IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 5

Civil Appeal No 63 of 2017

Between

(1) OCHROID TRADING LIMITED (FORMERLY KNOWN AS ORION TRADING LIMITED)
(2) OLE PRYTZ RASMUSSEN

… *Appellants*

And

(1) CHUA SIOK LUI (TRADING AS VIE IMPORT & EXPORT)
(2) SIM ENG TONG

… *Respondents*

In the matter of Suit No 238 of 2014

Between

(1) OCHROID TRADING LIMITED (FORMERLY KNOWN AS ORION TRADING LIMITED)
(2) OLE PRYTZ RASMUSSEN

… *Plaintiffs*

And

(1) CHUA SIOK LUI (TRADING AS VIE IMPORT & EXPORT)
(2) SIM ENG TONG

… *Defendants*

JUDGMENT

[Contract] — [Illegality and public policy]

[Credit and Security] — [Money and moneylenders] — [Illegal moneylending]

[Restitution] — [Unjust enrichment] — [Illegality and public policy]

TABLE OF CONTENTS

Ochroid Trading Ltd and another
v
Chua Siok Lui (trading as VIE Import & Export) and another

[2018] SGCA 5

Court of Appeal — Civil Appeal No 63 of 2017
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Tay Yong Kwang JA and Steven Chong JA
16 October 2017

22 January 2018 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2017] SGHC 56 ("the Judgment") dismissing the Appellants' claim for the return of monies (including alleged "profit") pursuant to 76 agreements. The Appellants mount their claim against the First Respondent in contract (for a total sum of $10,253,845, which includes the alleged "profit") or, alternatively, in unjust enrichment (for only the principal sums totalling $8,909,500 without the "profit"). They also claim against the First Respondent and the Second Respondent for both fraudulent misrepresentation as well as for conspiring to defraud them.

2 The primary issue arising from the Appellants' claim against the First

Respondent in contract is legally straightforward, albeit factually intensive – whether the claim fails because the agreements were illegal moneylending contracts which are unenforceable under the Moneylenders Act (Cap 188, 1985 Rev Ed) ("the MLA").

3 The alternative claim in unjust enrichment, however, is more difficult and legally significant. It concerns the issue of what impact, if any, the illegality of a contract has on an independent claim in unjust enrichment to recover the benefits conferred thereunder. This is a vexing area of the law, particularly after the recent landmark decision of the UK Supreme Court in *Patel v Mirza* [2017] AC 467 ("*Patel*"), in which the majority of a specially convened nine-judge *coram* dramatically shifted the law by replacing the traditional rule-based approach towards the doctrine of illegality with a discretionary policy-based test. To the extent that the present case concerns potential *statutory* illegality (as opposed to common law illegality), *Patel* is not, strictly speaking, relevant as the court in that decision confined its pronouncements to illegality at common law (although that in itself raises a difficulty which we shall elaborate upon later in this judgment). However, to the extent that the judges in *Patel* rendered observations on the restitutionary recovery of benefits conferred under an illegal contract through a claim in unjust enrichment as well as the impact of such recovery on traditional and established legal avenues of restitutionary recovery via doctrines such as *locus poenitentiae*, such observations are in fact directly relevant to the present case.

4 We would also like to take this opportunity to set out our views on the general relevance of *Patel* in Singapore law in order to clarify what the local position is on the doctrine of illegality and public policy in the context of unlawful contracts, and, in particular, what impact (if any) *Patel* has on the decision of this Court in *Ting Siew May v Boon Lay Choo and another* [2014]

3 SLR 609 ("*Ting Siew May*"). Before proceeding to do so, we first set out the factual background of the present case, a summary of the Judge's decision, as well as the issues that are raised in the present appeal.

The facts

Parties to the dispute

5 The Second Appellant ("Mr Ole") is the sole director and shareholder of the First Appellant ("Orion"). He is an experienced businessman who has been involved in various businesses since the 1980s, primarily in the retail of beverages and fruit juices. Mr Ole is married to Mdm Lai Oi Heng ("Mdm Lai"). Mdm Lai has been in charge of managing the couple's joint personal portfolio by channelling their wealth towards various investments since the 1970s.

6 The Second Respondent ("Mr Sim") is an entrepreneur. He is the mentor of the First Respondent ("Ms Chua"), who assisted him in his business. In 2003, Mr Sim and Ms Chua started a sole proprietorship, VIE Import and Export ("VIE"), with Ms Chua as its registered owner. VIE was in the business of general wholesale trade until it was de-registered in 2012.

Background to the dispute

7 Mdm Lai first met the Respondents around the end of 2003 when she obtained Mr Sim's help to settle a dispute. Mdm Lai and Mr Sim became good friends.

8 Subsequently, from early 2005, Mdm Lai and VIE entered into a series of agreements. The agreements were recorded in writing. On their face, they were for Mdm Lai to provide "loans" to VIE for the purchase and resale of

specified foods and food-related products overseas. The agreements provided that the funds were to be repaid with a "profit" on a stipulated date ("the Repayment Date"). Each agreement was also supported by a tax invoice from VIE stating the type, quantity and price of the goods which it related to.

9 At Mdm Lai's request, the party providing the funds under the agreements was changed from Mdm Lai to Orion around end 2007 (hereinafter referred to as "the Orion Agreements"), and then from Orion to Mr Ole from about end February to March 2008 (hereinafter referred to as "the Ole Agreements"). In total, between 2005 and early 2008, there were 740 such agreements between Mdm Lai, Orion or Mr Ole (as the party providing the funds) and VIE under which more than $58m was disbursed ("the Agreements").

10 Both sides accept that the Agreements are not entirely proper. In particular, it is common ground that the tax invoices are not genuine documents and do not reflect actual transactions performed by VIE. What is disputed is the true nature of the Agreements and the events which transpired during the material period.

11 Subsequently, VIE failed to repay the Appellants under the 76 Orion and Ole Agreements, which were concluded between December 2007 and March 2008. The sum outstanding under the Orion and Ole Agreements was $10,253,845, comprising $8,909,500 as the principal sums yet to be repaid and $1,344,345 as the "profit" due to the Appellants. The Appellants therefore sued Ms Chua (trading as VIE) for breach of contract (for the entire outstanding sum) and in unjust enrichment (for the unpaid principal sums alone). They also sued Ms Chua and Mr Sim for falsely representing to them that the monies were for business purposes and for conspiring to defraud them. The two latter claims are

therefore the only substantive causes of action against Mr Sim.

12 It should be noted from the outset that the claims in contract and unjust enrichment are against Ms Chua in her capacity as the sole proprietor of VIE. In fact, it was VIE which was the contracting party to the Agreements as made clear by the wording of the contracts, and the fact that they were endorsed with VIE's stamp. In this regard, it is undisputed that Mr Sim was the main controller of VIE and Ms Chua was acting as his assistant.

The decision below

13 In the proceedings below, the High Court dismissed the Appellants' claims against the Respondents in full. We will examine the Judge's analysis of each claim in greater detail in the course of our judgment, but at this stage it suffices to set out a brief summary of her grounds of decision.

14 First, on the breach of contract claim, the Judge found that:

(a) The Agreements were based on a template dictated by Mdm Lai who insisted on an invoice (which she knew to be false) to accompany each Agreement so that the transactions would not look like moneylending transactions (at [48] of the Judgment);

(b) The objective language of the Agreements and the substance of the transactions indicated that the Orion and Ole Agreements were loan contracts rather than "investments" as claimed by the Appellants (at [47]); and

(c) The evidence demonstrated that the Appellants were unlicensed moneylenders under the MLA and the Orion and Ole Agreements were unenforceable under s 15 of the same Act (at [80]).

15 Second, on the unjust enrichment claim, the Judge found that, since the Orion and Ole Agreements were unenforceable under s 15 of the MLA, the claim in unjust enrichment should also fail. The alternative claim was a backdoor attempt to enforce an unenforceable loan contract (at [84]).

16 Third, on the claim in fraudulent misrepresentation, the Judge found that there would have been no representation by the Respondents to the Appellants or to Mdm Lai that the monies advanced to VIE would be used to purchase the goods mentioned in the invoices, let alone any reliance placed by them on any such representation or on the invoices. This was because the Agreements were moneylending transactions and it was Mdm Lai who insisted on the fabricated invoices to mask the nature of the Agreements (at [91]).

17 Fourth, on the claim in conspiracy to defraud, there was no agreement between the Respondents to do certain acts with the intent to cause damage to the Appellants. Once again, the manner in which the Agreements were structured with the accompanying false invoices was done with the full knowledge of Mdm Lai and the Appellants. The monies advanced under the Agreements were thus purely loans and there were no terms limiting their use (at [92]).

The issues in this appeal

18 In this appeal, there are three main issues before us:

(a) Whether the Orion and Ole Agreements fall foul of the MLA and are thus unenforceable;

(b) If so, whether there can nevertheless be restitutionary recovery of the principal sums disbursed under the Orion and Ole Agreements pursuant to an independent cause of action in unjust enrichment; and

(c) Whether the claims in fraudulent misrepresentation and conspiracy to defraud are made out against the Respondents.

Our decision

19 Before we turn to our analysis of the issues in the present appeal, we first set out the law on the doctrine of illegality and public policy in the context of unlawful contracts.

The doctrine of illegality and public policy in the context of unlawful contracts

Introduction

20 As this Court observed in *Ting Siew May* (at [33]), "[i]t bears repeating that the law relating to illegality and public policy is generally confused (and confusing)". This is not surprising, given the very nature of the subject itself. Indeed, the oftimes elusive nature of the concept of public policy is, as we observed in that same case, "an unruly horse and must therefore be applied wisely". We say this only to underscore the important threshold point that any approach towards this very difficult subject in the common law of contract needs, in the circumstances, to be as straightforward as possible. Indeed, if the general approach is unclear and/or engenders uncertainty, the existing difficulties will only be exacerbated, which will not conduce towards the ultimate aim of the courts in achieving justice and fairness in the case at hand while upholding the integrity of the legal system. As we will elaborate upon below, the approach adopted in *Patel* has, with respect, generated more

uncertainty in introducing even more discretion in an area of contract law that is already excessively fluid. What is required, in our view, is a legal framework that is not only as comprehensible as is possible but also practically workable. Looked at in this light, it might be appropriate to commence with an overview of the present legal position in Singapore before proceeding to consider the decision in *Patel* and its impact on the law in our jurisdiction.

The present legal position in Singapore

(1) Introduction

21 The most recent authority outlining ***the present legal position in Singapore*** is that of this Court in *Ting Siew May*. Although we do not propose to re-traverse ground that has already been covered in some detail in that particular decision, we will summarise, where relevant, the principles which we laid down in that case.

(2) The *first* stage – is *the contract* prohibited?

(A) NO RECOVERY UNDER AN ILLEGAL CONTRACT

22 The law of illegality and public policy in the law of contract has traditionally been divided in two broad (or general) areas – *statutory* illegality and illegality at *common law* (see *Ting Siew May* at [27]). However, the *common thread* running through both areas is this – the ***first stage*** of the inquiry is to ascertain whether ***the contract*** (as opposed to merely *the conduct*) is ***prohibited***. If, indeed, *the contract* is prohibited, then there can be ***no recovery whatsoever pursuant to the (illegal) contract***; put simply, the contract concerned is ***void and unenforceable*** and ***cannot*** *be* ***"saved"*** *by any* ***balancing (or, indeed, any other) process***.

23 The strict rule that *no recovery* is permitted *under a contract* that is prohibited on the basis of illegality can be traced back to the celebrated decision of Lord Mansfield CJ in *Holman v Johnson* (1775) 1 Cowp 341 ("*Holman v Johnson*") at 343:

> 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 the 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 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. So if the plaintiff and defendant were to change 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***. [emphasis added in bold italics]

24 From this passage, the two Latin maxims which have dominated this doctrine can be extracted. The first is the maxim *ex turpi causa non oritur actio* (*ie*, from a dishonourable cause, an action does not arise). The second states that *in pari delicto potior est conditio defendentis* (*ie*, in equal fault, better is the condition of the defendant). These maxims, which have been used interchangeably by the courts, established themselves as a rule of the common law that the court will not assist a plaintiff whose claim is based on an illegal contract (see J K Grodecki, "In Pari Delicto Potior Est Conditio Defendentis" (1955) 71 LQR 254 ("*Grodecki*") at pp 256–258).

25 This traditional position, which left no discretion to the courts, was sometimes harsh. But as Lord Mansfield emphasised in *Holman v Johnson*, the focus was *not* on achieving justice between the parties. The defendant may be

equally undeserving, and it was not for his sake that the rule operated. Rather, it was premised on the unworthiness of the plaintiff and the broader public policy in protecting the integrity of the courts.

26 This last-mentioned point is of the first importance because a ***contrary*** *approach* was in fact adopted in *Patel*; as we shall see below, the *majority* of the UK Supreme Court in *Patel* adopted a ***balancing*** *exercise* at *this* particular stage (*viz*, the ***first*** *stage* of the inquiry), thereby ***departing from the strict orthodox position***. The important issue that arises is ***whether the Singapore courts ought now to adopt the discretionary approach that was mooted by the majority in*** **Patel** – and is one that we will deal with later in this judgment. For now, what we are concerned with in this section of our judgment is the ***present*** legal position in Singapore. As will be made clear, the position in Singapore is largely in line with the traditional strict position, subject to one important *caveat* that was elucidated in *Ting Siew May*, which is outlined at [31]–[41] below.

(B) STATUTORY ILLEGALITY

27 We start with the principles on ***statutory illegality***. Where it is alleged that *the contract* is *prohibited* by statute, the court will have to examine the *legislative purpose* of the relevant provision in order to determine whether the provision was intended to prohibit *the contract* (and not merely the illegal *conduct*). This is a question of *statutory interpretation*.

28 In *Ting Siew May*, this Court approved the seminal judgment of Devlin J (as he then was) in *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267 ("*St John Shipping*"), and the nuanced approach to statutory illegality laid down in that case (see, generally, *Ting Siew May* at [103]−[116]). The fundamental question is whether the statutory provision concerned is intended to prohibit only *the conduct* of the parties or whether it is, instead, intended to

prohibit not only the conduct *but also the contract* (see *Ting Siew May* at [106]). Where the statutory provision is clear, this would be a situation of "*express* prohibition" (see *Ting Siew May* at [107]–[109]). In so far as the category of "*implied* prohibition" is concerned, the court will be slow to imply the statutory prohibition of contracts. Thus, it will not be held that any contract or class of contracts is impliedly prohibited by statute unless there is a "clear implication" or "necessary inference" that this was what the statute intended (see *Ting Siew May* at [110]). Judicial reticence in this particular regard is warranted as *statutory illegality generally takes no account of the parties' subjective intentions or relative culpability* and could render contracts unenforceable even where the infraction was committed unwittingly. The restricted approach to implied prohibition is also justified given the proliferation of administrative and regulatory provisions in modern legislation (see *Ting Siew May* at [111]). At the same time, any concern that contracts involving statutory contraventions might go unpunished will be addressed by the common law principles on contractual illegality, to which we now turn.

(C) COMMON LAW ILLEGALITY

29 In so far as illegality at ***common law*** is concerned, the question is whether the contract falls foul of one of the *established heads of common law public policy*. The heads of public policy at common law which would render a contract unenforceable were developed over time. These include contracts prejudicial to the administration of justice (including contracts to stifle a prosecution and contracts savouring of maintenance or champerty); contracts to deceive public authorities; contracts to oust the jurisdiction of the courts; contracts to commit a crime, tort or fraud; contracts prejudicial to public safety; contracts prejudicial to the status of marriage (including marriage brokage contracts as well as agreements by married persons to marry and agreements

between spouses for future separation); contracts promoting sexual immorality; contracts that are liable to corrupt public life; and contracts restricting personal liberty (see "Illegality and Public Policy" in ch 13 of *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*Illegality and Public Policy in Singapore*") at paras 13.065–13.113).

30 In *Ting Siew May*, we reiterated the role of the established heads of common law public policy (at [27]–[28]; see, also, *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918 at [52]). In this regard, we should emphasise that although the categories of illegality at common law are not closed, the courts will not readily add new categories. There is also always the issue as to whether, as society changes, the existing categories themselves will need to be modified or even (in extreme cases) done away with. The entire legal enterprise in this particular sphere is exacerbated by the fact that, as already noted above, the very nature of public policy is both fluid and problematic.

31 One particular category of contracts which gave rise to much difficulty comprised contracts tainted by illegality, but which are not expressly or impliedly prohibited by statute nor contrary to one of the established heads of common law public policy. In particular, there was much confusion over contracts that are not for the express purpose of committing a crime, tort or fraud (which are clearly unenforceable) but which nevertheless involve the commission of a legal wrong either in their formation, purpose or manner of performance. The principle adopted in the English cases was that the court would refuse to enforce a contract which in itself was not unlawful but made, at the time the contract was entered into, with the intention of one or both parties of using the contract for the commission of a legal wrong or carrying out unlawful conduct (see *Alexander v Rayson* [1936] 1 KB 169 ("*Alexander*") at 182; *St John Shipping* at 283). The difficulty arose from the broad nature of this

principle, which could potentially render unenforceable a great many contracts, and the uncertainty over the degree of knowledge or participation in the illegal enterprise required before a plaintiff would be precluded from bringing a claim under the contract.

(I) TING SIEW MAY V BOON LAY CHOO

32 The decision of this Court in *Ting Siew May* principally concerned this difficult category of contracts which are not illegal *per se* but which nevertheless involve the commission of a legal wrong.

33 The case concerned an option to purchase a property ("the Option") which was granted by the appellant to the respondents on 13 October 2012. The Option was backdated to 4 October 2012 at the respondents' request. This was in order that the respondents could obtain a housing loan from a bank ("the Bank") on the more favourable terms allowed prior to the amendment to MAS Notice No 632 issued by the Monetary Authority of Singapore on 5 October 2012 ("the 5 October Notice"), which lowered the permissible loan-to-value ratio of residential property loans for borrowers in the respondents' position. Subsequently, the appellant withdrew her offer as provided in the Option, stating that she did not want to be a party to any illegality or irregularity. Correspondence between the parties' solicitors ensued. Amongst other things, the respondents' solicitors proposed exercising the Option on the basis that it was dated 13 October 2012, the actual date of the appellant's signature, and that the respondents would obtain financing for the purchase on that basis. However, no resolution was reached. The respondents applied to the High Court for a declaration that the Option was valid and binding on the appellant and for an order for specific performance of the Option by the appellant or, alternatively, damages. The High Court granted both the declaration and the order for specific

performance sought by the respondents. The appellant appealed against the decision that the Option was declared valid and binding on the appellant.

34 The issue before the Court of Appeal, therefore, was whether the Option was valid and enforceable. The Court held that there was neither express nor implied statutory prohibition of the Option. Nevertheless, it was found that the Option fell within the principles of common law illegality.

35 In particular, taking the cue from *St John Shipping* once again, it was accepted that *there is a* ***broad and general category of contracts illegal at common law comprising contracts which are not unlawful*** **per se** ***but entered into with the object of committing an illegal act***. This category depends on ***the intention of one or both of the contracting parties to break the law at the time the contract was made***. It includes contracts entered into with the object of using the *subject-matter* of the contract for an illegal purpose, contracts entered into with the intention of using the *contractual documentation* for an illegal purpose, as well as contracts which are intended to be performed in an *illegal manner*. This category also comprises contracts entered into with the intention of contravening a statutory provision, although not prohibited by that provision *per se* (at [43]–[45], [77] and [112]).

36 Having recognised this general category of common law illegality, the Court acknowledged that it would be unjust to lay down a strict rule that all contracts falling within this broad category would be automatically unenforceable. There might be legal wrongs intended to be committed by one or more parties which are *relatively trivial* and it would be *disproportionate* to render the contract void and unenforceable in such situations (at [46]). Therefore, it was held that the application of the doctrine of illegality to *this*

particular category of contracts is subject to ***the (limiting) principle of proportionality***.

37 In laying down the principle of proportionality, the Court relied on law reform proposals by both the Law Commission of England and Wales (Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (LCCP No 154, 1999) ("*Illegal Transactions (1999)*"); Law Commission of England and Wales, *The Illegality Defence* (LCCP No 189, 2009) ("*The Illegality Defence (2009)*")) and the Law Reform Committee of the Singapore Academy of Law (*Relief from Unenforceability of Illegal Contracts and Trusts* (5 July 2002) ("*Relief from Unenforceability of Illegal Contracts and Trusts*")). Reference was also made to the English case of *ParkingEye Ltd v Somerfield Stores Ltd* [2013] QB 840 in which the English Court of Appeal held that the defence of illegality should be rejected if to disallow the claim on the ground of illegality would lead to a disproportionate result.

38 At this juncture, we reproduce the material part of the judgment in *Ting Siew May* that sets out the principle of proportionality (at [66]–[71]):

> 66 We would therefore agree that where a contract is entered into with the object of committing an illegal act, the general approach that the courts should undertake is to examine the relevant policy considerations underlying the illegality principle so as to produce a *proportionate* response to the illegality in each case. As alluded to above, this was the approach advocated by the English Law Commission and endorsed by Toulson LJ in *ParkingEye* ([49] *supra*). The English Law Commission in *The Illegality Defence (2009)* ([61] *supra*) at paras 3.126–3.135 considered that the factors relevant to assessing proportionality included: (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the seriousness of the offence; (c) the causal connection between the claim and the illegal conduct; (d) the conduct of the parties; and (e) the proportionality of denying the claim (similar

factors were previously stated in *Illegal Transactions (1999)* ([45] *supra*) at paras 7.27–7.43).

67 Factor (c) above relates to how closely the unlawful conduct is connected to the particular claim. It is in substance similar to the principle of remoteness of the illegality, which was the very pith and marrow of Prof Furmston's view as set out above (at [54]), and which (as we have seen) was also applied in *Madysen*, *Anglo Petroleum* ([55] *supra*) and (most recently) *ParkingEye*. This principle of remoteness of the illegality means that some real or central (and not merely remote) connection must be demonstrated by the party relying on the defence of illegality between the contract concerned and the unlawful intention (whether that unlawful intention relates to a contravention of statute or the common law). We have also noted above that a key indication as to whether the illegality is too remote from the contract lies in whether any overt step in carrying out the unlawful intention was taken in the contract itself (see above at [56]).

68 In so far as the factor (e) at [66] above concerning the proportionality of denying the claim is concerned, we would observe from the commentary on this factor that it in fact relates to the consequences of denying the claim (see *The Illegality Defence (2009)* at paras 3.135). Proportionality is therefore not simply one of the factors to be considered, but applies as *an overarching principle* for the court to determine whether denial of the relief sought is a *proportionate* response to the illegality.

69 It should be noted that the factors first proposed by the English Law Commission in *Illegal Transactions 1999* were also discussed by the Law Reform Committee of the Singapore Academy of Law in its report entitled *Relief from Unenforceability of Illegal Contracts and Trusts* (5 July 2002) (at para 8.10) and adopted in a modified (but substantially similar) form in the Committee's proposed draft bill, entitled "Illegal Transactions (Relief) Act 2002", which accompanied the report. The relevant section of the draft bill reads as follows:

> **Relevant considerations**
>
> **6.**—(1) In granting or refusing to grant relief … the court shall have regard to all relevant circumstances including —
>
> (*a*) the public interest;
>
> (*b*) the seriousness of the illegality;
>
> (*c*) whether denying relief will act as a deterrent;

> (*d*) whether denying relief will further the purpose of the rule which renders the transaction illegal;
>
> (*e*) whether denying relief is proportionate to the illegality involved;
>
> (*f*) the circumstances of the formation or performance of the illegal transaction, including the intent, knowledge, conduct and relationship of the parties;
>
> (*g*) whether any party to the illegal transaction was, at a material time, acting under a mistake or fact or law;
>
> (*h*) the extent to which the illegal transaction has been performed;
>
> (*i*) whether the written law which renders the transaction illegal has been substantially complied with;
>
> (*j*) whether and to what extent the written law which renders the transaction illegal provides relief; and
>
> (*k*) other consequences of denying relief.

70 We would summarise the general factors which the courts should look at in assessing proportionality in the context of contracts entered into with the object of committing an illegal act as including the following: (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the remoteness or centrality of the illegality to the contract; (d) the object, intent, and conduct of the parties; and (e) the consequences of denying the claim.

71 It should be emphasised that this is not necessarily a conclusive list of factors and, more importantly, that these factors should not be applied in a rigid or mechanistic fashion. Rather, these factors should be applied to each individual case, and weighed and considered by the court in the context of the particular facts of that case itself. All this underscores the very *fact-centric* nature of the inquiry that has to be undertaken by the court in this regard. This is not perhaps entirely satisfactory when viewed from a strictly theoretical perspective but is, in our view, only to be expected in the *practical* context in which the *application* of the law to the relevant *facts* is involved (and in which the inherently difficult concept of public policy (see above at [33]–[35]) is also involved).

39 As is clear from the above passage, whilst the Court in *Ting Siew May did* apply a *balancing* exercise (based on ***proportionality***), it was ***only*** confined to *a* ***very limited*** sphere, namely, ***the general category of contracts which are not unlawful* per se*, but entered into with the object of committing an illegal act***. Therefore, such an approach would ***not*** apply to situations where the ***contract*** is ***prohibited*** (either expressly or impliedly by statute or because it falls foul of one of the established heads of common law public policy). Hence, while the decision in *Ting Siew May* developed and clarified the law on common law illegality, the case does ***not*** stand for the *wide* proposition that, in Singapore, a discretionary approach based on the proportionality principle has displaced the traditional approach under which, if the *contract* is held to be *prohibited*, then there can be *no recovery whatsoever pursuant to the (illegal) contract* (see [22]–[26] above).

40 This point is important for the present appeal because, as we shall see, the majority in *Patel* was prepared to apply a *balancing* exercise ***across the board in all cases of illegality at common law (albeit not in relation to statutory illegality)***. To reiterate, the Court in *Ting Siew May* applied ***the principle of proportionality in only a very limited sphere – in relation to common law illegality and only to the category of contracts which are not prohibited* per se*, but entered into with the object of committing an illegal act. As the law in Singapore presently stands, the principle does not apply where there has been statutory illegality that prohibits the contract concerned and/or a situation under common law illegality where the contract is prohibited under any of the established heads of common law public policy***. If a ***contract*** were to be ***prohibited*** in such a manner, then *the contract would be rendered* ***void and unenforceable*** *and* ***no*** *recovery* ***pursuant to the contract*** would be permitted (although ***restitutionary recovery*** might be possible under one or

more of the situations that are briefly set out in the next part of this judgment).

41 Before proceeding to the existing principles on the restitutionary recovery of benefits conferred under an illegal contract, we should also point out that, even in the more limited category of contracts examined in *Ting Siew May*, that case set out an approach based on ***proportionality***, ***whereas*** the balancing exercise adopted in *Patel* (*across the board* in relation to illegality at *common law*) is based, instead, on a broader ***"range of factors" approach*** (in which proportionality is *just one factor* to be considered).

(3) The *second* stage – if the contract is prohibited, could there nevertheless be *restitutionary* recovery of benefits conferred thereunder?

42 A finding that a contract is prohibited is *not necessarily* the end to the matter for there *might* be a ***second stage*** of the inquiry – which is to ascertain whether, *notwithstanding* the fact that there can be *no* recovery pursuant to the (illegal) contract, there *might*, nevertheless, be ***restitutionary*** *recovery* of the benefits conferred thereunder (*as opposed to* recovery of *full contractual damages*). Under the existing law, there are at least ***three*** possible legal avenues for such (restitutionary) recovery. From the outset, it should be emphasised that *the relief accorded by the court in these contexts is only by way of restitution – and* ***no more****; they do not allow the plaintiff to* ***enforce*** *or* ***profit from*** *the illegal contract as such*.

(A) *NOT* IN PARI DELICTO

43 The ***first*** avenue of restitutionary recovery, which is the corollary of the *in pari delicto* maxim, applies where the parties are ***not*** **in pari delicto** (*ie*, where the plaintiff is less blameworthy than the defendant). The maxim has, as its underlying premise, the idea that the party who is seeking restitutionary

recovery is *not* (or at least is *not legally deemed* to be) equally at fault *vis-à-vis* the other party. It should be emphasised that this principle does not entail a broad examination of the relative blameworthiness of each party. Instead, the maxim applies only in established situations, consisting of the following ***three*** categories:

(a) where the relevant legislation which prohibited the contract was a "***class protection statute***" that was intended to protect the class of persons to whom the plaintiff belonged (see, for example, the Privy Council decision (on appeal from the Court of Appeal for Eastern Africa) of *Kiriri Cotton Co Ltd v Ranchhoddas Keshavji Dewani* [1960] AC 192 applied by this Court in *Tokyo Investment Pte Ltd and another v Tan Chor Thing* [1993] 2 SLR(R) 467);

(b) where the plaintiff entered into the contract on the basis of ***fraud, duress or oppression*** (see, for example, the Court of King's Bench decision of *Smith v Bromley* (1760) 2 Doug KB 696 and the English Court of Appeal decision of *Shelley v Paddock* [1980] 1 QB 348); or

(c) where the plaintiff entered into the illegal transaction as a result of a ***mistake*** as to the facts constituting the illegality (see the decision of this Court in *Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2011] 2 SLR 865 ("*Aqua Art*") at [23]–[28]).

See, also, *Illegality and Public Policy in Singapore* at paras 13.129–13.136.

(B) LOCUS POENITENTIAE

44 The ***second*** possible avenue of restitutionary recovery is ***the doctrine of repentance (or timely repudiation) which is better known, in Latin, as the* locus poenitentiae *doctrine***. This doctrine enables a party to an illegal contract

to obtain (restitutionary) recovery of benefits that he has transferred pursuant to that contract if he "*repents*" in time, that is, *before* the illegal purpose is effected. Proverbially, that party is said to be permitted a *locus poenitentiae*, that is, a place for repentance – an opportunity to change one's mind and undo what had hitherto been done (see *Illegality and Public Policy in Singapore* at paras 13.155–13.157). The *rationale* for this doctrine is *to encourage contracting parties to back out of illegal contracts*.

45 The *locus poenitentiae* exception, as set out in the early cases, was available whenever the contract was not "*fully executed* and carried out" [emphasis added] (see the English High Court decision of *Wilson v Strugnell* (1881) 7 QBD 548 at 551; see, also, *Grodecki* at pp 261–263 as well as a leading English decision in *Taylor v Bowers* (1876) 1 QBD 291 ("*Taylor*")). In the late 19th and the 20th centuries, however, there were two developments which restricted the principle. First, in another leading English decision, *Kearley v Thomson* (1890) 24 QBD 742, it was held that no *locus poenitentiae* would be allowed if there was even "partial carrying into effect of an illegal purpose in a substantial manner" (at 747). This requirement was difficult to reconcile with the broader approach taken in earlier cases, particularly the leading English decision of *Taylor*. Second, in cases such as *Alexander* and the English High Court decision of *Bigos v Bousted* [1951] 1 All ER 92 ("*Bigos*"), a line was drawn between instances of "true repentance", where the plaintiff willingly withdrew from the illegal enterprise, and instances where the execution of the contract was frustrated by circumstances beyond the plaintiff's control. In other words, it was held that, in order for the doctrine to operate, there had to be *genuine and voluntary* "repentance" by the party seeking recovery.

46 In *Bigos*, for instance, Pritchard J drew a distinction between true "repentance" cases and so-called *frustration* cases, the latter of which could *not*

constitute "proper repentance". The latter situation was what the learned judge found to be present in *Bigos*: the person seeking recovery had *no* choice but to repent because the illegal purpose had been "frustrated" by external circumstances, namely the other party's breach of the contract. *However*, in the subsequent English Court of Appeal decision of *Tribe v Tribe* [1995] 3 WLR 913 ("*Tribe*"), Nourse and Millett LJJ were (at 926 and 938, respectively) of the view that, in a situation where the illegal scheme was simply no longer needed, the plaintiff's *voluntary withdrawal* from the illegal transaction was sufficient and *genuine repentance* was not necessary. In the words of Millett LJ (at 938):

> 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* … 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.

47 Whilst the approach adopted in *Tribe* is not unattractive, it might be queried whether the equities in a situation of "frustration" (as well as where the illegal purpose is no longer needed) would be such as to tilt the decision ***against*** recovery, in so far as the *rationale* of the doctrine is to *encourage timely withdrawal from the illegal enterprise*. The Singapore High Court in *Colombo Dockyard Ltd v Jayasinghe Athula Anthony (trading as Metro Maritime Services)* [2003] 1 SLR(R) 869 surveyed the relevant case law and appeared (at [130]−[140]) to adopt the approach taken in *Tribe*, which, as we have seen, diverged from the English decision of *Bigos* by emphasising only voluntariness of withdrawal – as opposed to genuineness of repentance.

48 In the more recent decision of this Court in *Aqua Art*, we referred (at [30]–[31]) to these contrary requirements, but did not make a definitive

pronouncement on which is to be applied in Singapore. We noted that, in the final analysis, it might perhaps be said that the two approaches overlap to some extent and that there may be no practical difference between genuineness and voluntariness when it comes to the application of the doctrine to a particular set of facts, if one accepts that the notion of genuineness does not connote a subjective feeling of remorse on the part of the plaintiff. To repeat our observations in *Aqua Art* (at [31]):

> There may well be an overlap between – or even coincidence of – these two elements, depending on the fact situation concerned. Indeed, if the relevant legal proposition is that the concept of genuineness is unnecessary in so far as it connotes a *subjective* feeling of *remorse* on the part of the party concerned … there may well be no practical difficulties inasmuch as the concept of voluntariness means that, on the facts of cases such as *Bigos*, the result would be the same … [emphasis in original]

49 In *Patel*, the majority of the UK Supreme Court did not consider it necessary to discuss the question of *locus poenitentiae*. However, the rest of the *coram* did consider the doctrine and endorsed the approach adopted in *Tribe*. In fact, they advocated for that doctrine to be ***further liberalised*** to allow recovery not just in cases where there is *no genuine repentance*, but even in instances where the illegal contract has been *fully executed*, as long as *restitutio in integrum* can be achieved in practical terms (see [92], [97], [100] and [104]–[105] below). We will return to this issue, and the impact of *Patel* on the doctrine of *locus poenitentiae* in Singapore later in our judgment (at [171]–[175] below).

(C) THE "INDEPENDENT CAUSE OF ACTION" EXCEPTION TO PROPERTY CLAIMS

50 The ***third***, and most controversial, possible avenue of restitutionary recovery is premised on recovery through ***an independent cause of action***. This is the flipside of what has been termed "*the reliance principle*": the notion that

a plaintiff cannot succeed if he has to "rely on" the illegal transaction in order to make out his cause of action. The reliance principle is much debated, and we will return to it, and the different conceptions of "reliance" which need to be disengaged, later in our judgment (see [127]–[138] below). For now, it suffices to note that recovery through an independent cause of action is permitted despite the illegality of the underlying contract because the plaintiff is *not* relying on the illegal contract in a *substantive legal manner* but, instead, on a cause of action that lies outside the sphere of the law of contract altogether. On a *normative* level, this exception is justified as it does *not* allow the plaintiff to profit from the illegal *contract* but simply puts the parties in the position they would have been in if they had never entered into the illegal transaction.

51 Traditionally, the independent causes of actions which have been recognised as allowing the recovery of benefits conferred under an illegal transaction include claims in *tort* and *the law of trusts* premised on the plaintiff's ***property or title***. In this regard, there are two important cases, the English Court of Appeal judgment of *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 ("*Bowmakers*") and the UK House of Lords decision in *Tinsley v Milligan* [1994] 1 AC 340 ("*Tinsley*").

(I) BOWMAKERS LTD V BARNET INSTRUMENTS LTD

52 *Bowmakers* concerned a claim in the *tort of conversion* based on the plaintiff's title in the relevant goods, which had been bailed to the defendants under an illegal contract of hire purchase. The defendants wrongfully sold the goods, and the plaintiff sought damages for the conversion. The defendants relied on the illegality of the contract as a defence. The English Court of Appeal allowed the claim in conversion, notwithstanding the illegality, on the basis that the plaintiff was "not relying on the [illegal] hiring agreements at all" (at 69).

In particular, it was held that a claim by a plaintiff to possess his own chattels will as a general rule be enforced "even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, *provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim*" [emphasis added] (at 71).

53 *Bowmakers* is a controversial case. The chief difficulty with its reasoning is the inescapable fact that even in a claim based upon title or proprietary interest, the plaintiff will have to rely at some point or other, on the illegal contract or transaction, if nothing else, to establish his title or proprietary interest in the subject-matter concerned (see *Illegality and Public Policy in Singapore* at paras 13.141–13.142). Nevertheless, the principle established in *Bowmakers* that recovery in the *proprietary context* is possible as long as the plaintiff does not have "to found his claim on the illegal contract or to plead its illegality" was endorsed and extended to proprietary claims *in equity* by the majority of the House of Lords in the famous (or perhaps infamous) case of *Tinsley*.

(II) TINSLEY V MILLIGAN

54 *Tinsley* concerned a claim in *resulting trust*. In that case, the parties both provided money for the purchase of a house in which they resided as lovers and which was also run as a lodging house. Although the common understanding was that there was to be joint ownership of the house, the house itself was conveyed only into the name of the plaintiff. Such a conveyance was in fact effected in order to enable the defendant to make false claims for social security benefits that would only be given in the event that the applicant did not own a

home. The parties later fell out, and the plaintiff moved out. The plaintiff subsequently gave the defendant notice to quit and brought an action for possession, claiming that the house was hers. The defendant brought a counterclaim for an order of sale and for a declaration that the property was held by the plaintiff on trust for the parties in equal shares.

55 The House held in favour of the defendant on resulting trust by a majority of three to two. The minority was of the view that recovery was precluded because the claim was in equity and fell within the scope of the maxim that "a court of equity will not assist a claimant who does not come to equity with clean hands", which was broader than the *Bowmakers* rule (*per* Lord Goff of Chieveley at 362). The majority, in contrast, held that the principle in *Bowmakers* was applicable to situations in ***both*** *common law and equity*.

56 In particular, the majority found that the illegality did not bar the claim because of the presumption of resulting trust, which meant that the defendant could establish her equitable interest in the property without relying in any way on the underlying illegal transaction. However, if the presumption of *advancement* had applied, then the claim would have failed as the plaintiff would have had to lead evidence sufficient to rebut the presumption and in so doing would normally have to plead, and give evidence of, the underlying illegal purpose. As Lord Browne-Wilkinson put it, "[a] party to an illegality can recover by virtue of a legal or equitable property interest *if, but only if, he can establish his title without relying on his own illegality*" [emphasis added] (at 375). The decision is also notable for the rejection by the House of Lords of the broader "public conscience test" (*viz*, whether the public conscience would be affronted by the allowance of the claim) developed in tort cases and applied by Nicholls LJ (as he then was) in the English Court of Appeal in *Tinsley v Milligan* [1992] 1 Ch 310.

57 The holding of the majority in *Tinsley* was – because of *its artificiality and possible arbitrariness in result* – the focus of a not insignificant amount of academic criticism (see, for example, Hugh Stowe, "The 'Unruly Horse' Has Bolted: *Tinsley* v *Milligan*" (1994) 57 MLR 441 at p 446). This was the case despite the fact that the decision had ample backing in the case law (see, for example, *ARPL Palaniappa Chettiar v PLAR Arunasalam Chettiar* [1962] AC 294 (Privy Council); *Gascoigne v Gascoigne* [1918] 1 KB 223 (English Court of Appeal); *In re Emery's Investments Trusts, Emery v Emery* [1959] 1 Ch 410 (English High Court); and *McEvoy v Belfast Banking Company Limited* [1934] NI 67 (Northern Ireland Court of Appeal); affirmed [1935] AC 24 (House of Lords); as well as *Tinker v Tinker* [1970] P 136 (English Court of Appeal), all of which were referred to in *Tinsley* itself (at 374)). Indeed, the English Court of Appeal in *Tribe*, in a fact situation where the rebutting of the presumption of advancement *was* necessary, avoided the harsh effects of the procedural distinction drawn in *Tinsley* by reference to the doctrine of *locus poenitentiae*, which we outlined earlier.

58 The decision of the House of Lords in *Tinsley* was also expressly rejected by the High Court of Australia in *Nelson v Nelson* (1995) 184 CLR 538 ("*Nelson*") on the basis that it was "neither satisfactory nor soundly based in legal policy" and would produce results which "are essentially random" (*per* McHugh J at [26]). We will return to *Nelson* as well as the criticisms of *Tinsley* later. At this point, it suffices to note that, despite its difficulties, *Tinsley*, and its formulation of the reliance principle as a formal or procedural test – which allows a plaintiff to obtain recovery if, but only if, he does not need to found his claim on the illegal contract or to plead its illegality in order to support his claim – remained a part of the English common law until it was recently rejected by the majority in *Patel*.

59 *Tinsley* has also been endorsed and applied in Singapore, including the decision of this Court in *Top Ten Entertainment Pte Ltd v Lucky Red Investments Ltd* [2004] 4 SLR(R) 559 ("*Top Ten Entertainment*"). In this regard, it has been held by the Singapore courts that *Tinsley* operates as a "special exception" to the doctrine of illegality *in the case of property rights* (see, for example, the Singapore High Court decision of *Chee Jok Heng Stephanie v Chang Yue Shoon* [2010] 3 SLR 1131 at [41] and [42], citing *Top Ten Entertainment*; see, also, the decision of this Court in *Shi Fang v Koh Pee Huat* [1996] 1 SLR(R) 906 where *Tinsley* was applied to a claim pursuant to a constructive trust).

(III) UNJUST ENRICHMENT AS A POSSIBLE INDEPENDENT CAUSE OF ACTION

60 The present appeal raises the further possibility that restitutionary recovery could be obtained through an independent cause of action in ***unjust enrichment***. This alternative route towards restitutionary recovery has been ventured in academic literature (see *Illegality and Public Policy in Singapore* at para 13.150; see, also, Andrew Phang, "Of Illegality and Presumptions – Australian Departures and Possible Solutions" (1996) 11 JCL 53). However, there is no Singapore authority as yet which has definitively recognised that a claim in unjust enrichment would fall within the "independent cause of action" exception, and thereby allow recovery of the benefits conferred under an illegal contract.

61 The decision which has come closest to exploring the issue is the judgment of this Court in *Top Ten Entertainment*. In that case, the Court observed that the reliance principle, as established in *Tinsley*, would preclude a claim for money had and received and/or on the basis of failure of consideration (*ie*, unjust enrichment in modern parlance) for the recovery of monies paid

under an illegal contract if the plaintiff has to rely on the illegal contract to establish his claim (at [34]). These observations, however, were *obiter dicta* as the relevant contracts in that case, which were tenancy agreements between the appellant tenant and the respondent landlord, were held to be not illegal in the first place.

62 The present case thus provides us with a useful opportunity to pronounce on the *scope*, as well as *limits*, of restitutionary recovery of the benefits conferred under an illegal contract through *an independent claim in unjust enrichment*.

(4) Summary of the present legal position in Singapore

63 As noted above, the ***present*** *law* of illegality and public policy in the Singapore context may be summed up as follows.

64 The court will first ascertain whether ***the contract*** is ***prohibited*** either pursuant to a *statute* (expressly or impliedly) and/or *an established head of common law public policy*. This is the ***first*** *stage* of the inquiry and, if the contract is indeed thus prohibited, there can be ***no recovery*** *pursuant to the (illegal) contract*. This is subject to the *caveat* that, in the general common law category of contracts which are not unlawful *per se* but entered into with the object of committing an illegal act (and ***only*** *in this category*), the proportionality principle laid down in *Ting Siew May* ought to be applied to determine if the contract is enforceable.

65 *However*, that may not be the end to the matter as a party who has transferred benefits pursuant to the illegal contract *might* be able to recover those benefits on a ***restitutionary*** *basis* (*as opposed to* recovery of *full contractual damages*). This is the ***second*** stage of the inquiry. We saw that there

were at least *three* possible legal avenues for such recovery – all of which have been summarised above (at [43]−[60]).

66 The present legal position in Singapore is thus relatively clear – at least in so far as *the legal approach* is concerned. Admittedly, the process of *application* of the relevant legal principles may be problematic but that is an inevitable part of adjudication and is common to all areas of the law. Having said that, and as alluded to above, there are issues which still need to be clarified, particularly the principles governing ***an independent claim in unjust enrichment*** for the recovery of benefits conferred under an illegal contract as well as the ***limits*** of such a claim.

Patel v Mirza

67 This brings us neatly to the judgment of the UK Supreme Court in *Patel*. The decision represents the current law on illegality and public policy in the UK. As we noted in our introduction, it is a landmark judgment. A bench of nine judges was convened to try to settle – once and for all – this problematic sphere of the private law. However, as we observed at the outset of this part of the judgment, any attempt to settle this particular area of the law of contract is always going to be an uphill task, to say the least. This is due – crudely put – to the nature of "the beast", which is at once harsh in its consequences yet fluid and elusive in its doctrinal form. Not surprisingly, perhaps, whilst the *coram* in *Patel* unanimously agreed on the *result*, the majority differed from the minority in so far as the ***actual reasoning*** was concerned.

68 In brief summary, *only the majority* (comprising Lord Toulson (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed)) adopted a balancing exercise (based on a broad "range of factors" approach). The

minority, on the other hand (comprising Lord Mance, Lord Clarke and Lord Sumption), adopted a rule-based approach largely in line with the traditional framework that precludes any recovery *under an illegal contract* (although they took an expansive view of the availability of *restitutionary recovery*). In our respectful view, whilst Lord Neuberger purported to adopt the view of the majority, his reasoning is best seen as straddling both that of the majority as well as the minority. In this section, we will examine the decision in *Patel* before we assess its impact (if any) on the present legal position in Singapore in the next part of our judgment.

(1) Preliminary points on the decision

69 Before we delve into the decision, it might be helpful to highlight a few points that have a bearing on the impact (if any) *Patel* may have on the development of the Singapore law of illegality and public policy.

70 The first preliminary point is that *Patel* did not purport to pronounce on the legal position in so far as *statutory* illegality is concerned. Presumably, therefore, the balancing exercise (via a "range of factors" approach) would ***not*** apply in the context of *statutory* illegality. We would only note parenthetically at this point that this results in a rather anomalous situation since, *ex hypothesi*, if a *contract* is prohibited, then it ought not, in principle, to matter whether that prohibition is by way of statute or the common law.

71 The second preliminary point is that, on a closer examination of the facts of *Patel* itself, it could be argued that the case was ***not*** *really about the* ***prohibition*** *of a* ***contract*** as such. As we shall see, *Patel* centred on the legal status of an agreement that amounted to a conspiracy to commit an offence of insider dealing under s 52 of the Criminal Justice Act 1993 (c 36) (UK).

However, s 63(2) of the same Act had provided that: "*No contract shall be void or unenforceable* by reason only of section 52." [emphasis added] (cited in *Patel* at [267]). If so, then the fact situation in *Patel* could be said to be ***analogous*** to that of *Ting Siew May* inasmuch as both cases concern a situation in which, *notwithstanding* the fact that there had been *illegal* ***conduct***, the ***contract*** between the relevant parties had ***not*** been ***prohibited*** (see [34] above). Having said that, it is clear that this was not a point taken up in the case of *Patel* itself. Thus, the court in *Patel* was concerned, not with the *enforcement* of the relevant contract or the question of whether it was *prohibited*, but with whether there could be *restitution* of the benefits conferred thereunder.

72 This leads us to the third preliminary point. The relevant cause of action which was the focus of the court in *Patel* was the plaintiff's claim premised on ***unjust enrichment***. The observations in that decision on the application of the doctrine of illegality to such a claim are therefore *directly relevant* to the issue which is before us in the present case – namely the scope, and limits, of restitutionary recovery of the benefits conferred under an illegal contract through an *independent cause of action in unjust enrichment*.

73 With these preliminary points in mind, let us now turn to the actual decision in *Patel* before assessing its impact (if any) on the current Singapore position.

(2) The decision in *Patel*

(A) THE FACTS AND CONTEXT

74 The circumstances immediately leading up to the case are worth noting. Prior to *Patel*, the traditional rule-based approach set out above had already been under immense scrutiny in the UK as a result of a series of three UK Supreme

Court decisions: *Hounga v Allen and another* [2014] 1 WLR 2889 ("*Hounga*"), *Les Laboratoires Servier and another v Apotex Inc and others* [2014] 3 WLR 1257 ("*Apotex Inc*") and *Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)* [2015] 2 WLR 1168 ("*Bilta*"). None of these cases involved a claim arising from an illegal contract. *Hounga* concerned a claim for the statutory tort of discrimination committed in the course of a dismissal. *Apotex Inc* dealt with a claim to enforce a cross-undertaking in damages given as a condition of an interlocutory injunction in the context of unsuccessful proceedings for patent infringement. And *Bilta* involved a company's claim against its directors for fraudulent trading. But these cases, along with earlier UK House of Lords authorities such as *Gray v Thames Trains Ltd and another* [2009] 1 AC 1339 and *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] 1 AC 1391, brought to the fore what Lord Toulson described in *Patel* at [81] as "a sharp division of opinion about the proper approach to the defence of illegality between, on the one hand, a strictly rule-based approach and, on the other hand, a more flexible approach by which the court would look at the policies underlying the doctrine and decide whether they militated in favour of the defence, taking into account a range of potentially relevant factors" (see *Patel* at [72]–[81]).

75 It is in this context that the case of *Patel* came to the English courts. The plaintiff, Mr Patel, transferred sums totalling £620,000 to the defendant, Mr Mirza, for the purpose of betting on the price of Royal Bank of Scotland ("RBS") shares, using advance insider information which Mr Mirza expected to obtain from RBS contacts regarding an anticipated government announcement which would affect the price of the shares. However, Mr Mirza's expectation of a government announcement proved to be mistaken and, hence, the intended betting did not take place. Nevertheless, Mr Mirza failed to repay the money

which Mr Patel had transferred to him, despite promises to do so. Mr Patel therefore brought a claim against Mr Mirza to recover these sums on the grounds of contract and unjust enrichment. The issue of illegality arose because the agreement between Mr Patel and Mr Mirza amounted to a conspiracy to commit an offence of insider trading under s 52 of the Criminal Justice Act 1993.

(B) DECISION OF THE ENGLISH HIGH COURT AND COURT OF APPEAL

76 At first instance, the English High Court applied the reliance principle based on *Tinsley* and denied recovery because Mr Patel had to rely upon his own illegality to establish his claim. The *locus poenitentiae* doctrine was considered but held not to apply because in the court's view, Mr Patel never himself withdrew from the illegal enterprise, nor did he do so voluntarily.

77 The English Court of Appeal reversed the High Court. The majority of the Court of Appeal agreed with the High Court on the reliance principle, but disagreed with its application of the *locus poenitentiae* doctrine. They found that the doctrine applied as long as the scheme had not been executed and there was no requirement for voluntary withdrawal.

78 Gloster LJ agreed with the majority on the outcome, but rejected the proposition that the illegality doctrine applied whenever a claim involved reliance on the plaintiff's own illegality. Instead, she adopted a broader approach and considered whether the policy underlying the rule which made the contract illegal would be *stultified* by allowing the claim. She judged that the policy underlying the offence of insider trading did not bar the return of the money particularly as Mr Patel was not seeking to make a benefit from wrongdoing. In the alternative, if the reliance principle did apply, Gloster LJ's assessment was that it was *not* necessary for Mr Patel to rely upon his own

illegality to establish his claim. In particular, Mr Patel did not need to establish that the intended betting on RBS shares was to be done with the benefit of insider information to make out his claim; it would have been enough for him to establish that the funds had been paid for the purpose of a speculation on the price of the shares which never took place.

79 The appeal to the UK Supreme Court was unanimously dismissed. However, *although both the majority and minority* ***agreed*** *on the* ***actual result***, they arrived at it through ***quite different reasoning***.

(C) THE MAJORITY

(I) LORD TOULSON (WITH WHOM LADY HALE, LORD KERR, LORD WILSON AND LORD HODGE AGREED)

80 The majority judgment was delivered by Lord Toulson (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed). After furnishing an excellent introduction and historical background to the law relating to contractual illegality, the learned judge focussed on the difficulties with the traditional approach, in particular the problems with the reliance principle laid down in *Tinsley*. He then proceeded to give an equally excellent as well as scholarly *comparative* account of the law in this particular sphere of the law of contract, focussing on the law in Australia, Canada and the USA. Lord Toulson also referred to the English Law Commission's proposals on law reform and the jurisprudential developments in the UK since those proposals.

81 After the above review of the illegality doctrine, Lord Toulson relied on the decision of McLachlin J (as she then was) in the Canadian Supreme Court decision of *Hall v Hebert* [1993] 2 SCR 159 ("*Hall v Herbert*") to identify the relevant question as follows (at [100]):

> [W]hether allowing recovery for something which was illegal would produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system.

82 He held that this was not a matter which could be determined mechanistically. Instead, he stated as follows (at [101]):

> … [One] cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) *considering* ***the underlying purpose of the prohibition*** *which has been transgressed*, (b) *considering conversely* ***any other relevant public policies*** *which may be rendered ineffective or less effective by denial of the claim*, and (c) *keeping in mind the possibility of overkill unless the law is applied with a due sense of* ***proportionality***. We are, after all, in the area of public policy. … [emphasis added in italics and bold italics]

83 On the third issue of disproportionality, Lord Toulson stated that various factors may be relevant and referred to the following non-exhaustive "range of factors" identified by Prof Andrew Burrows in his *Restatement of the English Law of Contract* (Oxford University Press, 2016) (at [93]):

> (a) how seriously illegal or contrary to public policy the conduct was;
>
> (b) whether the party seeking enforcement knew of, or intended, the conduct;
>
> (c) how central to the contract or its performance the conduct was;
>
> (d) how serious a sanction the denial of enforcement is for the party seeking enforcement;
>
> (e) whether denying enforcement will further the purpose of the rule which the conduct has infringed;
>
> (f) whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy;
>
> (g) whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct;
>
> (h) whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system.

84 It is crucial to note, however, that Lord Toulson made clear that this discretionary approach ***only applied to common law illegality*** as "***[t]he courts must obviously abide by the terms of any statute***" [emphasis added in bold italics] (at [109]).

85 In addition, the following important rulings of law were made by Lord Toulson:

(a) He agreed with the criticisms of the reliance rule as laid down in *Bowmakers* and *Tinsley* and held that it should no longer be followed (at [110]).

(b) Consequently, he ruled that unless a statute provides otherwise (expressly or by necessary implication), property can pass under a transaction which is illegal as a contract. There may be circumstances in which a court will refuse to lend its assistance to an owner to enforce his title as, for example, where to do so would be to assist the claimant in a drug trafficking operation, but the outcome should not depend on a procedural question (at [110]).

(c) The traditional avenues of restitutionary recovery, particularly the *locus poenitentiae* doctrine, did not need to be considered *because a person who satisfies the ordinary requirements of a claim in unjust enrichment will not* prima facie *be debarred from recovering money paid or property transferred by reason of the fact that the consideration which has failed was an unlawful consideration*. It was accepted that that there may be a particular reason for the court to refuse its assistance to the plaintiff, applying the policy-based reasoning set out above (at [82]), just as there may be a particular reason for the court to refuse to assist an owner to enforce his title to property, but such cases are likely

> to be *rare*. In this regard, Lord Toulson expressly referred to the *obiter dicta* by Heath J in *Tappenden v Randall* (1801) 2 Bos & Pul 467 ("*Tappenden*") at 471, that there might 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" (at [116]).

86 On the facts, Lord Toulson agreed with the reasoning of Gloster LJ in the Court of Appeal. She had "*correctly asked herself whether the policy underlying the rule which made the contract between Mr Patel and Mr Mirza illegal would be stultified if Mr Patel's claim in unjust enrichment were allowed*" [emphasis added] (at [115]). The policy underlying the relevant statutory provisions on insider trading did not require Mr Patel to forfeit the monies paid to Mr Mirza, as the monies were never used for the purpose for which they were paid and Mr Patel was seeking to unwind the arrangement, not profit from it.

(II) LORD KERR

87 Lord Kerr delivered a concurring judgment in which he described Lord Toulson's analysis as "a structured approach to a hitherto intractable problem" (at [123]). He criticised the rule-based approach for failing to deliver on its principal virtues of ease of application and predictability of outcome, pointing to the fact that the English Court of Appeal had been unable to agree whether Mr Patel had to rely on the illegality to establish his claim (at [134]). In addition, he pointed out that certainty and predictability of outcome are not necessarily virtues to which parties who had engaged in disreputable conduct can claim automatic entitlement (at [137]).

88 Lord Kerr also considered and rejected the approach of the minority, which we will turn to shortly, that the case could be dealt with in a straightforward manner by treating it as one of unjust enrichment where the parties would simply be returned "to the status quo ante where they should always have been" (at [128], quoting Lord Sumption). He saw the minority's approach as "a much more adventitious and less satisfactory route to the proper disposal of the case than that represented by a rounded assessment of the various public policy considerations at stake".

89 Finally, it is worth noting that both Lord Toulson and Lord Kerr's judgments were premised on the assumption that the approach which the majority laid down was to apply *not just to the contractual context*, but "in whatever context it arises" (*per* Lord Kerr at [142]) and "*to civil claims of all sorts, whether relating to contract, property, tort or unjust enrichment, and in a wide variety of circumstances*" [emphasis added] (*per* Lord Toulson at [2]).

(D) LORD NEUBERGER

90 In our respectful view, and as we suggested earlier, Lord Neuberger's judgment straddled both that of the majority and the minority. Our summary of his decision will reveal why we are of this view.

91 Lord Neuberger's judgment centred around what he termed "the Rule" (at [145]–[146]):

> [In] a claim for the return of money paid by the claimant to the defendant pursuant to a contract to carry out an illegal activity, and the illegal activity is not in the event proceeded with owing to matters beyond the control of either party… the general rule should in my view be that the claimant is entitled to the return of the money which he has paid.

92 Lord Neuberger held that this general rule that the plaintiff should be entitled to restitutionary relief where the illegal activity is not proceeded with applied regardless of whether the claim was in common law or equity (at [152]). It also did not depend on whether the plaintiff had "repented" (at [156]). Further, he could see no good reason for not extending the Rule to partly or *even wholly performed contracts* where *restitutio in integrum* could be achieved in practical terms (at [169]). In other words, Lord Neuberger's reasoning was based ***on a general principle of restitution as the*** **prima facie** ***outcome in cases where the contract is found to be illegal***.

93 The natural question which follows is what *exceptions*, if any, there are to the Rule. Lord Neuberger mentioned several specific exceptions, including cases where the defendant is in a class which is intended to be protected by the criminal legislation involved and situations where he was unaware of the facts which gave rise to the illegality (at [162]). But he accepted that there could be other situations where the Rule should not be applied. In this context, he adopted the policy-based "range of factors" approach suggested by Lord Toulson, which provided "as reliable and helpful guidance as it is possible to give in this difficult field" (at [174]).

94 Hence, it might appear that the approaches of the majority and Lord Neuberger are materially identical. They both start with restitution as the *prima facie* outcome subject to the policy-based "range of factors" analysis. However, a closer examination of the judgments reveals that there are at least two important differences between the analysis of the majority and that of Lord Neuberger.

(a) First, it is clear that Lord Neuberger's analysis only deals with the question of when *restitutionary relief* should be granted where a

contract has been found to be illegal (*ie*, the *second stage* of the analysis as set out above). The majority, by contrast, viewed the "range of factors" approach as applying even at the *first stage* when a court considers whether a claim in contract should be unenforceable due to illegality. Indeed, their view was that the approach ought to apply to "civil claims of all sorts" (see [89] above).

(b) Second, even though Lord Neuberger viewed the Rule as a *prima facie* outcome, he surprisingly took the view that it should apply even in extreme cases such as where "the claimant paid a sum to the defendant to commit a crime, such as a murder or a robbery … irrespective of whether the defendant had committed, or even attempted to commit, the crime" (at [176]). Lord Toulson, on the other hand, cited the very same example of a contract to commit a murder as one where even restitutionary relief would be denied because of the grossly immoral nature of the contract (at [116]).

(E) THE MINORITY

(I) INTRODUCTION

95 The minority in *Patel* comprised three judges and three judgments (by Lord Mance, Lord Clarke and Lord Sumption (with whom Lord Clarke also agreed)). They adopted a rule-based analysis premised on "the reliance principle" and the traditional position that there could be *no recovery* under an illegal contract. This strict starting point, however, was qualified by the minority's view that there is a *general right to restitution of money paid under an illegal contract*. Therefore, and this is a crucial point to be noted, even the judgment of the minority represented a significant shift from the traditional legal position as it involved a ***liberalisation*** of *the availability of restitutionary relief*.

(II) LORD MANCE

96 Lord Mance, like Lord Toulson, sought guidance from McLachlin J's judgment in *Hall v Hebert*. But he read the decision as calling for a limited approach to the effect of illegality "without depriving claimants of the opportunity to obtain damages for wrongs or to put themselves in the position in which they should have been" (at [192]).

97 This led him to the principle of *locus poenitentiae*, which he construed as a ***general principle of rescission*** that puts the parties "back in the position that they should have been in … but for the entry into of the contract which was or became affected and unenforceable by reason of the illegality" (at [193]). He viewed this principle as having been unduly limited with time, and held that there is "no reason why rescission should necessarily be restricted, as it was even in [the] earlier authorities, by reference to a test of execution or carrying out of the illegal purpose" (at [197]). He also did not view an imbalance or lack of parity of delict between the parties as a bar to rescission, though he accepted that, in accordance with general principle, factors such as change of position could well preclude recovery (at [198]). In his view (at [197]):

> The logic of the principle is that the illegal transaction should be disregarded, and the parties restored to the position in which they would have been, had they never entered into it. If and to the extent that the rescission on that basis remains possible, then prima facie it should be available.

98 Significantly, he commented on the scope of the reliance principle, and held that ***the principle is only engaged "in so far as it is reliance in order to profit from or otherwise enforce an illegal contract. Reliance in order to restore the status quo is unobjectionable"*** (at [199]).

99 Finally, Lord Mance eloquently articulated why he could not accept the "range of factors" approach that had been proposed by the majority (at [206]):

> *What is apparent is that this approach, would introduce not only a new era but entirely novel dimensions into any issue of illegality. Courts would be required to make a value judgment, by reference to a widely spread mélange of ingredients, about the overall "merits" or strengths, in a highly unspecific non-legal sense, of the respective claims of the public interest and of each of the parties.* But courts could only do so, by either allowing or disallowing enforcement of the contract as between the two parties to it, unless they were able (if and when this was possible) to adopt the yet further novelty, pioneered by the majority of the Australian court in *Nelson v Nelson* [1995] HCA 25, (1995) 184 CLR 538, of requiring the account to the public for any profit unjustifiably made at the public expense, as a condition of obtaining relief. [emphasis added]

(III) LORD CLARKE

100 Lord Clarke's judgment concurred with the reasoning of Lord Sumption (which we come to later) and emphasised that the case turned on "the application of orthodox principles of unjust enrichment, rescission and *restitutio in integrum*" (at [210]). At the same time, he recognised that even the reasoning of the minority did develop the law in two ways. First, it expanded the scope of restitutionary relief by providing that such relief should be available even when the contract is wholly performed as long as *restitutio in integrum* can be achieved in practical terms. Second, the minority recognised that some of the reasoning in *Tinsley* (in so far as it was based on a formal or procedural application of the reliance principle) could no longer stand (at [220]–[221]).

(IV) LORD SUMPTION (WITH WHOM LORD CLARKE AGREED)

101 Lord Sumption started out by endorsing the reliance test, which he defined as "whether the person making the claim is obliged to rely in support of it on an illegal act on his part" (at [234]). At first glance, this definition may appear to be an endorsement of the procedural approach set down in *Bowmakers*

and *Tinsley*. However, Lord Sumption clarified that the reliance test does not "depend on adventitious procedural matters, such as the rules of pleading, the incidence of the burden of proof and the various equitable presumptions" (at [237]).

102 He went on to consider the exceptions to the rule. First, he outlined the traditional position on the ***not* in pari delicto** doctrine (at [241]–[244]). Next, he turned to the question of whether and when illegality will bar a restitutionary action for the recovery of money paid under an illegal contract. On this point, he held that the same analysis should apply as in other unjust enrichment cases where a contract is held to be void or otherwise legally ineffective. In such cases, the ineffectiveness of the transaction operates as a ground for restitution even if the contract had been partly performed. He then held that the same reasoning should apply where the contract is unenforceable for illegality (at [247]–[248]). There was thus ***a general right to the restitution of money paid under an illegal contract***.

103 Lord Sumption viewed this restitutionary right as falling outside the scope of the reliance principle, properly understood. This was because restitution does not give effect to the illegal transaction, but merely recognises the ineffectiveness of the transaction and puts the parties in the position in which they would have been if they had never entered into the illegal transaction (at [250]).

104 In line with this analysis, Lord Sumption disapproved of the 20th century cases on the *locus poenitentiae* doctrine which restricted the right of restitution. He viewed these cases as placing an unnecessary moral gloss on a principle that "depends simply on the right to restitution that in principle

follows from the legal ineffectiveness of the contract under or in anticipation of which the money was paid" (at [252]).

105 Lord Sumption elaborated on the right to restitutionary relief as follows:

(a) Restitution should be available so long as mutual restitution of benefits remains possible even if the contract had been executed. In most such cases, the same facts will give rise to a defence of change of position (at [253]).

(b) The *dicta* in *Tappenden* that there may be some crimes so heinous that the courts will decline to award restitution in any circumstances was rejected on the basis that it was contrary to principle and difficult to apply. Hence, Lord Sumption was of the view that recovery should be available *even where monies have been paid under, for instance, a contract to commit a murder*. He stressed, however, that the scenario was rather artificial since in a case involving heinous crimes, both parties would be exposed to criminal confiscation orders (at [254]).

(c) Reference was made to the principle that an order for restitution should not be made if it would be functionally indistinguishable from an order for enforcement, as in a case of an illegal loan or foreign exchange transaction. It was accepted that the principle is sound, but no concluded view on the point was expressed (at [255]).

106 Finally, Lord Sumption considered the approach of the majority. His comprehensive response to the policy-based "range of factors" analysis at [261]–[264] can be summarised as follows:

(a) The real issue is whether the "range of factors" identified by the majority are to be regarded as: (i) part of the policy rationale of a legal rule and the various exceptions to that rule; or (ii) matters to be taken into account by a judge deciding in each case whether to apply the legal rule at all. It would be wrong to transform the policy factors which have gone into the development of the current rules into factors influencing an essentially discretionary decision about whether those rules should be applied.

(b) The "range of factors" test loses sight of the reason why legal rights can ever be defeated on account of their illegal factual basis. In particular, the "range of factors" test largely devalues the principle of consistency. In addition, extremes apart, it is difficult to reconcile with any kind of principle the notion that there may be degrees of illegality. If the application of the illegality principle is to depend on the court's view of how illegal the illegality was or how much it matters, there would appear to be no principle whatever to guide the evaluation other than the judge's gut instinct.

(c) The "range of factors" test would result in substantial uncertainty due to the incommensurate nature of the factors, which leaves a great deal to the judges' visceral reaction to particular facts. No one factor would ever be decisive as a matter of law, only in some cases on their particular facts. While certainty is not the only value, or even necessarily the most important, the case was concerned with the law of contract, an area in which the value of certainty is very great.

(d) Finally, the adoption of such a revolutionary change in hitherto accepted legal principle is unnecessary to achieve substantial justice in

> the great majority of cases. The unsatisfactory features of the illegality principle as it has traditionally been understood have often been overstated. When the law of illegality is looked at as a whole, it is apparent that although governed by rules of law, a considerable measure of flexibility is inherent in those rules. In particular, they are qualified by principled exceptions for: (i) cases in which the parties to the illegal act are not on the same legal footing; and (ii) cases in which an overriding statutory policy requires that the claimant should have a remedy notwithstanding his participation in the illegal act. Properly understood and applied, these exceptions substantially mitigate the arbitrary injustices which the illegality principle would otherwise produce. At the same time, the wider availability of restitutionary remedies which will result from the present decision will do much to mitigate the injustices which have hitherto resulted from the principle that the loss should lie where it falls.

107 For the above reasons, Lord Sumption rejected the majority's "range of factors" test and concluded on the following forceful note (at [265]):

> In my opinion, [the majority's approach] is far too vague and potentially far too wide to serve as the basis on which a person may be denied his legal rights. It converts a legal principle into an exercise of judicial discretion, in the process exhibiting all the vices of "complexity, uncertainty, arbitrariness and lack of transparency" which Lord Toulson attributes to the present law. I would not deny that in the past the law of illegality has been a mess. The proper response of this court is not to leave the problem to case by case evaluation by the lower courts by reference to a potentially unlimited range of factors, but to address the problem by supplying a framework of principle which accommodates legitimate concerns about the present law. We would be doing no service to the coherent development of the law if we simply substituted a new mess for the old one.

What is the impact of Patel *on the present legal position in Singapore?*

(1) Introduction

108 We now arrive at the question of how the law in Singapore should develop following *Patel*. The decision has, unsurprisingly, generated – and continues to generate – a wealth of academic commentary since its release (see, for example, James Goudkamp, "The End of An Era? Illegality in Private Law in the Supreme Court" (2017) 133 LQR 14 ("*Goudkamp*"); James C Fisher, "The Latest Word on Illegality" [2016] LMCLQ 483 ("*Fisher*"); Nicholas Strauss, "The Diminishing Power of the Defendant: Illegality After *Patel v Mirza*" [2016] RLR 145; Anthony Grabiner, "Illegality and Restitution Explained by the Supreme Court" [2017] CLJ 19 ("*Grabiner*"); Ernest Lim, "*Ex Turpi Causa*: Reformation not Revolution" (2017) 80 MLR 927; and Andrew Burrows, "Illegality after *Patel v Mirza*" (2017) 70 CLP 55).

109 It might be appropriate to reiterate right at the outset that the *present* position in Singapore on the law of contractual illegality and public policy is embodied, in the main, in *Ting Siew May* (in accordance with the overview set out above at [21]–[66]). This position has some ***overlap***, as well as ***dissimilarities***, with ***both*** the views of the ***majority*** as well as that of the ***minority*** in *Patel*.

110 The *overlap* with *the majority* arises from the recognition in *Ting Siew May* that a discretionary balancing approach may be adopted to determine the enforceability of a contract tainted by illegality, albeit ***only*** in the residuary common law category where the contract is not prohibited, but had been entered into with the object of committing an illegal act. ***In contrast***, the *majority* in *Patel* applied this balancing exercise to ***cover the entire field of illegality – at least in so far as common law illegality is concerned***. As noted earlier, the

balancing approach adopted in *Ting Siew May* is also *dissimilar* as the court focused on the concept of ***proportionality***, whereas the majority in *Patel* adopted a more *general* ***"range of factors" test*** (in which proportionality is *just one factor* to be considered).

111 We also note that even the approach of the ***majority*** in *Patel* is ***not*** an ***unqualified*** one. In particular, Lord Toulson acknowledged that that approach would apply ***only*** to ***common law illegality***; in his words (at [109]; see, also, at [110]):

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

112 Hence, in our view, the current law in Singapore is *more consistent* with *the minority's* position in that if a ***contract*** has been ***prohibited*** pursuant to either ***statute and/or common law***, then ***no recovery whatsoever*** is permitted under ***that contract*** (*but cf* Lord David Neuberger, "Some Thoughts on Principles Governing the Law of Torts" (2016) 23 Torts LJ 89 at p 101). In line with the position adopted by the minority, this strict approach at the ***first*** *stage* does ***not necessarily*** mean that ***no recovery*** is permitted ***at all*** – as explained above, benefits transferred by one contracting party to the other ***might possibly be recovered*** on a restitutionary basis. Having said that, unlike the view taken by the minority, ***there is presently no general right of restitutionary recovery under Singapore law*** and the plaintiff must bring himself within one or more of the categories described above (at [42]–[62]).

(2) Should the "range of factors" approach be adopted in Singapore as part of the *first* stage?

113 From the preceding discussion, the first question which arises before us is whether, given the above differences between the approach in *Ting Siew May* and that of the *majority* in *Patel*, should we depart from the current position and adopt the "range of factors" test as a part of Singapore law? If we decide so, then the "range of factors" approach will *displace* the traditional rule that *no recovery* is permitted under a contract which is held to be *prohibited* at the ***first stage*** of the two-stage analysis which presently represents the law in Singapore (see [22]–[25] and [39]–[40] above). We would respectfully answer this question in the ***negative*** and hence ***retain the present approach as embodied in* Ting Siew May**. Let us elaborate.

114 ***First*** (and returning to a point that was alluded to earlier), the approach by the *majority* in *Patel* has, with respect, complicated the law by creating a further and ***unprincipled distinction*** between the law applicable in a situation of *statutory* illegality from that of *common law* illegality. The reason for the distinction, on its face, appears straightforward enough inasmuch as a *court cannot legislate and is therefore bound by statute*. This is why even the majority in *Patel* acknowledged that the court must obviously abide by the terms of any statute. If a particular provision of a statute *prohibits* (whether expressly or by implication) a *contract*, then that is the end to the matter and the court *cannot* (in the absence of *legislative* provision) proceed to consider a range of factors in order to decide on a discretionary basis whether it would permit recovery by one of the contracting parties after all.

115 With respect, why should the legal position not be the ***same***, notwithstanding the fact that a *contract* has been ***prohibited*** under the ***common law***? In our judgment, there ought, in principle, to be no difference in the legal

result and it is, with respect, no answer to state that *the courts* are masters of *the common law*. That the courts are, in fact, masters of the common law which they oversee as well as develop does *not* mean that they can (or ought to) develop any particular branch of the common law (here, the law relating to contractual illegality) *arbitrarily* – for that would be the *very antithesis* of how the common law has developed throughout the centuries. Indeed, *the established categories of common law illegality* are ***the legal analogues*** of ***statutory*** *provisions that either expressly or impliedly prohibit* ***contracts***. Just as the courts will be astute not to prohibit a *contract* unless the statutory provision concerned does so either *expressly* or there is *a "clear implication" or "necessary inference"* that this is what the statute intends, *so also* the categories of common law illegality will only be extended *on a very strict basis*. Put simply, the doctrine of contractual illegality is one which – whether under statute or at common law – will be ***very sparingly*** invoked in the first place.

116 However, where it is clear that the ***contract*** concerned is ***prohibited*** under an established head of common law public policy, then it would be a contradiction in terms *not* to find that that contract is, as a consequence, ***void and unenforceable***. This is why even the English Law Commissioners in *Illegal Transactions (1999)* expressly recommended that the courts should *not* have a discretion to enforce contracts which are contrary to public policy.

117 As the English Law Commissioners noted in *Illegal Transactions (1999)* (at para 7.13):

> … The issue becomes more difficult where the contract is one which the court has declared to be otherwise contrary to public policy. *The difficulty is that* ***one cannot here separate the question as to whether the contract is contrary to public policy from the idea of giving the courts a discretion to refuse to enforce the contract as against the public interest. These are two sides of the same coin.*** *In deciding*

> *whether or not a contract is contrary to public policy, the court is already effectively asking the question - would it be against the public interest to enforce the contract?* ***Put another way, there is simply no scope for a discretion as regards enforceability which operates once the court has decided that a contract is contrary to public policy.*** [emphasis added in italics and bold italics]

118 In other words, to confer on the court ***a further discretion*** to ***permit*** recovery ***pursuant to the prohibited contract*** would render ***the doctrine of common law contractual illegality nugatory***. On this point, we would also note that if a particular court is of the view that a contract ought not to be prohibited pursuant to the common law ***category*** in question, then perhaps the appropriate way forward might, *instead*, be ***to reconsider that particular category altogether***. This might, for example, be the approach adopted toward *marriage brokage contracts* (see *Illegality and Public Policy in Singapore* at paras 13.095−13.096).

119 Could it not, however, be argued that what is conferred on the court is a discretion that is ***remedial*** in nature – an argument that appears to be supported by the very language utilised by Lord Toulson himself in *Patel* who focussed (at [109]) on the question of "whether the *relief* claimed should be granted" [emphasis added] (and see, to like effect, Lord Clarke's observations in the same case at [219])? This brings us to the ***second*** point, *viz*, ***the argument in favour of remedial discretion***. This argument is premised on the *unfairness* which would result if contractual claims are dismissed even in cases where the illegality is trivial, and the consequent need for the courts to have a remedial discretion. In our judgment, however, the broad approach adopted by the majority in *Patel is* ***unnecessary to achieve remedial justice*** in the Singapore context. For one, the majority's approach, with respect, ***conflates, unnecessarily, the principle of illegality with the alternative restitutionary remedies that might possibly follow thereafter***. The possibility of restitutionary

recovery *notwithstanding* the prohibition of the contract substantially mitigates the harshness of the traditional strict rule that any contract that is prohibited would *necessarily* result in the contract concerned being rendered void and unenforceable. *More importantly*, the argument that the traditional rule-based approach results in injustice was ***substantially addressed*** by this Court in *Ting Siew May*, in which we recognised that in the *general and broad* category of common law illegality, namely contracts which are not illegal *per se* but entered into with the object of committing an illegal act – *where the risk of such injustice is greatest* – the courts should apply the proportionality principle and reject the defence of illegality if to disallow the claim on the ground of illegality would lead to a disproportionate result (see [35]–[39] above).

120 To make good this point, we return (by way of ***illustration***) to ***the actual facts*** in *Patel*. This is a point which we briefly referred to earlier (at [71]), and it is this – the facts in *Patel* were, in substance, ***analogous*** to those in *Ting Siew May*. To elaborate, in ***both*** cases, the ***contract*** had ***not*** been ***prohibited*** (either by statute or an established head of common law public policy). Given the principles laid down in *Ting Siew May*, ***the process of balancing various factors*** (which was applied by the majority in *Patel*) would ***also have been available to a Singapore court had it been faced with the facts in*** **Patel** (although we do not comment on whether the *same result* would have, in fact, been arrived at given that the public policy considerations *vis-à-vis* insider trading in the Singapore context *may well be different*). ***However***, the majority in *Patel* had ***a much broader scope of application*** for such a balancing process, and envisaged that it would cover ***the entire field*** of ***common law illegality***. As we have sought to explain, such a wide or broad application of the discretionary balancing process would ***not*** be principled; nor is it necessary to achieve justice in the Singapore context. ***Put simply, if both approaches are practically similar, why***

then introduce further uncertainty through what appears to be, in the final analysis, an unnecessarily broad balancing process? And this is where the argument of the ***minority*** in *Patel* from ***consequent uncertainty*** would *buttress* the arguments that we have already proffered. We pause to reiterate that, even in more general fact situations, there may (as we have already noted) be possible *restitutionary* recovery, albeit pursuant to the established avenues under the *second stage* of the analysis.

121 We should add, however, that this is not to state that a broad balancing approach along the lines suggested by the majority in *Patel* – that would apply to all categories of illegality – is not possible. But such an approach would, in our view, have to be introduced by ***the legislature***. Indeed, there is ***precedent*** for such a ***legislative*** initiative in New Zealand and is to be found in ***the Illegal Contracts Act 1970*** (No 129 of 1970) (NZ) ("the Illegal Contracts Act 1970"). It should be noted that recommendations for such legislative reform were made by the Law Reform Committee of the Singapore Academy of Law, which suggested that the courts should be empowered to afford relief in their discretion in respect of an illegal contract or trust, having regard to all the circumstances (see *Relief from Unenforceability of Illegal Contracts and Trusts* at para 8.3). There have also been similar proposals made in other jurisdictions including England, British Columbia, Ontario and South Australia (see, generally, *Illegality and Public Policy in Singapore* at paras 13.237−13.243; and Andrew B L Phang and Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer Law & Business, 2012) at pp 479−482). In this regard, we note Prof James Goudkamp's perceptive observation that the majority in *Patel* had "in essence" given effect to the proposals which the English Law Commissioners had advanced, but on which ***the UK Parliament had not acted upon*** (see *Goudkamp* at pp 19−20). As the learned author points out, "[t]his is

one of the most controversial aspects of *Patel*" and that "[w]hile it is true that there may be many reasons for legislative inaction … with the result that inaction does not mean that Parliament disapproved of Law Commission's proposals, *it is striking that the Supreme Court proceeded in the way it did in the circumstances*" [emphasis added] (see *Goudkamp* at p 20).

122 Furthermore, it is instructive to note under the Illegal Contracts Act 1970, the ***statutory*** discretion conferred upon the court in a *remedial* context was ***not confined*** to *common law* illegality (which was, as noted above, the effect of the approach of the majority in *Patel*) but, instead, to ***all forms of contractual illegality (including both statutory as well as common law illegality)***. This observation further supports the point made above that it would be ***inappropriate to distinguish statutory illegality from common law illegality***. In addition, *even in* the *legislative* context, there has been some critique of the Illegal Contracts Act 1970, principally on the basis that that Act had ***introduced excessive vagueness and uncertainty*** (see, for example, M P Furmston, "The Illegal Contracts Act 1970 – An English View" (1972−1973) 5 New Zealand University Law Review 151; though *cf* New Zealand, *Illegal Contracts: Report of the Contracts and Commercial Law Reform Committee,* (1969) at p 10).

123 That leads us to our ***third point***, which is that, as the *minority* in *Patel* has pointed out (and as has already been alluded to above), the approach of ***the majority*** in that case engenders ***uncertainty***. As Prof Goudkamp has argued, rightly in our respectful view, this difficulty of uncertainty has not really been dealt with by the majority in *Patel* (see *Goudkamp* at pp 17−18). We also agree with the learned author's criticism that "the policy-based test [by the majority in *Patel*] … requires the courts *to weigh incommensurable* factors" [emphasis added] (see *Goudkamp* at p 18; see also, generally, on this point, *Goudkamp* at pp 18−19). This criticism is sound as the process of balancing various factors

advocated by the majority in *Patel* must, necessarily, involve a significant measure of uncertainty not only because of the actual process of balancing, which leaves much room for debate, but also because the list of factors is itself an open one, with no single factor being determinative (as Lord Toulson himself acknowledged in *Patel* at [107]). Whilst the Court in *Ting Siew May* also adopted a balancing approach, the scope and ambit of uncertainty is ***much reduced*** for two reasons. First, the approach is confined to *only a* ***residuary*** *area of common law illegality*. Second, the balancing approach in *Ting Siew May* is also ***anchored*** to the ***overarching principle of proportionality*** which, by contrast with the novel policy-based "range of factors" test, is a well-established legal principle that the courts regularly apply in other areas. For instance, proportionality is a relevant consideration in the assessment of damages in civil proceedings (see the decision of this Court in *Koh Sin Chong Freddie v Chan Cheng Wah Bernard and others and another appeal* [2013] 4 SLR 629 at [63]), the taxation of costs (see the decision of this Court in *Lim Jian Wei and another v Lim Eng Hock Peter* [2011] 3 SLR 1052 at [58]) and criminal sentencing (see the Singapore High Court decision of *Teo Kian Leong v Public Prosecutor* [2002] 1 SLR(R) 386 at [8]), among other contexts.

124 We acknowledge, in fairness, that uncertainty may also result in *borderline* situations where it has to be decided whether *a claim for restitutionary recovery (for instance, through an independent cause of action in unjust enrichment)* ought to be *disallowed* due to the operation of illegality and public policy as a *possible defence* – an issue which is, as we shall see, ***at the heart of this particular appeal***. However, while such uncertainty cannot be *wholly eliminated*, we do not see any justification for introducing *further uncertainty* into our law by adopting the wide "range of factors" approach which would leave "a great deal to the judges' visceral reaction to particular facts" as

Lord Sumption noted in *Patel* (at [263]). As the learned judge also observed, such uncertainty is particularly problematic in the field of contract law, which is an area that demands certainty.

125 To ***summarise*** the present part of this judgment, whilst the decision in *Patel* does furnish much legal food for thought, there are, with respect, difficulties with the approach adopted by the majority. While it may well be the case that, in ***practice*** there will be little difference between the approach of the majority in *Patel* and that of this Court in *Ting Siew May* (at least where similar fact situations are concerned), the majority in *Patel* have, with respect, introduced ***further uncertainty*** into the analytical process by ***superimposing*** an *additional* inquiry based on a "range of factors" test *across the board to all situations of common law illegality*. We find such an approach to be undesirable as it creates an ***unprincipled distinction*** between the principles which apply to *statutory* illegality and those which govern *common law* illegality. It is also ***unnecessary to achieve remedial justice*** in the Singapore context given the flexibility of the principles laid down in *Ting Siew May*, which would (if relevant) also allow restitutionary recovery at the *second* stage of the inquiry. We hence ***do not*** accept the broader approach based on a "range of factors" set out by the majority in *Patel* and the present law on the question of whether the contract is *prohibited* which arises at the ***first stage*** of the inquiry *remains unchanged*.

(3) An independent cause of action in *unjust enrichment* – the claim and its limits at the *second* stage

126 Given our endorsement of the approach in *Ting Siew May*, it is clear that the ***two-stage approach*** towards the doctrine of illegality in contract ***continues to be good law in Singapore***. *However*, this is not the end to the matter, for there arise *further issues concerning* the ***second*** *stage* of the analysis. In particular,

we have to identify the principles governing ***restitutionary recovery through an independent claim in unjust enrichment, as well as the limits of such a claim***.

(A) THE RELIANCE PRINCIPLE

127 At this particular juncture, it might be appropriate to clarify a point which stems from the ***terminology*** utilised towards the end of *Ting Siew May* (at [125]−[131]) – in particular, the section towards the end of the judgment under the heading "The reliance principle" (set out at [131] below). After all, the dissatisfaction with the reliance principle, as applied in the cases of *Bowmakers* and *Tinsley*, was one of the main factors which led the majority of the UK Supreme Court in *Patel*, as well as numerous commentators, to eschew the traditional rule-based approach in favour of a broad discretionary framework.

128 In our view, much of the confusion in this area can be avoided if it is recognised that there are, in fact, ***two different conceptions of "reliance" which must be disengaged***. First, there is ***reliance in the procedural or formal sense***, as applied in the cases of *Bowmakers* and *Tinsley*, which is triggered whenever the plaintiff has to assert, whether by way of pleading or evidence, the illegal acts and *therefore (**literally**) rely on the illegal contract*. This is ***a wholly separate and looser*** *concept of "reliance"* from the distinct conception of ***the reliance principle as a normative or substantive principle which is only engaged when a plaintiff seeks to enforce, and thereby profit from, the illegal contract through his claim.*** Such a claim is *legally impermissible*, in our judgment, because it offends the fundamental principle that that there can be ***no recovery*** under a contract that is prohibited on the basis of illegality.

129 However, when the plaintiff "relies" on ***an independent cause of action***

in order to successfully establish a ***restitutionary*** claim, such "reliance" is inoffensive from a ***normative*** point of view, even if it could be said that the plaintiff needs to "rely" on his illegal conduct (in a loose and indirect sense). The claim does not offend the principle underlying the illegality doctrine as restitution does not allow the plaintiff to profit from the illegal contract but simply puts the parties in the position they would have been if they had never entered into the illegal transaction**.** Indeed, as noted earlier, (restitutionary) recovery through an independent cause of action *is the flipside* of the "reliance principle" (in the normative sense) as it involves a situation where the illegal contract is *not* being invoked or "relied on" in any substantive legal manner.

130 When these two distinct conceptions of "reliance" are kept separate, it becomes clear that, in *Ting Siew May*, the court was ***not*** referring to "the reliance principle" in the procedural sense but, rather, the normative or substantive concept of "reliance" in a situation ***where an independent cause of action*** *is being mounted in order to obtain* ***restitution*** *of benefits hitherto transferred pursuant to an illegal contract*.

131 We set out the relevant passage in *Ting Siew May*, as it bears careful examination:

> ***The reliance principle***
>
> 125 Before concluding, we address Prof Tang's attempt to rely upon the "reliance principle" to buttress the Respondents' case. Prof Tang argued that the Respondents did not have to rely on the backdating of the Option to found their claim against the Appellant in the sense that their claim did not depend on them in fact pleading that the Option was backdated. In this regard, Prof Tang agreed with the Judge's interpretation of *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992 ("*Hong Lam Marine*") that if a plaintiff's cause of action is founded on the contract itself but the plaintiff does not need to rely on the illegal act or purpose, the claim should be allowed.

> 126 We did not hesitate to reject this argument. It should be noted that ***the "reliance principle", as traditionally understood, has a narrow ambit of operation. It is usually invoked only by a contracting party seeking to recover (on a restitutionary basis) what it had transferred to the other party pursuant to the (illegal) contract. Even more importantly, such recovery has been traditionally premised upon an independent cause of action – thereby avoiding the need to rely upon the (illegal) contract*** (see generally *Illegality and Public Policy* ([24] *supra*) at paras 13.137–13.154). It is clear that this was *not* the situation in the present appeal, based on the facts and submissions.
>
> 127 Further, ***the reliance principle is not merely literal or descriptive in nature; it is a legal principle necessarily embodying normative elements. The question therefore is not whether the illegality (in this case, the backdating of the Option) had to be specifically pleaded by the Respondents, but whether the Respondents were endeavouring to enforce an illegal contract***. Since we have already found that refusal to enforce the Option would be a proportionate response to the illegality in the present case (taking into account the various factors outlined above (at [70])), and there is no cause of action other than one based on contract (*ie*, based on the Option), there is no room for any argument based on the "reliance principle". Put simply, in so far as the category of contracts entered into with an illegal or unlawful object is concerned, once the court has concluded that it is contrary to public policy at common law to uphold such a contract, it is no longer relevant whether or not a party needs to "rely" on the illegality in its plea.
>
> [emphasis added in bold italics]

132 From the above passage, it is clear that the Court in *Ting Siew May* was *unequivocal* in *rejecting* the application of the principle as a procedural test that is "merely literal or descriptive in nature". Instead, the Court emphasised that the principle has a narrow ambit of operation and is a ***normative legal principle*** that may be invoked as a basis for obtaining ***restitutionary relief*** through ***an independent cause of action*** (thereby avoiding the need to "rely on" the illegal contract in a *substantive* sense). It does ***not*** allow a plaintiff to *enforce* an illegal contract (even if he can avoid having to *literally* "rely on" the illegal act or purpose in establishing his contractual claim). In fact, a close perusal of the

judgment in *Ting Siew May* will demonstrate that the court *was*, indeed, ***endorsing the traditional position under English law that there can be no recovery under a contract prohibited on the basis of illegality*** (see [22]–[25] and [39]–[40] above). This is exemplified by the focus in *Ting Siew May* on whether ***the contract*** *(as opposed to the* ***conduct****) was* ***prohibited***. And if so, it was clear that ***there could be no recovery whatsoever pursuant to the illegal contract***. And it is *only* if the contract was *not* prohibited *per se*, but entered into with the object of committing an illegal act that the proportionality principle applies.

133 We should also observe that Lord Mance adopted a related analysis of "reliance" in *Patel*; in his view (at [199]):

> *[R]eliance on illegality remains significant as* ***a bar to relief, but only*** *in so far as it is* ***reliance*** *in order to profit from or otherwise enforce* ***an illegal contract****.* ***Reliance*** *in order to* ***restore the status quo*** *is* ***unobjectionable****.* [emphasis added in italics and bold italics]

134 We also derive assistance from Lord Sumption's analysis in *Patel* of what the reliance test under English law entails. Drawing from Lord Mansfield's famous formulation of the illegality principle in *Holman v Johnson* (set out at [23] above), the learned judge set out what he perceived to be "[t]he underlying principle", which "is that for reasons of consistency the court will not give effect, at the suit of a person who committed an illegal act (or someone claiming through him), to a right *derived from* that act" (see *Patel* at [233]; emphasis added). He emphasised that the application of the principle does not "depend on adventitious procedural matters, such as the rules of pleading, the incidence of the burden of proof and the various equitable presumptions" (at [237]).

135 In addition, Lord Sumption stressed that a restitutionary claim in unjust

enrichment would not fall within the scope of this principle. In this regard, he observed thus at [250]:

> *Of course, in order to demonstrate that the basis for the payment had failed, Mr Patel must say what that basis was, which would necessarily disclose its illegality. In my opinion,* ***the reason why the law should nevertheless allow restitution in such a case is that it does not offend the principle applicable to illegal contracts***. That principle, as I have suggested above, is that the courts will not give effect to an illegal transaction or to a right derived from it. But *restitution does not do that. It merely recognises the ineffectiveness of the transaction and gives effect to the ordinary legal consequences of that state of affairs.* ***The effect is to put the parties in the position in which they would have been if they had never entered into the illegal transaction, which in the eyes of the law is the position which they should always have been in.*** [emphasis added in italics, bold italics and underlined bold italics]

136 And, at [268], Lord Sumption stated as follows:

> However, restitution still being possible, none of this is a bar to Mr Patel's recovery of the £620,000 which he paid to Mr Mirza. The reason is simply that *although Mr Patel would have to rely on the illegal character of the transaction in order to demonstrate that there was no legal basis for the payment, an order for restitution would not give effect to the illegal act or to any right derived from it. It would simply return the parties to the status quo ante where they should always have been.* The only ground on which that could be objectionable is that the court should not sully itself by attending to illegal acts at all, and that has not for many years been regarded as a reputable foundation for the law of illegality. This was Gloster LJ's main reason for upholding Mr Patel's right to recover the money. Although my analysis differs in a number of respects from hers, I think that *the distinction which she drew between a claim to give effect to a right derived from an illegal act, and a claim to unpick the transaction by an award of restitution, was sound.* [emphasis in italics]

137 We note that Lord Sumption's observations are, in fact, directly on point in so far as the independent cause of action in ***the present appeal*** is premised on the law of ***unjust enrichment***. In this context, we agree with the observations of Lord Mance and Lord Sumption in *Patel*, which coheres with the analysis of

this Court in *Ting Siew May*, that ***the reliance principle, properly understood as a normative or substantive principle, is only engaged when a plaintiff seeks to directly enforce and profit from an illegal contract, and is not offended when restitutionary recovery is sought through an independent claim in unjust enrichment***.

138 Accordingly, it also follows that the *obiter dicta* in *Top Ten Entertainment* (referred to at [61] above) that the principle established in *Tinsley* would preclude a claim in unjust enrichment for the recovery of monies paid under an illegal contract if the plaintiff has to "rely on" the illegal contract to establish his claim (in a procedural or literal sense) should *not* be followed.

(B) ESTABLISHING THE CLAIM IN *UNJUST ENRICHMENT*

139 The next question which arises is how a plaintiff can establish the cause of action in unjust enrichment in the context of contractual illegality. Here we reiterate that the claim will ***not*** be barred simply because the plaintiff needs to "rely on" his illegality in a formal or procedural manner as the reliance principle, properly understood in the *normative or substantive sense*, is only engaged if the plaintiff seeks to *enforce* or *profit from* the illegal and prohibited contract. Hence, in our judgment, ***restitutionary recovery of benefits conferred under an illegal contract would, in principle, be available where the ordinary requirements of a claim in unjust enrichment are made out notwithstanding the illegality of the underlying contract***. This is, however, ***subject to the defence of illegality and public policy in unjust enrichment***, which we will consider shortly.

140 What will be the "unjust factor" in such cases? In our judgment, the answer would depend on the facts of each case. For instance, in circumstances which would traditionally fall within the ***not* in pari delicto** doctrine because

the plaintiff's consent was somehow impaired due to mistake or duress, these same considerations would operate as unjust factors and allow the plaintiff to satisfy the ordinary requirements of a claim in unjust enrichment, thereby creating a *(limited) overlap between these doctrines* (see [170] below). In other cases, where the illegal transaction is not executed, there will usually be what is called a "failure of consideration" due to the failure of the promised counter-performance. We note in passing that this phrase may be confusing to the uninitiated. As we recently observed, "consideration" here should not be confused with "consideration" in the contractual sense; the latter refers to *the counter-promise itself*, whereas the former *usually* refers to its *performance* (see the decision of this Court in *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] SGCA 2 ("*Benzline*") at [49]). Some commentators and courts prefer to use the term "failure of basis" instead. While there is nothing wrong with that nomenclature, we will continue to use the term "failure of consideration" in this judgment because, first, it has attained the status of a term of art among the initiated, and second, although the phrase "failure of basis" avoids one possible source of confusion, it creates another in that it bears a superficial resemblance to Prof Peter Birks's later, conceptually distinct notion of "absence of basis" (a controversial topic which we need not discuss here).

141 The identification of the unjust factor, however, is trickier in cases where the contract is *fully or partially executed*. Lord Sumption held in *Patel* that the unjust factor in such cases, and indeed in *all* cases where the contract is found to be void and unenforceable, will be the total failure of consideration following from the *legal ineffectiveness* of the contract under or in anticipation of which the benefit was conferred (at [252]). He relied on the English High Court's decision in *Westdeutsche Landesbank Girozentrale v Islington London Borough*

Council [1994] 4 All ER 890 (approved (*obiter*) on appeal to the House of Lords [1996] AC 669 at 714 (*per* Lord Browne-Wilkinson)) and the English Court of Appeal case of *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215 for the proposition that "*[a]s a general rule, benefits transferred under a contract which is void or otherwise legally ineffective are recoverable*" [emphasis added] (at [247]). We stress that this proposition, and the authorities which Lord Sumption cited in support of it, are not uncontroversial. Prominent commentators, such as Prof Burrows, have argued that it cannot be said that there is *always* a total failure of consideration when a contract is void. The criticism is that that such a principle contravenes the commonly-held view, which we earlier mentioned, that failure of consideration relates to the failure of a *counter-performance* rather than of the *counter-promise itself* (see, also, Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) ("*Burrows's Law of Restitution*") at pp 320 and 385–386). There is no need for us to resolve this debate in this case, but it suffices to (tentatively) note that there is no reason why, in *some* cases at least, the condition for which payment is made cannot be, not only counter-performance, but also *the creation or transfer of a right* (see Frederick Wilmot-Smith, "Reconsidering 'Total' Failure" [2013] CLJ 414 at pp 433–434; *Goff & Jones* (C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (London: Sweet & Maxwell, 9th Ed, 2016 ("*Goff & Jones 2016*") at paras 13-19–13-37; see, also, *Benzline* at [52], where it was noted that a transfer may have more than one basis). *Ex hypothesi*, there will be a total failure of consideration if the plaintiff fails to obtain this right due to the illegality of the contract. In any event, the determination of this controversy is only likely to matter in rare situations, as Prof Burrows himself accepts (see *Burrows's Law of Restitution* at p 386). Hence, we will leave this issue open for now.

142 The normal defences to an unjust enrichment claim, particularly change of position, would also be available to the defendant in this context. This is both principled and in line with the views of the judges in *Patel* who considered the issue (*per* Lord Neuberger at [162]; *per* Lord Mance at [198]; and *per* Lord Sumption at [253]). The recognition of this defence would ensure that the defendant is not unduly prejudiced when he alters his position in good faith.

(C) ILLEGALITY AS A DEFENCE TO THE CLAIM IN UNJUST ENRICHMENT

143 The next, and important, issue ***that impacts the present case directly*** is whether there is ***any possible defence premised on illegality and public policy that might prevent recovery pursuant to a claim in unjust enrichment.*** The ***broader (and more general) issue*** that goes ***beyond*** *the* ***present case*** is this: ***to what extent is restitutionary recovery pursuant to various independent causes of action (whether in tort, the law of trusts or unjust enrichment) precluded*** *by* ***illegality and public policy***? It is of the first importance, at this particular juncture, to emphasise that what we are concerned with here is ***not*** the doctrine of illegality and public policy in a ***contractual*** sense (*ie*, the principles of statutory and common law illegality which apply at the *first stage* of the analysis) but, rather, the concept of illegality and public policy *as a* ***defence*** *in the context of* ***a claim in unjust enrichment*** – both concepts are ***separate and distinct***.

144 From *Patel*, there emerge two possible ways to view the impact of illegality on a claim in unjust enrichment. First, there is the strict view of Lord Sumption that restitutionary relief should always be available, even in cases of heinous criminality. Second, there is the view, adopted by the majority and Lord Neuberger that a discretionary "range of factors" test should be

applied to determine when restitutionary recovery should be denied on the basis of illegality, albeit with recovery as the *prima facie* starting point.

145 In our judgment, neither of these approaches is entirely satisfactory. Instead, taking reference from the seminal article on this issue by Prof Birks ("Recovering Value Transferred Under an Illegal Contract" (2000) 1 Theoretical Inquiries in Law 155 ("*Birks*")), we endorse the principle of ***stultification***, which would preclude allowing a claim in unjust enrichment if to do so would ***undermine the fundamental policy that rendered the underlying contract void and unenforceable in the first place***.

146 We first consider the rigid view that restitutionary relief should always be available even in extreme cases such as a claim involving a contract to commit a murder. This approach has little to commend it. As Lord Grabiner QC has written, "it is difficult to think of a more offensive or objectionable outcome in the procedural guise of a claim in restitution" than to allow a plaintiff to recover monies in such a scenario (see *Grabiner* at p 20). The example may be extreme and artificial, but it highlights the important point of principle that, even in the context of restitutionary relief, there will be cases where to allow the claim in unjust enrichment would bring the court into disrepute and undermine the integrity of the law. Second, the "range of factors" test as a defence to a claim in unjust enrichment is also unsatisfactory for the same reasons noted earlier, namely, that it engenders uncertainty by requiring the courts to weigh incommensurable factors from a list that is itself an open one, with no overarching principle (see [123] above). We also do not accept that there should be any *prima facie* starting position that restitution for unjust enrichment should be available without regard to the facts and context of the case, particularly the reason why the underlying contract has been rendered unenforceable for illegality.

147 We find that the better approach, which has firm grounding in ***principle***, ***precedent***, and ***theory***, is to premise the defence of illegality and public policy in unjust enrichment on the concept of ***stultification***. As outlined in Prof Birks's influential article (see *Birks* at p 160):

> "To stultify" is to "to make a fool of" or "to make nonsense of". It is important that the law as stated in one area should not make nonsense of the law as stated in another.

Hence, the relevant question is as follows (see *Birks* at p 202):

> [W]hether allowing the claim in unjust enrichment would make nonsense of the law's condemnation of the illegal contract in question and of its refusal to enforce the illegal contract.

148 In our judgment, the principle of stultification is both logical as well as commonsensical. Whether a claim in unjust enrichment ought to be allowed notwithstanding the illegality of the underlying contract has to be determined by reference to the reason why the contract is prohibited. The concept of stultification is premised on this intuitive insight and furnishes a ***principled*** basis upon which to ascertain when, in a situation where there would otherwise be a valid claim in unjust enrichment, the court should nevertheless not allow the claim on the basis of illegality. The court should not allow the claim if to do so would ***undermine the fundamental policy, be it statutory or of the common law, that rendered the contract in question void and unenforceable in the first place***. As Prof Birks perceptively points out, to allow the claim in such a situation would be to ***make a mockery or nonsense of the law that rendered the contract void and unenforceable to begin with***. We would hasten to add that we have added the word "***fundamental***" because there could conceivably be situations where to permit recovery pursuant to a claim in unjust enrichment might appear to the court to undermine some ***other*** *policy*, which policy, however, was ***not central*** *to the* ***prohibition*** *of* ***the contract*** *concerned. Much will therefore depend on* ***the precise policy considerations as construed in their***

context.

149 The concept of stultification is not only principled, but also well-supported by precedent as well as academic commentary. Prof Birks himself extracted the principle from the decision of the House of Lords in *Boissevain v Weil* [1950] 1 AC 327 ("*Boissevain*"). That case concerned a claim based on total failure of consideration for the recovery of a loan which had been made in violation of exchange control regulations under the Defence (Finance) Regulations 1939 (UK). The claim was dismissed on the basis that it would constitute an indirect enforcement of the illegal loan. In his oft-cited judgment, Lord Radcliffe held at 341 as follows:

> [I]f this claim based on unjust enrichment were a valid one, the court would be enforcing on the respondent just the exchange and just the liability, without her promise, which the Defence Regulation has said that she is not to undertake by her promise. *A court that extended a remedy in such circumstances would merit rather to be blamed for* ***stultifying the law*** *than to be applauded for extending it.* [emphasis added in italics and bold italics].

150 *Boissevain* was later cited by the English Court of Appeal in *Haugesund Kommune and another v Depfa ACS Bank* [2012] QB 549, where Aikens LJ observed at [92] that:

> There is no doubt that in English law a restitutionary claim for the return of money may be defeated on grounds of public policy where, on the correct construction of a statute or regulation, recovery in restitution would be contrary to the objective of the statute.

151 Interestingly, in the important Canadian case of *Hall v Herbert*, McLachlin J also used the language of stultification and cited Prof Ernest J Weinrib, "Illegality as a Tort Defence" (1976) 26 UTLJ 28 for the principle that the defence of illegality may properly be invoked to prevent the "stultification of the criminal law" (at 177) (albeit in the context of a claim in

tort). Hence, it appears that the central idea of stultification as the basis of the illegality defence was already a part of the common law before Prof Birks, in his usual persuasive manner, contended that it should be applied to the cause of action in unjust enrichment.

152 Returning to the context of unjust enrichment, the High Court of Australia in *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 ("*Equuscorp*") cited Prof Birks's article (at [37]) and applied the stultification principle as a part of Australian law (see, also, Elise Bant, "Illegality and the Revival of Unjust Enrichment Law in Australia" (2012) 128 LQR 341 ("*Bant*")). This case concerned a claim to recover monies lent to the respondents as part of a failed investment scheme. The loan agreements could not be enforced because they were made in furtherance of an illegal purpose. In particular, they were contrary to certain provisions of the Companies Code of the investors' home states which required a valid prospectus to be registered when the investors were offered the opportunity to enter into the schemes.

153 A majority of the High Court (comprising French CJ, Crennan and Keifel JJ in one judgment and Gummow and Bell JJ in another, with Heydon J dissenting) held that the appellant's claim to restitution was defeated on the ground of illegality. Notably, the *coram* was *unanimous* in recognising that the relevant question was ***whether permitting restitution would undermine or stultify the policy or purpose of the law*** (*per* French CJ, Crennan and Keifel JJ at [33]–[38]; *per* Gummow and Bell JJ at [103]; and *per* Heydon J at [117]). The majority held that the claim for money had and received should be rejected because it would allow the recovery of the loans even though the investors did not have the benefit of the protections required by the relevant statutory provisions, ***thereby stultifying the statutory purpose by the common law*** (at [45]). As noted by Prof Bant, the High Court's decision therefore "vindicates

the views of scholars who have argued that 'illegality' is best understood as a compendious term for the principle that a plaintiff will be allowed or denied recovery where otherwise the law's prohibition on certain conduct would be stultified" (see *Bant* at p 341).

154 In their majority judgment, French CJ, Crennan and Keifel JJ, besides relying on Prof Birks's article, also took reference from the American *Third Restatement on Restitution and Unjust Enrichment* (A Kull, *Restatement of the Law, Third: Restitution and Unjust Enrichment* (American Law Institute, 2011)) at §32(2) (at [38]):

> The negative goal of avoiding self-stultification in the law may be expressed positively as the objective of maintaining coherence in the law as discussed by this court in *Miller*. That approach is consistent with the proposition in the *Third Restatement on Restitution and Unjust Enrichment* that:
>
> > ***Restitution will also be allowed, as necessary to prevent unjust enrichment, if the allowance of restitution will not defeat or frustrate the policy of the underlying prohibition.***
>
> [emphasis added in bold italics]

In our view, the proposition in the American *Third Restatement on Restitution and Unjust Enrichment* aptly captures the essence of the stultification principle.

155 Finally, returning to the case of *Patel*, in her decision in the Court of Appeal, Gloster LJ endorsed the stultification principle based on a passage in the previous edition of *Goff & Jones* (C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (London: Sweet & Maxwell, 8th Ed, 2011 ("*Goff & Jones 2011*") at para 35-36) (see *Patel v Mirza* [2015] Ch 271 ("*Patel (CA)*") at [61]):

> In an instructive passage in *Goff & Jones* under the heading "Underlying Principles and Future Development" the editors write, at para 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 inquiry 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.*** *…*"
>
> [emphasis added in italics and bold italics]

156 She then went on to find that Mr Patel's claim for the recovery of the money did not stultify the policy of s 52 of the Criminal Justice Act 1993. The mischief at which s 52 was directed was the deliberate and improper exploitation of unpublished price-sensitive information obtained from a privileged source; but, in the circumstances, no such information had been acquired and no such market abuse had taken place (see *Patel (CA)* at [67]). This reasoning was endorsed by the majority of the UK Supreme Court in *Patel*, and Lord Toulson held that Gloster LJ had "correctly asked herself whether the policy underlying the rule which made the contract between Mr Patel and Mr Mirza illegal would be stultified if Mr Patel's claim in unjust enrichment were allowed" (at [115]). In addition, we note that Prof Birks's article and the notion of "self-stultification" was expressly cited and approved by Lord Kerr in his concurring judgment (at [141] and [142]). Therefore, although we do not accept the broader "range of factors" test proposed by the majority in *Patel*, the decision does support our ruling that the concept of stultification should be adopted as the overarching principle underpinning the defence of illegality in the law of unjust enrichment.

157 Turning to the relevant academic commentary on the stultification principle, we have already noted the previous edition of *Goff & Jones* in which the learned authors relied on Prof Birks's work to advocate for the proposition

that restitutionary claims should be denied where they would stultify the law. They described the analysis as "compelling" (see *Goff & Jones 2011* at para 35-37). Other commentators have also favoured the principle of stultification (see, for instance, Duncan Sheehan, "Reconsidering the Defence of Illegality in Unjust Enrichment" [2009] LMCLQ 319) and Prof Burrows describes Prof Birks's article and the idea of stultification as "influential" (see *Burrows's Law of Restitution* at p 600). The article and the principle of "stultification" were also cited by the English Law Commissioners in *The Illegality Defence (2009)* at para 4.7. This *considerable* traction which the stultification principle has gathered is unsurprising given Prof Birks's influence in this area of law and, more importantly, the soundness of the principle itself which, as we have noted, is both logical as well as commonsensical.

158 Finally, we consider the argument, made by some commentators as well as the court in *Patel*, that restitutionary recovery through a claim in unjust enrichment should generally be allowed since it simply places the parties back in the position in which they would have been if the illegal transaction had not been entered into. In this regard, we refer to *Goff & Jones 2016*, where the learned authors analyse and critique the UK Supreme Court's decision in *Patel*. They perceptively comment that, while the majority appeared to be of the view that claims in unjust enrichment create less risk of stultification than claims to enforce an illegal contract, matters "are not so simple" and that "there is more room for argument than the Supreme Court acknowledged in *Patel*, over the question whether awarding restitution will stultify the purposes of a rule making the contract illegal" (see *Goff & Jones 2016* at paras 35-41–35-48). We entirely agree. As Prof Birks noted in his seminal article, even where the restitutionary claim does not give the plaintiff substantially the same performance as he would have had under the illegal contract (which he termed the "identical yield

argument"), there is still the danger that the alternative claim may stultify the position taken by the law in relation to the illegal contract. He identified at least two reasons why this may be the case (see *Birks* at p 162):

> [G]etting back money or property already transferred is likely to do one or both of two things: (a) provide a lever which this and the class of all similar plaintiffs can use for the purpose of getting the other to perform the contract, and (b) stretch out a safety-net below all those minded either to engage in similar illegality or to abstain from diligently inquiring whether their proposed course of conduct does or does not run foul of it.

Prof Birks termed these the "lever argument" and the "safety-net argument", respectively, and we agree that these are relevant factors which the court should take into account when determining if the principle of stultification is engaged in a particular case. There will also be other relevant considerations and, in each case, the court must carefully examine the relevant policy, be it statutory or the common law, which rendered the contract illegal before considering if that same policy would be undermined or stultified if the claim in unjust enrichment were allowed.

159 *To reiterate*, where a plaintiff brings an independent claim in unjust enrichment for the recovery of benefits conferred under an illegal and prohibited contract, the question which the court has to answer is whether to allow the claim would ***undermine the fundamental policy that rendered the underlying contract void and unenforceable in the first place***. If so, then claim should be *dismissed* on the basis of the defence of illegality and public policy in unjust enrichment.

(4) Remaining issues

160 Before concluding our analysis of the law, there are a few remaining issues to consider. These issues do not strictly arise in the present case, but we

will make some tentative observations on them for future guidance.

(A) *OTHER* INDEPENDENT CAUSES OF ACTION AND THE SCOPE OF THE CONCEPT OF STULTIFICATION

161 The first of the remaining issues is this: *what is* ***the scope of the concept of stultification***? It is, strictly speaking, *not necessary* for us to render a *definitive* view in this appeal as the claim we are concerned with here is based on *unjust enrichment*. However, we proffer some ***tentative*** *views* on whether *the concept of stultification might apply to* ***other independent causes of action in tort and the law of trusts premised on the plaintiff's property or title in situations where the underlying contract has been prohibited***.

162 As noted above at [51]–[59], there is much difficulty surrounding such claims that are brought *in tort or the law of trusts* based on the plaintiff's *property or title* for the restitutionary recovery of the benefits conferred under an illegal contract. Our views here are therefore tentative, although we think that it would be useful to set out some preliminary views that could constitute a point of departure for a definitive analysis when the issue comes directly for decision in the future.

163 The principal difficulties arise from the procedural application of the reliance principle in the cases of *Bowmakers* and *Tinsley*, which gives rise to *artificiality and possible arbitrariness*, leaving the outcome of cases subject to the accidents of pleading. As noted above at [58], this was the reason why the High Court of Australia refused to follow *Tinsley* in *Nelson*.

164 In *Nelson* itself, the plaintiff furnished funds for the purchase of a house. The house was, however, registered in the names of her son and daughter as joint tenants so as to preserve her (the plaintiff's) status as an "eligible person"

within the Defence Services Homes Act 1918 (Cth), which entitled her to a subsidy for the purchase of property. To qualify as an "eligible person", she had to declare that she did not have any financial interest in a house or dwelling other than the one for which the subsidy was sought. But the plaintiff did in fact purchase another house in her own name. When the relationship between the parties soured, the (first) house was sold, and the plaintiff then brought the action in issue seeking a declaration that both her son and her daughter held the balance of the proceeds of sale on trust for her and an order that those proceeds be paid to her. The son joined his mother as a plaintiff. The daughter, as defendant, cross-claimed for relief, including a declaration that she possessed a beneficial interest in the sale proceeds.

165 The High Court of Australia held that there was a presumption of advancement, although a mother, and not a father, was involved. The court then held that an illegal purpose had been demonstrated, but that the plaintiff mother could nevertheless rebut the presumption of advancement to the defendant daughter, thus refusing to follow the ruling on the point by the House of Lords in *Tinsley*. The defendant was thus found to hold the proceeds of sale on a resulting trust for her mother, but (and this was by a majority ruling) *on the condition* that the latter repay any money owing to the Commonwealth as a result of her actions pursuant to the illegal purpose. It is indeed this focus on the condition that distinguishes the majority's approach in *Nelson*. Instead of applying the principle in *Bowmakers*, the majority in *Nelson* focused, instead, on the *adjustment of the remedy*. This was a departure from the conventional approach which would have resulted in an all-or-nothing result (as typified by both the majority *and* the minority approaches in *Tinsley*, for example). The majority in *Nelson* premised the condition and the adjustment of the remedy by purporting to adopt an *equitable* approach. That the courts may impose terms in

an equitable context is not unusual: witness, for example, Lord Denning MR's approach in the context of common mistake in equity in the English Court of Appeal decision in *Solle v Butcher* [1950] 1 KB 671 (it should, however, be noted, parenthetically, that English law no longer recognises a doctrine of common mistake in equity (see the subsequent English Court of Appeal decision of *Great Peace Shipping Limited v Tsavliris (International) Limited* [2003] QB 679), although Singapore continues to recognise such a doctrine (see the Singapore Court of Appeal decision of *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502)). It is our view, however, that this *de facto* ***merging*** of the remedy with the substantive cause of action is apt to create more uncertainty and unpredictability than is warranted. The majority of the court in *Nelson* created, in effect, a new exception that was wholly discretionary in character and that was *not* contained within a *statutory* vehicle such as the Illegal Contracts Act 1970 – to which reference has been made above (at [121]–[122]).

166 What is important, therefore, for the purposes of our present judgment is this: *putting to one side the adjustment of the remedy approach* adopted in *Nelson*, should we nevertheless follow *Nelson* in ***refusing to follow*** **Tinsley** ***and permitting recovery on a restitutionary basis notwithstanding the fact that a presumption (whether of advancement or of resulting trust) might need to be rebutted by reference to the illegal contract itself? Put simply, the question is whether we should depart from*** **Tinsley** ***and the procedural application of the reliance principle in the proprietary context.*** Looked at from one point of view, this would ***do away with the artificiality and possible arbitrariness referred to above***. Whilst we do not (as already mentioned) need to arrive at a definitive conclusion on this particular legal issue, we do think that one possible way to adopt *this part* of the decision in *Nelson* is to simply admit that there *has* indeed

been "reliance" on the illegal contract but that, *just as in the context of unjust enrichment*, this *literal reliance* is inoffensive when an independent claim is brought in tort or equity premised on the plaintiff's proprietary right or title.

167 Indeed, one writer has forcefully argued that, given the inevitable (even necessary) "reliance" on the illegal contract in such cases, the courts, whilst permitting recovery on a restitutionary basis, should simply admit that there *is* "reliance" on the illegal contract even in (and in that particular author's view, in fact, especially in) situations where the cause of action is premised on title or some other proprietary interest (see Nelson Enonchong, "Title Claims and Illegal Transactions" (1995) 111 LQR 135 ("*Enonchong*")). In our view, this thesis can, in fact, be ***further refined or nuanced by clarifying precisely which sense or meaning of "reliance" is being used or referred to.*** At this point, we would refer back to our analysis of the different conceptions of the "reliance principle" at [127]–[138] above, and, in particular, reiterate the need to ***disentangle*** reliance in the ***formal or procedural sense*** and the reliance principle as a ***normative or substantive principle*** which is only engaged when a plaintiff seeks to enforce, and thereby profit from, the illegal contract. In the context of independent claims in tort or the law of trusts premised on the plaintiff's property or title, it could be argued that ***there is no normative reliance as such because such claims are for the recovery of the plaintiff's property rather than the enforcement of the illegal contract.*** Looked at in this light, it is our tentative view that there may be no difficulty in (as was the case in *Nelson*) ***departing from*** the distinction drawn in *Tinsley* that is, in the final analysis, premised upon the formal concept of "reliance", which we do not accept (and that was, in fact, rejected by this Court in *Ting Siew May*, as noted earlier).

168 ***However***, we are of the view (***albeit necessarily tentative***, of course)

that, if we do depart from *Tinsley* in the proprietary context, ***the court should still retain the power to disallow the independent property claim in tort or the law of trusts even under this more flexible approach if to allow the claim would stultify or undermine the fundamental policy that rendered the contract concerned illegal in the first place*** (see also *Enonchong* at p 157 where it was similarly suggested the court should consider the relevant contractual policy rather than a formal notion of reliance in determining whether to allow the independent title claim). Whether the stultification principle is engaged in such a claim would depend very much on ***the nature as well as boundaries of the (fundamental) policy concerned***. ***It will also be immediately seen that the concept of stultification, if this approach is accepted, would constitute a common or underlying thread throughout this particular area of the law relating to (restitutionary) recovery pursuant to an independent cause of action***. ***This would, in fact, be a desirable outcome as it would furnish structure as well as coherence to this particular area of the law***. *However*, as we have already emphasised, these are ***merely tentative views and a definitive decision can only be rendered when the relevant issues arise directly for decision***.

(B) THE LEGAL STATUS OF THE NOT *IN PARI DELICTO* AND *LOCUS POENITENTIAE* DOCTRINES

169 We next consider the status of the not *in pari delicto* and *locus poenitentiae* doctrines, and make some (again *tentative*) observations on the interaction among these doctrines, the law of unjust enrichment and the principle of stultification.

(I) NOT IN PARI DELICTO

170 The legal principles which apply where the parties are ***not* in pari**

delicto – which include the more specific categories of ***class protection statutes***, situations where there has been ***fraud, duress or oppression***, and cases where the plaintiff entered into the illegal transaction as a result of a ***mistake*** – are uncontroversial and relatively well-settled (see [43] above). We therefore see no need to revisit them, except to make the point, alluded to earlier, that there will be some overlap between the not *in pari delicto* doctrine and the cause of action in unjust enrichment in so far as the circumstances which justify the application of the not *in pari delicto* doctrine may also give rise to "unjust factors" such as mistake and duress. In such situations, the stultification principle would ***not*** apply because it cannot be said that the integrity of the courts would be undermined or the underlying policy of the law stultified if the claim by the plaintiff, who is deemed to be less blameworthy in the eyes of the law, is allowed. Indeed, in some instances falling within the not *in pari delicto* principle, awarding restitution will ***positively further rather than stultify*** the policy of the rule that rendered the contract void and unenforceable, such as where the very reason for the rule is to protect parties in the plaintiff's position (see *Goff & Jones 2016* at para 35-50).

(II) LOCUS POENITENTIAE

171 The interaction between the independent claim in unjust enrichment and the *locus poenitentiae* doctrine is less straightforward. As noted earlier, it was suggested by the minority (as well as Lord Neuberger) in *Patel* that the *locus poenitentiae* doctrine should be *liberalised* as a *general principle of rescission* which would allow restitutionary recovery of the benefits conferred under an illegal contract regardless of whether the plaintiff has genuinely repented *and even if* the agreement has been fully executed (as long as *restitutio in integrum* can be achieved in practical terms) (see [49] above). We make two related points in this regard.

172 *First*, if it is accepted that the *locus poenitentiae* doctrine is as broad as suggested in *Patel*, then we find it difficult to identify any distinct rationale or justification for the doctrine that can distinguish it from a claim in unjust enrichment. In fact, such a broad principle would *undermine* the need for the plaintiff to establish the ordinary requirements of a claim in unjust enrichment, particularly the necessity to identify an "unjust factor", before being entitled to recovery of the benefits he conferred under the illegal contract (see [139] above). A broad and unrestrained doctrine of *locus poenitentiae* could also potentially allow a plaintiff to *circumvent* the restraining principle of stultification which would apply to a claim in unjust enrichment. With respect, this cannot be accepted.

173 *Second*, the broad conception of the *locus poenitentiae* doctrine suggested in *Patel* is also incompatible with the traditional justification for the doctrine, which is to encourage timely withdrawal from the illegal enterprise. We alluded to this point earlier when we discussed the cases of *Bigos* and *Tribe*, and the controversy over whether, in order for the *locus poenitentiae* doctrine to apply, the plaintiff needs to have *genuinely* repented of his or her illegality, or whether the doctrine would also apply even in circumstances where the illegal purpose has been frustrated by circumstances beyond the plaintiff's control or is simply no longer needed (see [45]–[48] above). The traditional rationale *supports* the narrower position adopted in *Bigos* – a plaintiff who "voluntarily" withdraws from an illegal transaction which has ceased to be needed needs no encouragement to do so; nor should he be given any credit for having withdrawn from an illegal agreement which, *ex hypothesi*, is simply no longer necessary. This reasoning applies *a fortiori* to a situation where the illegal contract has been frustrated by circumstances beyond the plaintiff's control or has been fully executed. In fact, as the learned authors of

Goff & Jones have observed, awarding restitution in situations where the only reason for the plaintiff's abandonment of the illegal enterprise is that a change in circumstances has rendered the scheme unnecessary or impossible "does not promote withdrawal, and *may even encourage those who contemplate entry into an illegal transaction* by providing them with a safety net if they find that there is no longer anything to be gained from it" [emphasis added] (*Goff & Jones 2016* at para 25-30).

174 This leads us to the analysis of Prof Birks, who has argued that the cases on the *locus poenitentiae* doctrine are best rationalised as falling within a narrow category of unjust enrichment where restitution is allowed based on *the policy of discouraging unlawful conduct*, and it is *only* in situations where there is *genuine* withdrawal and *voluntary* abortion of the illegal project that there can be said to be no threat of stultification such as to justify recovery under this doctrine. To quote Prof Birks once again (*Birks* at p 189; see, also, Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press: Oxford, 1985) at pp 301–302):

> It is entirely consonant with the policy of the law that people should be encouraged to withdraw from their illegal projects. There is no threat of stultification. Quite the contrary. So long as the withdrawal is a genuine withdrawal, neither the lever argument nor the safety-net argument applies. … However, the picture changes if the withdrawal is forced by betrayal on the part of the other. … *It is only while the project appears to be going ahead smoothly that there is an interest in encouraging withdrawal. In short …* ***the doctrine really is about penitence, meaning an unforced change of mind. It is about the voluntary abortion of illegal projects. Cases in which the plaintiff has been thwarted are not within it.*** That is not to say that thwarted plaintiffs are always barred from recovering, only that they cannot recover under this doctrine. [emphasis added in italics and bold italics]

175 As presently advised, the above analysis, which would enable the doctrine of *locus poenitentiae* to coherently fit within the framework of the law

of unjust enrichment (including the principle of stultification), appears to us to be both cogent and persuasive. It implies that the broad conception of the *locus poenitentiae* doctrine adopted by the minority (and Lord Neuberger) in *Patel* should not be accepted. It also suggests that the English Court of Appeal's decision in *Tribe* should not be followed in Singapore. *However*, as this particular issue did not arise on the facts of the present appeal, we will render a definitive view when it does arise directly for decision on a future occasion.

Summary of the law in Singapore on the doctrine of illegality and public policy in the context of unlawful contracts

176 To summarise our rulings on the doctrine of illegality and public policy in the context of unlawful contracts:

(a) The "range of factors" test adopted by the majority in *Patel* is *not* a part of Singapore law, and the present law on the question of whether the contract is *prohibited* which arises at the ***first stage*** of the inquiry *remains unchanged*. At this stage, the court will have to ascertain whether ***the contract*** is ***prohibited*** either pursuant to a *statute* (expressly or impliedly) and/or *an established head of common law public policy*. If the contract is indeed thus prohibited, there can be ***no recovery*** *pursuant to the (illegal) contract*. This is subject to the ***caveat*** that, in the general common law category of contracts which are not unlawful *per se* but entered into with the object of committing an illegal act (and *only in this category*), the *proportionality principle* laid down in *Ting Siew May* ought to be applied to determine if the contract is enforceable: see [22]–[40] above for an overview of the principles applicable at this first stage.

(b) *However*, that may not be the end to the matter as a party who has transferred benefits pursuant to the illegal contract *might* be able to recover those benefits on a ***restitutionary*** *basis* (*as opposed to* recovery of *full contractual damages*). This is the ***second*** stage of the inquiry. There are *three* possible legal avenues for such recovery:

(i) First, where the parties are ***not*** **in pari delicto –** which include the more specific categories of ***class protection statutes***, situations where there has been ***fraud, duress or oppression***, and cases where the plaintiff entered into the illegal transaction as a result of a ***mistake***: see [43] and [170] above.

(ii) Second, where ***the doctrine of*** **locus poenitentiae** applies because there has been timely repudiation by the plaintiff of the illegal contract. As presently advised, we are of the view that there must be *genuine and voluntary* withdrawal by the plaintiff from the illegal enterprise for the doctrine to apply, and that it would *not* apply in cases where the illegal purpose was frustrated by circumstances beyond the plaintiff's control or is simply no longer needed. We do not, however, make a definitive pronouncement on the issue in the present case: see [44]–[49] and [171]–[175] above.

(iii) Third, where the plaintiff brings ***an independent cause of action*** for the recovery of the benefits conferred under the illegal contract which *does not allow the plaintiff to enforce, and thereby profit from, the illegal contract*, namely:

(A) In ***unjust enrichment*** if the ordinary requirements of the claim are satisfied, subject to the ***defence*** of illegality and public policy in the law of unjust

enrichment. This defence is premised on the principle of ***stultification*** which requires the court to determine whether to allow the claim would ***undermine the fundamental policy that rendered the underlying contract void and unenforceable in the first place***: see [139]–[159].

(B) A claim in *tort* or *the law of trusts* based on the plaintiff's ***property or title***. Tentatively, our view is that the availability of such a claim ought *not* to depend on whether the plaintiff has to "rely on" the illegal contract in a formal or procedural sense, but should also be restrained by the principle of *stultification*: [161]–[168].

The present case

A preliminary evidential issue

177 We now turn to the facts of the present case. Before we delve into our analysis of the main issues in this appeal, however, we would like to make an observation on a preliminary issue that was raised in the course of submissions.

178 The Appellants argue that, since Ms Chua had elected not to take the stand and did not call Mr Sim as her witness, it was "evidentially wrong" for the Judge to have relied on Mr Sim's testimony and affidavit of evidence-in-chief to find in favour of Ms Chua's defence.

179 We find this argument to be without merit. In instances where some, but not all, defendants have submitted that there is no case to answer, the court, in deciding whether to uphold the submission of no case, may consider evidence

from the remaining defendants (who did not make the same submission) as it may reveal liability on the part of the former (see the Singapore High Court decision of *Sakae Holdings Ltd v Gryphon Real Estate Investment and others* [2017] SGHC 73 at [28]–[31]). Likewise, where a defendant has *merely chosen* ***not*** *to take the stand*, there is no reason why that defendant should be barred from relying on evidence adduced by the *remaining defendants* in the proceedings to support his submissions. It would be artificial and illogical to require the court, instead of weighing the evidence before it in its totality, to consider only selective portions of the facts while ignoring others depending on whom the claim is brought against. In this connection, a more fundamental point to note in the circumstances of the present case is that the claims in contract and unjust enrichment are made against Ms Chua *in her capacity as the sole proprietor of VIE*. Hence it would not make sense for us, in assessing the claims against Ms Chua in that capacity, to discount the evidence of Mr Sim who is, after all, the main controller of VIE, and arrive at our determination on an incomplete set of facts. The Judge was therefore correct to have relied on Mr Sim's evidence in the matrix, and we proceed on the same basis.

First stage: Whether the Orion and Ole Agreements fall foul of the MLA

180 As we alluded to in our introduction at [3], the present case concerns potential *statutory* illegality (as opposed to common law illegality). The first stage of our analysis concerns whether or not the Orion and Ole Agreements are caught by the MLA, such that there can consequently be ***no recovery*** under *the contracts* themselves. As we mentioned also at the start of our judgment, this issue is legally straightforward and primarily turns on a *factual assessment* of the evidence before us.

181 In our assessment, the Appellants' general approach in seeking to deal with the factual issues which arise from this primary contractual claim, as well as the related claims in fraudulent misrepresentation and conspiracy to defraud (which we come to later in our judgment), has been to rehash the very same arguments made in the court below and, in doing so, cherry-pick the facts which lend support to their case. They consequently fail to address material pieces of evidence highlighted in the Judgment that are unfavourable to them. Having considered the Appellants' case in detail, we are of the view that they have not raised any facts or evidence which the Judge below has not already properly considered and dealt with in arriving at her decision. Even if some of these facts were not expressly mentioned in the Judgment, it is clear to us that the Judge had taken into account the material aspects of the parties' evidence in reaching her determination. The Appellants therefore fail to convince us that their arguments on appeal, when considered, should affect the overall findings of fact made by the Judge. We now address each of the Appellants' arguments in further detail.

(1) Whether Mdm Lai and Mr Ole knew that the Orion and Ole Agreements were improper

182 We start by considering whether Mdm Lai and Mr Ole knew that the Orion and Ole Agreements were improper. The issue is *central* to the Appellants' claim in contract (as well the claims in fraudulent misrepresentation and conspiracy to defraud). This is because, if Mdm Lai and Mr Ole did, in fact, know that the Orion and Ole Agreements were improper, then the natural inference which would follow is that the monies disbursed under the contracts were not legitimate commercial investments as the Appellants claim, but rather pure moneylending transactions instead. Indeed, this was a key factual finding which led to the Judge's determination that the contracts were unenforceable

moneylending agreements. In addition, the claim that the Appellants were the victims of fraudulent misrepresentations as well as a conspiracy to defraud by Mr Sim and Ms Chua would also largely fall away if the Judge's finding on this issue is upheld.

(A) THE JUDGE'S FINDINGS

183 Based on the witnesses' oral testimony and the objective evidence before her, the Judge found that Mdm Lai and Mr Ole had always intended that the Orion and Ole Agreements were to be loan transactions. They also knew that the invoices were fabricated and that there were no specific sales by VIE in which they were "investing" (at [60]).

184 The main reasons for the Judge's decision were as follows:

(a) The Agreements were based on a template dictated by Mdm Lai who insisted on an invoice (which she knew to be false) to accompany each Agreement so that the transactions would not look like moneylending transactions (at [48]). Mdm Lai was a "seasoned investor" and would not have, on every occasion, willingly disbursed money to VIE upon receiving an Agreement and accepted whatever rate of return determined by Mr Sim. There was also no reason why Mr Sim would have voluntarily offered consistently high rates of return for such short periods of repayment. Furthermore, the fact that Mr Sim was not conversant in the English language lent support to the Respondents' case that Mdm Lai had dictated the actual language of the Agreements (at [50]).

(b) Mdm Lai and Mr Ole did not query several obvious discrepancies in the invoices which accompanied each Agreement. This

was despite the fact that Mr Ole was himself in the food business and the material particulars on the invoices would have been familiar to him (at [54]). Any reasonable investor in the shoes of Mdm Lai and Mr Ole at the time the funds were being disbursed and with even a superficial understanding of VIE's business model would have immediately realised that there was something awry (at [57]). The irresistible inference was that they knew that the particulars in the invoices were concocted and thus did not rely on them when advancing monies to VIE under the Agreements (at [54]).

(c) Mdm Lai and Mr Ole were most unsatisfactory and evasive witnesses. They were savvy investors who could articulate their views well, but yet they could not give convincing explanations on the material issues, tried to distance themselves from inconvenient facts by making implausible assertions and chose to downplay their involvement in the transactions (at [60]).

(d) Mdm Lai and Mr Ole never raised issue with the fact that VIE would have made hardly any profit from the Agreements based on the documents sent to them, a fact which should have raised doubts as to the viability of their joint venture in VIE (at [55]).

In the circumstances, the Judge found that what the parties really agreed upon was "a series of extortionate loans which they sought to disguise as being part of a joint venture investment" (at [63]).

(B) OUR ANALYSIS

185 According to the Appellants, the Judge erred in finding that the Appellants and Mdm Lai knew the invoices were fabricated and that there were

no real goods or profits underlying any of the agreements. They raise a number of grounds in support of their argument, which we address in turn.

186 First, the Appellants submit that the Judge's finding that the Appellants and Mdm Lai knew that the invoices were fabricated went beyond the case which the Respondents had pleaded. This submission is wholly unmeritorious. It was always the Respondents' case that Mdm Lai and the Appellants had full knowledge of the nature of the invoices. Specifically, Mr Sim had pleaded at paragraph 7 of his defence that:

> (f) … Mdm Lai told [Mr Sim] that … she wanted the written loan agreement to be supported by a tax invoice from [VIE].
>
> (g) [Mr Sim] objected. [Mr Sim] told her that … there would not have been an invoice from any customer at the time of the loan agreement. At the time of the loan agreement, [VIE] would not have found a customer yet. Mdm Lai replied that how [VIE's] tax invoice was obtained was something she would leave to [VIE].
>
> (h) From the outset, Madam Lai required that [VIE]'s tax invoice(s) be enclosed to each of the [Agreements]. Madam Lai explained to [Mr Sim] she did not want the loans to look like money lending transactions. She knew that lending (with the exorbitant interest rates) was illegal.

187 In our assessment, the allegation that the Appellants and Mdm Lai knew that the invoices were fabricated clearly fall within these pleadings. The Judge was therefore entitled to make a finding on this allegation. We would also take this opportunity to reiterate that the rules of pleadings, at the end of the day, are not meant to be technical defences; nor should the court allow them to be turned into engines of oppression to prevent the true version of events from coming to light. In this case, knowledge of the propriety of the transactions was evidently an issue that arose organically from the Respondents' pleaded cases. The issue was ventilated at trial, and it cannot be said that this was a matter which took the Appellants by surprise, such as to disentitle the court from making a finding

on the issue.

188 Second, according to the Appellants, the Judge erred in finding that the terms of the Agreements were determined by Mdm Lai and not the Respondents. The Appellants raise the following arguments:

(a) Mr Sim's account should not be believed given his inability to provide a consistent account as to who determined the terms in the Agreements. Mr Sim's allegation that Mdm Lai had dictated over the phone to Ms Chua the language of the template on which the Agreements were prepared was unsubstantiated and contradicted by Ms Chua's account.

(b) Although Mr Sim was not conversant in the English language, he could have just as easily dictated the terms of the template for the Agreements to Ms Chua in Cantonese, for her to translate into English.

(c) The Judge's finding that the parties sought to disguise loans as part of a joint venture investment made little sense. If Mdm Lai's objective was to disguise illegal moneylending transactions as investments, it would be unthinkable for a "savvy investor" such as she to dictate that the word "loan" be used.

(d) The invoices demonstrated that the rates of return were dependent on the type of foodstuff purportedly being purchased and resold. The rates of return were not exorbitant considering that they were well within the profit margin which Mr Sim conveyed to Mdm Lai.

(e) Mr Sim was unable to give satisfactory explanations for the fluctuations in the interest rates across the Agreements.

(f) It did not make sense for Mr Sim to continue accepting further funds from the Appellants and Mdm Lai if VIE's business was allegedly not doing well after six months. Although Mr Sim alleged that Mdm Lai had threatened the Respondents with legal action for the debt already incurred by that stage, the solution would have been to stop taking further sums which would expose VIE to even greater liability in the future.

(g) If Mr Sim had truly informed Mdm Lai and the Appellants that VIE's business was not doing well, they would not have continued to advance monies to VIE.

(h) Mdm Lai would have, on every occasion, willingly disbursed money to VIE upon receiving an Agreement and accepted whatever rate of return was determined by Mr Sim because: (i) VIE had not missed a single payment to Mdm Lai at the time, which indicated to her that the business was doing well; (ii) the invoices indicated to Mdm Lai that VIE had confirmed purchases from its customers; and (iii) Mdm Lai and Mr Sim shared a very close relationship in which Mdm Lai reposed "absolute trust" in Mr Sim.

189 In our assessment, the allegations raised here (a) have already been considered by the Judge in arriving at her decision; (b) merely represent an alternative interpretation of the evidence presented; or (c) are irrelevant to the Judge's overall findings. Even though the Judge does not mention some of the specific facts highlighted by the Appellants, she was evidently alive to the deficiencies in the Respondents' evidence. In fact, in her judgment (at [49]), the Judge set out clearly the aspects of Mr Sim's evidence which she found to be unsatisfactory, which are in line with the issues that the Appellants have

highlighted in the present appeal. Nevertheless, she chose to accept the Respondents' case as it was a more plausible account than that of the Appellants (at [48]–[50]). Indeed, we share the Judge's view that Mdm Lai, as an investor with nearly 40 years of experience in managing the couple's joint portfolio, would not have agreed to disburse more than $58m worth of funds under the Agreements without having had substantial input with regard to their terms. Her case that she was content to leave the terms of the Agreements entirely to Mr Sim is simply implausible. In addition, we note that, even after the business was not doing well, it was not unreasonable for Mr Sim to continue accepting and injecting funds from the Appellants into VIE's business in an attempt to turn it around. Given the attractive returns under the Agreements, it is also understandable why Mdm Lai continued advancing monies to the Respondents despite knowing that the business was not doing well. It is clear on the evidence that the Appellants would have been entitled to the principal and the returns under the Agreements regardless of whether VIE was turning a profit. We are thus unable to agree with the Appellants that the Judge's decision was plainly wrong.

190 Third, the Appellants argue that the Judge had erred in finding that Mdm Lai and Mr Ole must have already known that the invoices were fabricated on the basis of "obvious discrepancies" in those documents. They rely on the following bases in support of their argument:

(a) Mr Sim had represented to Mdm Lai that VIE had repeat orders from the same customers. It was thus reasonable to infer that VIE also had regular suppliers for those orders, such that the prices and shipping dates of those goods could be readily fixed in advance.

(b) Mdm Lai testified that she did not scrutinise the invoices and did not take note of details such as the shipping dates, which is not unusual given the closeness of her relationship with Mr Sim and the trust that she had placed in him. In any event, the discrepancies on the face of those documents did not mean that the supply chain was unworkable in reality.

(c) Mdm Lai simply could not have calculated, and did not calculate, the potential profit VIE would have made as she had left the Respondents to run the business. Mdm Lai did not pay attention to the details of the invoices, save for the food products involved, the names of the purchasers, and the dates of the invoices to establish the recipients of those funds and the date by which the remittances had to be made.

191 Once again, it is clear from the Judgment (at [52]–[57]) that these aspects of the evidence were carefully considered by the Judge in the course of her reasoning, although she eventually rejected the Appellants' case theory on the basis that it was incredible. In arriving at her decision, the Judge found that the evidence that Mdm Lai and Mr Ole were not interested in the shipping details in the invoices was "self-serving and difficult to reconcile with their assertions that they paid 'a lot of attention' to and were 'very interested in the details' of the invoices" (at [54]). Furthermore, the Judge noted that Mr Ole had testified that he made the time to look through every one of the Agreements and invoices (at [54]). The Appellants have not addressed these points, and have instead chosen to rely on what appear to be speculative and unsubstantiated statements to explain the inconsistencies in their evidence. Based simply on the allegations raised, the Appellants have not, in our view, demonstrated that there was a misjudgement of the facts below.

192 Fourth, the Appellants contend that Mdm Lai and Mr Ole were more credible witnesses than Mr Sim. They point out several instances where Mr Sim was evasive, or where his evidence was internally inconsistent or at odds with the extrinsic evidence before the court. In our view, the evidence which the Appellants highlight are similarly not sufficient to overturn the Judge's overall finding that it was Mdm Lai who had determined the language of the Agreements. As we mentioned, the Judge was clearly aware of the deficiencies in Mr Sim's evidence. In finding that Mdm Lai and Mr Ole were unsatisfactory witnesses, the Judge also took into account the fact that "[u]ndoubtedly there were flaws in Mr Sim's testimony and issues which he could not satisfactorily explain as well" (at [60]). Having tested the parties' oral evidence against the contemporaneous documents, however, she found on balance that Mr Sim's case was more probable than that of the Appellants. The Appellants, on the other hand, have not demonstrated to us why the Judge was wrong based on the *totality* of the evidence but have simply rehashed the same factual allegations as in the proceedings below which were clearly considered by the Judge in arriving at her decision. In our judgment, the Appellants' approach, in simply regurgitating the very same arguments that had failed in the proceedings below, does not bring them very far.

193 In the circumstances, we see no reason to disturb the Judge's finding that Mdm Lai and Mr Ole knew that the Orion and Ole Agreements were improper. We therefore affirm the Judge's conclusion that the Appellants were aware of the true nature of the Orion and Ole Agreements, which were moneylending transactions that the Appellants sought to disguise as *bona fide* investments in a joint venture.

(2) Whether the Orion and Ole Agreements are unenforceable by reason of s 15 of the MLA

194 The next question, then, is whether the contracts fall within the scope of s 15 of the MLA and are therefore unenforceable.

(A) THE JUDGE'S FINDINGS

195 In finding that the Orion and Ole Agreements were unenforceable under the MLA, the Judge first held that these were clearly loan contracts within the definition of the MLA (at [34]). In reaching her conclusion, she considered carefully the form and substance of the transaction as well as the parties' position and relationship in the context of the entire factual matrix (as per *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 ("*City Hardware*") at [24]), and made the following findings:

(a) The *form* of the Agreements indicated that they were loan contracts (at [35]). All 740 Agreements were titled "Agreement of Loan" and expressly stated that VIE "took a loan" from either Mdm Lai, Orion or Mr Ole. With Mdm Lai and Mr Ole's wide experience in investing and business, and Mdm Lai's strong command of the English language, it was strange that she had failed to query the language used in the Agreements if they did not truly reflect the nature of the transactions.

(b) The *substance* of the Agreements demonstrated that they were contracts for the repayment of monies lent (at [37]). Mdm Lai and Mr Ole admitted that VIE was contractually obliged to pay the principal sum and the pre-determined rate of return on the Repayment Date *regardless of whether it actually got paid by its customer or made any profit*.

(c) The language which the parties used in reference to the transactions in the course of their dealings suggests that they were, in fact, loans (at [40]).

(d) The steps which Mdm Lai and Mr Ole took to take control of VIE were consistent with a lender-borrower relationship between the parties (at [44]). Mdm Lai and Mr Ole were neither shareholders in VIE nor directly involved in its business, and Mdm Lai's desire to transfer VIE's business to her Hong Kong-incorporated companies (including Orion) was more plausibly explained by *her own desire to avoid paying taxes* rather than her concerns about whether *VIE was properly paying its taxes* (at [44]). Furthermore, Mdm Lai's desire for some control over and oversight of VIE would also have been driven by the fact that she was an unsecured creditor for very large sums (at [45]).

(e) The close relationship between Mdm Lai and Mr Sim was, at best, a neutral point in determining whether she was an investor rather than a lender (at [46]). Their close relationship did not prevent her from lending money to another business which Mr Sim managed (at [46]).

196 After determining that the Appellants were lending money to the Respondents under the Orion and Ole Agreements, the Judge found further that they were unlicensed moneylenders under the MLA and that the contracts were unenforceable under s 15 of the same Act. These were the reasons for her decision:

(a) The Appellants were not excluded moneylenders under exception (*c*) to the definition of "moneylender" in s 2 of the MLA ("s 2 Exception (*c*) of the MLA") (which defines excluded moneylenders as persons who "bona fide carr[y] on any business not having for its

primary object the lending of money in the course of which and for the purposes whereof he lends money"). This was because their sole object was to lend money at a high interest rate, Orion was "not trading anything" and there was no real joint venture under which the loans were advanced (at [70]–[71]).

(b) The Appellants were also carrying on the *business* of moneylending. There was a system and continuity in the transactions because (i) there was an organised system under which the amount required by VIE for each month would be determined and repaid; and (ii) there was continuity given that there were 76 Orion and Ole Agreements, and 740 Agreements in total under which a sizeable amount of more than $58m was disbursed. The loans under the Orion and Ole Agreements were disbursed regularly over three months, and the entire course of conduct in relation to the Agreements spanned a period of over three years (at [77]).

197 Finally, it bears noting that, in the course of her decision, the Judge was mindful that it would be inappropriate to apply the MLA to commercial transactions between experienced business persons who did not *prima facie* have the characteristics of moneylending (see *City Hardware* at [22]). Nevertheless, she was of the view that the principle did not apply in this case since the parties had wilfully attempted to structure a transaction so as to evade the MLA's application (at [80]–[81]).

(B) THE APPELLANTS' ARGUMENTS

198 The Appellants mount the following challenges against the Judge's findings.

199 First, the Appellants submit that the Judge erred in finding that the Orion and Ole Agreements were purely loans with no terms limiting their use. Their reasons are that:

(a) The Orion and Ole Agreements were not loans in their substance. They were in actual fact investments in VIE's purported business on the basis of a cost- and profit-sharing joint venture. Based on the invoices, the rates of return in the Agreements depended on the type of foodstuff purportedly being purchased and resold. The "profit" to be repaid did not accumulate or compound if VIE failed to make payment by the due date, which showed that it was not an interest rate in disguise.

(b) There is "overwhelming" objective contemporaneous evidence by Mr Sim and Ms Chua asserting that the transactions with VIE were "investments".

(c) Mdm Lai and the Appellants' attempts to transfer VIE's business to certain companies in which Mdm Lai and Mr Ole held shares, including Orion, and the fact that Mdm Lai was made a signatory to VIE's bank account, are demonstrative of their interest in the business.

(d) By dismissing the relationship between Mdm Lai and Mr Sim as a "neutral point", the Judge appears not to have considered their close personal relationship as a relevant indicator of the nature of the transactions. Their close relationship suggests that Mdm Lai would not have been a "rapacious moneylender".

(e) Mdm Lai and the Appellants clearly shared the risk of VIE's business with the Respondents. Mdm Lai and Mr Ole, in advancing monies to VIE, were essentially putting "at risk" funds from their joint

portfolio on an unsecured basis. In other words, they undertook the "risk" that they would lose the entire principal sum should VIE's business fail.

200 Second, the Appellants argue that even if the Orion and Ole Agreements were loan contracts, the Judge had erred in finding that they were unenforceable pursuant to s 15 of the MLA. They emphasise that:

(a) The Appellants fall within s 2 Exception (*c*) of the MLA as the loans were granted as part of their primary object of investing in VIE's business. It is not true that Orion did not have a primary business as it had entered into an agreement to conduct a business in food import and export and attempted to transfer VIE's business to itself, even though these did not subsequently materialise.

(b) In any event, they were not in the *business* of moneylending. In relying on the factors set out in the Singapore High Court decision of *Lim Beng Cheng v Lim Ngee Sing* [2016] 1 SLR 524 ("*Lim Beng Cheng*"), which are relevant to deciding whether there was a system and continuity in the transactions, the Appellants highlight that: (i) Mdm Lai and the Appellants never held themselves out as being willing to lend money; (ii) there is no evidence that they had lent money to any other entities not closely associated with the Respondents; (iii) none of Mdm Lai's and Mr Ole's businesses was connected with moneylending; (iv) any "system and continuity" in the transactions was orchestrated by the Respondents, and not Mdm Lai nor the Appellants; and (v) save for a stipulated due date, there was no clear and definite repayment plan in respect of the transactions.

(c) Finally, MLA is a piece of social legislation that is designed to protect individuals who had to turn to unscrupulous unlicensed moneylenders, who preyed on people unable to borrow money from banks and other financial institutions. It was not intended to protect borrowers who were experienced business persons/entities such as VIE.

(C) OUR ANALYSIS

201 As we held earlier (at [193]), we agree with the Judge's determination that Mdm Lai and Mr Ole had always intended that the transactions be loans but sought to disguise them as being part of a joint venture investment. Once we arrived at this conclusion, much of the Appellants' case, which seeks to demonstrate that the transactions were *not* loans, falls away. In any event, we are unable to agree with the Appellants that the factual matrix surrounding the transactions demonstrated that the Orion and Ole Agreements were not loans:

(a) It was obvious that the Orion and Ole Agreements were loans in substance. There is clear evidence that the rate of return under the Agreements was essentially pegged to the *quantum of the monies advanced by the Appellants* rather than to the *business revenue generated by VIE*. This was accepted by Mdm Lai in court, when she admitted that VIE was contractually obliged to pay the principal sum and the pre-determined rate of return on the Repayment Date regardless of whether it made any profit. It did not matter that the invoices showed that the rates of return depended on the type of foodstuff being purchased and resold; the invoices were fabricated to accompany the Agreements and Mdm Lai knew this to be so. It also did not matter that the rates of return on the monies advanced under the Orion and Ole

Agreements did not compound over time. There is no requirement that there be "accruing" interest for a loan to exist.

(b) Given that both sides have each adopted the term "investments" and "loans" on multiple as well as different occasions to describe the nature of these transactions, we are of the view that the labels which they have used are, by themselves, not particularly helpful in determining whether the transactions were truly monies advanced as part of a joint venture or were purely loans. What may be concluded from the totality of the evidence, however, is that the parties' use of the term "investment" does not preclude a finding of a loan on these facts. This is because Mdm Lai's testimony indicates she was aware that "investments" and "loans" were not mutually exclusive terms, when she admitted that what she repeatedly referred to as "investments" in Brightstar (another business managed by Mr Sim) were in fact "loans".

(c) The Appellants have not pointed to any evidence to demonstrate that their attempts to transfer VIE's business to Mdm Lai and Mr Ole's companies, including Orion, and the fact that Mdm Lai was made a signatory to VIE's bank account, indicated a genuine interest in the business itself as opposed to a way of retaining oversight of VIE's finances as its major unsecured creditor. Indeed, that Mdm Lai had only superficial knowledge of VIE's management and operations (which is demonstrated by, for example, the fact that she did not even know that VIE had at least six different bank accounts through which it transacted) strengthens the view that she was merely a creditor and not a partner in a joint venture.

(d) It was clear that the Judge had considered the relationship between Mr Sim and Mdm Lai to be a relevant, albeit neutral, point in determining whether Mdm Lai was lending money to VIE. Furthermore, since Mdm Lai had in fact lent money to Brightstar on numerous occasions despite the alleged closeness of her relationship with Mr Sim, we were hard-pressed to find that their relationship would necessarily have prevented her from lending money to VIE in this instance and under these contracts.

202 In our judgment, therefore, the Appellants have not been able to demonstrate that the Judge's determination that the transactions were loans was plainly wrong on the evidence.

203 The remaining issue, in determining whether the loans were unenforceable, is whether or not the Appellants were unlicensed moneylenders under the MLA. In our assessment, the Judge was correct to find that they were so for three reasons.

204 First, it seems clear to us that the Appellants did not fall within s 2 Exception (*c*) of the MLA. The Appellants accept that, while Orion had attempted to engage in businesses in the import and export of food, these ultimately did not materialise. In other words, Orion had in reality no primary business other than the loans which it made to VIE. As we found above, there was also no real joint venture under which the loans were advanced.

205 Second, the factors identified in *Lim Beng Cheng* (set out at [200(b)] above) are relevant, but not determinative, to finding that there was a *business* of moneylending. We are convinced on the evidence set out above at [196(b)],

that there was a system and continuity in the transactions and thus that the Appellants were in the *business* of moneylending.

206 Third, as far as the Appellants' argument, that the MLA is a piece of "social legislation" designed to protect vulnerable individuals rather than experienced business persons/entities (such as VIE), is concerned, we are unable to identify the *legal argument* which the Appellants are seeking to make. The Appellants have not pointed to a single legislative provision which should be construed in their favour in light of the MLA's legislative purpose, on the basis of which the Judge's finding should be overturned. More importantly, based on the express wording of s 2 and Exception (*c*) of the MLA, it is clear to us that the MLA extends not just to the rogue "loan shark" who preys on the poor and vulnerable, but to anyone who engages in the *business of moneylending* within the meaning of the MLA without license.

207 For ease of reference, we reproduce the relevant portions of s 2 (including Exception (*c*)) of the MLA as follows (incorporating the amendments up to December 2007, which is the date of the Orion and Ole Agreements):

> "moneylender" includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent but does not include —
>
> (*a*) any body corporate, incorporated or empowered by a special Act of Parliament or by any other Act to lend money in accordance with that Act;
>
> (*b*) any society registered under the Cooperative Societies Act;
>
> (*c*) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not

> having for its primary object the lending of money in the course of which and for the purposes whereof he lends money;
>
> (*d*) any pawnbroker licensed under the provisions of any written law in force in Singapore relating to the licensing of pawnbrokers;
>
> (*e*) any finance company licensed under the Finance Companies Act [Cap. 108];
>
> (*f*) any person licensed under the Securities and Futures Act 2001; and
>
> (*g*) any merchant bank which is an approved financial institution for the purposes of section 28 of the Monetary Authority of Singapore Act (Cap. 186);

208 The scheme of the MLA, and the requirement for commercial moneylenders to obtain a license, also indicate that the Act fulfils an important *regulatory purpose* in regulating transactions which fall outside of s 2 Exception (*c*) of the MLA (see Lal Harcharan Singh, *Law of Moneylenders in Malaysia and Singapore* (Sweet & Maxwell, 2003) at p 15, cited in *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 at [68]). In the present case, the transactions, which were basically extortionate loans disbursed over a substantial period of some three years and which were never part of any *bona fide* commercial venture, clearly fall within the mischief sought to be addressed by the MLA.

209 In the course of oral submissions, the Appellants stressed further that the Judge should not have found that the Orion and Ole Agreements were unenforceable under the MLA because the present case was factually similar to *Hungier v Grace and another* (1972) 127 CLR 210 ("*Hungier*"), in which the High Court of Australia had found that there was *no* business of moneylending. In *Hungier*, the appellant had extended monies to the respondent, a timber merchant, for a period of six years for the latter to purchase timber, following which the two men split the net profits from the timber's re-sale. The essential

fact, according to the Appellants, was that it had been the timber merchant who had approached the lender on each occasion. Any system or regularity in the transactions thus was not of the lender's seeking; he was merely responding to the timber merchant's requests. Since this was also a feature in the present case, the Appellants argued that *Hungier* gives support to their submission that they were similarly *not in the business of moneylending*.

210 The basic flaw in the Appellants' attempt to analogise the present facts to those of *Hungier*, however, is that their argument was once again premised entirely on their case that the events were all of Mr Sim and Ms Chua's initiation and that the Appellants did not know that the invoices were improper. As we have explained above, the Appellants have not succeeded in persuading us that the Judge had erred on this particular point. Indeed, the circumstances of the present case are quite different from those in *Hungier*. The Appellants in this case were well aware of the true nature of the Agreements and acted precisely in order to avoid the MLA. One further distinction (and a rather fundamental one) is that, unlike the facts in *Hungier*, the interest rates of the moneylending transactions in the present case were fixed, and there was no sharing of the profits made. As we alluded to earlier at [201(a)], and having regard to all the circumstances, it is evident that the Appellants in this case were not engaged in a commercial joint venture with the Respondents, with both parties taking on business risks; rather, their relationship was simply one of lender and borrower, with the Appellants having no real stake in VIE's business, apart from the credit risk which they took on as lenders. In our view, therefore, *Hungier* does not assist the Appellants in any way.

211 In the circumstances, we see no reason to disturb the Judge's finding that the Orion and Ole Agreements are unenforceable under s 15 of the MLA.

The Appellants' appeal in respect of their primary claim in contract is therefore dismissed.

Second stage: Whether the principal sums disbursed under the Orion and Ole Agreements can be recovered in unjust enrichment

212 As we agree with the finding below that the Orion and Ole Agreements are prohibited and unenforceable by reason of s 15 of the MLA, the Appellants' alternative claim needs to be considered. This is an independent claim in unjust enrichment for recovery of the outstanding principal sums disbursed under the contracts, totalling $8,909,500, from VIE (*ie*, Ms Chua).

213 Applying the legal principles set out above, the first question is whether the ordinary requirements of the claim in unjust enrichment are satisfied. As set out by this Court in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [98], these requirements are as follows:

(a) Has the defendant been benefited or been enriched?

(b) Was the enrichment at the expense of the claimant?

(c) Was the enrichment unjust?

(d) Are there any defences?

214 It is indisputable that the first two requirements are made out as VIE was benefitted by the principal sums totalling $8,909,500 lent by the Appellants and this enrichment was directly at the Appellants' expense. The identification of the unjust factor is also straightforward. In this case, there is a total failure of

consideration, namely the failure of VIE to repay the loan amounts which was the promised counter-performance based on which the loans were disbursed.

215 The final, and *key question*, is whether the defence of illegality operates to defeat the independent claim in unjust enrichment. This defence turns on an application of the concept of ***stultification*** to the present facts, and whether to permit recovery of the principal sums would ***undermine the fundamental policy underlying the MLA and make a nonsense of the legislative prohibition which renders the Orion and Ole Agreements void and unenforceable in the first place***.

216 In the court below, the Judge dealt with this issue briefly in the following passage in the Judgment (at [84]):

> Finally I should add that, as the Orion and Ole Agreements are unenforceable by reason of s 15 of the MLA, the plaintiffs' claim in unjust enrichment should also fail. This alternative claim is a backdoor attempt to enforce the Agreements. In every case involving an unlicensed and therefore unenforceable loan contract, it could similarly be argued by the lender that it has a separate cause of action based on unjust enrichment because the consideration for the grant of the loan has wholly failed. If allowed, such a restitutionary claim would render s 15 of the MLA otiose. The position may arguably be different if the lender had entered into the illegal loan agreement as a result of a mistake as to the facts constituting the illegality or was not *in pari delicto* (see *Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2011] 2 SLR 865 at [23]–[25]). However, it is not necessary for me to determine this point because, as explained above, this is not such a case.

217 As is apparent from the above passage, the parties did not present detailed legal arguments to the Judge on this alternative claim, and the Appellants relied chiefly on the principle that restitution of monies disbursed under an illegal contract is available to a plaintiff who was not *in pari delicto* (which we have examined at [43] and [171]–[175] above). In our view, the

Judge was entirely correct in finding that this doctrine does not apply to this case. It clearly has no application given the Judge's finding, which we have upheld, that the illegality was perpetuated with the knowledge and at the insistence of Mdm Lai and Mr Ole.

218 On appeal, the Appellants argue that the policy underpinning s 15 of the MLA would not be undermined if the claim in unjust enrichment were allowed because the underlying "illegality" in this case involved a commercial relationship between the Respondents and the Appellants rather than a typical infraction envisioned by the MLA. We do not agree.

219 In our judgment, the alternative claim in unjust enrichment ***cannot*** succeed because to permit recovery of even the principal sums would ***undermine and stultify the fundamental social and public policy against unlicensed moneylending which undergirds the MLA.*** An examination of the legislative policy underpinning the MLA indicates that unlicensed moneylenders should be precluded from recovering ***any compensation whatsoever*** for their illegal loans. Permitting restitution of the principal sums lent would make a ***nonsense*** of this policy and ***render ineffectual*** the prohibition in s 15, which reflects ***the strong need to deter illegal moneylending due to its status as a serious social menace in Singapore***.

220 We start with the observation that unlicensed moneylending is a serious and pernicious activity in our society against which Parliament has set its face implacably, as noted by the Singapore High Court in *Ho Sheng Yu Garreth v Public Prosecutor* [2012] 2 SLR 375 ("*Garreth Ho*") at [68]. This can be seen most evidently from the substantial and robust increases in the penalties for moneylending offences over the years since the criminal offence of unlicensed moneylending was first introduced through the Moneylenders Ordinance 1959

(No 58 of 1959) (see *Garreth Ho* at [58]–[68]). The prohibition with regard to the civil enforcement of unlicensed moneylending contracts presently found in s 15 of the MLA was first introduced in the same Ordinance to strengthen the legal regime against unlicensed moneylending and "to make it clear that ***a moneylender should not be able to recover a loan made by him unless he is licensed***" [emphasis added in bold italics] (State of Singapore, *Legislative Assembly Debates*, Official Report (13 January 1960) vol 12 at col 60 *per* Mr K M Byrne, Minister for Labour and Law).

221 More recently, the legislative scheme was further bolstered by the enactment of s 14(2) of the Moneylenders Act 2010 (Cap 188, 2010 Rev Ed) ("the MLA 2010") (introduced via the Moneylenders Act 2008 (Act No 31 of 2008)):

> (2) Where any contract for a loan has been granted by an unlicensed moneylender, or any guarantee or security has been given for such a loan —
>
> > (*a*) the contract for the loan, and the guarantee or security, as the case may be, shall be unenforceable; and
> >
> > (*b*) any money paid by or on behalf of the unlicensed moneylender under the contract for the loan shall not be recoverable in any court of law.

222 The explanatory statement to Clause 14 of the Moneylenders Bill 2008 (Bill No 33 of 2008) is revealing:

> Clause 14 makes it an offence for any person to carry on, or hold himself out as carrying on, moneylending business in Singapore unless he is authorised to do so by a licence, or he is an excluded moneylender or exempt moneylender. It is also an offence for any person to assist in the commission of such an offence, and the clause contains a presumption for this purpose. *A contract for a loan from an unlicensed moneylender, and any guarantee or security given for such a loan, will be unenforceable, and any money paid by or on behalf of the unlicensed moneylender is not recoverable in any court of law,*

> ***regardless of the cause of action***. [emphasis added in italics and bold italics]

The plain language of s 14(2) of the MLA 2010, together with the explanatory statement, clearly indicates that Parliament legislated via the Moneylenders Act 2008 to expressly prohibit a claim in unjust enrichment to recover any money paid by or on behalf of an unlicensed moneylender. This statutory provision, however, does not directly apply to the present case as the applicable provision is s 15 of the previous MLA (*ie*, the 1985 Revised Edition).

223 Both sides rely on the enactment of s 14(2)(*b*) of the MLA 2010 in support of their respective cases. The Appellants acknowledge that the claim in unjust enrichment would fail if this provision applied. However, since the provision does not apply in this case, they argue that the court is free to allow the claim in unjust enrichment under the common law. They also argue that the fact that s 14(2)(*b*) of the MLA 2010 had to be specifically enacted indicates that, prior to 2008, there was no legal prohibition against a claim in unjust enrichment to recover the principal amounts disbursed under an illegal moneylending contract. The Respondents, by contrast, submit that s 14(2)(*b*) of the MLA 2010 demonstrates that Parliament "remains resolute on barring the claims of illegal moneylenders".

224 In our assessment, the fact that s 14(2) of the MLA 2010 does not apply in this case does mean that there is no *statutory* prohibition of the unjust enrichment claim. Nevertheless, its enactment in 2008 is still relevant as *a significant indicator of Singapore's social and public policy towards unlicensed moneylending* which we are entitled to, and indeed must, take into account when considering the application of the common law defence of illegality in unjust enrichment. In this regard, we note that the enactment is not in any way a departure from the previous legislative policy of the MLA, but is in fact entirely

in line with the robust approach which has been consistently taken by Parliament in addressing unlicensed moneylending, as well as with the specific legislative purpose of s 15 of the MLA, which is to ensure that an illegal moneylender should not be able to recover a loan made by him (see [220] above).

225 Returning to the principle of stultification, there is no doubt that the rationale of s 15 of the MLA, and its efficacy in deterring illegal moneylending, would be severely undermined and made a nonsense of if the courts were to permit an unlicensed moneylender to recover the principal sums disbursed through an independent claim in unjust enrichment. It is true that the claim in unjust enrichment would not give the Appellants the exact same recovery as their contractual claim, as the former precludes the recovery of the interest or "profit" element (of approximately $1.3m in the context of the present case). However, this only addresses what Prof Birks referred to as the "identical yield argument" (see [158] above). This argument would apply in cases such as *Boissevain* (discussed at [149] above) where the restitutionary claim would allow the plaintiff to obtain substantially the same performance as he would have had under the illegal contract. However, there is still the fact that the availability of the claim in unjust enrichment for the principal sums would provide illegal moneylenders with *leverage* to compel their debtors to make full repayment despite the prohibition of the loan agreement. The claim would also provide them with a *"safety net"* by allowing them to recover their principal sums (thereby allowing them to grant further illegal loans). In other words, this is a situation where the "lever" and "safety-net" arguments identified by Prof Birks are entirely applicable (see [158] above).

226 Finally, we note that our analysis is supported by the observations made by the High Court of Australia on similar moneylending provisions in the

leading unjust enrichment case of *Pavey & Matthews Proprietary Limited v Paul* (1987) 162 CLR 221 ("*Pavey & Matthews*"). That decision concerned a claim in *quantum meruit* for the value of work done and materials supplied under an oral building contract. The majority of the court, comprising Deane, Mason and Wilson JJ, permitted the claim notwithstanding the fact that the contract was unenforceable due to s 45 of the Builders Licensing Act 1971 (NSW), which required the contract to be in writing. In the course of their analysis, the majority contrasted the writing requirement in s 45 of the Builders Licensing Act 1971, which in their view *did not* preclude the claim in unjust enrichment, with the statutory prohibition on the enforcement of unlicensed moneylending contracts found in moneylending legislation, which had been held in earlier authorities to *preclude* alternative restitutionary claims.

227 The relevant part of Mason and Wilson JJ's judgment is as follows (at pp 229–230):

> *Unlike the Court of Appeal we do not see any compelling analogy between s. 45 of the Act and the money-lending legislation* considered by this Court in *Mayfair Trading* [(1958) 101 CLR 428] and s. 22 of the *Money-lenders and Infants Loans Act* 1941 (N.S.W.) considered by Walsh J. in *Deposit & Investment Co. v. Kaye* [(1962) 63 SR (NSW) 453]. ***The relevant provisions in those cases explicitly rendered unenforceable contracts executed by the money-lender. The statutes were directed at making unenforceable an obligation to repay money already lent and a security already given in respect of such an obligation. It was not possible to interpret these provisions so that they left on foot any quasi-contractual causes of action on the part of the lender.*** *Request and receipt by the borrower of the money lent were integral elements in a situation in which the contract and all securities were expressed to be unenforceable.* ***An additional feature of the money-lending cases is that the legislation was designed to protect borrowers by imposing onerous obligations on money-lenders to comply with the statutory requirements. The need to protect borrowers in this way was the outcome of oppressive conduct on the part of money-lenders.*** Section 45, seen in its setting and in conjunction with the

> insurance scheme established by the Act, stands on a different footing. [emphasis added in italics and bold italics]

228 And, in a similar vein, Deane J observed thus (at pp 261–262):

> *The decisions on the money-lending legislation do not seem to me to be really in point.* ***In the legislation involved in those cases, it was possible to argue, both by reference to the different words used and the quite different history of money-lending legislation, that it was the plain legislative intent that the money-lender should be precluded from recovering any compensation for the loan which had been made and received by the borrower.*** *The relevant provisions went well beyond a mere statement that the agreement was to be unenforceable by the lender and were plainly directed towards imposing unenforceability in the ordinary case at a stage after the consideration had been fully executed by the lender, that is to say, after the money had been lent without an adequate memorandum in writing of the terms of the loan.* Thus, the sub-section of the Nigerian *Moneylenders Ordinance* (s. 19(4)) which was before the Privy Council in *Kasumu v. Baba-Egbe* [[1956] AC 539] expressly provided that a money-lender should not be entitled to enforce "any" claim "in respect of" any transaction in relation to which he had made default in complying with the requirement that he should enter certain particulars in a book. Section 9(1) of the *Money Lenders Act* 1912 (W.A.), which was before this Court in *Mayfair Trading Co. Pty. Ltd.* v. *Dreyer* [(1958) 101 CLR 428], provided that no contract for the "repayment by a borrower of money lent to him . . . or for the payment by him of interest on money so lent, and no security given by the borrower ... in respect of any such contract" should be enforceable in the absence of the prescribed note or memorandum. In *Deposit & Investment Co. Ltd. v. Kaye* [(1962) 63 SR (NSW) 453, at p 460], Walsh J. expressly drew attention to the fact that the form of the relevant provision did not simply say that "the contract of loan is not to be enforceable" but provided that "the borrower's obligations and the security for the performance of them shall not be enforceable". [emphasis added in italics and bold italics]

229 While we recognise that the moneylending provisions referred to in *Pavey & Matthews* are not exactly identical to s 15 of the MLA, the observations of the High Court of Australia underscore our ruling that the (fundamental) policy underlying the prohibition on the enforcement of illegal moneylending contracts found in a moneylending legislation such as the MLA,

which is to protect borrowers and deter the oppressive conduct of moneylenders, precludes even restitutionary recovery of the principal sums lent. To find otherwise would *stultify* the legislative intent that moneylenders should be precluded from recovering any compensation for the loan which they had made.

230 Finally, we do not agree with the Appellants that the policy underpinning s 15 of the MLA would not be undermined if their claim in unjust enrichment were allowed in the present case because of the commercial nature of the relationship between the parties. As we made clear earlier, the prohibition under s 15 of the MLA, and the policy of the Act, extends not just to the rogue "loan shark" who preys on the poor and vulnerable, but to anyone who engages in the *business of moneylending* within the meaning of the MLA without license (see [206] above). The conduct of the Appellants, who persistently lent monies to VIE at extortionate rates over a prolonged period of time without any legitimate commercial motivation other than to profit from usury, falls squarely within the mischief targeted by the MLA. In this regard, our rejection of the similar argument made by the Appellants in respect of their primary claim in contract equally applies to their alternative claim in unjust enrichment.

231 Accordingly, we find that the Appellants' appeal in respect of their alternative claim in unjust enrichment for the recovery of the outstanding principal sums disbursed under the Orion and Ole Agreements should also be dismissed.

Remaining claims in fraudulent misrepresentation and conspiracy to defraud

232 It remains for us to consider the two other claims against Mr Sim and Ms Chua, in fraudulent misrepresentation and conspiracy to defraud.

(1) The Judge's findings

233 The Judge's decision on the remaining claims was similarly premised on the key factual finding that Mdm Lai and Mr Ole knew that the Orion and Ole Agreements were improper. In her judgment, having found that the Agreements were moneylending transactions and that it was Mdm Lai who had insisted on the fabricated invoices to mask the nature of the Agreements, the Judge held that the claims for fraudulent misrepresentation and conspiracy to defraud must fail (at [91] and [92]).

234 In relation to the claim in fraudulent misrepresentation, the Judge essentially reasoned that, since Mdm Lai and Mr Ole were privy to the improper transactions and knew that the invoices were fabricated to disguise the true nature of the loan contracts, there would have been no representation by the Respondents to Mdm Lai and the Appellants that the monies advanced to VIE would be used to purchase the goods mentioned in the invoices, let alone any reliance placed by them on any such representation or on the invoices (at [91]).

235 In relation to the claim in conspiracy to defraud, the Judge held that there was no agreement between the Respondents to do certain acts with the intent to cause damage to the Appellants. Once again, the manner in which the Agreements were structured with the accompanying false invoices was done with the full knowledge of Mdm Lai and the Appellants. Furthermore, since Mdm Lai and Mr Ole knew that there were no genuine sales under the Agreements, the monies advanced were basically loans with no terms limiting their use. It was therefore irrelevant that VIE might have transferred some of the loan monies for purposes other than its business, and it did not indicate that there was a conspiracy to defraud (at [92]).

(2) The Appellants' arguments

236 In the Appellants' submissions, it is argued that the Judge had erred in concluding that both secondary causes of action were not made out. The following arguments were raised in support:

(a) By admitting that the monies advanced to VIE were used to make subsequent repayments to Mdm Lai and the Appellants under the Orion and Ole Agreements, Mr Sim effectively admitted to conspiring with Ms Chua to induce Mdm Lai and the Appellants to transfer money to VIE for its purported business. Further, and in the alternative, Mr Sim's admissions showed that the Respondents had falsely misrepresented to Mdm Lai and the Appellants that the sums advanced to VIE were used to conduct its business whereas they were actually used to make those subsequent repayments.

(b) The evidence shows further that the Respondents had transferred monies out of VIE to "random entities/persons for no apparent reason". This indicated that the Respondents had induced Mdm Lai and the Appellants to transfer money to VIE so that a significant portion of it could be siphoned off elsewhere, for unknown purposes.

(3) Our analysis

237 It is helpful, first, to set out the elements of each tort before considering whether the Judge had erred in her findings as the Appellants allege.

(A) FRAUDULENT MISREPRESENTATION

238 The essential elements of the tort of fraudulent misrepresentation are as follows (see the decision of this Court in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14]):

(a) First, there had to be a representation of fact made by words or conduct.

(b) Second, the representation had to be made with the intention that it be acted upon by the plaintiff, or by a class of persons which included the plaintiff.

(c) Third, the plaintiff had acted upon the false statement.

(d) Fourth, the plaintiff suffered damage by doing so.

(e) Fifth, the representation had to be made with knowledge that it was false, either made wilfully or in the absence of any genuine belief that it was true.

239 In our assessment, none of the Appellants' arguments, as summarised at [236] above, demonstrate that they are capable of establishing the elements of the tort. Indeed, as we have affirmed that Mdm Lai and the Appellants knew there was no real business or joint venture and the invoices were fabricated to disguise what were essentially loan contracts, the Appellants face an insurmountable task in demonstrating that they had relied on any false representations made by the Respondents in disbursing the funds. The fact is that the disbursement of the funds by the Appellants was *not* made on the representation that the monies would be used for VIE's business. They were disbursed on the basis that they were loans which VIE could use as they saw fit,

under the cover of a purported "joint venture" which the fabricated invoices sought to provide. Hence, the fact that Mr Sim eventually used those monies to repay the loans under subsequent agreements and/or transferred some of those sums to third parties is ultimately immaterial. In the premises, we find the Appellants' appeal in respect of their claim in fraudulent misrepresentation to be wholly without merit.

(B) CONSPIRACY TO DEFRAUD

240 In respect of their claim in conspiracy to defraud, the Appellants pleaded both conspiracy by unlawful means and conspiracy by lawful means in the alternative. A conspiracy by unlawful means is constituted when two or more persons combine to commit an unlawful act with the intention of injuring or damaging the plaintiff, and the act is carried out and the intention is achieved. In a conspiracy by lawful means, on the other hand, there need not be an unlawful act committed by the conspirators. But there is the additional requirement of proving a "predominant purpose" by all the conspirators to cause injury or damage to the plaintiff, and the act is carried out and the purpose achieved (see the decision of this Court in *Quah Kay Tee v Ong & Co Pte Ltd* [1996] 3 SLR(R) 637 at [45]; see, also, Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 15.052).

241 We find the Appellants' case on the Respondents' alleged conspiracy to defraud to be tenuous, to say the least. In their submissions, the Appellants have merely pointed to singular facts and admissions, namely, (a) Mr Sim's testimony that the monies advanced were used to make subsequent repayments to the Appellants, and (b) evidence that the Respondents had transferred the monies out of VIE to third parties, to allege that conspiracy is made out. Other

than that, the Appellants have not raised any further facts to establish the elements of the tort as summarised in the preceding paragraph, or to convince us that the Judge's decision was plainly wrong. In the premises, we see no reason to overturn the Judge's findings on the issue.

242 On both counts of fraudulent misrepresentation and conspiracy to defraud, therefore, we uphold the Judge's decision against the Appellants and dismiss the appeal on those claims.

Conclusion

243 For the above reasons, we dismiss the appeal in full, with the Appellants to pay costs to the Respondents. We invite the parties to make submissions (not exceeding 10 pages) on the appropriate quantum of the costs of the appeal

within 14 days of the date of the present judgment.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

Gary Leonard Low, Vikram Ranjan Ramasamy, Priya d/o Gobal and Chan Min Jian (Drew & Napier LLC) for the appellants;
First respondent in person;
Sarbjit Singh Chopra, Ho May Kim, Zheng Shengyang Harry and Lee Wen Rong Gabriel (Selvam LLC) for the second respondent.
