[Chapter number]

Illegality in Equity

Paul S Davies

The operation of the maxims *ex turpi causa non oritur actio* ('no action arises from a wrongful act') and *in pari delicto potior est conditio defendentis* ('where both parties are equally in the wrong the defendant is in the stronger position') have long proved to be problematic in private law. Indeed, each of the previous volumes in this series on *Defences* includes (at least) one chapter dealing with some of the difficulties involved.[1] Those essays sought to explain how the law might develop, but since they were written the significant decision of the Supreme Court in *Patel v Mirza*[2] has, for better or worse,[3] changed the legal landscape. The majority of the Supreme Court clearly thought that the approach of the House of Lords in *Tinsley v Milligan*[4] should no longer be followed, and that earlier decision has now effectively been overruled.[5] *Tinsley v Milligan* laid down a 'reliance principle', which meant that a claim would fail if the claimant had to rely upon his or her illegality. But *Patel v Mirza* favoured a more flexible test which involves the balancing of a range of factors. The crucial passage of Lord Toulson's leading judgment is worth setting out in full:[6]

> "I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any

[1] B McLachlin, 'Weaving the Law's Seamless Web: Reflections on the Illegality Defence in Tort Law' in A Dyson, J Goudkamp and F Wilmot-Smith (eds) *Defences in Tort* (Oxford, Hart Publishing, 2015); J Goudkamp and L Mayr, 'The Doctrine of Illegality and Interference with Chattels' in A Dyson, J Goudkamp and F Wilmot-Smith (eds) *Defences in Tort* (Oxford, Hart Publishing, 2015); G Virgo, 'The Defence of Illegality in Unjust Enrichment' in A Dyson, J Goudkamp and F Wilmot-Smith (eds) *Defences in Unjust Enrichment* (Oxford, Hart Publishing, 2016); R Toulson, 'Illegality: Where Are We Now?' in A Dyson, J Goudkamp and F Wilmot-Smith (eds) *Defences in Contract* (Oxford, Hart Publishing, 2017).
[2] [2016] UKSC 42; [2016] 3 WLR 399.
[3] This chapter does not seek to rehash the well-worn debate between the "reliance" principle and the "balancing of factors" approach, and proceeds on the assumption that the latter will now become commonplace following *Patel v Mirza*.
[4] [1994] 1 AC 340.
[5] *Patel* (n 2) [114]; see also [134] (Lord Kerr). Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed with Lord Touslon. Lord Neuberger also ultimately endorsed Lord Toulson's approach: see [174]. Lord Clarke, Lord Mance and Lord Sumption took a different view, more sympathetic to *Tinsley v Milligan*.
[6] ibid [101] (Lord Toulson).

other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy."

The ramifications of *Patel v Mirza* clearly need to be understood. The case concerned the recovery of money paid under an illegal contract, but its impact cannot sensibly be limited to claims brought at common law. Although *Tinsley v Milligan* concerned a trusts dispute, which was a very different context from *Patel v Mirza*, it would take a very bold judge indeed to continue to apply *Tinsley v Milligan* in the face of *Patel v Mirza.* Admittedly, it is in many respects unsatisfactory for the Supreme Court to quasi-legislate across the whole of private law, given its inability to work out the potential impact in all affected areas when deciding one particular case.[7] Moreover, it does not appear that counsel on either side actually asked the Supreme Court to adopt an approach which balanced a "range of factors" when deciding whether to apply the illegality defence, and that this step was taken of the Court's own volition.[8] Nevertheless, it is at least understandable why the Supreme Court decided to "venture further"[9] and deal with the law of illegality more broadly than the narrow context of restitution: the law was a mess, strongly criticised,[10] and it was unlikely that a better opportunity would soon present itself to the Supreme Court to deal with the law concerning trusts, for example.[11] Before *Patel v Mirza*, lower court judges continued to feel constrained to apply *Tinsley* in the context of trusts.[12] In order to move away from that situation, the majority Justices clearly intended that their favoured approach be applied broadly.

Patel v Mirza itself concerned a claim in unjust enrichment, and seems to make it easier for a briber to recover the value of a bribe from the bribee. This could conceivably affect the equitable jurisdiction to grant relief in the context of bribery and breach of fiduciary duty. Bribery is an important area of the law;[13] in *Patel v Mirza* Lord Toulson recognised that

[7] This is why Lord Goff in *Tinsley v Milligan* called for legislative intervention after a full and broad investigation by the Law Commission: *Tinsley* (n 4) 364.
[8] *Patel* (n 2) [261] (Lord Sumption); cf [20] (Lord Toulson).
[9] ibid [166] (Lord Neuberger).
[10] See the comments of Gloster LJ in the Court of Appeal in *Patel v Mirza* [2014] EWCA Civ 1047; [2015] Ch. 271, cited by Lord Toulson in the Supreme Court at [15].
[11] See *Patel* (n 2) [133] (Lord Kerr).
[12] *Hniazdzilau* v *Vajgel* [2016] EWHC 15 (Ch).
[13] *FHR European Ventures LLP v Mankarious* [2014] UKSC 45; [2015] AC 250 [42] (Lord Neuberger). For general discussion, see P Davies, 'Bribery' in P Davies and J Penner (eds) *Equity, Trusts and Commerce* (Oxford, Hart Publishing, 2017).

'[b]ribes of all kinds are odious and corrupting'.[14] It will be suggested in Section I that it is doubtful whether bribers really should be able to recover their bribes, and in Section II it will be argued that *Patel v Mirza* should not alter the right of a beneficiary to recover the bribe under a constructive trust, or affect his or her ability to bring personal claims against the briber or bribee. Claims brought against fiduciaries more generally will then be considered in Section III; most claims brought by a fiduciary against a principal should continue to be barred if pursuant to an illegal transaction. Finally, in Section IV some comments will be made about illegality in trusts disputes.[15] It now seems very unlikely that a claim to enforce a trust will be barred on the basis of illegality, unless, perhaps, the illegality is very serious indeed.[16]

I. The Decision in *Patel v Mirza*

Mr Mirza was a city trader. Mr Patel transferred sums totalling £620,000 to Mirza. The money was to be used for betting on the price of RBS shares. Mirza expected to obtain insider information from contacts at RBS regarding an anticipated government announcement which would affect the price of the shares. In the end, the government announcement never materialised, and the money was never used for the purpose of the intended betting. However, Mirza refused to repay the money to Patel. The claim was framed in both contract and unjust enrichment.

Mirza sought to resist Patel's claim on the basis of illegality. The agreement between the parties amounted to a conspiracy to commit an offence of insider dealing under section 52 of the Criminal Justice Act 1993. Since both parties were tainted by this illegal scheme, Mirza argued that Patel could not enforce the contract, and that the claim in unjust enrichment should also fail: *in pari delicto potior est conditio defendentis.* Nevertheless, the Supreme Court unanimously held that Mirza had to repay the money to Patel.

Lord Toulson suggested that resort to Latin maxims in this area is often unhelpful,[17] and that there are in fact two broad policy factors which underpin the illegality defence.[18] The

[14] *Patel* (n 2) [118].
[15] This issue is dealt with more fully elsewhere: P Davies, 'Ramifications of *Patel v Mirza* in the Law of Trusts' in A Bogg and S Green (eds) *Illegality after Patel v Mirza* (Oxford, Hart Publishing, forthcoming).
[16] *Patel* (n 2) [110] (Lord Toulson); cf [254] (Lord Sumption).
[17] ibid [95]-[96] (Lord Toulson).
[18] ibid [99].

first is that a person should not profit from his illegal conduct. The second is that the law should be "coherent and not self-defeating".[19] Lord Toulson was greatly influenced by the work of the Law Commission in this area,[20] and concluded that "[t]he law should strive for the most desirable policy outcome, and it may be that it is best achieved by taking into account a range of factors."[21] His Lordship emphasised the importance of identifying both the purpose of the relevant prohibition and any other public policies that might be affected, as well as a need for proportionality.[22]

Lord Toulson clearly thought that, taking these factors into account, Patel's claim for restitution should succeed. But it is not at all clear why this result was obviously correct. The judgment does not consider the purpose underpinning the law against insider trading, or how other public policies might be balanced on the facts of the case. It is somewhat unsatisfactory that the Supreme Court does not illustrate how its own test should be applied to the facts of the very case before it.[23] This is perhaps exacerbated by the impression that the Supreme Court's primary concern was to reform the illegality defence throughout private law. Yet effectively quasi-legislating in a very broad manner seems to be difficult for the Supreme Court to do on the basis of a single appeal.[24] The lack of clarity surrounding how the test applies to the facts of *Patel v Mirza* might give credence to the observation of Lord Clarke that the majority of the Supreme Court has come "close to reviving the public conscience test".[25] That test was favoured by the Court of Appeal in *Tinsley v Milligan*,[26] but was rejected by the House of Lords for being arbitrary and unpredictable.[27] It is striking that their Lordships in *Tinsley v Milligan* thought that primary legislation would be needed for a test based upon balancing various factors to be adopted,[28] whereas the Supreme Court in *Patelv Mirza* was much more bold. Over twenty years after the decision in *Tinsley v Milligan* that provoked such a long investigation by

[19] ibid. See also *Hall v Hebert* [1993] 2 SCR 159 (SCC) 165.
[20] This is unsurprising, given that Lord Toulson was the Chair of the Law Commission for part of the very long lifetime of the Commission's project.
[21] *Patel* (n 2) [91].
[22] ibid [101].
[23] ibid [107], Lord Toulson stating that '[p]otentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability', but did not clearly apply these to the facts of *Patel v Mirza*.
[24] Which seems unsatisfactory: see text to n 28.
[25] *Patel* (n 2) [219].
[26] [1992] Ch 310.
[27] *Tinsley* (n 4) 363 (Lord Goff).
[28] ibid 364 (Lord Goff).

the Law Commission,[29] the Supreme Court in *Patel v Mirza* has reversed the House of Lords and in substance favoured the approach of the Court of Appeal.

In any event, the Supreme Court supported the view that parties should generally be restored to the position they were in before there was any illegality. For example, Lord Toulson said that "a person who satisfies the ordinary requirements of a claim in unjust enrichment will not prima facie be debarred from recovering money paid or property transferred by reason of the fact that the consideration which has failed was an unlawful consideration".[30] Similarly, Lord Neuberger said that "the general rule should in my view be that the claimant is entitled to the return of the money which he has paid",[31] which was consistently referred as "the Rule".[32] The minority judges held similar views. Lord Sumption commented that restitution "merely recognises the ineffectiveness of the transaction and gives effect to the ordinary legal consequences of that state of affairs. The effect is to put the parties in the position in which they would have been if they had never entered into the illegal transaction, which in the eyes of the law is the position which they should always have been in".[33] Unfortunately, the minority judges employed the language of "rescission" to describe the process of restoring the parties to their original positions.[34] This is confusing. An illegal contract is void, so there is nothing to rescind. It is suggested that the judges were simply emphasising the primacy of the restitutionary remedy in order to restore the parties to the status quo ante through achieving *restitutio in integrum.*

However, Lord Kerr appeared to adopt a slightly different approach. His Lordship was influenced by Birks' contention that to allow restitution would "stultify" the law's refusal to enforce the contract.[35] This may be because restitution would be tantamount to enforcing the contract,[36] or because the restitutionary claim would provide a "safety net" in the event that the contract could not be enforced due to the illegality. Relying upon such an analysis,[37] Lord Kerr

---

[29] See Law Commission, *Illegal Transactions* Consultation Paper (Law Com No 154, 1999); Law Commission, *The Illegality Defence in Tort* Consultation Paper (Law Com No 160, 2001); Law Commission, *The Illegality Defence: A Consultative Report* Consultation Paper (Law Com No 189, 2009); Law Commission, *The Illegality Defence* Report (Law Com No 320, 2010).
[30] *Patel* (n 2) [116].
[31] ibid [146].
[32] ibid [176].
[33] ibid [250]; see also [199] (Lord Mance); [210] (Lord Clarke).
[34] ibid [197]–[198] (Lord Mance); [210] (Lord Clarke); [253] (Lord Sumption).
[35] See P Birks, "Recovering Value Transferred under an Illegal Contract" (2000) 1 *Theoretical Inquiries in Law* 155.
[36] cf *Boissevain v Weil* [1950] AC 327.
[37] *Patel* (n 2) [141]–[142].

thought that returning the parties to the status quo ante should not necessarily be the prima facie rule. Instead, he preferred the balancing approach set out by Lord Toulson as better-equipped to achieve principled and just results. There is much force in Lord Kerr's analysis, but his views seem more cautious as regards restitution than Lord Toulson and are somewhat isolated given the tenor of all the other judgments.

The thrust of the reasoning in *Patel v Mirza* is to encourage the award of restitution. But it is unclear on what grounds restitution is justified. It had previously been understood that a transaction could, generally, only be unwound if the contract remained wholly unperformed,[38] but the very result in *Patel v Mirza* suggests that it no longer needs to be the case that the contract is wholly executory. Lord Toulson refers to "failure of consideration", but, perhaps tellingly, not to *total* failure of consideration.[39] Indeed, Lord Neuberger thought it was "not necessarily the correct analysis"[40] that "the Rule" be explained on the ground of total failure of consideration, and that in any event "the law should not regard an inherently criminal act as effective consideration".[41] It would appear that the emphasis placed upon restoring the parties to their original positions is so strong that even if some shares had been bought with the money advanced by Patel to Mirza, restitution would still have been ordered.[42] Since restitution might be ordered even when the illegal contract has been fully executed,[43] the better view seems to be that the illegality itself justifies the practical response of the courts to put the parties – so far as it is possible to do so – back into their original positions before the illegal transaction.

Another consequence of *Patel v Mirza* seems to be to sideline the *locus poenitentiae,* or 'time for repentance'. After all, the balancing approach necessarily takes into account whether the illegal purpose has been fulfilled.[44] Moreover, in *Patel v Mirza* itself there was no withdrawal, let alone repentance, but simply a change of circumstances which meant that the illegal purpose could no longer be performed. If a claimant does genuinely withdraw before any illegal purpose is carried out then that further strengthens his or her claim to restitution, but even without such withdrawal it now appears to be highly likely that restitution will be granted anyway.

---

[38] See N Strauss, 'Ex turpi causa oritur actio?' (2016) 132 *LQR* 236, 258–259.
[39] *Patel* (n 2) [13].
[40] ibid [170].
[41] ibid [176].
[42] ibid [169] (Lord Neuberger).
[43] ibid [253] (Lord Sumption).
[44] ibid [44], [116] (Lord Toulson); see also [169] (Lord Neuberger); cf [202] (Lord Mance); [247]–[253] (Lord Sumption).

The major limitation on the ability to obtain restitution may be where the illegality is particularly serious. Lord Toulson gave the example of participation in a drug trafficking operation,[45] but recognised that such instances are likely to be "rare".[46] On the other hand, Lord Sumption stated that "I would also reject the dicta, beginning with *Tappenden v Randall* (1801) 2 B&P 467, 470 and *Kearley v Thomson* (1890) 24 QBD 742, 747, to the effect that there may be some crimes so heinous that the courts will decline to award restitution in any circumstances".[47] His Lordship thought it impossible to distinguish between degrees of illegality, and unnecessary to do so since restitution should presumptively always be available. It is of course true that distinguishing between different types of illegal conduct will often be very difficult to do, and it is not even clear why the offence of insider dealing was not thought by Lord Toulson to be particularly serious. Nevertheless, it may well be unsatisfactory to award restitution no matter the nature of the illegality, and regardless of whether or not the illegal conduct has occurred. These issues will be analysed in the next section when considering the particular context of bribery.

II. The impact of *Patel v Mirza* on bribery

Bribery poses important and difficult problems, for both the criminal law and private law. In *FHR European Ventures LLP v Mankarious* Lord Neuberger said:[48]

> As Lord Templeman said giving the decision of the Privy Council in *Attorney General for Hong Kong v Reid* [1994] 1 AC 324, 330H, 'bribery is an evil practice which threatens the foundations of any civilised society'. Secret commissions are also objectionable as they inevitably tend to undermine trust in the commercial world. That has always been true, but concern about bribery and corruption generally has never been greater than it is now: see for instance, internationally, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1999 and the United Nations Convention against Corruption 2003, and, nationally, the Bribery Acts 2010 and 2012.

---

[45] ibid [110].
[46] ibid [116].
[47] ibid [254]; see also [176] (Lord Neuberger). This has an impact on the hitman example, see text to nn 69 – 70.
[48] *FHR* (n 13) [42].

However, there is still no recognised tort of bribery.[49] As a result, many claims tend to be brought in equity. After all, the recipient of a bribe is often induced to breach an obligation of loyalty, and courts tend to be flexible when finding that there has been a 'fiduciary relationship' which facilitates the availability of gain-based relief against a bribee. For example, in *Reading v Attorney General*,[50] an army sergeant used to ride on lorries in full military uniform. The sergeant suspected that the lorries were used to transport drugs, and that his presence was designed to facilitate this. The sergeant accepted bribes to perform this role. It was held that the sergeant acted in breach of fiduciary duty and had to account for the profits he made. In the House of Lords, Lord Porter agreed[51] with Asquith LJ's observation in the Court of Appeal[52]

> "that the words 'fiduciary relationship' in this setting are used in a wide and loose sense and include, inter alia, a case where the servant gains from his employment a position of authority which enables him to obtain the sum which he receives."

The breadth of the equitable jurisdiction is able to offer strong protection to the vulnerable beneficiary whose fiduciary has acted disloyally as a result of bribery. The beneficiary may be able to sue the fiduciary either for the personal remedies of an account of profits or equitable compensation, or for a proprietary remedy on the basis that the fiduciary holds the bribe on constructive trust.[53] The beneficiary may also be able to sue the briber for dishonestly assisting a breach of trust, which could lead either to an award of compensation or an account of profits.[54] The beneficiary may even be able to combine claims against both the briber and the bribee.[55]

The remedies available to the beneficiary are discussed more fully elsewhere.[56] But whilst the beneficiary may have a claim against the briber in one direction, and the bribee in another, what about the remaining side of the triangle between the briber and bribee? It was previously thought that the briber could not recover the bribe. After all, as Lawrence Collins J noted in *Daraydan Holdings Ltd v Solland International Ltd*, bribery 'corrupts not only the

---

[49] K Handley, 'Civil Liability for Bribery (No 2)' (2001) 117 *LQR* 536; cf C Mitchell, 'Civil Liability for Bribery' (2001) 117 *LQR* 207. It is sometimes said that the fraud claim for loss suffered by a bribe is *sui generis*: *Petrograde Inc v Smith* [2000] Lloyds Rep 486, 490 (Steel J).
[50] *Reading v Attorney General* [1951] AC 507. See also *University of Nottingham v Fishel* [2000] ICR 1462
[51] *Reading* (n 50) 517.
[52] [1949] 2 KB 232, 236 (Asquith LJ).
[53] *FHR* (n 13).
[54] *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908; [2015] QB 499.
[55] See *Salford v Lever* [1891] 1 QB 168 (CA); cf *Mahesan S/O Thambiah Appellant v Malaysia Government Officers' Co-Operative Housing Society Ltd* [1979] AC 374 (PC).
[56] Davies (n 13).

recipient but the giver of the bribe'.[57] As a result, it was generally thought that both parties were equally tainted, and that the *in pari delicto* rule meant that the briber could not recover anything from the bribee. Yet if *Patel v Mirza* is understood to lay down a general desire to restore the parties to the status quo ante, then that may no longer be true. However, *Patel v Mirza* dealt with a relatively simple two-party situation; it is suggested that the same sort of reasoning should not readily be applied where the bribee is a fiduciary, since the interests of a third party, the beneficiary, should be taken into account.

Before *Patel v Mirza*, a leading decision that was taken to govern similar claims was *Parkinson v College of Ambulance Ltd*.[58] The secretary of the defendant charity, Harrison, told the claimant, Parkinson, that either he or the charity had the power to nominate people for honours, and that in return for a large donation Parkinson could expect to receive a knighthood. Parkinson did indeed make a sizeable donation, but did not receive a knighthood. He later sued both Harrison and the charity for the return of the money either on the basis of deceit, or money had and received. The contractual claim was obviously hopeless because it is unlawful to undertake that an honour will be conferred by the Sovereign in return for money or services.[59] Lush J was clear that both Parkinson and Harrison knew that the contract was illegal.[60] As a result both were *in pari delicto*, and the fact that Harrison had made fraudulent representations did not affect this conclusion. The claim in deceit therefore failed, as did the claim in unjust enrichment. Lush J held that Parkinson could not invoke the *locus poenitentiae* because he had not really resiled from the contract at all, but was instead bringing his action because he had failed to obtain the promised title.[61] Even if that were not the case, Lush J found that restitution could not be awarded simply because the contract was executory.[62]

It is suggested that the decision in *Parkinson v College of Ambulance Ltd* is both principled and appropriate. It fits better with the idea of "stultification"[63] discussed above,[64] and also seems more likely to deter illegal activities. If Parkinson had been able to recover the money, then he may have been encouraged to try again to buy a knighthood through a different party. This does not sit entirely easily with a general principle of "buyer beware", where the

---

[57] [2004] EWHC 622 (Ch); [2005] Ch 119 [1].
[58] [1925] 2 KB 1.
[59] ibid 13.
[60] ibid 15.
[61] ibid 16.
[62] ibid.
[63] See text to n 35.
[64] Although, arguably, arguments that seek to avoid stultification may be better accommodated through confiscation of illegal gains: see below.

risk lies with the person paying. It would be better to deter people from paying over money in the first place. If Parkinson knew that the charity could keep the money regardless of whether or not a knighthood was bestowed upon him, then it would seem foolish for Parkinson to go ahead with the transaction anyway: there would be little incentive for the charity to try to obtain a knighthood for Parkinson. Parkinson should be deterred from entering into a very bad, and illegal, deal. If determining whether it would be better to deter a party from paying money over, or from asking for money, it is surely better to deter the actual payment – at least where neither party is vulnerable to the other.[65] Furthermore, if the money is not returned then it remains amenable to confiscation under the Proceeds of Crime Act 2002.[66]

However, *Parkinson v College of Ambulance* now seems to be wrongly decided. In *Patel v Mirza* Lord Toulson said "[i]f today it transpired that a bribe had been paid to a political party, a charity or a holder of public office, it might be regarded it [*sic*] as more repugnant to the public interest that the recipient should keep it than that it should be returned".[67] His Lordship thought that the Supreme Court was "not directly concerned with such a case" but the emphasis placed on restitution makes it difficult to see how the judgment of Lush J can be consistent with the decision in *Patel v Mirza*. Lord Neuberger was clear that *Parkinson v College of Ambulance* was "wrongly decided".[68] Indeed, Lord Neuberger[69] and Lord Sumption[70] even thought that a person who hires a hitman to commit murder would be able to recover the money paid to the hitman (regardless of whether the murder actually takes place!), which seems a much stronger case than *Parkinson v College of Ambulance*. It is difficult to accept that this result is satisfactory, or sits easily with a general principle of "buyer beware".

Virgo has argued that deterrence is an unsatisfactory basis to deny restitution.[71] This is for three principal reasons, although in the context of bribery none is ultimately compelling. First, a claimant may not know that the transaction is illegal; this is unlikely to apply to instances of bribery. Secondly, the defendant may be encouraged to participate in the transaction if restitution is denied. Although it is true that the defendant would be deterred by granting restitution, it has been suggested above that prevention is better than cure and the law should primarily seek to deter parties from paying over bribes. Thirdly, Virgo argues that if the

---

[65] cf *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192 (PC).
[66] See text to nn 72 – 77.
[67] *Patel* (n 2) [118].
[68] ibid [170].
[69] ibid [176].
[70] ibid [254].
[71] Virgo, 'The Defence of Illegality in Unjust Enrichment' (n 1).

illegal conduct also constitutes a crime, then if the parties have not been deterred by the criminal law, then the private law is unlikely to be an effective deterrent. This is not clear. It may be that the parties take the view that the criminal sanctions would not have as severe consequences as a civil claim, and that the chances of a criminal prosecution being brought are slim – perhaps because of a lack of resources. It is very difficult to detect certain types of illegal behaviour, such that the parties themselves may be the most likely candidates to disclose the illegality. This is a bit odd, but obviously does happen. In both *Parkinson v College of Ambulance* and *Patel v Mirza*, for example, it is striking that these claims were brought despite revealing the illegal conduct and potentially exposing the claimants (and defendants) to criminal charges.

All this suggests that it is not as clear as the Supreme Court appeared to think that a person should make restitution of money received under an illegal transaction. This may be especially significant where the recipient of a bribe is a fiduciary. It is suggested that it would be unsatisfactory for the approach of *Patel v Mirza* to mean that a fiduciary should have to make restitution to the briber, to the detriment of the beneficiary. After all, it is already difficult enough for beneficiaries to discover fraud or instances of bribery; if beneficiaries do manage to establish an available claim, it is to be hoped that a meaningful remedy will be available. But a fiduciary should not be mulcted twice over; if the fiduciary has already restored the briber to the position he or she was in prior to the illegal transaction, then the fiduciary may be able to argue that he or she is unable also to satisfy the beneficiary's claim (beyond, perhaps, compensation for losses shown to have been caused by the breach of fiduciary duty). However, that result would be unsatisfactory, and a number of responses to *Patel v Mirza* might be made in order to avoid that outcome.

First, and least likely, *Parkinson v College of Ambulance* could be maintained in instances of bribery. Lord Toulson did say that the Supreme Court in *Patel v Mirza* was not "directly concerned" with such a case, and perhaps this could be exploited to restore a rule that fiduciaries who accept bribes do not have to make restitution. In such a scenario, beneficiaries' claims would be able to proceed as they always have done. However, as suggested above, it is difficult to see how such a stark rule would be consistent with the general tenor of the judgment in *Patel v Mirza*.

Secondly, bribery might be thought to raise particular concerns because the bribe itself could be confiscated as the proceeds of crime.[72] Giving and receiving a bribe is a criminal offence,[73] as is continuing to have possession of a bribe which is criminal property.[74] Where a criminal offence has been established, then it is possible for the State to bring a claim to confiscate the bribe.[75] The general rule is that '[i]f … the court is satisfied that any property is recoverable, the court must make a recovery order'.[76] This is mandatory: it follows that a confiscation order must be made when the fiduciary has committed the criminal offence of bribery under section 2 of the Bribery Act 2010. This should therefore take priority over both the claims of the principal and the briber.[77] The coherent operation of the Proceeds of Crime Act should not be disturbed by the approach to the illegality defence advanced in *Patel v Mirza*.[78] However, the National Crime Agency lacks the resources to seek confiscation of all proceeds of crime, and civil courts are unlikely to change their approach just because confiscation proceedings *might* be brought in the future. Indeed, it would appear that the money paid over in *Patel v Mirza* itself was amenable to confiscation, yet restitution was nevertheless ordered. Bribery was not viewed by Lord Toulson as especially serious, and certainly not in the same bracket as drug trafficking such that restitution should not be awarded.

The next three possibilities are perhaps more promising. Thirdly, it might be argued that fiduciaries are in a special position because of the obligation of loyalty owed to a third party, the beneficiary. This may be one of the factors that the court should consider. Lord Toulson was careful "not [to] attempt to lay down a prescriptive or definitive list"[79] of the factors to be taken into account, and as a result the position of the recipient of the bribe could well remain relevant. This would also help to protect the beneficiary's position.

A fourth possibility might be to conclude that the fiduciary is not enriched if he or she holds the bribe for the benefit of the principal. Indeed, one reason for the decision in *FHR* that a fiduciary holds a bribe on constructive trust for his or her principal was the need to combat

[72] Admittedly, where there has been an illegal transaction then there may often be gains which could be confiscated.
[73] Bribery Act 2010 s 2.
[74] Proceeds of Crime Act 2002, s 329(1)(c).
[75] ibid Part 5.
[76] ibid s 266(1).
[77] For further discussion of the relationship between confiscation and other private law claims, see Davies (n 13).
[78] *Patel* (n 2) [108] (Lord Toulson); [185] (Lord Neuberger); [254] (Lord Sumption). Lord Mance was more circumspect: [198].
[79] ibid [107].

bribery effectively.[80] Since the beneficial interest in the bribe resides in the principal from the moment of receipt, it is arguable that the fiduciary is not enriched such that no claim in unjust enrichment should lie.[81] Moreover, a claim brought by the briber against the beneficiary in unjust enrichment should fail since there is a good basis for the beneficiary's enrichment provided by the nature of the fiduciary relationship.

A further, fifth option may be to look at the three-party situation differently. Although the Supreme Court in *Patel v Mirza* rejected the notion that the court had a free-standing jurisdiction to punish the parties to an illegal transaction by requiring disgorgement to a third party,[82] this principle would not be infringed simply by recognising the beneficiary's equitable proprietary rights. In order to favour the beneficiary's claim the court would not have to disgorge the recipient's profits in favour of a third party extraneous to the dispute. Rather, the court could give effect to the proprietary rights acquired by the beneficiary on the point of receipt,[83] and find that such rights outweigh the interest in restoring two parties – who are both tainted by illegality – to their respective original positions. Given the wide range of considerations that might be relevant to the balancing approach when deciding whether the illegality defence applies, it is suggested that this is a likely outcome. There is no need to deter the beneficiary, who has done nothing wrong, but every reason to seek to deter the conduct of both the briber and bribee. It would be unfortunate if a desire to unwind a transaction were to prejudice an innocent beneficiary to the advantage of a party tainted by illegality.

It is, however, possible to envisage situations where the fiduciary makes restitution to the briber before the beneficiary becomes aware of the bribe. Given the decision in *Patel v Mirza*, a fiduciary might genuinely think that restitution would be necessary. But it is suggested that this should not be encouraged or condoned. Since a constructive trust in favour of the beneficiary arises at the moment the fiduciary receives the bribe, paying back the bribe can be viewed as a breach of trust. It is suggested that the fiduciary should remain liable to account to the beneficiary, and that the beneficiary may be able to trace his or her equitable interest into the hands of the briber to whom restitution has been made.

---

[80] *FHR* (n 13) [42].
[81] See *Challinor v Bellis* [2015] EWCA Civ 59 [113] (Briggs LJ). This has been criticised as 'confusing the factual and legal interpretations of enrichment': G Virgo, *The Principles of the Law of Restitution*, 3rd edn (Oxford, OUP, 2016) 73. But it is suggested that there is no confusion, and indeed a similar approach has been maintained in cases concerning freezing orders: see *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 1 WLR 1695; *Lakatamia Shipping Co Ltd v Su* [2014] EWCA Civ 636; [2014] C P Rep 37.
[82] cf *Nelson v Nelson* [1995] HCA 25; (1995) 184 CLR 538.
[83] *FHR* (n 13) [36]–[47]. See also P Millett, 'Bribes and Secret Commissions Again' [2012] *CLJ* 583.

III. Breach of fiduciary duty: beyond bribery

The illegality defence does not play a prominent role in claims for breach of fiduciary duty beyond the context of bribes and secret commissions. It has been said that even where a fiduciary pleads illegality to try to defeat a claim brought by his or her principal for breach of duty, the illegality should not, generally, bar the claim since it would be unconscionable for the fiduciary to be better off as a result of the breach of duty.[84] This is sensible. It is, however, less clear whether, as a result of *Patel v Mirza*, a fiduciary may now be able to bring a claim in unjust enrichment against his or her principal, even though the parties both participated in an illegal scheme.

In *Re Thomas*,[85] a principal handed over money to his solicitor to be used for conducting certain litigation. The principal later sought to obtain an account from the solicitor and a taxation of his bill of costs. The solicitor sought to resist the claim on the basis that the money had come from illegal agreements. That defence failed. The Court of Appeal was adamant that an officer of the court could not rely on such illegality to protect himself. Lindley LJ pointedly asked: "Is every rascally solicitor to invoke his own rascality as a ground of immunity from the jurisdiction of the Court? Or is the Court to listen to a solicitor who, after acting for and advising his client and taking his money, is mean enough to denounce him and set up the illegality of the client's conduct as a reason why the Court should not call its own officer to account?"[86] Clearly not. A court could not allow a fiduciary to act in such a reprehensible manner.

In *Harse v Pearl Life Assurance*[87] a claimant paid insurance premiums under a policy that was assumed to be illegal. The defendant insurer had made innocent misrepresentations to induce the claimant to take out the policy, but the court nonetheless held that the claimant could not recover the value of the premiums since the parties were *in pari delicto.* The outcome of the case may now be different following *Patel v Mirza*. However, Collins MR was clear that if the claimant had been able to establish a "difference in the position of the parties which created

[84] J Heydon, M Leeming, P Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies*, 5th edn (Sydney, LexisNexis, 2014) [5-305].
[85] [1894] 1 QB 747.
[86] ibid 749.
[87] [1904] 1 KB 558.

a fiduciary relationship to the [claimant] so as to make it inequitable for the defendants to insist on the bargain that they had made with the [claimant]",[88] then the claimant would have been able to obtain restitution. Where the defendant abuses a fiduciary relationship with the principal then he or she should not be able to invoke the illegality defence to resist a restitutionary claim.[89]

But what if it is the fiduciary who seeks restitution? The answer to this question is not clear. In *Wild v Simpson*[90] a solicitor entered into an illegal agreement with a client. The client promised to pay to the solicitor a percentage of certain sums he recovered. The client successfully recovered various monies, and the solicitor brought a claim for his costs. The claim failed: the agreement between the parties was illegal, and the solicitor could not bring a claim against the client. The outcome has been criticised as unfair,[91] since the solicitor was not seeking to enforce the illegal contract and recover a percentage of the client's money, but only to recover the value of the work the solicitor provided in a restitutionary claim. Such criticisms perhaps chime well with the emphasis placed upon the availability of restitution by the Supreme Court in *Patel v Mirza*, and it may be that *Wild v Simpson* could now be decided differently. However, it is suggested that since the enrichment of the defendant consisted of services rendered, rather than money received (as in *Patel v Mirza*), it is harder to achieve *restitutio in integrum.* Moreover, there are good reasons why a fiduciary (the stronger party) should not be able to bring a claim against his or her principal (the vulnerable party) once the parties have entered into an illegal arrangement. After all, the principal should be able to place trust and confidence in the fiduciary, and in order to hold fiduciaries up to higher standards the courts may well continue to be reluctant to allow fiduciaries even a restitutionary remedy in circumstances such as those in *Wild v Simpson*.

IV. Illegality and trusts[92]

Patel v Mirza purports to set down an approach to illegality throughout the private law. As a result, even in the context of trusts disputes it is to be expected that courts will balance

[88] ibid 563.
[89] Unless, perhaps, the illegality is very serious indeed: see text to nn 45 – 47.
[90] [1919] 2 KB 544 (CA).
[91] G Virgo (n 71) XXX.
[92] This section draws upon a more extensive analysis of these issues in Davies (n 15).

various factors when deciding whether the illegality defence should apply. This is a very different approach from that favoured in *Tinsley v Milligan*, but will often lead to the same results.[93] Moreover, it is possible to exaggerate the importance of the illegality defence in the context of trusts: in its "Impact Assessment for Reforming the Law of Illegality in Trusts" in 2010, the Law Commission was only able to identify 19 reported cases in the previous 9 years.[94]

It is important to remember that *Patel v Mirza* was not a trusts case, and that Lord Sumption's warning that the majority's approach could lead to "unforeseen and undesirable collateral consequences"[95] might be particularly prescient where third party rights are involved. The emphasis placed upon restitution throughout *Patel v Mirza* does not fit very well with many trusts cases. For example, in *Tinsley v Milligan* itself Miss Milligan's ability to enforce a beneficial share in the property did not reverse any illegality.[96] Instead, the decision of the House of Lords gave effect to the illegal scheme: Miss Milligan was able to hide her beneficial interest so that she could fraudulently claim benefits from the Department of Social Security. It was impossible to restore Miss Milligan and Miss Tinsley to any status quo ante, since the property in question could not be returned to the original vendors.

Nevertheless, the outcome in *Tinsley v Milligan* would be the same after *Patel v Mirza*; the Supreme Court Justices were clear that any other result would be "disproportionate".[97] Similarly, unwinding the transaction in *Tribe v Tribe*,[98] where a father transferred shares to his son to conceal them from his creditors, would still occur following *Patel v Mirza*, even if some of the illegal purpose had in fact been performed.[99] It is interesting to note that these cases of intentional fraud do not seem to be treated as involving illegal conduct of a particularly serious nature,[100] even though conspiracy to defraud may be punished with a custodial sentence of up to ten years.

One case that would be decided differently after *Patel v Mirza* is *Collier v Collier*.[101] The Law Commission observed that "[t]he facts of the case were complex and hard to discern,

---

[93] In *Patel v Mirza*, the only trusts case which the Supreme Court identified that should now be decided differently is *Collier v Collier* [2002] EWCA Civ 1095; [2002] BPIR 1057, discussed at text to nn 101.
[94] Law Commission, *The Illegality Defence* Report (n 29) 80.
[95] *Patel* (n 2) [226]; see also [165] (Lord Neuberger).
[96] Compare [201] (Lord Mance); for criticism see [135]–[136] (Lord Kerr). For further discussion of this case, see N McBride, 'The Future of Clean Hands' in this volume at XXX.
[97] *Patel* (n 2) [112] (Lord Toulson); [181] (Lord Neuberger).
[98] [1996] Ch 107.
[99] *Patel* (n 2) [171].
[100] See also *Silverwood v Silverwood* (1997) 74 P & CR 453.
[101] *Collier* (n 93).

the judge concluding that both parties had lied to the court".[102] Essentially, a father, who owned the freehold to two properties, gave his daughter a lease over both premises, together with an option to purchase the freehold at a later date. The purpose of this transaction was to deceive the father's creditors and the Inland Revenue; the father intended to continue to control both properties. Aldous and Chadwick LJJ held that the grant of the leases had not been by way of gift, because of the requirement that the daughter pay rent and a sum of money to exercise the option, so the presumption of advancement did not apply. Mance LJ, on the other hand, thought that the leases were shams and the presumption of advancement did apply. All three judges agreed that, if the presumption of advancement did apply, then it could not be rebutted by the father because of *Tinsley v Milligan*. That reasoning would no longer be followed, and it seems likely that if the transfer had been gratuitous then the father would now be able to establish a beneficial interest under a resulting trust.

The father also argued that there was an express trust in his favour. Chadwick LJ rejected this claim due to a lack of evidence; Aldous LJ held that any agreement included illegal terms and so could not be relied upon; Mance LJ thought that the father would have to rely on the proof of the purpose of their agreement, which was not allowed. Yet had the father been able to produce a simple document recording the express trust, then this would have been sufficient to establish a trust without leading any evidence of illegality. It is clearly unsatisfactory for the outcome of cases to depend upon whether an "untainted" document can be produced as an "objective fact", and the distinction drawn between relying upon an agreement and relying upon a neutral fact seems to be very fine indeed. The outcome of the case is, *prima facie*, that the daughter is rewarded for her duplicitous behaviour.[103] As the Law Commission noted, "it seems nonsensical that the courts might decide the outcome of the case by looking at selective pieces of the relevant evidence".[104] Happily, *Patel v Mirza* suggests a different outcome would now be reached.[105] The court would take into account the purpose of the prohibition and a sense of proportionality, such that the father would now be able to claim an interest under a trust.

---

[102] Law Commission, *The Illegality Defence: A Consultative Report* Consultation (n 29) para 6.41.
[103] Lord Mance called the decision "unsatisfying", having been reluctant to reach that result in *Collier v Collier* itself*: Patel* (n 2) [105] – [106], [187].
[104] Law Commission, *The Illegality Defence: A Consultative Report* Consultation (n 29) para 6.51.
[105] "It is I think now accepted on all sides that, if *Collier v Collier* [2002] BPIR 1057 came before the courts today it would be decided differently": *Patel* (n 2) [221] (Lord Clarke).

Patel v Mirza will also affect the law concerning constructive trusts, or at least common intention constructive trusts. In *Tinsley v Milligan,* Lord Browne-Wilkinson thought that the same result should be reached regardless of whether the claim is brought for a beneficial interest under a resulting trust or under a common intention constructive trust.[106] This view received some support from the Court of Appeal[107] prior to *Patel v Mirza,* but in some situations it would have been difficult to establish any agreement sufficient for a "common intention" without leading evidence of illegality.[108] Following *Patel v Mirza,* such a formalistic approach is not required: courts can look at all the evidence and decide whether a party should be prevented from enforcing a beneficial interest due to the illegality.[109] It is now even less likely that a party will be unable to claim a beneficial interest under a common intention constructive trust because of an illegal transaction.

It is suggested that, after *Patel v Mirza*, participation in an illegal transaction will prevent a claimant from enforcing a beneficial interest under a trust only in very unusual and rare circumstances. It is likely that the illegality will have to be particularly serious (such as terrorism offences[110]). Yet it is difficult to state definitively what outcomes will be reached, since an approach involving the balancing of various relevant factors is inherently somewhat uncertain.

Lord Toulson was highly influenced by the work of the Law Commission on illegality, but it should be remembered that the law of trusts was the one area where the Law Commission recommended statutory reform.[111] Admittedly, this was largely because the Commission did not think it likely that *Tinsley v Milligan* would be departed from judicially, but the Commission was perhaps also influenced by many responses to its consultations which emphasised the need for certainty in the context of property rights.[112] Lord Toulson thought that "people contemplating unlawful activity" do not perhaps "deserve" that the law be entirely certain.[113] But where the claim in a trust dispute concerns third parties, such reasoning is

---

[106] *Tinsley* (n 4) 376.
[107] *O'Kelly v Davies* [2014] EWCA Civ 1606; [2015] 1 WLR 2725.
[108] *Barrett v Barrett* [2008] EWHC 1061 (Ch); [2008] BPIR 817.
[109] And this may include considerations of remoteness: *Q v Q* [2008] EWHC 1874 (Fam); [2009] 1 FLR 935 [137] (Black J).
[110] cf *Tinsley* (n 4) 362 (Lord Goff).
[111] See the Draft Trusts (Concealment of Interests) Bill attached to Law Commission, *The Illegality Defence* Report (n 29).
[112] See Law Commission, *The Illegality Defence: A Consultative Report* Consultation (n 29) paras 6.87–6.88; Law Commission, *The Illegality Defence* Report (n 29) para 3.46.
[113] *Patel* (n 2) [113]; see also [137] (Lord Kerr).

obviously weakened. As Lord Neuberger rightly observed, innocent third parties are entitled to expect the law to be clear, and "there is a general public interest in certainty and clarity in all areas of law".[114]

It remains unclear what the effect of illegality should be upon third parties to the trust.[115] For example, the claimant may not be a tainted beneficiary, but instead the beneficiary's creditor[116] or executor.[117] The more flexible approach adopted by the Supreme Court in *Patel v Mirza*, and the desire to reach more transparently just outcomes, might suggest that the claims of an innocent creditor or executor should trump the claims of a defendant tainted by illegality.[118] Indeed, given the support extended to Lord Browne-Wilkinson's view in *Tinsley v Milligan* that the effect of illegality is procedural rather than substantive,[119] it seems possible for a court to say that whilst a beneficiary cannot personally enforce his or her rights due to the illegality defence, creditors or executors suing through the beneficiary may be able to.

It is also to be hoped that one factor to be taken account should be that the intended "victim" of the concealment may have an interest in the value of the assets of the beneficiary.[120] The Law Commission gave the example of a husband who may transfer property to his mistress in order to hide it from his wife. If a dispute were to arise between the husband and mistress over the ownership of the property, the court should be able to take into account the possibility that the wife might in the future bring a claim against her husband under the Matrimonial Causes Act 1973, and that the value of the wife's possible claim could be reduced if the court were to decide that the husband did not in fact have an interest under a trust in the property transferred to the mistress because of the illegality defence.

One issue that remains unclear is what consequences should follow if a trust is unenforceable as a result of illegality. The Law Commission's Draft Bill thought that there were four options regarding who should be entitled to the equitable interest: (i) the

---

[114] ibid [158]; see also [263] (Lord Sumption).
[115] The Law Commission accepted that "the position is simply not clear": Law Commission, *The Illegality Defence: A Consultative Report* (n 29) para 6.65.
[116] See the discussion of Mance LJ in *Collier* (n 93).
[117] See *Silverwood* (n 100)
[118] cf *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39; [2009] 3 WLR 455, criticised in *Bilta (UK) Ltd v Nazir* [2015] UKSC 23; [2016] AC 1.
[119] *Tinsley* (n 4) 374, cited in *Patel* (n 2) [20] (Lord Toulson), [193] (Lord Mance).
[120] Draft Trusts (Concealment of Interests) Bill, Clause 5(1)(f).

beneficiary;[121] (ii) the trustee;[122] (iii) the settlor;[123] and (iv) another beneficiary under the same trust.[124] The Law Commission concluded that these options were mutually exclusive, and that the illegality defence should operate in an all-or-nothing manner.[125] This is consistent with a traditional approach to the doctrine, but it is interesting to speculate whether the more flexible approach favoured in *Patel v Mirza* might have an impact upon the remedies awarded as well. It may be that an all-or-nothing approach is too inflexible, just as the reliance principle in *Tinsley* has been recognised as too inflexible, and that in some instances the court might have a discretion to split property between the settlor and beneficiary, for example.[126]

V. Conclusion

Patel v Mirza is a significant decision that is bound to have an impact upon the operation of the illegality defence in every area of private law. It is to be hoped that an approach which requires a range of factors to be balanced will lead to more transparent reasoning. But it is difficult to predict how the court's discretion will be exercised.[127] Of course, under *Tinsley v Milligan* the "reliance principle" had proved to be sufficiently malleable to undermine commercial certainty as well, but the prospect of successfully appealing against the decision of a trial judge now appears to be very remote indeed. Unless a judge has taken into account irrelevant factors, or failed to take into account clearly relevant factors, then it should be very difficult to appeal on the basis that the judge weighed those factors incorrectly. A trial judge who has heard all the evidence is in the best position to exercise a discretion in this area.

In any event, *Patel v Mirza* suggests that, as a general rule, it is only in instances of serious illegality that a claim seeking to restore the parties to the status quo ante will be barred. Yet this will not inevitably lead to satisfactory results. In particular, where a fiduciary has been bribed to act disloyally towards his or her principal, the parties should not simply be restored to their status quo ante, and the position of the principal should be protected. Indeed, courts

[121] The default position: see Clause 3(1).
[122] Draft Trusts (Concealment of Interests) Bill, Clause 4(4)(a).
[123] ibid Clause 4(4)(b).
[124] ibid Clause 4(4)(c).
[125] ibid Clause 4(3)(a), although if a particular class contains more than one party, then the interest can be split between those parties: Clause 4(3)(b).
[126] cf *Taylor v Bhail* [1996] CLC 377, CA, 383 (Millett LJ).
[127] Lord Neuberger thought that the majority's approach "is not akin in practice to a discretion", but in substance it is suggested that judges do have a wide discretion regarding the effect of illegality: *Patel* (n 2) [175]

should be wary about awarding restitution to a briber in all circumstances. It is clear that the task of the courts in applying the illegality defence in equity remains far from easy.