

***Stoffel & Co. v Grondona* [2020] UKSC 42**

Introduction

1. In *Stoffel & Co. v Grondona*, the Supreme Court considered the operation of the common law defence of illegality in the context of solicitors' negligence for the first time since its seminal decision in *Patel v Mirza* [2017] AC 467. At the same time, the Court handed down judgment in a clinical negligence case: *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43.
2. *Stoffel* and *Henderson* provide some further useful guidance on the way in which the Supreme Court's "trio of necessary considerations" in *Patel* should be applied. Some uncertainty, however, remains regarding the assessment of competing policy considerations.

Facts

3. Ms Grondona entered into an agreement with her business associate, one Mr Mitchell, under which she would use her name on his mortgage loan applications in order to give him access to capital that he would not otherwise have been able to obtain from high street banks. In return, Ms Grondona would receive 50% of the net profits of sale of properties purchased with such funds.
4. Ms Grondona duly applied for a mortgage from Birmingham Midshires in order to purchase a long lease from Mr Mitchell. In that application, she made several fraudulent misrepresentations, including that it was not a private sale. Birmingham Midshires therefore advanced £76,000, which was applied to discharge debt owed by Mr Mitchell secured on the lease.
5. Ms Grondona, Mr Mitchell and Birmingham Midshires instructed Stoffel & Co. in respect of the transaction. However, Stoffel & Co. negligently failed to register the lease in Ms Grondona's name. Mr Mitchell therefore remained the registered proprietor of the lease and borrowed further sums against it.
6. As a result of Stoffel & Co.'s negligence, when Ms Grondona later defaulted on the mortgage, she was unable to call on the lease in order to repay the sums owed to

Birmingham Midshires. Ms Grondona therefore claimed in negligence against Stoffel & Co. By its defence, Stoffel & Co. alleged that the claim was barred by illegality because the purpose of registering the lease was to facilitate her mortgage fraud.

At First Instance and in the Court of Appeal

7. At first instance, the illegality defence failed under the reliance test in *Tinsley v Milligan* [1994] 1 AC 340.
8. Thereafter, the Supreme Court handed down its decision in *Patel*, in which Lord Toulson set out (at [101]) the ‘trio of necessary considerations’ in illegality cases:

“(a) [...] the underlying purpose of the prohibition which has been transgressed, (b) [...] conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) [...] the possibility of overkill unless the law is applied with a due sense of proportionality.”
9. On appeal, Gloster and Flaux LJ applied *Patel* but nonetheless found that the illegality defence failed. Amongst other things, they considered that there was an important public policy in clients having an effective remedy against negligent solicitors.

In the Supreme Court

10. The Supreme Court unanimously dismissed Stoffel & Co.’s appeal regarding the proper application of *Patel*, with the Court’s only judgment being given by Lord Lloyd-Jones JSC. At [26], he said: *“In the application of stages (a) and (b) of this trio a court will be concerned to identify the relevant policy considerations at a relatively high level of generality... at stage (c), by contrast, it is likely that the court will have to give close scrutiny to the detail of the case in hand.”* Later in the same paragraph, he confirmed that it will not be necessary to consider stage (c) proportionality at all, where analysis of the competing policy considerations leads to the conclusion that the defence should fail.
11. On the facts of this case:

- a. At stage (a), the Court doubted that denying Ms Grondona a civil remedy would deter fraud or enhance the protection of mortgagees against such fraud ([27] to [31]);
 - b. At stage (b), the Court emphasised the importance of clients having effective remedies against negligent solicitors, agreeing with Gloster LJ below that it would be more likely that fraud would be detected if the defence failed in these circumstances. Further, legal title to property is transferred even where that transfer was for an illegal purpose and, accordingly, it would be incoherent for the law to recognise an equitable right to a legal interest whilst denying the beneficiary recourse for a third party's failure to protect that interest ([32] to [34]);
 - c. It was not therefore necessary for the Court to consider stage (c) ([35]), however, the Court found that disallowing this claim would have been disproportionate, in particular because Ms Grondona's conduct was not central to the claim ([40] to [43]) but rather (as it held) was part of the background.
12. Finally, the Court re-emphasised that judges should not focus on whether the Claimant is *"getting something"* out of the transaction by way of profit, but rather whether to allow recovery *"would result in an incoherent contradiction damaging to the integrity of the legal system"* ([46]).

Henderson

13. In *Henderson*, the Supreme Court considered whether the illegality defence barred a mental health patient from recovering compensation for losses flowing from her having committed manslaughter (by reason of diminished responsibility) and from her loss of liberty as a result of her conviction, from a hospital which had negligently failed to prevent the unlawful killing. The sentencing judge had made the finding that the claimant bore no significant responsibility for the killing.
14. In another unanimous decision, this time given by Lord Hamblen JSC, the Supreme Court held that the claim was barred for illegality. In so doing, the Court confirmed

that *Patel* does not represent “year zero” and earlier cases “remain of precedential value unless it can be shown that they are not compatible with the approach set out in *Patel*” ([77]).

Discussion

15. The Supreme Court’s guidance in *Stoffel* regarding the “high level of generality” to be deployed at stages (a) and (b) is helpful in principle. However, the status of that guidance and the extent to which it was specifically applied in *Stoffel* is unclear:

- a. At stage (a), the Court found specifically that a fraudster would be unlikely to contemplate whether they had a remedy against a solicitor who failed to register the transfer, when it determined that denying the claim would not deter fraud. This contrasts with the approach in *Henderson*, where the claimant argued that those suffering from diminished responsibility would not be deterred from unlawful killing by an inability to recover damages from negligent clinicians. Hamblen JSC there held that “*the question should not be considered solely at the granular level of diminished responsibility manslaughter cases... there may well be some deterrent effect in a clear rule that unlawful killing never pays*” ([131]). Should Lloyd-Jones JSC not therefore have posed the question more generally, such as whether fraudsters would ever be deterred by an inability to sue professionals involved in such transactions?
- b. Further, at stage (b), the court explicitly “descend[ed] to the facts of the present case” ([32]) in determining that the policy of requiring solicitors to act diligently would be undermined if the claim were denied, as demonstrated by *Stoffel & Co.*’s failure to spot several irregularities suggestive of mortgage fraud.

16. The Court’s guidance, however, regarding stage (c) will be of clear relevance to future cases. It is now plain that the court’s assessment of proportionality performs an ancillary role (see also *Henderson*, at [123]) and that the Court will assess the facts of the case at a high level of detail at that stage. Further, the centrality of the impugned

conduct to the claim has been re-emphasised within the proportionality analysis at least in cases involving serious misconduct, such as fraud.

17. *Stoffel* itself indicates that, while *Patel* has changed the framework under which the Court will assess illegality, it has not substantially changed the results that would have been produced in claims against professionals under *Tinsley*. This is further supported by the Court's observations in *Henderson* regarding precedent to the effect that (a) future cases can take into account pre-*Patel* case law and indeed (b) can apply it directly, as a means of demonstrating how the trio of considerations 'play out' on the facts of any given case.

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