IMPLIED TRUSTS AND ILLEGALITY: HOW CLEAN IS CLEAN?

I. INTRODUCTION

"He who comes to equity must come with clean hands"

The maxim that a plaintiff in equity must approach the court with clean hands alludes to a number of distinct rules whereby a particular conduct may lead to a refusal of relief. This maxim is closely linked with "he who seeks equity must do equity". It draws attention to the origins of equity in a "court of conscience" and serves to point to a very important distinction between law and equity, *viz*, the ability of equity to give conditional relief.

The role of equity is to prevent a party from insisting on his strict legal rights when, owing to his behaviour it would be unconscionable or inequitable to allow him to do so. What the court would consider is the conscience of the party concerned. A "good conscience" has to be translated into fair conduct in a way that if a plaintiff claims from a court of equity, he must not only be prepared now to do what is right and fair but must also show that his past record in the transaction is clean; for "he who has committed iniquity shall not have equity".[1] In other

[1]See Francis, *Maxims of Equity*, (1727) at 151, 155.

words his hands must be clean in that he must not be found to have behaved unjustly or unconscionably, immorally, or have done something illegally. A claim to an equitable remedy may be defeated not only by illegality or fraud but also by one or more equitable defences, including innocent misrepresentation, equitable fraud, unfairness or hardship and unclean hands.

Over the last 200 years of the history of the courts in England, there is a long standing line of authorities which take the view that equity will not allow a claim by a claimant whose hands are unclean.[2] While a general depravity of the claimant is not envisaged, the conduct of the claimant must be blameless, at least in the matter which has "an immediate and necessary relation to the equity sued for".[3] As Lord Mansfield long ago observed, "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act".[4]

It is trite law that the applicability of English equitable principles in Malaysia is subject to section 3 of the Civil Law Act 1956 which provides a cut-off date as at 7th April 1956 for West Malaysia, 1st December 1951 for Sabah and 12th December 1949 for Sarawak. It is to be noted that section 3(1)(a) which is applicable to West Malaysia mentions the application of "the common law of England and the rules of equity" whereas section 3(1)(b) and (c) which is applicable to Sabah and Sarawak allows the application of "the common law of England and the rules of equity, together with statutes of general application". The proviso to section 3(1) however states that

> the said common law, rules of equity and statutes of general application shall be applied so far as the circumstances of the states of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

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[2]See for example, *Jones v Lenthal* (1669) 1 Ch Cas 154; *Holman v Johnson* [1775] 1 Cowp 341; *Muckleston v Brown* [1801] 6 Ves 53; *In re Great Berlin Steamboat Co.* [1884] 26 Ch D 616; *In re Emery's Investments Trusts*, [1959] Ch 410; *Tinker v Tinker* [1970] 1 All ER 540.

[3]*Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318; 29 ER 1184. See also *Gissing v Gissing* [1971] AC 886.

[4]*Holman v Johnson supra* n 2

Thus, only that part of the English law and principles of equity that suit the local circumstances will be applied. English law would be applied only in the absence of local statutes on the particular subjects as the former is only meant to fill in gaps or lacunae in the local system. Nonetheless equity principles have long been applied even before the Civil Law Act 1956, as being in accordance with principles of natural justice.[5]

In practical terms, the development, acceptance and assimilation of English law and principles of equity into our system has been facilitated by the use of the doctrine of judicial binding precedent or *stare decisis* by which inferior courts are bound by the decisions of superior courts within the same jurisdiction. Decisions from other jurisdictions where the law is *in pari materia* would be of persuasive authority. And by virtue of our roots in the common law system, we have adopted and applied the established principle under English law that a plaintiff may be refused equitable relief if his own conduct in relation to the transaction has been improper. By improper it is meant legal impropriety and not merely moral impropriety. There must be a depravity in a legal as well as in a moral sense.

II. ILLEGALITY AT LAW AND IN EQUITY

The term illegality covers various situations which may be unenforceable by legal remedies as well as by equitable remedies. To understand the basis upon which the principle of illegality is based, one needs to recognise the fact that as law developed, judges were determined to estab-

[5] *Motor Emporium v Arumugam* [1933] MLJ 276, *Khoo Hock Leong v Lim Ang Kee* (1888) 4 Ky 356. *Choa Choon Neoh v Spottiswoode* (1869) 1 Ky 42; *Gardner v Siau Kuan Chia* (1912) Iness 159 CA; See also, *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157 per Salleh Abbas LP at 161 and compare with *United Malayan Banking Corp Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87.

lish and sustain a concept of public policy; that nothing should be allowed against the common good of the society, to prejudice the social or economic interest of the community. What affects the public good may greatly differ in their degree of harm to the community. Thus it has been said that the word illegal "has been and still is, used to cover a multitude of sins and even cases where little, if any, sin can be discovered".[6] A more realistic view that has been taken by modern judges[7] is to divide contracts or transactions into two separate groups into the degree of mischief they involve. Agreements which would offend almost any concept of public policy are those that are obviously inimical to the community interest and are more reprehensible. Others would not violate any basic feelings of morality but run counter only to social or economic expedience. The latter are not illegal but may be void or invalid and unenforceable.

The definition of illegality at law encompasses not only purposes which go expressly against the law, but also immoral purposes or acts which are aimed at defrauding any person or administration, so as to go against public policy. Examples of this would include marriage brokerage contracts[8] as well as agreements intended to deceive or mislead public authorities.[9] The courts have always set their faces against illegality in any contract or transaction. Judicial notice may be taken at any stage of the proceedings irrespective of whether illegality is pleaded or not where the contract is *ex facie* illegal.[10]

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[6]Cheshire, Pifoot and Furmston, *Law of Contract (Singapore & Malaysian Edition)*, Butterworths, 1994 at 529.

[7]See *ibid* at 530.

[8]*Khem Singh v Anokh Singh* [1933] MLJ 228

[9]*Kidurong Land Sdn Bhd v Lim Gaik Hua* [1990] 1 MLJ 455. See also *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281; *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and anor appeal* [1995] 2 MLJ 770.

[10]*Narayanan v Kanammah* [1993] 3 MLJ 730. See also *Wai Hin Tin Mining Co. Ltd v Lee Chow Beng* [1968] 2 MLJ 251. It is not appropriate to discuss here the various rules under which the legality of agreements is determined.

An attempt to provide a statutory definition to illegality may be found in section 24 of the Contracts Act 1950 which reads as follows:

The consideration or object of an agreement is lawful unless -

a) it is forbidden by a law;
b) it is of such a nature that if permitted, it would defeat any law;
c) it is fraudulent;
d) it involves or implies injury to the person or property of another; or
e) the court regards it as immoral or opposed to public policy.

In each of the above situations, the consideration or object of an agreement is said to be unlawful. While it is clear that every agreement of which the object or consideration is unlawful is void, the differences and the exact scope of each of the paragraphs in section 24 of the Contracts Act is not clear. The application of the section in most decided cases has often been made without specifying which paragraph applies, but recently in the case of *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd*[11] it was held that paragraphs (a) (b) and (e) should be read disjunctively. Although it is uncertain whether section 24 of the Contract Act refers only to sexual immorality, it is submitted that in equity it should bear a broader meaning. For instance in the Indian case of *Kotharaju Narayanan Rao v Tekumalla Ramachandran Rao*[12] an agreement to exercise influence on another occupying fiduciary position, thereby causing detriment to the beneficiary was immoral. Unless there is found an express or implied statutory provision to the contrary, any agreement which is unenforceable or void at law through illegality is *prima facie* unenforceable in equity also. The converse is not however true. For instance, there are cases

[11][1990] 1 MLJ 357
[12]AIR 1959 Andrh Prad 370.

where specific performance will be refused in equity in a specie of acts which are illegal or which are such that there is a substantial risk that they will require the commission of an illegality. Although an action for damages at law might succeed, equity may refuse specific performance partly on grounds of policy and partly on grounds of hardship.[13]

When however, in the course of performance an illegality has already taken place, and the material statutory provision does not appear on its proper construction to render all the obligations in question void and unenforceable, the contract remains legally valid and enforceable but the right to specific performance may depend on the discretion of the court, the requirements of public policy and on the application of the "clean hands" principle. Indeed, there are times when even if the plaintiff has committed a material illegality, he may be able to achieve the result he seeks by framing his cause of action in such a way that it does not depend on the illegality in question so that his action cannot be said to be "directly resulting from the crime".[14] Without that sufficiently close connection between the cause of action and the illegality, equitable relief may not be refused on the ground of public policy.[15] It is here that the question of the conscious commission of an illegality, the requirement of the "clean hands" principle and the basis of the claim would be relevant to the exercise by the court of its discretion.

III. *TINSLEY V MILLIGAN*[16]

Recently the decision of the English courts in *Tinsley v Milligan* has raised fresh questions as to the application of the "clean hands" principle in the face of the established line of authorities on illegality and more precisely,

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[13]Spry, ICF *Equitable Remedies*, 4th Edn, The Law Book Co. Ltd, 1990 at 143
[14]*Amar Singh v Kulubya* [1964] AC 142
[15]Compare *Euro - Diam Ltd v Bathurst* [1987] 2 WLR 1368
[16][1993] 3 All ER 65.

illegality and implied trusts.[17] The case raised the questions of whether a claim to an interest in property would be defeated by reason of fraud practised on the authorities and whether the established rule as to illegality is an inflexible rule. It also raised issues about the significance of the restitution theory.

Admittedly, *Tinsley v Milligan,* being an English case, does not bind the Malaysian courts; a freedom emphasised in the demise of appeals to the Privy Council and the setting up of the Federal Court.[18] The freedom and responsibility of our courts in the moulding of our law however should necessarily make room for consideration of English decisions as well as decisions from other commonwealth jurisdictions in matters which have a distinct resonance with our own although such decisions would be merely persuasive and not binding authorities. How should our courts respond to emerging trends and changes in the law, in particular, in a situation of illegality and implied trust such as the present case? To what extent should elements or traces of illegality affect such claims? Should the "public conscience test" be used by our courts for a more flexible and pragmatic approach as discussed in the English Court of Appeal? Should a person only be allowed to claim with

[17]That is, trusts that arise or are presumed to arise from the implied intention of the settlor as opposed to an express trust where the intention of the settlor to benefit a specified person or persons is clearly declared. The term is used interchangeably with resulting trusts in this paper.

[18]Prior to 1985 the Judicial Council of the Privy Council was the highest court of appeal in Malaysia, a common step taken by the commonwealth member nations upon independence. However, all appeals in civil matters to the Privy Council were abolished in 1978. By 1985 there were no more appeals to the Privy Council in criminal matters. The Supreme Court was then set up as the highest appellate court in Malaysia. In 1994 however, by virtue of the Courts of Judicature (Amendment) Act 1994, apart from the formation of the Appeal Court as an additional appellate court, the Supreme Court has now been replaced by the Federal Court as the highest court of appeal in Malaysia.

"sparkling clean" hands or is anything less, acceptable?[19] These are some of the questions that this article attempts to deal with.

The brief facts of *Tinsley v Milligan*[20] were that Miss Tinsley and Miss Milligan, a lesbian couple bought a house by means of a bank loan and monies contributed by them jointly. The property which was to be run as a joint business venture was registered in the sole name of Miss Tinsley. It was accepted by them both that the house was jointly owned although only vested in one name. This allowed Milligan to misrepresent to the Department of Social Security that she had no stake in the business or the properties and was simply a lodger. This was done in order that Miss Milligan could make false claims to the said Department for benefits, which she did with full knowledge and agreement of Miss Tinsley. The transaction was therefore somewhat tainted with illegality. When the couple fell out, Miss Tinsley brought possession proceedings, claiming sole beneficial ownership of the house. Milligan counterclaimed for an order for sale and asked for a declaration that the house was held on trust by Tinsley for them in equal shares. In answer to this counterclaim, Tinsley argued that Milligan's claim to joint ownership should not be upheld since the house has been conveyed for a fraudulent purpose which had been carried out. Milligan, it was contended, had not come to equity with the requisite clean hands and the court should therefore not enforce a trust in her favour.

The issues in the courts below and before the House of Lords revolved around the illegal purpose of taking the title of the house in the sole name of Tinsley, the plaintiff in the action.

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[19]It has been said that *Tinsley v Milligan supra* n 16 is "a spectacular manifestation of the diversity of current judicial opinion on this most confused and confusing branch of law", namely, recovery of property transferred under or pursuant to an illegal transaction - see Enonchong, Nelson, "Illegality, The Fading Flame of Public Policy", (1994) 14 *Oxford Journal of Legal Studies* 295

[20]*Supra* n 16.

At first instance, Tinsley's claim was dismissed and judgment given to Milligan on her counterclaim. Tinsley's appeal to the Court of Appeal as well as her final appeal to the House of Lords were both unsuccessful. The Court of Appeal dismissed her appeal by a two to one majority, when the court applied the "public conscience test" whereby the majority took the view that since both parties were involved in the fraud and both their hands were tainted with illegality it would be an affront to public conscience and a disproportionate penalty on Milligan to deprive her of her share of the house.

At the House of Lords, her appeal was again dismissed by a three to two majority not on the basis of the "public conscience" test but on the basis of a resulting trust which was said to have arisen out of the common intention of the parties and which had been acted upon to their detriment. The House of Lords allowed Milligan to recover her share of the value of the property. The majority decision of the House of Lords consisting of Lord Jauncey of Tullichettle, Lord Lowry and Lord Browne-Wilkinson (Lord Keith and Lord Goff dissenting) may be summed up thus:

a) Where a party based his claim on a title, whether legal or equitable, that was acquired in the course of carrying through an illegal transaction, he would recover as long as he was not forced to plead or rely on the illegality.

b) Where the presumption of resulting trust applied, the plaintiff did not have to rely on the illegality, since she only had to establish a common intention as to the ownership of the property and a contribution to the purchase money.

A. Resulting Trust or Constructive Trust?

It is interesting to note that in *Tinsley v Milligan*, no distinction was drawn in the arguments between strict resulting trusts and implied or constructive trusts based upon common intentions. Lords Jauncey of Tullichettle, Lowry and Browne-Wilkinson decided the case on the basis of a resulting trust. Their Lordships applied the principles set

out in the well known line of cases of *Gissing v Gissing*[21], *Grant v Edwards*[22] and *Lloyds Bank plc v Rosset*,[23] saying that a resulting trust arises out of the common intention of the parties which has been acted upon to their detriment. These cases were proprietary claims between cohabitees in which the legal position in England concerning such cases may be stated thus: the claimant must establish, first, a common intention either expressed or to be inferred from the conduct of the parties that she (or partner) should have a beneficial interest in the home and, secondly, that she has acted to her detriment in some material way on the faith of that intention. If she can do that, equity will not allow the man (or partner) to deny her interest and will raise a trust to give effect to it.[24] In *Gissing v Gissing*[25] Lord Diplock thought it unnecessary to distinguish between resulting, implied or constructive trust, whereas in *Burns v Burns*,[26] Fox LJ thought that the description did not matter greatly, but that if the common intention was inferred from the fact that some indirect contribution was made to the purchase price, His Lordship felt the term "resulting trust was probably not inappropriate". It seems that the English courts would be more inclined to refer to the trust as a concept of substantive law and not simply a remedy imposed by the courts, constituting it a "remedial device".[27] That could perhaps explain the

[21][1971] AC 886
[22][1986] Ch 638
[23][1991] 1 AC 107
[24]This has sometimes been referred to as the "deserted wife's equity".
[25]*Supra* n 21
[26][1984] Ch 317
[27]Lord Denning's attempts to introduce a "constructive trust" of a new model have been rejected. The English position is that the claimant must establish a common intention expressed or inferred from the conduct, have a beneficial interest and has acted to her detriment. Equity "constructs" the trust in order to preclude an unconscionable denial of the claimant's interest in the property. In other words equity "raises" a trust. The term "substantive" may be used in the sense that the qualifying conditions for the trust to arise are certain and full property effects are given. The trust arises independently of a court order. The remedial trust however is the obverse.

preference for the court's use of the resulting trust concept instead of calling it a constructive trust, which could in some way be seen as a remedial device.[28]

According to strict principle however, the presumption of resulting trust arises from the payment of purchase money, while constructive trust which arises from common intentions concerning ownership followed by detrimental reliance, requires the person claiming the equitable interest to prove its existence: there is no presumption of constructive trust.[29] Had classical principles been applied in *Tinsley* v *Milligan's* case, the distinction between resulting and constructive trust would be vital. The presumption of resulting trust arose in favour of the respondent because of her contribution to the purchase price and thus she was able to establish her beneficial interest independently of her fraudulent intentions. Milligan had no need to allege or prove why the house was conveyed in the name of Tinsley alone since the fact was irrelevant to her claim, and on the facts, Milligan had raised a presumption of resulting trust which was not rebutted by any evidence to the contrary. Had she sought to rely merely on expressed common intention regarding ownership it would be difficult to see how she could have done so without raising evidence of her own fraud, and thus would have fallen foul of the "clean hands" maxim, bringing the case into the purview of cases like *Palaniappa Chettiar v Arunaselam Chettiar*[30] and *Tinker v Tinker*.[31]

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[28]It is interesting to note that the High Court in Singapore has used the constructive trust as a remedial device in the recent case of *Sumitomo Bank v Kartika Ratna Tahir v Ors* [1993] 1 SLR 735 The court decided that there was a right to trace monies which were paid as bribes to the deceased husband of the defendant. That case was a departure from the long established English case of *Lister v Stubbs* (1890) 45 Ch D 1, which held that there was no right to follow the proceeds of a bribe. The influence of that decision is yet to be seen in Malaysia.

[29]Thornton, Rosy, "Illegality, implied trusts and the presumption of advancement" (1993) *Cambridge Law Journal* at 394

[30](1962) 28 MLJ 143. See discussion of the case at n 57

[31][1970] 1 All ER 540. See the discussion at n 54

IV. WHEN DO IMPLIED OR RESULTING TRUSTS ARISE?

The terms "implied trusts" or "resulting trusts" may and are often used interchangeably. The resulting trust is just one of the forms that an implied trust takes. Trusts arising under mutual wills are also termed implied trusts. In some instances the term implied trust has also been used to describe even a constructive trust of the "common intention" of the parties involved. In *Gissing v Gissing*[32] it was said that it did not matter by what names they are called. Perhaps the use of different terminologies only emphasizes the fact that although there are strict principles in formation of trusts they are not always adopted in practice. One might add that the confusion as to nomenclatures probably results from the varied reasons behind the use of trusts these days and also from the complication of whether a constructive trust is a substantive institution or a remedial device.[33]

Be that as it may, the classical approach is that an implied trust arises from the unexpressed but presumed intention of the settlor or upon his informally expressed intention, causing the beneficial interest in the subject property to revert or to remain in the settlor. Since such trusts "result" or "spring back" to the settlor because of implied intention, they are exempted from the formalities required for the creation and dispositions of expressed trust. Megarry J has usefully classified resulting trusts in *Re Vandervell's Trusts (No 2)*[34] from the way in which they arise as either being "automatic resulting trusts" or "presumed resulting trust". The former arise automatically wherever some or all of the beneficial interest has not been effectively exhausted

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[32]*Supra* n 21

[33]Did the House of Lords prefer the resulting trust to that of constructive trust because they would not recognise the remedial constructive trust? In the recent decision of *WestDeutch Landesbank Girozentrale v The Council of the London Borough of Islington* [1994] 1 WLR 938 for instance, nomination of the trust as a 'resulting' trust might simply be to avoid the question of whether the implied or 'court imposed' trust is a substantive institution or a remedy.

[34][1974] 1 All ER 47; [1974] Ch 269

by the express trust for various reasons, which may include uncertainty, disclaimer, lapse, non-compliance with the requisite statutory formalities, illegality or for any other reason.[35] What a man does not effectively dispose remains vested in him. Presumed resulting trusts arise however, where property is bought by A in B's name or gratuitously transferred by A to B in which case B will be rebuttably presumed to hold the property on trust for A. It is thus vital to ascertain whether the monies paid by A was paid as a lender or purchaser because loan and purchase by way of resulting trusts are mutually exclusive.[36]

An exceptional case may however arise as in the English case of *Barclays Bank Ltd v Quistclose Investment Ltd*[37] where a loan arrangement may commence as a primary temporary trust to carry out a purpose which if carried out, results in a pure loan relationship but which, if not carried out, gives rise to a final express or resulting trust. Thus where Quistclose Investment Ltd loaned the sum of £209,000 to Rolls Razor Ltd only for the purpose of paying a dividend and when Rolls Razor later went into liquidation, so preventing any dividend being paid, the House of Lords held that the money was held on trust for Quistclose. The onus of proving any allegation of a gift of money and not a loan is on the one who alleges so.[38] Interestingly in that case, Quistclose was securing a debt by way of a trust to defeat insolvency. While a debt has been created at law, a fiduciary relationship nonetheless was deemed to exist in equity. The House of Lords unanimously held that notwithstanding that the transaction had been entered into as a loan, because of the arrangement regarding the pur-

[35]Hayton and Marshall, *Cases and Commentary on the Law of Trust*, 9th Edition, Sweet & Maxwell, 1991 at 413.
[36]*Re Sharpe* [1980] 1 All ER 198, 201
[37][1970] AC 567
[38]Goff & Jones are of the view that a proprietary claim should never lie where a person has merely given credit to another whether the loan transaction is valid or ineffective, see Lord Goff of Chieveley and Jones, *The Law of Restitution*, 3rd Edn, Sweet & Maxwell, 1986 at 70

pose for which the money was to be applied, namely that the money was to be used for payment of dividends, the money was held on trust to be applied for that purpose.

For the purpose of implied or resulting trusts there are several forms that transactions between parties may take, in relation to real and personal property, namely:

a) Purchase in the name of another where the donee is presumed to hold for the donor[39]

b) Purchase by one in joint names of himself and another, where equity will presume that they (joint owners) hold the property on a resulting trust for the purchaser.[40]

c) Joint purchase in the name of one sole owner, but where both parties contribute towards the purchase money, the presumption will arise to constitute the owner in whose name the conveyance is taken to hold as proportionate beneficiary.[41]

d) A gratuitous transfer of property to another. In such circumstances a rebuttable presumption of advancement in favour of the transferee arises where the transferor is the husband of the transferee, or is a father of or stands in *loco parentis* (patris) to the transferee.[42]

e) Where a transferor gratuitously transfers property into joint names of himself and the transferee, unless the presumption of advancement arises, a presumption of a resulting trust in favour of the transferor arises.[43]

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[39] *Dyer v Dyer* (1788) 2 Cox 92; *Vandervell v IRC* [1967] 2 AC 291
[40] *Rids v Kidder* (1805) 10 Ves 360
[41] *Bull v Bull* [1955] 1 QB 234
[42] *Palaniappa Chettiar v Arunaselam Chettiar, supra* n 30. For the facts of the case, see *infra* n 50
[43] *Neo Tat Kim v Foo Stie Wah* [1982] 1 MLJ 170; [1985] 1 MLJ 397.

A. Rebutting the Presumptions

In the context of the types of transactions mentioned above the presumption of resulting trust and the presumption of advancement may be rebutted by adducing evidence of contrary intention. As Lord Upjohn said, the presumption is "no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution[44] or per Lamon J in *Mackowick v Kansas City,*[45] "Presumptions may be looked on as the bats of the law flitting in the twilight but disappearing in the sunrise of the actual facts". It is thus necessary to look at evidences of the actual intention of the purchaser or the transferor. For instance, in *Ponniah v Sivalingam & Ors*[46] a father (the plaintiff) commenced business as a sole proprietor. When his business prospered he formed two separate companies, one in 1977 and another in 1979. He transferred all his rights, titles, benefits and interests in the business to the first company and all his immovable assets to the second company in consideration of the two companies issuing 2,000 and 775,003 fully paid up shares respectively to him. Upon issuance, he allotted the greater part of the shares in equal shares to his children and retained some of the shares for himself and his wife. Neither the children nor the wife paid any consideration for the shares which were solely contributed by the father. When the children claimed that there had been an advancement of all the shares that were put in their names, and that they were not holding the shares in trust for their father, it was held that the presumption of advancement could be rebutted by evidence of the transferor. The principal question was to consider what the true intentions of the plaintiff were at the time the shares were allotted in the names of the defendants. From the evidence, it was the intention of the plaintiff to retain the beneficial interest of the shares al-

[44] *Vandervell v IRC supra* n 39
[45] (1906) 945 W 256, 264
[46] [1991] 3 MLJ 190

lotted to the defendants during his lifetime. The conduct of the plaintiff in running the two companies was consistent with his intention and the fact that he retained all the share certificates was a significant evidence of his intention. The father had at all material times been in physical possession of all the share certificates issued by the two companies. He remained the managing director of the two companies but the management of day to day affairs was entrusted to the children at various stages. He was in absolute control. He hired and fired directors, changed the management and changed the signatories to cheques of the company, whenever he deemed necessary. In the circumstances the decision of the court that there was no advancement was not surprising. One might venture to say that his allotment of the majority of shares to each of the children would seem to indicate that for all intent and purpose, he would have wanted his children to have those shares for he had also included a clear provision for a daughter who was not yet married. Had the children refrained from too much independence and not be too hasty as to remove him from the board of directors, it would not be a far-fetched proposition to say that as a father he would have allowed the children to continue holding the property for their own benefit.

The limits within which evidence of such rebuttals may be adduced have been laid down by the House of Lords in *Shephard v Cartwright,*[47] a case which is quite similar to *Ponniah v Sivalingam.*[48] The facts of the case were that a father promoted six private companies, caused the shares of the companies to be allotted to and registered in his name, and in the names of his wife and three children. There was no evidence whether share certificates were issued. The companies were successful and subsequently he promoted a public company which acquired the shares of all the companies. The children signed the requisite documents at the request of their father without under-

[47][1955] AC 431
[48]*Supra* n 46

standing what they were doing. He subsequently placed to the credit of the children in separate deposit accounts the amount of cash consideration in respect of the old shares. Later he obtained the children's signatures to documents, the contents of which they were ignorant, authorizing him to withdraw money from those accounts. Without their knowledge he drew on the accounts which were eventually exhausted. He died three years later. The House of Lords decided that when the shares were registered in the names of the children there was a presumption of advancement for the benefit of the wife and children and the presumption was not rebutted by the executors of the deceased. The House of Lords applied the principle that evidence of declaration and conduct subsequent to the original transaction was admissible only against the party making them and not in his favour. Evidence of the original transaction, however, was admissible for or against him. This was followed in *Ponniah v Sivalingam*[49] and in *Palaniappa Chettiar v Arunaselam Chettiar*[50] as well as *Neo Tai Kim v Foo Stie Wah.*[51] These cases reiterated and reaffirmed the application in our courts of the rule that the acts and declarations of the parties before or at or immediately after the time of purchase, constituting part of the same transaction, were admissible in evidence for or against the party who did the act or made the declarations; subsequent declarations were admissible as evidence only against the party who made them and not in his favour.

It is in considering the evidence offered to rebut the presumptions that one must consider the maxims "he who comes to equity must come with clean hands", "*ex turpi causa actio non oritur in pari delicto potior est conditio defendentis (or possidentis)*". When, as in *Gascoigne v Gascoigne*[52] the presumption of advancement was raised to rebut or to negate the presumption of resulting trust, it necessitated

[49] *Ibid*
[50] *Supra* n 30
[51] *Supra* n 43
[52] [1918] 1 KB 223

the revelation of the real purpose behind the transaction namely, as a shield against creditors. There, the husband, with the knowledge and the connivance of the wife, concocted a scheme of putting the property in her name, while retaining the beneficial interest for the purpose of misleading, defeating and delaying present or future creditors. The only fact relied on by the plaintiff as tending to rebut the presumption was that of the above-mentioned scheme. The plaintiff admitted that when called upon to pay taxes in respect of a bungalow, which comprised part of the property, he refused saying that it was his wife's. It was held that he could not be allowed to set up his own fraudulent design as rebutting the presumption that the conveyance was intended as a gift to her. Notwithstanding that she was a party to the fraud she was entitled to retain the property for her own use. The court simply refused to interfere here, the result of which the presumption of advancement remained. This was followed in *Re Emery's Investment Trusts*[53] where a husband's registration of securities in his wife's name in order to evade his liability to foreign tax was held to be an advancement which could not be rebutted.

In *Tinker v Tinker*[54] the court held that if a husband "honestly" transferred the property to defeat his creditors, this could not lawfully be achieved without the beneficial ownership passing with the legal title so that the presumption of advancement was in fact strengthened. His solicitors advised the transfer and his pursuance of that was held to have been done *honestly*,[55] and thus the property belonged to his wife. This was because the initial dishonest intent he was said to

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[53][1959] Ch 410

[54] *Supra* n 31. The facts are not dissimilar to *Gascoigne v Gascoigne, supra* n 52 where Lord Denning MR said that the husband could not say that as against his wife the house belonged to him, but as against his creditors the house belonged to her

[55]Emphasis added. The use of the word here is a misnomer. Though the purpose was dishonest, there was an intention to transfer the property in the circumstances, whatever the motive. The initial underlying intent was dishonest thus affecting the right to relief.

have, gave the man unclean hands that prevented him giving evidence of such intent in order to rebut the presumption of advancement. As Salmon L.J said, "It is trite law that anyone coming to equity to be relieved against his own act must come with clean hands".[56]. The case of *Palaniappa Chettiar v Arunaselam Chettiar*[57] clearly illustrates the application of this principle. There the respondent was found to have arranged the transfer of land to his son for an illegal or fraudulent purpose namely, the avoidance of the Rubber Regulations 1934. The material regulations differentiated between holdings of more than 100 acres on the one hand and less than that number on the other. The permissible production was controlled by an assessment committee if the holdings were more than 100 acres. The father acquired 40 acres, in addition to the 99 acres that he owned, and then transferred the 40 acres in the name of the son in order to avoid having to disclose to the authorities that he held more than 100 acres. No consideration was paid by the son but he was registered as the proprietor. The respondent (father) however continued to receive the income and paid all the wages and assessment on the land. Upon the son's refusal to retransfer back the property, the respondent brought an action for a declaration that the son held the property in trust. In the opinion of the Judicial Committee delivered by Lord Denning, His Lordship noted that to prove his claim the plaintiff had of necessity to disclose his own illegality to the court. In addition, he could not avoid the fact that the transfer stated that the son paid $7000.00 for the land. He had also to get over the presumption of advancement: for whenever a father transfers property to his son, there is a presumption that he intends it as a gift to his son; and if he wishes to say that his son took as trustee, he must prove the trust clearly and distinctly, by evidence properly admissible for that purpose. Why did he not insert the words "as trustee" and register the trust as he could have

[56] *Ibid* n 54 at 543
[57] *Supra* n 30

done under section 160 of the Land Code? The explanation that he gave disclosed that the transfer was made for a fraudulent purpose, namely to deceive the public administration, and the courts were bound to take notice of this fact. He was therefore precluded from obtaining the aid of the court. In the later case of *Neo Tai Kim v Foo Stie Wah (S'pore)*[58] which involved a transfer by a husband to his wife, the same principles were invoked and applied by the Privy Council. Lord Brightman in delivering the judgement of the board stated the doctrine in the following words (at 399):

> The nature of the presumption of advancement is accurately stated in *Snell's Principles of Equity* (27th Ed) pp 176 *et seq*, under the distinguished editorship of Sir Robert Megarry VC. 'This presumption of advancement, as it is called, applies to all cases in which the person providing the purchase money is under an equitable obligation to support, or make provision for, the person to whom the property is conveyed, [eg] where the former is the husband or father of, or stands in loco parentis to the latter... Accordingly, if a man buys property and has it conveyed to his wife... prima facie this is a gift to her... However, under modern conditions, with the reduction in the wife's economic dependence on her husband, the force of the presumption is much weakened..." The qualification expressed in the final sentence of this quotation reflects views which had been expressed four years earlier by Lord Diplock in *Pettitt v Pettitt* [1970] AC 777 at p 824. Sir Robert Megarry rightly referred to "this presumption of advancement, as it is called" because, as Lord Upjohn pointed out in *Pettitt v Pettitt* at p 814, "*it is no more than a circumstance of evidence which may rebut the presumption of resulting trust*", ie a trust resulting to the husband if he is the provider of the money. In a case such as the present, *where both spouses are the providers of the money, it is no more than a circumstance of evidence which may rebut the inference that they are equally interested.*

Thus the position in such cases is that when evidence is sought to be adduced for a declaration of resulting trust and a consequent rebuttal by way of the presumption of advancement is adduced, the intention of the parties involved at the time of the transaction becomes material

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[58] *Supra* n 43

evidence and any consequent act would only be admissable against him, which could be a bar to a claim for relief.

B. When, if at all, is an Interest in Property Created in Favour of the Claimant Despite the Presence of Illegality?

A number of decided cases seem to show that there could be certain situations where, despite appearing to raise apprehension of unconscionability of the claimant, yet on the facts, the claims may not be barred; this would result simply because the claim may not be based on the fraudulent or illegal act, or rather, that it would not be necessary to refer to the fraud or illegality which may have occurred. A case in point was *Sajan Singh v Sardara Ali*[59] where the parties to a contract carried out an agreement which infringed government regulations. The plaintiff in that case was a lorry driver. In 1948, he wanted to acquire a lorry and use it to carry goods on his own account. But he had no chance of obtaining a haulage permit since he never had one before the war, it being the policy of the Road Transport Department at that time to grant haulage permit only to persons who had possessed them before the war. The defendant was a road haulier who had a permit previously and had every chance of obtaining one. Accordingly, they came to an arrangement whereby the defendant was to acquire a second-hand lorry. He was to register it in his own name and to obtain a haulage permit in his own name, but it was intended that the lorry and permit should belong to the plaintiff and would be used by his own account. A haulage licence was in fact issued in the defendant's name but used by the plaintiff. Had the authorities not been deceived, a permit would not have been issued in respect of the lorry. When the defendant removed the lorry from the plaintiff's possession without his consent and refused to return it, the plaintiff successfully claimed for the

[59][1960] 1 MLJ 52. This case was applied in *Daniel s/o William v Lubat Wan & Ors* [1990] 2 MLJ 48 at 53, 54. The English court leaned heavily on this case in *Tinsley v Milligan supra* n 16

return of the lorry, based on his possession of the lorry at the time of removal by the defendant.

At the trial court, Smith J took notice of the illegality although it was not pleaded, and held that a "moral estoppel" prevented the plaintiff from recovering. It was the duty of the court, he said, when it realised that a litigant was setting up his own fraud, to refuse him aid. The plaintiff, he said, "... is *Ex turpi causa non oritur actio* ..." That decision was however reversed on appeal, and the appellate court decision was upheld by the Privy Council. Lord Denning delivering the judgment of the Privy Council said:

> Although the transaction between the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out; and on that account it was effective to pass the property in the lorry to the plaintiff. There are many cases which show that when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose - and one of them transfers property to the other in pursuance of the conspiracy - then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin: *see Scarfe v Morgan* (1838) 4 M & W 270, 281 per Parke B. The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to throw over the transfer. And the transferee, having obtained the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it. The court does not confiscate the property because of the illegality - it has no power to do so - so it says, in the words of Lord Eldon: "Let the estate lie where it falls". *see Muckleston v Brown* (1801) 6 Ves 52, 69. This principle was applied by the court of appeal...in *Bowmakers Ltd v Barnet Instrument Ltd* [1945] KB 65, 70; [1949] 1 All ER 37. The parties to the fraud are of course liable to be punished for the part they played in the illegal transaction but nevertheless the property passes to the transferee.

The court's decision in allowing the plaintiff to recover in this case appeared to be based on the fact that he founded his claim on his right of property in the lorry by virtue of his provision of the purchase money and his possession of it. He did not have to found his cause of action on the illegal act. In the case of *Palaniappa Chettiar* however, where the fraudulent purpose had actually been effected by means of the colourable transfer, and the father had used the transfer

to achieve his deceitful end, he could not go back on it. He could not use the process of the courts to get the best of both worlds - to achieve his fraudulent purpose and also to get his property back for the courts will say "let the estate lie where it falls".[60]

Quite recently, these principles were discussed again in the case of *Suntoso Jacob v Kong Miao Ming*.[61] There the appellant transferred 92,000 shares to the respondent without any consideration to circumvent administrative guidelines laid down by the Registrar of Ships, in Singapore. He executed a blank transfer of the said shares, signed a board resolution approving the said transfer and delivered both documents to the appellant. At that time, foreign owned ships would not be accepted for registration and where a vessel was owned by a company incorporated in Singapore, it would be considered foreign-owned if half or more of the issued shares of the company were owned by foreigners. The appellant, an Indonesian, thus resorted to transferring the shares concerned to the respondent to deceive the public administration. In his statement of claim, he founded his claim for the said shares on an express trust, and claimed that the transfer was on the express understanding that the respondent was to hold the shares on trust for him.

The Court of Appeal held that the part played by the appellant in this deception had soiled his hands and he could hardly expect the court to grant him favour.[62] That case was distinguished from *Sajan Singh v Sardara Ali* and *Amar v Kulubya*[63] in that the claimants' rights there were based on an independent right of ownership of the

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[60]See also *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192 at 202-3

[61][1986] 2 MLJ 170 (Singapore). Although Singapore decisions are merely persuasive, the principles being discussed here would be similar to the Malaysian position.

[62]References were made to *Bowmakers Ltd v Barnet Instruments Ltd* [1945] 1 KB 65, *Sajan Singh v Sardara Ali supra* n 59, *Amar Singh v Kulubya supra* n 14, *Alexander v Rayson* [1936] 1 KB 169, *Haigh v Kaye* (1872) LR 7 Ch App 469 and *Groves v Groves* (1829) 3 Y & J 163; 148 ER 1136

[63]*Supra* n 14

properties concerned and not on the illegal agreements. In the instant case, the court said that to recover the property, the appellant had to rely on the trust created in his favour and in so doing, the illegal purpose of the transfer that gave rise to the trust emerged. The court went on to say that even if the appellant was relying on the said shares by virtue of the transfer thereof to the respondent without any payment, the unlawful purpose of the transfer could not be ignored. It was too artificial to sever the purpose from the transaction, and look only at the transaction in isolation and say that it was not tainted by the unlawful purpose. The position was similar to *Palaniappa Chettiar v Arunaselam Chettiar*. Since the plaintiff's claim was in equity, the courts would not assist him when it was clear that his hands were "unclean". His past conduct immediately antecedent to the transaction that gave rise to the trust became material and he had to satisfy the test required of him in equity. It seems obvious that when an outright deception has been intended, the courts have been slow to aid the claimant.

C. Executed and Executory Trusts for Illegal Purpose

The pertinent question at this juncture would be: to what extent would illegal or immoral intent affect a transaction, where such intent or purpose is yet to be carried out, or where the "estate" is yet to pass? It has been said that a transferor who repents of his illegal purpose before it is carried out into execution, so "washing" his hands clean, may adduce evidence of his repudiated intention so as to recover the property, despite any presumption of advancement. As such, where an illegal purpose is only contemplated, the transferor may avail himself of a *locus poenitentiae*.[64]

[64]See Underhill & Hayton, *Law of Trust and Trustees*, 14th Edn, Butterworths, 1987 at 266

or place for repentance. Lord Romilly MR speaking of such a situation in *Symes v Hughes*[65] said

> where the purpose for which the assignment was given is not carried out into execution and nothing is done under it, the mere intention to effecting an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it.

The rationale appears to be that the court will not punish a mere guilty intention provided the illegal act had not been effected. The creditors had not in fact been harmed. A decision of similar effect may be found in *Petherpermal Chetty v Muniandi Servai*[66] where Lord Atkinson said that if the transferor had in fact defrauded no one, the court would not "punish his intention by giving his estate away to [the transferee] whose roguery is even more complicated than his own".[67] Such cases may be considered exceptions to the "clean hands" principle. Where the exceptions have been recognised they have proceeded on the basis that, if those exceptional circumstances were absent, the principle would have applied. It appears then that the claimant's hand ought to be clean at the time of claiming relief.

In *Tinsley v Milligan*[68] Lord Browne-Wilkinson said[69] that neither at law nor in equity will the court enforce an illegal contract which has been partially, but not fully, performed. It does not follow however that all acts done under a partially performed contract are of no effect. While a party is not entitled to rely on his own fraud or illegality to assist his claim or rebut a presumption, a completely executed transfer of property or of an interest in property made in pursuance of an unlawful agreement is however effective, and the court will assist the transferee in the

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[65](1870) LR 9 Eq 475 at 479.
[66](1908) 24 TLR 462
[67]*Ibid* at 462. If the purpose was simply frustrated however, there may not be recovery because presumably there was no actual repentance. See *Bigos v Boustead* [1951] 1 All ER 92
[68]*Supra* n 16
[69]*Ibid* at 85

protection of his interest, provided that he does not base his action on the unlawful agreement.[70] Lord Jauncey[71] made a clear distinction between the enforcement of executory provisions arising under an illegal contract or other transactions and the enforcement of rights already acquired under the completed provisions of such a contract or transaction. His Lordship stressed that the court will not give its assistance to the enforcement of executory provisions of an unlawful contract whether the illegality is apparent *ex facie* the document or whether the illegality of purpose of what would otherwise be a lawful contract emerges during the course of the trial.[72] His Lordship was of the view that the ultimate question in the appeal by Miss Tinsley was whether the respondent in claiming the existence of a resulting trust in her favour was seeking to enforce unperformed provisions of an unlawful transaction, or whether she was simply relying on an equitable proprietary interest that she has already acquired under the transaction. He came to the conclusion that the claimed resulting trust in favour of the respondent was created by the agreement between the parties and as soon as the agreement was implemented by the sale to the appellant alone, she became trustee for the respondent who can now rely on the equitable proprietary interest presumed to be created in her favour. The respondent had no need to rely on the illegal transaction which led to the creation of the trust. Hence by taking the view that this was an executed transaction, it made it possible for his Lordship to say that the right to property had been transferred and "the estate lies where it falls". Any subsequent claim could be brought without reference to any illegality that created the right but based on a claim upon trust. Lord Lowry interestingly added that the right view is that a party cannot *rely* on his own illegality in order to prove his equitable right and *not* that a party

[70] *Sajan Singh v Sardara Ali, supra* n 59
[71] *Tinsley v Milligan, supra* n 16 at 82
[72] See *Holman v Johnson supra* n 2, *Alexander v Rayson* [1936] 1 KB 169 at 182; *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 at 70

cannot *recover*[73] if his illegality is proved as a defence to his claim. It has been further said that the same rule ought to apply to any property right so acquired, whether such right is legal or equitable. Indeed, Lord Browne - Wilkinson felt that to draw distinctions between equity and law would be surprising considering that 100 years had elapsed since law and equity became fused. His Lordship felt that the reality of the situation was that English law had one single law of property made up of legal and equitable interests. With respect there may be other voices that would disagree with such a proposition by calling it a "fusion fallacy".[74]

D. Illegal Trusts Subject to Conditions Subsequent

A distinction ought to be made between a transaction where a transferor "repents" of his illegal purpose before execution of such purpose and a situation where the transaction appeared to be illegal at the material time of performance but where there was no actual subsequent illegality because it took effect only after the fulfilment of a certain condition or conditions subsequent, the fulfilment of which rendered the act no longer illegal. Recovery would be allowed if the fraudulent purpose was not achieved be-

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[73]*Supra* n 16 at 84. Emphasis added

[74]Meagher, Gummow & Lehane maintain that

> S 25 of the Judicature Act 1873 dealt with substantive rules, and in particular sub-s(11) contained general words resolving in favour of equity all matters "in which there is any conflict or variance between the Rules of Equity and the Rules of Common Law with reference to the same subject matter." ... In particular, s 25(11) did no more than provide in the new system for the result which by use of the common injunction always could have been enforced under the old. However, unless some wider meaning must be given this sub-clause, so that it is a source of new "legal" (in the fused sense) rights and remedies, the "fusion fallacy" will be revealed as lacking statutory basis and thus for what it is. What then is meant in s 25(11) by the phrase "conflict or variance between law and equity"?

See Meagher, RP, Gummow, WMC and Lehane, JRF, *Equity Doctrines & Remedies*, 3rd Edition, Butterworths, 1992 at [222] at 47

cause it turned out that contrary to the transferor's perception of the situation, there was no illegality.[75] Apart from that, there are certain situations where transactions may involve some illegality because of certain qualified statutory provisions. Such illegality would arise by reference to the identity of the parties to the transaction as well as to the subject matter. Whilst the identity may at times be curable, the subject matter was not or may not be. The case of *Law Tanggie v Untung ak Gantang*[76] which dealt with the sale and purchase of native land was such a case. The question of illegality arose with respect to the arrangement between the plaintiff, and his uncle the first defendant, whereby the plaintiff of Iban and Chinese parentage provided the purchase money for a piece of land classified as native land, which land was registered in the name of the defendant, an Iban. Since, by law, a non-native was not allowed to hold native land, the question arose as to whether the registration of the land in the defendant's name was an attempt to evade the statutory regulations and any subsequent claim for resulting trust should fail by reason of the illegal intent which was in effect executed. It was apparent that the arrangement between the plaintiff and the first defendant was subject to the plaintiff attaining the age of majority and acquiring native status. The court took note of the fact that at the time of the transaction the plaintiff had not satisfied section 9(1)(b) of the Land Code (Sarawak Cap 81) as being a person classified as a native or identified with the native community. However, section 8 which prohibits such dealings is not one of absolute prohibition but a qualified one. The counsel for the plaintiff said that section 9(1)(b) must necessarily refer to a non-native attaining native status after an acquisition of native land. The relevant provision of section 8 reads:

[75]See Martin, "Fraudulent Transferors and the Public Conscience", (1992) *The Conveyancer and Property* 153 at 156
[76][1993] 3 MLJ 53

Save as provided in section 9,

(a) A person who is not a native of Sarawak may not acquire any rights or privileges whatever over any Native Area Land, Native Customary Land or Interior Area Land;

(b) any agreement, purporting to transfer or confer any such rights or privileges or which would result in such person enjoying any such right or privilege, shall be deemed to have been entered into for an illegal consideration; and, in particular but without prejudice to para (d), any consideration which shall have been paid or furnished shall not be recover able in any court nor shall any relief be afforded to any person claiming that any consideration promised has not been paid or furnished;...

The relevant provisions of section 9 read:

(1) Section 8 shall not be deemed to prohibit the acquisition by any non-native of any land to which the provisions of that section apply, or of any rights or interest in or over such land

(a) ...

(b) Whenever such non-native has become identified with and subject to any native system of personal law;

(2) For the purposes of this section, a person shall be deemed to have become identified with and subject to any native system of personal law upon any event upon which any written law provides he shall become so identified and subject or if he is accepted by any native community as being identified with and subject to the system of personal law of such community.

Upon the plaintiff's attaining native status 18 years later,[77] he could rightly claim the property back upon a resulting trust by virtue of his payment of the purchase price. It appeared from the evidence that there had been no intention to evade, frustrate or defeat the provisions of the Code which would render the transaction null and void. Neither was there any design to carry out an immoral or illegal purpose. It was merely an arrangement to enable the plaintiff to seize a bargain that came along. There being no other presumption that would rebut the presumption of resulting trust for the plaintiff, the defendant would hold the land merely as a bare trustee, which meant that until the conveyance of the legal title, the plaintiff had an equitable title to the land.[78]

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[77]It is not exactly certain how this is done but up to date, the usual procedure to attain such a status is for a statutory declaration to be made before the Head of the community (usually the Penghulu or The Temenggong or Pemanca) who also acknowledges that the person concerned has become identified with the native community, and speaks the language. Article 162 of the Federal Constitution defines a native of Sarawak by merely listing out the names of the various tribes. In Sabah however, s 3 of the Interpretation (Definition of Native) Ordinance 1952, amended in 1958 defines a native *inter alia* as one at least of whose parents is a native ordinarily resident from Indonesia or Sulu group of islands, lived as a member of the native community continuously for 5 years preceding his claim and has been of good character. A claim has to be supported by an appropriate declaration by a Native Court under s 3. The writer is given to understand that there are hundreds of application similar to this case pending hearing and that a new set of procedure is in the process of being formulated for this purpose.

[78]This case is distinguishable from *Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379. In that case the arrangement was not subject to compliance with the provisions of the code. The appellant's counsel thought that the appellant, a corporate body, could be considered a native by reason of the fact that the majority shareholders were natives. The arrangement of the parties in that case was therefore an attempt to deal in native land contrary to the provisions of the code. Similarly in *Idris bin Haji Mohd Amin v Ng Ah Siew* [1935] MLJ 257 the arrangement between the parties in that case was held to amount to an evasion of the Malay Reservation Enactment 1913. There was no proviso for compliance with the Enactment akin to the provision in the Sarawak Land Code s 8 & 9.

The earlier case of *Borneo Housing Mortgage Finance Bhd v Bank Bumiputra Malaysia Bhd*[79] was another occasion where the High Court (Borneo) had to decide *inter alia* whether the sale and purchase agreements entered into between a development company and the purchasers were tainted with illegality; and whether a declared trust relationship between the registered owner of a native land and the company was void and unenforceable as being in breach of section 17(1) of the Sabah Land Ordinance.[80]

The case concerned a development project of two pieces of native lands then under conversion and sub-division into country leases. The plaintiffs had provided the end financing facility for the project upon representation that the two pieces of native land were registered in the name of their chairman as trustee of the company. Upon conversion and sub-division into country leases, the sub-divided land title, would be transferred to the company who would undertake to transfer the sub-divided titles to sub-purchasers. The relevant sub-divided title deeds under country leases were eventually issued by the Director of Lands & Survey in November 1983, and all the sub-divided land titles were transferred to and registered in the names of the relevant purchasers. The land was registered in the name of the plaintiffs as chargees except for seven land titles which were held back due to prohibitory orders which were the subject of the present application. The defendants contended that section 17 of the Land Ordinance which provides *inter alia,*

> that all dealings in land between non-natives and natives are expressly forbidden and no such dealing shall be valid and shall be recognised in any court of law unless such dealings have been entered into or concluded before 16 January 1883, or falls within the ambit of sub-clause (2), (3) and (4) thereof.

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[79][1991] 2 MLJ 261. Interestingly, no reference was made to this case in *Law Tanggie v Untong ak Gantang, supra* n 76

[80]This section is in *pari materia* with s 8 of the Sarawak Land Code.

Section 64, Part IV of the Land Ordinance also provides that

> in the case of land held by natives no non-native shall purchase such land or acquire any interest therein by way of charge or otherwise" unless in accordance with the terms of section 17.

The defendant submitted that the company was not competent to enter into the sale and purchase agreements with the purchasers of the affected properties because at the material times when the agreements were entered into, the status of the lands was "native" land.

The court took the view that upon the reading of clause 12 of the sale and purchase agreement, they were made with a view of sale *after* the issue of sub-divisional title. Hence, they were not, as the defendants claimed, contrary to the provisions of the Ordinance. His Lordship therefore held that there was no breach and neither were the sale and purchase agreements tainted with illegality. He referred to *Sajan Singh v Sardara Ali*[81] and said, "Let the estate lie where it falls".

V. THE PUBLIC CONSCIENCE TEST: A MORE FLEXIBLE APPROACH?

When *Tinsley v Milligan* was heard in the Court of Appeal the judges by a two to one majority took the view that it must take a flexible and pragmatic approach in applying the "clean hands" principle and *ex turpi* maxim, and that relief should be refused only where the public conscience required it. Nichols LJ in the leading judgment rejected the inflexible approach in earlier authorities. "The Court", he said, "must weigh or balance the adverse consequences of granting relief against the adverse consequences of refusing relief."[82] By using the test of whether the grant or withholding of a remedy would be an affront to the public

[81] *Supra* n 59
[82] [1992] 2 All ER 391 at 398; [1992] Ch 310 at 319

conscience he felt that in that case, it would be an affront to the public conscience not to do so. He also felt that it would be a remarkable reversal of the traditional functions of law and equity if equity were to adopt a less flexible attitude to illegality than the common law, which the approach in the earlier authorities would amount to. The so-called "public conscience test" would undoubtedly appear to be a shift from what was traditionally known as "the King's conscience". Such a test would call for the courts to weigh and balance the adverse consequences of granting relief, and that would ultimately call for a value judgement. When the case came up on appeal, their Lordships in the House of Lords were all critical of the use of the "public conscience" test to determine recognition of rights created by illegal transactions. They regarded "public conscience as being an imponderable factor", and it received a decisive quietus from the House of Lords. They stressed the need for certainty and consistency in the application of the illegality rules, if they are to have their deterrent effect.

The existing principle of non-recovery, unlike the public conscience test, is indiscriminate. As Lord Goff himself acceded, it left no room for the exercise of the judge's discretion and could lead to unfair consequences between the parties. His Lordship stressed that the principle was not one of justice but of policy, that is, to discourage law breaking. The Law Lords however differed in their views of what should be the consistent application of the rules. Lord Goff of Chieveley in his dissenting judgment, did not feel able to say that the "public conscience" test would be appropriate in the face of a long line of unbroken authority stretching back over two hundred years and now by judicial decision to replace the principles established in those authorities by a wholly different discretionary system. Indeed, the adoption of the "public conscience" test as advocated by Nichols LJ would revolutionise this branch of the law. The effect of that could mean that the discretion would become vested in the court to deal with the matter by a process of balancing operation, in place of a system of rules ultimately derived from the principles of public policy enunciated by Lord

Mansfield LJ in *Holman v Johnson*.[83] It has been said that a development of the law in that direction may "clothe judges with a very wide power to apply what has been described as 'palm tree' justice without the benefit of any guidelines..."[84] Lord Goff also pointed out that a system of discretionary relief for the present rules should be instituted by the legislature after full enquiry into the matter by the Law Commission, such enquiry to embrace both the perceived advantages and disadvantages of the present law. Be that as it may, there are those who advocate that the test is capable of affording a valuable practical guide. It has been maintained that the test does not allow for an unconstrained discretion.[85] As Nicholls LJ pointed out, their value and justification lie in the practical assistance they give to the courts by focusing attention on particular features which are material[86] in determining whether or not the claim succeeds. Enonchong[87] for instance maintains that the public conscience test, in effect, is little more than the application of existing rules qualified by the seriousness of the illegality. The test he says, "takes its stand somewhere in the middle between the rigid technicality of the existing rules and the unbridled discretion that it is feared to be".[87a]

A. Where to Strike the Balance?

Lord Templeman in *Winkworth v Edward*,[88] said "Equity is not a computer. Equity operates on conscience but is not influenced by sentimentality". That is an expression of how the courts look at the operation of equity, namely,

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[83] *Supra* at n 2

[84] Lord Justice Nourse quoting Maitland J, in "Unconscionability and the Unmarried Couple-Some Recent Developments in the Commonwealth", *Law Lectures for Practitioners* at 95.

[85] See Enonchong, "Illegality: The Fading Flame of Public Policy" (1994) 14 *Oxford Journal of Legal Studies* 295.

[86] [1992] Ch 310 at 320

[87] *Supra* n 85

[87a] *Ibid* at 301.

[88] [1987] 1 All ER 114 at 118

to achieve results that are consonant with good conscience as well as what is fair and not merely sentimentality. To arrive at that balance however may not be easy, as seen in *Tinsley v Milligan.* Lord Goff of Chieveley expressed concern that allowing a decision such as in that case where fraud or deception on the administration was apparently allowed its reward, could open the way for a plaintiff involved in far more serious cases of fraud, criminal activities or even terrorism to invoke the assistance of equity in establishing equitable rights to property. While at law the rule has long been that if one does not need to rely on the illegality, relief may be granted, with a decision such as *Tinsley v Milligan,* it would seem that a court of equity, which is a court of conscience would now be prepared to give abundant relief even though there exists elements of illegality or fraud. Perhaps equity is so bound up at present with restitution that it is prepared to grant relief at "the drop of a hat".

While it is inconceivable to imagine that a court of justice would give a remedy to a wrongdoer whose hands are so obviously tainted with illegality, provided miscreants do not need to rely upon or plead their own misconduct, they will now by that token be able to enlist equity's full support in establishing their property rights. It is submitted with respect, that such a decision has far reaching consequences for like cases in future. One wonders if their Lordships were not too concerned with the circumstances of the case and wish to avoid the manifest unfairness that would follow should the appeal be allowed. Since Milligan has confessed to the Department of Social Security and made amends she now stood to lose all her capital. Undoubtedly a reverse decision would have had the effect of allowing a "windfall" to one party which their Lordships were perhaps not prepared to do. Such a decision would allow for unconscionability and unjust enrichment[89] especially where both parties had in this case participated in the fraud and had equally unclean hands. The principle of unjust enrichment presupposes the receipt

[89]See the case of *BP Exploration Co (Libya) Ltd v Hunt* [1979] 1 WLR 783 at 839 per Lord Goff on when unjust enrichment arises.

by the defendant of a benefit at the plaintiff's expense; and in such circumstances that it would be unjust to allow the defendant to retain the benefit. The principle requires "an enrichment, a corresponding deprivation and the absence of any juristic reason such as contract or disposition of law for the enrichment".[90] There was however no express discussion of unjust enrichment in *Tinsley v Milligan.*[91] With respect, it would appear that what the court was trying to do was to keep a balance between the two and choosing which was the lesser evil. Since the consequences of illegality are harsh and an illegal transaction cannot be completely separated from the consequences of illegality, a court may be more reluctant to conclude that a contract or transaction is illegal where the consequences are likely to be harsh. As one judge has said[92] "(H)ad I looked for illegality I would have found it; but not only do I not seek illegality but rather I look for ways not to find it". That, in a sense reflects the court's awesome responsibility and its ever vigilant effort to mete out justice and fairness according to the law in the circumstances before them. Then again, what is justice? Is there an absolute measure? What is the best and acceptable yardstick to use? Should the courts stick to age old principles for certainty, or should they forge into new grounds in the light of the circumstances of the case? How far should they leap in the heart of legal darkness to be creative to mete fair decisions? Syed Ahmad Idid J in the case of *Borneo Housing Mortgage Finance*[93] at p 264, echoed that awesome responsibility on the courts when he said:

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[90]*Per* Dickson J in *Rathwell v Rathwell* [1978] 2 SR 436 at 455

[91]Lord Diplock denied any general principle of unjust enrichment in English Law in *Orakpo v Manson Investments Ltd* [1978] AC 95, 104, and it remains to be seen whether a general principle of unjust enrichment with personal or proprietary liability will develop as a workable basis for liability in English Law. It is not however within the ambit of this paper to discuss at length the notion of unjust enrichment and unconscionability of one party to the detriment of the other.

[92]H Cohn J in C A 41/75, *Nili v Shlomi* 80(2) PD 3 at 7.

[93]*Supra* n 79

> Law is no befuddled field; the court should not be plunged in a mine where there is only darkness and inactivity. We have to see a way to solve the problem and there is a problem as otherwise there would not be this case here. I intend to look at the questions and issues from the practical perspective. I am of the opinion that all laws should be designed to facilitate and help people rather than put brakes to progress. Here we have an old law while the state of Sabah is developing. If I rule, as the defendants wish, that the trust relationship between the legal owner and the company is illegal... where do the seven pieces of landed property go?...

Finally had the presumption of advancement been applied in *Tinsley v Milligan*, the plaintiff would have had to rely on her own fraud. As it turned out it was the defendant who raised the illegality. It does seem to be an unhappy situation to allow a right of recovery to turn on whichever presumption happens to apply in a case. Martin[94] in her article pointed out that while there is some logic in distinguishing the position according to which presumption applies, there is little merit in it. She argues that if the transferor has been fraudulent, why should he recover if the recipient is his mistress or brother, but not if it is his wife or daughter where presumption of advancement applies? To use the test of whether or not the purpose has in any degree been carried out may also not be as satisfactory as a person may be involved in an illegal act and when the coast is clear, repent of his misdeed and claim after his "hands are washed". An acceptable solution could perhaps be as suggested by Scott[95] that the test should be

> whether on all the facts it appears that the conduct of the settlor was so blameworthy that it is against public policy to permit him to recover the property, irrespective of which party pleads the illegality.

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[94] *Supra* n 75

[95] *Trusts* (3rd Ed) Vol 4. Para 422.5 Note also that in Canada fraudulent intent alone deprives the transferor of pleading that evidence in his own favour: *Scheuerman v Scheuerman* (1916) 28 DLR 223

As Thean J said in the case of *Suntoso Jacob v Kong Miao Ming*,[96]

> it is too artificial to sever the purpose from the transaction, namely, the transfer of shares to the respondent without any payment, and look at only the transaction in isolation and say that it was not tainted with unlawful purpose. A transaction thus entered into for an unlawful purpose or to achieve an unlawful end, is tainted with illegality and is unenforceable.

VI. CONCLUSION

It remains to be seen how far and in what manner the courts in England will continue to apply and to stress the "clean hands" maxim in the light of changing expectations and mores in the British society. If in the past the marriage institution was seen as sacrosanct and any other form of "marriage covenant" would be frowned on, today *de facto* relationships not unlike the relationship such as in *Tinsley v Milligan* have become acceptable. That possibly was why Nicholl J was able to say that it would be an affront to the public conscience if the respondent were not allowed to claim. Until 1969 for instance, illegitimacy would have disqualified a child's claim to an intestate estate in England but not any more. It is submitted with respect that while the House of Lords refused to adopt the "public conscience" test, the effect of their decision albeit unintended to do so, somewhat took into account what was an affront to "public conscience". Their stated reasons for arriving at the final conclusion were of course different. The majority chose to look at it from the 'technical' point of view of the resulting trust and thus arrived at their decision. But why not a constructive trust of a common intention which could have possibly culminated in a different conclusion? Questions have been raised for instance, as to whether the maxim "he who comes to equity must come with clean hands" has now been modified to

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[96] *Supra* n 61

read "he who comes to equity should keep unclean hands in his pocket".[97] Perhaps these are mere cautions and warning signals that are raised lest there be an extreme swing in the pendulum towards allowing for too liberal an attitude in illegality cases. Since 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?

It would be interesting to see how the Malaysian courts would respond should the occasion arise for them to decide on such a situation or a similar dilemma. Law is a pliable and flexible instrument in the hands of the judges. They may mould the law and give it shape and direction. More often than not, it can be made to yield a result which accords with social justice, or with the aspirations of the society. A decision one way or the other will count for the future, will advance or retard the development of the law in the proper direction.[98]

There is a natural tendency of the courts to strain to uphold just claims and reject the unjust. Even if the law appears to produce other results, morals and ethics[99] and the values of the society sometimes directly affect the decision of the cases. Quite apart from the fact that at times public policy could determine the conclusion of a case, the role of equity in determining the path that a court would take is very significant. This has been succinctly summed up in the statement made by Dickson J in the Canadian case of *Pettkus v Becker*[100] when he said:

> The great advantage of ancient principles of equity is their flexibility; the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice

[97]See Council, "Clean hands need not be spotless" (1993) *New Law Journal* 1577

[98]See Justice P N Baghwati, "The Role of Judiciary in Legal Aid", a paper presented at the World Legal Aid Conference, 2-4 May 1995, Kuala Lumpur.

[99]Baker and Langan, P St J, *Snell's Principles of Equity*, 20th Edition, Sweet & Maxwell, London, 1990 at p 7

[100](1980) 117 DLR (3d) 257

If judges are to "make" laws the field of equity remains one of the most fertile areas within which the judiciary may wield its influence in the administration of justice.

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I would like to acknowledge and thank Professor Judith Sihombing and Associate Professor Khaw Lake Tee for their encouragement and suggestions for amendments in the earlier drafts of this article. The errors that remain are solely mine.