A QUASI-FLEXIBLE APPROACH GOVERNING THE APPLICATION OF THE ILLEGALITY DEFENCE IN PRIVATE LAW

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ABSTRACT

The doctrine of illegality referred to as *ex turpi causa non oritur actio* provides a defence to civil claims concerning illegality thereby depriving the claimant of his normal rights and remedies. Over the years the courts have differed significantly as to the proper approach towards the illegality defence thus creating uncertainty in the law. Whilst some judges preferred a rigid rule-based approach others supported a flexible policy and proportionality approach. *Patel v Mirza* [2016] UKSC 42, a Supreme Court decision which set to resolve this long standing issue, further deepened it. There Lord Toulson for the majority laid down a trio of considerations under which various factors are to be weighed. The minority condemned this approach as being discretionary and tearing up the existing law. In contrast the minority preferred a rule-based approach governed predominantly by the reliance test. This thesis contributes to the literature by providing a quasi-flexible approach to the illegality defence. The test will be governed by the principles of consistency and proportionality which find support in English and other common law jurisdictions case law and the literature on illegality. Consistency will take precedence over proportionality, the latter of which will be restricted in application.

DEDICATION

To my beloved parents-

Fehmida Navid & Muhammad Navid

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LIST OF ABBREVIATIONS

DSS- Department of Social Security

HMRC- Her Majesty's Revenue and Customs

MLA- Moneylenders Act

NZLC- New Zealand Law Commission

NSW- New South Wales

POCA- Proceeds of Crime Act 2002

PTSD- Post Traumatic Stress Disorder

CHAPTER 1

INTRODUCTION

1.1 Research Context

The objective of this thesis is to provide an approach to the illegality defence which promotes certainty in the law; being governed by principle, whilst also maintaining a degree of flexibility in order to address the nuances of individual cases concerning illegality. The thesis fulfils this objective by providing a quasi-flexible approach to the illegality defence. The quasi-flexible approach is distinct from existing strict immutable rules which are devoid of policy considerations and the nature of illegality, and from extremely flexible approaches which lack certainty, structure and guidance, thereby creating uncertainty in this law.

The illegality doctrine also referred to as the principle *ex turpi causa non oritur actio* means 'no action arises from a disgraceful cause'.[1] In *Holman v Johnson*[2] (hereafter *Holman*) Lord Mansfield explained the 'principle of public policy expressed'[3] in this

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[1]Andrew Burrows, *Restatement of the English Law of Contract* (Oxford University Press, 2016) 221-222; for further definitions of *ex turpi causa* see Jonathan Mance, 'Ex turpi causa: When Latin Avoids Liability (2014) 18 *Edin. LR* 175, 175; Nelson Enonchong, *Illegal Transactions* (Lloyd's of London Press, Lloyd's Commercial Law Library,1998) 14; *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, 767 (Diplock LJ); *Revill v Newbery* [1996] QB 567, 576 (Neill LJ) 'ex turpi causa non oritur actio can be roughly translated as meaning that no cause of action may be founded upon an immoral or illegal act'.

[2](1775) 1 Cowp 341.

[3]see *Stone & Rolls Ltd v Moore Stephens* [2008] EWCA Civ 644 at [12] (Rimer LJ).

doctrine as 'no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act'.[4] The illegality doctrine therefore has the potential of operating as a defence to civil claims. Its application deprives the claimant of his normal legal rights and remedies.[5] The illegality defence operates as a rule of public policy.[6] Public policy reflects 'interests of the public as distinct from the parties'.[7] It is contrary to the public interest to allow claims which harm the integrity of the legal system, since this risks undermining public faith in the effectiveness, rationality and authority of the legal system.[8] It is argued in this thesis that the integrity of the legal system is preserved if there is consistency in the law.[9] The thesis argues that there is consistency in the law if allowing the claim does not undermine the purpose of the prohibition infringed or any other relevant public policy, and does not allow the claimant to profit from their illegal conduct or permit an evasion or rebate of penalty prescribed by the criminal law.[10]

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[4]*Holman* (n 2) 343 (Lord Mansfield);see further *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 at [126] (Lord Kerr);see also *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339 at [30F-H] (Lord Hoffmann); *Bilta v Nazir (No 2)* [2015] UKSC 23, [2016] AC 1 at [129] (Lord Toulson and Lord Hodge); *Tinsley v Milligan* [1994] 1 AC 340 (HL) 354, 355B-C (Lord Goff).
[5]*Patel* (UKSC) (n 4) [2] (Lord Toulson).
[6]*Patel* (UKSC) (n 4) [91] (Lord Toulson).
[7]Richard A. Buckley, *Illegality and Public Policy* (Sweet & Maxwell, 4th Edition, 2017) 2, 95.
[8]*Patel* (UKSC) (n 4) [109] (Lord Toulson); see in particular discussion of *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1 in chapter 6; see also Emer Murphy 'The ex turpi causa' (2016) 32 *PN* 241, 252, 253, 254.
[9]see *Hall v Hebert* [1993] 2 SCR 159, 169 (McLachlin J);see also *Hounga v Allen* [2014] UKSC 47; [2014] 1 WLR 2889 at [43], [44] (Lord Wilson).
[10]see *Patel* (UKSC) (n 4) [101], [108],[120] (Lord Toulson); *Hall v Hebert* (n 9) 169 (McLachlin J); *Hounga* (UKSC) (n 9) [43], [44] (Lord Wilson).

The illegality defence may be raised across private law in contract, tort, trusts and unjust enrichment.[11] In the context of contract law, the issue may be one of contractual enforcement.[12] For example, the doctrine may be argued to prevent enforcement of a contract of carriage of goods to recover freight where the ship on which the goods are carried is overloaded in contravention of a statutory provision.[13] In the context of tort, illegality may prevent compensation for injuries suffered whilst committing an illegal act or for loss suffered as a result of a lawful sentence imposed on the claimant.[14] In trusts, the issue may be one of enforcing an equitable interest in a property which is transferred to the defendant (under a trust arrangement) to hide it from creditors or to evade tax.[15] In unjust enrichment, the issue may be an attempt to recover money paid for an illegal purpose which is not carried out.[16] In all of these circumstances the courts are faced with the difficult task of deciding whether to allow the claim, which may appear to harm the integrity of the legal system by creating inconsistency with the rule infringed, versus denying recovery which would deprive the claimant of all his rights and remedies. This would be particularly harsh where the illegality is relatively minor.

Given the range of circumstances that can give rise to illegality, and the differences in severity of the illegality, the courts have found it difficult to apply a single consistent

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[11] *Patel* (UKSC) (n 4) [2] (Lord Toulson).
[12] see *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267;see also The Law Commission, *The Illegality Defence: A Consultative Report* (Law Com CP No 189, 2009) para 1.1.
[13] see *St John* (n 12).
[14] see *Cross v Kirkby* The Times, 5 April 2000 (Official Transcript),[2000] CA Transcript No 321; *Gray* (HL) (n 4); *Clunis v Camden and Islington Health Authority* [1998] QB 978; CP 189 (n 12) para 1.1.
[15] *Tinsley* (HL) (n 4); *Collier v Collier* [2002] EWCA Civ 1095.
[16] see *Patel* (UKSC) (n 4).

principle or test to determine when illegality should defeat the claimant's action. Various tests have been developed and applied over the years. These range from the rule-based tests of reliance,[17] inextricable link,[18] causation,[19] and let the estate lie where it falls;[20] to the flexible[21] tests of the public conscience test,[22] and the just and proportionate response to illegality.[23] The rigid rule-based tests operate in the absence of policy considerations, with some tests even failing to address the nature of illegality. For example, the reliance test provides that a claim is barred if the claimant is forced to plead or rely on his illegality in making his claim.[24] Such a procedural rule has the ability to effectively ignore illegality merely because one does not need to rely on it to bring a claim.[25] In contrast to this, the courts also adopted flexible[26] tests such as the

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[17]*Tinsley* (HL) (n 4) 370D, 376E (Lord Browne-Wilkinson);see further *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, 71 (Du Parcq L.J).

[18]*Hounga* (UKSC) (n 9) [55 F-G], [58]-[59] (Lord Hughes); *Hall v Woolston Hall Leisure Ltd* [2001] 1 WLR. 225 at [46] (Peter Gibson LJ), [79] (Mance LJ); *Cross* (n 14) [103] (Judge LJ), [76] (Beldam LJ);*Vakante v Governing Body of Addey and Stanhope School (No2)* [2005] ICR 231 at [36] (Mummery LJ).

[19]*Gray* (HL) (n 4) [54] (Lord Hoffmann); *Hall v Woolston* (n 18) [41], [47] (Peter Gibson LJ).

[20]*Muckleston v Brown* (1801) 6 Ves. Jr. 52, 69 (Lord Eldon).

[21]see *Hounga* (UKSC) (n 9) [42F], [44], [46E-F], [50]-[52] (Lord Wilson).

[22]*Euro-Diam Ltd. v Bathurst* [1990] 1 QB 1, 35 (Kerr LJ);see further *Thackwell v Barclays Bank Plc* [1986] 1 All ER 676, 687 (Hutchison J); *Gray v Barr* [1971] 2 QB 554, 581 (Salmon J);cf. *Tinsley* (HL) (n 4) 358E-F, 361G, 363B-G (Lord Goff), 369B (Lord Browne-Wilkinson) in which the public conscience test was expressly rejected.

[23]*Les Laboratoires Servier v Apotex Inc* [2013] Bus LR 80 (CA) at [73] (Etherton LJ); *ParkingEye Ltd v Somerfield Stores Ltd* [2013] QB 840 (CA) at [57], [68], [71], [77] (Toulson LJ) at [18], [35], [39] (Sir Robin Jacob).

[24]*Tinsley* (HL) (n 4) 370C-D, 375-376 (Lord Browne Wilkinson),366 C-G (Lord Jauncey);*Les Laboratoires* [2014] UKSC 55, [2015] AC 430 at [18] (Lord Sumption); see also *Hewison v Meridian Shipping Services PTE Ltd* [2003] ICR 766 at [62] (Ward LJ);James Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (2015) 6 *United Kingdom Supreme Court Yearbook* 254, 258.

[25]*Patel* (UKSC) (n 4) [139] (Lord Kerr); Nelson Enonchong 'Illegality: The Fading Flame of Public Policy' (1994) 14 *OJLS* 295, 295, 299,300;Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 24) 254, 261,262; CP 189 (n 12) para 5.15.

[26]see *Hounga* (UKSC) (n 9) [42F],[44],[46E-F],[50]-[52] (Lord Wilson).

public conscience test[27]which addresses the nature of illegality, and the just and proportionate response to illegality which takes into consideration both factors and policies.[28] The just and proportionate response to illegality test involves taking into account a number of factors such as the seriousness of illegality, object and intent of the claimant[29], and the centrality of illegality to the claim.[30] Under this test the courts also consider whether the application of the illegality defence 'furthers one or more of the specific policies underlying the defence of illegality'.[31] The policies identified by the English Law Commission, and which originate from the case law on illegality for the application of the illegality defence are:[32] (a) punishment; (b) responsibility; (c) deterrence; (d) not condoning or appearing to encourage the illegal conduct; (e) not allowing one to profit from his or her own wrong; (f) furthering the purpose of the rule which the illegal conduct has infringed; (g) maintaining the integrity of the legal system and (h) consistency in the law.[33]

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[27]*Euro-Diam* (n 22) 35 (Kerr LJ); see further *Thackwell* (n 22) 687 (Hutchison J); *Gray v Barr* (n 22) 581 (Salmon J); cf. *Tinsley* (HL) (n 4) 358E-F, 361G, 363B-G (Lord Goff), 369B (Lord Browne-Wilkinson) in which the public conscience test was expressly rejected.

[28]*Servier* (CA) (n 23) at [73] (Etherton LJ); *ParkingEye Ltd v Somerfield* (n 23) [57], [68], [71], [77] (Toulson LJ) [18], [35], [39] (Sir Robin Jacob).

[29]see *ParkingEye Ltd v Somerfield* (n 23) [57],[65], [66], [68],[72] (Toulson LJ).

[30]*ParkingEye Ltd v Somerfield* (n 23) [57], [65], [66], [68], [71], [77] (Toulson LJ).

[31]*ParkingEye Ltd v Somerfield* (n 23) [18], [39] (Sir Robin Jacob); *Servier* (CA) (n 23) [75] (Etherton LJ). It is notable that both Sir Robin Jacob and Etherton LJ said that the proportionality approach is not an exercise of judicial discretion.

[32]The Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (Law Com CP No 154, 1999) para 6.6, 6.11, 6.12, 7.39; *The Illegality Defence in Tort: A Consultation Paper* (Law Com CP No 160, 2001) para 4.15-4.80; CP 189 (n 12) para 2.5, 2.35.

[33]CP 154 (n 32) para 6.11;CP 160 (n 32) paras 4.15-4.81;CP 189 (n 12) para 2.28-2.35; see further The Law Commission, *Report on Aggravated, Exemplary and Restitutionary Damages* (Consultation Paper No 247, 1997) para 5.25.

Over the years the judiciary have been divided on the issue of whether a rule-based or flexible test is superior.[34] This reflects the 'tension between the need for principle, clarity and certainty in the law with the equally important desire to achieve a fair and appropriate result in each case'.[35] The courts have shifted from one test to another with such frequency that it has led to a large body of inconsistent authority.[36] The effect of this has been to make the law uncertain as it became increasingly difficult to predict which test would be applied to govern the application of the illegality defence.[37] The law of illegality has thus not been placed on a clear or consistent footing. This led to the President of the Supreme Court, Lord Neuberger, in *Bilta (UK) Ltd v Nazir (No 2)*[38] (hereafter *Bilta*) emphasising that the proper approach to the illegality defence needs to be addressed by the Supreme Court.[39]

In 2016, the Justices of the Supreme Court in *Patel v Mirza*[40] (hereafter *Patel*) were presented with an opportunity to resolve the long-standing schism between rule and

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[34]see in particular *Servier* (UKSC) (n 24) [13],[18] (Lord Sumption), [62],[63] (Lord Toulson);*Bilta* (UKSC) (n 4) [60]–[64] (Lord Sumption),[129]-[130] (Lord Toulson and Lord Hodge);*Hounga* (UKSC) (n 9) [42],[44]-[45],[52H],[52A] (Lord Wilson).
[35]*Bilta* (UKSC) (n 4) [13] (Lord Neuberger),[62D-E] (Lord Sumption);*Patel* (UKSC) (n 4) [133] (Lord Kerr); *Hounga* (UKSC) (n 9) [42], [44]-[45], [52H], [52A] (Lord Wilson); *Servier* (CA) (n 23) [73], [75] (Etherton LJ); *Patel* (UKSC) (n 4) [81] (Lord Toulson); Ernest Lim, 'Tensions in private law judicial decision-making: a case study on the illegality defence' (2016) 4 *JBL* 325, 325;Ernest Lim, 'Attribution and the illegality defence' (2016) 79 (3) *MLR* 476, 483.
[36]see *Bilta* (UKSC) (n 4) [13] (Lord Neuberger),[61] (Lord Sumption); *Servier* (UKSC) (n 24) [18] (Lord Sumption); Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 24) 274,275.
[37]see *Sharma v Top Brands Ltd* [2015] EWCA Civ 1140, [2016] PNLR 12 at [37] (Etherton C); see also *Patel* (UKSC) (n 4) [165] (Lord Neuberger); Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 24) 274, 275.
[38][2015] UKSC 23, [2016] AC 1 at [15] (Lord Neuberger).
[39]*Bilta* (UKSC) (n 4) [15] (Lord Neuberger).
[40][2016] UKSC 42.

flexibility.[41] *Patel*, however, did not end the tension between these two approaches nor the debates as to how the illegality defence should be applied. Lord Toulson for the majority in *Patel* laid down a trio of considerations. Under this the courts are to consider the purpose of the prohibition transgressed,[42] any other relevant public policies and whether denial of the claim would be a proportionate response to the illegality.[43] In relation to the third consideration of proportionality, Lord Toulson said various factors are to be taken into account including but not limited to: the seriousness of the illegality; the centrality of the illegality to the contract; whether it was intentional and whether there is disparity in the parties' culpability.[44] The overall rationale for the illegality doctrine, Lord Toulson held, is that the courts will not enforce a claim if to do so would be harmful to the integrity of the legal system.

The minority in *Patel* which consisted of Lords Sumption, Clarke and Mance heavily criticised the trio of considerations.[45] They argued that an unsettled range of factors would lead to discretionary decisions whilst 'exhibiting all the vices of complexity, uncertainty and arbitrariness'.[46] They preferred a rule-based approach which included a reinterpreted reliance test and the policy of restoring parties to their original position (*restitutio in integrum*).[47] The minority's approach was criticised by the majority, in particular Lord Kerr, who argued that these approaches side-step the issue of

[41]*Patel* (UKSC) (n 4) [226] (Lord Sumption).
[42]*Patel* (UKSC) (n 4) [120] (Lord Toulson).
[43]ibid.
[44]*Patel* (UKSC) (n 4) [107] (Lord Toulson).
[45]*Patel* (UKSC) (n 4) [261], [263], [264] (Lord Sumption).
[46]*Patel* (UKSC) (n 4) [206] (Lord Mance), [261], [263]-[265] (Lord Sumption).
[47]see also *Patel* (UKSC) (n 4) [154] (Lord Neuberger), [197], [199] (Lord Mance), [210]-[212], [220] (Lord Clarke) at [234], [235], [239], [250], [253], [264] (Lord Sumption).

illegality.[48] In relation to the reliance test, Lord Kerr argued that it is difficult to apply and predict the outcome of cases.[49] Whilst, in relation to *restitutio in integrum* policy he argued that it produces results which create inconsistency in the law.[50]

Post-*Patel,* academics have expressed sharp differences of opinion on the trio of considerations test laid down by Lord Toulson in *Patel*. Some academics have considered the test to be a triumph in this multifaceted area, enabling the courts to address the nuances of individual cases.[51] Others, however, have condemned the test as being insufficient to guide judges, labelling it as an approach creating uncertainty in the law because it consists of taking into account innumerable factors.[52] These issues

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[48]*Patel* (UKSC) (n 4) [140]-[141] (Lord Kerr).
[49]*Patel* (UKSC) (n 4) [123], [134], [138], [139] (Lord Kerr).
[50]*Patel* (UKSC) (n 4) [141] (Lord Kerr).
[51]Andrew Burrows 'A New Dawn for the Law of Illegality' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 24; see also Ernest Lim, 'Ex Turpi Causa: Reformation not Revolution' (2017) 80 *MLR* 927-941 The paper defends the majority's approach and proposes some refinements to the third strand of the trio of considerations test in order to reduce uncertainty in its application by limiting use of the proportionality principle; Nicholas Strauss, 'Illegality after Patel: potior non est conditio defendentis' (The Commercial Bar Association, London, 21st February 2017)1, 18 <http://www.combar.com/public/cms/260/604/384/2639/Illegality%20after%20Patel.pdf?realName=8H9W81.pdf&v=0>Accessed 20th May 2017; Anthony Grabiner, 'Illegality and restitution explained by the Supreme Court' (2017) 76 (1) *CLJ* 18-22; T.T. Arvind 'Contract Law' (OUP, 2017) 417-419, 425-426; Roger Toulson 'Illegality where are we now?' in Andrew Dyson, James Goudkamp, Frederick Wilmot-Smith, and Andrew Summers (ed) *Defences in Contract* (Bloomsbury Publishing PLC, 2017) 276; see also in favour of flexibility Nelson Enonchong 'Illegal Transactions: The future? (LCCP No 154)' (2000) 8 *RLR* 82, 103; J. F. Burrows, 'Contract Statutes: The New Zealand Experience' (1983) *Statute L Rev* 76, 89. R.A Buckley, 'Illegal transactions: chaos or discretion?' (2000) 20 *Legal Studies* 155, 172.
[52]Graham Virgo, '*Patel v Mirza*: one step forward and two steps back' (2016) 22 *Trusts & Trustees* 1090, 1094; see also Mark Law and Rebecca Ong 'He who comes to Equity need not do so with clean hands?' Illegality and resulting trusts after Patel v Mirza, what should the approach be?' (2017) 23 *Trusts & Trustees* 880, 892-894;see also

predominantly stem from the proportionality consideration, which will be referred to in this thesis as the proportionality principle (multi-factorial balancing exercise).[53]

This thesis contributes to the literature on illegality by providing and justifying a quasi-flexible approach to the illegality defence. That approach is governed by the two key principles of consistency in the law (which ensures that the integrity of the legal system is maintained) and the proportionality principle (multi-factorial balancing exercise).[54] The reason for adopting these principles is because they find support both in pre-*Patel* case-law, *Patel* itself,[55] the work of the Law Commission and decisions in other common law jurisdictions. The proportionality principle is restricted in use to specific circumstances thereby addressing the issue of lack of certainty and guidance which plague Lord Toulson's trio of considerations test. Furthermore, where a result cannot be reached under the proportionality principle, as the factors under it have the potential to be decided subjectively, the consistency principle will take precedence. The precedence of consistency over proportionality is because it has support of all of the justices in *Patel.*

The quasi-flexible test contributes to the literature by providing an approach which avoids the drawbacks of the rule-based approaches and the open-ended flexible

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James Goudkamp, 'The end of an era? Illegality in private law in the Supreme Court' (2017) 133 *LQR* 14, 17-19.

[53]ibid; see also *Ochroid Trading Ltd v Chua Siok Lui* [2018] SGCA 5,[2018] 1 SLR 363 at [39], [40] (Andrew Phang Boon Leong JA).

[54]This is the definition given to the third consideration of Lord Toulson's test (*Patel* (UKSC) (n 4) [107], [120] (Lord Toulson)) by Phang JA in *Ochroid* (n 53) [39], [40].

[55]Note that in *Patel* (UKSC) (n 4) consistency in the law is supported by all of the Justices, whilst proportionality is only supported by the majority, therefore the latter is restricted in use in the quasi-flexible approach to the illegality defence.

approach provided by Lord Toulson in *Patel.* It is an approach which promotes certainty in the law, but is sensitive to different fact patterns and levels of culpability that illegality cases raise.

1.2 Methodology

The thesis critically analyses how the illegality defence should be applied. In order to do this, the thesis examines case law; statutes; the works of the Law Commission and academic literature on the illegality defence. The thesis adopts a comparative approach by drawing from the approach taken towards the illegality defence in other common law jurisdictions namely New Zealand, Australia, Canada, and Singapore.

1.3 Thesis Structure and Research Questions

The thesis is split into three parts. The first part of the thesis examines the conflicting approaches taken towards the illegality defence pre-*Patel*. This examination is carried out to determine which approach is better suited in the realm of public policy and which provides a more comprehensive justification for applying or refusing to apply the illegality defence. This part also discusses whether there is any identifiable and consistent principle or policy at work in the case law. This part of the thesis addresses the following questions:

1) Are the rules devised and adopted by the courts pre-*Patel* - namely the reliance, inextricable link, causation and let the estate lie where it falls tests - certain and consistent in application in determining whether or not the illegality defence applies? Or are they arbitrary, complex and inadequate to apply in the realm of public policy?

2) In contrast, does a flexible approach under which courts assess various factors, including but not limited to the seriousness of illegality, the relative culpability of the parties, centrality of illegality and policies underlying the illegality defence, provide a more reasoned and transparent approach in determining whether the illegality defence applies?

Part two of the thesis examines the trio of considerations laid down by Lord Toulson in *Patel.* It examines how these considerations compare to those taken into account in pre-*Patel* case law and the most influential considerations in other common law jurisdictions. It also addresses the dissenting speeches of the minority in *Patel* who heavily criticised the trio of considerations for creating uncertainty in the law. This part of the thesis answers the following questions:

3) Can Lord Toulson's trio of considerations be supported by pre-*Patel* case law or is it revolutionary as the minority in *Patel* argue?

4) Is there support in other common law jurisdictions for flexibility and the considerations laid down by Lord Toulson? If so, can a set of overarching

principles be identified from the case law which are the most influential in determining whether or not the illegality defence will be applied?

The third part of the thesis addresses the academic responses to the trio of considerations (hereafter the Toulson test) laid down by Lord Toulson in *Patel*, in particular the criticisms to which it has been subjected. The predominant criticism of the Toulson test is that it is insufficiently clear to guide judges. This part of thesis contributes to the literature by providing a quasi-flexible test in order to tackle the issues of lack of guidance and uncertainty. This part answers the following questions:

5) What difficulties does the Toulson test present as an approach to the illegality defence?

6) Can an improved approach towards the illegality defence be provided, using the overarching principles identified as being most influential in the area of illegality both in England and other common law jurisdictions, which addresses the concerns of the minority in *Patel*, while also respecting the approach of the majority?

1.4 Chapter Synopsis

Chapter 1 is an introductory chapter which provides the research context, methodology, thesis structure, research questions and chapter synopsis.

Chapter 2 examines the operation of the illegality defence in private law from a policy perspective. In doing so it draws out the most influential policies governing the application of the illegality defence pre-*Patel.* The chapter illustrates that whilst a policy-based approach is beneficial as it provides a comprehensive rationale for the application of the illegality defence,[56] dependence on a number of different policy rationales, many of which overlap, creates uncertainty in the law. This is because the courts have not pinpointed an overarching policy as being the predominant one governing the outcome of cases. This thesis argues that the policies identified in this chapter can be reduced to one key principle of consistency. Chapter 3 of the thesis also identifies a key principle in governing the application of the illegality defence. The two key principles identified in these two chapters are matched against those identified by the Supreme Court in *Patel* and those deemed significant in other common law jurisdictions to provide a comprehensive test in chapter 7. Adopting such an approach will lead to greater clarity in the law and ensuring consistency in judicial decision making.

Chapter 3 examines the conflicting legal tests applied to the illegality defence pre-*Patel*. The chapter argues that whilst rules encourage certainty, predictability and consistency in the law,[57] the current rules devised by the judiciary of the reliance test,[58]

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[56]*Gray* (HL) (n 4) [30F-H] (Lord Hoffmann); *Patel* (UKSC) (n 4) [123], [127] (Lord Kerr); see further The Law Commission, *The Illegality Defence* (Law Com No 320, 2010) para 1.6, 3.10.
[57]A. Burrows 'A New Dawn for the Law of Illegality' (n 51) 23.
[58]*Tinsley* (HL) (n 4) 376E (Lord Browne-Wilkinson); see further *Bowmakers* (n 17).

the inextricable link,[59] causation,[60] and let the estate lie where it falls[61] are not satisfactory to achieve the required clarity and certainty in the law.[62] They are complex, arbitrary, and difficult to apply, leading at times to inconsistent and harsh consequences without proper consideration of the illegality involved. The courts also adopted flexible approaches to the illegality defence. These flexible tests include the public conscience[63] test, and the 'just and proportionate response to illegality'[64] test based on assessment of various factors and policies.[65] It is argued that, as this is a multifaceted area concerning varying circumstances,[66] taking into consideration different factors and policies is preferable to strict immutable rules. A flexible approach also provides a more logical and transparent justification for the application of the illegality defence. However, extensive flexibility is not ideal, which is illustrated in chapters 4, 5 and 6. This chapter also draws out that the conflict between rule and flexibility became acute as the Justices

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[59]*Hounga* (UKSC) (n 9) [55 F-G], [58]-[59] (Lord Hughes); *Hall v Woolston* (n 18) [46] (Peter Gibson LJ), [79] (Mance LJ); *Cross* (n 14) [103] (Judge LJ), [76] (Beldam LJ); *Vakante* (n 18) [36] (Mummery LJ).
[60]*Gray* (HL) (n 4) [54] (Lord Hoffmann); *Hall v Woolston* (n 18) [41], [47] (Peter Gibson LJ); cf *Hounga* (UKSC) (n 9) [36D] (Lord Wilson).
[61]*Muckleston* (n 20).
[62]see *Patel* (UKSC) (n 4) [134] (Lord Kerr); see also *Bilta* (n 4) [13] (Lord Neuberger).
[63]*Euro*-Diam (n 22) 35 (Kerr LJ);see further *Thackwell* (n 22) 687 (Hutchison J); *Gray v Barr* (n 22) 581 (Salmon LJ);cf *Tinsley* (HL) (n 4) 358E-F, 361G, 363B-G (Lord Goff), 369B (Lord Browne-Wilkinson) in which the public conscience test was expressly rejected.
[64]*Servier* (CA) (n 23) [73], [75] (Etherton LJ); *Servier* (UKSC) (n 24) [62], [63] (Lord Toulson); *ParkingEye Ltd v Somerfield* (n 23) [53], [57], [68], [71], [77] (Toulson LJ), [18], [35], [39] (Sir Robin Jacob); see also *Hounga* (UKSC) (n 9) [42F], [44]-[46E-F],[50]-[52] (Lord Wilson); *R (Best) v Chief Land Registrar* [2015] EWCA Civ 17, [2016] QB 23(CA) at [51], [52] (Sales LJ).
[65]*Servier* (CA) (n 23) at [73] (Etherton LJ); *ParkingEye Ltd v Somerfield* (n 23) [57], [68], [71], [77] (Toulson LJ),[18], [35], [39] (Sir Robin Jacob); see also *Hounga* (UKSC) (n 9) [42F], [44],[46E-F], [50]-[52] (Lord Wilson);
[66]*Patel* (UKSC) (n 4) [161] (Lord Neuberger); Toulson 'Illegality where are we now?'(n 51) 276, 277.

of the Supreme Court in a trio of cases, namely *Les Laboratoires Servier v Apotex Inc*[67] (hereafter *Servier*), *Hounga v Allen*[68] (hereafter *Hounga*) and *Bilta,* adopted opposing tests. This lack of uniformity in approach pre-*Patel* led to the law of illegality degenerating into further incoherence and uncertainty making it impossible to predict which legal test governs the application of the illegality defence.[69] The Supreme Court was given the opportunity to resolve this tension in *Patel.* However, chapter 4 reveals that the Supreme Court in *Patel* failed to put an end to the tension between the rule and flexible approaches to the illegality defence.

Chapter 4 examines the approaches taken towards the illegality defence in *Patel.* It draws out that the Supreme Court's decision does not reduce the tension between the rule and flexible approaches towards the illegality defence. Nor does it end the debates concerning how the illegality defence should be conceptualised and applied. The chapter traces the positions taken in *Patel* from the Court of Appeal to the Supreme Court. The former reveals both the inadequacies of the reliance test, and some support for a flexible approach which was expressly supported by Lord Toulson in the Supreme Court. The chapter argues that Lord Toulson's trio of considerations, which draw out and make clearer the policies and factors that were already at work pre-*Patel,* are not revolutionary. It is also an approach preferable to its counterparts, namely the reliance test and the *restitutio in integrum* approach, adopted by the minority. Notwithstanding this, the chapter acknowledges the minority's concern that Lord Toulson's test has the

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[67][2014] UKSC 55, [2015] AC 430.
[68][2014] UKSC 47, [2014] 1 WLR 2889.
[69]*Sharma* (n 37) [37] (Etherton C); James Goudkamp 'The Doctrine of Illegality: A Private Law Hydra'(n 24) 275; James C. Fisher, 'The ex turpi causa principle in Hounga and Servier' (2015) 78 *MLR* 854, 860.

potential for creating uncertainty in the law, particularly the use of the proportionality principle (multi-factorial balancing exercise). It is important for the promotion of certainty in the law that there should be an overarching principle governing the outcome of cases, particularly as the factors under proportionality consideration have the potential to be decided subjectively. That is to say, with heavy reliance on the individual sensibilities or sympathies of the judge hearing the case. The chapter identifies 'consistency' as the overarching principle. This principle has support from all of the justices in *Patel*. Whether 'consistency' finds support in other common law jurisdictions in addition to Canada from which its explanation was adopted in *Patel*, will be examined in Chapter 5.

Chapter 5 examines the approach taken towards the illegality defence in other common law jurisdictions namely, New Zealand, Australia, Canada and Singapore. It addresses the question whether there is support in these jurisdictions for the approach laid down by Lord Toulson in *Patel*. The chapter reveals that the courts in the common law jurisdictions listed above have shifted from strict rigid rules to favouring a degree of flexibility and supporting considerations akin to those laid down by Lord Toulson in *Patel*. However, the level of flexibility differs in the different jurisdictions. New Zealand provides the most extensive flexibility under the Illegal Contracts Act 1970 in which the court is given a discretion to consider different factors. Australia also supports flexibility, which is evident particularly through *Nelson v Nelson*[70] (hereafter *Nelson*) (deciphering legislative intention and considering factors such as the conduct of parties). It also provides support for the principle of maintaining consistency in the law

[70][1995] 4 LRC 453.

in *Miller v Miller*[71] (hereafter *Miller*) and the synonymous principle of stultification in *Equuscorp v Haxton*[72] (hereafter *Equuscorp*). Canada provides support for weighing policies and factors in *Transport North American Express v New Solutions Financial Corp*[73] (hereafter *New Solutions*) and *Still v Minister of National Revenue*[74] (hereafter *Still*). However, the Canadian cases reflect a limited approach in *Hall v Hebert*[75] (hereafter *Hall*), *British Columbia v Zastowny*[76] (hereafter *Zastowny*) and *Livent v Deloitte*[77] (hereafter *Livent*) which presents and adopts an explanation of the consistency principle which is limited in scope to ensuring that the claimant does not profit from their crime and the award does not reflect evasion of a penalty lawfully imposed on them.[78] That explanation does not fully accord to the one ascribed to consistency by Lord Toulson in *Patel*, who added proportionality within its ambit. Singapore provides a limited-flexible approach through *Ochroid Trading Ltd v Chua Siok Lui*[79] (hereafter *Ochroid*). *Ochroid* supports the stultification principle (akin to the consistency principle) and limits the use of the proportionality principle. The thesis learns from these jurisdictions, matching the key principles found there to both *Patel* and pre-*Patel* case law, in particular the limited use of the proportionality principle in Singapore, to develop and provide a test which tackles the issues of uncertainty and lack of guidance which plague the Toulson test.

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[71][2011] HCA 9, [2011] 5 LRC 14.
[72][2012] 3 LRC 716.
[73][2004] 1 SCR 249.
[74][1997] Carswell Nat 2193, [1998] 1 FC 549.
[75][1993] 2 SCR 159.
[76](2008) SCC 4, [2008] 1 SCR 27.
[77]2016 ONCA 11.
[78]*Hall v Hebert* (n 9) 169, 179, 180 (McLachlin J).
[79][2018] SGCA 5, [2018] 1 SLR 363.

Chapter 6 examines the academic responses to the Toulson test to detect its weaknesses which propel the need for reform. The chapter argues that whilst Lord Toulson's test provides considerations which found support both in pre-*Patel* case law and largely correlates to those taken into account in other common law jurisdictions, the lack of structure and uncertainty, created particularly by the proportionality principle,[80] is extremely concerning and needs to be addressed. In particular, the factors considered under the proportionality consideration of the Toulson test are too subjective. With no overarching principle guiding judges, decisions can be reached on an ad-hoc arbitrary basis, thereby plunging the law into significant uncertainty. This chapter argues that the law of illegality needs an approach which is more certain in application, governed by a principle supported both in *Patel* and other common law jurisdictions but also one that allows sufficient flexibility to deal with the nuances of individual cases. However, that flexibility should not be extensive or unrestrained.

Chapter 7 develops and justifies a quasi-flexible approach to the illegality defence. This is the main contribution the thesis makes to the existing literature on illegality. The quasi-flexible approach is governed by the guiding principles of consistency and proportionality. These two principles find support from the case law in England, other common law jurisdictions, the work of the English Law Commission, and academic literature. The quasi-flexible approach tackles the issues of lack of guidance and uncertainty, providing an approach which addresses both the concerns of the majority

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[80]see *Patel* (UKSC) (n 4) [107] (Lord Toulson); see also *Ochroid* (n 53) [39], [40] (Andrew Phang Boon Leong JA); see also Lim 'Ex Turpi Causa: Reformation not Revolution' (n 51) 937 who argues in favour of restricting the use of the proportionality principle.

and minority in *Patel.* This is achieved by restricting the application of the proportionality principle and the subordination of it to the principle of consistency as the latter has approval from the majority and minority in *Patel.* The explanation of consistency will be akin to that presented by McLachlin J in the Canadian case *Hall,* namely that there is inconsistency in the law if allowing the claim enables the claimant to profit from their illegal act or evade a penalty prescribed by the law.[81] The explanation of consistency will also include the idea that there is inconsistency in the law if allowing the claim undermines the purpose of the rule infringed or any other relevant policy. However, it will not include proportionality within the ambit of its explanation. The thesis will adopt the terminology of consistency as opposed to stultification, as the former has support of all of the Justices in *Patel* and the English Law Commission. After laying down the quasi-flexible test, the chapter will apply it to different case scenarios alongside those tests relied upon both pre-*Patel* and in *Patel*. This will demonstrate the strengths of the quasi-flexible test as opposed to the pre-existing tests. In some instances, the outcome may be the same but it is submitted that the reasoning and justification is clearer and more principled through the quasi-flexible test. The chapter also discusses the limitations to the quasi-flexible test and potential solutions to these limitations.

Chapter 8 provides a summary of the key findings of the thesis. It answers the research questions posed at the beginning of the research. The chapter draws out the contribution that this thesis makes to the literature on illegality and provides direction for future research on the illegality defence in light of the findings in this thesis.

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[81] *Hall v Hebert* (n 9) 179 (McLachlin J).

CHAPTER 2

LAW AND POLICY PRE-*PATEL*

2.1 Introduction

This chapter examines the operation of the illegality defence in private law from a policy perspective. In doing so it draws out the most influential policies governing the application of the illegality defence pre-*Patel v Mirza*[1] (hereafter *Patel*). The chapter illustrates that in such a multifaceted area with varying circumstances and degrees of illegalities, basing decisions on policy provides a comprehensive justification for the application of the illegality defence.[2] This approach is preferable to the stringent rules discussed in chapter 3, which often fail to address the illegality concerned and the policies engaged, thereby leading to unduly harsh results.[3] That being said, the chapter also acknowledges that whilst a policy-based approach is beneficial, dependency on a number of different but overlapping policy rationales creates uncertainty in the law. This is because there is no single principle governing the outcome of cases. The chapter contributes to the overall argument of the thesis by identifying the key policies at work

[1][2016] UKSC 42, [2017] AC 467.
[2]*Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339 at [30F-H] (Lord Hoffmann).
[3]The Law Commission, *The Illegality Defence: A Consultative Report* (Law Com CP No 189, 2009) para 1.3; The application of rules as devised by the judiciary in particular that propounded by Lord Sumption in *Patel* (UKSC) (n 1) can lead to results which no legal system would tolerate see Andrew Burrows 'A New Dawn for the Law of Illegality' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 33.

in the case law on illegality. These key policies of furthering the purpose of the rule infringed, non-condonation, not allowing one to profit from their crime, it will be argued in this thesis form part of the consistency policy and if there is consistency in the law then the integrity of the legal system is maintained. By reducing these policies to one key principle of maintaining consistency in the law this will lead to greater clarity in the law and ensure that there is uniformity in the judicial decision making.

2.2 Illegality Defence in Private Law and Public Policies

The illegality doctrine operates as a defence to civil claims across private law thereby precluding the claimant from enforcing his normal rights and remedies, due to his involvement in illegal conduct.[4] The policies identified by the English Law Commission, and which originate from the case law on illegality for the application of the illegality defence are:[5] (a) punishment; (b) responsibility; (c) deterrence; (d) not condoning or appearing to encourage the illegal conduct; (e) not allowing one to profit from his or her own wrong; (f) furthering the purpose of the rule which the illegal conduct has infringed; (g) maintaining the integrity of the legal system and (h) consistency in the law.[6] These policies provide justification for the application of the

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[4]The Law Commission, *The Illegality Defence* (Law Com No 320, 2010) para 1.1.
[5]The Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (Law Com CP No 154, 1999) Para 6.6, 6.11, 6.12, 7.39; *The Illegality Defence in Tort: A Consultation Paper* (Law Com CP No 160, 2001) para 4.15-4.80; CP 189 (n 3) Para 2.5, 2.35.
[6]CP 154 (n 5) para 6.11; CP 160 (n 5) paras 4.15,4.19-4.24, 4.25-4.35, 4.36-4.47,4.48-4.80;CP 189 (n 3) paras 2.5, 2.28-2.30, 2.35;see further The Law Commission, *Report on Aggravated, Exemplary and Restitutionary Damages* (Consultation Paper No 247, 1997) para 5.25.

illegality defence thereby ensuring that the illegality defence only applies to extent that it will serve a useful purpose.[7] In the sections below cases from contract, tort, trusts and unjust enrichment will be examined, drawing out and identifying the most significant policies governing the application of the illegality defence.

2.2.1 Contract

The illegality defence when applied to a contractual claim prevents a claimant from enforcing his rights and remedies under a contract. A contract may be expressly or impliedly prohibited by statute, or a contract may be prohibited at common law for being contrary to public policy, such as a contract to commit sexual immorality.[8] A contract, though not unlawful by statute or common law rule, may nonetheless be tainted by illegality because the contract is performed illegally.[9] In the sections below, these varying circumstances will be considered in order to draw out the operating policies governing the application or refusal of the illegality defence.

2.2.1.1 Statutory illegality

The most common type of contract to which the illegality defence applies is a contract expressly or impliedly prohibited by statute, which is often referred to as statutory illegality. Where a contract is expressly prohibited by a statute, a claim in contract will

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[7]CP 189 (n 3) para 1.14.
[8]see *Re Mahmoud v Ispahani* [1921] 2 KB 716; *Cope v Rowlands* (1836) 2 Meeson and Welsby 149, 157; *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267; *Pearce v Brooks* (1865-66) LR 1 Ex 213; For further examples see also the discussion on common law illegality in this chapter.
[9]see *ParkingEye Ltd v Somerfield Stores Ltd* [2013] QB 840 (CA).

not be allowed on the policy basis that it will frustrate the purpose of the law which rendered the contract illegal and unenforceable.[10] *Re Mahmoud v Ispahani*[11] (hereafter *Re Mahmoud*) illustrates this. There, the Seeds, Oils and Fats Order 1919 provided that a person shall not buy or sell linseed oil except under a licence. The defendant misrepresented to the claimant that he had the required licence, which induced the claimant to enter into the contract of sale. The claimant delivered the linseed oil against payment of the price under the contract but the defendant refused to accept delivery arguing there was no binding contract. The claimant then sold against the defendant to another party, suffering a loss on each sale.[12] The claimant sent an account to the defendant for the difference between the contract price and the sale price.[13] The defendant raised the illegality defence arguing that the contract was illegal, because he did not have a licence as required by the Order. At first instance, Rowlatt J held that the defendant should pay the loss which the claimant had suffered.[14] This was on the basis that the claimant had not committed an offence as he had a licence and because he did not aid or abet the defendant to commit the offence.[15] The defendant appealed. The Court of Appeal held in favour of the defendant, ruling that the claimant was barred from recovering the loss due to illegality. Bankes LJ held that the Order made 'it illegal, on the part both of the buyer and of the seller, to enter into a contract prohibited by the clause'.[16] Not having a licence was the mischief which the Order expressly prohibited.[17]

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[10]CP 160 (n 5) paras 4.56-4.59; CP 189 (n 3) para 2.6, 2.7.
[11][1921] 2 KB 716.
[12]*Re Mahmoud* (n 8) 718.
[13]ibid.
[14]see *Re Mahmoud* (n 8) 720, 721.
[15]ibid.
[16]*Re Mahmoud* (n 8) 724 (Bankes LJ).

The illegality defence therefore barred the claim as the court would not assist in giving effect to a contract of sale which was expressly prohibited by the Order.[18] If such a claim were allowed it would undermine the purpose of the 1919 Order and the illegal act under it; namely preventing the buying and selling of the linseed oil without licence.[19]

Re Mahmoud reveals that an 'important function that underlies the illegality defence is to support the law that the claimant has infringed'.[20] Thus where disallowing the claim will further the purpose of the rule infringed, the illegality defence will bar the claim.[21] *Re Mahmoud* also reveals that a non-recovery rule can pose great hardship for the claimant. Its operation however, is justified in order to maintain the integrity of the legal system as the claimant also has a degree of responsibility to check the facts before proceeding with the sale. The existence of the absolute rule supports the law, reinforcing parliamentary sovereignty by indicating that there is no room in such circumstances for judicial discretion. As Scrutton LJ said in *Re Mahmoud*:

> If this contract is prohibited by what is equivalent to a statute, the fact that the person who entered into the contract honestly believed that he was not breaking the statute, because he was told by the other party that he had a licence, is no

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[17]*Re Mahmoud* (n 8) 723,724 (Bankes LJ), 730-731 (Atkin LJ); 727,728 (Scrutton LJ); see also Pearce LJ in *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374, 385 (Pearce LJ), commenting on *Re Mahmoud* (n 8).
[18]*Re Mahmoud* (n 8) 730-731 (Atkin LJ), 727,728 (Scrutton LJ); see also Pearce LJ in *Archbolds* (n 17) 385 (Pearce LJ), commenting on *Re Mahmoud* (n 8).
[19]*Re Mahmoud* (n 8) 727 (Scrutton LJ).
[20]CP 189 (n 3) para 2.7.
[21]CP 189 (n 3) para 2.6; see *Cope* (n 8); CP 160 (n 5) para 4.56.

> defence…if the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract.[22]

The courts will also bar recovery under a non-contractual claim if to allow the claim would undermine the purpose of the law infringed which rendered the contract illegal. *Awwad v Geraghty*[23] (hereafter *Awwad*) illustrates this. There a solicitor brought a claim in unjust enrichment on the basis of *quantum meruit* for work done. The claim was for fees payable under a contingency fee agreement, which was expressly prohibited by statute. The illegality defence barred the claim, as the amount claimed represented that which was expressly prohibited by statute. To allow such a claim would have the effect of undermining the purpose of the rule infringed which was to prohibit contingency fees.[24] Peter Birks argues that the reason for disallowing the claim is because the contrary would stultify the 'law's condemnation of the illegality and its refusal to enforce the contract…it is important that the law as stated in one area should not make nonsense of the law as stated in another'.[25] Birks explains stultification as an inexplicable (and unjustifiable) contradiction in the law.[26] As will be explored later in the thesis, particularly chapters 4 and 5, stultification is synonymous with the principle of maintaining consistency in the law. Consistency will also be discussed in section 2.2.2. of this chapter.

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[22]*Re Mahmoud* (n 8) 728, 729 (Scrutton LJ).
[23][2001] QB 570.
[24]see also *Awwad* (n 23) 596 (Schiemann LJ).
[25]Peter Birks, 'Recovering Value Transferred under an Illegal Contract' (2000) 1 *TIL* 155, 158, 160.
[26]Birks (n 25) 155.

Bearing the above in mind, a question which arises is whether there could be any circumstances which would warrant a non-contractual claim succeeding despite the actual contract being prohibited by statute. For example, consider if in *Re Mahmoud* the defendant had accepted delivery and sold the linseed oil thus making a profit, but refused to pay for the oil. Could the claimant recover the value of goods in a non-contractual claim? Scrutton LJ in *Re Mahmoud* hinted at the possibility of a claim against the defendant who had fraudulently deceived the claimant, though he concluded that 'this Court is confined to an award made upon the contract'.[27] If here the strict rule of non-recovery is applied it would result in manifest injustice as the defendant would retain the goods without paying for them.[28] The defendant enjoys an undeserved windfall gain, and benefits further by selling the goods for a profit. To that end a flexible approach would enable the court to take into account the relative culpability of the parties and prevent unjust enrichment.[29] Allowing a non-contractual claim in such circumstances would enable the deceived claimant access to a remedy which would otherwise have been refused under a stringent rule of non-recovery. Such a flexible approach has been supported by Kerr LJ in *Saunders v Edwards*[30] (hereafter *Saunders*) who argued that the 'conduct and relative moral culpability of the parties may be relevant in determining whether or not the *ex turpi causa* defence falls to be applied as a matter of public policy'.[31] However, if such a non-contractual claim were allowed, the question then becomes as to how one would overcome the issue of contradiction in the

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[27]*Re Mahmoud* (n 8) 730 (Scrutton LJ).
[28]see Nelson Enonchong, *Illegal Transactions* (Lloyd's of London Press, Lloyd's Commercial Law Library,1998) 18.
[29]Enonchong, *Illegal Transactions* (n 28) 19; see also *Nelson v Nelson* [1995] 4 LRC 453, 509 (Toohey J).
[30][1987] 1 WLR 1116.
[31]*Saunders* (n 30) 1127 (Kerr LJ).

law; or as referred to by Birks, stultification. Chapter 7 of this thesis will put forth the argument that there is no contradiction in the law if the claimant is in a class entitled to sue namely relying on an independent unjust factor for the claim, such as fraud.[32] There it can be argued that as the claimant's participation in the illegality is involuntary; allowing the non-contractual claim will not lead to inconsistency in the law.[33] This is also known as the parties being 'not *in pari delicto*', meaning that the parties are not on an equal legal footing.[34] *Burrows v Rhodes*[35] presents a good example. There the claimant had been enlisted in an army for a raid contrary to the Foreign Enlistment Act 1870. The claimant was induced to enter into the defendants' service and participate in a raid which the defendant fraudulently misrepresented had the support of Her Majesty's Government.[36] The claimant relied upon the representation that the employment was lawful, entered into the service and participated in the raid.[37] The claimant suffered injuries as a result and claimed damages. His claim succeeded as his participation in the illegal act was involuntary, being brought upon by the defendant's fraudulent misrepresentation.[38]

Similarly, Birks argues, recognising an entitlement to recovery in a non–contractual claim to only a restricted class entitled to sue does not stultify the condemnation of the

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[32]see *Burrows v Rhodes* [1899] 1 QB 816; *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192; *Patel* (UKSC) (n 1) [241]-[244] (Lord Sumption).
[33]see *Patel* (UKSC) (n 1) [241]-[242] (Lord Sumption).
[34]ibid; Note *in pari delicto potior est conditio defendentis* means where both parties are equally in the wrong the position of the defendant is the stronger: *Ashmore, Benson, Pease & Co. Ltd v A. V. Dawson* [1973] 1 WLR 828,833 (Lord Denning). This will be discussed later in the chapter.
[35][1899] 1 QB 816.
[36]*Burrows v Rhodes* (n 32) 822 (Grantham J).
[37]*Burrows v Rhodes* (n 32) 817 (Grantham J), 827 (Kennedy J).
[38]*Burrows v Rhodes* (n 32) 827 (Grantham J), 831, 834 (Kennedy J); see also *Patel* (UKSC) (n 1) [242] (Lord Sumption).

contract.[39] Birks argues that the restricted class includes those claimants who entered into the transaction because they were deceived, pressurised, mistaken, exploited or were in some other way an unwilling participant to the illegal contract.[40] For example, in a restitutionary claim where value is transferred under duress or mistake, the claimant can rely on those independent unjust factors and need not found his claim on failure of consideration. Recognising that only a restricted class is entitled to recovery, and not all of the persons entering into an illegal contract, does not stultify the condemnation of the contract because there is adequate reason for allowing the claim.[41] This will be further discussed in section 2.2.3 on unjust enrichment. Cases such as *Hounga v Allen*[42] (hereafter *Hounga*) discussed in section 2.2.2 reveal that a claimant will be successful in bringing a non-contractual claim despite breaches of the law if the claimant is vulnerable to exploitation by the defendant, or in a class intended to be protected by the statute.[43] There too, allowing the non-contractual claim will not stultify the law infringed.[44]

Where a contract is not expressly prohibited by statute, the courts may have to determine whether it is impliedly prohibited by statute.[45] The fundamental question for the courts, as put by Parke B in *Cope v Rowlands*[46] (hereafter *Cope*), is 'whether the

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[39]Birks (n 25) 173.
[40]ibid.
[41]ibid.
[42][2014] UKSC 47, [2014] 1 WLR 2889.
[43]*Patel* (UKSC) (n 1) [242], [243] (Lord Sumption); see *Kiriri* (n 32); *Hounga* (UKSC) (n 42).
[44]This will be further illustrated in chapter 4 and 7.
[45]see *St John* (n 8).
[46](1836) 2 Meeson and Welsby 149.

statute means to prohibit the contract'[47] which is being sued on. The question is therefore one of statutory interpretation.[48] *St John Shipping Corp v Joseph Rank Ltd*[49] (hereafter *St John*) is illustrative of this exercise. In *St John*, a ship was overloaded in contravention of the Merchant Shipping (Safety and Load Line Conventions) Act 1932. A fine was imposed for overloading. The defendant argued that the way in which the contract was performed in contravention of statute rendered it unenforceable therefore, the claimant should be denied the right to freight. In rejecting the illegality defence, Devlin J followed Parke B's statement of the law in *Cope* noted above.[50] He said that unless a clear implication is found that the statute intended to prohibit the contract, the courts should not readily 'hold that a statute intends to interfere with the rights and remedies given by the… law of contract'.[51] He emphasised that the contact of carriage of goods was not within the ambit of the statute. Explaining this, he noted there may be an implied prohibition for a contract of loading, particularly a contract for bunkering at a specified port which has the effect of submerging the load line.[52] However, that implied prohibition does not extend to contracts for carriage of goods by improperly loaded ships.[53] He further emphasised it is important to have regard to the consequences, the inconvenience and injury which would follow from upholding the defendant's contention of non-recovery of freight.[54] He held that nullifying the bargain here, in a case of such 'triviality, where no authority would have felt it worthwhile to

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[47] *Cope* (n 8) 157 (Parke B); see also *St John* (n 8) 283, 287 (Devlin J).
[48] see *St John* (n 8) 287 (Devlin J); *Archbolds* (n 17) 385 (Pearce LJ); see also *Ochroid Trading Ltd v Chua Siok Lui* [2018] SGCA 5 at [27] (Andrew Phang Boon Leong JA).
[49] [1957] 1 QB 267.
[50] *St John* (n 8) 284, 285 (Devlin J).
[51] *St John* (n 8) 288, 289 (Devlin J).
[52] *St John* (n 8) 287, 288 (Devlin J).
[53] ibid.
[54] *St John* (n 8) 289 (Devlin J).

prosecute the seller [would result in the seller] forfeit[ing] a sum vastly in excess of any penalty that a criminal court would impose'.[55] It would also result in the harsh and untenable consequence of relieving the defendant of their liability to pay the freight because of the smallest of infringement(s) of a statute, particularly where the statute does not prohibit the contract itself.[56] Devlin J further said:

> The Act of 1932 imposes a penalty which is itself designed to deprive the offender of the benefits of his crime. It would be a curious thing if the operation could be performed twice—once by the criminal law and then again by the civil.[57]

John Shand also argues that the courts should avoid double punishment for the same offence.[58] *Narraway v Bolster*[59] (hereafter *Narraway*) also illustrates this. There a fine of 40 shillings was prescribed for breach of a statutory provision.[60] That fine was held to be a sufficient penalty, as opposed to depriving the landlord of the rent due, which would have been out of all proportion to the breach. Lord Darling said in *Narraway*:

> To say that because a man let a house to a tenant and the tenant was not given the name and address of the medical officer—which a man could perfectly well

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[55]*St John* (n 8) 288, 289, 291 (Devlin J).
[56]*St John* (n 8) 281, 288 (Devlin J).
[57]*St John* (n 8) 292 (Devlin J).
[58]John Shand, 'Unblinkering the Unruly Horse: Public Policy in the Law of Contract' (1972) 30 *Cambridge Law Journal* 144, 148, 150; see also CP 160 (n 5) para 4.7.
[59][1924] EGD 217.
[60]see Housing and Town Planning Act 1919.

> obtain for himself—that the tenant should live rent-free in the house for years, in that case for 97 weeks, was to argue that the legislature did a wicked injustice.[61]

Similarly, in *Shaw v Groom*[62] (hereafter *Shaw*) a fine prescribed by the statue[63] for failure to provide a rent book, was held to be sufficient penalty. The court held that Parliament did not intend to deprive the landlord of recovering rent for failing to comply with the statutory provision 'or impose any forfeiture on him beyond the prescribed penalty'.[64]

Furthermore, it is notable that any sum forfeited by the claimant goes to the defendant as an undeserved windfall.[65] This is particularly concerning where the defendant is equally blameworthy.[66] As Nelson Enonchong argues, such a windfall gain may act as an incentive for rogues who, hoping to receive a windfall gain, may encourage others to enter into illegal transactions with them.[67] Prohibiting recovery on grounds of the policy

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[61] *Narraway* (n 59) 218 (Lord Darling).
[62] [1970] 2 QB 504.
[63] Landlord and Tenant Act 1962.
[64] *Shaw* (n 62) 526 (Sachs LJ).
[65] *St John* (n 8) 288 (Devlin J).
[66] John W. Wade, 'Benefits obtained under illegal transactions- reasons for and against allowing restitution' (1946-1947) *25 Tex L Rev* 31,36; see further *Watts v Watts* [2014] WTLR 1781 at [207] (Nicholas Strauss QC) where he said that 'If a claim is barred for illegality, then potior est conditio defendentis, but that this is the result may be a decisive reason not to bar it'; Tey Tsun Hang, 'Reforming Illegality in Private Law' (2009) 21 *Singapore Academy of Law Journal* 218, 236; see also *Muckleston v Brown* (1801) 6 Ves. Jr. 52 (Lord Eldon);cf *in pari delicto, potior est conditio defendentis* which translated means: where both parties are equally in the wrong the position of the defendant is stronger; see *Ashmore, Benson, Pease* (n 34) 833 (Lord Denning); Andrew Burrows, *Restatement of the English Law of Contract* (Oxford University Press, 2016) 221-222.
[67] Enonchong, *Illegal Transactions* (n 28) 19.

of punishment is therefore not a suitable rationale for the application of the illegality defence as it punishes one party whilst giving the other an undeserved benefit.[68]

Another case which illustrates the cautious attitude of the courts in rendering a contract impliedly prohibited by ascertaining the purpose of the rule infringed is *Archbolds (Freightage) Ltd v S Spanglett Ltd*[69] (hereafter *Archbold*s). There the claimant employed the defendants to carry their whisky. The defendant's used a van which did not have the correct licence. The claimant believed that the defendant had the correct licence. The whisky was stolen due to negligence of the defendant's driver. The claimant brought an action for damages. The defendant argued that the contract was illegal as the van did not have the correct licence in contravention of the Road and Rail Traffic Act 1933. In construing the 1933 Act, the court firstly, held that the contract was not expressly prohibited by it because the statue merely regulated the means by which the carriers should carry the goods.[70] Secondly, the contract was not prohibited by implication as s 1 of the 1933 Act provided that 'no person shall use a goods vehicle on a road for the carriage of goods ... except under licence'. Here the claimants' part of the contract was not an illegal use of the vehicle as they were not the ones using it.[71] They merely supplied the load to be carried.[72] The claimant was not the one who had

[68]For detailed argument on rejection of punishment as a policy rationale underlying the illegality defence see CP 160 (n 5) paras 4.10-4.24.
[69][1961] 1 QB 374.
[70]*Archbolds* (n 17) 385 (Pearce LJ).
[71]ibid.
[72]*Archbolds* (n 17) 388 (Devlin LJ).

committed the illegal act nor did they aid or abet the defendants in committing it.[73] Significantly, Devlin LJ said:

> I think that the purpose of this statute is sufficiently served by the penalties prescribed for the offender; the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute.[74]

Here depriving the claimant of all contractual remedies would impose on the claimant a loss far in excess of the penalty imposed by the statute itself for the breach.[75] The penalty itself was intended to deprive the offender of the benefit from violation of the law. This demonstrates an important policy consideration – does allowing the claim result in a profit from the crime? Preventing profit from a crime is often referred to by the courts as a justification for the application of the illegality defence.[76] As Fry LJ said in *Cleaver v Mutual Reserve Fund Life Association*[77] 'it is against public policy to allow a criminal to claim any benefit by virtue of his crime'.[78]

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[73]*Archbolds* (n 17) 393 (Devlin LJ).
[74]*Archbolds* (n 17) 390 (Devlin LJ).
[75]ibid; Jack Beatson, Andrew Burrows, John Cartwright, *Anson's Law of Contract* (30th edition Oxford University Press, 2016) 413.
[76]The no profit policy recognised in the case law on illegality and the Law Commission see CP 189 (n 3) paras 2.16, 3.142; LC 320 (n 4) para 1.4; CP 154 (n 5) para 6.7; CP 160 (n 5) paras 4.36-4.37,4.70;see also *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 156, 159 (Fry LJ); see also *Beresford v Royal Insurance Company* [1938] AC 586, 598 599 (Lord Atkins), 603 (Lord Macmillan); *Euro Diam v Bathurst* [1990] 1 QB 1, 35 (Kerr LJ); *Geismar v Sun Alliance and London Insurance Ltd* [1975 G. No. 3758], [1978] QB 383, 395E-F (Talbot J); *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39 at [20] (Lord Phillips); *Hounga* (UKSC) (n 42) [44]-[45] (Lord Wilson); *Patel* (UKSC) (n 1) [99] (Lord Toulson), [143] (Lord Kerr).
[77][1892] 1 QB 147.
[78]*Cleaver* (n 76) 156 (Fry LJ).

The question then arises as to when a contract may be impliedly prohibited by statute. The answer appears to be in *Cope. Cope* decides that if one of the objects of the statute is found to be protection of the public then, despite a penalty being imposed, by inference a contract made in contravention of that statute's provisions, may be held to be impliedly prohibited by the statute.[79] In *Cope* the claimant, an unlicensed broker, brought an action for work, labour and commission for buying and selling stocks in the City of London. The statute 6 Ann, c16 provided that any person who acted as a broker in London without obtaining a licence had to forfeit and pay to the City, for every such offence, 25l.[80] Parke B held:

> The clause…which imposes a penalty, must be taken to imply a prohibition of all un-admitted persons to act as brokers, and consequently to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for so acting.[81]

He said the object of the statute was not merely to secure revenue to the city through a penalty imposed on unlicensed brokers but it included 'as one object, the benefit and security of the public in those important transactions…negotiated by brokers'.[82] The

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Cleaver (n 76) 156, 159 (Fry LJ).

[79]see *Cope* (n 8) 157-159 (Parke B);*Victorian Daylesford Syndicate Ltd v Dott* [1905] 2 Ch 624, 629-630 (Buckley J);cf. Harman LJ in *Shaw* (n 62) 518 who said that the proposition that if the statute is for the protection of the public it should thus be unenforceable is not the only test. The true test he said is 'whether the statute impliedly forbids the provision in the contract to be sued upon'.

[80]*Cope* (n 8)151-153 (Parke B).

[81]*Cope* (n 8)159 (Parke B).

[82]*Cope* (n 8) 157-159 (Parke B); Note this is akin to the point made by McHugh J in the Australian High Court in *Nelson* (n 29) 523: 'the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies'.

contract was therefore, prohibited by implication. Disallowing the claim here furthered the purpose of the rule infringed which included protection of the public.[83]

In conclusion, the operating policy in cases concerning statutory illegality discerned from *Re Mahmoud* and *Awwad* is furthering the purpose of the rule infringed. Where allowing the contractual claim undermines the purpose of the rule infringed, the claim will be barred by the illegality defence. Equally, *Awwad* reveals that a non-contractual claim will also be barred if allowing the claim will undermine the purpose of the rule which rendered the contract illegal. Birks argues that the reason for disallowing the claim is to prevent contradiction in the law, namely stultification of the rule infringed. *Burrows v Rhodes*[84] illustrates that a non-contractual claim will succeed if the claimant is in a class entitled to sue. That class includes claimants who entered into the transaction because they were deceived, pressurised, mistaken, exploited or were in some other way an unwilling participant to the illegal contract.[85]

Where it is alleged that a contact is impliedly prohibited by statute, cases such as *St John, Narraway, Shaw*, and *Archbolds* reveal the cautious attitude of the court in rendering a contract impliedly prohibited and depriving the claimant of a remedy. The decision turns on deciphering the purpose of the statute or rule infringed. The cases also demonstrate that the consequences of denying the claim are an important consideration in determining whether the illegality defence bars the claim. The courts ensure that they are not imposing on the claimant a loss which is far in excess of the penalty imposed by

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[83]*Cope* (n 8) 157-159 (Parke B); CP 189 (n 3) para 2.6.
[84][1899] 1 QB 816.
[85]Birks (n 25) 173.

the statute itself for breach.[86] This is particularly so where the penalty in the statute itself is intended to deprive the offender of the benefit from violation of the law. The courts are therefore upholding the policy that the claimant must not profit from their crime. Where, the object of the statute is also found to be protection of the public, the courts are likely to bar the claim and render the contract impliedly prohibited, as is evident in *Cope.*

2.2.1.2 Common law illegality

A contract may be prohibited at common law because it is contrary to public policy and therefore, unenforceable.[87] This category consists of a number of different contracts including contracts to commit a crime, tort, an agreement to commit fraud such as a contract to defraud the revenue, and also includes contracts promoting sexual immorality.[88] For example, a contract involving prostitution will not be enforced, nor rent recoverable for premises knowingly let out for such purposes. Further, a claimant may not be able to recover money for damage done to a vehicle knowingly hired out to a prostitute for immoral purposes.[89] Such a contract is unenforceable because it

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[86]*Archbolds* (n 17) 390 (Devlin LJ); Beatson, Burrows, Cartwright, *Anson's Law of Contract* (n 75) 413.
[87]see *Collins v Blantern* (1767) 2 Wilson KB 347, 350; 95 ER 850, 852 (Wilmot Lord Chief Justice); *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1, 13 (Lush J); see also *Ting Siew May v Boon Lay Choo* [2014] SGCA 28 at [24] (Andrew Phang Boon Leong JA).
[88]*Allen v Rescous* (1675) 2 Levinz 174, 83 ER 505; see also *Parkinson* (n 87) 13-14 (Lush J); *Alexander v Rayson* [1936] 1 KB 169; *Tinsley v Milligan* [1994] 1 AC 340 (HL) (defrauding the Department of Social Security); *Begbie v The Phosphate Sewage Company, Limited* (1876) 1 QBD 679; *Pearce* (n 8); see also Beatson, Burrows, Cartwright, *Anson's Law of Contract* (n 75) 416-417; Ewan McKendrick, *Contract Law* (11th edition, Palgrave Macmillan, 2015) 274.
[89]*Girardy v Richardson* (1793) 1 Esp 13; *Pearce* (n 8).

facilitates immorality.[90] Contracts contrary to public policy also include contracts leading to corruption of public life[91] and contracts prejudicial to the administration of justice.[92] For example, a contract to give false evidence in criminal proceedings thereby perverting the course of justice; contracts to stifle a prosecution; and contracts prejudicial to public safety.[93] Pre-*Patel* such contracts were deemed expressly unenforceable. Post-*Patel*, the position is less clear as will be discussed in Chapter 4. This is predominantly due to Lord Toulson's judgment in *Patel* which appears to suggest that before rendering such contracts unenforceable the courts are to weigh different factors under the proportionality consideration.[94] The question then arises as to which of these two conflicting approaches should be adopted. In chapter 7 it will be argued that contracts contrary to public policy should be treated in the same manner as those which are expressly prohibited by statute, namely automatically rendered unenforceable. The principle basis on which this decision is reached will also be provided in chapter 7.

A further category of contracts to which the illegality defence may be invoked are those where the contract is not expressly prohibited by statute or common law rule but is tainted by illegality in some other manner. This includes contracts entered into with the intention to contravene a statutory provision but the contract is not prohibited by the

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[90]see *Pearce* (n 8) 217-218 (Pollock CB), 219 (Martin B), 219-220 (Pigott B).
[91]*Parkinson* (n 87); Note after *Patel* (UKSC) (n 1) [118] (Lord Toulson), [150] (Lord Neuberger) the position in relation to this category of cases is less clear; see also Birks (n 25) 184; see also Emer Murphy 'The ex turpi causa' (2016) 32 *PN* 241, 252, 253, 254.
[92]*Egerton v Brownlow* (1853) 4 H.L. Cas, 164; 10 ER 359, 424 (Lord Lyndhurst).
[93]*Foster v Driscoll* [1929] 1 KB 470.
[94]see *Patel* (UKSC) (n 1) [109] (Lord Toulson);see also *Ochroid* (n 48) [84],[114], [115] (Andrew Phang Boon Leong JA).

provision, and those where the illegality resides in performance.[95] This category also includes contracts entered into with the object of committing an illegal act, such as where the object is to use 'the subject matter of the contract for an illegal purpose or entered into with the intention of using the contractual documentation for an illegal purpose'.[96] The case law on these variable circumstances, where the contract itself is not prohibited, highlights the importance of taking a flexible approach by considering different factors to determine the outcome of cases. In *Alexander v Rayson*[97] (hereafter *Alexander*) the court took into account the overt step the claimant took to perpetrate fraud and his knowledge of the legal implications of his unlawful acts.

In *Alexander,* the claimant let out a flat and gave the defendant two documents relating to rent. One provided the rate of 450l, the other 750l (payment for services). Altogether the rent was said to be 1200l. Later, the defendant refused to pay the quarterly instalments of 750l relating to services because the claimant had failed to comply with his obligations in relation to those services. The claimant sued for that part of the rent due. The defendant raised the illegality defence arguing that the agreement was illegal. This was on the basis that the reason for splitting the rent into two documents was for the purpose of defrauding the Council. The splitting induced the Council to believe that the rent received was just 450l whilst the landlord in fact received 1200l under the two documents.[98] Romer LJ held that where an agreement which is not itself unlawful such as an agreement for letting, is made with the intention to use its subject-matter for an

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[95]see *ParkingEye Ltd v Somerfield* (n 9).
[96]*Ting Siew* (n 87) [77], [81] (Andrew Phang Boon Leong JA); *Alexander* (n 88) 182 (Romer LJ)
[97][1936] 1 KB 169.
[98]*Alexander* (n 88) 176 (Romer LJ).

unlawful purpose or contrary to public policy, the party to the agreement who had the unlawful intention cannot sue on it.[99] This is based on the *ex turpi causa* rule. Here, the claimant's intention was to use the documents for an unlawful purpose, and the splitting of the rent transaction into two documents was an overt step in perpetrating the fraud.[100] The court also took into account that the claimant was aware of the legal implications of presenting the documents in such a way and intentionally split the transaction into the two documents to avoid paying more tax. Moreover, the part claimed would reflect the sum used to defraud the Council, to attain the benefit of retaining sums without paying tax. The claimant could not seek assistance of the court to recover that part of the rent namely 750l.[101]

This can be contrasted with *ParkingEye Ltd v Somerfield Stores Ltd*[102] (hereafter *ParkingEye*) in which the claimant was not aware and did not have knowledge that the 'intended mode of performance [was] illegal'.[103] In *ParkingEye,* the illegality resided in performance. There the claimant had entered into an agreement with the defendant to supply them with a monitoring and control system for their supermarket car parks. The system identified cars which over stayed and charged them. The charges were collected by the claimant. The contract was terminated early by the defendant. The claimant brought a claim for damages for the loss of revenue resulting from early termination of the contract. The defendant raised the illegality defence based on the false representations made by the claimant in the letters sent to the customers who had

[99]*Alexander* (n 88) 182 (Romer LJ).
[100]*Alexander* (n 88) 187-189 (Romer LJ).
[101]*Alexander* (n 88) 189 (Romer LJ).
[102][2012] EWCA Civ 1338.
[103]Feng Wang, *Illegality in Marine Insurance Law* (1st Edition, Informa Law from Routledge, 2017) 102, 103.

overstayed, in particular a third letter.[104] The third letter contained a falsehood that the charges as a debt were owed to the claimant (ParkingEye Ltd) whereas they were actually owed to the defendant supermarket (Somerfield). The letters also indicated that the claimant had the authority to issue legal proceedings which they did not.[105] If payment was not received, it was for the defendant to decide to issue proceedings.[106] The defendant argued that the claimant was not entitled to the damages as the contract had been concluded by the claimant with the intention of performing it in an illegal manner.[107]

In reaching their decision the court took into account a number of factors such as object and intent of the claimant and the centrality of illegality to the contract. Toulson LJ explained that the contract was not entered into to achieve an unlawful objective, rather the object and most important part of the contract was to provide the monitoring system which was lawful.[108] The illegality was the deception in the third letter, but there was no fixed intention to use that letter and the claimant would have ceased to use them if asked to do so by the defendant.[109] Moreover, 'the misrepresentation in the third letter was hardly central to the performance of the contract'.[110] The contract could be and was largely carried out lawfully as most customers never received the third deceptive letter.[111] Toulson LJ also highlighted that although there is a public interest in the court

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[104] *ParkingEye Ltd v Somerfield* (n 9) [11] (Sir Robin Jacob).
[105] *ParkingEye Ltd v Somerfield* (n 9) [9], [11] (Sir Robin Jacob).
[106] *ParkingEye Ltd v Somerfield* (n 9) [57] (Toulson LJ).
[107] ibid.
[108] *ParkingEye Ltd v Somerfield* (n 9) [57],[71] (Toulson LJ).
[109] *ParkingEye Ltd v Somerfield* (n 9) [68], [77] (Toulson LJ), at [18], [35] (Sir Robin Jacob).
[110] *ParkingEye Ltd v Somerfield* (n 9) [71], [75] (Toulson LJ).
[111] *ParkingEye Ltd v Somerfield* (n 9) [35] (Sir Robin Jacob), [57], [71] (Toulson LJ).

not appearing to reward wrongdoing or condone a breach of the law, the unjust enrichment of the defendant which would result from denying the claim should also be taken into account.[112] In such cases, Toulson LJ said although the rule *in pari delicto potior est conditio defendentis* (hereafter *in pari delicto*) meaning where both parties are equally in the wrong the position of the defendant is the stronger,[113] this rule should only prevail in very serious cases. He said the application of the *in pari delicto* rule would produce a severely disproportionate response in less serious cases such as this, especially where the parties did not realize that they were acting contrary to the law.[114] He also cited Lord Wright who had said in *Vita Food Products Inc v Unus Shipping Co Ltd*[115] that a bargain should only be nullified on serious grounds.[116] Having taken these factors into account, Toulson LJ held that it would be a disproportionate response to the illegality to deny the claimant a remedy.[117] It also appears from *ParkingEye* that where the contract itself is not unlawful, but tainted with illegality, if the claimant is not aware that the mode of performance is illegal, then the illegal intention will not necessarily vitiate a claim under the contact.[118] The adoption of a flexible approach under which the courts are able to take into account different factors is therefore useful in preventing undue hardship, particularly where the contract itself is not illegal and the illegality relatively minor.

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[112]*ParkingEye Ltd v Somerfield* (n 9) [45], [61] (Toulson LJ); see also *St John* (n 8) 288 (Devlin J).
[113]*Ashmore, Benson, Pease* (n 34) 833 (Lord Denning); *ParkingEye Ltd v Somerfield* (n 9) [45] (Toulson LJ).
[114]*ParkingEye Ltd v Somerfield* (n 9) [45], [79] (Toulson LJ).
[115][1939] AC 277.
[116]*ParkingEye Ltd v Somerfield* (n 9) [45] (Toulson LJ); see also *Vita Food* (n 115), 293 (Lord Wright).
[117]*ParkingEye Ltd v Somerfield* (n 9) [79] (Toulson LJ).
[118]Wang, *Illegality in Marine Insurance Law* (n 103) 102, 103.

Another case concerning common law illegality is *Taylor v Bhail*.[119] There the contract was held to be unenforceable as it was intended to be used to practise fraud against the defendant insurers. It was also a contract to which the claimant was a willing participant.[120] There a builder, in an agreement with the defendant, falsely inflated the estimate of the cost of work in order for the defendant to defraud his insurance company. The builder claimed the cost of work which he had carried out. The court rejected the claim. The effect of the illegality defence was to deprive the claimant of his legal rights and remedies and any profit he may have gained from such an illegal venture.[121] The case reflects the operation of the deterrence policy as justification for the application of the illegality defence. As Millett LJ said:

> It is time that a clear message was sent to the commercial community. Let it be clearly understood if a builder…agrees to provide a false estimate for work in order to enable its customer to obtain payment from his insurers to which he is not entitled, then it will be unable to recover payment from its customer and the customer will be unable to claim on his insurers even if he has paid for the work.[122]

The illegality defence operated to protect the public by deterring criminal conduct.[123] Over the years however, doubts over the value of deterrence as a policy justification for

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[119][1996] CLC 377.
[120]*Taylor v Bhail* (n 119) 382 (Millett LJ).
[121]CP 189 (n 3) para 2.19; *Patel* (UKSC) (n 1) [260] (Lord Sumption).
[122]*Taylor v Bhail* (n 119) 383-384 (Millett LJ), 381 (Brown P).
[123]Enonchong, *Illegal Transactions* (n 28) 15; *Cleaver* (n 76) 151 (Lord Esher).

the application of the illegality defence have been expressed. Lord Lowry in the House of Lords in *Tinsley v Milligan*[124] (hereafter *Tinsley*) said:

> I am not impressed by the argument that… the principle [*ex turpi causa*] acts as a deterrent…In the first place, they [the parties] 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.[125]

The argument here is that if the parties to an illegal transaction are not deterred by the criminal consequences it is unlikely that they will be deterred by civil consequences.[126] In addition, the Law Commission noted that even where the parties are aware of the law, deterrence as a rule would only operate to deter one party to the transaction whilst acting as an inducement to the other.[127] This is because the other party may be aware that the illegality defence can result in an unmerited windfall for him.[128]

Despite these arguments, the Law Commission said in its final Report on the illegality defence that deterrence is still an important policy underpinning the illegality defence.[129] Although it may be questioned whether as a matter of fact a court's decision

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[124][1994] 1 AC 340 (HL).
[125]*Tinsley* (HL) (n 88) 368E-G (Lord Lowry);see further *Tribe v Tribe* [1996] Ch 107, 134 (Millett LJ).
[126]see Nicholas Strauss, 'Ex turpi causa oritur actio?'(2016) 132 *LQR* 236, 263, footnote 183 of that paper.
[127]CP 189 (n 3) para 2.21; see also *Jackson v Harrison* (1977-1978) 138 CLR 438, 453; *Hounga* (UKSC) (n 42) [44C]-[44D] (Lord Wilson); J. Gregory Walta, 'The Doctrine of Illegality and Petty Offenders: Can Quasi-Contract Bring Justice?'(1967) 42 *Notre Dame L Rev* 46, 49.
[128]ibid.
[129]CP 189 (n 3) para 2.23.

on illegality deters others in entering illegal arrangements, the argument in favour of deterrence does show that courts are not appearing to condone illegality.[130] Furthermore, the Law Commission noted that the relevance of deterrence as a policy rationale varies in different contexts.[131] For example, deterrence is arguably more relevant to claims in contract and trusts as opposed to tort. This is on the basis that if the courts were to deprive the claimant of a valuable asset it may deter others from entering into a similar arrangement.[132] Moreover, in contract and trusts, the parties enter into a transaction in the hope of making a profit. The risk of losing that profit, or even the initial value transferred, because of involvement in illegality might deter the parties from entering into such arrangements. As Patrick Atiyah argues, civil sanctions can at times work as greater deterrents than sanctions imposed by criminal law since they essentially deprive the claimant of his legal rights and remedies under the contract.[133] In tort however, where illegality is raised as a defence the claimant has often committed or been involved in serious criminal offences. It is difficult in such cases to suggest that such a person will be deterred from these activities on the basis that they would lose

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[130]LC 320 (n 4) para 2.76; see also *Tinsley v Milligan* [1992] Ch 310, 334 (Ralph Gibson LJ); *K/S Lincoln v CB Richard Ellis Hotels Ltd* [2009] EWHC 2344 at [22] (Mr Justice Coulson).

[131]CP 189 (n 3) para 2.23; LC 320 (n 4) para 2.76; CP 154 (n 5) para 6.9-6.10; CP 160 (n 5) para 4.5, 4.28-4.29;see also A Burrows *Restatement of the English Law of Contract* (n 66) 229-230.

[132]*Watts* (n 66) at [201] (Nicholas Strauss QC);cf. Strauss, 'Ex turpi causa oritur actio?'(n 126) 263, footnote 183 of that paper.

[133]Patrick. S. Atiyah, *An Introduction to the Law of Contract* (5th Edition, Oxford: Clarendon Press, 1995) 342-343; see also the case *Watts* (n 66) [201], [202] (Nicholas Strauss QC) in which there was evidence in that case that 'the claimant might have been deterred if he had known that any claim he might have would be barred'.

compensation for any loss suffered as a result, since they were evidently not deterred by the criminal sanction. [134]

In conclusion, it is evident from the case law that where the contract is contrary to public policy, the contract is automatically unenforceable and recovery refused. Where the contract is not unlawful but the illegality resides for example in performance, the courts assess different factors including: object and intention of the claimant, knowledge of implication of illegality, seriousness of illegality and the centrality of illegality in order to reach a proportionate response to the illegality. The key operating policies are deterrence, not appearing to condone illegality versus taking into consideration the unjust enrichment of the defendant.

The significant policies identified in the section on contractual illegality (statutory and common law) are: furthering the purpose of the rule infringed; not encouraging or condoning illegality and not allowing one to profit from their crime. This thesis will argue that these three policies can be subsumed under the broader consistency policy. The consistency policy will be discussed in the next section on tort and chapters 4 and 5. In relation to deterrence, the impact of this policy differs depending on the context of the claim. Chapter 4 will address whether in *Patel* deterrence continues to be a significant policy governing the application of the illegality defence. The case law, in particular on statutory illegality also reveals that punishment is not one of the strongest policies for the operation of the illegality defence. It is also evident from the contractual illegality case law that courts consider the adverse consequences of denying relief, ensuring that a penalty in excess to the breach is not imposed, especially where the

[134]CP 189 (n 3) para 7.9.

penalty is sufficient to serve the object of the infringed statute. This is broadly what is meant by proportionality namely striking a balance between the nature of the illegality (what the parties have done) and the effect on the parties in terms of their legal rights and remedies. Where a contract is not illegal but the illegality resides in performance, as noted earlier, the courts have taken into consideration various factors as illustrated through *ParkingEye* to reach a just and proportionate response to illegality.

2.2.2 Tort

In tort, the illegality defence may bar a claimant from recovering damages for the loss suffered as a result of a lawful sanction imposed on him.[135] For example, a claim for the loss of earnings or liberty due to imprisonment or detainment after having committed a crime will be barred. Commonly in such cases the claimant argues that but for the defendant's negligence he would not have committed the crime, and would not have been imprisoned or detained. In such cases the illegality defence bars the claimant from recovering damages on grounds that preventing recovery maintains consistency in the legal system.[136] This is because if the claimant were to be compensated in civil law for the imprisonment or, indemnified for a fine paid, the law under which the claimant was punished would not be furthered but evaded.[137] Two cases illustrative of this are *Gray v*

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[135]see *Gray* (HL) (n 2); *Clunis v Camden and Islington Health Authority* [1998] QB 978;see also James Goudkamp, 'The defence of illegality in tort law: wither the rule in Pitts v Hunt?' (2012) 71 (3) *CLJ* 481, 482, 483.
[136]See *Gray* (HL) (n 2); *Clunis* (n 135);*Henderson v Dorset Healthcare University NHS Foundation Trust* [2016] EWHC 3275 (QB);[2017] 1 WLR 2673.
[137]CP 160 (n 5) para 4.56; see also *Clunis* (n 135).

Thames Trains Ltd[138] (hereafter *Gray*) and *Clunis v Camden and Islington Health Authority*[139] (hereafter *Clunis).* In *Gray,* the claimant suffered from post-traumatic stress disorder (PTSD) which he alleged was caused by a railway accident. Whilst suffering from PTSD he killed a man and was found guilty of manslaughter and detained under the Mental Health Act 1983. He brought a claim in negligence against the train operator claiming damages for loss of earnings after his detention and for loss of liberty consequent to the killing. The House of Lords applied the illegality defence to bar the claim. Lord Hoffmann said the claim for loss of earnings after arrest and damages for detention were all damages caused by the lawful sentence imposed on the claimant for the crime he committed, here manslaughter.[140] If the claimant were allowed to recover compensatory damages for loss of earnings due to imprisonment in civil law, the law under which he was punished would not be furthered and the determination of the criminal law would be nought.[141] Furthermore, such damages would undermine the penalty imposed by the rule which the claimant infringed.[142] In addition to basing the decision on the need to avoid inconsistency in the law, Lord Hoffmann also applied the causation test, but as the discussion focuses on policy in this chapter, that test will be discussed in chapter 3.

In *Clunis,* the claimant had been detained in hospital under s 3 of the Mental Health Act 1983. The claimant was subsequently discharged by the relevant health authorities.

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[138][2009] UKHL 33.
[139][1998] QB 978; see also *Gray* (HL) (n 2).
[140]*Gray* (HL) (n 2) [32], [50] (Lord Hoffmann).
[141]*Gray* (HL) (n 2) [32]-[39] (Lord Hoffmann); see also *British Columbia v. Zastowny* (2008) SCC 4; [2008] 1 S.C.R. 27 at [22],[23],[25],[30] (Rothstein J); *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35, 38 (Denning J); CP 160 (n 5) paras 4.56, 6.41;CP 189 (n 3) para 2.8.
[142]CP 189 (n 3) para 2.8; *Zastowny* (n 141) [22],[23],[25],[30] (Rothstein J).

Upon release the claimant killed a person. Following this, the claimant was found guilty of manslaughter and detained in hospital. The claimant brought an action in negligence against the health authorities, claiming damages for loss of liberty due to detention. The claim was barred by the illegality defence based on the need to avoid inconsistency in the law.[143] The rationale behind the decision was that it would be inconsistent to detain or imprison someone on the grounds that he was responsible for a serious offence and then to compensate them for being lawfully detained.[144] Put differently, the civil courts cannot allow the punishment imposed by the criminal law to be defeated or evaded by allowing the claimant to recover as damages, a rebate of a penalty lawfully imposed by the criminal law.[145] The criminal law has taken the claimant to be responsible for the wrongdoing, therefore he should bear the consequences of that punishment.[146]

One can see that the rationale of furthering the purpose of the rule infringed, here the purpose of the criminal law, is essentially part of the broader policy of consistency.[147]

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[143]*Clunis* (n 135) 989,990 (Beldam LJ); CP 160 (n 5) para 4.100; see also *Worrall v British Railways Board* (CA, 29 April 1999).
[144]*Clunis* (n 135) 989, 990 (Beldam LJ).
[145]see also *Zastowny* (n 141) [22],[23],[25],[30] (Rothstein J).
[146]ibid; *Gray* (HL) (n 2) at [37] (Lord Hoffmann) Inconsistency between the criminal law which imposed penalty and detained, and the civil law which enables recovery for loss of liberty from another party.
[147]CP 160 (n 5) para 4.56; *Hall v Hebert* [1993] 2 SCR 159, 175-176, 178-180 (McLachlin J); *Patel* (UKSC) (n 1) [29] (Lord Toulson), [231]-[232] (Lord Sumption), [123] (Lord Kerr), [100]-[101] (Lord Toulson), [160],[168] (Lord Neuberger);*Gray* (HL) (n 2) [38], [48], [50] (Lord Hoffmann); *R v Islam* [2009] AC 1076 at [38] (Lord Mance); *Stone & Rolls* (n 76) [128] (Lord Walker), [226] (Lord Mance); *Hounga* (UKSC) (n 42) [55] (Lord Hughes); *Les Laboratoires Servier v Apotex Inc* [2015] AC 430 at [24] (Lord Sumption); *Bilta (UK) Ltd v Nazir (No2)* [2016] AC 1 at [172] (Lord Toulson and Lord Hodge); cf. Andrew Burrows, 'Illegality as a Defence in Contract' (2016) Oxford Legal Studies Research Paper No. 15/2016, 1, 13. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2758797 >accessed 21st June 2016.

Nicholas McBride similarly argues that the law would be contradicting itself in relation to homicide were it to allow mitigation or nullification of the punishment imposed for such serious offences through the private law.[148] In such cases refusing the claim ensures that the criminal law is not undermined and hence consistency in the law is maintained.[149] Consistency was explained by McLachlin J in the Canadian case *Hall v Hebert*[150] (hereafter *Hall*) as:

> To allow recovery… would be to allow recovery for what is illegal. It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which-contract, tort, the criminal law-must be in essential harmony.[151]

She further explained that consistency in the law is maintained if by allowing the claim the claimant does not profit from his crime and the award does not reflect evasion of a penalty lawfully imposed on him.[152] This will be explored further in chapter 5. Here the

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[148] Nicholas J McBride 'Not a Principle of Justice' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 87, 90, 101.
[149]ibid; Robert Sullivan 'Restitution or Confiscation/Forfeiture? Private Rights versus Public Values' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 80; William Gummow 'Whither Now Illegality and Statute: An Australian Perspective' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 297, 298, 300-301.
[150][1993] 2 SCR 159.
[151]*Hall v Hebert* (n 147) 176 (McLachlin J).
[152]*Hall v Hebert* (n 147) 169, 179, 180 (McLachlin J).

principle of stultification advanced by Birks also features.[153] He explained that the law as stated in one area should not make nonsense of the law as stated in another.[154] Ernest Weinrib also provides a good example to illustrate this.[155] He says, two burglars A and B, who due to A's failure to deactivate an alarm are caught, convicted and fined. B brings a claim in tort against A to recover the fine paid, arguing that A should have foreseen the harmful consequences that would result from him negligently performing his part.[156] Due to the illegality defence however, B's claim in negligence will not succeed. This is because B has deliberately chosen to break the criminal law and therefore he should deal with the consequences. As Weinrib said:

> Conviction and sentencing by a criminal court is the law's method of ascribing to B the responsibility for his action. It would make no sense at all if B were able to utilize tort law's mechanism of shifting losses in order to avoid the very consequences which criminal law has imposed upon him for his intentionally culpable conduct… the wrongdoing plaintiff is prevented from using tort law to stultify the criminal sanction. [157]

Other circumstances in tort concerning illegality include a claim being brought by a company against its fraudulent director or a third party in negligence for the loss suffered as a result of their actions. The illegality defence may be raised by the directors or third party to avoid paying out damages by arguing that the director's fraud should be

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[153]CP 160 (n 5) paras 4.65-4.68; Birks (n 25) 201-202.
[154]Birks (n 25) 160.
[155]Ernest J. Weinrib, 'Illegality as a Tort Defence' (1976) 26 *UTLJ* 28,50,51.
[156]ibid.
[157]ibid.

attributed to the company.[158] In such cases the question is whether attribution is required to promote the purpose of the rule infringed.[159] In other words, the court has taken into account whether allowing the company's claim would create inconsistency in the law by undermining either the policy of the rule infringed or any other policy relevant.[160] In most cases disallowing the company's claim for damages would create inconsistency with the policy of the rule infringed or policy behind any other relevant law which has been infringed by the defendant.[161] *Bilta (UK) Ltd v Nazir (No2)*[162] (hereafter *Bilta*) is illustrative of this. There the liquidator of Bilta, brought proceedings against its two former directors in Bilta's name. The claim alleged that the directors were parties to an unlawful conspiracy to injure Bilta by a fraudulent scheme which involved breaching their fiduciary duties as directors. The liquidators claimed damages in tort from the directors. The directors raised the illegality defence arguing that Bilta's claim against them was barred by reason of the criminal nature of its conduct under their control, namely that the function of Bilta was to serve as a vehicle for defrauding Her Majesty's Revenue and Customs (hereafter HMRC). Thus their fraud should be attributed to Bilta so as to bar its claim against them.

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[158]see *Bilta* (n 147) [129], [130] (Lord Toulson and Lord Hodge); see also *Singularis Holdings Ltd v Daiwa Capital Markets Europe* [2017] EWHC 257 (Ch) at [184], [218], [250] (Rose J); see *Singularis Holdings Ltd v Daiwa* [2018] EWCA Civ 84 (CA); *Livent v Deloitte* 2016 ONCA 11.
[159]*Bilta* (n 147) [195] (Lord Toulson and Lord Hodge)
[160]see *Bilta* (n 147); *Stone & Rolls* (n 76) [241] (Lord Mance). *Singularis* (Ch) (n 158); *Singularis* (CA) (n 158); see also *Livent* (n 158) [161] (Blair JA).
[161]see *Bilta* (n 147); *Singularis* (Ch) (n 158); *Singularis* (CA) (n 158).
[162][2015] UKSC 23, [2016] AC 1.

Lord Mance held that the purpose of the fiduciary duties meant that the company could not be identified with the director.[163] 'Any other conclusion would ignore the separate legal identity of the company [and] empty the concept of [fiduciary] duty of content'.[164] Lords Toulson and Hodge said the question is whether attribution is required to promote the purpose of the rule infringed.[165] The purpose of the rule transgressed, namely the fiduciary duty, was for the protection of the creditors whilst the company is in insolvency. The protection of the creditors' interests would be emptied if the fiduciary duty could not be enforced. Lords Toulson and Hodge both concluded that it would be contrary to the purpose and terms of s 172(3) and s 180(5) Companies Act 2006 if the court permitted the directors to escape liability for breach of their fiduciary duty, by allowing the illegality defence to an action brought for the benefit of the creditors, for the loss caused to the company by the breach.[166] They held that it would be absurd in this context to attribute an act to the company to defeat its claim.[167] The liquidators' claim succeeded.[168] If the claim were disallowed, 'it would not promote the integrity and effectiveness of the law, but would have the reverse effect'.[169] It should be noted that not all of their Lordships in *Bilta* took a policy-based approach. In particular, Lord Sumption rejected the approach of deciding the case on grounds that application of the defence is inconsistent with a statutory policy requiring directors to have regard to

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[163]*Bilta* (n 147) [42] (Lord Mance).
[164]ibid.
[165]*Bilta* (n 147) [195] (Lord Toulson and Lord Hodge); see also *McNicholas Construction Co. Ltd. v HM Commissioners of Customs and Excise* [2000] STC 553 at [44] (Dyson J); Note that Lord Sumption was critical of the use of policy based approach in *Bilta* see *Bilta* (n 147) [62], [98]-[102].
[166]*Bilta* (n 147) [130], [208] (Lord Toulson and Lord Hodge).
[167]*Bilta* (n 147) [123]-[130],[206] (Lord Toulson and Lord Hodge), [18] (Lord Neuberger).
[168]*Bilta* (n 147) [127], [129] (Lord Toulson and Lord Hodge).
[169]*Bilta* (n 147) [129] (Lord Toulson and Lord Hodge).

interests of creditors of an insolvent company.[170] Instead he preferred to view the illegality defence as a rule of law and based his decision on the fraud exception to the attribution of illegality.[171] Lord Sumption's rejection of the policy-based approach was criticised by James Goudkamp who argues:

> It's most odd given the supremacy of statutory law that a common law rule should be insensitive to a policy manifested in a relevant statute. It's trite law that the common law must be developed in a way that is compatible with material statutes.[172]

Further cases reveal the courts also taking into account other relevant policies. Doing so also ensures there is consistency in the law. The first is *Stone & Rolls Ltd v Moore Stephens*[173] (hereafter *Stone & Rolls*). In *Stone & Rolls* a company had brought proceedings for damages against their auditors, alleging that the auditors had been negligent in failing to detect the managerial fraud of the company's director. The auditors raised the illegality defence arguing that the directors' fraud should be attributed to the company so as to bar its claim. Though the illegality defence succeeded there, the case was criticised by the Justices of the Supreme Court in *Bilta.* Significantly, Lords Toulson, Hodge and the President of the Supreme Court Lord Neuberger emphasised that the decision in *Stone & Rolls* having no majority *ratio*

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[170]*Bilta* (n 147) [98], [99], [101] (Lord Sumption); see also James Goudkamp, 'The Doctrine of Illegality: A Private Law Hydra' (2015) 6 *United Kingdom Supreme Court Yearbook* 254,271.
[171]*Bilta* (n 147) [62]-[64], [71], [89], [94] (Lord Sumption).
[172]Goudkamp, 'The Doctrine of Illegality: A Private Law Hydra'(n 170) 272.
[173][2009] UKHL 39,[2009] 1 AC 1391.

decidendi should be put to one side and not looked at again or treated as authoritative.[174] However, for the purposes of the current discussion it is important to note that Lord Neuberger did suggest that persuasive points can be found within the speeches in *Stone & Rolls*. One such point was made by Lord Mance in his dissenting speech. He took into account policies, notably that 'it would lame the very concept of an audit'[175] if an auditor could use the illegality defence to defeat a claim for breach of duty to detect the managerial fraud, by attributing to the company the very fraud which they should have detected.[176]

Similarly, in *Singularis Holdings Ltd v Daiwa*[177] (hereafter *Singularis*) though a post-*Patel* case, the court took into account policies in reaching their decision. *Singularis* concerned a claim by a company against a negligent third party, Daiwa. There, Daiwa had paid out a sum of money from a client account, on the instructions of the director of Singularis, to other companies which the director owned. Daiwa signed off these payments without question, though there were obvious signs of fraud on Singularis. The money now being lost, the liquidators of Singularis brought a claim against Daiwa in negligence for breach of the Quince-care duty to recover the money paid out. Daiwa raised the illegality defence arguing that the director's fraud should be attributed to the company to defeat its claim against them in negligence. The court refused to attribute the director's fraud to the company. It was held that the third party had been in breach of the Quince-care duty, which provides that a banker must refrain from executing an order if he has reasonable grounds to believe that the order is an attempt to

[174]*Bilta* (n 147) [30] (Lord Neuberger), at [154] (Lord Toulson and Lord Hodge).
[175]*Livent* (n 158) [161] (Blair JA); *Stone & Rolls* (n 76) [241] (Lord Mance).
[176]ibid.
[177][2017] EWHC 257, [2018] EWCA Civ 84.

misappropriate company funds.[178] Here the third party had signed off payments on the director's instructions from the company's account to other companies owned by the director without question. This was done even though there were clear signs of fraud on the company.[179] In allowing the company's claim, the court held that attributing the directors' fraud to the company would denude the Quince-care duty of any value particularly where it was most needed.[180] Further, 'if a regulated entity can escape from the consequences of failing to identify and prevent financial crime by casting on the customer the illegal conduct of its mandated employee, that policy [of preventing financial crime] will be undermined'.[181]

The illegality defence may also be invoked in tort to bar a claimant from recovering compensation for injuries where he has been involved in a joint illegal enterprise.[182] In *Ashton v Turner*[183] the court held that as a 'matter of public policy the law would not recognise a duty of care owed by one participant in a crime to another'.[184] Thus the claimant could not recover damages for injuries in negligence from the defendant.[185] Put differently, the claimant is 'responsible for his own acts and the reasonably foreseeable consequences of those acts for themselves and for others'.[186] Therefore, if

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[178]*Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363,376 (Steyn J).
[179]*Singularis* (Ch) (n 158) [192] (Rose J).
[180]The Court of Appeal in *Singularis* agreed with this. See *Singularis* (CA) (n 158) [56], [57] (Sir Geoffrey Vos).
[181]*Singularis* (CA) (n 158) [56]-[60] [66], [67] (Sir Geoffrey Vos); *Singularis* (Ch) (n 158) [184], [192], 219], [250] (Rose J).
[182]*Pitts v Hunt* [1991] 1 QB 24; Harold S. Davis, 'The Plaintiff's Illegal Act as a Defence in Actions of Tort' (1905) 18 *Harvard Law Review* 505-518.
[183][1981] QB 137.
[184]*Ashton v Turner* (n 183) 146 (Ewbank J); Enonchong, *Illegal Transactions* (n 28) 114, 115; see also *Smith v Jenkins* (1970) 44 ALJR 78.
[185]see also *Smith v Jenkins* (n 184).
[186]CP 160 (n 5) para 4.75.

the claimant committed an unlawful act and suffered because of it he cannot recover compensation for it.[187]

This responsibility rationale - that there should be no duty of care owed to the claimant - is problematic.[188] As the Law Commission and McLachlin J in *Hall* argued, the illegality doctrine frustrates the tort claim which would otherwise be made out.[189] The courts acknowledge that the 'defendant had acted negligently in causing the harm [but]… responsibility for…[the] wrong is suspended because concern for the integrity of the justice system trumps the concern that the defendant be responsible'.[190] The duty of care approach therefore, does not adequately capture what is truly meant when invoking the illegality defence.[191] The duty approach is also difficult to apply since it is unclear as to how a court is to determine when the illegal purpose in a joint illegal venture is such that it will displace the ordinary duty of care.[192] In addition, arguing that there is no duty of care because the nature of illegal enterprise is such that it is impossible to determine the standard of care, may encourage the belief that the duty to behave responsibly has diminished.[193] The duty approach also leads to unnecessary procedural issues. For example, a claimant may sue in contract and tort. In the contract claim the claimant's illegal conduct will be raised as a defence, whereas in a tort claim the same illegal conduct will be 'an element of the enquiry into the duty of care'.[194] Put differently, the onus in a contractual claim will be on the defendant to establish the

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[187]ibid.
[188]CP 160 (n 5) para 4.78.
[189]*Hall v Hebert* (n 147) 181 (McLachlin J).
[190]ibid.
[191]*Hall v Hebert* (n 147) 182 (McLachlin J).
[192]Enonchong, *Illegal Transactions* (n 28) 115.
[193]ibid.
[194]*Hall v Hebert* (n 147) 185 (McLachlin J).

relevance of the claimant's illegal conduct, whereas in a tort claim the onus will be on the claimant to 'disprove the relevance of the conduct'.[195] This will result in 'unnecessarily complicat[ing] the task of the trial judge and the parties'.[196] Moreover, if the onus will lie on the claimant (since the question is whether there exists a duty of care) it will cease to be a defence.[197]

Further, it cannot be said in every case involving illegality that the claimant can be said to have accepted responsibility for his injury.[198] Even if they accepted responsibility, responsibility as a rationale is better suited to the defence of *volenti non fit injuria* - that is, the assumption of risk where both parties agree to accept the risk of harm and give up their right to sue for injuries that arise as a result of that activity. [199] The Law Commission thus rejected responsibility as a policy rationale for the illegality defence.[200] It is submitted here, for the reasons noted above, that the Law Commission were right to do so. In such cases as opposed to strictly denying recovery, it is submitted here that the illegality defence should not be used to bar a claim for personal injury. This is because the strict rule of non-recovery can lead to harsh consequences, often resulting in double punishment for the claimant. For he is punished by the criminal law but also denied recovery for injuries suffered in tort. In contract cases discussed earlier in the chapter for example, if the claimant has already paid a fine for contravening a

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[195]ibid.
[196]ibid.
[197]*Hall v Hebert* (n 147) 184 (McLachlin J); Enonchong, *Illegal Transactions* (n 28) 114.
[198]see CP 160 (n 5) para 4.76.
[199]CP 160 (n 5) paras 4.76, 4.80; see also *Hall v Hebert* (n 147) 208 (Cory J); see also *Dube v Labar* [1986] 1 SCR 649, 658 (Estey J).
[200]see also CP 160 (n 5) paras 4.76, 4.78; *Hall v Hebert* (n 147) 181, 182, 185 (McLachlin J).

statutory rule, the courts would not generally deny him the contract payment, despite the illegality, the rationale being to avoid double punishment. The law would be acting inconsistently if the same argument is not allowed in tort. Moreover, the Law Reform (Contributory Negligence) Act 1945 will enable the court to take into account the relative culpability of the parties and enable reduction in damages accordingly.[201] Recognising this, the courts in England shifted towards more flexibility in allowing tort claims for injury despite the taint of illegality. In *Revill v Newbery*[202] (hereafter *Revill*) Evans LJ said:

> It is one thing to deny a plaintiff any fruits from his illegal conduct, but different and more far-reaching to deprive him even of compensation for injury which he suffers and which otherwise he is entitled to recover.[203]

More recently, in *McHugh v Okai-Koi,*[204] though a post-*Patel* case, a claim for damages for injury was awarded to the deceased's husband despite one of the causes of the death being the deceased's own illegal conduct.[205] The damages were reduced however, due to contributory negligence.[206] It is noteworthy that even pre-*Patel* in the Supreme Court in *Hounga* the court allowed a claim for damages in tort for injury suffered by an illegal immigrant under a claim for the statutory tort of discrimination. There Lord Wilson adopted McLachlin J's approach in *Hall* where she had said that the power to deny recovery is limited to circumstances to preserve the integrity of the legal system. She

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[201]See *McHugh v Okai-Koi* [2017] EWHC 1346 (QB); Law Reform (Contributory Negligence) Act 1945, s 1; CP 160 (n 5) paras 4.36-4.47, 5.24-5.34.
[202][1996] QB 567.
[203]*Revill* (n 202) 579.
[204][2017] EWHC 1346 (QB).
[205]*McHugh v Okai-Koi* (n 201) [19], [22]-[24] (David Pittaway QC).
[206]ibid.

said the integrity of the legal system is preserved if there is consistency in the law, and there is consistency if permitting the claim does not lead to the claimant profiting from their illegal conduct, or permit an evasion or rebate of penalty prescribed by the criminal law.[207]

At this juncture it is important to note that maintaining the integrity of the legal system has two interpretations, a broader interpretation which is reflective in McLachlin J's dictum in *Hall* which was adopted by Lord Wilson in *Hounga* and a narrow interpretation which will be considered later in this chapter. In *Hounga* Lord Wilson, in adopting McLachlin J's dictum, held that by awarding damages to the claimant (an illegal immigrant), the claimant was not profiting from her crime as the compensation is for injury suffered.[208] Furthermore, he noted that compensation sought and awarded did not reflect an evasion of a penalty imposed on the claimant since she had not been prosecuted for her entry into the employment contract.[209] Further, that even if a penalty were imposed on her, the award would not reflect an evasion of it as it is compensation for injury. Moreover, allowing compensation did not compromise the integrity of the legal system by appearing to encourage others in a similar position as the claimant to enter into illegal contracts of employment.[210] Conversely, he highlighted that enabling the illegality defence to succeed by denying the award of damages would compromise the integrity of the legal system by appearing to encourage those in a similar position to the employer to enter into such illegal employment contracts. It would 'engender a

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[207]see *Hall v Hebert* (n 147) 169, 179, 180 (McLachlin J);*Hounga* (UKSC) (n 42) [43], [44] (Lord Wilson).
[208]*Hounga* (UKSC) (n 42) [44] (Lord Wilson).
[209]ibid.
[210]ibid.

belief that the…[employers] could even discriminate against such employees with impunity'.[211] It is notable here that the Law Commission argued that non-condonation is a facet of the broader policy of preserving the integrity of the legal system,[212] and no more than an alternate way of expressing the policy of deterrence.[213] This thesis supports the assertion that the non-condonation policy provides no new rationale or insight as to why the illegality defence should apply to bar the claim other than to preserve the integrity of the legal system.[214]

It is also notable that Lord Wilson in *Hounga* considered whether there was any other 'public policy to which application of the defence would run counter'.[215] He found that there was, namely protection against trafficking and forced labour. He said the United Kingdom is to adhere to the Council of Europe Convention on Action against Trafficking in Human Beings CETS No 197 (hereafter the Convention). Article 15(3) of the Convention, provides the right of victims to compensation from the perpetrators. He held that it would be a breach of the UK's international obligations if the claim were defeated by the illegality defence.[216] To uphold the illegality defence would run counter to the strain of public policy against trafficking and forced labour.[217] Lord Wilson's

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[211]ibid; see also *Nizamuddowlah v Bengal Cabaret Inc* (1977) 399 NYS 2d 854.
[212]CP 189 (n 3) para 2.31; CP 160 (n 5) para 4.52; Hang, 'Reforming Illegality in Private Law' (n 66) 235.
[213]*Euro Diam* (n 76) 35 (Kerr LJ); CP 189 (n 3) para 2.30; CP 160 (n 5) para 4.34 4.48, 4.49, 4.52; see also *ParkingEye Ltd v Somerfield* (n 9) [45] (Toulson LJ); see *Thackwell v Barclays Bank Plc* [1986] 1 All ER 676, 689; *Gala v Preston* (1991) 100 ALR 29, 53-54 (Dawson J).
[214]CP 189 (n 3) para 2.30; CP 160 (n 5) para 4.52; Hang, 'Reforming Illegality in Private Law' (n 66) 235.
[215]*Hounga* (UKSC) (n 42) [42] (Lord Wilson).
[216]*Hounga* (UKSC) (n 42) [50] (Lord Wilson).
[217]*Hounga* (UKSC) (n 42) [52] (Lord Wilson); cf Lord Hughes in *Hounga* (UKSC) (n 42) [64], [65], [67] (Lord Hughes) on the trafficking point. Lord Hughes allowed the

policy-based approach has been commended by James Goudkamp.[218] He argued that Lord Wilson was right in considering whether applying the illegality defence to bar the claim would in fact serve any useful purpose through analysis of weighing policies in favour of and against application of the illegality defence. [219]

Whilst Lord Wilson's judgment in *Hounga* reflects the broader interpretation of the policy of maintaining the integrity of the legal system, it also has a narrow interpretation. The historical and narrow interpretation of maintaining the integrity of the legal system[220] is that 'the proper role of the court is not to provide an arena in which wrongdoers may fight over their spoils'.[221] Put differently, the courts will not sully their hands by dealing with such illegal enterprises and should not stoop to the indignity of inquiring into relative merits and demerits of the parties who are involved in serious wrongdoing.[222] The policy is reflected in Heath J's judgment in *Tappenden v Randall*[223] where he said, obiter, there may be cases where the contract is of 'a nature too grossly immoral for the Court to enter into any discussion of it'.[224] Wade however, argues 'any turpitude involved in a suit arising from an illegal contract is no worse than that disclosed in the sordid cases which the criminal courts entertain daily without

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claim on the basis that there was a lack of close connection between the illegality and the claim rather than the additional point of trafficking.

[218]Goudkamp, 'The Doctrine of Illegality: A Private Law Hydra' (n 170) 262, 263.

[219]ibid.

[220]CP 189 (n 3) para 2.5; *Patel* (UKSC) (n 1) [143] (Lord Kerr).

[221]CP 189 (n 3) para 2.24; *Tappenden v Randall* (1801) 2 B&P 467, 471; *Parkinson* (n 87) 13 (Lush J).

[222]*Patel* (UKSC) (n 1) [228], [230], [268] (Lord Sumption); CP 154 (n 5) paras 4.25,6.6.

[223](1801) 2 B&P 467.

[224]*Tappenden* (n 221) 471 (Heath J); see further *Patel* (UKSC) (n 1) [116] (Lord Toulson), [254] (Lord Sumption); CP 189 (n 3) para 2.24.

feelings of wounded dignity'.[225] In *Patel* Lord Sumption rejected the policy of maintaining the integrity of the legal system based on its narrow interpretation. However, in *Servier,* he accepted its broader interpretation, when he said:

> the illegality doctrine sometimes expressed as a principle protecting the innocence or dignity of the court against defilement… Today, the same concept would be expressed in less self-indulgent terms as a principle of consistency.[226]

So, although there are two possible interpretations of the policy of maintaining the integrity of the legal system, a broad and a narrow one, the courts at present appear to be supporting the broader interpretation. It is submitted here, that the broader interpretation of the policy of maintaining the integrity of the legal system as presented by Lord Wilson in *Hounga* should be adopted when referring to this policy.[227] The illegality doctrine operates to 'uphold the integrity of the judicial system because it permits the courts to withhold relief where granting a remedy would ensnare the courts in an inconsistency'.[228] There is inconsistency if allowing the claim results in the claimant profiting from their crime or reflects an evasion a penalty.[229]

In conclusion the key policies at work in tort are furthering purpose of the rule infringed, not allowing one to profit from their crime, non-condonation, maintaining the

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[225]Wade, 'Benefits obtained under illegal transactions' (n 66) 43, 44;see also Shand, 'Unblinkering the Unruly Horse' (n 58) 152.
[226]*Servier* (UKSC) (n 147) [24] (Lord Sumption).
[227]*Hounga* (UKSC) (n 42) [43], [44] (Lord Wilson);see also *Patel* (UKSC) (n 1) [99], [120] (Lord Toulson) [124], [125], [143] (Lord Kerr), [174] (Lord Neuberger).
[228]*Servier* (UKSC) (n 147) [24] (Lord Sumption); Goudkamp, 'The Doctrine of Illegality: A Private Law Hydra' (n 170) 265.
[229]This thesis also argues that there is inconsistency in the law if allowing the claim undermines the purpose of the rule infringed. This is explained in chapter 7.

integrity of the justice system and consistency. This thesis argues that the first three policies of furthering purpose of the rule, no profit and non-condonation promote consistency in the law and if there is consistency in the law then the integrity of the justice system is maintained. This explanation of consistency is taken from McLachlin J's judgment in *Hall* and that of Lord Wilson in *Hounga.*

2.2.3 Unjust enrichment

Where the 'claimant has conferred benefits on the defendant under a contract which later turns out to be unenforceable'[230] because of illegality, the question is whether those benefits can be recovered.[231] The maxim *ex turpi causa non oritur actio*[232] and *in pari delicto*[233] work to prevent the claimant from recovering benefits transferred under an illegal contract.[234] The most common circumstances in which the illegality defence bars a claim for reversal of unjust enrichment is for recovery of money under an illegal loan agreement. An example is *Boissevain v Weil*[235] (hereafter *Boissevain*). There a British subject, resident in enemy territory in 1944, had borrowed foreign currency from

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[230]CP 189 (n 3) para 4.1.
[231]ibid.
[232]A. Burrows, *Restatement of the English Law of Contract* (n 66) 221-222; For further definitions of *ex turpi causa* see Jonathan Mance, 'Ex turpi causa: When Latin Avoids Liability' (2014) 18 *Edin. L.R.* 175, 175; Enonchong, *Illegal Transactions* (n 28) 14; *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, 767 (Diplock LJ); *Revill* (n 202) 576 (Neill LJ).
[233]*Ashmore, Benson, Pease* (n 34) 833 (Lord Denning).
[234]see CP 189 (n 3) para 4.3; Graham Virgo, *The Principles of the Law of Restitution* (2nd Edition, Oxford University Press, 2006). Note the relevance of *in pari delicto* has been somewhat undermined by the majority's approach in *Patel* (UKSC) (n 1).
[235][1950] AC 327.

a Dutch subject, agreeing to repay it in England after the war.[236] It was held that this money was irrecoverable, since Regulation 2 of the Defence Finance Regulations 1939 prohibited this borrowing. The claim for repayment was barred.[237] If the claim were allowed it would have the same effect as enforcing the illegal contract.[238] It would yield the same performance as under the illegal contract.[239] The operating policy which prevents recovery here is the need to maintain consistency in the law (furthering and supporting the law infringed)[240] or, to use Birks' term, because of stultification recovery is barred.[241] Birks argues that the non-contractual claim will not succeed because it would have the effect of stultifying 'the law's refusal to allow action on the contract itself'.[242] If recovery were allowed it would 'reduce the risks of illegal conduct and encourage the plaintiff and others like him to neglect the law's requirements'.[243]

Where there is no real danger of inconsistency a non-contractual claim in unjust enrichment has succeeded pre-*Patel*. *Mohamed v Alaga*[244] (hereafter *Alaga*) is an example. There the claimant and defendant had entered into a contract in which the claimant would get 50% of the legal aid fees received by the defendant solicitor. Under Rule 3 and 7 of the Referral Code, although solicitors were permitted to accept referrals

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[236]*Boissevain* (n 235).
[237]*Boissevain* (n 235) 339, 343 (Lord Radcliffe).
[238]See *Boissevain* (n 235); Birks (n 25) 162.
[239]Birks (n 25) 160, 162, 168, 169, 202; *Boissevain* (n 235); see also *Patel* (UKSC) (n 1) [255] (Lord Sumption).
[240]CP 189 (n 3) para 2.7.
[241]Birks (n 25) 156, 160; see also *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 at [38] (French CJ).
[242]Birks (n 25) 156, 160.
[243]Birks (n 25) 161,162.
[244][2000] 1 WLR 1815.

from external parties, these parties could not be rewarded for the introductions.[245] In addition there was a prohibition under the Rules that the solicitor must not share or agree to share fees with any other person. The contractual claim for a share of the fees was therefore dismissed.[246] However a claim for payment for professional services as a translator and interpreter on the *quantum meruit* basis was allowed. Lord Bingham said the claimant was not suing on the contract and was not seeking to recover any part of the consideration payable under the unlawful contract.[247] Rather it was value for work done, namely a reasonable reward for professional services.[248] Similarly, Robert Walker LJ said the amount the claimant would be receiving on the *quantum meruit* basis, for professional services, would be 'proper disbursement and would not…involve either payment for introductions or the sharing of part of…profit'.[249] He noted that the defendant should not be unjustly enriched by the claimant's unremunerated services of translating and interpreting.[250] In addition the court took into account the relative culpability of the parties. Lord Bingham highlighted that the claimant is not in a situation where his blameworthiness is equal to that of the defendant solicitor.[251] The solicitor, in comparison to the claimant, was bound by the Rules and was reasonably to be assumed to know what the rules were and comply with them.[252] The non-contractual claim therefore succeeded.[253] Here one can distinguish *Alaga* from *Awwad* in which the

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[245]*Alaga* (244) 1823, 1824 (Lord Bingham).
[246]*Alaga* (244) 1824, 1826 (Robert Walker LJ).
[247]*Alaga* (244) 1825 (Lord Bingham).
[248]ibid.
[249]*Alaga* (244) 1827 (Robert Walker LJ).
[250]ibid.
[251]*Alaga* 244) 1825 (Lord Bingham).
[252]*Alaga* (244)1825 (Lord Bingham), 1827 (Robert Walker LJ).
[253]cf. *Awwad* (n 23) 596 (Schiemann LJ), 598, 599 (May LJ) in which the claim was for that which was prohibited i.e. contingency fee and the claimant being a solicitor was

claim was for the very thing prohibited by the statute, namely a contingency fee. Allowing the *quantum meruit* in *Awwad* would lead to inconsistency in the law, as the amount claimed represented that which is expressly prohibited and not other lawful work such as translating in *Alaga*. Moreover, the claimant in *Awwad* was a solicitor who had knowledge that contingency fee agreements were prohibited. He also had not been deceived into entering such a contract therefore the non-contractual claim was rightly defeated.

Birks explains the different ways in which stultification can be avoided.[254] This largely follows the reasoning on avoiding contradiction (inconsistency) in the law, which was discussed in the contract law section. First, where the claimant is in a restricted class entitled to sue. This class includes claimants who entered into a contract because they were deceived, under duress, undue influence, or were in some other way unwilling participants in the illegality.[255] Second, where the non-contractual claim poses no sensible danger of self-stultification, such as where the policy of the rule rendering the contract void is found to favour restitution.[256] An example is *Kiriri Cotton Co Ltd v Dewani*[257] (hereafter *Kiriri*). There the claimant was allowed to recover a premium paid to the landlord which was forbidden by s 3(2) of the Uganda Rent Restriction Ordinance 1949. In allowing restitution the tenant was protected from such demands and the illegal premium payment was not enforced. *Kiriri* can also be said to be an example of the claimant belonging to a class intended to be protected by the statute from exploitation

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aware of the illegality. The claimant therefore was not allowed to recover the contingency fee.

[254]Birks (n 25) 163, 164, 173, 184.

[255]ibid.

[256]Birks (n 25) 176,163,182,183,184; CP 160 (n 5) paras 4.67-4.68.

[257][1960] AC 192.

from the defendant. In such cases, due to the claimant's vulnerability, the claimant is not considered to be an equally guilty party (*not in pari delicto*) and so the illegality defence does not apply.[258] The third way to overcome stultification, which is linked to the second, is where allowing the claim would be avoidance of a greater evil, namely avoiding exploitation of a vulnerable claimant by the defendant.[259] For example, an illegal immigrant who has not been paid for the work done can arguably recover on a *quantum meruit* basis.[260] To rule out the claim for unpaid wages because of illegality may increase the possibility of exploitation bordering on, or condoning, slavery.[261] This is particularly so as the policy underlying immigration law is protected by criminal sanctions.[262] In the context of enforcement of an equitable proprietary interest, the greater evil may be arbitrary expropriation of a transferor's proprietary interest which was meant to be a reversionary transfer only.[263] As Birks argues, whenever one transfers property to hide it from creditors the transferee's interest in it is meant to be temporary.[264] Temporary interests expire by time or by an act, such as if a bailee sells the property or refuses to pay instalments for it.[265] The bailee's conversion ends his right to possession. The claimant can sue in tort for conversion to recover the property. Illustrative of this is *Bowmakers Limited v Barnet Instruments Ltd*[266] (hereafter

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[258]see *Patel* (UKSC) (n 1) [241]-[244] (Lord Sumption); CP 189 (n 3) para 4.18; see also *Browning v Morris* (1778) 2 Cowp 790, 792 (Lord Mansfield).
[259]See *Hounga* (UKSC) (n 42); *Bengal* (n 211).
[260]See *Patel* (UKSC) (n 1) at [74], [119] (Lord Toulson), at [243] (Lord Sumption).
[261]Birks (n 25) 174.
[262]ibid.
[263]Birks (n 25) 176.
[264]ibid.
[265]Birks (n 25)177.
[266][1945] KB 65.

Bowmakers), a case which will be discussed in chapter 3.[267] The reason that the transferor can recover, is because he did not intend to part with the reversion of his interest in the property. Conversion of it by the defendant ends the defendant's interest in it.[268] This enables it to be reverted back to the transferor, who had always intended a temporary transfer only. As Birks puts it:

> Claims which protect the reversion succeed … because the alternative would be to tolerate forfeiture of interests never brought within the illegal transaction between the plaintiff and the defendant.[269]

The law then has to decide whether to expropriate that reversionary interest or refuse to expropriate.[270] *Bowmakers*, discussed in chapter 3 suggests that common law tends to protect the reversionary interests.[271] Moreover, expropriation of the reversion is likely to be the greater evil since it can often result in the claimant losing their entire capital such as in *Tinsley*.[272] In refusing the interest the courts would be imposing a 'wholly disproportionate penalty to the illegality',[273] especially where the property would go to the equally culpable party as a windfall gain.[274] Put succinctly, the greater evil is the 'unwanted and incidental expropriation of a proprietary interest which was never

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[267]Birks (n 25) 177.
[268]ibid.
[269]Birks (n 25) 178.
[270]Birks (n 25) 176.
[271]Birks (n 25)177, 178.
[272]*Tinsley* (HL) (n 88) will be discussed later in the chapter.
[273]Birks (n 25) 155,176.
[274]Richard A. Buckley *Illegality and Public Policy* (Sweet & Maxwell, 4th Edition, 2017) 123.

intended to be transferred and the arbitrary disproportion of the punishment which would otherwise be inflicted'.[275] As Nicholls LJ said in the Court of Appeal in *Tinsley*:

> Both parties are liable for whatever criminal penalties may flow from their fraudulent conduct… civil court ought not, by refusing relief to one party, whether plaintiff or defendant, to impose on that party a one-sided and disproportionate confiscatory sanction. [276]

Birks' argument that protection of a reversionary interest never intended to be part of illegal transaction is an exception to the stultification rule.[277] The seemingly inexplicable contradiction in the law is overcome.

Two other significant methods of recovering benefits pre-*Patel* were the doctrine of *locus poenitentiae* and 'not *in pari delicto*'. The latter was partly discussed in Birks' argument of overcoming stultification. The doctrine of *locus poenitentiae* is as follows: where a claimant had withdrawn from the illegality before the illegal purpose had been wholly or partly carried into effect, the claimant could recover.[278] Under this doctrine, which served as an exception the reliance test, the claimant could rely on his illegality to recover the property or assets transferred. It was not material for what reason the claimant withdrew from the venture so long as the illegal purpose had not been carried

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[275]Birks (n 25)176.
[276]*Tinsley* (CA) (n 130) 326 (Nicholls LJ).
[277]Birks (n 25) 176-179, 189, 201.
[278]*Patel v Mirza* [2015] Ch 271 (CA) at [39], [45] (Rimer LJ); *Tribe* (n 125) 133A, 134E-135B (Millett LJ); *Taylor v Bowers* (1876) 1 QBD 291, 300 (Mellish LJ), 295 (Cockburn CJ).

into effect.[279] Post-*Patel,* however, the significance of the doctrine of *locus poenitentiae* is cast into doubt.[280] This will be addressed in chapter 4.

Under the 'not *in pari delicto'* doctrine, which also acted as an exception to the reliance test, the claimant could rely on the illegal agreement to advance their claim.[281] This was because participation in the illegal act was involuntary because it was brought about by fraud;[282] duress;[283] undue influence; or where the statute favoured the class to which the claimant belonged[284] so that the rule of law was intended to protect the claimant from exploitation by the defendant.[285] Restitution was therefore possible. In this thesis it will be argued that the factors which lead to the operation of the 'not *in pari delicto*' doctrine can be explained as factors which overcome the inconsistency argument.[286]

The total failure of consideration is also an unjust factor that might lead to a successful claim in unjust enrichment for recovery of benefits transferred. However, where the contract is contrary to public policy, it was clear pre-*Patel* that such a claim would not succeed. In *Parkinson v College of Ambulance Ltd*[287] (hereafter *Parkinson*) money was paid to receive a knighthood. The claimant did not receive the title and sued for return of the money. The claim for recovery of the bribe was barred by the illegality defence. Post-*Patel,* whether such a claim would still be barred by the illegality defence is

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[279]*Patel* (CA) (n 278) [113], [117], [118] (Vos LJ); *Tribe* (n 125) 135 (Millett LJ).
[280]*Patel* (UKSC) (n 1) [116] (Lord Toulson), [167]-[169] (Lord Neuberger),[197], [198], [202] (Lord Mance), [253] (Lord Sumption).
[281]see *Shelley v Paddock* [1980] QB 348.
[282]see for example *Burrows v Rhodes* (n 32)
[283]*Davies v London and Provincial Marine Insurance* (1878) 8 Ch D 469.
[284]see *Kiriri* (n 32) 250 (Lord Denning).
[285]see *Patel* (UKSC) (n 1) [243] (Lord Sumption); see also *Browning* (n 258) 792 (Lord Mansfield).
[286]This is akin to Birks' argument of overcoming stultification. See Birks (n 25).
[287][1925] 2 KB 1.

uncertain as will be illustrated in chapter 6. This thesis argues that such a claim should be prohibited based on the creation of inconsistency argument which will be presented in chapter 7.

In conclusion it is submitted here that the key policy at work in unjust enrichment cases appears to be the need to maintain consistency in the law by avoiding stultification of the rule which rendered the contract illegal.[288] If allowing the non-contractual claim has the effect of creating inconsistency with 'the law's refusal to allow action on the contract itself', it will be barred.[289] This was illustrated in *Boissevain.* Where allowing the unjust enrichment claim will not create inconsistency in the law, such as *Alaga,* as it does not enforce the illegal contract or rights under it, such as a right to wages, and the claim is not for that which is expressly prohibited by statute, the claim will likely succeed. Factors taken into account also include the relative culpability of the parties stemming from their knowledge of illegality. Moreover, the doctrine of 'not *in pari delicto*' can enable the claimant to succeed.[290] This is when the claimant's participation in the illegality is involuntary, such as brought upon by fraud, duress or undue influence.[291] Or the claimant is in a member of a class intended to be protected by the statute (infringed) from exploitation by the defendant, and that statute is in favour of restitution such as in *Kiriri*. In such circumstances the claim will succeed.

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[288]CP 189 (n 3) para 2.13.
[289]Birks (n 25) 160.
[290]see *Burrows v Rhodes* (n 32); *Kiriri* (n 32); *Patel* (UKSC) (n 1) [241]-[244] (Lord Sumption).
[291]ibid.

This above argument is similar to that put forth by Birks who argues that stultification can be overcome if the claimant is in a class entitled to sue. He includes the same categories as those included under 'not *in pari delicto*'.[292] He also argues that where the result would be an arbitrary expropriation of a reversionary interest never intended to be part of the transaction, particularly as the common law protects reversionary interests, the stultification argument can be overcome.[293] This thesis will argue in chapter 7 that the factors provided under 'not *in pari delicto*' are just another way of saying that there is no inconsistency in the law, thus the claim should be allowed. Following Birks, the thesis will also argue that the protection of a reversionary interest does not create inconsistency in the law.

2.2.4. Trusts

In this section, the effect of illegality on trusts is discussed. The most usual fact pattern is that a trust arrangement is created for the purpose of fraud. For example, property or assets are transferred in order to conceal one's beneficial interest in them from creditors or to defraud the Inland Revenue.[294] The transferor may bring a claim for beneficial ownership by enforcement of the trust.[295] The effect of illegality on trusts is that the courts will refuse to enforce the beneficial interest under the trust.[296] A trust may be unenforceable if it is created to evade a statutory prohibition or defeats the policy of the

[292]Birks (n 25) 163, 164, 173, 174, 176.
[293]Birks (n 25) 176.
[294]i.e. tax authorities; see also *Tinsley* (HL) (n 88);*Collier v Collier* [2002] EWCA Civ 1095; CP 189 (n 3) para 6.1.
[295]*Tinsley* (HL) (n 88); *Collier* (n 294); *Tribe* (n 125); *Halley v The Law Society* [2003] EWCA Civ 97.
[296]CP 189 (n 3) para 6.1; *Tinsley* (HL) (n 88) 374 (Lord Browne-Wilkinson).

statute infringed.[297] Illustrative of this is *Ex parte Yallop.*[298] There two partners had purchased a ship using their partnership funds but registered it in the name of only one of the partners.[299] A claim was brought for the recognition of an interest in the ship as being joint property. The policy of the infringed Act was held to be that the register 'should provide conclusive evidence of the true ownership of the ships'.[300] In refusing the claim it was held that to allow it would 'destroy the whole effect of [the] Acts of Parliament engaged'.[301] A trust could not be implied for the claimant who though paid for the ship, registered in the name of another.[302] This case however, preceded *Tinsley* and *Patel*, thus it is not clear whether it survives those decisions.[303] In *Tinsley,* though property was put in the name of only one party to defraud the Department of Social Security (hereafter DSS) the claimant could enforce her interest on the grounds that she was not relying on her illegality but on a resulting trust that arose in her favour. On the basis of *Tinsley* and the reliance test thereunder it is arguable that the result might be different in *Ex Parte Yallop.*[304] This is because the claimant would simply be relying on the resulting trust to enforce the interest in the ship and not the illegality. For this and other reasons which will be explored in chapter 3, the reliance test was criticised as it

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[297]*Ex parte Yallop* (1808) 15 Ves. Jr. 60;33 ER 677; *Curtis v Perry* (1802) 6 Ves 739; *Muckleston* (n 66) 69;CP 189 (n 3) para 2.8, 6.27; *Nelson* (n 29) in which the enforcement of resulting trust was not against policy of statute.
[298](1808) 15 Ves. Jr. 60, 66; 33 ER 677.
[299]*Ex parte Yallop* (n 297); CP 189 (n 3) para 6.29.
[300]*Ex parte Yallop* (n 297);see also Peter Creighton 'The Recovery of Property Transferred for Illegal Purpose' (1997) 60 *The Modern Law Review* 102, 107.
[301]*Ex parte Yallop* (n 297) 66.
[302]*Ex parte Yallop* (n 297);see also Creighton 'The Recovery of Property Transferred for Illegal Purpose' (n 300) 107.
[303]CP 189 (n 3) para 6.28.
[304](1808) 15 Ves 60.

gives priority to procedural issues.[305] As the Law Commission argued, the reliance test gives 'no opportunity for the court to consider the underlying policy of the legislation and determine whether this would be undermined by allowing the claim'.[306]

Pre-*Patel*, the operation of the reliance test dominated in trust law concerning illegality. Cases which illustrate the arbitrariness that can result from applying this test due to the operation of the equitable presumptions are *Tinsley* and *Collier v Collier*[307] (hereafter *Collier*). These will be discussed below. First, it is important to know that where property is transferred from husband to wife or parent to child the law presumes that the transferor intends to make a gift.[308] This is called the presumption of advancement.[309] In order to rebut this presumption the transferor has to reveal the real purpose of his transfer. However, he cannot do so without disclosing, pleading or relying on the illegality since the transfer is made for the illegal purpose of defrauding creditors. The transferor therefore cannot recover the property because he needs to rely on the illegality to advance his claim. *Collier* is illustrative of this. There, a father had granted to his daughter leases of certain property to defraud his creditors in order to prevent them from recovering the property and, to defraud the tax authorities to avoid inheritance tax on his estate.[310] The agreement between the father and daughter was that the interests acquired by the daughter under the leases should be held on trust for the

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[305]CP 189 (n 3) para 5.15.
[306]ibid; Guenter Treitel, The *Law of Contract* (*ed. E. Peel*) (12th edition, Sweet & Maxwell, 2007) 549.
[307][2002] EWCA Civ 1095.
[308]*Anson v Anson* [1952 A. No. 92.], [1953] 1 QB 636; see also *Tinker v Tinker* [No. 8149 of 1968], [1970] P. 136 (Salmon LJ).
[309]ibid.
[310]*Collier* (n 294) [46]-[48] (Aldous LJ).

father.[311] Since the relationship between the parties was one of parent and child it gave rise to the presumption of advancement.[312] The effect of this was that the law presumed that the parent intended to make a gift. To rebut that presumption the father had to reveal the purpose for the transfer, which was unlawful. The father could not rely on his own illegality to prove the real intention for the transfer, therefore could not recover the property. It is significant that Mance LJ in *Collier* made it clear that he had no great liking for this result.[313] This was because the daughter was party to the illegal purpose, had understood the motivation of the transaction and was prepared to co-operate.[314] She also enjoyed an uncovenanted benefit as a result of denial of the father's claim.[315] However, as the court was bound by the House of Lords decision of *Tinsley*, which advocated the use of the reliance test, Mance LJ could not take into account factors such as the daughter's knowledge.[316] The result was that the court refused to give effect to the father's beneficial interest.[317]

Where property is transferred for an illegal purpose by a person to whom the transferor is unrelated, and the transferor has also contributed towards the purchase price of the property, the law presumes that the property is held by the legal owner on resulting trust for the contributor.[318] There the beneficiary will not need to rely on the illegality; rather he can rely on the facts that give rise to the presumption of resulting trust. *Tinsley* is an

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[311]*Collier* (n 294) [27], [47] (Aldous LJ), [92], [97], [98], [109] (Mance LJ).
[312]CP 189 (n 3) para 6.7.
[313]*Collier* (n 294) [87]-[90] [113] (Mance LJ).
[314]ibid.
[315]ibid.
[316]*Collier* (n 294) [99], [113] (Mance LJ).
[317]*Collier* (n 294) [113] (Mance LJ).
[318]*Tinsley* (HL) (n 88) 371 (Lord Browne-Wilkinson); see also *Dewar v Dewar* [1975] 1 WLR 1532, [1975] 2 All E.R.728*; Standing v Bowring* (1885) 31 Ch.D. 282, 287 (Cotton LJ); CP 189 (n 3) para 6.8.

illustration of this. There the claimant and defendant purchased a house which was put in the name of the defendant. This was done in the understanding that they were joint beneficial owners of the property. The purpose of the arrangement was to assist fraud on the DSS. Over the years the claimant made false claims on the DSS. Subsequently, the claimant repented and disclosed the fraud to the DSS. An argument between the claimant and defendant led to the claimant moving out of the property, leaving the defendant in occupation. The defendant brought proceedings against the claimant claiming possession and asserting sole ownership of the property. The claimant counterclaimed that the property was held by the defendant on trust for the parties in equal shares. The court held that the claimant established a resulting trust in showing that she contributed to the purchase price of the property. The claimant therefore, did not need to rely on the illegality to prove why the house was conveyed.[319] If the parties in *Tinsley* had been husband and wife, they would have fallen into the same problem as *Collier.* This is because there would have been a presumption of advancement in favour of the wife which could not be rebutted without reliance on the illegality. The reliance test would therefore, produce the opposite result on the same facts. For this reason the reliance test has been criticised as producing arbitrary results based on a procedural rule. Further issues with the reliance test will be dealt with in chapter 3.

Pre-*Patel,* a claimant could also establish their 'equitable interest arising under an illegal transaction'[320] if they had withdrawn from the transaction before the illegal purpose had been wholly or partly carried into effect. There the claimant could rely on

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[319]*Tinsley* (HL) (n 88) 376 (Lord Browne-Wilkinson), 362 (Lord Goff); *Patel* (UKSC) (n 1) [112] (Lord Toulson), [181] (Lord Neuberger); Graham Virgo, '*Patel v Mirza*: one step forward and two steps back' (2016) 22 *Trusts & Trustees* 1090, 1096-1097.
[320]CP 189 (n 3) para 6.18.

the illegal agreement to recover the transferred benefits.[321] This is known as the doctrine of *locus poenitentiae*, mentioned earlier in the chapter. Illustrative of this is *Tribe v Tribe*[322] (hereafter *Tribe*). There the claimant sought a declaration that he was entitled to beneficial interest in shares which he had transferred to his son to defraud creditors.[323] However, no fraud was in fact practiced on the creditors since a resolution was reached without the father having to resort to the dishonesty. The danger having averted, the father asked the son to retransfer the shares but the son refused. Since this transfer was made from father to son, it gave rise to the presumption of advancement. In order to rebut this presumption, the father needed to rely on the illegality which he could not do to bring his claim. The Court of Appeal however, held that the claimant could recover. This was on the basis that a transferor can lead evidence of the illegal purpose so long as he has withdrawn from the transaction before the illegal purpose has been wholly or partly carried into effect.[324] Millett LJ held that the illegal purpose had not been carried out since no creditors were deceived.[325] The father could therefore rely on the illegal purpose of transfer to rebut the presumption of advancement.

The above cases illustrate that courts are likely to enforce the beneficial interest if the claimant does not need to rely on their illegality or if the claimant comes under the *locus poenitentiae* doctrine (withdrawal exception). However, the policy basis for these

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[321]*Patel* (CA) (n 278) [39], [45] (Rimer LJ); *Tribe* (n 125) 133A, 134E-135B (Millett LJ); *Taylor v Bowers* (n 278) 300 (Mellish LJ), 295 (Cockburn CJ).
[322][1996] Ch 107.
[323]*Tribe* (n 125) 117, 122 (Nourse LJ); see also CP 189 (n 3) para 6.19.
[324]*Tribe* (n 125) 124, 132, 133, 134 (Millett LJ).
[325]*Tribe* (n 125) 123 (Millett LJ), 122 (Nourse LJ).

decisions is unclear. From *Ex Parte Yallop,*[326] one could argue that the operative policy is the need to maintain consistency in the law but as noted earlier, the case preceded *Tinsley*. Moreover, the decisions of *Tinsley* and *Tribe* do not appear to be based on the policy of consistency but rather on the reliance test. Such decisions may in fact be used to argue that enforcing a beneficial interest creates inconsistency in the law since:

> no court would ever allow an action for the breach of a contract not to betray the transferor or not to deny the latter's superior right when the latter saw fit to reassert control of the thing [namely, the asset transferred].[327]

Affirming such a trust or allowing return of an asset would give the claimant what contract law refuses to give him.[328] However, this issue can be overcome if one adopts Birks argument. He argues that there is no inconsistency (or stultification), if allowing the action avoids both the arbitrary expropriation of a reversionary interest never intended to be brought within the illegal transaction, and the 'arbitrary disproportion of the punishment which would otherwise be inflicted'.[329] This coincides with the Law Commission's view that it is 'important for the court to bear in mind the value that the beneficiary stands to lose, compared with the seriousness of the conduct involved'.[330]

At this point, it must be acknowledged that there may be cases where the seriousness of illegality is such that it warrants the courts refusing to enforce the beneficial interest.

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[326](1808) 15 Ves 60, 66.
[327]Birks (n 25) 175.
[328]ibid.
[329]Birks (n 25) 176, 178, 179.
[330]LC 320 (n 4) para 2.71.

For example, a group of terrorists who have put a property in which they devise terrorist activities in the name of a third party. It is submitted here that in such cases, the civil law should not turn a blind eye to the illegality and the claimant should be denied his interest in the property on grounds of public policy.[331] However, the question then arises as to what should happen to the property, particularly where the third party is also equally implicated in the crime. Chapter 6 will advance the argument put forth by Robert Sullivan, as a proposal to reform this area of law, in which the High Court will have the power to confiscate the property so that neither party gets to retain it in cases of serious illegality.[332] Chapter 7 of the thesis will provide the principle on which decisions on the enforcement of the trust should be taken as the case law lacks sufficient guidance on this.

2.3 Conclusion

In conclusion, law and policy as it stood pre-*Patel* illustrates that there are a number of policies adopted by the courts in determining whether to apply the illegality defence. The chapter found that punishment and responsibility are not suitable rationales for the application of the illegality defence; they will therefore not be adopted. The key policies identified through the case law in this chapter are: a) furthering the purpose of the rule; b) not allowing one to profit from the his or her wrongdoing; c) consistency; d) maintaining the integrity of the legal system e) not encouraging or condoning illegality

[331]CP 189 (n 3) para 6.75.
[332]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 149) 70, 71, 83.

f) deterrence. From the above case law it is also evident that these policies are often overlapping and can be said to be different ways of saying the same thing.[333] Although the policies provide a rationale for the operation of the illegality defence, reliance on a number of different policies creates uncertainty as there is no single principle governing the outcome of cases.[334] This thesis will argue that these policies can be reduced to one key principle of maintaining consistency in the law. In Chapter 3 the thesis will also identify another key principle in governing the application of the illegality defence namely proportionality. The two key principles will then be matched against those identified by the Supreme Court in *Patel* and those deemed significant in other jurisdictions to provide a comprehensive test in chapter 7.

[333]CP 189 (n 3) para 2.34.
[334]*Patel* (UKSC) (n 1) [123], [127] (Lord Kerr); see further LC 320 (n 4) para 1.6, 3.10.

CHAPTER 3

APPROACHES TO THE ILLEGALITY DEFENCE PRE-*PATEL*

3.1 Introduction

This chapter examines the legal tests for the application of the illegality defence pre-*Patel v Mirza*[1] to assess the degree of change and impact the *Patel* decision has had upon the law of illegality. These tests include the rule-based reliance, inextricable link and causation tests, all of which express as a necessary requirement a connection between the illegality and the claim for the operation of the illegality defence.[2] The reliance test prohibits recovery if the claimant is forced to plead or rely on his illegality

[1][2016] UKSC 42, [2017] AC 467.
[2]Emer Murphy 'The ex turpi causa' (2016) 32 *PN* 241, 246; For reliance test see *Patel* (UKSC) (n 1) at [239] (Lord Sumption); causation test see *Patel v Mirza* [2015] Ch 271 (CA) at [54], [58] (Gloster LJ); *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339 at [54] (Lord Hoffmann); inextricable link test see *Cross v Kirkby* The Times, 5 April 2000 (Official Transcript), [2000] CA Transcript No 321 at [76] (Beldam LJ).

to bring the claim.[3] The inextricable link test prohibits recovery if the claim is closely or inextricably linked with the claimant's own illegal conduct.[4] The causation test[5] prohibits recovery if the damage was caused by the criminal act of the claimant as opposed to the tortious act of the defendant.[6] In addition, there exists the rule-based test of 'let the estate lie where it falls', though it does not require a connection.[7] Under this test, if both parties are dishonest the courts will not act and will instead let the estate lie where it falls.[8] In contrast to the rule-based approach, the courts have also adopted flexible approaches to the illegality defence. These include the public conscience test, which prohibits recovery if it would be an affront to public conscience[9] to allow the claim. There is also the 'just and proportionate response to illegality' test which involves taking into consideration different factors and policies.[10]

The courts shifting from one test to another has resulted in a large body of inconsistent authority. The continuation of such disparity was displayed more recently in the

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[3]*Tinsley v Milligan* [1994] 1 AC 340 (HL) 370D, 376E (Lord Browne-Wilkinson); see further *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65.
[4]*Hounga v Allen* [2014] UKSC 47,[2014] 1 WLR 2889 at [55 F-G],[58]-[59] (Lord Hughes); *Hall v Woolston Hall Leisure Ltd* [2001] 1 WLR 225 at [46] (Peter Gibson LJ), [79] (Mance LJ); *Cross* (n 2) [103] (Judge LJ), [76] (Beldam LJ); *Vakante v Governing Body of Addey and Stanhope School (No2)* [2005] ICR 231 at [36] (Mummery LJ).
[5]*Gray* (HL) (n 2) [54] (Lord Hoffmann); *Hall v Woolston* (n 4) [41], [47] (Peter Gibson LJ); Cf. *Hounga* (UKSC) (n 4) [36D] (Lord Wilson).
[6]*Gray* (HL) (n 2) [54] (Lord Hoffmann).
[7]*Muckleston v Brown* (1801) 6 Ves. Jr. 52, 69 (Lord Eldon).
[8]ibid.
[9]*Euro-Diam Ltd. v Bathurst* [1990] 1 QB 1, 35 (Kerr LJ); see further *Thackwell v Barclays Bank Plc* [1986] 1 All ER 676, 687 (Hutchison J); *Gray v Barr* [1971] 2 QB 554, 581 (Salmon J); cf. *Tinsley* (HL) (n 3) 358E-F, 361G, 363B-G (Lord Goff), 369B (Lord Browne-Wilkinson) in which the public conscience test was expressly rejected.
[10]*Les Laboratoires Servier v Apotex Inc* [2013] Bus. L.R. 80 (CA) at [73] (Etherton LJ); *ParkingEye Ltd v Somerfield Stores Ltd* [2013] QB 840 (CA) at [57], [68], [71], [77] (Toulson LJ) at [18], [35], [39] (Sir Robin Jacob); see also *Hounga* (UKSC) (n 4) [42F], [44],[46E-F],[50]-[52] (Lord Wilson).

Supreme Court decisions of *Les Laboratoires Servier v Apotex Inc*,[11] (hereafter *Servier*) *Bilta (UK) Ltd v Nazir (No2)*[12] (hereafter *Bilta*) and *Hounga v Allen*[13] (hereafter *Hounga*). In the former two cases Lord Sumption favoured a rule-based approach, in particular the *Tinsley v Milligan*[14] (hereafter *Tinsley*) reliance test.[15] He condemned the alternate-flexible approach as being discretionary in nature, arguing that it makes outcomes difficult to predict and hence the law uncertain.[16] In contrast, Lord Toulson in *Servier* and *Bilta* preferred the flexible approach of basing decisions on the underlying policies to the illegality defence[17] as did Lord Wilson in *Hounga.*[18] The sharp division in opinion has stemmed from the long-standing dispute between those judges 'who regard the law of illegality as calling for the application of clear rules, and those who would wish address the equities of each case as it arises'.[19] This lack of uniformity in approach has led to the law of illegality degenerating into incoherence and uncertainty, making it impossible to predict which legal test governs the application of the illegality defence.[20]

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[11][2014] UKSC 55, [2015] AC 430.
[12][2015] UKSC 23, [2016] AC 1.
[13][2014] UKSC 47,[2014] 1 WLR 2889.
[14][1994] 1 AC 340.
[15]see *Servier* (UKSC) (n 11) [13], [18] (Lord Sumption); *Bilta* (n 12) [62] (Lord Sumption).
[16]*Servier* (UKSC) (n 11) [18], [19],[21] (Lord Sumption); *Bilta* (n 12) [63], [98], [99], [101] (Lord Sumption); James Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' 2015) 6 *United Kingdom Supreme Court Yearbook* 254, 268.
[17]*Servier* (UKSC) (n 11) [62], [63] (Lord Toulson); *Bilta* (n 12) [129]-[130] (Lord Toulson and Lord Hodge).
[18]*Hounga* (UKSC) (n 4) [42], [44]-[45], [52H], [52A] (Lord Wilson); see also chapter 2.
[19]*Bilta* (n 12) [13] (Lord Sumption); *Patel* (UKSC) (n 1) [226] (Lord Sumption).
[20]*Sharma v Top Brands Ltd* [2015] EWCA Civ 1140, [2016] PNLR 12 at [37] (Etherton C); Goudkamp, 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 275; James. C. Fisher, 'The ex turpi causa principle in Hounga and Servier' (2015) 78 *MLR* 854, 860.

This chapter argues that whilst rules encourage certainty, predictability and consistency in the law,[21] the current rules devised by the judiciary and predominantly relied upon, namely the reliance, inextricable link and causation tests are arbitrary, complex and uncertain in application. It often happens that application of the same test has led to opposing results in different cases. Their application, including let the estate lie where it falls, has the potential of producing unduly harsh results as they fail to give proper consideration to factors and policies involved, at times even failing to address the illegality.[22] In contrast, the flexible approach which strives to reach a just response based on an assessment of factors and policies engaged appears to be more preferable than rigid immutable rules in this multifaceted area of law concerning varying circumstances.[23] As Lord Toulson writing extra-judicially put it, 'a slight alteration of…facts can lead the defence to seem callous where formerly it was condign'.[24] The flexible approach provides a transparent justification for the application of the illegality defence, though an entirely flexible approach is not without issue, as will be seen in chapters 4 and 6.[25]

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[21]Andrew Burrows 'A New Dawn for the Law of Illegality' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 23.
[22]The Law Commission, *The Illegality Defence: A Consultative Report* (Law Com CP No 189, 2009) para 1.3.
[23]*Patel* (UKSC) (n 1) [161] (Lord Neuberger); Roger Toulson 'Illegality where are we now?' in Andrew Dyson, James Goudkamp, Frederick Wilmot-Smith, and Andrew Summers (ed) *Defences in Contract* (Bloomsbury Publishing PLC, 2017) 276, 277.
[24]Toulson 'Illegality where are we now?'(n 23) 276.
[25]*Gray* (HL) (n 2) [30F-H] (Lord Hoffmann).

3.2. The Beginnings of Conflict

The maxim *ex turpi causa non oritur actio* is a policy that 'no action arises from a disgraceful cause'.[26] The exposition of this policy by Lord Mansfield in *Holman v Johnson*[27] as 'no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act',[28] has been the subject of much judicial dispute. Some members of the judiciary such as Lord Sumption in *Servier* have interpreted 'founds his cause of action' to mean that the reliance test, as propounded in *Bowmakers Ltd v Barnet Instruments Ltd*[29] and the House of Lords in *Tinsley*, must be applied.[30] That is to say, if the claimant needs to 'to rely on (to assert, whether by way of pleading or evidence) facts which disclosed the illegality'[31] the claim will be barred. Beldam LJ in *Cross v Kirkby*[32] (hereafter *Cross*) however argued otherwise, emphasising:

> I do not believe that there is any general principle that the claimant must either plead, give evidence of or rely on his own illegality for the principle [e*x turpi*

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[26]Andrew Burrows *Restatement of the English Law of Contract* (Oxford University Press, 2016) 221-222; For further definitions of ex turpi causa see Jonathan Mance, 'Ex turpi causa: When Latin Avoids Liability (2014) 18 *Edin. L.R.* 175, 175; Nelson Enonchong, *Illegal Transactions* (Lloyd's of London Press, Lloyd's Commercial Law Library,1998) 14; *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, 767 (Diplock LJ); *Revill v Newbery* [1996] QB 567 (CA), 576 (Neill LJ) 'ex turpi causa non oritur actio can be roughly translated as meaning that no cause of action may be founded upon an immoral or illegal act'.

[27](1775) 1 Cowp 341.

[28]*Holman* (n 27) 343 (Lord Mansfield); see further *Patel* (UKSC) (n 1) [126] (Lord Kerr); see also *Gray* (HL) (n 2) [30F-H] (Lord Hoffmann); *Bilta* (n 12) [129] (Lord Toulson and Lord Hodge); *Tinsley* (HL) (n 3) 355B-C (Lord Goff).

[29][1945] KB 65.

[30]*Servier* (UKSC) (n 11) [18] (Lord Sumption); *Bowmakers* (n 3) 71 (Du Parcq L.J); *Tinsley* (HL) (n 3) 370, 375-376 (Lord Browne-Wilkinson).

[31]see *Bowmakers* (n 3) 71 (Du Parcq LJ);*Tinsley* (HL) (n 3) 370, 375-376 (Lord Browne-Wilkinson).

[32]The Times, 5 April 2000 (Official Transcript), [2000] CA Transcript No 321.

> *causa*] to apply. Such a technical approach is entirely absent from Lord Mansfield's exposition of the principle. I would, however, accept that for the principle to operate the claim made by the claimant must arise out of criminal or illegal conduct on his part. In this context arise out of clearly denotes a causal connection with the conduct.[33]

Beldam LJ said that a claim will be barred where the 'claimant's claim is so closely connected or inextricably bound up with his own criminal or illegal conduct that the court could not permit him to recover without appearing to condone that conduct'.[34] In other words, 'founded on' is akin to 'arising out of' which is interpreted by Beldam LJ as 'caused' by. Thus where it is said that the loss for which the claimant seeks damages is caused by the claimant's criminal conduct, it can be concluded that there is a close connection between the illegality and the claim, so as to bar the claim.[35] Beldam LJ is implying that causation, and in turn the inextricable link test, is implicit in Lord Mansfield's exposition of *ex turpi causa* as a defence.

In contrast to the above, in the House of Lords, Lord Hoffmann in *Gray v Thames Trains Ltd*[36], and Lord Phillips in *Stone & Rolls Ltd v Moore Stephens*[37], argued that *ex turpi causa* is a policy that the courts will not assist a claimant who founds his cause of action on an illegal act[38] and that policy itself is based on a group of reasons as to why

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[33]*Cross* (n 2) [76] (Beldam LJ).
[34]ibid.
[35]ibid.
[36][2009] UKHL 33; [2009] 1 AC 1339.
[37][2009] UKHL 39; [2009] 1 AC 1391.
[38]*Holman* (n 27); see further *Patel* (UKSC) (n 1) [126] (Lord Kerr); *Bilta* (n 12) [129] (Lord Toulson and Lord Hodge); see also *Gray* (HL) (n 2) [30F-H] (Lord Hoffmann); *Tinsley* (HL) (n 3) 355B-C (Lord Goff).

the courts will not assist a claimant.[39] Lord Phillips noted one such policy as the courts will not allow the claimant to recover a benefit (or profit) from his crime.[40] In *Servier*, Etherton LJ observed that Lord Mansfield's statement:

> does not explain the rationale for the [*ex turpi cuasa*] principle…in order to make sense of the cases, and to provide a legal framework for the decision…it is necessary to identify the policy considerations that underlie the principle.[41]

He noted the following policies in his judgment: not allowing a claimant to profit from his crime; furthering the purpose of the rule infringed; maintaining consistency in the law; and preserving the integrity of the legal system.[42] He concluded that if the illegality defence is to be applied at all it must find its justification in these policies.[43]

From the above one can discern the serious disagreement and lack of clarity surrounding the meaning of Lord Mansfield's exposition of the *ex turpi causa* principle. In interpreting this dictum of 'founded on', the courts have ended up developing a range of different tests, leading to significant uncertainty as to the proper legal test for the illegality defence.[44] The sections below will examine the various tests devised by the courts for the application of the illegality defence. The frequent shifting from one test to another creates uncertainty as to which legal test governs the application of the illegality

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[38]*Gray* (HL) (n 2) [30] (Lord Hoffmann);*Stone & Rolls* (n 37) [25], [26] (Lord Phillips).
[39]ibid.
[40]*Stone & Rolls* (n 37) [26] (Lord Phillips).
[41]*Servier* (CA) (n 10) [65] (Etherton LJ).
[42]*Servier* (CA) (n 10) [66], [73], [74] (Etherton LJ); *ParkingEye Ltd v Somerfield* (n 10) [39] (Sir Robin Jacob); see also *Stone & Rolls* (n 37) [25], [26] (Lord Phillips).
[43]*Servier* (CA) (n 10) [66], [73], [74] (Etherton LJ); *ParkingEye Ltd v Somerfield* (n 10) [39] (Sir Robin Jacob).
[44]*Bilta* (n 12) [13]-[15] (Lord Neuberger), at [61] (Lord Sumption); *Servier* (UKSC) (n 11) [14] (Lord Sumption).

defence.[45] The section below also reveals that whilst rules tend to encourage certainty and predictability the current rules adopted by the judiciary are complex, arbitrary and uncertain in application. In contrast to the rule-based tests the flexible tests adopted by the judiciary provide a transparent justification for the application of the illegality defence.

3.3 Rule Based Tests

The reliance, inextricable link and causation tests adopted by the courts pre-*Patel* can broadly be categorised as rule-based tests.[46] This is because they require a necessary connection between the illegality and the claim for the operation of the illegality defence.[47] However, whether the link between the illegality and the claim is both necessary and sufficient for the illegality defence to apply is questionable particularly in relation to the inextricable link and causation test. This will be seen later in the chapter. This is a fundamental point since it reveals that these tests were not foundationally secure enough to form the basis of a rule. The reliance test, which though provides a stern rule, is also plagued with issues. The section below will examine all three of these tests, drawing out both the grounds for their support and their failure to provide rules which are clear and certain in application.

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[45]*Sharma* (n 20) [37] (Etherton C); Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 275; Fisher, 'The ex turpi causa principle in Hounga and Servier' (n 20) 860.
[46]For causation test *Gray* (HL) (n 2) [54] (Lord Hoffmann); for the inextricable link test see *Cross* (n 2) [76] (Beldam LJ); in relation to the reliance test see *Tinsley* (HL) (n 3) 370, 375, 376 (Lord Browne-Wilkinson); *Patel* (UKSC) (n 1) [239] (Lord Sumption).
[47]Murphy 'The ex turpi causa' (n 2) 246.

3.3.1 Reliance Test

The reliance test provides that a claimant cannot succeed if he is forced to plead or rely on his illegality in making his claim.[48] The origins of the reliance test can be traced to *Bowmakers.* There the claim was for the enforcement of legal property rights. This related to machine tools which were hired out to the defendant under a hire purchase agreement. After making some of the required payments, the defendant sold the machine tools for their own advantage. The claimant sued to recover damages for the conversion of their machine tools. The defendant raised the illegality defence arguing that the agreement under which the tools were hired out was illegal, being in contravention of a statutory order. The claimant argued that the machine tools were their property and they were not relying on the illegal agreements to enforce their property right. Du Parcq LJ held:

> In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to

[48] *Tinsley* (HL) (n 3) 370C-D, 375-376 (Lord Browne-Wilkinson), 366 C-G (Lord Jauncey); *Servier* (UKSC) (n 11) [18] (Lord Sumption);see also *Hewison v Meridian Shipping Services PTE Ltd* [2003] ICR 766 at [62] (Ward LJ); Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 258.

found his claim on the illegal contract or to plead its illegality in order to support his claim.[49]

Here, the claimant was simply saying that the property was theirs. Since the claim was based on the tort of conversion, they were not relying on the illegal agreement to enforce their property rights.[50] Du Parcq LJ emphasised that 'prima facie a man is entitled to his own property'[51] and it is not a rule that 'when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action'.[52]

Support for the reliance test was advanced most significantly by the majority in the House of Lords in *Tinsley*. In *Tinsley,* the facts of which were given in chapter 2, the court enforced the claimant's equitable title to property on the ground that she did not need to rely on the illegality (that the house was put in the sole name of the defendant to defraud the DSS) to establish her claim. This was because she could rely on the presumption of resulting trust, which arose in her favour as she had contributed to the purchase price of the property in equal shares.[53]

The reliance test was later supported by Lord Sumption in the Supreme Court in *Servier*, *Bilta* and *Patel* on several grounds. First, he argued that the test is well established in law and should be adopted on grounds of precedent since *Tinsley* is

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[49]*Bowmakers* (n 3) 71 (Du Parcq LJ).
[50]*Bowmakers* (n 3) 69, 70, 71 (Du Parcq LJ).
[51]*Bowmakers* (n 3) 70 (Du Parcq LJ).
[52]ibid.
[53]*Tinsley* (HL) (n 3) 376E (Lord Browne-Wilkinson).

binding authority.[54] He further argued that the test is not limited in application to title claims, but has been relied upon by the courts across private law claims in contract and tort.[55] He cited a part of Devlin J's judgment in *St John Shipping Corp v Joseph Rank Ltd*[56] (hereafter *St John*) and the case *Hewison v Meridian Shipping Services PTE Ltd*[57] (hereafter *Hewison*) in support.[58] Secondly, he argued that in his opinion, the reliance test is implicit in Lord Mansfield's dictum in *Holman*.[59] Thirdly, that the reliance test 'gives effect to the basic principle that a person may not derive a legal right from his own illegal act'.[60] Fourthly, it is the narrowest of the connection tests 'distinguishing between those acts which are background or collateral only to those from which the legal right asserted can be said to result'.[61] Fifthly, that the reliance test is not discretionary but a rule which is predictable and certain in application and outcome.[62]

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[54]*Bilta* (n 12) [62] (Lord Sumption); *Servier* (UKSC) (n 11) [18], [19],[21] (Lord Sumption).
[55] The test has also been applied to the tort of negligence in *Hewison* (n 48) [29] (Clarke LJ); it has been mentioned in contract law in *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374,388 (Devlin LJ). In contract law the reliance test prevents a plaintiff from recovering under a contract if to prove his rights under it, the plaintiff has to rely on his illegal act; *Patel* (UKSC) (n 1) [234] (Lord Sumption); Title claims *Bowmakers* (n 3);*Tinsley* (HL) (n 3) 370, 376 (Lord Browne-Wilkinson), 366 (Lord Jauncey); see further *Aliaksandr Hniazdzilau v Zsolt Adam Vajgel* [2016] EWHC 15 (Ch) at [221] (Mr Jeremy Cousins QC).
[56][1957] 1 QB 267.
[57][2003] ICR 766.
[58]*Patel* (UKSC) (n 1) [234] (Lord Sumption).
[59]ibid.
[60]*Patel* (UKSC) (n 1) [239] (Lord Sumption).
[61]*Bilta* (n 12) [102] (Lord Sumption); *Patel* (UKSC) (n 1) [239] (Lord Sumption).
[62]*Bilta* (n 12) [62] (Lord Sumption); *Servier* (UKSC) (n 11) [18] (Lord Sumption).

3.3.1.2 Reliance Test Criticisms:

Although the reliance test has some judicial support, it has also been heavily criticised by other members of the judiciary, the Law Commission, and academics.[63] These will be discussed below.

Precedence and adoption across private law?

In relation to the twin points of precedent and adoption of the reliance test across private law, it is evident from the case law analysed in chapter 2, that there is equally support for the adoption of the flexible approach. In particular, there is support for the use of a flexible test in the Supreme Court in *Hounga* by Lord Wilson, and in *Bilta* by Lords Toulson and Hodge. We have already seen (in chapter 2) that in contract law cases, the courts have based decisions on examining the purpose of the rule infringed, deciphering Parliament's intention and taking into consideration the adverse consequences of refusing relief including factors such as the seriousness of illegality. In *St John*, Devlin J took a policy-based approach where he examined whether the statute intended to prohibit the contract, holding that it did not. He also considered proportionality, by paying regard to the consequences which would follow from denying the claim.[64] In

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[63]The Law Commission, *The Illegality Defence* (Law Com No 320, 2010) para 2.13; Enonchong, *Illegal Transactions* (n 26) 187;Nelson Enonchong 'Illegality: The Fading Flame of Public Policy' (1994) 14 *OJLS* 295,298-300; see further Nelson Enonchong, 'Effects of illegality: a comparative study in French and English law' (1995) 44 (1) *ICLQ* 196,209,210; Andrew Burrows, *The Law of Restitution* (1st Edition, Oxford: OUP, 1993) 471 condemns test as unhelpful; G.H.Treitel, *Law of Contract* (12th edition, Sweet & Maxwell, 2007) 549; Richard. A. Buckley 'Illegality in the Supreme Court' (2015) 131 *LQR* 341, 343; Hugh Stowe, 'The 'Unruly Horse' Has Bolted: Tinsley v Milligan' (1994) 57 *MLR.* 441, 446; *Stone & Rolls* (n 37) [25] (Lord Phillips); *Cross* (n 2) [76] (Beldam LJ); see further *Patel* (CA) (n 2) at [78] (Gloster LJ).
[64]*St John* (n 56) 289 (Devlin J).

particular he emphasised that denying the claim would result in a penalty in 'excess of any penalty that a criminal court would impose'.[65] He also noted that the penalty imposed by the statute for its infringement was itself designed to deprive the claimant of the benefits of his crime, therefore allowing the claim for freight would not undermine the policy of profiting from the crime.[66] This approach which takes into account different factors and policies including the consequences of denying the claim can only be described as a flexible one.

In the years following, a similar approach was taken in other contractual cases concerning illegality, such as *Archbolds (Freightage) Ltd v S Spanglett Ltd*[67](hereafter *Archbolds*) and *Shaw v Groom*[68] (hereafter *Shaw*). In the former, the courts interpreted the purpose of the statue and it was again Devlin LJ who emphasised, that the purpose of the statute is served by penalties prescribed thereunder and, the adverse consequences which would result from denying the claim.[69] In the latter, it was held that Parliament did not intend to impose on the claimant a penalty that would result in forfeiture of his right to rent. Rather the fine prescribed by the statute itself was sufficient penalty for its breach.[70] In *ParkingEye Ltd v Somerfield Stores Ltd*,[71] (hereafter *ParkingEye*) a case concerning common law illegality in which the illegality resided in performance, the Court of Appeal took into account a number of different factors such as seriousness of

[65]*St John* (n 56) 281, 288, 289, 291 (Devlin J).
[66]*St John* (n 56) 292 (Devlin J).
[67][1961] 1 QB 374.
[68][1970] 2 QB 504.
[69]*Archbolds* (n 55) 390 (Devlin LJ).
[70]*Shaw* (n 68) 526 (Sachs LJ).
[71][2012] EWCA Civ 1338, [2013] QB 840 (CA).

illegality, intention of the claimant, and centrality of illegality to the contract to decide that the claim should not be barred.[72]

In tort, the courts equally took a policy-based approach, most significantly in the Supreme Court in *Hounga.*[73] There Lord Wilson took into consideration policies such as not allowing the claimants to profit from his crime and non-condonation. If these are adhered to then the integrity of the justice system is preserved. He also took into account other relevant policies to which application of the illegality defence would run counter. In *Hounga*, that policy was prevention from trafficking.[74] The consideration of these policies was clearly part of the *ratio decidendi* in *Hounga.*

Similarly, in the Supreme Court in *Bilta*, Lords Hodge and Toulson took a policy-based approach when they asked whether attribution was required to promote the purpose of the rule infringed.[75] In *Hewison,* there is notable support in Ward LJ's dissenting speech for a flexible approach. He considered policies underlying the illegality defence and proportionality.[76] In addition, if one traces the history of the tests adopted in the context of tort, illustrated later in this chapter, it is evident that courts have adopted a number of different tests. This is particularly evident in *Cross* where Beldam LJ adopted the inextricable link test, and Lord Hoffmann in *Gray* adopted both the causation test and

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[72]*ParkingEye Ltd v Somerfield* (n 10) [57], [68],[71], [75], [77], [79] (Toulson LJ).
[73]*Hounga* (UKSC) (n 4) [44], [50] (Lord Wilson) at [55] (Lord Hughes).
[74]*Hounga* (UKSC) (n 4) [44], [50], [52] (Lord Wilson).
[75]see Chapter 2 where Bilta is discussed in detail; see *Bilta* (n 12) [130], [195], [208] (Lord Toulson and Lord Hodge); see also *McNicholas Construction Co. Ltd. v HM Commissioners of Customs and Excise* [2000] STC 553 at [44] (Dyson J); cf. *Bilta* (n 12) [62], [98]-[102] (Lord Sumption). Lord Sumption was critical of the use of policy based approach.
[76]*Hewison* (n 48) [83]-[89] (Ward LJ).

the policy of consistency in the law to reach his decision.[77] This reveals that the reliance test has not dominated across private law in determining the application of the illegality defence. As Lord Phillips said in *Stone & Rolls*:

> The House in *Tinsley v Milligan* did not lay down a universal test of ex turpi causa. It was dealing with the effect of illegality on title to property…. I do not believe… that it is right to proceed on the basis that the reliance test can automatically be applied as a rule of thumb. It is necessary to give consideration to the policy underlying ex turpi causa in order to decide whether this defence is bound to defeat [the claim].[78]

Implicit in Lord Mansfield's dictum?

The above argument also links to the rebuttal of the second point raised by Lord Sumption, that the reliance test is implicit in Lord Mansfield's dictum in *Holman*. As noted earlier in the chapter, there was considerable disagreement as to which test is implicit in Lord Mansfield's dictum. Whilst Beldam LJ thought that the causation and close connection test are implicit in the dictum, Lord Hoffmann in *Gray* and Lord Phillips in *Stone & Rolls,* raised the point that Lord Mansfield's exposition of the *ex turpi causa* policy is based on a group of policy reasons.[79] As there is no consensus on the interpretation of the Lord Mansfield's dictum, Lord Sumption's argument is not convincing. As Goudkamp argues, 'Lord Mansfield's explanation of the ex turpi policy and efforts to elaborate on what is meant by founded on have yielded a confusing mass

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[77]The policy aspect of *Gray* (HL) (n 2) was discussed in Chapter 2. The causation test will be discussed later in this chapter.
[78]*Stone & Rolls* (n 37) [21], [25] (Lord Phillips).
[79]*Gray* (HL) (n 2) [30] (Lord Hoffmann); *Stone & Rolls* (n 37) [26] (Lord Phillips).

of cases, each pulling in a different direction'.[80] As a result, it is difficult to say with certainty what the position in relation to that dictum is. As Lord Sumption himself noted in *Servier*, the 'question what is involved in founding on an immoral or illegal act has given rise to a large body of inconsistent authority which rarely rises to the level of general principle'.[81]

Uncertainty: illegality central or background?

Lord Sumption had also argued that the reliance test is principled, namely, it gives effect to principle that a right cannot be derived from a person's own illegal act.[82] This is linked to his fourth point that the reliance test is the narrowest connection test- enabling the courts to distinguish between acts which are background, to those 'from which the…right asserted can be said to result'.[83] However, this distinction is problematic as it is not always clear whether the claimant needs to rely on the illegality to advance their claim and assert their right or not.[84] There is evidential disparity in the courts finding whether the illegality is central or background in very similar cases. This is evident when comparing *MacDonald v Myerson*[85] (hereafter *MacDonald*) with *Halley v The Law Society*[86] (hereafter *Halley*).[87]

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[80]Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 274.
[81]*Servier* (UKSC) (n 11) [14] (Lord Sumption); *Bilta* (n 12) [61] (Lord Sumption).
[82]*Patel* (UKSC) (n 1) [239] (Lord Sumption).
[83]*Patel* (UKSC) (n 1) [239] (Lord Sumption); *Bilta* (n 12) [102] (Lord Sumption).
[84]A. Burrows, *The Law of Restitution* (n 63) 471 condemns test as unhelpful; LC 320 (n 63) paras 2.13-2.15; Buckley 'Illegality in the Supreme Court'(n 63) 343; see also *Patel* (UKSC) (n 1) [134]-[137] (Lord Kerr).
[85][2001] EWCA Civ 66 (CA) at [40] (Charles J).
[86][2003] EWCA Civ 97(CA) at [97], [101], [104] (Mummery LJ).
[87]see further Paul S. Davies, 'The illegality defence-two steps forward, one step back?' (2009) 3 *Conv* 182, 185; see also Ernest Lim, 'Tensions in private law judicial decision-

In *MacDonald,* the claimant had committed mortgage fraud in applying for mortgages using false names. He then instructed the defendant solicitors to act for him on the sales of two properties using false powers of attorney from non-existent title holders, which he forged.[88] The defendant carried out the conveyance. The proceeds of sale were held in their client account. The claimant argued that those proceeds of sale were held on trust for him.[89] The solicitors raised the illegality defence arguing that it was essential for the claimant to found his action on his unlawful acts to claim the proceeds of sale.[90] Were it not for the false powers of attorney the solicitors could not have acted in the sale of the properties, with the result that there could be no proceeds of sale for the claimant. Despite the mortgage fraud, it was held that the claimant was entitled to the proceeds of sale. To assert his claim 'all the claimant had to establish was that he was the client and moneys representing the net proceeds of sale paid as a result of the performance of his instructions were held to the credit of the [defendant's] client account'.[91] Charles J said that once the sale of the houses was complete, the claimant could rely on his proprietary interest in the proceeds of sale and did not have to rely on any of the conveyancing transactions.[92] The conveyancing transaction was background to his proprietary rights as against the solicitors for the proceeds of sale.[93]

In contrast in *Halley* the court held that the fraudulent scheme used to obtain money was not background to the claimant's proprietary claim. The claimant needed to rely on the

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making: a case study on the illegality defence' (2016) 4 *JBL* 325, 332; *Hounga* (UKSC) (n 4) [30] (Lord Wilson).

[88]*MacDonald* (n 85) [20] (Charles J); CP 189 (n 22) para 6.80.

[89]*MacDonald* (n 85) [20] (Charles J).

[90]ibid.

[91]*MacDonald* (n 85) [43] (Charles J).

[92]*MacDonald* (n 85) [39] (Charles J); CP 189 (n 22) para 6.81.

[93]*MacDonald* (n 85) [39], [40], [42] (Charles J).

fraudulent scheme to make his claim for money held in a client account.[94] There the claimant derived money from fraud, in that the bank instruments for which money was obtained were in fact worthless.[95] Mummery LJ said: 'to establish the beneficial interest, the claimant has to rely on the contract under which the fee was to be paid'.[96] The contract was held to be no more than a dishonest means to obtain money.[97] This however, could also be said to be true of *MacDonald*, since if the forged power of attorneys had not been used, the property for which the claimant claimed the proceeds would not have been made. However, the fraud in *MacDonald* was determined to be background only, whereas in *Halley* the fraud was held to be central and the claimant did need to rely on it to establish his interest.

In response to these authorities, the Law Commission raised the concern that it is not entirely clear why the background to the claim was relevant in *Halley* whereas it was irrelevant in *MacDonald.*[98] The Law Commission further commented that it is not always clear 'to what extent… the court [may] take any notice of any underlying illegal arrangement from which the beneficiary's interest arises?',[99] nor 'whether a claimant can lead evidence of an underlying illegal contract in order to establish his or her equitable interest?'[100] For this reason, Goudkamp and Mimi Zou have criticised the reliance test for leaving outcomes 'hostage to luck'[101] as it is far from clear what it is

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[94]CP 189 (n 22) para 6.47.
[95]*Halley* (n 86) [2], [3] (Lord Carnwath).
[96]*Halley* (n 86) [97] (Mummery LJ).
[97]*Halley* (n 86) [2], [3], [9], [43] (Lord Carnwath).
[98]See also CP 189 (n 22) para 6.82.
[99]CP 189 (n 22) para 6.77.
[100] see further CP 189 (n 22) para 6.82.
[101]James Goudkamp and Mimi Zou 'The defence of illegality in tort law: beyond judicial redemption?'(2015) 74 *CLJ* 13, 15; *Patel* (UKSC) (n 1) [142] (Lord Kerr).

that needs to be relied upon.[102] Notwithstanding the issues with the reliance test, it appears from the facts of *Halley* that the claim was not allowed since the contract was not a valid contract at all, the whole transaction being so 'infected by fraud that it had no legal effect at all'.[103] The result could further be justified on grounds that the amount claimed reflected the consideration payable under the illegal contract.[104] However, the uncertainty caused by adopting the reliance test cannot be undermined. The lack of clarity as to the finding of reliance is also well illustrated through the Court of Appeal decision in *Patel,* which will be discussed in chapter 4.[105]

Procedural rule:

Moreover, one simply cannot ignore that the reliance test focuses on procedural matters such as 'rules of pleading…and the various equitable presumptions'[106]operating in complete disregard to the illegality involved.[107] For if the claimant does not need to rely on or plead the illegality the claim succeeds. This allows the claimant to 'cover up [their] own illegality even though it has been brought to the attention of the court'.[108] As

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[102]see also Paul S. Davies, 'The illegality defence-two steps forward, one step back?' (n 87) 185; Paul S. Davies, 'The Illegality Defence and Public Policy' (2009) 125 *LQR* 556, 558; see further criticism on the reliance test LC 320 (n 63) para 2.14; Lim, 'Tensions in private law judicial decision-making'(n 87) 332; see also Mitchell McInnes, 'Advancement, Illegality and Restitution' (1997) 5 *Australian Property Law Journal* 1, 10.

[103]*Halley* (n 86) [3], [9], [42]-[56] (Carnwath LJ); CP 189 (n 22) para 6.82

[104]see CP 189 (n 22) para 6.47.

[105]*Patel* (CA) (n 2) [20]-[22] (Rimer LJ), [102] (Vos LJ), [83] [88], [89], [92] (Gloster LJ).

[106]*Patel* (UKSC) (n 1) [237] (Lord Sumption).

[107]See *Patel* (UKSC) (n 1) [24], [87] (Lord Toulson), [237] (Lord Sumption); *Nelson v Nelson* [1995] 4 LRC 453, 509 (Toohey J)

[108]Enonchong 'Illegality: The Fading Flame of Public Policy' (n 63) 298;see also Mitchell McInnes 'Illegality and Canadian Private Law: Hall v Hebert's Legacy' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st

Andrew Burrows argues, under the reliance test whether the formation, purpose or the performance of the contract involves illegality 'all of this can be ignored because it is not necessary to rely on the terms of the agreement'.[109] From this one can discern that for the reliance test to operate the connection between the illegality and the claim is both necessary and sufficient for the illegality defence to apply, but this can lead to unmeritorious claims succeeding. In *Tinsley*, Lord Goff provides a good illustration of this.[110] He argues that the reliance test enables a terrorist to recover equitable title to a property, which they have deliberately bought in the name of a third party, and used to plan their criminal activities.[111] This is because under the reliance test the terrorist can rely on the presumption of resulting trust to recover their interest.[112] The claim would succeed despite the serious nature of illegality and moral culpability of the claimant's involved. Under the reliance test, the court effectively ignores the illegal intentions of the parties as they did in *Tinsley*.[113] For this reason the reliance test has been criticised as being unduly technical, giving priority to a procedural rule of pleading, in neglect of relevant considerations such as the nature of illegality, the intention and culpability of the parties. The result is that the issue of illegality is left unaddressed simply because

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Edition, 2018) 310; see further Enonchong, 'Effects of illegality: a comparative study in French and English law' (n 63) 209; *Patel* (UKSC) (n 1) [139] (Lord Kerr).

[109]A. Burrows *Restatement of the English Law of Contract* (n 26) 224; see also *Patel* (UKSC) (n 1) [139] (Lord Kerr); see also *Tinsley* (HL) (n 3) 368 H (Lord Lowry), 369 D, 370 C-D (Lord Browne Wilkinson).

[110]*Tinsley* (HL) (n 3) 362 (Lord Goff).

[111]ibid.

[112]ibid; see also Goo 'Let the Estate Lie where it Falls' (1994) 45 *Northern Ireland Legal Quarterly* 378, 388; see also Enonchong 'Illegality: The Fading Flame of Public Policy' (n 63) 298-299.

[113]Enonchong 'Illegality: The Fading Flame of Public Policy' (n 63) 299; see also *Patel* (UKSC) (n 1) [189] (Lord Mance).

one does not need to rely on it.[114] Illegality however, involves a variety of factual circumstances and often the need for one to rely on the illegality leads to the defendant getting an undeserved windfall gain though they are also participant to the illegality (as in *Collier v Collier*).[115] To reach an appropriate response, which is neither unduly harsh, nor a result which is harmful to the integrity of the legal system, such as in the terrorist example, courts need to give proper consideration to the factors noted above, and policy considerations.[116] As the Law Commission argues:

> The public policy principles that underlie the illegality doctrine mean that the civil law cannot simply ignore the illegal element …Whether or not the illegality has [the] effect [of denying the claimant his rights] should be determined by reference to such factors as the behaviour of the [claimant] the seriousness of the illegality and the value of the interest at stake.[117]

One could argue that this would lead to subjective decisions, but at the very least the courts would be required to address the actual illegality involved rather than side-stepping the issue. As Goudkamp argues the courts should not adopt rules that do not engage with the merits of the case or which cause significant injustice to individual litigants.[118]

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[114]Enonchong 'Illegality: The Fading Flame of Public Policy'(n 63) 298; Goudkamp 'The Doctrine of Illegality: A Private Law Hydra'(n 16) 261, 262;CP 189 (n 22) para 5.15.
[115][2002] EWCA Civ 1095.
[116]see Jack Beatson, Andrew Burrows, John Cartwright, *Anson's Law of Contract* (30th edition Oxford University Press, 2016) 437.
[117]CP 189 (n 22) para 6.75.
[118]Goudkamp, 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 263.

Not a rule of policy or justice:

Moreover, the reliance test is not a rule of justice or policy, whereas its counterparts, the public conscience test furthers the policy of not appearing to condone illegal behaviour, whilst let the estate lie where it falls, furthers the policy of deterrence.[119] The reliance test therefore has the potential of leading courts to unjust decisions by focusing on rules of pleading, in neglect of factors and policy considerations.[120] Decisions based on policy however, are more coherent because they provide justification for the application of the illegality defence.[121] In the realm of public policy it is important that the courts advance a policy-based justification for the application of the illegality defence as opposed to avoiding it merely because one does not need to rely on it.[122] Similarly, Hugh Stowe argues that 'it is unfortunate that the public policy rule [*ex turpi causa*] should be based on procedural criteria completely divorced from relevant policy considerations'.[123]

Unpredictable and arbitrary:

Moreover, the argument that the reliance test is not discretionary but a rule which is predictable, certain in application and outcome,[124] is questionable. For one, as illustrated through *Halley* and *Macdonald*, it is difficult to predict when the courts will

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[119]Enonchong 'Illegality: The Fading Flame of Public Policy' (n 63) 299; see McInnes 'Illegality and Canadian Private Law: Hall v Hebert's Legacy' (n 108) 310.
[120]LC 320 (n 63) para 2.13-2.15; *Patel* (UKSC) (n 1) [24] (Lord Toulson).
[121]see *Hounga* (UKSC) (n 4) [44], [50], [52] (Lord Wilson).
[122]*Patel* (UKSC) (n 1) [139] (Lord Kerr); see also *Nelson* (n 107) 476 (Deane J and Gummow J); see also McInnes, 'Advancement, Illegality and Restitution' (n 102) 10.
[123]Stowe, 'The 'Unruly Horse' Has Bolted: Tinsley v Milligan' (n 63) 446.
[124]*Bilta* (n 12) [62] (Lord Sumption); *Servier* (UKSC) (n 11) [18] (Lord Sumption).

regard the illegality as central or background such that the claimant needs to rely on it.[125] Moreover, the test operates on technicalities.[126] For example, if the parties in *Tinsley* had been husband and wife, the result would have been the opposite. If the house had been vested in the sole name of the wife in order to defraud the DSS, the husband would have had to rebut the presumption of advancement (arisen in favour of the wife) to prove his share. To rebut the presumption of advancement, the husband would have to plead and rely on his illegality. The reliance test would therefore have precluded recovery.[127] Results are therefore arbitrarily and incoherently reached.[128]

Noting these criticisms, it is submitted here that the operation of the illegality defence should not be dependent on the reliance test. A test which is entirely divorced from policy considerations, disregards the nature of illegality, lacks clarity as to whether the illegality needs to be relied upon and makes arbitrary distinctions based on the operation

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[125]CP 189 (n 22) para 6.82, 6.77; Paul S. Davies, 'The illegality defence-two steps forward, one step back?' (n 87) 185; Paul S. Davies, 'The Illegality Defence and Public Policy' (n 102) 558; LC 320 (n 63) para 2.14; Lim, 'Tensions in private law judicial decision-making' (n 87) 332.

[126]*Patel* (UKSC) (n 1) [18], [24], [110]-[111] (Lord Toulson), [236]-[238] (Lord Sumption)'The problem about this is that it makes the illegality principle depend on adventitious procedural matters, such as the rules of pleading, the incidence of the burden of proof and the various equitable presumptions'; LC 320 (n 63) para 2.13; CP 189 (n 22) para 6.11, 6.70; see also Enonchong 'Illegality: The Fading Flame of Public Policy' (n 63) 299; *Nelson* (n 107) 476-477 (Deane J and Gummow J), 495 (Dawson J); McInnes 'Illegality and Canadian Private Law: Hall v Hebert's Legacy' (n 108) 310; McInnes, 'Advancement, Illegality and Restitution' (n 102) 10.

[127]see further R.A Buckley, 'Illegal transactions: chaos or discretion?' (2000) 20 *Legal Studies* 155, 179; see also *Patel* (UKSC) (n 1) [18] (Lord Toulson), [237] (Lord Sumption); Enonchong, *Illegal Transactions* (n 26) 187.

[128]CP 189 (n 22) para 6.11, 6.70;see also *Patel* (UKSC) (n 1) [237] (Lord Sumption); Stowe, 'The 'Unruly Horse' Has Bolted: Tinsley v Milligan' (n 63) 446; McInnes 'Illegality and Canadian Private Law: Hall v Hebert's Legacy' (n 108) 310.

of procedural presumptions, is not ideal in the field of public policy.[129] This thesis therefore does not support the use of the reliance test.

3.3.2 Let the Estate Lie where it Falls

In *Tinsley* Lord Goff in his dissenting speech rejecting the reliance test for its capability of allowing unmeritorious claims,[130] invited the court to adopt Lord Eldon's principle in *Muckleston v Brown*[131]of 'let the estate lie where it falls'.[132] Though not a connection-based test, it is also one which offers a rule. The rule is that if both parties are dishonest, the courts will not act, and will instead let the estate lie where it falls.[133] Thus if property is transferred for an unlawful purpose such as to defraud creditors, the claimant will not be able to recover the property. In equity, this principle goes hand in hand with the maxim 'he who comes to equity must come with clean hands'.[134] For 'he who has committed iniquity shall not have equity'.[135] As Lord Goff explained:

> Once it comes to the attention of a court of equity that the claimant has not come to the court with clean hands, the court will refuse to assist the claimant, even

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[129]Stowe, 'The 'Unruly Horse' Has Bolted: Tinsley v Milligan' (n 63) 446.
[130]*Tinsley* (HL) (n 3) 362 (Lord Goff).
[131](1801) 6 Ves 52.
[132]*Muckleston* (n 7) 69 (Lord Eldon);*Tinsley* (HL) (n 3) 356-358 (Lord Goff).
[133]ibid.
[134]*Tinker v Tinker* [1970] P. 136, 143 (Salmon LJ); see further *Tinsley* (HL) (n 3) 362 B-C (Lord Goff).
[135]ibid.

> though the claimant can prima facie establish his claim without recourse to the underlying fraudulent or illegal purpose.[136]

This principle is the equitable counterpart of the common law doctrine *in pari delicto* (where both parties are equally in the wrong the position of the defendant is the stronger).[137] Let the estate lie where it falls furthers the policy of deterrence as noted earlier. The idea is that if the law will not assist a claimant in recovering the property which he has transferred to further an illegal purpose, he will be deterred from transferring it. Its application, however, can lead to unduly harsh results as it does not take into consideration the nature of illegality involved. This would result in no recovery even if the illegality is relatively minor.[138] Mitchell McInnes gives the example of a claimant being 'deprived of a multi-million dollar estate on the basis of a minor offence'.[139] Take also *Tinsley* as an example: the application of let the estate lie where it falls would result in the claimant losing her entire capital.[140] Lord Goff recognised that this can lead to harsh consequences but he preferred it to both the reliance test, and the flexible public conscience test; the latter he labelled as discretionary.[141] Ben Kremer however, argues that let the estate lie where it falls rule 'denies a court of equity the chance to do equity when any illegality, however incipient

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[136]*Tinsley* (HL) (n 3) 358 C-D (Lord Goff).
[137]*Ashmore, Benson, Pease & Co. Ltd v A. V. Dawson* [1973] 1 WLR 828,833 (Lord Denning); see also Enonchong 'Illegality: The Fading Flame of Public Policy' (n 63) 296; Goo 'Let the Estate Lie where it Falls' (n 112) 379.
[138]*Tinsley v Milligan* [1992] Ch 310 (CA), 323, 324 (Nicholls LJ);see further Enonchong 'Illegality: The Fading Flame of Public Policy' (n 63) 298, 299.
[139]McInnes, 'Advancement, Illegality and Restitution' (n 102) 9.
[140]Enonchong, 'Effects of illegality: a comparative study in French and English law' (n 63) 208; see also Goo 'Let the Estate Lie where it Falls' (n 112) 379,380.
[141]*Tinsley* (HL) (n 3) 363 (Lord Goff).

or serendipitous, is revealed, regardless of the other circumstances of the case'.[142] Enonchong argues that its application can lead to the undesirable effect of the equally culpable defendant getting a windfall gain.[143] It is submitted here, therefore, that let the estate lie where it falls, which is devoid of considerations of the nature of illegality thereby leading to unduly harsh results and which can lead to an equally culpable defendant getting a windfall gain, should not be followed. As Toulson LJ said in *ParkingEye*[144] when dealing with illegality:

> experience has shown that it is better to recognise that there may be conflicting considerations and that the rules need to be developed and applied in a way which enables the court to balance them fairly.[145]

3.3.3 Causation Test

In tort, the courts advanced a causation test.[146] Lord Hoffmann in *Gray* explained the test as follows:

> although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant (*Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218). Or…that

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[142]Ben Kremer, 'An "Unruly Horse" in a "Shadowy World"?: The Law of Illegality after *Nelson v Nelson*' (1997) 19 *Sydney L. Rev.* 240, 251.
[143]Enonchong, 'Effects of illegality: a comparative study in French and English law' (n 63), 208.
[144][2012] EWCA Civ 1338,[2013] QB 840 (CA).
[145]*ParkingEye Ltd v Somerfield* (n 10) [53]-[54] (Toulson LJ).
[146]The court also advanced the inextricable link test which will be discussed later in the chapter.

> although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant? (*Revill v Newbery* [1996] QB 567).[147]

Lord Hoffmann applied the causation test to the facts of *Gray.*[148] There the defendant had accepted liability for the claimant's injury caused by the train accident including PTSD and his loss of earnings before 19 August 2001(the date the claimant had committed the manslaughter).[149] The defendant however, denied liability for any loss from 19th August 2001, namely, after the manslaughter on the basis of the illegality defence.[150] In the House of Lords, Lord Hoffmann put the causation question as follows: 'whether [the claimant's] act of manslaughter caused his inability to earn'.[151] He held that the claimant's loss of earnings after being arrested and damages for detention were all caused by the lawful sentence imposed on him for the manslaughter which he had committed.[152] Put differently, the loss, for which he complained, namely his inability to earn, was caused by his own unlawful act of manslaughter which resulted in his imprisonment.[153] It is notable that in addition to relying on the causation test, Lord Hoffmann based his decision on the policy of consistency in the law as discussed in chapter 2. Upon the consistency policy, he said that one cannot recover damages (for loss of earnings or liberty) for a punishment lawfully imposed on him as a

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[147]*Gray* (HL) (n 2) [54] (Lord Hoffmann).
[148][2009] UKHL 33, [2009] 1 AC 1339; For facts of the case see chapter 2.
[149]*Gray* (HL) (n 2) 1342.
[150]ibid
[151]*Gray* (HL) (n 2) [48] (Lord Hoffmann).
[152]*Gray* (HL) (n 2) [50] (Lord Hoffmann).
[153]*Gray* (HL) (n 2) [49], [50] (Lord Hoffmann).

consequence of his own unlawful act.[154] For 'it is the law which, as a matter of penal policy, causes the damage and it would be inconsistent for the law to require you to be compensated for that damage'.[155]

The causation test was followed in a number of cases,[156] however its shortcomings soon became apparent. Firstly, it is a test which is not foundationally secure since it is unclear whether the connection between the illegality and the claim is both necessary and sufficient to bar a claim. Goudkamp argues that if the claimant caused all of his own loss or damage the claimant's action should fail as he cannot show that the defendant caused his loss.[157] In contrast, looking at Lord Hoffmann's application of the causation test in *Gray,* who had also relied upon the consistency policy to bar the claim, and exclude the defendant's liability, there is room for argument that the connection is necessary but not sufficient. In *Gray* though the immediate cause of the damage was the claimant's own deliberate and unlawful act, that connection was not sufficient to exclude the defendant's liability.[158] Rather the defendant's liability was excluded firmly because of public policy reasons, namely that allowing the claim would have created inconsistency in the law.[159] This illustrates that the test is not a holistic one in determining whether or not the illegality defence applies.

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[154]*Gray* (HL) (n 2) [29], [32] (Lord Hoffmann).
[155]*Gray* (HL) (n 2) [29] (Lord Hoffmann).
[156]see *Joyce v O'Brien* [2014] 1 WLR 70 (CA) at [29] (Elias LJ); *Delaney v Pickett* [2012] 1 WLR 2149.
[157]James Goudkamp, 'A long hard look at Gray v Thames Trains Ltd' in Paul S. Davies and Justine Pila (ed) *The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (Hart Publishing Ltd, 2015) 42, 46; Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 258.
[158]*Gray* (HL) (n 2) [28], [29], [32]-[44], [50] (Lord Hoffmann).
[159]ibid.

Secondly, the causation test has been criticised for its inability to take into account multiple causes of the injury for which the claimant complains. *McCracken v Smith*[160] (hereafter *McCracken*) is illustrative of this. *McCracken* concerned a joint illegal enterprise. The claimant was a passenger on a stolen motorbike ridden dangerously by his friend. Neither was wearing a helmet. The motorbike collided with a minibus driven negligently by the defendant. The claimant brought a claim against the defendant for injuries suffered. The defendant raised the illegality defence. The Court of Appeal in rejecting the illegality defence allowed the claim but reduced the amount of damages recoverable due to contributory negligence. Richard LJ in his judgment highlighted that the causation test was problematic in application, particularly where the claim is not against the other party to the joint illegal enterprise, but against a third tortfeasor who has also acted negligently. He noted that in this case there were two causes of the accident: a) the dangerous driving of the motorbike, which the claimant was held to be jointly responsible for, thus being put in the same position as the actual driver of the bike, and b) that of the negligence of the minibus driver.[161] Richard LJ said, 'I do not think that the fact that the criminal conduct was one of the two causes is a sufficient basis for the *ex turpi causa* defence to succeed'.[162] He emphasised that it would be wrong to hold that only one cause was the 'true cause', whilst the other a 'mere occasion'.[163] He held that Lord Hoffmann's causal approach in *Gray* could not be

[160][2015] EWCA Civ 380.
[161]*McCracken* (n 160) [49] (Richard LJ).
[162]*McCracken* (n 160) [52] (Richard LJ).
[163]*McCracken* (n 160) [51],[52] (Richard LJ); see also Richard Geraghty, 'McCracken v Smith: personal injury – road traffic accidents – damages' (2015) 3 *Journal of Personal Injury Law* 165, 166.

applied here.[164] He emphasised that the correct position was to give effect to both causes by allowing the claim in negligence and then to reduce amount recoverable on the basis of contributory negligence to reflect the claimant's fault and responsibility for the accident.[165] The result reached by the court is correct, since both parties caused the loss therefore, both should bear the burden. Moreover, allowing recovery for injury would not create inconsistency in the law as the award reflects compensation for injury and not a profit from the crime[166] as explained in *Hounga* and *Hall v Hebert*[167] (hereafter *Hall*).

The causation test has also been criticised by Alan Bogg and Sarah Green who argue that it cannot be adequately applied in all cases.[168] To illustrate this point they provide the example of *Hounga* which concerned a claim for the statutory tort of discrimination. They argue that it would be unsatisfactory to hold that one is cause of his or her own discrimination.[169] It is arguable however, that since the claimant in *Hounga* was working illegally, her claim for compensation for injury arose out of her own illegality.[170] Put differently, the illegal employment was undoubtedly a cause of her claim for compensation. Nonetheless, it was rightly held by the Supreme Court that the illegality was not linked to the claim. This is because her claim was not for wages on the illegal contract. Rather, it was a claim for injury based on the statutory tort of

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[164]*McCracken* (n 160) [51] (Richard LJ).
[165]*McCracken* (n 160) [52] (Richard LJ).
[166]see *Hounga* (UKSC) (n 4) [44] (Lord Wilson); *Hall v Hebert* [1993] 2 SCR 159, 169, 179, 180 (McLachlin J).
[167][1993] 2 SCR 159.
[168]Alan Bogg and Sarah Green, 'Rights are not just virtuous: What Hounga Means for the illegality defence in the discrimination torts' (2015) 44 *Industrial Law Journal* 101-122.
[169]Bogg and Green, 'Rights are not just virtuous' (n 168) 105.
[170]*Hounga* (UKSC) (n 4) [4] (Lord Wilson).

discrimination. Her illegal immigration formed part of the context in which the wrongs were committed by her employer.[171] Moreover, Lord Wilson was correct to hold that denying the claim would not have achieved anything worthwhile.[172] This is particularly evident from the policy-based analysis which he carries out.[173] He held that the policies against the application of the illegality defence were stronger.[174] For the claimant would not be profiting from her crime since the compensation was for injury.[175] The award also did not reflect evasion of a penalty imposed by the criminal law as she had not been prosecuted for her entry into the employment contract.[176] Allowing the claim would not condone others in a similar position to her. On the contrary, application of the illegality defence would condone others like the employer to enter into such illegal employment contracts and 'discriminate against such employees with impunity'.[177] Furthermore, application of the illegality defence would run counter to the policy of preventing trafficking.[178]

It is thus submitted here that the causation test should not be adopted in determining the application of the illegality defence. Firstly, it does not provide a comprehensive rule because the connection between the illegality and the claim, though necessary, is not sufficient to bar the claim. Secondly, it does not take into account that there may be two causes of the injury. Thirdly, it is driven by subjective considerations, so that one judge

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[171]*Hounga* (UKSC) (n 4) [24], [40] (Lord Wilson); Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 259.
[172]*Hounga* (UKSC) (n 4) [44], [50], [52] (Lord Wilson); see also Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 262, 263.
[173]*Hounga* (UKSC) (n 4) [44], [50], [52] (Lord Wilson).
[174]*Hounga* (UKSC) (n 4) [44], [52] (Lord Wilson).
[175]*Hounga* (UKSC) (n 4) [44] (Lord Wilson).
[176]ibid.
[177]ibid.
[178]*Hounga* (UKSC) (n 4) [52] (Lord Wilson).

may conclude that the criminal conduct is the cause of the claimants' injury whilst another may not. This will be further illustrated in the next section as some judges have interpreted the inextricable link test as being one of causation. In contrast, a policy-based approach, based on the need to avoid inconsistency in the law by ensuring that the damages claim does not reflect an evasion of a penalty or profit from a crime, as provided by Lord Wilson in *Hounga*, is far more preferable in determining the application or denial of the illegality defence.[179] Under this approach even if a claim for compensation succeeds, the amount recoverable can be reduced for contributory negligence.

3.3.4 Inextricable Link

In the context of tort claims, another test applied in determining the application of the illegality defence was the inextricable link test. This test is closely aligned with the causation test. The inextricable link test bars recovery if there is a close connection between the illegality and the claim.[180] Where the illegality can be regarded as collateral, the illegality defence will fail.[181] Illustrative of this is *Saunders v Edwards*[182] (hereafter *Saunders*).[183]There the claimants had bought a flat and chattels from the

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[179]*Hounga* (UKSC) (n 4) [44] (Lord Wilson); see also *Hall v Hebert* (n 166) 169, 179, 180 (McLachlin J).
[180]*Cross* (n 2) [76] (Beldam LJ) at [103] (Judge LJ); *Hall v Woolston* (n 4); *Vakante* (n 4) [36] (Mummery LJ); *Vellino v CC of Greater Manchester* [2001] EWCA Civ 1249, [2002] 1 WLR 218 at [70] (Sir Murray Stuart Smith); see also *Gray* (HL) (n 2) [48 H) (Lord Hoffmann).
[181]*Hounga* (UKSC) (n 4) [58] (Lord Hughes).
[182][1987] 1 WLR 1116.
[183]Though it is notable that Nicholls LJ in that case adopted the public conscience test, whilst Kerr LJ adopted the inextricable link test.

defendant. The value of chattels had been inflated at the claimants' request to avoid stamp duty. After purchasing the flat the claimant discovered that the flat did not include a roof garden. The claimants brought an action against the defendant for fraudulent misrepresentation. The defendant raised the illegality defence arguing that the claimant's act of deliberate miscalculation of the value of the chattels to avoid stamp duty was illegal. In giving judgment for the claimants, it was held that the claimant's fraud on the revenue was unconnected with the fraud which was done to them by the defendant. Kerr LJ said the:

> illegality involved in the apportionment of the price in the contract is wholly unconnected with their cause of action. The plaintiffs' loss caused by the defendant's fraudulent misrepresentation would have been the same, even if the contract had not contained this illegal element.[184]

Bogg and Green argue the inextricable link test is a useful threshold test which allows distinguishing between those claims where there is no factual link between the illegality and the claim from those where the link exists.[185] Put differently, the test is one which provides whether the illegality is central to the claim or merely incidental. However, whether the illegality is central or collateral is not always an easy determination to make.[186] It is also prone to being decided subjectively.[187] *Hounga* illustrates this, which

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[184]*Saunders* (n 182) 1127 (Kerr LJ).
[185]Bogg and Green, 'Rights are not just virtuous' (n 168) 107,108; see also *Saunders* (n 182) 1134.
[186]see also discussion on the reliance test in this chapter on centrality of illegality in particular *MacDonald* (n 85) and *Halley* (n 86).
[187]see Bogg and Green, 'Rights are not just virtuous' (n 168) 107; see *Saunders* (n 182) 1134 (Bingham LJ); *St John* (n 56); *Singh v. Ali* [1960] AC 167;*Shelley v. Paddock* [1980] QB 348 .

concerned a claim by an illegal immigrant for compensation for injury under the statutory tort of discrimination. In the Supreme Court, Lord Hughes found that there 'was not a sufficiently close connection between the illegality and the tort to bar [the] claim'.[188] He said that the claim on the basis of the statutory tort of discrimination, though set in the context of the claimant's unlawful immigration, was not closely connected to her tort claim for compensation for injury.[189] He explained that the illegality can 'properly be regarded as collateral or as doing no more than providing the context for the relationship which gives rise to the claim'.[190] Furthermore, he noted that if the claim were for the breach of contract or by 'statutory extension for unfair dismissal', which is dependent on a lawfully enforceable contract of employment, then that claim would have been dismissed as the claimant's whole employment was forbidden and illegal.[191] In contrast, Rimer LJ in the Court of Appeal in *Hounga* found that there was an inextricable link between the illegality and the claim. He held that the claimant's discrimination claim was clearly connected with her own illegal conduct therefore she was not entitled to the compensation.[192] Strauss, agreeing with this argued that it is hard to see on what basis the claimants' claim for racially discriminatory dismissal was not inextricably bound with her illegal employment:

> …logically, Ms Hounga was relying, for all her claims, on her own unlawful employment…. The circumstances of the claimant's entry into the UK may have been background, but the illegal contract of employment clearly was not. It was

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[188]*Hounga* (UKSC) (n 4) [59] (Lord Hughes), at [40] (Lord Wilson).
[189]*Hounga* (UKSC) (n 4) [59] (Lord Hughes).
[190]*Hounga* (UKSC) (n 4) [58] (Lord Hughes).
[191]*Hounga* (UKSC) (n 4) [59] (Lord Hughes).
[192]*Hounga v Allen* [2012] EWCA Civ 609 (CA) (Official Transcript) at [61] (Rimer LJ).

central to a claim for the statutory tort of racially discriminatory dismissal, as it was to an unfair dismissal claim.[193]

The disparate application of the inextricable link test is also evident in *Gray* which concerned a claim for loss of earnings for being imprisoned after committing manslaughter. There Mr Justice Flaux in the High Court and Lord Hoffmann in the House of Lords found the inextricable link between the illegal act of manslaughter and the claim for loss of earnings whilst imprisoned after committing the manslaughter, thereby barring the claim.[194] In contrast, Sir Anthony Clarke in the Court of Appeal did not find the link.[195] The test has for this reason been criticised as being subjective and malleable leading to inconsistent application.[196] Such inconsistency in application is problematic because it creates uncertainty in the law since the same test can lead to opposing results. The inextricable link test can also be criticised as not being a rule at all. It does not operate in a certain way that fixed rules do, since it can be driven subjectively rather than by principle.

Further problems with the test relate to the considerable uncertainty surrounding what an 'inextricable link' even means. Is it merely a causal connection[197] or does it involve an inquiry beyond questions of causation?[198] The case law appears unclear on this.[199]

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[193]Nicholas Strauss 'Ex turpi causa oritur actio?'(2016) 132 *LQR* 236, 252.
[194]*Gray v Thames Trains Ltd* [2007] EWHC 1558 (QB) at [30], [35] (Flaux J); *Gray* (HL) (n 2) [48] (Lord Hoffmann).
[195]*Gray v Thames Trains Ltd* [2009] 2 WLR 351(CA) at [22], [24],[28] (Sir Anthony Clarke MR).
[196]*Hounga* (UKSC) (n 4) [37],[40] (Lord Wilson),Although note that Lord Wilson did refer to the test in stating that the link was absent; P. S. Davies, 'The Illegality Defence and Public Policy'(n 102) 558.
[197]see *Cross* (n 2) [76] (Beldam LJ).
[198]*Cross* (n 2) [103] (Judge LJ).

In *Cross* Beldam LJ appears to suggest that the inextricable link is a question of causation.[200] In *Cross,* the claimant was opposed to hunting. The defendant was a former huntsman. The claimant trespassed on to the defendants' land and hit him with a bat. The defendant walked away but the claimant persisted with his aggressive behaviour, threatening to kill the defendant.[201] The claimant repeatedly assaulted the defendant. To ward off the blows, the defendant ended up wrestling with the claimant for the bat which resulted in him hitting the claimant on the head.[202] The blow resulted in the claimant suffering injury.[203] The claimant sued the defendant for injuries suffered. The defendant raised self defence or alternatively the illegality defence, arguing that the claimant's injury arose out of his own unlawful conduct.[204] The court accepted the plea of self defence.[205] Beldam LJ in particular considered that in case he was wrong on the self defence point, he would also bar the claim on grounds of the illegality defence. This was on the basis that the claimant's injury arose from his own criminal and unlawful conduct.[206] Beldam LJ said for *ex turpi causa* to operate as a defence:

> the claim made by the claimant must arise out of criminal or illegal conduct on his part. In this context "arise out of" clearly denotes a causal connection with the conduct…[the ex turpi causa defence applies] when the claimant's claim is so closely connected or inextricably bound up with his own criminal or illegal

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[199]see also Goudkamp, 'A Long Hard Look at Gray v Thames Trains Ltd' (n 157) 40.
[200]see also *Patel* (UKSC) (n 1) [240] (Lord Sumption);*Cross* (n 2) [76] (Beldam LJ).
[201]*Cross* (n 2) [91] (Judge LJ).
[202]*Cross* (n 2) [6] (Beldam LJ).
[203]*Cross* (n 2) [5] (Beldam LJ).
[204]*Cross* (n 2) [6] (Beldam LJ).
[205]*Cross* (n 2) [34]-[35] (Beldam LJ), [91]-[92] (Judge LJ).
[206]*Cross* (n 2) [35], [44], [57], [78] (Beldam LJ); see also *Murphy v Culhane* [1977] QB 94 where claimant's criminal affray deprived him of a cause of action arising from its consequences.

> conduct that the court could not permit him to recover without appearing to condone that conduct.[207]

Beldam LJ thereby suggested that a close connection is the same as a causation test, so that if the claimant's injury is caused by his own criminal conduct then his claim will fail.[208] However, in doing so the two causes of the injury are not fully accounted. This is because, although the claimant had behaved unlawfully, the injury he suffered was due also to the defendant's conduct. One cannot ignore that the act of the defendant, though not deliberate, was also a cause of the injury. In such circumstances the most appropriate response for the courts it is submitted here, is to bar the claim on grounds of self defence as was done in *Cross* (but not on grounds of the illegality defence). As Beldam LJ said:

> The defendant had taken every reasonable step to avoid becoming involved with the claimant … It was only when he was under actual attack with a weapon, described by the judge as likely to cause serious injury, that he became involved in the struggle to prevent the claimant hitting him with the bat.. [the defendant] only [did] what was necessary in the circumstances.[209]

Chapter 7 of the thesis will argue that if self defence had failed in *Cross*, the claim for compensation for injury should not be barred, based on the consistency principle, as put forth by McLachlin J in *Hall* and adopted by Lord Wilson in *Hounga.*

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[207] *Cross* (n 2) [76] (Beldam LJ).
[208] *Cross* (n 2) [35], [78] (Beldam LJ).
[209] *Cross* (n 2) [35] (Beldam LJ).

Differing from Beldam LJ on the interpretation of the inextricable link test, Judge LJ argued that the inextricable link test is different from that of causation. He said:

> where the claimant is behaving unlawfully, or criminally, on the occasion when his cause of action in tort arises, his claim is not liable to be defeated *ex turpi causa* unless it is also established that the facts which give rise to it are inextricably linked with his criminal conduct. I have deliberately expressed myself in language which goes well beyond questions of causation.[210]

He went on to endorse Rougier J's explanation of the inextricable link in *Revill v Newbery*[211] (hereafter *Revill*). Rougier J said an inextricable link is established 'if the injury complained of was so closely interwoven in the illegal or criminal act as to be virtually a part of it or if it was a direct uninterrupted consequence of that illegal act'.[212] This passage however, appears to reaffirm that the question is one of causation. This is denoted from the use of the words 'rise', 'arise' and 'direct consequence' in the quoted passage above. For if injury rises out of the criminal conduct or is a direct consequence of it, it is caused by it. Moreover, it will be remembered that in *Gray* Lord Hoffmann referred to *Revill* as an example of the causation test.[213]

Another issue with the 'inextricable link' test is that the decision whether something arises out of or is a direct consequence can be subjective. In *Cross,* for example it can be argued that the facts which gave rise to the damages claim for injury is a direct

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[210]*Cross* (n 2) [103] (Judge LJ).
[211][1996] QB 567. Note this explanation was cited by Neill LJ in the Court of Appeal in *Revill* (CA) (n 26).
[212]*Revill* (CA) (n 26) 571 (Neill LJ).
[213]*Gray* (HL) (n 2) [54] (Lord Hoffmann).

consequence of his threatening and violent behaviour as he attacked the defendant, who in return hit him with the same bat from which he was being struck.[214] Alternatively, one can argue that the injury was a direct consequence of the defendant hitting the claimant. As Lord Wilson observed in *Hounga*:

> I…am not convinced that the… inquiry suggested by Lord Hoffmann [of causation] is any more likely to secure consistency of decision-making… Every formulation of a requirement to identify the active or effective cause of an event or an act to which it is inextricably linked has a potential for inconsistent application driven by subjective considerations.[215]

Another interpretation of the inextricable link test found in the case law, suggesting that the inextricable link differs from causation is that presented by Mummery LJ in *Vakante v Governing Body of Addey and Stanhope School (No 2)*[216] (hereafter *Vakante*). He said:

> Matters of fact and degree have to be considered: the circumstances surrounding the applicant's claim and the illegal conduct, the nature and seriousness of the illegal conduct, the extent of the applicant's involvement in it and the character of the applicant's claim are all matters relevant to determining whether the claim is so "inextricably bound up with" the applicant's illegal conduct that, by permitting the applicant to recover compensation, the tribunal might appear to condone the illegality.[217]

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[214]*Cross* (n 2) [126] (Judge LJ).
[215]*Hounga* (UKSC) (n 4) [36C-D], [37] (Lord Wilson).
[216][2005] ICR 231.
[217]*Vakante* (n 4) [9] (Mummery LJ).

This formulation of the inextricable link test was however, rejected by Lord Wilson in *Hounga* who said that it 'was a loosening of the inextricable link test and an entry into it of factors which, logically, might not have been entitled to entry'.[218] The disparity as to the true meaning of the inextricable link therefore, makes it difficult to apply as the nature of the link is unclear.

Further issues with the inextricable link test are that the link between the illegality and the claim, though necessary, is not sufficient to bar the claim.[219] This makes the test less of a rule. This is apparent from Lord Hughes' judgment in *Hounga* where he said that although there must be a 'sufficiently close connection between the illegality and the claim'[220], this is not a comprehensive test.[221] Rather:

> En route to the answer in an individual case, the court is likely to need to consider also the gravity of the illegality of which the claimant is guilty and her knowledge or intention in relation to it. It will no doubt also consider the purpose of the law which has been infringed and the extent to which to allow a civil claim nevertheless to proceed will be inconsistent with that purpose.[222]

In conclusion, it is submitted here that the inextricable link test should be abandoned. This is particularly so as Lord Toulson for the majority in *Patel* did not adopt it; laying down a trio of considerations, and the minority in *Patel*, in particular Lord Sumption,

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[218]*Hounga* (UKSC) (n 4) [35] (Lord Wilson); cf Bogg and Green, 'Rights are not just virtuous' (n 168) 107.
[219]cf. *Hounga* (CA) (n 192) [61] (Rimer LJ).
[220]*Hounga* (UKSC) (n 4) [55] (Lord Hughes).
[221]ibid.
[222]ibid.

was critical of the inextricable link test.[223] The minority in *Patel* supported the reliance and *restitutio in integrum* test.[224] Moreover, it is not even clear what an inextricable link means. Is it merely a causation link or does it involve examining other factors as Mummery LJ in *Vakante* suggests?[225] If the former is true, the test is prone to the same criticism as the causation test, namely its inability to take into account multiple causes of an injury. In relation to the latter, that the inextricable link involves taking into account different factors, that interpretation was rejected by Lord Wilson in the Supreme Court in *Hounga.* Further difficulties with the inextricable link test include its inconsistent application by the courts thereby leading to opposing results. The test is subjectively driven thereby creating uncertainty in the law. [226] It is submitted here that a better approach to adopt is one governed by principle. Chapter 7 will argue that the courts should rely on the principle of maintaining consistency in the law. That approach provides a more coherent justification for the application of the illegality defence than applying an ill-defined rule.

3.3.5 Conclusion on rule based tests

Overall an examination of the rule-based tests adopted pre-*Patel* reveal the inadequacy of these approaches as clear and certain rules determining the application of the illegality defence. The reliance test is plagued with a number of issues. Firstly, it bases

[223]*Patel* (UKSC) (n 1) [120] (Lord Toulson) at [240] (Lord Sumption); For criticism of inextricable link test see Goudkamp, 'A Long Hard Look at Gray v Thames Trains Ltd' (n 157) 40; Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 262.
[224]*Patel* (UKSC) (n 1) [199], [203] (Lord Mance), [210] (Lord Clarke), [239], [268] (Lord Sumption).
[225]see also Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 262.
[226]see *Patel* (UKSC) (n 1) [240] (Lord Sumption); For criticism of inextricable link test see Goudkamp, 'A Long Hard Look at Gray v Thames Trains Ltd' (n 157) 40; Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 262.

decisions on legal and equitable presumptions which lead to arbitrary results. Secondly, it is not even clear what needs to be relied upon, which can lead to uncertainty. Thirdly, it enables parties to cover up and ignore illegality, opening doors to unmeritorious cases. Fourthly, it is a rule entirely divorced from policy considerations. Let the estate lie where it falls is also problematic, in particular it ceases to take into consideration the nature of the illegality involved. This can lead to harsh results where the illegality is minor. The causation test also raises concerns as it fails to fully take into account the culpability of both parties. In cases where there are multiple causes of an accident, it would be wrong to hold that one cause is the true cause and the other a mere occasion, as illustrated in *McCracken.* Moreover, in cases such as *Hounga* it would be unsatisfactory to hold that a person is the cause of his or her own discrimination.[227] The inextricable link test is also unsatisfactory. For one, it is unclear what is meant by an inextricable link, is it a causation inquiry or does in entail something different? Moreover, it experiences issues of inconsistent application which is driven by subjective considerations.[228] Furthermore, for the inextricable link and causation tests, the link between the illegality and the claim though necessary, is not in itself sufficient to bar the claim. Thus these tests can be criticised as not being rules at all. Acknowledging the issues with the rule-based tests and to counter the harshness which can arise from the application of the illegality defence, the law moved towards a flexible approach of taking into account different factors and policies. This will be discussed below.

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[227]Bogg and Green, 'Rights are not just virtuous' (n 168) 105.
[228]*Hounga* (UKSC) (n 4) [37], [40] (Lord Wilson), although note that Lord Wilson did refer to the test in stating that the link was absent.

3.4 Flexible Tests

The two tests pre-*Patel* reflecting a flexible approach to the illegality defence were the public conscience test and the just and proportionate response to illegality. The assessment of these tests reveals the courts recognising a need to provide an adequate justification for the application of the illegality defence by giving proper consideration to relevant factors and policies involved. Such an approach is preferable to basing decisions on ill-defined rules which are unclear in foundation, are inconsistent in application and which do not adequately address the illegality concerned, at times even ignoring it.[229]

3.4.1 Public Conscience

The development and application of the public conscience test largely emerged as the courts recognised the failure of the common law rules in giving consideration to the policies which justified the application of the illegality defence.[230] The public conscience test was described in *Thackwell v Barclays Bank Plc*[231] (hereafter *Thackwell*) by Hutchison J as:

> whether in all the circumstances it would be an affront to the public conscience, if by affording him the relief sought the court was seen to be indirectly assisting or encouraging the plaintiff in his criminal act.[232]

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[229]Enonchong 'Illegality: The Fading Flame of Public Policy' (n 63) 298, 299.
[230]CP 189 (n 22) para 3.137.
[231][1986] 1 All ER 676, 687.
[232]*Thackwell* (n 9) 687 (Hutchison J).

The public conscience test was expanded on by Nicholls LJ in the Court of Appeal in *Tinsley.* He said under this test 'the courts must weigh, or balance, the adverse consequences of granting relief against the adverse consequences of refusing relief. The ultimate decision calls for a value judgment'.[233] The operation of this test can be seen in *Saunders,* the facts of which were given earlier. There Nicholls LJ said, the courts must weigh the extent to which granting relief would be encouraging the claimants in their tax evasion, and indirectly encouraging others to do the same, against allowing the defendant to retain a benefit, namely the money received, which represents a loss suffered by the claimant as a result of the defendant's fraudulent misrepresentation.[234] He concluded on the facts that granting the claimant relief would not be an affront to public conscience.[235] This is because the claimant's loss resulted from the defendant's fraud and that loss would have been the same irrespective of their own apportionment of the price to defraud the revenue.[236] Moreover, section 5 of the Stamp Act 1891 itself imposed a fine on those who defraud the revenue.[237]

The public conscience test however, was firmly rejected in the House of Lords in *Tinsley.*[238] There Lord Browne-Wilkinson argued that 'the consequences of being a party to an illegal transaction cannot depend on… an imponderable factor as the extent to which the public conscience would be affronted by recognising rights created by

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[233]*Tinsley* (CA) (n 138) 319H (Nicholls LJ).
[234]*Saunders* (n 182) 1132,1133 (Nicholls LJ); Enonchong, 'Effects of illegality: a comparative study in French and English law' (n 63) 211
[235]*Saunders* (n 182) 1133 (Nicholls LJ).
[236]ibid.
[237]ibid.
[238]*Tinsley* (HL) (n 3) 355 (Lord Goff), 369 (Lord Browne-Wilkinson).

illegal transactions'.[239] This is because the public conscience may be affronted by factors of an 'emotional nature'[240] thus running the risk of basing decisions on speculation.[241] Such subjective considerations can make the law highly unpredictable. It has also been argued that the public conscience test is particularly 'sensitive to changing mores'[242]thus fuelling further uncertainty. Lord Goff in *Tinsley* argued that the adoption of a public conscience test would constitute a revolution in this area of law by giving the courts discretion to deal with matters of illegality by a process of balancing in place of a rule. [243] He further said:

> Lord Mansfield made clear, the principle [of ex turpi causa] 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… the principle allows no room for the exercise of any discretion by the court in favour of one party or the other.[244]

In a similar vein, Lord Sumption in the Supreme Court in *Servier* rejected the public conscience test as bringing unwarranted flexibility into the law of illegality, making the law uncertain by 'inviting courts to depart from existing rules of law'. [245] He argued that the *ex turpi causa* principle is a 'rule of law not mere discretionary power…based on

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[239]*Tinsley* (HL) (n 3) 369B-C (Lord Browne-Wilkinson).
[240]*Pitts v Hunt* [1990] 3 WLR 542; [1991] 1 QB 24, 56 B-D (Dillon LJ).
[241]*Reeves v Commissioner of Police of the Metropolis* [1999] QB 169, 185 (Buxton LJ); see further Gilbert Kodilinye, 'A Fresh Approach to the Ex Turpi Causa and "Clean Hands" Maxims' (1992) 7 *The Denning Law Journal* 93, 96.
[242]William Binchy 'Tort - public policy - damages awards in tort litigation' (1998) 20 *DULJ* 240-245.
[243]*Tinsley* (HL) (n 3) 355B-D, 363B-H (Lord Goff).
[244]*Tinsley* (HL) (n 3) 355 (Lord Goff).
[245]*Servier* (UKSC) (n 11) [14G-H], [18], [20] (Lord Sumption); *Bilta* (n 12) [62] (Lord Sumption).

perceived balance of merits between parties'.[246] He further criticised the test as being 'directly inconsistent with the decision of the House of Lords in *Tinsley*' in which it was expressly rejected.[247]

In countering the above criticisms of the public conscience test, firstly, it should be noted that the courts weighing and balancing adverse consequence of refusing relief against allowing it is not a revolution in this area of law. It will be remembered from the case law examined in chapter 2 that a balancing exercise was carried out in *St John, Narraway v Bolster*[248] and *Shaw v Groom.*[249] In *St John,* Devlin J had weighed the adverse consequences of refusing relief which would deny the claimant the freight due, a penalty far in excess to that prescribed for the breach, versus the adverse consequences of allowing relief, which in this case were thin on the ground. This is because the statute already imposed on the offender a penalty for the unlawful act of overloading, which itself was designed to deprive the offender of any benefit derived from such an unlawful act. Allowing a claim for freight would therefore not condone that illegality. On the contrary, allowing relief would protect the expectation of the contracting parties, ensuring that the defendant does not derive an unjustified windfall gain and escape liability to pay freight which was lawfully due.[250] Similarly, in *Narraway* and *Shaw,* the courts rightly held that disallowing the claim for rent, which would result in the defendant living rent free merely because the claimant failed to comply with a statutory provision, which significantly did not make the contract itself

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[246]*Servier* (UKSC) (n 11) [13C-D] (Lord Sumption).
[247]*Servier* (UKSC) (n 11) [20] (Lord Sumption); *Tinsley* (HL) (n 3) 355, 358E-F, 361D-E 363B-H (Lord Goff), 369 (Lord Browne-Wilkinson).
[248][1924] EGD 217.
[249][1970] 2 QB 504.
[250]see CP 189 (n 22) para 3.137

unenforceable, would be extremely harsh and unjust consequence.[251] This is particularly so where the statute itself prescribed a penalty for the breach which was sufficient to further its purpose. Denying the claim in such circumstances would lead to punishing the claimant twice without furthering the purpose of the statute. This approach, which weighs and balances adverse consequences is far preferable to stringent, procedural and arbitrary reliance test (advocated for by Lord Sumption in *Servier*)[252] which completely ignores the illegality merely because one does not need to rely on it. In contrast, under the public conscience test the courts are able to take into account the nature of illegality. As Diplock LJ explained in *Hardy v Motor Insurers' Bureau*[253] 'the court has to weigh the gravity of the anti-social act and the extent to which it will be encouraged by enforcing the right sought to be asserted against the social harm which will be caused if the right is not enforced'.[254]

Secondly, the public conscience test is not entirely inconsistent with authorities. Viewed as a test which furthers policies underlying the illegality defence, it does have support from the case law. As Nicholls LJ in *Saunders* explained the public conscience test 'summarises in essence the task on which the court is engaged when seeking to give effect to the requirements of public policy in this field' namely non-condonation and preserving the integrity of the legal system versus preventing unjust enrichment.[255] Support for giving consideration to policies in determining the application of the

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[251]*Narraway* (n 248) 218 (Lord Darling).
[252]*Servier* (UKSC) (n 11) [18], [20], [22] (Lord Sumption).
[253][1964] 2 QB 745.
[254]*Hardy* (n 26) 768 (Diplock LJ); see also *Tinsley* (HL) (n 3) 355, 358E-F, 361D-E 363B-H (Lord Goff), 369 (Lord Browne-Wilkinson); Enonchong 'Illegality: The Fading Flame of Public Policy' (n 63) 300,301; see also McInnes, 'Advancement, Illegality and Restitution' (n 102) 12.
[255]*Saunders* (n 182) 1132, 1133 (Nicholls LJ); see also CP 189 (n 22) para 2.27.

illegality defence is found in the dictum of both Lord Phillips in the House of Lords in *Stone & Rolls* and Lord Hoffmann in *Gray.*[256] They both considered that *ex turpi cuasa* is a policy which itself is based on a group of reasons which provide justification for its application as discussed earlier in the chapter.[257] Further support for a policy-based approach can be found in Lord Wilson's judgment in the Supreme Court in *Hounga.* He explicitly said that allowing the claim for compensation for injury to an illegal immigrant would not condone illegality nor harm the integrity of the legal system.[258]

Thirdly, contrary to the argument that affront to public conscience is too imponderable a factor (affected by factors of an emotional nature) to determine the consequences of illegality, it can be argued that the concept of 'illegal' and 'immoral' in Lord Mansfield's dictum in *Holman* is itself dependent on societal changes and perspectives. Acts which once were regarded as illegal or immoral, such as suicide, are not now.[259] It is submitted that the public conscience test cannot solely be criticised as being affected by considerations of emotional and societal changes. Moreover, the fact that the public conscience test responds to societal changes and moral values can be considered as a strength rather than a weakness. Furthermore, it is quite likely that courts can determine that it would be an affront to public conscience to allow a hit man to recover his fees, as opposed to a landlord recovering rent where he fails to provide the correct rent book.[260]

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[256]*Stone & Rolls* (n 37) at [25], [26] (Lord Phillips); *Gray* (HL) (n 2) [30] (Lord Hoffmann).
[257]ibid.
[258]*Hounga* (UKSC) (n 4) [44] (Lord Wilson).
[259]See Suicide Act 1961 s1.
[260]see *Shaw* (n 68); see also Enonchong 'Illegality: The Fading Flame of Public Policy' (n 63) 300; McInnes, 'Advancement, Illegality and Restitution' (n 102) 12.

Moreover, Strauss has argued that the public conscience test can be useful if simply stated as:

> whether ordinary and reasonable members of the public would consider it inappropriate to allow the claim. Such a test is no different in principle, as regards objectivity, from the objective test of dishonesty set out by Lord Nicholls in *Royal Brunei Airlines v Tan* namely whether the conduct was dishonest by the standards of ordinary and reasonable members of the public. It is for the court to find the facts and evaluate them objectively.[261]

Despite these arguments, one cannot overlook that the public conscience test is problematic. This is because it is predominantly based on furthering the policy of non-condonation to the absence of other significant policy considerations such as furthering the purpose of the rule infringed and maintaining consistency in the law. Take the following scenario as an example. A is involved in an illegal enterprise with B of stealing a car. To celebrate their successful venture, both A and B have a few drinks. B insists on driving despite being over the legal drink-drive limit. As they drive off in the stolen vehicle, B starts to speed, eventually causing the car to crash. A suffers severe injuries. A brings an action in negligence to recover compensation. Here, denying the claim on the basis that it would be an affront to public conscience, since the contrary could be seen to indirectly condone A's illegal venture, would be too harsh a result. Here it is submitted the result should be that A is entitled to compensation as doing so would not create inconsistency in the law. The compensation is for injury and not a

[261]Strauss 'Ex turpi causa oritur actio?' (n 193) 261.

profit from the crime.[262] Allowing compensation would also not be inconsistent with the deterring of theft and reckless driving.[263] This is because those who contemplate committing such offences generally are unaware of the position held by tort law on the issue of illegality.[264] For deterrence however, such knowledge is essential.[265]

The Law Commission also recognised the limitations of the public conscience test, but argued that it is useful in indicating the role of policy in denying recovery.[266] They argued that the courts should be transparent on the various policies that underlie the illegality defence.[267] In doing so the Law Commission proposed that:

> the courts should consider…whether the application of the illegality defence can be justified on the basis of the policies that underlie that defence. These include: (a) furthering the purpose of the rule which the illegal conduct has infringed; (b) consistency; (c) that the claimant should not profit from his or her own wrong; (d) deterrence; and (e) maintaining the integrity of the legal system. Against those policies must be weighed the legitimate expectation of the claimant that his or her legal rights will be protected. Ultimately a balancing exercise is called for which weighs up the application of the various policies at stake. Only when

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[262]see *Hounga* (UKSC) (n 4) [44] (Lord Wilson); see also *Hall v Hebert* (n 166) 169, 179, 180 (McLachlin J); see also *Miller v Miller* [2011] 5 LRC 14; see also James Goudkamp, 'The illegality defence in the law of negligence after Miller v Miller' (2011) 7 *Australian Civil Liability* 130-132< https://ssrn.com/abstract=2740306> Accessed January 2017.
[263]see also Goudkamp, 'The illegality defence in the law of negligence after Miller v Miller' (n 262) 130-132.
[264]ibid.
[265]ibid.
[266]CP 189 (n 22) para 3.140.
[267]ibid.

> depriving the claimant of his or her rights is a proportionate response based on the relevant illegality policies, should the defence succeed.[268]

Etherton LJ in *Servier* taking into account the Law Commission's proposal went on to adopt a 'just and proportionate response' to illegality test. That test essentially builds on the pubic conscience test by making the balancing process one of assessing and weighing a number of different policies underlying the illegality defence, as opposed to being limited to non-condonation.[269] It also expands on the public conscience test by taking into consideration not only the gravity of illegality but also the relative culpability of the parties, intention, and centrality of illegality, thereby providing a more holistic flexible approach to that of the public conscience test. Ultimately that test also recognises that the strict rule of non-recovery can lead to extreme hardship.[270]

3.4.2. Just and Proportionate Response

In *Servier* Etherton LJ put forth the just and proportionate response to illegality test as follows:[271]

> what is required in each case is an intense analysis of the particular facts and of the proper application of the various policy considerations underlying the

[268]CP 189 (n 22) para 3.142.
[269]*Servier* (CA) (n 10) [75] (Etherton LJ).
[270]CP 189 (n 22) para 1.14, 3.137
[271]*Servier* (CA) (n 10) [73] (Etherton LJ); *ParkingEye Ltd v Somerfield* (n 10) [53], [68], [70]-[72], [75], [77], [79] (Toulson LJ).

> illegality principle so as to produce a just and proportionate response to the illegality.[272]

He said if the illegality defence applies at all it must find its justification on the policies underlying it.[273] The policies identified by him were those listed by the Law Commission of 'furthering the purpose of the rule which the illegal conduct has infringed; consistency; the claimant should not profit from his or her own wrong; deterrence; and maintaining the integrity of the legal system'.[274] He argued that when considering application of those policies, the court is not exercising a discretion based on notions of public conscience.[275] To support this he cited Lord Hoffmann's dictum in *Gray* noted earlier in the chapter that *ex turpi causa* is a policy based on a group of reasons. Etherton LJ noted that there are many cases both before *Tinsley* and after in which it has been recognised that the illegality defence does not apply 'where the unlawful act is merely trivial or where the illegality is the result of an inadvertent breach of some law'.[276] In essence he was referring to the factors of seriousness of illegality and intention. In their Consultation Paper, the Law Commission had identified these

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[272]*Servier* (CA) (n 10) [75] (Etherton LJ).
[273]*Servier* (CA) (n 10) [66] (Etherton LJ).
[274]ibid
[275]*Servier* (CA) (n 10) [69], [70] (Etherton LJ); cf Strauss 'Ex turpi causa oritur actio?' (n 193) 246, 248-249 'Whether the proportionality test is really a "different thing" from the public conscience test may again be doubted'.
[276]*Servier* (CA) (n 10) [73], [74] (Etherton LJ); see also *Gray* (HL) (n 2) [83] (Lord Rodger); *Stone & Rolls* (n 37) [24] (Lord Phillips), [179] (Lord Walker), [219] (Lord Mance); see also *United Project Consultants v Leong Kwok Onn* [2005] 4 SLR 214 at [56], [57] (Yong Pung How CJ).

factors as important to determining whether denying relief through application of the illegality defence is a just and proportionate response to the unlawful conduct.[277]

The just and proportionate response to the illegality test builds on the public conscience test, providing a clearer statement that the balancing process is one of assessing and weighing a number of different policies underlying the illegality defence.[278] Viewed in this way, Lord Wilson's approach in *Hounga* can be said to be an example.[279] There he had weighed several polices holding that allowing the claim for compensation would not reflect a profit from the crime and would not condone illegality thereby not harming the integrity of the legal system.[280] Rather, denying the claim would have the adverse effect of condoning the employers, and others like them (namely such cruel behaviour) towards illegal immigrants. Applying the illegality defence would also have run counter to the policy against trafficking.[281]

In *Servier*, Etherton LJ in the Court of Appeal applied the just and proportionate response to illegality test. The facts of the case were as follows. Proceedings had been brought against Apotex for patent infringement. Apotex had begun selling in the United Kingdom a drug which was patented by Servier in Canada. Servier obtained an injunction restraining Apotex from importing the product into the United Kingdom until trial, in return for the undertaking that Servier would compensate Apotex in damages if

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[277]CP 189 (n 22) para 3.126, 3.129,3.134, 3.135.
[278]*Servier* (CA) (n 10) [75] (Etherton LJ).
[279]see *Hounga* (UKSC) (n 4) [44], [50]-[52] (Lord Wilson); see also *Servier* (UKSC) (n 11) [61], [62] (Toulson LJ).
[280]*Hounga* (UKSC) (n 4) [44] (Lord Wilson).
[281]*Hounga* (UKSC) (n 4) [44],[50]-[52] (Lord Wilson).

the courts later held that the injunction caused loss to Apotex.[282] The trial judge in 2007 held that the European patent was invalid. He discharged the injunction and directed an inquiry as to damages. Meanwhile in Canada, the Federal Court of Canada ruled that the patent was valid and had been infringed. Servier in the English Court then argued that Apotex could not recover damages under the undertaking because the claim was founded on Apotex's illegal act of patent infringement.[283] The Court of Appeal held that the illegality defence did not apply.[284]

In reaching his decision Etherton LJ took into account a number of different considerations. He examined the conduct of the parties, holding that Apotex had honestly and genuinely believed that the Canadian patent was invalid.[285] He also took into account the consequence of denying the claim, noting that the grant of a patent confers on the patentee a monopoly, and if that patent is invalid then it confers on the holder of the invalid patent an unjustified benefit.[286] He ruled that the grant of the injunction gave Servier a monopoly over what was an invalid patent.[287] This is because within a week of granting of the injunction the High Court held that the European patent was invalid.[288] He also considered the culpability of the parties, noting that Apotex honestly believed that the patent was invalid thus selling the product 'is low on the scale of culpability in terms of the illegality defence'.[289] Furthermore he noted that the sales of the product in the UK, but for the injunction granted to Servier, were not unlawful

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[282] *Servier* (UKSC) (n 11).
[283] ibid.
[284] *Servier* (CA) (n 10) [60] (Etherton LJ).
[285] *Servier* (CA) (n 10) [81] (Etherton LJ).
[286] *Servier* (CA) (n 10) [82] (Etherton LJ).
[287] ibid.
[288] ibid.
[289] ibid.

since patents are territorial.[290] In other words, the tort of patent infringement comes to an end at the border.[291] The injunction granted in Canada prevented Apotex from selling the products in Canada only.[292] Etherton LJ therefore held in Apotex's favour, subject to one qualification that their damages be reduced to reflect the amount for patent infringement. Namely, reducing the damages having regard to the profits made by Apotex; which could have been recovered by Servier under Canadian law for unlawful manufacture in Canada of the products.[293] He thus considered the policy of comity.[294]

Etherton LJ's exposition of the just and proportionate response to illegality test was adopted by Sir Robin Jacob in *Parkingeye* where he said that proportionality involved an 'assessment of how far refusal of the remedy furthers one or more of the specific policies underlying the defence of illegality'.[295] On the facts of *Parkingeye* (discussed in chapter 2) which concerned a claim for damages for loss caused to the claimant for early termination of a contract, Sir Robin Jacob held that allowing the claim did not involve an evasion of any of the policy rationales identified such as allowing the claimant to profit from their crime.[296] The claim was for loss caused to the claimant because of the defendant's early termination and not a profit from wrongdoing.[297] Moreover, Toulson LJ in *Parkingeye* took into account the intention of the wrongdoer; the centrality of illegality to the contract; and the gravity of illegality in holding that it

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[290] *Servier* (CA) (n 10) [83], [85] (Etherton LJ).
[291] ibid.
[292] *Servier* (CA) (n 10) [83] (Etherton LJ).
[293] *Servier* (CA) (n 10) [88] (Etherton LJ).
[294] *Servier* (CA) (n 10) [88] (Etherton LJ).
[295] *ParkingEye Ltd v Somerfield* (n 10) [18], [39] (Sir Robin Jacob); *Servier* (CA) (n 10) [75] (Etherton LJ). It is notable that both Sir Robin Jacob and Etherton LJ said that the proportionality approach is not an exercise of judicial discretion.
[296] *ParkingEye Ltd v Somerfield* (n 10) [39] (Sir Robin Jacob).
[297] *ParkingEye Ltd v Somerfield* (n 10) [18] (Sir Robin Jacob), [77] (Toulson LJ).

would not be a just and proportionate response to the illegality to deny the claimant a remedy.[298]

The just and proportionate response to illegality test was strongly condemned by Lord Sumption in the Supreme Court in *Servier,* when Servier appealed against the decision to pay damages to Apotex. Whilst agreeing that the illegality defence did not apply in this case, Lord Sumption criticised the just and proportionate test for being discretionary, leading to subjective judgments based on how badly the claimant had behaved and how much that mattered.[299] He argued that such an approach makes outcomes difficult to predict.[300] He said the illegality defence should be applied as a rule of law and not an exercise of balancing merits of the parties.[301] He decided the case on the basis that patent infringement did not constitute 'turpitude' for the purpose of the illegality defence as it did not engage the public interest.[302] Patent infringement he argued offended against interests that are private, thus the court should not withhold the remedy sought.[303] He further said that the just and proportionate response to illegality test is contrary to established legal principle as set out in the *Tinsley* (the reliance test) which still represented the law.[304]

In answer to the above it is submitted here, as noted earlier in the chapter, Lord Phillips observed in *Stone & Rolls* that the reliance test cannot be applied as a rule of thumb

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[298]*ParkingEye Ltd v Somerfield* (n 10) [53],[68],[70]-[72], [75], [77], [79] (Toulson LJ).
[299]*Servier* (UKSC) (n 11) [21] (Lord Sumption).
[300]ibid.
[301]*Servier* (UKSC) (n 11) [13C-D] (Lord Sumption).
[302]*Servier* (UKSC) (n 11) [28], [30] (Lord Sumption).
[303]ibid.
[304]*Servier* (UKSC) (n 11) [13], [19], [21] (Lord Sumption); see further Fisher, 'The ex turpi causa principle in Hounga and Servier' (n 20) 863.

rather it is 'necessary to give consideration to the policy underlying ex turpi causa…to decide whether this defence'[305] is bound to defeat the claim. Moreover, the Law Commission observed in their consultation paper on the illegality defence, whilst the courts have referred to the:

> illegality doctrine as being one which may operate indiscriminately and apparently applying a set of rules, the courts [have taken] into consideration a whole variety of factors which ensure that relief is only denied where it is a fair and proportionate response to the claimant's conduct.[306]

These factors are tied to policies that underlie the defence.[307] The factors and policies include whether allowing the claim would undermine the purpose of the rule which rendered the relevant conduct unlawful;[308] the seriousness of the illegality, how closely connected the illegality is to the claim and the conduct of the parties; including their relative culpability.[309] In *Archbolds* the court took into account that allowing the claim will not undermine the purpose of the statutory provision infringed. The lack of relevant licence there did not have any effect on the defendant's failure to take care. The illegality was not closely connected to the claim in negligence.[310] In *St John* proportionality was considered as the court took the view that the consequences of denying the claim would result in a penalty in excess of that prescribed for infringement of the statutory provision. Moreover, considering the nature of illegality in *St John,*

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[305]*Stone & Rolls* (n 37) [25] (Lord Phillips).
[306]CP 189 (n 22) para 3.125.
[307]ibid.
[308]ibid.
[309]CP 189 (n 22) para 3.129, 3.131, 3.132, 3.134.
[310]CP 189 (n 22) para 3.131-3.132.

particularly where the statute did not prohibit the contract, disallowing the claim would mean that the ship-owner who, if he accidently overloads a ship by an inch, would not be able to recover even a penny of freight.[311] More significantly, Lord Toulson in the Supreme Court in *Servier* approved of Etherton LJ's approach, arguing a flexible approach is a perfectly legitimate one to take on the state of the authorities.[312] In particular he highlighted that a policy-based approach was adopted by the majority in the Supreme Court in *Hounga*,[313] where Lord Wilson carried out a thorough analysis of the underlying policies and competing policies to the illegality defence, by weighing and balancing them in reaching his decision.[314] Lord Toulson said that it was open to the Court of Appeal in *Servier* to follow the Supreme Court's analytical framework in *Hounga*.[315] Moreover, Lord Hughes in *Hounga* had said that before the illegality defence operates to bar the claim the courts need to consider the gravity of the illegality; knowledge or intention in relation to the illegality; and to 'consider the purpose of the law which has been infringed and the extent to which to allow a civil claim nevertheless to proceed will be inconsistent with that purpose'.[316] He said other factors may also be relevant and 'it is via considerations such as these that the general public policy is to be

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[311] CP 189 (n 22) para 3.135; *St. John* (n 56) 288 (Devlin J).
[312] *Servier* (UKSC) (n 11) [62] (Lord Toulson).
[313] *Hounga* (UKSC) (n 4); *Servier* (UKSC) (n 11) [62 B] (Lord Toulson).
[314] *Hounga* (UKSC) (n 4) [42F], [44],[46E-F], [50]-[52](Lord Wilson).
[315] *Servier* (UKSC) (n 11) [57] – [58], [62 B], [63C-D] (Lord Toulson); see further *Bilta* (n 12) [129], [173] (Lord Toulson and Lord Hodge); *Vita Food Products v Unus Shipping Company, Limited* [1939] A.C. 277, 293 (Lord Wright); *Stone & Rolls* (n 37) at [25] (Lord Phillips); *Gray* (HL) (n 2) [30] (Lord Hoffmann); for further support of this point see also *R (Best) v Chief Land Registrar* [2015] EWCA Civ 17; [2016] QB 23 at [51H], [52B-C], [70] (Sales LJ) in which Sales LJ expressly endorsed Lord Wilson's analytical framework.
[316] *Hounga* (UKSC) (n 4) [55] (Lord Hughes).

served'.[317] Lord Toulson also emphasised that the time had come for there to be a detailed reanalysis of *Tinsley*, particularly in light of the criticism of the reliance test by the judiciary in subsequent cases and by the Law Commission.[318]

It is submitted here that just and proportionate response to illegality, which bases decisions on more flexible considerations of policy and factors, provides justification for the application of the defence thereby making the decisions of the courts more coherent.[319] In the realm of public policy it seems appropriate and necessary for the courts to give consideration to the underlying policies to the illegality defence, both in favour of and against its application. Although one could argue that taking into consideration and weighing different factors can be carried out subjectively, one cannot overlook that such an approach makes the considerations at work more transparent. It is an approach which is preferable to the arbitrary, complex and uncertain rules of reliance, causation and inextricable link. Goudkamp also agrees with the policy-based approach as opposed to the rule-based reliance and inextricable link test. In particular he approves of the policy analysis in *Hounga* where Lord Wilson had considered whether applying the illegality defence to bar the claim would in fact serve any useful purpose by weighing both policies in favour of and against applying the defence.[320] Goudkamp condemns the reliance test on number of grounds namely that it is impossible to know whether the claimant needs to rely on his illegality leaving outcomes hostage to luck; it

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[317]ibid.
[318]*Servier* (UKSC) (n 11) [64] (Toulson LJ).
[319]*Patel* (UKSC) (n 1) [129], [141]-[142] (Lord Kerr); see *Stone & Rolls* (n 37) [25] (Lord Phillips);*Gray* (HL) (n 2) [30F-H] (Lord Hoffmann); *R (Best) v Chief* (n 315) [52] (Sales LJ)
[320]see Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 262; *Bilta* (n 12) [101] (Lord Sumption) where Lord Sumption recognised that 'an examination of competing policies may be required'.

is insensitive to the merits of the case; and because no convincing reason has been given 'why it should matter that the claimant needs to rely on his or her own illegality'.[321] He also condemned the inextricable link test arguing that it should be abandoned as it is unclear as to what it involves namely a causal inquiry or something different.[322] He concluded by making the very important point that:

> it is axiomatic that the law should not adopt rules that accomplish nothing worthwhile, which do not engage with the merits of the case at hand or which cause significant injustice to individual litigants.[323]

Adopting rules such as the 'reliance test that have nothing to do with the merits of claims and which are wielded with no attention being paid to whether denying recovery would yield any benefits'[324] is therefore inadequate to deal with issues of illegality.

3.5 Conclusion

This chapter argued that the rules relied upon pre-*Patel*, of the reliance, let the estate lie where it falls, the inextricable link and causation tests are not satisfactory enough to achieve the required clarity and certainty in the law.[325] They are complex, arbitrary, difficult to apply and unclear in their foundations, leading at times to harsh consequences without proper consideration of the illegality involved. The reliance test

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[321]Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 262.
[322]ibid.
[323]Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 16) 263.
[324]ibid.
[325]*Patel* (UKSC) (n 1) [134] (Lord Kerr);see also *Bilta* (n 12) [13] (Lord Neuberger).

operates arbitrarily basing decisions on equitable presumptions, and procedure. Often it is unclear whether the claimant needs to rely on the illegality, allowing the claimant to cover up their illegality thereby opening doors to unmeritorious cases. Let the estate lie where it falls also fails to take into consideration the nature and gravity of the illegality involved, and can lead to harsh results, particularly where the illegality is relatively minor. The causation test fails to take into account that there may in fact be two causes of the loss for which the claimant complains. In such cases it would be inadequate to hold that one is the true cause whilst the other a mere occasion. In other cases it would be unsatisfactory to hold that a person is the cause of their own discrimination.[326] The inextricable link is also problematic as it is unclear what it even means. Does an inextricable link mean a causation inquiry or does it involve something different. The courts have been inconsistent in their explanation of this test. It is also a test which has been inconsistently applied.[327] Considering these issues, and to counter the harshness which can arise from the application of the illegality defence, the law moved towards a flexible approach. The two tests adopted by the courts were the public conscience and just and proportionality test. The former involved assessing whether allowing the claim would be an affront to public conscience and weighing adverse consequences of denying and allowing relief. This test however, was expressly rejected by the House of Lords in *Tinsley* as being discretionary. Notwithstanding this, members of the judiciary who favoured a flexible approach went on to develop and adopt a just and proportionate response to illegality defence test as proposed by the Law Commission. This built on the public conscience test, providing more specifically that the balancing exercise to be

[326]Bogg and Green, 'Rights are not just virtuous' (n 168) 105.
[327]Compare *Hounga* (UKSC) (n 4) [37], [40] (Lord Wilson), [59] (Lord Hughes) with *Hounga* (CA) (n 192) [61] (Rimer LJ).

carried out is one which weighs the application of various policies rather than just furthering non-condonation. It also involves taking into consideration factors such as the nature of illegality and culpability of the parties. As the illegality defence has the effect of depriving the claimant of his normal rights and remedies, and because illegality covers a vast factual and normative range, a flexible approach to illegality in which considerations of policy and factors are taken into account appears to be preferable.[328] Such an approach provides transparent and logical justification for the application of the illegality defence as opposed strict immutable rules which ignore the illegality concerned. It is submitted here that a court should strive to achieve the most just response to illegality rather than acting in complete disregard of it on grounds that a rule, no matter how lacking, is to be applied for the sake of predictability at the expense of justice, particularly where the rule applied itself is unpredictable.[329] This chapter therefore also found that proportionality is a key principle in governing the application of the illegality defence, though it does not have support of all of the Justices of the Supreme Court the predominant critic being Lord Sumption. This thesis acknowledges however, that extensive flexibility can also pose difficulties; this will be illustrated in the following chapters 4, 5 and 6.

The chapter also reveals that the adoption of a variety of tests, with no clear precedent as to which is determinative, makes it uncertain as to which is the proper approach to the illegality defence.[330] This issue was exacerbated when differing approaches were

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[328]Toulson 'Illegality where are we now?' (n 23) 276; *Patel* (UKSC) (n 1) [142] (Lord Kerr).
[329]J.F. Burrows, 'Contract Statutes: The New Zealand Experience' (1983) *Statute L. Rev.* 76, 91.
[330]see *Sharma* (n 20) [37] (Etherton C).

adopted in the Supreme Court in *Servier, Hounga* and *Bilta*[331] as illustrated in both in this and chapter 2. This led to a call from the President of the Supreme Court Lord Neuberger in *Bilta* saying that the proper approach to the illegality defence needs to be addressed as soon as possible.[332] The Supreme Court was given this opportunity in *Patel.* However, as the next chapter will reveal the Supreme Court in *Patel* failed to put an end to the tension between the rule based and flexible approaches to the illegality defence.

[331]see *Bilta* (n 12) [60]-[63], [98]-[100] (Lord Sumption), [170]-[174] (Lords Toulson and Hodge).
[332]*Bilta* (n 12) [15] (Lord Neuberger).

CHAPTER 4

APPROACHES TO THE ILLEGALITY DEFENCE IN *PATEL*

4.1 Introduction

This chapter will examine the judicial speeches in *Patel v Mirza*[1] which highlight the inconsistencies in approaching the illegality defence. It traces the position taken by the judiciary from the Court of Appeal to the Supreme Court. The Court of Appeal speeches are of significance for two reasons. First, they illustrate the difficulties with the application of the reliance test. Second, they show that a flexible approach - examining the policy of the rule infringed (adopted by Gloster LJ) - is a more coherent and transparent form of reasoning than the reliance test in determining the application of the illegality defence. The chapter then examines the conflicting approaches taken in the Supreme Court in *Patel* drawing out the conclusions reached by the majority and minority. For the majority Lord Toulson in the Supreme Court laid down a trio of considerations (hereafter the Toulson test), which significantly draws from Gloster LJ's

[1][2015] Ch 271 (CA); *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.

approach, the work of the Law Commission and pre-*Patel* case law.[2] The chapter argues that Lord Toulson's approach is neither revolutionary nor does it tear apart the law of illegality, contrary to the minority's criticism of it. It merely draws out more clearly the policies and factors which the courts were already taking into account to determine the application of the illegality defence. This chapter also examines the minority's approach in the Supreme Court in *Patel* who strongly condemned the trio of considerations as being discretionary and far too vague to 'serve as the basis on which a person may be denied his legal rights'.[3] The minority preferred a rule-based approach, particularly the reinterpreted reliance test and the *restitutio in integrum* rule. They argued that their approach brought certainty and clarity into the law of illegality. This chapter argues that the minority's approach is plagued with several issues. These will be drawn out particularly through academic responses to the minority's approach post-*Patel.* The chapter argues that Lord Toulson's policy considerations and proportionality-based approach is preferable to the rules presented by the minority, as it makes the decisions of the court not only transparent but more rational. Notwithstanding this, the chapter acknowledges the concern raised by the minority that Lord Toulson's test has the potential of creating uncertainty as it requires the assessment and balancing of a number of different factors. Moreover, Lord Mance in the minority raised the concern that support for Lord Toulson's flexible approach in other common law jurisdictions is

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[2]see *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, 288, 289 (Devlin J); *Narraway v Bolster* [1924] EGD 217, 218 (Lord Darling); *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374, 390 (Devlin LJ); *ParkingEye Ltd v Somerfield Stores Ltd* [2013] QB 840 (CA) at [57], [65], [68], [71] [72], [75], [76], [79] (Toulson LJ); *Hounga v Allen* [2014] UKSC 47,[2014] 1 WLR 2889 at [43]-[44] (Lord Wilson). The Toulson test also draws from other common law jurisdictions in particular *Nelson v Nelson* [1995] 4 LRC 453; *Still v Minister of National Revenue* [1997] Carswell Nat 2193, [1998] 1 FC 549; *Hall v Hebert* [1993] 2 SCR 159; Illegal Contracts Act 1970.

[3]*Patel* (UKSC) (n 1) [265] (Lord Sumption).

slender. Chapter 5 will therefore, examine the approach taken in other common law jurisdictions towards the illegality defence to see if there is ample support for the flexible approach, in particular the considerations laid down by Lord Toulson. After examining the position in other common law jurisdictions, the thesis will consider the issues, rebuttals and lingering concerns of the Toulson test in Chapter 6 (raised by academics post-*Patel*). These concerns encourage the necessity of reforming Lord Toulson's approach. To implement such reform however, one needs to find a principle which has support from all of the justices in *Patel* (and other common law jurisdictions) so that the reformed approach promotes uniformity and consistency; encouraging certainty in the law. That key principle will be identified in this chapter from the speeches of the Supreme Court in *Patel.*

4.2 *Patel v Mirza*

In *Patel*, the claimant, Mr Patel had transferred £620,000 to the defendant, Mr Mirza, for the purpose of betting on the price of RBS shares based on insider information. Mr Mirza's expectation of obtaining this information proved to be mistaken and the bets were not placed. Subsequently, Mr Mirza failed to repay the money to Mr Patel, who then brought a claim in unjust enrichment to recover the money. The agreement between Mr Patel and Mr Mirza amounted to a conspiracy to commit the offence of insider dealing under s 52 of the Criminal Justice Act 1993. The issue was whether the illegality defence precluded a party to a contract tainted with illegality from recovering money paid under that contract in an unjust enrichment claim. Though both the Court of

Appeal and Supreme Court unanimously held that Mr Patel could recover the £620,000, their approach to the illegality defence differed significantly. In the Court of Appeal, Rimer LJ and Vos LJ applied the reliance test, whilst Gloster LJ predominantly based her decision on examining the policy behind the statutory provision infringed and whether that would be undermined if the claim in unjust enrichment were to be allowed. The latter of the two approaches was supported by Lord Toulson for the majority in the Supreme Court, whilst the minority in the Supreme Court preferred the rule-based approach. An examination of these judgments will be carried out below.

4.2.1 The Court of Appeal

The claimant in *Patel* pleaded that the defendant had been unjustly enriched in receiving the money transferred to him and failing to repay it. This was on the basis that the consideration for which he paid the money to the defendant had failed because the defendant did not perform his obligation under the agreement.[4] The relevant principle of unjust enrichment is:

> a defendant's enrichment is prima facie unjust if the claimant has enriched the defendant on the basis of a consideration which fails. The consideration may have been a promised counter-performance (whether under a valid contract or not), an event or a state of affairs, which failed to materialise.[5]

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[4]*Patel* (CA) (n 1) [11] (Rimer LJ).
[5]*Patel* (UKSC) (n 1) [13] (Lord Toulson); *Patel* (CA) (n 1) [11], [20]-[22] (Rimer LJ), [102] (Vos LJ).

4.2.1.1 Reliance Test

Rimer LJ and Vos LJ held that to make good the claim for return of money based on failure of consideration, Mr Patel had to rely on the illegal agreement.[6] This is because to show there was a failure of consideration, Mr Patel had to show what that consideration was. In doing so he had to plead all the necessary facts: he had paid the money under an agreement to use it in betting on the movement of shares based on insider information.[7] Rimer LJ held that Mr Patel's claim was completely reliant on the illegality 'as he was claiming to be entitled to return of money because the illegal agreement under which he had advanced it was not carried out'.[8] Based on the reliance test, Mr Patel's reliance on the illegality meant that the illegality defence would bar the claim.[9]

Gloster LJ disagreed with the above. She was of the opinion that Mr Patel did not need to rely on the illegality to maintain his claim whether in unjust enrichment or for restitution on agency grounds. She argued that all Mr Patel needed to show was that the money was transferred for the purpose of speculating on 'RBS share price on Mr Mirza's IG Index account'.[10] As this speculation never occurred, the result was that Mr Patel was entitled to the return of the money because of Mr Mirza's obligation as an agent to account.[11] She explained that when an agent has received money on behalf of

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[6] *Patel* (CA) (n 1) [20]-[22] (Rimer LJ), at [102] (Vos LJ).
[7] *Patel* (CA) (n 1) [20]–[22] (Rimer LJ); see also *Patel* (UKSC) (n 1) [13] (Lord Toulson).
[8] *Patel* (CA) (n 1) at [20], [22] (Rimer LJ), at [102] (Vos LJ).
[9] Cf. *Patel* (CA) (n 1) [92] (Gloster LJ); see also *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39, [2009] 1 AC 1391 at [25] (Lord Phillips).
[10] *Patel* (CA) (n 1) [92] (Gloster LJ).
[11] ibid.

his principal or for a particular purpose which he does not carry out, the principal is entitled to sue the agent in restitution to recover that money.[12] The agent holding the money is bound to pay it to the principal, even if it is received in relation to an illegal transaction.[13] On the facts of *Patel*, Mr Patel's entitlement to recover the money arose out of and was founded on collateral rights namely, Mr Mirza's obligation as an agent to account for the money paid to him, where the purpose for which it was received was not carried out.[14] Gloster LJ emphasised that if a claimant such as the one in *Tinsley* who had defrauded a third party could recover her investment, she could not see why Mr Patel could not enforce his rights as a principal against his agent for the return of money.[15]

The above speeches illustrate that it is not always clear whether it is necessary for the claimant to rely on the illegality to bring his claim, and whether the illegality will be considered as central or collateral to the claim. The finding of reliance ultimately rested on how the Court of Appeal judges categorised the claim and their choice of material issues. Rimer LJ and Vos LJ focused on the contractual aspects whilst Gloster LJ focused on agency and unjust enrichment. The reliance test ultimately is prone to being applied both inconsistently and subjectively with the potential of leading to opposing results.

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[12] *Patel* (CA) (n 1) [86] (Gloster LJ).
[13] ibid.
[14] *Patel* (CA) (n 1) [66], [80], [86], [89] (Gloster LJ).
[15] *Patel* (CA) (n 1) [92] (Gloster LJ).

Whilst the judges differed on the reliance issue, they all agreed that Mr Patel was entitled to recover the money by the application of the doctrine of *locus poenitentiae*.[16] Rimer LJ and Vos LJ said that as no part of the insider trading agreement had been carried into effect, Mr Patel could recover the money paid.[17] Gloster LJ said (if she was wrong on the reliance issue and Mr Patel did need to rely on the illegality) she would allow the appeal as the illegal purpose had not been carried into effect.[18] The continued significance of the doctrine of *locus poenitentiae*, however, is cast into doubt after the Supreme Court judgments in *Patel*. This is illustrated later in the chapter.

4.2.1.2 Flexible approach

It is noteworthy that Gloster LJ had also adopted a flexible approach of considering the policy behind the statutory provisions infringed and proportionality in reaching her decision. She began by saying that one needs to 'consider the policy underlying the rule that renders the contract illegal and whether this would be stultified if a claim in unjust enrichment were allowed'.[19] She noted that s 52 of the Criminal Justice Act 1993 is directed at deliberate exploitation of unpublished information which may cause market abuse by making it an 'offence for a person in possession of insider information to deal in securities'.[20] The agreement between Mr Patel and Mr Mirza amounted to a

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[16]*Patel* (CA) (n 1) [39], [45] (Rimer LJ), at [118] (Vos LJ); *Tribe v Tribe* [1996] Ch 107,133A, 134E-135B (Millett LJ); *Taylor v Bowers* (1876) 1 QBD 291, 300 (Mellish LJ), 295 (Cockburn CJ).
[17]*Patel* (CA) (n 1) [45], [46] (Rimer LJ), [113], [117], [118] (Vos LJ); *Tribe* (n 16) 133-135 (Millett LJ).
[18]*Patel* (CA) (n 1) [94], [95], [98] (Gloster LJ).
[19]*Patel* (CA) (n 1) [65] Gloster LJ).
[20]*Patel* (CA) (n 1) [67] Gloster LJ).

conspiracy to commit the offence of insider dealing, but as the transaction based on insider dealing had not taken place she said:

> it is impossible to construe section 52…as being directed at some hypothetical mischief lying in the return to a party intending to be involved in such a transaction, of funds which he has advanced to another party also intending to be so involved, but which have not been utilised for the purposes of such transaction.[21]

Moreover, she highlighted that s 63(2) of the Criminal Justice Act 1993 provided that no contract shall be unenforceable by reason only of s 52.[22] In light of these provisions she concluded that she could not see any public policy against dealing in securities as reflected in s 52 (or against an agreement for conspiracy reflected in s 1 Criminal Law Act 1977), that required the claimant to lose his right to return of money where insider dealing had not been carried out.[23] Emphasising in particular on s 63(2) of the 1993 Act she said that if the:

> actual securities contract entered into on the basis of insider information is not… unenforceable it is hard to see on what possible basis the public policy behind the rule against insider trading requires the anterior contract …for the deposit of Mr Patel's funds with Mr Mirza, as Mr Patel's agent, to be struck down as unenforceable, so as to deny Mr Patel recovery of the moneys he paid over.[24]

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[21] *Patel* (CA) (n 1) [67] Gloster LJ).
[22] *Patel* (CA) (n 1) [68] Gloster LJ).
[23] *Patel* (CA) (n 1) [67], [74] Gloster LJ).
[24] *Patel* (CA) (n 1) [69] Gloster LJ).

She further noted that the claim was not one to enforce the criminal conspiracy, such as a claim for profits as a result of bets placed, but for the sums originally transferred.[25] In light of the policy considerations, whereby allowing the claim would not undermine the policy of the rule infringed, nor allow the claimant to recover a profit from his crime, Gloster LJ held that it would be a proportionate response to illegality to allow the claim.[26] She said refusing assistance would be the law drawing up its skirts 'without proper consideration as to the seriousness of the claimant's loss or as to how disproportionate his loss was in relation to the unlawfulness of his conduct'.[27] It would also disregard the public policy consequences of allowing an equally if not more 'blameworthy agent to profit disproportionately from the illegal nature of the proposal'.[28]

Considering policies and proportionality, as will be remembered, was supported pre-*Patel*, most significantly by Lord Phillips in *Stone & Rolls Ltd v Moore Stephens*[29] (hereafter *Stone & Rolls*), Lord Wilson in *Hounga v Allen*[30] (hereafter *Hounga*), Etherton LJ in *Les Laboratoires Servier v Apotex Inc*[31](hereafter *Servier*), (whose approach was approved of by Lord Toulson in the Supreme Court in *Servier*)[32] and by Lords Toulson and Hodge in *Bilta (UK) Ltd v Nazir (No 2).*[33] The approach taken by

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[25]*Patel* (CA) (n 1) [66], [70] Gloster LJ).
[26]*Patel* (CA) (n 1) [70], [72], [74], [76] (Gloster LJ).
[27]*Patel* (CA) (n 1) [74] (Gloster LJ); see also *Saunders v Edwards* [1987] 1 WLR 1116, 1134 (Bingham LJ).
[28]*Patel* (CA) (n 1) [74] Gloster LJ).
[29][2009] UKHL 39, [2009] 1 AC 1391.
[30][2014] UKSC 47, [2014] 1 WLR 2889.
[31][2013] Bus LR 80 (CA).
[32][2014] UKSC 55, [2015] AC 430.
[33][2015] UKSC 23, [2016] AC 1 at [129], [130], [195], [208] (Lord Toulson and Lord Hodge); see also case law in chapter 2 and 3: *Stone & Rolls* (n 9) [25] (Lord Phillips);

Gloster LJ is not novel or an unjustified development, but is based on precedent. This approach shows the courts' willingness to 'explore the relevant policy reasons which are at the heart of the defence'[34] thereby making their decisions more rational and transparent. Put differently, it allows the courts to take a more principled and consistent approach, which matches the facts, rather than apply a rigid rule, which is inconsistent in application and which leads to arbitrary results.[35]

4.2.2 The Supreme Court

4.2.2.1 Policy Considerations and Proportionality

Lord Toulson gave the lead judgment for the majority with which Lady Hale, Lord Wilson and Lord Hodge concurred. Lord Kerr also gave a separate judgment supporting Lord Toulson's approach. A number of significant points emerge from Lord Toulson's judgment. Firstly, Lord Toulson departed from the *Tinsley* reliance test as an approach to the illegality defence.[36] He emphasised the reliance test's unsatisfactory dependency on equitable presumptions which can lead to arbitrary results. He also emphasised the reliance test's lack of consideration for the nature of illegality involved and the policies underlying the illegality defence, making it an inadequate approach to the *ex turpi causa*

Hounga (UKSC) (n 2) [42], [44], [52] (Lord Wilson); *Servier* (UKSC) (n 32) [57]–[58], [62 B],[63C-D] (Lord Toulson); see also *Servier* (CA) (n 31) [66], [75] (Etherton LJ); *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339 at [30] (Lord Hoffmann); *ParkingEye Ltd v Somerfield* (n 2) [18], [39] (Sir Robin Jacob), [57], [68], [71]-[79] (Toulson LJ).

[34]The Law Commission, *The Illegality Defence* (Law Com No 320, 2010) para 3.36.

[35]see *Patel* (UKSC) (n 1) [142] (Lord Kerr).

[36]*Patel* (UKSC) (n 1) [110],[114] (Lord Toulson).

policy which is based on a group of different reasons.[37] Lord Kerr in agreement, highlighted that the reliance test is difficult to apply as it is unclear what exactly it is that needs to be relied on and whether the claimant needs to rely on the illegal dimension in advancing his claim.[38] The inability to predict this leads to uncertainty. This was evident from the Court of Appeal's judgments in *Patel*, where there was a sharp difference of opinion between the judges as to whether or not reliance on the illegal aspect of the agreement was present.[39] Lord Kerr therefore, said that the reliance test had failed to deliver what its supporters have claimed to be its 'virtues [namely] ease of application and predictability of outcome'.[40] Secondly, Lord Toulson emphasised that it is unnecessary to consider the doctrine of *locus poenitentiae* since it only assumed importance because of the wrong approach to the issue, namely, as an exception to the reliance test.[41] Thirdly, Lord Toulson endorsed the policy analysis and proportionality based approach adopted by Gloster LJ in the Court of Appeal.[42] Lord Toulson then laid down the following trio of considerations (which he said is the proper approach to the illegality defence):

> The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system … In assessing whether the public interest would be harmed in

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[37]*Patel* (UKSC) (n 1) [18], [29], [52], [87], [88], [94], [111] (Lord Toulson); see further R.A Buckley, 'Illegal transactions: chaos or discretion?'(2000) 20 *Legal Studies* 155, 179; *Gray* (HL) (n 33) [30] (Lord Hoffmann).
[38]see *Patel* (UKSC) (n 1) [134], [136], [138], [139] (Lord Kerr), [161]-[162], [172] (Lord Neuberger).
[39]*Patel* (UKSC) (n 1) [134] (Lord Kerr).
[40]*Patel* (UKSC) (n 1) [134], [138], [139], [142] (Lord Kerr).
[41]*Patel* (UKSC) (n 1) [115], [116] (Lord Toulson).
[42]*Patel* (UKSC) (n 1) [115] (Lord Toulson).

> that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim,[43] b) to consider any other relevant public policy on which the denial of the claim may have an impact[44] and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.[45]

He further said that deciding whether denial of the claim would be a proportionate response 'various factors may be relevant such as seriousness of illegal conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties respective culpability',[46] noting in particular that 'respect for the integrity of the justice system is not enhanced if it appears to produce arbitrary, unjust or disproportionate results'.[47]

Support for the trio of considerations can be found in pre-*Patel* case law examined in chapter 2 and 3. The predominant concern expressed by Lord Toulson of maintaining the integrity of the legal system was significantly highlighted by Lord Wilson in

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[43]In some cases the purpose may be defeated by applying the illegality defence, see for example *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745 in which Diplock LJ observed that the purpose of the relevant statutory prohibition in that case would in fact have been defeated if the doctrine of illegality was applied to it to bar the claim; see also *Patel* (UKSC) (n 1) [102] (Lord Toulson)

[44]For example in *Hounga* (UKSC) (n 2) and *R (Best) v Chief Land Registrar* [2015] EWCA Civ 17, [2016] QB 23 in which countervailing policies were balanced; see also *Patel* (UKSC) (n 1) [103] (Lord Toulson).

[45]*Patel* (UKSC) (n 1) [120] (Lord Toulson).

[46]*Patel* (UKSC) (n 1) [107] (Lord Toulson); see also Andrew Burrows 'range of factors approach' in Andrew Burrows, *Restatement of the English Law of Contract* (Oxford University Press, 2016) 229-230, which are largely the factors adopted by Lord Toulson, and which Lord Toulson had expressly stated in his judgment as being helpful, although he did say that he would not lay down a prescriptive list.

[47]*Patel* (UKSC) (n 1) [108] (Lord Toulson).

Hounga. There Lord Wilson held that allowing an illegal immigrant compensation for injury would not condone illegality or approve of such conduct so as to harm the integrity of the legal system, nor would it represent an award reflecting a profit from the crime.[48] Furthermore, the first consideration of the Toulson test, namely considering the purpose of the prohibition transgressed, has been the basis of determining the application of the illegality defence in a number of different cases. In contract, this included barring the claim in *Re Mahmoud v Ispahani*[49], where the purpose of the statute prohibited the contract thereby rendering it unenforceable. In *St John Shipping Corp v Joseph Rank Ltd*[50] and *Archbolds (Freightage) Ltd v S Spanglett Ltd*[51] the courts emphasised that the purpose of the statute was not to render the contract unenforceable and further the penalty prescribed for the infringement was sufficient to serve the purpose of the rule infringed. The claim was therefore not defeated by the illegality defence. In tort, the cases of *Gray* and *Clunis v Camden and Islington Health Authority*[52] where the claimant's action for loss of earnings resulting from imprisonment/detention after committing manslaughter was barred by the illegality defence, reflected the principle of furthering the law under which the claimant was convicted. By denying the claim the claimant was prevented from stultifying or otherwise undermining the criminal sanction imposed on him. In *Bilta* Lords Toulson and Hodge considered the purpose of s172(3) of the Companies Act 2006, holding that if the claim were denied the purpose of that rule would be undermined. In unjust

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[48]*Hounga* (UKSC) (n 2) [44] (Lord Wilson).
[49][1921] 2 KB 716.
[50][1957] 1 QB 267.
[51][1961] 1 QB 374.
[52][1998] QB 978; see also *Gray* (HL) (n 33)

enrichment, in *Boissevain v Weil*[53] the court refused recovery of a loan, the borrowing of which was prohibited by the Regulation 2 of the Defence Finance Regulations 1939.[54] In trusts, in *Ex parte Yallop*[55] the court refused to recognise the claimant's interest in a ship on the basis that doing so would defeat the policy of the statute infringed.[56]

The second consideration of the Toulson test of considering any other relevant policy also has support, predominantly found in Lord Wilson's judgment in *Hounga*, in which he considered that denying the claim would run counter to preventing trafficking. Ernest Lim argues that the first two considerations of the Toulson test work together to ensure that there is consistency in the law since the determination of whether to deny the claim is dependent on whether the purpose of rule infringed and any other relevant policy is furthered or undermined.[57]

In support of Lord Toulson's trio of considerations, Lord Kerr argued that this approach examines why illegality should or should not operate to deny the remedy claimed and provides justification for the application of the illegality defence in whatever context it arises.[58] For example, denying the claim because it undermines the purpose of the rule

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[53][1950] AC 327.
[54]*Boissevain* (n 53) 343 (Lord Radcliffe).
[55](1808) 15 Ves 60, 66.
[56]*Ex parte Yallop* (n 55) 66.
[57]Ernest Lim, '*Ex Turpi Causa*: Reformation not Revolution' (2017) 80 *MLR* 927,933, 934.
[58]*Patel* (UKSC) (n 1) [129], [139], [142] (Lord Kerr); *Stone & Rolls* (n 9) [25] (Lord Phillips); *Gray* (HL) (n 33) [30] (Lord Hoffmann); *Hounga* (UKSC) (n 2) [42], [44] (Lord Wilson); *Servier* (CA) (n 31) [73] (Etherton LJ).

infringed is a better explanation than whether one needs to rely on their illegality for the application of the illegality defence.

The third and final consideration of the Toulson test namely, proportionality also finds support in pre-*Patel* case law such as *St John, Narraway v Bolster*[59], *Servier*[60] and *ParkingEye Ltd v Somerfield Stores Ltd.*[61] In particular Toulson LJ in *ParkingEye* considered the factors of the object and intent of the claimant; centrality of illegality to the contract; and gravity of illegality as being of importance.[62] These factors also correlate to those which the Law Commission had suggested the courts should take into account. Andrew Burrows also supports this approach.[63] Such an approach is preferable to the rules of reliance, let the estate lie where it falls, inextricable link and causation, as the courts address the nature of illegality and relative culpability of the parties alongside intention and centrality of illegality.[64]

Notwithstanding that the courts can address the nuances of individual cases by taking into account various factors;[65] the third consideration of the Toulson test can be quite

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[59][1924] EGD 217.
[60]see *Servier* (CA) (n 31) [73], [75] (Etherton LJ);*Servier* (UKSC) (n 32) [62] (Lord Toulson).
[61][2012] EWCA Civ 1338; For pre-*Patel* case law see chapters 2 and 3.
[62]*ParkingEye Ltd v Somerfield* (n 2) [53], [68], [70]-[72], [75], [77], [79] (Toulson LJ).
[63]The Law Commission, *The Illegality Defence: A Consultative Report* (Law Com CP No 189, 2009) para 3.126, 3.129, 3.134, 3.135, 3.142; A. Burrows, *Restatement of the English Law of Contract* (n 46) 229-230.
[64]see also Alan Bogg 'Illegality in Labour Law after *Patel v Mirza* : Retrenchment and Restraint' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 285.
[65]see Andrew Burrows 'A New Dawn for the Law of Illegality' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 24, 34,38;Roger Toulson 'Illegality where are we now?' in Andrew Dyson, James

problematic as judges may reach differing conclusions on the same factors. Take the facts of *Patel* as an illustration. There it can be argued that the conspiracy was of such a kind which attracts a maximum prison sentence (seven years under s 61(1)(b) of the Criminal Justice Act 1993). It can therefore be classified as sufficiently serious illegality.[66] However, with no overarching principle determining as to whether the illegality defence applies, disparity in the degree of seriousness of the illegality could easily lead to subjective and discretionary decisions.[67] This was the basis on which the minority's argument in *Patel* rested.[68]

Lord Sumption for the minority argued that a test which is dependent on a range of unlimited factors, and their perceived relevance and relative weight, is discretionary.[69] He argued that it leads to decisions being made on a subjective basis; with no one factor being the determinant of the outcome, resulting in uncertain law.[70] Furthermore, if the application of the illegality defence is to depend on the 'court's view of how illegal the illegality was … there would appear to be no principle whatever to guide the evaluation other than the judge's gut instinct'.[71] Lord Clarke, agreeing with Lord Sumption, argued that the proper approach to the illegality defence should not be left to assessing the

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Goudkamp, Frederick Wilmot-Smith, and Andrew Summers (ed) *Defences in Contract* (Bloomsbury Publishing PLC, 2017) 276.

[66]see also Graham Virgo 'Illegality and Unjust Enrichment' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 221, 222.

[67]*Patel* (UKSC) (n 1) [216], [217], [219] (Lord Clarke).

[68]The Toulson test has also been criticised on this basis by academics post-*Patel*. The academic arguments will be addressed in chapter 6.

[69]*Patel* (UKSC) (n 1) [261]-[265] (Lord Sumption).

[70]*Patel* (UKSC) (n 1) [265] (Lord Sumption).

[71]*Patel* (UKSC) (n 1) [262] (Lord Sumption).

problem on a case by case basis by reference to a number of factors.[72] Rather, a framework of principle should be provided which addresses the problems.[73] Both Lord Clarke and Lord Sumption concluded that the range of factors approach is 'far too vague and potentially too wide to serve the basis on which a person may be denied his legal rights'.[74] Lord Mance also criticised the Toulson test on the basis that it leads to discretionary decisions, as the courts take into account a 'mélange of ingredients, about the overall merits or strengths, in a highly unspecific non-legal sense, of the respective claims of the public interest and of each of the parties'.[75] He argued that this approach of weighing and balancing adverse consequences would constitute a revolution in this area of law replacing a system of rules with discretion.[76] He further argued that the support which Lord Toulson advanced for his trio of consideration from other common law jurisdictions was slender as it boiled down simply to the Australian case of *Nelson v Nelson*[77] and the New Zealand Illegal Contracts Act 1970.[78] By and large the minority argued that the Toulson test 'converts a legal principle into an exercise of discretion in the process exhibiting all the vices of complexity, uncertainty, arbitrariness and lack of transparency'.[79] The concerns raised by the minority largely coincide with those raised by academics post-*Patel* which will be addressed in chapter 6.

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[72]*Patel* (UKSC) (n 1) [217] (Lord Clarke).
[73]ibid.
[74]*Patel* (UKSC) (n 1) [217] (Lord Clarke), [264], [265] (Lord Sumption).
[75]*Patel* (UKSC) (n 1) [206] (Lord Mance).
[76]*Patel* (UKSC) (n 1) [206] (Lord Mance) [264], [265] (Lord Sumption); see also *Tinsley v Milligan* [1994] 1 AC 340 (HL) 363 (Lord Goff).
[77][1995] 4 LRC 453.
[78]*Patel* (UKSC) (n 1) [207] (Lord Mance).
[79]*Patel* (UKSC) (n 1) [265] (Lord Sumption).

Lord Toulson, in addressing the issue of uncertainty, argued that doctrinally the illegality principle is riven with uncertainties.[80] Furthermore, that certainty is an aim for those who enter into lawful activities, not those who contemplate unlawful activity.[81] Lord Kerr agreed that certainty and predictability in the law is:

> a laudable aim for those who seek the law's resolution of genuine, honest disputes. It is not a premium to which those engaged in disreputable conduct can claim automatic entitlement.[82]

In response to this it is submitted here that the law should aspire towards certainty as much as possible, even if it does not achieve it.[83] As Lord Neuberger in *Patel* emphasised 'there is general public interest in certainty and clarity in all areas of law' and criminals, like others are also entitled to certainty in the law.[84] He further argued that 'those responsible for making and developing the law in any area must strive to achieve as much clarity and as much certainty as are consistent with principle and practicality'.[85] In considering these aims of certainty and clarity it is important to look at the alternative approach to the illegality defence provided by the minority in *Patel,* which consisted of Lords Sumption, Clarke and Mance. That approach provides a reinterpreted reliance test and the *restitutio in integrum* rule.

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[80]*Patel* (UKSC) (n 1) [113] (Lord Toulson).
[81]ibid.
[82]*Patel* (UKSC) (n 1) [137] (Lord Kerr).
[83]see in particular Mark Law and Rebecca Ong 'He who comes to Equity need not do so with clean hands?' illegality and resulting trusts after Patel v Mirza, what should the approach be?' (2017) 23 *Trusts & Trustees* 880, 893.
[84]*Patel* (UKSC) (n 1) [158] (Lord Neuberger).
[85]*Patel* (UKSC) (n 1) [157], [158] (Lord Neuberger).

4.2.2.2 Reliance and *Restitutio in Integrum*

The minority in *Patel* favoured the reliance test and *restitutio in integrum* rule, arguing that these tests bring more certainty, are clear and principled as they are well-defined rules with exceptions.[86] Lord Sumption, the main advocate for the reliance test, put forth a number of familiar arguments in support of this test. First, that the reliance test is implicit in Lord Mansfield's dictum.[87] Secondly, that it is the narrowest of the connection tests which:

> establishes a direct causal link between the illegality and the claim, distinguishing between those illegal acts which are collateral or matters of background only, and those from which the legal right asserted can be said to result.[88]

Thirdly, the issue is not with the reliance test itself but the way in which it was applied in *Tinsley v Milligan*[89] (hereafter *Tinsley*) namely its dependency on adventitious procedural matters such as equitable presumptions.[90] He argued that rather than the recognition of an interest being dependent on the nature of the party's relationship, which is completely arbitrary, the question of whether an equitable interest exists should

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[86]see *Patel* (UKSC) (n 1) [198], [199], [201]-[203] (Lord Mance), [210], [211], [217] (Lord Clarke), [241]-[244], [253] (Lord Sumption); see also Graham Virgo, '*Patel v Mirza*: one step forward and two steps back' (2016) 22 *Trusts & Trustees* 1090, 1095; Law and Ong 'He who comes to Equity need not do so with clean hands?'(n 83) 881, 890.
[87]*Holman v Johnson* (1775) 1 Cowp. 341, 343 (Lord Mansfield); see *Patel* (UKSC) (n 1) [234] (Lord Sumption).
[88]*Patel* (UKSC) (n 1) [239] (Lord Sumption).
[89][1994] 1 AC 340.
[90]*Patel* (UKSC) (n 1) [236]-[237] (Lord Sumption).

be dependent on intention of the parties.[91] Thus where there is no intention to make a gift, the claimant should be able to rely on that and recover.[92] Applying this to *Tinsley,* he said the claimant could just have said that she paid half the price and had no intention to make a gift.[93] He concluded that 'shorn of the arbitrary refinements introduced by the equitable presumptions' there is no need to get rid of the reliance test altogether.[94] Fourthly, he argued that there already exists sufficient flexibility in the law through the exceptions to the reliance test.[95] So, where parties are 'not *in pari delicto*', the claimant can rely on the illegality to bring his or her claim. Lord Sumption explained that the parties are 'not *in pari delicto*' if the claimant's participation in the illegal act is involuntary because it was brought about by undue influence, duress or fraud.[96] Furthermore, the parties are 'not *in pari delicto*' where the 'application of the illegality principle is inconsistent with the rule of law which makes the act illegal'.[97] For example, where the 'rule of law intended to protect persons such as the plaintiff against exploitation by the likes of the defendant'.[98] An example is *Kiriri Cotton Co Ltd v Dewani*[99] considered in chapter 2 in which the claimant was allowed restitution of an illegal premium paid which was forbidden by statute. The claimant belonged to a class intended to be protected by the statute from exploitation of the defendant. By allowing restitution the claimant was protected from such demands. Lord Mance also in support of the reliance test said:

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[91] *Patel* (UKSC) (n 1) [237], [238] (Lord Sumption).
[92] *Patel* (UKSC) (n 1) [238] (Lord Sumption).
[93] ibid.
[94] *Patel* (UKSC) (n 1) [237]-[239] (Lord Sumption).
[95] *Patel* (UKSC) (n 1) [264] (Lord Sumption).
[96] *Patel* (UKSC) (n 1) [242] (Lord Sumption).
[97] *Patel* (UKSC) (n 1) [243] (Lord Sumption).
[98] *Patel* (UKSC) (n 1) (Lord Sumption).
[99] [1960] AC 192.

> Reliance on illegality [still] remains a significant bar to relief, but only in so far as it is reliance in order to profit from or otherwise enforce an illegal contract. Reliance in order to restore the status quo is unobjectionable.[100]

Another exception to the reliance test is *locus poenitentiae*.[101] Under this the claimant could rely on his illegality and recover as long as the claimant had withdrawn from the illegality before the illegal purpose had been wholly or partly carried into effect.[102] It should be noted at this juncture, that Lord Sumption in *Patel* reanalysed the *locus poenitentiae* as being a ground for restitution shorn of the necessity of withdrawal. This constitutes a revolution, undermining the essence of the doctrine of *locus poenitentiae* as will be discussed later in the chapter.[103]

In response to Lord Sumption's argument, the following points can be made. The judiciary has long been divided on which test is implicit in Lord Mansfield's dictum. In chapter 3 it was illustrated that Beldam LJ in *Cross v Kirkby*[104] argued that the causation and close connection test were implicit in Lord Mansfield's dictum. Whilst, Lord Hoffmann in *Gray* and Lord Phillips in *Stone & Rolls* regarded the exposition of policy stated by Lord Mansfield as being based on a group of policy reasons.[105]

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[100]*Patel* (UKSC) (n 1) [199] (Lord Mance).
[101]see *Tribe* (n 16) 133, 134, 135 (Millett LJ).
[102]*Patel* (CA) (n 1) [39], [45] (Rimer LJ); *Tribe* (n 16) 133A, 134E-135B (Millett LJ); *Taylor v Bowers* (n 16) 300 (Mellish LJ), 295 (Cockburn CJ).
[103]see A. Burrows, 'A New Dawn for the Law of Illegality' (n 65) 32.
[104]The Times, 5 April 2000 (Official Transcript), [2000] CA Transcript No 321 at [76] (Beldam LJ).
[105]see *Cross* (n 104) [76] (Beldam LJ); *Gray* (HL) (n 33) [30] (Lord Hoffmann); *Stone & Rolls* (n 9) [25], [26] (Lord Phillips); see also Sandra A. Booysen 'Contractual Illegality and Flexibility — a Rose by Any Other Name' (2015) 32 *Journal of Contract Law* 170, 182.

Moreover, issues with the reliance test stretched farther than the adventitious procedural matter of considering equitable presumptions.[106] These ranged from the inconsistency (and subjectivity) with which it can be determined as to whether one needs to rely on the illegality to advance the claim, and hence whether the illegality is central or collateral to the claim. This is evident from the cases of *Halley v The Law Society*[107] and *MacDonald v Myerson*[108] (discussed in chapter 3) and the Court of Appeal speeches in *Patel* discussed earlier in the chapter. Furthermore, Goudkamp has raised the important point that 'it has never been explained precisely why it should matter that the claimant needs to rely on his or her illegality'.[109] He further observed that Lord Sumption's assertion in *Patel* that the claimant cannot rely on his illegality merely restates the reliance test, it does not provide justification for it.[110] Moreover, due to the nature of the test the claimant can side-step the issue of illegality because he does not need to rely on it. Crucially, the reliance test is entirely divorced from policy considerations, which is inadequate considering that *ex turpi causa* is a public policy rule.[111] As Lord Kerr argued in *Patel*, *ex turpi causa* is a policy based rule; taking into account policy considerations 'is the only logical way to proceed'.[112]

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[106]see Chapter 3 for criticisms of the reliance test; see also *Patel* (UKSC) (n 1) [237] (Lord Sumption).
[107][2003] EWCA Civ 97(CA).
[108][2001] EWCA Civ 66 (CA).
[109]James Goudkamp 'The end of an era? Illegality in private law in the Supreme Court' (2017) 133 *LQR* 14, 16.
[110]Goudkamp 'The end of an era?' (n 109) 16.
[111]Hugh Stowe, 'The 'Unruly Horse' Has Bolted: Tinsley v Milligan' (1994) 57 *MLR* 441, 446; see also *Tinsley* (HL) (n 76) 355B-C (Lord Goff); *Servier* (UKSC) (n 32) [13] (Lord Sumption); *Patel* (UKSC) (n 1) [129] (Lord Kerr).
[112]*Patel* (UKSC) (n 1) [129] (Lord Kerr); see *Stone & Rolls* (n 9) [25] (Lord Phillips); *Gray* (HL) (n 33) [30F-H] (Lord Hoffmann); *R (Best) v Chief* (n 44) [52] (Sales LJ).

Furthermore, the reinterpretation of the reliance test by Lord Sumption in *Patel* which involves ignoring presumptions has strongly been condemned by Burrows and Graham Virgo.[113] Burrows argues not only did Lord Sumption's reinterpretation of the reliance test contradict its application in *Tinsley*, but it also failed to provide adequate justification or logical basis for simply ignoring the standard law on presumptions.[114] Virgo agrees with this, commenting that Lord Sumption's argument that one should ignore presumptions and simply focus on whether there was intention to make a gift is revolutionary.[115] He emphasises that presumptions are significant because they assist in determining where there was an intention to make a gift or to declare a trust. Ignoring them would add novel dimensions into the law.[116] Virgo concluded that an approach which suggests that there is no role for presumptions is a 'radical reappraisal of the law of resulting trusts'.[117] It is submitted here therefore, that the reliance test even in its reinterpreted form should not be adopted as a legal test for determining the application of the illegality defence.

It is important now to look at the *restitutio in integrum* rule, as the minority in *Patel* also adopted this. This rule concerns restoring parties to their original position.[118] There Lord Mance said that allowing recovery under *restitutio in integrum* would have the effect of reversing rather than enforcing the illegal transaction.[119] Lord Clarke agreed that on the basis of the ordinary principles of *restitutio in integrum*, Mr Patel should be

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[113]A. Burrows 'A New Dawn for the Law of Illegality' (n 65) 24, 31-33; see also Virgo, '*Patel v Mirza*: one step forward and two steps back' (n 86) 1097.
[114]A. Burrows 'A New Dawn for the Law of Illegality' (n 65) 31, 32.
[115]Virgo, '*Patel v Mirza*: one step forward and two steps back' (n 86) 1097.
[116]ibid.
[117]ibid.
[118]see also *Patel* (UKSC) (n 1) [154] (Lord Neuberger).
[119]*Patel* (UKSC) (n 1) [201], [203] (Lord Mance).

allowed recovery of money.[120] Lord Sumption, also adopted the *restitutio in integrum* approach, and in doing so he created yet another innovation in the law (alongside the reinterpreted reliance test which involves ignoring equitable presumptions). That innovation was interpreting the doctrine of *locus poenitentiae* as being merely a ground of restitution shorn of its requirements of withdrawing from the illegality.[121] Lord Sumption argued that the limitation on the application of the doctrine of *locus poenitentiae* to cases where the 'the unlawful purpose has not been carried out was never sound'.[122] The legal rule he said, is that 'restitution is available for so long as mutual restitution of benefits remains possible'.[123] In agreement, Lord Mance said that he sees no reason why rescission[124] should be restricted by whether or not an illegal purpose is carried out.[125] Furthermore, Lord Mance said even if there has been part performance, rescission should be permitted by making adjustments to the benefits received namely by removing the profit and returning the rest.[126] This reinterpretation of the *locus poenitentiae,* it is submitted here, goes against the entire nature of the doctrine, which has always required that the illegal purpose is not carried out.[127] The justification for the *locus poenitentiae* is that by allowing the claimant to recover before

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[120]*Patel* (UKSC) (n 1) [210], [212] (Lord Clarke), [201], [203] (Lord Mance).
[121]*Patel* (UKSC) (n 1) [253] (Lord Sumption), [169] (Lord Neuberger) [202] (Lord Mance), [220] (Lord Clarke).
[122]*Patel* (UKSC) (n 1) [253] (Lord Sumption), [167] (Lord Neuberger).
[123]*Patel* (UKSC) (n 1) [253] (Lord Sumption).
[124]'Presumably, what the Justices meant was to use the language of *restitutio in integrum* to describe the strength of the restitutionary response…[unfortunately the Justices]…analysed this restitutionary claim with reference to the language of rescission, but this involves an abuse of language. Rescission is a remedy that operates to set aside a valid contract. But where a contract has been tainted by illegality it is void, so there is nothing to rescind' see Virgo, '*Patel v Mirza*: one step forward and two steps back' (n 86) 1095.
[125]*Patel* (UKSC) (n 1) [197] (Lord Mance).
[126]*Patel* (UKSC) (n 1) [197], [198] (Lord Mance).
[127]A. Burrows 'A New Dawn for the Law of Illegality' (n 65) 32.

the illegal contract is executed, the court is preventing the illegal purpose from being carried out.[128] The doctrine therefore, prevents violation of the law by encouraging withdrawal from illegal schemes before they are executed.[129] As Bramwell B said in *Bone v Eckless*:[130]

> The law is in favour of undoing or defeating an illegal purpose, and is therefore in favour of the recovery of the money before the illegal purpose is fulfilled, not afterwards.[131]

The reanalysis of the *locus poenitentiae* by Lord Sumption therefore, defeats the purpose of preventing violation of the law. As Burrows argues:

> No judge or commentator has ever gone so far as to suggest that, through the *locus poenitentiae*, a claimant is always entitled to restitution, subject to giving counter-restitution, under an illegal contract. This was almost…rewriting of the recognised law… The doctrine of *locus poenitentiae* has always been regarded as having limits (in particular, for example, that the illegal purpose must not have been carried out).[132]

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[128]S.U. Ahmed, 'Locus Poenitentiae - Repentance by a Party to an Illegal Contract' (1982) 12 *U Queensland LJ* 120, 120, 122.
[129]Peter Birks, 'Recovering Value Transferred under an Illegal Contract' (2000) 1 *TIL* 155, 189; S.U. Ahmed, 'Locus Poenitentiae' (n 128).
[130](1860) 29 LJ (Ex.) 438.
[131]*Bone* (n 130) 440 (Bramwell B).
[132]A. Burrows 'A New Dawn for the Law of Illegality' (n 65) 32.

Devoid of the withdrawal element, it appears that the *locus poenitentiae* does not assume the same level of relevance as it did pre-*Patel.* The eroding significance of the doctrine is also evident in Lord Toulson's judgment in *Patel* who thought it irrelevant to discuss the doctrine altogether.[133]

A significant policy point here is that the reinterpretation of the *locus poenitentiae,* and Lord Toulson's observation that it will be rare for the court to refuse recovery,[134] denotes that the significance of deterrence as a policy rationale in determining the application of the illegality defence is also doubtful.[135] This is particularly so as Lord Toulson said that although bribes are corrupting, 'it does not follow that it is in the public interest to prevent their repayment'.[136] It will be remembered from chapter 2 that doubts over the deterrence policy rationale were already expressed in the law, in particular by Lord Lowry in *Tinsley.*[137] In *Patel* Lord Sumption observed that whilst historically there was a hope that the illegality defence would deter illegal conduct, it is doubtful today whether 'any but the best-advised litigants have enough knowledge of the law to be deterred by it'.[138] Lord Sumption even went as far as suggesting that restitution of money paid to murder a third party even if the murder is carried out is possible.[139] A similar view was expressed by Lord Neuberger in *Patel*.[140] Put together

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[133]*Patel* (UKSC) (n 1) [116] (Lord Toulson).
[134]Namely, to an owner to enforce his title to property, or allow recovery of money paid for an unlawful purpose so long as the ordinary requirements of the unjust enrichment claim are satisfied by him.
[135]*Patel* (UKSC) (n 1) [118] (Lord Toulson).
[136]ibid.
[137]see *Tinsley* (HL) (n 76) 368E-G (Lord Lowry); see further *Tribe* (n 16) 134 (Millett LJ); see also chapter 2.
[138]*Patel* (UKSC) (n 1) [260] (Lord Sumption).
[139]*Patel* (UKSC) (n 1) [254] (Lord Sumption), [176] (Lord Neuberger).

this reveals that deterrence is no longer a compelling rationale for the application of the illegality defence. At this juncture, it should be noted that restitution of a bribe (discussed in chapter 6), and money paid for murder, discussed later in this chapter, have both been heavily criticised in the literature. This thesis also does not support allowing restitution in such cases. The principled basis for this will be provided both in this chapter when discussing the murder example and chapter 7 when discussing the bribe example (through *Parkinson v College of Ambulance Ltd*).[141]

Lord Sumption's speech in *Patel* is also important as the application of both the reliance test and *restitutio in integrum* itself reveal their drawbacks as an approach to the illegality defence. In *Patel*, Lord Sumption found that Mr Patel did need to rely on the illegality to advance his claim (contrary to Gloster LJ in the Court of Appeal). He argued that to show that the basis for the transfer had failed, making the retention of the money by the defendant unjust, Mr Patel had to disclose what that basis was.[142] In doing so Mr Patel had to reveal the illegality and therefore rely on the contract 'which provided as one of its terms that the dealing should be carried out with benefit of insider information'.[143] Lord Sumption further noted that the parties were *in pari delicto* as they were both on the same legal footing. This is because the contract was not entered into involuntarily and 'section 52 of the Criminal Justice Act 1993 is not a statute designed to protect the interests of persons entering into an agreement to commit the offence of

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[140]*Patel* (UKSC) (n 1) [176] (Lord Neuberger).
[141][1925] 2 KB 1.
[142]*Patel* (UKSC) (n 1) [250] (Lord Sumption).
[143]*Patel* (UKSC) (n 1) [267] (Lord Sumption).

insider dealing'.[144] Despite Mr Patel having to rely on the illegal nature of the agreement to show that there was no 'legal basis for the payment',[145] Lord Sumption said he would allow the appeal. This was on the basis that an 'an order for restitution would not give effect to the illegal act or to any right derived from it. It would simply return the parties to the status quo ante'.[146] In doing so Lord Sumption also highlighted that 'benefits transferred under a contract which is void or otherwise legally ineffective are recoverable'.[147] This speech reveals yet again the inconsistency with which it can be determined as to whether the claimant needs to rely on the illegality. Application of the *restitutio in integrum rule* reveals the courts side-stepping the issue of illegality and allowing restitution because mutual restitution of benefits is possible.

In support of the *restitutio in integrum* approach Mark Law and Rebecca Ong argue that this rule is normatively sound as neither party can profit from their crime because the original position is restored and therefore the integrity of the legal system is maintained.[148] They argue that there are no windfalls from such an approach, especially where mutual restitution is possible, since the parties are put back to the position they would have been in without the illegality.[149] Moreover, they argue that adopting this rule repudiates the fraud that has taken place. For example, where property is hidden from creditors, Law and Ong argue that the *restitutio in integrum* rule forces repudiation

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[144]ibid.
[145]*Patel* (UKSC) (n 1) [268] (Lord Sumption).
[146]ibid.
[147]*Patel* (UKSC) (n 1) [247] (Lord Sumption); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 (Hobhouse J); [1996] AC 669, 681-682 (Lord Goff), 714 (Lord Browne-Wilkinson), 723 (Lord Woolf)).
[148]Law and Ong 'He who comes to Equity need not do so with clean hands?' (n 83) 894.
[149]ibid; see also *Patel* (UKSC) (n 1) [202] (Lord Mance).

of the fraud in order to restore a prior title as rightful owner of the property, and upon return of the property to the claimant it becomes accessible to the creditors.[150] However, they go as far as saying that they would even allow terrorists to enforce their property rights in a base allowed for such activities which was put in the name of another party to cover up the illegal purpose.[151] It is submitted here however, that rather than restoring the terrorists' property rights, a better solution in cases concerning such serious illegality, would be to confiscate the property (a proposal put forth by Sullivan which will be discussed in chapter 6).[152] Law and Ong further argue that *restitutio in integrum* is an approach which avoids arbitrariness as it is not reliant on presumptions.[153] Thus in *Tinsley,* they argue, by applying the *restitutio in integrum* principle the court would be reversing rather than enforcing the transaction.[154] The application of this approach to *Tinsley* however is questionable. In *Tinsley*, the house was placed in the name of one party to defraud the DSS but was purchased in equal shares. As Virgo points out it is unclear what was being restored to the claimant:

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[150]Law and Ong 'He who comes to Equity need not do so with clean hands?' (n 83) 894, 895; see also Niamh Connolly, 'Re-examining Illegality in Restitution: a reason to deny restitution, or to grant it?' 1,28. Available at http://www.archive.legalscholars.ac.uk/edinburgh/restricted/download.cfm?id=315

[151]Law and Ong 'He who comes to Equity need not do so with clean hands?'(n 83) 890.

[152]see Robert Sullivan 'Restitution or Confiscation/Forfeiture? Private Rights versus Public Values' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 70, 71, 83.

[153]Virgo, '*Patel v Mirza*: one step forward and two steps back' (n 86) 1090-1097; Law and Ong 'He who comes to Equity need not do so with clean hands?'(n 83) 880-901; *Patel* (UKSC) (n 1) [239] (Lord Sumption) 'the reliance test accords with principle…it gives effect to the basic principle that a person may not derive a legal right from his own illegal act'.

[154]Law and Ong 'He who comes to Equity need not do so with clean hands?'(n 83) 895, 896; *Patel* (UKSC) (n 1) [201] (Lord Mance).

> since the point of the case was to recognize that she [the claimant] had an interest in property which she previously did not have, suggesting that this was a case where her position was being carried forward rather than being returned to the original position.[155]

In addition to Virgo's point, there are a number of other criticisms of the *restitutio in integrum* approach which will now be addressed. *Restitutio in integrum* like the reliance test effectively ignores the illegality concerned. As Lord Mance himself noted, under this approach the:

> illegal transaction should be disregarded, and the parties restored to the position in which they would have been, had they never entered into it. If and to the extent that the rescission on that basis remains possible, then prima facie it should be available.[156]

For this very reason Lord Kerr in *Patel* was critical of the *restitutio in integrum* approach.[157] He argued that this rule awarded restitution merely on the basis that restitution is possible and because the defendant would otherwise be unjustly enriched.[158] It side-steps the issue of illegality, effectively ignoring it.[159] The adoption of such an approach is problematic as it can lead to un-meritorious claims

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[155]Virgo, '*Patel v Mirza*: one step forward and two steps back' (n 86) 1097.
[156]*Patel* (UKSC) (n 1) [197] (Lord Mance).
[157]*Patel* (UKSC) (n 1) [140], [141] (Lord Kerr), [197] (Lord Mance); see also Law and Ong 'He who comes to Equity need not do so with clean hands?'(n 83) 887.
[158]*Patel* (UKSC) (n 1) [140]-[141] (Lord Kerr).
[159]ibid.

succeeding.[160] For example, Law and Ong would allow terrorists to recover, whilst Lord Sumption in *Patel* said that a claim for restitution of money paid for a contract of murder would also succeed whether or not the murder is carried out.[161] Allowing recovery in cases concerning heinous crime such as murder, however, is extremely unsatisfactory and has been criticised in the literature on illegality.[162] The criticism is on the basis that allowing these claims undermines the integrity of the legal system, if not at the very least encouraging such violent agreements.[163] As Sullivan argues, allowing restitution condones intentional killing.[164] Further, Lord Grabiner argues that in the realm of public policy 'it is difficult to think of a more offensive or objectionable outcome in the procedural guise of a claim in restitution'.[165] Burrows, in agreement, has highlighted that the application of the *restitutio in integrum* rule incentivises the most heinous of crimes, in turn leading to results which the no justice systems would tolerate.[166] He argues that even if the murder is not carried it is strongly arguable that restitution should be denied.[167] Birks also agrees with this, arguing that refusing restitution would be an appropriate response considering the nature of illegality

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[160]*Tinsley* (HL) (n 76) 362 (Lord Goff); Law and Ong 'He who comes to Equity need not do so with clean hands?'(n 83) 887, 894; *Patel* (UKSC) (n 1) [123], [128], [140], [141] (Lord Kerr).
[161]*Patel* (UKSC) (n 1) [254] (Lord Sumption, [176] (Lord Neuberger).
[162]see A. Burrows 'A New Dawn for the Law of Illegality' (n 65) 32,33.
[163]Anthony Grabiner, 'Illegality and restitution explained by the Supreme Court' (2017) 76 (1) *CLJ* 18, 20; A. Burrows 'A New Dawn for the Law of Illegality' (n 65) 33; Birks (n 129) 201, 202.
[164]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 152) 61, 65-68, 70, 71, 80; see also Nicholas J McBride 'Not a principle of Justice' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 101.
[165]Grabiner, 'Illegality and restitution explained by the Supreme Court' (n 163) 20; see also Birks (n 129) 201-202.
[166]A. Burrows 'A New Dawn for the Law of Illegality' (n 65) 33.
[167]A. Burrows 'A New Dawn for the Law of Illegality' (n 65) 32, 33.

involved.[168] He emphasises that where the claim concerns heinous crime, such as those guilty of incitement of mass murder, allowing a claim in unjust enrichment would make nonsense of the law's condemnation of the illegal conduct or refusal to enforce the contract. Those guilty of incitement of mass murder will never fit the class of persons entitled to sue to lift the bar of stultification.[169] Both Birks and Lord Grabiner argue that the standard response - that allowing the claim does not lead to the claimant profiting from their crime - cannot withstand serious scrutiny.[170] The public are unlikely to be able to comprehend how relief could be given in connection with serious crimes.[171] Lim also argues that the rule-based approach is unlikely to provide a clear authoritative answer in cases of serious illegality or where there is disparity in culpability.[172] Burrows therefore emphasises that in order to reach satisfactory results a court needs to take into consideration factors such as the serious nature of illegality.[173] McBride makes the important point that if, due to the claimant's unlawful conduct or behaviour, he has been deprived of private law rights and remedies which would otherwise have been available, then it cannot be said that some injustice has been done to him.[174] In a similar vein Sullivan argues that 'at least for serious crimes, their commission should disallow as a matter of public policy any restitutionary relief to persons implicated in the crime regarding any money or property involved in the offence'.[175]

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[168]A. Burrows 'A New Dawn for the Law of Illegality' (n 65) 33;Birks (n 129) 201,202.
[169]The class of people entitled to sue is listed in chapter 2; see also Birks (n 129) 173.
[170]Birks (n 129) 201-202; Grabiner, 'Illegality and restitution explained by the Supreme Court' (n 163) 20.
[171]R. Sullivan 'Restitution or Confiscation/Forfeiture?' (n 152) 70, 71.
[172]Lim, '*Ex Turpi Causa*: Reformation not Revolution' (n 57) 940, 941.
[173]A. Burrows 'A New Dawn for the Law of Illegality' (n 65) 33.
[174]McBride 'Not a principle of Justice' (n 164) 105.
[175]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 152) 70, 71.

While we might accept the moral repugnancy of allowing the claimant to recover money paid for the furtherance of a heinous crime, the question then arises as to what should happen to the money which is left with the defendant who is also party to the crime. This question will be addressed in chapter 6, where a solution proposed by Sullivan will be discussed.[176]

Another issue with the *restitutio in integrum* approach is that it can lead to windfall gains, contrary to Law and Ong's argument. Burrows gives the following example which illustrates this:

> C contracts with D for the carriage of C's goods from London to Liverpool for £25,000. C pays that price. As C knows, D gets goods to a destination on time by, if necessary, exceeding the speed limit. The contract is performed and the goods are delivered on time in Liverpool. C then seeks restitution on the basis that the contract was illegal as it was performed, as both parties knew it would be, by speeding on the motorway.[177]

Burrows notes that if the *restitutio in integrum* rule is followed, C is entitled to restitution of the £25,000. This is because the minority in *Patel,* in particular Lord Sumption, suggests that the claimant is always entitled to restitution as long as mutual restitution of benefits is possible.[178] Such a result Burrows argues is unacceptable because allowing restitution means that the claimant, who is equally culpable, receives

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[176]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 152) 70, 71, 83.
[177]A. Burrows 'A New Dawn for the Law of Illegality' (n 65) 33
[178]*Patel* (UKSC) (n 1) [197], [198], [200] (Lord Mance), [253] (Lord Sumption); A. Burrows 'A New Dawn for the Law of Illegality' (n 65) 31, 32, 33.

what he had contracted for namely the entire performance, for nothing.[179] C gets a windfall gain whilst D is deprived of the contract price which is completely disproportionate to the crime involved.[180] Burrows concludes by arguing that 'Lord Sumption's approach does not stand up to scrutiny. If it were the law, it would produce, on the face of it, results that no legal system would tolerate'.[181] In order to reach an appropriate result, Burrows argues courts need to take into consideration factors such as seriousness of illegality and culpability.[182] Though the alternate - Lord Toulson's test - is criticised, the policy considerations and multi-factorial approach of proportionality are useful. Not only does the court address the illegality and its nature, such an approach promotes transparency in the law since the courts overtly lay out the factors and policies, which are central to their decision.

Furthermore, the *restitutio in integrum* approach can lead to inconsistency in the law. For example, in a case such as *Collier v Collier*[183] the facts of which were given in chapter 2, allowing restitution would have the same effect as upholding the terms of the unlawful agreement. Those terms were that the lease be granted to the daughter in order to hide the property form the father's creditors and, after that danger has averted, the daughter was to return it to the father. The *restitutio in integrum* approach or otherwise restoring the *status quo ante,* produces a result inconsistent with that founded on a breach of contract claim, thereby leading to inconsistency in the law (or otherwise

[179]A. Burrows 'A New Dawn for the Law of Illegality' (n 65) 33.
[180]ibid.
[181]ibid.
[182]ibid.
[183][2002] EWCA Civ 1095.

stultification).[184] Further as Lord Kerr argues 'entitlement to restitution of money paid on foot of an illegal contract on the basis of unjust enrichment makes a nonsense of refusal to enforce the contract'.[185] This has also been noted by the Law Commission in their consultation paper on illegality where it was said that a:

> claim in unjust enrichment will not be allowed where it would have the same effect as a claim for contractual enforcement that the law has refused. To allow such a claim would stultify the law.[186]

Self-stultification, Lord Kerr argued, can be avoided by following Lord Toulson's approach which 'requires examination of the justification for the defence of illegality in whatever context it arises, not a decision to circumvent the defence because of the type of remedy that is claimed'.[187] However, Lord Kerr did not go on to fully explain this. Chapter 7 of this thesis will argue that stultification or otherwise inconsistency in the law can be avoided in these cases on the basis of Birks argument which was put forth in chapter 2. Birks had argued that stultification means an unexplained contradiction in the law. He argues that the need to avoid arbitrary 'expropriation of a proprietary interest which was never intended to be transferred…[and] the arbitrary disproportion of the punishment which would otherwise be inflicted', is sufficient reason to overcome the stultification issue.[188]

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[184]*Patel* (UKSC) (n 1) [141] (Lord Kerr); Note that stultification is synonymous to consistency see *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 at [38] (French CJ), a case which will be discussed in chapter 5.
[185]*Patel* (UKSC) (n 1) [141] (Lord Kerr).
[186]CP 189 (63) para 2.13.
[187]*Patel* (UKSC) (n 1) [142] (Lord Kerr); see further Birks (n 129) 155, 202-203.
[188]Birks (n 129) 176.

In conclusion, it is submitted here, that neither the reinterpreted reliance test, nor the *restitutio in integrum* approach to the illegality defence are satisfactory. They both sidestep the issue of illegality, no matter how serious, producing results intolerable by any justice system, thereby creating inconsistency in the law.[189] The latter also leads to windfall gains. The former, reinterpreted reliance test is revolutionary as it ignores presumptions. Coupled with the vast issues that already plague the reliance test discussed in chapter 3, in particular the difficulties with determining whether or not the claimant needs to rely on the illegality, the reliance test creates uncertainty in the law. In contrast, Lord Toulson's approach, which promotes consistency in the law by furthering the purpose of the rule infringed, or any other policy and which has regard to factors such as the nature of illegality, is preferable. Notwithstanding this, there are lingering concerns relating to lack of guidance and uncertainty of adopting a multi-factorial approach. These, were raised by the minority in *Patel.* Academics have also raised similar concerns, which cannot be overlooked, and will be addressed in chapter 6.

Notwithstanding the difference in opinion as to rule versus flexibility, all of the justices of the Supreme Court[190] endorsed the consistency policy as laid down by McLachlin J in *Hall v Hebert*[191] (hereafter *Hall*) as being significant in determining the application of the illegality defence. This will be discussed in the section below.

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[189]see the discussion of a claim in restitution for a contract of murder in this chapter.
[190]*Patel* (UKSC) (n 1) [56], [57], [77], [99] (Lord Toulson),[125], [141]-[143] (Lord Kerr), [155], [172], [173], [184] (Lord Neuberger), [190]-[192] (Lord Mance), [212]-[214] (Lord Clarke), at [230], [232] (Lord Sumption).
[191][1993] 2 SCR 159, 179, 180 (McLachlin J);Mitchell McInnes, 'Illegality and Canadian Private Law: *Hall v Hebert*'s Legacy' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 313, 320.

4.2.2.3 Consensus on the Principle of Consistency

The consistency principle was explained by McLachlin J in *Hall* as ensuring that the different parts of the law are in harmony and that the claimant does not profit from his or her wrongdoing or evade a penalty imposed by the criminal law.[192] McLachlin J said in *Hall*:

> I conclude that there is a need in the law … for a principle which permits judges to deny recovery to a plaintiff on the ground that to do so would undermine the integrity of the justice system. The power is a limited one. Its use is justified where allowing the plaintiff's claim would introduce inconsistency into the fabric of the law, either by permitting the plaintiff to profit from an illegal or wrongful act, or to evade a penalty prescribed by criminal law.[193]

Pre-*Patel* this explanation of the principle of consistency was adopted in England in a number of different cases concerning both tort and contract.[194] Most notably it was adopted by Lord Hughes and Lord Wilson in the Supreme Court in *Hounga* and by Lord Hoffmann in the House of Lords in *Gray*. In the former, Lord Hughes said, 'the law

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[192]*Hall v Hebert* (n 2) 176, 179, 180 (McLachlin J); For argument on whether the majority or minority's approach reflected McLachlin J's consistency principle see James Goudkamp 'The Law of Illegality: Identifying the Issues' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 46; Mitchell McInnes, 'Illegality and Canadian Private Law: *Hall v Hebert*'s Legacy' (n 191) 319, 320.

[193]*Hall v Hebert* (n 2) 179, 180 (McLachlin J).

[194]see *Patel* (UKSC) (n 1) [232] (Lord Sumption); *R v Islam* [2009] AC 1076 at [38] (Lord Mance); *Stone & Rolls* (n 9) [128] (Lord Walker), [226] (Lord Mance); *Hounga* (UKSC) (n 2) [43], [44] (Lord Wilson); *Servier* (UKSC) (n 32) [24] (Lord Sumption); *Bilta* (n 33) [172] (Lord Toulson and Lord Hodge).

must act consistently; it cannot give with one hand what it takes away with another, nor condone when facing right what it condemns when facing left'.[195] Moreover, Lord Wilson in *Hounga* allowed the claim on the ground that awarding compensation would not allow the claimant to profit from her crime as the compensation was an award for injury.[196] The compensation award also did not reflect an evasion of a penalty imposed on the claimant since the claimant had not been prosecuted for entering into the contract.[197] In the latter case of *Gray*, Lord Hoffmann held that the claimant could not recover damages for loss of earnings whilst imprisoned after committing manslaughter, a lawful sentence imposed on him. Allowing recovery in such circumstances would create inconsistency in the law as discussed in chapter 2.

In *Patel* all of the Justices of the Supreme Court[198] supported the quoted explanation of consistency provided by McLachlin J in *Hall*. Lord Sumption in the minority said that 'the internal coherence of the law is … the reason why [courts] will not give effect in a civil court to a cause of action based on acts which it would punish in a criminal

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[195]*Hounga* (UKSC) (n 2) [55] (Lord Hughes).
[196]*Hounga* (UKSC) (n 2) [43], [44] (Lord Wilson) In doing so Lord Wilson in *Hounga* also adopted McLachlin J's interpretation of this policy in *Hall*, which will be discussed in Chapter 5, namely that the court should deny recovery on grounds of the claimant illegal conduct in order to preserve the integrity of the justice system. She explained that the duty of the courts to preserve the integrity of the legal system is in issue where an award in a civil suit would in effect allow a person to profit from illegal conduct or permit evasion or rebate of penalty prescribed by the criminal law see *Hall v Hebert* (n 2) 169, 179, 180 (McLachlin J). Thus the integrity of the justice system is maintained if there is consistency in the law. A point which will further be made in chapter 7.
[197]*Hounga* (UKSC) (n 2) [43], [44] (Lord Wilson).
[198]*Patel* (UKSC) (n 1) [56], [57], [77], [99] (Lord Toulson),[125], [141]-[143] (Lord Kerr),[155], [172], [173], [184] (Lord Neuberger),[190]-[192] (Lord Mance), [212]-[214] (Lord Clarke), [230], [232] (Lord Sumption).

court'.[199] He further noted that 'courts exist to provide remedies in support of legal rights'.[200] The principle justification for departing from that general position is 'for reasons of consistency the court will not give effect, at the suit of a person who committed an illegal act (or someone claiming through him), to a right derived from that act'.[201]

Lord Toulson for the majority said that there are two key policy reasons behind the illegality defence, namely that the law should be 'coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand' and, secondly, that a 'person should not be allowed to profit from his own wrongdoing'.[202] He noted the concern raised by McLachlin J of focusing primarily on not allowing one to profit from their crime which can tempt 'judges to focus on whether the plaintiff is getting something out of the wrongdoing'.[203] He therefore said, the focus should be on the question 'whether allowing recovery for something which was illegal would produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system'.[204] Lord Toulson then went on to explain that in order to determine whether there is inconsistency in the law one has to consider 'a)…the underlying purpose of the prohibition which has been transgressed, b)…conversely, any other relevant public policies which may be rendered ineffective or less effective by denial of the claim'.[205] The first two considerations appear to be in line with the consistency

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[199]*Patel* (UKSC) (n 1) [232] (Lord Sumption).
[200]*Patel* (UKSC) (n 1) [233] (Lord Sumption).
[201]*Patel* (UKSC) (n 1) [233] (Lord Sumption).
[202]*Patel* (UKSC) (n 1) [99] (Lord Toulson).
[203]*Patel* (UKSC) (n 1) [100], [101] (Lord Toulson).
[204]ibid.
[205]*Patel* (UKSC) (n 1) [101] (Lord Toulson).

explanation of McLachlin J.[206] This is because if the purpose of the rule infringed is not undermined by allowing the claim, there will be consistency (harmony) in the law as the decision of the court is supporting the law rather than undermining it.[207] However, the problematic aspect is that Lord Toulson ventured further to include proportionality (multi-factorial balancing) as part of determining whether there is inconsistency in the law, noting that 'the integrity and harmony of the law permit - and I would say require – such flexibility.'[208]

The majority and minority had different views about consistency and its relationship with the factors laid down by Lord Toulson. The minority disagreed with the inclusion of 'weighing of different factors' as part of the principle of consistency. They argued that McLachlin J in *Hall* called for a limited approach, not an open ended one based on range of factors. This is because in laying down the consistency principle McLachlin J had said, 'I fear that unless placed upon a firm doctrinal foundation and made subject to clear limits' the general power to invalidate actions may prove to be problematic.[209] In support of this, Lord Sumption noted that the 'search for principle which led McLachlin J to identify consistency as the foundation of this area of law was a response to the judgment of Cory J in the same case'[210] who had favoured wider flexibility.[211] Mitchell McInnes also argues that the open-ended 'range of factors that Lord Toulson incorporated into the final element of his trio of considerations (proportionality) is, in

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[206]*Hall v Hebert* (n 2) 176, 179, 180 (McLachlin J);*Patel* (UKSC) (n 1) [101],[120] (Lord Toulson);see also Lim, '*Ex Turpi Causa*: Reformation not Revolution'(n 57) 933.
[207]*Patel* (UKSC) (n 1) [229], [230] (Lord Sumption).
[208]*Patel* (UKSC) (n 1) [101], [107], [108] (Lord Toulson).
[209]*Hall v Hebert* (n 2) 169 (McLachlin J).
[210]*Patel* (UKSC) (n 1) [257] (Lord Sumption).
[211]*Hall v Hebert* (n 2) 205 (Cory J).

particular, antithetical to the model of illegality that prevailed in *Hall v Hebert*'[212] which called for a more limited approach in terms of preventing profit and evasion of a penalty. McInnes notes that McLachlin J had explicitly explained that 'the threat of "inconsistency and disharmony" typically arises when a party seeks to either profit from a wrong or evade a criminal sanction'.[213] Lord Toulson's test which 'draws upon a wide variety of factors [therefore]…drifts from the core concern of consistency'.[214] Lord Mance in a similar vein argued that the incorporation of weighing factors by Lord Toulson 'transmuted' McLachlin J's analysis of the consistency principle'.[215] He argued that it is the uncertainty caused by Lord Toulson's multi-factorial approach which provides wide discretion which McLachlin J wanted to avoid when stating this principle.[216] The incorporation of proportionality as part of determining whether there is inconsistency in the law in the terms suggested by Lord Toulson is therefore problematic. Chapter 5 and 7 of this thesis submit that the principles of consistency and proportionality are largely separate and should not be merged; albeit there is room for argument that, in its wider form, proportionality as a principle has the potential to encourage consistency in the different branches of the law. For example, the civil law should not impose a penalty greater than that imposed by the criminal law.[217]

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[212]McInnes, 'Illegality and Canadian Private Law: *Hall v Hebert*'s Legacy' (n 191) 313, 320.
[213]*Hall v Hebert* (n 2) 179, 180 (McLachlin J); McInnes, 'Illegality and Canadian Private Law: *Hall v Hebert*'s Legacy' (n 191) 313, 320.
[214]McInnes, 'Illegality and Canadian Private Law: *Hall v Hebert*'s Legacy' (n 191) 314, 320.
[215]*Patel* (UKSC) (n 1) [204] (Lord Mance); McInnes, 'Illegality and Canadian Private Law: *Hall v Hebert*'s Legacy' (n 191) 320
[216]*Patel* (UKSC) (n 1) [204] (Lord Mance).
[217]see chapter 2, in particular *St John* (n 2) 279, 288, 289,291 (Devlin J).

Overall, one can see from the above discussion that the consistency principle as explained by McLachlin J in its limited form is supported both by the majority and minority. However, its extension to include proportionality is not supported by the minority. The question then arises as to whether consistency as a principle has support in other common law jurisdictions in addition to Canada, in determining whether or not the illegality defence applies. This will be addressed in Chapter 5.

4.3 Conclusion

The chapter has revealed that *Patel* does not reduce the tension between the two main approaches towards the illegality defence, nor does it end the debates concerning how the illegality defence should be conceptualised and applied. The chapter has argued that between the two approaches, Lord Toulson's trio of considerations is preferable. In doing so it has argued that the reliance test is unsatisfactory to adopt as it is a rule devoid of policy considerations, at times even ignores the illegality, and creates difficulties and inconsistencies in determining whether the claimant needs to rely on the illegality. The reinterpreted reliance test presented by Lord Sumption is equally problematic as it ignores the standard law on presumptions. The *restitutio in integrum* approach is also inadequate on a number of grounds including it side-stepping the issue of illegality; creating windfall gains; producing results which create inconsistency in the law (trust cases); and those results which no legal system would tolerate (restitution for contract of murder). In contrast, Lord Toulson's trio of considerations maintains consistency in the law by ensuring that the purpose of the rule infringed and any other policies are not undermined by allowing the claim. It also addresses the nature of

illegality, relative culpability and centrality of illegality alongside other factors, presenting a more suitable test to reliance and *restitutio in integrum*, in this multifaceted area.[218] The policy considerations and proportionality based approach provided for by Lord Toulson also has support from pre-*Patel* case law examined in chapters 2 and 3. Lord Toulson merely draws out and makes clearer the policies and factors that were already at work in the earlier case law. Overall, it is an approach which is more transparent than the rules of reliance and *restitutio in integrum* in providing a justification for the application of the defence in whatever context it arises. Notwithstanding this, one cannot simply ignore the criticisms of Lord Toulson's approach by the minority - in particular that proportionality (a multi-factorial balancing exercise) can lead to uncertainty in the law. It is important for the promotion of certainty in the law that there should be a principle governing the outcome of cases. This is particularly so where there may be disparity as to whether or not the illegality is of a particularly serious nature or disparity on the issue of the culpability of the parties. The rebuttal by Lord Toulson that the law was already uncertain and criminals are not entitled to certainty is inadequate. This is because the law being uncertain does not mean it should remain uncertain. As Lord Neuberger said in *Patel* certainty in the law is for the public interest, it should be offered to all citizens alike.[219] He argued that though the principle of illegality is based on policy that does not mean that the law should not be made as clear and as certain as possible, governed by principle.[220] And further, that the need for flexibility does not mean that overarching principles cannot be identified. In this regard, this chapter found that the principle of consistency in the law, in the

[218] See also *Nelson* (n 2) 520, 521 (McHugh J).
[219] *Patel* (UKSC) (n 1) [158],[161] (Lord Neuberger).
[220] *Patel* (UKSC) (n 1) [161] (Lord Neuberger).

terms explained by McLachlin J in *Hall*, is one which both the majority and minority in *Patel* regarded as significant in determining the application of the illegality defence. That principle also has support from pre-*Patel* case law.[221] Whether this principle finds support in other common law jurisdictions in addition to Canada will be examined in Chapter 5. That chapter will also address whether a flexible approach, in particular the considerations laid down by Lord Toulson in *Patel*, have support in other common law jurisdictions. An examination of the position in other common law jurisdictions will draw out which principles are considered the most influential in determining the application of the illegality defence. Chapter 5 will also provide direction as to how the issues surrounding the Toulson test, in particular lack of guidance and uncertainty relating to the proportionality principle (multi-factorial balancing exercise) can be resolved. Following this, chapter 6 will examine both support and issues with the Toulson test which propel the need for reform.

[221]Note furthering purpose of the rule infringed maintains consistency in the law see The Law Commission, *The Illegality Defence in Tort: A Consultation Paper* (Law Com CP No 160, 2001) Para 4.56; *Clunis* (n 52); *Gray* (HL) (n 33); *Re Mahmoud* (n 49); *Stone & Rolls* (n 9) [128] (Lord Walker), [226] (Lord Mance); *Hounga* (UKSC) (n 2) [43]-[44] (Lord Wilson); *Servier* (UKSC) (n 32) [24] (Lord Sumption); *Bilta* (n 33) [172] (Lords Toulson and Lord Hodge).

CHAPTER 5

APPROACH TO THE ILLEGALITY DEFENCE IN OTHER COMMON LAW JURISDICTIONS

5.1 Introduction

This chapter will examine the approach taken towards the illegality defence in other common law jurisdictions namely, New Zealand, Australia, Canada and Singapore. It will address the question whether there is support in these jurisdictions for the flexible approach laid down by Lord Toulson in *Patel v Mirza*[1] (hereafter *Patel*) which involves policy and proportionality considerations. Although Lord Toulson referred to some case law from other jurisdictions, Lord Mance was critical that the support was slender, boiling down to the Australian case of *Nelson v Nelson*[2] (hereafter *Nelson*) and the New Zealand Illegal Contracts 1970. It is, therefore, worth examining the position in other common law jurisdictions particularly since Lord Toulson did not examine the case law under the New Zealand Illegal Contracts Act 1970, or beyond *Nelson* in Australia. Lord Toulson also did not fully examine the Canadian approach other than reference to *Hall v*

[1][2016] UKSC 42, [2017] AC 467.
[2][1995] 4 LRC 453.

Hebert[3] (hereafter *Hall*) and *Still v Minister of National Revenue*[4] (hereafter *Still*). *Hall* is particularly significant because all justices in the Supreme Court in *Patel* favoured the consistency principle explained by McLachlin J in that case, however, they differed significantly as to whether that explanation represented a flexible or limited approach.[5] This chapter will argue that the limited approach is more reflective of McLachlin J's consistency principle. The chapter will also discuss other cases from Canada which reveals that the courts there have adopted a multi-factorial approach, taking into account factors akin to those laid down by Lord Toulson in determining the application of the illegality defence. The Singaporean approach will also be examined, which Lord Toulson did not refer to in his judgment. This will be examined because it shows support for the considerations that Lord Toulson laid down but also, and more significantly, a limited-flexible approach in *Ochroid Trading Ltd v Chua Siok Lui*[6] (hereafter *Ochroid*). That approach is governed by the principle of stultification, which is synonymous with consistency, and limits proportionality to specific circumstances. The thesis draws from and favours the Singaporean approach as a way of bringing more certainty and providing greater guidance and structure in determining whether to apply the illegality defence.

As chapter 7 of the thesis will propose a new approach to the illegality defence, the reason also for adopting a comparative approach is, as Lord Neuberger said in *Patel*, when developing 'any fundamental principle of the common law, it is normally sensible…to consider how the principle has been approached in other common law

[3][1993] 2 SCR 159.
[4][1997] Carswell Nat 2193, [1998] 1 FC 549.
[5]see chapter 4.
[6][2018] SGCA 5, [2018] 1 SLR 363.

jurisdictions'.[7] This is particularly so as one can learn from the experiences of other common law judges tackling similar issues.[8] Consistency in approach across common law jurisdictions is also beneficial because it leads to certainty and predictability of the common law.[9] A consistent approach ensures that businesses and communities at large do not have to deal with differing rules.[10] This chapter draws out the principles considered to be the most influential in the examined case law in determining the outcome of cases concerning illegality. Matching these key principles to those identified in both *Patel* and pre-*Patel* case law, a quasi-flexible approach will be advanced in chapter 7.

5.2 Common Law Jurisdictions

5.2.1 New Zealand

In New Zealand, the need for reform in the field of illegality, particularly illegal contracts grew increasingly strong by the mid-twentieth century due to repeated 'judicial expressions of concern at the harshness of the consequences which flowed from illegality'.[11] A major concern was the severe consequences which flowed in

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[7]*Patel* (UKSC) (n 1) [183] (Lord Neuberger).
[8]*Patel* (UKSC) (n 1) [183] (Lord Neuberger); see also *Starbucks (HK) Ltd v British Sky Broadcasting Group PLC* [2015] UKSC 31, [2015] 1 WLR 2628 at [50] (Lord Neuberger).
[9]Sir Geoffrey Vos, 'Certainty v. Creativity: Some pointers towards the development of the common law' (Singapore Academy of Law, 2018) para 51-53.
[10]Vos, 'Certainty v. Creativity' (n 9) para 51.
[11]Report of the Contracts and Commercial Law Reform Committee New Zealand on the Law governing Illegal Contracts (1969) 1.

particular from breach of statutory provisions and regulations. For example in *Carey v Hastie*[12] a builder was unable to recover money for work carried out by him without obtaining a building permit, which was required by the bylaw of Auckland City Council.[13] Although the builder was refused recovery, it is noteworthy that all three judges in the Court of Appeal recognised the harsh results which can arise from denying recovery. This was on the basis that such a result enables the defendant to get the benefit of the value of work done at the expense of the builder by avoiding payment.[14] In expressing the need for reform in the law of illegality, McCarthy J said:

> There are few areas in the law of contract which cause more trouble than that of illegality, and it may be…that the time has come when the Legislature might look carefully at this subject and consider doing something to remove the over-severe consequences which sometimes flow from a breach of one of the less important of the very large number of regulations which a managed welfare State seems to require. But until that is done, we have to apply the law as it is.[15]

As a result of this, the Contracts and Commercial Law Reform Committee in New Zealand produced a Report on the law governing illegal contracts in 1969 with a Draft Illegal Contracts Bill attached. In their Report the Committee recommended that the particular statute, regulation or bylaw in question should be construed to see if its

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[12][1968] NZLR 276.
[13]*Carey v Hastie* (n 12) 279 (North J), 281 (Turner J); see also *Strongman Ltd. v. Sincock* [1955] 2 QB 525, 537 (Denning LJ); *Townsend (Builders) Ltd. v Cinema News and Property Management Ltd.* [1959] 1 All ER 7, 12 (Lord Evershed MR).
[14]*Carey v Hastie* (n 12); see also *Townsend (Builders) Ltd* (n 13) 12 (Lord Evershed MR).
[15]*Carey v Hastie* (n 12) 282 (McCarthy J).

purpose and policy require that breach of it should affect the legality of the contract.[16] The Committee recommended that courts be given a wide discretion under which they can grant relief by validating an illegal contract. The Committee noted that giving the courts a discretion may be 'undesirable as a source of uncertainty',[17] but concluded that conferring a power on the courts was a much lesser evil than to leave the law in the unsatisfactory state it was in.[18] Moreover, the power to exercise such discretion is subject to the caveat that the courts should not grant relief if they consider that doing so would not be in the public interest.[19] Following the Committee's Report, the New Zealand Legislature enacted the Illegal Contracts Act 1970. The key provision of the Illegal Contracts Act 1970 is s 7(1) which provides:

> subject to the express provisions of any other enactment, the court may… grant…relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the court in its discretion thinks just.[20]

This power to validate was criticised by the Law Commission of Ontario in their 'Report on the Amendment of the Law of Contract' since it enables the 'court to declare

[16]Report (1969) (n 11) pg 8.
[17]Report (1969) (n 11) pg 10.
[18]Report (1969) (n 11) pg 10.
[19]Report (1969) (n 11) pg 10-11; see also Illegal Contracts Act 1970, s 7(3).
[20]Illegal Contracts Act 1970, s 7(1)(c).

valid what the legislature may have expressly intended to declare invalid'.[21] However, Cooke J in *Harding v Coburn*[22] highlighted:

> in practice validation might well be out of the question if it would produce a result contrary to the object of another enactment. It is no part of the purposes of the Illegal Contracts Act to undermine the social or economic policies of other measures. [23]

Another key provision is s 7(3) of the Illegal Contracts Act 1970 which provides:

> In considering whether to grant relief under subsection (1), and the nature and extent of any relief to be granted, the court shall have regard to—
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> (a) the conduct of the parties; and
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> (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
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> (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.

s 7(4) provides that:

> The court may make an order under subsection (1) notwithstanding that the person granted relief entered into the contract or committed an unlawful act or

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[21]The Ontario Law Reform Commission, *Report on the amendment of the Law of Contract* (1987) pg 232; see also The Law Reform Commission of British Columbia, *Report on Illegal Transactions* (LRC 69, 1983) pg 74-75.
[22][1976] 2 NZLR 577.
[23]*Harding* (n 22) 584-585 (Cooke J).

> unlawfully omitted to do an act with knowledge of the facts or law giving rise to the illegality, but the court shall take such knowledge into account in exercising its discretion under that subsection.[24]

The examination of the conduct of the parties; object of the enactment; gravity of the penalty expressly provided for, object of any another enactment, knowledge of illegality, are essentially the same considerations as those put forth by Lord Toulson in *Patel* under the trio of considerations.[25] In particular, the assessment of the object of an enactment, any other enactment, and ensuring they are not undermined is significant, as it encourages consistency in the law.[26]

The New Zealand case law reveals that courts have taken assistance from the factors in s 7(3) of the Illegal Contracts Act 1970 such as taking into account the object of enactment, in determining whether or not the illegality defence applies. Illustrative of this are *NZI Bank Ltd v Euro-National Corporation Ltd*[27] (hereafter *NZI*) and *Catley v Herbert*[28] (hereafter *Catley*).

In *NZI*, a company EN made a scheme under which it provided financial assistance for the purpose of purchase of its own shares. This scheme was illegal under s 62 (1) of the Companies Act 1955 which provided that it shall not be lawful for a company to give financial assistance for the purpose of or in connection with a purchase for any shares in

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[24] Illegal Contracts Act 1970, s 7 (4).
[25] see *Patel* (UKSC) (n 1) [120] (Lord Toulson).
[26] see Ernest Lim, '*Ex Turpi Causa*: Reformation not Revolution' (2017) 80 *MLR* 927,933, 934; Note also the policy of consistency is supported both in England and Canada and it is also supported in Australia and Singapore, although in the latter two, particularly Singapore the terminology used is that of stultification.
[27] [1992] 3 NZLR 528.
[28] [1988] 1 NZLR 606.

the company. An exception to this rule existed in s 62(1)(b) of the 1955 Act which provided that a company is not prohibited from purchasing shares in the company if the purchase of shares is to be held by or for the benefit of employees of the company. EN set up an employee unit trust (EUT) as a conduit to bring their illegal scheme under the protection of s 62(l)(b). Subsequently, the principal shareholders secured control of the EN board, and proceedings were brought in the name of EN for a refund of £3.2 million paid under those arrangements by EN to NZI and DFC. The lower court ordered the refund. NZI and DFC appealed against this judgment.

Richardson J in the Court of Appeal said:

> The object of s 62(1) is to protect the interests of shareholders and most importantly of creditors. The real protection for shareholders and creditors is that the impugned arrangement is of no effect.[29]

He said it is significant that the parties knew the arrangements were prohibited by s 62(1) unless brought within para (b). Moreover, as the money advanced was not in fact for the benefit of EN's employees, the scheme could not come under the protection s 62 (1) (b).[30] To grant relief would be directly contrary to the object of the enactment. The court thus refused to validate the contract.[31]

In contrast in *Catley*, the policy of s 62[32] was not undermined, thereby leading to relief by way of validation. There Mr Herbert and Catley owned shares in two companies.

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[29]*NZI* (n 27) 547 (Richardson J).
[30]*NZI* (n 27), 543, 545 (Richardson J).
[31]*NZI* (n 27) 548 (Richardson J).
[32]Companies Act 1955.

Later the business was dissolved. An agreement was drawn up under which Mr Herbert was to receive Mr Catley's shares in BOP and OK Ltd and Mr Catley would receive flats and property, with the balance to be made up in cash. Mr Herbert could only meet Mr Catley's requirements by receiving assets owned by the companies. In order to sell the properties to Mr Catley, it was necessary for Mr Herbert to first purchase them from OK Ltd. An agreement to sell these assets to Mr Herbert, so that he could pass them on to Mr Catley, amounted to the company assisting him to purchase the shares.[33] Mr Catley later decided to cancel this agreement and argued that the contract was invalid and unenforceable since the companies were providing financial assistance for the purchase of their own shares thus being in breach of s 62 of the 1955 Act.

In the Court of Appeal, Hardie Boys J held that although the sale of the company's assets was to enable Mr Herbert to use them to buy the company's shares, and that this amounted to financial assistance by the company in contravention of s 62, the object of s 62 was not undermined. The object of the prohibition in s 62 was for the protection of shareholders and creditors.[34] Here there was no question of prejudice to the shareholders or the creditors.[35] The arrangements were made by the directors who were also the only shareholders.[36] The parties were on equal terms and were to equally benefit. He said that although the exchange of assets for acknowledgement of debts might prejudice creditors if the debtor is unable to meet his obligations, here there was no evidence that creditors would be affected.[37] The accounts of OK Ltd showed an

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[33] *Catley v Herbert* (n 28) 615 (Hardie Boys J).
[34] *Catley v Herbert* (n 28) 615, 616 (Hardie Boys J).
[35] *Catley v Herbert* (n 28) 616 (Hardie Boys J).
[36] *Catley v Herbert* (n 28) 614 (Hardie Boys J).
[37] *Catley v Herbert* (n 28) 616 (Hardie Boys J).

excess of assets over liabilities and so the company was able to meet its liabilities and creditors would not be prejudiced.[38] The transaction did 'not bring about the kind of consequence the prohibition was designed to avoid'.[39] The contract was therefore validated.

It should be noted however, that as s 7(3)(c) of the 1970 Act provides that the courts can take into account 'such matters as it thinks proper'. As a result, the New Zealand courts have the ability to consider a range of factors and the case law reveals that they have exercised this wide discretion openly. This is, however, concerning as there is no overarching principle governing the application of the illegality defence. Often breach of the same statutory provision or common law rule has led to opposing results. No set factor or principle has determined the outcome of cases, leading to decisions being reached on an ad-hoc basis. This lack of guidance creates uncertainty in the law as it is difficult to predict in which direction the decisions will sway. The cases below illustrate this point.

In *Leith v Gould*[40] (hereafter *Leith*) the claimant entered into an agreement with the defendant to purchase a leased property.[41] However, the defendant denied that any such agreement for sale of property was made. The claimant being in possession of the property sued for specific performance. The defendant raised the illegality defence arguing that the contract was unlawful and of no effect since it was entered into in contravention of s 25 of the Land Settlement Promotion and Land Acquisition Act

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[38]*Catley v Herbert* (n 28) 616,617 (Hardie Boys J).
[39]*Catley v Herbert* (n 28) 617 (Hardie Boys J).
[40][1986] 1 NZLR 760.
[41]*Leith* (n 40) 764 (Ongley J).

1952. That provision made it a requirement to get consent of the Land Valuation Tribunal to a transaction for the sale of land. If a valid application for consent was not made, the transaction would be deemed unlawful and of no effect.[42] The claimant had made an application but that application was supported by fraudulent documents. The court held that a valid application had not been made, thus the agreement of sale and purchase was unlawful and of no effect.[43] The claimant applied to the court to validate the contract under s 7.[44] In refusing to validate the contract, Ongley J took into account the claimant's knowledge of the deception perpetrated by their solicitor in using the fraudulent documents which the claimant signed off in support of his application.[45] A valid application had not been made, the agreement for sale was deemed unlawful and of no effect.[46] Ongley J said:

> the result of the solicitor's misconduct is that no application has been made for consent to the transaction so that to validate the transaction would be totally to avoid the operation of the legislation and necessarily to vitiate the object of the enactment.[47]

In contrast in *Hurrell v Townend*[48] (hereafter *Hurrell*), despite the object of the statutory provision being essentially undermined, relief was granted. In *Hurrell,* Mr Hurrell had agreed to purchase blocks of farmland. Section 24 of the Land Settlement Promotion and Land Acquisition Act 1952 dispensed with the need to obtain consent of the Land

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[42]see Land Settlement Promotion and Land Acquisition Act 1952, s 25 (1), s25(4).
[43]*Leith* (n 40) 766, 767 (Ongley J).
[44] Illegal Contracts Act 1970.
[45]*Leith* (n 40) 767,768 (Ongley J).
[46]ibid.
[47]ibid.
[48][1982] 1 NZLR 536.

Valuation Tribunal where the purchaser does not own any other farmland. Mr Hurrell owned other farm land but no application for the consent was filed. Mr Hurrell later decided not to buy the land and argued that the agreement was void as it did not comply with s 25 of the 1952 Act.[49] The vendor sued Mr Hurrell for specific performance and an order for validation of contract under s 7 of the Illegal Contracts Act 1970. The Court of Appeal said that as the purchaser was not a landless man the transaction was in contravention of s 25, unlawful and of no effect. However, s 7 of the Illegal Contracts Act 1970 gave the court discretion to validate the transaction. Somers J said the object of the 1952 Act was to prevent undue aggregation of land. He said, to acquire a farm which is an economic unit whilst being the owner of another such unit (farmland) is to aggregate unduly.[50] However, it was held that on evidence provided to the court, Mr Hurrell could not have purchased the property in question without first disposing of his own land.[51] Put differently, he could not have financed the purchase except by disposing of his land. Based on the evidence that Mr Hurrell would be selling his own land, it was held that validating the contract and transferring the land to Mr Hurrell would not defeat the object of the 1952 Act, as there would be no undue aggregation.[52] The court upheld specific performance.[53]

Similarly, in *Williams v Gibbons*[54] which involved breach of s 25 of the Land Settlement Promotion and Land Acquisition Act 1952, the court validated the contract. The defendant had leased a property to the claimant subject to a compulsory purchasing

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[49] Which required that an application for consent be made.
[50] *Hurrell* (n 48) 552 (Somers J).
[51] *Hurrell* (n 48) 553 (Somers J), 539, 540 (Cooke J and Roper J).
[52] *Hurrell* (n 48) 540 (Cooke J and Roper J), 553 (Somers J).
[53] *Hurrell* (n 48) 540 (Cooke J and Roper J), 554 (Somers J).
[54] [1994] 1 NZLR 273.

clause at the end of the term for $140,000.[55] An interest of 20% would be charged for late payment. The claimant sought to extend the payment date but this extension was refused. Subsequently, the claimant said he would be ready to pay on time. He arranged payment but that payment was wrongfully refused by the defendants' solicitor. The defendant tried to cancel the contract and argued that the contract was illegal as being contrary to s 25 of the 1952 Act. This was on the basis that the claimant had made a declaration that he was landless. As this declaration was false, consent of the land valuation tribunal was required.[56] The consent not been obtained, the agreement being unlawful and of no effect.[57] The claimant issued proceedings for specific performance by validation of the contract under Illegal Contracts Act 1970. The dispute needed to be resolved as the claimant had sold the land on at a much higher price, which the court recognised provided the explanation for the defendant's unwillingness to settle.[58] The court held that the tender of a bank cheque by the claimant for settlement was good tender, and was wrongfully refused by the defendants' solicitor.[59] The contract could not be cancelled by the defendant. Regarding illegality, Casey J held firstly that the claimant was mistaken in his landless declaration, with no intention to deceive the Tribunal. Secondly, as the mistake prejudiced or misled nobody (remaining undetected for the five year lease term, only to be relied on by the defendants to avoid their obligation under the compulsory purchase clause), the contract should be and was validated.[60] He noted that the compulsory purchase clause bound both sides, so that the

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[55] *Williams* (n 54) 274 (Casey J).
[56] *Williams* (n 54) 277, 278, 279 (Casey J).
[57] see Land Settlement Promotion and Land Acquisition Act 1952, s 25.
[58] *Williams* (n 54) 275 (Casey J).
[59] *Williams* (n 54) 275, 277 (Casey J).
[60] *Williams* (n 54) 280 (Casey J).

claimant would have had to take a risk of a fall of property value in the same way as the defendant took the risk of a rise of property prices.[61] He held that validation would not be contrary to the object of the 1952 Act.

The outcomes of these cases appear to turn on the judicial assessment of the level of culpability of the parties, in particular the moral quality of the claimant's behaviour. Though the outcomes reached appear to be fair, one cannot overlook that basing decisions on moral factors can create uncertainty as these factors can be decided upon subjectively.[62] Richard Buckley similarly observes that courts in New Zealand examine the purpose of the statute and the specific contractual situation, which results in relief being refused in some cases as it undermines the purpose of the statute, whilst in other cases involving the same statutory provision, relief is granted.[63] Although this approach has the advantage that the court is not confined to rigid rules (which devoid of such considerations can lead to harsh results)[64], without a governing principle the law is plunged into uncertainty.

Two further cases which illustrate the courts reaching opposing results are *Slater v Mall Finance & Investment Co Ltd*[65](hereafter *Slater*) and *Polymer Developments Group Ltd v Tilialo*[66] (hereafter *Polymer*). In *Slater*, the applicant, who had become aware that one the directors of a company had misappropriated $11,500 belonging to the company, agreed to give an unregistered mortgage over her property to the company in the sum of

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[61]*Williams* (n 54) 280 (Casey J).
[62]This point will be further illustrated through the *Patel* case example in chapter 6.
[63]Richard Buckley 'Illegal transactions: chaos or discretion?' (2000) 20 *Legal Studies* 155, 172.
[64]Buckley, 'Illegal transactions: chaos or discretion?' (n 63) 169.
[65][1976] 2 NZLR 1.
[66][2002] 3 NZLR 258.

$11,500. This was done to prevent the matter going to the police. The court held that any contract affecting the administration of justice is illegal and void as long as the consideration for it is the non-disclosure of an offence which is a matter of public concern.[67] The court held that where the agreement is made for the express purpose of preventing prosecution, the agreement is void.[68]

In *Polymer*, the agreement was that if the defendant repaid the money taken from the company, the company would not bring legal proceedings against his brother who had misappropriated the money. When some repayments were not made, the company brought proceedings against the defendant to recover the money. The defendant argued that the agreement was illegal and unenforceable as it prohibited bringing legal proceedings. The defendant sought return of the money he had already paid. The company argued that the agreement was not illegal but if it was, it should be validated under s 7 of the 1970 Act. Glazebrook J said that the agreement contained a term which was illegal since it prohibited the company from instituting legal proceedings. This made the agreement an illegal contract and of no effect.[69] To determine whether relief should be granted under the Illegal Contracts Act 1970, Glazebrook J said that the course of negotiations between the parties was highly relevant, as were factors such as which party is more to blame (culpable) and the conduct of the parties.[70] He said it was of significance that the agreement had been drafted by the defendant's solicitor, on his instructions and was presented to company in a manner that deprived the company of

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[67]*Slater* (n 65) 5 (White J).
[68]*Slater* (n 65) 6 (White J).
[69]*Polymer* (n 66) [102] (Glazebrook J).
[70]*Polymer* (n 66) [89]-[90] (Glazebrook J).

the opportunity to take legal advice.[71] Such conduct pointed towards relief being given to the company. As the agreement was drafted at the defendant's instructions, it was held that he had to bear the primary responsibility for the illegality.[72] Although there was public interest in the misappropriation coming to the attention of the police, the agreement did not prohibit the company from informing the police.[73] Glazebrook J said the agreement merely prohibited bringing a private prosecution and 'there is a very limited role for private prosecutions in New Zealand and the public interest involved in ensuring bargains are not made to prohibit private prosecutions is weak'.[74] Relief was granted to the company, severing reference to criminal proceedings in the agreement and validating the contract, to the extent of payments made. The company also did not have to repay the amount received.[75] However, the court took into account that the financial circumstances of the defendant were not good and that his brother was the actual offender. The court reduced the amount the defendant had to pay under the agreement.[76]

Although the courts appear to have reached a fair result, the difficulty is that despite both cases involving the same principle, namely a contract affecting the administration of justice (by prohibiting legal proceedings), the courts reached opposing conclusions. This makes it difficult to predict when the claim will be barred. Arguably, relief should also have been denied in *Polymer* on the ground that the contract was contrary to public policy, being one which affects the administration of justice. Doing so, the courts would

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[71] *Polymer* (n 66) [103] (Glazebrook J).
[72] ibid.
[73] *Polymer* (n 66) [97], [103] (Glazebrook J).
[74] *Polymer* (n 66) [86], [98] (Glazebrook J).
[75] *Polymer* (n 66) [104] (Glazebrook J).
[76] *Polymer* (n 66) [105] (Glazebrook J).

then be adopting the same position as that taken pre-*Patel* when dealing with contracts contrary to public policy which were automatically rendered unenforceable and with pre-*Patel* treatment of express statutory illegality cases in England.[77] In relation to contracts contrary to public policy, in *Parkinson v College of Ambulance Ltd*[78] (hereafter *Parkinson*) money paid as a bribe was irrecoverable because it was contrary to public policy as encouraging corruption in public life. However, post-*Patel* it appears that in England contracts contrary to public policy, such as *Parkinson* and arguably *Polymer,* are not automatically unenforceable. This is evident from Lord Toulson's judgment where he said the if a bribe is paid to gain a public office position or knighthood, it would be more repugnant to the public interest that the recipient should keep it, than the money being returned to the one who bribed.[79] Secondly, Lord Toulson differentiates between cases which concern statutory illegality such as express statutory illegality, and those which are contrary to public policy. This is evident from the following passage where Lord Toulson said:

> courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the

[77]see *Boissevain v Weil* [1950] AC 327 in which repayment of a loan was prevented as being contrary to Regulations; see also chapter 2 for facts of this case.
[78][1925] 2 KB 1.
[79]*Patel* (UKSC) (n 1) [118] (Lord Toulson).

> public interest in preserving the integrity of the justice system should result in denial of the relief claimed.[80]

This suggests that where contracts are contrary to public policy, the result would be dependent on taking into account various factors as opposed to automatic unenforceability. This is the approach taken by New Zealand, as the courts are given a wide discretion in determining whether or not to grant relief. In *Polymer*, the court based the decision on conduct of the parties and relative culpability. In doing so, as noted earlier, they failed to provide a clear principle on which these results are based. Whether contracts contrary to public policy, such as *Polymer* and *Parkinson*, should be subject to a multi-factorial approach is questionable. In Chapter 7 it will be argued that contracts contrary to public policy should be automatically rendered unenforceable. The principled basis for this will be on grounds of maintaining consistency in the law, as such contracts are already deemed as contrary to the public interest.[81]

Another concern of s 7(3)(c) of the Illegal Contracts Act 1970 is the high level of generality as to what represents the public interest. One case however, does provide some guidance on this. That case is *Broadlands Rentals v R.D. Bull.*[82] There the claimant leased a car, with the understanding that he would eventually purchase it. This transaction was in breach of the Hire Purchase and Credit Sales Stabilisation Regulations 1957. The defendant repossessed the car and sold it. The claimant claimed repayment of the rental monies. The defendant counterclaimed the balance still owing

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[80]*Patel* (UKSC) (n 1) [109] (Lord Toulson);see also *Ochroid* (n 6) [114], [115] (Andrew Phang Boon Leong JA).
[81]see The Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (Law Com CP No 154, 1999) para 7.13.
[82]1 NZLR [1975] 304; [1976] 2 NZLR 595.

under the hire agreement from the claimant. Both applied for relief under s 7 of the Illegal Contracts Act 1970. Keeping in mind the public interest, Chilwell J at first instance dismissed the defendant's claim on the grounds that to allow the defendant relief would allow him to profit from his own wrongdoing. Chilwell J said 'to grant relief to a financier, such as the defendant in this case who adopts an ingenious device to defeat the operation of the regulations for its own profit would not be in the public interest'.[83] This part of Chilwell's judgment was not appealed. This reveals that it is not in the public interest to grant relief where it would allow the claimant (here the defendant being the counter-claimant), to profit from their crime. In essence, the New Zealand courts are applying a principle of consistency as explained by McLachlin J in *Hall* under which there is inconsistency in the law if allowing the claim leads to the claimant profiting from their wrongdoing. However, it should be noted that the New Zealand courts have not explicitly indicated consistency in the law as a principle preserving the public interest. For this reason it is difficult to say with certainty as to when it is not in the public interest to grant relief.[84] This problem also relates in general to the open-ended nature of public interest. In contrast, in *Patel*, Lord Toulson explained explicitly that it is not in the public interest to enforce a claim which is harmful to the integrity of the legal system. In order to know whether the public interest is harmed in that way, he said the courts have to consider the purpose behind the prohibition which has been infringed and any other relevant public policy. Doing so

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[83]*Broadlands Rentals* (n 82) 309 (Chilwell J).
[84]Compare *Slater* (n 65) with *Polymer* (n 66) in which opposing results were reached despite both involving an agreement for the purpose of preventing prosecution. In *Slater* relief was refused whilst in *Polymer* it was allowed.

maintains consistency in the law. Further it is in the public interest that the courts reach a proportionate response to the illegality.[85]

In conclusion, despite the arguments of uncertainty, considering that in New Zealand reform was initiated to counter the all or nothing consequences of illegality, it is unsurprisingly that the courts there are making full use of the discretion vested in them through the Illegal Contracts Act 1970. As Buckley argues, a wide discretion has its benefits as it enables the courts to take into account 'whether the illegality was the result of deliberation or oversight'.[86] This flexible position appears to be preferable to a rigid rule which fails to take into account different factors such as knowledge; conduct of the parties; and purpose of enactment.[87] Moreover, as cases concerning illegality are very fact-centric,[88] with varying degrees of illegalities and circumstances, it is often difficult to reach a just result without taking into consideration such factors. As Enonchong argues, favouring flexibility at the expense of justice 'may be a price worth paying'.[89] Notwithstanding this, it is submitted in this thesis that whilst the law should have flexibility, it should not be so extensive so as to be devoid of a principle. The law

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[85]*Patel* (UKSC) (n 1) [120] (Lord Toulson).
[86]Buckley, 'Illegal transactions: chaos or discretion?' (n 63) 172.
[87]ibid; see *Duncan v McDonald* [1997] 3 NZLR 669 in which the court took into account the differing degrees of responsibility of the parties and apportioned responsibility for the losses accordingly. Thus the instigator of the scheme had to pay out the greater amount to the claimant, that is to say that he was the primary source of recoupment of the claimant's lost money, whilst the secondary party to the scheme had to pay out the lesser amount; see also Brian Coote, "The Illegal Contracts Act 1970" in the New Zealand Law Commission, Contract Statutes Review (1993) Chapter 3, 173 who argues that in practice the Illegal Contracts Act 1970 has worked reasonably well.
[88]Goh, Lee, Tham 'Contract Law' (2014) 15 *SAL Ann Review* 217, 243.
[89] Nelson Enonchong 'Illegal Transactions: The future? (LCCP No 154)' (2000) 8 *RLR* 82, 103; see also J F. Burrows, 'Contract Statutes: The New Zealand Experience' (1983) *Statute L. Rev*. 76, 89; Buckley, 'Illegal transactions: chaos or discretion?' (n 63) 172.

should aspire to achieve as much certainty as possible and certainty can be brought through an overarching principle which governs the outcome of cases. That is not to suggest that flexibility cannot be retained. It can be retained, but its application (taking into consideration various factors) can be limited to specific circumstances. Those circumstances will be laid down in chapter 7, which will provide a quasi-flexible approach to the illegality defence. It is thus submitted here, that the extensively flexible approach taken in New Zealand should not be adopted in England and Wales.

5.2.2 Australia

In Australia, the *Holman v Johnson*[90] (hereafter *Holman*) dictum 'No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act'[91] has been labelled as 'too extreme and inflexible to represent sound legal policy'.[92] As Kirby J said in *Fitzgerald v FJ Leonhardt*[93]:

> It would be…absurd if the courts closed their doors to a party seeking to enforce its contractual rights without having regard to the degree of that party's transgression, the deliberateness or otherwise of its breach of the law and its state of mind generally relevant to the illegality…It is one thing for courts to respond with understandable disfavour…to attempts to involve them and their processes in an inappropriate and unseemly way effectively in the advancement of illegality and wrong-doing. It is another to invoke a broad rule of so-called

[90](1775) 1 Cowp 341.
[91]*Holman* (n 90) 343 (Lord Mansfield).
[92]*Nelson* (n 2) 521 (McHugh J).
[93][1997] HCA 17, [1997] 189 CLR 215.

> "public policy" which slams the doors of the court in the face of a person whose illegality may be minor, technical, innocent, lacking in seriousness and wholly incidental or peripheral to a contract which that person is seeking to enforce.[94]

The case *Nelson* concerning enforcement of a trust is also significant in reflecting support for the Toulson test considerations, and rejection of the reliance test.[95] This is however foreseeable, as Lord Toulson expressly drew from *Nelson* for his trio of considerations. Nonetheless, the case is seminal in preferring and providing a flexible approach as opposed to the reliance test.

In *Nelson*, the claimant purchased two properties. The first property was purchased by her in the name of her two children. The second property was purchased with the assistance of a subsidised loan under the Defence Service Homes Act 1918 (hereafter 1918 Act) by making a false declaration that the claimant did not own any financial interest in any other property. Subsequently, the claimant sold the first property. The daughter claimed beneficial interest in the proceeds of sale of the first property. The mother brought proceedings for a declaration that the proceeds of sale of the first property were held on trust for her. The daughter raised the illegality defence arguing that the purpose for which the mother had put the first property in the children's name was to enable her to get the subsidised loan, which was illegal. Moreover, as the transfer was from mother to child it raised the presumption of advancement which the mother could not rebut without relying on her illegality. The High Court held that the mother could recover the proceeds of sale provided that she returned the amount equal to the

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[94] *Fitzgerald* (n 93).
[95] For criticism of reliance test see *Nelson* (n 2) 476, 477 (Deane J and Gummow J), 505, 509 (Toohey J), 519-521 (McHugh J).

subsidy taken under the 1918 Act. The case is of significance as McHugh J said that a court should not refuse to enforce legal or equitable rights simply because they arose out of or are associated with an unlawful purpose unless:[96]

> (a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or
>
> (b)(i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct;
>
> (ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and
>
> (iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies.[97]

The policy of the 1918 Act was said to be providing assistance to acquire homes.[98] The claimant's conduct did not undermine that policy. McHugh J emphasised that the 1918 Act contained internal mechanisms to deal with false declarations. Under the 1918 Act a false declaration was not a criminal offence but the subsidy could be cancelled[99] and repayment of the subsidised loan to the commonwealth be ordered.[100] Moreover, the Secretary on behalf of the Commonwealth had discretion to write off the amount that a

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[96]*Nelson* (n 2) 523 (McHugh J).
[97]ibid.
[98]*Nelson* (n 2) 524, 526 (McHugh J).
[99]see s26(1) of Defence Service Homes Act 1988, which amended the Defence Service Homes Act 1918.
[100]s 29 Defence Service Homes Act 1988.

person was required pay and waive the right to recover the loan.[101] In light of these provisions, McHugh J said if the policy of the Act is not defeated by the corporation waiving its right to recover the wrongfully obtained subsidy, then it is hard to see how the policy of the Act could be defeated if a court enforces a resulting trust in the claimants' favour.[102] Moreover, he said that the resulting trust will be enforced on the terms that the benefit which she received under the Act (the amount of subsidy) is returned.[103] He emphasised that refusal to enforce the equitable right would be a penalty out of all proportion to the seriousness of the claimant's conduct (particularly where the Act itself provides sufficient sanctions to deal with breaches) and there is no provision in the Act making unenforceable any such agreements in breach.[104]

In relation to the reliance test, McHugh J expressed strong disapproval. He argued the reliance test produces arbitrary results (based on presumptions) and pays:

> no regard to the legal and equitable rights of the parties, the merits of the case, the effect of the transaction in undermining the policy of the relevant legislation or the question whether the sanctions imposed by the legislation sufficiently protect the purpose of the legislation. Regard is had only to the procedural issue; and it is that issue and not the policy of the legislation or the merits of the parties which determines the outcome. Basing the grant of legal remedies on an essentially procedural criterion which has nothing to do with the equitable

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[101] s 30 (1) , s 30 (1) (b) Defence Service Homes Act 1988.
[102] *Nelson* (n 2) 526 (McHugh J).
[103] *Nelson* (n 2) 526 (McHugh J), 488, 489 (Deane J and Gummow J).
[104] *Nelson* (n 2) 526 (McHugh J), 471, 477, 479, 482, 484, 486, 489 (Deane J and Gummow J).

> positions of the parties or the policy of the legislation is unsatisfactory, particularly when implementing a doctrine that is founded on public policy.[105]

Moreover, the reliance test leads to severely harsh consequences for those who are forced to rely on the illegality whilst giving the other party a windfall gain. It often also defeats the intention of Parliament.[106] For example, in *Nelson* to rebut the presumption of advancement the mother would have had to rely on the illegality. This would result in her losing her equitable interest despite the Act providing that the penalty for obtaining a subsidy by a false declaration is repayment of the subsidy received. More significantly the Act provided that the Secretary on behalf of the Commonwealth had discretion to write off the amount that a person was required pay and to waive the right to recover the loan.[107] Further, the windfall issue earlier noted was also raised by Toohey J in his dissenting speech:

> Although the public policy in discouraging unlawful acts and refusing them judicial approval is important, it is not the only relevant policy consideration. There is also the consideration of preventing injustice and the enrichment of one party at the expense of the other.[108]

In *Nelson*, it would have given the daughter a windfall gain of nearly $200,000 to the mother's detriment.[109] The reliance rule can thus act as an incentive to illegality as it encourages those to whom the property is transferred to encourage the transferors to

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[105]*Nelson* (n 2) 520 (McHugh J).
[106]ibid.
[107]see Defence Service Homes Act 1988 s 26 (1), s29, s 30 (1), s 30 (1) (b). Note Defence Service Homes Act 1988 amended the Defence Service Homes Act 1918.
[108]*Nelson* (n 2) 509 (Toohey J).
[109]ibid.

carry out their illegal purpose.[110] In contrast, the policy based approach (presented in *Nelson*) is preferable than the application of the reliance test for the reasons noted by McHugh J above.[111] Ben Kremer commends the approach taken in *Nelson,* arguing that it provides 'clear and principled guidance to the doctrine of illegality' and is coherent and well reasoned.[112] It is not an:

> unarticulated discretion but…a balancing of identified factors: the extreme sanction of denying a curial remedy in order to prevent or condone breaches of the law as against the equity of leaving the parties in their current situation.[113]

Kremer also commends rejection of the reliance test, arguing that it was a procedural rule enabling the 'unscrupulous to use it to their advantage'.[114] He argued that it was 'not a sound principle of justice…[as it led] to random windfalls and losses regardless of the merits of the case'.[115]

Despite a generally positive response to *Nelson,* some scholars have identified problems with it. McInnes, observes that although *Nelson* places the illegality defence on a more 'rational…footing' it is not entirely without issue.[116] McInnes questions whether the approach advanced by McHugh J avoids uncertainty or provides greater predictability

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[110]*Nelson* (n 2) 520 (McHugh J).
[111]see also *Nelson* (n 2) 505, 509, 510 (Toohey J).
[112]Ben Kremer, 'An "Unruly Horse" in a "Shadowy World"?: The Law of Illegality after *Nelson v Nelson'* (1997) 19 *Sydney L Rev* 240, 250, 254, 256.
[113]Kremer, 'An "Unruly Horse" in a "Shadowy World"?' (n 112) 253.
[114]Kremer, 'An "Unruly Horse" in a "Shadowy World"?' (n 112) 251.
[115]ibid.
[116]Mitchell McInnes, 'Advancement, Illegality and Restitution' (1997) 5 *Australian Property Law Journal* 1, 20.

through 'adherence to legislative intention'.[117] He argues that ascertainment of legislative intention can at times be a difficult exercise, particularly where the statute does not expressly provide the consequences of the breach.[118] He observes that although in some cases the courts can derive 'parliamentary intent from the statutory scheme as a whole',[119] in other cases finding the intent will be highly speculative.[120] Moreover, if Parliament had not considered the matter properly, adherence to statutory intent may be artificial.[121] Where the intention is in doubt, the interpretation of the scheme may be coloured by what the judge perceives to be the right result and that could be labelled as discretionary.[122] Notwithstanding this, he admits, that in cases such as *Nelson*, where statutory sanctions are already provided, it would be quite surprising that Parliament also intended further penalties such as forfeiture,[123] though he says this tentatively.[124]

Both Kremer and McInnes raise important points. In relation to Kremer's view, McHugh J's approach is preferable to the procedural reliance test. The reliance test being devoid of policy considerations and which can often lead to windfall gains.[125] This was in fact what occurred in the English case *Collier v Collier*[126] (hereafter *Collier*) where the reliance test led to the father failing to recover the property which he had transferred to his daughter for an illegal purpose. There he could not rebut the

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[117]McInnes, 'Advancement, Illegality and Restitution' (n 116) 15.
[118]ibid.
[119]ibid.
[120]ibid.
[121]McInnes, 'Advancement, Illegality and Restitution' (n 116) 16.
[122]ibid.
[123]McInnes, 'Advancement, Illegality and Restitution' (n 116) 15, 16.
[124]ibid.
[125]Kremer, 'An "Unruly Horse" in a "Shadowy World"?' (n 112) 251;see also McInnes, 'Advancement, Illegality and Restitution' (n 116) 13.
[126][2002] EWCA Civ 1095.

presumption of advancement without relying on the illegality. Mance LJ in *Collier* had expressed his discontent with the outcome particularly as the daughter, being party to the illegal purpose, understood its motivation, co-operated, and the operation of the reliance test led to her enjoying an uncovenanted benefit.[127] McInnes's concern regarding McHugh J's approach, which involves determining parliamentary intention, is also legitimate. However, it is likely that courts will derive guidance from Hansard,[128] or from the statute itself. Thus where the statute imposes a penalty courts are likely to conclude that it is sufficient to serve the purpose of the rule infringed such as in *Shaw v Groom*[129] unless either the statute expressly provides otherwise or an inference can be found for refusal of recovery altogether.[130]

The next two Australian cases are of particular significance as they reveal support for the policy of maintaining consistency in the law[131] and the synonymous principle of stultification, in determining the application of the illegality defence. These cases are *Miller v Miller*[132] (hereafter *Miller*) and *Equuscorp v Haxton*[133] (hereafter *Equuscorp*). In *Miller* French CJ said:

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[127]*Collier* (n 126) [87]-[90] [113] (Mance LJ).
[128]Mark Law and Rebecca Ong 'He who comes to Equity need not do so with clean hands?' illegality and resulting trusts after Patel v Mirza, what should the approach be?' (2017) 23 *Trusts & Trustees* 880,892.
[129][1970] 2 QB 504, 526 (Sachs LJ).
[130]see also *Cope v Rowlands* (1836) 2 Meeson and Welsby 149, 157-159 (Parke B).
[131]*Miller v Miller* [2011] 5 LRC 14 at [15] (French CJ).
[132][2011] 5 LRC 14.
[133][2012] 3 LRC 716.

> Ultimately, the question is: would it be incongruous for the law to proscribe the plaintiff's conduct and yet allow recovery in negligence for damage suffered in the course, or as a result, of that unlawful conduct?[134]

In *Miller* the plaintiff had stolen a car. The defendant who later showed up insisted that he drive the car. Both the defendant and plaintiff were drunk. The defendant began speeding. The plaintiff asked the defendant twice to let her out of the car but the defendant refused. Eventually he lost control of the car, and it crashed into a pole. The plaintiff was seriously injured. The plaintiff brought an action against the defendant for damages for negligence. The defendant argued that he did not owe the plaintiff a duty of care because they were involved in a joint illegal enterprise at the time of the accident, namely the unlawful use of a motor vehicle without the owner's consent contrary to s 371A of the West Australian Criminal Code. In the High Court, French CJ said:

> It will be by reference to the relevant statute, and identification of its purposes, that any incongruity, contrariety or lack of coherence denying the existence of a duty of care will be found.[135]

The purpose of s 317A of the Code was to punish the taking and use of vehicles illegally.[136] Often a consequence of the commission of such a crime, French CJ said, is that the driver will drive recklessly.[137] The statutory purpose of a law proscribing illegal use (s 371A) and dangerous/reckless driving is not consistent with one offender owing

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[134]*Miller* (n 131) [16] (French CJ).
[135]*Miller* (n 131) [74] (French CJ).
[136]*Miller* (n 131) [99] (French CJ).
[137]ibid.

another co-offender a duty to take care.[138] However, if a person withdraws from the prosecution of the illegal purpose, by words or conduct, communicating the withdrawal to each other, that person is not responsible for offences committed subsequently.[139] He noted that the plaintiff has asked twice to be let out of the car.[140] He held the 'claimant had withdrawn from…participating in, the crime of illegally using the car when the accident happened, it could no longer be said that [the defendant] owed her no duty of care'.[141] As she had withdrawn, she was not complicit in the crime. He owed her a duty to take care. The claim was allowed.

A criticism of the approach taken in *Miller* is the emphasis on the duty of care question. To ask whether one party owes the other a duty of care adds little in deciding whether to allow or deny relief where the claim is tainted with illegality.[142] The criticisms of the duty approach were addressed in Chapter 2 and therefore will not be repeated here, other than to emphasise that the duty of care analysis does not fully capture the scope of the illegality defence. For the illegality defence frustrates a negligence claim which would otherwise be fully made out.[143] The courts acknowledge that the 'defendant had acted negligently in causing the harm [but]…that responsibility for…[the] wrong is suspended because concern for the integrity of the justice system trumps the concern that the defendant be responsible'.[144] The approach of denying recovery because it would undermine the coherence of the legal system thereby harming the integrity of the

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[138]*Miller* (n 131) [101] (French CJ).
[139]*Miller* (n 131) [79] (French CJ).
[140]*Miller* (n 131) [103], [106] (French CJ).
[141]ibid.
[142]*Hall* (n 3) 181 (McLachlin J).
[143]ibid.
[144]*Hall* (n 3) 181, 182 (McLachlin J).

justice system in the terms explained by McLachlin J in *Hall*, is therefore preferable in determining the application of the illegality defence.[145] That approach is also in line with the passage quoted from French CJ's judgment in *Miller* above, where he said that the key question is whether it would be inconsistent for the law to proscribe the claimant's conduct and yet allow recovery in negligence for the damage suffered during or as a result of the illegal conduct.[146]

In *Equuscorp*, the claim was for restitution of money advanced under a loan agreement made in furtherance of an illegal purpose, which involved contravention of s 170(1) of the Companies Code. French CJ said the relevant question was whether allowing the claim for restitutionary relief would frustrate or defeat, that is to say stultify, the statutory purpose of the provisions of the Code.[147] If allowing restitution does not frustrate the policy of the underlying prohibition then the claim will be allowed.[148] In *Equuscorp*, French CJ emphasised that the statutory purpose was protective of the class of persons from whom the claimant sought recovery.[149] The court held that the money advanced by the claimant could not be recovered because to do so would stultify, (or otherwise create inconsistency) with the purpose of the Code which rendered the transaction illegal in the first place.[150] It is notable that French CJ emphasised that the:

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[145]See *Hall v Hebert* (n 3) 169, 178-181 (McLachlin J); see also chapter 4.
[146]*Miller* (n 131) [16] (French CJ).
[147]*Equuscorp* (n 133) [25], [38] (French CJ).
[148]*Equuscorp* (n 133) [38] (French CJ).
[149]*Equuscorp* (n 133) [34], [45] (French CJ).
[150]*Equuscorp* (n 133) [45] (French CJ).

> negative goal of avoiding self-stultification in the law may be expressed positively as the objective of maintaining coherence in the law as discussed by this court in *Miller v Miller* [2011] 5 LRC 14.[151]

French CJ emphasised that 'the central policy consideration at stake is the coherence of the law'.[152] In *Equuscorp* it was clear that the need to maintain coherence in the law in avoiding stultification of the statutory purpose led to the conclusion that the claim for restitution should be denied.[153] Put differently, maintaining coherence in the law means the law avoiding contradictions, a definition which Birks also ascribed to stultification.[154]

In conclusion, the most important considerations found in the examined Australian case law are determining parliamentary intention (whether the statute discloses an intention that the rights claimed should be unenforceable), the sanction of unenforceability of rights is not disproportionate to the seriousness of illegal conduct, the sanction is necessary having regard to the terms of the statute and the statute does not disclose an intention that the sanctions there-under are to be the only consequences of breach.[155] To find Parliamentary intention, courts are likely to gain guidance 'from the statutory scheme as a whole'[156] or Hansard. The central policy is the need to maintain

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[151]*Equuscorp* (n 133) [38] (French CJ).
[152]*Equuscorp* (n 133) [23] (French CJ); *Miller* (n 124) [15] (French CJ).
[153]*Equuscorp* (n 133) [34], [45] (French CJ).
[154]see also Peter Birks, 'Recovering Value Transferred under an Illegal Contract' (2000) 1 *TIL* 155, 155.
[155]*Nelson* (n 2) 523 (McHugh J).
[156]McInnes, 'Advancement, Illegality and Restitution' (n 116) 15.

consistency in the law by avoiding stultification of the purpose of the rule infringed.[157] These considerations, in particular the intention of the statute and proportionality, are akin to those put forth by Lord Toulson in *Patel* and in New Zealand.[158] Support from *Nelson* was foreseeable. However, *Miller* and *Equuscorp* also provide support particularly for the principle of consistency (stultification in the latter) and examining the purpose of the statute (rule) infringed.

5.2.3 Canada

In Canada, strict application of the rule 'No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act'[159] also led to harsh results, oft times denying the claimant a remedy where the illegality had been relatively trivial. Illustrative of the strict application of the non-recovery rule is *Kingshott v Brunskill*.[160] There the claimant had sold and delivered ungraded apples to the defendant. This was contrary to the provisions of the provincial regulations which required that no person shall sell or offer for sale produce unless they are graded. When the defendant refused to pay for the apples, the claimant sued him for the price. Roach J held that the claimant could not recover the price for these apples, despite the fact that the defendant had

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[157]i.e. not to encourage or condone breaches of statute see *Nelson* (n 2) 523 (McHugh J); *Equuscorp* (n 133) [45] (French CJ).
[158]see Illegal Contracts Act 1970 s7 (3), s7(4); *Patel* (UKSC) (n 1) [107], [108] [120] (Lord Toulson); *ParkingEye Ltd v Somerfield Stores Ltd* [2013] QB 840 (CA) at [39] (Sir Robin Jacob), [45], [79] (Toulson LJ); *Les Laboratoires Servier v Apotex Inc* [2013] Bus LR 80 (CA) at [73], [75] (Etherton LJ).
[159]*Holman* (n 90) 343 (Lord Mansfield).
[159]ibid.
[160][1952] Carswell Ont 150.

resold the apples after grading them for a profit.[161] He said the sale of the apples was forbidden and the contract was illegal because the object of the statute and the penalty authorised by it were imposed wholly for the protection of the public.[162]

The Ontario Law Reform Commission was highly critical of the decision in *Kingshott*, arguing that in such a case where illegality is so trivial where 'no substantial penalty would be imposed, the Court reached a decision that deprived the plaintiff of the value of his entire crop. The penalty was wholly disproportionate to the offence'.[163]

Another case illustrative of the application of the rigid rule is *Kocotis v D'Angelo*[164] in which the claimant was unable to recover money for work done because he had a wrong licence. The dissenting speech of Schroeder J.A. there is important. He said, if the purpose sought to be effected by the statute is to deprive the seller of compensation for goods supplied or right to recover charges for his services, then that should be expressed in clear and unequivocal language.[165] He observed that the effect of contravention of the bylaw in the present case was not to make void the act done in breach so as to prevent the person doing those services without a licence from recovering their charges.[166] Rather the person in breach was subject to a penalty under the bylaw. His right to recover compensation for the services performed, if such services were otherwise

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[161]*Kingshott* (n 160) [9] (Roach JA).
[162]ibid.
[163]Ontario LRC (1987) (n 21) 218.
[164][1957] CarswellOnt 108.
[165]*Kocotis* (n 164) [82] (Schroeder JA); see also Harman LJ in *Shaw* (n 129) 518 (Harman LJ) who said that the proposition that if the statute is for the protection of the public it should thus be unenforceable is not the only test. The true test he said is 'whether the statute impliedly forbids the provision in the contract to be sued upon'.
[166]*Kocotis* (n 164) [78] (Schroeder JA).

satisfactory, was not taken away.[167] Moreover, he said that the bylaw prohibited an unlicensed person under the bylaw to contract to do electrical work, not that 'no person, not licensed [specifically] as an electrical contractor shall contract for or do any electrical work'.[168] Here the claimant was licensed under the bylaw No 134. He had a Class C license for maintenance electrician (temporary electrical contractor's certificate) instead of a Class A licence for electrical contractor (master electrician certificate), under the bylaw.[169] Schroeder JA highlighted that the claimant must have possessed qualifications of a fairly high order to hold the license which was issued to him.[170] He concluded that the only consequences of breaching the provision are those that the bylaw itself prescribes.[171]

Following these cases the courts in Canada began to introduce flexibility in the law of illegality, in order to allow recovery by examining different policies and factors. This is known as the 'modern approach' as labelled by Robertson JA in *Still* and illustrated through the case law below.

In *Still* the applicant, pending consideration of her application for permanent residence status, accepted employment without obtaining a work permit, which was required under the Immigration Act, R.S.C. 1985. Upon dismissal from her employment she submitted a claim for benefits under the Unemployment Insurance Act 1985. Due to the statutory breach, her claim was rejected. The Tax Court of Canada took the position that failure to obtain a work permit resulted in the formation of an illegal contract of service

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[167] *Kocotis* (n 164) [78] (Schroeder JA).
[168] *Kocotis* (n 164) [81] (Schroeder JA).
[169] *Kocotis* (n 164) [2] (Laidlaw JA).
[170] *Kocotis* (n 164) [81] (Schroeder JA).
[171] *Kocotis* (n 164) [82] (Schroeder JA).

and so did not constitute insurable employment within meaning of the Act. The applicant appealed.

Robertson JA in the Federal Court of Appeal said:

> While on the one hand we have to consider the policy behind the legislation being violated, the Immigration Act, we must also consider the policy behind the legislation which gives rise to the benefits that have been denied, the Unemployment Insurance Act.[172]

The purpose of the Unemployment Insurance Act 1985 was to make benefits available to the unemployed,[173] whilst the purpose of the restriction under the Immigration Act 1985 which prohibited employment without a permit was for the benefit of Canadian citizens. If issuing a permit would adversely affect the employment opportunities of the Canadian citizens the officer was to refuse to issue the permit.[174] Robertson JA firstly, said that is was questionable whether a person who gains employment as a housekeeper, such as the applicant, would adversely affect the employment opportunities of Canadians.[175] Secondly, he emphasised that although the 'legislative purpose underlying the requirement of legal immigrants to obtain a work permit is compelling, but non- determinative of the issue at hand'.[176] In considering other policy considerations, namely that a person should not benefit from his or her own wrong, he said that it is of critical significance that the applicant was not an illegal immigrant who

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[172]*Still* (n 4) [49] (Robertson JA).
[173]*Still* (n 4) [50] (Robertson JA); see also *Abrahams v Canada (Attorney General),* [1983] 1 SCR 2 (SCC) (Wilson J).
[174]*Still* (n 4) [51] (Robertson JA).
[175]*Still* (n 4) [52] (Robertson JA).
[176]ibid.

gained entry through deception.[177] Moreover, both the applicant and the employer had contributed to the insurance fund during the periods of illegal employment, thus the solvency of the fund was not affected.[178] Further, there was no express penalty for the breach, and conviction under the penal provision could not be obtained because of the requirement that a person knowingly contravene the Immigration Act.[179] In effect, the applicant was not subject to any penalty under the legislation. Having regard to the objects of the Unemployment Insurance Act, the fact that the applicant was a legal immigrant and had acted in good faith, Robertson JA held that she was entitled to the benefits claimed.[180] He said public policy weighs in favour of legal immigrants who have acted in good faith and that 'this is not a case where relief must be denied in order to preserve integrity of the legal system'.[181] Denial of the benefits claimed would be a penalty disproportionate to the statutory breach.[182]

Overall, *Still* considered the importance of policy considerations, the consequences of invalidating a contract and whether the response to illegality is proportionate.[183] This supports the Toulson flexible approach and the factors that lie under his trio of considerations. However, this is predictable since Lord Toulson expressly drew from *Still* and *Nelson* for the trio of considerations. Notable here, and of particular

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[177]*Still* (n 4) [52],[54]-[56] (Robertson JA).
[178]*Still* (n 4) [55] (Robertson JA).
[179]ibid.
[180]*Still* (n 4) [56] (Robertson JA).
[181]ibid.
[182]*Still* (n 4) [55] (Robertson JA).
[183]*Still* (n 4) [43], [48], [49], [55], [56] (Robertson JA); see also *Royal Bank v Grobman* [1977] CarswellOnt 105 at [33] (Krever J); *Sidmay v Wehttam Investments* [1967] CarswellOnt 235, [1967] 1 OR 508.

significance are the cases *Agasi v Wai*[184] (hereafter *Agasi*) and *Transport North American Express v New Solutions Financial Corp*[185] (hereafter *New Solutions*) which, though not cited by Lord Toulson, present further Canadian support for a flexible approach and the considerations laid down by him.

Agasi concerned an unlicensed renovator who was able to recover money for unpaid renovation. *Agasi* reflects a shift from the rigid approach taken in *Kocotis.* The defendant in *Agasi* argued that the contract should be unenforceable because the claimant had contravened a bylaw by working without a licence. Boyko J said that the law on the question of enforceability of contracts has evolved significantly since *Kocotis*. Recent cases reject the principle that a contract made or performed in contravention of a statutory requirement is unenforceable.[186] He noted that the bylaw in question simply provides a penalty of $20 to $2000 for non-compliance.[187] He cited Robertson JA who had said in *Still:*

> Today a finding of illegality is dependant, not only on the purpose underlying the statutory prohibition, but also on the remedy being sought and the consequences which flow from a finding that a contract is unenforceable.[188]

One therefore needs to look at the 'serious consequences of invalidating a contract [and] the social utility of those consequences'.[189] In *Agasi*, Boyko J said the contract entered

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[184]2000 CarswellOnt 2903.
[185][2004] 1 SCR 249.
[186]*Agasi* (n 184) [27] (Boyko J); see also *Sidmay* (n 183).
[187]*Agasi* (n 184) [31] (Boyko J).
[188]*Still* (n 4) [43] (Robertson JA); see also *Agasi* (n 184) [43] (Boyko J).
[189]*Agasi* (n 184) [35] (Boyko J);see also *Grobman* (n 183) [33] (Krever J)

into between the claimant and defendant was not inherently illegal.[190] It was capable of being performed. He then cited Brooke JA who said in *Beer v Townsgate*[191] 'while the Act provides for a financial penalty for a breach… it does not expressly provide that the contract so made is unenforceable'.[192] Boyko J said the policy behind the bylaw was to protect consumers from unqualified workers,[193] but here the defendant had first reviewed the claimant's qualifications and previous work before entering into the contract.[194] There was no evidence that he did not have the required skill and was not qualified to do the renovation work and the claimant also did not find it difficult to obtain the licence shortly after completing the work.[195] This was not a case where the consumer needed protection from an unskilled worker.[196] In such circumstances the defendant could not rely on such a technical argument that would allow her to benefit at the claimants expense.[197] The claim was allowed.

In *New Solutions*, which concerned a resititutionary claim, recovery was allowed provided that doing so did not undermine the policy of the rule infringed. There the agreement provided for a criminal interest rate of 90% which was significantly higher than the maximum 60% allowed under s 347 of the *Criminal Code*, R.S.C. 1985. Arbour J said there are four considerations relevant to determining whether public

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[190] *Agasi* (n 184) [39] (Boyko J).
[191] 1997 CarswellOnt 3753.
[192] *Beer* (n 191) [16] (Brooke JA); *Agasi* (n 184) [40] (Boyko J).
[193] *Agasi* (n 184) [47] (Boyko J).
[194] ibid.
[195] *Agasi* (n 184) [26] (Boyko J).
[196] Ibid.
[197] *Agasi* (n 184) [47] (Boyko J).

policy ought to allow an otherwise illegal agreement to be partially enforced rather than rendered void *ab initio* due to the taint of illegality. These were:[198]

1. Whether the purpose or policy of s. 347 would be subverted by severance;

2. Whether the parties entered into the agreement for an illegal purpose or with an evil intention;

3. The relative bargaining positions of the parties and their conduct in reaching the agreement;

4. The potential for the debtor to enjoy an unjustified windfall.

In applying the four factors Arbour J said first, there was no need to deter a 60% interest rate which is the maximum rate allowed under s 347. Secondly, the contract had been entered into for a commercial purpose and there was nothing illegal about that intention.[199] Thirdly, the parties had negotiated at arm's length and both had independent legal advice in the course of negotiations leading to the agreement. Each party was commercially experienced.[200] Fourthly, there would be an unjustified windfall to the defendant from not having to repay the interest or the possibility of not having to pay a commercially appropriate interest rate on the loan. Given both parties were

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[198]*New Solutions* (n 185) [42] (Arbour J).
[199]*New Solutions* (n 185) [44] (Arbour J).
[200]*New Solutions* (n 185) [45] (Arbour J).

independently advised and knew the obligations they were taking on, the claimant was allowed to recover the maximum legal amount of interest.[201]

From the above cases one can see that the courts take into account the policy behind the rule infringed, conduct and intention of the parties and the consequences of invalidating the contract in determining whether or not to allow relief.[202] These factors are largely akin to those under the Toulson test.[203] Couple this with the Australian case law and that of New Zealand Illegal Contracts Act 1970 discussed earlier, it is evident that contrary to Lord Mance's criticism in *Patel,* support for the approach taken by Lord Toulson is not slender.

A trio of Canadian cases which are also of significance as they advance and adopt the principle of maintaining consistency in the law in determining the application of the illegality defence are *Hall, British Columbia v Zastowny*[204] (hereafter *Zastowny*) and *Livent v Deloitte*[205] (hereafter *Livent).* However, the explanation of consistency advanced by McLachlin J in *Hall* and adopted in *Zastowny* and *Livent* reveals a

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[201]*New Solutions* (n 185) [42], [46] (Arbour J).
[202]ibid; *Agasi* (n 184) [35] (Boyko J);see also *Grobman* (n 183) [33] (Krever J); *Still* (n 4) [43] (Robertson JA); see also *Patel* (UKSC) (n 1) [107],[115],[116],[120] (Lord Toulson),[169] (Lord Neuberger). Lord Neuberger said 'In the present case for example, it would seem to be penal on the claimant that he could be deprived of £610,000 (and by the same token it would seem absurdly gratuitous that the defendant could benefit to the tune of £610,000) simply because the contract had been performed to a small extent'.
[203]*Patel* (UKSC) (n 1) [107], [120] (Lord Toulson).
[204](2008) SCC 4, [2008] 1 SCR 27.
[205]2016 ONCA 11.

restrictive approach as opposed to the wide interpretation given to it by Lord Toulson in *Patel* who added proportionality within its ambit.

In *Hall,* both the respondent and appellant had been drinking. When their car stalled, the respondent allowed the appellant to drive the car in order to give it a rolling start, even though he was aware that the appellant was quite drunk. The appellant lost control of the car, it turned upside down, resulting in the appellant suffering head injuries. The appellant brought a claim for civil damages, to which the respondent raised the illegality defence. In the Supreme Court of Canada, McLachlin J said the 'fundamental rationale for the defence of *ex turpi causa*, [is] that based on the need to maintain internal consistency in the law, in the interest of promoting the integrity of the justice system'.[206] She then said that a Court can bar recovery:

> on the ground that to do so would undermine the integrity of the justice system. The power is a limited one. Its use is justified where allowing the plaintiff's claim would introduce inconsistency into the fabric of the law, either by permitting the plaintiff to profit from an illegal or wrongful act, or to evade a penalty prescribed by criminal law. Its use is not justified where the plaintiff's claim is merely for compensation for personal injuries sustained as a consequence of the negligence of the defendant.[207]

In *Hall,* McLachlin J allowed the claim for compensation for personal injury as it did not allow the claimant to profit from the crime.[208] Allowing compensation did not

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[206]*Hall v Hebert* (n 3) 178 (McLachlin J).
[207]*Hall v Hebert* (n 3) 169, 179, 180 (McLachlin J).
[208]*Hall v Hebert* (n 3) 172 (McLachlin J).

produce any inconsistency since the compensation sought was for injuries and not for wrongdoing.[209] Cory J explained in *Hall*, the primary purpose of tort law is to provide compensation for injuries not profit, thus the illegality defence should not preclude the claim.[210] It is also notable that the compensation given was reduced due to contributory negligence.[211]

McLachlin J's explanation of the consistency policy is thus restricted to the terms quoted in the passage above. Lord Toulson's inclusion of proportionality within its ambit is therefore antithetical of this.[212] However, the inclusion of ensuring that the purpose of the rule infringed and any other policy is not undermined, may be regarded as part of maintaining consistency in the law. This is because McLachlin J also explained consistency as:

> 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.[213]

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[209]*Hall v Hebert* (n 3) 185-186 (McLachlin J).
[210]*Hall v Hebert* (n 3), 200 (Cory J); cf. Nelson Enonchong, *Illegal Transactions* (Lloyd's of London Press, Lloyd's Commercial Law Library, 1998) 95.
[211]*Hall v Hebert* (n 3) 185-186 (McLachlin J).
[212]*Hall v Hebert* (n 3) 179, 180 (McLachlin J); Mitchell McInnes, 'Illegality and Canadian Private Law: *Hall v Hebert*'s Legacy' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 313, 320;see Chapter 4 for fuller discussion of McInnes's argument.
[213]*Hall v Hebert* (n 3)176, 177, 178 (McLachlin J).

Thus, where a contract is expressly prohibited by statute such as in *Boissevain v Weil* [214] which concerned a claim for repayment of an illegal loan, for the maintenance of consistency in the law, the court should not allow either a contractual or non-contractual restitutionary claim.

Zastowny is a case which supports the limited scope of the consistency principle. There the claimant, whilst in prison, was assaulted by a prison official. After he was released he became addicted to heroin and a repeat offender. He became imprisoned again. He brought an action to recover damages for wage loss for the time he was incarcerated. The issue was whether the plaintiff was barred from compensation for loss of wages during the time he was unable to work because he was incarcerated.[215] The Supreme Court of Canada held that he could not recover damages for wage loss for periods of unemployment due to incarceration for criminal conduct for which he was convicted and sentenced,[216] except for circumstances where there had been wrongful conviction. Rothstein J said the:

> judicial policy that underlies the *ex turpi* doctrine precludes damages for wage loss due to…incarceration because it introduces an inconsistency in the fabric of the law that compromises the integrity of the justice system.[217]

An award of damages for loss of earnings whilst incarcerated would undermine the penalty imposed by the rule which the claimant has infringed.[218] The criminal law has

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[214][1950] AC 327, see chapter 2 for facts of this case.
[215]*Zastowny* (n 204) [21] (Rothstein J).
[216]*Zastowny* (n 204) [22] (Rothstein J).
[217]*Zastowny* (n 204) [30] (Rothstein J).

taken the claimant to be responsible for the wrongdoing; therefore, he should bear the consequences of that punishment, both direct and indirect.[219] When a person receives a criminal penalty, the civil consequences and natural result of the criminal sanction includes wage loss.[220] An award of damages would in effect permit a rebate of a penalty lawfully imposed by the criminal law thus creating inconsistency in the law which would be harmful to the integrity of the legal system.[221]

The consistency principle was also adopted in *Livent*, a case concerning attribution of illegality raised to defeat a claim in negligence for damages. This case further supports the limited scope of the consistency principle to 'no profit' and 'no evasion' cases. There the principals of Livent had fraudulently manipulated the company's books in order to inflate earnings and profitability. The fraud was revealed when new management was appointed and soon Livent filed for insolvency. The two principals of Livent were criminally convicted for fraud and were imprisoned. Deloitte was Livent's auditor. Notwithstanding the ongoing fraud, Deloitte issued clean audited financial statements for Livent. As a result Livent through its receiver's brought an action against Deloitte. The action alleged that Deloitte was liable in negligence as a result of its failure to follow generally accepted auditing standards and thus discover the material misstatements in Livent's books. Deloitte raised the illegality defence arguing that the knowledge of the misconduct of the two principals should be attributed to Livent so as to bar its claim against them. In adopting the consistency principle Blair JA said:

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[218]The Law Commission, *The Illegality Defence: A Consultative Report* (Law Com CP No 189, 2009) para 2.8; The Law Commission, *The Illegality Defence in Tort: A Consultation Paper* (Law Com CP No 160, 2001) para 4.56.
[219]see *Zastowny* (n 204) [22],[23],[25],[30] (Rothstein J).
[220]*Zastowny* (n 204) [22],[23],[25],[30] (Rothstein J).
[221]*Zastowny* (n 204) [22] (Rothstein J); *Hall v Hebert* (n 3) 169, 178-180 (McLachlin J).

> The policy underlying the *ex turpi causa* doctrine is…. to maintain the integrity of the justice system by preventing a wrongdoer from profiting from his or her wrongdoing or evading a criminal sanction.[222]

He said invoking the defence here was not be required to maintain the integrity of the justice system as the actual fraudsters would not profit from their wrongdoing nor would Livent profit from the wrongdoing.[223] Moreover, no criminal sanction will be evaded if Livent were awarded the damages.[224]

Bringing into consideration other relevant policies, akin to the second consideration of the Toulson test and the policy considerations exercise taken by Lord Hodge and Lord Toulson in *Bilta (UK) Ltd v Nazir (No 2)*[225] Blair JA, citing Lord Mance's speech in *Stone & Rolls Ltd v Moore Stephens*[226] said:

> it would lame the very concept of an audit if the auditor could, by reference to the maxim *ex turpi causa*, defeat a claim for breach of duty in failing to detect managerial fraud at the company's highest level by attributing to the company the very fraud which the auditor should have detected.[227]

He said that 'applying the *ex turpi causa* doctrine in these circumstances would risk undermining the value of the public audit process, and thereby [harm] the integrity of

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[222]*Livent* (n 205) [154] (Blair JA).
[223]*Livent* (n 205) [156] (Blair JA).
[224]*Livent* (n 205) [161] (Blair JA).
[225][2015] UKSC 23, [2016] AC. 1.
[226][2009] UKHL 39, [2009] 1 AC 1391.
[227]*Stone & Rolls* (HL) (n 226) [241] (Lord Mance); see also *Livent* (n 205) [161] (Blair JA).

the justice system'.[228] Deloitte could not escape liability for its negligence by attributing the principal's fraud to Livent to prevent it from recovering damages. This reveals support for a policy-based approach. However, the scope of the consistency principle, being circumscribed, reveals that Canada in fact adopts a limited flexible approach compared to Australia, New Zealand, and the approach put forth by Lord Toulson. The flexibility of weighing factors comes from cases such as *New Solutions*, whilst the limitations come from *Hall.*

In conclusion, the modern approach taken in Canada reflected in *Still, Agasi* and *New Solutions* which advance support for a flexible approach provide considerations akin to those under the Toulson test. These cases reveal courts taking into account factors such as conduct of the parties; whether parties entered into the transaction for an illegal purpose and with unlawful intention; whether the response to illegality, that is to say the penalty imposed, is proportionate to the illegality and weighing different policy considerations. Where the approach in Canada differs from, or rather does not fully coincide with, that of Lord Toulson is the explanation of consistency. McLachlin J in *Hall* had called for a limited approach, explaining that there is inconsistency in the law if allowing the claim allows the recovery of a profit from the crime or evasion of a penalty. Whilst that explanation of consistency in the law appears to include ensuring that the purpose behind the rule infringed (such as a statute) and the purpose of any other law is not frustrated, it does not include proportionality within its ambit. In Canada, the courts appear to have adopted a limited flexible approach, though they moved away from rigid rules. In that sense the Canadian approach is not fully flexible

[228] *Livent* (n 205) [162] (Blair JA).

as that provided by Lord Toulson in *Patel*. This thesis supports McLachlin J's explanation of consistency. It also supports the explanation that if the purpose of the rule infringed or any other public policy is not undermined by allowing the claim then consistency in the law is maintained as Lord Toulson's trio of considerations suggest. However, the thesis does not support the inclusion of proportionality (multi-factorial balancing exercise) as part of the maintenance of consistency in the law. Though the thesis supports taking into consideration different factors, it does so as a separate inquiry to consistency and also that its use should be limited to specific circumstances. The Singaporean approach illustrates the limited use of a multi-factorial approach which this thesis supports.

5.2.4 Singapore

In Singapore, the need for reform was advanced by the Singapore Law Reform Committee (hereafter the Committee), who argued that the courts have felt it necessary to minimise the occasions on which the equally blameworthy defendant is unjustly enriched as a result of holding a contract or trust illegal.[229] Furthermore, the complex state of the law failed to do justice between the parties leading to further calls for reform.[230] In 2002, a multi-factorial, policy-based approach was proposed by the Committee under which the courts were to be given the discretionary power to grant

[229]The Law Reform Committee of the Singapore Academy of Law '*Relief from Unenforceability of Illegal Contracts and Trusts* (July 5 2002) para 1.2 (hereafter LRC 2002).
[230]LRC (2002) (n 229) Para 1.2, 7.0-7.8.

relief in respect of illegal contracts or trusts.[231] The Committee said that its aim in putting forth a discretionary approach was to 'ensure that the courts' decisions reflect the policies that lie behind the illegality rules'.[232] Although such proposals did not lead to legislation, a multi-factorial approach was laid down and adopted in 2014 by the Singaporean Court of Appeal in *Ting Siew May v Boon Lay Choo*[233] (hereafter *Ting Siew*). In 2018, the Singaporean Court of Appeal in *Ochroid* further clarified the law concerning the application of the illegality defence, by laying down a limited flexible approach, in which proportionality (multi-factorial balancing exercise) is restricted in application. These two cases are seminal cases in demonstrating both support for the trio of considerations and differences from the approach laid down by Lord Toulson in *Patel.*

In *Ting Siew*, the appellant granted the respondent an Option to purchase a property. The Option was backdated so that the respondent could get a loan from the bank on more favourable terms. These favourable terms were available prior to the Monetary Authority of Singapore Notice on 5th October 2012. Later, the appellant withdrew her offer arguing that she did not want to be party to any illegality. The respondents applied for a declaration that the Option was valid, binding and for specific performance or damages. The High Court granted the declaration and an order for specific performance. The appellant appealed.

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[231]LRC (2002) (n 229) Para 8.1, 8.3;Appendix I Draft Illegal Transactions (Relief) Act 2002 s 6(1) lays down proposed factors courts should take into account.
[232]LRC (2002) (n 229) Appendix III Para 7.28.
[233][2014] SGCA 28, [2014] 3 SLR 609.

The question for the Singaporean Court of Appeal was whether the respondent could enforce the Option despite it being backdated. The backdating was for the purposes of enabling the respondent to obtain a larger credit facility than otherwise entitled under the 5th October Notice.[234] Phang JA said that the contract was unenforceable due to common law illegality.[235] This is because the illegality was in the intention to use the option to circumvent the 5th October notice.[236] The court followed *Alexander v Rayson*[237] (hereafter *Alexander*) in which Romer LJ said where an:

> 'agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject matter for an unlawful purpose… In such a case any party to the agreement who had the unlawful intention is precluded from suing on it'.[238]

The courts will therefore refuse to enforce the contract.[239] In *Ting Siew*, taking a flexible approach Phang JA said where a contract is entered into with object of committing an illegal act the courts should examine the relevant policy considerations underlying the

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[234]*Ting Siew* (n 233) [15] (Andrew Phang Boon Leong JA).
[235]*Ting Siew* (n 233) [124] (Andrew Phang Boon Leong JA).
[236]*Ting Siew* (n 233) [77], [80], [81] (Andrew Phang Boon Leong JA). The option fell within the head of illegality at common law concerning contracts entered into with the object of committing an illegal act which includes contracts entered into with object of using the subject matter of the contract for an illegal purpose and contracts entered into with the intention of using the contractual documentation for an illegal purpose. These contracts are unenforceable at common law because the courts find that an unlawful intention behind a contract renders the contract itself unlawful.
[237][1936] 1 KB 169.
[238]*Alexander* (n 237) 182 (Romer LJ).
[239]*Alexander* (n 237) 182 (Romer LJ); *Ting Siew* (n 233) [51], [77] (Andrew Phang Boon Leong JA).

illegality principle so as to produce a proportionate response to illegality.[240] The factors relevant to assessing proportionality, he said, include:

> (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the remoteness or centrality of the illegality to the contract; (d) the object, intent, and conduct of the parties; and (e) the consequences of denying the claim.[241]

He noted that the factors listed did not comprise a conclusive list and were not to be rigidly applied.[242] Rather the factors should be weighed and considered by the courts in the context of each individual case.[243] The factors which Phang JA expressly listed, and the expression that the list is not conclusive, is akin to the position provided by Lord Toulson in *Patel*.[244] Further those factors correlate to those taken into account in *Nelson* and those listed under the New Zealand Illegal Contracts Act 1970 s7, which the courts there have used to reach their decisions in the case law examined earlier. However, where the court differs in *Ting Siew* is that it provides the application of this multi-factorial approach to limited cases where the contract is not unlawful in itself but tainted with illegality. In contrast Lord Toulson seems to have provided that a multi-factorial balancing exercise (proportionality principle) is to be applied across the board,

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[240]*Ting Siew* (n 233) [66] (Andrew Phang Boon Leong JA).
[241]*Ting Siew* (n 233) [70] (Andrew Phang Boon Leong JA).
[242]*Ting Siew* (n 233) [71] (Andrew Phang Boon Leong JA).
[243]ibid.
[244]*Patel* (UKSC) (n 1) [107] (Lord Toulson).

including contracts contrary to public policy, in determining whether to grant relief, with the exception of statutory illegality.[245] This was discussed earlier in the chapter.

In applying the factors to the facts in *Ting Siew*, Phang JA said that the object and intent was to use the false date in the Option for a purpose which the respondent knew was prohibited.[246] The main policy behind the 5th October Notice was 'to limit the quantum of residential property loans so as to foster stability in the property market'.[247] That part of the 5th October Notice which the respondents sought to contravene was directly related to the policy objective and not merely trivial in nature.[248] That policy objective would be undermined if the court were to permit enforcement of the backdated Option.[249] Furthermore, in backdating the Option, the respondents had carried out an overt step which was integral in carrying out the unlawful intention. The objectionable part resided in the Option itself and not outside it.[250] He related this to the case of *Alexander* in which the splitting of the transactions into two documents was held to be an overt step in carrying out the fraudulent intention and therefore rendering the contract unenforceable.[251] Moreover, denying enforcement of the Option would not be a disproportionate response to illegality particularly in light of the respondent's clear intent to violate the 5th October Notice at the time they entered into the contract.[252] The result, Phang JA said, is not founded on legislative intention that the option should be

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[245]*Patel* (UKSC) (n 1) [109] (Lord Toulson).
[246]*Ting Siew* (n 233) [82] (Andrew Phang Boon Leong JA).
[247]*Ting Siew* (n 233) [83] (Andrew Phang Boon Leong JA).
[248]ibid.
[249]*Ting Siew* (n 233) [84] (Andrew Phang Boon Leong JA).
[250]*Ting Siew* (n 233) [85] (Andrew Phang Boon Leong JA).
[251]*Ting Siew* (n 233) [85] (Andrew Phang Boon Leong JA); see also *Alexander* (n 237) 188, 189 (Romer LJ).
[252]*Ting Siew* (n 233) [92], [102] (Andrew Phang Boon Leong JA).

prohibited, but rather on the public policy that the court will not assist the respondents to benefit from their own wrongdoing.[253] He emphasised that as a general principle courts will not permit a guilty party to benefit from his own wrong and as matter of justice the court should not appear to reward or condone a breach of the law.[254] He did however, point out that there might be wrongs intended to be committed which are relatively trivial. In such circumstances it might be disproportionate for the court to decide that the contract concerned is unenforceable.[255]

The case demonstrates that where the contract is not expressly prohibited by statute or contrary to public policy by a common law rule, but the contract is nonetheless tainted with illegality in some other way, the courts are to apply the proportionality principle by taking into account various factors in deciding whether or not the illegality defence will bar the claim. The case also highlights the significance of the no-profit policy which this thesis argues is a facet of maintaining consistency in the law.

Another seminal case is *Ochroid.* There the Singaporean Court of Appeal provided a structure for the courts when considering the application of the illegality doctrine as a defence. That approach is governed by the overarching principle of stultification and limits the use of the multi-factorial balancing exercise labelled as the proportionality principle by Phang JA in *Ochroid*.[256] The case is also significant as it expressly addresses the position taken in *Patel.* In doing so it reflects a position which is not entirely flexible. It also differs in its treatment of contracts contrary to public policy to

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[253]*Ting Siew* (n 233) [124] (Andrew Phang Boon Leong JA).
[254]*Ting Siew* (n 233) [46] (Andrew Phang Boon Leong JA).
[255]*Ting Siew* (n 233) [46] (Andrew Phang Boon Leong JA).
[256]*Ochroid* (n 6) [39],[40],[176] (Andrew Phang Boon Leong JA).

that of Lord Toulson in *Patel*. This thesis draws from the approach in *Ochroid* in developing a quasi-flexible test.

In *Ochroid*, an agreement was made to provide an illegal loan. The respondent failed to repay the loan under the agreements which had been made. Both sides accepted that the agreements were not entirely proper.[257] The appellant brought a claim on two grounds: first, in contract for the outstanding sum plus profit. Here the issue was whether the contractual claim should fail because the agreements were illegal money lending contracts, unenforceable under the Moneylenders Act (Cap 188, 1985 Rev Ed) (hereafter the MLA).[258] Secondly, an alternate claim in unjust enrichment to recover the benefits conferred under the agreements, namely unpaid principal sums without profit.[259] The issue was what impact the illegality of a contract would have on the independent claim in unjust enrichment.[260]

Phang JA laid down a structure for the application of the doctrine of illegality as a defence, particularly in relation to cases concerning illegal contracts. He said the first question that must be asked is whether the contract is prohibited, either through express or implied statutory illegality or an established head of common law illegality because it is contrary to public policy.[261] This is stage one of the test. He said, if a contract is

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[257]*Ochroid* (n 6) [10] (Andrew Phang Boon Leong JA).
[258]*Ochroid* (n 6) [2],[18] (Andrew Phang Boon Leong JA).
[259]*Ochroid* (n 6) [3] (Andrew Phang Boon Leong JA).
[260]*Ochroid* (n 6) [3],[18] (Andrew Phang Boon Leong JA).
[261]Such as contracts promoting sexual immorality, contracts to commit a crime, contracts prejudicial to public safety, contracts to oust the jurisdiction of the courts, contracts prejudicial to the administration of justice, contracts to deceive public authorities, contracts prejudicial to the status of marriage, contracts that are liable to corrupt public life; and contracts restricting personal liberty; see also *Ochroid* (n 6) [29] (Andrew Phang Boon Leong JA).

prohibited in such a manner then the contract is unenforceable and there can be no recovery pursuant to the contract.[262] This is based on the *Holman* rule (strict rule of non-recovery namely *ex turpi causa*).[263] He noted that in relation to express and implied statutory illegality there is consensus of opinion even in *Patel* that there should be no recovery.[264] However, in relation to contracts considered contrary to public policy, Phang JA noted that the position is less clear in *Patel*. He said that Lord Toulson's judgment suggests that where the illegality is at common law, whether the contract is enforceable is dependent on the multi-factorial balancing exercise.[265] In differing from Lord Toulson's view, Phang JA said that where the contract is contrary to public policy, there can be no recovery since the contract is already prohibited under the established heads of public policy.[266] The courts should therefore not have discretion to enforce them.[267] To 'confer on the court a further discretion to permit recovery pursuant to the prohibited contract would render the doctrine of common law contractual illegality nugatory'.[268] It would be a 'contradiction in terms *not* to find that that contract [prohibited under a head of public policy] is…unenforceable'.[269]

Phang JA then said that even if the contractual claim is not allowed[270] a party who may have transferred benefits under the illegal contract might be able to recover them under

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[262]*Ochroid* (n 6) [40], [115], [176] (Andrew Phang Boon Leong JA).
[263]*Ochroid* (n 6) [23]-[25], [114] (Andrew Phang Boon Leong JA).
[264]*Ochroid* (n 6) [84] (Andrew Phang Boon Leong JA); see also *Patel* (UKSC) (n 1) [109] (Lord Toulson).
[265]*Ochroid* (n 6) [40], [110], [111] (Andrew Phang Boon Leong JA).
[266]*Ochroid* (n 6) [116] (Andrew Phang Boon Leong JA).
[267]ibid.
[268]*Ochroid* (n 6) [118] (Andrew Phang Boon Leong JA).
[269]*Ochroid* (n 6) [116]-[117] (Andrew Phang Boon Leong JA).
[270]Where the contract is expressly prohibited by statute, or common law rule because it is contrary to public policy.

an alternate claim on a restitutionary basis. Such recovery is possible in one of three ways. This is stage two of the test. First, if the parties are not *in pari delicto* namely, where the legislation which prohibited the contract intended to protect the class to which the claimant belonged,[271] where the claimant entered into the contract as a result of fraud, duress or oppression[272] or where the contract was entered into as a result of mistake of the fact constituting illegality.[273] Secondly, under the doctrine of *locus poenitentiae.* It is notable that the court in *Ochroid* took a different view to that in *Patel* as to when the *locus poenitentiae* doctrine is applicable. Phang JA said (obiter) that the broad conception of the *locus poenitentiae* doctrine adopted by the minority in *Patel* and by Lord Neuberger should not be accepted, as 'it is incompatible with the traditional justification for the doctrine which is to encourage timely withdrawal from the illegal enterprise'.[274] Phang JA was of the view that the *locus poenitentiae* only applies where there had been 'timely repudiation by the plaintiff of the illegal contract'.[275] The requirement, he said, is that there:

> must be genuine and voluntary withdrawal by the plaintiff from the illegal enterprise for the doctrine to apply, and that it would not apply in cases where

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[271]see for example *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192; *Ochroid* (n 6) [176] (Andrew Phang Boon Leong JA).
[272]see *Shelley v Paddock* [1980] QB 348; *Smith v Bromley* (1760) 2 Doug KB 696n; 99 ER 441.
[273]see *Aqua Art v Goodman Development* [2011] SGCA 7 at [23]-[25], [28]-[29], [33]-[35] (Andrew Phang Boon Leong JA);*Ochroid* (n 6) [43] (Andrew Phang Boon Leong JA).
[274]*Ochroid* (n 6) [173] (Andrew Phang Boon Leong JA).
[275]*Ochroid* (n 6) [176] (Andrew Phang Boon Leong JA).

> the illegal purpose was frustrated by circumstances beyond the plaintiff's control or is simply no longer needed. [276]

Thirdly, a claimant can succeed under an independent cause of action, such as unjust enrichment, which does not allow the claimant to profit from the illegal contract and allowing the claim does not lead to stultification.[277] In relation to an action in unjust enrichment, Phang JA said that restitutionary recovery is possible where the ordinary requirements of the unjust enrichment claim are made out but that this is subject to the defence of illegality.[278] That defence he said is based on the stultification principle 'which requires the court to determine whether to allow the claim would undermine the fundamental policy that rendered the underlying contract…unenforceable in the first place'.[279] In other words whether allowing the unjust enrichment claim would 'make…nonsense of the law that rendered the contract…unenforceable'.[280] In relation to the unjust factors that need to be shown to satisfy the ordinary requirements of an unjust enrichment claim, Phang JA said unjust factors include total failure of consideration,[281] mistake, fraud, oppression and duress.[282] In such cases there is no stultification since it cannot be said that the integrity of the legal system is harmed or the underlying policy of the law stultified if a claimant who is considered less blameworthy in the eyes of the law (or otherwise not *in pari delicto*) is able to get

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[276]*Ochroid* (n 6) [171]-[176] (Andrew Phang Boon Leong JA).
[277]*Ochroid* (n 6) [176] (Andrew Phang Boon Leong JA).
[278]*Ochroid* (n 6) [139] (Andrew Phang Boon Leong JA).
[279]*Ochroid* (n 6) [159], [176] (Andrew Phang Boon Leong JA).
[280]*Ochroid* (n 6) [147]-[148] (Andrew Phang Boon Leong JA).
[281]*Ochroid* (n 6) [141] (Andrew Phang Boon Leong JA).
[282]*Ochroid* (n 6) [140], [170] (Andrew Phang Boon Leong JA).

restitution.[283] Moreover, allowing restitution does not allow the claimant to profit from the illegal contract 'but simply puts the parties in the position they would have been in if they had never entered into the illegal transaction'.[284] Phang JA emphasised that whether the claim in unjust enrichment ought to be allowed despite illegality of contract, has to be determined by reference to why the contract is prohibited.[285] The claim will not succeed where to do so would undermine the policy, whether statutory or common law, that rendered the contract illegal.[286] He further expressed the view, though tentatively, that a claimant may also succeed in bringing a claim in tort or trusts based on their property or title provided that it does not lead to stultification. If, however allowing the claim 'would stultify or undermine the fundamental policy that rendered the contract concerned illegal in the first place',[287] the courts should disallow the claim in tort or trusts.

Where, the contract is not unlawful *per se* but was entered into with the object of committing an illegal act, which includes contracts to use the subject matter of the contract for an illegal purpose and those intended to be performed illegally or the contract aims to contravene a statutory provision, although the contract itself is not prohibited by the provision, Phang JA said there is flexibility in the law, and the result as to whether the claim will succeed will depend on the principle of proportionality.[288]

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[283] *Ochroid* (n 6) [170] (Andrew Phang Boon Leong JA).
[284] *Ochroid* (n 6) [50] (Andrew Phang Boon Leong JA).
[285] *Ochroid* (n 6) [148] (Andrew Phang Boon Leong JA).
[286] *Ochroid* (n 6) [148]-[149] (Andrew Phang Boon Leong JA).
[287] *Ochroid* (n 6) [168] (Andrew Phang Boon Leong JA).
[288] *Ochroid* (n 6) [35], [39]-[40] (Andrew Phang Boon Leong JA).

Applying the above structure to the facts of the case, Phang JA first held that the agreements were illegal money lending loans, unenforceable by reason of s 15 MLA.[289] As the contract was expressly prohibited by statute, there could be no recovery in contract and the principle of proportionality was not applicable.[290] In relation to the alternate claims on grounds of unjust enrichment, he said the first question was whether the ordinary requirements of an unjust enrichment claim are satisfied. Having found that the defendant would be unjustly enriched at the expense of the claimant, the unjust factor being total failure of consideration, namely failure by the defendant to repay the loan which is the promised counter performance,[291] he also considered the question of whether there were any defences available and held that the defence of illegality was available and that it defeated the claim. This was based on the principal of stultification. He said to permit recovery of the principal sums would undermine the policy of the MLA against unlicensed money lenders recovering compensation for illegal loans, and make nonsense of the legislative prohibition which renders these loan agreements unenforceable in the first place.[292] He said it would render nugatory the prohibition in s15 MLA which reflects a strong need to deter illegal money lending due to its status as a serious threat in Singapore. This is a policy which protects borrowers and deters oppressive conduct by moneylenders.[293] He also pointed out that this is not a case where

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[289]*Ochroid* (n 6) [195], [196], [202],[203],[206],[208] (Andrew Phang Boon Leong JA).
[290]*Ochroid* (n 6) [211] (Andrew Phang Boon Leong JA).
[291]*Ochroid* (n 6) [214] (Andrew Phang Boon Leong JA);*Equuscorp* (n 133) [30] (French CJ); *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48;(1992) 175 CLR 353.
[292]*Ochroid* (n 6) [215], [219], [225] (Andrew Phang Boon Leong JA).
[293]*Ochroid* (n 6) [216], [219], [220], [224], [225], [229] (Andrew Phang Boon Leong JA).

the claimant is not *in pari delicto* such as *Aqua Art v Goodman Development*[294] where the lender had entered into the agreement as a result of mistake as to the facts constituting illegality.[295] Arguably if such were the case here, he said the result would be different but in the present case as the illegality was perpetrated with knowledge and insistence of the claimant, Phang JA refused the claim.[296] The appellants could not recover under the unjust enrichment claim either.[297]

Ochroid shows that Singapore has adopted a limited flexible approach, as opposed to the full flexibility and widespread application of the proportionality principle[298] as provided by Lord Toulson in *Patel*. It is submitted in this thesis, that the uncertainty and lack of guidance of which the minority in *Patel* complained in relation to the Toulson test in fact stems from widespread adoption of the proportionality principle. To remedy the concerns raised in relation to the Toulson test, guidance can be gained from *Ochroid*, which provides a clear structure limiting the proportionality principle to specific circumstances. The approach provides that where there is express statutory illegality or the contract is contrary to public policy according to common law rules, there should be no recovery in contract. However, a non-contractual claim in tort, trusts, and unjust enrichment may be allowed, provided there is no stultification of the fundamental policy which rendered the contract illegal in the first place.[299] This approach allows certainty by laying down a rule whilst mitigating the harshness of

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[294][2011] SGCA 7.
[295]*Aqua Art* (n 273) [23]-[25] (Phang JA); *Ochroid* (n 6) [216], [217] (Andrew Phang Boon Leong JA).
[296]*Ochroid* (n 6) [217] (Andrew Phang Boon Leong JA).
[297]*Ochroid* (n 6) [231] (Andrew Phang Boon Leong JA).
[298]The multi-factorial balancing exercise is labelled as proportionality principle by Phang JA in *Ochroid* (n 6) [39], [40] (Andrew Phang Boon Leong JA).
[299]*Ochroid* (n 6) [176] (Andrew Phang Boon Leong JA).

application of the rigid rule by enabling the claimant to recover in a non-contractual claim, provided that doing so does not stultify the rule which made the contract unenforceable. It also limits the use of the multi-factorial balancing exercise to well-defined circumstances, thus addressing the concerns of an extremely flexible and discretionary approach to the illegality defence. This thesis supports a limited flexible approach. The justification for doing so will further be given in chapter 7.

In conclusion, although Singapore has adopted flexibility, it has done so in a limited way. Although cases such as *Ting Siew* reveal support for the considerations laid down by Lord Toulson and the application of the proportionality principle, the court in *Ochroid* clarified that the proportionality principle (multi-factorial balancing exercise) is only available in limited circumstances.[300] The Singaporean approach also differs in its treatment of contracts contrary to public policy (to that of Lord Toulson in *Patel*), which the Singaporean Court renders automatically unenforceable. However, it is important to note that Singapore also supports a principle synonymous to consistency namely stultification in determining the application or denial of the illegality defence. This overarching principle is also deemed significant in other common law jurisdictions such as Australia in *Equuscorp*, in Canada in *Hall*, and in *Patel* itself, though the latter two refer to the principle as consistency in the law.

5.3 Conclusion

An examination of the case law from other common law jurisdictions, namely New Zealand, Australia, Canada and Singapore reveal that the courts have shifted from strict

[300] *Ochroid* (n 6) [39], [40] (Andrew Phang Boon Leong JA).

rigid rules to favouring a degree of flexibility. However, the level of flexibility differs in the different jurisdictions. New Zealand offers the greatest amount of flexibility under the Illegal Contracts Act 1970. However, such extensive flexibility creates uncertainty in the law as the courts grant relief by way of exercising a discretion under which different factors are taken into account. This is problematic as the factors considered such as culpability can be decided upon subjectively. With no overarching principle governing the outcome of cases, it is difficult to predict in which direction the decision will sway. This thesis does not support the use of such extensive flexibility because of the lack of certainty, guidance and lack of predictability that it creates. Australia, through *Nelson,* reflects a flexible approach and supports the considerations of the Toulson test, but this was foreseeable as it was expressly cited by Lord Toulson and used to develop the trio of considerations. *Nelson* is also a case which clearly reflects disapproval of an extremely rigid rule-based approach, in particular rejection of the reliance test. Other Australian cases, such as *Miller* and *Equuscorp,* support consistency in the law, or otherwise labelled as stultification, by ensuring that the purpose of the rule infringed is not undermined by allowing the claim. A meaning which Lord Toulson also gave to the consistency principle namely, that if the purpose of the rule infringed, or any other relevant policy is not undermined by allowing the claim, there is consistency in the law. It appears that McLachlin J in *Hall* would also approve of including the purpose of the rule as a facet of consistency as she said that the different parts of the law should be in harmony. The approach in Canada though founds support for flexibility, especially in cases such as *New Solutions* in which different factors are taken into account, and *Still* which involved an exercise of weighing of policies is carried out akin

to Lord Toulson's trio of consideration.[301] However there is one significant difference. That difference is the explanation of the consistency principle by McLachlin J in *Hall* which is not as wide as that put forth by Lord Toulson, who included proportionality within its ambit. McLachlin J explains in *Hall* there is only inconsistency in the law if allowing the claim enables the claimant to profit from their crime or evade a penalty. Singapore reflects the most restrictive flexible position. Whilst in *Ting Siew*, considerations akin to those provided by Lord Toulson in *Patel* are adopted, such as purpose of the rule infringed, object, intent and conduct of the parties, centrality of illegality to the contract, and consequence of denying relief,[302] Singapore has limited the use of proportionality principle to specific circumstances in *Ochroid. Ochroid* advocates the adoption of stultification as the overarching principle in determining the application of the illegality defence with restricted application of the proportionality principle to specific circumstances. This thesis draws from the Singaporean approach. Having examined the case law from other jurisdictions, the next chapter will examine the academic responses to the Toulson test, drawing out that the extensive flexibility it provides through a multi-factorial balancing exercise (proportionality principle), can be problematic for lack of guidance and uncertainty. Chapter 6 provides the issues propelling need for reforming the Toulson test.

[301] *Still* (n 4) [43], [48], [49] (Robertson JA); *New Solutions* (n 185) [42] (Arbour J).
[302] *Ting Siew* (n 233) [70] (Andrew Phang Boon Leong JA).

CHAPTER 6

ACADEMIC RESPONSES TO THE TOULSON TEST IN *PATEL*: ISSUES PROPELLING REFORM

6.1 Introduction

Following *Patel v Mirza*[1] (hereafter *Patel*) academics have tended to the view that Lord Toulson's trio of considerations applies across private law to claims concerning illegality and is not restricted in application to unjust enrichment claims.[2] Whilst some

[1][2016] UKSC 42, [2017] AC 467.

[2]See James Goudkamp 'The Law of Illegality: Identifying the Issues' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 40-42, 59; Alan Bogg 'Illegality in Labour Law after *Patel v Mirza* : Retrenchment and Restraint' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 262, 284; Graham Virgo, '*Patel v Mirza*: one step forward and two steps back'(2016) 22 *Trusts & Trustees* 1090, 1090; Andrew Burrows 'A New Dawn for the Law of Illegality' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 33-34, including footnote 33 on page 34; Mitchell McInnes 'Illegality and Canadian Private Law: *Hall v Hebert*'s Legacy' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 308; The Toulson test has been applied in a number of cases post –*Patel* (but that does not eliminate the issues raised by the minority in relation to it namely uncertainty and lack of guidance) including *Singularis Holdings Ltd v Daiwa Capital Markets Europe* [2017] EWHC 257 (Ch);[2018] EWCA Civ 84 (CA); *McHugh v Okai-Koi* [2017] EWHC 1346 (QB); *Stoffel & Co v Ms Maria Grondona* [2018] EWCA Civ 2031 at [36]-[40] (Gloster LJ); cf *Henderson v Dorset Healthcare University NHS Foundation Trust* [2016] EWHC 3275 (QB); [2017] 1 WLR 2673 in which the Jay J applied the causation test; In relation to *Henderson*, Burrows in 'A New Dawn for the

academics consider the test to be a triumph[3] others condemn the test as being insufficient to guide judges.[4] This chapter will focus on examining the academic responses to the Toulson test post-*Patel* to detect its weaknesses which propel the need for reform. The chapter will argue that, whilst the considerations in the Toulson test found support both in pre-*Patel* case law and in other common law jurisdictions, the lack of structure and uncertainty in particular created by the proportionality principle (multi-factorial balancing exercise)[5] cannot be overlooked. In relation to the former (lack of structure) it is unclear whether the Toulson test operates in a sequential

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Law of Illegality' referred to earlier in this footnote, argued that Jay J was wrong to adopt that approach. Burrows argues that Jay J should have adopted the Toulson test; For further comment on *Henderson* see James Goudkamp, 'Does Patel v Mirza apply in tort?' (2017) *Personal Injury Law Journal* 2, 3.

[3]A. Burrows 'A New Dawn for the Law of Illegality' (n 2) 24; see also Ernest Lim, 'Ex Turpi Causa: Reformation not Revolution' (2017) 80 *MLR* 927-941 The paper defends the majority's approach and proposes some refinements to the third strand of the trio of considerations test in order to reduce uncertainty in its application by limiting use of the proportionality principle; Nicholas Strauss, 'Illegality after Patel: potior non est conditio defendentis' (The Commercial Bar Association, London, 21st February 2017)1, 18 <http://www.combar.com/public/cms/260/604/384/2639/Illegality%20after%20Patel.pdf?realName=8H9W81.pdf&v=0>Accessed 20th May 2017; Anthony Grabiner, 'Illegality and restitution explained by the Supreme Court' (2017) 76(1) *CLJ* 18-22; T T. Arvind 'Contract Law' (OUP, 2017) 417-419, 425-426;see also support for a flexible approach Nelson Enonchong 'Illegal Transactions: The future? (LCCP No 154)' (2000) 8 *RLR* 82, 103; see further J F. Burrows, 'Contract Statutes: The New Zealand Experience' (1983) *Statute L Re.* 76, 89. Richard A Buckley, 'Illegal transactions: chaos or discretion?' (2000) 20 *Legal Studies* 155, 172; Roger Toulson 'Illegality where are we now?' in Andrew Dyson, James Goudkamp, Frederick Wilmot-Smith, and Andrew Summers (ed) *Defences in Contract* (Bloomsbury Publishing PLC, 2017) 276.

[4]Virgo, '*Patel v Mirza*: one step forward and two steps back' (n 2) 1094; see also Mark Law and Rebecca Ong 'He who comes to Equity need not do so with clean hands?' illegality and resulting trusts after Patel v Mirza, what should the approach be?' (2017) 23 *Trusts & Trustees* 880, 892-894; see also James Goudkamp, 'The end of an era? Illegality in private law in the Supreme Court' (2017) 133 *LQR* 14, 17-19.

[5]see *Patel* (UKSC) (n 1) [107], [120] (Lord Toulson); see also *Ochroid Trading Ltd v Chua Siok Lui* [2018] SGCA 5 at [39], [40] (Andrew Phang Boon Leong JA); see also Lim, 'Ex Turpi Causa: Reformation not Revolution' (n 3) 937 who argues restricting the use of the proportionality principle.

manner.[6] In relation to the latter (uncertainty) unrestrained use of the proportionality principle, in particular the assessment of various factors which can potentially be subjectively decided, can plunge the law into significant uncertainty. With no overarching principle to guide judges, decisions can be reached on an ad hoc arbitrary basis. This chapter therefore argues that the law of illegality needs an approach which is more certain in application, governed by a principle supported both in *Patel* and other common law jurisdiction, but also allows sufficient flexibility to deal with the nuances of individual cases. However, the flexibility available should not be extensive or unrestrained.

6.2 The Toulson Test

The Toulson test as noted in chapter 4 is formed of three considerations. The first is to consider the purpose of the prohibition transgressed and whether that 'purpose will be enhanced by denial of the claim'.[7] The second is to consider any other relevant public policies and the third is to consider whether denial of the claim would be a proportionate response to the illegality.[8] In relation to the third consideration of proportionality, Lord Toulson said various factors are to be taken into account including but not limited to the 'seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective

[6]see A. Burrows 'A New Dawn for the Law of Illegality' (n 2) 34, footnote 35 on that page; Lim, 'Ex Turpi Causa: Reformation not Revolution' (n 3) 937-939.
[7]*Patel* (UKSC) (n 1) [120] (Lord Toulson).
[8]ibid.

culpability'.[9] In the section below the criticisms of the Toulson test and rebuttals to those criticisms presented in the literature will be addressed.

6.2.1 Issues and Rebuttals

The chief criticisms of the Toulson test, namely that of lack of guidance and uncertainty, which were raised by the minority in *Patel* and discussed at large in chapter 4, are also echoed in the literature on illegality. Virgo, Law, Ong and Goudkamp emphasise that the Toulson test does not give sufficient guidance to the courts and creates uncertainty in the law.[10] In relation to the first consideration of the test, Law and Ong argue it may be difficult to find the purpose behind a particular legal provision, particularly where an underlying policy cannot be found or where the purposes of the provision are contested.[11] This is akin to the argument put forth by McInnes who said that ascertaining legislative intention can be a difficult, speculative and at times even bordering on a discretionary exercise.[12] Goudkamp argues that this can in turn lead to long trials which generate additional costs.[13] In relation to the second consideration of the test, namely that of considering any other relevant public policy, Virgo argues although the test requires the courts to take into account different policies, it is unclear

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[9]*Patel* (UKSC) (n 1) [107] (Lord Toulson).
[10]Virgo, '*Patel v Mirza*: one step forward and two steps back' (n 2) 1094;Law and Ong 'He who comes to Equity need not do so with clean hands?'(n 4) 892; Goudkamp, 'The end of an era?' (n 4) 17-19.
[11]Law and Ong 'He who comes to Equity need not do so with clean hands?' (n 4) 892; Goudkamp, 'The end of an era?'(n 4) 17-19.
[12]For McInnes's full argument see chapter 5 Mitchell McInnes, 'Advancement, Illegality and Restitution' (1997) 5 *Australian Property Law Journal* 1,15, 16.
[13]Goudkamp, 'The end of an era?' (n 4) 17-19; *Patel* (UKSC) (n 1) [158] (Lord Neuberger); Law and Ong 'He who comes to Equity need not do so with clean hands?' (n 4) 892.

what these policies, particularly countervailing policies, might be and how these policies might be identified.[14] In relation to the third consideration of proportionality, particularly the assessment of various factors, Goudkamp argues the test gives 'trial judges considerable freedom to decide which factors are material'[15] as Lord Toulson did not provide an exhaustive list. Moreover, the test gives judges the freedom to decide the weight that each factor should carry which is highly discretionary.[16] Such an approach he argues, alongside Law and Ong, makes it difficult to predict which factor or policy will be given overriding importance, thereby leading to uncertainty.[17] This in turn makes it difficult to predict in advance how a case will be decided, and what factors will be relevant.[18] The Toulson test is therefore criticised for being discretionary in nature and providing little guidance to the courts.

In response to the criticism raised above, the following arguments have been put forth in the literature. In relation to the first consideration of the Toulson test, cases concerning statutory illegality, it is argued that courts are likely to refer to and gain guidance from Hansard.[19] Once the underlying policy behind the relevant infringed provision is found, basing decisions on whether that policy would be undermined presents a far more

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[14]Virgo, '*Patel v Mirza*: one step forward and two steps back' (n 2) 1094-1095; see also Bogg 'Illegality in Labour Law after *Patel v Mirza'* (n 2) 286.
[15]Goudkamp, 'The end of an era?' (n 4) 19.
[16]ibid.
[17]Goudkamp, 'The end of an era?'(n 4) 18; see also Law and Ong 'He who comes to Equity need not do so with clean hands?' (n 4) 892-894.
[18]Goudkamp, 'The end of an era?'(n 4) 17-19; *Patel* (UKSC) (n 1) [206] (Lord Mance), [217] (Lord Clarke), [265] (Lord Sumption).
[19]see Law and Ong 'He who comes to Equity need not do so with clean hands?' (n 4) 892.

coherent form of reasoning than the reliance test advocated by the minority in *Patel*.[20] The reliance test does not take into consideration the degree of wrong-doing, often even ignoring the illegality, and does not give the court the opportunity to 'consider the underlying policy of the legislation and determine whether this would be undermined by allowing the claim' despite the supremacy of statutory law.[21] Moreover, Kremer argues that the reliance test, being a rule of procedure, allows the unscrupulous to use the rule to their advantage.[22] Moreover, it is a rule entirely divorced from policy considerations, which is extremely unsatisfactory considering that the *ex turpi causa* principle is a public policy rule.[23] There is also considerable uncertainty in determining whether one even needs to rely on the illegality, which can be decided inconsistently. *Patel* itself is a good illustration of this. Judges in the case were divided as to whether the claimant needed to rely on the illegality.[24] The *restitutio in integrum* principle (adopted by the minority in *Patel*) is also unsatisfactory as it similarly side-steps the issue of illegality.[25] In contrast to this, an approach which examines the policy behind the rule infringed, ensuring that by allowing the claim it is not undermined, provides a far better

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[20]see Ben Kremer, 'An "Unruly Horse" in a "Shadowy World"?: The Law of Illegality after *Nelson v Nelson*' (1997) 19 *Sydney L. Rev.* 240, 251, 254, 256.

[21]The Law Commission, *The Illegality Defence: A Consultative Report* (Law Com CP No 189,2009) Para 5.15; Treitel G, The *Law of Contract* (*ed. E. Peel*) (12th edition, Sweet & Maxwell, 2007) 549; James Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' 2015) 6 *United Kingdom Supreme Court Yearbook* 254,272.

[22]Kremer, 'An "Unruly Horse" in a "Shadowy World"?'(n 20) 251; Arvind 'Contract Law' (n 3) 418-419; McInnes 'Illegality and Canadian Private Law: *Hall v Hebert*'s Legacy' (n 2) 310; see also A. Burrows 'A New Dawn for the Law of Illegality' (n 2) 24.

[23]*Patel* (UKSC) (n 1) [129] (Lord Kerr); Hugh Stowe, 'The 'Unruly Horse' Has Bolted: Tinsley v Milligan' (1994) 57 *MLR* 441, 446.

[24]see chapter 4 in which this is illustrated *Patel v Mirza* [2015] Ch 271 (CA) at [20]-[22] (Rimer LJ), at [102] (Vos LJ), at [89], [92] (Gloster LJ); *Patel* (UKSC) (n 1) [267] (Lord Sumption).

[25]For fuller criticism of the *restitutio in integrum* approach see chapter 4; *Patel* (UKSC) (n 1) [139], [140], [141] (Lord Kerr).

justification for the application or refusal to apply the illegality defence. In *Patel*, for example, s 52 of the Criminal Justice Act 1993 was held not to be aimed at some hypothetical mischief of market abuse which never took place.[26] Moreover, s 63(2) of the Criminal Justice Act 1993 Act did not render a contract unenforceable by reason only of s 52.[27] Allowing recovery therefore did not create inconsistency in the law as it did not undermine the purpose of the rule infringed, and also did not produce a profit from the crime.[28]

In relation to the second consideration of determining any other relevant policies, it is argued in the literature and submitted here that courts can derive guidance from cases pre-*Patel* and the case law from other common law jurisdictions. For example, in the employment context, Bogg argues that looking in particular at Lord Toulson's endorsement of the Canadian case *Still v Minister of National Revenue*[29] (hereafter *Still*) one can predict that 'legislative policies favouring worker protection in protective employment statutes…including respect for the worker's fundamental rights' will be taken into account.[30] He argues that there a number of ways of identifying the relevant fundamental rights, for example discouraging exploitation approaching slavery[31] which

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[26]*Patel* (CA) (n 24) [67] Gloster LJ).
[27]*Patel* (CA) (n 24) [68] Gloster LJ).
[28]For the full argument see chapter 4, in particular *Patel* (CA) (n 24) [66], [69] [70] Gloster LJ); *Patel* (UKSC) (n 1) [115] (Lord Toulson).
[29][1997] CarswellNat 2193, [1998] 1 FC 549.
[30]Bogg 'Illegality in Labour Law after *Patel v Mirza*' (n 2) 262, 264; see also *Patel* (UKSC) (n 1) [58]-[61] (Lord Toulson).
[31]*Nizamuddowlah v Bengal Cabaret Inc* (1977) 399 NYS 2d 854; Bogg 'Illegality in Labour Law after *Patel v Mirza'* (n 2) 282; Peter Birks, 'Recovering Value Transferred under an Illegal Contract' (2000) 1 *TIL* 155, 174.

has affinities with forced labour and trafficking.[32] As Lord Wilson said in *Hounga v Allen*[33] (hereafter *Hounga*) the UK is obliged to adhere to The Council of Europe Convention on Action against Trafficking in Human Beings CETS No 197 (hereafter the Convention) following its ratification.[34] Lord Wilson also made reference to the International Labour Organisation indicators of forced labour.[35]*Hounga* is thus supportive of taking into account these instruments to 'influence the development of the English common law, and shape its formulation of fundamental rights'.[36] Bogg argues that:

> a broader formulation of the relevant fundamental right would be the right to a minimum or living wage. This would have the advantage of pegging the level of the *quantum meruit* to the relevant statutory minimum rather than the contractual wage.[37]

Further Lord Wilson in *Hounga* said that 'among the purposes of the Convention, set out in article 1…are protection of the human rights of victims'.[38] This means potentially taking into account human rights.[39] Bogg however, acknowledges that this may be problematic as judges may not agree whether common law fundamental rights fall

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[32]*Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889 at [48],[50]-[52] (Lord Wilson); Bogg 'Illegality in Labour Law after *Patel v Mirza*' (n 2) 282.
[33][2014] UKSC 47, [2014] 1 WLR 2889.
[34]*Hounga* (UKSC) (n 32) [50] (Lord Wilson).
[35]*Hounga* (UKSC) (n 32) [48], [49] (Lord Wilson).
[36]Bogg 'Illegality in Labour Law after *Patel v Mirza*' (n 2) 283.
[37]ibid.
[38]*Hounga* (UKSC) (n 32) [50], [52] (Lord Wilson).
[39]Bogg 'Illegality in Labour Law after *Patel v Mirza*' (n 2) 264, 277, 286.

within the ambit of public policy.[40] Moreover, even if the judges do agree on this point, there may be disagreement on which fundamental rights are to be included.[41] Suppose even that is agreed upon, another difficulty is that there may be differences as to how much weight is to be attached to this second consideration.[42] Notwithstanding this, one cannot undermine the guidance which can be derived from pre-*Patel* case law such as *Hounga* as noted above. Moreover, as Bogg argues, the criminal offences in areas such as employment law tend to be quite narrow, that is to say they either involve breaches of immigration rules or tax fraud. He argues that 'once the legislative purpose of the relevant prohibition has been identified correctly, this should crystallise a rule of law in subsequent cases'.[43] Such identification of countervailing policies it is submitted here is also possible in other contexts such as negligence claims. For example, in cases such as *Singularis Holdings Ltd v Daiwa*[44] (hereafter *Singularis*) and *Livent v Deloitte*[45] (hereafter *Livent*) duties owed by third parties such as auditors or banks in detecting and preventing financial fraud and crime are likely to be taken into account in similar cases.[46] Over time, it should become evident which countervailing policies are the most relevant in the different contexts. In supporting a policy evaluation approach, Bogg argues:

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[40]Bogg 'Illegality in Labour Law after *Patel v Mirza'* (n 2) 282, 283, 286, 287; Human Rights Act 1998; The Coroners and Justice Act 2009.
[41]Bogg 'Illegality in Labour Law after *Patel v Mirza'* (n 2) 286, 287.
[42]ibid.
[43]Bogg 'Illegality in Labour Law after *Patel v Mirza'* (n 2) 285.
[44][2017] EWHC 257 (Ch), [2018] EWCA Civ 84 (CA); see chapter 2 for fuller discussion of the case.
[45]2016 ONCA 11.
[46]see *Singularis* (Ch) (n 2) [184], [219], [250] (Rose J); *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39, [2009] 1 AC 1391 at [241] (Lord Mance); see also *Livent* (n 45) [161] (Blair JA).

> the transparent evaluation of relevant policy considerations will…enhance the legitimacy of legal reasoning by exposing the real basis of decisions, rather than obscuring those normative judgments behind conclusory labels such as 'inextricable link'[47] [or in fact basing decisions on the fortuitous reliance test].[48]

Furthermore, taking the first two considerations of the Toulson test together, namely examining the policies underlying both the rule infringed and any other relevant public policies, ensures that there is consistency in the law. As Lim argues:

> if allowing the illegality defence would frustrate the purpose or policy of the law which has been infringed or frustrate the purpose or policy of another law, which although not infringed by the claimant applies to the facts of the case, then there will be inconsistency and hence the integrity and coherence of the legal system would be undermined.[49]

The principle of maintaining consistency in the law; ensuring that by allowing the claim the policy of the rule infringed or any other relevant policy is not undermined, and the claimant is not profiting from their crime or evading a penalty, has widespread support in the case law on illegality. This was illustrated in chapters 2, 4 and 5.[50] The evaluation

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[47]Bogg 'Illegality in Labour Law after *Patel v Mirza'* (n 2) 285.
[48]see *Patel* (UKSC) (n 1) [142] (Lord Kerr).
[49]Lim, 'Ex Turpi Causa: Reformation not Revolution' (n 3) 933, 934.
[50]see for example *Hounga* (UKSC) (n 32) [42], [44], [52] (Lord Wilson); *Still* (n 29) [43] [48],[49] (Robertson JA); *Miller v Miller* [2011] 5 LRC 14 at [16] (French CJ); *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 at [38] (French CJ); *Patel* (UKSC) (n 1) [56], [57], [77], [99] (Lord Toulson), [125],[141]-[143] (Lord Kerr), [155], [172], [173], [184] (Lord Neuberger), [190]-[192] (Lord Mance), [212]-[214] (Lord Clarke), [230], [232] (Lord Sumption); *Ochroid* (n 5) [116]-[117], [145], [148], [149], [151], [154], [176] (Andrew Phang Boon Leong JA).

of policies ensures that 'the same act will not be reprobated by one area of law and approbated by another'.[51] Agreeing with this, Bogg argues that since the illegality doctrine is rooted in public policy, 'legal norms should avoid contradiction and inconsistency'.[52] This can be achieved by taking into account the first two considerations of the Toulson test.

In relation to the criticisms of the third consideration of proportionality - that it lacks sufficient guidance, particularly as to which factors are the most relevant (as Lord Toulson did not provide an exhaustive list) and which will be given the most weight - the following response can be made. One can derive guidance from the case law and the Law Commission consultation paper and report on illegality, which were discussed in chapters 2 and 3, and the case law in other common law jurisdictions discussed in chapter 5, including the New Zealand Illegal Contracts Act 1970. Those cases and the Law Commission's report reveals that the factors identified explicitly by Lord Toulson in *Patel*, such as 'seriousness of illegality, its centrality, whether it was intentional and whether there was disparity in the parties culpability',[53] are the most relevant, predominant and significant factors in determining as to whether or not the illegality defence applies.[54] The policies of preserving the integrity of the legal system,

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[51]McInnes 'Illegality and Canadian Private Law: *Hall v Hebert*'s Legacy' (n 2) 308; see also Nicholas J McBride 'Not a principle of Justice' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 100, 101.
[52]Bogg 'Illegality in Labour Law after *Patel v Mirza'* (n 2) 258.
[53]*Patel* (UKSC) (n 1) [107] (Lord Toulson).
[54]see *Tappenden v Randall* (1801) 2 B&P 467, 471;126 ER 1388, 1390 (Heath J); *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2005] ICR 231 at [9] (Mummery LJ); *Vita Food Products Inc. v Unus Shipping Co Ltd* [1939] AC 277, 293 (Lord Wright); *ParkingEye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338 (CA) at [53], [68], [70]-[72], [75], [77], [79] (Toulson LJ); *Transport North American*

consistency and whether allowing the claim would undermine the purpose of the rule which has been infringed, and not allowing one to profit from their own wrongdoing, are also those deemed most influential in pre-*Patel* case law and the case law and legislation from other common law jurisdictions.[55] These considerations are not novel. They are an established part of the law of illegality here and elsewhere, so they are quite familiar to the judiciary. Furthermore, as illegality covers a vast factual and normative range, it has been argued in favour of the Toulson test that courts need to evaluate conflicting policies and factors in order to do justice.[56] Take contract law for example, the factual variations that can arise run from those contracts entered into to commit an illegal act,[57] those contrary to public policy,[58] to those which although lawful at inception are either performed illegally either by one or both parties. Where 'both

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Express v New Solutions Financial Corp [2004] 1 RCS 249 at [42] (Arbour J); *Fitzgerald v FJ Leonhardt* [1997] 189 CLR 215 (Kirkby J); *Nelson v Nelson* [1995] 4 LRC 453, 523 (McHugh J); *Ting Siew May v Boon Lay Choo* [2014] SGCA 28 at [70] (Andrew Phang Boon Leong JA); see also Goudkamp 'The Law of Illegality: Identifying the Issues' (n 2) 44, 45.

[55]*Patel* (CA) (n 24) [66], [67] (Gloster LJ); see also *Patel* (UKSC) (n 1) **[**41]-[42], [115] (Lord Toulson); *Beresford v Royal Insurance Company Ltd* [1938] AC 586, 598, 599 (Lord Atkin), 603 (Lord Macmillan); *Euro Diam v Bathurst* [1990] 1 QB 1, 35 (Kerr LJ); *Geismar v Sun Alliance and London Insurance Ltd* [1975 G. No. 3758];[1978] QB 383, 395E-F (Talbot J);consistency and integrity of the legal system: *Hounga* (UKSC) (n 32) [44] (Lord Wilson); *Gray v Thames Trains Ltd* [2009] UKHL 33,[2009] 1 AC 1339 at [32], [38] [39], [50] (Lord Hoffmann); *Hall v Hebert* [1993] 2 SCR 159,176, 179-180 (McLachlin J); *British Columbia v Zastowny* [2008] 1 SCR 27 at [22],[23], [30] (Rothstein J); seriousness of illegality see *Clunis v Camden and Islington Health Authority* [1998] QB 978, 989E (Beldam LJ); *Nelson* (n 54) 523 (McHugh J); see also Illegal Contracts Act 1970; A. Burrows 'A New Dawn for the Law of Illegality' (n 2) 38; see also Lim, 'Ex Turpi Causa: Reformation not Revolution'(n 3) 933-935.

[56]Toulson 'Illegality where are we now?'(n 3) 276.

[57]*Allen v Rescous* (1675) 2 Levinz 174; 83 E.R. 505; *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, 283 (Devlin J); *Patel* (UKSC) (n 1) [3] (Lord Toulson), [159] (Lord Neuberger).

[58]*Pearce v Brooks* (1865-66) LR 1 Ex. 213.

parties perform illegally, their culpability may vary'.[59] The relationship between claim and illegality is also important. For example, is a ship-owner who overloads a ship in contravention of a statutory provision entitled to freight? The seriousness of illegality is also important as it can vary considerably, from relatively minor instances of illegality (as in *ParkingEye Ltd v Somerfield Stores Ltd*[60]-hereafter *ParkingEye*) to the much more significant illegalities (contract for murder). Where the illegality involved is of a less serious nature, the courts can take this into account in ensuring that a penalty out of all proportion to the illegality committed is not imposed, especially not one beyond that which criminal law would have imposed.[61] Moreover, the courts can consider the disparity in culpability of the parties to reach an appropriate result. This might be the case where the relationship of the parties to the illegality is such that one is the perpetrator and the other a victim and the parties are 'not *in pari delicto*'.[62] The minority in *Patel* it seems would also agree with the latter point of allowing recovery where the parties are 'not *in pari delicto*' because the claimant's participation in the illegal act is involuntary such as brought upon by fraud or duress, or where the rule of law intends to protect the claimant from exploitation from the defendant.[63] As Bogg

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[59]Toulson 'Illegality where are we now?'(n 3) 276; *Ashmore, Benson, Pease & Co. Ltd v A. V. Dawson Ltd* [1973] 1 WLR 828; *Patel* (UKSC) (n 1) [3], [107] (Lord Toulson), [235] (Lord Sumption); *St John* (n 57) 284 (Devlin J); *Cowan v Milbourn* (1866-67) L.R. 2 Ex. 230, 235 (Bramwell B).

[60][2012] EWCA Civ 1338, [2013] QB 840.

[61]see *St John* (n 57) 279, 289, 292 (Devlin J); Robert Sullivan 'Restitution or Confiscation/Forfeiture? Private Rights versus Public Values' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 76.

[62]Toulson 'Illegality where are we now?'(n 3) 276; see also Law and Ong 'He who comes to Equity need not do so with clean hands?' (n 4) 891.

[63]*Patel* (UKSC) (n 1) [242], [243] (Lord Sumption); R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 61, 65, 66,77; Graham Virgo, 'Illegality's Role in the Law of Torts' in Matthew Dyson (ed) *Unravelling Tort and Crime* (Cambridge

argues a 'legal system in good order will be concerned to protect the most vulnerable from abuse and exploitation by the powerful'.[64] In support of considering such factors, Burrows argues that taking into account the range of factors and policies engaged is best way forward, as it enables courts to consider the nuances of individual cases and enables them to reach the desired results by applying a consistent and transparent balancing approach.[65] He further argues, alongside Paul Davies, that Lord Toulson's test will lead to greater transparency in judicial reasoning such that the law will become clear through decided cases thereby rendering the law more certain.[66] In a nutshell therefore, due to the vast array of circumstances in which illegality arises, a test completely devoid of such considerations is not ideal.

Furthermore, in relation to which factors will be given most weight it is likely that where the case involves serious illegality, for example murder or drug trafficking, as Lord Toulson suggested in *Patel*, the illegality defence will apply to bar the claim.[67] This is because allowing such claims would undermine the integrity of the legal system.[68] Sullivan argues that the criminal law would be undermined if a civil court

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University Press, 2014) 190; Lim, 'Ex Turpi Causa: Reformation not Revolution' (n 3) 938.

[64]Bogg 'Illegality in Labour Law after *Patel v Mirza'* (n 2) 259.

[65]A. Burrows 'A New Dawn for the Law of Illegality' (n 2) 24, 34, 38; Law and Ong 'He who comes to Equity need not do so with clean hands?'(n 4) 890; see further Buckley, 'Illegal transactions: chaos or discretion?'(n 3) 172.

[66]A. Burrows 'A New Dawn for the Law of Illegality'(n 2) 29; Paul S. Davies 'Ramifications of *Patel v Mirza* in the Law of Trusts' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 252.

[67]For arguments as to why such a claim is refused see chapter 4; *Patel* (UKSC) (n 1) [110],[116], [121] (Lord Toulson).

[68]*Patel* (UKSC) (n 1) [110], [116], [121] (Lord Toulson); A. Burrows 'A New Dawn for the Law of Illegality' (n 2) 28, 33; Graham Virgo 'Illegality and Unjust Enrichment' in

were to allow a claim to recover money paid for a killing or money paid to buy illegal drugs.[69] For 'it is a matter of public confidence in the legal system as a whole: the general public would be unlikely to comprehend [or tolerate] how relief could be given… in connection with serious crime'.[70] McBride agrees that the law would be contradicting itself in relation to homicide.[71]

Furthermore, in relation to the proportionality principle, Strauss and Goudkamp argue that taking into account detailed facts and balancing competing policies is what a court does.[72] Judges do not seem to have any difficulty in weighing factors of the Toulson test in previous case law.[73] As will be remembered from Chapter 3, such an approach was adopted and carried out both by Etherton LJ is the Court of Appeal in *Les Laboratoires Servier v Apotex Inc*[74] (hereafter *Servier*) and by Toulson LJ in *ParkingEye* without difficulty.[75] Strauss further argues judges are familiar with such an approach of proportionality - balancing difficult and sometimes incompatible factors and policies, as part of their common law determination of a case such as 'when deciding whether it is

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Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 222, 223, 234; R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 61, 65, 66.

[69]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 61, 65, 66,70, 71.

[70]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 70, 71.

[71]McBride 'Not a Principle of Justice'(n 51) 101.

[72]Nicholas Strauss, 'Illegality after Patel: potior non est conditio defendentis' (n 3) 1, 18; Goudkamp, 'The end of an era?'(n 4) 18, 19.

[73]ibid.

[74][2013] Bus. L.R. 80 (CA).

[75]*ParkingEye Ltd v Somerfield* (n 54) [53], [68], [70]-[72], [75], [77], [79] (Toulson LJ); *Servier* (CA) (n 74) at [81], [82], [83], [85] (Etherton LJ).

just and reasonable to impose a duty of care. Nobody would regard that as a discretionary exercise'.[76]

Lord Toulson writing extra-judicially also noted that 'the law has become more familiar with an approach based on proportionality. It has recently been applied by the Supreme Court in relation to the doctrine of penalty clauses'.[77] Burrows also agrees with this, highlighting the various areas of the law where judges are required to weigh different policies and consider proportionality, such as under Unfair Contract Terms Act 1977 or under the recent Consumer Rights Act 2015, which requires considerations of various factors to work out whether a term is fair and reasonable including the need to consider the weaker party, or whether insurance had been or could have been taken out.[78] The nature of that test is open-ended and flexible which courts have to apply as it is in the statute. Moreover, in the context of negligence claims, s 1(1) of the Law Reform (Contributory Negligence) Act 1945 dealing with apportionment of liability in cases of contributory negligence, gives judges a discretion. That discretion is to determine the amount by which the claimant's damages should be reduced 'to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for

[76]Strauss 'Illegality after Patel: potior non est conditio defendentis' (n 3) 1, 18.
[77]Toulson 'Illegality where are we now?'(n 3) 286; *ParkingEye Ltd v Beavis* [2015] UKSC 67;*Cavendish Square Holding v Makdessi* [2016] AC 1172 at [32] (Lord Neuberger), at [227] (Lord Hodge);*Watford Electronics v Sanderson CFL Ltd* (2001) 3 TCLR 14 at [52] (Chadwick LJ).
[78]A. Burrows 'A New Dawn for the Law of Illegality'(n 2) 36; see also Unfair Contract Terms Act 1977 Schedule 2.

the damage'.[79] Kremer has thus rightly commented that 'courts have long been engaged in the balancing of public policy factors'.[80]

Notwithstanding these arguments one cannot discount that without an overarching principle determining whether or not the illegality defence applies, considering different factors and weighing them can lead to disparate and subjective results. This will be discussed in the next section. Moreover, it is notable that Lord Neuberger emphasised in *Patel* that the need for flexibility does not mean an overarching principle cannot be identified. Consistency, as identified by McLachlin J, is one such principle. Lord Neuberger emphasised that the law should be made as clear and as certain as possible.[81]

6.2.2. Lingering Concerns and Suggestions

Virgo argues that the Toulson test, when applied, will not provide the necessary guidance for judges to make decisions.[82] For example judges may differ as to whether a particular offence is sufficiently serious.[83] This is particularly evident through the application of the Toulson test to the facts of *Patel* by Virgo, Burrows and Sullivan. In applying the Toulson test to *Patel*, Virgo argued, first, that the criminal conduct of conspiracy, a statutory offence under s 1(1) Criminal Law Act 1977 is sufficiently

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[79]Law Reform (Contributory Negligence) Act 1945 s 1(1); see also Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 21) 268-269.
[80]Kremer, 'An "Unruly Horse" in a "Shadowy World"?'(n 20) 253.
[81]*Patel* (UKSC) (n 1) [161] (Lord Neuberger).
[82]Virgo, '*Patel v Mirza*: one step forward and two steps back' (n 2) 1095.
[83]Cf. Nelson Enonchong 'Illegality: The Fading Flame of Public Policy' (1994) 14 *OJLS* 295, 300;see further *Attorney-General v Brighton & Hove Co-operative Supply Association* [1900] 1 Ch 276, 282 (Lindley M.R.);see *Shaw v Groom* [1970] 2 QB 504 which involved breach of the Landlord and Tenant Act 1962.

serious. To be guilty of this offence proof of culpability is required, namely intention that the agreed course of conduct is carried out.[84] The maximum prison sentence for this conspiracy is seven years under s 61(1)(b) Criminal Justice Act 1993. Secondly, the illegality in question in *Patel* was at the 'the core of the contract which constituted criminal conspiracy'.[85] Thirdly, there was no marked disparity in culpability of the parties since to be guilty of the crime of conspiracy both had to share similar culpability.[86] In light of this Virgo argued that an assessment of these factors leads to the conclusion that denying the claim by refusing a restitutionary remedy would be a proportionate response to illegality.[87] Virgo noted that despite this, the court in *Patel* held that because the ordinary requirements of an unjust enrichment claim were fulfilled, the illegality defence did not operate to bar the claim.[88] It is submitted in this thesis that although his argument is plausible, the result should not be dependent solely on the evaluation of such factors which can be decided upon subjectively. Rather the outcome should be based on whether allowing the claim would create inconsistency in the law such that the integrity of the legal system is harmed. In Chapter 7 it will be argued that in the absence of confiscatory proceedings,[89] relief should be possible. This is on the basis that doing so would not undermine the policy of s 52 of the Criminal Justice Act 1993 and is not contrary to s 63(2) of the Criminal Justice Act 1993 which

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[84]see Criminal Law Act 1977 s1 (1); Virgo 'Illegality and Unjust Enrichment' (n 68) 221, 222; see also R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 71-74.
[85]Virgo 'Illegality and Unjust Enrichment'(n 68) 221, 222.
[86]ibid.
[87]ibid.
[88]ibid; see also *Patel* (UKSC) (n 1) [116] (Lord Toulson); In relation to the ordinary requirements of unjust enrichment fulfilled the illegality defence not operating to bar the claim cf. *Ochroid* (n 5) [139], [176] (Andrew Phang Boon Leong JA).
[89]This will be dealt with later in this chapter.

itself provides that no contract shall be unenforceable by reason of s 52. Moreover, as Gloster LJ had pointed out in the Court of Appeal in *Patel* if the:

> actual securities contract entered into on the basis of insider information is not… unenforceable it is hard to see on what possible basis the public policy behind the rule against insider trading requires the anterior contract…for the deposit of…funds…to be struck down as unenforceable.[90]

Moreover, the claim in *Patel* was not to enforce the criminal conspiracy, such as a claim for profits as a result of bets placed, but restitution of sums originally transferred.[91]

Burrows in applying the Toulson test to the facts of *Patel* argued that there was 'no specific policy reason relating to the illegality of insider dealing to override [the] general position' in favour of restitution which unwound the contract rather than enforcing the illegality.[92] In a similar vein, Sullivan also pointed out that there was in fact no breach of s 52 of the Criminal Justice Act 1993 as no information was ever received and no insider trading actually took place.[93] Moreover, Sullivan argues that confiscation of the sum lost (£620,000) would have been a fine greatly in excess of any fine for the crime of conspiracy.[94] Burrows added that Mr Mirza was arguably more culpable. Being a professional advisor, it would have been disproportionate to allow Mr Mirza to keep the money, particularly where the crime was not as serious as murder or

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[90]*Patel* (CA) (n 24) [69] Gloster LJ).
[91]*Patel* (CA) (n 24) [66], [70] Gloster LJ).
[92]A. Burrows 'A New Dawn for the Law of Illegality'(n 2) 28.
[93]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 72, 73, 75, 76.
[94]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 76.

drug trafficking.[95] The underlying position (for differentiating between illegalities) may be that causing harm to a person (through murder, drugs and exploitation) is far more morally reprehensible than financial irregularities and white collar crime. As Sullivan comments, 'insider trading is arguably a victimless offence, in that there is no direct victim'.[96] Furthermore, any profits made, no matter how vast, are by way of a valid contract, since a contract for dealing in securities, even if it contravenes the insider trading provisions, is not an unenforceable contract under s 63(2) Criminal Justice Act 1993.[97] Nevertheless, the concern over white-collar criminals recovering funds from co-criminals cannot be discounted.[98] Sullivan argues that there is potential public interest in the money being confiscated.[99] In relation to the relative degree of culpability between the parties, this factor is also open to debate. Burrows, as noted above arguing that Mr Mirza being more culpable. Sullivan on the other hand bringing to light that Mr Patel 'moved in a circle that was well informed about finance and investment opportunities'.[100] It would be quite surprising therefore, that Mr Patel did not know of the illegality as to insider dealing.[101] Were Mr Patel genuinely mistaken and induced

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[95]A. Burrows 'A New Dawn for the Law of Illegality'(n 2) 28; cf. *Patel* (UKSC) (n 1) [241] (Lord Sumption) that the principle of not *in pari delicto* does not allow a 'general enquiry into their relative blameworthiness'.
[96]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 75.
[97]see Criminal Justice Act 1993 s 63(2); see also R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 75, 76.
[98]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 76.
[99]ibid.
[100]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 77; see also *Patel* (CA) (n 24) [3]-[6] (Rimer LJ).
[101]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 77.

into the agreement by deception, the position would be different as he could come under the 'not *in pari delicto*' doctrine.[102]

The assessment of such factors as seriousness of illegality and culpability of the parties thus reveals that the Toulson test can lead to subjective and disparate results, which leads to uncertainty in the law. This has led to the proportionality principle being considered the most problematic part of the Toulson test in the literature.[103] The key issue is that it is unclear as to which factor or policy should be and would be given overriding importance in determining whether or not the illegality defence applies. This is particularly so where there may be disagreement concerning whether or not the conduct is sufficiently serious. For example, insider dealing is an offence where views differ as to the extent of its seriousness, as illustrated through Virgo and Sullivan's arguments above. There may be more or less serious instances of insider dealing. For example, deliberate dishonesty is more morally culpable than inadvertence or ignorance. Law and Ong argue that taking into account various factors alongside seriousness of illegality means balancing this factor out with others, thereby potentially rendering its value nugatory.[104] An example could be the facts of *Patel*, whereby as Virgo's observed, despite arguably serious illegality of insider dealing, Lord Toulson in *Patel* allowed the claim based on the fact that the ordinary requirements of an unjust

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[102]ibid; *Patel* (UKSC) (n 1) [242] (Lord Sumption);see *Aqua Art v Goodman Development* [2011] SGCA 7 at [23]-[25], [28]-[29], [33]-35] (Andrew Phang Boon Leong JA); *Ochroid* (n 5) [43] (Andrew Phang Boon Leong JA).

[103]Law and Ong 'He who comes to Equity need not do so with clean hands?'(n 4) 894; Bogg 'Illegality in Labour Law after *Patel v Mirza'* (n 2) 287;see also Enonchong 'Illegal Transactions: The future? (LCCP No 154)'(n 3) 95.

[104]Law and Ong 'He who comes to Equity need not do so with clean hands?'(n 4) 891.

enrichment claim were satisfied.[105] Linked to this is that although Lord Toulson laid down the trio of considerations, he did not go on to apply it to the facts of *Patel*, making it difficult to assess which factor or policy he gave overriding importance in reaching the decision. This lack of guidance is problematic as it creates uncertainty as to the basis on which decisions will be reached. Lord Toulson's response to this - that doctrinally the illegality principle is driven with uncertainties - is unsatisfactory.[106] As Law and Ong argue, the law being uncertain does not mean it should remain uncertain.[107]

In order to tackle the lack of guidance and uncertainty issue, Lim argues that the first two considerations of the Toulson test should be the controlling factors whilst the third of proportionality should be subordinated. Adopting such an approach, he argues, will reduce uncertainty as the proportionality consideration of weighing different factors will be restricted in application.[108] He then argues that if no outcome can be reached by the application of the first two considerations then the third of proportionality should be applied but no more than necessary to preserve the integrity of the legal system.[109] Burrows, however, argues that most cases will be of the type that will reach the stage where one needs to consider proportionality.[110] Put differently 'the expectation is that it will be rare to stop at (a) or (b)' [namely, the first two considerations of the Toulson

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[105]That is to say, by showing that defendant has been enriched, the enrichment was at the claimant's expense and the enrichment is unjust; see *Benedetti v Sawiris* [2014] AC 938 at [10] (Lord Clarke);*Patel* (UKSC) (n 1) [121] (Lord Toulson); see also *Ochroid* (n 5) [213] (Andrew Phang Boon Leong JA).
[106]*Patel* (UKSC) (n 1) [113] (Lord Toulson).
[107]Law and Ong 'He who comes to Equity need not do so with clean hands?' (n 4) 893.
[108]Lim, 'Ex Turpi Causa: Reformation not Revolution'(n 3) 939.
[109]Lim, 'Ex Turpi Causa: Reformation not Revolution'(n 3) 937, 938.
[110]A. Burrows 'A New Dawn for the Law of Illegality'(n 2) 34, footnote 35.

test].[111] Notwithstanding this, Lim's proposal to restrict the use of the proportionality consideration and adopt a sequential approach provides a step in the right direction towards achieving guidance and certainty. Drawing from this, and in particular the approach adopted by the Court in *Ochroid Trading Ltd v Chua Siok Lui*[112] Chapter 7 of this thesis will provide more specific guidance on the limitation of the proportionality principle. Such an approach will also indicate why and in what circumstances it should be possible to restrict the use of the proportionality consideration.

Another lingering issue which arises in relation to Lord Toulson's test is his suggestion that contracts contrary to public policy are now subject to the proportionality principle rather than being automatically rendered unenforceable.[113] In commenting on *Parkinson*[114] he suggested that although bribes are odious and corrupting that does not mean that it is not in the public interest to repay them.[115] Such a view has been heavily criticised in the literature. Firstly, as Sullivan emphasises bribes are 'damaging and destabilising in many countries'.[116] Secondly, Virgo notes that bribery as an offence which attracts a prison sentence of 10 years under s 11(1) Bribery Act 2010 is sufficiently serious.[117] Furthermore, under s 1 and s 2 Bribery Act 2010 both the offeror and offeree of the bribe are equally guilty of the offence of bribery.[118] Virgo emphasises that no obvious reason was given in *Patel* why a distinction has been drawn in nature

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[111]A. Burrows 'A New Dawn for the Law of Illegality' (n 2) 34, footnote 35.
[112][2018] SGCA 5, [2018] 1 SLR 363; For discussion of this case see Chapter 5.
[113]see *Patel* (UKSC) (n 1) [109] (Lord Toulson).
[114]see Chapter 2 for facts. The case is also discussed in chapter 5.
[115]*Patel* (UKSC) (n 1) [118] (Lord Toulson).
[116]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 75, 76.
[117]Virgo 'Illegality and Unjust Enrichment'(n 68) 222.
[118]see R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 75, 76.

between the offence of drug trafficking where restitution is not possible, and bribery where restitution may be required, despite both offences being quite serious.[119] In such cases Sullivan argues that there should be a 'strong presumption in favour of confiscating or forfeiting bribes, rather than paying them back to the briber'.[120] He emphasises that the prospect of 'other white collar criminals with the resources to litigate recovering…money from co-criminals'[121]cannot be discounted.[122] Davies in agreement argues that the original result in *Parkinson*, that is to say the denial of the restitutionary claim, was principled and appropriate, particularly because returning the money encourages Parkinson to try again.[123] He argues that the original result fits better with the stultification argument[124] and supports deterrence, as it is surely better to deter such illegal activities.[125] Birks similarly highlights that the ability to demand repayment would clearly work as an inducement towards achieving the corrupt objective and would stretch out a safety net below all those who are like-minded in embarking on such corruption.[126] Murphy also agrees with this position that recovery of a bribe paid should not be allowed.[127] To illustrate his point he gives the following hypothetical example:

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[119]Virgo 'Illegality and Unjust Enrichment' (n 68) 222.
[120]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 75.
[121]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 76.
[122]ibid; This point was also made earlier in the chapter in relation to insider dealing.
[123]Paul S Davies, 'Illegality in Equity' in Paul S Davies, Simon Douglas, James Goudkamp (ed) *Defences in Equity* (Hart Publishing, 2018) 256;R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 75.
[124]Paul S Davies, 'Illegality in Equity'(n 123) 256; See Birks (n 31) 155.
[125]Paul S Davies, 'Illegality in Equity'(n 123) 256
[126]Birks (n 31) 184.
[127]Emer Murphy 'The ex turpi causa' (2016) 32 *PN* 241, 252, 253, 254.

> what if a solicitor expressly advises a client that payment of a bribe is not unlawful, and the client subsequently sues in negligence to recover (i) losses suffered following a criminal prosecution; and (ii) the value of the bribe?[128]

Murphy argues that the claimant should not be able to recover under either head. Under the first head (that is to say the loss suffered from criminal prosecution) the loss should be irrecoverable since it would be harmful to the integrity of the legal system since 'to allow the claimant to escape the criminal consequences of his conduct would be inconsistent with the criminal law's sanction of the claimant's behaviour.'[129] Under the second head (recovery of the value of the bribe), Murphy argues that this loss should also be irrecoverable applying Toulson's trio of considerations since 'dissuading bribery is likely to take precedence over discouraging negligence'.[130] He also notes that considering that:

> bribery is a serious crime, that the bribery was central to the claim against the solicitors, that the losses suffered were a direct result of the bribery, that the bribery was intentional (but presumably not knowingly illegal), and that the parties (payer and solicitor) were both blameworthy,[131]

it would be an appropriate response to the illegality to disallow the claim.

Against the above is the argument that by allowing restitution the claimant is not profiting from their crime or enforcing the contract, rather the agreement is reversed and

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[128]Murphy 'The ex turpi causa' (n 127) 252.
[129]Murphy 'The ex turpi causa' (n 127) 252, 253, 254.
[130]ibid.
[131]ibid.

the *status quo ante* restored.[132] In the absence of the courts being able to confiscate money, as the Proceeds of Crime Act 2002 (hereafter POCA) is a matter for the state, leaving the money with the defendant, or returning it to the claimant are both unsatisfactory positions.[133] This makes cases such as *Parkinson v College of Ambulance Ltd*[134] (hereafter *Parkinson*) problematic and thus the question remains whether the post-*Patel* position should be accepted namely, that restitution should be possible, or should the position be that restitution is denied as it originally was in *Parkinson*? That is to say, that contracts contrary to public policy should automatically be rendered unenforceable? Though an obvious negative effect of this may be that the defendant, who may be at least equally, if not more, culpable than the claimant, gets to keep the money. If the latter is the correct position, the question then becomes on what principle can this result be justified? This issue will be addressed in Chapter 7 where it will be argued that restitution of a bribe paid should not be possible based on the principle of consistency in the law. If this is accepted and bribes are not returned, the issue as noted above is that the money is left with the equally culpable defendant thereby unjustly enriching him.[135] A solution to this exists in the literature on illegality. This involves reforming the current law in order to enable courts to confiscate the money. This power to confiscate could be used in cases such as *Parkinson*, *Patel*, and restitution of money

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[132]*Patel* (UKSC) (n 1) [150] (Lord Neuberger), [197], [199] (Lord Mance), [250] (Lord Sumption); Virgo 'Illegality and Unjust Enrichment'(n 68) 227-229.
[133]A. Burrows 'A New Dawn for the Law of Illegality' (n 2) 29; Virgo 'Illegality and Unjust Enrichment'(n 68) 228, 229; Frederick Wilmot-Smith, 'Illegality as a Rationing Rule' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 117.
[134][1925] 2 KB 1.
[135]P. S. Davies 'Ramifications of *Patel v Mirza* in the Law of Trusts'(n 66) 249;Law and Ong favour a restitutionary approach see Law and Ong 'He who comes to Equity need not do so with clean hands?'(n 4) 881, 890.

paid for murder. These are positive steps towards improving the current unsatisfactory state of the law and will be discussed below.

Confiscation Powers:

In cases such as the above where money for the purpose of a bribe is paid, or money is paid for murder or a property that is used for the purpose of terrorism is transferred, it is submitted here that there should be a presumption in favour of confiscation so that neither party keeps the property. This has been proposed by Sullivan, who argues that the civil law should do all it can to implement the process of statutory confiscation and forfeiture and the High Court's general civil jurisdiction should be extended to encompass statutory confiscation/forfeiture orders.[136] Before looking at those proposals it is important to consider his suggestions absent those proposals. Sullivan begins with the following example:

> The claimant pays £200,000 to the defendant for drugs, the defendant is about the supply the drugs but the claimant finds out that the drugs [are] of a lesser quality and that he has ended up paying more for them. The claimant asks for the money back [but] the defendant refuses. The claimant sues the defendant for restitution[137]

Sullivan argues that such a claim should not be tried. The judge should adjourn proceedings and alert the relevant authorities such as the Crown Prosecution Service, police and the Assets Recovery Agency if the claimant has yet to be prosecuted for his

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[136]R. Sullivan 'Restitution or Confiscation/Forfeiture?' (n 61) 70, 71, 83.
[137]R. Sullivan 'Restitution or Confiscation/Forfeiture?' (n 61) 61, 65, 66.

crime.[138] Both the claimant and defendant would be convicted and the money in the defendant's hands being proceeds of crime would be confiscated under s 75-76 POCA. Or alternatively the director of Asset Recovery Agency could bring proceedings for civil forfeiture to take the money from the defendant as acquired from unlawful conduct.[139] Noting this Sullivan laments that it did not occur to any of the Judges in *Patel* to contact the National Crime Agency, or the Financial Conduct Authority in order to see if they were aware of the share dealing intentions, or that a statutory confiscation order against Mr Mirza would have been a better outcome.[140] Virgo agrees that the money may be forfeit under POCA and that such a result would be the most equitable.[141] He however, recognises that the courts do not have the ability to activate POCA which as highlighted by Lord Neuberger in *Patel* is matter for the state.[142] Sullivan argues that although a civil court does not have the power to order payment of the money to public funds, it can adjourn proceedings and seek advice on forfeiture and whether confiscatory proceedings will be brought.[143] He acknowledges however, that the relevant criminal justice authorities may decide not to go forward with prosecution which leaves us back to the issue of what should happen to the money.[144] Should the money be returned to the claimant at least in arguably less serious crimes? Arguably 'if it is clear that the criminal justice authorities have not stirred themselves and there is no

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[138]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 61, 65- 67.
[139]Proceeds of Crime Act 2002, s 240;see also R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 66; McBride 'Not a principle of Justice' (n 51) 87, 90.
[140]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 72-74.
[141]Virgo 'Illegality and Unjust Enrichment'(n 68) 234.
[142]Virgo 'Illegality and Unjust Enrichment'(n 68) 234; *Patel* (UKSC) (n 1) [185] (Lord Neuberger), [188] (Lord Mance).
[143]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 68.
[144]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 83.

prospect of future action' this may favour allowing resititutionary proceedings.[145] However, this is unsatisfactory since the money could be reapplied for the same purpose.[146]

Sullivan then proposes that legislation should be brought so that 'any sum of money potentially subject to statutory confiscation/forfeiture should presumptively be confiscated or forfeited whenever a claimant making a restitutionary claim for that money is a joint principal or conspirator'.[147] He argues that the most straightforward way of achieving this, as noted earlier is 'by extending the High Court's general civil jurisdiction to encompass statutory confiscation/forfeiture orders'.[148] This would extend the High Court's existing confiscatory and forfeiture powers that currently can only be invoked at hearings dedicated to such issues, so that 'a High Court could directly access these powers when disposing of a resititutionary claim'.[149] Enabling such reform would allow the courts to take into account the crime committed rather than completely disregarding it.[150]

The question then becomes how the presumption in favour of forfeiture and confiscation can be overridden? Sullivan argues that the law already takes account of where the 'claimant's input was rendered under duress',[151] or where the claimant has been exploited, (parties are not *in pari delicto*) and this enables recovery despite involvement in illegality. For example, where both parties have to a certain extent

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[145]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 67, 68.
[146]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 83.
[147]ibid.
[148]ibid.
[149]ibid.
[150]ibid.
[151]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 72.

colluded in breaching the criminal law, such as illegally working, restitutionary relief for fair payment, or a *quantum meruit* claim for value for work done, should be possible where the claimant is exploited, such as in *Hounga.*[152] As Lord Sumption said in *Patel,* a claim for *quantum meruit* for services performed would have succeeded in *Hounga* on this ground.[153] Lord Toulson also hinted at this in *Patel* when he said that it is unfortunate that the court did not have the opportunity of considering whether the claimant in *Hounga* had a claim for *quantum meruit.*[154] The question then becomes, if a claim for *quantum meruit* is allowed, on what policy basis is such a result justifiable since allowing the claim for services means the law contradicting itself? This is because the employment is illegal and the same illegal immigrant is being allowed restitutionary relief for services done. The position in *Hounga* also appears to be different from that in *Alaga* in which the *quantum meruit* claim was allowed because there the claimant did not know of the illegality as to prohibition of fee sharing agreements, whereas in *Hounga* the claimant was aware of her illegal employment situation.[155] In such circumstances, as Bogg argues, 'where the parties have been complicit in fraudulent arrangements, this is likely to be fatal to the *quantum meruit* claim'.[156] Couple this with the policy of the Immigration Act 1971, and the Immigration Act 2016 which is against recovery, the case becomes more problematic. It appears from Lord Toulson's judgment in *Patel* that an exercise similar to that carried out by Robertson JA in *Still* of weighing the different policies both in favour of and against allowing relief would have to be considered. In *Still* for example, despite breach of the immigration law, the

[152]ibid.
[153]*Patel* (UKSC) (n 1) [74],[119] (Lord Toulson), [243] (Lord Sumption).
[154]*Patel* (UKSC) (n 1) [119] (Lord Toulson).
[155]Bogg 'Illegality in Labour Law after *Patel v Mirza*'(n 2) 283.
[156]ibid.

Unemployment Insurance Act 1985 was taken into account in holding that the claim would be allowed. However, this does not appear to resolve the contradiction of payment to an illegal immigrant. In other words the law would be contradicting itself since the employment is illegal yet value for work done similar to wages is made available. Chapter 7 of the thesis will argue that the *quantum meruit* claim can be allowed without contradiction since the *quantum meruit* will be set to the relevant statutory minimum which is not the same as the contractual wage.[157]

At this juncture it should be noted that further research is required on Sullivan's proposals and how they may be implemented, however this is not within the scope of this thesis. In the absence of such reform, the rule that restitution is not possible where serious illegality is involved, such as drug trafficking and murder, should be maintained as Lord Toulson suggested in *Patel*; whilst in arguably less serious illegalities restitution should be allowed. Though differentiating between the levels of illegalities may be raised as an issue, Sullivan rightly argues 'differentiating between degrees of wrongdoing in terms of the type of offence and the particulars of the offence is core business for a sentencing judge and the subject of much work by [the] sentencing council'.[158]

In the absence of reform proposals for confiscation, it may also be argued that Lord Toulson's test of denying restitution in serious cases such as murder leaves the party to whom the money was transferred unjustly enriched. To this criticism it can be said that

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[157]Bogg 'Illegality in Labour Law after *Patel v Mirza'* (n 2) 282, 283.
[158]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 61) 71, footnote 42 on that page; see also A. Von Hirsch and N. Jareborg, 'Gauging Criminal Harms: A Living Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1.

Lord Mansfield in *Holman v Johnson*[159] recognised this was the nature of the illegality doctrine when he said:

> 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.[160]

However, the above leaves crimes such as insider dealing in *Patel* and cases of bribes hanging in the middle. Guidance is therefore needed, governed by a principle, which aids courts in reaching decisions where it cannot be easily decided as to whether or not the illegality is serious. Such guidance will be provided in chapter 7 which will help to predict how a court will approach such disputes.[161]

6.3 Conclusion

In conclusion, it is evident that the Toulson test is both useful and concerning. Although Lord Toulson's trio of considerations test introduces greater transparency in the law as the court overtly lays down the factors and polices which are central to its decision, the issue is that taking into account various factors can lead to uncertainty in the law if applied without restriction, or without an overarching principle. In contrast, rules can

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[159](1775) 1 Cowp 341.
[160]*Holman* (n 159) 343 (Lord Mansfield).
[161]see P. S. Davies 'Ramifications of *Patel v Mirza* in the Law of Trusts' (n 66) 252.

lead to improved predictability as to how the courts will decide a particular case. However, the rules put forth by the courts, discussed both in chapters 3 and 4, in particular the reinterpreted reliance test and that of *restitutio in integrum*, have not proven to be the ones better able to achieve certainty in the law. A rule embedded in policy, such as that of consistency, which is supported both by the majority and minority in *Patel*, and the restricted use of the proportionality principle, it is submitted here can achieve the aims of certainty. A quasi-flexible approach will achieve the aims of greater certainty and guidance whilst retaining the necessary flexibility to counter the harsh operation of the illegality doctrine as a defence. The quasi-flexible approach will be provided in chapter 7.

CHAPTER 7

A QUASI-FLEXIBLE APPROACH TO THE ILLEGALITY DEFENCE

7.1 Introduction

In the preceding chapters of the thesis it was found that the two principles of consistency and proportionality are significant in determining whether or not the illegality defence applies. These two principles find support not only in the English case law but, as we saw in chapter 5, also that of other common law jurisdictions namely New Zealand, Australia, Canada and Singapore. In *Patel v Mirza*[1] (hereafter *Patel*) whilst the principle of consistency garnered support from all of the Supreme Court judges, proportionality found support from the majority. In chapter 6 it was found that the most problematic aspect of the Toulson test related to the proportionality principle.[2] Carrying out a multi-factorial balancing exercise, without an overarching principle governing the outcome of cases, leads to significant uncertainty. This is particularly due to there being disparity in judicial opinions on issues such as seriousness of illegality, culpability or centrality of illegality. The courts may also differ as to how much weight

[1][2016] UKSC 42, [2017] AC 467.

[2]*Patel* (UKSC) (n 1) [158] (Lord Neuberger), [262] (Lord Sumption);Mark Law and Rebecca Ong 'He who comes to Equity need not do so with clean hands?' illegality and resulting trusts after Patel v Mirza, what should the approach be?'(2017) 23 *Trusts & Trustees* 880, 893,894; James Goudkamp, 'The end of an era? Illegality in private law in the Supreme Court' (2017) 133 *LQR* 14, 17-19; see also Nelson Enonchong 'Illegal Transactions: The future? (LCCP No 154)' (2000) 8 *RLR* 82, 95.

is to be attributed to each factor. This makes it difficult to predict which factors are the most influential and in which direction the decisions will sway. Moreover, there is a concern in the literature that widespread use of the proportionality principle may lead to courts allowing claims which are contrary to public policy on the basis that to deny the claim would be a disproportionate response to illegality.[3] The Toulson test has thus been labelled as discretionary, too vague and wide a test, to which a claimant is denied their rights.[4] On the other hand, support for Lord Toulson's test[5] reveals, firstly, that since illegality covers vast factual circumstances, the courts need to evaluate conflicting policies and factors in order to do justice.[6] Secondly, that the rigid rule-based approaches adopted pre-*Patel*, in particular the reliance test[7] 'failed to deliver on what some have claimed to be its principal virtues *viz* ease of application and predictability of outcome'.[8] This chapter will contribute to the existing literature on illegality by proposing a quasi-flexible approach to the illegality defence. The guiding principles of consistency and proportionality identified in this thesis will govern the application of the illegality defence and will be presented in a rule form in section 7.3 of this chapter. Concerns over the use of the proportionality principle will be addressed by limiting the use of proportionality to well-defined circumstances. This will provide the certainty and structure, whilst flexibility is maintained through the proportionality principle (though restricted in application) so that the law can adequately deal with nuances of individual

[3]Law and Ong 'He who comes to Equity need not do so with clean hands?'(n 2) 891.
[4]*Patel* (UKSC) (n 1) [217], [219] (Lord Clarke), [264], [265] (Lord Sumption).
[5]see chapter 4 and chapter 6 supporting arguments.
[6]Roger Toulson 'Illegality where are we now?' in Andrew Dyson, James Goudkamp, Frederick Wilmot-Smith, and Andrew Summers (ed) *Defences in Contract* (Bloomsbury Publishing PLC, 2017) 276.
[7]of which the minority in *Patel* (UKSC) (n 1) were supportive and which was reinterpreted by Lord Sumption in *Patel* (UKSC) (n 1) see Chapter 4.
[8]*Patel* (UKSC) (n 1) [123], [134], [138] (Lord Kerr).

cases. Furthermore, although both consistency and proportionality are found to be significant principles in governing the application of the illegality defence, the former, as explained by McLachlin J in *Hall v Hebert*[9] (hereafter *Hall*) of promoting internal coherence of the law, and ensuring that the claimant does not profit from wrongdoing or evade a penalty, will take precedence over proportionality. This is particularly useful where the courts cannot reach a determinate outcome when weighing factors. The precedence of consistency is because, as noted earlier, there was consensus of opinion amongst all of the justices of the Supreme Court in *Patel* that consistency is a significant principle, whereas the judges disagreed over the use of proportionality as a criterion. In providing a quasi-flexible approach the thesis draws from the Singaporean case *Ochroid Trading Ltd v Chua Siok Lui*[10] (hereafter *Ochroid*) thereby providing a test which tackles the issues of lack of guidance and uncertainty in the law which plague the Toulson test. However, this thesis will adopt the terminology of consistency as opposed stultification put forth in *Ochroid*. This is because consistency was the preferred terminology adopted and approved by the justices of the Supreme Court in *Patel* and the English Law Commission.[11] After laying down the quasi-flexible test, this chapter will illustrate its application to different case scenarios alongside the various other tests relied upon both pre-*Patel* and in *Patel*. This exercise is carried out to demonstrate the strengths of the quasi-flexible test as opposed to the pre-existing tests. In some instances the outcome may be the same, but it is submitted that the reasoning and justification is clearer and more principled through the quasi-flexible test. The

[9][1993] 2 SCR 159.
[10][2018] SGCA 5, [2018] 1 SLR 363.
[11]see chapter 2 and chapter 4;Though it should be noted as mentioned earlier the two principles of consistency and stultification are synonymous see *Equuscorp Pty Ltd v Haxton* [2012] HCA 7, [2012] 3 LRC 716 at [38] (French CJ).

chapter will also discuss the limitations to the quasi-flexible test and potential solutions to it.

7.2 The Guiding Principles of Consistency and Proportionality

In *Patel*, Lord Toulson emphasised that the overall aim in this area of law is the need to maintain the integrity of the legal system. In this thesis it is argued that the integrity of the legal system is maintained if there is consistency in the law.[12] That is to say, that the purpose of the rule infringed and any other relevant public policies are not undermined or rendered ineffective by allowing the claim (these are the first two considerations of the Toulson test).[13] It is important that the illegality defence supports the purpose of the rule which has made the conduct or contract illegal.[14] If allowing the claim does not undermine the purpose of the rule then the illegality defence should not apply to bar the claim.[15] As Lim puts it, the question is would permitting recovery result in disharmony

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[12]The Law Commission, *The Illegality Defence in Tort: A Consultation Paper* (Law Com CP No 160, 2001) para 4.63, 4.70; *The Illegality Defence: A Consultative Report* (Law Com CP No 189,2009) para 2.13; *Patel* (UKSC) (n 1) [101], [120] (Lord Toulson) [123], [143] (Lord Kerr), [155], [160], [168], [174] (Lord Neuberger),[192] (Lord Mance), [213]-[214] (Lord Clarke), [231], [232], [262] (Lord Sumption); *Hall v Hebert* (n 9) 176,178 (McLachlin J).

[13]*Patel* (UKSC) (n 1) [101], [120] (Lord Toulson); see also *Singularis Holdings Ltd v Daiwa Capital Markets Europe* [2017] EWHC 257 (Ch) at [219] Rose J); *Singularis Holdings v Daiwa* [2018] EWCA Civ 84 (CA) at [56]-[60] [66], [67] (Sir Geoffrey Vos); Ernest Lim, 'Ex Turpi Causa: Reformation not Revolution' (2017) 80 *MLR* 927, 933; see further Andrew Burrows 'A New Dawn for the Law of Illegality' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 27;CP 160 (n 12) para 4.56, 4.57.

[14]CP 160 (n 12) para 4.56, 4.57.

[15]CP 160 (n 12) para 4.57.

in the law?[16] Moreover, maintaining consistency in the law includes ensuring that the claimant is not profiting from their wrongdoing or evading a penalty imposed by the criminal law, if the claim is allowed.[17] This is the definition provided by McLachlin J in *Hall* and which was supported by the justices of the Supreme Court in *Patel.* Although Lord Toulson included proportionality within the consistency principle, as noted in chapter 4, this was not supported by the minority in *Patel.* This thesis also does not include proportionality within the explanation of the consistency principle.[18]

The justification for consistency as the guiding principle is that consistency explains a number of cases in the law illegality.[19] In contract, for example, where the contract is expressly prohibited by a statute, the contractual claim is not allowed because to do so would frustrate the purpose of the law which rendered the contract illegal and unenforceable.[20] In other words it would be inconsistent with the law which rendered the contract illegal in the first place. This was illustrated through *Re Mahmoud v Ispahani*[21] (hereafter *Re Mahmoud*) in chapter 2. A non-contractual claim may also be barred on these grounds as was illustrated through *Awwad v Geraghty*[22](hereafter *Awwad*). In *Awwad* the claimant was trying to recover contingency fees, which were expressly prohibited by statute, in an unjust enrichment claim. The claim was barred by the illegality defence since allowing it would be giving that which was expressly

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[16]Lim, 'Ex Turpi Causa: Reformation not Revolution'(n 13) 933.
[17]*Hall v Hebert* (n 9)179-180 (McLachlin J);*Patel* (UKSC) (n 1) [99] (Lord Toulson); see also Peter Birks, 'Recovering Value Transferred under an Illegal Contract' (2000) 1 *TIL* 155, 160.
[18]see chapter 5 for fuller argument.
[19]see chapter 2 which discusses the case law reflecting this policy.
[20]CP 160 (n 12) para 4.56-4.59; CP 189 (n 12) para 2.6, 2.7.
[21][1921] 2 KB 716.
[22][2001] QB 570.

prohibited and therefore result in frustrating the purpose of the rule infringed. In tort, cases such as *Gray v Thames Trains Ltd*[23](hereafter *Gray*) and *Clunis v Camden and Islington Health Authority*[24] (hereafter *Clunis*) also reflect the consistency principle as a basis for refusing recovery. In those cases, the claimant was prevented from recovering their loss of earnings for being imprisoned or detained as a result of committing the unlawful act of manslaughter. The law of manslaughter under which the claimant was punished would not be furthered if the claimant were to be compensated for a lawful sentence imposed on them.[25] However, as the English Law Commission pointed out, it would not be inconsistent to allow recovery in all types of cases concerning illegality. They gave the example of the law of speeding and argue that, that law would not be frustrated by allowing a negligently injured driver to sue another motorist.[26] This is because allowing a claim for personal injury does not reflect a profit from crime, or evasion of a penalty as explained and applied in *Hall.*[27] In trusts, a case reflective of the consistency principle is *Ex parte Yallop,*[28] in which the court refused to enforce an interest in a ship because to do so would destroy the effect of the statute.[29] If a trust

[23][2009] UKHL 33, [2009] 1 AC 1339.
[24][1998] QB 978.
[25]see *Gray* (HL) (n 23); *Clunis* (n 24); see also *British Columbia v Zastowny* (2008) SCC 4;[2008] 1 SCR 27 at [22],[23],[25],[30] (Rothstein J); *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35, 38 (Denning J); CP 160 (n 12) para 4.56, 4.58, 4.64; The Law Commission, *The Illegality Defence* (Law Com No 320, 2010) Para 3.16.
[26]CP 160 (n 12) para 6.41.
[27]*Hall v Hebert* (n 9) 169, 179, 180 (McLachlin J);*McHugh v Okai-Koi* [2017] EWHC 1346 (QB); CP 160 (n 12) para 4.70.
[28](1808) 15 Ves 60.
[29]*Ex parte Yallop* (n 28) 66. For fuller discussion of this case see chapter 2.

therefore defeats the policy of a statute it should arguably not be enforced on grounds of creating inconsistency in the law.[30]

Proportionality is also an important principle in the law of illegality. This is evident not only through pre-*Patel* case law discussed in chapter 2 and 3 such as *ParkingEye Ltd v Somerfield Stores Ltd*[31] (hereafter *ParkingEye*) but also in other common law jurisdictions as discussed in chapter 5. Significantly, in *Patel* Lord Toulson noted that ensuring consistency in the law is only one way of protecting the integrity of the legal system; the other is that the response to illegality should be proportionate. As illegality covers a variety of different factual circumstances, with varying degrees of illegality involved, it is important to take into consideration factors such as seriousness of illegality, in order to avoid results which are particularly harsh.[32] Notwithstanding this, one cannot overlook that the factors laid down by Lord Toulson[33] to determine whether denial of the claim is a proportionate response can be decided upon subjectively, as illustrated through the *Patel* example in Chapter 6. To tackle this issue, this chapter will provide an approach in which the consistency principle is preferred as the guiding principle, and take precedence over the proportionality principle because opinions have been divided on the usefulness of the latter, given its uncertainty. [34] The proportionality

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[30]see Treitel G.H, The *Law of Contract* (*ed. E. Peel*) (12th edition, Sweet & Maxwell, 2007) 549; CP 189 (n 12) para 5.15.
[31][2012] EWCA Civ 1338,[2013] QB 840 (CA).
[32]Toulson 'Illegality where are we now?'(n 6) 276; *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, 279, 288, 289, 291 (Devlin J).
[33]*Patel* (UKSC) (n 1) [107] (Lord Toulson).
[34]*Patel* (UKSC) (n 1) [99], [120] (Lord Toulson),[123] (Lord Kerr), [155], [160], [168], [174] (Lord Neuberger), [192] (Lord Mance), [213]-[214] (Lord Clarke), [231], [232], [262] (Lord Sumption).

principle will be utilised but it will be restricted in application to well- defined circumstances to bring greater certainty in the law.

In the section below the operation of the guiding principles of consistency and proportionality will be illustrated in the context of contract, tort, trusts and unjust enrichment claims. Contract is dealt with in more detail than other civil law claims as it is a particularly problematic area in which the doctrine of illegality is raised as a defence.[35] This is because there are a range of ways in which contracts can be illegal as discussed in chapter 2. After this, the quasi-flexible test will be laid out. The section below therefore acts as a preface to the quasi-flexible test.

7.2.1 Contract

Where a contract is expressly prohibited by statute, a claim in contract will not be allowed because it will frustrate the purpose of the law which rendered the contract illegal and unenforceable.[36] It would be harmful to the integrity of the legal system to enforce the contract since in doing so the purpose and terms of the statute will be disregarded. In other words, allowing a contractual claim will be inconsistent with the purpose of the statute which prohibits the contract. Here therefore, the courts should not consider the proportionality principle. As Lord Toulson said in *Patel* 'the courts must

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[35]*Patel* (UKSC) (n 1) [3]-[8], [82] (Lord Toulson), [146], [157], [165] (Lord Neuberger); *Patel v Mirza* [2015] Ch 271 (CA) at [47] (Gloster LJ); *Ting Siew May v Boon Lay Choo* [2014] SGCA 28 at [3] (Andrew Phang Boon Leong JA); Andrew Burrows *Restatement of the English Law of Contract* (Oxford University Press, 2016) 221-222.

[36]see *Re Mahmoud* (n 21).

obviously abide by the terms of any statute'.[37] Thus if *Re Mahmoud* were to come before the courts today, in which the contract for buying and selling linseed oil was expressly prohibited by statute, the contractual claim should still be dismissed since otherwise the statutory provision which expressly prohibited the contract would be undermined.

Similarly, a contractual claim should not succeed where the contract is one which is contrary to public policy by a common law rule as identified in Chapter 2.[38] As with contracts expressly prohibited by statute, it is submitted here, contrary to the view taken in *Patel*,[39] that contracts contrary to public policy which fall under the recognised heads[40] should also not be subject to the proportionality principle. This is because as the English Law Commission argued:

> In deciding whether or not a contract is contrary to public policy, the court is already effectively asking the question - would it be against the public interest to enforce the contract? Put another way, there is simply no scope for discretion as regards enforceability which operates once the court has decided that a contract is contrary to public policy.[41]

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[37]*Patel* (UKSC) (n 1) [109] (Lord Toulson).
[38]This category of contracts includes contracts to commit a crime, contracts promoting sexual immorality, contracts leading to corruption of public life, contracts prejudicial to administration of justice for example a contract to give false evidence in criminal proceedings thereby perverting the course of justice as well as contracts to stifle a prosecution and contracts prejudicial to public safety.
[39]*Patel* (UKSC) (n 1) [109] (Lord Toulson).
[40]see chapter 2.
[41]The Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (Law Com CP No 154, 1999) para 7.13.

Moreover, as Phang JA said in *Ochroid,* to conduct a further weighing and balancing of factors in order to allow recovery 'pursuant to the prohibited contract would render the doctrine of common law contractual illegality nugatory'.[42] There can be no recovery in a contractual claim, since otherwise the policy behind the rule which rendered the contract unenforceable would be undermined.[43]

Whilst a contractual claim should be dismissed due to express statutory or common law illegality (where the contract is contrary to public policy), the claimant may still succeed in bringing a non-contractual claim under the quasi-flexible test, provided that that claim does not create inconsistency in the law. The key question to ask is whether allowing the claim in tort, trusts or unjust enrichment would undermine the policy, be it statutory or common law, which rendered the underlying contract unenforceable in the first place.[44] For example, there will be inconsistency in the law if a claimant brings a claim in unjust enrichment to recover repayment of a loan which is prohibited by statute.[45]

Where the non-contractual claim will not create inconsistency in the law, the claim will succeed. These cases include where the claimant is in a restricted class entitled to sue, such as those claimants that entered into the contract as a result of fraud, duress or undue influence (which can act as an unjust factor for the purposes of a claim in unjust enrichment), or the claimant was in some other way an unwilling participant in the

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[42]*Ochroid* (n 10) [118] (Andrew Phang Boon Leong JA).
[43]ibid; see also Birks (n 17) 184;Emer Murphy 'The ex turpi causa' (2016) 32 *PN* 241, 252, 253, 254.
[44]*Ochroid* (n 10) [176] (Andrew Phang Boon Leong JA).
[45]*Boissevain v Weil* [1950] AC 327;*Ochroid* (n 10);Birks (n 17) 162, 169.

illegality.[46] In this sense it can be said that there is no inconsistency in the law if the claimant is 'not *in pari delicto*'. As explained by Lord Sumption in *Patel*, this occurs, first, where the claimant's participation in the illegal act is involuntary (brought about by fraud, undue influence or duress) and secondly, where the rule of law intends to protect the claimant from exploitation by the defendant.[47] In these situations, the claimant can recover. Thus it is evident that the factors which give rise to the application of the 'not *in pari delicto*' doctrine also act as unjust factors for the purposes of a claim in unjust enrichment. Rather than referring to the 'not *in pari delicto*' doctrine, the courts can refer simply to the consistency principle. In other words, there is no inconsistency in the law if the party's involvement in the illegality is involuntary. Thus in *Re Mahmoud*, if the defendant had accepted the goods without paying for them and sold them for a profit, post-*Patel* a claim in unjust enrichment for the value of goods transferred should succeed. Scrutton LJ in that case hinted at a claim against the defendant who had fraudulently deceived the claimant.[48] The claimant could rely directly on that fraudulent misrepresentation as an unjust factor, to bring a claim in unjust enrichment (non-contractual claim).

Adopting such a quasi-flexible approach as above, where the contractual claim is dismissed, but a non-contractual claim is allowed provided that it does not create inconsistency in the law, addresses both the concerns of majority and minority in *Patel.* This is because for the majority in *Patel* a flexible approach based on proportionality was necessary in order to mitigate the harshness of the strict rule of non-recovery.

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[46]Birks (n 17) 163, 164, 173, 174.
[47]*Patel* (UKSC) (n 1) [242], [243] (Lord Sumption); see *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192; *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889.
[48]*Re Mahmoud* (n 21) 730 (Scrutton LJ).

However, it is submitted here that the proportionality principle is not required at this stage to mitigate the harshness of the operation of illegality defence. This is because an alternate claim may still be allowed provided there is no inconsistency in the law.[49] This would be akin to the approach in *Ochroid*[50] and in line with Lord Toulson who said in *Patel* that the question is 'whether the relief claimed should be granted'.[51] Equally, this approach addresses the minority's concern that the traditional rule is being converted into an uncertain discretionary approach by weighing innumerable factors, since at this stage innumerable factors are not being weighed. The quasi-flexible approach which limits the use of the proportionality principle, whilst also serving policy concerns in this area, namely that of preventing inconsistency in the law, is therefore far more adequate than both the extremely flexible and the extremely rigid rule-based approaches to the illegality defence.[52] This will be further illustrated in section 7.4.

Another category of cases in contract involves those where the contract is not expressly prohibited by statute or common law rule, but it is alleged that the contract is impliedly prohibited by statute, or is tainted by illegality at common law. In the latter category concerning illegality at common law, this comprises those cases where the contract is not unlawful *per se*, but the contract is entered into with the object of committing an illegal act[53] or where the illegality resides in performance. In all of these types of cases,

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[49]*Ochroid* (n 10) [22] (Andrew Phang Boon Leong JA).
[50]Though there the Singaporean Court of Appeal used a synonymous term to consistency namely stultification. see *Ochroid* (n 10) [176] (Andrew Phang Boon Leong JA); see also *Equuscorp* (n 11) [38] (French CJ).
[51]*Patel* (UKSC) (n 1) [109] (Lord Toulson).
[52]*Equuscorp* (n 11) [38] (French CJ).
[53]Such as contracts where the object is to use the subject matter of the contract for an illegal purpose, contracts to use contractual documents for an illegal purpose, contracts entered with intention to contravene a statutory provision.

the proportionality principle will apply to aid in determining whether the contract is enforceable and thus whether a claim in contract can be allowed despite the taint of illegality.[54]

First, in relation to cases concerning alleged statutory illegality, statutory interpretation is important. The key question is 'whether the statute meant to prohibit the contract which is [being] sued upon'.[55] The courts should also consider, as Devlin J said in *St John Shipping Corp v Joseph Rank Ltd*[56] (hereafter *St John*) and *Archbolds (Freightage) Ltd v S Spanglett Ltd*[57] (hereafter *Archbolds*) the consequences of denying the claim, looking in particular at the penalty imposed by the statute and whether this is designed to deprive the offender of the benefit of his crime.[58] Moreover, as McHugh J said in the Australian case of *Nelson v Nelson*[59] (hereafter *Nelson*) where Parliament has already indicated that the sanctions imposed in statute are sufficient to deal with the conduct that breaches the statute and its policies, the courts should not impose a further sanction.[60] Furthermore, as Schroeder JA said in the Canadian case *Kocotis v D'Angelo*[61] if the purpose sought to be effected is, for example, to deprive the seller of compensation for goods supplied then that should be expressed in clear and unequivocal

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[54]*ParkingEye Ltd v Somerfield* (n 31); *St John* (n 32); *Archbolds* (n 57); *Anderson v Daniel* [1924] 1 KB 138; see also *Ochroid* (n 10) [64] (Andrew Phang Boon Leong JA);*Patel* (UKSC) (n 1) [235] (Lord Sumption).
[55]*St John* (n 32) 285, 287 (Devlin J).
[56][1957] 1 QB 267.
[57][1961] 1 QB 374.
[58]*St John* (n 32) 279, 292 (Devlin J); *Archbolds* (n 57) 390 (Devlin LJ).
[59][1995] 4 LRC 453.
[60]*Nelson* (n 59) 522, 523 (McHugh J).
[61][1957] CarswellOnt 108.

language.[62] Where the only consequences of breaching the provision are those prescribed by the statute (for example, in the form of a fine) then, where there is no clear implication that the statute meant to prohibit the contract, the court should not deprive the claimant of the remedy sought. To do so would be a disproportionate response to the illegality and would also unjustly enrich the defendant.[63]

Secondly, where the contract is not unlawful *per se* but is one which is entered into with the object of committing an illegal act or where the illegality resides in performance, proportionality should be taken into account to aid in determining whether the claim should be allowed. If one compares *ParkingEye* to *Ting Siew May v Boon Lay Choo*[64] (hereafter *Ting Siew*) (discussed respectively in Chapter 2 and Chapter 5), for example, then it becomes evident that the examination of factors such as centrality of illegality to the contract, the gravity of illegality, intent and conduct of the parties, were the determinants of whether or not the claim should be allowed.[65] It becomes necessary to take into account these factors in order to deal adequately with the different circumstances of individual cases to reach the most appropriate result. It should also be

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[62]*Kocotis* (n 61) [82] (Schroeder J.A); see also Harman LJ in *Shaw v Groom* [1970] 2 QB 504, 518 (Harman LJ) who said that the proposition that if the statute is for the protection of the public it should thus be unenforceable is not the only test. The true test he said is 'whether the statute impliedly forbids the provision in the contract to be sued upon'.

[63]see *Kocotis* (n 61) [82] (Schroeder JA); see also Alan Bogg 'Illegality in Labour Law after *Patel v Mirza* : Retrenchment and Restraint' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 271, 272;*Nelson* (n 59) 509 (Toohey J), 523 (McHugh J).

[64][2014] SGCA 28, [2014] 3 SLR 609.

[65]*ParkingEye Ltd v Somerfield* (n 31) [35], [38], [40] (Sir Robin Jacob), [61], [65],[68],[69],[71], [77]-[79] (Toulson LJ); *Ting Siew* (n 35) [80]-[85],[88]-[92] (Andrew Phang Boon Leong JA); *Harb v Aziz* [2018] EWHC 508 (Ch) at [228], [229], [230] (Mr Justice Arnold); *St John* (n 32) 288 (Devlin J).

noted that punishment for any transgressions is a matter for the criminal courts[66], thus where the illegality committed in the performance of the contract is minor and not central to the contract, the contract should not be deemed unenforceable. As the English Law Commission said:

> it clearly cannot be in every case that a contract is unlawfully performed, even where this was the original intention, that the offending party loses his or her remedies. Such a proposition would result in the widespread forfeiture of contractual remedies as a result of minor and incidental transgressions.[67]

Where enforcement of the contract is denied, the courts should in future explain which factors are considered most important and decisive in arriving at this conclusion.[68] This will lead to the development of more concrete reasoning of the courts in reaching the decisions.[69] Over time, it will become more evident as to which factors under proportionality are the controlling ones in determining the outcome of decisions. Taking into account different factors and weighing them to determine the outcome of cases is also not an exercise with which the courts are unfamiliar, as explained in Chapter 6.[70] Furthermore, as explained earlier, the proportionality principle is limited in scope under

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[66]*Patel* (UKSC) (n 1) [120] (Lord Toulson).
[67]CP 189 (n 12) para 3.31.
[68]Andrew Burrows 'Illegality as a Defence in Contract' (2016) Oxford Legal Studies Research Paper No. 15/2016, 1, 13 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2758797> Accessed 21st June 2016.
[69]A. Burrows 'A New Dawn for the Law of Illegality'(n 13) 23-25.
[70]see *ParkingEye Ltd v Beavis* [2015] UKSC 67;*Cavendish Square Holding v Makdessi* [2016] AC 1172 at [32] (Lord Neuberger), at [227] (Lord Hodge); Unfair Contract Terms Act 1977 Schedule 2; *Watford Electronics v Sanderson CFL Ltd* (2001) 3 TCLR 14 at [52] (Chadwick LJ); Toulson 'Illegality where are we now?'(n 6) 286; A. Burrows 'A New Dawn for the Law of Illegality'(n 13) 36, 37.

the quasi-flexible test. Where there is judicial disparity of opinion on issues such as seriousness of illegality, the factors should be taken into account no more than necessary to give effect to, and ensure the maintenance of, consistency in the law. The operation of this will be illustrated in section 7.4 in which the quasi-flexible test will be applied to the facts of *Patel.* Furthermore, the proportionality principle only applies where the contract is not unlawful *per se,* but the illegality is either alleged by statutory implication or for example illegality in performance. The material factor being that the underlying contract is not illegal itself and so there is no argument for saying that the contract should be completely unenforceable. The use of the proportionality principle does not extend to cases concerning express statutory illegality or where the contract is contrary to public policy because of a common law rule.

7.2.2 Tort

The guiding principle in tort is also the need to avoid inconsistency in the law. Where allowing the claim will create inconsistency in the law 'either by permitting the plaintiff to profit from an illegal or wrongful act, or to evade a penalty prescribed by criminal law',[71] the claim will not succeed. Where the claim is for personal injury, the claimant is likely to succeed as the award of damages does not reflect a profit from crime.[72] The compensation is an award for injuries sustained as a result of the defendants' negligence.[73]

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[71]*Hall v Hebert* (n 9) 179,180 (McLachlin J), 210, 211(Cory J).
[72]*Hall v Hebert* (n 9) 172, 176 (McLachlin J).
[73]*Hall v Hebert* (n 9) 179,180 (McLachlin J).

Where the claim concerns negligence and the issue of attribution is raised, either by a fraudulent director attempting to attribute their fraud to the company or a negligent third party arguing the illegal acts of the fraudulent director of the company are to be attributed to the company, to bar the company's claim, the governing principle is consistency in the law. In such cases the courts have taken and should take into account whether allowing the claim would create inconsistency, either by undermining the policy of the rule infringed or any other policy.[74] In most cases, disallowing the company's claim for damages would create inconsistency with the policy of the rule infringed or policy behind any other relevant law which is infringed either by the fraudulent director or the third party.[75]

7.2.3 Trusts

Where property or other assets are transferred by one party to another for an illegal purpose such as to defraud creditors, the question as to whether the claimant can recover the property, assets or enforce their equitable interest in the property, is similarly dependent on the principle of consistency. The question is whether allowing recovery of the property transferred (such as enforcement of a resulting trust) would create inconsistency in the law, that is to say, undermine the policy of the law which made the agreement unenforceable in the first place. It is submitted here, that the courts should also take into account whether denying the claim would be a punishment in excess of

[74]see *Singularis* (Ch) (n 13) [184], [218], [219], [250] (Rose J); *Singularis* (CA) (n 13) [56]-[60] [66], [67] (Sir Geoffrey Vos); *Bilta v Nazir (No 2)* [2015] UKSC 23, [2016] AC 1 at [123]-[129], [130], [206], [208] (Lord Toulson and Lord Hodge).
[75]see *Bilta* (n 74); *Singularis* (Ch) (n 13); *Livent v Deloitte* 2016 ONCA 11.

that which would otherwise be inflicted on the claimant.[76] For example, in *Nelson* enforcing the claimant's equitable interest would not have led to inconsistency where the contravened statute provided for the return of the falsely taken subsidy, and where the right to recover the subsidy by the commonwealth could be waived.[77] Denying the equitable interest, particularly where the statute itself imposed the relevant sanctions, and those sanctions were sufficient to serve the purpose of the statue, would be excessive.[78] The imposition of an additional sanction by denying the interest would cause prejudice to a person in the claimant's position without furthering the object of the legislation.[79] By allowing the claim therefore, there is no inconsistency in the law as the purpose of the statue is served by the penalties imposed under it.[80]

It is important to note that, as mentioned in chapter 2, it may be argued that inconsistency is created by allowing the return of assets or property because 'no court would ever allow an action for the breach of contract not to betray the transferor or not to deny the latter's superior right when the latter saw fit to reassert control of the thing [namely asset transferred]'.[81] Affirming such a trust or allowing return of an asset would give the claimant what contract law refuses to give him or her.[82] In *Tinsley v Milligan*[83] (hereafter *Tinsley*) for example, the intention of putting the property in the

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[76]*Nelson* (n 59) 523, 526 (McHugh J);*Ochroid* (n 10) [168] (Andrew Phang Boon Leong JA).
[77]s29, s 30 (1), s 30 (1) (b) Defence Service Homes Act 1988.
[78]*Nelson* (n 59) 526 (McHugh J).
[79]*Nelson* (n 59) 487 (Deane J and Gummow J).
[80]*Nelson* (n 59) 526, 527 (McHugh J), 487, 488, 489 (Deane J and Gummow J); See The Defence Service Homes Act 1918 amended by Defence Service Homes Act 1988, s26, s 29, s 30(1) and s 30 (1) (b).
[81]Birks (n 17) 175.
[82]ibid.
[83][1994] 1 AC 340.

name of one party was to defraud the DSS to get benefits, with the agreement that both parties were to share the beneficial interest. Whilst in *Collier v Collier*[84] (hereafter *Collier*) the agreement was that the property be hidden from the creditors, but once that danger was averted the property should revert back to the transferor, namely the father. In this respect Birks provides a persuasive argument that overcomes the inconsistency issue (or as he refer to it avoids stultification).[85] As explained in Chapter 2, Birks argues that whenever a person transfers property to hide it, he merely intends the transferee's interest in it to be temporary.[86] The transferor does not intend to part with the reversion.[87] The choice for the law in such cases is between whether to expropriate the reversionary interest thereby avoiding a seeming contradiction in the law, or to refuse to expropriate by refusing to deprive the transferor of his reversionary interest.[88] He argues that refusing to expropriate the reversionary interest is a more fair response than tolerating forfeiture of an interest which the claimant never intended to be brought within the illegal transaction.[89] To explain further he gave the following helpful example illustrating that the common law tends to protect the reversionary interest: A puts bars of gold with B for a week to hide it from creditors (unlawful purpose). B later refuses to give the gold back. B is liable for conversion. Allowing that claim would not undermine the law's refusal to enforce the contract, as forfeiture of the reversion, Birks argues, is a disproportionate response to the illegality.[90] The case of *Bowmakers Limited*

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[84][2002] EWCA Civ 1095.
[85]Birks (n 17) 155-204.
[86]Birks (n 17) 176.
[87]ibid.
[88]ibid.
[89]Birks (n 17) 176-179, 189, 201.
[90]Birks (n 17) 177.

v Barnet Instruments Ltd[91] discussed in Chapter 3, in which the claim for conversion of tools succeeded, can also be explained on this basis.[92] There the machine tools hired out to the defendant under a hire purchase agreement (argued to be illegal by the defendant) were sold by defendants after they had made only some payments. The claimant sued and succeeded in an action for conversion. This accepts that in cases of extinction of a temporary interest, either by time or because of a repudiatory breach, which allows termination of the contract, the claimant can assert and protect his reversion which itself was never subjected to the illegal transaction.[93] In addition, the cases of *Collier* and *Tribe v Tribe*[94] (hereafter *Tribe*) can be explained on this ground, since there too 'arbitrary civil forfeiture of [a reversionary] interest never intended to be brought within the illegal transaction'[95] was worth avoiding, particularly where the contrary result would inflict a particularly harsh punishment.[96] Where refusing recovery is an excessive (or otherwise disproportionate) punishment to that which would otherwise be inflicted by the law then one can argue that the integrity of the legal system is not damaged by allowing the claim. In *Tinsley*, preventing the claimant from enforcing her equitable interest in the property would have led to the claimant losing all her capital and have unjustly enriched the defendant.[97]

Moreover post-*Patel*, it is evident that the illegality defence is unlikely to bar a claim in trusts, as is the case with unjust enrichment claims, unless the illegality is of a

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[91][1945] KB 65.
[92]Birks (n 17) 177- 179.
[93]That is to say the reversionary interest itself has never been subjected to the illegal transaction; see Birks (n 17) 177,178,179.
[94][1996] Ch 107.
[95]Birks (n 17) 189, 201.
[96]Birks (n 17) 176, 189, 201.
[97]see also *Patel* (UKSC) (n 1) [112] (Lord Toulson).

particularly serious nature.[98] As Lord Toulson said in *Patel*, courts may 'refuse to assist an owner to enforce [the claimant's] title to property, but such cases are likely to be rare'.[99] For example, if the property transferred is used for illegal purposes such as terrorism, it is arguable that the illegality is so severe that the illegality defence applies to bar the transferor from recovering his property.[100] The question then arises as to what should happen to that property. Should it lie where it falls? The answer it is submitted here should be that there is a presumption in favour of confiscation and forfeiture in the terms explained by Sullivan in chapter 6. Implementation of Sullivan's law reform would enable the courts to reach the most equitable result in such cases,[101] since the property would not vest in either the transferor or transferee. However, absent Sullivan's proposals, which are not yet implemented, the property should lie where it falls, meaning the defendant keeps it. Another question which arises in these cases is the criterion for seriousness. Perhaps it can be determined by the extent to which there is threat to life, severity of criminal sanctions or, as Sullivan suggests, transgressions of human rights.[102] It is likely that courts can, however, make that judgment. As noted in chapter 6, Sullivan argued that 'differentiating between degrees of wrongdoing in terms of the type of offence and the particulars of the offence is core business for a sentencing

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[98]Paul S Davies 'Ramifications of *Patel v Mirza* in the Law of Trusts' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 243, 244, 255; *Patel* (UKSC) (n 1) [110], [116] (Lord Toulson);cf *Patel* (UKSC) (n 1) [176] (Lord Neuberger), [254] (Lord Sumption).

[99]*Patel* (UKSC) (n 1) [116] (Lord Toulson).

[100]P. S. Davies 'Ramifications of *Patel v Mirza* in the Law of Trusts' (n 98) 249; CP 189 (n 12) para 6.75.

[101]Robert Sullivan 'Restitution or Confiscation/Forfeiture? Private Rights versus Public Values' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 83.

[102]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 71.

judge'.[103] This is also supported by Enonchong, who argues that 'no one would have any difficulty in saying that a landlord's failure to provide his tenant with a proper rent book as required by Statute involves far less serious illegality than terrorism or armed robbery'.[104]

7.2.4 Unjust enrichment

Where the claimant has conferred benefits on the defendant under a contract which later turns out to be unenforceable because of illegality, the question is whether those benefits can be recovered.[105] Post-*Patel*, it is evident that if the ordinary requirements of a claim in unjust enrichment are satisfied, that is to say the defendant has been unjustly enriched at the claimant's expense; the claim will normally succeed despite the taint of illegality.[106] Unjust factors include total failure of consideration due to a failure of counter performance,[107] fraud,[108] duress, oppression and mistake.[109] Thus one can say

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[103]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 71, footnote 42 on that page.
[104]Nelson Enonchong 'Illegality: The Fading Flame of Public Policy' (1994) 14 *OJLS* 295, 300.
[105]CP 189 (n 12) para 4.1.
[106]*Patel* (UKSC) (n 1) [110], [116], [121] (Lord Toulson); see also Graham Virgo, 'The Illegality Revolution' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), Revolution and Evolution in Private Law (1st Edition, Hart Publishing, 2018) 304; Graham Virgo 'Illegality and Unjust Enrichment' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 213, 223, 224, 234; *Ochroid* (n 10) [139] (Andrew Phang Boon Leong JA).
[107]*Ochroid* (n 10) [139], [140], [170] (Andrew Phang Boon Leong JA); *Patel* (UKSC) (n 1) [13] (Lord Toulson).
[108]or deception. Note that some claimants may not be able to come within this class entitled because although deceived they are not deceived as to the corrupt nature of the agreement see *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1;see also Birks (n 17) 184.

that there is an overlap between these unjust factors and the 'not *in pari delicto*' doctrine. This was explained earlier in the chapter.[110] By allowing the claim for restitution the court is neither enforcing the contract nor allowing the claimant to profit from his crime.[111] Moreover, where legislation which prohibited the contract intended to protect the class of persons to whom the claimant belonged, and is in favour of restitution, there the illegality defence should also not apply.[112] In these circumstances, allowing the claim would not create inconsistency in the law.

However, it should be noted that there may be 'rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system'.[113] Lord Toulson in *Patel* gave the example of drug trafficking or a contract for murder where there can be no recovery of money paid or return of drugs or return of money paid for illegal drugs.[114] This is based on the principle of

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[109]*Ochroid* (n 10) [170], [176] (Andrew Phang Boon Leong JA); *Patel* (UKSC) (n 1) [241]-[244] (Lord Sumption); see also *Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2011] 2 SLR 865.
[110]see *Ochroid* (n 10) [140], [170] (Andrew Phang Boon Leong JA).
[111]*Patel* (UKSC) (n 1) [99] (Lord Toulson), [202] (Lord Mance); see Virgo 'Illegality and Unjust Enrichment' (n 106) 213.
[112]see *Kiriri* (n 47); *Hounga* (UKSC) (n 47);*Patel* (UKSC) (n 1) [243], [244] (Lord Sumption); Birks (n 17) 163, 165, 173,174,183; see also *Ochroid* (n 10) [140], [170] (Andrew Phang Boon Leong JA) overlap between 'not *in pari delicto*' and unjust factors.
[113]*Patel* (UKSC) (n 1) [121] (Lord Toulson).
[114]*Patel* (UKSC) (n 1) [110], [116] (Lord Toulson);R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 61, 65-68, 70, 71; Nicholas J. McBride Not a Principle of Justice' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 101;*Patel* (CA) (n 35) [75] (Gloster LJ); Birks (n 17) 201-202; Anthony Grabiner, 'Illegality and restitution explained by the Supreme Court' (2017) 76(1) *CLJ* 18, 20; A. Burrows 'A New Dawn for the Law of Illegality'(n 13) 31-33; cf. *Patel* (UKSC) (n 1) [176] (Lord Neuberger), [254] (Lord Sumption); Virgo 'Illegality and Unjust Enrichment'(n 106) 224, 225, 227. That by disallowing the claim the defendant is able to profit from the illegal transaction. If the claim is allowed

consistency. As Sullivan and McBride argue that the criminal law would be undermined if a civil court were to allow a claim to recover money paid for a killing.[115] Such proceedings, as Sullivan persuasively argues, should be adjourned and the relevant authorities such as the Crown Prosecution Service and Asset Recovery Agency should be informed so that the money can be confiscated from the defendant under the Proceeds of Crime Act 2002.[116] In relation to recovery of drugs or money paid for illicit drugs, Connolly argues it would offend against the dignity of the court since the court would in essence be assisting the drug dealer in his illicit activities and protecting his property rights in illegal drugs.[117] Allowing such a claim would in essence give the drug dealer a security in which to carry out his business, whilst also stretching out a safety net for like-minded individuals.[118] Thus, although return of the drugs would mean that the illegal sale is unravelled, it would be at the expense of the dignity of the courts. Such a claim should be barred by the illegality defence, since any other result would undermine the law against drug trafficking, namely the rule which rendered the contract illegal and unenforceable in the first place.

The key question for the courts, it is submitted here, is whether allowing the unjust enrichment claim would undermine the rule or the purpose of the statute which rendered

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the parties are restored to their original position which does not involve enforcement of the contract or enable a party to profit from their crime.

[115]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 70, 71;McBride Not a Principle of Justice'(n 114) 90, 101.

[116]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 66-68.

[117]Niamh Connolly, 'Re-examining Illegality in Restitution: a reason to deny restitution, or to grant it?' 1, 21-22 (The Society of Legal Scholars, Edinburgh, 2013)<www.archive.legalscholars.ac.uk/edinburgh/restricted/paper.cfm?id=315>Accessed November 2016.

[118]ibid.

the contract unenforceable in the first place.[119] Thus, where allowing the claim in unjust enrichment would undermine the purpose of the rule infringed (such as allowing repayment of a loan to an unlicensed moneylender), the claim should fail.[120] In such cases the fundamental policy behind these prohibitions, namely preventing illegal money lending, is to protect the public (borrowers) and deter oppressive conduct by moneylenders.[121] That policy would be undermined if a claim for repayment of the loan were allowed.[122] Moreover, if the allowing the claim would be harmful to the integrity of the legal system (drug/murder example) as it creates inconsistency in the law, then the claim should be barred by the illegality defence. Where however the unjust enrichment claim does not undermine the rule which rendered the contract unenforceable the claim should be allowed. The central policy at stake is the coherence of the law.[123] Restitution will be allowed if doing so does not defeat the purpose of the rule infringed.

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[119]*Ochroid* (n 10) [139]-[159] (Andrew Phang Boon Leong JA); *Boissevain* (n 45); *Equuscorp* (n 11).

[120]And the claimant cannot come under the not *in pari delicto* doctrine by identifying an independent unjust factor such as mistake as to the facts constituting illegality, arguably the result may be different see *Ochroid* (n 10) [216], [217] (Andrew Phang Boon Leong JA); *Aqua Art* (n 109) [23]–[25] (Andrew Phang Boon Leong JA); Richard A. Buckley, *Illegality and Public Policy* (Sweet & Maxwell, 2nd Edition, 2009) para 17.08; *Victorian Daylesford Syndicate Ltd v Dott* [1905] 2 Ch. 624, 628, 630 (Buckley J); *Cope v Rowlands* (1836) 2 Meeson and Welsby 149;see also *Equuscorp* (n 11) [45] (French CJ) in which there was no recovery of loan because to do so would undermine the statutory purpose; *Haugesund Kommune v Depfa ACS Bank* [2012] QB 549 at [92] (Aikens LJ) where it was said that a restitutionary claim may be defeated where on the proper construction of a statute recovery in restitution would be contrary to the objectives of the statute.

[121]*Ochroid* (n 10) [229] (Andrew Phang Boon Leong JA)

[122]ibid.

[123]*Equuscorp* (n 11) [34] (French CJ).

7.3 The Quasi-Flexible Test for the Illegality Defence

In this section the quasi-flexible test for the illegality defence will be laid down. The test presents the relevant considerations in a conceptually clearer form. The test provides clear rules governed by the principles of consistency. It also provides the requisite flexibility through the proportionality principle. However, the proportionality principle is restricted in use. This test therefore, tackles the lack of certainty, guidance and structure issues which plagued the Toulson test. It also encourages uniformity through adoption of the two key principles across private law claims concerning illegality. Accompanied by these rules are explanatory notes which provide case examples to which the rule would apply.

The quasi-flexible test:

1) If a contract is
    a) expressly prohibited by statute or
    b) contrary to public policy by a common law rule

    the contract shall be unenforceable and there shall be no recovery in contract.

    Explanatory note:

    Re Mahmoud: Buying and selling linseed oil expressly prohibited by statute. Contract is unenforceable. Claim barred by the illegality defence. (Furthering purpose of the rule infringed).

Pearce v Brooks[124]: A brougham knowingly hired out to a prostitute for immoral purposes.[125] Cannot recover money for damage done to the brougham. Contract is contrary to public policy as it promotes sexual immorality.[126]

2) Despite statutory or common law illegality, a non-contractual claim in tort, trusts or unjust enrichment may succeed provided that allowing the non-contractual claim does not undermine the policy, whether statutory or common law, which rendered the contract unenforceable in the first place. (For unjust factors for a claim in restitution see explanatory provisions).

Explanatory Note:

Hounga v Allen[127]: Illegal immigrant succeeding in a claim for statutory tort of discrimination, though the contract illegal due to breach of immigration law. Compensation awarded is for injuries. It does not reflect a profit from crime or evasion of a penalty.[128] There is therefore no inconsistency in the law.[129]

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[124](1865-66) L.R. 1 Ex. 213
[125]*Pearce v Brooks* (1865-66) L.R. 1 Ex. 213.
[126]see also *Girardy v Richardson* (1793) 1 Esp 13.
[127][2014] UKSC 47, [2014] 1 WLR 2889.
[128]see *Hounga* (UKSC) (n 47) [44] (Lord Wilson).
[129]ibid; see also *Hall v Hebert* (n 9) 169, 179, 180 (McLachlin J).

Nelson: Claim for beneficial interest in proceeds of sale of property. Policy of statue infringed would not be undermined by enforcing the trust in favour of the claimant.

Kiriri: Claim for restitution of premium paid to landlord (premium forbidden by statute). Claim allowed because the claimant belonged to a class intended to be protected by the statute from exploitation by defendant. In allowing restitution the tenant would be protected from such demands and the illegal premium payment would not be enforced.

Awwad: Claim in unjust enrichment for recovery of contingency fees expressly prohibited by statute. The amount claimed represented that which was expressly prohibited by statute. To allow such a claim would have the effect of undermining the purpose of the rule infringed. Claim barred by the illegality defence.

Equuscorp v Haxton[130]: Claim for restitution of money advanced under a loan agreement made in furtherance of an illegal purpose involving contravention of a Code. Money irrecoverable because to do so would create inconsistency with the purpose of the Code which rendered the transaction illegal in the first place. The purpose of the Code was also protective of the class of persons from whom the claimant sought recovery.[131]

[130][2012] HCA 7, [2012] 3 LRC 716.
[131]*Equuscorp* (n 11) [34], [45] (French CJ).

Ochroid: Agreement was an illegal money lending loan unenforceable by reason of statute. Claim in unjust enrichment barred by the illegality defence. To allow recovery of the principal sums would undermine the fundamental policy of the statute (make nonsense of the prohibition) which renders these loan agreements unenforceable in the first place.[132]

3) Where it is alleged that the contract is illegal by implication, the contractual claim will not be automatically dismissed. The court should consider:

   a) Whether the statute can be interpreted to prohibit the contract (by examining its purpose) and

   b) The consequences of denying the claim. Where the only consequences of breaching a provision are those prescribed by the statute in form of a fine and that serves the purpose of the statute, the contract shall not be deemed unenforceable, and the remedy sought will be allowed, unless the statute expressly denies the remedy claimed in clear and unequivocal language.

Explanatory Note:

St John: Overloading ship in contravention of statute. Claim for freight allowed. Contract of carriage of goods not prohibited by statute. Consequence of breach

[132]*Ochroid* (n 10) [215], [219], [225] (Andrew Phang Boon Leong JA).

specified in statute which was a fine. That fine was paid. The statute imposed a penalty which itself was intended to deprive the offender of the benefits of his crime.

4) Where a contract is not unlawful *per se*[133] but the illegality resides in performance or the contract is one which is entered into with the object of committing an illegal act, whether the claim succeeds will be dependent on the proportionality principle. Factors listed in 'explanatory provisions' should be taken into account, but no more than necessary to give effect to ensuring the maintenance of consistency in the law.

Explanatory Note:

ParkingEye: Claimant provided monitoring systems to the defendant which assessed how long cars were parked. Claimant collected charges from those who overstayed. Claimant sent out letters to customers. The third out of four letters contained falsehoods. Defendant terminated contract early. Claimant sued for damages for loss of revenue (contractual claim). Claim succeeds. Factors to taken into account: (i) the contract is not illegal. Object of the contract was to provide the monitoring system which was entirely lawful;[134] (ii) the illegality is in performance - the illegality resides in the deception contained in the third

[133] Because it is not expressly prohibited by statute or common law rule namely it is not contrary to public policy.
[134] *ParkingEye Ltd v Somerfield* (n 31) [57],[71] (Toulson LJ).

letter. The intention to use the deceptive letters was not fixed but provisional;[135] (iii) there was no fixed intention to use the third letter and the claimant would have ceased to use the letters if asked to do so by the defendant;[136] (iv) the illegality (misrepresentation in the third letter) was not central to the performance of the contract which could have been and was largely carried out lawfully as most customers never received the third deceptive letter and the main object was to provide the monitoring systems;[137](v) allowing the claim does not create inconsistency in the law. The contract is lawful, and the claimant is not profiting from their wrongdoing but getting damages for early termination.

Patel comes under this category. The case will be discussed in detail in section 7.4 to illustrate the application of the above rule.

5) Where the claim is in tort on the basis of negligence, the damages claimed will not be awarded if doing so will create inconsistency with the policy of the rule infringed or policy behind any other law or if the award reflects a profit from the crime or reflects an evasion of a penalty prescribed by the criminal law.

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[135]*ParkingEye Ltd v Somerfield* (n 31) [18] (Sir Robin Jacob)
[136]*ParkingEye Ltd v Somerfield* (n 31) [68],[77] (Toulson LJ), [18], [35] (Sir Robin Jacob).
[137]*ParkingEye Ltd v Somerfield* (n 31) [35] (Sir Robin Jacob), [57], [71, [75] (Toulson LJ).

Explanatory Note:

Singularis Holdings Ltd v Daiwa[138]*:* Attribution of director's fraud to the company, raised by third party to avoid liability for losses caused to the company. Company's negligence claim succeeded. Allowing the claim would not defeat the purpose of the rule infringed by the director. On the contrary, attributing the director's fraud to the company would undermine the purpose of the rule (Quince-care duty) infringed by the third party, the purpose of which was to protect the company where its agent seeks to defraud it.[139] Looking at any other policy, denial of the claim would have a material impact on the growing reliance on banks and other financial institutions in reducing and uncovering financial crime.[140]

Gray: Claimant suffered PTSD caused by a railway accident. Whilst suffering from this he killed a man. Claim to recover loss of earnings whilst imprisoned. Claim barred by the illegality defence. An award of damages would in effect permit a rebate of a penalty lawfully imposed by the criminal law thus creating inconsistency in the law which would be harmful to integrity of the justice system.[141] It would undermine the penalty imposed by the rule which the

[138][2017] EWHC 257 (Ch), [2018] EWCA Civ 84 (CA).
[139]The Court of Appeal in *Singularis* agreed with this; see *Singularis* (CA) (n 13) [56]-[60] [66], [67] (Sir Geoffrey Vos); *Singularis* (Ch) (n 13) [184], [250] (Rose J).
[140]*Singularis* (Ch) (n 13) [192], [219] (Rose J).
[141]see *Hall v Hebert* (n 9) 169, 178 (McLachlin J); *Zastowny* (n 25) [22] (Rothstein J).

claimant infringed.[142] The law under which the claimant is punished would not be furthered if the claimant were to be compensated for imprisonment.[143]

Clunis, highlighted earlier in the chapter and discussed in chapter 2 also fits in this category.

6) A claim for damages for personal injury will not be denied solely on the ground that the circumstances giving rise to the claim involved illegal conduct; however, such conduct may reduce the damages awarded due to contributory negligence.

Explanatory Note:

McHugh v Okai Koi[144]: Claim by deceased's husband for damages against negligent defendant. Deceased highly culpable in causing the accident due to her criminal conduct (affray, assault, harassment and breach of public order). Nonetheless, claim allowed. The damages reflect compensation for injury, not a profit from the crime. Moreover, damages can be reduced according to contributory negligence.[145]

Cross also falls under this category and will be discussed in section 7.4.

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[142]see CP 189 (n 12) para 2.8.
[143]see also CP 160 (n 12) para 4.56;see *Zastowny* (n 25) [22],[23],[25],[30] (Rothstein J).
[144][2017] EWHC 1346 (QB).
[145]The Law Reform (Contributory Negligence) Act 1945 s1.

Explanatory Provisions:

7) Unjust Factors for a claim in restitution:

   a) the claimant is in a restricted class entitled to sue because the contract was entered into as a result of duress, mistake, fraud or undue influence;

   b) where the policy of the rule rendering the contract unenforceable is in favour of restitution;

   c) the rule of law intends to protect the claimant from exploitation by the defendant;

   d) where denial of restitutionary claim results in arbitrary expropriation of a reversionary proprietary interest never subjected to the illegal transaction and such expropriation would not be furthering the policy of the law infringed.[146]

8) Proportionality

   (1) When assessing proportionality, the courts ought to take into account:[147]

      a) seriousness of illegal conduct;

      b) the centrality of illegal conduct to the contract;

      c) whether the illegal conduct was intentional;

      d) whether there is marked disparity in the parties' relative culpability.

[146]Note where trusts against policy of the law, it will not enforced see *Curtis v Perry* (1802 6 Vesey Junior 739, 747,748, 31 ER 1285, 1289 (Lord Chancellor Eldon).
[147]Factors listed drawn particularly from *Patel* (UKSC) (n 1) [107] (Lord Toulson).

7.4 Application of the Quasi-Flexible Test versus Other Tests[148]

In the section below the various tests adopted by the courts including reliance, *restitutio in integrum*, causation, inextricable link, trio of considerations and the quasi-flexible test will be applied to the different case scenarios. It should be noted that *restitutio in integrum* will be applied where the claim is in unjust enrichment only. The inextricable link and causation tests will be applied in tort scenarios only as they were relied upon predominantly in that area. The section illustrates that the quasi-flexible approach provides a more structured approach. It is also one that is more certain in application to guide courts, and governed by principle. In addition, it provides more reasonable justification for the application or denial of the illegality defence in whatever context it arises. This is so despite the result in some scenarios being the same as those reached by other tests. The scenarios explained below are taken from case law.

Example 1 (*Parkinson v College of Ambulance Ltd*)[149]

A pays money to B who misrepresents that A will receive a knighthood upon payment. A pays but does not receive the knighthood. B refuses to return the money. A sues B to recover the money. B raises the illegality defence.

Part 1: Application of Reliance, restitutio in integrum and trio of considerations:

Under the reliance test, A would not be able to recover. A would have to rely on the illegal contract to recover.[150] Whether his claim is framed as total failure of

[148]Both pre-*Patel* and that put forth in *Patel.*
[149][1925] 2 KB 1.

consideration, namely failure of performance as he did not receive the knighthood that was promised, or based on the fraud of B, A cannot recover. A would not come under the 'not *in pari delicto*' exception to reliance test, as he was not deceived as to the legality of the contract.[151] Though the reliance test produces the correct result here, its application can in some cases lead to arbitrary and harsh results.[152] The application of *restitutio in integrum* test would side-step the issue of illegality and allow restitution on grounds of restoring the *status quo ante* and that there is no profit from the crime.[153] Under the trio of considerations, the court will take into account, alongside the purpose of the prohibition transgressed and any other policy; whether the illegality is classified as sufficiently serious; the culpability of the parties; the intention of the claimant and centrality of illegality to the contract. Lord Toulson's judgment in *Patel* however, renders it unclear whether or not the claim will succeed under the trio of considerations. There Lord Toulson has said that although bribes are odious and corrupting, it may be more 'repugnant to public interest that the person keeps it than that it being returned'.[154] This appears to be in favour of recovery.[155] However, this result (recovery of a bribe)

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[150]A 'contract to guarantee or undertake that an honour will be conferred by the Sovereign if a certain contribution is made … is against public policy, and, therefore, an unlawful contract to make see *Parkinson* (n 108) 12, 13, 14 (Lush J).
[151]*Parkinson* (n 108) 14, 15 (Lush J); *Patel* (UKSC) (n 1) [242] (Lord Sumption).
[152]For criticisms of the reliance test see chapter 3 and 4.
[153]*Patel* (UKSC) (n 1) [118] (Lord Toulson), [140] (Lord Kerr), [150] (Lord Neuberger),[197],[199] (Lord Mance);Virgo 'Illegality and Unjust Enrichment'(n 106) 222,227-229; R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 75, 76;P. S Davies, 'Illegality in Equity' in Paul S Davies, Simon Douglas, James Goudkamp (ed) *Defences in Equity* (Hart Publishing, 2018) 256; Emer Murphy 'The ex turpi causa' (2016) 32 *PN* 241, 252, 253, 254; *Parkinson* (n 108) 14,15,16 (Lush J).
[154]*Patel* (UKSC) (n 1) [118] (Lord Toulson).
[155]ibid.

has been heavily criticised in the literature; in particular highlighting that bribery is a sufficiently serious offence.[156]

Application of the quasi flexible test:

If a contract is contrary to public policy by a common law rule, the contract shall be unenforceable and there shall be no recovery in contract. A's claim should be dismissed as the contract is one which is contrary to public policy as it encourages corruption of public life. A also cannot recover in a non-contractual claim (restitution) as it would create inconsistency in the law with the rule which rendered the contract illegal in the first place. Though A was deceived by B (namely he would receive the knighthood if he pays), he was not deceived as to the corrupt nature of the agreement.[157] The only deception was that he thought he would profit or benefit from his illegal act.[158] Allowing such a claim would create inconsistency in the law by rendering the rule which made the contract illegal nugatory. It would also put out a safety net below all those like-minded criminals.[159] Allowing restitution sends out a message to those who bribe for commercial gains that the bribe can be recovered.[160] A's claim should therefore be refused.

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[156]see chapter 6; R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 75, 76; Virgo 'Illegality and Unjust Enrichment'(n 106) 222; P. S Davies, 'Illegality in Equity'(n 153) 256; Murphy 'The ex turpi causa'(n 153) 252, 253, 254.
[157]*Parkinson* (n 108) 15, 16 (Lush J).
[158]*Parkinson* (n 108) 14, 15, 16 (Lush J).
[159]*Birks* (n 17) 184; P. S Davies, 'Illegality in Equity'(n 153) 256; R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 75; Note also Bribery Act 2010, s 11(1) under which bribery attracts a maximum sentence of 10 years imprisonment.
[160]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 75.

The above result leads to the defendant keeping the money. This may not be the most ideal result but in the absence of the courts having the power to confiscate, as POCA is a matter for the state, the loss should lie where it falls, rather than returning it to A who can reapply it. Restitution would condone and encourage the making of such agreements as the money can be recovered. The most ideal result it is submitted here would be reached by adopting the reform proposals of Sullivan.[161] That would mean there is a strong presumption in favour of confiscating or forfeiting bribes rather than paying them back to the briber.[162] The presumption would not be overridden since the claimants input in the illegality was not rendered under duress or in a class entitled to be protected and the claimant is not exploited.[163] Adoption of such reform proposals ensure that the bribe is not returned to the offeror and it also does not stay with offeree.[164] Overall, the quasi-flexible approach addresses the issue of illegality and provides a principled justification for the application of the illegality defence.

Example 2 (*Patel*):

A transfers £620,000 to B, a broker who has a spread betting account for the purpose of betting on the price of shares based on insider information.[165] B's expectation of obtaining this information proves to be mistaken and the intended bets are not placed. B fails to repay the money. A sues B in a claim for unjust enrichment. B raises the illegality defence. The agreement between A and B amounts to conspiracy to commit

[161]see chapter 6.
[162]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 75.
[163]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 72.
[164]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 83.
[165]see *Patel* (CA) (n 35) [3]-[6] (Rimer LJ).

the offence of insider dealing under s 52 of the Criminal Justice Act 1993. A is also known to be moving in a circle of people well informed about finance. Can A recover the money?

Application of the reliance, restitutio in integrum and trio of considerations:

The reliance test can be inconsistently applied depending on how A frames the claim. A can avoid reliance on the illegality by arguing that the claim in unjust enrichment is based on collateral rights namely return of money from B, his agent.[166] The money is transferred for the purpose of speculating on share prices. Where the speculation did not occur and money not used for the purpose paid, B as agent has to account. Alternatively, it can be argued that A will need to rely on and plead all the facts: that money was paid for betting on shares based on insider information, if the claim is based on total failure of consideration because the promised counter performance is not carried out.[167] In other words his claim is reliant on the illegality as he is claiming return of money because the illegal agreement is not carried out.[168] A would not come under an exception to the reliance rule as the parties are *in pari delicto* since the contract was not entered into involuntarily.[169] Further s 52 of the Criminal Justice Act 1993 Act is not designed to protect the interest of persons like A who have entered into agreements to commit the offence of insider dealing.[170] The reliance test, therefore, creates

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[166]For fuller argument of this see *Patel* (CA) (n 35) [66], [80], [86], [89], [92] (Gloster LJ).
[167]see *Patel* (CA) (n 35) [20]-[22] (Rimer LJ), at [102] (Vos LJ); *Patel* (UKSC) (n 1) [267] (Lord Sumption).
[168]*Patel* (CA) (n 35) [20]-[22] (Rimer LJ), at [102] (Vos LJ); *Patel* (UKSC) (n 1) [267] (Lord Sumption).
[169]*Patel* (UKSC) (n 1) [267] (Lord Sumption).
[170]ibid.

uncertainty because of its inconsistent application, potentially leading to opposing results. Under *restitutio in integrum*, A's claim will succeed because allowing restitution restores the *status quo ante* and does not enable the claimant to profit from their crime. However, it does so at the expense of side-stepping the issue of illegality.[171] This can be problematic in cases concerning more serious illegalities such as a contract for murder.[172] The trio of considerations equally raises issues for there may be disparity on the issue of whether the offence of insider dealing (and of conspiracy) is sufficiently serious and whether there is in fact any disparity in culpability.[173] With no overarching principle the trio of considerations also has the potential of producing inconsistent results. It is unclear which factor will be the determinant in allowing or refusing relief. The quasi-flexible approach on the other hand addresses the illegality and applies a test which is certain in application governed by the principle of maintaining consistency in the law.

Application of the quasi flexible test:

The agreement between A and B amounts to conspiracy to commit the offence of insider dealing under s 52 of the Criminal Justice Act 1993. Section 52 makes it an offence for a person in possession of insider information to deal or encourage another person to deal in securities.[174] Section 63(2) of the Criminal Justice Act 1993 Act provides that no contract shall be unenforceable by reason only of s 52. Arguably

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[171]*Patel* (UKSC) (n 1) at [268] (Lord Sumption).
[172]Allowing restitution there produces a result which no legal system would tolerate. The criticism of adopting a *restitutio in integrum* approach was discussed at large in chapter 4.
[173]see Chapter 6.
[174]*Patel* (CA) (n 35) [68] (Gloster LJ); *Patel* (UKSC) (n 1) [115] (Lord Toulson).

therefore, this is not a case about prohibition of contract.[175] Rather the position appears to be that there has been illegal conduct but the contract between A and B has not been prohibited as the 1993 Act does not render the contract unenforceable.[176] It can be argued that the contract here is not prohibited either by statute or any head of common law public policy, but one which is entered into with the object of committing an illegal act.[177] One can therefore consider factors under proportionality.[178] Although the court can take into account factors such as seriousness of illegality, ultimately they are to reach a decision which promotes consistency in the law. This is because there may be disparity in evaluation of factors. Some may hold insider dealing to be serious and the parties equally culpable, others may not. It may be argued that B is more culpable in a moral sense than A because of his profession and experience which makes his participation in the illegality more blameworthy than A.[179] However, there is also room for argument that A moved in a circle of people well-informed about finance and therefore it would be quite astonishing that he did not know that insider dealing was illegal.[180] The position would of course be different if it could be proved that A was genuinely mistaken and induced into the agreement by deception of B.[181] The court should make a decision on the consistency principle, namely the fact that the criminal

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[175]*Ochroid* (n 10) [71] (Andrew Phang Boon Leong JA).
[176]ibid.
[177]*Ochroid* (n 10) [110] (Andrew Phang Boon Leong JA).
[178]*Ochroid* (n 10) [120] (Andrew Phang Boon Leong JA).
[179]Virgo 'Illegality and Unjust Enrichment'(n 106) 221,222, see also A. Burrows 'A New Dawn for the Law of Illegality'(n 13) 28; cf. *Patel* (UKSC) (n 1) [241] (Lord Sumption) that the principle of not in pari delicto does not allow a 'general enquiry into their relative blameworthiness'.
[180]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 77; see also *Patel* (CA) (n 35) [3]-[6] (Rimer LJ).
[181]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 77; *Patel* (UKSC) (n 1) [242] (Lord Sumption);see *Aqua Art* (n 109) [23]-[25], [28]-[29], [33]-[35] (Andrew Phang Boon Leong JA); *Ochroid* (n 10) [43] (Andrew Phang Boon Leong JA).

conspiracy was not implemented, A is not seeking a benefit from his wrongdoing, rather he is recovering the original sums, and no profits are made. These factors favour the return of the money to A.[182] Moreover, the statutory proscription of insider dealing was not transgressed.[183] Although there was a conspiracy, no price sensitive information was received or used, and therefore there was no breach of s 52 of the 1993 Act. Further, even if profits had been made they would have been by way of a valid contract because contracts of insider dealing are not unenforceable under s 63(2) of the 1993 Act.[184] Furthermore, the money lost by A is in excess of any fine imposed for the crime of conspiracy.[185] Allowing restitution would not be in conflict with or create inconsistency with 'overriding policies expressed in…the 1993 Act'.[186] It would not frustrate or undermine the policy of the underlying prohibition on insider dealing.[187] A should therefore be able to recover the money.

The above conclusion, however, does not mean that such a result is ideal. This is particularly so since A was a co-conspirator and allowing return of money can have the effect of encouraging him to try again. The most equitable result here would be to confiscate the money so that neither A or B can keep it, as discussed in chapter 6.

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[182]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 67, 68; *Patel* (CA) (n 35) [70] (Gloster LJ).
[183]see R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 72,73.
[184]see R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 75, 76
[185]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 76.
[186]William Gummow, 'Whither Now Illegality and Statute: An Australian Perspective' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 306; On the contrary if allowing the claim will create inconsistency then the claim should be barred such as it was in *Equuscorp* (n 11) which was discussed in chapter 5.
[187]*Patel* (CA) (n 35) [69] (Gloster LJ); *Patel* (UKSC) (n 1) [115] (Lord Toulson); Gummow, 'Whither Now Illegality and Statute' (n 186) 306.

However, in the absence of the court's ability to order this, the result in favour of restitution should be maintained on the basis of consistency in the law. In light of the statutory provisions infringed, the policy of which would not be undermined, restitution of the money paid would not create inconsistency in the law. Further, if it is clear that the criminal justice authorities have not taken action and there is no prospect of doing so then as Sullivan argues the restitutionary proceedings should be permitted.[188]

Example 3: (*Cross v Kirkby*)[189]

A trespasses onto B's land with a bat. A starts quarrelling with B and eventually hits him, shouting that he will kill B. B walks away. A persists on being aggressive and tries to hit B again. B, trying to ward off the blows, ends up getting hold of the bat. A is injured as a result. A brings claim for injury suffered as a result of the hit. The plea of self defence has failed. B raises illegality defence.

Application of the reliance, inextricable link, causation and trio of considerations:

The reliance and inextricable link tests can be inconsistently applied. It can be argued that A's injuries arose out of his unlawful conduct of assaulting B; causing B actual bodily harm.[190]A threatened to kill, which is an offence under the Public Order Act 1986, he also committed affray (Public Order Act 1986) and had an offensive weapon contrary to the Prevention of Crime Act 1953.[191] His injuries were provoked by his own

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[188]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 67, 68.
[189]The Times, 5 April 2000 (Official Transcript), [2000] CA Transcript No 321.
[190]*Cross* (n 189) [77] (Beldam LJ).
[191]ibid.

illegal conduct. A's claim is inextricably linked with his own illegal conduct.[192] Further, the causation test would not take into account that there were two causes of the injury, the criminal conduct of A and the conduct of B. A's claim would therefore be barred. Alternatively, it can be argued A did not need to plead or rely on his illegal conduct to establish the claim for injury. He only needed to rely on the tort of battery for the claim of compensation for injury.[193] Similarly, it can be argued that the tort of battery is not caused by or closely connected to A's illegal conduct.[194] These tests being inconsistently applied creates uncertainty in the law and can lead to opposing results.[195]

Under the trio of considerations, the court will assess various factors, taking into account A's criminal conduct (assault, affray, breach of Public Order Act 1986, carrying a weapon) and the centrality of illegality; which can be determined disparately as under the reliance and inextricable link test. On the facts, it appears that A may be more culpable since he trespassed and committed several offences including assault,[196] but it cannot be discounted that B's hit also caused the injury.[197] There is a possibility of damages being awarded for injury with reduction in the amount recoverable due to A's contributory negligence.[198] The issue with the trio of considerations and proportionality

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[192]*Cross* (n 189) [6], [76], [78] (Beldam LJ).
[193]see *Cross* (n 189) [72] (Beldam LJ).
[194]ibid; For detailed criticism of the inextricable link test see James Goudkamp, 'A Long Hard Look at Gray v Thames Trains Ltd' in Paul S. Davies and Justine Pila (ed) *The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (Hart Publishing Ltd, 2015) 39-40.
[195]For criticism of the reliance test, inextricable link and causation test see chapter 3.
[196]see *Cross* (n 189) [6] (Beldam LJ).
[197]see also *McHugh v Okai-Koi* (n 144) [19], [22]-[24] (David Pittaway QC).
[198]see *McHugh v Okai-Koi* (n 144) [19], [22]-[24] (David Pittaway QC).There a claim was brought by the deceased's husband to recover damages from the negligent defendant. The deceased had behaved unlawfully, being involved in criminal conduct (affray, assault, harassment and breach of public order). She had been

in particular is that the factors under it can be decided upon subjectively, which leads to uncertainty. The result under quasi-flexible approach would be the same as the trio of considerations, namely recovery by A however, the reasoning is more principled, based on the consistency principle. Quasi-flexibility is more coherent and certain approach than all of these tests. This is illustrated below.

Application of the quasi flexible approach

The illegality defence should not operate to bar A's claim. This is on the basis that allowing recovery would not create inconsistency in the law since the claim is for injury, and not an award which reflects a profit from the crime.[199] Moreover, even if a claim for injury succeeds, the courts can reduce the amount recoverable by A according to contributory negligence thereby accounting his liability for the injury.[200] A is not seeking to shift the consequences of the criminal sentence which would be imposed on

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extremely abusive to the defendant, eventually kicking at the defendant's car and soon climbing on to its bonnet. The defendant called the police. The deceased remained on the bonnet and unfortunately, knowing this, the defendant still drove off, resulting in the deceased slipping off the car bonnet and hitting her head on the pavement. This resulted in her death. David Pittaway QC, the judge, said that although the deceased was highly culpable, that does not mean that her claim should be dismissed. There were two causes of the accident: the deceased's criminal conduct (affray, assault, harassment and breach of public order) and the defendant's decision to move off, knowing that Mrs McHugh was on the bonnet of the car. He held that the public interest would be served by taking into account both the defendant and the deceased's fault, particularly in the circumstances where the defendant had been convicted of causing death by careless driving, it would not be a proportionate response to illegality to deny the claim. However, he noted that damages can be and were reduced. In applying section 1 of the Law Reform (Contributory Negligence) Act 1945 by taking into account the relevant culpability of the parties, particularly that the deceased had behaved in a highly culpable manner, he reduced the damages, dividing responsibility 75:25 in favour of the defendant.

[199]*Hall v Hebert* (n 9) 179,180 (McLachlin J), 210, 211(Cory J).

[200]*McHugh v Okai-Koi* (n 144) [19], [22]-[24] (David Pittaway QC).

him to B by way of award of compensation.[201] Rather he is trying to undo the loss by B's negligence.[202]

Example 4 (*Hounga*):

A, an illegal immigrant (trafficked), is hired by B to do housework. A works for B knowing that it is illegal for her to work in the UK (s 24(1)(b)(ii) of the Immigration Act 1971). A has not been paid wages for her work and is often physically assaulted by B. Later B dismisses A from her employment. A is not prosecuted for entry into this contract. A brings a claim against B on two grounds. First, in contract for unfair dismissal, breach of contract and unpaid wages. Second, a claim in *quantum meruit* for work done.

Contractual Claim

Application of the reliance and trio of considerations:

As A's first claim is contractual the inextricable link, causation and *restitutio in integrum* tests will not be applied. This is because the former two were predominantly applied in tort cases, whilst the latter in unjust enrichment as noted at the beginning of this section. Moving on to the reliance test, the contractual claim will be dismissed. A needs to rely on the illegal contract of employment to bring a claim for unpaid wages,

[201]James Goudkamp, 'The Illegality Defence in the Law of Negligence after Miller v Miller' (2011) 7 *Australian Civil Liability* 130, 131,132.
[202]ibid.

breach of contract of employment, or statutory extension for unfair dismissal.[203] Under the trio of considerations, the court will take into account that it is unlawful for A to enter into the contract of employment – s 24(1)(b)(ii) of the Immigration Act 1971.[204] The court will take into account factors such as A's knowledge that it was illegal to enter into the contract of employment.[205] All of A's claims in relation to unfair dismissal, unpaid wages and restatement involves A trying to enforce the illegal contract of employment.[206] The illegality defence will bar A from enforcing the contract. The same result is reached under the quasi-flexible approach but the result is based on the consistency principle.

Application of the quasi flexible test:

Under the quasi-flexible test, if a contract is expressly prohibited by statute the contract shall be unenforceable and there shall be no recovery in contract. In the scenario above, it is a criminal offence under s 24(1)(b)(ii) Immigration Act 1971 for A to enter into the contract of employment. The contract being expressly prohibited the claimant is barred from enforcing the contract. A's whole employment is forbidden by the statute.[207] The illegality defence therefore precludes the claimant's claim for unpaid wages, because in pursing this claim the claimant is seeking to enforce the contract, which is illegal.[208] It also bars her claim for unfair dismissal and breach of contract. The opposing result

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[203]*Hounga* (UKSC) (n 47) [54]-[55], [59] (Lord Hughes); *Bilta* (n 74) [102] (Lord Sumption).
[204]see also *Hounga* (UKSC) (n 47) [24] (Lord Wilson).
[205]*Hounga* (UKSC) (n 47) [18] (Lord Wilson).
[206]*Hounga* (UKSC) (n 47) [24] (Lord Wilson).
[207]*Hounga* (UKSC) (n 47) [24] (Lord Wilson), [54] (Lord Hughes).
[208]*Hounga* (UKSC) (n 47) [24] (Lord Wilson).

would create inconsistency with the rule infringed (the rule than rendered the contract illegal).

Quantum meruit claim

Application of the reliance and trio of considerations and restitutio in integrum:

Arguably A needs to rely on the fact that she is an illegal immigrant to make good the claim for *quantum meruit* for services performed. Though A may come under the 'not *in pari delicto*' exception, that law intended to protect persons such as A against exploitation from B.[209] Under the trio of considerations, it is arguable whether or not A will succeed.[210] First, considering the underlying purpose of prohibition (Immigration Act 1971), the policy of which may be against recovering remuneration.[211] Secondly, any other policy, here protection of victims of trafficking from grievous exploitation bordering on slavery and freedom from forced labour, will be taken into account and possibly weigh heavily.[212] Thirdly, under proportionality, the court would consider factors such as A is aware/has knowledge of the illegality. Courts may differ on who is more culpable. There is a possibility of recovery under a *restitutio in integrum* claim. As Virgo argues, where the underlying contract is void because of illegality, the remedy for value of work done can be sought outside of contract as a claim for restitution to

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[209]*Patel* (UKSC) (n 1) [119] (Lord Toulson), [243] (Lord Sumption); see also *Nizamuddowlah v Bengal Cabaret Inc* (1977) 399 NYS 2d 854.
[210]see *Hounga* (UKSC) (n 47) [24], [46]-[52] (Lord Wilson); *Patel* (UKSC) (n 1) [119] (Lord Toulson); Bogg 'Illegality in Labour Law after *Patel v Mirza*'(n 63) 280-281; *Bengal* (n 209).
[211]Bogg 'Illegality in Labour Law after *Patel v Mirza*'(n 63) 280-281.
[212]*Hounga* (UKSC) (n 47) [51]-[52] (Lord Wilson);Bogg 'Illegality in Labour Law after *Patel v Mirza*'(n 63) 280-281.

reverse the defendants' unjust enrichment.[213] Post- *Patel* it would seem, that a *quantum meruit* claim may succeed, this is supported by the dictum of Lord Toulson and Lord Sumption in *Patel.*[214]

Application of quasi-flexible approach:

Despite statutory or common law illegality, a non-contractual claim in tort, trusts or unjust enrichment may succeed provided that allowing the non-contractual claim does not undermine the policy, whether statutory or common law, which rendered the contract unenforceable in the first place. A's claim is for *quantum meruit* for the value of work done.[215]

First, the claim can be sought outside of contract. This was noted earlier where Virgo has pointed out that despite the underlying contract being void because of illegality, the remedy for value of work done can be sought outside of contract as a claim for restitution to reverse the defendants' unjust enrichment.[216] Further, Lord Neuberger said in *Patel* that there is room to say that a claim for payment can be made on a *quantum meruit* basis, even though the claimant cannot enforce his right to contractual payment.[217] Both Lord Toulson and Lord Sumption in *Patel* expressed the possibility of a claim in *quantum meruit* on such facts. Lord Sumption said notwithstanding that there is no claim on the illegal employment contract, a *quantum meruit* for services may have

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[213]Virgo 'Illegality and Unjust Enrichment'(n 106) 231;*Patel* (UKSC) (n 1) [180] (Lord Neuberger).
[214]*Patel* (UKSC) (n 1) [119] (Lord Toulson) at [243] (Lord Sumption); Bogg 'Illegality in Labour Law after *Patel v Mirza'* (n 63) 283.
[215]*Patel* (UKSC) (n 1) [119] (Lord Toulson) at [243] (Lord Sumption).
[216]Virgo 'Illegality and Unjust Enrichment'(n 106) 231;*Patel* (UKSC) (n 1) [180] (Lord Neuberger).
[217]*Patel* (UKSC) (n 1) [180] (Lord Neuberger).

succeeded.[218] Sullivan argues that restitution should be allowed where A has been exploited despite breach of immigration law.[219]

Secondly, the tension is between the Immigration Act 1971[220] and the protection of victims of trafficking especially from grievous exploitation. Taking into account the policies behind each of these, the inconsistency arguments can be circumvented.[221] It is noteworthy that the law provides penalties for obtaining employment in breach of immigration laws, such as deportation. The penal purposes of the immigration legislation are served by those criminal liabilities set out in the legislation.[222] Deprivation of compensation, as a fair amount for services done in such circumstances, is not warranted by any public policy consideration.[223] Whilst it may appear that in allowing such a claim the law is contradicting itself, in that the employment is illegal yet the illegal immigrant is awarded relief on a *quantum meruit* basis, the amount recoverable is not that of a contractual wage.[224] The 'quantum is set by the relevant statutory standard rather than the contractually agreed wage… [this way] a *quantum*

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[218]*Patel* (UKSC) (n 1) [74], [119] (Lord Toulson),[243] (Lord Sumption).
[219]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 72.
[220]In particular see s24B Immigration Act 1971 inserted into the 1971 Act by the Immigration Act 2016.
[221]Bogg 'Illegality in Labour Law after *Patel v Mirza*'(n 63) 283.
[222]Bogg 'Illegality in Labour Law after *Patel v Mirza*'(n 63) 272; see also Immigration Act 1971 s 24B; Immigration Act 2016 s 34.
[223]Bogg 'Illegality in Labour Law after *Patel v Mirza*'(n 63) 271, 272, 276 that taking into account the legislative policy of labour market regulation and the legislative policy of worker protection would be akin to the exercise carried out in the Canadian case *Still v Minister of National Revenue* [1997] Carswell Nat 2193 of which Lord Toulson was approving in *Patel* and thus may lead to the conclusion that the exploited vulnerable claimant is not denied a restitutionary remedy; McBride Not a Principle of Justice' (n 114) 101;see also *Patel* (UKSC) (n 1) [65], [66] (Lord Toulson).
[224] McBride Not a Principle of Justice' (n 114) 101; see also Bogg 'Illegality in Labour Law after *Patel v Mirza'* (n 63) 281, 282.

meruit is not functioning to enforce the contractual wage-work bargain'.[225] Thus as the amount recoverable is not the contractual wage but rather a just amount as value for work done, it would not reflect enforcement of rights under an illegal contract.[226] Moreover, the Immigration Act 2016 and the offences under it dealing with illegal working such as s 34 and s 35, inserted into Immigration Act 1971, do not specify express prohibition of employment contracts.[227] They were introduced as measures to tackle not only illegal working but also exploitation.[228] A can therefore recover on a *quantum meruit* basis which reflects fair value for services and work done.[229]

Example 5 (*Collier*):

A enters into an agreement with B, his daughter, to hide A's property from his creditors. Once that danger averts, the property is to revert back to A. A resolves matters with creditors and asks B to return the property. B refuses. A brings a claim to recover the property. B raises the illegality defence.

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[225]Bogg 'Illegality in Labour Law after *Patel v Mirza*'(n 63) 271, 272, 283.
[226]Bogg 'Illegality in Labour Law after *Patel v Mirza*'(n 63) 283.
[227]Bogg 'Illegality in Labour Law after *Patel v Mirza*'(n 63) 272.
[228]Bogg 'Illegality in Labour Law after *Patel v Mirza*'(n 63) 272; *Patel* (UKSC) (n 1) [241]-[243] (Lord Sumption); see for example See for example *Hounga* (UKSC) (n 47) [44] (Lord Wilson); Birks (n 17) 173, 174; R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 72, 77, 78 where Sullivan argues that being 'not *in pari delicto*' shifts the presumption against forfeiture and confiscation of money; see also *Bengal* (n 209) in which illegal worker claim allowed in unjust enrichment.
[229]Bogg 'Illegality in Labour Law after *Patel v Mirza*'(n 63) 271, 272, 283.

Application of the reliance test, restitutio in integrum and trio of considerations:

Under the reliance test, A needs to rely on the illegal purpose to rebut the presumption of advancement which he cannot do (*Tinsley* decision). Under the reinterpreted reliance test, ignoring presumptions, namely presumption of advancement (a view heavily criticised in the literature and noted as being inconsistent with *Tinsley*) A just needs to show he did not intend a gift.[230] A would be allowed recovery. The contentious nature of the reliance test makes it least acceptable to apply. *Restitutio in integrum* sidesteps the issue of illegality, and allows the claim. A is not trying to profit from the crime. Under the trio of considerations court will take into account B's knowledge and participation in the illegality and the unjust enrichment of B at A's expense. Denial of claim whereby A loses entire capital is arguably a disproportionate response to the illegality.

Application of the quasi flexible test:

Despite statutory or common law illegality, a non-contractual claim in tort, trusts or unjust enrichment may succeed provided that allowing the non-contractual claim does not undermine the policy, whether statutory or common law, which rendered the contract unenforceable in the first place. A can recover the property without any inconsistency arising because when A transferred the property to hide it, he merely intended for B's interest in it to be temporary.[231] A does not intend to part with the reversion of the interest.[232] The retransfer of property of assets does not lead to

[230]see chapter 4.
[231]Birks (n 17) 176.
[232]ibid.

inconsistency since the reversionary interest was never intended to be part of the illegal transaction.[233] Moreover, the common law tends to protect one's reversionary interest.[234] A should be able to recover the property.

7.5 Limitations and Solutions

One of the issues which can be raised in relation to the quasi-flexible test is that although proportionality is limited in application, taking into account different factors is still required in some cases. In such cases, the issue as to differentiating between the nature of illegality may still cause concerns. In response to this, Enonchong has argued that although it may be said that it is difficult to distinguish between degrees of illegality, it is not difficult to say that failure to provide a rent book required by statute is not as serious as terrorism,[235] murder or drug trafficking.[236] As argued earlier in the chapter the seriousness can be determined by threat to life and severity of criminal sanctions.[237] Sullivan also argued that courts are likely to be able to make this judgment on differentiating between degrees of illegalities.[238] Furthermore, as Kremer argues:

> [that] some element of judicial discretion undoubtedly exists and may be difficult to exercise is not, and should not, be fatal in itself particularly when the

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[233]Birks (n 17) 176-179, 189, 201; see chapter 2 where Birks argument is fully explored.
[234]Birks (n 17) 177.
[235]Nelson Enonchong 'Illegality: The Fading Flame of Public Policy' (n 104) 300.
[236]*Patel* (UKSC) (n 1) [116] (Lord Toulson).
[237]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 71.
[238]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 71, footnote 42 on that page.

> parameters by which it will be exercised are clearly spelt out and reflect traditional concerns of the law.[239]

The above is what this thesis has attempted to do: define the parameters in which the proportionality principle is to be exercised, the overarching principle being to ensure the maintenance of consistency in the law. For example, it is quite clear that murder is a serious crime. A claim brought in restitution of money paid for murder should not be allowed. If it is, it would 'undermine the criminal law's denunciation of intentional killing', thereby creating inconsistency in the law.[240]

The issue then becomes that in cases such as these, where money is paid for murder or a group of terrorists who have put a property in which they devise terrorist activities in the name of a third party, the third party who is equally complicit in the crime gets an unjustified windfall gain. The best solution is that the law should adopt the reform proposals put forward by Sullivan; discussed in chapter 6. There should be a presumption in favour of confiscation. The High Court should be given power to invoke that. The result is that the money or property is taken away from the claimant and the defendant.[241] Butler also agrees with 'legislation which allows for…forfeiture'.[242] Further research should focus on Sullivan's proposals in order to produce rules which cover all of the different situations relating to how and when the presumption of forfeiture would be implemented and how to deal with the varying degrees of illegality.

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[239]Ben Kremer, 'An "Unruly Horse" in a "Shadowy World"?: The Law of Illegality after *Nelson v Nelson'* (1997) 19 *Sydney L. Rev.* 240, 253.
[240]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 80.
[241]R. Sullivan 'Restitution or Confiscation/Forfeiture?'(n 101) 80, 83, 84; McBride Not a Principle of Justice' (n 114) 101-103.
[242]Peter Butler, 'Illegally Tainted Transfers and Resulting Trusts: *Nelson v Nelson*' (1996-1997) 19 *U Queensland LJ* 150, 159.

Another issue which can be raised in relation to the quasi-flexible test is that there is not enough guidance as to which countervailing policies may be taken into account.[243] Future research should therefore focus on the countervailing policies which courts take into account post-*Patel*, in different context of claims such as contract, tort, trusts and unjust enrichment. From pre-*Patel* case law it is evident that in the context of employment cases, particularly those concerning immigration offences, courts are likely to take into account protection from forced labour and trafficking, such as in *Hounga*. Similarly, in tort cases concerning attribution of illegality, countervailing policies such as bank, auditors and other financial institution's duty to protect from financial fraud is evident from cases such as *Singularis*.[244] However, as noted earlier, further research is needed, to draw out which countervailing policies in the different types of claims are most relevant and likely to crystallise into important considerations over time.

7.6 Conclusion

This chapter has contributed to the literature on illegality by providing a quasi-flexible approach towards the illegality defence governed by the two guiding principles of consistency and proportionality, found in the case law of England and other common law jurisdictions, legislation and literature on illegality. The latter of the two principles has been restricted in application in the quasi-flexible test. The former, which has

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[243]Graham Virgo, '*Patel v Mirza*: one step forward and two steps back' (2016) 22 *Trusts & Trustees* 1090, 1094-1095; Bogg 'Illegality in Labour Law after *Patel v Mirza'* (n 63) 286, 287.

[244]see *Singularis* (Ch) (n 13) [184], [219], [250] (Rose J); *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39, [2009] 1 AC 1391 at [241] (Lord Mance).

approval from all the justices in *Patel*, takes precedence over the latter. The quasi-flexible approach is designed to provide clarity in the law of illegality in determining whether or not the illegality defence should apply. The approach serves as guidance to the judiciary but should not be taken as strict immutable rules incapable of development over time. This is because, as Lord Neuberger noted in *Patel*, it is impossible to envisage and cater for every type of problem which might arise in the field of illegality.[245] On the whole, the quasi-flexible test proposed provides structured, clear justification grounded in principle in determining the application of the illegality defence.[246] It reduces the uncertainty created through an extremely flexible approach by limiting the use of the proportionality principle to well defined circumstances.

[245]*Patel* (UKSC) (n 1) [165] (Lord Neuberger).
[246]see *Patel* (UKSC) (n 1) [233] (Lord Sumption).

CHAPTER 8

CONCLUSION

8.1 Introduction

This thesis examined how the illegality defence, which deprives the claimant of his normal legal rights and remedies, should be applied. It analysed the two conflicting approaches of rule and flexibility. Whilst the aims of certainty, predictability, consistency in the law[1] and due flexibility to avoid harsh consequences are important aims, the thesis found that they are neither fully achieved through the rules devised by the judiciary pre- *Patel v Mirza*[2] (hereafter *Patel*) and by the minority in *Patel*, nor by Lord Toulson's trio of considerations in *Patel*. This thesis has made an important contribution to the literature in arguing that the aims of the illegality defence are best achieved through a quasi-flexible approach presented in chapter 7. This quasi-flexible approach is governed by the principle of consistency and the restricted use of the proportionality principle. Both of these principles find support in the case law in England, the works of the Law Commission and the case law and legislation of other common law jurisdictions. This chapter will provide a summary of the key findings of the thesis and explain how the research questions posed at the beginning of the thesis in chapter 1 have been answered. The chapter will also draw out the contribution that this

[1]Andrew Burrows 'A New Dawn for the Law of Illegality' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 23.
[2][2016] UKSC 42, [2017] AC 467.

thesis makes to the literature on illegality, as well as providing direction for future research on the illegality defence in light of the findings in this thesis.

8.2 Key Findings and Contribution

The thesis was split into three parts in order to determine how the illegality defence should be applied. The first part of the thesis, namely Chapters 2 and 3, examined the law, policy and approaches taken towards the illegality defence pre-*Patel.* This part of the thesis addressed the research questions concerning whether the rules devised and adopted by the courts pre-*Patel* were certain and consistent in application or whether they were arbitrary, complex and inadequate to apply in the realm of public policy. The thesis also assessed whether a flexible approach which assesses various factors and policies provides a more reasoned and transparent approach in determining whether the illegality defence applies. The thesis found that the rules devised and adopted by the judiciary - the reliance, inextricable link and causation tests - are arbitrary, complex and uncertain in application. Very often, application of the same test has led to opposing results. Their application, including let the estate lie where it falls test, has the potential of producing unduly harsh results as they fail to give proper consideration to factors and policies involved, at times even failing to address the illegality.[3] The latter is particularly true of the reliance test. The thesis therefore did not support these rules as an approach to the illegality defence. In contrast, more flexible approaches, in particular the just and proportionate response to illegality test (which drew from the public

[3]The Law Commission, *The Illegality Defence: A Consultative Report* (Law Com CP No 189, 2009) Para 1.3.

conscience test)[4], basing decisions on assessment of factors and policies, was found to be more reasoned, transparent and therefore preferable in this multifaceted area, than the rigid immutable rules provided pre-*Patel*.[5] This part of the thesis, in particular chapter 2, detected that the key influential policies in determining the application of the illegality defence were: furthering the purpose of the rule; not allowing one to profit from his or her wrongdoing; consistency; maintaining the integrity of the legal system; not encouraging or condoning illegality and deterrence. These policies were said to be overlapping, arguably being different ways of saying the same thing.[6] It was found there that reliance on a number of different policies creates uncertainty as there is no single principle governing the outcome of cases.[7] This thesis in the latter half argued that these policies can be reduced to one key principle of maintaining consistency in the law. It also found that post-*Patel* deterrence has ceased to be an influential policy. However, Lord Sumption in the Supreme Court in *Les Laboratoires Servier v Apotex Inc*[8] (hereafter *Servier*) and *Bilta (UK) Ltd v Nazir (No 2)*[9] (hereafter *Bilta*) strongly condemned the flexible approaches arguing that these tests (public conscience and just

[4]This test was expressly rejected by the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340 (HL), 355, 358, 361 (Lord Goff), 369 (Lord Browne-Wilkinson). This was discussed in Chapter 3.
[5]*Patel v Mirza* (UKSC) (n 2) [161] (Lord Neuberger); Roger Toulson 'Illegality where are we now?' in Andrew Dyson, James Goudkamp, Frederick Wilmot-Smith, and Andrew Summers (ed) *Defences in Contract* (Bloomsbury Publishing PLC, 2017) 276, 277; see further The Law Commission, *The Illegality Defence* (Law Com No 320, 2010) para 1.6, 3.10.
[6]CP 189 (n 3) para 2.30, 2.34.
[7]ibid.
[8][2014] UKSC 55, [2015] AC 430.
[9][2015] UKSC 23, [2016] AC. 1.

and proportionate response) are discretionary in nature.[10] He argued these tests lead to subjective decisions thereby creating uncertainty in the law.[11] In contrast he advocated for a rule based approach, in particular, endorsing the reliance test.[12] Notwithstanding this, Lord Toulson in *Servier* and *Bilta* advocated for a flexible approach, and consideration of whether 'public policy considerations merited applying the doctrine of illegality'.[13] In the former he also expressly argued for a re-analysis of *Tinsley v Milligan*[14] (hereafter *Tinsley*). Similarly, Lord Wilson in *Hounga v Allen*[15] (hereafter *Hounga*) adopted a flexible approach in basing his decision on an assessment of policies.[16] This mounting tension between the two approaches led to the President of the Supreme Court, Lord Neuberger, in *Bilta* emphasising that the proper approach to the illegality defence needs to be addressed.[17] *Patel* presented such an opportunity. However, *Patel* failed to provide the necessary clarity or end the debates concerning how the illegality defence should be conceptualised and applied. This was considered in part two of the thesis, in particular chapter 4.

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[10]*Servier* (UKSC) (n 8) [14], [16], [18], [19],[21] (Lord Sumption); *Bilta* (n 9) [62], [63], [98], [99], [101] (Lord Sumption); James Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (2015) 6 *United Kingdom Supreme Court Yearbook* 254, 268.
[11]*Servier* (UKSC) (n 8) [18], [19], [21] (Lord Sumption); *Bilta* (n 9) [62], [63], [98], [99], [101] (Lord Sumption); Goudkamp 'The Doctrine of Illegality: A Private Law Hydra' (n 10) 268.
[12]*Bilta* (n 9) [62], [102] (Lord Sumption); *Servier* (UKSC) (n 8) [18], [19],[21] (Lord Sumption).
[13]*Servier* (UKSC) (n 8) [62] (Lord Toulson); *Bilta* (n 9) [195] (Lord Toulson and Lord Hodge).
[14][1994] 1 AC 340.
[15][2014] UKSC 47, [2014] 1 WLR 2889.
[16]*Hounga* (UKSC) (n 15) [42], [44]-[45], [52H], [52A] (Lord Wilson).
[17]*Bilta* (n 9) [14], [15] (Lord Neuberger).

Part two of the thesis, beginning with Chapter 4, focused on *Patel*, which revealed yet again sharp differences of opinion between the justices of the Supreme Court. In that decision, Lord Toulson for the majority laid down the trio of considerations drawing in particular from pre-*Patel* case law, the works of the English Law Commission and from other common law jurisdictions, namely the Australian case *Nelson v Nelson*[18] (hereafter *Nelson*) and the Canadian cases of *Hall v Hebert*[19] (hereafter *Hall*) and *Still v Minister of National Revenue*[20] (hereafter *Still*). He also made reference to the New Zealand Illegal Contracts Act 1970, although he did not analyse the case law under the statute.

Chapter 4 answered the question as to whether Lord Toulson's trio of considerations is drawn from pre-*Patel* case law or whether it is a revolutionary approach. The chapter found that the trio of considerations merely drew out more clearly those factors and policies which were deemed the most significant in pre-*Patel* case law.[21] Significantly, it presented an approach based on policy considerations, which had support from Lord Wilson in the Supreme Court in *Hounga,* and Lords Hodge and Toulson in *Bilta.*[22] The trio of considerations comprised of considering the purpose of the prohibition

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[18][1995] 4 LRC 453.
[19][1993] 2 SCR 159.
[20][1997] Carswell Nat 2193, [1998] 1 FC 549.
[21]*ParkingEye Ltd v Somerfield Stores Ltd* [2013] QB 840 (CA) at [53], [54] [68], [70]-[72], [75], [77], [79] (Toulson LJ); *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, 288- 292 (Devlin J); *Narraway v Bolster* [1924] EGD 217, 218 (Lord Darling); *Shaw v Groom* [1970] 2 QB 504, 526 (Sachs LJ); *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374, 390 (Devlin LJ); *Les Laboratoires Servier v Apotex Inc* [2013] Bus. L.R. 80 (CA) at [73]-[75], [81], [82] (Etherton LJ); *Servier* (UKSC) (n 8) [62] (Lord Toulson); see further Chapter 2.
[22]*Bilta* (n 9) [195] (Lord Toulson and Lord Hodge); *Hounga* (UKSC) (n 15) [42], [44]-[45], [52H], [52A] (Lord Wilson).

transgressed and whether that 'purpose will be enhanced by denial of the claim',[23] any other relevant public policies, and whether denial of the claim would be a proportionate response to the illegality.[24] In relation to the third consideration of proportionality, Lord Toulson said various factors are to be taken into account such as 'seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability'.[25] However, he refused to lay down an exhaustive list of factors.[26] Lord Toulson also overruled the reliance test.[27] The minority in *Patel* strongly condemned the trio of considerations, in particular the proportionality consideration, labelling the approach as being discretionary, far too vague as the basis to deny a person's rights, and revolutionary.[28] The minority preferred a rule-based approach comprised of the reinterpreted reliance test and *restitutio in integrum.* The reinterpreted reliance test involved ignoring legal and equitable presumptions.[29] The minority's approach also involved reinterpreting the *locus poenitentiae* as merely a ground for restitution without the need to withdraw from the illegal purpose to recover assets transferred.

The thesis criticised the minority's approach, which was also strongly condemned by some academics in the literature on several grounds.[30] The reliance test was already plagued with issues, ranging from being a procedural rule, devoid of policy

[23]*Patel* (UKSC) (n 2) [120] (Lord Toulson).
[24]ibid.
[25]*Patel* (UKSC) (n 2) [107] (Lord Toulson).
[26]ibid.
[27]*Patel* (UKSC) (n 2) [110], [114] (Lord Toulson).
[28]*Patel* (UKSC) (n 2) [217] (Lord Clarke), [206] (Lord Mance), [262], [264], [265] (Lord Sumption).
[29]*Patel* (UKSC) (n 2) [237]-[239] (Lord Sumption).
[30]see Chapter 4.

considerations, ignoring the illegality, and inconsistent in application. Its reinterpreted form presented by Lord Sumption in *Patel*, which involved ignoring the standard law on presumptions, was in itself revolutionary as was the reinterpretation of the *locus poenitentiae*.[31] Equally the *restitutio in integrum principle* was condemned in this thesis on a number of grounds: side-stepping the issues of illegality, creating inconsistency in the law, as well as producing results which no justice system would tolerate.[32] Chapter 4 concluded by arguing that Lord Toulson's trio of considerations is preferable to the minority's approach. It maintains consistency in the law by ensuring that the purpose of the rule infringed and any other policy is not undermined by allowing the claim. It addresses the nature of illegality and the culpability of the parties in addition to other relevant factors. It provides a more transparent approach than its rule-based counterparts which are devoid of policy considerations and some of which side-step the issue of illegality (reliance and *restitutio in integrum* tests). Notwithstanding this, the thesis recognised that Lord Toulson's test is also plagued with issues, particularly the proportionality principle (multi-factorial balancing exercise).[33] Moreover, it is unclear whether the Toulson test operates in a sequential approach, thereby lacking structure. For the promotion of certainty in the law the thesis argued that there should be an overarching principle governing the outcome of cases. This is particularly necessary since the factors under the proportionality principle, such as the degree of culpability of

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[31] See chapter 4; see also A. Burrows 'A New Dawn for the Law of Illegality' (n 1) 24, 31-33; see also Graham Virgo, '*Patel v Mirza*: one step forward and two steps back'(2016) 22 *Trusts & Trustees* 1090, 1097.

[32] *Patel* (UKSC) (n 2) [140], [141] (Lord Kerr); A. Burrows 'A New Dawn for the Law of Illegality' (n 1) 33.

[33] *Patel* (UKSC) (n 2) [107], [120] (Lord Toulson); see also *Ochroid Trading Ltd v Chua Siok Lui* [2018] SGCA 5 at [39], [40] (Andrew Phang Boon Leong JA); see chapter 4 and chapter 6.

the parties, can be subjectively decided. Without an overarching principle, the decisions can be reached on an ad hoc basis. The argument is that the need of flexibility in the law does not mean that a governing principle cannot be identified.[34]

Chapter 4 revealed that a principle which has support of all the justices in *Patel* is maintaining consistency in the law, as explained by McLachlin J in the Canadian case *Hall*. An issue which arose is Lord Toulson's inclusion of proportionality within the ambit of consistency, which the minority disagreed with. The thesis preferred the limited explanation of consistency. This argument was developed in chapter 5. That limited explanation is that there is inconsistency in the law if allowing the claim permits a profit from the crime or evasion of penalty. It also includes ensuring that the purpose of the rule infringed and any other policy is not undermined. This is because McLachlin J also explained consistency as 'the law must aspire to be a unified institution, the parts of which contract, tort, the criminal law must be in essential harmony'.[35]

As preference was given to the Toulson approach, as opposed to the rule-based approaches (presented pre-*Patel* and by the minority in *Patel*), the thesis then went on to address the question as to whether there is support in other common law jurisdictions for flexibility and the considerations laid down by Lord Toulson. If so, could a set of overarching principles be identified from the case law which are the most influential in determining whether or not the illegality defence will be applied? Chapter 5 examined the case law in other common law jurisdictions namely New Zealand (case law and

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[34]see *Patel* (UKSC) (n 2) [161] (Lord Neuberger).
[35]*Hall v Hebert* (n 19) 176, 177-180 (McLachlin J).

legislation), Australia, Canada and Singapore. It found that whilst the courts there have shifted from rigid rules to flexibility, the level of flexibility adopted across these jurisdictions differs.

New Zealand offers the greatest amount of flexibility under s 7 of the Illegal Contracts Act 1970 under which courts are given an overt discretion. Section 7 contains factors akin to Lord Toulson's trio of considerations, namely object of enactment; conduct of the parties and knowledge of illegality. However, it also gives the courts the ability to take into account such matters as they think proper. The case law revealed that the courts in New Zealand have made use of the discretion. Often, in very similar cases concerning breach of the same enactment or common law rule, the courts have reached opposing results.[36] With no overarching principle governing the outcome of cases, it makes it difficult predict when the illegality defence will bar the claim. It leads to results being reached on an ad hoc basis. This thesis therefore did not support the use of such a wide discretion as it creates uncertainty in the law and arbitrary results.

An examination of the Australian case law, in particular *Nelson,* revealed support for the considerations laid down by Lord Toulson, most notably ascertaining legislative intention (policy of the rule infringed) and whether refusing relief is proportionate to the seriousness of illegality.[37] *Nelson* was also a case in which the court condemned the

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[36]see *Leith v Gould* [1986] 1 NZLR 760 breach of s 25 Land Settlement Promotion and Land Acquisition Act 1952 led to relief being denied, whereas in *Hurrell v Townend* 1 NZLR [1982] 536 a case concerning the same provision, relief was allowed; compare also *Slater v Mall Finance & Investment* [1976] 2 NZLR 1 and *Polymer Developments Group Ltd v Tilialo* [2002] 3 NZLR 258 discussed in chapter 5; Richard A Buckley, 'Illegal transactions: chaos or discretion?' (2000) 20 *Legal Studies* 155, 172.
[37]*Nelson* (n 18) 523 (McHugh J).

reliance test. However, this thesis acknowledged that *Nelson* would provide support for Lord Toulson's trio of considerations since it was expressly cited in his judgment in *Patel.* Other cases examined revealed support for the consistency principle, namely the Australian case of *Miller v Miller*[38] (hereafter *Miller*) and support for the synonymous principle of stultification in *Equuscorp v Haxton*[39] (hereafter *Equuscorp*) which ensured that the purpose of rule infringed is not undermined by allowing the claim.[40]

In Canada examination of the case law, in particular *Transport North American Express v New Solutions Financial Corp*[41] (hereafter *New Solutions*) revealed support for flexibility and the considerations laid down by Lord Toulson, namely policy of the rule infringed, conduct and intention of the of the parties.[42] The case of *Still* supported weighing of policy considerations. However, the thesis acknowledged that, like *Nelson*, support from *Still* was apparent because Lord Toulson also cited *Still* in his judgment in *Patel.* The case of *Hall* revealed that the consistency principle is significant in determining the application of the illegality defence. Again this was apparent as Lord Toulson, alongside all other justices in the Supreme Court in *Patel*, cited McLachlin J's judgment from *Hall.* However, the thesis noted that the explanation of the consistency principle by McLachlin J in *Hall* did not wholly square with that given by Lord Toulson in *Patel.* Significantly, it did not include proportionality within its ambit.[43] Rather McLachlin J provided a limited approach whereby the courts could deny recovery in circumstances where recovery would create inconsistency in the law, thereby harming

[38][2011] HCA 9, [2011] 5 LRC 14 at [16], [74] (French CJ).
[39][2012] 3 LRC 716 at [38] (French CJ).
[40]*Equuscorp* (n 39) [34], [45] (French CJ).
[41][2004] 1 SCR 249.
[42]*New Solutions* (n 41) [42] (Arbour J).
[43]see chapter 5.

the integrity of the justice system if by allowing the claim the claimant would profit from their crime or evade a penalty.[44] It did not operate to prohibit compensation for personal injury.[45] That explanation of the consistency principle was also adopted in the Canadian cases of *British Columbia v Zastowny*[46] (hereafter *Zastowny*) and *Livent v Deloitte*[47] (hereafter *Livent*). It was argued in chapter 5, that whilst proportionality did not form part of the consistency principle, it appeared from McLachlin J's judgment in *Hall* that she would not find it antithetical to her explanation of consistency in the law to include the consideration of the purpose of the rule infringed as part of maintaining consistency in the law.[48] The thesis argued in favour of McLachlin J's explanation of the consistency principle which had support of all of the Justices in *Patel*, with the addition of considering the purpose of the rule infringed and any other policy within its ambit. However, it did not support the inclusion of proportionality within the scope of maintaining consistency in the law.

The Singaporean case law revealed the adoption of a limited flexible approach. It supported flexibility in *Ting Siew May v Boon Lay Choo*[49] (hereafter *Ting Siew*) laying down considerations largely akin to those of Lord Toulson's test in *Patel* namely, the 'purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the…centrality of the illegality to the contract; (d) the object, intent, and conduct of the parties; and (e) the consequences of denying the claim'.[50] In *Ochroid Trading Ltd v*

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[44]*Hall v Hebert* (n 19) 169, 179, 180 (McLachlin J).
[45]ibid.
[46](2008) SCC 4; [2008] 1 SCR 27.
[47]2016 ONCA 11.
[48]*Hall v Hebert* (n 19) 176, 177, 178 (McLachlin J).
[49][2014] SGCA 28, [2014] 3 SLR 609.
[50]*Ting Siew* (n 49) [70] (Andrew Phang Boon Leong JA).

Chua Siok Lui,[51] (hereafter *Ochroid*) the Singaporean Court of Appeal provided for a limited approach whereby the proportionality principle (multi-factorial balancing exercise) was restricted in use. *Ochroid* advocated the use of stultification as the overarching principle. This thesis drew from the approach in *Ochroid*.

Having examined the case law in other common law jurisdictions the thesis found that there is support for flexibility, but the level of it differs. It found that the most significant principles governing the application of the illegality defence are consistency in the law and the synonymous principle of stultification.

The third part of the thesis addressed the academic responses to the trio of considerations laid down by Lord Toulson, post-*Patel.* It addressed the question as to what difficulties does the Toulson test present as an approach to the illegality defence? The chapter found that whilst the considerations provided by Lord Toulson found support in pre-*Patel* case law and the work of the English Law Commission, and are somewhat akin to the factors and policies taken into account in other common law jurisdictions, the lack of structure and uncertainty created, in particular by the proportionality principle, is extremely concerning. The chapter concluded by arguing that there is a need in the law of illegality for an approach which is more certain in application governed by a principle which has support of all of the justices in *Patel* and other common law jurisdictions, but one which also provides sufficient flexibility to deal with the nuances of cases.

[51][2018] SGCA 5, [2018] 1 SLR 363.

Chapter 7 of the thesis addressed the question as to whether an improved approach to the illegality defence can be provided using overarching principles identified as being most influential in the area of illegality both in England and other common law jurisdictions, which addresses the concerns of the minority in *Patel*, while also respecting the approach of the majority. Chapter 7 contributed to the literature by providing a quasi-flexible approach governed by the principles of consistency and proportionality. Both were supported in England and other common law jurisdictions. The quasi-flexible test provided that the consistency principle takes precedence over the proportionality, as it has support from all the justices of the Supreme Court in *Patel.* Proportionality found support, but only from the majority in *Patel*. The quasi-flexible test therefore restricted its use to specific circumstances, thereby addressing the concerns of the minority regarding uncertainty and lack of guidance. The quasi-flexible test provides a structured approach, providing a clear rule, governed by principle, but with the requisite flexibility to deal with the nuances of cases, thereby respecting the majority's position in *Patel.* In chapter 7, the quasi-flexible test was applied to a series of different scenarios alongside the pre-*Patel* and *Patel* tests to the illegality defence. This illustrated that the quasi-flexible test provides a clearer, more certain and structured approach, which provides more reasonable justification for the application of the illegality defence in whatever context it arises. Chapter 7 also noted the limitations of the quasi flexible test, providing also areas of future research.

8.3 Future Research

Future research should focus on identifying the relevant countervailing public policies which are likely to be taken into account in the different contexts in which the illegality

defence operates, such as contract, tort, trusts and unjust enrichment. This should be achieved by examining post-*Patel* case law on illegality as a pattern should emerge as to which countervailing policies are the most influential. This in turn will provide clearer guidance as to which countervailing policies should be taken into account by courts post-*Patel*. For example, in this thesis it was found that in cases concerning employment the claims are likely to centre around the breach of immigration laws, therefore the countervailing policies of protection from trafficking and forced labour, such as in *Hounga,* and protection of human rights and fundamental rights, such as right to a wage, are likely to be taken into account.

Future research should also examine in greater detail the proposals put forth by Sullivan which were discussed in chapter 6. Sullivan proposed that legislation should be brought so that any sum subject to statutory confiscation can be confiscated 'whenever a claimant making a restitutionary claim for that money is a joint principal or conspirator'.[52] This would involve extending the High Court's existing confiscatory and forfeiture powers that can currently only be invoked at hearings dedicated to such issues, so that 'a High Court could directly access these powers when disposing of a resititutionary claim'.[53] Enabling such reform would allow the courts to take into account the crime committed rather than completely disregarding it.[54] The presumption in favour of forfeiture and confiscation would be overridden where the 'claimants input

[52]Robert Sullivan 'Restitution or Confiscation/ Forfeiture? Private Rights versus Public Values' in Sarah Green and Alan Bogg (ed) *Illegality after Patel v Mirza* (Hart Publishing, 1st Edition, 2018) 83.
[53]R. Sullivan 'Restitution or Confiscation/ Forfeiture?'(n 52) 83.
[54]ibid.

was rendered under duress'[55] or where the claimant has been exploited, which is already a consideration in the law that is to say under the 'not *in pari delicto* doctrine'. Further research should be conducted on Sullivan's proposals and how they should be implemented.

8.4 Conclusion

In determining how the illegality defence should be approached, this thesis has examined both the rigid rule-based and the extensively flexible approaches, reaching the conclusion that a quasi-flexible approach which provides a middle ground is preferable. Such an approach provides greater clarity and more certain rules governed by principle. The thesis emphasises that, rather than continuing to put strain on the law by constantly warring between the two conflicting approaches of rule versus flexibility, the law should consider taking the middle ground and uphold the principles which both sides consider as important in determining the application of the illegality defence. This thesis identified the most influential principles at work in the law of illegality. It recast them into rule form. The most important and influential principle is that of consistency in the law. Greater predictability and certainty in rules is achieved by restricting the operation of the proportionality principle. A quasi-flexible approach therefore, contributes to the literature on illegality by providing a middle ground which is distinct from, but draws upon, the two predominant approaches towards the illegality defence which have thus far been adopted in the law of illegality.

[55]R. Sullivan 'Restitution or Confiscation/ Forfeiture?' (n 52) 72.

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