Ex Turpi Causa:

Patel v Mirza in the Supreme Court, 20th July 2016

1. The Supreme Court has today delivered an important decision on the vexed subject of ex turpi causa: Patel v Mirza [2016] UKSC 42. The judgments take up 91 pages. They are all worth reading in detail but here is a short summary.

2. P transferred £620,00 to M to bet on the price of RBS shares. P and M expected M to obtain insider information relating to a government announcement of the price of shares. P and M’s arrangement was a conspiracy to commit an offence of insider dealing under s 52 of the CJA 1993. No government announcement was made and no betting took place. M refused to return the monies and P sought their return on the basis of unjust enrichment. M’s defence was ex turpi causa.

3. The majority in Patel v Mirza (6 of a 9 Justice court) were Lord Toulson (who delivered the leading judgment) and Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge (who all agreed with Lord Toulson). Lord Neuberger delivered a concurring judgment. Lords Mance, Sumption and Clarke dissented.

4. The headline point is that the ex turpi causa test is now “flexible” and based on the requirements behind the public policy making conduct illegal, “taking into consideration a range of factors including the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was a marked disparity in the parties’ respective culpability” (par. 107 of the judgment of Lord Toulson).
5. The reliance test approved by the majority in *Tinsley v Milligan* is no longer the law. Indeed, *Tinsley v Milligan* was expressly departed from (par 114 of the judgment of Lord Toulson).

6. There had been a significant dispute at the Supreme Court level as to the appropriate test to be applied. The majority in the case of *Hounga v Allen* [2014] 1 WLR 2889 had held that a more general public policy test was appropriate, but in the later cases of *Les Laboratoires Servier v Apotex* [2015] AC 430 and *Bilta v Nazir* [2016] AC 1, a divide emerged between those who preferred such a test and those (particularly Lord Sumption) who maintained that the reliance test as approved in *Tinsley v Milligan* [1994] 1 AC 340 remained the law.

7. It is now clear from the judgment of the majority that a public policy test is appropriate. See the following pars of the judgment of Lord Toulson:

"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. That trio of necessary considerations can be found in the case law... [par 101]"

"The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the
boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate...

[par 120]"

8. The minority objected largely on the basis of the potential uncertainty of the test with Lord Mance citing “an open and unsettled range of factors” (par 192). Lord Sumption stated that “if the application of the illegality doctrine is to depend on the court’s view of how illegal the illegality was or how much it matters, there would appear to be no principle whatever to guide the evaluation other than the judge’s gut instinct (par 262 iii)” and that the Toulson test was “far too vague and potentially far too wide (par 265)”.

9. These points – powerful as they might seem initially – were addressed and rejected by Lord Toulson at pars 113: the concept of illegality is riven with uncertainties in any event whatever the test to be applied; there is no evidence that this has caused problems in jurisdictions such as Canada and Australia which take a more flexible approach. Indeed, this is not an area where certainty
is paramount. The need for certainty applies to ordinary citizens acting lawfully: it does not apply “in the same way to people contemplating illegal activity”.

10. On the facts of the case, all 9 Justices were agreed that the defence was not made out.

11. It is also worth noting the recent (19th July 2016) Court of Appeal decision of Beaumont v Ferrer [2016] EWCA Civ 768, handed down one day before Patel v Mirza, in which a claim for serious personal injuries sustained by two youths engaged on a criminal enterprise (escaping a taxi in order to avoid paying any fare) were rejected on the grounds of ex turpi causa. The CA found that the actions of the taxi driver in continuing to drive when three other youths had already run off was (contrary to the holding of the judge) was negligent.

12. However, (applying Lord Hoffmann’s test in Gray v Thames Trains) “even if it could be said that the claimants’ injuries would not have happened but for the tortious conduct of Mr Ferrer, they were in reality caused by the claimants’ own criminal acts in making off without payment and that, therefore, there should be no recovery”. Longmore LJ considered that whatever the divergence of opinion in the Supreme Court, the defence of illegality was made out.

Dan Stacey
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