

Illegality re-explained and *Tinsley v Milligan* overruled by Supreme Court

The doctrine of illegality has been criticised for its complexity and incoherency. In *Patel v Mirza* [2016] UKSC 42 the Supreme Court delivered welcome guidance as to the scope and application of the doctrine.

Mr Patel transferred £620,000 to Mr Mirza. Mr Mirza was to place bets on a bank's share prices with the benefit of insider information, in contravention of the Criminal Justice Act 1993. Mr Mirza failed to obtain the information and so did not place the bets. Mr Patel sought repayment of his money; Mr Mirza refused relying on the doctrine of illegality.

In *Tinsley v Milligan* [1994] 1 AC 340 the House of Lords had formulated a reliance principle: if one needed to plead or rely on one's own illegality to establish a cause of action, the court would bar the claim. If, however, one did not need to do so (as in *Tinsley* itself), a claim would not be barred even though a transaction might (loosely speaking) be regarded as tainted by illegality.

Tinsley was criticised for producing capricious results, dependent on the coincidence as to whether a claimant needed to rely on the illegal scheme; the Supreme Court has now overruled *Tinsley* and established a new approach.

In the leading judgment, Lord Toulson explained that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system. A three-fold approach was required: (a) what was the underlying purpose of the transgressed prohibition and would that purpose be enhanced by the denial of the claim, (b) was there any other public policy which would be affected by a denial of the claim, and (c) would the denial of the claim be a proportionate response to the illegality. Here, the illegal scheme had not been implemented; the claim was simply for restitution of the sums advanced and the illegal element remained wholly executory. Accordingly, Mr Patel's money should be returned.

The majority highlighted certain factors that would be relevant in applying the new test: the seriousness of the illegal conduct, whether it was central to the contract, the extent to which each party was culpable and whether there was knowing illegality. The obvious criticism (made by the minority) is that the new approach savours of discretion and suffers a lack of predictability of result. This, however, is probably a price worth paying in a murky area where justice benefits from the court having a degree of room for manoeuvre.

Richard Hayes / 31st Aug 2016

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