

REFLEXIONS ON THE LAW OF ILLEGALITY

In the last three years of my time in practice, I was much exposed to the question of the proper scope of the illegality defence in English law, as a result of two cases which I argued as Counsel: *Stone & Rolls v. Moore Stephens*¹, a victory which earned me the undying resentment of company lawyers, and *Safeway v. Twigger*², another case in which the defence was upheld to the horror of all sound competition lawyers. I happen to think that the result was right in both cases, but I am not to be blamed for either of them, for the law of illegality is an area in which there are few propositions, however contradictory or counter-intuitive, that cannot be supported by respectable authorities at the highest levels. For as long as I can remember, the English courts have been endeavouring to rationalise it. The proposition itself is straightforward enough. *Ex turpi causa oritur non actio*. Like many of the Latin phrases which we are now discouraged from using, this one is useful in cramming the maximum of meaning into the minimum of words. But like other apparently straightforward propositions of law, it begs many more questions than it answers. What is turpitude? What sort of connection with it will bar the enforcement of a legal obligation? And with what consequences? The answers to these questions are to be found in two centuries of English case-law, which the Law Commission characterised a decade ago as complex, uncertain and unjust, but which it has recently proposed to leave more or less intact.

First of all, what is turpitude? Anything, we are told by Flaux J. in *Safeway v. Twigger*³, which is morally reprehensible. Plainly most criminal offences are morally reprehensible. But what of minor traffic offences or some offences of a purely regulatory nature or offences of strict liability, which are criminal but may involve no moral obloquy at all. What of conduct

¹ [2009] 1 A.C. 1391

² [2010] EWCA Civ 1472

³ [2010] EWHC 11 (Comm) at [26]

which is unlawful but not criminal? For example breaches of competition law which are subject to civil penalties but not criminal prosecution? Or conduct which has traditionally been treated as immoral but not unlawful. Or suicide, which it is an offence to assist but not to commit? And what of torts? At what point short of criminality does negligence become morally reprehensible?

Once some conduct is characterised as turpitude, we enter the realm of a hundred artificial distinctions which hardly seem consistent with the supposed moral basis of the rule. The law distinguishes between cases where the illegal conduct is contrary to statute and those in which it offends against some other rule. It distinguishes between cases where an obligation is illegal at its inception and cases where the illegality arises in the course of its performance. It distinguishes between cases about property rights, contractual rights and other rights. It has at various times distinguished between cases where a party was required in law to rely on his own illegal act to make out his claim, and cases where legal presumptions or legal ingenuity might enable him to get away without doing so; or between cases where the illegal activity was inextricably linked with the illegal activity, and cases where it was adventitious. In some of these contexts the law distinguishes between cases where both parties to the relevant obligation are privy to the illegality and cases where only one of them is, while in other contexts no such distinction is made. In each of these categories, the case-law exhibits its own inconsistencies and absurdities, and carves out its own well-established but anomalous exceptions.

At the same time there are some distinctions which respond to most people's moral instincts, but which the law does not make. It provides no satisfactory basis for distinguishing between degrees of turpitude, or between degrees of culpability. It is wholly indifferent to the

proportionality of the illegal behaviour and the potentially drastic consequences of being denied relief.

I suspect that the main reason why English law has got itself into this mess has been a distaste for the consequences of applying its own rules. Most legal systems have a principle broadly corresponding to the *ex turpi causa* principle in English law. But they differ about the consequences of its application. An illegal transaction will not be enforced, but where does that leave the parties? Broadly speaking, two approaches are possible. The law may set about reversing the consequences, financial or proprietary, of the transaction so far as the parties have given effect to them. Or it may simply decline to have anything to do with it. The first approach seeks to regulate the consequences of the illegal transaction, so as to put the parties so far as possible in the position they would have been in had the transaction not occurred. The second simply withholds legal remedies, and generally leaves the loss to lie where it falls. French law, certainly in the realm of obligations, has generally adopted the first approach. English law has adopted the second.

Historically, the reason for this particular propensity of English law was that for a Claimant to invoke the court's jurisdiction on the footing of his own illegal conduct was thought to be insulting. It was inconsistent with the dignity of Her Majesty's judges. In *Everett v. Williams*⁴, the notorious case of 1725 in which the court was invited to take an account of profits between two highwaymen, the Court not only dismissed the claim but fined the plaintiff's solicitors for inflicting such an 'indignity' upon the court. Two centuries later, in *Parkinson v College of Ambulance Ltd and Harrison*⁵, Lush J said of a contract to procure an honour, that "no Court could try such an action and allow such damages to be awarded with any propriety or decency." In another case it was suggested that there are

⁴ 104 E.R. 725

⁵ [1925] 2 K.B. 1, 13

some contracts of a nature so grossly immoral that the Court could not be expected to enter into any discussion of it. Some of these observations date back to a forgotten age of presumed judicial innocence. It must be doubted whether this is any longer a relevant consideration. In *Dubai Aluminium v. Salaam*⁶, for example, the court had no difficulty in apportioning a liability for damages between the Defendant fraudsters under the Civil Liability (Contribution) Act 1978, an exercise which was not so very different to taking an account between two highwaymen and certainly involved examining some extremely murky transactions. No one suggested that the Commercial Court, the Court of Appeal and the House of Lords had all been sullied by their involvement. But even if the concept of protecting the dignity of the Court seems dated now, it has had a powerful and continuing effect on the approach of English law to the consequences of an illegal transaction.

The fact that the rule of law is substantive but that it operates by denying relief not only works injustice between the parties, but in some cases actually rewards illegal conduct. The principle that the loss lies where it falls means that the past consequences of the transaction are left undisturbed. The loss lies where it falls. In most civil law systems, the absence of a legal basis for a benefit is generally a sufficient basis for its restitution. This enables some of the anomalies and injustices associated with the refusal to give effect to an illegal transaction to be corrected. But English law severely restricts even restitutionary claims arising out of illegal transactions. Claim in restitution will be barred by the *ex turpi causa* principle, except in a narrowly framed range of cases where the Claimant was induced to enter into the illegal transaction by fraud or duress or was ignorant of the fact which made it illegal. This contrasts with French law, under which an illegal transaction is wholly devoid of legal consequences. Those consequences which the parties have themselves brought about by

⁶ [2003] 2 A.C. 366

acting on it, are devoid of legal basis (or ‘cause’) and the courts will undo it, ordering mutual restitution.

The English position means that where the Claimant and the Defendant were both party to the illegality, the Claimant is prevented from using the court’s procedures to obtain the reward of his illegal acts, but the Defendant gains a corresponding windfall from his. In most cases, the windfall will consist in the enjoyment of a right of property free of the Claimant’s adverse claim or in the practical liberation of the Defendant from a contractual obligation for which the Claimant may already have provided the consideration. But it may also consist simply in being relieved of an obligation in tort or restitution to make good a real loss. *In pari delicto potior est conditione defendantis* says the maxim. The potential injustice of this state of affairs was acknowledged by Lord Mansfield in his famous formulation of the common law rule in *Holman v. Johnson*⁷:

“The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff”

So, having devised a rule whose animating idea was perfectly rational but whose consequences were arbitrary, capricious and unjust, the courts then salvaged their consciences by devising a host of exceptions for cases where the result seemed somehow wrong. In this way, they have achieved substantial justice in the majority of cases but at the expense of a large degree of incoherence and unpredictability.

⁷ 98 E.R. 1120, (1775) 1 Cowper 341, 343

Other arrangements are possible. In New Zealand, the Illegal Contracts Act 1970 swept away much of the accumulated case-law and substituted a relatively simple statutory scheme. The Act defined an “illegal contract” as “any contract that is illegal whether at law or in equity, whether the illegality arises from the creation or performance of the contract.” Section 6 provided that such a contract should be of no effect, save that dispositions of property in favour of a person who was not party to the illegality and had no notice of it should be valid. Section 7 provided that notwithstanding Section 6 the Court had a discretion to validate or vary the contract in whole or in part, or to grant such relief as might be just by way of restitution or compensation. At the time that these provisions were enacted, they were much criticised on the ground that the discretionary element left the practical application of the law as uncertain as the pre-existing law and that it would encourage a mass of litigation. But the consensus of the profession and the view of the New Zealand Law Commission is that these fears have proved unfounded.

Recent attempts to produce a more coherent scheme of law really begin with the decision of the Court of Appeal in *Euro-Diam v. Bathurst*⁸ in 1987. The Court of Appeal reviewed a considerable body of case-law, before concluding that its common theme was that the defence of illegality should apply only where in the light of all the surrounding circumstances, it would be ‘an affront to the public conscience to grant the plaintiff the relief which he seeks’. ‘The public conscience’ test did not address the problem of the consequences of applying the illegality defence. It also had the disadvantage of being relatively unpredictable, although that would probably be true of any rule which avoided the rigidities of the common law. Its main advantage was that it enables the court to distinguish between degrees of iniquity and degrees of culpability on the part of those who were involved in it. It was, however, difficult to reconcile with two

⁸ [1990] 1 Q.B. 1

centuries of jurisprudence which showed that this was an area governed by absolute rules of law which left very little scope for the balancing of relevant factors in what would have become an essentially discretionary jurisdiction. For this reason the 'public conscience' test had a short life. It was rejected in 1993 by all five members of the judicial committee of the House of Lords in *Tinsley v. Milligan*⁹.

Unfortunately, the committee disagreed on the question what should replace it. The facts of *Tinsley v. Milligan* are well-known. Ms. Tinsley and Ms. Milligan had contributed to the purchase of a home together, but had the legal title conveyed to Miss Tinsley only, in order enable Miss Milligan to make fraudulent claims to social security benefits. The minority, consisting of Lords Keith and Goff, favoured a strict rule which would have defeated any claim 'tainted' by the Claimant's illegal purpose. This view would, as Lord Goff acknowledged, have operated harshly in many cases including that one. It would have left Miss Tinsley with the benefit of Miss Milligan's money as the reward for her participation in an illegal transaction in which her role was every bit as culpable. It would have inflicted a loss on Miss Milligan which was altogether disproportionate to the fraud, especially when one remembers that she was also criminally liable as well as civilly liable to repay the benefits to the social security authorities. The majority, consisting of Lords Jauncey, Lowry and Browne-Wilkinson, understandably found that result distasteful. But because of the rigidity of the legal consequences of a finding that a transaction has been tainted by illegality, they were obliged, as so many of their judicial predecessors have been obliged, to resort to an equally unsatisfactory evasion. They evaded it by an extremely technical approach to the 'reliance test'. The reliance test depends on whether the Claimant was required by the nature of his or her case to rely on his illegal acts, i.e. in practice to rely on it in his pleadings or his evidence. Miss Milligan succeeded because she

⁹ [1994] 1 A.C. 340

was able to prove her interest in the house without relying on the illegal purpose of the transaction. She only had to rely on the fact that she has paid part of the price of the property and on the presumption of Equity that a resulting trust arose from that contribution.

The origin of the reliance test was the decision of the Court of Appeal in *Bowmakers v. Barnet Instruments*¹⁰ in 1945. In that case, the hirer of some tools refused to return them to the hire purchase company and sold some of them to third parties. It then defended an action for conversion on the ground that the hire purchase agreement contravened statutory price controls. The defence failed, because the Court considered that the hire purchase company could establish its title to the tools without relying on the contract. Commentators on the case have had some difficulty in understanding how the court reached that conclusion on the facts, since in at least two of the three cases the supplier as well as the hire purchase company and the hirer was privy to the breach of the statute. But for present purposes we need not trouble with that. What is clear is that the court, having concluded that the owner did not need to rely on the illegal contract, regarded the illegality as simply irrelevant to the owner's claim. The result, it should be pointed out, would have been the same under French law (the owner would have got his tools back) although French law would have gone further and ordered restitution of the hirer's payments. But in *Tinsley v. Milligan* the reliance test was applied in a quite different way. The illegal transaction was certainly not irrelevant in that case. The owner's claim was wholly founded on it. But that was held to be irrelevant because although Miss Milligan's claim to an equitable interest depended on an illegal transaction, the particular features of the transaction which made it illegal did not have to be pleaded. This was because the effect of the presumption of a resulting trust was that the burden of proof was on the legal owner to rebut it. The test of relevance thus came to depend on

¹⁰ [1945] K.B. 65

the effect of presumptions devised by equity for a very different purpose, and on the incidence of the burden of proof. If the person who had intended to defraud the social security by paying for the property without appearing on the title had been Miss Milligan's father, the result would have been different, because that is a relationship which gives rise to a presumption of gift and not of resulting trust. In an area of law which turns on principle and public policy, this concentration on form over substance seems difficult to justify. Indeed that was substantially what did happen in *Collier v. Collier*¹¹, a decision of the Court of Appeal in 2002. Mr. Collier effectively transferred his business premises to his daughter in trust for him, in order to defeat his creditors. In fact the creditors were not defeated, because he got over his financial problems and repaid them. But he was not allowed to rebut the presumption of gift, because he could only do so by relying on the illegal purpose of the transfer. In this case, the same test produced the opposite result from *Tinsley v. Milligan*, although the moral equities were the same. The result was that the father lost everything because of an illegal intention which was never actually carried out, while the daughter was rewarded for her participation with 100% of the spoils.

In the decade and a half after *Tinsley v. Milligan*, two alternative tests held the field. The reliance test was one of them. In *Webb v. Chief Constable of Merseyside Police*¹², the Defendant was entitled to recover from the police the cash found on him at the time of his arrest, even on the assumption that it represented the proceeds of drug-trafficking, because he was not obliged to explain how he had had got it in order to justify its recovery. In *Standard Chartered Bank v. Pakistan National Shipping Corporation*¹³ Aldous LJ held that the reliance test was generally applicable. Rimer LJ, delivering the leading judgment in the Court of Appeal in *Stone & Rolls v. Moore Stephens*¹⁴, regretted the inflexible nature of the test and the

¹¹ [2002] EWCA Civ 1095

¹² [2000] Q.B. 427

¹³ [2001] Q.B. 167

¹⁴ [2008] 3 W.L.R. 1146

capricious consequences of its application, but regarded it as a test of general application. The same view appears to have been taken in the House of Lords by the two members of the majority, Lord Walker and Lord Brown, whose views are probably to be regarded as expressing the ratio of that case.

The other test favoured was first clearly formulated by the Court of Appeal in *Cross v. Kirkby*¹⁵, although earlier decisions can perhaps be rationalised on a similar principle. Mr. Cross was a hunt saboteur who got into a fight with Mr. Kirkby, a hunt follower, while trying to disrupt a hunt meeting. He had started the fight by hitting Mr. Kirkby with a baseball bat. Mr. Kirkby wrestled the baseball bat from him and in the process, it was alleged, negligently hit him with excessive force, fracturing his skull. Mr. Kirkby relied on, among other things, the illegality defence. The reliance test would not have been enough for him, because Mr. Cross did not need to plead that he had started the fight in order to make out his claim for negligence. The Court rejected the reliance test as inappropriate to the case, for reasons which are not really articulated. It then proceeded to uphold the illegality defence on the ground that Mr. Cross's original criminal assault on Mr. Kirkby had been 'inextricably linked' with the circumstances which led to his injuries. This formula may fairly be criticised not just for its vagueness but for its unprincipled character. It is actually rather difficult to see how the illegality defence could have arisen at all in *Cross v. Kirkby*. Mr. Kirkby was entitled to use reasonable force to defend himself against attack and disarm the attacker. A fairly wide margin would be allowed to most people in his position as to the amount of force which was reasonable. The main ground on which the Court of Appeal decided in his favour was that the degree of force used, although great, was reasonable. It was only in case they were wrong about that, that they dealt with illegality. But if they were wrong about reasonable force, then they had to

¹⁵ [\[2000\] All ER \(D\) 212](#)

be wrong about illegality too. The illegality defence is based on a public policy which operates to defeat a claim that would otherwise succeed. Its availability in a case like *Cross v. Kirkby* must be tested on the assumption that Mr. Kirkby had used excessive force. Was he entitled to succeed anyway even on that assumption? Surely not. If the force was excessive even having regard to the fact that he was attacked first, then the fact he was attacked first was at best incidental to the wrong. It is difficult to resist the conclusion that the ‘inextricable linkage’ test was really an attempt to return to something closer to the ‘public conscience’ test. At the same time it illustrates very neatly what was wrong with that test. Mr. Cross’s real problem was that the Court of Appeal did not like the cut of his jib. That may be understandable in human terms, but it is hardly a substitute for legal analysis.

All of this case-law now has to be viewed in the light of the decision of the House of Lords in 2008 in *Gray v. Thames Trains*¹⁶. Mr Gray was seriously injured in the Ladbroke Grove rail crash of October 1999, as a result of the admitted negligence of Thames Trains. As a result of his injuries, he suffered a personality change which brought about occasional and irrational homicidal instincts. He subsequently killed a man and pleaded guilty in the Crown Court to manslaughter on the ground of diminished responsibility. He was ordered to be detained in a secure mental institution. Mr. Gray’s plea necessarily involved accepting a large measure of responsibility for his act. But his case was he would not have done it but for the negligence of Thames Trains. He claimed damages for his detention, his loss of earnings after his release, his loss of reputation, and his grief and remorse after the manslaughter, plus an indemnity against any liability that he might have to his victims’ dependents. The case was the first to reach the House of Lords in a line of decisions in which convicted criminals have sued railway companies, utilities or the National Health Service for

¹⁶ [2009] 1 A.C. 1339

negligently turning them into rapists, burglars, fraudsters or murderers. Such cases go against the grain of judicial sympathies, and this one was unanimously rejected by the trial judge, the Court of Appeal and every member of the judicial committee of the House of Lords. None of them had any difficulty in finding that the claim was barred by public policy. Lord Hoffman offered the fullest analysis of the underlying policy. He identified two principles. There was a narrow principle that a Claimant could not recover losses directly attributable to the sentence imposed on him by a court as a result of his own criminal responsibility for his actions. Lord Hoffmann based this on the principle of consistency. The sentence of the criminal court reflects what the law regards as appropriate to reflect the criminal responsibility of the Claimant. It would be inconsistent for the law to entitle the Claimant to be relieved of that responsibility by allowing a claim to transfer it to a third party. That disposed of most of Mr. Gray's claims. But there was also a wider principle which prevented him from recovering even the losses which were not attributable to his imprisonment (such as the losses arising from his grief and remorse or the damages payable to his victims' dependents). The wider principle was that he could not recover losses which he had incurred as a result not of the sentence but of the crime itself. True it is that his loss was also the result of the Defendant's negligence, and that that would normally be enough to support an award of damages. But where the crime was not just an incidental aspect of the facts, but an essential factor without which the loss could not have arisen, recovery was barred by public policy.

The narrower principle seems, with respect, obvious. But in most cases in which the illegality defence succeeds, it is likely to be on the basis of the wider principle. So it is here that the main importance and difficulty of the case lies. Lord Hoffman rejected the reliance test, on the ground that the question what was or had to be pleaded in order to make out the cause of action had no bearing on the question what the relevant rule of law was. He found the concept of 'inextricable linkage' unhelpful, a classic judicial

put-down, which I think meant that if ‘inextricable linkage’ was just a synonym for causation it was redundant, and if it meant more than that it was wrong. Lord Hoffmann said this about the wider principle:

“It differs from the narrower version in at least two respects: first, it cannot, as it seems to me, be justified on the grounds of inconsistency in the same way as the narrower rule. Instead, the wider rule has to be justified on the ground that it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct. Secondly, the wider rule may raise problems of causation which cannot arise in connection with the narrower rule. The sentence of the court is plainly a consequence of the criminality for which the claimant was responsible. But other forms of damage may give rise to questions about whether they can properly be said to have been caused by his criminal conduct.”¹⁷

In other words, it is a question of causation. Lord Hoffmann put the principle of causation this way:

“Can one say that, although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant? Or is the position that although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant?”¹⁸

The distinction which Lord Hoffmann is making here is between cases where the illegal act was the effective cause of the Claimant’s loss, and cases where it merely provided the occasion for the Defendant to commit

¹⁷ [2009] 1 A.C. 1339 at [51]

¹⁸ *supra* at [54]

an actionable wrong. He thought that the negligence of Thames Trains merely provided the occasion for Mr. Gray to incur personal, albeit diminished, responsibility for killing a man. This is, I fear, less helpful than it sounds. To say that the Claimant's loss must have been caused by his own illegal acts is not so much an answer as a restatement of the question.

Of course, the illegal conduct of the Claimant must have been an effective cause of the loss. It must be more than an incidental or background fact. I would have no difficulty with Lord Hoffmann's formulation if that was all that he was saying. But it is not very satisfactory to make the application of the illegality defence depend on the relative causal efficacy of the illegal conduct and the Defendant's breach of duty, or on the distinction between an occasion for loss and its effective cause. I do not doubt that some cases can be analysed in these terms. But many cannot. In *Gray's Case* itself, I rather doubt whether it was right to say that the homicidal tendencies brought about by the negligence of Thames Trains did no more than create the occasion for him to commit homicide. It seems to me that it was an effective cause of his doing so, notwithstanding that another effective cause was necessary before his pre-existing propensity to kill actually resulted in a killing. To take an absurd proposition simply to test the argument, if manslaughter had not been illegal the courts would have had no difficulty in holding that any loss arising from the victim's death was caused by the negligence of Thames Trains, notwithstanding that a voluntary act of the Claimant was necessary as well. What barred the claim in *Gray's Case* was not the relative causal efficacy of the negligence and the killing, but the illegal character of the killing. In *Stone & Rolls v. Moore Stephens*, which was decided by the House of Lords at almost the same time by a committee three of whom sat in both cases, there were concurrent claims in contract and tort against the auditors of a company. On the assumed facts, the auditors had negligently failed to detect the fact that the company's revenues were derived from frauds against third parties, as a result of which the frauds continued for longer than they

would otherwise have done. The majority of the committee upheld the illegality defence. But it would have been artificial to analyse the case on the footing that the negligence of the auditors merely provided the occasion for the fraudulent course of trading to continue. If the company's transactions with third parties, instead of being fraudulent had merely been loss-making, the negligence of the auditors might (depending on a number of other factual issues) have been regarded as causative of the loss. In fact, as I have pointed out, the case was decided, at any rate by Lord Walker and Lord Brown, on the reliance test.

We are concerned here with a question of public policy. *Ex hypothesi*, in every case where the question arises it is because the Claimant's loss was caused both by the Defendant's breach of duty and by the Claimant's illegal act, neither of which would have been enough on its own to cause the Claimant's loss. In every case, the position is or must be assumed to be that but for the illegality defence, the Claimant's loss will be recoverable as flowing from the Defendant's breach of duty. In many cases neither the illegality nor the breach of duty can sensibly be classified as a mere occasion for the other to operate. They will be concurrent, effective causes. If the Claimant's loss has been caused by the combined effect of the two, then the real question must be whether the illegal act engages the public policy. That must necessarily, as it seems to me, depend on what the public policy is and what object it seeks to achieve. Lord Hoffman deals fully with the rationale of the policy underlying the narrower principle. However, he tells us nothing about it in the context of the wider principle, except that it is 'not based upon a single justification but on a group of reasons, which vary in different situations.'

In his speech in *Tinsley v. Milligan* Lord Goff recognised that the illegality defence can operate with unreasonable and disproportionate harshness, and suggested that the whole subject called for study by the Law Commission, followed by legislation. The result was four successive reports

of the Commission which, like the Grand Old Duke of York, marched his men to the top of the hill and then marched them down again. In its initial consultative reports, the Commission proposed legislation governing the illegality defence in cases of trusts and contracts, broadly along the lines of the New Zealand Illegal Contracts Act. It would have made the civil consequences of an illegal transaction discretionary and conferred a power on the court to allow restitution of benefits received under such transactions. The same approach was proposed in relation to the creation of interests in property under a trust affected by illegality. In a subsequent consultative report, a similar discretionary regime was proposed for cases where claims in tort were affected by the illegality defence. However, in a yet further consultative report of 2009 and in their final report of 2010, the Commission abandoned these proposals in spite of the strong support that they had received from the great majority of consultees, except in a limited class of trusts affected by illegality. Their retreat was due in part to the difficulty which they had encountered in drafting a bill to give effect to their views. But the major factor seems to have been their view that the greater willingness of the courts in recent years to express their reasoning in terms of policy meant that that it should be left to them to clarify the law. The courts, it was said, had achieved a pragmatically satisfactory state of affairs, in that they had managed by one means or another to escape the harsher and more arbitrary consequences of the illegality defence. Let them get on with it. I think that this retreat is extremely unfortunate, for I am not nearly as sanguine about the current state of the law as the Law Commission is.

It is always perilous to attempt an answer to difficult questions like in the abstract, particular in the course of a brief lecture. Facts will always be found which look like an exception to whatever rule one might formulate. But I think that some general points of principle can fairly be made.

The first is that it is not, in my view, right to say that the rationale of the public policy varies according to the situation. Unlike Lord Hoffmann, I think that consistency is the rationale not just of his narrower principle but of the wider one as well. Indeed, I think that it is the rationale of the whole concept of barring claims on account of the illegal acts of the Claimant. It seems to me that this was well expressed by MacLachlan J, delivering the leading judgment in the Supreme Court of Canada in *Hall v Hebert*¹⁹ in 1993:

“To allow recovery in these cases would be to allow recovery for what is illegal. It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which—contract, tort, the criminal law—must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to ‘create an intolerable fissure in the law's conceptually seamless web’... We thus see that the concern, put at its most fundamental, is with the integrity of the legal system.”

The Supreme Court of Canada in *Hall v. Hebert* limited the application of the consistency principle to cases where if the Claimant obtained judgment in his favour, he would be enabled to profit from his illegal conduct or to evade the intended impact on him of a criminal sanction. This is a much narrower approach than I would accept, and it is certainly narrower than anything that can be derived from the English authorities. Leaving aside the evasion of criminal sanctions (which is really Lord Hoffmann’s narrower principle), the wider principle would hardly ever apply in tort cases save

¹⁹ [1993] 2 S.C.R. 159

perhaps in torts arising out of conspiracies or contractual relationships. The actual facts in *Hall v. Hebert* were that two drunken young men went out in a car together, taking turns to drive, and had an accident in which one of them was injured. This is the sort of case that really is capable of being resolved by reference to Lord Hoffmann's distinction between the occasion for a wrong and the cause of a loss. The decision of the two young men to go out driving when they were way over the legal limit was unlawful, but it was merely a background fact. The sole effective cause of Mr. Hall's injuries was the negligence of his friend. In *Gray v. Thames Trains*, the limitations proposed by the Supreme Court of Canada would have led to the case being decided the other way. Mr. Gray was not seeking to profit from his illegal conduct, and his claims for damages for remorse and an indemnity against civil damages payable to the victim's estate were not attempts to evade the impact of any criminal sanction.

However, shorn of its (to my mind) arbitrary limitations, MacLachlan's J's statement of the underlying rationale of the public policy seems to be right in principle, and to be applicable to claims in both contract and tort, as indeed Lord Walker and implicitly Lord Brown accepted in *Stone & Rolls v. Moore Stephens*. More recently, the High Court of Australia has also accepted it in *Miller v. Miller*²⁰. If the law stigmatises the conduct of the Claimant as illegal or criminal, it is inconsistent for it to allow legal rights to be founded on that conduct. The rational view is the one taken by French law that the coherence of the law requires that illegal acts should be devoid of all civil legal consequences. What has obscured this fact in our jurisdiction is the irrational insistence of English law on recognising or at least leaving untouched some legal consequences of an illegal transaction.

The second point of principle which is I think worth making concerns the question what is meant by founding one's claim on an illegal act. No one

²⁰ [2011] HCA 9

suggests that the mere fact that the Claimant was engaged in an illegal activity at the time when he committed the wrong is capable without more of giving rise to the defence. The Claimant's illegal act must be the basis of his claim, as in *Gray's Case* where the basis of the Claimant's claim for damages for remorse and an indemnity against civil liability was that he had committed an unjustifiable homicide, or in *Stone & Rolls* where it was that the company had defrauded more people of more money because the auditors failed to expose them. The various tests which have been proposed (such as the reliance test, the 'inextricable linkage', and so on) are simply evidential tests which may assist in deciding whether the claim is or is not founded on the illegal act.

Take the reliance test. The House of Lords seems to have dismissed the reliance test in *Gray v. Thames Trains* and then applied it in *Stone & Rolls v. Moore Stephens*. But it seems to me that if the Claimant is bound to rely on his own illegal act in order to make good his cause of action, he is necessarily doing what the principle of consistency forbids. But the converse does not follow. The mere fact that the Claimant can formulate his claim without relying on his own illegal act, does not mean that his claim is not founded on it. This, as it seems to me, is the problem about the reasoning on the majority in *Tinsley v. Milligan*. On any view, Miss Milligan's claim to an interest in the property depended on the dishonest deal that she had made with Miss Tinsley. Its dishonesty consisted in the purpose for which it was made, notwithstanding that that purpose was not apparent from the actual terms of the deal. If I sell you a crowbar for the purpose of breaking into a house, I cannot sue for the price notwithstanding that the proposed use of the bar is not a term of the contract. The mere fact that the presumption of resulting trust enabled Miss Milligan to formulate her claim without pleading the dishonest purpose, indeed without pleading anything other than the contribution to the price, cannot be enough to defeat the illegality defence. It follows that I

think that the minority were right. It does not of course follow that that is an attractive outcome, or that the law should not be changed.

My third point of principle is that there may be exceptional cases in which the principle of consistency positively requires that the illegality defence should fail, notwithstanding that the Claimant's claim is founded on his own illegal act. That will happen if the purpose of the rule which the Claimant's illegal act violated would be defeated by preventing him from suing on it. This is not the orthodox view, but there are signs that it may come to be accepted and that would certainly be welcome. In *Courage v. Crehan*²¹, the relevant illegal act was entering into a tied house agreement with a brewer. Both the Advocate-General and the European Court of Justice considered that the crudeness of the English law of illegality might not necessarily be consistent with European law, because the economic reality was that the tie reflected the superior economic power of the brewer and the mere refusal of relief to the tenant might enable him to get away with it. In the field of economic regulation, which is giving rise to an increasing proportion of these cases, the refusal of relief and in particular the refusal of restitution, is often inconsistent with the economic objective of the regulation. In *Safeway v. Twigger* the Court of Appeal struck out on the ground of illegality a claim by a company which was liable for civil penalties under the Competition Act 1998 for price-fixing to recover them as damages from the employees who had actually engaged in the price-fixing without the Board's authority. It was at least arguable, although not in fact argued, that the economic objective of the legislation about price-fixing would have been better served by visiting its consequences on the individuals who were actually responsible, and not just on the company which was legally responsible.

²¹ [2002] Q.B. 507

My fourth and final point concerns the role of judicial discretion in this area. I have already expressed my view that logically the minority were right in *Tinsley v. Milligan*. The result, as I have also accepted, is arbitrary and it is harsh. But I think that we need to get clear in our minds the reason why it is arbitrary and harsh. It is arbitrary, because it would require only a light adjustment of the facts to produce a different result without in any way diminishing the element of turpitude involved. Suppose, for example, that Miss Milligan had agreed to put the property into Miss Tinsley's sole name for some perfectly proper reason, such as that she was a minor, but the two of them had later decided to exploit the undisclosed character of her interest to defraud the social security system. As for the harshness of the result, that is not really the result of the illegality defence itself. It is the result of the rigid and extreme view of English law about the consequences of its application. English law does not regulate those consequences, but simply throws up its hands and leaves the loss to lie where it falls. In *Tinsley v. Milligan* itself, the result would have been that Miss Milligan lost all the money that she had contributed and that Miss Tinsley was unjustly enriched by the same amount. A broader basis for claiming restitution of benefits conferred under illegal transactions would be at least a partial answer to that problem. But it would not have been a complete answer unless one assumes that the value of the property was unchanged. If, for example, it had risen a restitutionary remedy would have left Miss Tinsley with a reduced windfall, but a windfall all the same.

What these considerations suggest to me is that only way in which the complexity, capriciousness and injustice of the current English law can be addressed is by making the consequences of a finding that a claim is founded on the Claimant's illegal act subject to a large element of judicial discretion. That is why I regret the decision of the Law Commission to abandon its original proposal to confer such a discretion on the court by statute. The Commission seems to me to have been far too optimistic about the effect of recent decisions, and in particular of *Gray v. Thames*

Trains and Stone & Rolls v. Moore Stephens in clarifying and moderating the law. There remains considerable uncertainty in the case-law about the true rationale of the illegality defence. The law remains excessively complex and technical. There is still no satisfactory or consistent basis on which a court can take account of the gravity of the illegal acts or the degree of the Defendant's culpability, and it is difficult to see how this can be accommodated within a legal principle from which all discretionary elements have been excluded. It is all very well to say that the courts are now more willing to explain their decision in terms of the underlying legal principle, but if the principle is an unattractive one, its lucid demonstration is a mixed blessing at best. In *Gray v. Thames Trains*, it was Lord Hoffmann who rejected the attempt of some judges to modify the operation of the rule where the Claimant's conduct 'had not been as blameworthy as all that'. Above all, there remains a real problem about the principle that where a transaction is affected by illegality the loss should lie where it falls, and a real problem about the rejection of restitutionary claims arising out of illegal transactions in the great majority of cases. These are probably the main sources of injustice in the current law. It is true that in some cases the courts have been able to escape the harshness of the law, but they have done it by cheating, a process which is not conducive to either clarity or coherence in the law. The government is, I believe, still considering its response to the Law Commission's final report. We may be permitted to hope that it will prefer the more imaginative proposals which the Commission had put forward in its early consultation documents to the abandonment of the cause which is evident in its final report.

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