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Lecture

JONES DAY PROFESSORSHIP OF COMMERCIAL LAW LECTURE 2019 – "THE STATE OF ILLEGALITY"

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1 Can a nation's legal culture be defined by one legal doctrine – or even one case? The doctrine of illegality, and recent decisions in England and Singapore on its operation, may serve to define each state's legal culture, including judicial attitudes to the act of judging. Justice Finn[1] once said, specifically of the legal culture in England and Australia (but Singapore could be included as well), that there are "differing casts of mind, distinctive methodologies and markedly different contexts". But bearing in mind our shared sources of law, perhaps our legal cultures are not so different after all. Analysis of the approach to illegality will cast a useful spotlight on these differences and similarities.

2 In England, two judicial factions have emerged as regards the interpretation of illegality which, superficially at least, can be characterised as the anti- and pro-discretion camps. On one side are those judges who wish to adopt a rule-based approach; one which is founded on reason, logic and the rule of law. For these justices predictability of result is vital and the uncertainty of judicial discretion makes it unacceptable; they tend to come from the commercial practice tradition. The other faction appears more concerned with the desire to reach the just result on the facts by resorting to the exercise of judicial discretion. The identification of these factions is, however, an unsophisticated caricature. The reality is more complex and subtle, although it is clear that some justices are more comfortable with the notion of judicial discretion than others.

3 In Singapore there is, perhaps, less of a conflict, with a greater acceptance of the importance of rules and the need for certainty, but, of

1 "Common Law Divergences" (2013) 37 *Melbourne University Law Review* 509 at 511.

course, the need for justice and fairness remains vital. This approach has been reflected particularly clearly by Andrew Phang who has said:[2]

> [F]airness and justice, though, must be achieved in a principled manner – in accordance with the existing rules and principles (or by way of a principled application and/or extension of them).

The need to balance certainty and fairness, whilst respecting long-standing legal doctrine, runs throughout our legal systems. It is especially significant in private law and it is in the context of the doctrine of illegality that the different approaches are most apparent. But might there be a way to balance certainty, the rule of law, fairness and justice? That is what this lecture will examine.

I. What is discretion?

4 Before the law on illegality is considered, it is important to reflect on the function of judicial discretion, which has often been regarded as the solution to the illegality problem but also used as a weapon to attack sloppiness of legal thinking.

5 The language of judicial discretion appears to allow for the judge to secure what he or she considers to be the just result with reference to the particular facts of the case. That was certainly the view of Sir Thomas More writing 500 years ago in *Utopia*:[3]

> The law and Judges should avoid arcane interpretations and debates about law but should instead judge the overall equity or justice of a situation and decide accordingly.

But the consequent lack of certainty and predictability has been a cause of concern. In *Doe v Kersey* in 1795 Lord Camden said:[4]

> The discretion of a Judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, in temper and passion. In the best it is often times caprice; in the worst it is every vice, folly and passion to which human nature is liable.

2 Andrew Phang, "The Intractable Problems of Illegality and Public Policy in the Law of Contract – A Comparative Perspective" in *Essays in Memory of Professor Jill Poole: Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Rob Merkin & James Devenney eds) (Routledge, 2018) at p 180.

3 Thomas More, *Utopia* Book 1 (1516) at p 45.

4 (1795), quoted in *Bouvier's Law Dictionary* (1839).

But this simple equation of judicial discretion with arbitrary choice lacks sophistication. In an important and helpful analysis H L A Hart[5] argued that discretion is fundamentally different from arbitrary choice: discretion by its nature is guided by rational principles, so that a decision which is not susceptible to principled justification is not an exercise of discretion at all but simply an arbitrary choice, and it is this which should be considered to be contrary to the rule of law. Hart rejected arbitrary choice as a basis for judicial decision-making. He was right to do so. Judges must, by virtue of their office, act judicially and not arbitrarily, but this does not prevent them from exercising discretion as long as that exercise can be justified by reference to recognised principles. The key question will then be what principles, or reasons of general application,[6] might be identified. This will depend on the particular body of law which is being considered.

6 This analysis of discretion identifies a basis for the recognition of a middle way between the operation of strict rules on the one hand and arbitrary choice, which is dependent on careful assessment of the facts, on the other. That model requires the identification of a rule which can then be modified by the application of recognised principles as determined by the particular facts of the case. It is this model which can provide the solution to the disagreement about the operation of illegality.

II. Illegality in England

A. Background

7 Confusion about the operation of the illegality defence runs throughout the law of obligations in English law.[7] The defence of illegality is traditionally formulated as a rule. It applies in the form of the maxim *ex turpi causa non oritur actio* ("No action can arise from a base cause"),[8] meaning that the courts will not assist a claimant to obtain a remedy where the action is founded on illegal conduct. It is influenced

5 "Discretion", written in 1956 and published in (2013) 127 Harv L Rev 652.

6 John Gardner, "Ashworth on Principles" in *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Lucia Zedner & Julian Roberts eds) (Oxford: Oxford University Press, 2012) at p 9.

7 For tort see Graham Virgo, "Illegality's Role in the Law of Tort" in *Unravelling Tort and Crime* (Matthew Dyson ed) (Cambridge: Cambridge University Press, 2014) ch 7. For unjust enrichment see Graham Virgo, "The Defence of Illegality in Unjust Enrichment" in *Defences in Unjust Enrichment* (Andrew Dyson, James Goudkamp & Frederick Wilmot-Smith eds) (Oxford: Hart Publishing, 2016) ch 8.

8 *Holman v Johnson* (1775) 1 Cowp 341 at 343, *per* Lord Mansfield. See also *Muckleston v Brown* (1801) 6 Ves Jun 52 at 69, *per* Lord Eldon LC.

by external considerations of public policy rather than securing justice between the parties.[9] As Lord Goff said in *Tinsley v Milligan*:[10]

> [I]t is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation. Moreover the principle allows no room for the exercise of any discretion by the court in favour of one party or the other.

In *Les Laboratoires Servier v Apotex Inc*,[11] Lord Sumption emphasised that the defence was not based "on the perceived balance of merits between the parties to any particular dispute",[12] thus squarely placing it within the external relationship between the court and the claimant,[13] rather than the internal relationship between the claimant and the defendant.

8 Lord Mance has written, extra-judicially, that "the underlying problem [is] of how to react to illegal behaviour".[14] Inherent in this statement is the assumption that the defence of illegality should not necessarily be absolute in its application, and that in certain cases, such as where the illegality is minor or the defendant is more responsible than the claimant for participation in the illegal transaction, a claim tainted[15] by illegality should nonetheless be recognised by the courts. For instance, where the effect of rendering the claim unenforceable is wholly out of proportion to the illegal behaviour, "most people's moral instincts"[16] would be that the defence should not apply. It was for this reason that the Judiciary sought to temper the strict rule to secure justice. For a few years in the 1980s this was achieved through the reformulation of the illegality defence by reference to the public conscience test, whereby the defence would only be applied if the public conscience would be affronted if relief was granted. This test originated in *Thackwell v Barclays Bank plc*,[17] where an action for conversion failed by virtue of the illegality defence, but only after the court had considered all the circumstances of the case, including the nature of the illegality, to determine whether the granting of a remedy to the claimant

9 *Hounga v Allen* [2014] UKSC 47; [2014] ICR 847 at [42], *per* Lord Wilson and [55], *per* Lord Hughes; *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] AC 430 at [13], *per* Lord Sumption.

10 [1994] 1 AC 340 at 355.

11 [2014] UKSC 55; [2015] AC 430.

12 *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] AC 430 at [13].

13 See *Hounga v Allen* [2014] UKSC 47; [2014] ICR 847 at [56], *per* Lord Hughes.

14 Lord Mance, "*Ex Turpi Causa* – When Latin Avoids Liability" (2014) 18 Edin LR 175.

15 Alexander Loke, "Tainting Illegality" (2014) 34(4) LS 560.

16 Lord Sumption, "Reflections on the Law of Illegality" [2012] RLR 1 at 2.

17 [1986] 1 All ER 676. See also *Saunders v Edwards* [1987] 1 WLR 1116; *Howard v Shirlstar Container Transport Ltd* [1990] 1 WLR 1292; and *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1.

would be seen to be indirectly assisting or encouraging his criminal act. A remedy was eventually denied because the claimant had been a knowing party to a fraudulent transaction. The public conscience test was, however, rejected by the House of Lords in *Tinsley v Milligan*, on the ground that it was inconsistent with previous authority and that it would replace a principled system of rules with a discretionary balancing operation.[18]

9 The rejection of the public conscience test was surely correct. The application of the test resulted in inconsistent decisions,[19] often turning on judicial outrage arising from the facts of the case.[20] Justice is dependent on a high degree of predictability, which is lacking under the public conscience test. But, even though subsequent cases have not resurrected the test, there remains a clear judicial desire to temper the rigidity of the *ex turpi causa* rule to avoid unjust results. But the *ex turpi causa* rule was never absolute; it has always been qualified by various doctrines to limit its operation.

(1) No reliance on illegality

10 Since the illegality defence is typically formulated in terms of the claimant being prevented from relying on the illegality to establish the claim,[21] it follows that a claim may succeed where its elements can be established without needing to rely on the illegality.[22] In *Tinsley v Milligan*[23] a majority of the House of Lords recognised that Miss Milligan could vindicate her equitable proprietary right even though she had participated in an illegal transaction, since, having contributed to the purchase of a property which had been put into Miss Tinsley's sole name, the presumption of resulting trust was engaged without needing to plead the illegality. If, however, the claimant needed to refer to illegality to make good the claim, it would be defeated by the illegality defence.[24] But whether the claimant can establish the claim without relying on illegality turns on chance. *Tinsley v Milligan* would have been different had the presumption of advancement applied, for then the claimant would have needed to plead the illegal agreement to

18 *Tinsley v Milligan* [1994] AC 340 at 358–361, *per* Lord Goff, and 363–364 and 369, *per* Lord Browne-Wilkinson.

19 *Tinsley v Milligan* [1994] AC 340 at 363, *per* Lord Goff.

20 *Hewison v Meridian Shipping Services Pte Ltd* [2002] EWCA Civ 1821; [2003] ICR 766 at 788–789, *per* Ward LJ.

21 See *Holman v Johnson* (1775) 1 Cowp 341 at 343, *per* Lord Mansfield, and *Stone and Rolls v Moore Stephens* [2009] UKHL 39, [2009] 1 AC 1391 at [86], *per* Lord Phillips.

22 See *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65.

23 [1994] 1 AC 340 at 376, *per* Lord Browne-Wilkinson.

24 *Patel v Mirza* [2014] EWCA Civ 1047; [2015] Ch 271 at [20], *per* Rimer LJ, and [102], *per* Vos LJ.

rebut the presumption. The validity of the no-reliance principle has anyway been doubted. In *Stone and Rolls Ltd v Moore Stephens*,[25] Lord Phillips said:[26]

> I do not believe … that it is right to proceed on the basis that the reliance test can automatically be applied as a rule of thumb. It is necessary to give consideration to the policy underlying *ex turpi causa* in order to decide whether this defence is bound to defeat [the claimant's] claim.

(2) Withdrawal from an illegal transaction

11 Where the claimant has effectively withdrawn from an illegal transaction before any part of it has been performed he or she will no longer be tainted by the illegality and restitution will be awarded. This withdrawal principle, otherwise known as the *locus poenitentiae*, has long been recognised as a reason why a claim should succeed despite the taint of illegality.[27] Whilst originally the principle required proof of repentance by the claimant,[28] over time this requirement was dropped,[29] it being sufficient that the claimant has sought to distance him or herself from the illegality, even if this occurred for reasons outside the claimant's control, such as because the transaction had been frustrated;[30] withdrawal does not require any voluntary change of mind on the part of the claimant. The operation of this radically reinterpreted principle is illustrated by *Tribe v Tribe*.[31] The claimant feared that he would be forced to sell his shares in the family business to meet potential liabilities to creditors. Consequently, he transferred them to his son, who never paid for them and was never intended to do so. This transfer of shares was an illegal transaction because the claimant's purpose was to defraud his creditors. No creditors were deceived, however, because alternative arrangements were made which prevented the liabilities from arising. Once the risk that the assets would be taken had passed, the claimant requested his son to return the shares to him, but he refused to do so. Since the equitable presumption of advancement applies in respect of transfers of property from a father to his son, it was presumed that the claimant had given the shares to his son. To rebut this presumption the claimant needed to plead his purpose that the shares were not transferred to the son absolutely, but only until the threat from his creditors had passed, but this was an illegal purpose on which he could

25 [2009] UKHL 39; [2009] 1 AC 1391.
26 *Stone and Rolls Ltd v Moore Stephens* [2009] UKHL 39; [2009] 1 AC 1391 at [25].
27 See *Taylor v Bowers* (1876) 1 QBD 291.
28 *Bigos v Bousted* [1951] 1 All ER 92.
29 *Tribe v Tribe* [1996] Ch 107 at 135, *per* Millett LJ.
30 As had been recognised by the Court of Appeal in *Patel v Mirza* [2014] EWCA Civ 1047; [2015] Ch 271.
31 [1996] Ch 107.

not rely. Despite this, the Court of Appeal held that the father had withdrawn from the illegal transaction because no part of the illegal purpose had been carried into effect, since no creditors had been deceived. Consequently, he ceased to be tainted by the illegality and so was able to plead his true intention in transferring the shares to his son. If, however, the illegal purpose had been carried into effect, even if only partly, restitution would not be available.[32]

(3) The parties are not in pari delicto

12 In *Holman v Johnson*[33] Lord Mansfield recognised the *in pari delicto est conditio defendentis* principle ("in the case of mutual fault, the position of the defendant is the stronger one"), which enables the court to determine whether the claimant is less responsible for the illegality than the defendant, for then the claimant should not be denied relief since the parties are not *in pari delicto*. But where the claimant is more responsible for the illegality or the parties are considered to be equally responsible, the *in pari delicto* principle applies and the claim will fail. The operation of this principle is illustrated by *Mohamed v Alaga and Co*,[34] where the claimant sued the defendant firm of solicitors for work done in preparing and presenting asylum claims. A contract between the claimant and the defendant concerning payment to the claimant for the introduction of clients to the defendant was illegal as it was an unlawful fee-sharing agreement, but the claimant's restitutionary claim succeeded as regards the professional work he had legitimately done, because the claimant was less responsible for the illegality than the defendant firm of solicitors, which was assumed to know the rules of the profession.[35]

(4) The policy behind the illegality

13 In Australia the operation of the illegality defence is determined by reference to the policy of the law by virtue of which the relevant transaction was found to have been illegal.[36] The significance of this is illustrated by *Equus Corp Pty Ltd v Haxton*.[37] Money had been advanced under loan agreements which were made in furtherance of an illegal purpose to get tax deductions through an investment scheme in blueberry farms. The claimant sought restitution of the money which had been transferred to the defendant, but it was held that the illegality which rendered the loan agreements unenforceable also denied the

32 *Collier v Collier* [2002] EWCA Civ 1095; [2002] BIPR 1057.
33 (1775) 1 Cowp 341 at 343.
34 [2000] 1 WLR 1815.
35 *Cf Awwad v Geraght and Co* [2001] QB 570, where the claimant was a partner in the firm of solicitors.
36 *Nelson v Nelson* (1995) 184 CLR 538.
37 [2012] HCA 7. See also *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446.

restitutionary claim, by reference to the scope and purpose of the statute which rendered the transaction illegal, particularly the purpose of protecting the class of persons from whom the claimant sought restitution.

(5) Close connection or inextricable link

14 A further mechanism to limit the operation of the illegality defence is whether there is a sufficiently close connection or inextricable link between the claim and the illegality that the court cannot permit the claimant to recover without appearing to condone the illegal conduct.[38] This was recognised by the Supreme Court in *Les Laboratoires Servier v Apotex*,[39] in holding that the turpitude must be sufficiently related to the claim in order to defeat it.

B. ***Rule*** **versus** ***discretion***

15 But this principled approach to illegality has not been recognised consistently by the Supreme Court. In *Les Laboratoires Servier v Apotex Inc*, although the Supreme Court held that a claim for damages should succeed on the ground that the illegality defence was not engaged on the facts, the justices' judgments reflected a fundamental division of approach.[40] The Court of Appeal had approached the defence on the basis that "it required in each case … an intense analysis of the particular facts and of the proper application of the various policy considerations underlying the illegality principle so as to produce a just and proportionate response to the illegality".[41] This approach was specifically rejected by Lord Sumption, with whom Lords Neuberger and Clarke agreed. Lord Sumption emphasised that the defence was grounded on general rules of law and was not a mere discretionary power, involving fact-based evaluations of the effect of the rules in individual cases.[42] He considered the only key issues to be whether the relevant conduct involved sufficient turpitude and whether this was sufficiently related to the claim.[43]

16 This strict approach to illegality can be contrasted with that of Lord Toulson in the same case, who refused to criticise the approach of

38 *Cross v Kirby* [2000] EWCA Civ 426 at [76], *per* Beldam LJ.
39 [2014] UKSC 55; [2015] AC 430 at [22], *per* Lord Sumption.
40 Described by Lord Sumption as a "long-standing schism": *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [226].
41 *Les Laboratoires Servier v Apotex Inc* [2012] EWCA Civ 593; [2013] Bus LR 80 at [75], *per* Etherton LJ.
42 *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] AC 430 at [13] and [22]. See also the judgment of Lord Mance.
43 *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] AC 430 at [22].

the Court of Appeal and who considered that, when determining whether the illegality defence should apply, "it is right to proceed carefully on a case by case basis, considering the policies which underlie the broad principle".[44] This is also the approach which was adopted by a differently constituted Supreme Court in the earlier decision of *Hounga v Allen*.[45] That court held that a claim in tort for race discrimination,[46] following wrongful dismissal from employment, succeeded, even though the claimant was an illegal immigrant who knew that it was illegal to work in the UK. This had been sufficient for the Court of Appeal to dismiss her claim. But the Supreme Court considered that the illegality defence was not engaged, explicitly for policy reasons. Crucially, Lord Wilson said, in the judgment of the majority, that it was necessary, first, to ask, "What is the aspect of public policy which founds the defence?" and, second, "But is there another aspect of public policy to which application of the defence would run counter?"[47] Lord Hughes, with whose judgment Lord Carnwath agreed, emphasised that in assessing what public policy requires, it is necessary to have regard to various factors, including the gravity of the illegality and the claimant's knowledge of it.[48]

17 Subsequently in *Jetivia SA v Bilta (UK) Ltd*[49] the disagreement between the justices was reinforced, with Lord Sumption again emphasising the rule-based interpretation and Lords Toulson and Hodge the policy-based, context-dependent interpretation of the defence. Lord Neuberger,[50] with whom Lords Clarke, Carnwath and Mance agreed, identified the disagreement, but refused to resolve it, preferring the matter to be considered as soon as possible and preferably by a panel of nine justices. Lord Neuberger summarised the spectrum of views as "epitomising the familiar tension between the need for principle, clarity and certainty in the law with the equally important desire to achieve a fair and appropriate result in each case",[51] or, in other words, a rule of public policy, which applies automatically if certain conditions are met, or a discretion founded on justice to secure a fair result following careful consideration of the factual context of the case.

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44 *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] AC 430 at [57]. See also *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 AC 1339 at 1370, [30], *per* Lord Hoffmann, and *Stone and Rolls Ltd v Moore Stephens* [2009] UKHL 39; [2009] 1 AC 1391 at [25], *per* Lord Phillips.

45 [2014] UKSC 47; [2014] ICR 847.

46 Contrary to s 4(2)(c) of the UK Race Relations Act 1976 (c 74). See now s 39(2)(c) of the UK Equality Act 2010 (c 15).

47 *Hounga v Allen* [2014] UKSC 47; [2014] ICR 847 at [42], with whom Baroness Hale and Lord Kerr agreed.

48 *Hounga v Allen* [2014] UKSC 47; [2014] ICR 847 at [55].

49 [2015] UKSC 23; [2016] AC 1.

50 *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23; [2016] AC 1 at [14].

51 *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23; [2016] AC 1 at [13].

18 A nine-panel Supreme Court resolved this disagreement finally in *Patel v Mirza*.[52]

C. Patel v Mirza

19 The respondent had transferred £620,000 to the appellant, a city trader who had suggested the scheme, so that the appellant could use the money to bet on share price movements based on inside information. Such insider dealing is a crime under Pt V of the Criminal Justice Act 1993.[53] The inside information was not forthcoming and so the agreement was not carried out. The respondent sought restitution of the money paid on the ground that the appellant had been unjustly enriched at his expense, the ground of restitution being that the basis for the transfer had failed totally. Because the parties had committed a conspiracy to commit insider dealing, and so were tainted by illegality, the appellant refused to make restitution.

20 The trial judge had dismissed the restitutionary claim on the basis that the illegality barred the court from granting any remedy. This was rejected by the Court of Appeal[54] on the ground that the respondent had withdrawn from the transaction because it had been frustrated. In the Supreme Court the nine justices unanimously held that the respondent should recover the money he had paid to the appellant. The logic of restitution prevailed, despite the taint of illegality arising from the conspiracy to commit insider dealing, such that all the justices recognised that it was appropriate to restore the *status quo* rather than to allow the appellant to profit from his participation in the illegal transaction. As Lord Sumption recognised,[55] "an order for restitution would not give effect to the illegal act or to any right derived from it". It appears to follow that there is very little role for the defence of illegality in the law of restitution, since the courts will be willing to unwind the transaction because the claimant will not profit from it. Illegality will be much more significant within the law of contract, since the courts will typically not enforce an illegal transaction. The role of illegality in the law of tort is more controversial, but it is likely that it too will not have a significant impact where the claimant is compensated for harm suffered because, again, this does not involve profiting from the illegality.

21 *Patel v Mirza* is of wider significance, however. There was consensus that the rationale behind the illegality defence is that it would be contrary to the public interest to enforce a claim if to do so would be

52 [2016] UKSC 42; [2017] AC 467.
53 c 44 (UK).
54 [2014] EWCA Civ 1047; [2015] Ch 271.
55 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [268].

harmful to the integrity of the legal system.[56] But just below the surface of this apparent consensus, the continuing tensions between rule *versus* discretion are easy to identify. On this issue the justices were split six to three, with the majority preferring a "range of factors" approach to that of a strict rule, and so appear to have opted for a discretionary approach to respond to illegality. This was reflected in the leading judgment of Lord Toulson, with whom Lady Hale and Lords Kerr, Wilson and Hodge agreed. The ratio of the case is as follows:[57]

> [O]ne cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law.

22 Clarification, or possibly obfuscation, of the operation of the trio of considerations was provided by Lords Toulson and Kerr. Consequently, the three considerations will operate in the following way:

> (a) It is necessary to consider the reasons why the conduct was made illegal, although no guidance was given as to how this should be achieved and why it is relevant to the operation of the defence. Further, Lord Kerr interpreted this test to mean "the reasons that a claimant's conduct should operate to bar him or her from a remedy which would otherwise be available",[58] which is significantly different from examining the purpose behind the illegality.
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> (b) Consideration of the policies which would be affected by denying the claim, but again it is unclear what these policies might be and how they might be identified.
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> (c) Various factors were identified to assess the question of proportionality of denying relief, although Lord Toulson emphasised that this was not a closed list because of the infinite possible variety of cases involving illegality. The identified factors included the seriousness of the conduct, its centrality to any contract and whether there was a marked disparity in the

56 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [120], *per* Lord Toulson.
57 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [101], *per* Lord Toulson. See also [120].
58 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [124].

> parties' respective culpability. But the question of proportionality requires a quantitative assessment against some objective guide, and no such guide was identified.

23 This "trio of considerations" was explicitly identified as discretionary. Lord Kerr considered it to be a "structured approach to a hitherto intractable problem" which "will promote, rather than detract from, consistency in the law".[59] But for Lords Sumption, Clarke and Mance the basket of factors approach was rejected for reasons of uncertainty, with Lord Mance describing it as "highly unspecific" and "non-legal"[60] and Lord Clarke as converting "a legal principle into an exercise of judicial discretion"[61] and close to reviving the public conscience test.[62] Lord Sumption considered this to be:[63]

> … far too vague and potentially far too wide to serve as the basis on which a person may be denied his legal rights. It converts a legal principle into an exercise of judicial discretion, in the process exhibiting all the vices of 'complexity, uncertainty, arbitrariness and lack of transparency' which Lord Toulson attributes to the present law.

24 Lord Toulson responded as follows. First, he considered the law already to be doctrinally riven with uncertainties. Secondly, he emphasised that uncertainty did not appear to be a problem in other jurisdictions which have adopted a relatively flexible approach to the illegality defence, such as New Zealand. Thirdly, he considered that the absence of certainty was not a relevant consideration when dealing with people who were contemplating unlawful activity. A similar view was expressed by Lord Kerr who said:[64]

> Certainty or predictability of outcome may be a laudable aim for those who seek the law's resolution of genuine, honest disputes. It is not a premium to which those engaged in disreputable conduct can claim automatic entitlement.

Lord Toulson did not consider that the framework he was proposing would mean that:[65]

> … 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 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [123].
60 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [206].
61 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [217].
62 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [219].
63 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [265].
64 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [137].
65 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [121].

25 But surely Lord Sumption's analysis is correct. Whilst the trio of considerations purport to be principled, there is a significant danger that when applied by a judge they will not provide the guidance to judicial decision-making that is required of a legal principle. It is, for example, unclear how the considerations were applied on the facts of *Patel v Mirza* itself, although it is clear that they did not operate to defeat the unjust enrichment claim. But the majority did not identify reasons why insider dealing was made a crime, or explain why this was relevant to the determination of how the defence applied. Neither were any policies identified which would have been affected had the claim been denied, nor was the question of proportionality considered explicitly. If this fear that the trio of considerations will collapse into an arbitrary choice without principled guidance proves to be correct, we may have gone full circle in the development of the law and returned to a test akin to the public conscience test,[66] which itself gave as little guidance to the judge as the new trio of considerations test actually does.

26 The effect of applying the trio of considerations to the facts of the case was that the respondent's participation in the illegality did not bar the claim for restitution. It appears that this will normally be the case once the elements of an unjust enrichment claim have been satisfied, although Lord Toulson acknowledged[67] that there might be rare cases where the circumstances of the illegality were such that the court should refuse its assistance to the claimant. Lord Kerr considered the facts more carefully. He balanced the wrongful retention of the money by the appellant against the respondent's illegality in entering into the transaction. He emphasised the importance of adopting a rounded assessment of the various public policy considerations at stake rather than simply returning the parties to their original position.

27 Lord Neuberger adopted a more nuanced approach. He identified a "Rule"[68] within the law of unjust enrichment by virtue of which the claimant is entitled to the return of money paid despite the taint of illegality, even where the contemplated illegal activity has been performed in whole or in part. He considered this Rule to be applicable to any contract where the illegality would prevent the court from being able to order specific performance or award damages for breach.[69] He considered that the Rule was consistent with authority, and that it accorded with policy, since there is an "obvious attraction in the notion that, if all transfers made pursuant to an unexecuted illegal contract are re-transferred, then the parties are back in the position that they were,

66 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [219], *per* Lord Clarke.
67 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [116].
68 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [146].
69 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [159].

i.e. as if there had been no illegal contract".[70] He emphasised that the *prima facie* outcome of applying the Rule is "*restitution in integrum*".[71] The Rule was, however, subject to principled exceptions,[72] such as where one of the parties is in a class which is intended to be protected by the criminal legislation or where the defendant was unaware of the facts which gave rise to the illegality.

28 Although Lord Neuberger considered that the Rule would establish a "degree of clarity and certainty"[73] he went on to adopt Lord Toulson's "trio of considerations" to determine when the Rule should be disapplied. In fact, despite the different language used by Lords Neuberger and Toulson, their approach to the illegality defence can be considered to be virtually identical. The starting point is that the illegality defence does not apply to defeat a claim in unjust enrichment, save where exceptionally the defence is applied. If there is a difference between the two approaches, it is that Lord Toulson explicitly acknowledged that application of the illegality defence is likely to be rare, although Lord Neuberger's emphasis on the Rule suggests that he too would consider the application of the illegality defence to be exceptional. Significantly he said:[74]

> Once a judge is required to take into account a significant number of relevant factors, and the question of how much weight to give each of them is a matter for the judge, the difference between judgment and discretion is, I think, in practice pretty slight.

But does this not collapse discretion into arbitrary choice such that all his good work in developing the Rule and focusing on the need for certainty and clarity is dissipated? He continued to emphasise that the trio of considerations created a structured approach which was not akin in practice to a discretion, but he was using "discretion" in a pejorative sense and, in that sense, that is exactly what the trio of considerations becomes.

29 The remaining justices adopted a distinct approach to the illegality defence, which was restrictive and articulated as a rule. Whilst these justices purported to agree with each other's judgments, their approach to the illegality defence was distinctive. Lord Mance sought to adopt a limited role for the defence which did not deprive claimants of the opportunity "to put themselves in the position in which they should

70 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [154].
71 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [186].
72 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [161].
73 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [157].
74 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [173].

have been".[75] This seems very little different in effect to the approach of the majority.

30 But it is the approach adopted by Lord Sumption which draws out most significantly the difference between the minority and the majority and which was more consistent with the classical model of illegality. He said:[76]

> When the law of illegality is looked at as a whole, it is apparent that although governed by rules of law, a considerable measure of flexibility is inherent in those rules. In particular, they are qualified by principled exceptions for (i) cases in which the parties to the illegal act are not on the same legal footing and (ii) cases in which an overriding statutory policy requires that the claimant should have a remedy notwithstanding his participation in the illegal act.

This reflects the "middle way" and consequently judicial discretion properly defined, because the judge is not exercising an arbitrary choice but is making a decision with reference to identified principles. The trio of considerations of Lord Toulson might be analysed in similar terms as involving principled discretion rather than arbitrary choice, but the language of the tests is so vague it cannot properly be analysed as discretionary in the proper sense. Rather, it leaves open the possibility of judges resorting to arbitrary choice to determine how illegality should operate. For how is it possible to identify in a principled way the policies which militate against or are in favour of awarding a remedy and determining whether the denial of relief is disproportionate? These three considerations will readily collapse into one and take English law perilously close to resurrecting the public conscience test and the arbitrary choice which inexorably followed.

31 In the typical case where a claim in unjust enrichment has been tainted by illegality, the claimant has transferred a benefit to the defendant pursuant to a contract. In order to obtain restitution it is necessary to show that the transaction is no longer effective, which can be established by pleading the illegality which renders the contract void. But, following the rejection of the no-reliance principle by the majority in *Patel v Mirza*, that the claimant needs to rely on the illegality to establish the claim is no longer a bar to a claim. But it is still necessary to establish a ground of restitution. Where the contract is unexecuted, as it was in *Patel v Mirza*, this will be total failure of basis. But what if the basis has only partially failed or even has not failed at all? So, for example, if in *Patel v Mirza* the appellant had invested some of the money which he had received from the respondent, would it still be

75 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [192].
76 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [264].

possible to obtain restitution? Applying orthodox unjust enrichment law, the answer will be "no" because the partial failure of consideration is not recognised as a ground of restitution.[77] The fact, however, that an illegal contract is null and void might provide a basis for establishing a ground of restitution, because there can never be a valid legal basis for the defendant's receipt of the enrichment if the underlying contract was void from the start. This was recognised and expressed most clearly in the judgment of Lord Neuberger who described his Rule in favour of restitution as applying even where the contemplated illegal activity had been performed in whole or in part,[78] because "the law should not regard an inherently criminal act as effective consideration".[79] It would follow, therefore, that even if the appellant had invested £10,000 of the £620,000 in shares, the respondent should still be able to recover the £620,000, on the ground that the basis for the transaction had failed totally by virtue of the illegality. The fact that the appellant had invested £10,000 of the money should be taken into account through the operation of the defence of change of position, which admittedly may not apply by virtue of the taint of illegality.

32 Lords Neuberger and Sumption took the logic of the Rule in support of restitution as far as they could and did not seem especially concerned about the seriousness of the illegality when determining whether restitution should be awarded. They both accepted that if, for example, the claimant had paid money to the defendant to murder a third party, the claimant should be able to obtain restitution of the money even if the murder was committed, because there could never have been any valid consideration for such an illegal transaction.[80] This is certainly consistent with the principle that an illegal consideration is never a valid consideration such that, even if the defendant has done what the claimant wanted him or her to do, this should not be regarded as a valid performance of the contractual obligation because there never was a valid contract in the first place. Lord Toulson, and those concurring with his judgment, would presumably have balked at such a conclusion, which they might well have considered to be disproportionate in the light of the very serious nature of the illegality. Certainly if a payment relating to drug trafficking cannot be restored to the claimant by virtue of the seriousness of the illegality, it must follow that a payment to an assassin to commit murder should not be restored either; and such a result might be achieved through the deployment of the trio of considerations. Paradoxically, even Lord Neuberger contemplated that there might be cases where it would be inappropriate

77 *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574.
78 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [167].
79 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [176].
80 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [176], *per* Lord Neuberger, and [254], *per* Lord Sumption.

to apply the Rule in favour of restitution,[81] although he did not extend this to his subsequent analysis relating to murder.

D. Implications

33 One of the remaining issues relates to the extent to which the previous doctrines which limited the *ex turpi causa* principle remain relevant after the decision of the Supreme Court and whether any other doctrines are relevant.

(1) No reliance

34 The majority recognised that the no-reliance principle should be rejected. This is primarily because of its perceived procedural nature and its arbitrary consequences. It follows that a claim will not be defeated simply because the claimant needs to establish the illegality of the transaction to make the claim.

35 Even so, the majority considered that *Tinsley v Milligan* would have been decided the same way, but without the artifice of considering whether or not it was necessary to rely on the illegality to establish the claim. Rather, the majority would have required the nature of the illegality to be considered explicitly, but they would have concluded that it would have been disproportionate to have prevented Miss Milligan from enforcing her equitable proprietary interest which had arisen under a resulting trust, because this would have resulted in Miss Tinsley being unjustly enriched.[82]

(2) Withdrawal

36 The continued operation of the withdrawal doctrine, allowing a claim to succeed if the claimant has voluntarily withdrawn from the illegal transaction, is doubtful following *Patel v Mirza*. Lord Toulson did not consider that this doctrine was relevant on the facts of the case, so he did not examine it. But the doctrine appears to be inconsistent with the trio of considerations which he identified, or, if it remains relevant, it will be subsumed into one of the relevant factors to assess the disproportionality of denying relief. Lords Neuberger and Sumption did consider the doctrine still to be relevant and they reanalysed it. They rejected the previous connotations of repentance and the need for voluntary withdrawal from the transaction. Rather, they considered that the doctrine appears to be simply that, because the basis for an illegal

81 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [177].

82 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [110], *per* Lord Toulson, and [136], *per* Lord Clarke.

transaction will always fail as a matter of law since the basis is unlawful, restitution should generally be available in the normal way. It follows that *Tribe v Tribe* would presumably be decided in the same way, with restitution being awarded because no part of the illegal purpose had been satisfied, save if the application of the trio of considerations would defeat the claim.

(3) Confiscation

37 Any analysis of the impact of illegality on private law claims must not ignore the public law dimension which could serve to fulfil the prime function of the private law claim, by ensuring that the defendant is deprived of his or her enrichment, but through confiscation to the State rather than restitution to the claimant. This could be effected in many cases involving illegality through the operation of the Proceeds of Crime Act 2002.[83]

38 The confiscatory powers under the Proceeds of Crime Act 2002 were not engaged in *Patel v Mirza*. Following restitution to the respondent it is no longer possible to engage these powers, since restitution operates to turn back time so that the money restored to the respondent can no longer be characterised as the proceeds of crime in his hands. And it has been recognised that once the money has been restored a confiscation order will not be made.[84] If, however, the appellant had been allowed to keep the money, it might still be forfeit under the Proceeds of Crime Act as the proceeds of crime. This might be considered to be the most equitable result in a case such as this, and it is one which St Thomas Aquinas in *Summa Theologica* advocated,[85] namely that neither party should have the money but that it should be paid to a charity. Whilst payment to a charity is not an option, confiscation by the State is, and continues to be so since the Proceeds of Crime Act applies even if the defendant has not been convicted of a crime. Whilst neither Patel nor Mirza had been convicted of or even charged with a crime, the £620,000 received by Mirza did constitute the proceeds of crime and could have been confiscated. Crucially, however, the application of the Proceeds of Crime Act is a matter for the State and cannot be instituted by the courts, or replicated by it.[86]

83 c 29 (UK).

84 *Waya* [2012] UKSC 51; [2013] 1 AC 294 at [28], *per* Lord Walker and Hughes LJ.

85 Quoted by Lord Sumption in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [254]. See also [185], *per* Lord Neuberger.

86 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [185], *per* Lord Neuberger, and [188], *per* Lord Mance.

III. Illegality in Singapore

39 In Singapore, a decision of the Court of Appeal in *Ochroid Trading Ltd v Chua Siok Lui*[87] ("*Ochroid*") in 2018 rejected the approach adopted by the UK Supreme Court, particularly the reliance on the range of factors. The case concerned a claim for recovery of money paid pursuant to illegal moneylending contracts.[88] Andrew Phang Boon Leong JA specifically characterised the decision in *Patel v Mirza* as "dramatically" shifting the law "by replacing the traditional rule-based approach towards the doctrine of illegality with a discretionary policy-based test".[89]

40 Over 740 agreements had been made to lend more than S$58m. The borrower had failed to repay over S$10m and the lender claimed for breach of contract for the entire outstanding sum and in unjust enrichment for the unpaid principal sum. It was found that the contract was illegal as a moneylending transaction and that the claimants were unlicensed moneylenders. It was held that, because it was illegal, the contract could not be enforced. The claim for unjust enrichment did not succeed either.

41 In a wide-ranging judgment the court considered the state of the doctrine of illegality in Singapore and whether, in the light of the decision in *Patel v Mirza*, the law needed to change.

42 The court identified a number of core principles:[90]

(a) The law needs to be straightforward as possible.

(b) The law needs to achieve justice and fairness.

(c) The law needs to uphold the integrity of the legal system.

(d) There needs to be a legal framework which is as comprehensible as possible and is practically workable.

(e) In Singapore a discretionary approach has not generally displaced the traditional approach.[91]

87 [2018] 1 SLR 363. Much of the analysis in the case was prefigured in the important paper by Andrew Phang, "The Intractable Problems of Illegality and Public Policy in the Law of Contract – A Comparative Perspective" in *Essays in Memory of Professor Jill Poole: Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Rob Merkin & James Devenney eds) (Routledge, 2018) ch 12.

88 Contrary to the Moneylenders Act (Cap 188, 1985 Rev Ed).

89 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [3].

90 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [20].

91 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [39] and [40].

43 The court reviewed the existing law relating to illegality, as had been considered in *Ting Siew May v Boon Lay Choo*,[92] and confirmed that this approach should be retained. In the light of this the position in Singapore is as follows:

(a) If the contract is prohibited, whether by statute or the common law, there can be no recovery pursuant to the illegal contract, which is void and unenforceable and cannot be saved by any balancing process. There is no discretion available for the judges.[93] This is different to the position in England, where, it seems, a contract which is prohibited by statute cannot be saved by the balancing process, whereas a contract prohibited at common law might be saved.

(b) Where the contract is not prohibited but the conduct is illegal at common law, there may be scope for a remedy to be provided. This is illustrated by *Ting Siew May v Boon Lay Choo* itself. In that case an option was backdated to enable a housing loan to be obtained from a bank. This was caught by common law illegality, not because the contract was unlawful *per se* but because it was entered into with the object of committing an illegal act. It was accepted that in such a case there was no rule that the contract was automatically unenforceable, but this would turn on the facts of the case with regard to the principle of proportionality as to whether it would be disproportionate to treat the contract as void and unenforceable. Relevant factors in assessing proportionality include whether allowing the claim would undermine the purpose of the prohibiting rule; the nature and gravity of the illegality; the remoteness or centrality of the illegality to the contract; the object, intent and conduct of the parties; and the consequences of denying the claim. It was emphasised that this proportionality test is narrower than the balancing exercise adopted in *Patel v Mirza* of which proportionality is only one factor.

(c) Even where the contract is unenforceable for illegality, whether by statute or at common law, benefits transferred might be recovered through a restitutionary claim. This mitigates the harshness of the strict rule against enforcement. Three routes were identified for such a claim, which is narrower than that adopted in England:

(i) **where the parties are not *in pari delicto***. This does not involve a broad examination of the relative blameworthiness of each party, but only applies where

92 [2014] 3 SLR 609.

93 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [25].

(A) the claimant is protected by a class protection statute; (B) the claimant entered into the contract as the result of fraud, duress or oppression; and (C) the claimant entered into the contract as a result of a mistake as to the facts which constituted the illegality. But the court did not provide any explanation as to why a mistake made by the claimant should mean that the defendant is more responsible for the illegality than the claimant within the *in pari delicto* principle. It was recognised that restitution on the basis that the parties are not *in pari delicto* will not be defeated by an argument that restitution would result in stultification of the law.[94]

(ii) **where the *locus poenitentiae* doctrine applies**. This is interpreted in Singapore as being founded on the need for repentance before any part of the illegal purpose is carried out. It does not extend to whether the contract has been frustrated but will extend to a genuine and voluntary withdrawal from the contract before any part of the purpose was carried out.[95]

(iii) **where the claimant is not relying on the illegal contract in any substantive sense but instead relies on an independent cause of action which lies outside the sphere of the law of contract altogether,[96] such as claim in tort or property unjust enrichment**. This was considered not to be normatively offensive because the contract is not being enforced and the claimant is not profiting: the parties are simply being restored to their original position.[97] This was considered to be a decisive argument in *Patel v Mirza* as well. But it not true to say that there is no reliance on the illegal contract at all. The claimant needs to establish that the contract is void in order to bring a claim in unjust enrichment and to show this the claimant must plead that the contract is illegal. A claim in unjust enrichment will still be defeated by illegality where restitution would stultify the law. So, for example, the Court of Appeal rejected the view that restitution would be available even in extreme cases such as contract to commit murder, since awarding the remedy

94 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [170].
95 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [47] and [174(b)(ii)].
96 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [50].
97 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [129].

> would bring the court into disrepute and would undermine the integrity of the law.[98]

44 The court compared the Singapore approach with that adopted by the Supreme Court in *Patel v Mirza*. It was assumed that the balancing exercise does not apply in cases of statutory illegality. This was implicit in the judgment of Lord Toulson,[99] but cannot be determined categorically. The Court of Appeal noted that, if the balancing exercise only applies to common law illegality, an unprincipled distinction is drawn which, of course, creates further complexity. Crucially, the approach of the majority was criticised on the basis that "such a wide or broad application of the discretionary balancing process would not be principled".[100] The uncertainty of *Patel v Mirza* derives from the fact that the judge is required to measure incommensurable factors, which leaves room for debate, exacerbated by the fact that the list of factors is left open with no single factor being determinative.[101] This was compared with the approach adopted in Singapore, where the balancing exercise is anchored on a single overarching principle of proportionality. But how certain is this? Admittedly it is a concept that is used in other areas of the law, such as assessing damages, awarding costs and imposing sentences, but proportionality as regards illegality inevitably involves issues of policy. The core principle underpinning the defence of illegality was that it operates to avoid stultification of the law.[102]

45 The Court of Appeal noted that the Singapore approach to illegality is more consistent with the approach of the minority in *Patel v Mirza*, where the contract will not be enforced regardless of statutory or common law illegality, although the approach of the minority to restitutionary claims is significantly wider.

46 How did these principles apply in *Ochroid*? The contract was illegal by statute, being loans disguised as joint venture investments. The loan contract could not be enforced but restitution was considered. It was clear that the defendant had been enriched at the claimant's expense. The ground of restitution was total failure of consideration. The parties were not *in pari delicto*. Even if the defendant had repaid some of the loan it might be possible to conclude that the consideration had failed totally because, as a matter of law, the claimant never obtained any rights under the contract.[103] The key question was whether the award of restitution would stultify the law relating to moneylending

98 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [146].
99 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [109].
100 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [120].
101 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [123].
102 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [145].
103 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [141].

contracts. It was held that it would stultify the fundamental social and public policy against unlicensed moneylending. This was, in fact, an easy-to-establish example of stultification.

47 Would *Ochroid* be decided the same way in England? On the facts it is highly unlikely that the contract would be enforced, either because of statutory illegality or because the balancing factors would militate against enforcement. What about a claim in unjust enrichment? The elements of the claim could be established as in *Ochroid*. Everything then turns on the defence of illegality and the balancing factors in a case where the effect of restitution is to repay the loan. In *Patel v Mirza* the justices were all clear that it is much more difficult to justify enforcing an illegal transaction than it is to unwind an illegal transaction by awarding a restitutionary remedy. But Lord Neuberger did acknowledge that there may be circumstances where the award of a restitutionary remedy may have the effect of enforcing an illegal transaction.[104] So, for example, if the claimant has lent money to the defendant pursuant to a transaction which is illegal, the restitution of the money lent plus interest will have the same effect as enforcing the loan agreement. But Lord Neuberger acknowledged that this should not bar the claim, because:[105]

> If a particular outcome is correct, then the mere fact that the same outcome could have been arrived at on a wrong basis does not make it the wrong outcome.

This is consistent with other areas of the law of unjust enrichment where a loan contract has been void for reasons other than illegality, but it has still been possible to award a restitutionary remedy.[106] This does suggest a significant difference between English and Singapore law.

IV. Are the two approaches so different?

48 A useful method for testing the approaches of the English and Singapore courts to the question of illegality is to consider their application to a particular case. The English case of *Parkinson v College of Ambulance Ltd*[107] ("*Parkinson*") is particularly useful.

49 In *Parkinson* the secretary to a charity had fraudulently represented to the claimant that the secretary was in a position to secure a knighthood for the claimant if he made a substantial donation to the

104 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [171].
105 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [171].
106 See, for example, *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] QB 549.
107 [1925] 2 KB 1.

charity. This the claimant did, transferring £3,000. When no knighthood was forthcoming the claimant sought restitution of the money paid or damages for deceit or breach of contract. Since, however, a contract for the purchase of a title was illegal as being contrary to public policy, all the claims failed. On the face of it, at least as regards the claim for restitution, this appears to raise identical issues to those of *Patel v Mirza* in that money was paid for a purpose, obtaining a knighthood and investment in shares respectively, which failed. But *Parkinson* was different in that part of the purpose of the transaction had been fulfilled, namely the payment to the third-party charity. Lush J specifically recognised that the case did not involve an executory contract:[108]

> [Parkinson] never has resiled from an executory contract at all. But, further than that, the 3000l. was given to the college as a donation. The plaintiff received his letter of thanks for it from [the patron of the charity]. His name would be in the list of donors. The matter was at an end so far as the college was concerned. How can the plaintiff recall the gift and claim back the money?

Patel v Mirza was also different because the payment was not a gift but was made with a view that the money would be invested. Specifically, there was an agreement to place a spread bet on Royal Bank of Scotland shares, using the respondent's spread betting account, after advance information had been received. No information ever materialised; hence, no spread bet was ever placed. Transferring money to the respondent's bank account did not constitute performance of the agreement, but was merely an act in preparation to do so.

50 If the facts of *Parkinson* arose today would restitution be allowed, bearing in mind that the contract was not executory, the payment to the defendant was a gift and the defendant had not authorised the actions of the secretary?[109] On the first point, for those justices who considered the issue, the fact that an illegal contract has been partially performed is not a reason to allow the illegality defence to operate. The effect of the illegality should operate to render the transaction void so that the basis can be considered to have failed totally. There is, further, no reason to conclude that the effect of the illegality on the underlying transaction should be different in result depending on whether that transaction is a contract or a gift. Bearing in mind that Parkinson was seeking restitution and that there is a general consensus amongst the justices in the Supreme Court that the parties should be restored to their original position despite the illegality, it follows that Parkinson would be able to recover the money from the charity, assuming that the defence of change of position would not have been

108 *Parkinson v College of Ambulance, Ltd* [1925] 2 KB 1 at 16.
109 *Parkinson v College of Ambulance, Ltd* [1925] 2 KB 1 at 12.

applicable, save if the application of the majority's trio of considerations would enable the judge to conclude that restitution would not be appropriate.

51 We return then to the uncertainty in the operation of those considerations. The first relates to the reason why the conduct was made criminal. This is difficult to determine on the facts of *Parkinson*, because the agreement was not made criminal by statute but was treated as illegal by judicial determination that it was contrary to public policy.[110] This was because the payment was considered to be derogatory to the Sovereign who bestows the honour and that it might produce mischievous consequences, especially as regards the improper means which might be employed by the person who had promised to obtain the honour. It is difficult, however, to see how investigation why the reasons for making the conduct illegal assists with determining whether restitution should be awarded; although, admittedly, the claim for restitution would have been stronger if the money had been received by the secretary for his own use, rather than being paid on to the charity, since the secretary would presumably then have been more motivated to ensure that the honour was forthcoming. Secondly, it is unclear what policies might be affected if the claim was denied, save that it would undermine the fundamental policy in favour of restitution. Finally, it would be necessary to consider whether the denial of relief might be considered proportionate. The trial judge in *Parkinson* had found that, although the secretary was more blameworthy than Parkinson, Parkinson knew that the transaction was illegal and improper. Consequently, as between Parkinson and the charity it might be possible to conclude that there was a marked disparity in their culpability in favour of the charity. Further, as Lush J recognised, making a gift to a charity is a "meritorious service",[111] which might favour the defendant's reliance on the illegality defence. Against this would be the fact that the defendant charity would be profiting from its employee's fraud. Parkinson himself was prevented from arguing this at trial, because that would have involved him relying on the illegality. But since such reliance is now possible, the fact that the charity had benefited from the payment arising from an illegal transaction is a significant reason in favour of restitution.

52 On balance this analysis would suggest that *Parkinson* would be decided differently today, because there is not a strong enough reason to displace the assumption in favour of restitution, and Lord Neuberger specifically considered it to have been overruled.[112] But this cannot be

110 *Parkinson v College of Ambulance, Ltd* [1925] 2 KB 1 at 13.
111 *Parkinson v College of Ambulance, Ltd* [1925] 2 KB 1 at 14.
112 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [150].

asserted with any confidence; such is the uncertainty created by the majority's adoption of the trio of considerations.

53 How would this case be decided in Singapore? First this would be a case of common law illegality rather than statutory, but nothing should turn on this. Secondly, the gift is not illegal *per se*; it is the intention behind it that renders it illegal. But the claim relates to one for restitution of the money paid. The elements of the claim can be made out, so everything depends on illegality. By virtue of the principle of proportionality and of stultification it is likely that restitution would not be awarded in Singapore.

V. Conclusions

54 In England *Patel v Mirza* has put the law on illegality on a new course, a course which purports to be discretionary. But this can only properly be called discretionary if principles can be discerned. And they cannot. The approach of the Singapore courts is properly characterised as discretionary, because it is principled. This is as area of the law where the English judges got it wrong – the Singapore judges, the Singapore lawyers and Singapore law got it right. English lawyers have a lot to learn from the state of illegality in the state of Singapore.