



Illegality as a defence to a civil claim (Patel v Mirza)

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Ex turpi causa is a legal doctrine which prevents a claimant from pursuing a civil claim if the claim arises in connection with some illegal act on the part of the claimant. It is often referred to as the illegality doctrine or the illegality defence.

The application of this doctrine has caused a great deal of uncertainty, complexity and sometimes inconsistency. In its recent decision in *Patel v Mirza* [2016] UKSC 42 (*Patel*), the Supreme Court has restated the law on illegality as a defence, overruled the test approved by the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340 (*Tinsley*), and held instead that a claimant will be prevented from bringing a claim if it would be harmful to the integrity of the legal system.

Facts

Mr Patel gave Mr Mirza £620,000 to place bets on a bank's share prices with the benefit of insider information. The inside information did not materialise and the intended betting did not take place. Mr Patel sought return of the monies. Mr Mirza refused.

Mr Patel issued a claim against Mr Mirza. Mr Mirza contended that the claim should fail because of the illegality of the arrangement with Mr Patel. The Court of Appeal dismissed Mr Mirza's contention and ordered Mr Mirza to repay the money. Mr Mirza appealed to the Supreme Court. Did the fundamental illegal nature of the agreement between the parties bar the claim?

Decision

The Supreme Court unanimously dismissed Mr Mirza's appeal.

Notwithstanding the long established maxim that "*no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act*" (per Lord Mansfield, *Holman v Johnson* (1775) 1 Cowp 341, 343), the Supreme Court held that a person who satisfies the ordinary requirements of a claim in unjust enrichment will not *prima facie* be prevented from recovering money paid because the consideration which has failed was unlawful.

Reasoning

The Supreme Court considered whether it would be disproportionate to refuse relief to which Mr Patel would otherwise be entitled (had the agreement not been tainted by illegality), as a matter of public policy. In doing so, the Supreme Court identified various (non-prescriptive or definitive) factors that may be relevant to a court's

assessment, including:

- the seriousness of the conduct;
- its centrality to the contract;
- whether it was intentional; and
- whether there was marked disparity in the parties respective culpability.

In assessing these factors, the Supreme Court confirmed that the relevant issue is "*not whether the contract should be regarded as tainted by illegality, but whether the relief claimed should be granted*". The reliance test, as laid down in *Tinsley*, (that a claimant cannot rely on his own illegal conduct to establish a claim (save in limited circumstances)), should no longer be followed.

The court must assess whether the public interest would be harmed by allowing the defence to be advanced. An assessment of the public interest requires the court to consider:

- (a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by a denial of the claim;
- (b) any other relevant public policy on which the denial of a claim may have an impact; and
- (c) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts (applying the factors identified above).

The Supreme Court held that there was no logical basis why public policy should require Mr Patel to forfeit the monies which he paid Mr Mirza, and which were never used for the purpose for which they were paid. Such a result would "*not be a just and proportionate response to the illegality*".

Importance of the decision to banks

Banks providing banking services to corporate and commercial customers in particular, often face bold claims from customers or third parties who have been involved in illegal activity, not least where the bank has taken resulting steps to freeze an account. Criminal incidences of fraud, money-laundering and misappropriation of funds by corporate customers, directors, or third parties (with whom the customer is complicit), regularly result in disputes with banks.

For example, a bank might be unwittingly exposed to the unscrupulous conduct of a customer's directors, leading to the misuse or misappropriation of funds from an account. Increasingly, corporate customers sue their bank for negligence for failing to prevent such losses, despite the losses being caused by the illegal actions of the company representatives. The illegality defence may be of particular importance in defending such claims. Whilst the defence will still be available, its potency will depend upon whether it is regarded as a proportionate response to the illegality on the particular facts of each case.

Future of the Illegality Defence

- Despite finding that the illegality in this case did not afford Mr Mirza a defence of *ex turpi causa*, the Supreme Court restated the essential rationale of the illegality doctrine - whether 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. The defence is still available in *just and proportionate* circumstances.
- Within the framework of factors identified by the Supreme Court, the common law principles remain applicable - the intervention of Parliament to legislate in this area remains unlikely. The courts will continue to look to common law and there is likely to remain a degree of uncertainty and complexity in future cases whilst the courts interpret the *Patel* judgment. Each case will, it appears, turn on its facts.
- The case serves as an illustration that the courts are perhaps moving towards a more "just" set of principles, to ensure justice is seen to be done, despite the fact this may appear to condone illegal conduct; indeed, the Supreme Court concluded: "*the public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.*"