**Illegality after Patel: potior non est conditio defendentis**

Before the decision of the Supreme Court in Patel v. Mirza[[1]](#footnote-1), the illegality principle was notorious, as the object both of a considerable volume of criticism and of a judicial tug of war as to how the principle should be applied.

It was of course based on the famous ex turpi causa dictum of Lord Mansfield in Holman v. Johnson[[2]](#footnote-2). Claims founded on illegality must fail, despite the fortuitous benefit to the undeserving defendant. An apparently simple proposition.

But the ensuing 240 odd years of case law led Lord Neuberger to say in Patel[[3]](#footnote-3) that the law was “*in some disarray*”. While Lord Sumption called it “*a mess*” - adding that this was no reason to substitute for it the “*new mess*” proposed by the majority of his colleagues[[4]](#footnote-4).

Previous accolades include –

“*an intricate set of tangled rules that are difficult to ascertain and that the courts sometimes break*”[[5]](#footnote-5); “*notoriously knotty territory*”[[6]](#footnote-6); “*almost impossible to ascertain or articulate principled rules[[7]](#footnote-7); and* “*the disordered state of the law is due to the courts’ distaste for the consequences of applying their own rules*”[[8]](#footnote-8).

And many others to similar effect. Recent judicial comment can only be described as a chorus of disapproval.

The difficulty may have been a failure by the courts to concentrate on their main function.

What the State wants from its system of justice is that civil courts decide what are the rights of the parties, and that prosecuting authorities, criminal courts and sometimes regulators deal with breaches of the criminal law.

Of course a civil court should not undermine the law, by enforcing an illegal contract, or by compensating the claimant for the consequences of a criminal act.

But if a court that is asked to do neither of these things still rejects a claim because it is in some other way tainted by illegality, then it risks both undue interference in the operation of the criminal law, by imposing an additional penalty, and at the same time failure to do its own job.

Both of these are inherent in the reasoning of the House of Lords in Tinsley v. Milligan[[9]](#footnote-9), the correctness of which was the main issue in Patel, and it is helpful to start with that case.

The facts are well known. Miss Tinsley and Miss Milligan were tenants in common of a house, but it was put in Miss Tinsley’s sole name to facilitate a social security fraud, described by Lord Goff as “*relatively minor dishonesty[[10]](#footnote-10)*”.

Miss Milligan confessed and she and the Department of Social Security came to an arrangement. Then she sought to enforce her equitable right to half the house in answer to Miss Tinsley’s claim for possession.

In the Court of Appeal[[11]](#footnote-11), the majority, Lord Justices Nicholls and Lloyd, applied the so called public conscience test. In all the circumstances, would it shock the ordinary citizen to allow the claim? The answer was no, both parties were liable to criminal sanctions, but there was no justification for imposing a disproportionate extra penalty on one party.

The House of Lords unanimously disapproved the public conscience test, holding that it amounted to judicial discretion[[12]](#footnote-12). It upheld Lord Mansfield’s principle: an action founded on illegality must be rejected.

Therefore, if Miss Milligan had been Miss Tinsley's mother, instead of a friend, her claim would have been barred because she would have had to rely on illegality to make it. The claim would have been founded on illegality. She would have lost her half of the house.

So, in a case in which the court was not asked to enforce the illegal transaction, and in which the authority responsible for prosecutions had decided that it was not in the public interest to prosecute –

The House of Lords would in effect have overridden that decision and, by forfeiting the defendant’s property, imposed a far more severe penalty than any that a court would have imposed if there had been a prosecution. The property would not have been forfeit to the State, but would have been given to the equally guilty defendant. And the House of Lords would have failed to do its day job, that is to do justice between the parties by enforcing the defendant’s legitimate claim.

The House of Lords escaped from these unpalatable results of the illegality principle only by a majority of 3-2, and only by holding that Miss Milligan could rely on the presumption arising from her contribution to the purchase price.

So framed, the claim was not founded on illegality. The court was of course fully aware of the illegality but that did not matter.

The illegality rule – of all rules – was now described as “*procedural*”[[13]](#footnote-13) only, and all depended on whether the plaintiff benefited from a presumption.

The later case of Collier v. Collier[[14]](#footnote-14) was father against daughter, and the presumption was that the transfer was a gift. The father had to rely on the illegal transaction and he lost.

Potior est conditio and the defendant rules OK? The Supreme Court in Patel, said “not OK”. It disapproved the reasoning in Tinsley and overruled Collier.

And it went some way towards addressing the role of the criminal law in a civil case. On the one hand, when would it undermine the criminal law to allow the claim? On the other, when would rejecting the claim wrongly interfere with the criminal law and unjustifiably impose a double penalty?

Before I examine Patel, I should briefly give a second reason for the confusion in the law before it was decided. That is the plethora of imprecise concepts and woolly questions, on all of which one could find decisions or dicta going both ways.

Tainted by illegality is one. Whether the claimant has to rely on the illegality is another which has given rise to much dispute in several cases, including in Patel itself.

Would disallowing the claim act as a deterrent?

Should the court condone the illegality?

Should the court sully its hands?

Has the plaintiff repented, and has he done so in time?

Should the court take into account the public interest in doing justice between the parties?

Are there degrees of illegality? Is the relative blameworthiness of the parties a factor?

Is the undesirability of rewarding a guilty defendant a factor?

Patel v. Mirza gives answers to most of these previously unresolved questions.

The facts of the case were that the parties conspired to profit from insider trading, using information which the defendant, Mr. Mirza, expected to obtain. The claimant, Mr. Patel, paid Mr. Mirza £620,000 to finance it, but no information was obtained and no trading took place. Mr. Patel wanted his £620,000 back.

The trial judge, bound by Tinsley, held that, since Mr. Patel had to rely on the failure of the illegal transaction, his claim was founded on illegality and was barred.

There was an exception if a claimant withdrew voluntarily from the illegal transaction before it was implemented, but he held that Mr. Patel did not withdraw voluntarily and therefore could not benefit from this so-called locus poenitentiae.

The Court of Appeal, equally bound by Tinsley, held that it was not necessary that the claimant should have withdrawn voluntarily to benefit from the locus poenitentiae, so long as he did so before the transaction had been implemented.

So the appeal was allowed. Lady Justice Gloster would have allowed it for other reasons as well.

In the Supreme Court, the main issue was whether the reasoning in Tinsley was right. Where a claimant was not seeking to enforce an illegal transaction, but rather was asking for the restitution of money or property transferred under it, was the claim barred? If not, then neither the timing of the withdrawal, nor whether it was voluntary, mattered.

In addition, the 9 - member court addressed the controversy over the general principle governing the illegality defence in all cases. Should the principle be rule – based, that is essentially Lord Mansfield’s principle, or should it be based more flexibly on a balance of policy considerations, proportionality and the detailed facts of the case?

I will start with the decision on the restitution issue, on which the Court was unanimous, and for largely the same reasons.

What the Court held was that there was a general rule that the claimant could recover money or property transferred under an illegal transaction in an action for unjust enrichment, on the basis that the consideration for the payment had failed. Such a claimant was asking the court to undo the transaction, not to enforce it. Illegality was no bar to recovery.

Since the Court unanimously decided that Mr. Patel did have to rely on the illegality – only Lady Justice Gloster in the Court of Appeal had decided that he did not – Lord Mansfield’s principle was an obstacle. The action was founded on illegality, and according to the prevailing principle should have failed, as Mr. Patel had no presumption to fall back on.

This obstacle was overcome by Lord Sumption by a slight but neat alteration to the formulation of the principle. Instead of “*no court will lend its aid to a man who* ***founds his cause of action*** *on an illegal act*” – Lord Mansfield – the principle stated by Lord Sumption was

*“... the courts will not* ***give effect*** *to an illegal transaction or to a right derived from it.”[[15]](#footnote-15)*

Even though Mr Patel’s claim was founded on an illegal agreement, he was not seeking to give effect to it, or to claim a right derived from it. He was seeking to recover the property he would have had, if he had never entered into the transaction which, because illegal, was ineffective. This was consistent with the restated principle which was, Lord Sumption said, its narrowest possible formulation.[[16]](#footnote-16)

Similarly Lord Mance said:-

*“Reliance on illegality remains ... a bar to relief, but only insofar 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.”[[17]](#footnote-17)*

The majority of the Court applied the more flexible principles to which I have referred, but reached essentially the same conclusion. So for example, Lord Toulson, with whom 4 other justices agreed, said *“Mr. Patel is seeking to unwind the transaction, not to profit from it.”[[18]](#footnote-18)*

He said that the question was not whether the contract should be regarded as tainted by illegality, but whether the relief claimed should be granted.[[19]](#footnote-19) The focus is on whether what the court is asked to do is objectionable, not only on whether the transaction is objectionable.

The result is that an action for the restoration of property transferred under an illegal transaction will not in general be barred by illegality, and both the search for a convenient presumption, and the intricacies of the locus poenitentiae, can be consigned to legal history.

Two questions remain, (1) are there any exceptions to the general rule applicable where the claim is for restitution, and (2) what defences may be available?

On the first question, the majority judgment recognised that there might be exceptional cases, but the only specific exception discussed was a possible exception for heinous crimes.

Lord Toulson referred to Tappenden v. Randall[[20]](#footnote-20) in which Heath J. said that there might be a case “*too grossly immoral for the court to enter into any discussion of it*”, such as a contract to murder someone, to which Lord Toulson added drug trafficking.[[21]](#footnote-21)

But both Lord Neuberger and Lord Sumption said that in such a case the money ought to be recoverable whether or not the defendant had given consideration by committing the crime.[[22]](#footnote-22)

Lord Sumption thought that judicial abstention in order to avoid sullying the court’s hands was not a respectable foundation for the law of illegality[[23]](#footnote-23). Lord Mance referred disparagingly to what he called “early 20th century moralising”[[24]](#footnote-24).

On the second question, what defences might be available, nothing was said in the majority judgment, but in principle alteration of position would be a defence to a claim for unjust enrichment, and all the other 4 justices supported this.

Lord Sumption said that an action for unjust enrichment would be available, so long as mutual restitution of benefits remained possible, and that this would in most cases be the same as the alteration of position defence. Lord Neuberger said the same, and Lord Mance and Lord Clarke agreed.[[25]](#footnote-25)

That probably means that the principle adopted in contract cases will be applied. The courts will do what is “practically just”, making appropriate adjustments to achieve substantial restitution, even if precise restoration of the original position is no longer possible.[[26]](#footnote-26)

However, two difficulties would arise if the alteration in the defendant's position resulted from illegal dealings. For example, what would the Court have decided if Mr. Mirza had had inside information, but of such an unreliable kind as to result in losses of, say, £100,000. Would he have had a defence to the extent of the amount of the loss, £100,000, or perhaps for half of it, £50,000.

But for the illegality, Mr. Mirza would have had the defence of alteration of position, but the first difficulty is that there is authority that the defendant to an unjust enrichment claim cannot rely on a changed position which is the result of illegal dealings: see Barros Mattos Junior v. General Securities[[27]](#footnote-27).

Secondly, anything approaching the taking of an account between partners in crime would run up against that old chestnut, the Highwayman’s Case, Everet v. Williams (1725)[[28]](#footnote-28), in which it was held that no such claim for an account was permissible. To allow what would in effect be the taking of an account could be seen as tantamount to enforcing the illegal contract.

There is not much in the judgments to help on this. Only Lord Neuberger addressed the point, but indirectly. In one passage, he said that even if the effect of allowing an action for unjust enrichment was in practice “*getting precious close*” to enforcing performance of the illegal contract, such an action should still be allowed.

In another, however, he said that the court might well be justified in refusing a claim for repayment where the contract has not been performed but only “*if the defendant has spent the money and was unaware of the facts giving rise to the illegality at the time he spent it*”[[29]](#footnote-29) (my emphasis). This was not the case in Patel.

So there is uncertainty. For what it is worth, it seems to me that it would be wrong to allow the claimant to recover money paid under an illegal contract, whether or not performed, but then to refuse to allow the defendant to rely on an alteration of his position resulting from the same illegality.

And it would be odd to disallow an alteration of position defence on grounds of public policy, when the courts are obliged by the Civil Liability (Contribution) Act 1978 to apportion liability between joint tortfeasors, even though in some cases the tort will have involved illegality.

Apart from that quite important unresolved issue, this part of the law now seems clear. Money or property transferred pursuant to an illegal transaction is recoverable. And the illegality defence will no longer be available as an answer to a claim for the return of money or property in such cases, whether or not the agreement has been performed.

I will now turn to what was said in Patel v. Mirza about the general principle applicable to cases of illegality. This is a bit diffuse. There are several strands and some loose ends.

The background is to be found in three earlier but very recent decisions in the Supreme Court.

The first is Hounga v. Allen[[30]](#footnote-30). In that case, the claimant was an immigrant who had obtained entry into the UK by fraud and worked for the defendant illegally, in breach of a condition of her entry into the U.K. The defendant was fully complicit in the illegality, indeed had instigated it.

The claimant’s claims for unpaid salary and unfair dismissal were dismissed by the employment tribunal, on the ground that they were based on the illegal contract of employment, that decision was upheld by the Employment Appeal Tribunal and there was no further appeal.

There remained a claim for the tort of racially discriminatory dismissal from her employment, contrary to section 4 of the Race Relations Act. The claimant had been thrown out of the house with abuse and some violence.

The Employment Appeal Tribunal’s decision to allow this claim was reversed by the Court of Appeal, but upheld in the Supreme Court, even though such a claim was necessarily founded on the illegal contract of employment.

Lord Wilson, with whom all other members of the Court agreed, expressed the principle in this way[[31]](#footnote-31):-

“*The defence of illegality rests on the foundation of public policy … so, it is necessary first, to ask “what is the foundation of public policy which founds the defence?” and, second, to ask “But is there another aspect of public policy to which the application of the defence would run counter?*”.

He then held that Miss Hounga was entitled to claim damages for racially discriminatory dismissal, even though the claim was founded upon the illegal employment, because the damages were awarded for injury to feelings and because it was fanciful to suppose that to allow the claim would encourage others to work illegally.

There was also a second ratio. The Court held, by a majority, that to refuse the claim would be contrary to public policy because it would encourage the trafficking of human beings, contrary to the international convention to which the UK was a party[[32]](#footnote-32).

The correctness of this decision was questioned in the Supreme Court in Les Laboratories Servier v. Apotex[[33]](#footnote-33). In that case, the Court of Appeal had applied a similarly flexible principle, expressed by Lord Justice Etherton as follows:-

“*The court is able to take into account a wide range of considerations in order to ensure that the defence only applies where it is a just and proportionate response to the illegality involved in the light of the policy considerations underlying it*.”[[34]](#footnote-34)

The Supreme Court held unanimously that there had been no conduct engaging the illegality principle. The principle was only engaged by criminal activity, or quasi-criminal activity which was against the interests of the State, for example corruption or prostitution, and not by the merely tortious conduct of infringing the claimant’s patent.

However, the members of the Court disagreed, obiter, about how the illegality principle, if it had been engaged, should have been applied. Lord Toulson and Lord Hodge approved of the Court of Appeal’s approach[[35]](#footnote-35), but the majority rejected it, saying that the wide range of considerations taken into account by the Court of Appeal amounted to no more than *“largely subjective judgments about how badly Apotex had behaved and how much it mattered”*, which could not possibly have justified its decision.[[36]](#footnote-36)

This fundamental difference of view was apparent in yet another illegality case, Bilta v. Nazir[[37]](#footnote-37), leading Lord Neuberger to say[[38]](#footnote-38) that a 7- or 9- member court should address the proper approach to the illegality principle as soon as possible, that is, whether it should be a flexible principle, as set out by the Court of Appeal in Apotex and by the Supreme Court in Hounga, or whether it should remain essentially as established in 1775.

Patel was treated as the opportunity to resolve the issue, with a 9-member court, although it was not necessary to go beyond the restitution issue. The outcome was that the majority formulated a more elaborate flexible rule than was set out in Hounga. Lord Sumption, Lord Mance and Lord Clarke emphatically disagreed, and preferred to stay with Lord Mansfield’s principle, varied as I have explained.

Lord Neuberger maintained an intermediate position. If the whole purpose of a contract was the commission or a crime, as in Patel, or where a contract necessarily involved commission of a crime, it could not be enforced, nor could damages be awarded for its breach. But he considered that, in other cases involving illegality, there could be flexibility, since experience had shown that no certain principle could be formulated.[[39]](#footnote-39)

Oddly enough, the starting point for all 9 members of the Court was the same. It was the principle formulated by Mrs. Justice McLachlin in the Canadian case of Hall v. Hebert[[40]](#footnote-40), on which the Court had relied in Hounga. The relevant passages in her judgment are set out in the notes. What she said can, I think, be expressed as two rules:

1. The court has a duty to decide the case before it and enforce the rights of the parties, and its power to refuse to do so is a limited one.

2. That power can be used only where to allow the claim would undermine the integrity of the law by introducing inconsistency or disharmony between the civil and the criminal law.

Lord Sumption put it in this way[[41]](#footnote-41):-

“*The starting point is that the courts exist to provide remedies in support of legal rights. It is fundamental that any departure from that concept should have a clear justification grounded in principle, and that it should be no more extensive than is required by that principle. The underlying principle is that for reasons of consistency the courts will not give effect, at the suit of a person who committed an illegal act ... to a right derived from that act*.”

But the majority view that has prevailed is that, even in a case in which the court would be giving effect to a right derived from an illegal act, it is still necessary to consider whether to refuse to do so would be against the public interest or disproportionate.

The decision in Hounga was approved, even though the claim in that case arose directly from an illegal agreement – an unlawful contract of employment.

And the Court of Appeal’s decision in ParkingEye v. Somerfield Stores[[42]](#footnote-42), to which I will come, was also approved.

The key passages in Lord Toulson’s judgment are set out in the notes. The central point is what he calls the trio of considerations:

“*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 ... in assessing whether the public interest would be harmed … it is necessary to consider (a) the underlying purpose of the prohibition…and whether that purpose will be enhanced by denial of the claim (b) .. any other relevant public policy on which the denial of the claim would have an impact and (c) 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*.”[[43]](#footnote-43)

It is the third of these - proportionality – that goes beyond the principle as stated in Hounga, and this is emphasised by passages approving the “range of factors” approach suggested by Professor Burrows in his Restatement of the English Law of Contract. These include factors such as how serious the illegality was, how central to the transaction and how serious denying the claim would be for the claimant.[[44]](#footnote-44)

To this Lord Toulson[[45]](#footnote-45) added that there was no limit on the other factors that might also be relevant, including for example a *“marked disparity in the parties’ respective culpability.,”*

He also approved dicta of Lord Wright in Vita Food v. Unas Shipping[[46]](#footnote-46) and of Lord Walker in Bakewell Management Ltd v. Brandwood[[47]](#footnote-47) to the effect that it was always necessary to consider whether denial of the claim was in the public interest which, as Lord Wright said, might sometimes be better served by refusing to nullify a contract save on serious and sufficient grounds.

The effect of all this is clearly to move away from a strict rule that disallows a claim which is based on illegality to a much more open one that takes into account the detailed facts of the case and the importance, where possible, of doing justice between the parties.

In another important passage, Lord Toulson expanded upon the role of the criminal law. He said that part of the harmony of the law was the division of responsibility between the criminal and civil courts, and that punishment was not generally the function of the civil courts. Civil courts should not undermine the effectiveness of the criminal law, but nor should they impose what would in substance be an additional penalty which may be disproportionate to the nature and seriousness of the wrongdoing.[[48]](#footnote-48)

Since almost all civil cases involving illegality issues arise from a breach of the criminal law[[49]](#footnote-49), this gives rise to doubt as to the role of the criminal law in a civil case. It will be necessary to consider first, whether it would undermine the criminal law to allow the claim, and, secondly, even if it would, whether it would be disproportionate to disallow it.

No detailed help is to be found in Patel as to where the line is to be drawn.

There are also indications in the judgments that a court might be able in some cases to satisfy the public interest in upholding the criminal law by inviting the enforcement authority to make an application under the Proceeds of Crime Act, or possibly by some other form of payment for the public good, as suggested in the Australian case of Nelson v. Nelson[[50]](#footnote-50).

More simply, it is almost always open to a court to send the papers to the DPP or the CPS, and sometimes, as was done by the judge in Patel, to an appropriate regulator. That should result in the appropriate body considering whether it is in the public interest to bring criminal or disciplinary proceedings resulting in an appropriate penalty.

The minority, that is Lord Mance, Lord Clarke and Lord Sumption, strongly disapproved of Lord Toulson’s formulation of the illegality rule, for several reasons.

One of the main reasons was the same reason that the House of Lords in Tinsley had disapproved of the public conscience test, namely that it turned what should be a matter of principle into the exercise of a discretion.

Lord Mance, for example, said that it required courts to make value judgments

*“by reference to a widely spread mélange of* *ingredients, about the overall merits or strengths ... of the respective claims of the public interest and of each of the parties”.[[51]](#footnote-51)*

Is the objection that the rule is now discretionary a valid one? It is indeed difficult to see much difference between the public conscience test disapproved in Tinsley and a test involving the trio of considerations plus what is proportionate and in the public interest having due regard to all relevant policies and all relevant factors in the individual case.

But it does not follow that either is discretionary. Balancing competing policies and taking account of the detailed facts is what a court does, for example, when deciding whether it is just and reasonable to impose a duty of care. Nobody would regard that as a discretionary exercise.

The danger of discretionary decisions is they can be arbitrary, and Lord Toulson’s formulation might give rise to objectionably arbitrary decisions, if a judge’s decision on an illegality issue were to be treated as discretionary in the sense that it would not be reversed on appeal unless irrational, like a case management decision.

A recent note in the Law Quarterly Review[[52]](#footnote-52) suggests that this may be the position, and that such decisions will become effectively unappealable. But I doubt that. Nothing was said in Patel to that effect.

In Les Laboratoires Servier,[[53]](#footnote-53) Lord Sumption said of the public conscience test in that the decisions it required were discretionary in nature but not discretionary in law, and the same should be true of the new principle. There is no reason why decisions on illegality should not be fully appealable, with appellate courts able to substitute their own view for that of the judge.

Another objection to the new principle was that it introduced uncertainty and unpredictability. Lord Toulson’s answer to this was that the major benefit of certainty was that people would order their affairs knowing what the law was, and that was not a consideration which should apply to people contemplating unlawful activity[[54]](#footnote-54). Lord Neuberger on the other hand thought that even criminals were entitled to expect certainty[[55]](#footnote-55) and clarity from the law. And Lord Sumption said that uncertainty generated a lot of wasteful and expensive litigation.[[56]](#footnote-56)

Probably the best answer to this point – Lord Toulson again – is that the previous law, based on Lord Mansfield’s principle, had generated plenty of uncertainty and unpredictability. Certainty on this issue may just not be unachievable.[[57]](#footnote-57)

The next question to consider about Patel is how far it is binding. The decision that illegality will not affect restitution claims is clearly binding. But it is doubtful whether anything else is.

While the whole point of a 9-man court was to seek an authoritative decision on what principle governing illegality cases should be, there are passages in the judgments of both Lord Neuberger and Lord Mance suggesting that everything other than the decision on the claim for restitution may be obiter[[58]](#footnote-58). Lord Mance said pointedly that it was unnecessary for the Court, in order to reach its decision, to rewrite the whole law of illegality.

Therefore, if there is already an appellate decision based on Lord Mansfield’s principle, which cannot be distinguished on the facts, should a 1st instance judge treat it as binding or reconsider it applying the new flexible approach?

This arose in a recent case before Mr. Justice Jay called Henderson v. Dorset Healthcare Trust[[59]](#footnote-59). The claimant had stabbed her mother to death when suffering from mental illness, and pleaded guilty to manslaughter on the ground of diminished responsibility. Her mental functioning and self-control were profoundly and substantially, but not wholly, impaired, she had no significant personal responsibility. The event was caused by the defendant’s negligence in failing to respond to her mental collapse.

The judge held that there was binding authority, Clunis v. Camden and Islington Health Authority in the Court of Appeal and Gray v. Thames Trains in the House of Lords[[60]](#footnote-60), which could not be distinguished and which precluded recovery of several heads of the damages claimed, for example damages for loss of liberty, on the ground of public policy.

He rejected a submission that, while the decision of the Court of Appeal in Clunis was not expressly disapproved or overruled in Patel, it was inconsistent with the flexible approach laid down in Patel and could not survive that decision – that it was impliedly overruled.

He held that the doctrine of precedent required a court to apply the explicit reasoning of a higher court on the facts before it. It did not permit a court to draw logical inferences from statements of general application, in order to justify departing from other binding authority. Clunis and Gray were indistinguishable on the facts, and had to be followed.

He cited the dictum of Lord Halsbury in Quinn v. Leatham to the effect that the generality of expressions in a judgment are not intended to be explanatory of the whole law, but are governed by the particular facts of the case.[[61]](#footnote-61)

If Mr. Justice Jay is right, Patel may be of limited application in first instance decisions. There has been a great deal of binding appellate authority over the past 2 centuries based on Lord Mansfield’s principle, covering many different fact situations. In many cases the claimant may – as in Henderson – have to get to the Court of Appeal or the Supreme Court for effect to be given to the trio of considerations and proportionality.

If this is the position, it is a paradoxical result. The 9-member court in Patel was convened precisely in order to resolve, once and for all, the longstanding differences between appellate judges as to the applicable principle. Lord Toulson’s judgment clearly was intended to be an exposition of the whole law.

But the Supreme Court has not, so far, altered the doctrine of precedent. Lord Toulson’s judgment will be very persuasive authority where there is no existing binding authority. However, in many cases first instance judges will have to follow previous decisions which were based on the very principle that has been rejected by the majority in Patel.

One example of an area which would be affected are cases in which the parties to perfectly lawful contracts have performed them in a way that defrauds third parties.

For example, contracts of employment where the parties have defrauded the tax authorities by paying salary in the guise of expenses.

If a claim for wrongful dismissal came before a court, unaffected by previous authority, it would have no difficulty in enforcing the contract, while dealing with the illegality simply by reporting it to the tax authorities.

HMRC is the authority whose job it is to enforce tax law and it has ample powers to prosecute or to impose penalties proportionate to the offence, as it considers appropriate in the public interest.

Allowing the claim while leaving it to HMRC to deal with the tax fraud would not involve giving effect to the illegal agreement to evade tax, and it would respect the integrity of the law and the division of responsibility between different parts of the State’s machinery for law enforcement.

It would not be justifiable for the court to impose an additional penalty on the employee by disallowing his claim, which would simultaneously have the undesirable effect of rewarding the equally blameworthy employer.

There is little doubt that, applying the reasoning of the majority in Patel, that is what a court today would do, if unconstrained by authority.

But there are two Court of Appeal decisions, Miller v. Karkinski and Napier v. National Business Agency[[62]](#footnote-62) in which the employee’s claim has been dismissed on public policy grounds and which could not be distinguished. In both these cases, the court refused to sever the unlawful part of the contract and allow the claim to the extent that it was based on legitimate wages.

Therefore, if Mr. Justice Jay was right in Henderson, Miller and Napier would have to be followed by a first instance judge. Possibly the court might apply an exception to stare decisis set out in Young v. Bristol Aeroplane[[63]](#footnote-63), on the basis that, even though these Court of Appeal authorities have not been overruled, they cannot stand with the decision in Patel.

But an argument to that effect might founder if what is said about the general illegality principle is not part of the ratio of the decision.

If that is the position, the case would have to go to the Supreme Court before the law could be reconsidered.

The next question is how are appellate courts or, where permitted, first instance judges, likely to apply the new principle set out in Patel. Very little is said in the judgments but, one hopes, flexibly and consistently with Hall v. Heber, that is in such a way as to fulfil the courts’ duty to enforce the claimant’s rights, unless that would involve giving effect to what is clearly unlawful.

However, in many cases, either principle would lead to the same result. Recent decisions, including Patel, frequently cite what Bingham LJ said in Saunders v. Edwards[[64]](#footnote-64):

“*…no court should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits*”.

For example, suppose that in Patel there had been profitable trading activity using inside information, and that Mr. Patel had been claiming not only the return of his £620,000 deposit, but also his share of the profits.

To allow the latter would clearly undermine the criminal law, by enabling Mr. Patel to recover the proceeds of a criminal conspiracy. It could hardly be seen as disproportionate to disallow the claim.

But to reject the claim would leave the whole profit in the hands of Mr. Mirza, which might be seen as a countervailing consideration.

The answer, I would suggest, would be to dismiss the claim and send the papers to the DPP, and invite him to consider whether to prosecute, or possibly instigate an application under part 5 of the Proceeds of Crime Act against the defendant.

Two other aspects of the decision in Patel require attention. The first is the approval by the majority of the decision of the Court of Appeal in ParkingEye v. Somerfield Stores,[[65]](#footnote-65) which will affect how the courts deal with contractual claims involving illegality. The second is what is said about quantum meruit in cases in which the illegal transaction cannot be enforced.

ParkingEye concerned the repudiation by the defendant of a contract under which the claimant provided it with an automatic control system for its supermarkets’ car park.

The defendant met the claim with a plea of illegality based on false representations in some of the demand letters sent to customers who had not paid for their parking. These constituted a minor part of the performance of a lawful contract. The judge held that they amounted the tort of deceit, but found that they had not been sent dishonestly.

In the absence of a finding of dishonesty, it is not easy to see why the illegality principle was engaged at all – by facts amounting to a tort but not to a crime - but both the trial judge and the Court of Appeal held that it was engaged.

The importance of the case arises from the principle adopted by the Court of Appeal in rejecting the defence of illegality in a case in which a lawful contract had been performed, as it held, illegally.

The ratio of the case was expressed succinctly by Sir Robin Jacob, with whom Lord Justice Laws agreed: it would be “*disproportionate*” for Parking Eye to be left without a remedy for loss of income that would have been wholly lawful. There was “*insufficient justification*” for it.[[66]](#footnote-66)

Thus, a flexible principle involving weighing the extent of the illegality against the severity of the consequences of barring the claim.

Lord Justice Toulson expressed essentially the same principle in more detail, looking back to the judgment of the Court of Appeal in Apotex and foreshadowing the majority judgment in Patel.

He held that whether the claim should be barred should depend on the scope of the illegality, its seriousness and how central it was to the contract. Taking these into account, would disallowing the claim be a just and proportionate response?[[67]](#footnote-67)

So the cases in which the outcome may be doubtful include those in which the contract is essentially lawful, but there is an element of illegality in its terms or in its performance that is perhaps not as peripheral as the conduct in ParkingEye, but less than central. The test will be one of proportionality.

I turn to what is said in Patel about quantum meruit.

The difficulty with a quantum meruit claim in the context of illegality is that it may be an indirect means of enforcing the illegal contract, sometimes even by recovery of exactly the same amount as would be contractually due.

On the other hand, it can be argued that, if there is now a general rule that a claim for unjust enrichment will succeed to enable the claimant to recover money or property transferred under an illegal contract, the same should apply to valuable services rendered under an illegal contract.

However, the difficulty with that argument will sometimes be that the rendering of the services would have been an illegal act, even if not under the contract, in which case a quantum meruit would allow recovery for what is illegal.

For example, it is now a criminal offence, under sections 34 and 35 of the Immigration Act 2016, for an illegal immigrant to be employed in the UK. Illegality would be as much an objection to a claim for a quantum meruit as to a claim for contractual wages.

The Supreme Court in Patel did not suggest that claims for a quantum meruit should generally be allowed, but it did approve the decision of the Court of Appeal in Mohamed v. Alaga & Co[[68]](#footnote-68). In that case, the plaintiff sought to enforce a contract (illegal under the Solicitors Act 1974) to share fees charged to clients introduced by him. The contractual claim was dismissed, but a quantum meruit was allowed for a reasonable sum for his lawful services. There was no prohibition against remuneration for introductions generally, only against fee sharing.

The grounds for the decision were that the court was not enforcing the illegal contract, but merely allowing a claim for services lawfully provided, and also that the claimant was probably ignorant of the prohibition and significantly less blameworthy.

There are also dicta in the speeches of both Lord Toulson and Lord Sumption in Patel suggesting that illegal immigrants who enter into employment contracts and are less blameworthy than the employers may be allowed to recover on a quantum meruit. Lord Toulson referred with approval to the decision of the New York Supreme Court (Appellate Division) in Nizamuddowlah v. Bangal Cabaret Inc*.* allowing a quantum meruit based on the minimum wage, for services provided by an illegal immigrant who knew he was not allowed to work, where the defendant was the main culprit, intent on evading the immigration laws. Lord Sumption referred to the same case, and said that a claim for a quantum meruit might similarly have succeeded in Hounga, where the claimant had been illegally trafficked from her home country[[69]](#footnote-69).

The position is therefore open. There is an argument for a general rule allowing quantum meruit claims, but thus far the decision in Mohamed v. Alaga and the dicta in Patel suggest that such claims may be limited to cases where either (a) the claim is for services which it was lawful to provide, or (b) to allow the claim is not an indirect means of enforcing an unlawful contract or (c) the claimant is less blameworthy and has broad merits, because of overtones of exploitation.

In conclusion, Patel v. Mirza represents a determined effort by the Supreme Court to rationalise previously incoherent law and will, as my title suggests, result in less frequent victories for undeserving defendants.

That will certainly be so where the claim is for recovery of money or property transferred under illegal transactions. Parties to such transactions are now entitled to reverse its effects, if that remains possible, whether or not the transaction has been performed.

And in my view it will often be so in other cases. The starting point will be the old principle, as restated by Lord Sumption. Is the court being asked to give effect to the illegal transaction or to a right derived from it

But even if it is, it may be disproportionate or not in the public interest to bar the claim.

And it may sometimes be possible, even if the claim is barred, to find a way to deprive the defendants of their gains.

Nicholas Strauss Q.C.

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More detailed views are set out in articles in 132 L.Q.R. 236 and 2016 Restitution Law Review 145.

1. [2016] UKSC 42. [↑](#footnote-ref-1)
2. [1775] 1 Cowp. 341, 343. [↑](#footnote-ref-2)
3. Patel at [164]. [↑](#footnote-ref-3)
4. Patel at [265]. [↑](#footnote-ref-4)
5. Law Commission Report no. 320 para. 3.5. [↑](#footnote-ref-5)
6. Parkingeye Ltd v. Somerfield Stores Ltd [2013] Q.B. 740 at [28] per Sir Robin Jacob. [↑](#footnote-ref-6)
7. Patel v. Mirza [2014] EWCA (Civ) at [49]. [↑](#footnote-ref-7)
8. Les Laboratoires Servier v. Apotex Inc.[2015] A./C. 430 at [14] per Lord Sumption. [↑](#footnote-ref-8)
9. [1994] 1 A.C. 340. [↑](#footnote-ref-9)
10. Ibid at 362E. [↑](#footnote-ref-10)
11. [1992] Ch. 310. [↑](#footnote-ref-11)
12. [1994] 1 A.C. at 358E-F. [↑](#footnote-ref-12)
13. [1994] A.C. 340 at 374E per Lord Browne-Wilkinson. [↑](#footnote-ref-13)
14. [2002] BPIR 1057. [↑](#footnote-ref-14)
15. Patel at [233]. [↑](#footnote-ref-15)
16. Patel at [239]. [↑](#footnote-ref-16)
17. Patel at [199]. [↑](#footnote-ref-17)
18. Patel at [115]. [↑](#footnote-ref-18)
19. Patel at [109]. [↑](#footnote-ref-19)
20. (1801) 2 Bos. & Paul. 467, 471. [↑](#footnote-ref-20)
21. Patel at [116]. [↑](#footnote-ref-21)
22. Patel at [136,254]. [↑](#footnote-ref-22)
23. Patel at [258]. [↑](#footnote-ref-23)
24. Patel at [202]. [↑](#footnote-ref-24)
25. Patel at [167-70, 197, 216, 253]. [↑](#footnote-ref-25)
26. See Erlanger v. New Sombrero Phosphate Co. (1878) 3 App. Cases 1218, 1278; O’Sullivan v. Management Agency and Music Ltd [1985] Q.B. 458, 466. [↑](#footnote-ref-26)
27. [2015] 1 W.L.R. 24. [↑](#footnote-ref-27)
28. (1893) 9 L.Q.R. 197. [↑](#footnote-ref-28)
29. Patel at [182]. [↑](#footnote-ref-29)
30. [2014] 1 W.L.R. 1889. [↑](#footnote-ref-30)
31. Ibid at [42]. [↑](#footnote-ref-31)
32. Ibid at [48-52]. [↑](#footnote-ref-32)
33. [2015] A.C. 430. [↑](#footnote-ref-33)
34. [2013] Bus. L.R. 80 at [73].. [↑](#footnote-ref-34)
35. [2015] A.C. 430 at [62]. [↑](#footnote-ref-35)
36. Ibid at [20-1]. [↑](#footnote-ref-36)
37. [2016] A.C. 1. [↑](#footnote-ref-37)
38. Ibid at [15]. [↑](#footnote-ref-38)
39. Patel at [160, 174-5]. [↑](#footnote-ref-39)
40. (1993) S.C.R. 159 esp. at 175-6, 179-80. [↑](#footnote-ref-40)
41. Patel at [233] and at [192, 202] per Lord Mance. [↑](#footnote-ref-41)
42. [2013] Q.B. 740. [↑](#footnote-ref-42)
43. Patel at [120]. [↑](#footnote-ref-43)
44. Patel at [93]. [↑](#footnote-ref-44)
45. Patel at [107]. [↑](#footnote-ref-45)
46. [1939] A.C. 277, 293. [↑](#footnote-ref-46)
47. [2004] 2 A.C. 519 at [60]. [↑](#footnote-ref-47)
48. Patel at [108]. [↑](#footnote-ref-48)
49. Laboratoires Servier v. Apotex Inc. [2015] A.C. 430 at [23-8]. [↑](#footnote-ref-49)
50. (1995) 184 C.L.R. 538. [↑](#footnote-ref-50)
51. Patel at [206]. [↑](#footnote-ref-51)
52. 133 L.Q.R. 14 (James Goudkamp). [↑](#footnote-ref-52)
53. [2015] A.C. 430 at [14]. [↑](#footnote-ref-53)
54. Patel at [113]. [↑](#footnote-ref-54)
55. Patel at [157-8]. [↑](#footnote-ref-55)
56. Patel at [263]. [↑](#footnote-ref-56)
57. Patel at [175] per Lord Neuberger. [↑](#footnote-ref-57)
58. Patel at [164-6, 204]. [↑](#footnote-ref-58)
59. [2016] EWHC (QB) 3275. [↑](#footnote-ref-59)
60. [1998] Q.B. 978; [2009] 1 A.C. 1339. [↑](#footnote-ref-60)
61. [1901] A.C. 495. [↑](#footnote-ref-61)
62. (1945) 62 T.L.R. 85; [1951] 2 All E.R. 264. [↑](#footnote-ref-62)
63. [1944] 1 K.B. 718. [↑](#footnote-ref-63)
64. [1987] 1 W.L.R. 1118, 1134. [↑](#footnote-ref-64)
65. [2013] Q.B. 740. [↑](#footnote-ref-65)
66. Ibid at [38-9]. [↑](#footnote-ref-66)
67. Ibid at [64 et seq]. [↑](#footnote-ref-67)
68. [2000] 1 W.L.R. 1815. [↑](#footnote-ref-68)
69. Patel at [62-6, 243]. [↑](#footnote-ref-69)