IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 129 of 2009

BETWEEN : **STEVEN GRANT PETHERICK** of level 2, 187 Vivian Street. Te Aro, Wellington, New Zealand, Businessman and/or nominee (who together with its executors administrators and assigns).

Plaintiff

AND : **AUSSIE HOUSES INTERNATIONAL LIMITED** (An International Business Company incorporated under the International Business Companies Act 291 British Virgin Islands I.B.C No. 382542) and having its registered local office at Denarau, Nadi in the Republic of Fiji Islands.

1st Defendant

AND : **HAROLD JOHN HEELEY** of 2 The Cove, Denarau Island, Nadi, in the Republic of Fiji Islands, Company Director.

2nd Defendant

Counsel: : Janend Sharma Lawyers for the Plaintiff.
A.K. Narayan for the Defendant

RULING

INTRODUCTION

1. This case was ready for trial but the parties requested that I deal first with a preliminary question. I am grateful to both counsel for their submissions. The question is whether or not the Plaintiff should recover all monies that he had paid pursuant to an unlawful Agreement which failed to comply with section 7 of the Exchange Control Act and which is *ipso facto* unenforceable.
2. Our Courts have dealt with the question on numerous occasions[1]. The approach has always been to apply the traditional doctrine of illegality and the narrow exceptions which developed under common law and equity.

[1] (see Bianco v Rugglero [1997] FJLawRp 35; [1997] 43 FLR 229 (12 September 1997); Mediterranean Island Resort Ltd v Bianco [1999] FJCA 26; Abu0061u.97s (11 March 1999); Singh v Singh [1980] FJLawRp 15; [1980] 26 FLR 77 (31 July 1980); Chand v Sharma [1979] FJSC 70; Action 212 of 1978 (12 October 1979); Rahiman v Mandri [1982] FJSC 32; Civil Appeal 8 of 1982 (10 September 1982); Wati v Devi [2015] FJHC 364; HBC158.2013 (15 May 2015); Wati v Devi [2014] FJHC 238; HBC158.2013 (10 April 2014); Stephens v Fisher [2009] FJHC 240; HBC163.2008L (22 October 2009); Ramkhelawan v Mohanlal [1950] FJLawRp 2; [1946-1955] 4 FLR 37 (14 December 1950); Ramdin v Singh [1977] FJLawRp 15; [1977] 23 FLR 127 (22 July 1977); Sakashita v Concave Investment Ltd [1999] FJHC 3; HBC0121j.1998s (5 February 1999); Kento (Fiji) Ltd v

3. The doctrine of illegality was summarized by Lord Mansfield C.J in **Holman v. Johnson** (1775) 1 Cowp.341, 343 thus[2]:

> 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[3].

4. Recovery was allowed in three situations. The first is the principle in **Bowmaker Ltd v Barnet Instruments** (1945) that recovery is possible if the plaintiff can establish title without relying upon the illegality.
5. The second, and for which **Kiriri Cotton Co Ltd v Dewani** [1960] AC 192 is oft cited, is that recovery will be allowed where the parties were not *in pari delicto*. The third is by the application of the doctrine of *locus poenitentiae* – that is - where the claimant repents (or timely repudiation) and withdraws from the contract because he does not wish to commit to the illegality.
6. Hence, the first question is always whether or not an agreement is illegal. If so, then the principle of *ex turpi causa non oritur actio* will apply to prevent recovery under contract law. However, because of the harsh consequences of a strict adherence to the principle, equity would step in to allow restitution if either of the above three situations is made out.

Naobeka Investment Ltd [2017] FJHC 671; HBC100.2012 (12 September 2017); Damodar & Rantanji Ltd v Redwood Investment Ltd [1988] FJLawRp 10; [1988] 34 FLR 30 (1 July 1988); Prasad v Raj [2012] FJHC 7; Civil Action 230 of 2005 (19 January 2012); Tabua Furniture Investments Ltd v Tabua Furniture Ltd [2014] FJHC 170; HBC178.2011 (21 February 2014); In re Comsol Fiji Ltd [2009] FJHC 77; HBE0048.2007L (25 March 2009); Lee v Lee [2002] FJHC 37; Hbc0654j.1998s (7 March 2002)).

[2] Lord Mansfield C.J. in Holman v. Johnson (1775) 1 Cowp.341, 343, in the context of the law of contract, when he said:
"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 plaintiffs 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."

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7. Over time, equity would slowly expand to allow restitution in claims for unjust enrichment (see **Sakashita v Concave Investment Ltd** [1999] FJHC 3; Hbc0121j.1998s (5 February 1999 for a discussion on this).

8. However, in 2016, in a landmark decision, the English Supreme Court in **Patel v Mirza** [2017] AC 467 adopted an analytical approach which departed in many respects from the traditional approach, and which analytical approach more or less clarified how unjust enrichment fits into the grand scheme of things so to speak.

PATEL v MIRZA

9. In this case, Patel and Mirza had an agreement pursuant to which Patel paid Mirza £620,000. Mirza was then to bet on the price of some shares, on the basis of insider information. Their arrangement contravened section 52 of the English Criminal Justice Act 1993 which criminalised the use of insider information to profit from trading in securities. For one reason or another, their plan did not come into fruition. Patel sued on contract and unjust enrichment to recover the £620,000. Mirza argued that no such obligation could be enforced because the whole contract was illegal.

10. Lord Toulson[4] said at paragraph 116 that a person who satisfied the ordinary requirements of a claim for unjust enrichment should be entitled to restitution and should not be debarred from recovery merely because consideration, which failed, was unlawful:

> 116. It is not necessary to discuss the question of locus poenitentiae which troubled the courts below, as it has troubled other courts, because it assumed importance only because of a wrong approach to the issue whether Mr Patel was prima facie entitled to the recovery of his money. In place of the basic rule and limited exceptions to which I referred at para 44 above, I would hold that 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. I do not exclude the possibility that there may be particular reason for the court to refuse its assistance to the claimant, applying the kind of exercise which Gloster LJ applied in this case, 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. (At para 110 I

[4] (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed).

gave the example of a drug trafficker.) In *Tappenden v Randall* (1801) 2 Bos & Pul 467, 471, 126 ER 1388, 1390, a case of a successful claim for the repayment of money paid for an unenforceable consideration which failed, Heath J said obiter 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". The case was mentioned by the Law Commission (LCCP 189, para 4.53), but there is a dearth of later case law on the point. This is hardly surprising because a person who takes out a contract on the life of a third person is not likely to advertise his guilt by suing. But as a matter of legal analysis it is sufficient for present purposes to identify the framework within which such an issue may be decided. No particular reason has been advanced in this case to justify Mr Mirza's retention of the monies beyond the fact that it was paid to him for the unlawful purpose of placing an insider bet.

.....

121. A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case. I would dismiss the appeal.

11. Lord Sumption, at paragraph 268, emphasised that an order for restitution would merely return the parties to their previous position and prevent the defendant gaining by unjust enrichment and, accordingly, such an order should be made :

268. 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.

12. The Supreme Court also expressed the view that the traditional rule that a claimant could not enforce his claim if he had to rely on his own illegal acts to establish it is no longer satisfactory. That old doctrine of illegality was based on a public policy concern that to enforce such a claim would be contrary to the integrity of the legal system. Lord Sumption said at 101 107 to 110 and at 120 that, instead, the court should assess whether the public interest would be

harmed by enforcement of the illegal agreement by considering *inter alia* whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment was a matter for the criminal courts.

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. That trio of necessary considerations can be found in the case law.

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107. In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. Professor Burrows' list is helpful but I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability.

108. The integrity and harmony of the law permit - and I would say require - such flexibility. Part of the harmony of the law is its division of responsibility between the criminal and civil courts and tribunals. Punishment for wrongdoing is the responsibility of the criminal courts and, in some instances, statutory regulators. It should also be noted that under the Proceeds of Crime Act 2002 the state has wide powers to confiscate proceeds of crime, whether on a conviction or without a conviction. Punishment is not generally the function of the civil courts, which are concerned with determining private rights and obligations. The broad principle is not in doubt that the public interest requires that the civil courts should not undermine the effectiveness of the criminal law; but nor should they impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing. *ParkingEye* is a good example of a case where denial of claim would have been disproportionate. The claimant did not set out to break the law. If it had realised that the letters which it was proposing to send were legally objectionable, the text would have been changed. The illegality did not affect the main performance of the contract. Denial of the claim would have given the defendant a very substantial unjust reward. Respect for the integrity of the justice system is not enhanced if it appears to produce results which are arbitrary, unjust or disproportionate.

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

110. I agree with the criticisms made in *Nelson v Nelson* and by academic commentators of the reliance rule as laid down in *Bowmakers* and *Tinsley v Milligan*, and I would hold that it should no longer be followed. Unless a statute provides otherwise

(expressly or by necessary implication), property can pass under a transaction which is illegal as a contract: *Singh v Ali* [1960] AC 167, 176, and *Sharma v Simposh Ltd* [2013] Ch 23, paras 27-44. 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.

.....

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

BACKGROUND

13. The Plaintiff and the Defendant are both non-residents. On 19 June 2006, the Plaintiff (as purchaser) and the First Defendant (as vendor) entered into an agreement for the sale and purchase of a piece of land on Denarau Island which is comprised in Certificate of Title No. 35954 being Lot 15 on DP No. 9047. The land is 1604 square meters in size. The Second Defendant executed the Agreement on behalf of the First Defendant as director. Notably, the Plaintiff and the Defendant were represented by the same lawyer in the said dealing.

14. At the time they executed their Agreement, the Defendant had already started constructing a luxury water front residence on the property. The plaintiff did pay a deposit of well over a million dollars to their common solicitor's trust account. The plaintiff also made various other stipulated payments which, together with the deposit, added up to close to half the total purchase price. The balance of the purchase price was to be settled incrementally to construction work progress. The total monies that the Plaintiff has paid to the Defendant is NZD$2,297,862-00, inclusive of the deposit.

15. The Defendant was obligated to complete construction within twelve months of the commencement date (i.e. from 19 June 2006). However, they did not do so.

16. The parties' Agreement gave some comfort to the Plaintiff by allowing him to lodge a caveat on the title. On 12 September 2006, the parties' common solicitor lodged a caveat for the Plaintiff. However, on 12 November 2008, the Defendant would lodge a *section 110(1) (Land Transfer Act)* application to the Registrar of Titles to remove the said caveat. The Registrar of Titles would send Notice of that application to the parties' former solicitors in December 2008.

17. As it turned out, the parties' former solicitor did obtain a Court Order to extend the said caveat. However, the caveat had been removed earlier that same day it was lodged for registration. A little more than a month after the removal of the caveat, the Defendant's new solicitors would issue a Notice of Rescission to the Plaintiff based on the Plaintiff's alleged failure to pay the balance of the purchase price. The said Notice stated categorically that the deposit, as well as all other sums paid by the Plaintiff, were forfeited to the Defendant. Furthermore, the Notice stated that the Defendant would be reselling the property and would sue the Plaintiff for any deficiency in the sale price.

18. The Plaintiff would then lodge an application for some interim injunctive Orders to restrain the Defendant from disposing of the property. These Orders were granted by Mr. Justice Inoke.

SECTION 7 LAND SALES ACT

19. Section 7 of the old Land Sales Act expressly forbids any non-resident vendor from contracting with another non-resident for the disposition of land without the prior written consent of the Minister of Lands.

> ***Disposition of land by non-resident***
>
> 7.-(1) No non-resident or any person acting as his agent shall without the prior consent in writing of the Minister responsible for land matters make any contract for the disposition of any land in favour of another non-resident.
> (2) The Minister responsible for land matters shall where necessary require any application for his consent mentioned in subsection (1) to be accompanied by a bond for such sum as he shall direct and to, be in the appropriate form and may refuse his consent without assigning any reason, or may specify terms upon which such consent is conditional.

(3) No appeal shall lie against a decision by the Minister responsible for land matters made under this section.
(4) The provisions of this section shall not apply to dealings in native land, as defined by the Native Land Trust Act, or to the original grant of any lease or licence by the Native Land Trust Board.
(Cap. 134.)

20. As I have said, the section 7-consent was not even sought, let alone obtained, prior to the parties' Agreement.

PLAINTIFF'S ARGUMENT

21. The Plaintiff seeks recovery of the monies on two grounds. First, to counter the Defendants argument that the parties were in *pari delicto*, Mr. Sharma highlights that the language of section 7(1) of the old Land Sales Act casts the burden on the non-resident vendor rather than the non-resident purchaser to obtain the Ministerial consent.

22. In **Kiriri Cotton** (supra) the Privy Council said that:-

> "..... if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than other it being imposed on him especially for the protection of the other - then they are not in pari delicto and the money can be recovered back see **Brown v. Morris** (by Lord Mansfield)."

23. Second, is the argument that the Defendant would be unjustly enriched if he were allowed to retain the money. Accordingly, the Court should allow restitution to put the parties back to the position they were.

DEFENDANTS'ARGUMENT

24. AK Lawyers submit as follows at paragraph 9.2 of their submissions:

> **9.2** Restitution under an illegal contract may be entertained if there is total failure of consideration and the plaintiff is not guilty of illegal conduct (**Parkinson v College of Ambulance Ltd and Harrison** [1925] 2 KB1. If the parties are pari delicto (equally blameworthy) the maxim ***in pari delicto potior est condition defendentis et possidendis*** applies (the law leaves them where it finds them). Thus, an innocent party who has bought goods from an enemy alien and paid the price for them may recover his payment made under the illegal contract on the ground of total failure of consideration if the defendant does not deliver the goods when delivery is due (cf. **Berg v Sadler and Moore** [1937] @KB 158.

9.3 A guilty party however, who is in pari delicto with the defendant may not recover payment under the illegal contract (**Abdul Shukorv v Hood Mohammed** [1968] 1 MLJ 258.). In other well defined cases (they may be seen as involving parties who are not in pari delicto), restitution may be entertained if the party seeking restitution of benefits conferred under an illegal contract is within a class of protected persons (**Kirri Cotton v Ranchhoddas Keshavji Dewani** [1960] 2 KB 482.) or if he is the victim of a mistake or fraud perpetrated (**Hughes v Liverpool Victoria Friendly Society** [1916] 2 KB 482) or duress or undue influence exerted (**Smith v Cuff**(nil) 6 M& S 160) by the other contracting party.

25. They further submit that there is no basis for recovery in the present case for the following reasons (see para 9.4 of their submissions):

(i) There was not a total failure of consideration, as confirmed by the pictures, which shows that under the Agreement, the Defendant was fulfilling his part and had completed a substantial part of the building.
(ii) The second defendant had expanded his unpaid time for supervision of the building.
(iii) The first defendant had settled and obtained a discharge of a mortgage to enable the Plaintiff to proceed.
(iv) The first defendant had signed a transfer and mortgage simultaneously with the Agreement.
(v) The first defendant had delivered the duplicate Certificate of Titles to R. Patel Lawyers on behalf of the Plaintiff.
(vi) The parties were aware of the Ministerial consent as both had been exchanging emails from 26th May 2006 to 29th May 2006.
(vii) The plaintiff had benefit of independent legal advice from his New Zealand solicitor and was advised of the requirement for prior Ministerial consent.
(viii) The New Zealand Solicitor had downloaded a Land Sales Act consent form for the Plaintiff.
(ix) The Plaintiff had also been advised of the legal requirement for prior consent by R.Patel Lawyers despite which he still required the commencement of construction from 19th June 2006 (the date of signing the Agreement) knowing he did not have prior consent.
(x) Both parties did not fall within a class of protected persons.
(xi) The parties had entered the Agreement willing as per paragraph 8 of the Agreement which states that "the said property....is being purchased solely and entirely in reliance upon his own judgment...". There was no duress, fraud or undue influence exerted on the Plaintiff. The Plaintiff had the benefit of independent legal advice from his New Zealand solicitors.

HOW COURTS IN FIJI HAVE DEALT WITH SUCH ISSUES

26. In **Damodar & Rantanji Ltd v Redwood Investment Ltd** [1988] FJLawRp 10; [1988] 34 FLR 30 (1 July 1988), the Fiji Court of Appeal cited with

authority MacKinnon L.J. in **Harry Parker v. Mason** (1940) 2 KB 590 and Lord Mansfield in **Holman v. Johnson** (supra). This is the same principle which guided the Court in **Ramkhelawan v Mohanlal** [1950] FJLawRp 2; [1946-1955] 4 FLR 37 (14 December 1950). The headnotes to this case read:

> the plaintiff agreed to purchase the transfer of a Crown lease from the defendant and paid him a portion of the agreed amount. The plaintiff then erected a house on the land. The lease was a protected lease and after some correspondence with the Director of Lands, the defendant withdrew his application for the Director's consent to the transfer. The defendant then took possession of the building. The plaintiff then claimed from the defendant the return of part of the purchase price paid for the Crown lease and the cost of building the house. Judgment in the resulting action in the Supreme Court was as follows:-
> HELD –
> The transfer being an illegal one, the monies paid were not recoverable.

27. Mr. Justice Lyons in **Bianco v Ruggiero** [1997] FJLawRp 35; [1997] 43 FLR 229 (12 September 1997) found that the parties were not *in pari delicto* because the statutory provision in question imposed a duty on the defendant to obtain the requisite consent – which he did not comply with. There was a contract for the sale of shares to the non-resident Plaintiff. For some reason, the Plaintiff had sought to rescind the contract and a refund of monies he had paid. He argued that the Agreement violated section 10 of the Exchange Control Act[5] in that the prior permission of the Minister had not been obtained.

28. The Court found that the Agreement was invalid. The defendant then argued that, as the parties had both signed the invalid contract, and since the signing then violated the statutory provision in section 10, they were in *pari delicto* and therefore, there could be no recovery by the Plaintiff.

29. Lyons J found that section 10 imposed a duty on the defendant and that the parties therefore, were not in *pari delicto*:

> .. the onus of complying with Section 10 is solely on Mediterranean. If Mediterranean does not seek the Minister's permission, then the Plaintiff cannot do it by operation of Section 10 alone. Further, Exhibit 2, indicates that Mediterranean instructed its Accountant Messrs.

[5] Section 10 (1) of the Exchange Control Act reads:-
"Except with the permission of the minister, no person shall in Fiji issue any security or, whether in Fiji or elsewhere, issue any security which is registered in Fiji, unless the following requirements are fulfilled, that is to say:-
(a) neither the person to whom the security is to be issued nor the person, if any, for whom he is to be a nominee is resident outside Fiji, and
(b) the prescribed evidence is produced to the person issuing the security as to the residence of the person to whom it is to be issued and that of the person, if any, for whom he is to be a nominee.."

Kapadia Singh & Co. to attend to all the necessary matters relevant to a share issue. This must have included the obtaining of permission under Section 10 (See Exhibit 2 para (c)). This alone is evidence that, by referring to the need of a work permit in paragraph (c), that Mediterranean and its Accountants were, as I have previously found aware, of the Plaintiff's non-residential status.

.....

There was a mistake at law in not observing the requirements of Section 10.

The Defendant, Mediterranean, is the party primarily responsible for this mistake. The obligation to obtain permission to issue the security is its sole responsibility under Section 10.

Further the obligation is placed there for two reasons:-

(1) for the good of the nation (as Counsel for the Defendant puts it) - this is enforceable by criminal prosecution.
(2) for the benefit of the other party - the purchaser of the security - to ensure that he or she gets what they have bargained for - this gives rise to enforcement by civil action.

Indeed both **Re Fry** and **Re Transatlantic** confirm this approach.

Accordingly, in my judgment, a mistake has been made but between the two of them, the duty of observing the law is placed on the shoulders of Mediterranean rather than the Plaintiff - and this duty is imposed on Mediterranean for protection of the Plaintiff, inter alia - then the parties are not in pari delicto and the money can be recovered (to paraphrase Lord Denning).

As this is fundamentally an action for monies had and received, the Plaintiff should succeed in his action for return of the $100,000.00 (One Hundred Thousand Dollars) paid in February 1994.

If I am wrong in this, the situation remains that the issue of the 10,000 shares to the Plaintiff was invalid thus the share registry of Mediterranean reflects an incorrect number of shares properly issued. Of the 90,000 share issued (see Exhibits 2 and 3), only 80,000 shares have been correctly issued (perhaps by way of example, I should also note that this would also reflect an inaccuracy in the issued share capital of Mediterranean some $100,000 (One Hundred Thousand Dollars).

In **Re Transatlantic**, Slade J. was confronted with this position. He was asked to make a declaration by way of an order for rectification under Section 116 of the Companies Act 1948 (UK).

Slade J. made an order for rectification of the share registry to reflect the true position resulting from his finding of an invalid issue of shares due to the breach of Section 80 (1).

In so doing, His Lordship expressed the view that if rectification is made, repayment to the Plaintiff, as ancillary relief flowing therefrom, would have the Court's approval.

30. On appeal[6], the Fiji Court of Appeal rejected the argument that the parties automatically were *in pari delicto* if the transaction was illegal:

[6] (see Ruggiero v Bianco [1998] FJCA 58; Abu0061.97 (7 October 1998)

We turn now to consider Dr Sahu Khan's second point which was that if the transaction was illegal then the parties were in pari delicto and Mr. Bianco was not entitled to recover. He submitted that there was some responsibility on Mr. Bianco under s.10 (1) to ensure compliance with the section and therefore he was in pari delicto. We do not think it is correct that the section requires the person who becomes the owner or receives the benefit of the security to ensure compliance with it. The language is plain and in our view the duty of ensuring compliance with the section is cast upon the person issuing the security.

THE LAW – EVOLVING

31. The many case authorities cited by Mr. Narayan reiterate the strict public policy which, traditionally, has guided the Courts over the centuries. As I have said above, the law in England has evolved so much from this position over the years, culminating in **Patel v Mirza**. The English Law Commission[7] highlights the problem with the traditional approach thus:

> 1.2 This area of law purports to be governed by strict rules, which often appear arbitrary. Very early on, the case law established **that the illegality doctrine is not there to find a just resolution to the dispute between the claimant and the defendant; rather it is based on "general principles of policy"** that might arbitrarily apply to the advantage of the defendant. As the Chancery Bar Association noted in its response to our 2009 consultative report, "the result is a forensic lottery depending on the accidents of litigation or the manoeuvrings of the parties".
> 1.3 Yet illegality may affect a civil claim in numerous ways. **The illegality may be deliberate and serious, or it may be accidental and technical in nature.** It may be inextricably linked to the circumstances that give rise to the claim, or it may be fairly incidental. The parties may be equally guilty, or one may be more responsible than the other. To date, the common law rules have found it difficult to cope with such a variety of circumstances.
>
> (my emphasis)

32. In **Tinsley v Milligan** [1994] 1 AC 340, HL(E)), **Lord** Justice Nicholls favored a "public conscience" test which the majority of the House of Lords would later reject on appeal. However, in **Patel v Mirza**, the English Supreme Court would depart from the House of Lords approach in **Tinsley**.

33. In **Tinsley**, two women lovers cohabited in a house they had purchased by a bank loan and partly by their own joint equity contribution. They had agreed

[7] See The Law Commission (LAW COM No 320) THE ILLEGALITY DEFENCE - Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965 - Ordered by The House of Commons to be printed 16 March 2010. (http://www.bailii.org/ew/other/EWLC/2010/320.pdf)

that the title should be taken in the sole name of the appellant so that the respondent can falsely represent to the Department of Social Security (**"D.S.S"**) that she did not own a home and thereby, be able to collect social security benefits. In 1988, the parties fell out and the appellant moved out of the house. Because the title was in her name, she would later bring an action to assert her complete ownership of the house. The respondent counter-claimed for a declaration, based on the principles of a resulting trust, that the appellant held the property on trust for the both of them in equal shares. The County Court judge dismissed the claim and found for the respondent. On appeal, the appellant argued that the respondent's claim was defeated by the frauds on the DSS.

34. Nicholls L.J. at p.319H said:

> ".....the underlying principle is the so-called public conscience test. The court must weigh, or balance, the adverse consequences of granting relief against the adverse consequences of refusing relief. The ultimate decision calls for a value judgment."

He concluded (at p. 321D) that:

> "..... far from it being an affront to the public conscience to grant relief in this case, it would be an affront to the public conscience not to do so."

At p. 323G, Nicholls LJ said that equity should be more flexible to illegality than the common law. He explained the older authorities in which relief was denied as cases in which, in their respective particular circumstances, the grant of relief would have been an affront to the public conscience[8].

35. Notably, although Nicholls LJ's approach was rejected on appeal by the House of Lords, the same rationale he applied is favoured in some other jurisdictions

[8] As Lord Goff of Chieveley observed on appeal in the House of Lords of Nicholls LJ's approach in the Court of Appeal:

> On that approach he [Nicholls LJ] concluded (at p. 321D) that "... far from it being an affront to the public conscience to grant relief in this case, it would be an affront to the public conscience not to do so." Furthermore, Nicholls L.J. rejected (at p. 323G) the inflexible approach embodied in the earlier authorities as according ill "with the underlying considerations of public policy the court is seeking to discern and apply in this field"; the approach would, he considered, also mean that equity was taking a less flexible attitude to illegality than the common law, which would constitute a remarkable reversal of the traditional functions of law and equity. "; the approach would, he considered, also mean that equity was taking a less flexible attitude to illegality than the common law, which would constitute a remarkable reversal of the traditional functions of law and equity. He accordingly sought to rationalise the older authorities in which relief was denied as cases in which, in particular circumstances, the court considered that to have granted relief would have been an affront to the public conscience.

and certainly appears to be in the same vein as the English Supreme Court's approach in **Patel v Mirza**.

36. In **Domingo Gonzalo v John Tarnate** G.R. No. 160600 January 15, 2014[9], the Supreme Court of the Phillipines opined that the doctrine of *in pari delicto* cannot prevent a recovery if doing so violates the public policy against unjust enrichment.

> The doctrine of in pari delicto is a universal doctrine that holds that no action arises, in equity or at law, from an illegal contract; no suit can be maintained for its specific performance, or to recover the property agreed to be sold or delivered, or the money agreed to be paid, or damages for its violation; and where the parties are in pari delicto, no affirmative relief of any kind will be given to one against the other.
> Nonetheless, the application of the doctrine of in pari delicto is not always rigid. An accepted exception arises when its application contravenes well-established public policy. In this jurisdiction, public policy has been defined as "that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."
>
> Unjust enrichment exists ..... "when a person unjustly retains a benefit at the loss of another, or when a person retains money or property of another against the fundamental principles of justice, equity and good conscience."

37. In Botswana, which is a common law jurisdiction, the Industrial Court sitting in Gaborone **Molefi v Blue Blends Investments (Pty) Ltd T/A Nesca**; 2004 (1) BLR 259 (IC)[10] referred to a bold statement of the Country's Chief Justice that the Court has a discretion as to whether or not to depart from the maxim *in pari delicto* and that the said discretion is exercisable if the interests of justice requires it in any given case[11].

> In referring to the case of **Brandt v Bergstedt** 1917 CPD 344 in which the judge refused to grant relief to the plaintiff on the ground that he considered himself bound by then prevailing legal decisions Chief Justice Stratford disagreed at pp 543-44:

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[9] (see https://www.lawphil.net/judjuris/juri2014/jan2014/gr_160600_2014.html).

[10] (see http://www.elaws.gov.bw/desplayIrpage.php?id=757&dsp=2).

[11] The Appellate Division held that the maxim in pari delicto potior est conditio defendentis applied as it normally did in such circumstances. However the court ruled that judges may in their discretion depart from the maxim in the interests of justice. Chief Justice Stratford explained:

> 'We are concerned with the application of two legal maxims taken from Roman law by all modern civilised legal systems. The first is the maxim ex turpi causa non oritur actio and the second, in pari delicto potior est conditio defendentis. ... In my view the first maxim prohibits the enforcement of immoral or illegal contracts and the second curtails the right of the delinquents to avoid the consequences of their performance or part performance of such contracts.' (pp 540-541).

> **'I respectfully suggest that he should have approached the matter from the more fundamental point of view as to whether public policy was best served by granting or refusing the plaintiff's claim.** If the learned Judge had so approached the case and had considered that as an equitable Judge he was free (as I think he was) to order the restoration of the cow, I cannot doubt that he would have granted the relief prayed. Indeed the facts of that case afford a typical example which called for a decision **on which side public policy is best served. It may be said that contracts of that nature are more discouraged by leaving the bereft plaintiff unhelped and the doubly delinquent defendant in possession of his ill-gotten gains.**

38. The Court in the above case opined that if the maxim is applied unreservedly, it may be more counter-productive to public policy in that, rather than deter illegal or unlawful contracts, it may promote it amongst people who will use them to profit unjustly. However, the court should be guided by (i) the principles which underlie the maxim, as these are still relevant, and (ii) doing justice between the parties.

> Thus I reach my third conclusion, which is that courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment. (My emphasis)

> **The effect of the decision in Jajbhay v Cassim is to acknowledge that, in effect, the illegality of the contract raises a presumption that the in pari delicto maxim operates to defeat a claim by a party to the illegal contract. But public policy in a proper case may dictate that exceptions be made.** I have explained the circumstances that led to the entering into of the illegal contract the subject of this decision. Clearly the respondent took advantage of a desperate employee and failed to heed the employee's request for legalising the relationship. Therefore regarding 'the various degrees of turpitude' which we have to take into account, there is no doubt as to where the greater degree lies.

39. The House of Lords' approach in **Tinsley** was also expressly rejected by the High Court of Australia in **Nelson v Nelson** (1995) 184 CLR 538 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]).

40. In Fiji, Mr. Justice Fatiaki in **Sakashita v Concave Investment Ltd** [1999] FJHC 3; Hbc0121j.1998s (5 February 1999) recognised the jurisprudential

dilemma in a similar situation such as the one in this case before me now. On the one hand, a defendant would be unjustly enriched if the deposit was not returned whereas, on the other hand, if returned, the court might be seen to be lending assistance to a party to an illegal contract. He recognised that equity would step in to provide an exception to avoid the harshness and injustice of the *ex-turpi causa* rule by categorizing the plaintiff's claim as one which was either for "*money had and received*" or for *restitution* based on the House of Lords decision in **Fibrosa Spolka Akcyjna v . Fairbairn Lawson Combe Barbour Ltd** (1943) A.C. 32.

41. In contrast, the Singaporean Court of Appeal in a rather lengthy discourse, in January this year (2018) in **Ochroid Trading Limited Ole Prytz Rasmussen v Chua Siok Lui (trading as vie import & export) & Sim Eng Tong** [2018] SGCA 5, was not so convinced about the applicability of **Patel v Mirza** in Singapore.

42. I apply **Patel v Mirza** in this case before me now.

RESOLVING THE ISSUE

43. The plaintiff pleads that the defendant would be unjustly enriched if he was allowed to keep the money as well as retain the benefit of the land and the house in question. Accordingly, restitution should be allowed to restore the parties back to their respective positions.

44. As I have said, the Agreement was unlawful and the Plaintiff cannot recover under contract law.

45. I then ask, whether or not the parties were in *pari delicto* in this case. I find that the parties were not in *pari delicto* based on **Kiriri Cotton** (supra) and **Bianco v Ruggiero** and on my interpretation of section 7 as placing a burden on the Defendant as non-resident vendor to seek and obtain the prior written Ministerial consent. I also take into account that the parties had a common local solicitor. The plaintiff would have relied on the solicitor to ensure that the dealing steered clear of any illegality.

46. Having said that, even if the parties were in *pari delicto* (which I insist they were not) - the modern approach is to firstly recognize that there is a competing public policy against unjust enrichment. I then ask if the defendant has satisfied a claim in unjust enrichment (**Patel v Mirza**). If so, whether the principles of *ex-turpi causa non orituractio* and in *pari delicto* should still debar him from recovery.

47. In **DD Growth Premium 2X Fund (In Official Liquidation) (Appellant) v RMF Market Neutral Strategies (Master) Limited (Respondent) (Cayman Islands)** [2017] UKPC 36, the Privy Council said:

> It is fundamental that **a payment cannot amount to enrichment if it was made for full consideration**; and that **it cannot be unjust to receive or retain it if it was made in satisfaction of a legal right**. As Professor Burrows has put it in his Restatement of the English Law of Unjust Enrichment (2012), para 3(6), "in general, **an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid contractual, statutory or other legal obligation**". The proposition is supported by more than a century and a half of authority: see, in particular, Aiken v Short (1856) 1 H& N 210, 215, Barclays Bank Ltd v W J Simms, Son and Cooke (Southern) Ltd [1980] QB 677, Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 AC 548, 574-577, 580-581, Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349, 408 (Lord Hope), Fairfield Sentry Ltd (in liquidation) v Migani [2014] 1 CLC 611 (JCPC), para 18.

48. In **Manohan Aluminium & Glass (Fiji) Ltd v Fong Sun Development Ltd** [2018] FJCA 23; ABU0018.2015 (8 March 2018), the Fiji Court of Appeal discussed unjust enrichment thus:

> Unjust enrichment has been described as follows:
>
> > " Unjust enrichment arises in a situation in which the defendant is enriched at the expense of the claimant and there is in addition a reason, not being a, manifestation of consent or a wrong, why that enrichment should be given up to the claimant" (**Peter Berks, Unjust Enrichment**, second ed. 2005).
>
> [34] Unjust enrichment has also been described as follows:
>
> > "The principle of unjust enrichment requires first, that the defendant has been enriched by the receipt of a benefit, secondly that this enrichment is at the expense of the claimant, and that the retention of the enrichment be unjust and finally that there is no defence or bar to the claim". (**Chitty on Contracts**, Vol 1, para 29-018, Sweet & Maxwell, 2004).
>
> [35] The particular terms of the contract may sometimes make it difficult to ascertain the extent of their enrichment .

"Services may take many forms and while some result in an indirect accretion to the defendant's wealth, for instance by improving his property, other 'pure 'services do not. (**Chitty on Contracts**, Vol. 1, para 29-021, (supra).

[36] The second witness for the Plaintiff was Samuto Chang, from ViewTech the company that had given the quotation for the replacement of the windows. He said that since the installed windows were of residential quality, and were improperly designed, the company was not prepared to risk attempting repair. He thus recommended a total removal of the existing windows and replacement with windows suitable for the 'environment'. In view of this, it also included the price of scaffolding. It quoted a sum of $76, 840.00 for the removal of the existing windows and installation of new windows, and $24,000.00 for the scaffolding. This makes up the sum of $100,840.00 set out in the Respondent's Statement of Claim. However, the learned trial Judge did not allow this sum on the basis that the design in the proposed new windows was different from the design of the existing windows installed by the Appellant.

[37] Despite the Respondent's willingness to deposit the balance sum of $10,000.00 in the Solicitor's Trust Accounts until the Appellant rectified the faulty windows, the Appellant was unwilling to accept this course of action and continued to refuse to attend to the repairs. The failure to repair could be attributed to more than one reason; that the Appellant itself knew that the windows were so badly structurally designed that it saw no purpose in attempting to repair them, or that the Appellant was unwilling to perform the contract. Either way, it made no difference to the correct finding that there had been a breach of contract by the Appellant.

[38] In **Daydream Cruises Ltd v Myers**, [2005] FJHC 316, Connors J considered the issue of unjust enrichment in respect of a claim of breach of contract and unjust enrichment . The Plaintiffs pleaded that the Defendants had benefitted from the use of the name 'Daydream Island'. In determining this claim, Connors J. having considered the relevant authorities said:

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep." – **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbaur LD** [1943] A.C. 32 at 61 per Lord Wright.

The remedy for unjust enrichment is restitution which is the reversal of an unjust enrichment of the defendant at the expense of the plaintiff. The measure of the plaintiff's recovery in restitution is the benefit or gain of the defendant and not, as in compensatory damages, the loss suffered by the plaintiff. A restitutionary order once made, compels the defendants to disgorge, and the plaintiff to recoup, benefits which have been unjustly obtained and retained by the defendants to the detriment of the plaintiffs.

In **Pavey & Mathews Pty Ltd v Paul** [1987] HCA 5, (1987) 162 CLR 221, the High Court of Australia recognized unjust enrichment as a valid basis of liability in a claim for restitution for quantum meruit".

The three elements of a claim for unjust enrichment are- **National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd** [1997] 1 NZLR:

(i) Proof of enrichment by receipt of a benefit;

(ii) Enrichment at the expense of the plaintiff; and
(iii) That retention of the benefit is unjust .

[39] In **Daydream Cruises Ltd v Myers**, (supra) the claim of unjust enrichment was upheld on the basis that the 1st Defendant has received the benefit of the use of the Plaintiffs' name, and the infrastructure and facilities erected on it by the Plaintiff together with the expertise and services of the Plaintiffs. In the circumstances of that case, it was held that the right to use that island was clearly a 'significant enrichment ' of the 2nd Defendant.
[40] In the present case, the property in the windows passed to the owner when the contract price was paid by the Respondent. The fact that twelve years after the breach of the contract, the windows were, due to the efforts of the Respondents yet in place, does not amount to due performance of the contract by the Appellant, nor does it amount to unjust enrichment on the part of the Respondent. There can be no unjust enrichment based on goods and services manufactured and delivered in breach of contract.
[41] The retention of the faulty windows by the Respondent cannot be regarded as unjust enrichment , because the Respondent had paid for them. Even a claim for set-off would not have been possible because the Respondent had paid $20,000.00, and the Appellant claimed $10,459.61, being the balance due. However, since the Appellant had breached the contract, the Counterclaim was correctly dismissed by the learned trial Judge.
[42] When the money was paid by the Respondent, and the windows were affixed, as part of the contract of services, the property in the goods passed from the Appellant to the Respondent. Thus, in the totality of the circumstances of the case, I hold that the learned trial Judge did not err in not considering that the windows that were affixed to the Respondent's building, belonged to the Appellant. I therefore dismiss the third ground of appeal.
[43] In my view, the Respondent suffered loss and damage as a result of the leakage in the windows manufactured and installed by the Appellant. The leakage was a direct cause of the failure on the part of the Appellant to properly perform the contract entered into between the parties. This entitles the Respondent to damages. In the absence of a pro-rated breakdown in the Appellant's quotation distinguishing between the goods and services components respectively, (i.e the cost of the windows as distinguished from the cost of the installation of the windows). I am of the view that the contract entered into between the parties, was a contract for services, and the Appellant failed to perform the contract. I am of the view that in all the circumstances of this case, it would not be correct to hold that the Respondent has benefitted, or that its property has been enriched by the faulty windows installed by the Appellant.

49. In my view, the Defendant would be unjustly enriched if he would have the benefit of keeping the land in question and the house that he has already constructed on it, as well as keeping the more than NZD$2.5 million dollars that the Plaintiff has already paid. The house would have escalated in value, even if it yet remains uncompleted, in the lucrative Denarau market. And even so, the Defendant still has the option of completing it and listing it for an even greater profit.

50. In addition, to allow the defendant to retain the monies as well as the property would unjustly enrich him as it would allow him to gain a windfall out if an illegality that was caused by his failure to comply with section 7 of the Exchange Control Act.

51. Any argument that recovery should be refused because consideration was unlawful, on **Patel v Mirza**, would be irrelevant. I am satisfied that an Order for payment and restitution would merely return the parties to their previous positions and prevent any unjust enrichment to the defendant.

CHANGE OF POSITION

52. In any claim for restitution, change of position is available as a defence (see **Phillip Collins Ltd v Davis** [2000] 3 All ER 808)[12]. Generally, the defence is

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[12] as Parker LJ observed in Phillip Collins Ltd:

The Change of Position Issue

76 As Mr Howe correctly observed in the course of argument, "change of position" is what this case is really all about.
77 In Lipkin Gorman (above) the House of Lords recognised change of position as a defence to restitutionary claims. In the course of his speech in that case Lord Goff said this (at p. 580c–h):

> "I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way. It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer. These are matters which can, in due course, be considered in depth in cases where they arise for consideration. They do not arise in the present case. Here there is no doubt that the respondents have acted in good faith throughout, and the action is not founded upon any wrongdoing of the respondents. It is not however appropriate in the present case to attempt to identify all those actions in restitution to which change of position may be a defence. A prominent example will, no doubt, be found in those cases where the plaintiff is seeking repayment of money paid under a mistake of fact; but I can see no reason why the defence should not also be available in principle in a case such as the present, where the plaintiff's money has been paid by a thief to an innocent donee, and the plaintiff then seeks repayment from the donee in an action for money had and received. At present I do not want to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things. I fear that the mistaken assumption that mere expenditure of money may be regarded as amounting to a change of position for present purposes has led in the past to opposition by some to recognition of a defence which in fact is likely to be available only on comparatively rare occasions."

Lord Goff went on to emphasise that the defence of change of position will avail a defendant only to the extent that his position has been changed (see Lipkin Gorman, above, p. 580h).

78 Earlier in his speech in Lipkin Gorman (at p. 578) Lord Goff said this:

> "The claim for money had and received is not, as I have previously mentioned, founded upon any wrong committed by the club against the solicitors. But it does not, in my opinion, follow that the court has carte blanche to reject the solicitors' claim simply because it thinks it unfair or unjust in the circumstances to grant recovery. The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle."
> Thus, if recovery of the overpayments is to be denied in the instant case, it must be denied not as a matter of discretion but of legal principle. What, then, are the relevant legal principles, in the context of the instant case?

79 For obvious reasons, it would not be appropriate for me to attempt to set out an exhaustive list of the legal principles applicable to the defence of change of position, but four principles in particular seem to me to be called into play in the instant case.
80 In the first place, the evidential burden is on the defendant to make good the defence of change of position. However, in applying this principle it seems to me that the court should beware of applying too strict a standard. Depending on the circumstances, it may well be unrealistic to expect a defendant to produce conclusive evidence of change of position, given that when he changed his position he can have had no expectation that he might thereafter have to prove that he did so, and the reason why he did so, in a court of law (see the observations of Slade L.J. in Avon County Council v. Howlett (above) at pp. 621–2, and Goff & Jones (above) at p. 827). In the second place, as Lord Goff stressed in the passage from his speech in Lipkin Gorman quoted above, to amount to a change of position there must be something more than mere expenditure of the money sought to be recovered, "because the expenditure might in any event have been incurred ... in the ordinary course of things". In the third place, there must be a causal link between the change of position and the overpayment. In South Tyneside Metropolitan B.C. v. Svenska International plc [1995] 1 All E.R. 545, Clarke J., following Hobhouse J. in Kleinwort Benson Ltd v. South Tyneside MBC [1994] 4 All E.R. 972, held that, as a general principle, the change of position must have occurred after receipt of the overpayment, although in Goff & Jones

available to a person shoes position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively, to make restitution in full.

53. Nothing however was raised in the Defendant's pleadings or submissions in this regard, although, their submissions point to allegations of fact which appear to raise the point. Again, as an equitable defence, change of position is not available to any wrongdoer obviously because of the maxim that he who seeks equity must come with clean hands.

CONCLUSION

54. The Defendant would be unjustly enriched if he were allowed to retain all the monies paid by the Plaintiff pursuant to their unlawful Agreement as well the benefit of having to retain the property in question and all improvements thereon which they could always resell. Accordingly, the Plaintiff is entitled to an Order for full restitution of all the monies he had paid to the Defendant.

55. I make no Order as to interest. Parties are to bear their own costs.

56. As these issues were raised as preliminary points, I will adjourn the case to Monday 23 April 2018 at 10.30 a.m. to see if there are any subsisting matters to be dealt with or whether the parties will now withdraw their substantial claim and counter-claim.

.....

Anare Tuilevuka
JUDGE
16 April 2018

(above) the correctness of this decision is doubted (see ibid. pp. 822–3). But whether or not a change of position may be anticipatory, it must (as I see it) have been made as a consequence of the receipt of, or (it may be) the prospect of receiving, the money sought to be recovered: in other words it must, on the evidence, be referable in some way to the payment of that money. In the fourth place, as Lord Goff also made clear in his speech in Lipkin Gorman, in contrast to the defence of estoppel the defence of change of position is not an "all or nothing" defence: it is available only to the extent that the change of position renders recovery unjust.

81 With those basic principles in mind, I turn to the facts of the instant case.