REFORMING ILLEGALITY IN PRIVATE LAW

The application of the defence of illegality often leads to harsh results. The sheer number of regulatory laws implemented in our modern world exacerbates this situation. In minimising injustice in particular contexts and in coping with the shifting winds of public policy, the judiciary in the common law jurisdictions have made ad-hoc inroads and exceptions to this defence, resulting in departures from the strict *ex turpi causa* principle that are needlessly complex, often irreconcilable with one another, and have little consistency between the different areas of private law. This article makes a comparative survey of the jurisprudence in Australia, England and Wales, New Zealand, Canada, Israel and Singapore, and evaluates: (a) the rationales giving expression to the various grounds of public policy; (b) the possibility and desirability of a unified approach in private law for the relief of unenforceability due to the application of the defence of illegality; and (c) the various reform models and proposals in these jurisdictions, and the optimal approach to statutory reform in Singapore.

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I. Harsh results and ad-hoc exceptions

1 Personal claims in tort, contract and trusts are subject to the defence of illegality – based on the Latin maxim, *ex turpi causa non oritur action*[1] – that the court does not generally lend its assistance to a plaintiff in obtaining a remedy where his action is founded on illegality.

2 The strict application of this defence often leads to harsh results,[2] with considerations of fairness and justice between the plaintiff and defendant often not taken into account. The sheer multitude of

* The author is grateful to Dennis Tan for excellent research assistance.

1 A dishonourable cause does not give rise to an action.

2 Well-known examples include *Re Mahmoud and Ispahani* [1921] 2 KB 716; *Chai Sau Yin v Liew Kwee Sam* [1962] AC 304; *Mohamed v Alaga & Co* [1998] 2 All ER 720.

regulatory laws implemented in our modern world exacerbates this situation, making the legal landscape a potential minefield for the plaintiff. Further, the grounding of this principle on public policy has engendered uncertainty. The requirements of public policy are uncertain and the notion of public policy liable to change over time.[3]

3 In minimising injustice in particular contexts and in coping with the shifting winds of public policy, the judiciary in the common law jurisdictions have made *ad hoc* inroads and exceptions to the defence of illegality to reach sensible results on the facts of each case. These departures from the strict *ex turpi causa* principle have become needlessly complex, are often irreconcilable with one another, and have little consistency between the different areas of private law. In addition, the case law in this area is often unclear as regards the rationale for denying or allowing a claim to succeed. There are risks that these *ad hoc* rules may be applied in ways which are arbitrary, undesirable as regards the outcome reached, or disproportionate to the seriousness of the illegality.[4]

4 Thus, there is a pressing need for clarity. An argument could be made for a unified approach to the law of illegality in private law. This article starts off with a brief commentary on the problematic state of the defence of illegality in tort, contract and trusts. The rationales – express and otherwise – underlying the disparate defence of illegality are evaluated to demonstrate that the defence of illegality should be maintained. This article then delves into the possibility and desirability of a unified approach in private law for the relief of unenforceability due to the application of the defence of illegality. The various models of, and possible approaches to, law reform are evaluated. In particular, this article argues that a unified approach to the illegality defence in private law can be taken, and that the optimal approach to possible reform is by a structured discretion in the judicial evaluation of claims tainted with illegality.

II. The problems with illegality

5 The defence of illegality, if successfully pleaded, results in the court's denial of the plaintiff's normal legal rights and remedies. The

3 G Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 2nd Ed, 2006) at p 722.

4 See, generally, Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) Pts II and III; Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) Pts II and III; Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contracts and Trusts* (5 July 2002) at paras 2.0–7.8.

harsh result has long prompted the courts, in the common law tradition, to make piecemeal inroads and exceptions to the defence of illegality in order to produce just outcomes.[5] The application of the *ex turpi causa* principle has become unnecessarily complex and intolerably unclear. Despite the numerous exceptions made, the propensity of the illegality defence in producing unjust decisions has not been fundamentally ameliorated.

A. Complexity

6 The numerous strict and technical illegality rules are a rich source of complexity. On top of this, the crude and harsh nature of the illegality rules has prompted judges to create a significant number of exceptions, introduced in piecemeal fashion, to their application in order to do justice in difficult cases, further compounding the complexity in the doctrine.[6] The outcome, a confounding mishmash of disparate rules, is more like a muddle than a system.

7 The set of strict technical rules dealing with contractual enforceability, for example, include unnecessary distinctions that further complicate the doctrine which is convoluted enough as it is. For example, contract law generally draws a distinction between a contract performed illegally after formation (which is generally enforceable, even by the guilty party),[7] and one where the illegality was contemplated by the contracting parties at formation (which is unenforceable by the guilty party).[8] In *St John Shipping Corp v Joseph Rank Ltd*,[9] the shipper was allowed to claim his full freight because his decision to overload his ship only came after the agreement to ship the defendants' goods. Devlin J opined that had the shipper intended to overload his ship when the contract was entered into, then he would not be able to enforce it.[10] However, would the purpose of the statute have required the shipping contract to be unenforceable if overloading was contemplated at the

5 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contracts and Trusts* (5 July 2002) at para 1.2: "Complex rules have been devised to do real justice between the parties, despite the presence of illegality."

6 N Enonchong, *Illegal Transactions* (London: LLP Ltd, 1998) at pp 19–20.

7 See, *eg*, *Wetherell v Jones* (1832) 110 ER 82; *Coral Leisure Group Ltd v Barnett* [1981] ICR 503.

8 See, *eg*, *Langton v Hughes* (1813) 105 ER 222; *Mason v Clarke* [1954] 1 QB 460 (this was a decision of the Court of Appeal; though subsequently overruled by the House of Lords in [1955] AC 778 on a finding of fact, the legal principles laid down were not challenged).

9 [1957] 1 QB 267.

10 [1957] 1 QB 267 at 287–288.

time of contracting, but enforceable if the decision to overload was taken subsequently?[11]

8 In another example, the intent of contracting parties in statutorily prohibited contracts is immaterial (such contracts are unenforceable notwithstanding there was no intention to break the law),[12] whereas for contracts unenforceable at common law, ignorance of the law or of the circumstances surrounding the contract formation seems to be pertinent.[13] In *J M Allan (Merchandising) Ltd v Cloke*,[14] the plaintiffs hired a roulette wheel to the defendants for an express purpose which, unknown to both parties, breached the UK Betting and Gaming Act 1960. When discovered, the Court of Appeal did not allow the plaintiffs' claim for the hire instalments due under the contract, stating emphatically that "it is no answer for those concerned to say that they did not know the law".[15] This can be contrasted with cases involving contracts unenforceable at common law, especially where fraud has been perpetrated by one of the parties, in which the intentions of the parties must necessarily be taken into account.[16] This distinction is theoretically unsound, introduces a fundamental disjunct within the illegality defence, and engenders a needless layer of complexity.

9 The law with regard to illegality in trusts is equally – if not more – complex. In fact, the Law Commission of England and Wales thought it prudent to include a caveat in their consultation paper that the exposition set out as the present law was to be regarded "merely as a tentative and novel attempt to produce some order out of chaos".[17] The effect of the "reliance principle" upon the operations of the presumption of resulting trust, and the contrary presumption of advancement, is a

11 G H Treitel, "Contract and Crime" in *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981) p 81 at p 95.

12 See, *eg*, *Ahmad bin Udoh v Ng Aik Chong* [1969] 2 MLJ 116 at 117; *Datuk Ong Kee Hui v Sinyiam Anak Mutit* [1983] 1 MLJ 36 at 41.

13 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contracts and Trusts* (5 July 2002) at para 3.1; see also *Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd* [2008] 1 SLR 375 at [73] (which was concerned with the tort of deceit).

14 [1963] 2 QB 340.

15 [1963] 2 QB 340 at 349, *per* Lord Denning MR. See also *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374 at 387, *per* Pearce LJ: "If the court too readily implies that a contract is forbidden by statute, it takes it out of its own power (so far as that contract is concerned) to discriminate between guilt and innocence."

16 *Siow Soon Kim v Lim Eng Beng alias Lim Jia Le* [2004] SGCA 4 at [39], *per* Chao Hick Tin JA, where he noted the dicta of L P Thean J in *Suntoso Jacob v Kong Miao Ming* [1986] SLR 59 at [13].

17 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 5.2.

major source of complexity when dealing with illegal trusts.[18] The interplay of these doctrines has produced a complex body of strict rules which generate arbitrary results depending upon the presumption which applies.[19]

10 Even in restitutionary claims for benefits conferred under illegal contracts or trusts, the courts have traditionally adopted a formalistic, technical approach in deciding if the parties are *in pari delicto*.[20] The court would allow recovery only if the plaintiff could "show that he was induced to enter into the illegal transaction as a result of fraud, duress or oppression of the other party, that he was ignorant of a fact that rendered the contract illegal, or that he belonged to a vulnerable class protected by statute".[21]

11 The complexity of the illegality defence is compounded in tort because of the wide-reaching area of the law, and its application in a myriad of situations and circumstances. The 2001 Law Commission of England and Wales Consultation Paper[22] categorised tortious claims in which illegality has been raised as an arguable defence (even if the defence ultimately failed) into six groups: (a) injury incurred in the course of an illegal joint venture;[23] (b) injury in the course of the

18 For more details, see Law Commission of England and Wales, *Illegal Transactions: the Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at paras 3.8–3.12.

19 *Tinsley v Milligan* [1994] 1 AC 340 at 371, *per* Lord Browne-Wilkinson:

> Where the presumption of resulting trust applies, the plaintiff does not have to rely on the illegality. If he proves that the property is vested in the defendant alone but that the plaintiff provided part of the purchase money, or voluntarily transferred the property to the defendant, the plaintiff establishes his claim under a resulting trust unless either the contrary presumption of advancement displaces the presumption of resulting trust or the defendant leads evidence to rebut the presumption of resulting trust. Therefore, in cases where the presumption of advancement does not apply, a plaintiff can establish his equitable interest in the property without relying in any way on the underlying illegal transaction.

20 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 7.17. It might have been expected that the illegality defence has little role to play in restitutionary claims. After all, the plaintiff in a restitutionary claim seeks not to enforce the illegal contract, but rather to "repudiate it and undo what has been executed". However, the courts have "traditionally adopted a much tougher line", and illegality generally acts as a defence to a standard restitutionary claim except where the parties are "not equally at fault": Law Commission of England and Wales, *Illegal Transactions: the Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 2.34.

21 For a detailed discussion, see J K Grodecki, "In pari delicto potior est conditio defendentis" (1955) 71 LQR 254.

22 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at paras 2.3–2.10.

23 See, *eg*, *Pitts v Hunt* [1991] 1 QB 24; *Ashton v Turner* [1981] QB 137.

plaintiff's own illegal activity;[24] (c) compensation for detention as a result of the plaintiff's crime;[25] (d) indemnity for liability arising from the plaintiff's crime;[26] (e) compensation for the defendant's fraud or other wrongs;[27] and (f) conversion.[28] The law on the defence of illegality in these six disparate categories was so complex, the Law Commission found it "not easy to state the principles governing [the illegality defence] in tort other than in broad terms".[29]

12 Besides being a problem itself, the complexity of the rules of the illegality defence is also to blame for causing other related difficulties.

B. Uncertainty

13 One inevitable result of the complexity is that there are certain areas where the applicable rules cannot be stated with any certainty. In relation to illegal contracts, for example, the jurisprudence has been contradictory as to when the defendant's illegal purpose in entering into a contract would cause the plaintiff's claim to fail. *Langton v Hughes*[30] is authority for the proposition that mere knowledge of the defendant's illegal purpose is sufficient to bar the otherwise innocent plaintiff's claim. Another line of authorities suggest that knowledge in and of itself is insufficient, and that some additional element, vaguely referred to as "participation" or "assistance", is required.[31]

14 Another example would be the significance of the distinction between contracts which involve the breach of a statutory prohibition in their formation, and those which involve a breach of statutory prohibition in their performance. This distinction has been frequently mentioned in case law,[32] and has some academic support.[33] However, the

24 See, *eg*, *Cross v Kirby*, *The Times* (5 April 2000); *Revill v Newbery* [1996] QB 567.

25 See, *eg*, *Meah v McCreamer* [1985] 1 All ER 367; *Clunis v Camden and Islington Health Authority* [1998] QB 978.

26 See, *eg*, *Meah v McCreamer (No 2)* [1986] 1 All ER 943.

27 See, *eg*, *Saunders v Edwards* [1987] 1 WLR 1116.

28 See, *eg*, *Thackwell v Barclays Bank plc* [1986] 1 All ER 676; *Webb v Chief Constable of Merseyside Police* [2000] QB 427.

29 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 2.11.

30 (1813) 105 ER 222 at 223, *per* Le Blanc J.

31 *Hodgson v Temple* (1813) 128 ER 656; see also *Biggs v Lawrence* (1789) 100 ER 673 and *Waymell v Reed* (1794) 101 ER 335.

32 See, *eg*, *Re Mahmoud and Ispahani* [1921] 2 KB 716 at 724–725 *per* Bankes LJ; *Edler v Auerbach* [1950] 1 KB 359 at 367 *per* Devlin J.

33 See, *eg*, Professor Prentice in *Chitty on Contracts* (London: Sweet & Maxwell, 27th Ed, 1994) ch 16; Professor Furmston in *Cheshire, Fifoot and Furmston's Law of Contract* (London: Butterworths, 13th Ed, 1996) ch 11; however, see also Professor Treitel in his treatise *The Law of Contract* (London: Sweet & Maxwell, 9th Ed,

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enforceability of a contract "illegal in its conception" is unclear. One line of authorities suggests that a contract "illegal in its inception" is unenforceable by either party, whether or not either or both were aware of the illegality.[34] Other cases propose a more nuanced position, such that an innocent plaintiff's claim would be allowed.[35] In both examples, the two lines of authorities are irreconcilable, and the question of which rule applies in any given context is anyone's guess.

15 In the context of illegal trusts, the ambiguity in the scope of the "reliance principle" is responsible for much uncertainty.[36] It is unclear, for example, whether the principle applies in the context of determining the enforceability of an automatic resulting trust arising on the failure of an express trust for illegality. There is little positive support for this proposition other than in Lord Browne-Wilkinson's dicta in *Tinsley v Milligan*.[37] The case of *Rowan v Dann*[38] also invoked the "reliance principle" in justifying recovery by a deserving settlor.[39] However, that was an "easy" case where the principle was invoked to substantiate a holding which was clearly justified on the facts.[40] As the Law Commission of England and Wales observed, what is lacking is a firm decision which "considers a claim by a settlor to property under an automatic trust, or under an express 'default' disposition in his or her favour, after his or her intended express trust has been held to be void for illegality".[41]

1995) ch 11 at pp 438–447, who draws the distinction between the position of the innocent and guilty parties instead.

34 *Cheshire, Fifoot and Furmston's Law of Contract* (London: Butterworths, 13th Ed, 1996) at pp 385–386; see, *eg*, *J M Allan (Merchandising) Ltd v Cloke* [1963] 2 QB 340; *The Gas Light and Coke Company v Samuel Turner* (1840) 133 ER 127.

35 See, *eg*, *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374 at 387, *per* Pearce LJ; see also M P Furmston, "The Analysis of Illegal Contracts" (1966) 16 University of Toronto LJ 267 at 280.

36 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 5.9

37 [1994] 1 AC 340 at 371, where he said that "if the law is that a party is entitled to enforce a property right acquired under an illegal transaction, in my judgment the same rule ought to apply to any property right so acquired, whether such right is legal or equitable". The Law Commission of England and Wales interpreted this to be a proposal that "the principles which governed the validity and enforcement of proprietary interests were (or should be) the same, whether the origin of the interest was the common law or equity", one such principle being the "reliance principle" (Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at paras 3.40–3.41)

38 (1992) 64 P&CR 202.

39 (1992) 64 P&CR 202 at 209, *per* Scott LJ.

40 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 3.44.

41 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* Consultation Paper No 154, 1999) at para 3.42.

16 For restitutionary claims, much uncertainty still surrounds the doctrine of *locus poenitentiae*. The limits of the doctrine remain unclear.[42] Early authorities such as *Taylor v Bowers*[43] suggest that the doctrine is broad, and would apply wherever "the illegal transaction was not carried out".[44] However, subsequent cases have usually adopted a more conservative tone. In particular, two qualifications have typically been imposed. Firstly, the withdrawal must have taken place before any part of the illegal purpose had been completed;[45] and secondly, the plaintiff must genuinely repent of the illegality.[46] The academic literature on this is varied.[47] Professor Birks contended that genuine repentance should be a requirement, unless the illegal purpose has not yet been achieved and to allow recovery would only prevent its being achieved. Allowing recovery when the plaintiff's illegal purpose was frustrated by the other party's refusal to carry out the transaction would give the plaintiff a lever with which to compel performance and disincentivise the other party from abstaining from the illegality.[48] However, Professor Grodecki took a diametrical view, arguing that in order to encourage abstinence from illegality, withdrawal should be allowed as long as the illegal purpose has not been fully carried out, regardless of the plaintiff's subjective state of mind.[49] Professor Enonchong took a proprietary view, suggesting that recovery should be allowed up till the point at which title passes to the

42 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154 (1999) at para 2.50.

43 (1876) 1 QBD 291.

44 See (1876) 1 QBD 291 at 299–300, where Mellish LJ said:

> [The Plaintiff] is not bringing the action for the purpose of enforcing the illegal transaction … [I]f the illegal transaction had been carried out, the plaintiff himself in my judgment, could not afterwards have recovered the goods. *But the illegal transaction was not carried out; it wholly came to an end.* To hold that the plaintiff is enabled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps to carry it out. [emphasis added]

45 This requirement was laid down authoritatively in *Kearley v Thomson* (1890) 24 QBD 742.

46 This requirement was particularly emphasised in *Bigos v Bousted* [1951] 1 All ER 92. See also *Parkinson v College of Ambulance Ltd and Harrison* [1925] 2 KB 1 at 16, *per* Lush J, and *Harry Parker Ltd v Mason* [1940] 2 KB 590. However, doubt has been subsequently cast on this requirement by the Court of Appeal in *Tribe v Tribe* [1996] Ch 107, particularly by Millett LJ at 135: "But I would hold that genuine repentance is not required. Justice is not a reward for merit; restitution should not be confined to the penitent."

47 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 2.56.

48 P Birks, *An Introduction to the Law of Restitution* (Oxford; New York, Clarendon Press, Rev Ed, 1989) at pp 301-303

49 J K Grodecki, "In pari delicto potior est conditio defendentis" (1955) 71 LQR 254 at 261–263. See also R Merkin, "Restitution by Withdrawal from Executory Illegal Contracts" (1981) 97 LQR 420.

defendant.[50] Professor Beatson, on the other hand, argued that recovery should be allowed only where to not do so would increase the probability of the illegal purpose being achieved.[51]

17 In tort, the applicability of the general defence of *ex turpi causa* is itself disputed, and the scope of the defence also varies considerably among the jurisdictions. The maxim appears to have been first applied in contract cases, and earlier UK cases were unclear about its applicability to tortious claims.[52] It was only in the 1998 case of *Clunis v Camden and Islington Health Authority*[53] that the UK Court of Appeal unequivocally confirmed the applicability of the illegality defence in tort, and laid down that the defence is the same in both contract and tort.[54] Five years earlier in *Hall v Herbert*,[55] the Supreme Court of Canada similarly pronounced that the illegality defence applies in tort. McLachlin J felt that there was a need for the illegality doctrine in tort to prevent the plaintiff profiting from his own wrongdoing, but suggested that the *ex turpi causa* defence be strictly confined and made generally inapplicable to compensation claims involving personal injury.[56] On the other hand, the Australian courts take an opposing view, and the general defence of *ex turpi causa* in tort is not recognised.[57] Instead, the Australian courts preclude tortious claims tainted with illegality on the basis that no duty of care is owed by the defendant to the plaintiff.[58]

18 In Singapore, the applicability of the illegality defence in tort seems uncertain. The High Court in *Ooi Han Sun v Bee Hua Meng*[59] held that the defence had "a very limited application in tort", and that it applied only to "the limited range of cases in which, on the facts of the

50 N Enonchong, "Title Claims and Illegal Transactions" (1995) 111 LQR 135 at 156.

51 J Beatson, "Repudiation of Illegal Purpose as a Ground of Restitution" (1975) 91 LQR 313 at 314.

52 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 2.1.

53 [1998] QB 978.

54 [1998] QB 978 at 987.

55 [1993] 2 SCR 159.

56 [1993] 2 SCR 159 at [5]; McLachlin J who gave the combined judgment of La Forest, L'Heureux-Dubé, McLachlin and Iacobucci JJ.

57 See *Gollan v Nugent* (1988) 166 CLR 18 at 46, citing with approval Windeyer J in *Smith v Jenkins* (1969–1970) 119 CLR 397 at 410: "The intrusion of this Latin maxim into learned commentary, and also into judgments, has caused a confusion which would not have occurred if the writers had condescended to translation and had not taken the maxim into territory where it does not belong." See also *Jackson v Harrison* (1977-1978) 138 CLR 438 at 452 where Mason J concluded that "the maxim *ex turpi causa non oritur actio* has no place in the law of torts".

58 This principle was first mooted by Barwick CJ in *Smith v Jenkins* (1969–1970) 119 CLR 397 at 400. However, the difficulties of the reasoning in that case led later courts to seek better explanations: eg, *Progress and Properties Ltd v Craft* (1975–1976) 135 CLR 651; *Gala v Preston* (1991) 100 ALR 29.

59 [1991] SLR 824.

case, an injury can be held to have been directly incurred in the course of the commission of a crime".[60] In the subsequent case of *Zhao Feng Guo v Tan Hong Soon*,[61] the holding in *Ooi Han Sun v Bee Hua Meng* was cited with approval, but the court went further and concluded that the illegality defence did not apply in tort at all, except perhaps in the calculation of damages.[62] However, in a drastic about-turn, the Court of Appeal in the recent case of *United Project Consultants Pte Ltd v Leong Kwok Onn*[63] treated as a given the applicability of the illegality defence to tortious claims, citing the 2001 Consultation Paper on "The Illegality Defence in Tort".[64]

19 From the numerous examples cited above, given the uncertainty in the applicability, scope and practical application of the illegality defence, extrapolating the current legal position with regard to the illegality defence is a "difficult, if not impossible, task".[65]

C. Injustice

20 Since Lord Mansfield's *locus classicus* in *Holman v Johnson*,[66] the propensity of the illegality rules to lead to unjust results, particularly "the unjust enrichment of the defendant at the plaintiff's expense",[67] has been readily acknowledged. Lord Mansfield made it clear that even an unmeritorious defendant could plead the illegality defence against the plaintiff's claim, in spite of the defendant's own involvement in the illegality, and even though the defence if successfully raised would confer a windfall upon the defendant.[68] As Lord Goff put it in *Tinsley v*

60 [1991] SLR 824 at [18].
61 [2003] 2 SLR 417.
62 [2003] 2 SLR 417 at [7].
63 [2005] 4 SLR 214.
64 [2005] 4 SLR 214 at [52], citing the Law Commission of England and Wales Consultation Paper No 160, 2001.
65 Paula Giliker, "Restitution, Reform and Illegality: An End to Transactional Uncertainty?" [2001] SJLS 102 at 103.
66 (1775) 1 Cowp 341.
67 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 5.3.
68 (1775) 1 Cowp 341 at 343: "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the

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Milligan,[69] "the principle is not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation".[70]

21 The illegality rules take into account neither the seriousness of the illegality involved nor the culpability of the parties, giving rise to some rather harsh decisions. For example, the notion of implied statutory prohibition in contract law is problematic. In *Re Mahmoud v Ispahani*,[71] it was the unlicensed defendant who induced the plaintiff, who was ignorant that the defendant did not have a licence, to enter into a contract for sale of linseed oil in breach of statutory regulations. It was also the defendant who subsequently refused to take delivery of the oil. However, the court nonetheless allowed the defendant's plea of illegality to stand, denying the plaintiff his usual remedies for breach of contract. Similarly, in *Mohamed v Alaga & Co*,[72] the successful plea of illegality allowed the (guilty) defendant to benefit from the (innocent) plaintiff's work without making any payment for it.

22 The illegality defence applied to trusts may also result in some equally harsh decisions. In *Lowson v Coombes*,[73] the plaintiff had contributed to the purchase price of a flat, which was conveyed into the sole name of his mistress in order to frustrate any claim by the plaintiff's wife. The court held that the plaintiff was entitled to his half-interest in the property, despite the plaintiff's own illegal purpose, simply because it was "not a case where the presumption of advancement was applicable".[74] The fairness in attaching such great importance to the presumption of advancement was soundly questioned by Robert Walker LJ,[75] though the Court of Appeal in the end felt bound by the House of Lords precedent of *Tinsley v Milligan*.[76] The problem here, as summarised by the Law Commission of England and Wales in their consultation paper, is that "the effect of using the 'reliance principle' to refuse the enforcement of a resulting trust is to put the technicalities of

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defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*."

69 [1994] 1 AC 340.

70 [1994] 1 AC 340 at 355.

71 [1921] 2 KB 716.

72 [1998] 2 All ER 720.

73 [1999] Ch 373.

74 [1999] Ch 373 at 385; the presumption of advancement does not apply to gifts between a man and his mistress.

75 [1999] Ch 373 at 385, citing support from numerous other passages: *Pettitt v Pettitt* [1970] AC 777 at 824, *per* Lord Diplock; *Tribe v Tribe* [1996] Ch 107 at 118, *per* Nourse LJ and 128–129, *per* Millett LJ.

76 [1994] 1 AC 340.

the pleadings before the merits of the case … The potential for injustice is clear."[77]

23 In the context of restitution of benefits conferred under illegal transactions, the *par delictum* rule may also operate harshly because it "assumes that all illegality is equally serious".[78] The courts do not seem to attach weight to the fact that "the plaintiff is seeking to reverse, rather than exploit, the illegal transaction, and that the failure of his or her claim may leave the (guilty) defendant with a large windfall".[79] For example, in *Harse v Pearl Life Assurance Co*,[80] the plaintiff who had unknowingly paid premiums under an illegal and void life insurance contract was unable to recover them. The court held that because the defendant insurer was also unaware of the illegality of the insurance contract, the parties were *in pari delicto* and the defendant could raise the illegality defence against the plaintiff's claim.[81]

24 In tortious claims, the lack of clarity on the illegality defence makes it difficult to explain case holdings in terms of the apparent rationales for the defence of illegality, "with the result that there is a risk of arbitrariness or possibly disproportionality".[82] That said, most of the reported tort cases were decided on more than one ground, not just illegality,[83] and the final outcome of those cases were on the facts, even if

77 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 5.7.

78 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contracts and Trusts* (5 July 2002) at para 7.7; see also the example provided:

> Suppose the plaintiff has sold rubber to a firm of rubber dealers and the sale is prohibited because rubber dealers must be licensed but the firm is not licensed. If the plaintiff who was aware of the illegality sues to recover back the rubber delivered to the firm, the *par delictum* rule will bar his claim. But it may be that, on the particular facts, the firm was unlicensed only because of an inadvertent omission to renew its license and that it would have been granted a fresh license had it not neglected to renew its expired license. Under those circumstances, the contravention of policy is not serious but the *par delictum* rule will nevertheless bar recovery by the plaintiff.

79 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 7.17.

80 [1904] 1 KB 558.

81 [1904] 1 KB 558 at 563. This decision has been frequently criticised as inordinately harsh: see, *eg*, J K Grodecki, "In pari delicto potior est conditio defendentis" (1955) 71 LQR 254 at 264.

82 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 1.5.

83 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 2.73: "The only recent case where the illegality defence has operated as the sole bar to a tortious claim appears to be *Worrall v British Railways Board* (Unreported) 29 April 1999."

the reasoning adopted with respect to the illegality defence has been subsequently criticised.[84]

III. The need for the doctrine of illegality

25 Despite the many problems with the illegality doctrine, many jurisdictions have not abandoned it entirely. Instead, exceptions were made to the general principle. There is a high degree of correlation between the rationales for the illegality doctrine in private law. The following section seeks to identify and evaluate the rationales, to make a case for the continued need for the defence of illegality.

A. Upholding the dignity of the courts

26 Some cases have suggested that the courts should not lower themselves by discussing the demerits of the parties tainted by illegality. In *Tappenden v Randall*,[85] Heath J felt that "there may be cases where the contract may be of a nature too grossly immoral for the Court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person".[86] This argument has further support in the fact that the courts may take note of any illegality uncovered in the course of the proceedings, even if neither party brought it up.[87] In *Re Mahmoud v Ispahani*,[88] Scrutton J said that "the Court is bound, once it knows that the contract is illegal, to take objection and to refuse to enforce the contract, whether its knowledge comes from the statement of the party who was guilty of the illegality, or whether its knowledge comes from outside sources. The Court does not sit to enforce illegal contracts".[89]

27 This "dignity of the courts" policy justification does have some merit where the illegality involved is of a serious nature, or where great moral turpitude is involved. The "proper role of the court is not to provide an arena in which wrongdoers may fight over their spoils".[90]

84 See, *eg*, *Clunis v Camden and Islington Health Authority* [1998] QB 978. It has been suggested that the illegality rule laid down in that case, if "applied in a blanket way", might violate Art 2 of the European Convention on Human Rights where the illegality defence is applied to "debar a claim by the claimant or his dependents stemming from conduct taking or endangering his or her life": *Clerk and Lindsell on Torts* (London: Sweet & Maxwell, 18th Ed, 2000) at para 1-71.

85 (1801) 126 ER 1388.

86 (1801) 126 ER 1388 at 1390.

87 *North-Western Salt Co Ltd v. Electrolytic Alkali Co Ltd* [1914] AC 461 at 469, *per* Viscount Haldane.

88 [1921] 2 KB 716.

89 [1921] 2 KB 716 at 729.

90 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 6.6.

However, this rationale can hardly hold where the illegality involved is a minor one, such as trivial breaches of a minor regulation.[91] Also, this rationale has featured mainly in contractual cases of age,[92] and would rarely be invoked in the present day, especially in tortious claims.[93] For example, in many recent tort cases[94] where the illegality involved was serious, the courts have not felt a threat to their dignity, and have either allowed the claims[95] or used other reasons to bar the claims.[96]

B. Wrongdoer shall not profit from his own wrongdoing

28 The old equitable maxim *nemo ex suo delicto meliorem suam conditionem facere potest* – no wrongdoer should profit from his own wrongdoing – is trite law. Lord Atkin recognised this in *Beresford v Royal Insurance Co Ltd*,[97] where he held that "the Courts will not recognize a benefit accruing to a criminal from his crime".[98] In *Gala v Preston*,[99] the High Court of Australia held that it would be "wholly repugnant" to the accepted standards of the law if one participant in an illegal activity could "ameliorate his position at the expense of the other in that situation".[100]

29 Quite naturally, this policy argument should only apply to plaintiff "wrongdoers", as recognised by Lord Denning in *Strongman Ltd v Sincock*:[101]

> It is, of course, a settled principle that a man cannot recover for the consequences of his own unlawful act, but this has always been confined to cases where the doer of the act knows it to be unlawful or is himself in some way morally culpable. It does not apply when he is an entirely innocent party.

91 See, *eg*, *St Johns Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267.
92 See, *eg*, *Tappenden v Randall* (1801) 126 ER 1388; *Parkinson v College of Ambulance Ltd and Harrison* [1925] 2 KB 1.
93 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 4.26.
94 See, *eg*, *Meah v McCreamer* [1985] 1 All ER 367; *Meah v McCreamer (No 2)* [1986] 1 All ER 943.
95 See, *eg*, *Webb v Chief Constable of Merseyside Police* [2000] QB 427, where the plaintiff's claim for a sum of money (suspected to be the proceeds of drug-dealing) which was confiscated by the police was allowed.
96 See, *eg*, *Clunis v Camden and Islington Health Authority* [1998] QB 978, in which the Court of Appeal did not mention anything of outraged dignity in barring the claim, though the serious offence of manslaughter was involved.
97 [1938] AC 586.
98 [1938] AC 586 at 599.
99 (1991) 100 ALR 29.
100 (1991) 100 ALR 29 at 54.
101 [1955] 2 QB 525 at 535.

30 Similarly, in *Marles v Philip Trant & Sons Ltd*,[102] it was held that the innocent party would be able to sue on an illegally performed contract. However, if the plaintiff participates in, or assents to, the illegal performance, the claim would fail due to the taint of illegality.[103]

31 Allowing a plaintiff to obtain a claim for his wrongdoing would send out the message that crime does pay, which would undermine the law.[104] The value of the *nemo ex* maxim is undeniable, and the illegality rules play an important role in enforcing it in private law.

C. Deterrence

32 The policy rationale frequently raised in English case law to bolster the illegality defence is the desirability of deterring unlawful or immoral conduct.[105] In *Taylor v Bhail*,[106] the defendant, the headmaster of a school which had been damaged by gales, agreed to award a contract to the plaintiff, a builder, provided that the builder would falsely increase his estimate of the cost of the works by £1,000, so that the defendant could claim the inflated sum from his insurers and pocket the £1,000 for himself. After completing the works, the plaintiff brought an action in the alternative to enforce the contract or for a *quantum meruit* in respect of work done but not paid for. Millett LJ refused both claims due to the taint of illegality, and called for a clear message of deterrence to be sent to such wrongdoers.[107] Deterrence was thus suggested as a valid rationale in the 1999 Consultation Paper, based upon the weight of such English authorities.[108]

33 However, the 2001 Consultation Paper subsequently questioned the validity of this rationale, as several consultees, following the publication of the 1999 Consultation Paper, had questioned the value of this rationale.[109] Neither did the House of Lords decision in *Tinsley v Milligan*[110] add much weight to this rationale. In *Tinsley v Milligan*, the parties had co-contributed to the purchase of a house. The house had, however, been registered in the sole name of Miss Tinsley to allow

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102 [1954] 1 QB 29.

103 *Ashmore, Benson, Pease & Co Ltd v A V Dawson Ltd* [1973] 1 WLR 828.

104 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 4.36.

105 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 6.9.

106 [1996] CLC 377.

107 [1996] CLC 377 at 383–384.

108 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 6.10.

109 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 4.28.

110 [1994] 1 AC 340.

Miss Milligan to make false claims to the Department of Social Security and obtain financial support. The parties had a subsequent falling-out, and when Miss Milligan tried to claim for her half-share held on trust, Miss Tinsley raised the defence of illegality. The majority in the House of Lords[111] held that the claim would succeed as Miss Milligan did not have to rely on the illegality to bring her claim. This hardly sends the signal of deterrence to wrongdoers, revenue defrauders in the instant case. As a further attack on the strength of this policy consideration, Lord Lowry commented:[112]

> I am not impressed by the argument that the wide principle acts as a deterrent to persons in A's position. In the first place, they may not be aware of the principle and are unlikely to consult a reputable solicitor. Secondly, if they commit a fraud, they will not have been deterred by the possibility of being found out and prosecuted. Furthermore, the wide principle could be a positive encouragement to B, if he is aware of the principle, because by means of his complicity, he may become not only the legal owner but the beneficial owner.

34 In *Gala v Preston*,[113] Dawson J also rejected the suggestion that a rationale of the illegality doctrine was to preserve the normative and deterrent effect of the criminal law, as he felt that it would not be possible to gauge the extent to which allowing a civil remedy might impair the normative, and especially the deterrent, effect of the criminal law. He agreed with Mason J's judgment in *Jackson v Harrison*,[114] which also rejected a deterrence-based rationale:[115]

> The elimination of civil liability between the participants in a joint criminal enterprise cannot be sustained on the ground that it is a deterrent against criminal activity; it might with equal force be put forward as an inducement to such activity. Even if punishment of illegal conduct is not a matter for the exclusive attention of the criminal law, as I think it should be, a policy of deterrence directed against the participants in a joint criminal enterprise but not against the individual criminal makes very little sense.

35 On the other hand, Professor Atiyah argued in favour of the deterrence rationale of the illegality defence. He noted that in many instances, the denial of civil law remedies would be a greater deterrent than sanctions imposed by criminal law. For example, there may be forms of anti-social conduct which are not criminal, like prostitution, where deterrence is desirable. Although the policy of deterrence is not commonly associated with the law of contract, trusts and tort, perhaps in such transactions – which are contrary to public policy yet are not

111 Lords Jauncey, Lowry and Browne-Wilkinson; Lords Keith and Goff dissenting.
112 [1994] 1 AC 340 at 368.
113 (1991) 100 ALR 29.
114 (1977–1978) 138 CLR 438.
115 (1991) 100 ALR 29 at 54, citing (1977–1978) 138 CLR 438 at 453.

illegal – the only legal deterrent possible would be through the courts withholding the legal rights and remedies via the doctrine of illegality.[116]

36 The 2001 Consultation Paper accepted the validity of the deterrent rationale, qualifying, however, that there would only be rare instances where it could apply, for example, where there are overlaps between contractual and tortious claims.[117] Understandably, the rationale of deterrence is more relevant to contractual claims rather than tortious claims with heavy concurrent criminal penalties, as it is difficult to see how the bar on civil claims would be a more effective deterrent than the imposition of criminal sanctions.

D. No condonation

37 The deterrence rationale may also be linked to the policy consideration of not condoning the illegal activity or encouraging others. In *Thackwell v Barclays Bank plc*,[118] it was held that the defence of illegality would apply "where the court, in finding for the plaintiff, would be indirectly assisting or encouraging the plaintiff in his criminal, fraudulent or illegal activity".[119] Similarly, Dawson J in *Gala v Preston*[120] considered that the rationale of the illegality doctrine in disallowing civil remedies must be the law's non-condonation of criminal offences committed by the plaintiff.[121]

38 It is not certain whether the rationale of not condoning the illegal activity is an aspect of the deterrence consideration, or a separate consideration as such. "Not encouraging the claimant or others" would most certainly constitute an aspect of deterrence. However, "not condoning the illegal activity" may be construed as a separate policy consideration based on the courts not condoning the activity, rather than actually doing so.[122] This policy consideration first appeared in the context of the "public conscience" test in *Euro-Diam Ltd v Bathurst*,[123] where Kerr J stated that the defence of illegality must hold in the case, as otherwise "the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to *encourage others in similar acts*".[124]

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116 P S Atiyah, *An Introduction to the Law of Contract* (Oxford: Clarendon Press, 5th Ed, 1995) at pp 342–343.

117 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 4.33.

118 [1986] 1 All ER 676.

119 [1986] 1 All ER 676 at 689.

120 (1991) 100 ALR 29.

121 (1991) 100 ALR 29 at 55.

122 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at paras 4.34 and 4.48.

123 [1990] 1 QB 1.

124 [1990] 1 QB 1 at 35.

However, such an explanation could be similarly criticised as "imponderable" as the "public conscience test. Perhaps the rationale of "non-condonation" would be better characterised as arising from that of "consistency", where the court would not allow a claim if it feels that doing so would be inconsistent with other aspects of the law.[125]

39 Further, the no condonation rationale does not seem to offer the court any solid guidelines in its decision-making process.[126] It fails to satisfactorily explain, for example, why the defendant in *Cross v Kirby*,[127] whose vigorous self-defence resulted in the plaintiff's grievous injuries, could raise the illegality defence against his attacker, whereas a motorist who is injured in an accident, caused partly by the defendant's and partly by his own reckless driving, should not.

40 It appears that the rationale of "not condoning the illegal activity or appearing to condone or encourage others" does not provide a satisfactory justification for the general illegality defence. Whilst some of the arguments in its favour have merit, these arguments seem to support other policy rationales at the same time. The rationale of "no condonation" should be rejected.

E. Punishment

41 The 1999 Consultation Papers accepted the suggestion[128] that a possible policy consideration would be that the denial of legal rights and remedies could serve as punishment of the plaintiff for entering into illegal transactions. The principal argument that the Law Commission adopted then was that there was no valid reason why punishment should not also be regarded as a legitimate aim of the civil law.[129] However, this argument drew wide-spread criticism, given its "arbitrary and potentially disproportionate nature".[130]

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125 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at paras 4.51–4.52.

126 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 4.53.

127 *The Times* (5 April 2000).

128 See J W Wade, "Benefits Obtained under Illegal Transactions – Reasons for and Against Allowing Restitution" (1946) 25 Texas Law Review 31 at 35–36; and R A Buckley, "Law's Boundaries and the Challenge of Illegality" in *Legal Structures: Boundary Issues Between Legal Categories* (R A Buckley ed) (Chichester: John Wiley & Sons, 1996) ch 9.

129 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 6.11; citing the Law Commission of England and Wales, *Report on Aggravated, Exemplary and Restitutionary Damages* (Consultation Paper No 247) at para 5.25.

130 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 4.15.

42 The 2001 Consultation Paper re-evaluated this policy rationale, and came to the conclusion that punishment is not a valid principle underpinning the general defence of illegality. Firstly, the defence of illegality is usually raised by the defendant who (as a tortfeasor, contract-breaker or betrayer of trust) cannot truly be considered to be "innocent". In certain instances, the defendant may also be a participant in the plaintiff's crime. A "windfall" going to such a defendant as a result of barring the plaintiff's claim could hardly be justified. Secondly, illegality usually deprives the plaintiff of all reliefs, and punishing the plaintiff with such a blunt tool can be disproportionate to the wrong done. Thirdly, cases which at first glance appear to support the assertion that punishment is a satisfactory rationale underlying illegality can be satisfactorily covered by other rationales, without the need of invoking a punitive basis.[131]

43 The rationale of punishment holds poor explanatory effect for illegality cases, and is accordingly rejected as the theoretical basis for the general defence of illegality. In fact, the 2001 Consultation Paper suggested that the court should instead consider whether a denial of relief would have an unduly punitive effect.[132]

F. Responsibility

44 The consideration of responsibility is that everyone should be held responsible for his actions, as well as the reasonably foreseeable consequences that flow from those actions. However, this seems to be more appropriate to the defence of assumption of risk, and not that of the doctrine of illegality.[133] Further, the argument that a wrongdoer should accept responsibility for his wrongdoing seems strictly tautological; there is no explanation as to why the wrongdoer must accept such responsibility, other than the fact of the wrong committed.

45 An alternative argument along the line of responsibility is that the rationale is not aimed at establishing the illegality defence, but rather at precluding the owing of any duty. However, the difficulty of this approach, as noted in the Canadian case of *Hall v Hebert*,[134] is that this shift of analysis to the duty of care does not offer any fresh insight

131 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at paras 4.16–4.19.
132 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at paras 4.21–4.23.
133 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at paras 4.75–4.76.
134 [1993] 2 SCR 159.

or guidelines as to when the court should deny claims tainted by illegality.[135]

46 This rationale, whilst a novel and interesting suggestion, lacks direct support from case law[136] and also has little explanatory effect for the decisions in illegality cases, and is rejected accordingly.

G. Consistency

47 In the landmark case of *Hall v Hebert*,[137] McLachlin J suggested that an important rationale for the defence of illegality is the need for consistency in the law as a whole:

> [Allowing recovery] would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which – contract, tort, the criminal law – must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to 'create an intolerable fissure in the law's conceptually seamless web'.[138]

48 This rationale is concerned with whether denying relief to the plaintiff would further the purpose of the statute rendering the contract illegal. For example, in dealing with alleged statutory illegality of contracts and trusts, a test frequently applied by courts is whether the refusal of the claim would further the purpose of the statute. The underlying rationale here is, clearly, that of consistency of the law. This rationale helps explain the case law where the plaintiff failed to recover damages in tort for the fact that he has been made the subject of a hospital order,[139] or lost employment and pension rights as a direct result of a criminal offence.[140] In these instances, the illegality doctrine was rightly applied, as it would not further that part of the law resulting in the plaintiff's punishment if he were compensated for it. The policy consideration of "furthering the purpose of the rule" appears to be a valid and convincing aspect of the consistency rationale.

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135 [1993] 2 SCR 159 at [28]–[39].

136 The rationale was suggested at a consultation seminar for the 2001 Law Commission of England and Wales Consultation Paper: see Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 4.75.

137 [1993] 2 SCR 159.

138 [1993] 2 SCR 159 at [17]. See also E J Weinrib, "Illegality as a Tort Defence" (1976) 26 UTLJ 28 at 42.

139 See, *eg*, *Clunis v Camden and Islington Health Authority* [1998] QB 978.

140 See, *eg*, *Worrall v British Railways Board* (unreported, 29 April 1999).

49 In the New Zealand jurisprudence,[141] this rationale figures strongly. The landmark case of *Accident Compensation Corp v Curtis*[142] examined the arguments for withholding compensation under the Accident Compensation Scheme from a wrongdoing accident victim. The New Zealand Court of Appeal held that given the purpose of the statute, which was intended as a departure from the common law stand relating to *ex turpi causa*, there would have to be an exceptional reason for departing from the statutory objective of providing no-fault cover.[143] In this case, it was not repugnant to justice to award compensation. The "repugnance to justice" test appears to take into account factors such as deterrence and punishment, but the New Zealand Court of Appeal has emphasised that compensating persons injured in the course of an illegal activity would not necessarily be repugnant to justice as "the threshold in the face of the initial statutory assumption that 'cover shall exist' is a high one".[144] Here, one can see the importance New Zealand places on the connection between the purpose of the statute and the illegality defence.

50 Additionally, the New Zealand courts have, in the exercise of their wide discretion as afforded by the New Zealand Illegal Contracts Act 1970, shown that an overriding consideration is whether the alleged breach of the statutory prohibition infringed the policy behind that prohibition. In *Catley v Herbert*,[145] an illegal contract for financial assistance was validated as the contract did not contravene the policy of the New Zealand Companies Act, in the sense that no creditor or shareholder was prejudiced by the transaction. In *NZI Bank Ltd v Euro-national Corp Ltd*,[146] however, a similar contract for financial assistance was not validated. In that case, the major shareholders were not informed of the contract and would have been prejudiced, thus violating the policy behind the statute.

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141 Note that the *ex turpi causa* defence is recognised in New Zealand, but it has very little case-law on this issue. This could be due to the Accident Compensation Scheme, which provides no-fault cover for personal injuries and abolished tortious claims for people covered by the scheme. The New Zealand Accident Compensation Scheme was established in 1972 under the Accident Compensation Act 1972, and originated from the recommendations of the 1967 Royal Commission on Compensation for Personal Injury in New Zealand, chaired by Sir Owen Woodhouse. For further details, see Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (Government Printing Office: Wellington, 1967).

142 [1994] 2 NZLR 519.

143 [1994] 2 NZLR 519 at 525.

144 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 3.52.

145 [1988] 1 NZLR 606.

146 [1992] 3 NZLR 528.

51 Both the New Zealand Illegal Contracts Act 1970 and Accident Compensation Scheme thus appear to share the same policy consideration – whether denying relief to the plaintiff would further the purpose of the relevant statute. This rationale of "furthering the purpose of the statute" may be considered a subset of the "consistency of the law" rationale.

52 However, the consistency rationale has a broader scope than simply "the furtherance of the purpose of the rule". As noted in the Canadian case of *Hall v Hebert*,[147] the integrity of the legal system should be preserved through preventing internal inconsistencies from arising. A consistent system of law "should … be the aim of any system of justice that seeks to be as fair, as clear and as simple as possible".[148] This was echoed by Dawson J in *Gala v Preston*,[149] where he surmised that the court must refuse to impose a duty of care if it led to a "fundamental inconsistency" between the civil and the criminal law.[150]

53 In light of the many convincing rationales that have been offered in support of the illegality doctrine, it is a reasonable conclusion that the illegality doctrine serves an important and essential function in the law. The next part of this article examines whether a unified approach in private law, to the relief of unenforceability resulting from the application of the illegality defence, is desirable in light of these rationales, and if so, whether unification is possible.

IV. The case for a unified approach

54 Despite sharing the same name, the illegality doctrines in tort, contract and trusts have significant differences in how they determine the impact of illegality. An argument for this counter-intuitive circumstance may be that the rationales for the illegality doctrine in tort are different from those in contract and trusts. However, if the underlying rationales can be reconciled, there would be no need for this variance. A unified approach in private law is both desirable and possible.

147 [1993] 2 SCR 159 at [17].

148 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 4.63.

149 (1991) 100 ALR 29.

150 (1991) 100 ALR 29 at 54.

A. The desirability of unification

55 A unified approach is desirable as it, firstly, avoids different regimes for overlapping or closely related claims.[151] For example, in *Saunders v Edwards*,[152] the defendant had fraudulently represented in the sale of a lease of a flat that the lease included a roof garden. The plaintiffs had sought to defraud the Revenue by understating the true value of the flat, in order to avoid paying stamp duty. The action was brought upon the tort of deceit, and no contractual actions for specific performance or damages for breach were brought, and so no confusion as to the applicable regime arose on the facts. However, if a contractual claim had been brought in the alternative, the court would have been required to apply the rules with regard to illegal contracts on the one hand, and the very different rules with regard to tortious claims on the other. The current compartmentalised approach to illegality risks confusion and inconsistent results, and should be improved upon.[153]

56 Secondly, unification based upon the shared rationales underlying contract, trusts, tort illegality jurisprudence would allow the general defence of illegality to develop in an appropriate and principled manner. The fear is that authoritative statements on the illegality doctrine in some cases may resolve fundamental issues in ways which cause the lower courts to subsequently deny claims in situations unjustifiable in terms of the fundamental rationales of the defence.[154] For example, there is a significant divergence in judicial opinion on the proper ambit of care in tortious claims, the Australian position being "openly hostile to an expansive liability in negligence" whereas the Canadian decisions being "overwhelmingly favourable to expansive liability".[155] This situation suggests that fundamental questions on the proper scope of the illegality defence in tort merit a detailed analysis and discussion before a position is reached, which courts faced with a particular fact pattern are ill-equipped to decide with any finality. The doctrine of illegality is "not one that should be lightly invoked", and

151 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 5.9.

152 [1987] 1 WLR 1116.

153 In fact, the operation of two different regimes was one of the chief reasons some of the respondents to the Law Commission Consultation Paper suggested that the scope of the examination be expanded to include the effect of illegality on tortious claims as well: Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at Pt V footnote 11, p 95.

154 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 5.24.

155 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 3.65, citing R Kostal, "Currents in the Counter-Reformation: Illegality and Duty of Care in Canada and Australia" [1995] Tort LR 100.

where invoking it is justified by reasoning that "properly reflects the policy rationales that justify its existence".[156]

B. A unifying rationale?

57 Before attempting to set out a unified approach, the various rationales elaborated upon above[157] must first be evaluated, and a common set of rationales identified. For a unified approach to be possible, the important rationales in private law must be sufficiently compatible. However, this is no easy task: the case law from Australia, England and Wales, New Zealand, Canada and Singapore – though extensive – has been far from uniform.

58 The classical statement by Lord Mansfield in *Holman v Johnson*[158] that "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act"[159] is frequently cited to support the illegality doctrine. Unfortunately, this statement is unhelpful. Firstly, it does not explain cases where a plaintiff whose claim is closely connected to his illegal act may be defeated by the illegality defence, even though he does not have to, in a technical sense, found the claim upon it.[160] Secondly, it is not self-explanatory, and does not tell us *why* the courts will not lend its aid in those circumstances.

59 The rationale of "protecting the dignity of the courts", whilst valid under exceptional circumstances, is by itself an unsatisfactory rationale upon which to base the general defence of *ex turpi causa*. The dignity of the courts could only be at risk where serious illegality was involved.[161] In cases involving minor breaches of mere regulations, this rationale would not provide guidance to the courts.

60 As regards the rationale based upon the *nemo ex* maxim, it fails as a unifying rationale, for not all English cases involving claims for personal injuries and indemnities tainted by illegality have been barred.[162] More importantly, the 2001 Consultation Paper felt that this rationale does not adequately justify the application of the illegality

156 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 5.25.
157 See paras 26–52 of this article.
158 (1775) 1 Cowp 341.
159 (1775) 1 Cowp 341 at 343.
160 See, *eg*, *Cross v Kirby*, *The Times* (5 April 2000).
161 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 4.25.
162 See, *eg*, *Meah v McCreamer* [1985] 1 All ER 367; though the issue here may be the broader one of the interpretation given to the meaning of "benefit" or "profit: Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 4.39.

doctrine in the context of tortious claims tainted by illegality.[163] The problem with a bright line rule allowing an "entirely innocent party" to claim is that it seems unduly harsh on the plaintiff in situations of minor illegality.[164]

61 The Australian approach in *Nelson v Nelson*,[165] which appears to weigh the seriousness of the illegality involved with the hardship caused to the plaintiff, seems preferable. In that case, the High Court of Australia allowed the plaintiff's claim on condition that the plaintiff disgorges the benefit illegally obtained. This elegantly reflected the courts' disapproval of unjust enrichment via unlawful means, without being overly draconian towards the plaintiff by a total denial of relief.[166] The rationale inherent in this approach seems to be the recognition that whilst a plaintiff should not profit from his own wrongdoing, neither should relief be totally denied, especially if the illegality is not serious. Thus, the rationale that a plaintiff should not profit from his own wrongdoing, though compelling at first glance, also fails to provide an over-arching policy consideration upon which to base the general defence illegality.

62 The rationale of deterrence, though grudgingly accepted by the 2001 Consultation Paper,[167] clearly cannot fully underpin the general defence of illegality. There is much judicial scepticism regarding the efficacy of the deterrent effect of the illegality defence.[168] *A fortiori*, the converse argument that allowing a remedy would achieve the same aim of deterrence is at least equally compelling.[169]

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163 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 4.47.

164 See, *eg*, *Cope v Rowlands* (1836) 150 ER 707, *Re Mahmoud v Ispahani* [1921] 2 KB 716, and the dicta of Kerr LJ in *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1988] QB 216.

165 (1995) 184 CLR 538.

166 A Phang, "Of Illegality and Presumptions – Australian Departures and Possible Approaches" (1996) 11 JCL 53 at 72–73.

167 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at paras 4.33 and 4.35.

168 For example, see Diplock LJ's comments in *Hardy v Motor Insurer's Bureau* [1964] 2 QB 745 at 770.

169 For if one party to an illegal transaction knew that the other party would be able to obtain restitution of benefits conferred, it would stop him from entering into the illegal transaction in the first place: G H Treitel, "Contract and Crime" in *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981) p 81 at p 100; G Virgo, "The Effect of Illegality on Claims for Restitution in English Law" in *The Limits of Restitutionary Claims: A Comparative Analysis* (W Swadling ed) (London: UKNCCL, 1997) p 141 at pp 183–184.

63 On the other hand, the "consistency of the law" rationale, as evaluated above, holds great explanatory power.[170] The 2001 Consultation Paper regarded this rationale as the most important relating to the illegality doctrine in tort, holding the view that it may underlie many of the existing rules of illegality in tort, and provide a useful rationale to explain many of the cases.[171] The Law Commission also noted that they see no reason why it cannot apply to contract and trusts as well.[172]

64 As can be seen, the most hopeful candidate to serve as a unifying rationale underpinning the general defence of illegality is the "consistency of the law" rationale.[173] The rest of the rationales, whilst compelling in their own right, appear to be insufficient on their own strengths to fully support the doctrine of illegality.

V. The optimal approach to unification

A. The difficulty of judicial reform

65 We will now turn to the possible methods for bringing forth a unified approach to the illegality doctrine in private law. Reform for a unified approach to the illegality defence could be carried out by the Judiciary, developing the common law in its characteristic piecemeal fashion. This, however, is unlikely to be satisfactory. Firstly, the capacity of judicial reform to effect such large-scale changes to the law is doubtful. The *ratio decidendi* of cases brought before the courts are necessarily limited to the issues at hand. Remarks made by the court beyond its ambit in the instant case are simply *obiter dicta*. Judicial reform can thus only be carried out in a piecemeal fashion, which is neither feasible nor efficient when implementing the vital systemic changes required for a unified general defence of illegality which spans the entire length and breadth of private law. Additionally, "hard cases make bad law".[174] Cases which involve exceptional factors or extenuating

170 See paras 47–52 above; Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 3.47.

171 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at paras 4.69–4.71. The Law Commission went as far as to suggest that if "consistency" is not accepted as a valid rationale, much of the case-law on tortious claims tainted by illegality would have no underlying justification, and the doctrine of illegality should be abolished unless another convincing rationale can explain the holdings in these cases: at para 4.74.

172 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 6.53.

173 See paras 47–52 of this article.

174 G Hayes (1854) quoted in W S Holdsworth, *A History of English Law* (London: Methuen, 1926.) vol ix at p 423.

circumstances "tempt a judge to stretch or even disregard principle(s) of law at issue".[175]

66 Secondly, the realistic likelihood of such judicial reform is low. Judicial reform can only be effected when appropriate cases are brought up to the courts. Reform to unify the disparate approaches to the illegality doctrine under tort, contract and trusts necessarily requires an authoritative whole-scale restatement of the law coming from the highest court, the chances of which are slight. In the context of English law, given the rejection of the "public conscience test"[176] by the House of Lords in *Tinsley v Milligan*,[177] the prospect of wholesale judicial reform of the illegality defence is bleak.[178] The House of Lords would be unlikely to adopt an approach which would give courts the sort of discretion required for the kind of reform that is necessary.[179]

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175 *Black's Law Dictionary* (St Paul, MN: West, 8th Ed, 2004), definition of "hard case".

176 The "public conscience test" was a general principle that the courts would only refuse to assist the plaintiff where to do so would be an "affront to the public conscience" (*Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 35, *per* Kerr LJ). It was the result of a general rejection by the courts of the technical and inflexible rules that comprise the illegality defence in the late 1980s and early 1990s (Law Commission of England and Wales, *Illegal Transactions: the Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 4.1). This test was first considered by Hutchison J in *Thackwell v Barclays Bank plc* [1986] 1 All ER 676 (a case concerning the recovery of property obtained illegally), and followed in *Saunders v Edwards* [1987] 1 WLR 1116 (where the plaintiffs were able to recover damages for the defendants' fraudulent misrepresentation in the sale of a flat and furniture despite their own involvement in the alleged illegality), *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 (where the illegality defence was unsuccessfully raised by the defendant when the plaintiff sought to sue on a contract of insurance), *Howard v Shirlstar Container Transport Ltd* [1990] 1 WLR 1292 (a case concerning enforcement of a contract despite illegal performance), and by the majority of the Court of Appeal in *Tinsley v Milligan* [1992] Ch 310, *per* Nicholls and Lloyd LJJ (Ralph Gibson LJ dissenting).

177 [1994] 1 AC 340. Both the majority (at 369, *per* Lord Browne-Wilkinson) and the minority (at 362–364, *per* Lord Goff) rejected the argument that there was any so-called public conscience test in English law.

178 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 5.10.

179 The reason for this is that, in rejecting the "public conscience test", the courts seem primarily concerned with the issue of certainty. As Lord Browne-Wilkinson in *Tinsley v Milligan* [1994] 1 AC 340 stated at 369: "[T]he consequences of being a party to an illegal transaction cannot depend … on such an *imponderable factor* as the extent to which the public conscience would be affronted by recognizing rights created by illegal transactions." [emphasis added] This echoed Dillon LJ's criticisms in *Pitts v Hunt* [1991] 1 QB 24 at 56: "I find a test that depends on what would or would not be an affront to the public conscience every difficult to apply …" The English courts' concerns are perhaps best summed up by McHugh J in *Nelson v Nelson* (1995) 184 CLR 538 at 612: "While it provides a ready means for a judge to do what he or she thinks is just in the circumstances of the particular case, it does so by means of an unstructured discretion. The so called 'public conscience' test, although providing a flexible approach, leaves the matter at large. Greater

(*cont'd on the next page*)

67 Lastly, the propriety of the Judiciary in deciding upon the illegality doctrine – which is based on public policy considerations – is questionable. Lord Goff was clear in his call for any reform in this area to be instituted by the Legislature.[180] Since the illegality doctrine is a "principle of policy",[181] so the argument goes, and Parliament would be a better forum for deciding on public policy matters, any sweeping reforms to the illegality defence should be left to the Legislature. Clearly, judicial reform is not a feasible route to achieving a unified approach in private law for the relief of unenforceability due to illegality.

B. Legislative reform models and proposals

68 A unified approach to the illegality defence could be effected through legislative reform. There is wide-spread academic support for this approach,[182] because "reform by way of legislation, which provides the opportunity to deal with the relevant law as a whole, would result in a cleaner, quicker, and more coherent advance than any reform that could be achieved incrementally by the common law".[183] Additionally, legislative reform has already been adopted,[184] or recommended by law reform bodies,[185] in several jurisdictions.

69 There are several ways to legislative reform. One would be the imposition of a strict set of rules for relief of unenforceability to succeed. However, the approach of a strict set of rules is undesirable. It would be "difficult to formulate a set of rules that could adequately

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certainty in the application of the illegality doctrine will be achieved if the courts apply principles instead of a vague standard such as the 'public conscience'."

180 *Tinsley v Milligan* [1994] 1 AC 340 at 364.

181 *Tinsley v Milligan* [1994] 1 AC 340 at 355, *per* Lord Goff.

182 J Shand, "Unblinkering the Unruly Horse: Public Policy in the Law of Contract" (1972A) CLJ 144 at 164; A Stewart, "Contractual Illegality and the Recognition of Proprietary Interests" (1988) 1 JCL 134 at 161; N Cohen, "The Quiet Revolution in the Enforcement of Illegal Contracts" [1994] LMCLQ 163 at 170–171; B Dickson, "Restitution and Illegal Transactions" in *Essays on the Law of Restitution* (A Burrows ed) (Oxford: Clarendon Press, 1991) p 171 at p 195; N Cohen, "Illegality: The Case for Discretion" in *The Limits of Restitutionary Claims: A Comparative Analysis* (W Swadling ed) (London: UKNCCL, 1997) at p 186.

183 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 5.12.

184 See, *eg*, the Illegal Contracts Act 1970 of New Zealand and the Contracts (General Part) Law 1973 ss 30–31 of Israel.

185 Recommendations for legislative reform have been made by the Law Reform Committee of South Australia (*37th Report Relating to the Doctrines of Frustration and Illegality in the Law of Contract*, 1977, p 23), by the Law Reform Commission of British Columbia (*Report on Illegal Transactions*, 1983; see also the British Columbia Law Institute, *Proposals for a Contract Law Reform Act* (1998)), by the Ontario Law Reform Commission (*Report on Amendment of the Law of Contract*, 1987), and by the Singapore Law Reform Committee (*Relief From Unenforceability of Illegal Contract And Trusts*, 5 July 2002).

replace those (already) operating" at present.[186] Further, a strict set of rules would be ill-equipped to tackle factors such as the degree of seriousness of the illegality involved.[187] Drawing up a closed list of offences that are, or are not, sufficiently serious to bar the claim would not work either, as it would not allow for the varied circumstances of cases to be taken into account, and could operate arbitrarily.[188] Much of the potential for injustice in the current illegality doctrine is the inflexibility of the rules involved. It is difficult to see how the imposition of another strict set of rules can alleviate this situation.[189] Instead, most academic commentators in this area support the adoption of some type of discretionary approach,[190] and that is the approach which has been followed in those jurisdictions where legislation has been implemented.[191]

186 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 6.6; see also Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 7.2.

187 The inability of the current regime of strict illegality rules to take into account the seriousness of the illegality involved is discussed in Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at paras 7.29–7.32; see also J D McCamus, "Restitutionary Recovery of Benefits Conferred under Contracts in Conflict with Statutory Policy – the New Golden Rule" (1987) 25 Osgoode Hall LJ 787 at 821–824.

188 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 6.6.

189 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 7.2: "[I]njustice would seem to be the inevitable result of [such an] application of a strict set of rules to a wide variety of circumstances, including cases where the illegality involved may be minor, may be wholly or largely the fault of the defendant, or may be merely incidental to the contract in question."

190 See, *eg*, J K Grodecki, "In pari delicto potior est conditio defendentis" (1955) 71 LQR 254 at 273–274; J Shand, "Unblinkering the Unruly Horse: Public Policy in the Law of Contract" (1972A) CLJ 144 at 164–165; R Merkin, "Restitution by Withdrawal from Executory Illegal Contracts" (1981) 97 LQR 420 at 444; A Stewart, "Contractual Illegality and the Recognition of Proprietary Interests" (1988) 1 JCL 134 at 161; R A Buckley, "Social Security Fraud as Illegality" (1994) 110 LQR 3 at 7–8; N Cohen, "The Quiet Revolution in the Enforcement of Illegal Contracts" [1994] LMCLQ 163 and "Illegality: the Case for Discretion" in *The Limits of Restitutionary Claims: A Comparative Analysis* (W Swadling ed) (London: UKNCCL, 1997) ch 7; N Enonchong, "Effects of Illegality: A Comparative Study in French and English Law" (1995) 44 ICLQ 196; and B Dickson, "Restitution and Illegal Transactions" in *Essays on the Law of Restitution* (A Burrows ed) (Oxford: Clarendon Press, 1991) ch 7 at p 195.

191 See the New Zealand Illegal Contracts Act 1970 and, to a more limited extent, Israeli Contracts (General Part) Law 1973 ss 30–31.

C. The Israeli model

70 One option could be what has been termed the "partial solution",[192] an example of which is the Israeli Contracts (General Part) Law 1973. Under the Israeli law, a contract which is illegal, immoral or against public policy is void, and not merely unenforceable.[193] However, the court is under a duty of restitution: in so far as one party has fulfilled his obligations under the illegal contract, the court may if it "deems it just to do so and on such conditions as it sees fit … require the other party to fulfil the whole or part of the corresponding obligation".[194] Effectively, the Israeli court may in its discretion enforce the illegal contract, and the court may decide on which factors matter and which do not.[195]

71 The Israeli solution introduced major innovations into the reform of unenforceability of illegal contracts, the most important being the almost total rejection of the much criticised *ex turpi causa* doctrine in favour of a restitution-based approach.[196] The Israeli Act also provides a wide scope of relief, since illegal contracts are made void, as opposed to being merely unenforceable.[197] However, the protection of third parties who had dealt in good faith with the parties to an illegal contract is a matter left entirely to the Israeli courts. The Israeli solution also goes too far in making restitution a matter of duty, ignoring the possibility that restitution should be denied in certain cases for the protection of the public interest.[198]

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192 Singapore Law Reform Committee, *Relief From Unenforceability of Illegal Contract and Trusts* (5 July 2002) at para 8.5.

193 Israeli Contracts (General Part) Law 1973 s 30: "A contract, the conclusion, contents or object of which are illegal, immoral or contrary to public policy is void."

194 Israeli Contracts (General Part) Law 1973 s 31:

> The provisions of Section 19 to 21 (which impose a duty of restitution where a contract has been rescinded) will apply, mutatis mutandis, to the avoidance of a contract under this chapter, provided that in the case of an avoidance under section 30 the court may, if deems it just to do so and on such conditions as it sees fit, relieve a party of all or part of the duty under section 21 and, insofar as one party has fulfilled his obligation under the contract, require the other party to fulfil all or part of the corresponding obligation.

195 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) at para 8.5.

196 Daniel Friedmann, "Consequences of Illegality under the Israeli Contract Law (General Part) 1973" (1984) ICLQ vol 33 No 1 81 at pp 81–85.

197 Void contracts will not pass title and will not permit a claim based on title which has passed; see also Daniel Friedmann, "Consequences of Illegality under the Israeli Contract Law (General Part) 1973" (1984) ICLQ vol 33 No 1 81 at pp 86–87.

198 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) at para 8.6.

D. The New Zealand model

72 A second option to define the scope of a statutory discretion would be for statute to grant the courts a wide and unstructured discretion in granting relief from the unenforceability of illegal contracts, as has been done in New Zealand pursuant to the Illegal Contracts Act 1970.[199] The New Zealand Illegal Contracts Act renders all illegal contracts ineffective,[200] and goes on to confer a very wide power on the court to grant to the contracting parties and any others affected:[201]

> … such relief by way of restitution, compensation, variation of contract, validation of the contract in whole or part or for any particular purpose or otherwise howsoever as the Court in its discretion thinks just.

73 The distinctive characteristics of the New Zealand Illegal Contracts Act are a wide range of discretionary relief, not restricted to mitigating the defence of illegality, and a relatively unstructured discretion.[202] Though the statute does impose certain factors which the court has to take into consideration in exercising its discretion,[203] this list of factors is concise, and subordinate to the overarching discretion of the court "not [to] grant relief if it considers that to do so would not be in the public interest".

74 The most attractive point of the New Zealand Illegal Contracts Act is that "it has not, despite the absence of a structured discretion, provoked a floodgate of litigation".[204] The statutory recognition of

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199 The New Zealand Illegal Contracts Act (No 129 of 1970) originated from a report of the Contracts and Commercial Law Reform Committee of New Zealand presented to the Minister of Justice of New Zealand in October 1969.

200 New Zealand Illegal Contracts Act 1970 s 6(1): "… every illegal contract shall be of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract …".

201 New Zealand Illegal Contracts Act 1970 s 7(1).

202 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) at para 8.7.

203 New Zealand Illegal Contracts Act 1970 s 7(3):

> In considering whether to grant relief … the court must have regard to– (a) The conduct of the parties; (b) In the case of a breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for any breach thereof; and (c) Such other matters as it thinks proper; but shall not grant relief if it considers that to do so would not be in the public interest.

204 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) at para 8.8. It has been reported that in the first 15 years of its operation, only some 20 cases were decided under it: D W McLauchlan, "Contract and Commercial Law Reform in New Zealand" (1984–1985) 11 NZULR 36 at 40–41; see also R Cooke, in his review of *Consensus ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel* (1998) 114 LQR 505 at 509.

discretion in this area has been widely heralded as a success.[205] As Higgins and Fletcher put it:[206]

> The Act is a bold piece of legislation but one suspects that it merely gives legislative force to what less timorous members of the common law judiciary have been doing for some time.

75 One criticism of the New Zealand approach is that its scope is excessively restricted, since it is focused only upon illegal contracts. The application of the general common law illegality rules in the cases of trusts, gifts and other non-contractual transactions on the one hand, and the application of a statutorily-derived discretion in contractual cases on the other would not be ideal.[207] Another criticism is that the New Zealand legislation does not define illegal contracts, and thus fails to provide clear guidance as to its intended scope.[208] More importantly, some commentators reject the New Zealand model because they believe that the wide discretion granted to the courts creates uncertainty.[209]

E. The Australian and Canadian proposals

76 The New Zealand legislative reforms of the illegality doctrine subsequently inspired the British Columbia,[210] Ontario,[211] and South

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205 See, *eg*, D W McLauchlan, "Contract and Commercial Law Reform in New Zealand" (1984–1985) 11 NZULR 36 at 41; B Coote, "The Illegal Contracts Act 1970" in New Zealand Law Commission, *Contract Statutes Review* (Report No 25, 1993) ch 3; and R Cooke, in his review of *Consensus ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel* (1998) 114 LQR 505 at 509.

206 Higgins and Fletcher, *The Law of Partnership in Australia and New Zealand* (Sydney: Law Book Co, 3rd Ed, 1975) at p 42.

207 The argument here is similar to that brought up by the 2001 Law Commission of England and Wales Report, though it was raised there in the context of different regimes applying to tort as opposed to contracts and trusts: Law Commission of England and Wales, *The Illegality Defence In Tort* (Consultation Paper No 160, 2001) at paras 5.9–5.13.

208 M P Furmston, "The Illegal Contracts Act 1970 – An English View" (1972–1973) 5 NZULR 151; *cf* Schwartz, "Law Reform Commission of British Columbia, Report on Illegal Contracts" (1985) 19 Can Bus LJ 83 at 88, where he states: "Despite initial doubts about the soundness of its key provisions and rather cumbersome drafting, the Act has been tested on a number of occasions and most commentators agree that it has worked well in practice."

209 The adoption of a discretionary approach is rejected by G Virgo, "The Effect of Illegality on Claims for Restitution in English Law" in *The Limits of Restitutionary Claims: A Comparative Analysis* (W Swadling ed) (London: UKNCCL, 1997) ch 6 at pp 178–179, and F Rose, "Restitutionary and Proprietary Consequences of Illegality" in *Consensus ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel* (F D Rose ed) (London: Sweet & Maxwell, 1996) ch 10 at p 204.

210 Law Reform Commission of British Columbia, *Report on Illegal Transactions* (LRC 69, November 1983).

211 Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987) at pp 223–225.

Australian[212] proposals for similar reform. The underlying thinking of the Australian and Canadian law reformers was succinctly captured in the South Australian Report:[213]

> The fact is that the New Zealand report and Act were the first in this area of the law … For ourselves, we think that the New Zealand Act merits consideration and that there are suggestions which could be made which would assist in its operation in this State.

77 The Australian and Canadian reports essentially endorsed the wide discretion embodied in the New Zealand approach,[214] and at the same time proposed modifications to the New Zealand model in order to "cure" perceived systemic weaknesses or doctrinal fissures. One suggestion that was common to all three reports was the rejection of s 6 of the New Zealand Act, which provides that illegal contracts shall be of no effect. The South Australian Committee felt that "the common law has already provided a number of ways in which relief may be granted to persons whose contracts would otherwise be caught by illegality either at common law or by statute … and it would seem unfortunate to force contracts with very varying kinds of illegality into a strait jacket".[215] The British Columbia proposal for reform concurred, adding that such a provision would throw into doubt the title to property, might create anomalies by "encourag[ing] self-help remedies", and "revive the technical illogicality" of the reliance principle.[216] The Ontario Report also pointed out the "dangers in this approach" with regard to property and criminal law issues.[217]

78 Another common suggestion was that the focus be broadened from simply "illegal contracts". The South Australian Committee wished to include contracts considered void at common law, such as those "being in restraint of trade, in derogation or ouster of the jurisdiction of the Courts or which operates so as to take away or derogate from the interdependent rights and liabilities of husband and wife or parent and

212 Law Reform Committee of South Australia, *37th Report Relating to the Doctrines of Frustration and Illegality in the Law of Contract* (1977) at p 23.

213 Law Reform Committee of South Australia, *37th Report Relating to the Doctrines of Frustration and Illegality in the Law of Contract* (1977) at pp 23–24.

214 Law Reform Commission of British Columbia, *Report on Illegal Transactions* (LRC 69, November 1983) at pp 55–56; Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987) at p 232; Law Reform Committee of South Australia, *37th Report Relating to the Doctrines of Frustration and Illegality in the Law of Contract* (1977) at pp 26–27.

215 Law Reform Committee of South Australia, *37th Report Relating to the Doctrines of Frustration and Illegality in the Law of Contract* (1977) at p 25.

216 Law Reform Commission of British Columbia, *Report on Illegal Transactions* (LRC 69, November 1983) at pp 81–83.

217 Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987) at p 231.

child".[218] Similarly, the Ontario Report questioned "the express exclusion in section 11 of the [New Zealand] Act of certain void but not illegal contracts … there is little to commend in the perpetuation of the distinction between void contracts and illegal contracts".[219] The British Columbia Committee went even further, advocating that the focus of reform in this area should be extended to all "transactions", defined to include any "contract, trust, power or other arrangement, or provisions thereof, and transfer, conveyance, deed or other disposition of property".[220]

79 There was, however, one major difference in opinion between these law reform committees: this was with regard to how their respective recommendations would interact with the existing law on illegality. Section 6 of the New Zealand Act provides that the statutory discretion therein entirely replaces the previous illegality regime in common law and equity.[221] This was similarly suggested by the British Columbia Committee.[222] On the other hand, the South Australian Report felt that any statutory remedy implemented would only be applicable "in addition to any remedy already given by the common law or by any other statute in relation to illegal contracts".[223] The Ontario Committee concurred, explaining that "the existing common law should be left in place, for if the existing devices whereby courts have held contracts to be enforceable were removed, with nothing put in their place, there would be a danger of exacerbating, rather than alleviating, the anomalies and injustices caused by the law of illegal contracts".[224]

80 Undeniably, these subsequent law reform proposals have built and developed much upon the New Zealand model, plugging many of the gaps in the original Act. However, the singular efficacy with which the Australian and Canadian Committees have incorporated the

218 Law Reform Committee of South Australia, *37th Report Relating to the Doctrines of Frustration and Illegality in the Law of Contract* (1977) at p 24.

219 Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987) at p 224.

220 Law Reform Commission of British Columbia, Report on Illegal Transactions (LRC 69, November 1983) at p 64.

221 New Zealand Illegal Contracts Act 1970 s 6(1): "*Notwithstanding any rule of law or equity to the contrary*, but subject to the provisions of this Act and of any other enactment, every illegal contract shall be of no effect …". [emphasis added]

222 Law Reform Commission of British Columbia, *Report on Illegal Transactions* (LRC 69, November 1983) at p 59, Recommendation 3: "In a proceeding between parties involved in an illegal transaction, no relief should be granted by a court in respect of an illegal transaction or any property affected by it, except as provided by the Illegal Transaction Act."

223 Law Reform Committee of South Australia, *37th Report Relating to the Doctrines of Frustration and Illegality in the Law of Contract* (1977) at p 26.

224 Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987) at p 232.

signature statutorily-derived, wide-ranging discretion of the New Zealand model also meant that the fundamental weakness of the New Zealand approach – the problem of uncertainty – has not been dealt with.[225]

F. The English proposal

81 The third option would be for legislation to grant a structured discretion to the courts, akin to that proposed by the Law Commission of England and Wales.[226] Under the Law Commission of England and Wales's recommendations, the structured discretion takes the form of a series of statutorily provided factors which the court must take into account in structuring its discretion to apply the public interest.[227] Importantly, the courts may only exercise their structured discretion to provide restricted relief. The courts would only be able to mitigate the defence of illegality but not, say, validate the contract in question or provide restitutionary relief in favour of a contracting party.[228] The Law

225 The adoption of a discretionary approach is rejected by G Virgo, "The Effect of Illegality on Claims for Restitution in English Law" in *The Limits of Restitutionary Claims: A Comparative Analysis* (W Swadling ed) (London: UKNCCL, 1997) ch 6 at pp 178–179, and F Rose, "Restitutionary and Proprietary Consequences of Illegality" in *Consensus ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel* (F D Rose ed), (1996) ch 10 at p 204.

226 See Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at paras 6.6–6.8, and Law Commission of England and Wales, *Illegal Transactions: the Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at paras 7.27–7.28.

227 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 7.18. The Law Commission provisionally proposed that when exercising its discretion to afford relief, a court should consider:

(i) the seriousness of the illegality involved;

(ii) the knowledge and intention of the party seeking to enforce the contract, seeking to recover benefits conferred under it, or seeking the recognition of legal or equitable rights under it;

(iii) whether denying the claim would deter the illegality;

(iv) whether denying the claim would further the purpose of the rule which renders the transaction or plaintiff's conduct illegal; and

(v) whether denying relief would be proportionate to the illegality involved.

228 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 7.73: "In reaching the provisional recommendations outlined above, we have also *implicitly considered, but not favoured*, an alternative approach to reform which would involve giving the courts a discretion to go beyond treating illegality as a defence to standard rights and remedies … Under this alternative more radical approach to the adoption of a discretion, the courts would not be required to stay within the limits of the general common law framework of rights and remedies, but, in a contractual dispute which involves illegality, would be allowed to make any adjustment to the rights and remedies of the parties as they consider fit." [emphasis added]

Commission of England and Wales envisaged its proposed structured discretion *replacing* the present strict rules under the illegality doctrine, for it was of the view that the plaintiff was being unduly penalised under the present rules.[229]

82 The English proposal is attractive for it combines the recognition of the need for discretion in relation to the illegality defence,[230] with a mindfulness of the uncertainty associated with the adoption of such a discretionary approach.[231] By "providing guidance as to the [five] factors that the court should consider when reaching its decision",[232] the Law Commission of England and Wales hoped to impose what it felt to be the relevant considerations by statute, and not leave the identification of such considerations to the courts. The Law Commission of England and Wales was also unconvinced that the discretionary approach would result in any greater uncertainty than already exists under the current law:[233]

> Any certainty that the present rules create is more illusory than real. It is not always clear what the rules are, and it is difficult to apply them to specific factual situations.

83 There have been concerns that even a structured discretion may result in "too much uncertainty in an area where clarity is vital".[234] However, even if the discretionary approach does bring about greater

229 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 7.2.

230 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 7.2: "We consider that the best means of overcoming the injustice (associated with the illegality defence) is to replace the present strict rules with a discretionary approach under which the courts would be able to take into account such relevant issues as the seriousness of the illegality involved, whether the plaintiff was aware of the illegality, and the purpose of the rule which renders the contract illegal … In our view, a balancing of various factors is required so that, put quite simply, the law on illegal contracts does not lend itself to a regime of rules."

231 For criticisms on the uncertainty of a discretionary approach, see G Virgo, "The Effect of Illegality on Claims for Restitution in English Law" in *The Limits of Restitutionary Claims: A Comparative Analysis* (W Swadling ed) (London: UKNCCL, 1997) ch 6 at pp 178–179, and F Rose, "Restitutionary and Proprietary Consequences of Illegality" in *Consensus ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel* (F D Rose ed) (London: Sweet & Maxwell, 1996) ch 10 at p 204.

232 Law Commission of England and Wales, "*Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 7.27.

233 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 7.3.

234 See, *eg*, G Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 2nd Ed, 2006) at p 737.

uncertainty, it is arguably "a price worth paying for the greater justice that it may bring" to the realm of private law.[235]

G. The Singapore proposal

84 A novel approach was put forth by the Singapore Law Reform Committee in its 2002 report, "Relief from Unenforceability of Illegal Contract and Trusts".[236] At first glance, the Singapore approach seems difficult to classify. It draws from both the New Zealand Act and the English proposal, attempting to maintain the vigour of the wide-ranging discretion afforded under the New Zealand Act, even as it seeks to provide some manner of guidance to the court, drawing from the English proposal in order to ameliorate concerns of "uncertainty".

85 However, on a practical analysis, the proposed Singapore approach tends towards the wide and unstructured statutory discretion embodied in the New Zealand Act, rather than the bounded discretion as suggested by the English proposal, for two reasons. Firstly, the Singapore committee rejected an obligatory series of factors to consider in granting relief – which comprises the gist of the structured discretion proposed by the Law Commission of England and Wales – in favour of a voluminous, comprehensive list of the relevant considerations,[237] which

235 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 7.3; see also J K Grodecki, "In pari delicto potior est conditio defendentis" (1955) 71 LQR 254 at 260.

236 Singapore Law Reform Committee (5 July 2002).

237 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002), Appendix I: Draft Bill entitled "Illegal Transactions (Relief) Act" s 6 (Relevant considerations):

> (1) In granting or refusing to grant relief under section 5, the court shall have regard to all relevant circumstances including —
>
> *(a)* the public interest;
>
> *(b)* the seriousness of the illegality;
>
> *(c)* whether denying relief will act as a deterrent;
>
> *(d)* whether denying relief will further the purpose of the rule which renders the transaction illegal;
>
> *(e)* whether denying relief is proportionate to the illegality involved;
>
> *(f)* the circumstances of the formation or performance of the illegal transaction, including the intent, knowledge, conduct and relationship of the parties;
>
> *(g)* whether any party to the illegal transaction was, at a material time, acting under a mistake of fact or law;
>
> *(h)* the extent to which the illegal transaction has been performed;
>
> *(i)* whether the written law which renders the transaction illegal has been substantially complied with;
>
> *(j)* whether and to what extent the written law which renders the transaction illegal provides relief; and

(*cont'd on the next page*)

may bear on the exercise of the court's discretion.[238] Secondly, the court's power to grant relief is not restricted to mitigating the defence of illegality alone – as suggested by the Law Commission of England and Wales – but goes beyond that.[239]

86 Similar to the South Australian and Ontario proposals,[240] the proposed Singapore approach seeks to retain all elements of the existing law on illegality, so that "nothing in the proposed reform should affect the determination of whether a contract or trust is illegal".[241] Instead, reform would be effected through the empowerment of the courts, above and beyond the current rules, with a statutorily provided discretion to afford unrestricted relief having regard to all the circumstances.[242] In this way, the proposed Singapore approach attempts

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(k) other consequences of denying relief.

(2) In addition to the matters it shall have regard to under subsection (1), the court shall also have regard to whether or not —

(a) a party to the transaction has so altered that party's position that granting relief would, in the circumstances, be inequitable;

(b) another proceeding has been commenced in respect of the transaction; and

(c) a party to the transaction has compromised a claim in respect of the transaction.

238 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) at para 8.11.

239 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) at para 8.11. See also Appendix I of that same report: Draft Bill entitled "Illegal Transactions (Relief) Act" s 5.

240 Law Reform Committee of South Australia, *37th Report Relating to the Doctrines of Frustration and Illegality in the Law of Contract* (1977) at p 26; Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987) at p 232.

241 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) at para 8.1. See also Appendix I of that same report: Draft Bill entitled "Illegal Transactions (Relief) Act" s 4 (Determination of illegality): "Nothing in this Act shall abrogate or affect any rule of law (including any rule of construction) relating to whether and in what circumstances a transaction is affected by illegality."

242 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) at para 8.3. See also Appendix I of that same report: Draft Bill entitled "Illegal Transactions (Relief) Act" s 5 (Court may grant relief):

(1) Notwithstanding any rule of law to the contrary, but subject to this Act, in any proceedings involving an illegal transaction, the court may grant to any person referred to in subsection (2), one or more of the following reliefs:

(a) restitution in whole or in part;

(b) compensation by way of damages or otherwise;

(c) apportionment of any loss arising from the formation or performance of the transaction, other than loss of profit;

(d) a declaration;

(e) an order vesting property in any person (including the State as *bona vacantia*) or directing a person to assign or transfer property to another;

(*cont'd on the next page*)

to harness the strength of the unstructured discretion implemented under the New Zealand Illegal Contracts Act, whilst at the same time doing away with the problematic position that all illegal contracts are "to be of no effect".[243]

87 Though an interesting synergy of the New Zealand model and English proposal, it is unclear in practice how the "semi-bounded" discretion described in the proposed Singapore approach would work. In laying down a grand total of 14 factors[244] for the courts to consider in applying its discretion to grant relief, the suggestion is that the proposed Singapore approach is concerned with providing some form of "guidance on how the discretion to grant relief should be exercised".[245] If that indeed is the case, then, why has the Singapore proposal "not found it necessary to stipulate an obligatory list of considerations to be taken into account when granting relief"?[246] If, instead, it is up to the court to identify the pertinent considerations and factors with which to exercise its discretion in the circumstances of each case, then the 14 factors listed may not be able to provide much real guidance after all, and the court's

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(f) variation of the transaction, including severance of any illegal part of the transaction;

(g) enforcement of the transaction in whole or part or for any particular purpose; or

(h) any other remedy the court could have granted at common law or in equity had the transaction not been an illegal transaction.

(2) Any relief under subsection (1) may be granted to —

(a) any party to the illegal transaction; or

(b) any person claiming through or under any such party.

(3) Any relief under subsection (1) may be granted upon and subject to such terms and conditions as the court thinks fit.

243 New Zealand Illegal Contracts Act 1970 s 6(1). This section has been previously rejected by the South Australian (*37th Report Relating to the Doctrines of Frustration and Illegality in the Law of Contract* (1977) at p 25) and British Columbia (*Report on Illegal Transactions* (LRC 69) at pp 82–83) proposals for reform. The Singapore Law Reform Committee rejected this section in favour of a retention of the current rules on illegality: Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002), Appendix I: Draft Bill entitled "Illegal Transactions (Relief) Act" s 4 (Determination of illegality).

244 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) Appendix I: Draft Bill entitled "Illegal Transactions (Relief) Act" s 6 (Relevant considerations).

245 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) at para 8.11. This concern was echoed in "*Illegal Transactions: The Effect of Illegality on Contract and Trust*" (Consultation Paper No 154, 1999) at para 7.27: "… provide guidance as to the factors that the court should consider when reaching its decision …"

246 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) at para 8.11.

discretion under the proposed Singapore approach may in reality be unbounded.[247]

88 More significantly, the practical effectiveness of employing the existing law on illegality overlaid with the suggested statutory discretion is questionable. A key reason for reform has always been to comprehensively alleviate the complexity and inconsistency of the current illegality rules.[248] Under the proposed Singapore approach, potential injustice in the operation of the current illegality rules may be ameliorated through the statutory discretion of the courts, but the courts would still have to work with the current complex and unclear regime of illegality rules. Such a proposal, it is submitted, may not be going far enough.

VI. Reforming illegality in private law

89 Of the various options for reform, a structured discretion granted to the courts via statutory reform seems the best method of achieving a unified approach in private law to the relief of unenforceability due to illegality. It would be helpful if, ultimately, a structured statutory discretion together with a common set of factors could be developed to which "the court could refer without having to categorize the claim based on [the] often artificial boundaries between" the different areas in private law.[249]

90 In exercising the structured discretion, the courts should bear in mind the fundamental policy rationales for the illegality doctrine.[250] By logical extension, the considerations guiding the courts in exercising their discretion should closely reflect these policies. And as evaluated above,[251] it is recommended that there be five obligatory considerations guiding the courts:

247 As the Honourable Justice of Appeal Phang then was, Andrew Phang ed, *Singapore and Malaysian Edition of Cheshire, Fifoot and Furmston's Law of Contract* (Singapore: Butterworths Asia, 2nd Ed, 1998) at p 742; see also Hans Tjio, "Review of the Singapore and Malaysian Edition of Cheshire, Fifoot and Furmston's Law of Contract, 2nd ed" [1999] SJLS 286 at 289: "The truth is that discretion inheres in every decision. There is no need to fear the animal that can be tamed."

248 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) at para 1.2: "Complex rules have been devised to do real justice between the parties, despite the presence of illegality. As complexity has mounted, the need for reform has become more pressing."

249 Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 5.14.

250 See paras 26–52 of this article.

251 See paras 26–52 of this article.

(a) whether denying relief will promote consistency of the law;[252]

(b) the seriousness of the illegality and whether awarding relief would adversely affect the dignity of the court;[253]

(c) whether denying relief will act as a deterrent;[254]

(d) whether denying relief is proportionate to the illegality involved;[255] and

(e) circumstances of the formation or performance of the illegal transaction.[256]

91 Of the five considerations, the policy consideration of "consistency of the law" should be weighted more strongly than the rest, as it is the strongest rationale supporting the unified approach in private law for the relief of unenforceability due to illegality. It is conceded, however, that the actual weighting of these considerations ultimately lies in the hands of the court when confronted with the facts of a particular case.

92 In considering these recommendations, many other considerations are considered but rejected. "The public interest"[257] is rejected as a consideration because it is simply too vague to guide the court. "Whether any party to the illegal transaction was, at a material time, acting under a mistake of fact or law",[258] "the extent to which the illegal transaction has been performed"[259] and "whether the written law which renders the transaction illegal has been substantially complied with"[260] are extensions of the consideration of "the circumstances of the formation or performance of the illegal transaction",[261] and are hence

252 See paras 47–52 of this article.
253 See paras 26–27 of this article.
254 See paras 32–36 of this article.
255 See para 85 of this article.
256 See para 85 of this article.
257 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) Appendix I: Draft Bill entitled "Illegal Transactions (Relief) Act" (Relevant considerations) s 6 (1)(*a*).
258 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) Appendix I: Draft Bill entitled "Illegal Transactions (Relief) Act" (Relevant considerations) s 6 (1)(*g*).
259 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) Appendix I: Draft Bill entitled "Illegal Transactions (Relief) Act" (Relevant considerations) s 6(1)(*h*).
260 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) Appendix I: Draft Bill entitled "Illegal Transactions (Relief) Act" (Relevant considerations) s 6(1)(*i*).
261 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) Appendix I: Draft Bill entitled "Illegal Transactions (Relief) Act" (Relevant considerations) s 6(1)(*f*).

subsumed under that consideration accordingly.[262] "Whether and to what extent the written law which renders the transaction illegal provides relief"[263] and "whether denying relief will further the purpose of the rule which renders the transaction illegal"[264] are collapsed under a single heading: "whether denying relief will promote consistency of the law".[265]

93 A unified structured discretion that does away entirely with the undue technicality, complication and inconsistency of the current illegality defence in contract, trusts and tort would provide a clean, quick and coherent reform.[266] It would enable the courts to grant relief based closely upon the pragmatic policy considerations that underlie the illegality doctrine, rather than compelling the judges to artificially force the myriad circumstances of the illegality cases into the straitjackets supplied by the current rigid illegality rules.

94 There is no evidence that such an approach would be any more uncertain than the current state of the law.[267] *A fortiori* past cases would no longer be binding precedents, and instead serve as persuasive authorities in the judicial deliberation and application of the structured discretion.

95 A unified structured discretion for the general defence of illegality would thus provide a good middle ground. The courts would have sufficient flexibility to do justice in illegality claims by providing discretionary relief. At the same time, a series of obligatory considerations to be considered in the judicial deliberation and application of the structured discretion would, it is hoped, guide the courts in granting relief closely in line with the underlying rationales for the illegality doctrine itself.[268] Fears of uncertainty are likely to be myopic, given the potential of subsequent long-term, principled development of the illegality defence in private law.

96 The exploration of the underlying rationales for the illegality doctrine has shown that, despite its inflexibility and potential for

262 See para 85 of this article.

263 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) Appendix I: Draft Bill entitled "Illegal Transactions (Relief) Act" (Relevant considerations) s 6(1)(*j*).

264 Singapore Law Reform Committee, *Relief from Unenforceability of Illegal Contract and Trusts* (5 July 2002) Appendix I: Draft Bill entitled "Illegal Transactions (Relief) Act" (Relevant considerations) s 6(1)(*d*).

265 See paras 47–52 of this article.

266 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 5.12.

267 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at para 7.3.

268 See paras 26–52 of this article.

injustice, the doctrine has a vital role to play in ensuring consistency in the law. Given the confluence of rationales underlying the illegality defence in contract, trusts and tort, a unified approach to the illegality defence spanning the realm of private law is both possible and desirable. A unified structured discretion should replace the current inflexible regimes of the illegality rules, to secure a more principled and consistent development of the defence of illegality in private law.

VII. POSTSCRIPT

97 In January 2009, the Law Commission of England and Wales released a consultation paper,[269] giving provisional recommendations[270] that for claims in tort,[271] contract[272] and for reversal of unjust enrichment,[273] it should be up to the courts to develop clear, fair law, based on a set of policy rationales. The courts should base their decisions directly on the overlapping policy rationales[274] that underlie the illegality defence and explain their reasoning accordingly.[275] It proposes that these policies include: furthering the purpose of the rule which the illegal conduct has infringed, consistency, no profit from own wrongdoing, deterrence and maintaining the integrity of the legal system.[276] However, for the area of law on a trust that has been set up to hide its true ownership for criminal purposes, it proposes statutory reform.[277]

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269 Law Commission of England and Wales, *The Illegality Defence: A Consultative Report* (Consultation Paper No 189, 2009) (The Law Commission, The Stationery Office, London, 30 January 2009); <http://www.lawcom.gov.uk/docs/cp189.pdf> (accessed 30 January 2009).

270 Law Commission of England and Wales, *The Illegality Defence: A Consultative Report* (Consultation Paper No 189, 2009) at para 1.12.

271 Law Commission of England and Wales, *The Illegality Defence: A Consultative Report* (Consultation Paper No 189, 2009) at para 7.69.

272 Law Commission of England and Wales, *The Illegality Defence: A Consultative Report* (Consultation Paper No 189, 2009) at para 3.142.

273 Law Commission of England and Wales, *The Illegality Defence: A Consultative Report* (Consultation Paper No 189, 2009) at paras 4.44, 4.58–4.59.

274 Law Commission of England and Wales, *The Illegality Defence: A Consultative Report* (Consultation Paper No 189, 2009) at para 1.14.

275 Law Commission of England and Wales, *The Illegality Defence: A Consultative Report* (Consultation Paper No 189, 2009) at para 2.34.

276 Law Commission of England and Wales, *The Illegality Defence: A Consultative Report* (Consultation Paper No 189, 2009) at para 2.35.

277 Law Commission of England and Wales, *The Illegality Defence: A Consultative Report* (Consultation Paper No 189, 2009) at paras 1.15, 6.98–6.100.