IN THE HIGH COURT OF JUSTICE **Claim No. HC11C04047**

CHANCERY DIVISION

Neutral Citation No. 2013 EWHC 1892

BETWEEN:

CHANDRAKANT PATEL

Claimant

- and -

SALMAN MIRZA

Defendant

Before:

David Donaldson Q.C. sitting as a Deputy High Court Judge

5 July 2013

1. This action is centred on three men: the Claimant, the Defendant, and a common friend of each of the two parties, Mr George Georgiou. Though not a party to the action, Mr Georgiou was projected to give evidence in support of the Defendant, and the hearing proceeded on that basis. At the very last moment before he was due to call Mr Georgiou as his last witness Counsel for the Defendant, Mr William McCormick Q.C., announced that he no longer intended to do so. Mr Georgiou is nonetheless a central character in the events which I have to consider, and his absence from the witness-box was unfortunate, to say the least. Though the decision not to call him might be thought to betoken concerns as to what he would say on the witness stand in answer to pertinent questions, I am unable to identify any specific inference which it would right for me to draw from the bald fact of that decision, for which I was offered no explanation. It remains the case that the Defendant has deprived himself of a witness who was at the heart of this matter, and who, if the Defendant's account of matters was correct, could have been expected to support the Defendant's case, as indeed was foreshadowed by his witness statement.

2. Mr Georgiou was a property investor and dealer in property investments, operating through a number of companies including Simply George and Georgiou Inc. Prior to the property crash his wealth was considerable, and demonstrated to the outside world by a large house, exotic cars, and a private aircraft. In mid-2008, as for many in the property world, things began to sour badly, though the trappings of his opulence remained. Eventually, he was declared bankrupt in May 2010.

3. The Claimant ("Mr Patel)", usually known as Charlie, became friends with Mr Georgiou and his future wife around 2004. They went socialising and clubbing together and shared Christmas. Mr Patel was an usher at Mr Georgiou's wedding in 2006. Though less opulent than Mr Georgiou, Mr Patel was also a man of some wealth. Initially, Mr Patel bought two properties from Mr Georgiou, and then began to offer to friends properties which Mr Georgiou owned or was about to own, receiving a commission from Mr Georgiou for this service. Mr Georgiou then suggested to Mr Patel that if he could obtain investors to advance him money for use as deposits he could profitably "flip" contracts for the purchase of property to third parties without the need for him ever to complete on the deal. To this end Mr Patel introduced various relatives and friends to Mr Georgiou. Mr Patel told me that, though he was supposed to be paid commission, he never received it. In a further touch to the picture, Mr Patel had a desk in Mr Georgiou's office in Ilford, used the latter's email facilities, and was even provided with a mobile phone by him.

4. The Defendant ("Mr Mirza"), often known as Simon, was and is employed by Tullet Prebon Plc as a foreign exchange broker with the title of Divisional Director in charge of a substantial team. He is not a trader, and his broking activities at Tullet Prebon are limited to forex. He did however have a personal spread-betting account with IG Index, though my impression was that it was little used, other than possibly for a few forex transactions.

5. Mr Mirza came to know Mr Georgiou when they were both young teenagers. Mr Georgiou was a cousin of a neighbour of Mr Mirza in Ilford; his family saw Mr Georgiou regularly and Mr Georgiou became like one of that family. In his twenties, when Mr Mirza married and later moved away from Ilford, he lost touch with Mr Georgiou for some 10 years, until he ran into him by chance during a visit to his mother in 2007. Their two families began then to socialise, and Mr Georgiou and Mr Mirza went on one or two skiing trips with other friends. In December 2008 Mr Georgiou persuaded Mr Mirza to advance him £300,000 to enable Mr Georgiou to buy a site at Gants Hill on the basis that Mr Mirza would be given a share in the profit on resale. In March 2009, Mr Georgiou asked for a further loan, apparently unrelated to Gants Hill, and Mr Mirza lent him £70,000. Sometime between May and August 2009 Mr Mirza asked for, but did not obtain, the return of his Gants Hill loan.

6. Mr Patel and Mr Mirza met for the first time at Mr Georgiou's house at the end of 2008 or the beginning of 2009. Mr Georgiou held a poker game every Friday at his house for 10 to 15 friends and cousins, 10 of them being more or less regular attendees - these included Mr Patel and Mr Mirza, and some employees of RBS. Those who had to drop out of a particular session, when their stake was exhausted, would often retire to the kitchen for sustenance in the form of home-cooked curry or takeaway from Nandos, and discussion could take place then, as well as round the poker table. Mr Georgiou's house also contained an office, where more private conversations were possible.

7. In early 2009 Mr Patel included Mr Mirza in emails relating to some cars and watches which Mr Patel was able to source at a large discount. Mr Mirza was interested in a deal for seven of the cars, but ultimately nothing came of it. He did however agree to take a watch for £9,000, but when the watch arrived in October 2009 it lacked a box and a receipt and it appears that Mr Patel never received payment.

8. In August 2009, according to Mr Patel, he was approached by Mr Georgiou with a deal which he said he had been offered by Mr Mirza. The idea was that Mr Mirza would use his spread-betting account to bet on the movement of RBS shares. He explained that Mr Mirza knew people who would sit in on any meeting between RBS heads and government officials and within minutes of the end of any such meeting Mr Mirza would know of the outcome. Mr Mirza had offered to include money from Mr Georgiou in bets based on such information along with his own. Mr Georgiou suggested that Mr Patel should become involved, and called Mr Mirza there and then with his phone on loudspeaker, asking Mr Mirza to confirm the scheme directly to Mr Patel, which he did. Not long after, on what was probably 4 September 2009, the three men met up around the kitchen table on a Friday poker evening. According to Mr Patel, Mr Mirza confirmed that he had contacts in RBS who could supply him with information of meetings with government officials, and in particular of a public statement expected from the Chancellor which would have an effect on the RBS share price. Mr Mirza expressed his readiness to include Mr Patel's money in a bet based on such information, and wrote down the details of his bank current account to which Mr Patel could send the money.

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

10. On 9 September 2009 Mr Patel sent to Mr Mirza's account £120,000 sourced from his investor pool, in particular his cousin Chiraq Patel. £50,000 followed the next day, a further £50,000 on 30 September 2009, and somewhat later a further £400,000 on 16 December 2009, all sourced from the pool but primarily from Chiraq. Though the entries in Mr Mirza's statement of account showed the first three payments merely as emanating from NatWest bank, the payer of the £400,000 was specified as C.Patel. It was apparently intended that a still larger sum would have been paid, but for the fact that Mr Mirza placed a ceiling on it. Even capped at £620,000, this - with a 5x gearing or more - was sufficient to open a position in excess of £3,000,000 worth of RBS shares, even ignoring any additional monies contributed by Mr Mirza himself.

11. In late January or February 2010, according to Mr Patel, he was told by Mr Mirza that there was no longer expected to be a statement from the government about RBS and he would therefore be returning the money, which he promised would be done around the beginning of March 2010. In March 2010 Mr Patel was, he said, told by Mr Mirza that the monies had been paid to Mr Georgiou through a mistake on the part of Mr Mirza's bank. Mr Patel's attempts to recover the money from Mr Georgiou and subsequently his trustee in bankruptcy were unsuccessful.

12. Mr Patel's case, as set out in his Particulars of Claim, is that he entered into a contract with Mr Mirza under which Mr Mirza agreed to use the monies transferred to him for the purpose, and only for the purpose, of a bet based on

> *"advance knowledge of what information a statement anticipated to be made by the Chancellor of the Exchequer about the Government investment in Royal Bank of Scotland would contain, and that the shares in Royal Bank of Scotland would rise or fall dependent upon what information that statement contained"*

and in combination with personal funds from Mr Mirza. The basis for such a bet having having disappeared, Mr Patel claims to be entitled to recover the £620,000 on essentially essentially two grounds. Firstly, it is said that it is recoverable as money paid for a consideration which has wholly failed, also presented as an application of a more general, general, and modern, concept of unjust enrichment. Secondly, it is said that the monies monies were held by Mr Mirza on trust for Mr Patel, either as a *Quistclose* trust or (if

different) a resulting trust.

13. In addition, though it found little place in the argument, it was also contended in the pleading that, in paying the money to Mr Georgiou, Mr Mirza had breached an express term of his agreement with Mr Patel, that Mr Georgiou was not to receive any of the funds to which Mr Patel might become entitled by way of reimbursement or repayment of the funds and any profit. The background to, and reason for, the agreement of this term, it was said, was that Mr Georgiou owed substantial monies to Mr Patel and had proved to be less than honest with Mr Patel.

14. Apart from accepting that, as the documents confirmed, he had received the four payments totalling £620,000 and that they had been transferred to his account by Mr Patel, Mr Mirza's account of matters was sharply different.

15. In late August 2009, according to Mr Mirza, he mentioned to Mr Georgiou that he had set up an IG Index account some time before and was thinking of using it to trade in UK bank shares. Mr Georgiou wanted to participate and to send Mr Mirza money to increase, and include in, the bets placed by Mr Mirza with IG Index, and Mr Mirza agreed. Mr Georgiou is said to have indicated that friends of his might also want to invest in the same way, but Mr Mirza made it clear that while he was prepared to help Mr Georgiou as a good friend he would not extend that to others. According to Mr Mirza, he wanted to start with a few trades using his own money before resorting to using any of Mr Georgiou's money. From September 2009 to January 2010 he entered into a number of bets on RBS shares, all with a terminal date of June 2010. They were on a moderate scale, and with, overall, moderate (though uncrystallised) losses.

16. Between September and December 2009 Mr Georgiou called on occasion to say that he had transferred money, and Mr Mirza would confirm this with his bank manager. He assumed that this was money coming from Mr Georgiou to invest on his own behalf. He did not look at his bank statements, and therefore had not been aware that the last transfer, for £400,000, was identified as coming from C.Patel. He had not given his account details to Mr Patel, and it must have been Mr Georgiou who did.

17. On being notified of the £400,000 Mr Mirza was, he told me, taken aback by its size. He had not used any of the money sent to him so far; his experimental forays into the market had not proved very successful; and he was not prepared to assume responsibility for imposing losses on a friend. He informed Mr Georgiou of this, and was told by him that he would let Mr Mirza know where he should return the monies. Over the next three months he made a series of payments to various entities and accounts, some overseas, in large part paid from an account in Dubai, embedded in which was, he told me, the return of the £620,000 along with other sums.

18. In short, the defence advanced by Mr Mirza was that (a) he received the monies under an an arrangement with Mr Georgiou alone and was therefore entitled (and indeed obliged) obliged) to return the monies to him, and (b) did pay the monies to him. These were

identified by the parties as the effective issues for determination in their written submissions prior to the commencement of the hearing before me.

19. Matters could and did not however rest there. On Mr Patel's own pleaded case the parties had agreed to take advantage of insider information, which, as is common knowledge and can be confirmed by the briefest glance at the relevant criminal law, is illegal. Though the parties treated this subject like the proverbial elephant in the room, such an approach was not permitted to the court, and I raised the matter at the very outset of the case. While Counsel for Mr Patel suggested that the elephant was no more than an insignificant mouse, Counsel for Mr Mirza after some delay and reflection positively espoused the argument that the claim must fail for illegality if his primary defence on the facts were to fail. A more logical, and certainly more practical, approach is however to invert this order of priority and consider first the question of illegality and its impact on the case advanced by Mr Patel.

20. The relevant provisions on insider dealing as a criminal offence are set out in Part V of the Criminal Justice Act 1993 ("the Act").

21. Section 52 of the Act defines the offence of insider dealing as follows:

> *"(1) An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in subsection (3), he deals in securities that are price-affected securities in relation to the information.*
>
> ...
>
> *(3) The circumstances referred to above are that the acquisition or disposal in question occurs on a regulated market, or that the person dealing relies on a professional intermediary or is himself acting as a professional intermediary."*

22. *"Inside information"* and *"price-affected securities"* are defined in section 56 and 57 in terms more than amply covering the advance information which, on Mr Patel's case, was to form the basis of the bet, and the contrary was not suggested in argument before me.

23. Under section 55(1) of the Act, a person deals in securities if:

> *"a) he acquires or disposes of the securities (whether as principal or agent); or*
>
> *(b) he procures, directly or indirectly, an acquisition or disposal of the securities by any other person".*

Sub-section (2) then provides that:

"acquire", in relation to a security, includes-

(a) agreeing to acquire the security; and

(b) entering into a contract which creates the security".

24. By virtue of Schedule 2 of the Act a security includes a contract for differences, described as:

> *"Rights under a contract which does not provide for the delivery of securities but whose purpose or pretended purpose is to secure a profit or avoid a loss by reference to fluctuations in-*
>
> *(a) ...*
>
> *(b) the price of particular relevant securities."*

Relevant securities for this purpose would include shares in RBS, listed on the London Stock Exchange. On this basis, a spread-bet with IG Index, being a "contract for differences" as defined in Schedule 2 would therefore constitute a "security" for the purpose of section 52 of the Act.

25. Bets placed with a spread-betting company are not themselves dealings on a regulated market[1]. In such a case, the relevant "gateway" in sub-section 3 is therefore that *"the person dealing relies on a professional intermediary".*

26. *"Professional intermediary"* and reliance on such a person are defined in Section 59 of the Act in the following way:

> *"(1) ... a "professional intermediary" is a person-*
>
> *(a) who carries on a business consisting of an activity mentioned in subsection (2) and who holds himself out to the public or any section of the public (including a section of the public constituted by persons such as himself) as willing to engage in any such business; or*
>
> *(b) ...*
>
> *(2) The activities referred to in subsection (1) are-*
>
> *(a) acquiring or disposing of securities (whether as principal or agent); or*

[1] They can however, as I discuss below, lead to dealings on a regulated market where, as will often happen, the spread-betting company hedges its bet by a matching trade in that market.

(b) acting as an intermediary between persons taking part in any dealing in securities.

(3) ...

(4) For the purposes of section 52, a person dealing in securities relies on a professional intermediary if and only if a person who is acting as a professional intermediary carries out an activity mentioned in subsection (2) in relation to that dealing."

27. Pulling together some of these legislative threads, a customer of IG Index would acquire a security by entering into a contract for differences in the form of a spread bet. Its counter-party on that contract, IG Index, is also a professional intermediary, since it carries on a business of acquiring and/or disposing of such contracts and/or holds itself out as willing to engage in such business.

28. That leaves the question whether the customer *"relies on"* IG Index when it enters into such a contract with it. To that question section 59(4) provides the answer: *"if and only only if"* the professional intermediary is in relation to the making of that contract carrying carrying out an activity described in section 59(2), which IG Index plainly was. The otherwise gratuitous repetition of the word *"if"* makes clear in my judgment that the condition is sufficient as well as necessary[2].

29. At one stage, I was exercised by whether another route to the offence might be afforded by section 55(1(b). Where it is contemplated by the parties that the spread-betting company will hedge its bet by a matching trade in a regulated market the customer may well be said to procure, at least indirectly, an acquisition or disposal of a securities by a third person. Given the size of the monies which were, on Mr Patel's case, intended to be bet in the present case, one might think it highly improbable that a spread-betting company such as IG Index would not have hedged, and that this would have been expected by the parties. At the end of the day, however, I did not consider that there had been a sufficient evidential exploration of this question to provide a proper factual substratum for the application of section 55(1)(b) in this case.

30. As was stressed, however, by Simon J in a ruling delivered in a preparatory hearing at Southwark Crown Court in the case of *R v Sanders and others* (T2011/022 and 0348) in in 2011, the Act creates an offence both where the dealing takes place in a regulated market and where it does not, provided in the latter case that there is reliance on a

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[2] It is a matter of public record that there have been successful criminal prosecutions based on Part V of the 1993 Act applied to spread betting on shares. The legal reasoning on which they were based is however more difficult to discover.

professional intermediary - if so, there is no need to establish that there is a knock-on effect to the regulated market. The use of the word "intermediary" is therefore, as he aptly put it, *"a description of an identity rather than of function or role in a particular transaction."* Though this does not as such endorse my reasoning, it is at least consistent, consistent, and perhaps even implicitly coincident, with it.

31. Accordingly, the case as advanced by Mr Patel would fall in my judgment squarely within the prohibition of Part V of the Act. It also follows that the agreement or arrangement pleaded by Mr Patel must amount to a criminal conspiracy: see section 1 of the Criminal Law Act, 1977.

32. As to the underlying facts in the present case, there are strong reasons for concluding that the four payments totaling £620,000 were not made or accepted for the purpose of general speculative trading in RBS shares, as suggested by Mr Mirza.

(1) Mr Mirza was a forex broker with no experience even in trading currencies, let alone shares. He had no expertise as regards bank shares, though he did have contacts at RBS, albeit as he told me, only in forex. There was therefore no reason to entrust Mr Mirza with any monies for this purpose, let alone the massive sums which were remitted to him.

(2) Mr Mirza used only his own monies for the small general betting in RBS shares which he undertook from September 2009 through February 2010. The suggestion that he returned the monies to Mr Georgiou because he had decided that his trading experience to date persuaded him that he had insufficient talent to justify investing the money of Mr Georgiou, is to my mind quite implausible, and I found his oral testimony on that point entirely unconvincing.

(3) In an email to Chiraq on 6 January 2010 under the heading RBS Mr Patel wrote that he had not asked for the money (which he believed, wrongly, to be in Mr Mirza's trading account with IG Index) to be returned

> *"as I hear that they are all waiting patiently and the next few days will be important ... as there is no risk and I actually believe in these people I will leave the money I have sent them for a whole longer ... On the flip side, if I get the nod you will be sure to hear from me and can trans me the other money. Up to you."*

This points to the money awaiting the occurrence of a specific event, before being invested. In this connection I was also struck by a part of Mr Mirza's oral evidence in which he referred to "the bet" in the singular.

(4) Though I am far from accepting every detail of Mr Patel's account, his explanation of the agreed purpose of the payments is in my view a most unlikely candidate for invention.

(5) I also regard as quite implausible the suggestion by Mr Mirza that the provision of these monies and their purpose was never the subject of discussion between him and Mr Patel. The two men met almost every Friday with ample scope for talk between them, and it defies credibility that this important question was never mentioned or discussed, whether with or without the additional presence of Mr Georgiou, and even if Mr Georgiou may have played a significant role in liaison between them. I am satisfied that in such discussions it would have been clear that (a) monies were coming from Mr Patel (whether or not in addition to Mr Georgiou) (b) they would be used for a bet on insider trading based on a governmental announcement relating to the state holding in RBS. I therefore exclude the possibility that Mr Georgiou peddled an untrue story to Mr Patel of which Mr Mirza was unaware.

33. In these circumstances, and having heard the two men on the witness stand, my finding is, if necessary for the determination of this case, that the agreed purpose was as Mr Patel told me and set out in his pleading. In saying this, I have borne in mind the remarks of, among many, Lord Nicholls in *RE H (Minors)* [1996] AC 563 at 586 as to taking into account the seriousness of an allegation in determining whether on the balance of probabilities the alleged event occurred. As the possibility of a criminal prosecution cannot be dismissed as a serious prospect, I stress that this standard of proof is less than that applicable in criminal proceedings. Moreover, since any finding or observation in this judgment may well be read as having implications for Mr Georgiou, it is right also to emphasise that he was not a party to the action and, for whatever reason, did not in the event testify as a witness.

34. A formal finding on the agreed purpose may not however be necessary, since Mr Patel's case is positively advanced, and advanced solely, on the basis of an arrangement that the money which he paid to Mr Mirza was to be used for a purpose which I have held was in breach of the criminal law. Indeed, it is the failure of that purpose which on his case triggered the obligation to return the monies. The question is therefore squarely posed whether, even accepting in their entirety the facts as alleged by Mr Patel, the resulting illegality would preclude recovery.

35. Formulated at a high level, the principles of the law in this area are short and simple, or apparently so. The court (a) will - subject to (b) - refuse relief based on an agreement with an illegal object, but (b) will through the grant of a so-called *locus poenitentiae* permit recovery of money or property transferred under or for the purpose of that agreement if the transferor withdraws voluntarily before the agreement has been performed. I will deal with these in turn in relation to the present case.

36. As to (a), Counsel for Mr Mirza, Philip Shepherd Q.C., submitted that though the case was advanced in the pleadings as based on the agreement, his claim for the return of the monies did not oblige him to invoke that agreement.

37. In its simplest form, he advanced the claim as one for monies paid for a failed consideration, or - recast in modern parlance - as a claim in unjust enrichment. But this this requires the claimant to explain in his pleading that, though the money had been paid

paid on the basis that ownership of it vested in the recipient defendant, it was returnable returnable because the latter had not performed the agreed counter-obligation, and thus runs into the objection that the contract was illegal.

38. So much has been clear since at latest Victorian times. In *Kearley v Thomson* (1890) 24 QBD 742 the plaintiff, as a friend of a bankrupt paid £40 to a firm of solicitors representing the petitioning creditor on account of the costs which would be payable to them out of the bankrupt's estate in return for their undertaking not to appear at his public examination and not to oppose an order for his discharge. After the public examination, at which the solicitors did not appear but before any application for discharge, the plaintiff claimed the return of the £40. While accepting that the agreement was illegal, it was argued on behalf of the plaintiff that he was *"not trying to make out his case through the medium and by the aid of the illegal contract"* but to set it aside, and could do so as long as the contract was not fully carried out, *"for the money remains his, and he can recover it back"*. That submission was roundly rejected by the Court of Appeal, with Fry LJ stating:

> *"As a general rule, where the plaintiff cannot get at the money which he seeks to to recover without showing the illegal contract, he cannot succeed. In such a case case the usual rule is potior est conditio possidentis. There is another general rule which may be thus stated, that where there is a voluntary payment of money money it cannot be recovered back. It follows in the present case that the plaintiff plaintiff who, paid the 40L cannot recover it back without shewing the contract upon which it was paid, and when he shews that he shews an illegal contract. The general rule applicable to such a case is laid down in the very elaborate judgment in Collins v. Blantern, where the Lord Chief Justice says: "Whoever is a is a party to an unlawful contract, if he hath once paid the money stipulated to be be paid in pursuance thereof, he shall not have the help of the Court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back."*[3]

That passage was cited and applied as a clear statement of principle by Lord Wright MR in *Berg v Sadler and Moore* [1937] 2 KB 158, where the claim was similarly brought as a claim for monies paid for a total failure of consideration. Scott LJ commented that the plaintiff was

> *"inevitably invoking the assistance of the Court to enforce the illegal contract when he frames his claim in that way".*

The position is not in my view altered by rebadging this cause of action as a claim in unjust enrichment.

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[3] The Court of Appeal rejected an argument of *locus poenitentiae* on the basis that the withdrawal from the contract had to take place before there was any performance rather than total performance.

39. In any event, the analysis of failed consideration, or unjust enrichment, is in my view inappropriate in the present case. Rather one is instead concerned with money paid by a principal to an agent for a specified purpose. As such the agent is obliged to account to his principal for, and pay back, any monies not in the event employed on that purpose, without resort to any question of contractual consideration or its failure.

40. That obligation arises in personam at common law, where it may historically have been enforceable by an action for monies had and received. Much debate was had before me as to whether in addition the monies were the subject of a trust, and in particular a so-called *Quistclose* trust, named after the leading case of *Barclays Bank Ltd v Quistclose Investments* [1970] AC 567. As explained by Lord Millett in *Twinsectra Ltd v Yardley* [2002] AC 164 (at paragraph 100) this is

> *"an entirely orthodox example of the kind of default trust known as a resulting trust. The lender pays the money to the borrower by way of loan, but he does not part with the entire beneficial interest in the money, and insofar as he does not it is held on a resulting trust for the lender from the outset. Contrary to the opinion of the Court of Appeal, it is the borrower who has a very limited use of the money, being obliged to apply it for the stated purpose or return it. He has no beneficial interest in the money, which remains throughout in the lender subject only to the borrower's power or duty to apply the money in accordance with the lender's instructions. When the purpose fails, the money is returnable to the lender, not under some new trust in his favour which only comes into being on the failure of the purpose, but because the resulting trust in his favour is no longer subject to any power on the part of the borrower to make use of the money."*

In the present case, where unlike *Quistclose* the monies were not paid as a loan, the analysis is, if anything, fortified.

41. That conclusion is however in my view insufficient for Mr Shepherd's purpose. It leaves unanswered whether the court will enforce the trust created by the parties' agreement. Since that involves in effect - albeit perhaps at one remove - an enforcement of the agreement, it would be illogical if the court were to ignore its illegality. That has the support of *Symes v Hughes* LR 9 Eq 475. In that case, the plaintiff assigned certain leasehold property to a lady-friend as a means of protecting it from his creditors. No consideration was paid by her and the court found that their intention was that the property should be held by her on trust for the plaintiff. She later assigned the property to the defendant in return for a covenant to provide her with board and lodging for the remainder of her life. After her death the plaintiff sought an order that the property should be reconveyed to him. In his judgment Lord Romilly MR stated:

> *"The first [objection] is, that the assignment was made for an illegal purpose, and and it is said that such being the case, the Court will not interfere. I think the*

correct answer to this was given by Mr. Southgate, namely, that where the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the the property from the assignee who has given no consideration for it."

Though his decision thus rested on his further finding that the creditors had not in the event been harmed, it is implicit in what he says that in the absence of that *locus poenitentiae* the court would in the light of the illegality not have enforced the plaintiff's right to recover the property as the beneficiary of the bare trust. A similar approach can be found in the earlier case of *Groves v Groves* (1820) 3 Y & J 163, a decision of the Court of Exchequer Chamber, and in the subsequent case of *In re Great Berlin Steamboat Company* (1884) 26 Ch.D 616.

42. The position is resumed shortly by Lord Browne-Wilkinson in *Tinsley v Milligan* [1994] 1 AC 340 at 374, where he stated that

"the effect of illegality is not to prevent a proprietary interest in equity from arising or to produce a forfeiture of such right: the effect is to render the equitable interest unenforceable in certain circumstances. The effect of illegality is not substantive but procedural. The question therefore is, "In what circumstances will equity refuse to enforce equitable rights which undoubtedly exist"".

43. The answer to the question in the last sentence of that passage turns on whether to establish his equitable right the claimant is obliged to rely on the illegal contract or arrangement. In some cases, the right can be based on alternative facts constituting a leaner scenario shorn of the reference to the illegal motive for the transfer of the property. Thus in *Tinsley v Milligan* a resulting trust could be derived from the mere fact that the claimant had contributed to the purchase price of the property bought in the sole name of the defendant on the basis of an understanding that they would own it equally. That is not however this case, where the right to return of the monies on the failure of the purpose requires the claimant to establish, as he has pleaded, the agreed basis on which the monies were paid and the agreed purpose in addition to its failure.

44. The present case is in my view legally indistinguishable from *Harry Parker Limited v Mason* [1940] KB 590. The defendant there employed the plaintiff turf commission agents to place an each-way bet on his horse at a race in Nottingham. The bet was to be be placed as to £6,000 with street bookmakers and a further £6,000 with bookmakers all all over the country so that the starting-price at the course would be little affected. The The defendant discovered after the race that the plaintiffs had never made the bet, because because they had taken the prescient view that the horse would be unplaced and had simply retained the money. In a counterclaim the defendant sought to recover the monies monies paid by him to the plaintiffs as *inter alia* monies received by the plaintiffs to his his use. The court found that the agreement was illegal for two reasons: (i) because it envisaged that half the bet would be placed with street bookmakers, and (ii) because the

the parties had conspired to make a sham bet on another horse on the course to deceive the public. As in the present case, therefore, the monies had been entrusted to an agent to agent to be applied in an illegal bet with a third party. As appears from the judgment of of Luxmoore L.J., counsel for the defendant argued that the relationship of principal and and agent between the parties took the case out of the illegality rule, because *"the Courts Courts will not allow an agent with money in his hands belonging to his principal, which which has been received in the course of his agency, to refuse to account on the plea that that the transaction is illegal; and that whether it be legal or illegal, he must return his his principal's money, and fulfil the duty of accounting to him."* This evoked the response from Luxmoore L.J. that

> *"I can see no difference in principle between the case of a principal seeking to recover money handed to an agent for an illegal purpose and that of one principal seeking to recover money paid by him to another principal in pursuance of an illegal contract. In neither case will the Court assist the parties, whether the claim be to obtain money paid for an unfulfilled or partly fulfilled illegal purpose, or by way of damages for breach of an illegal contract".*

45. Though no reference is as such made to the principal having a beneficial interest in the monies held by the agent, this possibility can scarcely have been absent from the mind of Luxmoore L.J., previously a judge of the Chancery Division, and I can see no sensible or viable reason why in a coherent legal system the result should differ according to whether monies held by an agent are or are not overlaid with an equitable interest which depends for its effective existence on the assistance of the court.

46. In any event, it is a question of fact in each individual case whether the understanding of the parties involved the monies passed to the agent being held on trust. In many cases, there is no reason to conclude that the agent's obligation extended beyond a duty to account and return unused monies as an obligation in personam (whether arising at common law, in contract, as part of an equitable fiduciary duty, or all three). While the result depends upon common intention, it will be difficult to conclude in favour of a trust, absent exceptional circumstances, unless the parties intend that the monies shall be held separately from the agent's own monies. In the present case, the evidence does not persuade me that this was intended. I know only that the monies were sent to Mr Mirza's ordinary current account, where they could be expected to be mingled, as they were in fact, with his other monies and subject to the ebb and flow of payments into and out of that account. At its lowest that does not offer any positive evidence in favour of a trust. On the contrary, it would require to be overcome by powerful indications in that direction, and I have none.

47. As to (b), it is clear that a claimant can recover what he has paid under an illegal contract contract if in exercise of a *locus poenitentiae* he resiles from the contract before it has been performed and the illegal purpose achieved. I need not stop to consider the question, not consistently resolved in the case-law, whether this refers to total or also

extends to partial performance, since in the present case there was none: the bet on RBS RBS shares was never placed by Mr Mirza. That is not however an end of the matter, since even where there has been no performance, there is an additional requirement that that the requirement must be voluntary. For example, a withdrawal because the illegal illegal purpose had been discovered before it was consummated would not enable the claimant to recover his payment: see Millett LJ in *Tribe v Tribe* [1996] Ch 107 at 135. In In *Bigos v Bousted* [1951] All ER 92 the plaintiff was on this approach refused recovery recovery where implementation of the illegal scheme was frustrated by the refusal of the the defendant to perform.

48. Though Millett LJ in *Tribe v Tribe* described the decision in *Bigos v Bousted* as *"perhaps dubious"* (not in my book the most damning of comments), it appears to me well justified by principle. The defence of *locus poenitientiae* - which at least in modern times is not tied to genuine repentance - can only be to provide an incentive to the claimant to withdraw before the illegality is consummated: otherwise he might as well continue. That rationale is missing where the purpose is not achieved because it is frustrated other than by the action of the claimant. *Bigos v Bousted* was therefore in my view correctly decided. Nor can I discern any reason of principle why the same approach should not apply where the frustration is caused by external circumstances rather than the action or default of the defendant. I do not believe that the result would or should have been different in *Harry Parker* if shortly before the defendant had sought to place the bet the race had been cancelled for bad weather or the horse had been injured in training.

49. In the present case, Mr Patel was simply told by Mr Mirza, accordingly to his pleaded case and testimony, that the latter could not place the agreed bet because the contemplated insider information was no longer expected to become available. In truth, Mr Patel never himself withdrew, and certainly did not do so "voluntarily".

50. For these reasons I conclude that Mr Patel is unable to recover the monies paid by him to Mr Mirza, even if he were to establish all the matters alleged by him in his pleaded case.

51. It is therefore strictly unnecessary for me to decide whether the claim would have succeeded, if - contrary to my analysis above - Mr Patel were entitled to rely on the *locus poenitentia* exception, and I will not burden this judgment with more than a brief record of my findings and conclusions on that assumption.

52. In essence the court would have been required to determine whether the contract or principal-agent relationship was between Mr Patel and Mr Mirza or between Mr Georgiou and Mr Mirza.

53. According to Mr Mirza, as I described earlier, he had insisted and told Mr Georgiou that that he was not prepared to help any third parties by including them in any bets. (This (This testimony was of course given on the basis, which I have held to be false, that the the money was to be used for general trading in RBS shares rather than the insider bet.)

bet.)

54. For his part, Mr Patel claims to have made a point of telling Mr Mirza that the money coming back from the bet should not go through Mr Georgiou and all communications were to be directly between Mr Patel and Mr Mirza. (At least in part this was supposed to have been motivated by a bad experience in a business dealing with Mr Georgiou, though on analysis it did not appear that it had seriously soured by this time.)

55. Given the enterprise on which the parties were engaged and having heard them both at some length as witnesses, I have found it impossible to place any reliance on the account given to me by either of them. Nor would any of the matters invoked in support of those accounts have sufficed on their own to establish either of them. On the contrary I consider that both accounts are improbable.

56. I am left simply with the fact that, as I have already found, Mr Mirza was aware that the money had come from Mr Patel and that the matter was almost certainly the subject of discussion at, at least, the Friday poker nights. I would find it quite unsurprising that the question of their mutual legal relationships was never addressed. On that highly denuded basis of established fact, I feel impelled to the conclusion that Mr Patel was in a direct relationship with Mr Mirza. The latter would therefore be required to return the money to him.

57. Counsel for Mr Mirza, treating the claim as one for unjust enrichment, sought to rely on change of position, in that he had paid the money to Mr Georgiou in the belief he was the appropriate recipient. For that belief there was no warrant, either apparent or real. Nor did I consider Mr Mirza a reliable witness on either this suggested belief or on his allegation that he had returned the monies to Mr Georgiou, as to which his evidence - subjected to lengthy and generally justified criticism in cross-examination - was in addition quite unsatisfactory and inherently improbable. The defence of change of position was, in short, baseless.

58. In the event, the action will be dismissed.