

[Chapter number]

**Ramifications of *Patel v Mirza* in the Law of Trusts**

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Cases concerning the law of property and, in particular, trusts have had a significant impact upon the illegality defence throughout the common law. The decision of the House of Lords in *Tinsley v Milligan*<sup>1</sup> acted as a catalyst for the prolonged work of the Law Commission; that was a trusts case, which built upon decisions concerning legal property rights.<sup>2</sup> The “‘reliance-based’ approach endorsed in *Tinsley* clearly did cause some concern in trust cases,<sup>3</sup> and in *Patel v Mirza*<sup>4</sup> the departure from the reliance principle came as no great surprise. As a result, some cases concerning trusts may now be decided differently; indeed, the Supreme Court in *Patel v Mirza* expressed dissatisfaction with *Collier v Collier*,<sup>5</sup> for example. Considering how the illegality defence will operate in the context of trusts is therefore of some practical importance.<sup>6</sup> However, the number of cases affected should not be exaggerated. 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.<sup>7</sup> Even in its original consultation, the Commission recognised that:<sup>8</sup>

[T]rusts which ‘involve’ illegality have not caused, and would perhaps be unlikely to cause, significant difficulties for the courts. There is certainly a dearth of case law dealing with many of the ways in which a trust may ‘involve’ a legal wrong.

In any event, *Patel v Mirza* is not a trusts case, and the Supreme Court did not consider the ramifications that decision may have in this area of law. Lord Sumption warned that the majority’s stance could lead to ‘unforeseen and undesirable collateral consequences’,<sup>9</sup> and these could be felt particularly keenly where property rights are concerned. Moreover, there are a number of open questions concerning the effect of illegality in the law of trusts, and this chapter will also seek to address the most pressing of these.

**I. Does *Patel v Mirza* affect the Law of Trusts?**

It may seem obvious that the decision of the Supreme Court in *Patel v Mirza* affects all areas of private law, and is not limited to the facts of the dispute which was before the court. After all, Lord Toulson, speaking for the majority, was clear that the approach in *Tinsley v Milligan*

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<sup>1</sup> *Tinsley v Milligan* [1994] 1 AC 340.

<sup>2</sup> See, in particular, *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 (CA).

<sup>3</sup> See, eg, the comments of Judge Weeks QC at first instance and the Court of Appeal in *Tribe v Tribe* [1996] Ch 107, 118 (Nourse LJ), 133 (Millett LJ); *Q v Q* [2008] EWHC 1874 (Fam), [2009] Fam Law 17 [138] (Black J).

<sup>4</sup> *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.

<sup>5</sup> *Collier v Collier* [2002] EWCA Civ 1095, [2002] BPIR 1057.

<sup>6</sup> Lord Sumption noted ‘the volume of litigation which the [illegality] principle has generated in every period of its history’: *Patel* (n 4) [263].

<sup>7</sup> Law Commission, *The Illegality Defence* (Law Com No 320) 80.

<sup>8</sup> Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (Law Com CP No 154, 1999) para 8.16.

<sup>9</sup> *Patel* (n 4) [226]; see too [165] (Lord Neuberger).

should be departed from.<sup>10</sup> But while throughout the judgment reference was made to the law of contract, tort and unjust enrichment,<sup>11</sup> there was little explicit discussion of property rights.<sup>12</sup> Given the facts of *Patel v Mirza* – which concerned the recovery of money paid under a contract tainted by illegality – this is understandable. But it does highlight the ambition of the majority in *Patel v Mirza*: effectively, the Supreme Court sought to reform a wide area of law, and used the dispute in one particular case as a springboard to do so. This is problematic, given the nature of how cases are decided.<sup>13</sup> Counsel on both sides in *Patel v Mirza* were, inevitably, focussed on achieving the best outcome for their clients, for whom the coherence of the law is naturally secondary to winning the case. Indeed, it appears that neither 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.<sup>14</sup> It is impossible for the Supreme Court to have the same information and broad view available to it as a legislature would have, and it is not obviously desirable for judges to quasi-legislate in the manner undertaken by the Supreme Court in *Patel v Mirza*. It is worth recalling the wise warning of Lord Goff in *Tinsley v Milligan*:<sup>15</sup>

[I]f there is to be a reform aimed at substituting a system of discretionary relief for the present rules, the reform is one which should only be instituted by the legislature, after a full inquiry into the matter by the Law Commission, such inquiry to embrace not only the perceived advantages and disadvantages of the present law, but also the likely advantages and disadvantages of a system of discretionary relief.

Nevertheless, it would now take a very bold judge to apply the approach in *Tinsley v Milligan* to a trust dispute on the basis that the ratio of *Patel v Mirza* does not cover trusts.<sup>16</sup> And it is at least understandable why the Supreme Court decided to ‘venture further’<sup>17</sup> and deal with the law of illegality more broadly: the law was a mess, strongly criticised,<sup>18</sup> and it was unlikely that a better opportunity would soon present itself to the Supreme Court to deal with the law concerning trusts.<sup>19</sup> Before *Patel v Mirza*, lower court judges continued to feel constrained to apply *Tinsley* in the context of trusts.<sup>20</sup> In order to move away from that situation, the majority Justices clearly intended that their favoured approach be applied broadly.

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<sup>10</sup> See, eg, *ibid* [114]; see too, eg, [134] (Lord Kerr).

<sup>11</sup> See, eg, *ibid* [164], [174] (Lord Neuberger), [191], [204] (Lord Mance); [230], [263] (Lord Sumption).

<sup>12</sup> Although Lord Toulson did recognise that illegality ‘has the potential to provide a defence to civil claims of all sorts, whether relating to contract, property, tort or unjust enrichment’: *ibid* [2]. *Cf R (Best) v Chief Land Registrar* [2016] QB 23.

<sup>13</sup> *Patel* (n 4) [164] (Lord Neuberger). The Law Commission originally thought that ‘any possibility of wholesale judicial reform appears blocked’: CP 154 (n 8) para 5.10.

<sup>14</sup> *Patel* (n 4) [261] (Lord Sumption); *cf* [20] (Lord Toulson).

<sup>15</sup> *Tinsley* (n 1) 364.

<sup>16</sup> Writing before the decision in *Patel v Mirza* was handed down, one commentator considered there to ‘be some merit in a bifurcated approach in which the reliance test set out in *Tinsley* remained the appropriate test for “trust cases”’: C Darton, ‘Trusts and the Law of Illegality’ (2016) 22 *Trusts & Trustees* 729, 736.

<sup>17</sup> *Patel* (n 4) [166] (Lord Neuberger).

<sup>18</sup> See, eg, 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 in *Patel* (n 4) [15].

<sup>19</sup> See, eg, *Patel* (n 4) [133] (Lord Kerr).

<sup>20</sup> See, eg, *Hniazdzilau v Vajgel* [2016] EWHC 15 (Ch).

This has the advantage of maintaining a semblance of coherency and consistency across private law: the law of property and trusts is not an entirely different species from contract and tort.<sup>21</sup> Nevertheless, there appears to be some feeling that certainty is especially important in the context of property rights. The Law Commission was acutely conscious of many responses to its consultations which emphasised the need for certainty in the context of property rights,<sup>22</sup> and the Draft Bill it ultimately attached to its final report was very narrow in scope and covered only equitable property rights but not legal property rights. The reliance principle in *Bowmakers Ltd v Barnet Instruments Ltd*<sup>23</sup> would therefore have been maintained. Admittedly, the Commission thought this was a source of ‘regret’, but the different considerations at issue – particularly as regards third parties – when considering property rights mean that it is unlikely that *Patel v Mirza* will be the final word on illegality in property law. Indeed, when downplaying fears of uncertainty, Lord Toulson pointed out that ‘people contemplating unlawful activity’ do not perhaps ‘deserve’ that the law be entirely certain,<sup>24</sup> but where the claim in a trust dispute concerns third parties, such reasoning is 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”.<sup>25</sup>

## II. The Role and Future of the Presumption of Advancement

The decision in *Tinsley* highlighted the importance of the two so-called ‘presumptions’ of resulting trust and advancement. Equity is generally said to be suspicious of transfers made for no consideration in return, so a donee may hold the property transferred on trust for the donor by virtue of a ‘presumption of resulting trust’. In some circumstances, however, equity will presume that a gift was intended because of the relationship between the parties, as a result of a ‘presumption of advancement’. The effect of these different presumptions relates to the allocation of the burden of proof:<sup>26</sup> where the presumption of resulting trust arises, the burden will be on the transferee to show that a trust was not intended, and where the presumption of advancement applies, the burden will be on the transferor to show that he or she did not intend a gift but intended to retain a beneficial interest in the property.

In *Stack v Dowden*,<sup>27</sup> Baroness Hale cited with approval the observation of Lord Diplock in *Pettitt v Pettitt* that the equitable presumptions are ‘no more than a consensus of judicial opinion disclosed by reported cases as to the most likely inference of fact to be drawn in the absence of any evidence to the contrary’.<sup>28</sup> However, it is worth highlighting that the existence of two competing ‘presumptions’ is controversial. Logically, only one is needed. So, for example, we may only need a presumption of resulting trust, and where this does not apply

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<sup>21</sup> F Rose, ‘Restitutionary and Proprietary Consequences of Illegality’ in F Rose (ed), *Consensus Ad Idem: Essays on the Law of Contract in Honour of Guenter Treitel* (London, Sweet & Maxwell, 1996) 216.

<sup>22</sup> See, eg, CP 154 (n 8) paras 6.87–6.88; LC 320 (n 7) para 3.46.

<sup>23</sup> n 2.

<sup>24</sup> *Patel* (n 4) [113]; see too [137] (Lord Kerr).

<sup>25</sup> *ibid* [158]; see too, eg, [263] (Lord Sumption).

<sup>26</sup> *Russell v Scott* (1936) 55 CLR 440, 451 (Dixon and Evatt JJ).

<sup>27</sup> *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 [60].

<sup>28</sup> *Pettitt v Pettitt* [1970] AC 777 (HL) 823H.

there is no need for any fact to be presumed and therefore no need for any ‘presumption’ of advancement.<sup>29</sup>

Nevertheless, the language of two different presumptions is entrenched in the decided cases and was raised to undue prominence by the House of Lords in *Tinsley*. Miss Tinsley and Miss Milligan were lovers who purchased a property which was conveyed into the sole name of Tinsley, even though Milligan had contributed to the purchase price. The purpose of this arrangement was to defraud the Department of Social Security. Milligan claimed a share in the property, and Tinsley argued that she could not do so because of her illegal conduct. A bare majority of the House of Lords held that Milligan could claim a share in the house despite the illegal purpose of the arrangement. Milligan could rely on the presumed resulting trust which arose in her favour by virtue of her contribution to the purchase price:<sup>30</sup> she did not need to lead any evidence of illegality in order to establish her beneficial interest, and Tinsley could not rebut the presumption of resulting trust by relying on the illegal purpose of the arrangement. However, on only slightly different facts the result would have been entirely different. If the case had concerned a married heterosexual couple, and the husband had contributed to the purchase of a house in the sole name of his wife, then there would have been a presumption of advancement in favour of his wife, rather than a presumption of resulting trust. Consequently, the husband would not have been able to claim a share in the property: he would have needed to lead evidence of illegality in order to rebut the presumption of advancement, and this would not be permitted. Yet the merits of the two cases appear overwhelmingly similar.

This highlights that the two presumptions ‘are not as innocuous as they seem’.<sup>31</sup> The relationship between the parties could be crucial in determining whether a trust prima facie arises, and whether there is any need to rely upon illegal conduct. This was highlighted in *Tribe v Tribe*.<sup>32</sup> A father transferred shares to his son to conceal them from his creditors. Once the threat from his creditors had passed, the father asked his son to return the shares to him. The son refused and argued that, since there had been an apparent gift from father to son, the presumption of advancement applied and the father was unable to rebut this by pleading his actual unlawful purpose. The Court of Appeal held that, since none of the creditors had been aware of the transfer of shares, no part of the illegal purpose had been carried into effect, so the father could withdraw from the illegal scheme as he was still within the ‘locus poenitentiae’; the father could therefore plead his illegal intent in order to rebut the presumption of advancement. This reliance on the locus poenitentiae is controversial, since it appears that the illegal purpose of the father had been carried out, as his shares were hidden with his son for a given period, exactly as intended.<sup>33</sup> The decision in *Tribe v Tribe* seems to fall foul of the warning given by Lord Denning in *Chettiar v Chettiar* that ‘he cannot use the process of the

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<sup>29</sup> W Swadling, ‘Legislating in Vain’ in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, OUP, 2013).

<sup>30</sup> On the same facts today the analysis would be based upon a constructive trust rather than resulting trust, following the decisions in *Stack v Dowden* (n 27) and *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776: see below.

<sup>31</sup> JD Davies, ‘Presumptions and Illegality’ in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Oxford, OUP, 1996) 33.

<sup>32</sup> *Tribe v Tribe* [1996] Ch 107.

<sup>33</sup> F Rose, ‘Gratuitous transfers and illegal purposes’ (1996) 112 *LQR* 386.

courts to get the best of both worlds – to achieve his fraudulent purpose and also to get his property back’.<sup>34</sup>

Following *Patel v Mirza* it may now be that there is no need to invoke a locus poenitentiae since the balancing approach necessarily takes into account whether the illegal purpose has been fulfilled.<sup>35</sup> But *Tribe* highlights a certain level of dissatisfaction with the rigid approach in *Tinsley*. Millett LJ criticised the ‘harshness’ of the decision in *Tinsley*,<sup>36</sup> and Nourse LJ cited with apparent approval the criticism of HHJ Weekes QC at first instance in the case, who found it ‘difficult to see why the outcome in cases such as the present one should depend to such a large extent on arbitrary factors, such as whether the claim is brought by a father against a son, or a mother against a son, or a grandfather against a grandson’.<sup>37</sup> More recently, Black J has lamented that ‘the courts have plainly felt uncomfortable at times with the results of the rules, which can seem sometimes to favour one of a number of parties who are all equally implicated in the illegal purpose simply by virtue of the accident of how a case has to be pleaded, but that is the way in which the law operates’.<sup>38</sup>

Much of the dissatisfaction stems from whether the presumption of advancement or presumption of resulting trust arises from the facts of the case. And it is in the context of illegal transactions that the presumptions are most important: both the presumption of advancement and the presumption of resulting trust can be displaced by any evidence of a contrary intention,<sup>39</sup> but the major restriction was that evidence tainted by illegality was not admissible under the ‘reliance principle’ of *Tinsley*. As a result, the Law Commission understandably considered whether the presumption of advancement could simply be abolished,<sup>40</sup> and whether this would solve many of the problems posed for the law of trusts by *Tinsley*. Although this proposal apparently received the support of consultees, this limited idea of reform was soon dropped by the Law Commission since it would only affect resulting trusts. Yet the fact-pattern of *Tinsley* itself would no longer be considered to concern a resulting trust, but rather a constructive trust, following the decisions of the House of Lords in *Stack v Dowden*<sup>41</sup> and *Jones v Kernott*.<sup>42</sup>

Beyond the context of illegality, the presumption of advancement has continued to be attacked. In its traditional form, it is easy to criticise this presumption as anachronistic and discriminatory. In *Tinsley v Milligan*, Lord Browne-Wilkinson explained that it applied to ‘a transfer from a man to his wife, children or others to whom he stands *in loco parentis*’.<sup>43</sup> But why should it matter whether the transferor was male or female? The basis of the presumption appears to be that women and children depended upon a patriarch such that the advantage of a presumption of advancement was required as a matter of public policy. However, as Lord Reid

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<sup>34</sup> *Chettiar v Chettiar* [1962] AC 294, 302.

<sup>35</sup> See, eg, *Patel* (n 4) [44], [116] (Lord Toulson); see too [169] (Lord Neuberger) and cf, eg, [202] (Lord Mance), [247]–[253] (Lord Sumption).

<sup>36</sup> *Tribe* (n 32) 133.

<sup>37</sup> *Ibid* 118.

<sup>38</sup> *Q v Q* [2008] EWHC 1874 (Fam), [2009] Fam Law 17 [138].

<sup>39</sup> See, eg *Pettit* (n 28) 814 (Lord Upjohn).

<sup>40</sup> See [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/Presumption\\_of\\_Advancement.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/Presumption_of_Advancement.pdf)

<sup>41</sup> n 27.

<sup>42</sup> n 30.

<sup>43</sup> *Tinsley* (n 1) 372.

commented in *Pettitt v Pettitt* as long ago as 1969, ‘These considerations have largely lost their force under present conditions, and, unless the law has lost all flexibility so that the courts can no longer adapt it to changing conditions, the strength of the presumption must have been much diminished’.<sup>44</sup> It has also been said that existence of the presumption of advancement is contrary to human rights,<sup>45</sup> although the better view is that the presumption of advancement in itself is probably not contrary to the United Kingdom’s obligations under the European Convention on Human Rights.<sup>46</sup>

In any event, distinguishing between gifts on the basis that they were made by a man or by a woman is clearly unsatisfactory. There are two principal options for future reform: either abolish the presumption of advancement, or extend it so that it also applies to transfers from wife to husband and mother to child, for example. The first option was adopted in section 199 of the Equality Act 2010. Yet despite much of the Equality Act 2010 already being implemented, section 199 has not been brought into force, and there are no indications that the Government intends to do so. It is suggested that one consequence of *Patel v Mirza* will be that section 199 of the Equality Act 2010 is even less likely to be implemented, since any perceived need to do so will be reduced now that cases on illegality no longer turn upon whether the presumption of advancement applies.

Judicial proclamations that the presumption of advancement is on its ‘death-bed’<sup>47</sup> are therefore likely to prove premature. More to the point is Lord Neuberger’s observation in *Stack v Dowden* that ‘the presumption of advancement, as between man and wife, which was so important in the 18th and 19th centuries, has now become much weakened, although not quite to the point of disappearance’.<sup>48</sup> Indeed, it is possible to imagine that the presumption might conceivably have some role to play beyond illegal transactions. For instance, a father might transfer property to his son immediately before becoming mentally incapacitated or dying, and it may be important to ascertain where the burden of proof lies. It is suggested that there is much to be said in favour of retaining the presumption of advancement. After all, when a father gives property to his child, it seems more likely than not that a gift was intended, and that the burden should be on the father to prove the contrary. It is to be hoped that the presumption will simply be extended to cover gifts from mother to child<sup>49</sup> and from wife to husband<sup>50</sup> or between spouses in a same-sex marriage. This path is available to judges when developing the common law. It is doubtful whether the contrary approach of abolishing the presumption of advancement

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<sup>44</sup> *Pettitt* (n 39) 793.

<sup>45</sup> See, eg, G Andrews, ‘The Presumption of Advancement: Equity, Equality and Human Rights’ [2007] *Conv* 340, who considers the presumption to be inconsistent with Article 14 of the European Convention on Human Rights, which prohibits discrimination on the grounds of sex, as well as Article 5 of Protocol 7 of the Convention, which provides that ‘Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution.’

<sup>46</sup> J Glister, ‘Section 199 of the Equality Act 2010: How Not to Abolish the Presumption of Advancement’ (2010) 73 *MLR* 807, who argues that Article 5 of Protocol 7 is limited to relations between spouses and their children in the context of marriage, and that the presumption of advancement is not a ‘right’ within the scope of Article 5. The United Kingdom has not (yet) ratified Protocol 7.

<sup>47</sup> *Bhura v Bhura* [2014] EWHC 727 (Fam), [2015] 1 FLR 153 [8] (Mostyn J); see too *Jones v Kernott* (n 30) [34] (Lord Walker and Lady Hale).

<sup>48</sup> *Stack v Dowden* (n 27) [101].

<sup>49</sup> See the approach of the Australian courts in *Nelson v Nelson* [1995] HCA 25, (1995) 184 CLR 538.

<sup>50</sup> *Cf Abrahams v Trustee in Bankruptcy of Abrahams* (1999) 31 LS Gaz R 38, [1999] BPIR 637.

should be pursued by judges when Government has deliberately chosen not to bring such a reform into effect through section 199.

There is some evidence that the courts have already started to shift in the direction of expanding the presumption of advancement. In *Antoni v Antoni*, Lord Scott, giving the advice of the Privy Council, employed gender-neutral language in describing the presumption of advancement as applying ‘when a parent places assets in the name of a child and assumes that the parent intends to make a gift to the child’.<sup>51</sup> Similarly, in *Close Invoice Finance Ltd v Abaowa*, Mr Simon Picken QC, sitting as a Deputy Judge, said, obiter, that he ‘would have had no hesitation in deciding that in the modern age the presumption of advancement should, indeed, be taken as applying between a mother and a daughter in the same way that it does as between a father and his child’.<sup>52</sup> It has been suggested this approach might come at an indirect cost to women,<sup>53</sup> and it may prove difficult to define precisely which relationships give rise to the presumption of advancement. Nevertheless, it remains the best avenue available to judges. The alternative option of abolishing the presumption can now only satisfactorily be achieved through legislation, and in many respects section 199 remains problematic. For example, that provision would operate prospectively only;<sup>54</sup> reform should be both immediate and have retrospective effect.

### III. Implementing the work of the Law Commission?

It is clear that Lord Toulson and the majority of the Supreme Court in *Patel v Mirza* were influenced by the work of the Law Commission.<sup>55</sup> Given that Lord Toulson was the Chair of the Commission for part of the very long lifetime of the Law Commission’s project, this is unsurprising. However, it is worth reflecting on the scope of the Law Commission’s proposals compared to the scope of the decision of the Supreme Court. This is particularly appropriate in the context of trusts, since the Law Commission did recommend statutory reform, and indeed the final report of the Law Commission included a Draft Trusts (Concealment of Interests) Bill (Draft Bill).

Too much weight should not be placed upon the Law Commission’s proposed legislation. After all, the Government said that it was ‘minded not to implement the Commission’s proposals’,<sup>56</sup> and the Law Commission itself confessed to finding the project very difficult, and to divisions within the Commission.<sup>57</sup> It might be thought that the Law Commission did well just to rid itself of the project in the end, since, at least on one view, it had received something of a ‘hospital pass’ from Lord Goff in being made to look at such an intricate and complex area of law where opinions differ markedly and vociferously. It is not surprising that legislation has not been passed. But the Law Commission’s project does have the great merit of clearly highlighting the major areas of difficulty in the common law, and it

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<sup>51</sup> *Antoni v Antoni* [2007] UKPC 10, [2007] WTLR 1335.

<sup>52</sup> *Close Invoice Finance Ltd v Abaowa* [2010] EWHC 1920 (QB) [93]–[94].

<sup>53</sup> See, eg, L Sarmas, ‘A Step in the Wrong Direction: The Emergence of Gender Neutrality in the Equitable Presumption of Advancement’ (1993) 19 *Melbourne University Law Review* 758.

<sup>54</sup> Equality Act, s 199(2).

<sup>55</sup> See, eg, *Patel* (n 4), [21]–[49] (Lord Toulson).

<sup>56</sup> Ministry of Justice, *Report on the implementation of Law Commission Proposals* (March 2012) [52].

<sup>57</sup> See, eg, CP 154 (n 8) para 1.3; LC 320 (n 7) para 1.6.

is interesting to consider to what extent the Supreme Court has resolved those difficulties, and how such problems might be confronted in the future.

The Draft Bill was only intended to apply ‘if in the court’s opinion the circumstances are exceptional’.<sup>58</sup> It is unclear what the terms ‘exceptional’ and ‘circumstances’ mean. The Law Commission thought that what constitutes ‘exceptional circumstances’ can be ‘safely left to the courts’,<sup>59</sup> but that this extra hurdle of exceptional circumstances was necessary since ‘in the general “run of the mill” type of case we do not expect the illegality to have any effect on the beneficiary’s entitlement’.<sup>60</sup> However, if a beneficiary has taken steps to conceal an equitable interest for the purpose of committing a criminal offence – the only sort of situation to which the Draft Bill applies – this does not appear to be very ‘run of the mill’ at all. The Explanatory Notes to the Draft Bill indicate ‘that the circumstances might be exceptional where, for example, the claimant’s behaviour has been particularly reprehensible’,<sup>61</sup> but this does not much further the quest for clarity.

The Supreme Court in *Patel v Mirza* did not endorse this ‘gateway’ of ‘exceptionality’. This has the advantage of avoiding prolonged discussion about whether the facts of a particular case fall within the scope of a statutory regime. However, it is also clear from the decision in *Patel v Mirza* that it is only in a rare case that the illegality defence will affect the result in a case.<sup>62</sup> So although there is no formal barrier of ‘exceptionality’ to applying the balancing approach in *Patel v Mirza*, it is likely that it is only in situations where the illegality is very serious that a beneficiary would be unable to enforce his or her interests under a trust.

The Draft Bill, as its name suggests, was only intended to apply to instances of concealment.<sup>63</sup> If a trust was set up in order to conceal a beneficiary’s interest in the property, and this was done in connection with the commission of an offence, then the statutory scheme would bite.<sup>64</sup> The proposed legislation also covered situations where a trust was established for proper purposes, but was later deliberately continued in order to conceal a beneficial interest in connection with the commission of an offence, and this was exploited by one of the parties.<sup>65</sup>

The decision in *Patel v Mirza* covers such situations. However, that decision is not as limited as the proposed statutory discretion. For example, cases where the trust is executed in return for consideration which is illegal,<sup>66</sup> or where the relevant illegality is the source of the trust property, rather than the purpose of the trust arrangement,<sup>67</sup> would have remained outside

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<sup>58</sup> Draft Bill, cl 4(1).

<sup>59</sup> LC 320 (n 7) para 2.60.

<sup>60</sup> *ibid.*

<sup>61</sup> Draft Bill, B.31.

<sup>62</sup> This seems to follow from the result in *Patel v Mirza* itself, which departs from the approach in *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1 (CA), considered below, text to nn 151-155. Lord Toulson recognised that in some extreme cases illegality may prevent the court from offering assistance, and gave the example of drug trafficking as an example of sufficiently serious illegality: *Patel* (n 4), [110]

<sup>63</sup> Draft Bill, cl 2.

<sup>64</sup> *ibid* cl 2(2).

<sup>65</sup> *ibid* cl 2(4).

<sup>66</sup> *Ayers v Jenkins* (1873) LR 16 Eq 275 (CA). This is particularly significant since property rights can pass under an illegal contract: *Singh v Ali* [1960] AC 167.

<sup>67</sup> Compare *Macdonald v Myerson* [2001] EWCA Civ 66, [2001] EGCS 15 with *Halley v Law Society* [2003] EWCA Civ 97, [2003] WTLR 845. See too *Mortgage Express v McDonnell* [2001] EWCA Civ 887.



the scope of the statutory regime, but appear to be subject to the “new” approach to illegal transactions endorsed by the Supreme Court. This might be especially welcome in cases where the relevant illegality is particularly serious.

Indeed, the Law Commission’s very restrictive statutory regime would have left many property law cases outside its favoured approach, and created a divide between legal property rights and equitable property rights.<sup>68</sup> That this unfortunate consequence has been avoided is most welcome.<sup>69</sup> Moreover, the judicial approach promoted in *Patel v Mirza* can clearly be trumped by legislation which already provides that a transaction should be void, in which case there should be no balancing of factors at all.<sup>70</sup> And if the trust requires a beneficiary to commit an unlawful act, for example, then the trust should also still be void.<sup>71</sup> In any event, general principles of severance may still apply, such that an illegal and void provision may be severed from the other terms of the trust, such that the remainder of the trust can be enforced in the usual way.<sup>72</sup>

#### IV. Illegality and Third Parties

The Law Commission struggled to be clear about what the effect of illegality should be upon third parties to the trust. There are two main areas to consider here. First, what about claimants who are not the tainted beneficiaries, but instead the beneficiaries’ creditors<sup>73</sup> or executors,<sup>74</sup> for example? And secondly, what about the position of third parties who are the innocent victims of the illegality?

As regards the first scenario, the Law Commission accepted that ‘the position is simply not clear’.<sup>75</sup> In *Collier v Collier*, Mance LJ thought that the illegality defence might only bar the claim of a person tainted by the illegality, rather than an innocent creditor.<sup>76</sup> In a case such as *Collier*, where both the ‘primary’ parties to the trust were similarly tainted by the illegality, allowing a claim brought by an innocent third party creditor would seem to lead to the most sensible results. On the other hand, in *Stone & Rolls Ltd v Moore Stephens*<sup>77</sup> the House of Lords appeared to take the view that the creditor could be in no better position than the beneficiary through whom he claimed. This is understandable, but the status of *Moore Stephens* has been somewhat undermined by the subsequent decision of the Supreme Court in *Bilta (UK) Ltd v Nazir* that *Moore Stephens* should no longer be relied upon.<sup>78</sup> Moreover, *Moore Stephens* might in any event be limited to cases brought on the basis of a breach of contractual or tortious duty of care. 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

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<sup>68</sup> The Law Commission confessed to being ‘disappointed’ by this: CP 154 (n 8) para 5.26.

<sup>69</sup> See, eg, *Patel* (n 4) [152] (Lord Neuberger), supporting *Tinsley* (n 1) 371 (Lord Browne Wilkinson).

<sup>70</sup> See, eg, Insolvency Act 1986, ss 84 and 284

<sup>71</sup> *Mitchel v Reynolds* (1711) 1 P Wms 181, 189; *Earl of Shrewsbury v Hope Scott* (1859) 6 Jur 452, 456; *Re Piper* [1946] 2 All ER 503.

<sup>72</sup> CP 154 (n 8) para 3.39.

<sup>73</sup> See, eg, the discussion of Mance LJ in *Collier* (n 5).

<sup>74</sup> See, eg, *Silverwood v Silverwood* (1997) 74 P&CR 453 (CA).

<sup>75</sup> CP 154 (n 8) para 6.65.

<sup>76</sup> *Collier* (n 5) [112].

<sup>77</sup> *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39, [2009] 3 WLR 455.

<sup>78</sup> *Bilta (UK) Ltd v Nazir* [2015] UKSC 23, [2016] AC 1; see, eg, [81] (Lord Sumption).

creditor or executor should trump the claims of a defendant tainted by illegality. Indeed, given the support extended to Lord Browne-Wilkinson's view in *Tinsley* that the effect of illegality is procedural rather than substantive,<sup>79</sup> 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.

This issue remains confused but important. It is to be hoped that guidance will soon be forthcoming. The Law Commission's Draft Bill explicitly provided that one factor to be taken into account should be that the intended 'victim' of the concealment may have an interest in the value of the assets of the beneficiary.<sup>80</sup> 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 might 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 might 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. This is a sensible approach, and it is to be hoped that it will be adopted by the courts.

As regards third party victims of the illegality, the Supreme Court refused to recognise any power in the courts to force a party to give up his or her illegal gains to the third party. That might have serious repercussions in a case such as *Tinsley v Milligan*. On the facts of that case, it appears that Milligan may have made peace with the Department for Social Security by paying back the benefits she fraudulently claimed.<sup>81</sup> But if she had not done so, and her claim were still not barred by the illegality defence due to the illegality being considered insufficiently serious,<sup>82</sup> then she would be able to retain the benefits she had fraudulently claimed. This would represent a windfall benefit (which would not be shared with Tinsley). Rather than allowing Milligan to assert her share in the property and retain the fraudulently claimed benefits, it may be preferable to allow Milligan to assert her share in the property only if she returned the benefits fraudulently claimed. That would be an available course of conduct in Australia following the decision of the High Court in *Nelson v Nelson*,<sup>83</sup> but this was described as a 'yet further novelty',<sup>84</sup> and the door was shut on this possibility in *Patel v Mirza*.<sup>85</sup>

It is understandable why a court might feel uncomfortable arrogating to itself such an extensive power to make an order in favour of a third party not before the court. Indeed, the Law Commission also ultimately concluded that such a power would not be appropriate; after all, third party victims may choose to bring a claim in their own right,<sup>86</sup> and whether they do

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<sup>79</sup> *Tinsley* (n 1) 374, cited in *Patel* (n 4) [20] (Lord Toulson); see too [193] (Lord Mance).

<sup>80</sup> Draft Bill, cl 5(1)(f); LC 320 (n 7) para 2.77.

<sup>81</sup> *Tinsley v Milligan* [1992] Ch 310 (CA), 317 (Nicholls LJ) cited in the House of Lords (n 1) 353 (Lord Goff).

<sup>82</sup> Although defrauding the state might be viewed as pretty serious.

<sup>83</sup> (1995) 184 CLR 538.

<sup>84</sup> *Patel* (n 4) [206] (Lord Mance).

<sup>85</sup> See, eg, *ibid* [188] (Lord Mance), [254] (Lord Sumption).

<sup>86</sup> In practice, many third parties will lack the awareness and resources to bring a claim.

so or not is up to them and should not trouble a separate dispute before a court.<sup>87</sup> Yet the thrust of much of the reasoning in *Patel v Mirza* is to allow the courts to put the parties back into their original position before any illegality.<sup>88</sup> If this is taken seriously, and followed through to its logical conclusion, then illegally acquired benefits should be given up to innocent parties who have been deprived by the illegal conduct.

In many instances, the third party which might have standing to bring the claim will be the State. Indeed, it might be thought that an illegal act necessarily involves a wrong against the State.<sup>89</sup> In some circumstances, the State might seek to confiscate the proceeds of crime through the Proceeds of Crime Act 2002. This legislative regime was understandably not considered by the Supreme Court, and there were no submissions made regarding it.<sup>90</sup> But why did the State not seek to confiscate the benefits illegally acquired in *Patel v Mirza*? The answer appears to have been previously recognised by the Law Commission: the National Crime Agency ‘does not have sufficient resources to institute proceedings in every case in which property has been obtained through unlawful conduct’.<sup>91</sup> Admittedly, in the context of trust disputes the National Crime Agency’s interest may often be piqued given the possibility of recovering tangible assets and sizeable sums, but it cannot be said with confidence that Lord Sumption was right to surmise that confiscation would be inevitable even as regards ‘heinous crimes’.<sup>92</sup> The priorities and resources of the National Crime Agency determine whether a confiscation order is sought. It is suggested that the power of the courts to confiscate illegally acquired gains should be expanded. This is best achieved through statutory reform, given the limits already imposed by Parliament through the 2002 Act;<sup>93</sup> the reluctance of the Supreme Court squarely to confront this issue is therefore understandable.<sup>94</sup>

Significantly, however, the Law Commission’s Draft Bill contained provision for some minor amendments to the Proceeds of Crime Act 2002 in order to ensure that even where the court decides that the beneficiary should not be able to enforce his or her rights, there should be no adverse impact on the ability to recover the proceeds of crime.<sup>95</sup> One limitation of reforming the law through judicial decisions is the inability to tinker with other statutes. Yet the Law Commission’s approach must be correct, and it is to be hoped that the courts somehow manage to arrive at the same outcome.<sup>96</sup> It is unclear how this can best be achieved.<sup>97</sup> There is,

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<sup>87</sup> LC 320 (n 7) para 2.84-2.85. However, if Miss Milligan’s only asset was her interest in the house, but the court were to decide that her illegality was so serious that her claim should not be allowed to succeed, the Department of Social Security might have been deprived of any chance of seeking substantial relief from Miss Milligan.

<sup>88</sup> See, eg, *Patel* (n 4) [116] (Lord Toulson), [146] (Lord Neuberger); see too [197] (Lord Mance), [211] (Lord Clarke), [268] (Lord Sumption).

<sup>89</sup> B Dickson, ‘Restitution and Illegal Transactions’ in A. Burrows (ed), *Essays on the Law of Restitution*, (Oxford, OUP, 1991) 175.

<sup>90</sup> *Patel* (n 4) [198] (Lord Mance).

<sup>91</sup> CP 154 (n 8) para A.16, which refers to the ‘Serious Organised Crime Agency’ which has since been replaced by the National Crime Agency.

<sup>92</sup> *Patel* (n 4) [254].

<sup>93</sup> Although that should not ossify the common law: see eg *Patel* (n 4) [185] (Lord Neuberger).

<sup>94</sup> Compare the suggestion of the Law Commission that the trustee should be entitled to property in some circumstances: see text to nn 109-111 below.

<sup>95</sup> Draft Bill, cl 6.

<sup>96</sup> See, eg, *Patel* (n 4) [185] (Lord Neuberger).

<sup>97</sup> Indeed, the importance of this point might suggest that the result in *Patel v Mirza* itself is unsatisfactory, since the money returned would probably have been amenable to confiscation had not restitution not been ordered.

after all, no guarantee that the claim for confiscation will be pursued before the trust dispute between the parties tainted by illegality, and a court cannot simply refuse to decide the latter issue or wait for any potential confiscation issue to be resolved. Perhaps the courts need to develop a novel order themselves, whereby, for example, the beneficiary is held to be unable to enforce his or her interest as a result of the illegality, but that interest can still be confiscated by the National Crime Agency.

## V. The Consequences of Illegality

Given that *Patel v Mirza* is not a trusts case, it is unsurprising that the decision of the Supreme Court does not resolve what the consequences of an illegal transaction in the trust context might be. The general thrust of the reasoning in *Patel* might suggest that if a trust fails for illegality then the settlor should be able to claim the return of his or her property under a resulting trust.<sup>98</sup> This is likely to be sufficient in many cases,<sup>99</sup> but not in every situation. For instance, the settlor's illegality may be so serious that the court is sensibly reluctant to allow the settlor to recover the property.<sup>100</sup>

As suggested above, in many circumstances the most attractive solution may be to confiscate the property which is the subject of the illegal transaction. Both the Law Commission and the Supreme Court in *Patel v Mirza* considered that the civil courts should not effectively 'punish' parties in this way,<sup>101</sup> unless authorised to do so under the Proceeds of Crime Act 2002.<sup>102</sup> It may nonetheless be possible for judges in some trust cases to achieve the same result by declaring that the property is bona vacantia such that it reverts to the State, but this remains an unlikely outcome: it is tantamount to confiscation, and property which has had an owner should not readily become ownerless.

In general, therefore, the court has four options when deciding who is entitled to the equitable interest, all of which were recognised in the Law Commission's Draft Bill: (i) the beneficiary;<sup>103</sup> (ii) the trustee;<sup>104</sup> (iii) the settlor;<sup>105</sup> or (iv) another beneficiary under the same trust.<sup>106</sup> The Law Commission concluded that these options were mutually exclusive, and that the illegality defence should operate in an all-or-nothing manner.<sup>107</sup> 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

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<sup>98</sup> See, eg, *Patel* (n 4) [116] (Lord Toulson), [146] (Lord Neuberger); see too [197] (Lord Mance), [211] (Lord Clarke), [268] (Lord Sumption)

<sup>99</sup> In instances where a provision in a trust for a charity is illegal, then the property may be applied cy-près.

<sup>100</sup> See, eg, *Patel* (n 4) [110] (Lord Toulson); cf [254] (Lord Sumption).

<sup>101</sup> See, eg, *ibid* [108] (Lord Toulson), [184] (Lord Neuberger). Such reasoning may be doubted: P Davies, 'The illegality defence - two steps forward, one step back?' [2009] *Conv* 182, 186-188.

<sup>102</sup> See, eg, *Patel* (n 4) [185] (Lord Neuberger).

<sup>103</sup> The default position: see Draft Bill, cl 3(1).

<sup>104</sup> *ibid* cl 4(4)(a).

<sup>105</sup> *ibid* cl 4(4)(b).

<sup>106</sup> *ibid* cl 4(4)(c).

<sup>107</sup> *ibid* cl 4(3)(a), although if a particular class contains more than one party, then the interest can be split between those parties: cl 4(3)(b).

*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.<sup>108</sup>

If the settlor has transferred property to be held on trust for him, but the illegal purposes (such as terrorism) are so severe that the illegality defence applies and prevents the settlor from recovering his property, then it is difficult to know what should happen to the property. The Law Commission thought that in such situations the court might declare that the trustee, as legal owner, should become beneficially entitled to the property in question.<sup>109</sup> The Law Commission considered that this ‘would appear to require a new statutory power to be given to the court’,<sup>110</sup> and would be an available option for a court even where the purported ‘trustee’ did not counterclaim for any relief in his or her favour. It is unclear whether such a solution is desirable: after all, why should the trustee reap such a windfall gain, and why would this be better than confiscation of the illegal gains to the State? It may be that this option will now fade away if the view that it can only be made possible through legislation is supported, although it should be noted that in *Q v Q* there is perhaps some suggestion that this result can be reached even in the absence of legislation.<sup>111</sup> Similar concerns regarding undue windfalls surround the Law Commission’s suggestion that the courts should be able to award the settlor’s beneficial interest to ‘any other beneficiary’. This looks like confiscating property and transferring it to a third party, and courts may reasonably be slow to do this without being empowered to do so by statute.

It also remains to be seen how the relationship between illegality and sham will be resolved in the trusts context. This is a difficult topic. Sham trusts are often established in order to effect an illegal purpose. Under the Draft Bill, the Law Commission’s proposed scheme would have trumped any considerations of sham, and it may be that the more flexible approach favoured in *Patel v Mirza* will take priority over a more rigid approach towards sham trusts, especially as regards the relief available. Indeed, the consequence of finding that a trust is a sham appears to be that the trust is void;<sup>112</sup> a more nuanced approach to illegal transactions might be preferred.

It should perhaps also be noted that courts may need to clarify the position of a trustee of an ‘illegal trust’ who administers the trust as if it was valid, only later to find that the trust is invalid under the broader approach favoured by the Supreme Court in *Patel v Mirza*. In principle, the trustee is likely to have committed a breach of trust. In appropriate cases it is to be expected that the trustee will be able to rely upon section 61 of the Trustee Act 1925 to be relieved from personal liability,<sup>113</sup> but guidance regarding when the trustee should be expected to seek the directions of the court would be helpful. It is suggested that it is only in instances of serious and obvious illegality that a court should refrain from granting relief under section 61 on the basis that the trustee ought to have sought the directions of the court. Similarly general

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<sup>108</sup> *Cf Taylor v Bhail* [1996] CLC 377 (CA) 383 (Millett LJ).

<sup>109</sup> Draft Bill, cl 4(4)(a).

<sup>110</sup> LC 320 (n 7) para 2.93.

<sup>111</sup> [2008] EWHC 1874 (Fam), [2009] 1 FLR 935 [139] (Black J).

<sup>112</sup> *Midland Bank v Wyatt* [1995] 1 FLR 696 (Ch) 707; *Rahman v Chase Bank (CI) Trust Co Ltd* [1991] JLR 103, 168.

<sup>113</sup> See generally P Davies, ‘Section 61 of the Trustee Act 1925: deus ex machina?’ [2015] *Conv* 375.

principles should govern the liability of third parties who receive property conveyed to them by a trustee before a court decides that the trust is invalid for illegality: such third parties might be liable for knowing receipt<sup>114</sup> or subject to a proprietary claim for the property received.<sup>115</sup>

## VI. Deciding Cases Differently

The approach of courts to problems of illegality will be very different under the guidance of *Patel v Mirza* than it has previously been under *Tinsley v Milligan*. However, the Law Commission noted that any earlier difficulties did not generally result in unsatisfactory outcomes on the facts of individual cases, and the criticism was focussed upon the way that those decisions were reached.<sup>116</sup> It can confidently be expected that many cases would be decided in exactly the same way even after *Patel v Mirza*. Indeed, in *Patel v Mirza* itself the divide between the judges as to the correct method of reasoning did not lead to any divergence in the outcome of the dispute.

In any event, the approach in *Patel v Mirza* is a clear break from earlier orthodoxy, and this appears to have been accepted by all members of the Supreme Court. In *Tinsley v Milligan*, Lord Goff noted that the traditional authorities left ‘no room for the exercise of any discretion by the court in favour of one party or the other’.<sup>117</sup> The Court of Appeal in *Tinsley v Milligan* had employed a test of whether it would be ‘an affront to the public conscience’ to grant relief,<sup>118</sup> but Lord Goff held that that ‘is little different, if at all, from stating that the court has a discretion whether to grant or refuse relief. It is very difficult to reconcile such a test with the principle of policy stated by Lord Mansfield CJ in *Holman v Johnson* ... or with the established principles’ going back over 200 years.<sup>119</sup>

The majority approach in *Patel v Mirza* breaks away from the strictures of *Tinsley v Milligan*, and requires the balancing of a number of considerations. Lord Toulson concluded that ‘The 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’.<sup>120</sup> The crucial passage of Lord Toulson’s judgment is worth setting out in full:<sup>121</sup>

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 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.

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<sup>114</sup> *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* Court of Appeal [2001] Ch 437.

<sup>115</sup> *Foskett v McKeown* [2001] 1 AC 102.

<sup>116</sup> See too *Patel* (n 4) [23] (Lord Toulson).

<sup>117</sup> *Tinsley* (n 1) 355.

<sup>118</sup> See eg *Tinsley* (n 81) 319 (Nicholls LJ).

<sup>119</sup> *Tinsley* (n 1) 358.

<sup>120</sup> *Patel* (n 4) [91].

<sup>121</sup> *ibid* [101].

This balancing approach is influenced by the work of the Law Commission. However, the Law Commission's Draft Bill set out a rather fuller list of factors to consider:<sup>122</sup>

- (a) the conduct of all the relevant persons;
- (b) the effect which the declaration or determination would have on any relevant unlawful act or purpose;
- (c) the fact that an offence has, or has not, been committed;
- (d) the value of the relevant equitable interest;
- (e) any deterrent effect on others;
- (f) the possibility that a person from whom the relevant equitable interest was to be concealed might have an interest in the value of B's [the beneficiary's] assets (for example, as a creditor of B or because of proceedings under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004).

The Draft Bill also provided that 'the court may take anything which it thinks relevant into account';<sup>123</sup> the above list of factors was optional and non-exhaustive. It is likely that all these factors will influence a court's decision; Lord Toulson explicitly recognised the importance of 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'.<sup>124</sup> A similar list of relevant factors has been put forward by Andrew Burrows,<sup>125</sup> and was described by Lord Toulson as 'helpful',<sup>126</sup> but the Supreme Court ultimately balked at setting down a list of potentially relevant factors.<sup>127</sup>

Given the wide range of circumstances in which illegality might be an issue, and the numerous factors that might influence a court, it is understandable why the Supreme Court was wary about setting out a definitive list. The Law Commission also concluded that a comprehensive list was not feasible. Nevertheless, it is suggested that structured guidance is helpful. It allows parties to predict how a court will approach a dispute with greater confidence. Ultimately, despite their protestations to the contrary,<sup>128</sup> the majority approach in *Patel v Mirza* vests judges with a discretion in determining the consequences of illegality.<sup>129</sup> As Lord Clarke pointed out, the majority of the Supreme Court has effectively come 'close to reviving the public conscience test'.<sup>130</sup> It is ironic that after more than twenty years of grappling with this issue of illegality in the wake of the House of Lords decision in *Tinsley*, the Supreme Court has now reversed that decision and more or less restored the decision of the Court of Appeal.

In practice, the courts now have a discretion where illegality is concerned.<sup>131</sup> This might make the reasoning of judges more transparent, such that the law becomes clear through the

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<sup>122</sup> Draft Bill, cl 5(1).

<sup>123</sup> Draft Bill, Clause 5(1).

<sup>124</sup> *Patel* (n 4) [107].

<sup>125</sup> A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford, OUP, 2012) 229–230.

<sup>126</sup> *Patel* (n 4) [107].

<sup>127</sup> *ibid* [107] (Lord Toulson), [173] (Lord Neuberger).

<sup>128</sup> See, eg, *ibid* [175] (Lord Neuberger); see too [41] (Lord Toulson).

<sup>129</sup> See, eg, *ibid* [215] (Lord Clarke), [218] (Lord Sumption).

<sup>130</sup> *ibid* [219].

<sup>131</sup> Although note the contrary protestations of Lord Neuberger: *ibid* [175].

decided cases. Furthermore, a discretionary approach might reduce the number of appeals concerning the defence of illegality: 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. Of course, some judges may feel somewhat uncomfortable to be cast adrift in a sea of broad discretion; some judges prefer to apply clear rules, and that partly explains why Lord Goff in *Tinsley* thought that if judges were to be granted a discretionary power, that should receive the imprimatur of democratic legitimacy through an act of parliament. But the Supreme Court in *Patel v Mirza* was far bolder than the House of Lords in *Tinsley*, and the judges arrogated to themselves a wide-ranging discretion. Perhaps trial judges might now feel emboldened when writing their judgments, especially given the diminished prospects of appeals.

So which cases would now have a different outcome? It seems clear from the judgments in the Supreme Court that the results in the key cases on resulting trust – *Tinsley v Milligan* and *Tribe v Tribe* – would be the same. The judges in *Patel v Mirza* thought that any other result in *Tinsley v Milligan* would be ‘disproportionate’.<sup>132</sup> This is unsurprising. Indeed, although Lord Goff dissented in *Tinsley*, he did ‘not disguise [his] own unhappiness’ at doing so<sup>133</sup> since denying Miss Milligan any interest in the property was ‘particularly harsh’.<sup>134</sup> Unwinding the transaction in *Tribe v Tribe* would still occur following *Patel v Mirza*, even if some of the illegal purpose had in fact been performed.<sup>135</sup> 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,<sup>136</sup> even though conspiracy to defraud may be punished with a custodial sentence of up to ten years.

A difficult case is *Collier v Collier*.<sup>137</sup> The Law Commission observed that ‘The facts of the case were complex and hard to discern, the judge concluding that both parties had lied to the court’.<sup>138</sup> 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 LJ 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*

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<sup>132</sup> *ibid* [112] (Lord Toulson), [181] (Lord Neuberger). The focus might now be on the equitable doctrine of “clean hands” rather than illegality: see N McBride, ‘The Future of Clean Hands’ in P Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Oxford, Hart, 2018); J Heydon, M Leeming, P Turner, *Meagher, Gummow & Lehane’s Equity: Doctrines & Remedies*, 5th ed (Chatswood, LexisNexis, 2014) [3-090]. In *Patel*, Lord Mance (at [201]) appeared to think that *Tinsley* could be explained on the basis of unravelling the transaction, but this seems misconceived: see, eg, [135]-[136] (Lord Kerr).

<sup>133</sup> *Tinsley* (n 1) 363.

<sup>134</sup> *ibid* (n 1) 362.

<sup>135</sup> *Patel* (n 4) [171].

<sup>136</sup> See too *Silverwood* (n 74).

<sup>137</sup> n 5.

<sup>138</sup> CP 154 (n 8) para 6.41.



*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, especially given the attitude of the Supreme Court in *Patel v Mirza* towards *Tribe v Tribe*.

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.<sup>139</sup> 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’.<sup>140</sup> Happily, *Patel v Mirza* suggests a different outcome would now be reached.<sup>141</sup> 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.

*Patel v Mirza* will also affect the law concerning constructive trusts, or at least common intention constructive trusts. In *Tinsley*, 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.<sup>142</sup> This view received some support from the Court of Appeal<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup> 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.

In any event, where the trust is created for an ‘illegal consideration’, it would appear that the trust is valid, not void, unless independently void because contrary to public policy.<sup>146</sup> Under the approach in *Tinsley*, it seemed likely that any beneficiary would be able to enforce the trust unless he or she needed to lead evidence of the illegality in order to establish his or

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<sup>139</sup> Lord Mance in *Patel* (n 4) [187] called the decision ‘unsatisfying’, having been reluctant to reach that result in *Collier* (n 4) itself: [105]–[106].

<sup>140</sup> CP 154 (n 8) para 6.51.

<sup>141</sup> ‘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 4) [221] (Lord Clarke).

<sup>142</sup> *Tinsley* (n 1) 376.

<sup>143</sup> *O’Kelly v Davies* [2014] EWCA Civ 1606; [2015] 1 WLR 2725.

<sup>144</sup> *Barrett v Barrett* [2008] EWHC 1061 (Ch); [2008] BPIR 817.

<sup>145</sup> And this may include considerations of remoteness: *Q v Q* [2008] EWHC 1874 (Fam), [2009] 1 FLR 935, [137] (Black J).

<sup>146</sup> *Ayerst v Jenkins* (1873) LR 16 Eq 275 (CA).

her claim.<sup>147</sup> However, the better view may now be that the trust is enforceable by an innocent beneficiary, but not by a party who provided the illegal consideration and knew that it was illegal, although admittedly this may be the subject of a balancing approach.<sup>148</sup>

Finally, it is worth considering whether *Patel v Mirza* will have any impact in situations where a fiduciary receives a bribe to commit a breach of fiduciary duty, and receiving (and giving) the bribe constitutes a crime.<sup>149</sup> In *FHR European Ventures LLP v Cedar Capital Partners LLC*,<sup>150</sup> the Supreme Court held that the fiduciary holds the bribe on constructive trust for his or her principal. This is sometimes justified by a perceived need to prevent the fiduciary from obtaining a windfall profit. That seemed particularly important since *Parkinson v College of Ambulance Ltd*<sup>151</sup> was understood to mean that the briber cannot recover the value of the bribe from the fiduciary. However, in *Patel v Mirza* the Supreme Court signalled dissatisfaction with *Parkinson v College of Ambulance Ltd* and thought it was wrongly decided.<sup>152</sup> This is somewhat surprising, and is analysed in detail elsewhere.<sup>153</sup> It may perhaps be that the strength of the Supreme Court's commitment to restitutio in integrum and unwinding illegal transactions means that the briber should be able to recover the value of the bribe from the fiduciary. Nevertheless, it is suggested that this is unlikely and would be an unfortunate step to take. The principal has the best claim to the bribe:<sup>154</sup> the fiduciary should not have accepted the bribe, and could only do so in his or her position as a fiduciary, with a concomitant duty to account for that bribe to the principal.<sup>155</sup> Although this might be thought to give a windfall to the principal, the principal is at least untainted by any illegality, unlike the fiduciary or briber. Both the briber and bribee have acted so unmeritoriously that neither deserves to "trump" the innocent principal.

## VII. Conclusion

*Patel v Mirza* will undoubtedly have an impact upon the law of trusts. It is likely that the role of illegality in the law of trusts will be greatly reduced (from an already low level), and will only affect the outcome of a dispute where the illegality involved is particularly serious. This may further weaken any calls for section 199 of the Equality Act to be brought into force. Yet many issues remain to be resolved, and these could be important. As Lord Sumption remarked, 'We would be doing no service to the coherent development of the law if we simply substituted a new mess for the old one'.<sup>156</sup> It is to be hoped that *Patel v Mirza* will not give rise to a mess, but promote fair and transparent reasoning to achieve sensible results.

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<sup>147</sup> *Tinsley* (n 1) 373 (Lord Browne-Wilkinson).

<sup>148</sup> CP 154 (n 8) para 3.54; see too paras 8.28-8.29.

<sup>149</sup> See generally P Davies, 'Bribery' in P Davies and J Penner (eds) *Equity, Trusts and Commerce* (Oxford, Hart, 2017).

<sup>150</sup> [2014] UKSC 45, [2015] AC 250.

<sup>151</sup> [1925] 2 KB 1 (CA).

<sup>152</sup> See eg [118] (Lord Toulson); [150] (Lord Neuberger); [254] (Lord Sumption).

<sup>153</sup> See P Davies 'Illegality in Equity' in P Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart, 2018).

<sup>154</sup> Indeed, it is not clear that the fiduciary is even enriched for the purposes of a claim in unjust enrichment if he or she is to hold the bribe on trust: *Challinor v Bellis* [2015] EWCA Civ 59 [113] (Briggs LJ).

<sup>155</sup> *FHR* (n 150) [36]-[47]; P Millett, 'Bribes and Secret Commissions Again' [2012] CLJ 583.

<sup>156</sup> *Patel* (n 4) [261].