appellate litigation in this context in Australia and elsewhere seems absolutely clear.

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ILLEGALITY AND RESTITUTION EXPLAINED BY THE SUPREME COURT

IN the Court of Appeal in *Patel v Mirza* [2014] EWCA Civ 1047; [2015] Ch. 271, Gloster L.J., in sympathy with the "hapless law student", said of the illegality concept "it is almost impossible to ascertain … principled rules from the authorities relating to the recovery of money or other assets paid or transferred under illegal contracts" (at [47]). The Supreme Court ([2016] UKSC 42; [2016] 3 W.L.R. 399) has clarified the law in many respects. In other respects, it may have created some new uncertainties and no diminution in work for inventive lawyers and some of their more dubious clients.

The facts were simple. Mr. Patel paid £620k to Mr. Mirza to bet on the price of shares in the Royal Bank of Scotland (RBS). The agreement was based on the fact that Mr. Mirza had access to inside information from his RBS contacts which would enable him to anticipate movements in the market price of the shares. This was a conspiracy to commit an offence of insider trading contrary to the Criminal Justice Act 1993, s. 52. The inside information never arrived. Although he said he would return the money, Mr. Mirza decided to keep it. When sued for its return, he pleaded illegality and invoked the two classic maxims: "no action arises from a disgraceful cause" and "where both parties are equally in the wrong the position of the defendant is the stronger".

In the Supreme Court, all nine Justices were agreed in the result, namely that Mr. Patel should be entitled to restitution of his £620k. Another way of analysing the result is that Mr. Patel would neither be profiting from his admitted participation in an illegal agreement, nor would he be invoking the court process for the purpose of enforcing the agreement.

At first glance, this result appears to offend against the spirit and possibly even the letter of Lord Mansfield's nearly 250-year-old dictum in *Holman v Johnson* (1775) 1 Cowp. 341, 343:

> The principle of public policy is this; … 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.

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Yet, it seems obvious that granting Mr. Patel the remedy of restitution necessarily involved assisting him and/or giving him aid notwithstanding the blatant illegality at the heart of the contract.

The principle stated by Lord Mansfield was taken to be reflected in the reliance rule, as laid down in *Tinsley v Milligan* [1993]UKHL 3; [1994] 1 A.C. 340. In *Tinsley*, the House of Lords found for Ms. Milligan, on the basis that she did not need to rely on the illegal agreement to sustain her cause of action. But the reasoning in *Tinsley* and *Collier v Collier* [2002] EWCA Civ 1095; [2002] B.P.I.R. 1057 (and the result in *Collier*) was rightly rejected in *Patel*. In light of the new judgments, both Ms. Milligan and Mr. Collier would have succeeded in their claims, notwithstanding the fact that, in both cases, there was a blatantly illegal feature of the transaction.

Lord Toulson, with whom Lady Hale and Lords Kerr, Wilson and Hodge agreed, decided that the reliance rule should no longer be followed (at [110]). Lord Toulson's analysis has been described as the "range of factors" approach. It permitted the court to examine the "underlying purpose" of the prohibition transgressed by the transaction and to inquire whether that purpose would be enhanced by the denial of the claim: in *Patel*, to consider whether the insider trading legislation would be "stultified" if Mr. Patel's claim were allowed to succeed (approving the approach of Gloster L.J. in the Court of Appeal).

Lord Neuberger agreed that restitution should be allowed: the ratio of the Supreme Court decision, namely of all the judgments, is captured in what he called the "Rule", at [145]–[146]: "The present appeal concerns the claim for the return of money paid by the claimant to the defendant pursuant to a contract to carry out an illegal activity, and the illegal activity is not in the event proceeded with owing to matters beyond the control of either party. In such a case, the general rule should … be that the claimant is entitled to the return of the money which he has paid."

Lord Neuberger agreed with Lord Toulson's analysis. This means that, on the obiter aspect of the judgments – the "range of factors" versus the narrow "Rule" – the Supreme Court divided 6:3 in favour of the former, with the commercial lawyers (Lords Mance, Clarke and Sumption) in the minority.

The really interesting passages in the judgment of Lord Neuberger are paras. [176], [178]:

> A simple example is a case where the consideration for which the claimant paid or owed money was inherently illegal …. In such cases, … the claimant should generally be able to … recover the money he had paid. Thus, if the claimant paid a sum to the defendant to commit a crime, such as a murder … the claimant should normally be able to recover the sum, irrespective of whether the defendant had committed, or even attempted to commit, the crime. If the defendant

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> had not attempted the crime, the Rule would generally apply. If he had actually succeeded in carrying out the crime, he should not be better off than if he had not done so ... one could justify that conclusion on the ground that the law should not regard an inherently criminal act as effective consideration.

Lord Mansfield might not merely have turned in his grave; he surely would have jumped out of it and sought to remonstrate with Lord Neuberger over this passage. The restitution analysis is impeccable: the contract killer should not be unjustly enriched at the expense of his contracting employer, whether or not the murder has been carried out. It is also understandable that the killing of someone should not be recognised as "effective consideration" and this opens the way to the restitution remedy. That said, why would the grant of that remedy not fall foul of Lord Mansfield's dictum about the court not assisting the transgressor or lending its aid to a plaintiff whose cause of action "appears to arise *ex turpi causa*"? The anticipated response, to the effect that the court would not be enforcing the bargain or allowing the employer to profit from the bargain, is not convincing. In the realm of public policy, it is difficult to think of a more offensive or objectionable outcome in the procedural guise of a claim in restitution.

Lord Sumption made the same point (at [254]). In this passage, he implicitly recognised the extraordinary nature of this claim: his solution was that, in such a case, both parties would be exposed to confiscation orders under the Proceeds of Crime Act 2002.

Lord Mance was in the minority on the obiter aspects of the judgments. A key part of Lord Mance's analysis (in agreement with Lord Sumption at [245]–[252]) was his rejection of twentieth-century case law, which had the effect of unduly restricting the rescission principle (at [197]). Like Lord Neuberger, Lord Mance would have given the rescission remedy more flexibility with the use of suitable adjustments, subject to the particular facts of the case, such as the availability of the defence of change of position.

On this basis, Lord Mance would have retained the reliance test as a bar to relief "but only in so far as it is reliance in order to profit from or otherwise enforce an illegal contract. Reliance in order to restore the status quo is unobjectionable" (at [199]). Lord Mance expressed his strong disagreement with the majority on the "range of factors" analysis (at [204]–[209]): "[T]his approach, would introduce ... entirely novel dimensions into any issue of illegality. Courts would be required to make a value judgment, by reference to a widely spread melange of ingredients, about the overall 'merits' ... in a highly unspecific non-legal sense, of the respective claims of the public interest and of ... the parties."

Lord Sumption agreed with Lords Mance and Clarke, and disagreed with the other six on the obiter point. He described the debate as evincing "a long standing schism between those ... who regard the law of illegality

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as calling for the application of clear rules, and those who would wish to address the equities of each case as it arises".

Lord Sumption supported the reliance test – the "narrowest test" – and explained that, properly applied, the reliance test would have produced the right results and for the right reasons in both *Tinsley* and *Collier* (at [238]–[239]). Lord Sumption would have also preserved the well-established exceptions, which would entitle the party not *in pari delicto* successfully to avoid the rule (at [241]–[244]).

Lord Sumption (like Lord Mance) also subjected the "range of factors" approach of the majority to some stringent criticism because of the resulting uncertainty that would involve the substitution "of a new mess for the old one" (at [262]–[263]).

We should welcome the modern approach of judges seeking to give transparency to their thinking. A key feature of all the judgments is the desire to mark an indelible dividing line between the criminal and the civil law. The fact that the agreement between Patel and Mirza amounted to a criminal conspiracy should not of itself have determined the outcome of Mr. Patel's civil claim for the return of the money. The distinct decision whether or not to prosecute Patel and Mirza, and the outcome of their criminal trial would be a matter for the criminal law. The demarcation line is thereby drawn between the civil and the criminal law, and the observations of Lords Neuberger and Sumption about the contract killing example are more easily understood.

The majority approach is likely in future cases to lead to roving inquiries at trial as to the public policy behind particular common-law and legislative rules against particular forms of wrongdoing. In such cases, the uncertainty is increased, as is the cost.

Lawyers often laud the notion of certainty but it has a holy-grail quality and grail hunts invariably fail. The outcome of contract-law disputes can rarely be predicted with certainty. In any event, it is difficult to think of realistic examples of cases where the application of the two approaches – the range of factors versus the reliance test as reinterpreted in light of *Patel* – would produce different results. But they will be cases where the illegality is on the margin of the transaction.

Patel raises interesting questions. If we assume the transaction had proceeded and Mr. Mirza had generated some profit and then refused to repay Mr. Patel, could Mr. Patel get restitution in respect of his £620k? If the answer is "yes", what would Lord Mansfield have had to say about that?

Or suppose the transaction proceeded as planned but Mr. Mirza lost the £620k. By way of defence to Mr. Patel's claim for the return of the £620k

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could Mr. Mirza plead his own change of position – that he had spent the money in accordance with the bargain and could no longer give restitution?

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AUTONOMOUS CHARACTERISATION UNDER THE BRUSSELS I REGULATION RECAST

IN *Arcadia Petroleum Ltd. v Bosworth* [2016] EWCA Civ 818, three companies in the Arcadia Petroleum Group sued their de facto CEO and CFO and others in England for siphoning off money for their own benefit. One of the companies was incorporated in England, the others in Singapore and Switzerland. The companies claimed for unlawful means conspiracy, breach of fiduciary duty, dishonest assistance and knowing receipt. Could these claims all be litigated in England under the Lugano Convention, which allocates jurisdiction to determine disputes among the members of EFTA (the provisions at issue are identical to those of the Brussels I Regulation (No 44/2001) applicable in the EU)? The conclusion depended on whether the claims related to a contract of employment, or were contractual or were tortious. Each characterisation led to a different court with jurisdiction. The Court of Appeal held that mostly they could be litigated in England; only those for breach of fiduciary duty arising during the period of the directors' employment could not.

Directors have a contradictory relationship with their companies. They manage the company's business as the embodiment of the company. English company law imposes fiduciary duties to control directors' misbehaviour. Directors may also be employees of the company taking the benefit of employment protections drafted to protect weaker parties. Those contradictions are carried through into the Lugano Convention (2007 OJ L 339/3), Brussels I Regulation (Regulation 44/2001 2001 OJ L 12/1) and to the almost identical provisions of the Brussels I Regulation Recast (Regulation 1215/2012 2012 OJ L 351/1). For convenience, this note refers to the Articles as numbered in the Recast Regulation rather than the Lugano Convention/Brussels I Regulation.

The defendant directors made all the strategic decisions of the companies, including moving themselves and the business to Switzerland. Nevertheless, they wanted the benefit of the special protective rules of jurisdiction for employees in Article 22. They argued the claims were related to their individual contracts of employment and therefore could only be brought in Switzerland. The companies countered by arguing that the claims fell into the special rules of jurisdiction for torts permitting proceedings in a court other than the domicile of the defendants (Article 7(2)).

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