Neutral Citation Number: [2014] EWCA Civ 1047

Case No: A3/2013/2039

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr David Donaldson QC, sitting as a Deputy High Court Judge
[2013] EWHC 1892 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 29th July 2014

Before :

LORD JUSTICE RIMER
LADY JUSTICE GLOSTER
and
LORD JUSTICE VOS

- -

Between :

CHANDRAKANT PATEL	**Appellant**
- and -	
SALMAN MIRZA	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Philip Shepherd QC (instructed by **K. A. Arnold & Co**) for the **Appellant**
Mr William McCormick QC and **Mr Faisel Sadiq** (instructed by **Dale Langley Solicitors**) for the **Respondent**

Hearing date: 30 January 2014

- -

Judgment

Lord Justice Rimer :

1. The appellant is Chandrakant Patel, the claimant. The respondent is Salman Mirza, the defendant. Mr Patel's appeal is against an order made on 5 July 2013 by David Donaldson QC, sitting as a Deputy High Court Judge in the Chancery Division, dismissing his claim for the repayment of £620,000 he had paid Mr Mirza between September and December 2009. On Mr Patel's own case, he had paid the money to Mr Mirza for the purposes of an illegal agreement for insider dealing in shares in Royal Bank of Scotland Plc ('RBS'). In the event, the agreement could not be and was not carried out because the expected inside information was not forthcoming, but the judge held that Mr Patel's claim was still barred by illegality. The position would, the judge held, have been different if Mr Patel had withdrawn from the agreement before its implementation became frustrated, but he had not.

2. Mr Shepherd QC, for Mr Patel, submitted that (i) the judge was wrong to find that Mr Patel needed to rely on any illegality in making his claim; and (ii) the fact he had not withdrawn from the agreement before its performance was frustrated was also no bar to his claim. Mr McCormick QC and Mr Sadiq, for Mr Mirza, submitted that the judge's order was correct.

The facts

3. George Georgiou was, until the financial crisis of 2008, a successful and wealthy property investor and dealer, although his fortunes then declined and he was adjudicated bankrupt in 2010. Mr Patel, also a wealthy man, became friends with Mr Georgiou in about 2004. They clubbed and socialised together. Mr Patel bought properties from Mr Georgiou and also offered Georgiou properties to friends, for which he received a commission. Mr Patel had a desk in Mr Georgiou's Ilford office.

4. Mr Mirza was employed by Tullett Prebon Plc as a foreign exchange broker. He also had a personal spread-betting account with IG Index. He and Mr Georgiou had known each other since they were teenagers. Mr Mirza made at least two loans to Mr Georgiou.

5. Mr Patel and Mr Mirza first met at Mr Georgiou's house at about the end of 2008 at one of Mr Georgiou's Friday poker evenings. Mr Patel sought thereafter to interest Mr Mirza in buying cars and watches that he was able to source at a large discount.

6. In August 2009, Mr Georgiou told Mr Patel of a deal offered by Mr Mirza involving the use of Mr Mirza's spread-betting account to bet on the movement of RBS shares. The claimed beauty of the deal was that Mr Mirza knew people who would sit in on any meeting between RBS heads and government officials, and within minutes of the end of the meeting he would know its outcome. Mr Georgiou suggested that Mr Patel should be involved. He telephoned Mr Mirza there and then, with his phone in loudspeaker mode, and Mr Mirza confirmed the scheme to Mr Patel. Shortly afterwards, all three men met around Mr Georgiou's kitchen table during a Friday poker evening in early September 2009. The judge said that Mr Patel's evidence was that:

> '8. … Mr Mirza confirmed that he had contacts in RBS who could supply him with information of meetings with government officials, and in particular of a

public statement expected from the Chancellor which would have an effect on the RBS share price. Mr Mirza expressed his readiness to include Mr Patel's money in a bet based on such information, and wrote down the details of his bank current account to which Mr Patel could send the money.

9. I interject by way of brief technical excursus that a spread bet on listed shares is on analysis a contract of differences, based on movements in the quoted share price over a specified period. In the case of IG Index the client was required, as Mr Mirza told me, to deposit 15-20% of the initial share price and maintain a deposit to at least this level as the price moved. The level of the deposit meant that substantial gearing, of at least 5 times, could be achieved. Mr Mirza told me that the level of margin required would decrease – and hence the available gearing would increase – with the size of the bet. It follows that Mr Mirza could benefit from agglomerating outside money with his own in placing any bet.'

7. Between 9 September and 16 December 2009, Mr Patel transferred to Mr Mirza's bank account four payments totalling £620,000 sourced from his 'investor pool', which included his cousin Chirag Patel. The judge said that, with gearing of five times or more, that was sufficient to open a position of more than £3m worth of RBS shares.

8. In the event, nothing came of the proposal. In late January or February 2010, according to Mr Patel, Mr Mirza told him that there was no longer expected to be a government statement about RBS and that he would return the money to Mr Patel at about the beginning of March. But, come March, Mr Patel's evidence was that he was told by Mr Mirza that the £620,000 had, by a mistake by Mr Mirza's bank, been paid instead to Mr Georgiou. Mr Patel failed in his attempts to recover the money from Mr Georgiou or his trustee in bankruptcy. So Mr Patel sued Mr Mirza for the money.

9. At the heart of this murky story is, therefore, the entry by Mr Patel and Mr Mirza into what, on Mr Patel's case, was an illegal arrangement directed at achieving a profit from the movement of RBS shares by using insider information. Such illegality was the reason why the judge dismissed Mr Patel's claim. It is relevant to see how his case was pleaded.

The pleadings

10. The amended particulars of claim (not the work of Mr Shepherd) were not shy about proclaiming the illegal nature of the arrangement. Having pleaded Mr Mirza's status as a foreign exchange dealer in paragraph 1, paragraph 3 pleaded that in two conversations in August and September 2009, Mr Mirza outlined the following proposal to Mr Patel:

'3.1 [Mr Mirza] would get advance knowledge of what information a statement anticipated to be made by the Chancellor of the Exchequer about the Government investment in [RBS] would contain, and that the shares in [RBS] would rise or fall dependent upon what information that statement contained.

3.2 If [Mr Patel] were to transfer monies to [Mr Mirza], he would place them in his IG Index account and would be able to gear them up to gain maximum benefit from such rise or fall.

> 3.3 [Mr Mirza] would only place any funds provided to him by [Mr Patel] once he had the information set out in sub-paragraph 3.1 above and therefore there was no risk associated with the placing of the funds with him.
>
> 3.4 [Mr Mirza] would be placing a large sum representing his personal funds into the same transaction.'

11. Paragraph 4 pleaded the terms governing any transfer of money by Mr Patel to Mr Mirza, which included allegations that Mr Georgiou was not, nor was to be, involved in the transaction in any way and that Mr Mirza was to be entitled to a commission from any profit generated for Mr Patel. Paragraph 5 pleaded that Mr Mirza's proposal was in the nature of an offer that Mr Patel accepted. Paragraph 9 pleaded the transfer of the £620,000 to Mr Mirza's bank account. Paragraph 10 pleaded a further, or alternative, case that the money was transferred to and held by Mr Mirza upon trust for the sole purpose of applying the money in accordance with the proposal. Paragraph 11 pleaded Mr Mirza's explanation in 2010 that the Chancellor was no longer expected to make the predicted statement and that he would not therefore be implementing the proposal and would return the money. Paragraph 12 pleaded what Mr Mirza had said was the mistaken payment to Mr Georgiou. Paragraph 13 pleaded that if Mr Mirza had paid the money to Mr Georgiou, he did so in breach of the contract with Mr Patel. Paragraph 14 pleaded that 'the consideration for the payment of the Funds by [Mr Patel] to [Mr Mirza] has wholly failed in that [Mr Mirza's] obligations under the terms of the contract remain wholly unperformed and [Mr Mirza] has provided no other consideration for the Funds'. Paragraph 14 alleged that Mr Mirza had, in receiving the money and in failing to repay it, been unjustly enriched. Paragraph 15 pleaded that the purpose of the trust upon which Mr Mirza had held the money had failed and that, as from such failure, Mr Mirza held the money upon a bare trust for Mr Patel. The claims were for damages and/or equitable compensation, payment of the £620,000, a declaration that the £620,000 was held on trust for Mr Patel, accounts, inquiries and payment.

12. The re-amended defence denied all dealings or agreements between Mr Mirza and Mr Patel. It admitted the payment of the £620,000 by Mr Patel, but advanced a complicated explanation that Mr Mirza believed this was really provided by Mr Georgiou for legitimate investment in bank shares and that it was only in about May 2011 that Mr Mirza discovered that Mr Patel had made funds available to Mr Georgiou for him to invest. Mr Mirza pleaded that in due course he decided not to proceed with his investment agreement with Mr Georgiou and returned the money to him. No point was made that Mr Patel's claim was, on its face, barred by illegality.

The judge's decision

13. The judge explained that Mr Patel's pleaded case was founded on an illegal agreement that sought to take advantage of insider information. He referred to Part V of the Criminal Justice Act 1993, which made insider dealing an offence, and held that Mr Patel's claimed agreement with Mr Mirza fell within its prohibitions. He recorded that whilst both sides had treated this like the proverbial elephant in the room, he raised the illegality point at the outset, upon which Mr Patel's counsel sought to reduce the elephant to the size of a mouse, whilst Mr Mirza's counsel embraced it as requiring the claim to fail.

14. Having also found that the agreed purpose of the dealing between Mr Patel and Mr Mirza was as set out in Mr Patel's pleading, the judge considered whether, accepting in their entirety the facts alleged by Mr Patel, the resulting illegality precluded his claim to recover the money he paid Mr Mirza. He said the principles were that: (a) the court will refuse relief claimed in reliance on an agreement with an illegal object, but (b) will grant relief if the claimant voluntarily withdraws from the agreement before it is performed. As to (a), to make good his case, Mr Patel had to prove the agreed purpose for which he had paid the money to Mr Mirza, as well as the failure of that purpose, and thus he had to rely on an agreement which his case showed to be illegal. As to (b), whilst a claimant is not barred from recovery if he withdraws from the illegal contract before it is performed and the illegal purpose achieved, in this case the reason the illegal purpose was not achieved was because it could not be. The rationale of the *locus poenitentiae* doctrine is missing where the illegal purpose is not achieved other than because of action by the claimant. Mr Patel did not withdraw from the illegal agreement, and certainly had not done so voluntarily. He was therefore barred by illegality from recovering the money he had paid and his claim fell to be dismissed.

The appeal

15. In *Holman v. Johnson* (1775) 1 Cowp 341, at 343, Lord Mansfield explained the principle of public policy that no court will lend its aid to a man:

> '… who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.'

16. The modern statement of the principles is to be found in the decision of the majority of the House of Lords in *Tinsley v. Milligan* [1994] 1 AC 340, where it was held that a claimant to an interest in property is entitled to recover or establish it provided that in doing so he is not required to plead or rely on an illegality.

17. The first question in the appeal is whether Mr Patel was entitled to recover the £620,000 without relying on the fact that it was paid to Mr Mirza under an illegal agreement for insider dealing. Mr Shepherd's submission was that, in order to recover the money, Mr Patel did not need either to plead, or otherwise rely on, the illegal agreement with Mr Mirza since the money remained his from the moment it was paid over to Mr Mirza. It remained his because it was, from the moment of payment, held by Mr Mirza on a resulting trust for him. The money was not paid to Mr Mirza beneficially, it was only to be applied for one purpose and no other and it was not open to Mr Mirza to apply it as he wished. Mr Shepherd said it was therefore unnecessary for Mr Patel to have pleaded more than that he paid the money to Mr Mirza, that Mr Mirza received it, that Mr Patel had demanded its repayment and that Mr Mirza had not returned it. That would have been sufficient to identify a cause of action for the return of the money, without any need to refer to the illegal agreement, and it would have been sufficient, if proved, to entitle Mr Patel to the return of the money.

18. Whether if the case had been so pleaded, Mr Patel would have succeeded on the claim without running into illegality problems, I do not know, although I have serious doubts. The first problem with the submission is, however, that the suggestion that, as from the moment of payment, the money was held by Mr Mirza on a resulting trust for Mr Patel is wrong. It was plainly not so held. It was voluntarily paid by Mr Patel into a bank account where it became mixed with other moneys and was so paid on terms under which Mr Mirza was entitled and expected to pay it away in betting on the movement of RBS shares if a potentially profitable opportunity arose in which that might be done. That arrangement was inconsistent both with the suggestion of an immediate resulting trust in favour of Mr Patel and also with Mr Patel's own pleaded case in paragraph 15 of the particulars of claim that the money only became held for him on a bare trust when the purpose of its payment failed in 2010. I doubt that even then the money became held by Mr Mirza on trust for Mr Patel. Why should it be characterised as trust money? It had been knowingly paid into and was held, so far as is known, in a bank account where it was mixed with other money, normally an arrangement pointing away from the existence of any trust. Mr Mirza was no doubt, illegality apart, accountable to Mr Patel for the money. But I am not convinced it ever became held on trust for him. Moreover, of more relevance than my own views on that is that at paragraph 46 of his judgment the judge found as a fact that the money paid by Mr Patel was *not* held on any trust by Mr Mirza. Even if, which I doubt, this finding is challenged in Mr Patel's grounds of appeal, Mr Shepherd said nothing to persuade me that the judge was wrong to find against there being any trust.

19. If, having paid the money to Mr Mirza, Mr Patel had had second thoughts about the illegal arrangement, had withdrawn from it and asked for the return of his money, the position might have been different; and, had the money not been returned, it may be that Mr Patel could have pleaded a case for the return of the money that would not have run into illegality problems. But speculation as to how Mr Patel might have pleaded his case in different circumstances that did not happen is unhelpful. The relevant question is how, in the circumstances that did happen, he *did* plead and advance it (see again Lord Mansfield in *Holman v. Johnson*), and whether, in making the case he did, he was relying on the illegal arrangement with Mr Mirza.

20. As to that, it is clear that he was positively relying on the illegal agreement in order to make good his claim for the return of the money. His case was that he had paid the money to Mr Mirza under an agreement pursuant to which Mr Mirza was to use it in betting on the movement of RBS on the basis of insider information; and that, when it became apparent that the agreement could not be carried out, he was entitled to the repayment of the money on the basis that it was paid for a consideration that had wholly failed, alternatively that it was then held upon a *Quistclose* trust for him (*Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567). Mr Patel's case therefore deliberately advanced, and relied upon, the illegal agreement. It had to be so advanced and reliant since how else could Mr Patel have made a case based on right of recovery based on a total failure of consideration or a failure of the purpose for which the money was paid?

21. For reasons given, there is no need to say more about Mr Patel's attempt to set up a trust case. But to make the case based on a failure of consideration, or unjust enrichment, Mr Patel had to plead all the facts necessary to make it good. In *Berg v. Sadler and Moore* [1937] 2 KB 158, Lord Wright MR said, at 163:

> ‘The plaintiff now demands the repayment of that money. He can only do that on the ground that he is entitled to sue for it in an action for money had and received, and that it is contrary to what is *aequum et bonum* for the defendants to retain it. To maintain an action for money had and received he has to prove the exact circumstances in which the money was paid, and the circumstances which he says entitle him on grounds of justice to have an order for repayment. If, however, he proceeds to that proof he can only establish his claim by proving facts which show that he was engaged in a criminal attempt to obtain goods by false pretences. The Court on well-established principles will refuse to give its aid to any claim which can only be established by proving facts of that nature.’

Romer LJ agreed with Lord Wright’s judgment, at 167. Scott LJ said, at 169, that by framing his claim on the basis of money had and received upon the total failure of consideration of his contract, the plaintiff was inevitably invoking the assistance of the court to enforce an illegal contract. Mr Patel was doing exactly the same. Moreover, when pleading the oral agreement he had made with Mr Mirza, he was required by paragraph 7.4 of Practice Direction 16 – Statements of Case, supplementing CPR Part 16, to ‘set out the contractual words used and state by whom, to whom, when and where they were spoken.’ Mr Shepherd’s submissions that we should approach Mr Patel’s case on the basis that he could have pleaded his case in various alternative ways that carefully kept the illegal cat secure in the bag cut no ice with me. To make good his case based on a total failure of consideration, or unjust enrichment, Mr Patel had to plead the facts that made that case and he did so. Moreover, the judge found the facts proved.

22. Mr Patel’s case thus ran straight into the principle of public policy that the courts will not lend their aid to claimants whose case is stated to be, and is, reliant on illegality. His case was so stated and was so reliant: he was claiming to be entitled to the return of his money because the illegal agreement under which he had advanced it was not carried out. I would reject Mr Shepherd’s submission that this is a case in which the illegality principle was not engaged at all. It clearly was. Mr Patel positively engaged it.

23. Mr Shepherd’s second submission was that, as the illegal purpose was not carried out, the judge was wrong to bar Mr Patel’s claim on the public policy ground that he did. The judge regarded the applicable principle as the *locus poenitentiae* doctrine. He accepted that a claimant who withdraws from an illegal contract before it has been performed is not barred by public policy grounds from recovering money paid under it. He held, however, that such withdrawal must be voluntary and that the doctrine has no application where there has been no such withdrawal but the illegal venture has not been carried out because it has become frustrated. A consideration of the judge’s approach requires a reference to the authorities.

24. If the agreement for an illegal purpose has not been carried out, but remains executory, it will be open to a party who has made a payment or transfer of property under it to repudiate and withdraw from the agreement and recover what he has paid or transferred: *Taylor v. Bowers* (1876) 1 QBD 291. If, however, the illegal agreement has been carried out in whole or in part, it will be too late for a claimant to recover money paid or property transferred under it: *Kearley v. Thomson and Another* (1890) 24 QBD 742.

25. The question in this case is the different one as to whether it is open to the claimant to recover money paid under an illegal agreement in circumstances in which the claimant neither repudiates nor withdraws from the agreement before its performance, but in which its performance then becomes frustrated. What do the authorities say about that?

26. Mr McCormick placed some, albeit limited, reliance on the following statement of principle in Romer LJ's judgment for the Court of Appeal in *Alexander v. Rayson* [1936] 1 KB 169, at 190:

> 'Plaintiff's counsel further contended that inasmuch as the plaintiff had failed in his attempted fraud, and could therefore no longer use the documents for an illegal purpose, he was now entitled to sue upon them. The law, it was said, would allow the plaintiff a locus poenitentiae. So, perhaps, it would have done had the plaintiff repented before attempting to carry his fraud into effect: see *Taylor v. Bowers* (1876) 1 QBD 291. But, as it is, the plaintiff's repentance came too late – namely, after he had been found out. Where the illegal purpose has been wholly or partially effected the law allows no locus poenitentiae: see Salmond and Winfield's Law of Contract, p. 152. It will not be any the readier to do so when the repentance, as in the present case, is merely due to the frustration by others of the plaintiff's fraudulent purpose.'

27. That statement was adopted by Lord Wright MR in his lead judgment in the Court of Appeal in *Berg v. Sadler,* supra, at 165, with which Romer LJ agreed, at 167. Scott LJ also decided the appeal on a like basis. He cited from the judgment under appeal, including the following passage, and expressed his agreement with it (see 167/168):

> 'If dishonest people pay money for a dishonest purpose, and then, by good fortune the offence which they designed to commit is not committed, are they entitled in this Court to come and ask for recovery of the money? In my opinion they are not. It would be a bad example if this Court were to entertain an action by a man for money dishonestly paid for the purpose of committing an offence against the criminal law, and he were allowed to claim from the Court an order that the money should be repaid.'

28. I do not, however, regard either of those passages as directly in point for present purposes. In both cases, the plaintiff fraudster had attempted to carry out his fraud but had been found out, with the consequence that the intended fraud was frustrated. In *Alexander* the fraud consisted of the plaintiff's dishonest presentation to the rating authorities of only part of the documentation relating to a tenancy he had granted, but his intended fraud was frustrated by the disclosure by the defendant tenant, at the instance of the Assessment Committee, of the balance of the documentation; and the reference to 'others' at the end of the quotation from *Alexander* is probably a reference to the Assessment Committee. *Berg* was a case in which the claimant sought, unsuccessfully, to recover money he had paid for goods under a contract he had induced by false pretences, his fraud being discovered by the supplier before it supplied the goods. In both cases, therefore, there was an attempt to achieve the illegal intent but the fraud was discovered and its achievement avoided. It is, I consider, therefore easy to see why in both cases the plaintiffs' claims failed. Neither case, however, had anything to say as to the principle applicable in our case, namely

one in which the intended illegal agreement is not carried out because circumstances so change, or turn out, that it becomes impossible for it to be carried out.

29. *Bigos v. Bousted* [1951] 1 All ER 92 is a decision of Pritchard J which he regarded as determined by the approach adopted in *Alexander* and *Berg*. In *Bigos* the defendant agreed with the plaintiff that, in breach of the Exchange Control Act 1947, the plaintiff would provide £150 of Italian money to the defendant's wife and daughter when they arrived in Italy, in exchange for which the defendant promised to repay the plaintiff with sterling in England, for the due performance of which promise he gave the plaintiff security in the form of a share certificate. When the wife and daughter went to Italy, the plaintiff failed to provide them with the Italian money and they returned to England. The plaintiff then sued the defendant for £150 on the basis that she had lent him that sum. The defendant denied the loan, pleaded the facts and counterclaimed for the return of the share certificate. The plaintiff abandoned her claim but the defendant continued with his counterclaim.

30. The judge dismissed the counterclaim. The reason the main contract – the money exchange contract – was not carried out was not because the defendant had thought the better of it and withdrawn from it, but because its performance had been frustrated by the plaintiff's refusal to perform her part of it. The deposit of the share certificate sprang from that contract, it was tainted with the same illegality and the defendant was not entitled to recover the security. In so concluding, Pritchard J identified a distinction in the authorities between 'repentance cases' (in which the claimant withdraws from the illegal contract before it is performed) and 'frustration cases'. He said, at 100G:

> 'If a particular case may be held to fall within the category of repentance cases, I think the law is that the court will help a person who repents, provided his repentance comes before the illegal purpose has been substantially performed. If I were able, in this case, to take the view that the defendant had brought himself within that sphere of the authorities, it might well be that I would have been able to help him by saying that his repentance had come before the illegal purpose had been substantially performed, but I do not take that view. I think, however, that this case falls within the category of cases which I call the frustration cases, and that it is proper to regard it as in the same category as *Alexander v. Rayson* [1936] 1 KB 169 and *Berg v. Sadler & Moore* [1937] 2 KB 158, rather than as in the category of cases such as *Taylor v. Bowers* (1876) 1 QBD 291 and *Kearley v. Thomson* (1890) 24 QBD 742, and, to some extent, *Hermann v. Charlesworth* [1905] 2 KB 123.'

31. I shall defer further comment on *Bigos* until after I have referred to *Tribe v. Tribe* [1996] Ch 107, to which I come next. On any footing, however, *Bigos* is distinguishable from the present case. It was not, like our case, one in which the illegal purpose became impossible of performance by force of a change of circumstances beyond the control of either of the parties to the illegal contract. We were not referred to any authority in which that was the position.

32. The decision of the Court of Appeal in *Tribe* is, however, of assistance in determining the outcome of this appeal. The plaintiff was the lessee of two leasehold shops occupied by his company for the purposes of its business. Faced with large claims for dilapidations from his landlords, the plaintiff feared that he would or might have to

have recourse to his shareholding in the company to satisfy the claim. In order to avert such a risk, he transferred his shares to his son, the defendant, on terms that he was to hold them as his nominee, and to return them on demand, or when the dilapidations disputes were resolved. The point of the scheme was, if necessary, to cheat the landlords by setting up a false façade purporting to show that the plaintiff did not own the shares at all. The plaintiff's arrangement with his son was dishonest.

33. In the event, the plaintiff did not have to rely on his dishonesty vis-à-vis the landlords, since he achieved a personally painless resolution of his differences with them. The danger so averted, he sued to recover his shares from his son. As the transfer gave rise to a presumption of advancement in favour of the son, the plaintiff found himself in the tricky position that he could rebut the presumption only by relying on his dishonest agreement with his son.

34. The plaintiff's claim succeeded before the judge, whose reason was that as the illegality had not been carried into effect in any way – because the share transfer had not been shown to the landlords or any other creditor – it was open to the plaintiff to rely on his dishonest arrangement in rebuttal of the presumption of advancement. The question for the Court of Appeal was whether that was correct. Nourse LJ summarised the question, at 111F as being:

> '… whether, where the presumption of advancement applies, the transferor can still recover the property, on the ground that, although he is forced rely on the illegality in order to rebut the presumption, the illegal purpose has not been carried into effect in any way.'

35. Nourse LJ, in upholding the decision of the judge, answered that question in the affirmative. He said that the House of Lords in *Tinsley v. Milligan* [1994] 1 AC 340 had recognised an exception to Lord Mansfield's principle expressed in *Holman v. Johnson,* namely in those cases where the illegal purpose has not been carried into effect (see Lord Goff of Chieveley, at 356, and Lord Browne-Wilkinson, at 374).

36. He referred also to the decision of the High Court of Australia in *Perpetual Executors and Trustees Association of Australia Ltd v. Wright* (1917) 23 CLR 185. That was a case in which the plaintiff put his house in his wife's name in order to save it from the clutches of his creditors should he fail in business. His claim for its return on the basis that he was its sole beneficial owner was denied by his late wife's administrators on the ground that there was a presumption of advancement in favour of the wife and the plaintiff was barred from rebutting it by setting up the arrangement that he asserted since to do so was to rely on an illegal agreement, namely to hoodwink his creditors. All four members of the court held that that the plaintiff was not so barred. That was because no creditors had been hoodwinked, nor had there been any attempt to hoodwink any creditors, and therefore, per Barton ACJ, at 193:

> '… the whole thing rested on what might happen but never did happen. That such a state of things, carried no further, is not a bar to the [plaintiff's] claim to what is beneficially his own is to me apparent …'.

And, per the joint judgment of Isaacs, Gavan Duffy and Rich JJ, at 196:

> ‘The test appears to be, not whether the plaintiff in such a case relies on the illegal agreement, because in one sense he always does so, but whether the illegal purpose from which the plaintiff insists on retiring still rests in intention only. If either he is seeking to carry out the illegal purpose, or has already carried it out in whole or in part, then he fails.

And again, at 198:

> ‘In this case no creditors have been defrauded, the illegal purpose has never been in any respect carried into effect, and therefore the [plaintiff] was entitled to succeed. …’

37. Nourse LJ applied that principle to the appeal before him, holding that, similarly, the illegal purpose behind the father’s share transfer into the son’s name had not been carried into effect in any way. He said, at 121H:

> ‘Certainly the transaction was carried into effect by the execution and registration of the transfer. But *Wright’s* case, 23 CLR 185, shows that it is immaterial. It is the purpose which has to be carried into effect and that would only have happened if and when a creditor or creditors of the plaintiff had been deceived by the transaction. The judge said there was no evidence of that and clearly he did not think it appropriate to infer it. Nor is it any objection to the plaintiff’s right to recover the shares that he did not demand their return until after the danger had passed and it was no longer necessary to conceal the transfer from his creditors. All that matters is that no deception was practised on them. …’.

38. Millett LJ concurred in the dismissal of the appeal. He said, at 123H, that the case raised two questions of importance: (i) whether, once property has been transferred to a transferee for an illegal purpose in circumstances giving rise to a presumption of advancement, it is still open to the transferor to withdraw from the transaction before the illegal purpose has been carried out and then give evidence of the illegal purpose in order to rebut the presumption; and (ii) whether, if so, it is sufficient for him to withdraw from the transaction because it is no longer necessary, and without repenting of its illegal purpose.

39. I shall not summarise Millett LJ’s valuable discussion, and he anyway set out his own summary of it at 134E to 135B. That summary includes the key proposition that ‘The transferor can lead evidence of the illegal purpose whenever it is necessary for him to do so *provided that he has withdrawn from the transaction before the illegal purpose has been wholly or partly carried into effect.*’ (Emphasis supplied). It is plain that Millett LJ regarded the plaintiff in *Tribe* as having so withdrawn from the transaction, otherwise he would not have concurred in the dismissal of the appeal. That was because the plaintiff had sought to undo the share transfer before it had been deployed for its intended evil purpose.

40. Of further interest for present purposes is Millett LJ’s closing part of his judgment, at 135B, under the heading ‘The doctrine of locus poenitentiae’. He said it was clear that the claimant ‘must withdraw voluntarily, and that it is not sufficient that he is forced to do so because his plan has been discovered’. He continued:

> ‘In *Bigos v. Bousted* [1951] 1 All ER 92 this was, perhaps dubiously, extended to prevent withdrawal where the scheme has been frustrated by the refusal of the other party to carry out his part.
>
> The academic articles Grodecki, “In Pari Delicto Potior Est Conditio Defendentis” (1955) 71 L.Q.R. 254, Beatson, “Repudiation of Illegal Purpose as a Ground for Repudiation” (1975) 91 L.Q.R. 313 and Merkin, “Restitution by Withdrawal from Executory Illegal Contracts” (1981) 97 L.Q.R. 420 are required reading for anyone who attempts the difficult task of defining the precise limits of the doctrine. I would draw back from any such attempt. But 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. It is true that this is not necessary to encourage withdrawal, but a rule to the opposite effect could lead to bizarre results. Suppose, for example, that in *Bigos v. Bousted* [1951] 1 ALL ER 92 exchange control had been abolished before the foreign currency was made available: it is absurd to suppose that the plaintiff should have been denied restitution. …’

41. Whatever the weight of those observations, they do not amount to an overt assertion that *Bigos* was wrongly decided, although it is apparent that Millett LJ was doubtful about its correctness. He does not, however, explain why he regarded it as dubious. The defendant in *Bigos* had entered into an illegal agreement with the plaintiff, he had given her security for the due performance of his own illegal part in it, and the only reason he did not perform his part is because she had refused to perform hers. Once the plaintiff had refused to perform her part of the agreement, it was too late for him to withdraw from it. He could not have sued her for specific performance, and all that he could do was what he did, namely to accept her repudiation and sue for the return of the security he had given for the due performance of his counter-obligation. In my view, it is by no means clear that Pritchard J’s decision was other than sound. How can it be said that what the defendant did represented a ‘voluntary withdrawal’ by him from the illegal arrangement? Moreover, with respect to Millett LJ, and if that was his point, I also cannot see how his hypothetical change of the facts of *Bigos* at the end of the quotation demonstrates any error in Pritchard J’s decision on the actual facts.

42. Otton LJ’s judgment in *Tribe* was confined to a simple agreement, although given that Nourse and Millett LJJ did not plough identical furrows it is obscure with whom or what he was agreeing save that the appeal should be dismissed.

Conclusion

43. I come to the disposition of this appeal. We were not shown any authority closely comparable on its facts to those of this case. The authorities show clearly that, if *before* he had learnt that his venture with Mr Mirza could not be carried out because none of the expected insider information would be forthcoming, Mr Patel had repudiated and withdrawn from the agreement, he would have been entitled to sue for and recover his £620,000 even though in order to do so he would have had to plead the illegal arrangement under which he had paid it over. He would have been squarely within the principle that permits a claimant so to rely on an illegal agreement provided that he has voluntarily withdrawn from it before it has been carried into effect. He will not be so barred merely by reason of the fact that he has to rely on the making of an

illegal agreement: what counts is whether or not the agreement has been carried into effect to any extent (see the advice of the Privy Council, delivered by Lord Atkinson, in *Petherpermal Chetty v. Muniandi Servai* L.R. 35 Ind. App. 98).

44. The question for us, however, is whether it makes any difference if the claimant's withdrawal from the illegal agreement is not because of a change of mind that he no longer wishes to participate in it; but because the agreement is no longer capable of being performed at all. I have not found the answer to that easy, and my mind has wavered on it since we reserved judgment; and that we have taken rather longer to deliver our judgments than might ordinarily have been expected is at least in part explained by the fact that we considered it necessary to go back to counsel for assistance on certain questions. If *Bigos* was rightly decided, it seems to me to be an authority that comes closest to supporting the judge's decision in this case.

45. I have, however, decided that the point to which I have just referred makes no difference. That is, I consider that it is equally open to Mr Patel to rely on the wholly unperformed illegal agreement and be entitled to recover his money. It appears clear that the Court of Appeal in *Tribe* did not regard *Bigos* as establishing a principle that stood in the way of the plaintiff's claim in the case before it. In particular, I would regard as unattractive a distinction between cases (a) where the withdrawal is from an illegal agreement that is no longer needed for the purpose for which it was designed, and (b) where the withdrawal is from an illegal agreement that cannot be or is anyway not going to be performed. The drawing of any such distinction would, I consider, depend on holding that 'genuine repentance' on the part of the withdrawer is required. But I would take my lead from Millett LJ in *Tribe* and hold, in respectful agreement with him, that such repentance is not required. I consider that if, as in *Tribe*, voluntary withdrawal from an illegal agreement when it had ceased to be needed is sufficient to entitle the claimant to recover, it would be an odd distinction if a claimant were nevertheless not entitled to recover by relying on an illegal agreement that neither was performed nor could be performed. To recognise such a distinction would, I consider, require proof of a true sense of penitence, something that was not required or expected of the successful claimant in *Tribe.* Whether that was a correct course for this court to adopt might be a matter upon which some would have a different view. It appears to me, however, that the essence of what can be derived from *Tribe* is that, so long as the illegal agreement has not been carried into effect to any extent, the claimant can rely on it and recover. That is this case.

46. I would therefore allow Mr Patel's appeal and order the repayment to him of the £620,000 he paid Mr Mirza.

Lady Justice Gloster :

47. As any hapless law student attempting to grapple with the concept of illegality knows, it is almost impossible to ascertain or articulate principled rules from the authorities relating to the recovery of money or other assets paid or transferred under illegal contracts. This Court frankly recognised in *Tribe v Tribe*[1] (per Nourse LJ at 121, and per Millett LJ at 135) that the authorities are irreconcilable. The three different judgments in this case reflect some of the complexities of the problems raised by the illegality principle which are apparent from the authorities.

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[1] [1996] Ch 107.

48. I agree with the conclusion of Rimer LJ[2] that, broadly for the reasons stated in paragraph 46 of the judge's judgment, this was not a case where, on the facts, the payment of Mr Patel's monies to Mr Mirza's current account, for the purpose of the latter, as Mr Patel's agent, using his spread betting account with IG Index to bet on the RBS share price, gave rise either to a resulting trust or to a *Quistclose*[3] type trust.

49. However, in relation to the first of the two principal issues arising on this appeal, namely whether Mr Patel is entitled to recover the £620,000 he paid without relying on the fact that it was paid to Mr Mirza under an illegal agreement for insider dealing ("the reliance issue"), I am unable to agree with the conclusion reached by my brothers Rimer and Vos LJJ.

50. In relation to the second of the two principal issues, namely whether, because the illegal purpose had not been carried out (i.e. no spread bet on the RBS share price had ever been placed on the basis of insider information), Mr Patel was entitled to recover his money from Mr Mirza ("the recovery issue"), I agree with the conclusion reached by Rimer and Vos LJJ. However I have approached the determination of the issue in a somewhat different way and for that reason consider it appropriate to deliver a separate judgment on this issue.

51. As Rimer LJ records[4], after the hearing of the appeal, this Court, by a note dated 3 June 2014, invited further submissions from counsel as to various issues raised by the Court. As a result, counsel for Mr Patel provided a further 21 pages of written submissions and counsel for Mr Mirza a further 10 pages of written submissions.

The correct approach to the defence of illegality

52. The maxim *ex turpi causa non oritur actio* ("*ex turpi causa*") is a principle that prevents a claimant from using the court to obtain benefits from his own wrongful conduct. The policy underlying *ex turpi causa* was explained by Lord Mansfield CJ in 1775 in *Holman v Johnson*[5]:

> "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change

[2] At paragraph 18 of his judgment.
[3] *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567.
[4] At paragraph 44 of his judgment.
[5] 1 Cowp 341, 343.

> sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, *potior est conditio defendentis*."

53. The law governing the question whether illegality should debar claims in unjust enrichment has been widely criticised as complex, uncertain, formalistic and capable of producing injustice[6]. In 1999, the Law Commission recommended that legislation should be enacted to resolve these problems by giving the courts a structured statutory discretion to decide the effects of illegality on private law claims[7]. Such discretion would require the court to take into account specific factors in reaching its decision, namely: the nature and seriousness of the illegality, the knowledge and intentions of the parties, whether denying a claim would deter the illegality, whether denying the claim would further the purpose of the rule which rendered the parties' dealings illegal, and whether denying the claim would be a proportionate response to the claimant's participation in the illegality. However, no legislation was enacted in response to this recommendation.

54. However, two recent cases of the House of Lords have indeed adopted the approach favoured by the Law Commission, namely that, in deciding whether the defence applies, consideration has to be given to the underlying policy rationale. Thus for example in *Gray v Thames Trains Limited*[8] Lord Hoffmann said[9]:

> "The maxim *ex turpi causa* expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations".

Gray v Thames Trains was obviously a very different type of claim from the present. It was a claim in tort by a man who had suffered post-traumatic stress disorder as a result of the Ladbroke Grove train crash and, as a consequence of his mental condition, had killed a man and was convicted of manslaughter. The claimant's negligence claim against Thames Trains (whose negligence was responsible for the crash) was upheld in relation to the claim for general damages, but the claim for loss of earnings (following his detention in a mental hospital) failed, because that part of the claim relied on his own criminal conduct. Lord Hoffmann made it clear that, in considering whether the *ex turpi causa* principle applied, the degree of connection between the wrongful conduct and the claim made was an important consideration. He said[10]:

> "This distinction, between causing something and merely providing the occasion for someone else to cause something, is one with which we are very familiar in the law of torts. It is the same principle by which the law normally holds that even though damage would not have occurred but for a tortious act, the defendant is not liable if the immediate cause was the

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[6] See e.g. *Goff and Jones,* Unjust Enrichment, 8th Edition, paragraphs 35-34.
[7] Law Commission, *Illegal Transactions*: *The effect of illegality on contracts and trusts (1999) Law Com No.154* paragraph 8.63
[8] [2009] UKHL 33.
[9] At para 30.
[10] At paragraphs 53 to 54.

> deliberate act of another individual… It was Judge LJ … who formulated the test of "inextricably linked" which was afterwards adopted by Sir Murray Stuart-Smith … Other expressions which he approved… were "an integral part or a necessarily direct consequence" of the unlawful act … and "arises directly *ex turpi causa*" ... It might be better to avoid metaphors like "inextricably linked" or "integral part" and to treat the question as simply one of causation. Can one say that, although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant? ... Or is the position that although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant?"

55. In the later House of Lords case of *Stone & Rolls Limited (in liquidation) v Moore Stephens*[11], a fraudster, who was the sole directing mind and will, and the beneficial owner, of the appellant company ("S&R"), used it as a vehicle for defrauding banks. The fraud was discovered and both S&R and the fraudster were successfully sued for deceit by the principal victim, the relevant bank. S&R went into liquidation and the liquidator brought proceedings against the respondent, Moore Stephens, which had been S&R's auditors, both in contract and tort for the latter's alleged negligence in failing to spot the fraud. Moore Stephens contended that the claim could not succeed because it was founded on S&R's fraud and therefore the *ex turpi causa* defence arose. The House of Lords refused, by a majority of three to two, to allow the claim to continue. For present purposes, what is relevant is that Lord Phillips said:

> "25. Although *Tinsley v Milligan* does not establish a general rule that if a claimant founds his claim on his own illegal conduct, the defence of *ex turpi causa* will apply, earlier cases support this principle: *Marles v Philip Trant & Sons Ltd* [1954] 1 QB 29*; Archbolds (Freightage) Ltd v S. Spanglett Ltd* [1961] 1 QB 374. **I do not believe, however, that it is right to proceed on the basis that the reliance test can automatically be applied as a rule of thumb. It is necessary to give consideration to the policy underlying *ex turpi causa* in order to decide whether this defence is bound to defeat S&R's claim**. As Lord Hoffmann recently remarked in *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 3WLR 167 at para 30:
>
> "The maxim *ex turpi causa* expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations". (My emphasis.)

56. Earlier Lord Phillips had said:

[11] [2009] 1 AC 1391; [2009] UKHL 39.

> "21. The House in *Tinsley v Milligan* did not lay down a universal test of *ex turpi causa*. It was dealing with the effect of illegality on title to property. It established the general principle that, once title has passed, it cannot be attacked on the basis that it passed pursuant to an illegal transaction. If the title can be asserted without reliance on the illegality, the defendant cannot rely on the illegality to defeat the title…. The House held that it also applied in the case of both legal and equitable title to realty. The House did not hold that illegality will never bar a claim if the claim can be advanced without reliance on it. On the contrary, the House made it plain that **where the claim is to enforce a contract** the claim will be defeated if the defendant shows that the contract was for an illegal purpose, even though the claimant does not assert illegal purpose in making the claim; see *Alexander v Rayson* [1936] 1KB 169, approved by Lord Browne-Wilkinson at page 370." (My emphasis.)

57. And, importantly, at paragraph 26 said:

> "26…. The policy can be sub-divided into two principles in relation to contractual obligations.
>
> 1) The court will not enforce a contract which is expressly or impliedly forbidden by statute or that is entered into with the intention of committing an illegal act.
>
> 2) The court will not assist a claimant to recover a benefit from his own wrong doing. This extends to claims for compensation or an indemnity aspect of the adverse consequences of the wrong doing: see *Beresford v Royal Insurance Co Limited* [1938] AC 586."

58. It is also clear from other authorities that, in order to decide whether the *ex turpi causa* principle applies, the degree of connection between the wrongful conduct and the claim made is an important consideration, as is the question of how disproportionate the claimant's loss is to the unlawfulness of his conduct. As Bingham LJ (as he then was) stated in *Saunders v Edwards*[12]*:*

> "Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all

[12] [1987] 2 All ER 651 at 665-666:

> assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct."

59. This passage was cited with approval in the Court of Appeal decision in *Cross v Kirkby*[13]. In that case Beldam LJ stated[14]:

> "I do not believe that there is any general principle that the claimant must either plead, give evidence of or rely on his own illegality for the principle to apply. Such a technical approach is entirely absent from Lord Mansfield's exposition of the principle. I would, however, accept that for the principle to operate the claim made by the claimant must arise out of criminal or illegal conduct on his part. In this context **"arise out of" clearly denotes a causal connection with the conduct**…In my view the principle applies when the claimant's claim is so closely connected or inextricably bound up with his own criminal or illegal conduct that the court could not permit him to recover without appearing to condone that conduct." (My emphasis.)

That passage is of course to be read subject to Lord Hoffmann's comments in *Gray v Thames Trains* quoted above that it might be better to avoid metaphors like "inextricably linked" or "integral part" and to treat the question as simply one of causation.

60. In 2010, the Law Commission published another report, "The illegality defence"[15], to which we were referred in the course of argument. The report noted that the courts had already begun to develop a structured discretion to deal with the effect of illegality on tort claims and contract claims[16], and concluded that there was no need for general legislation in the area (other than in relation to trust law), because the existing law was largely amenable to common law development that would set it on a clearer and more rational footing. It commended the approach adopted in *Gray v Thames Trains* and *Stone & Rolls* and in two first instance decisions, *Nayyar v Denton Wilde Sapte*[17] and *K/S Lincoln v CB Richard Ellis Hotels Ltd*[18] which it regarded as :

> "encouraging developments which indicate a willingness to move away from a mechanical application of the reliance principle and instead explore the relevant policy reasons which are at the heart of the defence.".

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[13] The Times, April 5, 2000.
[14] Paragraph 77.
[15] 2010 Final Report (Law Com 320); http://www.lawcom.gov.uk/illegal.htm
[16] See for example paragraphs 1.11 -1.14 of the Introduction; and paragraphs 3.1 – 36 in the main body of the report .
[17] [2009] EWHC 3218.
[18] [2009] EWHC 2344.

The Law Commission still considered, however, that targeted legislation was needed to abolish the *Tinsley* reliance principle and to give the courts a discretion to determine the effect of illegality on the creation of trusts.

61. In an instructive passage in *Goff and Jones*[19] under the heading "*Underlying Principles and Future Development"* the editors write:

> "35-36
>
> In the event that the courts take their lead from the tort cases to develop a common law discretion to determine the effect of illegality on claims in unjust enrichment, what principles should underpin this discretion? We consider that the primary enquiry in any case where benefits have been transferred under an illegal contract should be on the policy underlying the rule that renders the contract illegal, and on the question whether this would be stultified if a claim in unjust enrichment were allowed. Some claims should also be prohibited on the grounds of extreme moral turpitude-claims to recover money paid to a defendant to murder a third party would be an example. But a high threshold of turpitude would be needed to trigger this secondary principle and claimants who are guilty of fraud or theft should not be denied recovery on this ground.[81]
>
> [81] *Cf. Tinsley [1994] A.C. 340*; *Tribe [1996] Ch. 107*."

62. In the light of the dicta in *Gray v Thames Trains* and *Stone & Rolls*, that appears to me to be a sensible approach.

63. Finally, in this context, I refer to certain statements of Etherton LJ in *Les Laboratoires Servier v Apotex Inc*[20] relating to the policy underlying the rule, which, following *Gray v Thames Trains* and *Stone & Rolls*, he summarised as follows at paragraphs 66 and 73:

> "66. Following its Consultation Paper No. 160 on "The Illegality Defence in Tort", the Law Commission in its 2009 Consultation Paper No. 189 and its 2010 final Report (Law Com 320) on "The Illegality Defence" recommended that the illegality defence should be allowed where its application can be firmly justified by one or more of the following policies underlying its existence: furthering the purpose of the rule which the illegal conduct has infringed; consistency; the claimant **should not profit from his or her own wrong; deterrence; and maintaining the integrity of the legal system.** As the cases plainly show, this does not mean that the illegality defence will always apply where one or more of those

[19] Op.cit. paragraphs 35-36.
[20] [2012] EWCA Civ 593. The appeal to the Supreme Court was heard on 10 June 2014 and judgment is currently awaited.

> policy rationales is relevant. It means that, if the illegality defence applies at all, it must find its justification firmly in one or more of them. [Emphasis added]
>
> …
>
> 73. It is clear, then, that the illegality defence is not aimed at achieving a just result between the parties. On the other hand, the court is able to take into account **a wide range of considerations in order to ensure that the defence only applies where it is a just and proportionate response to the illegality involved in the light of the policy considerations underlying it.** As Lord Hoffmann said in *Gray* at [30]:
>
> "The maxim e*x turpi causa* expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations." [Emphasis added]

64. I respectfully agree with that approach.

Policy considerations

65. Accordingly, I turn first to consider "the policy underlying the rule that renders the contract illegal" and whether this would be "stultified" if a claim in unjust enrichment or pursuant to the agency contract between Mr Patel and Mr Mirza were allowed. In the first instance I do so without any consideration of the authorities to which we were referred and which are considered in the judgments of Rimer and Vos LJJ.

66. The judge appears to have concluded that, on the basis of the case advanced by Mr Patel, the arrangement or agreement was illegal because it involved an offence under section 52 of Part V of the Criminal Justice Act 1993 ("the 1993 Act") and amounted to a conspiracy contrary to section 1 of the Criminal Law Act 1977 ("the 1977 Act")[21]. But in my judgment that conclusion per se does not lead to the further conclusion that an investor who has placed money with his broker or other financial intermediary for the illegal purpose of dealing in securities (or here placing bets on an index) on the basis of future insider information, is precluded as a matter of public policy from enforcing his contract of agency with the broker and requiring the latter to account, or from otherwise recovering his money in unjust enrichment from the broker, in circumstances where, for whatever reason, no insider information is ever received or utilised, and no insider dealing ever takes place.

67. First, I cannot see that the rationale for the public policy against dealing in securities on the basis of insider information, as reflected in Part V of the 1993 Act, or the public policy against agreements for illegal purposes, reflected in section 1 of the Criminal Law Act 1977, requires that an investor in Mr Patel's position loses all rights to the return of the money which he has deposited with his agent, in circumstances where the securities transaction based on insider information never

[21] See paragraphs 20 – 31 of the judgment. There was no appeal against the judge's finding that the arrangement or agreement gave rise to offences under section 52 of the 1993 Act and section 1 of the 1977Act.

takes place. The mischief at which section 52 is directed is the deliberate and improper exploitation of unpublished price-sensitive information obtained through or from a privileged relationship, which may distort a regulated market because public disclosure of the relevant information would materially affect it – in other words, market abuse. It is impossible to construe section 52, or any other provision of Part V, as being directed at some hypothetical mischief lying in the return to a party intending to be involved in such a transaction, of funds which he has advanced to another party also intending to be so involved, but which have not been utilised for the purposes of such transaction. Of course insider dealing may also give rise to a breach of a person's duty of confidence to his employer or otherwise, but that consequence likewise does not suggest any policy reason for preventing recovery (and, in any event was not a relevant consideration so far as Mr Patel was concerned).

68. Second, this approach is supported by section 63(2) of the 1993 Act (which does not feature in the judgment). Section 63(2) provides as follows:

> "**Limits on section 52**
>
> …..
>
> 63 (2). No contract shall be void or unenforceable by reason only of section 52."

According to Gore-Browne on Companies[22]:

> "The purpose of this provision, according to the Treasury, is to avoid the difficulties which are associated with undoing deals on a contemporary market. **It would seem that the intention behind this provision is to exclude the application of the common law doctrine of illegality.**" (My emphasis.)

69. In circumstances where the actual securities contract entered into on the basis of illegal insider information is not void or unenforceable (even, presumably, on the basis of the current wording of section 63(2), if the contract still remains executory[23]), it is hard to see on what possible basis the public policy behind the rule against insider trading requires the anterior contract or arrangement for the deposit of Mr Patel's funds with Mr Mirza, as Mr Patel's agent, to be struck down as unenforceable, so as to deny Mr Patel recovery of the monies he paid over, or as Mr Mirza argued, to produce the result that Mr Patel has no enforceable rights under, or in relation to, the arrangements which he entered into with Mr Mirza. Indeed it could be said (although

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[22] Paragraph 42[21].

[23] Cf. the decision of Knox J in *Chase Manhattan Equities v Goodman* [1991] BCLC 897 where he refused to make available the powers of the court to enforce a transaction which was still incomplete, on the basis that to do so would be to enforce an objectional transaction. However the relevant legislation in force at that time, viz. section 8(3) of the Companies Securities (Insider Dealing) Act 1985 merely provided: "(3) No transaction is void or voidable by reason only that it was entered into in contravention of section 1, 2, 4 or 5."

this was not argued by Mr Shepherd QC) that to deny Mr Patel any rights under his contract of deposit directly conflicts with the express provisions of section 63(2).

70. Third, the transaction which Mr Patel is seeking to enforce is not (contrast *Chase Manhattan Equities v Goodman)* the legally objectionable agreement to speculate on the index on the basis of insider information. His claim is not to enforce the criminal conspiracy entered into between Mr Patel, Mr Georgiou and Mr Mirza - for example, a claim for profits arising as a result of bets placed on the RBS share price. Nor, as in *Chase Manhattan Equities v Goodman*, is it a claim to enforce a profitable share sale by a seller who dealt on the basis of his own inside information. Rather it is a claim by Mr Patel to recover an amount equal to the sums which he originally deposited with Mr Mirza as his agent in circumstances where no bets have been placed and the consideration under such contract has failed. Nor is this a situation where a claimant is seeking to recover *a benefit* from his own wrongdoing. All that Mr Patel is seeking to recover is an amount equivalent to the sums which he originally paid over to Mr Mirza. In net terms, there is no benefit to Mr Patel in being repaid the sums which he originally paid over. Accordingly neither of the two principles of policy identified by Lord Phillips at paragraph 26 of his judgment in *Stone & Rolls* (quoted above) arise for consideration.

71. Fourth, there was no express finding by the judge that Mr Patel actually knew that taking advantage of insider information was unlawful; the highest it was put by the judge at paragraph 19 of the judgment was that such activity: "as is common knowledge and can be confirmed by the briefest glance at the relevant criminal law, is illegal." As Mr Shepherd QC put it in his skeleton argument in reply:

> "The unattractive nature of [the respondent]'s position will not be lost on the Court of Appeal. [The respondent] suggested the scheme. He is a very senior director of Tullett Prebon one of the world's leading interdealer brokers. [The appellant] is a property dealer who nobody suggests had any idea what was proposed in by [the respondent] was illegal. "

Mr McCormick QC, counsel for Mr Mirza, did not suggest otherwise.

72. Fifth, this is not a case where the criminal conduct can be said to be "proximate" or where there can be said in any real sense to be a causal connection between the claim for the return of the sums Mr Mirza deposited and the illegal conduct. Put somewhat differently, and adopting the approach of Lord Hoffmann in *Gray v Thames Trains,* the degree of causal connection between the wrongful conduct (i.e. the agreement to engage in insider dealing transactions) and Mr Patel's claim to have his money repaid is tenuous. Mr Patel's entitlement to his money back does not arise out of criminal or illegal conduct on his, or anyone else's, part; it arises because Mr Patel deposited money with an agent, for a transaction which was never implemented, and in those circumstances (subject to any illegality defence), the agent has no entitlement to retain the funds.

73. Would it make a difference, for example, to Mr Patel's right of recovery, if he had placed money with Mr Mirza in order for him, as Mr Patel's agent, to carry out legitimate investment or speculation on Mr Mirza's IG index account *before* any question of an insider dealing transaction had arisen, and only subsequently the

decision was taken to take advantage of illegal insider information and to apply the funds deposited in speculating in RBS shares on the basis of such information? In such a case the original transmission of the funds could not have been characterised as unlawful. Before that decision was taken, and in the absence of any express agreement to the contrary, Mr Mirza, as Mr Patel's agent, would undoubtedly have been obliged to repay (or account for) any deposited funds not applied in bets on the index. But in the example I have given, the subsequent decision by Mr Patel and Mr Mirza to apply the already deposited funds in the implementation of an illegal insider dealing transaction would have been equally heinous as the decision in the present case originally to remit the funds for an illegal purpose. However, in the hypothetical scenario I have postulated, if Mr Patel had made a claim for the return of the sums deposited after there was no prospect of obtaining inside information, he would merely have needed to rely on his original transmission of the money and the agent's obligation to account to obtain the return of his money. But where is the distinction in commercial reality between the two situations?

74. Finally, I can see no warrant, in the light of the express provision contained in section 63(2), for concluding that there is some wider public policy consideration that nonetheless requires Mr Patel's claim for the return of his deposited funds to be struck down, on the grounds, for example, that the original arrangements involved a criminal conspiracy, or that insider dealing is inherently morally reprehensible, and therefore the word "only" in section 62 (2) is engaged. In my view to refuse assistance to a claimant in Mr Patel's circumstances would, as Bingham LJ so graphically described it in *Saunders v Edwards*, indeed involve the court unacceptably "draw[ing] up its skirts" without proper consideration as to the seriousness of the claimant's loss or as to how disproportionate his loss was in relation to the unlawfulness of his conduct. It also wholly disregards the public policy consequences of allowing the equally, or, on Mr Shepherd QC's submissions, more blameworthy agent to profit disproportionately from the illegal nature of the proposal. Whilst both the majority and the minority in the House of Lords in *Tinsley v Milligan*[24] agreed that the consequences of being a party to an illegal transaction could not depend, as the majority of the Court of Appeal had held in that case, "on such an imponderable factor as the extent to which the public conscience would be affronted by recognising rights created by illegal transactions[25]", clearly considerations of public policy do come into play in the court's determination as to the effect of illegality on parties' rights, as is clear from the passages which I have already quoted from *Gray v Thames Trains* and *Stone & Rolls.*

75. During the course of argument the example was put to counsel of a claimant who had made a large payment to a hit man to murder X. The hypothetical question was whether, if, before the murder was committed, X died of natural causes, could it seriously be suggested that the court would allow the claimant to recover his money? Mr McCormick suggested that the present case was no different in kind; the public policy considerations which drove the decisions in cases of illegality required the court to refuse a claimant any aid in such cases. But, with respect, this example is an old chestnut and of little assistance in resolving the question whether in any particular case a claimant should be entitled to invoke the doctrine of *locus poenitentiae*. It was given by Heath J in *Tappenden v Randall*[26] in an early case where the court[27]

[24] *Supra* at e.g. page 369B per Lord Browne-Wilkinson.
[25] See per Lord Browne-Wilkinson ibid.
[26] (1801) 2 Bos & P 467; 126 ER 1388; 25 Digest (Repl) 427, 90.

recognised the doctrine of *locus poenitentiae* and applied it to entitle the plaintiff to recover money paid under an executory illegal contract. Heath J said:

> "It seems to me that the distinction adopted by Mr. Justice Buller between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the Court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of that kind occurs I think there ought to be a *locus poenitentiae*, and that a party should not be compelled against his will to adhere to the contract."

And, as *Goff and Jones* states, at the passage cited above[28], it may well be that unjust enrichment claims should be prohibited in such cases of extreme moral turpitude. Nor can I accept the suggestion that the present case is "no different in kind" from the murder example. As I have attempted to explain above, the present case raises very different policy considerations from those which would arise in a murder case. Given the seriousness of the intended crime of murder, there is every public policy justification in such a case to deny recovery. In the present case there is no such public policy justification.

76. For the above reasons I can see no logical basis as to why considerations of public policy should require that Mr Patel has to forfeit the funds which he paid into Mr Mirza's personal bank account, and which were never used to spread bet or to open any positions using Mr Mirza's IG Index account. Such a result would not, in my view, be "a just and proportionate response to the illegality involved [in the present case] in the light of the policy considerations underlying [that illegality]"[29].

77. I turn then to consider the authorities and to explore whether they prevent or permit the outcome which I consider to be the correct one.

The reliance issue

78. In my judgment both *Tinsley v Milligan* and cases such as the Court of Appeal's decision in *Cross v Kirkby,* to which I have referred above, make it clear that there is no principle that the claimant must either plead, give evidence of or rely upon his own illegality for the illegality defence to apply, or that, once he does so, necessarily the revealed illegality precludes him from recovering. Thus in *Cross v Kirkby* Beldam LJ said:

> "I do not believe that there is any general principle that the claimant must either plead, give evidence of or rely on his own illegality for the principle to apply. Such a technical approach is entirely absent from Lord Mansfield's exposition of the principle."

And in *Tinsley v Milligan* Lord Browne-Wilkinson concluded at 376-7:

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[27] Lord Alvanley, Ch J, Heath J, Rooke J and Chambre J.
[28] Op.cit. paragraphs35-36.
[29] See per Etherton LJ in *Les Laboratoires Servier v Apotex Inc* at paragraph 73 quoted above.

> "Finally, I should mention a further point which was relied on by Miss Tinsley. It is said that once the illegality of the transaction emerges, the court must refuse to enforce the transaction and all claims under it whether pleaded or not: see *Scott Brown, Doering, McNab & Co.* [1892] 2 Q.B. 724. Therefore, it is said, it does not matter whether a plaintiff relies on or gives evidence of the illegality: the court will not enforce the plaintiff's rights. In my judgment, this submission is plainly ill founded. There are many cases where a plaintiff has succeeded, notwithstanding that the illegality of the transaction under which she acquired the property has emerged: see, for example, *Bowmakers Instruments Ltd.* ***v*** *Barnet Instruments Ltd.* [1945] K.B. 65 and *Singh* ***v.*** *Ali* [1960] AC 167. In my judgment the court is only entitled and bound to dismiss a claim on the basis that it is founded on an illegality in those cases where the illegality is of a kind which would have provided a good defence if raised by the defendant. **In a case where the plaintiff is not seeking to enforce an unlawful contract but founds his case on collateral rights acquired under the contract (such as a right of property) the court is neither bound nor entitled to reject the claim unless the illegality of necessity forms part of the plaintiff's case."** (My emphasis.)

79. In the light of these statements, I do not consider that the illegality principle is engaged merely because a claimant pleads facts that demonstrate criminal conduct. I see no reason to conclude (as my brethren do) that, simply because the claimant here did indeed plead the illegal contract in his statement of claim, and in that very loose sense "relied upon it", it follows that his claim is to be characterised as "arising *ex turpi causa"* or "founded on illegality" so as to engage the illegality defence. What matters, in my view, is whether viewed **objectively**: (i) the illegality "**of necessity**" formed part of Mr Patel's case - i.e. was it an essential element of his cause of action; and (ii) whether, on analysis, this is in reality a situation where it is the defendant who has to rely on the illegality to resist repayment.

80. In my judgment the starting point is that this was not a case where Mr Patel was seeking to enforce the unlawful contract (i.e. to place bets on the basis of illegal insider information), but rather one where he founded his case on collateral rights, namely his entitlement to have a sum equivalent to the money which he had paid, repaid in circumstances where the contract had not gone ahead, and Mr Mirza, as agent, no longer had any entitlement to retain it.

81. Rimer and Vos LJJ in their judgments in relation to the reliance issue rely on the statements made by Lord Wright MR, Romer and Scott LJJ in *Berg v. Sadler and Moore* quoted at paragraph 21 of Rimer LJ's judgment. However the facts in *Berg v. Sadler and Moore* were very different from the circumstances of the present case; the actual payment of the money to the defendants by Berg amounted to a criminal attempt on his part (together with his accomplice Reece) to deceive the defendants themselves and to obtain goods from them by false pretences. There was no question of the defendants being party to the criminal conduct. But, in my view, the fact that, in *Berg v. Sadler and Moore*, the court took the view that Berg was required to plead his crime, as a constituent element of his cause of action, does not lead to the conclusion that, in the very different circumstances of the present case, on a proper analysis of Mr Patel's cause of action, he could only establish his claim "by proving facts which show that he was engaged in a criminal attempt to" profit by insider-trading.

82. Moreover, in the light of the formulation by Lord Browne-Wilkinson in *Tinsley v Milligan* referred to above, I am not persuaded that Lord Wright's statement that:

> "To maintain an action for money had and received he has to prove the exact circumstances in which the money was paid, and the circumstances which he says entitle him on grounds of justice to have an order for repayment."

can be applied as some sort of mantra in the present case, so as to have required Mr Patel to plead the fact that the proposed collective speculation in RBS shares was going to be based on illegal insider information. Whilst Rimer LJ is critical of Mr Shepherd's submission that "we should approach Mr Patel's case on the basis that he could have pleaded his case in various alternative ways that carefully kept the illegal cat secure in the bag"[30], in my view the correct question to ask is whether of necessity the pleading of the illegal purpose was an essential element of Mr Patel's cause of action. If it was not, then the fact that the illegal cat was let out of the bag by Mr Patel does not in my view matter. If Mr Patel could have discharged "the burden .. on a claimant in an action for money had and received to prove that the money was not paid by way of gift or pursuant to an enforceable contract" referred to by Millett LJ in *Tribe v Tribe*[31] without needing to refer to the illegal purpose of the collective speculation or if, alternatively, Mr Patel could have relied on a different cause of action to justify the repayment of the funds which he had paid over, I see no reason why he should not have done so.

83. Nor, with respect, can I agree with the proposition stated by Rimer LJ at paragraph 21 of his judgment, by reference to the judgment of Scott LJ in *Berg v. Sadler and Moore* at 169, that, by framing his claim on the basis of money had and received upon the total failure of consideration of his contract, Mr Patel was "inevitably invoking the assistance of the court to enforce an illegal contract". Mr Patel was not seeking to enforce the illegal contract; there was no question of the court being asked, for example, to compel Mr Mirza to place bets on the RBS share price or to pay over the profits of speculation based on illegal insider information. All Mr Patel was doing was asking for the return of the money which he had paid. In circumstances where Mr Patel was not relying upon, or seeking enforcement of, the contractual term that the funds should be applied in speculating on the basis of illegal inside information, the fact that he might nonetheless have been required by paragraph 7.4 of Practice Direction 16 – Statements of Case, supplementing CPR Part 16, to 'set out the contractual words used and state by whom, to whom, when and where they were spoken' is in my view irrelevant. It does not lead to the conclusion that such matters were an essential element of his cause of action or per se engage the illegality principle.

84. I turn to consider the question whether viewed objectively: (i) the illegality "of necessity" formed part of Mr Patel's case - i.e. whether it was an essential element of his cause of action; and (ii) whether, on analysis, this is in reality a situation where it is the defendant who has to rely on the illegality to resist repayment.

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[30] See paragraph 21 of Rimer LJ's judgment.
[31] At page 125 B.

85. As the judge pointed out at paragraph 39 of his judgment, the case was one which was concerned:

> "with money paid by a principal to an agent for a specified purpose. As such the agent is obliged to account to his principal for, and pay back any money is not in the event employed on that purpose, without resort to any question of contractual consideration or its failure."

86. As the editors of *Bowstead & Reynolds on Agency* state[32], an agent who holds or receives money for his principal is bound to pay over or account for that money at the request of his principal, "even if the money has been received in respect of a void or illegal transaction." They explain that the principle is one of common law and give as an example the situation where an agent has received money on his principal's behalf or receives it for a particular purpose which he does not carry out. In those circumstances, the principal is entitled to sue the agent in restitution. The principle is articulated as follows:

> **"Common Law Duty to Pay Over Money Held for Principal**
>
> **6-099**
>
> Subject to the provisions of Article 70, an agent who holds or receives money for his principal is bound to pay over or account for that money at the request of his principal, notwithstanding claims made by third persons, even if the money has been received in respect of a void or illegal transaction.[683]
>
> **Comment**
>
> 6-100
>
> The principle expressed in this Article is a principle of common law which applies wherever an agent holds money for his principal. Thus if the agent has received money on his principal's behalf, or receives it for a particular purpose which he does not carry out, the principal can sue the agent in restitution.[684] Further, if the principal has entrusted money to his agent for a particular purpose which the agent has not carried out, the principal can recover that money on the same basis.[685] When available, such common law actions in restitution have long been alternatives to an account.[686] Where the money can be regarded as held in trust, however, a proprietary remedy will be available, and may be more advantageous.[687]
>
> ….

[32] 19th Edition, para 6-099 – 6-100

> An agent usually discharges his liability by handing over the money or property he has received to his principal, but he may also pay a third party in accordance with the principal's instructions[693]; he will also be discharged if he pays a third party in obedience to the instructions of the court.[694] Furthermore, an agent, in accounting for money received for his principal, is entitled to set off all just allowances and any sums expended by him in that connection with the authority of the principal,[695] even if they were spent for an unlawful purpose[696]; but if the authority to deal with the money in an unlawful manner is revoked before the agent has used the money, the principal can recover.[697]"

87. The editors go on to state[33]:

> "Even though the agent receives money for his principal in respect of a transaction which is void or illegal, the principal can sue his agent in restitution. Thus if an agent was employed to make bets and he won money, he was under a duty to pay it over to the principal, although the betting transactions were themselves void; similarly, if an agent is employed to sell shares, he cannot retain the money he receives by saying that the sale is illegal by Act of Parliament. But if the contract between the principal and agent is itself illegal, then the principal cannot recover any money received by the agent. The reason is that since both parties are equally to blame, the court will not assist the plaintiff: *ex turpi causa non oritur actio*."

As is obvious there is something of a tension between the proposition articulated in the first sentence of the text and the proposition articulated in the last two sentences.

88. Mr Shepherd QC submitted that, at trial, (and irrespective of Mr Patel's *Quistclose* claim) he had clearly argued on Mr Patel's behalf that in the circumstances Mr Patel did not "need" in any sense of the word to rely on the illegal purpose of the contract to obtain the return of the money which he had paid; there was no dispute that the money originally paid was Mr Patel's money to which he had lawful title; as appeared from paragraph 10 of the Re-Amended Defence, Mr Mirza had admitted receipt of the money and did not deny a prime facie obligation to repay; moreover, by the date of trial Mr Mirza accepted that the money had been paid to him by Mr Patel, but claimed that at the time he received it he thought that the money belonged to, and had been paid by Mr Georgiou, and, on the basis of that mistaken premise had allegedly repaid it to Mr Georgiou[34]; and it was for that reason alone that Mr Mirza had put forward had a change of position defence[35]. That defence had been decisively rejected by the judge[36].

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[33] Para 6-100.
[34] See paragraphs 14 -16 and 18 of the judgment.
[35] RAD paragraphs 6, 10 and 12.
[36] See paragraphs 32(5) and 56 – 57 of the judgment.

89. Of course, as my Lords have pointed out, Mr Patel clearly did plead and in one sense rely upon, the illegal purpose of the agreement. But, in my judgment, as a matter of analysis there was no necessity for him to have done so in circumstances where his entitlement to repayment arose simply as a result of Mr Mirza's obligation as an agent to account for the sum paid in circumstances where the latter had received it for a particular purpose (which at its bare minimum was speculating on the IG index in RBS shares), a purpose which, on his own admission, Mr Mirza had not carried out. I do not see that the fact that the rules of court arguably might have required Mr Patel to have pleaded every term of the contract - even though all he actually needed to plead was the bare minimum of payment to Mr Mirza as agent for the purpose of speculating on the IG index in RBS shares, which purpose had not been carried out - or the fact that he gave evidence about the illegal purpose, leads to the conclusion that, "of necessity", he had to rely on any illegality in order to get his money back. Nor do I think there is some sort of moral or ethical reason why in the circumstances Mr Patel should be punished for having pleaded, and adduced evidence of, the illegal purpose of the transaction.

90. Even in the absence of any trust, or retention of a proprietary interest in the money, once Mr Mirza had admitted receipt of the money for the purpose of speculating on the IG index, in my view the evidential and legal burden shifted to him to rebut the presumption that he was bound to repay Mr Patel. Whilst Mr Patel was required to demonstrate that the money had not been transferred by way of gift or pursuant to an enforceable contract that entitled Mr Mirza to retain the funds[37], absent those factors, proof of payment imported a prima facie obligation to repay. As Wilmer LJ said in *Seldon v Davidson*[38]:

> "No such considerations arise in the present case; indeed they are clearly ruled out, because we have from the Defendant in this case a clear admission of the payment of the money, and no suggestion that it was paid in settlement of an existing debt, or that it was given in return for cash, or anything of that sort. If the Defendant seeks to evade repayment of the money which was paid to him, it seems to me that the judge was right in placing the onus on the Defendant. In the absence of any such circumstances A did not need to open or lead any evidence".

Seldon v Davidson was neither an illegality nor a trust case. It is none the less instructive. The judge rejected this argument at paragraphs 35-39 of his judgment.

91. I cannot see why there is, or should be, any logical difference in principle between the hypothetical situation where an investor in Mr Patel's position expressly agrees with the broker that the latter is to hold the remitted monies in a separate trust account pending their application for the illegal purpose (and therefore has a proprietary claim to the return of the funds along the lines of the claim in *Tinsley v Milligan*), and the current situation, where no such trust arrangement is agreed and the broker merely has

[37] See *Tribe v Tribe [*1996] Ch 107, per Millett LJ at 125B.
[38] [1968] 1 WLR 1083 at 1088 F (C.A)

an obligation to account for the funds remitted in the event that they are not applied in the agreed speculation. Indeed on this point the judge took precisely the same view.[39]

92. But the judge considered that the current case was legally indistinguishable from *Harry Parker Ltd v Mason*[40] (see paragraph 44 of the judgment). I disagree. One can quite see that the "sordid story"[41] of Mr Mason's dealings with his bookmaker (and the fact that the court regarded it as far too late for the plaintiff to reply on any *locus poenitentiae* since the race had been run*)* might well have persuaded a mid-20th Century Court of Appeal that it should not let Mr Mason recover the £12,000 which he had deposited with his bookmakers. But the statutory background of section 63(2) of the 1993 Act is very different from the type of activity under consideration in that case, and, if the House of Lords in *Tinsley v Milligan* thought Ms Milligan was entitled to recover her investment, despite the fact that the property had been put in Ms Tinsley's sole name for the illegal purpose of enabling Ms Milligan fraudulently to claim social security benefits from the DSS, I see no reason why in principle, post *Tinsley v Milligan,* Mr Patel should not be able to enforce his rights as principal to the return of his money from his agent, Mr Mirza, irrespective of the fact that he retained no proprietary or equitable rights in the monies paid to Mr Mirza. As I have already said, in order to maintain his claim either in unjust enrichment, or on agency grounds, against his agent, Mr Patel did not need to rely on the illegal and improper purpose of the underlying "insider trading conspiracy" to obtain recovery of the monies which he had remitted to Mr Mirza. All Mr Patel *needed to* establish was that the funds had been remitted for the purpose of speculating in the RBS share price on Mr Mirza's IG Index account; that such speculation had never occurred, with the result that Mr Mirza had an obligation as agent to account; and accordingly that Mr Patel was accordingly entitled to his money back. On that basis it would have been for Mr Mirza to raise the illegal purpose of the transaction in order to resist repayment. In reality therefore, in my judgment it was Mr Mirza who needed to raise, and rely upon, the underlying illegal purpose of the arrangements under which the monies were originally remitted

93. Accordingly, I would allow Mr Patel's appeal on this first ground. I accept however that the position is not clear on the authorities as to whether a claimant in such circumstances has to lead evidence of the illegal purpose when bringing an action at law; see for example proposition (5) articulated by Millett LJ in *Tribe v Tribe (supra)*[42].

The recovery issue

94. Even on the assumption that I were wrong on the first ground, and the illegality principle was engaged so as *prima facie* to prevent Mr Patel from recovery on the grounds that he had pleaded, and adduced evidence of, his own illegality, I would also allow Mr Patel's appeal on the second ground, namely the application of the *locus poenitentiae* doctrine - a doctrine which was clearly recognised by Lord Browne-Wilkinson in *Tinsley v Milligan*[43].

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[39] See paragraph 45 of the judgment.
[40] [1940] KB 590
[41] [1940] KB 590 at 604 per Luxmore LJ.
[42] At page 134G.
[43] At e.g. pages 25 -26..

95. In the present case it was common ground that the illegal purpose was not carried out. On the contrary this was a case where, as the judge found, there was no performance at all because the bet on the RBS shares was never placed; see paragraph 47 of the judgment. All that happened was that the money was received by Mr Mirza in his private bank account. Other than the illegal agreement itself, nothing illegal actually occurred. The authorities cited by Millett LJ in *Tribe v Tribe (supra)*[44] and his view that genuine repentance or penitence is not required, and that voluntary withdrawal from an illegal transaction when it ceases to be needed is sufficient, clearly demonstrate that in a situation such as the present case, recovery is permitted despite the fact that:

i) title to the monies paid has passed to the transferee; and

ii) there may have been no genuine "repentance" before the parties to the illegal transaction, for whatever reason, decide not to go ahead with it.

96. Unlike the judge, I cannot conclude that the first instance decision in *Bigos v Bousted (supra)* predicates a result whereby Mr Patel is precluded from recovery in the present case. I very much doubt whether that case would be decided the same way today in the light of *Tinsley v Milligan* and *Tribe v Tribe.* Since the case is not binding on us, it is not necessary to consider whether the public policy considerations, or the provisions of the Exchange Control Act 1947 which gave rise to the illegality in that case, required such a result. There is no question here of any "discovery" of the fraudulent purpose or any other reason to deny restitution to Mr Mirza. I agree with the views of Rimer LJ (as expressed at paragraph 45 of his judgment), and those of Vos LJ (as expressed at paragraph 113 of his judgment) that the entitlement to recover under the *locus poenitentiae* doctrine cannot depend upon some questionable analysis of the reasons why the illegal transaction did not proceed, or upon the vague and subjective concept of genuine "repentance" or "withdrawal", prior to the time at which the illegal agreement no longer is, or appears to be, capable of performance. Such an approach is, in my judgment, wholly inconsistent with the authorities and in particular Millett LJ's analysis of the principle in *Tribe v Tribe.* Moreover it would lead to all kinds of difficulties in the practical application of the principle.

97. In my judgment the best articulation of the principle is contained in what Millett LJ referred to in *Tribe v Tribe*[45] as Lord Atkinson's "clear exposition of the law" in the Privy Council case of *Petherpermal Chetty v Muniandy Servai*[46]. That was a case where the plaintiff's attempt to defraud his creditors by putting his property in a name of a nominee had never been carried out and, indeed, according to Lord Atkinson[47], had been "absolutely defeated." The facts of the case certainly do not suggest any genuine repentance or voluntary withdrawal on the plaintiff's part. Lord Atkinson said[48]:

> "Notwithstanding this, it is contended on behalf of the Appellant that so much confusion would be imported into the law, if the maxim *in pari delicto potior est condito possidentis*

[44] See in particular those cited at pages 126-128, 129-130.
[45] See per Millett LJ in *Tribe v Tribe* at page 127F.
[46] (1908) LR 35 Ind. App. 98 (PC).
[47] At page 5 of the judgment.
[48] At pages 5-6 of the judgment.

were not rigorously applied to this case, and, apparently, that the cause of commercial morality would be so much prejudiced if debtors who desired to defraud their creditors were not deterred from trusting knaves like the defendant, that in the interest of the public good, as it were, he ought to be permitted to keep for himself the property into the possession of which he was so unrighteously and unwisely put.

The answer to that is that the plaintiff, in suing to recover possession of his property, is seeking to put everyone, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant who is relying upon the fraud and is seeking to make title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor v Bowers* (1 QBD 291) and the authorities upon which that decision is based clearly establish this. *Symes v Hughes* (LR Eq 475, at p. 479) and *In re Great Britain Steamboat Co* (26 Ch D 616) are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry LJ, in *Kearley v Thomson* (24 QBD 742).

Mr Upjohn contended that, where there is a fraudulent arrangement to defeat creditors, such as was entered into in this case, if anything be done or any step taken to carry out the arrangement, such as, on the trial of an indictment for conspiracy, would amount to a good overt act of the conspiracy, any property transferred by the debtor to his co-conspirator cannot be recovered back. This, however, is obviously not the law. In conspiracy the concert or agreement of the two minds is the offence, the overt act is about the outward and visible evidence of it. Very often the overt act is but one of the many steps necessary to the accomplishment of the illegal purpose, and may, in itself, be comparatively insignificant and harmless; but to enable a fraudulent confederate to retain property transferred to him in order to reject a fraud, a contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with."

98. In my judgment that statement clearly expresses the law in relation to the *locus poenitentiae* principle. It can make no difference that in this case it was money which was paid over by Mr Patel to the defendant, rather than the transfer of property. The

principle clearly enables Mr Patel to recover in this case, notwithstanding that he, Mr Mirza and Mr Georgiou may have been parties to a criminal conspiracy.

99. Accordingly my provisional view that there is no logical basis as to why considerations of public policy should require that Mr Patel should not be able to recover a sum equivalent to the monies which he paid into Mr Mirza's personal bank account, and that a result which precluded him from doing so would not be "a just and proportionate response to the illegality involved [in the present case] in the light of the policy considerations underlying [that illegality]"[49], is amply supported and confirmed by authority.

100. For the above reasons, I would also allow the appeal on this ground.

Lord Justice Vos :

101. I agree with the judgment of Rimer LJ, but would add a few words of my own since we are disagreeing with the judge. Rimer LJ has set out the parameters of the dispute with perfect clarity and I do not propose to repeat that exercise. There are in effect two questions.

102. I propose to say little about the first, namely whether Mr Patel is entitled to recover the £620,000 without relying on the fact that it was paid to Mr Mirza under an illegal agreement for insider dealing, because I entirely agree with Rimer LJ's approach in paragraphs 15 to 22 of his judgment. As it seems to me, Mr Patel pleaded, relied upon and succeeded in the judge's judgment in establishing, the illegal agreement, and cannot now be heard to say that he could have succeeded as well had he not done so. The only possible basis on which he could have established his case without reliance on the illegal agreement would have been by reliance on Mr Mirza's admission that the money was repayable (albeit not to Mr Patel, but to Mr Georgiou). But that was not how Mr Patel put his case before the judge and he cannot now rewrite history.

103. I would want to leave open whether, even if Mr Patel had simply relied on that admission, he could have succeeded in a claim for unjust enrichment in the face of two authoritative *dicta* which would seemingly cast doubt on that proposition. Those *dicta* are that of Millett LJ in *Tribe v. Tribe*, where he said at page 125B that "[i]n an action for money had and received … whatever the relationship between the parties, the burden lies on the plaintiff to prove that the money was not paid by way of gift or pursuant to an enforceable contract", and that of Lord Wright MR (with whom Romer LJ agreed) in *Berg v. Sandler* who said at page 163 that "[t]o maintain an action for money had and received he has to prove the exact circumstances in which the money was paid, and the circumstances which he says entitle him on grounds of justice to have an order for repayment". In this case, in my judgment, for the reason I have mentioned, this question does not arise.

104. I turn then to the second question relating to the exception to the illegality principle often referred to as the *locus poenitentiae*. John Gray's *vade-mecum* on Lawyers' Latin 2002 explains that phrase as follows: "'a place of repentance'. Used in the law

[49] See per Etherton LJ in *Les Laboratoires Servier v Apotex Inc* at paragraph 73 quoted above.

to denote a breathing space, a time before legal obligation operates; or during which the law affords an opportunity for change of mind".

105. The key question for the court, which seems not to have arisen in such a stark form before, has been stated as being whether a claimant who enters into an illegal agreement which results in his making a payment under it may claim the return of his money, relying upon the exception to the illegality principle that I have referred to, when the illegal venture has been prevented from reaching fruition, not by his own voluntary withdrawal, but because the venture has been rendered impossible by actions beyond the claimant's control.

106. The principle on which the exception is based has been frequently stated. In *Hastelow v. Jackson* (1828) 8 B. & C. 221, Bayley J said at page 224 that the money can be recovered if "he rescinds the contract while it still remains executory". Littledale J at page 226 referred to it being recoverable "before the execution of the contract", but neither judge explained what was meant by the terms "executory" or "execution" in this context, since in that case the illegal wager had already been handed over to a stakeholder to abide the event of a boxing match.

107. In *Taylor v. Bowers* (1876) 1 QBD 291, both the Queen's Bench Division (Cockburn CJ, Mellor and Quain JJ) and the Court of Appeal (James and Mellish LJJ, Baggallay JA and Grove J) held that the plaintiff could repudiate an illegal agreement to defraud creditors, even though his goods had been transferred in pursuance of it, because the fraudulent or illegal object had not been performed. Cockburn CJ said at page 295 that: "it seems to us well established that where money has been paid, or goods delivered, under an unlawful agreement, but there has been no further performance of it, the party paying the money or delivering the goods may repudiate the transaction, and recover back his money or goods". Likewise, Mellish LJ (with whom Baggallay JA and Grove J agreed) said at page 300 that: "[i]f money is paid or or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done".

108. In *Alexander v. Rayson* [1936] 1 KB 169, the Court of Appeal (Greer, Romer and Scott LJJ) said at page 190 that the exception applied "had the plaintiff repented before attempting to carry his fraud into effect". But in that case, the repentance came too late, because it was only after the plaintiff had been found out. It is worthy of note, however, that it was not just that the fraud had been discovered, but the illegal purpose had been partly performed, in that the documents in question had actually been placed before the rent assessment committee.

109. In *Harry Parker Ltd. v. Mason* [1940] 2 KB 590, the decision turned on the fact that the illegality in question had been partially performed, but du Parq LJ at least said at page 612 that if the plaintiff had demanded the return of the money "before the time had come for putting the bargain into effect", he might have recovered it. In fact, as I say, the illegality had been partly carried into effect (see Mackinnon LJ at page 601-2, Luxmoore LJ at pages 608-9, and du Parq LJ at page 112).

110. More recently in *Tinsley v. Milligan* [1994] 1 AC 340 at page 374, Lord Browne-Wilkinson described the exception as being both in law and in equity that "if the plaintiff had repented before the illegal purpose was carried through, he could recover his property".

111. In *Tribe v. Tribe*, Millett LJ stated the principle as being that the transferor will be able to recover "provided he withdraws from the transaction before the illegal purpose has been wholly or partly performed" or that the transferor "can lead evidence of his dishonest intention … provided he has withdrawn from the transaction before the illegal purpose has been carried out" (page 133A) or "he must have withdrawn from the transaction while his dishonesty still lay in intention only" (page 133H). Millett LJ then continued in the passage referred to by Rimer LJ at paragraph 40 as follows:

> "It is clear that he must withdraw voluntarily, and that it is not sufficient that he is forced to do so because his plan has been discovered … I would draw back from [attempting the difficult task of defining the precise limits of the doctrine]. But 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".

112. Finally in *Collier v. Collier* [2002] EWCA Civ 1095, the Court of Appeal denied a claimant the benefit of the exception on the grounds that the illegal purpose, which was to defraud the Inland Revenue, had been carried into effect (per Aldous LJ at paragraph 46). Mance LJ said this about the exception and the principles underlying it at paragraphs 107-111:-

> "107. … Taking *Tribe v Tribe*, as I do, as the most recent and an authoritative statement of the law, this court there held withdrawal under the doctrine of *locus poenitentiae* to be possible, despite the existence of a presumption of advancement, so as to enable recovery from a person into whose names shares had been transferred, with a view to deceiving creditors. There was however no evidence that the transfer had ever been communicated to creditors or relied on or used for this illegal purpose in any way. The shares were in these circumstances recoverable by their transferor.
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> 108. The present case raises issues concerning the scope of the illegal purpose, and whether it was carried into effect in such a way and to such an extent as to make it too late for the father to "withdraw" and recover the property as beneficial owner. I proceed on the basis that genuine repentance is not required, and that "voluntary withdrawal from an illegal transaction when it has ceased to be needed" suffices: see *Tribe v Tribe*, 938H per Millett LJ; and also Professor Merkin (above) at pages 428-431. …
>
> 111. … But, however generous an attitude is taken to the exception, I do not think that it can sensibly cover a situation, where creditors have been successfully deceived over a number of years, by being misled into accepting and treating the proceeds of the exercise of the options as the father's only interest in the properties".

113. I agree with Mance LJ and Millett LJ that a person may take advantage of the exception to the illegality principle if he voluntarily withdraws from an illegal transaction under which property has been transferred, without the need for genuine repentance, before the fraud or the illegal purpose has been wholly or partly carried into effect. I am not, however, persuaded that the reason for the claimant's withdrawal is, on the authorities, material to his entitlement to take advantage of the exception. Though the Latin phrase refers to the "place of [or perhaps for] repentance", John Gray has referred to its use in the law as denoting a breathing space during which the law affords an opportunity for change of mind. I cannot see why the reason for the change of mind should matter provided it is in time. This seems to me to accord with all the recent statements of the exception and the principle underlying it to which I have sought to refer.

114. It is not, I think, a contradiction in terms to talk of both (a) property having been transferred under an illegal transaction, and (b) the withdrawal from an illegal transaction before the illegal purpose has been wholly or partly performed. Property can be transferred under an illegal transaction without the illegal purpose of the transaction being wholly or partly performed. Indeed that is what the court held had happened in *Tribe v. Tribe*. The transfer of the property may, in some circumstances, be properly regarded as simply preparatory and unconnected to the illegal purpose that was ultimately in view. Such cases may be rare, but then so are cases where reliance on the exception has been allowed. It is also worth noting that there is no reason why "genuine repentance" should, in any event, assist a wrongdoing claimant who has already partly performed his illegal purpose, because by then it is too late to take advantage of the exception.

115. The question before the court, therefore, seems to me to be perhaps better framed (as opposed to the way I have stated it above in paragraph [105]) as whether, in the circumstances of this case, the claimant withdrew from the illegal transaction and reclaimed his money from the defendant before the illegal purpose had been wholly or party carried into effect. What has troubled me here is that in this case, on the claimant's own admission, he entered into a conspiracy to undertake illegal insider trading. The judge held that the agreement itself amounted to a criminal offence (see paragraph 31). On one analysis, therefore, that illegal conspiracy and the illegal purpose of insider trading was partially carried into effect when the money was paid across to Mr Mirza with the intention that it be used for that purpose. In my judgment, however, that is not the correct analysis.

116. In *Tribe v. Tribe*, an agreement to defraud creditors was seemingly entered into, and the property was transferred in furtherance of that agreement, but the holding in that case was that no part of the illegal purpose had actually been carried into effect because the creditors had never been told of the transfer. Likewise in *Taylor v. Bowers*, the property had been transferred by the plaintiff in pursuance of an unlawful agreement to defraud creditors, and yet he was permitted to recover it. Whilst the situation here is not the same as in either of those cases, the transfer of the money only allowed Mr Mirza to be ready to undertake the intended and agreed illegal insider trading and to further the criminal conspiracy that the judge held had been entered into. Properly regarded, the payment of the money did not, I think, wholly or partially carry the illegal purpose into effect, since it remained open to Mr Patel to withdraw from the transaction and to reclaim his funds at any time before the shares

were purchased with the benefit of insider information. No shares were purchased here, and no information was obtained. Since, as I have said the reason for the withdrawal does not matter as a matter of law, Mr Patel should I think have been allowed the benefit of the exception. I agree with Rimer LJ that there is no proper basis for a distinction between withdrawal from an illegal agreement that is no longer needed (as in *Tribe v. Tribe*, for example), and withdrawal, because the illegal agreement can no longer be performed.

117. The decision in *Bigos v. Bousted* can also be analysed without regard to the reason for the withdrawal. In that case, the agreement entered into was illegal and the share certificate had been delivered in pursuance of it. Thus the illegal purpose had been partly carried into effect. The example mentioned in argument concerning the attempt to recover a payment made pursuant to an agreement with a hit man to commit a murder, frustrated by the victim's death from natural causes, would be governed by different principles of public policy as Gloster LJ suggests, so that whether or not the illegal purpose has been partially performed, the money would not be recoverable. Once again, I doubt that the reason for the withdrawal – namely the premature death of the victim by natural causes - is strictly relevant.

118. For these reasons, it does not seem to me to matter that Mr Patel did not voluntarily withdraw from the illegal transaction, nor that the illegal transaction was prevented from being fulfilled by third parties, provided that, properly regarded, no part of the illegal purpose has been carried into effect before the claim is brought. In this case, it had not, and for that reason the judge was wrong to deny Mr Patel relief.

119. For these reasons, I agree with the result proposed by Rimer and Gloster LJJ that Mr Patel's appeal should be allowed.