a contract or creation or implication of a trust by fastening upon some act which is essential to its formation, whether or not the prohibition be absolute or subject to some qualification such as the issue of a licence; (ii) an express statutory prohibition, not of the formation of a contract or creation or implication of a trust, but of the doing of a particular act; an agreement that the act be done is treated as impliedly prohibited by the statute and illegal; and (iii) contracts and trusts not directly contrary to the provisions of the

[29] (1836) 2 M&W 149 [150 ER 707].
[30] [1918] AC 199.
[31] [1961] 1 QB 374.
[32] (1995) 184 CLR 538 at 552.

> statute by reason of any express or implied prohibition in the statute but which are 'associated with or in furtherance of illegal purposes'. The phrase is that of Jacobs J in *Yango*."[33]

20. And, as to class (iii) it was added in *Nelson*[34]:

> "In this last class of case, the courts act not in response to a direct legislative prohibition but, as it is said, from 'the policy of the law'. The finding of such policy involves consideration of the scope and purpose of the particular statute. The formulation of the appropriate public policy in this class of case may more readily accommodate equitable doctrines and remedies and restitutionary money claims than is possible where the making of the contract offends an express or implied statutory prohibition."

21. Neither *Yango* nor *Phoenix General Insurance*[35] had been cited in argument in *Tinsley*. In *Phoenix*, decided in 1988, the Court of Appeal had held that the *Insurance Companies Act* 1974 (UK) did not merely impose upon unauthorised insurers a prohibition upon making contracts of insurance but extended the prohibition to the performance of such contracts. If the statute had merely prohibited entry into the contract, whether the performance of the contract would be prohibited would have depended, as indicated in *Yango*, upon considerations of public policy.

22. When *Tinsley* was before the Court of Appeal[36], Nicholls LJ had reached the same result as was to obtain in the House of Lords, but upon reasoning akin to that in *Phoenix*. His Lordship noted that the fraud perpetrated

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[33] (1978) 139 CLR 410 at 432; see also at 430, *per* Mason J.
[34] (1978) 139 CLR 410 at 432.
[35] [1988] QB 216 at 273-274.
[36] [1992] Ch 310 at 317, 319.

by both parties on the Department of Social Security "played only a small financial part in the acquisition of the equity in the house which is now in dispute" and averred that the court was to "weigh, or balance, the adverse consequences of granting relief against the adverse consequences of refusing relief."

23. The reasoning in *Yango* (a contract case) and *Nelson* (a trust case) has been applied by the High Court to actions in tort (*Miller v Miller*[37]) and for money had and received (*Equuscorp Pty Ltd v Haxton*[38]). The plaintiff in *Miller* succeeded in an action for personal injury sustained while a passenger in a car stolen by the plaintiff and driven by the defendant; it was critical that before the accident the plaintiff had withdrawn from the joint enterprise proscribed by the *Criminal Code* (W.A.).[39] *Equuscorp* held that restitutionary relief, in respect of moneys owing under loan agreements which were unenforceable by reason of their association with contravention of prospectus provisions in the corporations law, would stultify the policy of those provisions.

24. *Equuscorp* may be read with the English decision in *Awwad v Geraghty & Co (a firm)*[40]. A solicitor and client contingency fee agreement was contrary to professional practice rules made pursuant to statute. The agreement

[37] (2011) 242 CLR 446; [2011] HCA 9.
[38] (2012) 246 CLR 498; [2012] HCA 7.
[39] As to that offence in Hong Kong, see *HKSAR v Chan Kam Shing* (2016) 19 HKCFAR 640.
[40] [2001] QB 570, at 596.

was unlawful and the Court of Appeal, with reasons given by Schiemann LJ, held that claim by the solicitor for payment based on quantum meruit must also fail. On the other hand, no public policy was engaged where an interpreter claimed a fair fee for interpreting with respect to a champertous agreement which was not to be enforced[41].

25. The most recent High Court decision is *Gnych v Polish Club Ltd*[42]. The failure of a licensee under the Liquor Act 2007 (NSW) to obtain approval of the statutory licensing authority to the lease of part of its premises did not avoid that lease and render the lessee liable to vacate the premises; the contrary conclusion would be inconsistent with the supervisory role of the authority under its powers given by the statue.

26. With respect to reliance upon public policy Gageler J observed[43]:

> "The court will recognise that, 'whilst persons who deliberately set out to break the law cannot expect to be aided by a court, it is a different matter when the law is unwittingly broken'[44]. The court will weigh the consequences of withholding a remedy to enforce the agreement in light of the objects or policies which the statute seeks to advance and the means which the statute has adopted to achieve that end. Ordinarily, it would be open to the court to conclude that withholding a common law remedy from a person whose intention was, and remained, to flout the statute was justified by reference to the narrower consideration of public policy only if the consequence of withholding the remedy could be determined by the court to be both proportionate to the seriousness of the illegality and not incongruous with the

[41] *Mohamed v Alaga and Co (a firm)* [2000] 1 WLR 1815; cf *Tse Chun Wai v Leung Kwok Kin Joseph* [2017] 4 HKLRD 563 at [34]-[38], [60], [68].
[42] (2015) 255 CLR 414; [2015] HCA 23.
[43] (2015) 255 CLR 414 at [75].
[44] *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 221. See also *Nelson v Nelson* (1995) 184 CLR 538 at 604.

> statutory scheme[45]. The moulding of an equitable remedy, if sought, might involve other considerations and permit of greater flexibility[46]."

27. There remains the recent formulations of principle in *Patel v Mirza*.

Patel v Mirza

28. Mr Patel sued to recover from Mr Mirza moneys paid for a failed consideration, namely their application by Mr Mirza in insider trading which had not come to pass.

29. Lord Touslon concluded his reasons as follows[47]:

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather [than by] the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate." (emphasis added)

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[45] *Nelson v Nelson* (1995) 184 CLR 538 at 612-613; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 229-230, 249-250.

[46] eg *Nelson v Nelson* (1995) 184 CLR 538 at 571-572, 617-618. [Cf *Patel v Mirza* [2017] AC 467 at [207] per Lord Mance].

[47] [2017] AC 467 at [120].

As has already been noted, in the above passage Lord Toulson excluded from consideration what might be called "common law" illegality founded in certain aspects of public morality. Yet, unlike the formulations in *Yango* and *Nelson*, his Lordship did not place at the forefront considerations arising from applicable statute law. However, two statutory provisions relevantly imposed criminal sanctions. Section 52 of the *Criminal Justice Act* 1993 (UK) ("the 1993 Act") created the offence of "insider dealing". Section 1 of the *Criminal Law Act* 1977 (UK) operated to render guilty of conspiracy to commit an offence a person, such as the plaintiff, Mr Patel, who agreed with another, such as the defendant, Mr Mirza, that a course of conduct be pursued which if the agreement were carried out (by insider trading by Mr Mirza) would necessarily amount to the commission by Mr Mirza of the offence of insider dealing. Further, the conspiracy offence would be complete on the making of the agreement, even if not brought to fruition by commission of the insider dealing offence[48]. There may be, as Gleeson CJ has observed, good reasons for the law to punish people who make some agreements without waiting for any performance of their agreement[49].

30. Lord Toulson concluded that Mr Patel should not be debarred from enforcing his claim to recover his moneys as having been paid for a failed

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[48] *Yip Chiu-cheung v The Queen* [1995] 1 AC 111 at 117-118.
[49] *Lipohar v The Queen* (1999) 200 CLR 485 at [12]; [1999] HCA 65.

consideration. That the money had been paid for an unlawful purpose would not undermine "the integrity of the justice system"[50].

31. The failure by Lord Toulson to treat the operation of the criminal law as the starting point for analysis marks off the formulation of principle in *Patel* from that in *Yango*. (There were approving references to *Nelson*, but these largely were directed to the treatment there of *Tinsley*[51]). Rather, Lord Toulson started from a major premise as follows[52]:

> "The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted."

32. Were attention paid primarily to statute law several consequences would follow. First, consideration would be given to the proposition advanced by Mason J in *Yango Pastoral* that once a statutory penalty has been provided for an offence, in *Patel* that of criminal conspiracy, the role of the common law in determining the legal consequences of commission of the offence is thereby diminished[53].

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[50] [2017] AC 467 at [121].
[51] [2017] AC 467 at [50]-[54], [110].
[52] [2017] AC 467 at [109].
[53] (1978) 139 CLR 410 at 429.

33. Secondly, s 63(2) of the 1993 Act expressly saved the validity of contracts for insider trading. As Gloster LJ had noted in the Court of Appeal, it therefore was hard to discern any public policy which would require the anterior agreement between Mr Patel and Mr Mirza, conspiracy though it was, to be struck down as unenforceable[54], or to deny to Mr Patel recovery of the moneys he had paid out. So it may well be that were the reasoning in *Yango* to be applied to the situation in *Patel*, the same result - recovery by Mr Patel - would be reached.

34. Lord Sumption observed [55] that the phrase "maintaining the integrity of the legal system" had appeared in a Consultation Paper issued in 2009 by the Law Commission[56] with the meaning of sparing the judiciary from involvement in serious wrongdoing, whereas the illegality principle "has almost invariably been raised as a defence to a civil claim based on a breach of the criminal law", and the illegality principle was founded on the need for consistency and internal coherence of the legal system as a whole.

35. Lord Sumption also stressed that [57] the common law, while a system of judge-made customary law, "is not an uninhabited island on which judges are at liberty to plant whatever suits their personal tastes". To adopt the

[54] [2015] Ch 271 at [69].
[55] [2017] AC 467 at [230], [231], [237].
[56] Consultation Paper No. 189, The Illegality Defence, paras 2.24, 2.5.
[57] [2017] AC 467 at [226].

"range of factors" test proposed by Lord Toulson would be to substitute "a new mess for the old one"[58]. It also would achieve a result for which neither party had contended, the submissions of both contending for rule-based approach[59].

36. The report in the Appeal Cases of the arguments of counsel bears this out. Counsel for Mr Mirza contended that (a) "founded upon" when used in *Tinsley* depended on substance not pleading (b) Mr Patel's claim was founded upon illegality, the criminal conspiracy pursuant to which he paid over the money, and (c) matters should lie where they had fallen.[60] Counsel for Mr Patel emphasised that to fix upon the conspiracy was to ignore whether, the illegal purpose of the transactions not having been put into effect, there was any reason to allow the unjust enrichment of Mr Mirza to continue, it being "one thing to refuse to enforce an illegal transactions [and] another to refuse restitution". Mr Patel was asking the Court not to enforce the illegal agreement but to unwind it.[61]

37. Yet, like Lord Toulson, Lord Sumption also favoured recovery by Mr Patel. With reference to the provisions of the criminal law, Lord Sumption

[58] [2017] AC 467 at [265].
[59] [2017] AC 467 at [261].
[60] [2017] AC 467 at 470-471, 473-474.
[61] [2017] AC 467 at 472-473.

saw no policy which required the participation in the offence to be overlooked in determining the civil consequences. But he concluded:[62]

> "However, restitution still being possible, none of this is a bar to Mr Patel's recovery of the £620,000 which he paid to Mr Mirza. The reason is simply that although Mr Patel would have to rely on the illegal character of the transaction in order to demonstrate that there was no legal basis for the payment, an order for restitution would not give effect to the illegal act or to any right derived from it. It would simply return the parties to the status quo ante where they should always have been."

38. This approach appears to reflect what earlier in his reasons Lord Sumption said, qualifying the "reliance test" in *Tinsley*[63]:

> "The true principle is that the application of the illegality principle depends on what facts the court must be satisfied about in order to find an intention giving rise to an equitable interest. It does not depend on how those facts are established. Ms Milligan was entitled to the interest which she claimed in the property because she paid half of the price and there was no intention to make a gift. That was all that the court needed to be satisfied about." (emphasis added)

39. It also may involve a problematic application of reasoning exemplified in the statement by Millett LJ in *Tribe v Tribe*[64]:

> "It is ... settled both at law and in equity that a person who has transferred property for an illegal purpose can nevertheless recover his property provided that he withdraws from the transaction before the illegal purpose has been wholly or partly performed. This is the doctrine of *locus poenitentiae* and it applies in equity as well as at law …
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> I would hold that genuine repentance is not required. Justice is not a reward for merit; restitution should not be confined to the penitent. I would also hold that voluntary withdrawal from an illegal transaction when it has ceased to be needed is sufficient …"
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> (emphasis added)

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[62] [2017] AC 467 at [268].
[63] [2017] AC 467 at [238].
[64] [1996] Ch 107 at 124, 135. This was relied upon as an alternative ground of decision in *Best Sheen Development Ltd v Official Receiver* [2001] 1 HKLRD 866 at 875.

40. The difficulty in applying the *locus poenitentiae* doctrine to the situation in *Patel* was that it was the very making of the agreement which constituted completion of the crime of conspiracy. So one is left by Lord Sumption with a revision of the "reliance test" in *Tinsley*.

41. Finally, it should be noted that Lord Sumption did advert to the significance of statue law. But he did so as providing a category where the common law regarded the parties as not being in *pari delicto*. This category was an exception to the principle that a party "may not rely on his own illegal act in support of his claim"[65]. Lord Sumption went on[66] give as an example the decision of Devlin J in *St John Shipping Corporation v Joseph Rank Ltd*[67] that statutory prohibitions on overloading of ships did not provide a defence to an action to recover an amount for freight from the shippers and bill of lading holders. But that was because neither expressly nor as a matter of clear implication did the statute prohibit recovery under the contracts on the ground that the vessel had been overloaded[68].

42. In *Ochroid Trading Ltd v Chua Siok Lui*[69] the Singapore Court of Appeal has declined to follow the majority in *Patel* and expressed preference for the qualification of *Tinsley* by Lord Sumption; the recent Australian decision

[65] [2017] AC 467 at [241].
[66] [2017] AC 467 at [244].
[67] [1957] 1 QB 267.
[68] [1957] 1 QB 267 at 287-289.
[69] [2018] SGCA 5 at [101]-[107], [134]-[137].

in *Gnych v Polish Club Ltd*[70] appears not to have been drawn to the attention of the Court of Appeal.

Conclusion

43. What is disclosed by the foregoing is a wide range of normative propositions jostling for attention. There is the "reliance test" associated with *Bowmakers* and *Tinsley*, and its adjustment by Lord Sumption in *Patel*. At the other end of the scale there is the formulation by Lord Touslon in *Patel*, with its emphasis upon assessment of public policy considerations on a case by case basis. None of the above emphasises the importance of statute law as the starting point for analysis. That absence is to be contrasted with *Yango*, *Nelson* and later decisions.

44. It may be, as noted above in para 32 that in a given situation the same result may be reached by applying quite different reasoning. However, the need remains for the making of a choice between these jostling propositions.

[70] (2015) 255 CLR 414.