# Maintaining Integrity in Illegality:

Comparing the Use of Discretion in Granting Relief for Contracts Tainted by Illegality in the United Kingdom and New Zealand

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# Table of Contents


Introduction: 4

Chapter I: Background Context 7

I: What is The Illegality Doctrine? 7

II: Rationales behind Illegality 8

A: Integrity of the Legal System 8

B: Maintain Internal Consistency within the Law 9

C: Deterrence and Punishment 10

III: Conclusion 11

Chapter II: Judicial Background 12

I: The Public Conscience Test 12

II: The Reliance Test 12

III: The Trio of Confused Cases: *Jetivia, Les Laboratoires and Hounga* 13

Chapter III: The Range of Factors Approach in *Patel v Mirza* 15

I: The Facts 15

II: The Range of Factors Approach 15

Chapter IV: Strengths of a Discretionary Approach 17

I: Harsh Rules Create Arbitrary Results in the Illegality Context 17

II: Discretion Occurs Covertly 18

III: Society has Changed since Illegality's Inception 22

IV: Public Policy is a Valid Test in Other Legal Contexts, Why Not Illegality? 23

V: Discretion will Allow Issues on the Edges of Illegality to be Better Assessed 24

VII: Discretion is Now the Norm 25

Chapter V: Problems with *Patel* 28

I: Discretion Properly Defined 28

II: The Language of the Test is Too Vague 28

III: Why is the Range of Factors Superior? 30

IV: How is the Trio of Considerations to Apply? 31

V: Subsequent Case Law 32

VI: Certainty is Sacrificed Too Much 35

Chapter VI: New Zealand 38

I: NZ vs *Patel* 38

II: “Any Other Matter the Courts thinks Proper” 41
III: Statute vs Common Law Problems 42
IV: Room for Error: Problems with NZ 43
Chapter VII: Reform 45
Conclusion 48
Bibliography 50
Appendices 55

# Introduction:

The doctrine of illegality is one that has plagued the minds of legal scholars since Lord Mansfield CJ first uttered the words "ex dolo malo non oritur action" in 1775.[1] With these words he ushered in over two centuries of case law, attempting to determine both the effect and extent of this maxim.[2] The doctrine itself represents the broad public policy that no court will aid a person who founds their cause of action upon an immoral or illegal act.[3] This sounds simple in theory, however application in practice has been arduous.

Many illegality cases involve illegal contracts. Despite New Zealand's colonial legal history, the approach taken to relief for illegal contracts has been very different in the United Kingdom and NZ, with the former being developed by the common law and the latter being dominated by statute. This dissertation will analyse these different approaches, their merits, and their pitfalls.

Traditionally, when a contract was tainted by illegality the general position was that the so-called contract was void.[4] This approach was based on public policy; to allow the contract to stand would invite disregard for the law or allow public policy interests to be contravened.[5] However, this approach was strict and was not fit to apply across every situation of illegality. Where the illegality is minor and there is no harm to the public interest, it may be unreasonable and indeed undesirable to offer no relief. This is especially where one party will be disproportionately affected by the illegality.[6] Thus, the development of both the common law and statute has seen a general trend towards allowing an element of discretion in this realm. The NZ Illegal Contracts Act 1970 was introduced under the premise that although some illegal contracts should not be enforceable in law, there are situations wherein it is just and proper to give legal effect to such agreements. However, there has never been consensus on the correct approach to illegality. This disagreement has resulted in case law in this realm being couched in uncertainty, complexity and sometimes inconsistency.[7] The illegality doctrine can apply across a multitude of civil claims such as property, tort, or unjust enrichment and in a wide

[1] *Holman v Johnson* (1775) 1 Cowp 341.
[2] *Patel v Mirza,* [2016] UKSC 42 at [1] per Lord Toulson.
[3] *Holman v Johnson*, above n 1, at 342 per Lord Mansfield.
[4] John Burrows, Jeremy Finn and Matthew Barber, *Burrows Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington 2018) at 325.
[5] At 467.
[6] At 467.
[7] *Patel v Mirza*, above n 2, at [3].

variety of circumstances. Attempting to apply a strict rule across all of these situations has only exacerbated the inconsistency, as judges created unprincipled exceptions in order to avoid manifestly unjust results.

In 2016, the Supreme Court of the United Kingdom attempted to remedy this, and provide clarity as to how the doctrine should apply in the landmark decision of *Patel v Mirza.* Prior to this, the traditional approach to illegality was the reliance principle, as applied in *Tinsley v Milligan*.[8] The theoretical underpinnings to these contrasting approaches can broadly be described by one simple dictum; there has been a lasting conflict in the law of illegality between those who advocate for a flexible, discretionary approach, and those who support a rule-based approach. This paper will critically evaluate both of these approaches and whether the debate persists today. The structure of this paper is as follows:

Chapter I focuses on the theoretical background to illegality as well as its rationales, in particular the need to uphold the integrity of the legal system.

Chapter II analyses early conceptualisations of both rule and discretion based approaches, and the judicial development that led to the revolutionary range of factors approach introduced in *Patel v Mirza.*

Chapter III outlines the range of factors approach.

Chapter IV analyses why the common law has converged into favouring a discretionary approach and argues that this is a positive trend. This section thus outlines the benefits of using a discretionary approach such as that employed in the United Kingdom and New Zealand. Despite this convergence, there are differences in how the courts exercise their discretion in these respective jurisdictions.

Chapter V will critique the use of discretion in *Patel* and outline its weaknesses.

[8] *Tinsley v Milligan* [1994] 1 AC 340.

Chapter VI will compare *Patel* to the approach in NZ, ultimately concluding that although the discretion in NZ is wide, it offers greater guidance than that purported by *Patel.* Despite this, there is still room for error.

Chapter VII will outline possible reform, concluding that both the UK and NZ approaches will benefit greatly from greater specificity being added to the exercise of discretion.

# Chapter I: Background Context

## I. *What is the Illegality Doctrine?*

Mansfield CJ's original proclamation still remains one of the soundest illustrations of illegality today.[9]

> If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis.

However, applying this dictum in practice has been incredibly difficult. As Gloster LJ put it "it is almost impossible to ascertain or articulate principled rules from the authorities."[10] Historically judges tended to speak in very general terms, which made understanding the relevant principles challenging. For instance, it was commonplace for courts to refuse to give effect to certain contracts, some of which were classed as illegal and some as void, however the distinction between the two was often not explained.[11] Moreover, because of the age of the doctrine, many of the leading decisions date back to the 18th century, an era before Parliamentary intervention was commonplace.[12] The judges of the period focused on public policy, emphasising that they would not tolerate any contract which was injurious to society.[13] However what constitutes as injurious to society is impossible to define. Moreover, views of morality vary between individual judges; what is injurious in one's opinion, may not be in the eyes of another and the outcome therefore may have depended on the judge of the day, in their attempt to achieve substantial justice.

Lord Mansfield once stated that "the most desirable object in all judicial determinations, especially in mercantile ones…is to do substantial justice."[14] Interestingly however, his maxim in *Holman v Johnson* is not concerned with achieving such justice and he explicitly acknowledged the potential unjust state of affairs this would bring; "the doctrine is founded in

[9] *Holman v Johnson,* above n 1, at 343.
[10] *Patel v Mirza* [2014] EWCA Civ 1047 at [47], endorsed by Supreme Court, above n 2, at [15].
[11] Burrows, Finn and Todd, above n 4, at 470.
[12] At 470.
[13] R.A. Buckley *Illegality and Public Policy* (4th ed, Sweet and Maxwell, London, 2017) at 95.
[14] *Alderson v Temple* (1768) 4 Burr 2235, at 2239.

general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident."[15] The fact that the illegality defence can operate with unreasonable and disproportionate harshness has long been recognised by the courts.[16] Thus, having created a rule whose goal is perfectly rational but whose consequences could be unjust and arbitrary, the courts responded by devising a multitude of exceptions for cases wherein the result that would be generated by applying Mansfield's proclamation seemed somehow inherently wrong. Alternatively, the courts would avoid unnecessarily harsh outcomes by warping the application of the rules to the particular facts so that justice could be done in the particular case.[17] This enabled them to achieve substantial justice (as they perceived it to be). However this was in exchange for a large degree of inconsistency and unpredictability.[18] Thus we are left with a confusing doctrine, inconsistent application, and ultimately judicial anarchy in this realm.

## *II. Rationales behind Illegality:*

With the state of illegality being in such turmoil, one might wonder why the doctrine exists. Nonetheless, its survival over 2 centuries is a testament to its necessity. Scholars and judges alike have put forward various rationales as to the doctrine's public policy underpinnings, the most prominent of which are outlined below.

### *A. Integrity of the Legal System:*

Protecting the integrity of the legal system is fundamental to the illegality doctrine.[19] However, this has been interpreted in various ways. Historically, it was believed to be an afront to the public conscience if judges allowed illegal claims. Courts were not there to provide an arena in which wrongdoers could fight over their spoils.[20] This notion had more traction when the law was more infused with religious values. As there was a moral undertone to the law, judges were perceived as somewhat guardians of morality; allowing illegal claims would not fit this agenda. Judges therefore were to be spared from any involvement in wrongdoing.[21] However, this is idealistic and impractical. There are exceptions to illegality which may entitle a

[15] *Holman v Johnson*, above n 1, at 343.
[16] *Tinsley v Milligan*, above in 8, at 79 per Lord Goff. See also *Patel v Mirza,* above n 2, at [23] per Lord Toulson.
[17] *Patel v Mirza*, above n 2, at [23] per Lord Toulson.
[18] Lord Sumption *"*Reflections on the Law of Illegality" (2012) 20 RLR 1 at 5.
[19] Andrew Warnock QC and Maurice Rifat *Illegality: An Overview by Maurice Rifat* (online ed, 1 Chancery Lane).
[20] *Evervet v Williams* (1725) reported at (1893) 9 Law Quarterly Review 197.
[21] *Patel v Mirza*, above n 2, at [230] per Lord Sumption.

wrongdoer to base a claim on an illegal act.[22] There are statutory schemes of apportionment which may require liability for illegal acts to be distributed among wrongdoers.[23] The judicial role to abstain from looking into illegality has therefore never been unqualified. As Bingham LJ observed in *Saunders v Edwards,* the law must;[24]

"steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct."

This proposition illustrates the moral and conceptual difficulties inherent in illegality; as the administrators of the law, judges are not exempt from engaging in these. Indeed, it is they who steer the middle course. Therefore, a modern interpretation is that to protect the integrity of the legal system is to preserve the seamless coherence of all its strands. This relates to the below rationale; the law shall be consistent and certain.[25]

*B. Maintain Internal Consistency within the Law:*

The law aspires to be a unified institution; its internal coherence requires that tort, contract and criminal law act in harmony.[26] If claims founded on illegality were allowed, the law would be somewhat self-defeating, by prohibiting an act in one context whilst simultaneously allowing it in another.[27] As Lord Hughes put it "the law…cannot give with one hand what it takes away with another, nor condone when facing right what it condemns when facing left."[28] Allied to this is the no profit principle; the Courts should not "recognise a benefit accruing to a criminal from his crime."[29] Moreover, disallowing the claim may further the purpose of the rule which

[22] *Patel v Mirza*, above n 2, at [228] per Lord Sumption.
[23] See for example Law Reform Act 1983, s 17.
[24] *Saunders v Edwards* [1987] 1 WLR 1116 at 1134.
[25] Andrew Warnock QC and Maurice Rifat, above n 19.
[26] *Hall v Herbert* [1993] 2 SCR 159 at [176] per McLachlin J. See also *Patel v Mirza*, above n 2, at [230] per Lord Sumption.
[27] *Patel v Mirza,* above n 2, at [99] per Lord Toulson.
[28] *Hounga v Allen* [2014] 1 WLR 2889 at [55]. A dissenting judgement, but not on this point.
[29] *Beresford v Royal Insurance Company* Ltd [1938] AC 586 at 599 per Lord Atkin.

has been infringed. If the sale of handguns is illegal, it furthers the purpose of gun control to prevent a seller from suing for the contract price.[30]

The law being consistent also relates to rule of law considerations as certainty ensures law abiders are fully aware of their rights and obligations. This relates to practicality; greater certainty within the law lessens the demand on the services of the courts. Thus, there is great public interest in ensuring certainty, both for the rule of law, and the administration of justice.

*C. Deterrence and Punishment:*

These rationales state that illegal conduct should be deterred and punished. However, this is controversial because it is for the criminal law, not the civil law to penalise a party to an illegal contract.[31] Insofar as the civil law is fashioned by judges in a particular case, their job is simply to ensure that it is not inconsistent with the criminal law.[32] Rifat therefore cites issue with these rationales. He believes that opportunistic tortfeasors are able to evade liability by "trawling through their opponents affairs to find some illegal behaviour; this is encouraged by over-eager judges who refuse assistance at the first indication of unlawfulness."[33] Punishment being left in the criminal realm was also supported by the UK Law Commission.[34]

Deterrence is also difficult because it assumes that people are aware of the doctrine, how it operates, and will adjust their behaviour accordingly.[35] This is unlikely to be true due to illegality's complex nature.[36] Courts have attempted to deter illegal behaviour in specific contexts. For instance, the UK Court of Appeal has attempted to send a message to builders that they will be unable to enforce payment if they provide false estimates of work, thereby discouraging insurance fraud.[37] However as a whole, the doctrine could actually work to encourage illegal behaviour, as a potential defendant will want to deter a potential plaintiff

[30] Law Commission of England and Wales, Consultative Report on the Illegality Defence, (LLCP 189, 2009) at 1.9.
[31] *Patel v Mirza,* above n 2, at [184] per Lord Neuberger.
[32] At [184] per Lord Neuberger.
[33] Andrew Warnock QC and Maurice Rifat, above n 19.
[34] Law Commission of England and Wales, above n 30, at 2.5- 2.31.
[35] Graham Virgo "Illegality's Role in the Law of Torts" in Matthew Dyson (ed) Unravelling Tort and Crime (Cambridge University Press, Cambridge 2014) at 187.
[36] At 187.
[37] *Taylor v Bhail* [1996] CLC 377.

from bringing a claim against him, and thus seek to defeat such a claim with the illegality doctrine.[38]

### *III. Conclusion*

The illegality doctrine has had a tumultuous history. Beginning as a strict dictum that was known to produce harsh results, judges engaged in legal manoeuvring in their attempt to reach desirable judicial outcomes. However, laws do not exist in a vacuum and this use of judicial entrepreneurship resulted in a doctrine plagued by inconsistency and unpredictability. This ignited a long-lasting debate as to how the doctrine should be tackled. The theoretical underpinnings of the doctrine establish the context in which illegality exists. This enables a critical evaluation of the contrasting approaches, and how effectively they achieve these aims. Traditionally, there were two fundamental schools of thought in relation to illegality, namely the rule-based approach, and the judicial discretion approach.[39] I turn now to analyse early conceptualisations of these approaches, and the development that led to the decision in *Patel.*

[38] Graham Virgo, above n 35, at 187.
[39] Graham Virgo QC Jones Day Professorship of Commercial Law Lecture 2019: "The State of Illegality" (2019) 31 SAcLK 747 at [1].

## Chapter II: Judicial Background

### *I. The Public Conscience Test:*

The public conscience test is an early example of a discretionary approach. *Euro-Diam Ltd* held that the illegality defence was to apply when it would be affront to the public conscience to allow the claim.[40] This test confers an unprincipled judicial discretion; what constitutes an affront to the public conscience is impossible to define. Moreover, it will inevitably change over time as societal expectations change and therefore outcomes may depend on how socially aware the judge of the day is. Lord Goff therefore rejected the test as it required the courts to "weigh, or balance, the adverse consequences of respectively granting or refusing relief".[41] In his view, this was "little different, if at all, from stating that the court has a discretion whether to grant or refuse relief" which is difficult to reconcile with the original principle of policy stated by Lord Mansfield in *Holman v Johnson*.[42]

### *II. The Reliance Test:*

The reliance test is arguably the epitome of the rule-based approach.[43] This states that "a party to an illegality can recover by virtue of a legal or equitable property interest, only if he can establish his title without relying on his own illegality."[44] Professor Burrows has outlined what he described as his single reliance master rule;[45]

> "If the formation, purpose or performance of a contract involves conduct that is illegal (such as a crime) or contrary to public policy (such as a restraint of trade), a party cannot enforce the contract if it has to rely on that conduct to establish its claim."

While this test purported to offer clarity, in practice it resulted in unprincipled exceptions to avoid unduly harsh outcomes.[46] The test has been applied inconsistently; the House of Lords appeared to dismiss it in *Gray v Thames Trains*[47], and then subsequently apply it in *Stone & Rolls v Moore Stephens*.[48] Moreover, it often turned on procedural issues. The fact that the claimant can formulate their claim without relying on their illegal act, does not mean that their

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[40] *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 (CA) at 35.
[41] *Tinsley v Milligan*, above n 8, at 71a per Lord Goff.
[42] At 75f per Lord Goff.
[43] *Jetivia SA and another v Bilta (UK) in liquidation and others* [2015] UKSC 23 at [62] per Lord Sumption.
[44] *Tinsley v Milligan*, above n 8, at 375 per Lord Brown-Wilkinson.
[45] Andrew Burrows *Restatement of the English Law of Contract* (Oxford University Press, Oxford, 2016) at 224.
[46] Matthew Chan "Finding Principle in Illegality: Reflections on Tinsley v Milligan" (2015) 4 Oxford University Undergraduate Law Journal 13 at 19. See also *Patel v Mirza,* above n 2, at [23] per Lord Toulson.
[47] *Gray v Thames Trains and others* [2009] UKHL 33 at [30].
[48] *Moore Stephens (a firm) v Stone Rolls Limited (in liquidation)* [2009] UKHL 39.

claim is not founded on it.[49] This was evident in *Tinsley v Milligan.* Miss Tinsley and Miss Milligan each contributed to the purchase of a home. It was vested in Tinsley's sole name, to enable Milligan to make false benefit claims, but with the mutual understanding that they were joint beneficial owners.[50] The parties fell out; Milligan sought to assert her proprietary interest. Her claim to any interest depended on the dishonest deal. The lucky fact that the presumption of resulting trust enabled Milligan to avoid pleading the dishonest purpose should not be enough to defeat the illegality defence.[51] As Lord Browne-Wilkinson acknowledged "The effect of illegality is not substantive but procedural. The question therefore is, 'in what circumstances will equity refuse to enforce equitable rights which undoubtedly exist?'"[52] On a proper application of the reliance test, the minority was logically correct in *Tinsley.* However this outcome would have been arbitrary; only a slight change of facts would have altered the outcome, without altering any of the turpitude involved.

### *III. The Trio of Confused Cases: Jetivia, Les Laboratoires and Hounga*

The discord between judges who advocated for the rule-based approach, and those in favour of discretion is evident in the cases that led up to *Patel.* Although *Tinsley* rejected the public conscience test, it was unclear whether this meant there was no role for discretion, and if so, whether this was universal or depended on the context in which the claim was brought.[53] This scepticism was evident in *Jetivia.* Lord Sumption believed the illegality defence was based on a rule of law which the court was required to apply. He referred to *Les Laboratoires Servier v Apotex*[54] which confirmed that the defence's application was not "dependent upon a judicial value judgement about the balance of equities in each case."[55] But *Les Laboratoires* itself was not exempt from disagreement plaguing the judgment. The Court of Appeal's approach had largely followed the recommendations of the Law Commission, however the Supreme Court held that the considerations put forward could not possibly justify the result, despite the result being correct.[56] Lord Toulson disagreed, preferring the Court of Appeal's approach.[57]

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[49] Lord Sumption, above n 18, at 19.
[50] *Tinsley v Milligan*, above n 8, at 65e-f.
[51] Lord Sumption, above n 18, at 19.
[52] *Tinsley v Milligan*, above n 8, at 374.
[53] Matthew Chan, above n 46, at 15.
[54] *Les Laboratoires Servier and another v Apotex Inc and others,* [2014] UKSC 55.
[55] *Jetivia SA,* above n 43, at [62].
[56] *Patel v Mirza*, above n 2, at [80] per Lord Toulson. See also *Les Laboratoires*, above n 54, at [21] per Lord Sumption.
[57] *Les Laboratoires,* above n 54, at [62].

Moreover, in *Jetivia,* Lord Toulson and Lord Hord felt the defence was not based on a rigid application of the reliance test. They referred to Lord Wilson's judgement in *Hounga v Allen*[58], suggesting that it was necessary to evaluate the policy underpinning the defence in order to determine whether it should defeat the claim, appearing to advocate for an element of discretion.[59] Lord Wilson held it is necessary first, to determine the aspect of public policy which founds the defence, then whether there is another public policy which counters the application of the defence.[60] However, Lord Sumption distinguished *Hounga* as turning on its own context and involving no departure from *Tinsley*.[61]

These cases illustrate the confusion among the judiciary as to the correct approach to illegality. *Patel v Mirza* purported to alleviate this confusion. With the historical context established, I turn now to analyse the range of factors approach brought in by *Patel,* and both its successes and downfalls.

[58] *Hounga v Allen*, above n 28.
[59] *Jetivia SA,* above n 43*,* at [171].
[60] *Hounga v Allen*, above n 28, at [42].
[61] *Jetivia SA,* above n 43, at [14].

## Chapter III: The Range of Factors Approach in *Patel v Mirza:*

The debate regarding the illegality defence is not merely one of pro vs anti-discretion legal thinkers. It epitomises the familiar tension between the need for principle, clarity and certainty in the law, with the equally important desire to achieve a fair and reasonable result in each case.[62] This debate was in need of resolution when *Patel v Mirza* came before the Supreme Court in 2016. The facts are as follows.

### *I. The Facts*

Mr Patel transferred £62,000 to Mr Mirza with the intention that Mirza would trade in shares using insider information he expected to receive. This information never materialised, nor did the purchase of the shares. Patel brought a claim for unjust enrichment when Mirza refused to return the money.[63] As the money was paid under an illegal contract, Mirza sought to invoke the illegality defence. Neither party was completely innocent, but neither had the illegal purpose been brought to fruition.[64] The Court had to consider whether Mr Mirza should be entitled to retain Mr Patel's money. The Supreme Court unanimously found that Mr Patel was entitled to restitution. However, there was a stark split in approach between the majority of 6, led by Lord Toulson[65], and the minority of 3 comprised of Lord Sumption, Mance and Clarke, with the majority establishing the range of factors approach in an attempt to dispel confusion in this realm.

### *II. The Range of Factors Approach:*

Lord Toulson expressly rejected the reliance rule specifically, but also any rule-based approach as being unworkable. In its place, he set down the 'range of factors' which denotes a trio of considerations one must consider in determining whether relief should be granted when a claim is tainted by illegality. These are as follows.[66]

1) The purpose of the illegality in question; i.e. the purpose of the crime, or civil wrong, or infringement on public policy;

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[62] *Jetivia* SA, above n 43, at [13].
[63] *Patel v Mirza,* above n 2, at [11].
[64] Phillip Clifford and Robert Price *The defence of illegality: does crime ever pay?* (online ed, Thomson Reuters).
[65] His Judgment was agreed to by Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge. Lord Neuberger gave a separate judgement which ultimately agreed with Lord Toulson's approach, although favouring a starting rule of restitution.
[66] *Patel v Mirza,* above n 2, at [101]. See also his summary at [120].

2) Any conflicting relevant public policies which may be rendered ineffective by denial of the claim;
3) The need to avoid a disproportionate result. In deciding this final consideration he also purported a number of factors that may be relevant including:
    a. The seriousness of the illegal conduct
    b. Its centrality to the claim
    c. Whether the conduct was intentional
    d. Whether there was a marked disparity in the blameworthiness of the parties' conduct.

*Patel v Mirza* marks the latest statement in a common law trend of convergence favouring a flexible approach to illegality.[67] I move now to analyse the benefits of a discretionary approach and therefore why this is a positive trend; a discretionary approach is the best way forward.

[67] See for example *Hardy v Motor Insurers Buerau* [1964] 2 QB 745, 768; *ParkingEye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338, [2013] QB 840; *Hounga v Allen*, above n 28.

# Chapter IV: Strengths of a Discretionary Approach

As both the UK and NZ now employ discretionary approaches, they share many of the same benefits. This chapter outlines the benefits of these approaches in a general sense.

## *I. Harsh Rules Create Arbitrary Results in the Illegality Context*

Rules in the legal context are desirable. They offer certainty and ensure people are aware of their rights and obligations under the law. Because of this, rules have been developed across time throughout the common law, designed to reach just, fair results. This has not been so in the illegality arena. Judges' attempts to establish rules for matters involving illegality have been historically difficult and ambiguous. This is due to the limitless number of situations in which illegality can arise.[68] It can arise in different legal areas, including contract, tort, and restitution.[69] It can involve a wide variety of illegal behaviour, from parking tickets to murder. The conduct may be central to the claim, such as a contract for murder, or it may be merely a background fact. The consequences of the illegal act may be upon the parties to the wrongdoing, or an innocent third party. To grapple with these complexities, the past 240 years have seen various tests come in and out including public conscience[70], what the claimant bargained for[71], reliance[72], sufficient connection[73], causation[74], and general public policy.[75] It is clear none of these worked.

The most prominent attempt at a rule, the reliance rule, was arbitrary and resulted in judges creating exceptions on the day in order to avoid unjust outcomes. This did no service to certainty as the outcome depended on the willingness of the judge to engage in such judicial legislation, resulting in arbitrary results anyway. Moreover, the rule was not as straightforward as it seemed. For instance, in *Cross* the parties got into an altercation initiated by the claimant, who suffered a skull fracture as a result of the defendant hitting him with a baseball bat.[76] A court could reasonably interpret that the claimant had to 'rely' on the fact that the defendant

[68] Andrew Warnock QC and Maurice Rifat, above n 19.
[69] For examples see *Equiticorp Industries Group Ltd (In Statutory Management) v The Crown (Judgment No 47: Summary)* [1996] 3 NZLR 586 (contract and restitution) and *Leason v Attorney-General* [2014] 2 NZLR 224 (tort).
[70] *Euro-Diam Ltd v Bathurst*, above n 40, at 35B–C per Kerr LJ.
[71] *Murphy v Culhane* [1977] 1 QB 94 (CA) at 98E–H per Lord Denning MR.
[72] *Tinsley v Milligan*, above n 8, at 370C–D per Lord Browne-Wilkinson.
[73] *Cross v Kirkby* (2000) Times, 5 April (CA) at [76] per Beldam LJ.
[74] *Gray,* above n 47, at [29].
[75] *Hounga v Allen,* above n 28, at [42] per Lord Wilson.
[76] *Cross v Kirkby,* above n 73.

has assaulted him with a baseball bat and thus award him damages in accordance with ordinary tort principles.[77] However, a court could equally hold that this assault had been provoked by the claimant himself, and thus the claimant's cause of action had to 'rely' on his own illegal act, thus estopping him from obtaining relief. Reliance, is therefore not a strong enough principle on which to poise all illegality cases.

For that matter there is no single principle which could be up to this task. As outlined in Chapter I, the illegality defence's very existence is based on considerations of public policy. It is therefore inconceivable that courts should cling to a rigid test that only occasionally produces results which uphold that policy. This is especially considering that there is no single policy which underpins the illegality defence; rather there are a diverse range of considerations, which vary in different contexts.[78] If a single rigid test is unable to uphold a single public policy, how then would a single rigid test ever be able to uphold multiple public policies at once, in every given situation?[79] It is virtually impossible that there is a single principled rule that can apply across every diverse context in which illegality can arise, and still reach results which are acceptable as fair by society. A strict approach does "not advance the public policy which underlies Lord Mansfield's maxim once the underlying policy is properly understood."[80] At least some level of discretion is therefore not only necessary, but desirable in order to avoid unduly harsh outcomes that do not adequately align with the wrong involved. The importance of certainty in the legal context must not be understated, but the courts should not desire to apply a test that does not further desirable judicial aims, no matter how clear or certain it may be.[81]

### *II. Discretion Occurs Covertly*

As mentioned, although the reliance rule purported to offer certainty and clarity by applying a single principle across contexts, this was not so in practice. Judges would impute discretion into their decisions, under the guise of exceptions to the reliance rule.[82] The difficulty with these exceptions arises from the "legal manoeuvring that must take place to arrive at what is considered a just result."[83] Judges would redefine what illegality means in a given context, or

[77] Matthew Chan, above n 46, at 17.
[78] *Gray,* above n 47, at [30] per Lord Hoffmann.
[79] Matthew Chan, above n 46, at 24.
[80] *Patel v Mirza*, above n 2, at [9] per Lord Toulson.
[81] Matthew Chan, above n 46, 24.
[82] *Patel v Mirza,* above n 2, at [23] per Lord Toulson.
[83] *Still v Minister of National Revenue* (1997) 154 DLR (4th) 229 at [24].

conclude that a public policy underpinning illegality did not apply on the facts, or even that illegality did not apply at all, as it was trumped by some alternative doctrine.[84] In this way, judges could cloak their use of discretion behind the façade of applying a strict rule. However the result of this was even more confusion and inconsistency as on the face of it, judges were not using discretion and thus were not required to outline the policies behind how they exercised such discretion to arrive at the outcome. The law on illegality, and the general law, benefits from an open discussion of the policy considerations behind a decision as this guides how future decisions are to be made. In this way, it paradoxically can lead to greater clarity than if a single rigid test were applied.[85] It also ensures the reasoning is transparent, which allows criticism and evaluation to see if it actually does uphold the public policy it claims to.

An example of this is the pre-*Patel* decision of *R (Best) v Chief Land Registrar.*[86] The lower Court had found that a squatter could use his adverse possession of a residential property to claim title to the property even though his occupation was a criminal offence under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA). The Government appealed to the Court of Appeal. The Court considered the public policy behind the illegality defence, and weighed it against the public policy underlying the law of adverse possession.[87] The Court had explicit sensitivity to the LASPOA regime in order to evaluate the conflicting public policies openly, and come to a reasoned decision. Such an approach would have been precluded by a strict application of the reliance test, and thus an outcome may have existed which did not actually give effect to the public policies at play underneath the surface.

An example of how discretion can be used by stealth is in *Jetivia,* in Lord Sumption's explanation of *Hounga.* Lord Sumption conceded that there were exceptions to the reliance test, and in some cases "an examination of competing policies may be required, and that is where a competing public policy…requires the imposition of civil liability notwithstanding that the claim is founded on illegal acts."[88] Thus, in his view, *Hounga* was not a significant decision of public policy, and did not constitute a departure from the reliance rule, it was merely an exception.[89] However, unless all conflicting public policies are to automatically displace the

[84] Graham Virgo, above n 35, at 177.
[85] Matthew Chan, above n 46, at 24.
[86] *R (on the application of Best) v Chief Land Registrar,* [2015] EWCA Civ 17.
[87] At [67] and [70].
[88] *Jetivia*, above n 43, at [101].
[89] *Jetivia*, above n 43, at [102].

defence, the court must engage in an analysis in which the policies for and against the applicability of the defence are weighed. It is then a small step to hold that such considerations are generally to be considered in all cases of illegality, especially when it has not been explained *why* such an exercise was permitted in *Hounga,* but not in other cases.[90] The importance of *why* was emphasised in the Australian case of *Miller;* "it is important to identify not only what are the policy considerations that are engaged, and how they are engaged in the particular case, but also, and more fundamentally *why* policy considerations are engaged."[91]

Understanding why policy considerations are engaged helps mitigate against the risks of employing discretion in the first place. The risk of judicial entrepreneurship being used in law is a valid and genuine concern. Judges are human. No matter how impartial humans aspire to be, we will always have some level of bias. Thus there is an argument that judges are neither competent, nor constitutionally mandated to engage in an exercise of policy consideration.[92] Pointon argues that alongside the range of factors expounded by Lord Toulson is perhaps the most important factor of all; the judge.[93] Everyone possesses different views of culpability, morality, blameworthiness, responsibility, and seriousness of illegality. We all have notions of just how 'bad' an illegal act is. It is true that judges, more than anyone are likely able to ignore such predispositions but for Pointon, it is impossible for any judge short of a "Dworkinian Hercules" to do so completely.[94]

The facts of *Cross v Kirby* illustrate an example. A hunt saboteur started a fight with a huntsman and lost.[95] He sued for damages due to his injuries. It was held that the huntsman had not used excessive force in defending himself, but regardless the injuries were "inextricably linked" to the saboteurs illegal act of starting the fight.[96] Lord Sumption views this case as "illustrating the tendency of any test broader than the reliance test to denigrate into a question of instinctive judicial preference for one party over another."[97] However, McBride perceives the use of the illegality defence in the case as 'just' in the political sense, as the claimant could not fairly claim the benefit of the law's protections against those who harm

[90] Matthew Chan, above n 46, at 24.
[91] *Miller v Miller* (2011) 275 ALR 611 at [14].
[92] Andrew Burrows "A New Dawn for the Law of Illegality" in Sarah Green and Alan Bogg (eds) *Illegality after Patel v Mirza* (Hart Publishing, Oxford, 2018) 23 at 35.
[93] Nicholas Pointon *Illegality: a new mess for the old one?* (online ed, St John's Chambers) at 7.
[94] At 7.
[95] *Cross v Kirby,* above n 73, at [4].
[96] *Cross v Kirby*, above n 73, at [103] and [126].
[97] *Patel v Mirza,* above n 2, at [240] per Lord Sumption.

others, when he had clearly shown a lack of respect for these protections when he attacked the huntsmen, who eventually injured him.[98] The question comes down to how much confidence we instil in judges to exercise their discretion, free from prejudice.[99] This is a legitimate risk, but this is the very reason why the doctrine needs an openly discretionary approach. In the context of illegality, judges have been seen to exercise their discretion to generate what they perceive to be desirable results, yet they are doing so by stealth, which allows their true reasoning to go under the radar.[100] Moreover, this risk can be further mitigated through the use of well-established principles the decision-maker must follow in exercising their discretion. This is *essential* and as I will discuss in chapter V, this is a significant downfall of the specific discretion in *Patel.* But that is not to say that discretion cannot be done; it simply must be done properly.

The separation of powers is also significant here. Where discretion is employed to a large extent, the risk of judicial legislation appropriately causes concern. Our legal system fundamentally relies on the legislature to make the law as the democratically elected representatives of the people. Judges are not democratically elected and thus it would violate both the rule of law and the separation of powers if they engaged in such a role. However, for Burrows, this risk is overstated. He argues that the error here is in assuming that when judges balance policy concerns, they are acting as mini-legislators, which they are not.[101] The development of the common law significantly differs from the process of enacting legislation. The common law has checks and balances on what it can achieve in 'making law'. For instance, it develops slowly over time to adapt to the society in which it exists. This incremental development allows historic precedent to act as a restraint on what judges can do.[102] Moreover, as experienced lawyers, judges are the best equipped people to make long-term policy decisions. And if all else fails, our society is structured as such that the legislature can override any judicial decision it sees fit.[103] However the legislature can only make such an assessment if the reasoning of the judge is plain to see. This transparency is achieved through the use of structured discretion, rather than legal manoeuvring around a rule that is not fit for purpose.

[98] Nicholas McBride, "Not a Principle of Justice?" in Sarah Green and Alan Bogg (eds) *Illegality after Patel v Mirza* (Hart Publishing, Oxford, 2018) 85 at 103.
[99] Nicholas Pointon, above n 93, at 6.
[100] Caleb O'Fee "Patel v Mirza and the Future of the Illegality Doctrine in New Zealand" (LLB (Hons) Dissertation, Victoria University of Wellington, 2018) at 22.
[101] Andrew Burrows, above in 92, at 37.
[102] This is emphasised in John Gardner *Law as a Leap of Faith* (Oxford, Oxford University Press, 2012) at 37-42.
[103] Andrew Burrows, above n 92, at 37.

Again, the lack of sanctioned discretion therefore exacerbates these risks rather than mitigates them.

Burrows has stated that "the present rules are so unsatisfactory that we should welcome their being wiped away in favour of a flexible, balancing approach."[104] Pointon too conceded that arguably, the vesting of a discretion ought to be a last resort, only where it is not possible to tailor rules to all contexts and circumstances which could arise.[105] In the context of illegality, we have reached such a point. A strict test inevitably leads to discretion being implemented away from scrutiny. Although the concern of judicial legislation is valid, discretion by stealth exacerbates this risk by enabling discretion to occur without logical and structured principles guiding its use. An element of discretion in illegality is therefore desirable. But more than this, it is not only beneficial but *essential* for the law to engage in such discretion transparently as Lord Wilson did in *Hounga,* rather than covertly, if the integrity of the legal system is in fact to be upheld.

### *III. Society has Changed since Illegality's Inception*

In contemporary society, the original rationales underpinning illegality do not have as much force as they once did. This was touched on in Chapter I; it is no longer 'offensive' for judges to allow illegal claims, it is sometimes necessary and just. This illustrates the fact that notions of morality and justice have thankfully moved on since 1775. But more than this, our system of governance has also transformed since the doctrine was created. The society in which the doctrine was born was one that was far less regulated than the society we live in today. As McHugh J acknowledged in *Nelson,* "with the rapid expansion of Regulations, it is undeniable that the legal environment in which the doctrine of illegality operates has changed."[106] Kirby J concurred in *Fitzgerald;* "the substantial growth of legislative provisions affecting all aspects of the society in which contracts are made presents a legal environment quite different from that in which the doctrine of illegality was originally expressed."[107] In contemporary society, much of commercial life is governed by regulations which can easily be broken without wicked intent.[108] Today, the broad underlying policy of *Holman* remains relevant; the Court must not assist a breach of statue, or frustrate the operation of a statute. However the dictum that "no

[104] Andrew Burrows, above n 92, at 35.
[105] Nicholas Pointon, above n 93, at 7.
[106] *Nelson and Another v Nelson and Others* (1995) 143 ALR 133 at 611.
[107] *Fitzgerald v FJ Leonhardt Pty Ltd* [1997] 189 CLR 215 (H Ct of Aus) at 242 per Kirby J.
[108] *St John Shipping Corpn v Joseph Rank Ltd* [1957] 1 QB 267 at 690.

court will aid a man who founds his cause of action upon an immoral or illegal act" is far too simple, severe, and rigid to properly embody sound legal policy in the modern era.[109] In order to uphold the integrity of the legal system, the law must adapt to the society that it is intended to govern, even if it means abandoning rules which once dominated.

### *IV. Public Policy is a Valid Test in Other Legal Contexts, Why Not Illegality?*

Considerations of public policy are not exclusive to the doctrine of illegality. Indeed, they are employed across a wide range of contexts. The defence of disclosure being in the public interest is central to breach of confidence and the tort of privacy.[110] Birks argues that all restitution can in a sense broadly be called "policy-motivated."[111] Moreover, judicial review explicitly requires engagement with policy considerations in the evaluation of "proportionality" and *'Wednesbury* unreasonableness.'[112] Policy being acceptable in these arenas but not illegality makes the law incoherent and therefore disrupts the integrity of the legal system. Albeit, these areas of law are not immune to criticism. Stevens argues that policy considerations are unacceptable in the law of tort for the reason that "unelected judges lack the political competence" to engage with them.[113] However, as previously explained, the risk of judges undermining the democratic will of the people by engaging in such a role is in fact exacerbated by refusing to allow policy into the conversation at all, in difficult contexts such as illegality. This enables reasoning to be opaque and discretion to be used unprincipledly. Stevens himself admitted that his view is unconventional when compared to other tort lawyers.[114] His opinion highlights that policy considerations will never be without controversy. However, the best way to mitigate the risks associated with such a test is to ensure discretion is done properly and judiciously. If this is achieved, policy tests can potentially be far greater than a single rule, as is evident in the illegality context.

### *V. Discretion will Allow Issues on the Edges of Illegality to be Better Assessed:*

There are various situations wherein it is unclear whether or not the doctrine of illegality applies. For instance it is unclear to what extent the doctrine applies to a contract whose object or performance includes some aspect of unlawfulness, but not in a way that is central to the

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[109] Graham Sinclair *The effect of illegality since Patel v Mirza: A multi-national overview of developments in the law concerning defences alleging illegality* (online ed, East Anglican Chambers).
[110] Andrew Burrows, above n 92, at 36.
[111] Peter Birks *An Introduction to the Law of Restitution* (Oxford University Press, Oxford, 1959) at 294.
[112] Paul Craig "The Nature of Reasonableness Review" (2013) 66 Current Legal Problems 131 at 136.
[113] Robert Stevens *Torts and Rights* (Oxford University Press, Oxford, 2007) at 308.
[114] Andrew Burrows, above n 92, at 36.

contract.[115] The UK Law Commission has also acknowledged that the effect of unlawful performance on the parties' contractual rights is very uncertain.[116] The below two cases illustrate two contrasting approaches taken to the similar issue of overloading.

In *St John Shipping,* a cargo ship was overloaded, which constituted an offence by the master, for which he was fined £1,200.[117] The extra freight earned from the overloading was £2,295, therefore the ship owners were projected to profit from their wrong. The cargo owners refused to pay that proportion of the freight as it was based on an illegality. Delvin J rejected this on the basis that the goods had been returned safely.[118] If the ship owners were not entitled to payment, they would have suffered an additional penalty greater than was provided for by Parliament in the infringed statute, for conduct which may have been unintentional.

The Court took a different approach in *Ashmore.*[119] Manufacturers of heavy engineering equipment entered into a contract of carriage with road hauliers. The road haulers overloaded the vehicles, in breach of road traffic regulations. One of the lorries fell over due to driver negligence. The manufacturers transport manager was present when the goods were loaded and therefore was aware of the overloading. The Court held that because the manufactures participated in the illegal performance of the contract, they were unable to sue under it.[120] Here, the Court applied the strict rule of illegality; the Court will not lend its aid to a man who founds his action on an illegal act. However, this is a harsh result that does nothing to address the underlying policy rationales behind the statute, or Parliaments intention.

The difference in reasoning highlights the confusion surrounding the approach to contracts which do not have illegality at their core. Applying a strict rule will do nothing to alleviate this confusion, as it will prevent the ability for reasoned and sound precedents to be set down in establishing legal principles in this context. Applying a rigid test may also result in cases on the edge of illegality to be captured in illegality's net, despite this not actually achieving any of the doctrines aims. This may depend on the kindness of the judge on the day; in *St John Shipping* Delvin J used his discretion to reach a result which aligned with Parliaments purpose,

[115] *Patel v Mirza*, above n 2, at [5] per Lord Toulson.
[116] Law Commission of England and Wales, above n 30, at 3.27.
[117] *St John Shipping,* above n 108, at 685.
[118] *St John Shipping,* above n 108, at 693.
[119] *Ashmore, Benson, Pease and Co Ltd v Dawson* [1973] 1 WLR 828.
[120] *Ashmore,* above n 119, at 833.

whilst the judges in *Ashmore* clearly felt bound by the strict rule which dominated legal thinking at the time. This is yet another example of judges using discretion covertly to avoid harsh outcomes, this time in contexts in which the law is unclear as to whether illegality even applies. Allowing a discretionary approach forthright would enable cases such as these to be better assessed in light of public policy, thereby reaching a more accurate decision as to whether they come within the doctrine's ambit, thus helping alleviate confusion in this realm.

### *VI. Discretion is Now the Norm:*

For the above reasons, illegality has witnessed a widespread trend of convergence towards the use of discretion. With the reliance rule being the norm up until *Patel,* the UK was actually out of step with the approach taken in much of the world. A discretionary approach has been taken in various forms throughout most Commonwealth countries. *Tinsley* was almost immediately rejected by the Australian High Court the year after it was decided in the case of *Nelson v Nelson*.[121] McHugh J expounded that "the seriousness of the illegality must be judged by reference to the statute whose terms or policy it contravened. It cannot be assessed in a vacuum."[122] A rule based approach assesses illegality in a vacuum by failing to take into account extraneous factors such as the purpose of the law which was infringed upon. Australia has long recognised this fatal flaw of a strict rule. The policy approach was again affirmed in *Equuscorp* in which it was held that the outcome of a restitutionary claim for benefits received under an illegal contract will depend upon whether it would be unjust for the recipient to retain those benefits.[123] It was recognised that "there is no one size fits all answer to the question of recoverability" as justice cannot be done in every case via a single principle.[124] *Equuscorp* also confirmed the statement from *Miller,* that the central policy consideration to be upheld is the coherence of the law.[125]

The coherence of the law being the paramount concern echoes the Canadian approach in *Hall v Herbert*[126]. A strict rule has the potential to disrupt this sacrosanct principle by failing to take context into account. In *Hall v Herbert,* two friends spent an evening drinking and then drove a 1968 Potiac Firebird, which one of them owned. The car crashed and the passenger sustained

[121] *Nelson v Nelson,* above n 106.
[122] *Nelson v Nelson,* above n 106, at 192.
[123] *Equuscorp Pty Ltd v Haxton & ors* [2012] HCA 7.
[124] At [34] per French CJ, Crennan and Keifel JJ.
[125] At [34]. See also *Miller v Miller,* above n 91, at [15].
[126] *Hall v Herbert*, above n 26, at [5] per McLachlin J.

head injuries. He sued for civil damages. Using the reliance rule, he would not have been able to recover damages due to his involvement in the illegality; drunk driving. However, this would do nothing to achieve the aims of the doctrine as no one in this situation could be said to be "profiting" from their illegal act. As McLachlin J acknowledged, "as a general rule, the *ex turpi causa* principle will not operate in tort to deny damages for personal injury, since tort suits will generally be based on a claim for compensation, and will not seek damages as profit for illegal or immoral acts."[127] Allowing damages in this case did not upset the coherence of the law, as the law is not rewarding and condemning the same illegal behaviour. Employing discretion here allowed a just result as well as maintenance of the integrity of the legal system, which multiple jurisdictions agree is paramount.[128]

New Zealand was one of the first to implement a discretionary approach to illegality, albeit through statute rather than common law. The Illegal Contracts Act was introduced in 1970, and has since been subsumed into the Contract and Commercial Law Act 2017. While this only applies to illegal contracts, such contracts constitute the vast majority of illegality cases and thus the impact is significant. This statute renders illegal contracts unenforceable,[129] yet gives the Court a wide discretionary power to grant relief. [130] This statute will be analysed in Chapter VI but it is important to note here that NZ has long recognised a discretionary approach to illegal contracts, which aligns with both Australia and Canada, and the UK in the post-*Patel* era.

These jurisdictions reflect the trend of convergence towards discretion in the illegality realm. For the above reasons, I submit that the debate around illegality needs to be reconceptualised. The focus has been on discretion vs. rules, and which is better but this is a historical debate that is no longer the issue. From common law experience, there is unlikely to be a simple rule that can apply across every situation of illegality.[131] This is evident from the turbulent common law experience of attempting to apply such a rule.[132] Illegality is just too complex and wide a doctrine to have rigid tests govern its application. This is not necessarily a bad thing; discretion can be used to reach fair outcomes when used properly and appropriately. Indeed, enabling

[127] *Hall v Herbert,* above n 26, at [5] per McLachlin J.
[128] At [176] per McLachlin J; *Patel v Mirza,* above n 2, at [230] per Lord Sumption; *Miller,* above n 91, at [15].
[129] Contract and Commercial Law Act 2017, s 73.
[130] Section 76.
[131] Andrew Burrows, above n 92, at 24.
[132] See for example *Jetivia,* above n 43, *Les Laboratoires,* above n 54*, Hounga.*v Allen, above n 28.

discretion does not mean the pendulum swings into judicial entrepreneurship. Rather, instead of separating discretion and rules into a rigid dichotomy, the focus needs to be on how best to incorporate principled rules into a structured discretionary exercise. The two are not mutually exclusive. However, despite this trend of convergence, there are differences in how the courts exercise their discretion. Thus, the challenge becomes how to properly do discretion. With the benefits of a discretionary approach established, I turn now to outline the issues with the specific discretion in *Patel*, and why it fails at this hurdle.

# Chapter V: Problems with *Patel*

## *I. Discretion Properly Defined*

In order to outline why *Patel* is not a perfect use of discretion, an analysis of discretion itself is necessary. Virgo submits that discretion properly defined involves judges making a decision with reference to a set of clearly identified principles.[133] There must be a process to follow; it is not simply asking judges to determine what they believe the best outcome to be. Whilst discretion *can* lead to arbitrary choice if not done properly, merely assuming discretion to equate with arbitrary choice lacks a sophisticated understanding of what discretion truly is.[134] HLA Hart explains the fundamental difference between the two.[135] Discretion by nature is guided by rational principles. Hence, a decision which is not subject to principled justification via clearly established principles is not a discretion at all. Rather it is an arbitrary choice, and accordingly should be rejected as being contrary to the rule of law.[136] Therefore, judges are not prevented from engaging in discretion so long as that exercise can be justified with reference to recognised principles. This begs the question, what principles are sufficient to ensure the use of discretion meets this threshold?[137] And why does *Patel* fall short?

## *II. The Language of the Test is Too Vague*

For Burrow's, the test in *Patel* reaches this threshold. He argues that it is a structured discretion if applied in the three step order indicated by Lord Toulson.[138] On the surface, the *Patel* test does appear to be a structured approach, with a range of factors to consider in a particular order. However when the words are analysed closely, it is clear the language of the test is far too vague. The test asks the judge to do the impossible by weighing incommensurable factors against each other.[139] For Liron, this is akin to asking them to determine which is higher; 30 degrees or 30 metres?[140] Little guidance is offered as to how this exercise is to be done; the

[133] Graham Virgo '*Patel v Mirza*: One Step Forward and Two Steps Back' (2016) 22 *Trusts & Trustees* 1093 at 1095. See also Graham Virgo, above n 39, at [30].
[134] Graham Virgo, above n 39, at [5].
[135] HLA Hart "Discretion" written in 1956, published in (2013) 127 Harv L Rev 652.
[136] At 656-657.
[137] John Gardner "Ashworth on Principles" In Lucian Zedner and Julian Roberts (eds) Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth (Oxford University Press, Oxford, 2012) at 9.
[138] Andrew Burrows, above n 92, at 34.
[139] James Goudkamp "The Law of Illegality: Identifying the Issues" in Sarah Green and Alan Bogg *Illegality after Patel v Mirza* (Hart publishing, Oxford, 2018) at 47.
[140] Liron Shmilovits "When is illegality a defence to a tort?" (2021) 30 SLS 1 at 9.

principles offered are too vague themselves to be of any use. Because of this, Lord Mance describes the test as "highly unspecific" and "non-legal."[141]

For Virgo, the issue with the test is unpredictability. He suggests it is "so vague…it leaves open the possibility of judges resorting to arbitrary choice."[142] The test is comprised of 3 discretionary elements in pursuit of the abstract goal of 'the integrity of the legal system'. For Liron, it is difficult to imagine a less specific aspiration.[143] In this sense, the test cannot properly be called discretionary. "For how is it possible to identify in a principled way the policies which militate against or are in favour of awarding a remedy and determining whether the denial of relief is disproportionate?"[144] The Supreme Court of Singapore appears to agree, expressly rejecting Patel as "such a wide or broad application of the discretionary balancing process would not be principled."[145] Rather than asking judges to use a set of identifiable principles to reach a reasoned conclusion, the test requires them to simply make a judgement call, based on their assessment of what they believe the answer to be. It is difficult to imagine a more burdensome task. Because of the lack of principles to adhere to, Virgo argues the 3 considerations will collapse into one, which in practice will constitute a revival of the public conscience test.[146] Just as this test was unfit for purpose, so too is *Patel.* General public policy is far too wide and vague to serve as the basis upon which a person may be denied their legal rights.[147] For Hui, the discretion purported by the range of factors is not unfettered because it will always be controlled by the judge's knowledge of the law which he cannot eliminate.[148] I agree that judges will bring their exceptional knowledge to bear, but the test can only benefit from having such principles explicitly outlined rather than requiring judges to delve into the depths of their minds to determine what policies might apply.

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[141] *Patel v Mirza*, above n 2 at [206].
[142] Virgo, above n 39, at [30].
[143] Liron Shmilovits, above n 140, at 3.
[144] Virgo, above n 39, at [30].
[145] *Ochroid Trading ltd and another v Chua Siok Lui (trading as VIE Import and Export) and another* [2018] SGCA 5 at [119].
[146] Virgo, above n 39, at [30]. For a positive view of the revitalisation of the public conscience test see Nicholas Strauss "The Diminishing Power of the Defendant: Illegality after *Patel v Mirza*" (2016) 24 Restitution L. Rev. 145 at 156.
[147] Melanie Yu "Modern Day Illegality: Mance LJ and the Range of Factors Approach" (2019) 9 Southampton Student Law Review 41 at 46.
[148] Martin Hui "Triumph or tragedy? Hong Kong's approach on illegality defence in civil claims after *Patel v Mirza*" (2018) 24 *Trusts & Trustees* 813 at 820.

It is important to note that Lord Toulson perceived the integrity of the legal system, which he interpreted to mean consistency within the law, to be the ultimate question of the inquiry.[149] However, he then posits two guiding principles to guide application, the second being the coherency of the legal system.[150] The guiding principle cannot be the same as the test which it is supposed to guide.[151] This highlights how wide and general the approach truly is; it asks judges to assess general public policy to ensure coherence within the law, without any principles by which to do this. For Burrows, there are principles to adhere to, as evident under the proportionality element.[152] These include considering the seriousness of the conduct and disparity between the parties culpability.[153] However, as Goudkamp points on, *Patel* consisted of no justification as to why these should be considered.[154] It is true many of them are found in case law, but so are an almost infinite amount of rules and precedents that have been employed across illegality's life span. Moreover, the considerations are general in nature and are "entitled to no more weight than the judge chooses to give it in the particular case."[155] Unless a sufficient number of Dworkinian Hercules judges exists, such unfettered discretion may produce considerable uncertainty and unpredictability, which is exactly what the range of factors approach was designed to avoid.[156] As Lord Sumption stated, the new test simply replaced "a new mess for the old one."[157] But this does not need to be so; discretion can be employed in a principled way. It is simply that *Patel* does not reach this threshold.

### *III. Why is the Range of Factors Superior?*

Lord Toulson, with respect, focused his judgement on justifying why the range of factors is better than the reliance test.[158] However, as previously discussed, the debate does not need to be centred around a strict dichotomy between a single rule and an absolute discretion. A middle ground can be achieved. There are a range of differing tests evident in case law that were not mentioned. For instance, Lord Hoffman's causal test employed in *Gray* was not considered.[159] Nor was the Australian inquiry into whether granting redress would be inconsistent with the

[149] *Patel v Mirza*, above n 2, at [108-[109].
[150] *Patel v Mirza*, above n 2, at [99].
[151] Liron Shmilovits, above n 140, at 4.
[152] Andrew Burrows, above n 92, at 34.
[153] *Patel v Mirza*, above n 2, at [107] per Lord Toulson.
[154] James Goudkamp, above n 139, at 47.
[155] *Patel v Mirza*, above n 2, at [262] per Lord Sumption.
[156] Jennie Sehee Ham "The Law of Illegality and Trusts: A New Mess for the Old One" (2019) 9 Southampton Student Law Review 34 at 40.
[157] *Patel v Mirza*, above n 2, at [265] per Lord Sumption.
[158] James Goudkamp, above n 139, at 46.
[159] *Gray,* above n 47, at [27].

policy of the criminal law prohibition that the claimant has infringed.[160] This paper is not large enough to evaluate the credibility of all these tests against each other, but it is unclear why the Court in *Patel* did not engage in such an exercise when revolutionising the law, and purporting the range of factors to be preferable. The test can only be deemed superior once such an analysis has occurred. All the majority did was demonstrate why the range of factors approach is better than the reliance test, which is not the only alternative.[161]

### *IV. How is the Trio of Considerations to Apply?*

When revolutionising the law, it is important to make clear exactly *how* the new law is to apply. This is especially when the new law is a public policy doctrine, in order to avoid widespread judicial entrepreneurship and inconsistent application. However, with respect, exactly *how* the three step approach was to apply was unclear. Virgo provides a useful illustration which I now turn to.[162]

1. The first step is to consider the reasons behind the conduct being illegal. However no guidance was given as to how to ascertain this, or why it is relevant to the operation of the defence.

Moreover, Lord Kerr interpreted this step to mean the court must find "the reasons that a claimants conduct should operate to bar him or her from a remedy which would otherwise be available."[163] This is significantly different from analysing the purpose behind the illegality. Thus we are left wondering, what actually is the first step, how do we achieve it and why?

2. Next the policies which would be affected by denial of the claim must be considered. Again it is unclear what they policies could be, or how they might be identified. There is no process through which to ascertain such policies. Thus, we can assume the judge must simply find them via their own will and discretion.
3. The final step is to assess proportionality. Here, potential factors were provided to aid in the evaluation however this was not an exhaustive list.[164] But the analysis requires a quantitative assessment against some objective guide, with no such guide being provided.

[160] See for example *Nelson v Nelson,* above n 106; *Miller v Miller,* above n 91.
[161] James Goudkamp, above n 139, at 47.
[162] Virgo, above n 39, at [22].
[163] *Patel*, above n 2, at [124] per Lord Kerr.
[164] *Patel*, above n 2, at [107].

This again reinforces the vagueness of the approach and highlights that it is too unspecific to properly be called discretionary. Although on the face of it there appears to be a structured test, with principles to adhere to, when the language is closely analysed it is unclear how the steps are to be achieved.

Moreover, the test was not engaged on the facts of *Patel* in a meaningful way so as to serve as an example of how the approach was to be achieved. Whilst it was clear the defence did not operate to defeat the unjust enrichment claim, the majority did not identify reasons why insider trading was a crime, nor why this was important.[165] Further, no policy that would have been affected by denial of the claim was identified.[166] Moreover the third requirement of proportionality was not explicitly considered at all, raising uncertainty as to its role in the operation of the test.[167] Indeed, Lord Toulson simply endorsed the approach of Gloster LJ's in the Court of Appeal without engaging an analysis of the approach itself.[168] This is odd; he created the approach yet declined to explicitly employ it, thus there was no identifiable example of subsequent courts to follow.

I also note that Gloster LJ found it relevant that there was no finding that Mr Patel knew that insider dealing was illegal.[169] This would have been irrelevant in a criminal court, and Lord Sumption therefore struggles to see why it should be any more relevance in a civil court, especially considering the ultimate goal is to maintain consistency within the law.[170] This lack of clarity as to how the approach is to apply in practice risks inconsistent application, which poses a threat to the very principle identified as being sacrosanct; the integrity of the legal system.

### *V. Subsequent Case Law*

The inconsistencies in subsequent case law further highlight the issue of vagueness. *Stoffel* first applied the trio of considerations. The Court seemed to place less importance on proportionality, holding that it will not be necessary to consider in every case due to the sequential nature of the test.[171] *Henderson* further confirmed that the third limb of

[165] Virgo, above n 39, at [25].
[166] At [25].
[167] At [25].
[168] *Patel,* above n 2, at [115] per Lord Toulson.
[169] *Patel v Mirza,* [2014] EWCA Civ 1047 at [71] per Gloster LJ.
[170] *Patel,* above n 2, at [262] per Lord Sumption.
[171] *Stoffel & Co v Grondona* [2020] UKSC 42 at [26].

proportionality is not essential, and should be treated as a check rather than a rigid requirement in every case.[172] It is important to note that whilst Burrows acknowledged this may occur, he foresaw proportionality as almost always being engaged.[173] Indeed, he expected that although "in one sense the approach may be said to be structured…the vast majority of cases will get to stage (c)."[174] From this, one would assume that Burrows envisaged proportionality to be the paramount consideration as the policy considerations engaged in step (a) and (b) will rarely be enough to either stop, or allow, a claim. Due to the sequential nature of the test, the outcome would then almost always turn on proportionality, thus making it the central requirement. This expectation appears to be pivotal in Burrow's analysis that the approach can properly be called a structured discretion.[175] However these cases illustrate that this is not so, highlighting disagreement as to how the test works in practice. Furthermore, the Court in *Henderson* interpreted element (a) to include *any* policy reasons against the claim; the analysis is not confined merely to the specific purpose of the prohibition infringed upon.[176] For Liron, this illustrates an augmentation of the discretion already.[177]

Moreover, in *Patel* Lord Toulson provided 2 guiding principles, the first being preventing profiting from wrongdoing. He then immediately rejected this, as did the 5 member panel in *Stoffel* as being an unsatisfactory test.[178] As Lord Goff stated in *Spycatcher,* the no profit rule "does not of itself provide any sure guidance to the solution of a problem in any particular case."[179] The use of this test does not fully explain why claims are rejected, and can lead to judges focusing on preventing such a profit, rather than analysing whether allowing a claim would violate the integrity of the legal system.[180] It is therefore interesting that subsequently, the case of *Henderson* put "great weight" on this principle.[181] This again highlights inconsistency within the judiciary as to the importance of different policies. Historically ensuring an individual could not profit from their own wrong was of paramount importance, but both *Patel* and *Stoffel* held this was insufficient as a rationale. *Stoffel* therefore had no issue

[172] *Henderson v Doset Healthcare University NHS Foundation Trust* [2020] UKSC 43 at [123].
[173] Andrew Burrows, above n 92, 34.
[174] Andrew Burrows, above n 92, footnote 35.
[175] At 34.
[176] *Henderson*, above n 172, at [119] per Lord Hamblen.
[177] Liron, above n 140, at 3.
[178] *Patel v Mirza*, above n 2, at [100]-[101] per Lord Toulson; Stoffel, above n 171, at [46].
[179] *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 286.
[180] *Hall v Herbert,* above n 26, at [175]-[176].
[181] *Henderson,* above n 172, at [121].

in allowing the respondent to "get something" out of their fraudulent transaction.[182] *Henderson* nonetheless viewed it as being of substantial importance. I agree with the Court in *Henderson* that the no profit rule is a relevant policy consideration where it applies.[183] But there is no explanation as to why it was relevant in *Henderson,* but not *Stoffel.* Is it because the wrong in *Henderson* was perceived to be worse? If so, what is the criteria against which 'wrongs' are being assessed to determine their level of 'badness'? Or does it depend upon the judges interpretation of 'profit'? Or the type of relief sought?[184] It is true that judges will give different weight to different factors depending on their view of the case. However, the entire purpose of the range of factors approach was to eradicate the inconsistency surrounding illegality, and it has clearly failed in doing so. Because of the vagueness of the test, it appears that Pointon was correct; the most important factor after all, is the judge themselves.[185] *Patel* reach just outcomes. However the route it uses to get there is no better than the route it replaced in terms of uncertainty and inconsistency.

*Henderson* was useful in confirming the relevance of previous precedent in light of *Patel.* The Court applied the principle in *Gray,* which had been decided pre-*Patel,* concluding that a person cannot benefit by bringing damages to a claim where the cause of the loss was their own criminal act, on which the claimant relied.[186] The Court held the approach in *Gray* was compliant with *Patel.*[187] Although *Gray* did not consider issues of proportionality, this was held to be immaterial as the factual matrix did not give rise to these issues.[188] This is significant as although *Patel* changed the approach to illegality, this does not mean that in all future cases only *Patel* is to be applied.[189] Prior decisions are still valuable because the principles identified in *Patel* were established from the existing case law.[190] An example of this is in *Stoffel,* in which the reliance test was revived to the extent that it can still be a relevant consideration in determining whether the illegality is central to the claim, which in turn is used to assess proportionality.[191] Therefore, precedent should only be disregarded if it is clearly incompatible with the approach in *Patel,* or wrongly decided in light of *Patel's* reasoning. However, the

[182] *Stoffel*, above n 171, at [46].
[183] Henderson, above n 172, [119]-122].
[184] *Stoffel*, above n 171, at [45].
[185] Nicholas Pointon, above n 93, at 7.
[186] *Henderson,* above n 172, at [79]-[86].
[187] At [90].
[188] At [95].
[189] At [77].
[190] *Patel v Mirza,* above n 2, at [42], [99], [102]-[106] per Lord Toulson.
[191] Andrew Warnock QC and Maurice Rifat, above n 19.

vagueness of the range of factors approach means that the determination of whether past precedents continue to apply will be unprincipled, and the cycle continues. Moreover, many academics who supported *Patel* perceived it to "wipe the slate clean" of the existing rules.[192] This again shows the lack of clarity as to how the test ought to apply, and what principles and precedents ought to be brought to bear.

### *VI. Certainty is Sacrificed Too Much*

The trio of considerations aims to avoid inconsistency within the law, thereby maintaining the integrity of the legal system.[193] However the majority's treatment of certainty does not promote this vision. The greatest criticism of a flexible approach is that it sacrifices certainty, a fundamental pillar of the legal system. As explained, illegality is an area of law that is unable to have strict rules govern its application, and I acknowledge that this means certainty must be *somewhat* sacrificed. However the issue with Patel is that it *goes too far* in this respect.

The majority expressly acknowledged the lack of certainty the approach offers and in fact was unconcerned with it. This was because they perceived certainty in the law to not be as important when dealing with those contemplating unlawful activity.[194] As Lord Kerr put it certainty "is not a premium to which those engaged in disreputable conduct can claim automatic entitlement."[195] I disagree with this as it completely contradicts the standard approach to criminal law.[196] Arguably, certainty is even more important in situations of illegality as the stakes are higher, and the potential punishments are greater. Criminals are entitled to certainty in the law just as much as anyone else.[197] Moreover, the lack of certainty in illegality would affect not only those engaged in criminal behaviour, but also innocent third parties impacted by rights gained or lost under a contract. Innocent third parties are in a particularly strong position to expect certainty under the law.[198]

Thus this aspect of the range of factors approach falls short of achieving consistency within the law; it stands at odds with established notions of the importance of certainty in the criminal

[192] See for example Martin Hui, above n 148, at 819; Andrew Burrows "Illegality after *Patel v Mirza*" (2017) 70 Current Legal Problems 55 at 56.
[193] Andrew Burrows, above n 192, at 58.
[194] *Patel v Mirza*, above n 2, at [113] per Lord Toulson and [137] per Lord Kerr. Cf Lord Neuberger at [158] and Lord Sumption at [263].
[195] *Patel v Mirza*, above n 2, at [137].
[196] Andrew Burrows, above n 192, at 61.
[197] *Patel v Mirza*, above n 2, at [158].
[198] *Patel v Mirza*, above n 2, at [158] per Lord Neuberger.

context. This sacrifice of certainty completely undermines the goal of upholding the integrity of the law which *Patel* sought to achieve, making the test both contradictory and unprincipled. There will of course always be less certainty with a discretionary approach when compared to a rule. However, this can be mitigated through the use of clear principles guiding an exercise of discretion. *Patel* does not have such principles.[199] It is too vague, hence it swings the pendulum too far and risks venturing into the realm of arbitrary choice.

For Strauss, an exercise of discretion is only arbitrary if it cannot be reviewed.[200] The nature of discretion is such that judges will take different views. Often this fact is respected by judges of higher courts on appeal, "within the limits of reasonable disagreement."[201] Unless there is an identifiable error, an appellate court will only interfere where the trial decision was unreasonable.[202] Thus, where unprincipled discretion is used, appellant courts will be impacted greatly; there will be little principle against which to assess reasonability of the trial decision, as judges can choose to give weight to what they desire. Thus, decisions on illegality will largely be immune from appellate review.[203] *Patel* risks venturing into this dangerous territory due to the lack of identifiable guiding principles. The judge not only has the discretion to determine which weight factors ought to be given, but what factors *even apply*.[204] Atiyah expresses anxiety on this point; if all principle is to be abandoned and everything left to the discretion of a lone trial judge, the entire value of the case by case methodology of the common law will be lost.[205]

Confusion continues to plague illegality, despite the respite *Patel* purported to offer. Although the range of factors was intended to replace the old arbitrary rules, it is too vague an approach to achieve this, and thus results in arbitrary application itself. The lack of specificity did not elude the judges who advocated for the range of factors. Lord Neuberger admitted to disliking the test at first, but later conceded as it was "simply not possible to identify a more helpful or

[199] Virgo, above n 39, at [54].
[200] Nicholas Strauss, above n 146, at 156.
[201] *Jackson v Murray* [2015] UKSC 5; [2015] 2 All E.R 805 at [28].
[202] At [28].
[203] James Goudkamp "The end of an era? Illegality in private law in the Supreme Court" (2017) 133 LQR 14 at 17.
[204] Ting Ming Zee, "The Defence of Illegality Defended: Analysing Patel v Mirza in Light of Ochroid Trading Ltd v Chua Siok Lio" (2018) 13 Sing Comp L Review 26 at 30.
[205] Patrick Atiyah, "Common law and statute law" (1985) 48 *Mod. L. Rev.* 1 at 4.

rigorous test."[206] The Judges were not deluded, they were resigned.[207] Lord Toulson responded to criticisms of uncertainty by arguing that the existing approaches also yielded uncertainty.[208] While this is true, it does not mean that an equally uncertain test is better.[209] I submit a more rigorous discretionary test is possible, offering both flexibility and principality. With this in mind, I move to consider how NZ approaches the use of discretion in comparison to *Patel.*

[206] Patel, above n 2, at [175] per Lord Neuberger.
[207] Liron, above n 140, at 4.
[208] Patel, above n 2, at [113] per Lord Toulson.
[209] James Goudkamp, above n 203, at 16.

# Chapter VI: New Zealand

## *I. NZ vs Patel:*

NZ was one of the first to pioneer a flexible approach to illegal contracts, with the Illegal Contracts Act 1970. It is important to compare the approach to discretion in NZ with the approach taken in *Patel,* to determine if the UK can learn something from NZ, or if NZ's approach too needs amendment.

The relevant sections are now in the CCLA. As aforementioned, all illegal contracts are rendered void and unenforceable.[210] However, the court has a discretionary power to grant relief[211], so long as granting relief would not be contrary to the public interest.[212] Factors the court must consider include the conduct of the parties, the object of any enactment breached, and the gravity of the penalty imposed by that enactment, as well as any other matter the court thinks proper.[213] On the surface, this appears to be a very wide discretion and therefore akin to *Patel.* Indeed, in *Patel* Lord Toulson justified his wide discretion on the basis that flexible approaches have not raised issues in jurisdictions where they have been adopted.[214] However, Goudkamp argues that the approach in NZ is not as flexible as the approach in *Patel.*[215] In fact, Goudkamp states that no jurisdiction adopts an approach nearly as flexible to *Patel.*[216] First, the focus of the inquiry is slightly different in both. The starting point of the NZ statute is that the contract is illegal. The operation of discretion is therefore whether to nonetheless grant relief based on the circumstances of the case. In contrast, the inquiry in *Patel* is whether the defence of illegality should defeat the claim. Although slight, the difference in NZ is that illegality already does defeat the claim; the contract is illegal, but the court can nonetheless grant relief if the circumstances of the case require.

Moreover, the NZ statute denotes a set of criteria the court *must* consider in choosing whether to exercise their discretion. Each are mandatory. This differs to *Patel;* no factors are provided under the first two limbs, and the factors provided under the proportionality limb are done so

[210] Contract and Commercial Law Act, s 73.
[211] Section 76.
[212] Section 79.
[213] Section 78.
[214] *Patel v Mirza,* above n 2, at [113] per Lord Toulson.
[215] James Goudkamp, above n 203, at 16.
[216] At 16.

tentatively[217]; they are labelled *potentially* relevant factors, and it is unclear how they might apply.[218] What if the illegality is serious, but it is not central to the claim? Or what if it was deliberate, but trivial?[219] The proportionality requirement does not exist in the NZ statute, and Lim cautions against employing proportionality in private law due to its incommensurable nature.[220] The vagueness of the *Patel* criteria in deciding proportionality exacerbates this risk. Moreover, due to the statute making each consideration compulsory, under the NZ approach there is at the very least certainty that each factor will be considered in every case. The sequential nature of the *Patel* test means that proportionality may not be engaged, and therefore the potential factors beneath this limb may not be necessary. Indeed, the *Patel* test can theoretically stop after the first step.[221]

The NZ criteria is arguably narrower than *Patel,* which is essentially an evaluation of general public policy, and occasionally proportionality. For instance, the expansion of the discretion in *Henderson* shows that element a) of *Patel* has been interpreted to include *any* public policy the court thinks relevant. In NZ, the focus is instead on the public policy underpinning any enactment the illegal contract has breached. Thus, the public policy focus is narrower under the statute. Indeed, in NZ public policy appears to come into play in the analysis of *whether* a contract is illegal, rather than whether relief should be granted. The CCLA defines an illegal contract as a contract "governed by NZ law that is illegal at law or in equity, whether illegality arises from the creation or the performance of the contract."[222] This offers zero guidance as to *how* the courts are to determine this issue. Thus the method the courts have employed has largely been one of public policy. Indeed, in *Polymer,* Glazebrook J proclaimed "while clearly, under common law heads of legality, public policy issues drive the decision as to whether a contract is illegal, when deciding whether to grant relief *public policy can be a rather blunt instrument*."[223] Without adequate guiding principles, public policy is too wide and vague a basis on which the merits of a case are to be judged. Thus while it informs NZ decisions, it is not the sole focus.

[217] Ernest Lim and Francisco Urbina "Understanding Proportionality in the Illegality Defence" (2018) 136 Law Quarterly Review 1 at 15.
[218] *Pate v Mirzal,* above n 2, at [107].
[219] Ernest Lim and Francisco Urbina, above n 217, at 16.
[220] At 22.
[221] At 22.
[222] Contract and Commercial Law Act, s 71.
[223] *Polymer Developments Group Ltd v Tilialo* [2002] 3 NZLR 258 at [85].

Rather, NZ jurisprudence appears to show that the overriding consideration is whether the breach of statutory prohibition infringed the policy behind that prohibition.[224] The vast majority of cases in which relief is sought involve breaches of statute, thus there are often statutory indications as to the manner in which the discretion is to be exercised.[225] *Catley v Herbert* involved an illegal contract for financial assistance. The Court exercised their discretion to validate the contract because no creditor or shareholder had been prejudiced by the transaction and therefore the contract did not contravene the policy of the Companies Act.[226] In contrast, in *NZI Bank Ltd v Euronational*, a similar contract was not validated; the shareholders had not been informed of its existence and thus would have been prejudiced, violating the policy behind the statute.[227]

*Accident Compensation Corp v Curtis* also illustrates this focus on the relevant statutory policy. The case concerned whether compensation should be withheld under the Accident Compensation Scheme from a wrongdoing accident victim.[228] The Court reasoned that the statute's purpose was intended as a departure from the common law relating to illegality[229], and thus there would have to be a compelling reason to depart from the statutory objective of providing no-fault cover.[230] Accordingly, the statute precludes the use of the illegality defence in personal injury claims.[231] This demonstrates the importance NZ places on the connection between the purpose of the statute and the illegality defence.[232] Both the illegal contract provisions in the CCLA and the Accident Compensation Scheme appear to share the same policy rationale; whether denying relief would further the purpose of the relevant statute. This rationale further relates to the need for the law to consistent, which in turn upholds the integrity of the law.[233] Thus, the NZ approach is focused more on the purpose of the relevant statute, and maintaining the integrity of the law through this avenue, whilst *Patel* is focused on general public policy. Moreover, the list of factors in NZ is subordinate to the overarching requirement

[224] Tey Tsun Hang "Reforming Illegality in Private Law" (2009) 21 SAcLJ 218 at 238.
[225] Stephen Todd and Matthew Barber "Illegality under the Contract and Commercial Law Act 2017" in *The Laws of New Zealand* (LexisNexis, 2020) 221 at 227.
[226] *Catley v Herbert* [1988] 1 NZLR 606 at 616.
[227] *NZI Bank Ltd v Euronational Corp Ltd* [1992] 3 NZLR 528 at 548.
[228] *Accident Compensation Corp v Curtis* [1994] 2 NZLR 519.
[229] See Accident Compensation Act, s 317.
[230] *Accident Compensation Corp v Curtis*, above n 228, at 525.
[231] Caleb O'Fee, above n 100, at 12.
[232] Tey Tsun Hang, above n 224, at 238.
[233] At 239.

that granting discretion must be in the public interest. There is no such public interest requirement in *Patel.*

Australian authority takes a similar approach. The High Court of Australia has emphasised that for any consideration of public policy, the constitutional relationship between the unwritten common law and the statute in question is paramount.[234] The two sources of law are not separate or distinct and thus common law doctrines need to be developed sensitively to their interaction with legislation.[235] *Miller* emphasised that if a statute has been contravened, "it will be by reference to the relevant statute and identification of its purposes that any incongruity, controversy, or lack of coherence" in denying the claim will be found.[236] This describes the focus of the inquiry at a more specific level than *Patel,* as it is not merely "the integrity of the legal system", but rather the relationship between judge-made and statute law. It also focuses on statutory interpretation and construction, which is a consideration somewhat concealed in *Patel.*[237]

### *II. "Any Other Matter the Court thinks Proper"*

It is true that the NZ statute includes the general catch-all of "any other matter the court thinks proper", which is a wide discretion.[238] However, this type of catch all is practical in the context of illegality, wherein issues can arise in almost any context. This is not to contradict my earlier statements in which I consider *Patel* to be too wide; a catch-all such as this would still be useful in the range of factors approach, *provided* more clearly established principles are first implemented. Catch-all statements such as this are common in statute, as it is impossible for the legislature to predict every criteria that will arise in any given situation. Thus, in these instances it is more practical for the legislature to proceed in partnership with the judiciary.[239] However, the test itself cannot simply be a catch-all statement. The court cannot be asked to assess the merits of a case on "any matter it thinks proper" alone. The more principles are used to guide the exercise of discretion, the less likely the catch-all will need to be employed at all. Thus the use of "any other matters" statements can be useful and helpful, and do not necessarily

[234] The Hon William Gummow AC "Wither Now Illegality and Statute: An Australian Perspective" in Sarah Green and Alan Bogg (eds) *Illegality after Patel v Mirza* (Hart Publishing, Oxford, 2018) 293 at 297.
[235] *Commonwealth Bank of Australia v Barker* [2014] HCA 32, (2014) 253 CLR 169 at [17]-[18], [118]-[119].
[236] *Miller v Miller*, above n 91, at [74].
[237] The Hon William Gummow AC, above n 234, at 298.
[238] Dr G P Barton "Whither Contract?" (1981) 57 NZLJ 369 at 377.
[239] Patrick Atiyah, above n 205, at 5.

denote the risk of judicial anarchy. However, this is provided that any predictable considerations are already included in the test.

Moreover, in practice this catch-all provision has not been used radically in NZ. In *Polymer,* "any other matters" included the consideration that both parties were innocent[240], the fact that there was no misappropriation of funds[241], and the financial circumstances of the parties.[242] In *Merchant Finances* "any other matters" included the practical effects of granting relief, most notably the effect relief would have on both secured and unsecured creditors and innocent third parties.[243] These cases show the tendency of the NZ courts to engage this catch-all simply to take into account context. It has not been used as a weapon through which the courts can take into account whatever they desire. Indeed, the general opinion seems to be that despite the wide discretion conferred, the Act is largely heralded as a success.[244] Perhaps this is because "it merely gives legislative force to what less timorous members of the common law judiciary have been doing for some time."[245] The Act has not opened a floodgate of litigation.[246] In its first 15 years of existence, only 20 cases were decided under it.[247] Lim suggests that the range of factors approach in *Patel* is new and thus whether it will open a floodgate of litigation and uncertainty must be assessed empirically.[248] This may be true, however the subsequent case law following *Patel* has added to the confusion, rather than alleviating it. From the perspective of those engaged in these subsequent cases, attempting to determine the application of *Patel* has already been a lengthy and expensive exercise.[249] It would appear inefficient, and indeed illogical, to continue this process when a greater level of specificity could instead simply be added to the test.

### *III. Statute vs Common Law Powers:*

It is important to also note the source of the power to grant discretion. Commentators throughout history have claimed the common law has supreme efficiency due to the wisdom

[240] *Polymer,* above n 223, at [93].
[241] At [92].
[242] At [93].
[243] *Re AIC Merchant Finances Ltd* [1990] 2 NZLR 385 at 394 per Richardson J.
[244] D W McLauchlan "Contract and Commercial law Reform in New Zealand" (1984) 11 NZULR 36 at 40-41.
[245] Higgins and Fletcher *The Law of Partnership in Australia and New Zealand* (3rd ed, Law Book Co, Sydney, 1975) at 42.
[246] Tey Tsun Hang, above n 224, at 248.
[247] D W McLauchlan, above n 244, at 40-41.
[248] Ernest Lim "Ex Turpi Causa: Reformation not Revolution" (2017) 80 MLR 927 at 936.
[249] Charles Redmond "An Appeal to Illegality" (2020) 9 The Oxford University Undergraduate Law Journal 86 at 89.

of judges in the role of administration and interpretation.[250] Whilst this is true, this efficiency stems from the fact that judges are constitutionally mandated to have this role. As the judicial power in NZ is derived from statute, this automatically offers more certainty as the legislature has expressly intended the court to have this mandate, rather than it being self-imposed as in the case of *Patel.* Where a discretionary power comes from the common law, judges may be more or less willing to engage in the test, depending on how conservative or radical their own views are. This is evident from the majority, minority divide in *Patel.* The minority entered a resounding dissent, and were so against the range of factors approach, it is likely they will exercise their newfound discretion cautiously in subsequent judgements. Moreover, in creating the range of factors approach the Supreme Court largely followed the recommendations of the UK Law Commission, which Parliament themselves clearly had not acted on.[251] This raises concerns and uncertainties as to whether such an act was outside Parliaments intention.

The time period is also significant. The NZ illegality provisions have existed for 50 years. This resulted in the possibility that NZ could have as tumultuous a judicial history as the UK being eliminated. There was no historic disagreement between strict rules and wide discretion as the ambit of the courts power was clear early on, and was expressly provided for by Parliament. As such, unclear precedent as to the correct approach, as evident through the trio of *Bilta, Les Laboratoires* and *Hounga* did not eventuate.[252] This has resulted in NZ illegality cases being relatively limited, and less controversial, when compared to that of the UK.

### *IV. Room for Error: Problems with NZ*

However, this is not to say that the NZ statute is perfect; it merely is not as wide as *Patel.* As previously stated adding more principles in this realm could not possibly be a bad thing. Thus the NZ statute could benefit from greater guiding considerations. The current principles and 'rules' around illegality in NZ have largely been developed by judges. These include the aforementioned focus on the policy behind the infringed statute, as well as the general rule that the courts will not use their discretion to increase the hardships suffered by a party.[253] Whilst the development of these rules has been helpful in illustrating how the discretion is to be used, the main strength of the statute is in eliminating the uncertainty surrounding illegality. Having

[250] See for example Richard A. Posner *Economic Analysis of Law* (Little Brown and Company, Boston, 1977) particularly chs. 13 and 19.
[251] Ting Ming Zee, above n 204, at 30.
[252] See chapter II.
[253] Burrows, Finn and Todd, above n 4, at 507-510.

greater guiding considerations could only advance this. It would add greater clarity and certainty to the law, which is significant in the discretionary context wherein certainty is already being compromised to some extent.

Some may argue that this is not necessary due to the fact that case law in NZ has not raised issues in this context, and in fact the statute has been used sparingly. However our ability to have a low amount of cases coming through in this area should not mean we accept a lower level of certainty and predictability where more is possible. This is especially considering NZ's low level of illegality cases; the law has not a chance to develop principally due to the limited precedent available. Moreover, application of the discretion has not been perfect. In *Howick* it was suggested that an illegal contract can be enforced by the courts notwithstanding a statutory illegality, where the court considers it inequitable not to do so.[254] This cannot be reconciled with the express words of s 73.[255] Such a test of unconscionability echoes the over-ruled and unprincipled public conscience test and thus ventures into the same territory as the range of factors approach and all the risks associated with it.[256] Ergo, it violates the integrity of the legal system, the very premise the doctrine is built on and the sacred principle judges are attempting to uphold. Although the discretion expounded in the CCLA has largely been exercised cautiously and judiciously, *Howick* shows that the risk of judicial entrepreneurship still very much exists. Thus, there is still room for improvement in the level of specificity in the CCLA illegality provisions.

Moreover, judges have acknowledged that although the statute has been used sparingly, the law in NZ relating to illegality in general is unclear; "the precise metes and bounds of the *ex turpi causa* doctrine in New Zealand have not been authoritatively settled."[257] Illegal contracts are merely one context in which the doctrine applies. Therefore, seeing judges engage with a greater level of considerations at more depth, justifying why policy considerations do or do not apply will enable a more coherent picture to be painted regarding NZ's approach to illegality as a whole. Thus I submit a greater level of specificity be added to the CCLA illegality provisions, *Patel v Mirza,* and NZ's general illegality approach.

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[254] *Howick Parklands Building Co Ltd v Howick Parklands Ltd* [1993] 1 NZLR 749 at 765.
[255] Stephen Todd and Matthew Barber "Contract: Illegality" in *Commercial Law in New Zealand* (LexisNexis, 2021) 5.4 at 5.4.6; Jeremy Finn "Justice Not According to Law" 69 NZLJ 331 at 334.
[256] See chapter V.
[257] *H v S* [2015] NZHC 310 at [114].

# Chapter VII: Reform

So how do we edit *Patel* to ensure that it reaches the threshold of proper discretion, and the risks associated with arbitrary judicial choice are mitigated? How do we add greater specificity to the CCLA to improve the level of principled reasoning in future cases? The answer is quite simple. *Patel* is merely too vague to properly be considered principled, thus the answer is in adding greater specificity. First, *Patel* could benefit from some of the strengths in the CCLA. A greater level of *mandatory* considerations, such as those provided in the CCLA, rather than only the *potentially* relevant factors in *Patel* would at least provide certainty that each factor is to be considered in every case. To this end, the sequential nature of the test should also be abandoned; like the CCLA, every step should be compulsory. This would result in a better analysis as to how the discretion is to be exercised, which will further guide subsequent case law and enable the crystallisation of rules over time. It is of course also possible for the UK to implement legislation similar to that of the CCLA in order to add certainty to the source of power to grant discretion. However this is unlikely as the Law Commission has recommended against this.[258] Regardless, if legislation was enacted it would still require greater specificity than that of the CCLA, as both approaches would benefit from greater guiding principles being implemented.

The Irish case of *Quinn* is useful in illustrating how specific the test could have been.[259] *Quinn* was decided before *Patel,* and it is unfortunate and unclear why the Supreme Court did not reference it in creating the range of factors, as it provides a far more descriptive discretionary test.[260] The scope of this paper is too limited to go into detail on all of the factors posited by *Quinn* but they are attached as (Appendix A) as they are important simply for showcasing the far greater level of detail possible in a discretionary test. Having specific principles to adhere to helps mitigate against the risk of uncertainty that is inherent in discretion. Clare J's list of criteria may have added a higher level of judicial support for *Patel,* both from the minority and subsequent jurisprudence.[261] Moreover, it may have promoted refinement and structure to Lord Toulson's much shorter and broader approach.[262] The CCLA would also benefit from the greater level of specificity included in *Quinn.* NZ has a limited number of illegality cases thus

[258] Law Commission of England and Wales, *Consultative Report on the Illegality Defence* (LLCP 189, 2009) at [1.13].
[259] *Quinn v Irish Bank resolution Corporation Limited (In Special Liquidation) and ors* [2015] IESC 29.
[260] At [8.55].
[261] Graham Sinclair, above n 109, at [61].
[262] Graham Sinclair, above n 109, at [61].

the level of principled precedent in this realm is low. A greater degree of guiding considerations for judges to adhere to can only add to this shortfall, thereby aiding future cases in this uncertain and prickly area of law.

Further, the range of factors posited in *Patel* was largely based on an approach suggested by Professor Burrows.[263] However, Professor Burrows' approach included far more considerations to apply[264] (See Appendix B). Lord Toulson cited Professor Burrows' list as "helpful" but he "would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases."[265] Lord Neuberger appeared to agree;

"I am not convinced that it is helpful to list all the potentially relevant factors and say that it is a matter for the court in each case to decide which of those factors apply in that case and what weight to give them. Once a judge is required to take into account a significant number of relevant factors, and the question of how much weight to give them is a matter for the judge, the difference between judgement and discretion is, I think, in practice pretty slight."[266]

With respect, the infinite number of possible illegality cases is the very reason greater specificity is required. Without clear principles to adhere to, judges are being asked to decide complex, perhaps unprecedented cases, entirely on the basis of general public policy and proportionality. This is far wider a general discretion than Professor Burrows' more detailed list of considerations.

It is burdensome to require judges to engage in such a general analysis, without adequate guiding principles to aid them. While the range of factors purports to do this, the considerations identified in *Patel* are "insufficiently secure to structure judicial evaluation of the facts."[267] While the NZ jurisprudence has not faced extreme difficulties, this is largely due to the low level of cases we have in this area; the risk still very much exists, as evidenced through *Howick.* Where discretion is at play, and therefore the risk of uncertainty present, I submit the more guiding principles the better. The main risks of a discretionary approach I have identified are unpredictability and unprincipled reasoning. A greater level of specific guiding principles

[263] *Patel v Mirza*, above n 2, at [93] per Lord Toulson.
[264] Andrew Burrows, above n 45, at 229-230.
[265] *Patel v Mirza*, above n 2, at [107].
[266] *Patel v Mirza*, above n 2, at [173] per Lord Neuberger.
[267] Graham Virgo, above n 133, at 1095.

mitigates against these risks, as judges have a road map to aid their analysis. Whilst not every principle will apply in every case, including an abundance of principles in the test requires judges to go through each consideration and *justify* why it does or does not apply. This justification is important for transparency, so that decisions can be scrutinised by higher courts. As case law develops, this would also help develop precedent, which further helps eliminate uncertainty from this realm. A general public policy discretion does not promote this possibility, as judges can merely include whichever public policy they desire. Although NZ's statutory test requires more than general public policy, it too will benefit from greater specificity of considerations. Information as to how illegality applies in NZ is already finite, thus when future cases arise they will add far greater precedential value if they engage in a greater degree of mandatory policy considerations and principles. Thus far, judges have not had to engage with the NZ illegality provisions to a high degree and indeed most NZ illegality cases cannot be described as particularly difficult cases. Thus there have been limited difficulties in this arena. But this does not mean that such cases will never arise. Why wait until something is broken for it to be fixed?

Greater guiding principles will only benefit the use of discretion in the illegality context. This is especially considering the wide discretion both the range of factors and the CCLA already allow. While this may make the tests more complex in the sense that they will be longer, and greater analysis required, illegality *is* complex, and transparent principled reasoning is more important than efficient judgements.

Lord Toulson perceived the quest for workable rules to be feeble. [268] However, Burrows foresaw this crystallisation of principles and refinement of relevant public policy factors over time as a legitimate possibility.[269] Although Virgo and Burrows disagree as to the correctness of *Patel,* they agree on the need for principles to guide its application.[270] A structured discretion, with rules building up over time, is far better than a general public policy discretion for all eternity. The greater specificity supplied in *Quinn,* and by Professor Burrows, is evidence that such a test is possible, at least insofar as achieving this goal to a greater extent than *Patel,* and indeed the CCLA.

[268] Sarah Green and Alan Bogg (eds) *Illegality after Patel v Mirza* (Hart publishing, Oxford, 2018) at 3. See also *Patel v Mirza*, above n 2, at [175] per Lord Neuberger.
[269] Andrew Burrows, above n 45, at 55-56.
[270] Liron, above n 140, at 4.

## Conclusion:

The illegality doctrine has had a tumultuous history, being at the centre of the familiar legal debate between traditional rules and judicial discretion. Despite this, the doctrine's existence is essential. Illegal contracts, and indeed illegality in any form, is impossible to eradicate. Thus the focus is on how to adequately respond. The doctrine is needed to ensure coherency within the law, and indeed the integrity of the legal system by preventing the law from condemning with one hand, what it condones with the other.[271] This ensures the law operates consistently and fairly across contexts. Common law history has proven that this cannot be achieved through the application of strict rules, as illegality can apply across too many contexts, fact matrixes, and levels of 'wrong.' Thus jurisprudence has shown a trend of convergence towards an element of discretion being employed over time. However discretion is employed differently across jurisdictions.

*Patel v Mirza* marks the UK's newfound approach to discretion. The range of factors purported to uphold the integrity of the legal system through its three step analysis, applicable across all legal contexts. While this goal was admirable, the language of the test itself it too vague to properly be called discretionary.[272] It therefore carries legitimate risks of judicial entrepreneurship and unprincipled decision making. In this way, the test may lead to the same inconsistency and unpredictability issues that it was designed to eliminate.

NZ has long taken a discretionary approach to illegality, albeit through statute rather than the common law. This codification of discretion removed the uncertainty as to how the doctrine was to apply in regards to relief, resulting in a less turbulent judicial history. This dissertation has concluded that on a proper analysis of both approaches, and how they have been used in practice, the range of factors approach in *Patel* contains a wider discretion than that of the CCLA. However, both can benefit from a greater level of specificity.

Discretion is the way forward for illegality. But in the legal context, discretion carries risks of unpredictability and uncertainty. These risks must not be overlooked; they must be faced head on and mitigated through the use of clearly identified principles, guiding the use of discretion. The considerations posited in *Quinn,* or those provided by Burrows are useful illustrations of

[271] *Patel v Mirza*, above n 2, at [230] per Lord Sumption. See also *Hall v Herbert,* above n 26, at [176] per McLachlin J.
[272] See Chapter V.

how greater specificity is possible, even in discretionary tests. In this way, principled discretion offers a hopeful future for the illegality doctrine.

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# Appendices

## *I. Appendix A:*

Summarised criteria from *Quinn v Irish Bank resolution Corporation Limited (In Special Liquidation)* and ors [2015] IESC 29 to showcase an example of how specific a discretionary test can be.

In summary, the principal criteria are as follows:[273]

1) The first question to be addressed is as to whether the relevant legislation expressly states that contracts of a particular class or type are to be treated as void or unenforceable. If the legislation does so provide then it is unnecessary to address any further questions other than to determine whether the contract in question in the relevant proceedings comes within the category of contract which is expressly deemed void or unenforceable by the legislation concerned. (para. 8.9)
2) Where, however, the relevant legislation is silent as to whether any particular type of contract is to be regarded as void or unenforceable, the court must consider whether the requirements of public policy (which suggest that a court refrain from enforcing a contract tainted by illegality) and the policy of the legislation concerned, gleaned from its terms, are such as require that, in addition to whatever express consequences are provided for in the relevant legislation, an additional sanction or consequence in the form of treating relevant contracts as being void or unenforceable must be imposed. For the avoidance of doubt it must be recalled that all appropriate weight should, in carrying out such an assessment, be attributed to the general undesirability of courts becoming involved in the enforcement of contracts tainted by illegality (especially where that illegality stems from serious criminality) unless there are significant countervailing factors to be gleaned from the language or policy of the statute concerned. (para. 8.9)
3) In assessing the criteria or factors to be taken into account in determining whether the balancing exercise identified at 2 requires unenforceability in the context of a particular statutory measure, the court should assess at least the following matters:-
    a) Whether the contract in question is designed to carry out the very act which the relevant legislation is designed to prevent (para. 8.32)

[273] This summary was helpfully provided by Graham Sinclair *The effect of illegality since Patel v Mirza: A multi-national overview of developments in the law concerning defences alleging illegality* (online ed, East Anglican Chambers).

b) Whether the wording of the statute itself might be taken to strongly imply that the remedies or consequences specified in the statute are sufficient to meet the statutory end. (para. 8.34)

c) Whether the policy of the legislation is designed to apply equally or substantially to both parties to a relevant contract or whether that policy is exclusively or principally directed towards one party. Therefore, legislation which is designed to impose burdens on one category of persons for the purposes of protecting another category may be considered differently from legislation which is designed to place a burden of compliance with an appropriate regulatory regime on both participants. (para. 8.37)

d) Whether the imposition of voidness or unenforceability may be counterproductive to the statutory aim as found in the statute itself.(para. 8.39)

The aforementioned criteria or factors are, for reasons which will become apparent, sufficient to resolve this case. However, the following further factors may well be properly taken into account in an appropriate case:-

4) Whether, having regard to the purpose of the statute, the range of adverse consequences for which express provision is made might be considered, in the absence of treating relevant contracts as unenforceable, to be adequate to secure those purposes. (para. 8.44)
5) Whether the imposition of voidness or unenforceability may be disproportionate to the seriousness of the unlawful conduct in question in the context of the relevant statutory regime in general. (para. 8.47)
6) Doubtless other factors will come to be defined as the jurisprudence develops.

## *II. Appendix B*

Burrows' longer list of criteria to serve as a second example of how specific a discretionary test can be.[274]

"If the formation, purpose or performance of a contract involves conduct that is illegal (such as a crime) or contrary to public policy (such as a restraint of trade), the contract is unenforceable by one or either party if to deny enforcement would be an appropriate response to that conduct, taking into account where relevant:

a) How seriously illegal or contrary to public policy the conduct was;
b) Whether the party seeking enforcement knew of, or intended, the conduct;
c) How central to the contract or its performance the conduct was;
d) How serious a sanction the denial of enforcement is for the party seeking enforcement;
e) Whether denying enforcement will further the purpose of the rule which the conduct has infringed;
f) Whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy;
g) Whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct;
h) Whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system."

This final factor is capable of a wider or narrower approach, depending on what one understands by inconsistency.

[274] Andrew Burrows, above n 45, at 229-230; *Patel v Mirza*, above n 2, at [93] per Lord Toulson.