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The Defence of Illegality – "Ex turpi causa non oritur actio" - The Cyprus Approach

2022

HISTORICAL BACKGROUND

There is a long-standing common law principle, that the courts will not assist a party whose case is based upon an immoral or illegal act.

This principle can be traced back into a very old case, ***Holman v Johnson***[1] where in the words of Lord Mansfield:

"No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act".

This common law principle, is known as the principle of "*EX TURPI CAUSA NON ORITUR ACTIO"* meaning that, "No action can arise from an illegal act". It is also presented as the "Illegality Defence Principle" or the "Defence of Illegality". Defendants raise as a defence, to defeat the claim, the illegality on which the claim is based.

The traditional courts response when the claimant tried to rely on illegality to prove his claim, was that, *"Let the estate lie where it falls*[2]*".*

In effect, the claimed property remained there where it stood. No balancing considerations were taken into account. The moral and ethical approach of the case was the dominant factor and directed the decision[3].

This area of the law and the principles established hundreds of years ago since 1775, was redrawn initially with the case of ***Tinsley v Milligan***[4] issued in 1994. *Tinsley v Milligan* adopted a mechanical, rule-based approach to the defence of illegality, the so called "reliance test".

The question was whether the claimant relied on an illegal act in order to advance her case. Once there was reliance on the illegality, it was sufficient to defeat the claim without

[1] *Holman v Johnson (1775) 1 Cowp 341 at 343 as applied also in Tinsley v Milligan (1994) 1 AC 340.*

[2] *Muckleston v Brown (1801) 6 Ves 52, 68-69.*

[3] *Equity and Trusts, Alastair Hudson, 10th Edition 2022, at page 473.*

[4] *(1994) 1 AC 340.*

considering any other policy or public interest factors or balancing proportionality issues of granting or rejecting the claim.

Tinsley v Milligan, departed from the strict moral approach of *Holman v Johnson,* granted equitable relief to the claimant, despite the illegality she participated, because she could base her claim on a cause of action not tainted with the illegality. *Tinsley v Milligan* was a case of resulting trust on which the property was returned to the claimant despite the illegality involved in the overall transaction.

In addition, the core maxim of equity[5], that, "O*ne who comes to equity must come with clean hands",* surprisingly, did not play any role, as the claim was based on contract despite the fact that the remedy granted was an equitable one, on a resulting trust basis.

Subsequently, the UK Supreme Court with a pioneer decision issued in 2016, in the case of ***Patel v Mirza[6],*** overruled *Tinsley v Milligan*, not as to the outcome but as to its reasoning, rejecting altogether the reliance test followed.

When considering the illegality defence principle in the case of *Patel v Mirza,* the majority of the UK Supreme Court judges, warned against its mechanical application as applied in *Tinsley v Milligan*, emphasizing instead the need to consider a "range of factors", looking at the specific policies behind the relevant law which was infringed, the particular conduct of the claimant, and to consider whether it would be a disproportionate response to the illegality involved to deny relief to the claimant[7].

Patel v Mirza showed also that, there is a close similarity between the operation of equity and of common law in this area, and, in a case where the relevant conduct of the claimant was unlawful, it has been noted that: "it is not obvious why the public policy considerations relied on in *Patel v Mirza*, should not equally apply to the equitable maxim, "O*ne who comes to equity must come with clean hands"*[8].

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[5] *Snell's Equity, Thirty Fourth Edition 2020, page 91 at page 96, [5-010].*

[6] *2016 UKSC 42, 2017 A.C 467.*

[7] *Snell's Equity, Thirty Fourth Edition 2020, at page 97, [5-010]. See the approach set out by Lord Toulson [2016] UKSC 42 [2017] A.C. 467 at [95-119].*

[8] *Snell's Equity, Thirty Fourth Edition 2020, at page 97, [5-010], referring to Ball v de Marzo [2019] EWHC 1587 (Ch) at [52].*

In effect, the maxim of equity, "O*ne who comes to equity must come with clean hands",* is closely related to the common law principle, *EX TURPI CAUSA NON ORITUR ACTIO*[9]*.*

The illegality defence principle, moved from a 17th century, strict not flexible rule – based, mechanical, formalistic, moral approach, as established in *Holman v Johnson* and *Tinsley v Milligan*, to a logical approach of the 21st century as *Patel v Mirza* resettled[10].

The Supreme Court in *Patel v Mirza*, established a discretionary approach where illegality is concerned, balancing various considerations and adopting a proportionality test which will be discussed further below.

The principle of "*EX TURPI CAUSA NON ORITUR ACTIO"*, *(*"No action can arise from an illegal act"), is still applicable but the background reasoning in implementing it has changed[11].

TINSLEY v MILLIGAN in detail

The *Tinsley v Milligan* case, was concerning a claim based on a resulting trust.

The facts were as follows: Kathleen Tinsley and Stella Milligan, were a couple who had acquired a guesthouse together. Both of them contributed to the purchase price to acquire the house and lived in it. They ran the guesthouse as a joint business venture. It was decided between them that the property would be put in Tinsley's sole name so that Milligan could attempt to defraud the social security system by claiming entitlement to housing benefit on the basis that she had no rights in any property. Milligan has been convicted of a criminal offence as a result of this illegal act.

At some stage, the relationship broke and Tinsley claimed absolute title on the house. Milligan claimed that the house held on trust for both parties in equal shares due to the contributions on the purchase price by both of them.

[9] *Snell's Equity, Thirty Fourth Edition 2020, at page 97, [5-010].*

[10] *See comments by Alastair Hudson, in Understanding Equity and Trusts, Seventh Edition 2022 at page 97 under title: The preference of logic over ethical behaviour.*

[11] See comments by Alastair Hudson, in Understanding Equity and Trusts, Seventh Edition 2022 at page 97.

Tinsley raised as a defence the illegality involved and alleged that Milligan in order to prove her claim must rely on the illegality and that equity should not give Milligan any benefits due to the fraudulent background. The property, Tinsley alleged, must remain there where is registered, despite the fact that she was also part of the illegal operation and conspiracy.

It was held by the House of Lords, that Milligan was entitled to an equitable interest in the property on resulting trust in proportion to her contribution to the purchase price. The court though applied the strict reliance test but the decision was that Milligan was able to prove that her interest arose from the contribution of the purchase price, a lawful act, and not from the fraud on the social security system which was the unlawful act[12].

The illegal and fraudulent facts of the case were ignored. Also, the maxim of equity, "O*ne who comes to equity must come with clean hands"* did not play any role and was not considered as well.

The decision marks a movement away from the traditional moral principles-based approach, towards a technical procedural rule-based approach.

The same approach as to the defence of illegality, has been followed in the court case, *Davies v O' Kelly*[13] with identical facts as to those of *Tinsley v Milligan.*

In the case, *Tribe v Tribe*[14] the Court of Appeal held that a resulting trust arose on the facts of the case and the property, shares, transferred to the son of the claimant were held on resulting trust for him, despite the fact that the property was transferred to the son for an illegal purpose, namely, to avoid the future claims of creditors. Finally, the purpose for which the property has been transferred, did not materialize, there were not any creditors to be deceived and, in this respect, despite the fraudulent plan in place, the court accepted the creation of a resulting trust and the son was holding the shares on a resulting trust for the claimant.

[12] *Equity and Trusts, Alastair Hudson, 10th Edition 2022, at page 472.*

[13] *[1214] EWCA Civ 1606, [2015] 1 WLR 2725.*

[14] *[1995] 4 All ER 236.*

Tinsley v Milligan and *Tribe v Tribe,* in substance, overruled *Gascoigne v Gascoigne*[15] *and Tinker v Tinker*[16]*,* as they granted equitable relief, where *Gascoigne v Gascoigne* and *Tinker v Tinker* on similar grounds rejected it. In both cases the claimants illegally transferred property to third persons to avoid it form their creditors. Subsequent claims to recover the property on resulting trusts were rejected.

Therefore, what *Tinsley v Milligan* established, was a procedure to identify the applicability of the illegality defence principle, which was rather a formalistic approach and on procedural level.
Was the claimant's illegal act the reason for the purported transfer of the property to another person or the purported creation of a trust? If the illegal act is not bound up in the transfer of property, then the claimant will be entitled to rely on equitable or common law relief.

Any incidental illegality, as in *Tinsley v Milligan,* or any illegality which was not finally performed, as in *Tribe v Tribe*, will not be taken into account and the illegality defence will fail.

THE PROBLEM OF INJUSTICE APPLYING TINSLEY v MILLIGAN

The reliance test and the strict rule-based approach of the illegality defence applied in *Tinsley v Milligan*, was difficult to be reconciled with the notion of justice and fairness.

This was especially evident once the illegality was committed by two persons which were the subsequent litigants. Following *Tinsley v Milligan*, no convincing reply could be given, why the property to be vested in one wrongdoer once both were liable and committed the illegality?

The long-standing approach, in *Muckleston v Brown*[17], that property should stay there where it stands, ("Let the estate lie where it falls"), if there is illegality in the whole transaction, nowadays does not seem to serve the notion of justice and fairness and other considerations need to be taken into account.

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[15] *[1918] 1 KB 223. Also, same approach has been followed in Tinker v Tinker [1970] 2 WLR 331.*

[16] *[1970] 2 WLR 331.*

[17] *(1801) 6 Ves 52.*

The decision in *Tinsley v Milligan,* was heavily criticised by the UK Law Commission in a report published in 2010[18]. In particular, it was said that, the reliance test was deemed to be arbitrary, not promoting justice and fairness. It was a test, based only on a procedural issue of whether a party needed to rely on an illegal act in order to advance its case, without considering other factors and considerations of the case.

PATEL v MIRZA in detail

The opportunity to reconsider the reliance test as the method to identify whether the illegality defence principle, EX *TURPI CAUSA NON ORITUR ACTIO,* is applicable under the facts of the case, came in 2016 in the UK Supreme Court case of *Patel v Mirza,* an English contract law case relating to insider trading under section 52 of the Criminal Justice Act 1993.

It was unanimously held in *Patel v Mirza,* that *Tinsley v Milligan* was no longer representative of the law, and that a person who satisfies the requirements for unjust enrichment, should not *prima facie* be prohibited from recovering his property even though that person, was involved in an illegal act related to the claim.

In essence, the UK Supreme Court held that in cases of illegality the court should not limit itself to consider whether the claimant has to base its property rights / claims on its illegal acts as in *Tinsley v Milligan*. The EX *TURPI CAUSA NON ORITUR ACTIO* principle must be observed, but the reasoning in *Tinsley v Milligan,* should not be followed. The Supreme Court considered that the case *Tinsley v Milligan* was correct as to the outcome but not as to the reasoning to reach that result[19].

As to the facts of this case, Mr. Patel paid £620,000 to Mr. Mirza pursuant to an agreement under which Mr. Mirza would bet on the price of some shares in Royal Bank of Scotland on the basis of insider information Mr. Mirza had from his contacts at the bank about a pending government announcement that would affect it.

Using advance insider information to profit from trading in securities is an offence under section 52 of the Criminal Justice Act 1993. It was in effect, a contract for the commission

[18] *The Illegality Defence: A Consultative Report (LCCP 189) (2009) and The Illegality Defence (Law Com 320) (2010).*

[19] *Equity and Trusts, Alastair Hudson, 10th Edition 2022, at page 480.*

of a crime. The scheme did not come to fruition as the expected insider information was mistaken, and Mr. Mirza did not return the money to Mr. Patel as promised, but kept them for himself.

Mr. Patel brought a claim based on contract and unjust enrichment for the return of his £620,000. It was argued by Mr. Patel that the money could be recovered on the basis of a resulting trust.

Mr. Mirza argued that no such obligation could be enforced because the whole contract was illegal, and any claim would be precluded by the principle of *EX TURPI CAUSA NON ORITUR ACTIO.* The illegal purpose prevented a resulting trust, an equitable remedy being born and used and the money should stay there where they are.

The UK Supreme Court held unanimously, that the plaintiff, Mr. Patel, could recover the money transferred based on an illegal purpose, and that the former test in *Tinsley v Milligan* was no longer representative of the law.

The claimant, (Mr. Patel), was held entitled to restitution of the money paid, because that was the result reached by applying a flexible structured approach which considered both the policies involved and proportionality[20].

This Supreme Court judgement, became one of the fundamental decisions of the English legal system.

In effect, the UK Supreme Court has held that in cases of illegality and in relation to resulting trusts specifically, the court should not limit itself to considering whether the claimant has to base its property rights on their illegal acts as in *Tinsley v Milligan.* The strict application of the reliance test was rejected.

The leading Judgement in *Patel v Mirza* was given by Lord Toulson. He rejected the rule – based approach and, in particular, the reliance test established in *Tinsley v Milligan*. In its place, a flexible approach was adopted, so that the court should consider the policies involved, public interest, and the need for proportionality[21].

[20] Hart Studies in Private Law, 2018, ILLEGALITY AFTER PATEL V MIRZA, Edited by Sarah Green and Alan Bogg, at page 26 "A new Dawn for the Law of Illegality", by Andrew Burrows.

[21] Hart Studies in Private Law, 2018, ILLEGALITY AFTER PATEL V MIRZA, Edited by Sarah Green and Alan Bogg, at page 27 "A new Dawn for the Law of Illegality", by Andrew Burrows.

In essence, a person who satisfies the ordinary requirements for a claim in unjust enrichment should be entitled to the return of his property; he should not *prima facie* be debarred from recovering his property just because the consideration which had failed was an unlawful consideration.

Mr Patel's claim should be allowed since it would have the effect of returning the parties to their positions prior to the conclusion of the illegal contract, as well as prevent Mr Mirza from being unjustly enriched.

Thus, the prior test in *Tinsley v Milligan* was considered to be inconsistent with the coherence and integrity of the legal system.

As per the Court's decision in *Patel v Mirza,* courts should consider whether the public interest would be harmed by the enforcement of the illegal agreement, taking into account the following "*trio of necessary considerations*", the three - stage test, replacing the reliance test:

a. What is the purpose behind the law which has been infringed, and whether the purpose would be enhanced by the denial of the claim;

b. Any other public policies which may be affected by the denial or grant of the relief requested, and

c. Whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors should be considered, which include, the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability[22].
In effect, following now the three - stage test, the "*trio of necessary considerations*", there might be cases where the person who was deprived of his property, even if through an illegal act in which he or she was involved, might be entitled to claim and recover his

[22] Patel v Mirza at [107].

property from the person who unjustly benefited from that illegal act or was an accomplice to the illegal act.

The basic rule of *EX TURPI CAUSA NON ORITUR ACTIO* remains in force, no one can be benefited from its own wrong, and pursuant to this principle, the court will not assist him, but the three - stage test established in *Patel v Mirza* case, should be considered to reach fair and justice results whether to grant relief or not.

The three - stage test marked the move from a strict inflexible rule-based approach, to a more pragmatic approach based on the balancing of public policy considerations.

What *Patel v Mirza* also establishes is that when a claimant would have been entitled to restitution for unjust enrichment, i.e., total failure of consideration, it will be rare to deny that claim because of the illegality. This is no doubt because, far from upholding or enforcing illegality, the claimant is seeking to unwind it[23].

DECISIONS AFTER PATEL v MIRZA

The test established in *Patel v Mirza in 2016* has been constantly applied since then without any hesitation in a variety of cases, indicatively:

1. Mortgage fraud case: ***Stoffel & Co v Grondona[24].***
   The Supreme Court has held that a claimant who has been engaged in mortgage fraud was not barred from bringing a claim against her solicitors for negligently failing to register the forms transferring the property to her and releasing a prior mortgage.

2. Negligence claim against Dorset Healthcare: ***Henderson v Dorset Healthcare University NHS Foundation Trust,[25].***

   The claim based on negligence on behalf of Dorset Healthcare was rejected and the illegality defence was successful on the principles of *Patel v Mirza* applying this time

[23] *Hart Studies in Private Law, 2018, ILLEGALITY AFTER PATEL V MIRZA, Edited by Sarah Green and Alan Bogg, at page 27 "A new Dawn for the Law of Illegality", by Andrew Burrows.*

[24] *[2020] UKSC 42.*

[25] *[2020] UKSC 43.*

the *EX TURPI CAUSA NON ORITUR ACTIO* principle, *to* grant a defence and reject the claim.

3. Misappropriation of assets: ***Singularis Holdings Limited v Daiwa Capital Markets Europe Ltd[26].***

The sole shareholder and board chairman of Singularis made fraudulent transfers of the company's assets via the bank Daiwa. Singularis sued the bank, for breach of their duty to make proper inquiries as to the transfers and the bank relied on the illegality defence, namely that the chairman of Singularis had acted in breach of his fiduciary duty owed to the company. The Supreme Court decided that the illegality in place did not bar the claim, applying the *Patel v Mirza* approach. The Supreme Court decided that denying the claim would undermine the public interest in requiring banks to play an important part in uncovering financial crime and money laundering.

4. Bribery: ***Bank St Petersburg PJSC v Arkhangelsky[27].***

The claimant bank brought a claim against a husband and wife under personal guarantees and a personal loan. The couple counterclaimed against the bank and its chairman for damages for an alleged unlawful conspiracy to seize the assets of two of their businesses in Russia. The trial judge dismissed their counterclaims on the evidence (but declined to make the declarations sought as to their bad faith in bringing them). The couple appealed. On that (ultimately successful) appeal, the bank and its chairman argued that the trial judge had misapplied *Patel v Mirza* and should have dismissed the counterclaims on grounds of illegality (since the first defendant had admitted paying bribes to obtain licences for the businesses). The Court of Appeal disagreed, with the application of the defence of Illegality, finding that:

a. It would do nothing to prevent or discourage bribery to deny the couple's claim for damages for a subsequent dishonest conspiracy;

b. There was a strong additional public policy in allowing them to vindicate their rights (if entitled to do so) for that dishonest conspiracy; and

[26] *[2019] UKSC 50.*

[27] *[2020] EWCA Civ 408.*

c. Denial of the counterclaim would be a disproportionate approach to the illegality (particularly given that punishment for bribery is generally a criminal matter).

Note: This bribery case is highly relevant to the Cyprus *Civil Appeal court case No. 14/2014, Andronikou v Mavropoulou and another,* dated 30/09/2021 which we shall discuss further below.

5. Professional negligence claim against solicitors: **Day v Womble Bond Dickinson**[28]**.**

An unsuccessful appellant in criminal proceedings brought a professional negligence claim against his former solicitors, WBD, for their purported failure properly to defend him. His action was struck out on the basis that (among other things) it breached the doctrine of illegality. This was because the judge held that in order to succeed, the claimant would have to prove outcomes which were inconsistent with his criminal conviction and sentence. The Court of Appeal was asked to determine whether WBD's alleged failure to pursue certain arguments on the appellant's behalf was indeed barred by the illegality defence. The Court of Appeal – relying upon both *Patel v Mirza* and *Gray v Thames Trains Ltd [2009] UKHL 33* – dismissed this part of the appeal. It held that awarding damages in a civil claim for a disadvantage imposed on a claimant by the criminal courts as punishment for his criminal act would result in an inconsistency between the law causing the loss and the law ordering compensation. In other words, allowing a convicted criminal later to attack his conviction in a civil claim was contrary to public policy.

6. Employment: ***Robinson v His Highness Sheikh Khalid Bin Saqr Al Qasim***[29]***.***

The case, concerned the defence of illegality in an employment context and the statutory interim relief regime in the context of alleged automatic unfair dismissal. In relation to the illegality defence, the Court of Appeal held that the long-standing test of "knowledge plus participation" (applied consistently in the employment law field since the Court of Appeal's decision in ***Hall v. Woolston Hall Leisure [2001] 1 WLR 225***) was a necessary, but not a sufficient, criterion for the defence to

[28] *[2020] EWCA Civ 447.*

[29] *[2021] EWCA Civ 862.*

succeed. It was necessary for an assessment of proportionality to be performed, having regard to the "trio of considerations" set out by Lord Toulson in the Supreme Court in ***Patel v Mirza*** (see at paragraph [70] of the judgment).

7. Tax evasion case: ***Al-Dowaisan v Al-Salam[30].***

8. Fraud Case: ***Grove Park Properties Ltd v The Royal Bank of Scotland Plc[31]***

WHAT PATEL v MIRZA POINTED OUT

The following may be summarized as to *Patel v Mirza*:

1. The courts should methodically assess the three - stage test for and against granting relief to a claim tainted with illegality.

2. There are no fixed rules for the illegality defence principle any more. Discretion plays an important role.

3. The pre - *Patel v Mirza* case law remains relevant, but it will be applied in a principle-based approach and not in a rule - based approach, applying the three – stages test.

4. The three - stage test does not represent "year zero" such that, in all future cases, it is only *Patel v Mirza* that is to be applied. Prior decisions remain of precedential value unless it can be shown that they are not compatible with *Patel v Mirza*.

5. The importance of the unlawfulness and its role in the transaction plays still an important factor to be considered.

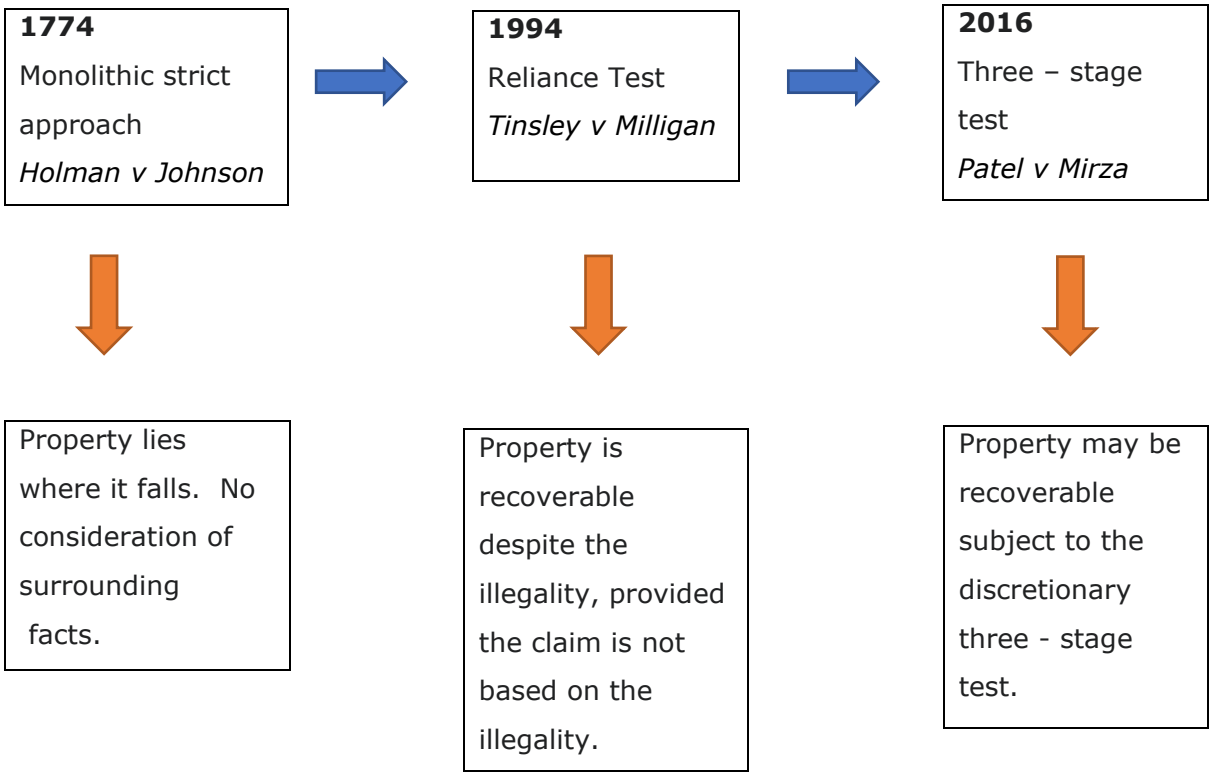
6. The nature of the *Patel v Mirza* test, does appear capable of allowing a court to reach a just/fair result on the facts of the case exercising relevant discretion.

7. It will not be necessary in every case to complete an exhaustive examination of all stages of the test. If a clear conclusion emerges on examination of the relevant policy considerations at stages one and two that the defence should not be allowed, stage three is not required to be considered.

[30] *[2019] EWHC 301 (Ch).*

[31] *[2018] EWHC 3521 (Comm).*

SUMMARISING THE ILLEGALITY DEFENCE PRINCIPLE HISTORICALLY



THE CYPRUS POSITION ON THE PRINCIPLE OF EX TURPI CAUSA NON ORITUR ACTIO

The most known judgements of the Cyprus Supreme Court dealing with the principle of *EX TURPI CAUSA NON ORITUR ACTIO*, are:

1. ***Tryfonos and others v Minerva Insurance Coamony LTD (2006) 1 CLR 200,***
2. ***Christodoulou and others v. Vraets (2009) 1 ΑΑΔ, 802,***
3. ***Chloi Constantinou v. Athina Apla Civil Appeal 55/2010 dd 03/04/2015***,
4. ***Civil Appeal No. 97/2014 dated 28/09/2021 Polydorou v. Polydorou and others,*** and
5. ***Civil Appeal No. 14/2014, Andronikou v Mavropoulou and another dated 30/09/2021.***

Our courts follow the principle of *EX TURPI CAUSA NON ORITUR ACTIO* in its strict form as a rule-based approach of general application, as applied in *Holman v Johnson*[32] and refined in *Tinsley v Milligan* without balancing public interest or other policy considerations or other factors such as the proportionality test as decided in *Patel v Mirza*.

In effect, no matter whatever the factual circumstances of the case are, once the claim is tainted or based on an illegal or immoral act, it will be rejected and the property subject matter of the claim will remain there where it falls. *The rule in Muckleston v Brown* is followed[33].

THE RECENT CIVIL APPEAL COURT CASE NO. 14/2014, ANDRONIKOU V MAVROPOULOU AND ANOTHER DATED 30/09/2021

This case is the most recent and main representative case on the *EX TURPI CAUSA NON ORITUR ACTIO principle,* as this is applicable in Cyprus.

The facts of this case were the following:

[32] *[1775] 1 Cowp 341.*

[33] *(1801) 6 Ves 52, 68-69.*

The Plaintiff – Respondent in the Appeal, herein referred as the "Plaintiff", requested the return of an amount of money, €170.660,14 plus interest, paid to the Defendant 1 - Appellant, herein referred to as the "Defendant", who promised to her to approach certain unknown officials in a land developing company so that they will exercise their influence to persuade the land developing company to purchase her land. The causes of action were based on the ground of fraud and/or false and/or negligent representation and/or conspiracy to deceit the Plaintiff, and/or unjust enrichment and or negligence.

The Plaintiff, in her testimony, which was accepted by the court of first instance, said that she paid the money to the Defendant, who was the intermediary, relying on his statements and allegations that he would pay the said money to the company officials so that they will exercise their influence to convince the company they work, to purchase her land.

The Defendant, in his testimony and pleadings was alleging that the money was paid wilfully by the Plaintiff to him as a bonus / or as reward for his efforts to succeed in the sale of the land to the developing company.

The court of first instance after trying the case found as true and correct the following facts:

1. Accepted that the Plaintiff has been deceived by the Defendant.

2. Accepted and decided that the allegations of Defendant, that the money paid by the Plaintiff to him, supposedly to be subsequently paid to the unknown officials of the buyer, not ever specified, were a misrepresentation of facts made intentionally and purposedly by the Defendant in order to convince the Plaintiff to pay to him the money.

3. The Plaintiff relied on these misrepresentations and paid the money to the Defendant.

4. There was no finding that an illegality took place in the transaction on behalf of the Plaintiff.

In view of the above findings, the court of first instance issued judgment in favour of the Plaintiff as to the claimed amount.

It is crucial to note that:

1. The court of first instance did not consider the principle of *EX TURPI CAUSA NON ORITUR ACTIO*, as this defence was not pleaded by the Defendant during the trial of the case and no evidence was presented as to this issue.

2. The Defendant did not allege in his testimony and pleadings that any illegal act was committed whatsoever, but simply claimed the money as a bonus and reward for his services.

3. The court of first instance did not find any illegality in the transaction apart from the deceptive acts of the Defendant.

4. There was not any finding as to the commitment of any bribery, as the facts did not support such inference, neither the Defendant alleged such a thing.

5. The Defendant filed an appeal challenging the decision of the first instance court on various grounds. The one which dominated the appeal was the illegality defence allegation, raised for first time, based on the principle of EX *TURPI CAUSA NON ORITUR ACTIO,* namely that the court should not aid the Plaintiff as she bases her action upon an immoral or an illegal act.

6. It is interesting to note that the Supreme Court judgment was not unanimous. Parparinos J issued the majority judgement with which Economou J agreed and Ioannides J issued the minority dissenting judgment. Both judgements differ substantially on the acceptance and interpretation of the facts and on the legal inferences from the facts.

With the majority judgement, Parparinos J and Economou J, accepted the appeal and annulled the judgment issued by the court of first instance on the following grounds:

1. They accepted that the principle of *EX TURPI CAUSA NON ORITUR ACTIO* was applicable on the facts of the case. The strict rule moral-based approach of the cases of *Holman v Johnson* and *Tinsley v Milligan* has been followed.

2. They considered that they could handle the issue of illegality at the appeal stage, despite the fact that this defence, *EX TURPI CAUSA NON ORITUR ACTIO,* was not raised before the first instance court.

3. They accepted that, the Plaintiff, by paying the money to the Defendant, with the intention to be paid further to the officials of the developing company, committed

the crime of active bribery in the private sector within the meaning of art. 4 of the law no. 23(III)/2000, as amended with the law no. 22(III)/12. Consequently, the principle of EX *TURPI CAUSA NON ORITUR ACTIO* was applicable. They followed the case of *Christodoulou and others v. Vraets (2009) 1 ΑΑΔ, 802,* quoting relevant passage from the judgment accepting its strict reasoning and rejecting any flexible discretionary approach once an illegality is present in the transaction. The UK cases of ***Holman v Johnson*** and ***Tinsley v Milligan*** were quoted.

4. They accepted that the Plaintiff, knew of the illegality of her acts, participated with her own will on the agreement and acted "in pari delicto" with the Defendant.

{*Our Comment:* Parties are in "pari delicto" when both have participated in the same illegal conduct. A Latin phrase commonly used in tort and contract law which means "in equal fault"}.

5. They accepted that, once the Plaintiff has been involved in the criminal offence of bribery, there was no room for the proportionality test to be applied to consider the behaviour of both parties and decide accordingly whether defence of illegality will succeed or not. They accepted that under the circumstances *"……, the dogma of ex turpi causa non oritor action is applicable".*

6. They accepted that the claim of the Plaintiff is surrounded by a punishable behaviour and her acts, are in breach of the European and Cyprus Law and even more, against the public common feeling.

7. They accepted that as a consequence of the Plaintiff's acts, the court will not allow the restitution of the paid amount.

In summary: They accepted that the principle of *EX TURPI CAUSA NON ORITUR ACTIO* was applicable on the facts of the case. The strict rule moral-based approach, of the cases of *Holman v Johnson* and *Tinsley v Milligan* has been followed, as these cases were also followed by *Christodoulou and others v. Vraets (2009) 1 ΑΑΔ, 802*.

In this respect, they considered that the claim of the Plaintiff should not succeed straight away, without considering any other factors. The strict moral - based approach of the above cases has been reconfirmed.

With the minority dissenting judgment, Ioannides J, considered the case from a completely different angle and rejected the appeal confirming as correct the judgement of the court of first instance.

He based his decision on the following grounds and arguments:

1. He did not accept that the Plaintiff committed any crime and in effect the liability defence principle of *EX TURPI CAUSA NON ORITUR ACTIO* was not applicable.

2. He did not agree with the finding of the majority, that the crime of active bribery in the private sector has been committed. He analysed the relevant articles of the Convention of the Council of Europe for the criminalisation of corruption art. 7 and 8, which has been implemented in Cyprus by law No. 23(III)/2000, on which law the majority based their arguments as to illegality, and concluded that the conditions of this law are not met.

3. He concluded that the case *Christodoulou and others v. Vraets (2009) 1 ΑΑΔ, 802*, was not applicable on the facts of the case under consideration as in that case there was a finding of the court of first instance that an illegality existed. In the case under consideration there was no such finding in the court of first instance judgment.

4. What the Plaintiff did in this case is to try to sell and sold her plot to the buyer at a particular price which the buyer accepted with its free will.

5. In conclusion, his position was:

    a. He accepted that the sale of the land to the buyer was through a lawful contract. The Buyer never alleged that the contract was illegal or that it was executed with the illegal or unlawful influence of any person, and,

    b. He accepted that the Plaintiff paid the money to the Defendant which money the Defendant extracted from the Plaintiff by misrepresentation and deceit.

6. Alternatively, he commented that, even if we consider that the behaviour of the Plaintiff had an element of blameworthiness, this behaviour in no way can be compared with the untrustworthy behaviour of the Defendant who tricked and extracted from the Plaintiff the relevant amount planning a particular fraudulent scheme. The behaviour of the Defendant is by analogy and comparatively worse than the one of the Plaintiff. Applying the proportionality test, as this was applied in *Saunders and another v. Edwards and another (1987) 2 All E.R. 651*), the Defendant should not be allowed to keep the fruits of his unlawful fraudulent behaviour.

OUR COMMENTS AS TO THIS CASE

The Supreme Court in a not unanimous and highly controversial judgement, reversed the judgement of the court of first instance, applying the strict approach of the *EX TURPI CAUSA NON ORITUR ACTIO* principle as this was set up and applied in the cases with leading authorities Holman v Johnson and *Tinsley v Milligan* and the Cyprus case *Christodoulou and others v. Vraets (2009) 1 ΑΑΔ, 802.*

For the majority decision, the following are observed:

1. They have accepted as a fact that the Plaintiff has committed a criminal offence, a punishable immoral behaviour. Based on this finding, they considered that the principle of *EX TURPI CAUSA NON ORITUR ACTIO* was applicable on its strict form as was applicable until then in Cyprus and accepted the appeal annulling the judgment of the court of first instance, denying any remedy to the Plaintiff. *{**Note:** we do not examine whether a criminal offence was committed or not, but we accept it as a fact for the purpose of our comments}.*

2. The majority judgement and reasoning, once it is based on a committed criminal offence and consequently on the above decisions, supporting the strict approach of the principle, can be justified. It applied in its strict form the principle of *EX TURPI CAUSA NON ORITUR ACTIO* and the precedents applicable so far in Cyprus.

Our Questioning:

a. ***Is this though, the correct approach our Supreme Court should have followed having in mind the common feeling of justice and the current UK and Commonwealth countries approaches on the principle of EX TURPI CAUSA NON ORITUR ACTIO?***

b. ***Could our Supreme Court close its eyes on the turbulence that is going on around the principle of EX TURPI CAUSA NON ORITUR ACTIO and apply principles that have are already been rendered obsolete?***

In both questions we believe not! We explain our position further below.

The illegality principle has been applied as this was formed and followed in *Holman v Johnson* and *Tinsley v Milligan* and related cases, which cases as to their reasoning and way of applying the principle, have been overruled by *Patel v Mirza* and are no good law any more.

In applying the strict approach of the illegality defence principle, crucial aspects of the case have not been considered as the path followed, did not allow any discretion on the matter. The discretion is fettered.

The implementation of the strict approach of the illegality principle and as a consequence, the absence of consideration of the relevant surrounding facts of the case as identified below, raises doubts as to its fairness and undermine the common feeling of justice.

In particular:

1. The decision was centralized on the finding that the Plaintiff, by transferring the money to the Defendant for the purpose of bribery, committed a criminal offence and this was enough to deprive her of any remedy, without considering any other aspects or facts of the case as the strict application of the principle does not allow any other approach.

2. This monolithic reasoning and justification, is criticized in *Patel v Mirza*.

   See the comment of *Alastair Hudson, Principles of Equity and trust, Second Edition 2022, at page 253* where the following are mentioned:

   "The decision of the Supreme Court in Patel v Mirza has overruled Tinsley v Milligan …… the court should not limit itself to considering whether the claimant has to base their property rights on their illegal acts (as in Tinsley v Milligan)".

3. The strict implementation of the principle, precluded the majority from taking into consideration similar recent UK court cases related to the illegality defence principle based on bribery, according to which bribery does not defeat the claim straight away, as the public interest proportionately outweighed the illegality defence allegation. See the case of *Bank St Petersburg PJSC v Arkhangelsky [2020] EWCA Civ 408,* commented above.

4. It has been given to the bribe element, more than what was necessary value, which in any event was a disputed fact, among the members of the Supreme Court. In *Patel v Mirza* the following was said in paragraph 118 of the case by Lord Toulson, as to bribes, rejecting the previous authorities on this issue:

   "[118]. Bribes of all kinds are odious and corrupting, but it does not follow that it is in the public interest to prevent their repayment".

5. The fact that the Plaintiff in essence was unwinding the illegality instead of enforcing it, did not play any role due to the strict approach of the principle. In the article of

Paul Davies, Professor of Commercial Law in the University College London, titled, *"Ramifications of Patel v Mirza, in the Law of Trust",* published by Hart Studies in Private Law, 2018, ILLEGALITY AFTER PATEL V MIRZA, edited by Sarah Green and Alan Bogg, at page 255, the following was said:

"*It may perhaps be that the strength of the Supreme Court's commitment to restitutio in integrum and unwinding illegal transactions means that the briber should be able to recover the value of the bribe from the fiduciary".*

6. There was inference that the crime of active bribery in the private sector has been committed, but there was no comment on the fact that there was no evidence of who was bribed from the buyer's company involved in the transaction and whether any money was actually paid to such persons. The decision was limited only on the unethical behaviour of the Plaintiff without any examination as to who was bribed. What would have been the position if nobody was actually bribed as this was the inference of the court of first instance?

7. It was the finding of the first instance court that the money was paid by the Plaintiff to the Defendant, relying on the misrepresentation of the Defendant that the money would have been given to hypothetical officials of the developing company. There was no evidence that such an incident took place and on the contrary, there was a finding that this was part of the plan of the fraudulent scheme and the gist of the deception of the Plaintiff by the Defendant. On this crucial finding there was not any comment.

8. The plaintiff has been judged that she committed a criminal offence, active bribery in the private sector, without having the chance to defend herself on this serious crime.

9. The end result was that the Defendant being "in pari delicto" with the Plaintiff, has been benefited from the decision and unjustly enriched, despite the fact that the rejection of the Plaintiff's claim, has been a disproportionate response to the Plaintiff's conduct, the Defendant's conduct and the benefit granted to the Defendant having in mind also his behaviour which has been condemned heavily by the court of first instance. The strict implementation of the principle prohibited such approach of the case. See comment on this issue on *Patel v Mirza* case, at *Snell's Equity Thirty Fourth Edition at page 97, Thirty Fourth Edition, 2020.*

In effect,

The finding that the Plaintiff has committed a criminal offence, active bribery in the private sector, applying the strict approach of the illegality principle, closed the door for any further examination of any other relevant factor of the case.

Further comments:

It is doubtful if the judgment would have been the same if the illegality defence principle as applied in *Patel v Mirza* and subsequent cases would have been taken into consideration. There is no justification why the money remained with the one litigant being part of the alleged criminal offence and not with the other.

Why should the Defendant, who according to the court of first instance, generated the whole illegal transaction or at least as per the appeal court, who was part of the illegality, be benefited for his illegal act with such a considerable amount of money? Why is it more justifiable for the money to be kept with the Defendant and not with the Plaintiff? The "in pari delicto" principle which the majority approved as applicable in the case, means "in equal fault." Once both parties, as per the majority decision are equally at fault, why is it justifiable for one of the two to be unjustifiably enriched? There is no ethical reason why one of them should take preference over the other[34].

It is for this reason that *Patel v Mirza* resettled the law in this area. The applicability of the three - stage test and the consideration of all the facts of the case, the conduct of the Plaintiff, the conduct of the Defendant, the public policy considerations and the proportionality test, whether to reject or accept the Plaintiff's claim, gives now the guidance as to how such cases must be considered and judged accordingly, to secure that by applying the proper court's discretion, justice will be done.

In essence, the Supreme Court of Cyprus with this case, prohibited something with the left hand and then approved it with the right hand!

It is not the role of this court to impose punishment as it is not a criminal court. There is no justification as to why to punish one of the participants in the crime, as per the majority judgment, and benefit the second one, a person who invented the whole scheme and implemented it.

[34] See comments of *Alastair Hudson, Equity and Trusts, 10th Edition 2022, at page 483.*

We believe that the majority judgement does not reflect the current trend of the law and does not give persuasive arguments why one wrongdoer can be benefited and unjustifiably enriched at the detriment of the other. The *EX TURPI CAUSA NON ORITUR ACTIO* principle has been applied in its old version, which principle since 2016 has been resettled in UK, overruling any old mode of its application and given it new dimensions based on discretionary approach in order to administer justice more effectively.

Ioannides J, with his dissenting judgment tried to cure the whole injustice considering that the principle of *EX TURPI CAUSA NON ORITUR ACTIO* was not applicable as there was no illegality on behalf of the Plaintiff.

Alternatively, as per Ioannides J, even if there was some unlawfulness on behalf of the Plaintiff, relying on the proportionality test, the claim is justified.

The minority dissenting judgement reaches a more justifiable result in line with the recent developments and current trend of the law, despite the fact that the case was not also approached from the *Patel v Mirza* angle but it reached the correct result following a different path.

The proportionality test though, followed and suggested as applicable by Ioannides J in its minority judgment, falls within the three necessary considerations of *Patel v Mirza* and is a good justification towards this direction.

We believe, based on *Patel v Mirza,* the defence of illegality in this case should not have been applied and the appeal should have been rejected. The Defendant should have been ordered to return the funds on the basis of "unjust enrichment".

In addition, a resulting or constructive trust basis, might be an additional justification for returning the funds to the Plaintiff.

It remains to be seen whether the Supreme Court of Cyprus will follow the new test adopted in *Patel v Mirza* and subsequent cases in the way the illegality defence principle has evolved.

We hope and wish the dissenting judgment, to be the initiative for the Supreme Court of Cyprus to depart from the strict monolithic moral - based approach of the principle of *EX TURPI CAUSA NON ORITUR ACTIO to the principles* established by *Patel v Mirza*.

On the other hand, why stick to the old version and test of illegality, that of *Holman v Johnson* and *Tinsley v Milligan*, since those who invented the old test are following a new test now to cure unfairness and injustice, especially in cases where two participants (Plaintiff and Defendant) are taking part, "in pari delicto", in the illegal transaction?

Another consideration which has not been taken into account from the judges and the parties in this case, is the following:

The whole factual situation and the allegations of the Defendant show that the Defendant in effect was claiming a fee for his effective involvement and introduction to the sale of land. Such an activity might fall within the provisions of the Real Estate Law of 2010 No. 71(I)/2010, as amended.

As per the provisions of this law the commissioning for the sale of immovable property is a regulated activity and only licenced estate agents can be engaged in such an activity.

Non - licenced persons claiming a fee, which in fact is a commission for the introduction and effective intervention for the sale of land, constitutes a criminal offence. This is what in fact the Defendant was claiming, a commission for his intervention in the sale of the land in question.

This is an argument which was not put forward which would have given an additional armour to the Plaintiff to request the return of the funds for unlawful illegal consideration.

FINAL OBSERVATIONS AS TO ILLEGALITY FROM CYPRUS PERSPECTIVE

In *Tinsley v Milligan* a resulting trust has been accepted that it was created on the facts of the case, and Milligan was granted therapy on equitable grounds. The claim was based on a resulting trust basis and not on the fraud committed. The reliance strict test principle, has been though re-confirmed in this case.

Patel v Mirza resettled the illegality defence principle of *EX TURPI CAUSA NON ORITUR ACTIO,* establishing a three - stage test. In this case, irrespective of the illegality involved in the transaction, the claimant was granted therapy and the money were returned to him despite the fact that there was a contract to commit a crime with the involvement of the claimant.

Tinsley v Milligan is old, not applicable any more, law. It is up to the Cyprus Supreme Court to refrain from applying the old test and settle *EX TURPI CAUSA NON ORITUR ACTIO* principle on its new dimensions.

The recent case of the Supreme Court of Cyprus, *Civil Appeal No. 14/2014, Andronikou v Mavropoulou and another dated 30/09/*2021 and all the cases that apply the principles and dogmatism of *Holman v Johnson* and *Tinsley v Milligan,* would be more justifiable to be resettled and overruled the soonest possible, as *Patel v Mirza* did for *Tinsley v Milligan*.

Logic over ethic

What the current trend shows, is that the logic of the 21st century, has overruled the strict ethical moral behaviour of the 17th century. We have a movement from the *ethic strict moral based approach*, to a new *logic-based approach* where discretionary powers are granted to the court to think and decide subject to the particular facts of the case and the underlying public policy principles[35].

The new way of thinking and approach, has also been approved by the High Court of Australia in *Nelson v Nelson*[36] which was a case setting the pavement for *Patel v Mirza.*

In *Nelson v Nelson* the High Court of Australia, accepted the basic rule established in *Holman v Johnson* but as they said, the regulatory, legal and sociological background of the late 20th century (issued in 1995), a completely different one from the one in 17th century and having this factual background, the defence of illegality must be treated accordingly by applying a discretionary approach. As has been said by McHugh J, in *Nelson v Nelson* at page 611:

"… the doctrine of illegality expounded in Holman was formulated in a society that was vastly different from that which exists today. It was a society that was much less regulated. With the rapid expansion of regulation, it is understandable that the legal environment in which the doctrine of illegality operates has changed. The underlying policy of Holman still

[35] *See comments by Alastair Hudson, in Understanding Equity and Trusts, Seventh Edition 2022 at page 97 under title: The preference of logic over ethical behaviour.*

[36] [1995] 184 CLR 538, it is discussed with relevant comments by Polyvios G. Polyviou in his book "The Law of Contracts" at pages 641-643.

valid today – the courts must not condone or assist a breach of statute, nor they help to frustrate the operation of a statute….".

Nelson v Nelson considered essentially the same issues as in Tinsley v Milligan, which it declined to follow. Nelson v Nelson was emphatically approved in Patel v Mirza.

To re-shape the principle

The defence of illegality as is now applicable in Cyprus, must be re-shaped in order to follow the current approach and principles as stated in *Patel v Mirza*. *Patel v Mirza* is a triumph of the legal system[37]. It wiped effectively the rules promoted by *Tinsley v Milligan* and requires the courts to reach the best decision on illegality by applying and balancing a range of factors.

Our courts now have the relevant justification to follow a flexible approach to reach justice and fairness in such a complicated and rather difficult concept. They should have a discretion where illegality is concerned and this discretion must be used effectively for the promotion of justice in cases of all aspects of the law where the defence of illegality is put forward, whether in contract, tort, criminal, company, fiduciary, employment, trust, litigation or otherwise.

The old concept and strict approach should also become old for Cyprus as well as it has become old for UK and other commonwealth countries. We are in the 21st century, in the era of blockchain, artificial intelligence, smart contracts and in the era where technology rules and the law follows. In such a moving world, what applied yesterday is not valid today, our courts should grasp the message and adapt rules, principles and procedures to meet the challenge.

We shall end this article with what McHugh J, in *Nelson v Nelson* described as unsatisfactory a doctrine of illegality that depended upon the state of the pleadings. He said at p 611:

[37] Hart Studies in Private Law, 2018, ILLEGALITY AFTER PATEL V MIRZA, Edited by Sarah Green and Alan Bogg, at page 24 "A new Dawn for the Law of Illegality", by Andrew Burrows.

"….. However, the Holman rule, stated in the bald dictum: 'No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act' is too extreme and inflexible to represent sound legal policy in the late twentieth century even when account is taken of the recognised exceptions to this dictum."

He also said at pp 612-613:

"It is not in accord with contemporaneous notions of justice that the penalty for breaching a law or frustrating its policy should be disproportionate to the seriousness of the breach. The seriousness of the illegality must be judged by reference to the statute whose terms or policy is contravened. It cannot be assessed in a vacuum. The statute must always be the reference point for determining the seriousness of the illegality."

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