

The effect of illegality since *Patel v Mirza*

A multi-national overview of developments in the law
concerning defences alleging illegality

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Introduction

1. In summer 2016 the Supreme Court delivered its judgment in the case of *Patel v Mirza*. It was one of three important cases on contract or commercial law which emerged at the same time and I wrote a couple of very short articles on the East Anglian Chambers website about them. *Patel* has now definitively decided the principles which should be applied by the courts in this country should illegality be raised in proceedings as a defence, and how the Supreme Court reached – or could have reached – a conclusion seen by some as controversial is a worthy topic for exploration.
2. As I started to research the subject I came across and was able to download from the Chancery Bar Association website a lecture given by Lord Sumption in 2012 on the law of illegality, then while casting around online for a reference to the title of a public lecture on the subject by Lord Grabiner QC that I had attended at Cambridge University in 2015 I discovered that a video of it is still available online. I also became aware of a very informative decision by the Supreme Court of Ireland in March 2015 in a case called *Quinn v Irish Bank Resolution Corporation Ltd (in Special Liquidation)*, which sadly was not mentioned either in argument or in any of the judgments one year later in *Patel*. In the judgment of the entire court, delivered by Clarke J (now Chief Justice of Ireland), a wide-ranging analysis of English, Australian and (a few) Irish judgments leads, at paragraph 8.55, to Clarke J summarising what he considered to be the principal criteria which courts should apply when considering the issue of illegality. It is a far more detailed and extensive list than the principles enunciated by Lord Toulson JSC, on behalf of the majority, in *Patel*. I set out Clarke J's criteria in full, as an appendix.
3. I acknowledge at the end of this paper the two lectures referred to and a large number of reported cases. There could have been many more, from this and other jurisdictions, so this will therefore be very much a *tour d'horizon* of the subject, mentioning only briefly most of the cases but spending a little bit of time on *Hall v Hebert*, some of the Australian cases which so influenced the Irish Supreme Court in *Quinn*, and then concluding with *Patel* itself.

A long-standing problem

4. In their joint, majority judgment in the High Court of Australia case of *Equuscorp Pty Ltd v Haxton and ors* French CJ, Crennan and Kiefel JJ, observed at [35-36] that :

35 Much judicial and academic ink has been spilt on this topic, which exercised the minds of Roman jurists in the days of the Republic. It elicited the *cri de coeur* of Lord Chief Justice Wilmot in 1767, "no polluted hand shall touch the pure

fountains of justice", and the more temperate offering of Lord Mansfield, who wrote of a plaintiff's need to "draw [his] remedy from pure fountains."

- 36 The importance of policy in determining the effect of illegality upon a restitutionary claim was central to Lord Mansfield's observation in *Holman v Johnson* :

"It is not for [the defendant's] sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say."

There were often compelling policy arguments on both sides. In listing reasons for and against the grant of relief in relation to illegal transactions, Professor John Wade, writing in the *Texas Law Review* in 1946, said that :

"The balancing process ... leaves on one side the view that a court should not help a man who has engaged in an illegal transaction out of the predicament in which he has placed himself, and on the other the view that a court should not permit unjust enrichment of one person at the expense of another. Of these two arguments, each of which seems most nearly determinative upon its side of the question, neither takes precedence upon logical analysis."

5. As Bingham LJ said in *Saunders v Edwards* :

"Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct."

6. It is in the nature of these cases that the parties rarely attract much, if any, sympathy. The illegal behaviour involved has included breach of hire purchase regulations, the deliberate overloading of a merchant ship, social security fraud, driving across common land in breach of the Law of Property Act 1925, claiming title to land based on adverse possession by squatting in breach of the criminal law, human trafficking, the failure to declare a medical condition which would have prohibited employment, a VAT carousel fraud, an agreement to manufacture pharmaceuticals in Canada in breach of a Canadian patent, the granting of loans for the illegal purchase of a bank's own shares, and even homicide. As Heydon J said in *Equuscorp* (which involved a scheme for the farming of blueberries and the setting off of start-up costs against tax), at [116] :

"The relevant transactions ...are redolent of tax avoidance, suggest a preference for the beauty of the circle to the bluntness of the straight line, and indicate a

single group of minds in control of superficially different entities. There is about them something of the night.”

Ex turpi causa

7. In his 2012 address to the Chancery Bar Association Lord Sumption asked :

“What is turpitude? What sort of connection with it will bar the enforcement of a legal obligation? And with what consequences?
... First of all, what is turpitude? Anything, we are told by Flaux J in *Safeway v Twigger*, which is morally reprehensible. Plainly most criminal offences are morally reprehensible. But what of minor traffic offences or some offences of a purely regulatory nature or offences of strict liability, which are criminal but may involve no moral obloquy at all. What of conduct which is unlawful but not criminal? For example breaches of competition law which are subject to civil penalties but not criminal prosecution? Or conduct which has traditionally been treated as immoral but not unlawful.”

8. Later, he commented that English law may have got itself into this mess because of its distaste for the consequences of applying its own rules. Most legal systems, he argued, have a principle broadly corresponding to the *ex turpi causa* principle in English law, but they differ about the consequences of its application :

“Broadly speaking, two approaches are possible. The law may set about reversing the consequences, financial or proprietary, of the transaction so far as the parties have given effect to them. Or it may simply decline to have anything to do with it. The first approach seeks to regulate the consequences of the illegal transaction, so as to put the parties so far as possible in the position they would have been in had the transaction not occurred. The second simply withholds legal remedies, and generally leaves the loss to lie where it falls. French law, certainly in the realm of obligations, has generally adopted the first approach. English law has adopted the second.”

9. English law, he argued, severely restricts even restitutionary claims arising out of illegal transactions. Claimant restitution would be barred by the *ex turpi causa* principle except in a narrowly framed range of cases where the claimant was induced to enter into the illegal transaction by fraud or duress, or was ignorant of the fact which made it illegal. This contrasts with French law, under which an illegal transaction is wholly devoid of legal consequences. Those consequences which the parties have themselves brought about by acting on it are devoid of legal basis and the courts will undo it, ordering mutual restitution. The English position means that where the claimant and defendant are both party to the illegality the claimant is prevented from using the court to obtain the reward for his illegal acts, but the defendant gains a corresponding windfall from his.

Illegality and unenforceability

10. As Clarke J said in *Quinn* :
 - 7.1 The circumstances in which contracts may be regarded as illegal, void or unenforceable in common law countries are many and varied. There is no unique

classification of all of the relevant headings. However, in order to understand the aspect of the broad area of "unenforceability on the grounds of illegality" with which this case is concerned, it is necessary to start by saying just a little about the area of illegal contracts as a whole. The authors of *Chitty on Contract*, 31st ed, volume I suggest, at para. 16-005, that contracts may be invalidated for any one of five reasons, being : first, that the object of the relevant contract is treated as illegal by common law or by legislation; second, that the objects are injurious to good government; third, that the objects interfere with the proper working of the machinery of justice; fourth, that the objects are injurious to marriage and morality; and fifth, that the objects are, for economic reasons, against the public interest. However, as the authors go on to point out, not all cases fit neatly into one of the relevant boxes.

- 7.2 Furthermore, the authors note that contracts may be regarded as illegal either in their formation or in their performance. Contracts may be regarded as illegal as to their formation when they cannot be performed in accordance with the terms agreed without committing an illegal act. In contrast, contracts may be illegal as to performance where one or both of the parties intend to perform the contract in an illegal manner or to effect some illegal purpose.

Lord Mansfield

11. The doctrine of illegality is often traced back to *Holman v Johnson*, although the law thus articulated was well established before the time of that decision. The plaintiff, who lived in Dunkirk, sold tea to the defendant. The plaintiff knew it was intended to be smuggled into England, but he was not concerned with the smuggling scheme. The method of payment was meant to be by bills of exchange drawn in England. The seller brought an action for non-payment, and the defendant contended that it could not be enforced because the contract was unlawful. Lord Mansfield held that the agreement could be enforced because the seller had himself done nothing unlawful. He put the principle in the following terms, at pg 343 :

“The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*.”

12. Lord Mansfield, therefore, acknowledged that it was possible that a defendant might obtain what could be seen to be an unfair advantage by being able to rely on the principle of illegality. However, as has been acknowledged in many other cases, the principle is one of policy rather than being based on attempting to do justice between the parties.

13. In *St John Shipping Corpn v Joseph Rank Ltd* a shipping company deliberately overloaded a merchant vessel with a view to maximising the profitability of a particular voyage. It was caught and fined by the authorities. A cargo owner refused to pay the cost of shipment and, when sued, pleaded illegality. Devlin J held that the purpose of the statute on the overloading of ships did not prevent enforceability of a contract of carriage. It did not follow because it was an offence for one party to enter into a contract that the contract itself was void. Further, in the Privy Council case of *Vita Food Products Inc v Unus Shipping Co Ltd* Lord Wright said, at pg 293 :

“Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.”

14. In *Les Laboratoires Servier v Apotex Inc* Lord Sumption JSC, giving the principal judgment, noted that this subject had given rise to “a large body of inconsistent authority which rarely rises to the level of general principle.” He also noted that the main reason for the disordered state of the case law is the distaste of the courts for the consequences of applying their own rules, which may appear very unjust on the facts of an individual case, which he noted Lord Mansfield had pointed out two centuries ago. In the Irish Supreme Court case of *Quinn Clarke J* agreed, stating that :

“A strict application of a rule of unenforceability in relation to all contracts tainted by illegality can have consequences which may appear very unjust on the facts of an individual case. That leads to attempts to find, normally by way of exception, a basis for avoiding the full rigours of the rule in cases where the consequence may appear to be particularly unjust.

15. In more recent times a strand developed in English jurisprudence which sought to redefine the principle as a power vested in the court to be exercised in an appropriate case, rather than as a rule of law to be applied in all cases save those where there was an established exception or where, in accordance with the established jurisprudence, the rule did not apply because, for example, the transaction sought to be rendered unenforceable was beyond the scope of the rule. In that context *Euro-Diam Ltd v Bathurst* is often cited. This line of authority suggested that the court had a power to decline to enforce contracts where it would be “an affront to the public conscience” to allow the plaintiff to succeed. This test was effectively discretionary in nature. It called for a value judgment about the significance of the illegality and the injustice of barring the claimant’s claim on account of it. This approach was short lived. It was killed off by the House of Lords in *Tinsley v Milligan*.

Tinsley v Milligan – the reliance principle

16. Ms Tinsley and Ms Milligan had contributed to the purchase of a home together but had the legal title conveyed to Ms Tinsley only, in order to enable Ms Milligan to make fraudulent claims for Social Security benefits to cover fictitious rent payments. Having later fallen out, Ms Milligan claimed entitlement to a beneficial share in the property. The Court of Appeal rejected her claim on the basis that it would be an affront to the public conscience. The House of Lords unanimously rejected that basis for denying her claim and, by a majority of 3 to 2, allowed it. The minority, consisting of Lords Keith and Goff, favoured a strict rule which would have defeated any claim tainted by the claimant's illegal purpose. This view would, as Lord Goff acknowledged, have operated harshly in many cases including that one. It would have left Ms Tinsley with the benefit of Ms Milligan's money as a reward for her participation in an illegal transaction in which her role was every bit as culpable. Lord Goff added that he would be more than happy if a new system could be evolved which was both satisfactory in its effect and capable of avoiding the kind of result which in his judgment flowed from the established rules. However, that reform should be instituted only by the legislature, after a full enquiry by the Law Commission, which would embrace not only the advantages and disadvantages of the present system but also the likely advantages and disadvantages of a discretionary one.

17. The majority found the result proposed by Lord Goff distasteful and, because of the rigidity of the legal consequences of a finding that the transaction had been tainted by illegality, they were obliged to resort to an equally unsatisfactory evasion. They did so by an extremely technical approach to the "reliance test". Lord Browne-Wilkinson started from the proposition that title to property can pass even by an illegal transaction. What the court will not do is assist a claimant to recover the property if, to do so, he has to rely upon his own illegality. Illegality was therefore not substantive but procedural. In this case Ms Milligan had paid money to Ms Tinsley and therefore a resulting trust arose automatically. She was able to recover by claiming an interest under the trust and without relying upon the illegal nature of the agreement between them.

18. The origin of the reliance test may have been the decision of the Court of Appeal in *Bowmakers Ltd v Barnet Instruments Ltd*, where the hirer of tools under an HP agreement refused to return them and sold them on to third parties, later defending a claim in conversion on the basis that the agreement contravened statutory price controls. This failed because the Court of Appeal considered that the hire purchase company could establish its title to the tools without relying on the contract. The artificiality and potential injustice of this approach was demonstrated in 2002 in the case of *Collier v Collier* where, in order to put assets beyond his creditors, a father effectively transferred his business premises to his daughter in trust for him. In fact he was able to resolve his financial difficulties and repay his creditors but he was not then allowed to rebut the presumption of gift to his daughter because he could only do so by relying upon the illegal purpose of the transfer. The same test therefore produced the opposite result than in *Tinsley v Milligan*, although the moral equities were the same. The result was that father lost everything because of an illegal intention which was never actually carried out, while daughter was rewarded with 100% of the spoils.

The Law Commission

19. After the decision in *Tinsley v Milligan* the Law Commission included the illegality defence in its Sixth Programme of Law Reform in 1995. It undertook a full enquiry of the kind which Lord Goff envisaged. It produced its first consultation paper in 1999. In 2009 it issued a further consultation paper and, the following year, its final confirmed report (Law Com 320). In relation to the law of contract and unjust enrichment the commission considered that there are serious problems but they were capable of being, and could best be, tackled by the process of judicial development.
20. From its study of the case law and academic writing the commission identified the principal policy rationale for the illegality doctrine as being (1) furthering the purpose of the rule infringed by the claimant's behaviour, (2) consistency, (3) prevention of profit from the claimant's wrongdoing, (4) deterrence and (5) maintaining the integrity of the legal system. A sixth possible rationale, punishment, was controversial, with the large majority of consultees considering that punishment was a matter for the criminal courts and/or regulators, and that it should not be invoked in determining parties' civil disputes.
21. Having examined the law in other jurisdictions the commission, in its first consultation paper in 1999, recommended the introduction of statutory reform on the lines of the New Zealand model. The New Zealand Illegal Contracts Act 1970, section 7, provides that the court may grant any party to an illegal contract :

“Such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the court in its discretion thinks just.”

It is interesting to note that in his 2012 lecture to the Chancery Bar Association Lord Sumption advocated just such a remedy. Within a few short years however, he has in his various judgments, and most recently in *Patel* itself at [265], recanted his belief in the merits of leaving the outcome to the exercise of judicial discretion.

22. Amongst domestic authorities considered by the commission were two concerning the law of tort rather than contract. They were *Bakewell Management Ltd v Brandwood* and *Gray v Thames Trains Ltd*, each of which reached the House of Lords. *Bakewell* involved the purchase of an area of land registered as a common. Owners of neighbouring properties had for years driven across the land to reach the public highway. *Bakewell* brought an action to prevent them from continuing to do so. The defendants claimed to have acquired rights of way by prescription, but by driving across the land without the owner's consent they had committed offences under the Law of Property Act 1925, so to establish their property rights the defendants had to rely on conduct which was criminal. This, *Bakewell* submitted, they were not entitled to do. The House of Lords rejected this argument, stating that public policy did not prevent the defendants from acquiring an easement where the landowner could have made a grant which would have removed the criminality of the user.
23. *Gray* was an altogether different type of case. As a result of the Ladbroke Grove train crash Mr Gray, a survivor, developed post-traumatic stress disorder which caused him

to suffer depression and a substantial personality change. He was previously of unblemished character. Two years after the accident, while under medical treatment, he pursued and stabbed to death a man who had stepped in front of his car. His plea of guilty to manslaughter on the grounds of diminished responsibility was accepted and he was ordered to be detained in a mental hospital. He sued the train operator for negligence and liability was admitted. His claim for damages included compensation for his loss of liberty, damage to reputation, his grief and remorse after the manslaughter, and loss of earnings during his detention. He also sought an indemnity against any liability that he might have to his victim's dependents. The House of Lords held that public policy precluded him from recovering damages under those heads.

24. Lord Hoffmann, giving the leading opinion, observed that the maxim *ex turpi causa* expresses not so much a principle of policy based on a group of reasons, which vary in different situations. The courts had therefore evolved varying rules to deal with different situations. Because questions of fairness and policy were different in different cases and led to different rules, one could not simply extrapolate rules applicable to one situation and apply them to another. It had to be assumed that the sentence was what the criminal court regarded as appropriate to reflect Mr Gray's personal responsibility for the crime he had committed. It was therefore right to apply the rule that he could not recover damages for the consequences of the sentence, reflecting underlying policy based on the inconsistency of requiring someone to be compensated for a sentence imposed because of his personal responsibility for a criminal act. It was also right to apply a wider rule that you cannot recover damage which is the consequence of your own criminal act, reflecting the idea that it is offensive to public notions of fair distribution of resources that the claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct. Where the crime was not just an incidental aspect of the facts, but an essential factor without which the loss could not have arisen, recovery was barred by public policy.
25. The Law Commission drew from the various judgments a readiness on the part of the judges to examine the policy reasons which justify the application of illegality defence and to explain why those policies applied to the facts of the case. None of the commission's reports on the subject of illegality were taken any further.
26. Further examples of how the doctrine has been applied in the UK include *Hewison v Meridian Shipping Services PTE Ltd*, where the Court of Appeal struck out a claim by an injured crane driver for compensation for future loss of employment. The claimant was an epileptic and had been prescribed anti-convulsant drugs. This would have prevented him working offshore as a crane driver. He had deliberately failed to disclose this to his employer, a fact which was admitted to amount to obtaining a pecuniary advantage by deception, contrary to section 16 of the Theft Act 1968. By a majority, the Court of Appeal held that a claimant could not rely on an unlawful act to obtain recovery in tort.
27. By contrast, in *R (Best) v Chief Land Registrar* the Court of Appeal appears to have followed Lord Browne-Wilkinson's approach in *Tinsley v Milligan* by allowing a claim to have acquired title to land by adverse possession, notwithstanding that squatting on the land was for a material part of the time relied upon a breach of the criminal law.

28. The issue of illegality also reached the Supreme Court on three occasions before finally being determined by a specially convened panel in *Patel v Mirza*. In 2015, in *Nazir v Bilta* Lord Neuberger commented, at [14-15] :

14 In these proceedings, Lord Sumption JSC considers that the law is stated in the judgments in the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340, which he followed and developed (with the agreement of three of the four other members of the court, including myself and Lord Clarke JSC) in *Les Laboratoires Servier v Apotex Inc* [2015] AC 430. He distinguishes the judgment of Lord Wilson JSC in *Hounga v Allen (Anti-Slavery International intervening)* [2014] 1 WLR 2889 as involving no departure from *Tinsley v Milligan*, but as turning on its own context in which “a competing public policy required that damages should be available even to a person who was privy to her own trafficking” (para 102). By contrast Lord Toulson JSC (who dissented from that approach in the *Les Laboratoires* case) and Lord Hodge JSC favour the approach adopted by the majority of the Court of Appeal in *Tinsley v Milligan* and treat that of Lord Wilson JSC in para 42ff of *Hounga v Allen* as supporting that approach.

15 In my view, while the proper approach to the defence of illegality needs to be addressed by this court (certainly with a panel of seven and conceivably with a panel of nine Justices) as soon as appropriately possible, this is not the case in which it should be decided. We have had no real argument on the topic: this case is concerned with attribution, and that is the issue on which the arguments have correctly focussed. Further, in this case, as in the two recent Supreme Court decisions in the *Les Laboratoires* and *Hounga* cases, the outcome is the same irrespective of the correct approach to the illegality defence.

Thoughts from abroad

29. In 1993 the issue of illegality came up for consideration by the Supreme Court of Canada in a seminal case arising in tort rather than contract. It has been cited with approval in a number of more recent authorities, including *Patel*. In *Hall v Hebert* the defendant was the owner of a 1968 Pontiac Firebird or, as the English version of the report describes it, a “souped-up” muscle car. (Being a Canadian case, even one on appeal from British Columbia, the report is printed with two parallel columns per page – one in English and the other in French. In the latter the car is described more intriguingly as *une voiture au moteur «gonflé»*).
30. The owner and his passenger had been out for an extended drinking session. When the car stalled on an unlit and particularly rough gravel road with a sharp drop off to one side, the owner decided the only way to start it was “a rolling start” after he could not find the keys, which had been shaken out of the ignition. At his passenger’s request the owner allowed him to drive when they tried the rolling start, despite being aware that he had consumed 11 or 12 bottles of beer that evening, three within the last hour prior to the accident. Despite this, the owner did not consider that his passenger was drunk. He duly lost control of the car; it left the road, went down the steep slope and turned upside down. Both were able to walk away from the accident and reached the house of an acquaintance who described them as being drunk. It was later discovered that the

appellant passenger had suffered significant head injuries.

31. The injured passenger sued the owner for civil damages, with the trial judge apportioning liability on a 25% / 75% basis. The Court of Appeal allowed the respondent owner's appeal. At issue before the Supreme Court were : (1) whether a person having the care and control of a motor vehicle owes a duty of care to another who is known to be impaired to deny that impaired person permission to drive the vehicle; (2) whether *ex turpi causa non oritur actio* provides the respondent with a complete defence to the action; and (3) whether the trial judge erred in his apportionment of liability.

32. The Supreme Court allowed the passenger's appeal. McLachlin J (now the Chief Justice) gave the leading judgment on behalf of the majority. At pg 169 she stated :

“My own view is that courts should be allowed to bar recovery in tort on the ground of the plaintiff's immoral or illegal conduct only in very limited circumstances. The basis of this power, as I see it, lies in duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand. It follows from this that, as a general rule, the *ex turpi causa* principle will not operate in tort to deny damages for personal injury, since tort suits will generally be based on a claim for compensation, and will not seek damages as profit for illegal or immoral acts. As to the form the power should take, I see little utility and considerable difficulty in saying that the issue must be dealt with as part of the duty of care. Finally, I see no harm in using the traditional label of *ex turpi causa non oritur actio*, so long as the conditions that govern its use are made clear.”

33. At pg 175, in a section of the majority judgment arguing that the underlying rationale concerns the integrity of the judicial process, McLachlin J went on :

“The narrow principle illustrated by the foregoing examples of accepted application of the maxim of *ex turpi causa non oritur actio* in tort, is that a plaintiff will not be allowed to profit from his or her wrongdoing. This explanation, while accurate as far as it goes, may not, however, explain fully why courts have rejected claims in these cases. Indeed, it may have the undesirable effect of tempting judges to focus on the issue of whether the plaintiff is "getting something" out of the tort, thus carrying the maxim into the area of compensatory damages where its use has proved so controversial, and has defeated just claims for compensation. A more satisfactory explanation for these cases, I would venture, is that to allow recovery in these cases would be to allow recovery for what is illegal. It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must

aspire to be a unified institution, the parts of which – contract, tort, the criminal law – must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to "create an intolerable fissure in the law's conceptually seamless web"... We thus see that the concern, put at its most fundamental, is with the integrity of the legal system."

34. *Tinsley v Milligan* was reported in 1994 and almost immediately rejected by the High Court of Australia the following year in *Nelson v Nelson*. Again the facts were similar to those in both *Tinsley v Milligan* and *Collier v Collier*. As the widow of a master mariner who had undertaken war service Mrs Nelson was eligible under the Defence Service Homes Act 1918 to buy a house with the benefit of a subsidy from the Commonwealth of Australia provided that she did not own or have a financial benefit in another house. She provided the money to buy a house in Bent Street, Sydney but the transfer was taken in the names of her son and daughter. Their common intention was that Mrs Nelson should be the beneficial owner of the house. The reason for putting the Bent Street property in the names of her children was to enable her to buy another property with the benefit of a subsidy under the Act. This she did. One year later the Bent Street property was sold. By this time Mrs Nelson and her daughter had fallen out and a dispute arose as to who was entitled to the proceeds of sale. Mrs Nelson and her son brought proceedings against the daughter for a declaration that the proceeds were held by the son and daughter in trust for their mother. The daughter opposed the claim and sought a declaration that she had a beneficial interest. Under *Tinsley v Milligan* the daughter would have succeeded because the illegal purpose of the parties in arranging for the property to be transferred into the names of the children would have prevented Mrs Nelson from rebutting the presumption of advancement in their favour.
35. The High Court unanimously rejected that approach. The majority held that the court should use its equitable jurisdiction to grant the declaration sought by Mrs Nelson, with the proviso that it should be subject to terms designed to ensure that the benefit wrongly obtained by the purchase of the second property should be repaid to the Commonwealth. The minority would have made the declaration without any such proviso, since the Commonwealth was not a party to proceedings and should in their view be left to decide what action, if any, it wished to take.
36. McHugh J described as unsatisfactory a doctrine of illegality that depended upon the state of the pleadings and, at pg 611, said :

“The doctrine of illegality expanded in *Holman* was formulated in a society that was vastly different from that which exists today. It was a society that was much less regulated. With the rapid expansion of Regulation, it is undeniable that the legal environment in which the doctrine of illegality operates has changed. The underlying policy of *Holman* is still valid today — the courts must not condone or assist a breach of statute, nor must they help to frustrate the operation of the statute... However, the *Holman* rule, stated in the bald dictum : ‘No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act’ is too extreme and inflexible to represent sound legal policy in the late twentieth century even when account is taken of the recognised exceptions to

this dictum.”

He noted, however, that Lord Mansfield’s dictum in *Holman* :

“... is subject to exceptions which allow relief to be granted despite the presence of illegality. First, the courts will not refuse relief where the claimant was ignorant or mistaken as to the factual circumstances which render an agreement or arrangement illegal. Second, the courts will not refuse relief where the statutory scheme rendering a contract or arrangement illegal was enacted for the benefit of a class of which the claimant is a member. Third, the courts will not refuse relief where an illegal agreement was induced by the defendant's fraud, oppression or undue influence. Fourth, the courts will not refuse relief where the illegal purpose has not been carried into effect.”

He later went on :

“It is not in accord with contemporaneous notions of justice that the penalty for breaching the law or frustrating its policy should be disproportionate to the seriousness of the breach. The seriousness of the illegality must be judged by reference to the statute whose terms or policy is contravened. It cannot be assessed in a vacuum. The statute must always be the reference point for determining the seriousness of the illegality.”

37. In saying this McHugh J was following existing Australian case law. The Australian courts have given significant attention to the issue of illegal contracts over the last third of a century. *Yango Pastoral Company Pty Ltd and ors v First Chicago Australia Ltd*, cited by Clarke J in the Irish Supreme Court case of *Quinn*, involved a secured loan which was given in circumstances where it was accepted by the lender, First Chicago Australia Ltd, that it did not have the proper authorisation required by law for the carrying out of the relevant banking business. Mason J in the High Court of Australia said, at pgs 429 and 430 :

“However, in the present case Parliament has provided a penalty which is a measure of the deterrent which it intends to operate in respect of non-compliance with s.8. In this case it is not for the court to hold that further consequences should flow, consequences which in financial terms could well far exceed the prescribed penalty and could even conceivably lead the plaintiff to insolvency with resultant loss to innocent lenders or investors. In saying this I am mindful that there could be a case where the facts disclose that the plaintiff stands to gain by enforcement of rights gained through an illegal activity far more than the prescribed penalty. This circumstance might provide a sufficient foundation for attributing a different intention to the legislature. It may be that the true basis of the principle is that the court will refuse to enforce a transaction with a fraudulent or immoral purpose: *Beresford v Royal Insurance Co Ltd*. On this basis the common law principle of *ex turpi causa* can be given an operation consistent with, though subordinate to, the statutory intention, denying relief in those cases where a plaintiff may otherwise evade the real consequences of a

breach of a statutory prohibition.”

38. Gibbs ACJ, in the same case, said the following at pg 413 :

"There are four main ways in which the enforceability of a contract may be affected by a statutory provision which renders particular conduct unlawful : (1) The contract may be to do something which the statute forbids; (2) The contract may be one which the statute expressly or impliedly prohibits; (3) The contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or (4) The contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits."

39. *Fitzgerald v FJ Leonhardt Pty Ltd* concerned the recovery of a debt by the plaintiff for boring holes for water on behalf of the defendant in circumstances where the defendant landowner failed to obtain the appropriate permits required by statute prior to the relevant holes being drilled. That obligation fell on the landowner, and there was no equivalent obligation on the party drilling holes to obtain the relevant permit. In that context, Kirby J stated, at pg 242 :

“The first task of a court is to ascertain the meaning and application of the law which is said to give rise to the illegality affecting the contract. The law in question may be a rule of the Common Law but nowadays it is much more likely to be a provision of legislation. The substantial growth of legislative provisions affecting all aspects of the society in which contracts are made presents a legal environment quite different from that in which the doctrine of illegality was originally expressed. Courts, in this area, are faced with a dilemma. They do not wish to deprive a person of property rights, e.g. under a contract, least of all at the behest of another person who is also involved in a breach of the applicable law. On the other hand, they do not wish to ‘condone or assist a breach of statute, nor must they help to frustrate the operation of a statute.’ That is why the first function of the court, where a breach of a legislative provision is alleged, is to examine the legislation so as to derive from it a conclusion as to whether a relevant breach is established and, if so, what consequences flow either from the express provisions of the legislation or from implications that may be imputed to the legislators. Little, if any, assistance will be derived for the ultimate task of a court from examination of the terms of other statutes or judicial classifications of them or by reference to their meaning as found.”

40. More recently the High Court has upheld the defence. In *Equuscorp Pty Ltd v Haxton and ors*, the appellant sought the assistance of the court to recover money advanced under loan agreements which were made in furtherance of an illegal purpose. They were an important part of a number of failed tax-driven investment schemes in which members of the public were invited to invest in a blueberry farming enterprise. The attraction for investors was that non-farmers could invest in farming businesses and claim amounts expended on farming enterprises as tax deductions in relation to their non-farming incomes. The invitations to invest in the schemes were made in contravention of the requirements of the law regulating the issue of prescribed interests. Equuscorp was not

a party to the loan agreements. They were made by Rural Finance Pty Ltd ("Rural"), which was a member of a group of companies controlled by the promoters of the schemes. Equuscorp, as an arms length financier of the group, took an assignment of the loan agreements from the receivers and managers of Rural after the enterprise collapsed. It sued the investors under the loan agreements. The agreements were found to be unenforceable for illegality, having been made in furtherance of an illegal purpose. Equuscorp claimed in the alternative for restitution of the advances made under the agreements as money had and received.

41. Delivering the judgment of the court, French CJ, Crennan and Kiefel JJ stated, at [34] :

“The outcome of a restitutionary claim for benefits received under a contract which is unenforceable for illegality, will depend upon whether it would be unjust for the recipient of a benefit under the contract to retain that benefit. There is no one-size-fits-all answer to the question of recoverability. As with the question of recoverability under a contract affected by illegality the outcome of the claim will depend upon the scope and purpose of the relevant statute. The central policy consideration at stake, as this Court said in *Miller*, is the coherence of the law. In that context it will be relevant that the statutory purpose is protective of a class of persons from whom the claimant seeks recovery. Also relevant will be the position of the claimant and whether it is an innocent party or involved in the illegality.”

42. While the Court also found against the appellant on the question of assignability of the loans it first ruled against it on the illegality point, stating at [45] :

“Had a right to claim restitution for money had and received been available to Rural in this case, it would have been able to recover by such claims what the policy of the law denied it in respect of the loan agreements. Rural was not an arms length financier. It was part of the closely related group of companies that were involved in the promotion of the schemes. The loan agreements were an integral part of the schemes and in so far as they involved the issue of invitations and offers to investors to take up prescribed interests without the benefit of the protections required by the Code, furthered that illegal purpose. As in the *Hurst* case, while not essential to the investments, the loans made the investments more attractive. Recovery from the investors would have been recovery from persons whose protection was the object of the statutory scheme. The respondents were not *in pari delicto* with Rural. The failure of consideration invoked by Equuscorp was the product of Rural's own conduct in offering the loan agreements in furtherance of an illegal purpose. This is a clear case in which the coherence of the law, and the avoidance of stultification of the statutory purpose by the common law, lead to the conclusion that Rural did not have a right to claim recovery of money advanced under the loan agreements as money had and received. There was therefore no right to claim such relief available for assignment to Equuscorp.”

Quinn

43. In *Quinn v Irish Bank Resolution Corporation Limited (In Special Liquidation) & ors* the plaintiffs/respondents, all members of the Quinn family, made a number of accusations against the first defendant/ appellant, a successor to Anglo Irish Bank plc (“Anglo”). The family started out by owning a quarry in Co Fermanagh, in Northern Ireland. This later expanded to the manufacture of cement, property, hospitality, plastics, glass and general and health insurance, taking on a large amount of debt in the process. Until the UK general insurance arm was placed in administration in 2010 Quinn Insurance provided professional indemnity cover for about one third of all solicitors in the UK.
44. Seán Quinn senior (the father or husband of each of the Quinns) was involved in the acquisition of a very substantial indirect interest in Anglo by means of contracts for difference (“CFDs”). Such contracts, in simple terms, involve an agreement to exchange the difference between the current and future price of financial instruments such as shares. Thus they entitle a party to benefit in the event that the share price of a relevant company goes up but equally require that the relevant person pays money in the event that the share price goes down. Such contracts can amount to a form of surrogate ownership of shares in the relevant company as the contracting party will be able to acquire shares at their current price by “topping up” the original price with the proceeds of a CFD. As the Anglo share price declined, Seán Quinn was required to make very substantial payments arising out of those CFDs. In that context, money was borrowed from Anglo. In addition, an arrangement was put in place that Seán Quinn's indirect interest in Anglo, held through his CFDs, would be “taken out” by the purchase of shares in Anglo by a group of ten very wealthy investors together with the Quinns.
45. One of the allegations made in the proceedings was that a series of lending transactions entered into in connection with Seán Quinn's payment obligations under CFDs, together with the purchase of shares in Anglo designed to unwind Seán Quinn's interest in the bank, amounted to illegal contracts as being in breach of the Market Abuse (Directive 2003/6/EC) Regulations 2005 (“MAR”) and/or section 60 of the Companies Act 1963.
46. A preliminary issue was directed to be tried as to whether the Quinns had an “entitlement to rely” on any such alleged breaches in aid of the claims made concerning the invalidity of guarantees given by the Quinns, and security put in place by them, in connection with those transactions. To put this in context, from doing a rough count of the sums mentioned in Clarke J’s judgment it would appear that in 2007–08 the Quinns had obtained loans, liability for which they were seeking to avoid, of around €950 million.
47. In response the bank argued that, even if the factual contentions put forward in their claim by the Quinns concerning breaches of either or both the MAR and section 60 were to be sustained, then they still could not succeed because the application of relevant legal principles does not render lending transactions, guarantees or security void or unenforceable even if the relevant transactions are in breach of the MAR, or are in contravention of section 60, or are connected with transactions which breach those provisions.
48. After a wide-ranging examination of UK, Australian and some Irish authorities on illegality

Clarke J, in section 8 of his judgment, discusses what he considers to be the proper approach which the courts should now take, largely adopts the Australian approach in preference to that in *Tinsley v Milligan* and subsequent UK cases, sets out a list of relevant factors, and after applying them to the facts of the case upholds the bank's argument that its attempt to recover the loans was not adversely affected by the principle of illegality.

49. At para 9.2 he says :

“The core issue of controversy stems from the proper application of the principles which I have sought to identify as being applicable to the second question. Taking the two legislative provisions which are at the heart of these proceedings, can it be said that a proper analysis of the respective statutory regimes leads to the conclusion that, as a matter of policy, a court should regard contracts which are tainted by any illegality arising under those two regimes as being unenforceable? Answering that question requires considering the policy of the relevant legislation, but also the important policy requirement which suggests that courts should be slow to become involved in the enforcement of tainted contracts.”

50. Clarke J's list of matters to be taken into account is summarised at para 8.55 and appears in a schedule at the end of this paper.

Patel v Mirza

51. In *Patel v Mirza* Lord Neuberger got his wish for a case in which a nine judge court would be required to apply its collective mind to the many criticisms levelled against *Tinsley v Milligan* and its “reliance test”. Lord Toulson SCJ delivered the majority judgment, with a separate supporting judgment by Lord Kerr, and another by Lord Neuberger broadly in support of Lord Toulson's “range of factors” approach. There were three dissenting judgments delivered by Lords Mance, Clarke and – perhaps most powerfully – by Lord Sumption.

52. The claimant paid a large sum of money to the defendant pursuant to an agreement under which the defendant agreed to use the money to bet on the movement of shares on the basis of inside information. The agreement was contrary to the prohibition on insider dealing in section 52 of the Criminal Justice Act 1993 . In the event the agreement could not be carried out because the expected inside information was not forthcoming. The claimant brought a claim against the defendant for the repayment of the money. The judge dismissed the claim as being barred by illegality, holding that (i) the claimant's case relied on the illegal agreement, since in order to make good his case the claimant had had to prove the illegal purpose for which he had paid the money to the defendant, as well as the failure of that purpose; and (ii), although the claimant would not have been barred from relief if he had voluntarily withdrawn from the illegal agreement before it had been performed, he was so barred because the agreement had been frustrated. The Court of Appeal allowed the claimant's appeal on the basis that a party who had withdrawn from an illegal agreement because it could no longer be performed was not prevented by public policy from relying on the agreement, provided that no part of it had been carried into effect. The defendant appealed.

53. Lord Toulson began by explaining the two views adopted in *Tinsley v Milligan*, criticisms of the majority view which soon followed – from both judges and academics, the Law Commission’s failed attempts over a number of years to resolve the problem, discussed McLachlin J’s desire for coherence and consistency across the legal system – criminal and civil – in *Hall v Hebert*, the very different approach adopted in the Australian cases, and the respective roles of the criminal courts (which can in appropriate circumstances deploy the Proceeds of Crime Act to recover illicit gains disapproved of by Parliament).
54. Considering that this aspect of the law was at a crossroads, and citing Professor Andrew Burrows’ analysis of the problem of illegality in his *Restatement of the English Law of Contract* (Oxford, 2016), he discusses at [83] onwards the professor’s alternative possible formulations of a “rule-based approach” and a “range of factors approach.” Having set out, at [84–85] a rule said to be derived from *Tinsley v Milligan* and *Les Laboratoires Servier* and an alternative set of three rules Professor Burrows then identified six criticisms of those rules and, more generally, of a “rule-based approach”. These can be found at [87–92]. At [93] Lord Toulson records Professor Burrows’ suggestion for a possible “range of factors” formulation :
- “If the formation, purpose or performance of a contract involves conduct that is illegal (such as a crime) or contrary to public policy (such as a restraint of trade), the contract is unenforceable by one or either party if to deny enforcement would be an appropriate response to that conduct, taking into account where relevant – (a) how seriously illegal or contrary to public policy the conduct was; (b) whether the party seeking enforcement knew of, or intended, the conduct; (c) how central to the contract or its performance the conduct was; (d) how serious a sanction the denial of enforcement is for the party seeking enforcement; (e) whether denying enforcement will further the purpose of the rule which the conduct has infringed; (f) whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy; (g) whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct; (h) whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system.”
55. Lord Toulson then turns to analysing the problem with a view to establishing a definitive way forward, noting the countervailing public interest considerations in *Hounga* and *Best*, Lord Wright’s concern in *Vita Food Products Inc* that :
- “public policy concerns in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds”
- and Devlin J questioning, in *St John Shipping* :
- “...whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression.”
56. At paragraphs [109–110] Lord Toulson states firmly :

- 109 The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted.
- 110 I agree with the criticisms made in *Nelson v Nelson* 184 CLR 538 and by academic commentators of the reliance rule as laid down in *Bowmakers Ltd v Barnett Instruments Ltd* [1945] KB 65 and *Tinsley v Milligan* [1994] 1 AC 340, and I would hold that it should no longer be followed. Unless a statute provides otherwise (expressly or by necessary implication), property can pass under a transaction which is illegal as a contract: *Singh v Ali* [1960] AC 167, 176, and *Sajan Sharma v Saudara Simposh Ltd* [2013] Ch 23, paras 27–44. There may be circumstances in which a court will refuse to lend its assistance to an owner to enforce his title as, for example, where to do so would be to assist the claimant in a drug trafficking operation, but the outcome should not depend on a procedural question.

57. At [114] Lord Toulson explained why it was up to the court to grasp the nettle:

“In *Tinsley v Milligan* Lord Goff considered that if the law was to move in a more flexible direction, to which he was not opposed in principle, there should be a full investigation by the Law Commission (which has happened) and that any reform should be through legislation. Realistically, the prospect of legislation can be ignored. The government declined to take forward the commission's bill on trusts because it was not seen to be “a pressing priority for government” (a phrase familiar to the commission), and there is no reason for optimism that it would take a different view if presented with a wider bill. In *Clayton v The Queen* (2006) 231 ALR 500, para 119, Kirby J said that waiting for a modern Parliament to grapple with issues of law reform is like “waiting for the Greek Kalends. It will not happen” and that “Eventually courts must accept this and shoulder their own responsibility for the state of the common law”.

58. At [120] he summarises his thoughts and sets out the criteria by which courts should respond to the issue of illegality:

“The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy

on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate..”

59. Applying these criteria Lord Toulson dismissed the defendant’s appeal and allowed the return of Mr Patel’s money. In the minority, Lord Mance would also have dismissed the appeal, but on the grounds of rescission. He expressed a strong preference for the approach of the Canadian Supreme Court in *Hall v Hebert* and, on the new “range of factors” approach adopted by the majority, concluded at [206–207]:
- 206 What is apparent is that this approach, would introduce not only a new era but entirely novel dimensions into any issue of illegality. Courts would be required to make a value judgment, by reference to a widely spread mélange of ingredients, about the overall “merits” or strengths, in a highly unspecific non-legal sense, of the respective claims of the public interest and of each of the parties. But courts could only do so, by either allowing or disallowing enforcement of the contract as between the two parties to it, unless they were able (if and when this was possible) to adopt the yet further novelty, pioneered by the majority of the Australian court in *Nelson v Nelson* (1995) 184 CLR 538, of requiring the account to the public for any profit unjustifiably made at the public expense, as a condition of obtaining relief.
- 207 Although other jurisdictions are invoked, it is notable how slender the basis for doing so is. It comes down to the New Zealand statute and the Australian authorities of *Nelson v Nelson* and *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215. We have no idea or information as to whether or not the approach there has proved unproblematic for the profession or the courts. What we do however have is an authoritative decision of the Canadian Supreme Court in *Hall v Hebert* [1993] 2 SCR 159, which does not in any way support the wholesale abandonment of a clear cut test, but rather explains and redefines the principle *ex turpi causa* in a manner which (consistently with the way in which the common law usually develops) offers every prospect of avoiding the evident anomalies which an over formalistic approach has in the past evidenced.
60. Lord Sumption, also in the minority, agreed that the appeal should be dismissed, but on the basis that restitution was still possible. He too was a firm supporter of McLachlin J’s approach in *Hall v Hebert* and saw no reason to alter a well-established (until *Tinsley v Milligan*) reliance test, which if properly applied provides some well-known exceptions. He criticised the Law Commission’s desire to legislate for judicial discretion (despite the views he had expressed in 2012) and at [262] set out in detail his criticisms of the “range of factors” test now adopted by the majority.

Conclusion

61. Lord Toulson and his majority of six to three in *Patel* have now broadly fallen into line with the Australian “range of factors” approach to illegality, although those itemised are far less definite and provide a less structured approach than Clarke J’s analysis of the Australian authorities in *Quinn*. It is unfortunate that this Irish decision was not cited in *Patel*. I doubt if it would have swayed the minority, but observations on Clarke J’s list of relevant criteria may perhaps either have added high level judicial support for them – and provoked refinement of Lord Toulson’s much shorter list – or caused the Irish Supreme Court to think again. As it is, judicial approaches in the UK, Australia and Ireland now seem to be coalescing, and the New Zealand courts are expressly authorised by statute to apply judicial discretion, leaving Canada to plough its own “reliance test” furrow.

SCHEDULE
The Quinn criteria – para 8.55

In summary, the principal criteria are as follows:-

1. *The first question to be addressed is as to whether the relevant legislation expressly states that contracts of a particular class or type are to be treated as void or unenforceable. If the legislation does so provide then it is unnecessary to address any further questions other than to determine whether the contract in question in the relevant proceedings comes within the category of contract which is expressly deemed void or unenforceable by the legislation concerned. (para. 8.9)*
2. *Where, however, the relevant legislation is silent as to whether any particular type of contract is to be regarded as void or unenforceable, the court must consider whether the requirements of public policy (which suggest that a court refrain from enforcing a contract tainted by illegality) and the policy of the legislation concerned, gleaned from its terms, are such as require that, in addition to whatever express consequences are provided for in the relevant legislation, an additional sanction or consequence in the form of treating relevant contracts as being void or unenforceable must be imposed. For the avoidance of doubt it must be recalled that all appropriate weight should, in carrying out such an assessment, be attributed to the general undesirability of courts becoming involved in the enforcement of contracts tainted by illegality (especially where that illegality stems from serious criminality) unless there are significant countervailing factors to be gleaned from the language or policy of the statute concerned. (para. 8.9)*
3. *In assessing the criteria or factors to be taken into account in determining whether the balancing exercise identified at 2 requires unenforceability in the context of a particular statutory measure, the court should assess at least the following matters:-*
 - 3(a) *Whether the contract in question is designed to carry out the very act which the relevant legislation is designed to prevent (para. 8.32)*
 - 3(b) *Whether the wording of the statute itself might be taken to strongly imply that the remedies or consequences specified in the statute are sufficient to meet the statutory end. (para. 8.34)*
 - 3(c) *Whether the policy of the legislation is designed to apply equally or substantially to both parties to a relevant contract or whether that policy is exclusively or principally directed towards one party. Therefore, legislation which is designed to impose burdens on one category of persons for the purposes of protecting another category may be considered differently from legislation which is designed to place a burden of compliance with an appropriate regulatory regime on both participants. (para. 8.37)*
 - 3(d) *Whether the imposition of voidness or unenforceability may be counterproductive to the statutory aim as found in the statute itself. (para. 8.39)*
4. *The aforementioned criteria or factors are, for reasons which will become apparent, sufficient*

to resolve this case. However, the following further factors may well be properly taken into account in an appropriate case:-

- 4(a) Whether, having regard to the purpose of the statute, the range of adverse consequences for which express provision is made might be considered, in the absence of treating relevant contracts as unenforceable, to be adequate to secure those purposes. (para. 8.44)
- 4(b) Whether the imposition of voidness or unenforceability may be disproportionate to the seriousness of the unlawful conduct in question in the context of the relevant statutory regime in general. (para. 8.47)
5. Doubtless other factors will come to be defined as the jurisprudence develops.

With acknowledgements to :

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Euro-Diam Ltd v Bathurst [1990] 1 QB 1

Fitzgerald v F J Leonhardt Pty Ltd [1997] 189 CLR 215 (H Ct of Aus)

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