

Hong Kong Court of Final Appeal Clarifies the Principles of Foreign Illegality in Claims for Unjust Enrichment

12 May 2026

KEY TAKEAWAYS

- In *Wong Chi Hung v Lo Wing Pun* [2026] HKCFA 14, a decision handed down on 15 April 2026, the Court of Final Appeal (“CFA”) unanimously confirmed that the “range of factors” approach in the UK Supreme Court decision *Patel v Mirza* [2017] AC 467 applies in Hong Kong to the defence of illegality to civil claims.
- The CFA’s decision is to be welcomed by parties to cross-border and international transactions as it:
 - Provides clarity by definitively laying down a flexible and principled approach to the defence of illegality.
 - Confirms that an alternative avenue for recovery of funds may lie via an unjust enrichment claim, even where a contract is unenforceable due to domestic or foreign illegality.

BACKGROUND

Pursuant to a 2016 agreement (“Exchange Agreement”), the Plaintiff transferred RMB 1 million into a Mainland Chinese bank account (the “Mainland Account”) designated by the 2nd Defendant (“Defendant”).¹ However, the funds in the Mainland Account were subsequently frozen by Mainland Chinese authorities in connection with an unrelated criminal investigation. Consequently, the Defendant failed to make a corresponding payment in HKD to the Plaintiff’s Hong Kong bank account, as required by the Exchange Agreement.

¹ Note that the 1st Defendant, the 2nd Defendant’s husband, did not play a relevant part in the matter or the proceedings.

The Plaintiff brought proceedings in the Hong Kong District Court for breach of contract or, alternatively, unjust enrichment. At first instance, the District Court found that performance of the contract would involve an unlicensed currency exchange transaction, which was illegal under Mainland Chinese law. The Exchange Agreement was therefore unenforceable and the District Court dismissed the contractual claim. This finding was not challenged on appeal to the Court of Appeal or the CFA.

Both the District Court and Court of Appeal upheld the Plaintiff's unjust enrichment claim, however, rejecting the Defendant's defence of "foreign illegality". The Defendant appealed this point to the CFA.

DECISION

The Defence of Illegality

Traditionally, Hong Kong courts had adopted the "reliance principle" from *Tinsley v Milligan* [1994] 1 AC 340 to the defence of illegality in contract law. Under this principle, a claimant could only enforce property rights passed under an illegal contract if they could prove those rights without relying upon the illegality.

This principle had been criticised as being overly technical and unsupported by a coherent policy. Following the Supreme Court's decision in *Patel* in 2016, the UK position changed to a "range of factors" approach. This entails determining whether the illegality defence will bar a claim by considering the following: (a) the underlying purpose of the prohibition which has been transgressed; (b) any other relevant public policies which may be rendered ineffective or less effective by denial of the plaintiff's claim; and (c) the possibility of overkill unless the law is applied with a due sense of proportionality.

Although the "range of factors" approach had been adopted by the Hong Kong Court of Appeal in at least one prior decision, *Wong Chi Hung* is the first decision of Hong Kong's apex court confirming that this approach applies in Hong Kong, both in respect of unjust enrichment claims and, in *obiter*, contract claims.

On that basis, in the leading judgment of Mr Justice Ribeiro PJ, the CFA stated that the law generally favours restitution where consideration has completely failed, notwithstanding that a contract has been tainted by illegality. In particular, from a policy standpoint, upholding an unjust enrichment claim would amount to unwinding the transaction and placing parties in a position as if it had never been entered into (rather than, as in a contract claim, enforcing what would otherwise be an illegal

agreement). Accordingly, the CFA indicated that it would be rare for illegality to be sufficiently serious so as to bar an unjust enrichment claim.

In a separate judgment, Chief Justice Cheung (concurring with the lead judgment) recognised that there may be circumstances where permitting an unjust enrichment claim would effectively enforce an illegal contract. In those cases, policy concerns underlying the relevant illegality may militate in favour of barring the claim under the “range of factors” approach.

Where a contract may be tainted by foreign illegality, the CFA stated that Hong Kong courts should adopt the “range of factors” approach, taking into account not only Hong Kong public policy, but also international comity. The underlying question is whether granting restitution would constitute an unacceptable violation or stultification of foreign law, breaching principles of international comity.

In this case, there was a low level of illegality affecting the Plaintiff’s claim. Although she had committed an offence contrary to PRC law, it was effectively a breach of administrative rules. Further, the Plaintiff would have had a claim to recover the funds under the PRC Civil Code. This reinforced the view that allowing the unjust enrichment claim would not involve any breach of comity. The CFA therefore upheld the unjust enrichment claim.

The Doctrine of *Stare Decisis*

In a separate judgment (with which all other justices concurred), Chief Justice Cheung clarified in *obiter* the doctrine of *stare decisis* in Hong Kong by reference to the decision in *Monat Investment Ltd v All Person(s) in Occupation of Part of No 16 Ma Po Tsuen* [2023] 2 HKLRD 1311. In that case, the Hong Kong Court of Appeal adopted the *Patel* framework on the defence of illegality, erroneously treating the UK Supreme Court case as being binding upon it unless local circumstances rendered this inappropriate.

In a detailed explanation of the doctrine of *stare decisis* (binding precedent), Chief Justice Cheung confirmed that only pre-1997 Privy Council decisions on appeal from Hong Kong are binding on Hong Kong courts. Whilst authorities from other common law jurisdictions are frequently cited by Hong Kong courts, these are persuasive only. Further, no particular jurisdiction is accorded special status by reason of the provenance of its authorities. The CFA retains its position as the apex court in the development and clarification of the common law of Hong Kong.

COMMENT

The CFA's unanimous decision provides much-needed clarity in an area of law that has long been plagued by conflicting and inconsistent decisions. The adoption of a more flexible and nuanced approach in an international financial centre like Hong Kong is apposite, particularly where the regulation of international and cross-border transactions is becoming increasingly complex.

The decision also posits Hong Kong as a jurisdiction in favour of restitution where a claim involves a complete failure of consideration and a transaction tainted by low-level illegality. In particular, claimants may still be able to seek redress through an unjust enrichment claim even where the underlying contract may be unenforceable.

Finally, the decision highlights both the uniqueness of the Hong Kong judicial system as well as its independence post-1997. Whilst Hong Kong constitutional law expressly provides that authorities from other common law jurisdictions may be referred to by its courts, these decisions are not binding. Ultimately, Hong Kong has its own autonomous common law and judicial system, with the CFA playing a pivotal role as Hong Kong's ultimate appellate Court.

* * *

Please do not hesitate to contact us with any questions.



Tony Dymond
Partner, Hong Kong, London
+852 2160 9800
+44 20 7786 9030
tdymond@debevoise.com



Emily Austin
Counsel, Hong Kong
+852 2160 9888
eaustin@debevoise.com



Mark Johnson
Of Counsel, Hong Kong
+852 2160 9861
mdjohnson@debevoise.com



Joyce Ng
Associate, Hong Kong
+852 2160 9883
jng@debevoise.com



Mia Hermann
Trainee Associate, London
+44 20 7786 5428
mhermann@debevoise.com