

Relying on unlawful conduct as a defence

Think carefully before deciding to resist an order on the basis of illegality, says **Sophie Purkis**



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Recent Court of Appeal decisions have reinforced the need to consider carefully the requirements for a defendant to rely on the claimant's unlawful conduct as a defence in tort, contract and property claims.

In *Gelley & Ors v Shepherd & Anor* [2013] EWCA Civ 1172 the court reviewed the circumstances in which it will give effect to a foreign judgment tainted by fraud. Under common law, if a foreign judgment is otherwise entitled to recognition, the court will not re-examine the merits of the underlying claim, except where the judgment was obtained by fraud (*Jet Holdings Inc v Patel* [1990] 1QB 335).

Gelley concerned a BVI judgment granted after the claimant had deliberately misled the BVI court. The Court of Appeal considered *Jet* and held

that it should recognise the judgment because, although it was "tainted by fraud", for the exception to apply, the fraud must have been "operative in obtaining the foreign judgment" which, in *Gelley*, the court decided it was not. It held that "if the foreign court would have made the order in question ... even with full awareness of the conduct of the person said to have practised the relevant fraud upon the court, he would have been prepared to recognise and give effect to the order".

Otkritie International Investment Management Ltd & Ors v Uromov & Ors [2013] EWCA Civ 1196 considered the principles applicable to an application to amend made mid-way through trial to plead a defence based on illegality.

Having heard some of the claimants' evidence, some defendants applied to amend their defences to plead that the claims against them were barred *ex turpi causa* based on an argument that the claimants had conspired to defraud a third party using warrants which formed the subject matter of their claims against the defendants.

The trial judge refused permission. In dismissing the appeal, the Court of Appeal summarised the principles applicable as:

(1) if the illegality is "manifest" or obvious, the court must take the point of its own motion to



The claimant's illegality must be operative or necessarily relied upon by the claimant to pursue its claim

- ensure that its process is not abused (*Bank of India v Patel* [1982] 1 Lloyd's Rep 427);
- (2) if the illegality is not obvious (e.g. it depends on disputed facts), the normal rules applicable to amendments apply; and
- (3) if there is no properly pleadable case of illegality, the application should be dismissed.

The court referred to Aldous LJ's statement in *Standard Chartered Bank v Pakistan National Shipping Corporation* [1999] EWCA Civ 3028 that: "public policy requires that the courts will not lend their aid to a man who founds his action upon an immoral or illegal act. The action will not be founded upon an immoral or illegal act, if it can be pleaded and proved without reliance upon such an act."

Both *Otkritie* and *Gelley* demonstrate that while the court will not allow itself to be used in furtherance of illegality,

ARGUING ILLEGALITY

- When pleading, fraud practitioners are under a duty to ensure the pleading is based on credible material establishing a *prima facie* case. *Gelley* and *Otkrite* re-emphasise the need for practitioners to review the factual bases of claims carefully before pleading illegality as a defence.
- Where the enforcement of foreign judgments is concerned, the defendant must show that, but for the fraud, the order would not have been made or there was a real possibility that it would not have been made.
- A defence of *ex turpi causa* must demonstrate that the court must take the claimant's illegal act into consideration when deciding the claimant's claim and that the claimant cannot plead and prove its claim without reliance on that act.
- If the claim may be pleaded and proved without such reliance a defence of *ex turpi causa* is unlikely to succeed.

for a defendant to use a claimant's conduct as its defence, the claimant's illegality must be operative or necessarily relied upon by the claimant to pursue its claim. **SJ**