



Back for good? Can it be said that all forms of illegality are sufficient to defeat the Change of Position Defence to Unjust Enrichment Claims?

In ***Arrows Ecs Norway AS***, [2018] HKCFI 975, the Hong Kong High Court’s Anderson Chow J held that as ***Tinsley v. Milligan*** (HL) [1994] 1 AC 340¹ remains binding in Hong Kong, he should accept the correctness of the frequently criticised proposition laid down in ***Barros Mattos Junior v. MacDaniels Ltd*** [2005] 1 WLR 247:-

“Unless the illegality was so minor as to be ignored on the de minimis principle, an innocent recipient of stolen money could not rely on the defence of change of position where the recipient’s actions of changing position were treated as illegal.”

In good faith?

Anderson Chow J granted summary judgment in respect of the Plaintiff’s claim in the total sum of US\$4,188,175 against the 5th, 10th, 11th and 13th to 15th Defendants (the “**Relevant Defendants**”). The various sums of money totalling US\$4,188,175 were received by them, as second level recipients, from a bank account of the 2nd Defendant which the Plaintiff says represent a portion of the money which it was induced by fraud to transfer to the said bank account. The Relevant Defendants relied on the defence of change of position in that they had received the funds and subsequently paid them out in good faith and in the usual course of their money changing business.

Applying ***Barros Mattos***, Anderson Chow J held that by reason of their non-compliance with the licensing and customer due diligence requirements imposed by the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance Cap. 615, the Relevant Defendants could not rely on the defence of change of position. The receipts and payments out occurred in the course of their operation of unlicensed and therefore illegal,

¹ The “reliance principle” laid down in ***Tinsley v. Milligan*** had been overruled by the Supreme Court in ***Patel v. Mirza*** [2017] AC 467, which laid down a new test regarding illegality. The new test is a flexible and case by case approach with proportionality being taken into account as one of the factors in determining whether or not a claim should fail on grounds of illegality. The cases of ***Tinsley v. Milligan*** and ***Patel v. Mirza*** were also referred to in the 2nd edition of *A Word of Counsel* in A Change of Direction in favour of filial piety? by Yang-Wahn Hew, John Hui and Alvin Tsang.

money service business or such business which was being carried out in an illegal manner. The change of position defence was not open to the Relevant Defendants given that they were the “wrongdoers” as referred to in ***Lipkin Gorman v. Karpnale*** [1991] 2 A.C 548 (HL). In light of the “illegality”, the Relevant Defendants also did not act “in good faith” and it would be inequitable, unconscionable, or unjust to allow them to deny restitution to the Plaintiff.

So, in Hong Kong, the answer is “yes”. Unless the same can be regarded as *de minimis*, any form of illegal conduct will defeat the change of position defence to unjust enrichment claims. This is the case even if it only involves the breach of an unrelated technical regulation and/or does not involve a wrongdoing committed *vis-à-vis* the Plaintiff.

Look out for...

This is however subject to an appeal by the Relevant Defendants in ***Arrows Ecs Norway AS***. The Court of Appeal may well review whether Lord Goff’s reference to a “wrongdoer” in ***Lipkin Gorman*** should be taken as referring to all forms of illegal conduct i.e. the proposition assumed in ***Barros Mattos*** which is a non-binding English first instance decision. It also remains to be seen whether the Court of Appeal take the opportunity to consider the applicability and effect of ***Patel v. Mirza*** on the change of position defence².

Anson Wong SC appeared as Lead Counsel for the Plaintiff.

Connie Lee appeared for the Relevant Defendants and authored this Case Report.



*Will the court consider
the applicability and
effect of ***Patel v. Mirza***?*



² It has been said that the Court of Appeal is bound by ***Tinsley v. Milligan***. The correctness of which in view of ***Patel v. Mirza*** may well have to be reviewed by the Court of Final Appeal: [2018] HKCFI 975, [28].