counsel in that case had taken the point early enough, noting in this respect *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272 (Ch); [2008] B.C.C. 22. *Farepak* in turn connects to that other hard case, *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch. 105; [1979] 3 All E.R. 1025.

This is very difficult territory. Unless the concept of "fundamentality" is going to be asked to do a lot of work, in a way that it does not in the personal claim in money had and received, there are going to be many parties to contractual relationships who might legitimately argue that they made a fundamental mistake in making a payment to an insolvent counterparty. For example, a party that buys goods that are subject to serious latent defects will have a plausible case that it made a fundamental mistake in making a payment for them. It cannot be responded that such a buyer had a legal obligation to make the payment. Even if the contract on its face required payment for the goods on a date certain, there would not in these circumstances be any legal obligation to pay. This can be tested by observing that if the buyer had just changed its mind about the goods and did not pay on due date, the seller would fail in a contract or debt action if at trial the buyer could show that the goods were defective. Also problematic will be cases where payers advert to the fact that they might be mistaken (see *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49; [2007] 1 A.C. 558 at [26]); can they be taken to have assumed the risk of the payee's insolvency and therefore fail in a trust claim?

The scope of proprietary claims might be capable of being narrowed by stipulating that any mistake must be combined with a misrepresentation, or even perhaps a fraudulent misrepresentation. Even stricter criteria might require the payer to signal its recall of the payment before the arrival of the payee's insolvency. Another solution might be to recognise a trust only where there was no basis for the payment within the terms of the relationship between the parties. This would be a plea based on absence of basis, rather than on mistake or total failure of consideration. We will just have to wait and see if any of these approaches is endorsed. If *Angove* is any guide, the dispatch of *Chase Manhattan* is equally on the cards. [47]

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THE END OF AN ERA? ILLEGALITY IN PRIVATE LAW IN THE SUPREME COURT

Patel v Mirza [2016] UKSC 42; [2016] 3 W.L.R. 399 is a pivotal moment in English private law. By a majority, the Supreme Court declared that the landmark decision in *Tinsley v Milligan* [1994] 1 A.C. 340; [1993] 3 All E.R. 65 should not be followed in so far as it established that a claimant will fail for illegality where he or she needs to rely on his or her wrongdoing in order make out the cause of action. Instead of a reliance test, the illegality doctrine is to turn on a policy-based test pursuant to which various salient factors are weighed. Expressed in language that will now be familiar to disciples of this area of jurisprudence, *Patel* opts for a discretionary approach over a rule-based analysis. *Patel* apparently brings to a halt, at least for the moment, a debate regarding the illegality doctrine that has raged in the Supreme Court for several years.

Before addressing *Patel*, it is necessary to give a brief history of the saga that preceded it. The question in *Tinsley v Milligan* was whether a claimant who had contributed to the purchase price of a house could assert a beneficial interest in it where the house's legal title had been placed solely in the name of the claimant's cohabitee in order to facilitate the commission of an offence (on the facts, welfare fraud). A majority of the House of Lords answered this question in the affirmative, holding that the illegality doctrine was inapplicable. In essence, the reasoning was as follows: (1) the presumption of the resulting trust applied; (2) therefore, the claimant did not need to rely on her illegality in order to establish the elements of her claim (she had to prove only the contribution to the purchase price); and (3) it followed that she should succeed in her action. It was this reasoning that gave rise to the reliance test. Decades passed. Other approaches to the illegality doctrine applying in different parts of private law were born and buried. So matters stood until the Supreme Court addressed the law of illegality in a series of landmark decisions (considered by Strauss (2016) 132 L.Q.R. 236).

The first decision in the sequence was *Hounga v Allen* [2014] UKSC 47; [2014] 1 W.L.R. 2889. That appeal concerned the statutory tort of unlawful discrimination. Lord Wilson, who delivered the principal reasons, seemed to prefer the policy-based test (at [42]). The next decision was *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] A.C. 430, in which the illegality doctrine was invoked to resist a claim under a cross-undertaking in damages. The asserted "turpitude" in *Apotex* was merely private law wrongdoing (breach of a patent), and all of the members of the Supreme Court agreed that such wrongdoing was insufficient to enliven the illegality doctrine, subject to exceptions. It was on this basis that the court disposed of the appeal. However, the court proceeded to consider the proper approach to determining when, if turpitude exists, the doctrine applies. The court divided sharply on this point. Lord Sumption (with whom Lord Neuberger and Lord Clarke agreed) preferred a rule-based approach. The rule endorsed was the reliance test. By contrast, Lord Toulson argued for the policy-based test. This difference in opinion was left unresolved. The debate between these two camps played out again in *Bilta (UK) Ltd v Nazir (No.2)* [2015] UKSC 23; [2016] A.C. 1 but, again, no definite conclusion was reached. This prompted Lord Neuberger to remark that the illegality doctrine needed to be addressed again by the Supreme Court as soon as was appropriately possible (at [15]).

Patel v Mirza was the opportunity of which Lord Neuberger spoke. Mr Patel transferred to Mr Mirza £620,000 in order that the latter could trade shares on the basis of inside information. Although the promised inside information was not forthcoming, Mr Mirza refused to return the money. Mr Patel sued. Mr Mirza resisted the claim on the basis that the agreement between them constituted a conspiracy contrary to s.52 of the Criminal Justice Act 1993. At first instance ([2013] EWHC 1892 (Ch); [2013] Lloyd's Rep. F.C. 525), it was held that the claim was barred for illegality. An appeal to the Court of Appeal was allowed ([2014] EWCA Civ 1047; [2015] Ch. 271).

[47] Agency agreements; Authority; Constructive trusts; Distributors; Insolvency; Proceeds of sale; Revocation

The Supreme Court, sitting as a panel of nine, unanimously dismissed an appeal by Mr Mirza. The court split (broadly speaking) into two factions, with one preferring the policy-based test and the other the reliance test, with the former faction prevailing (Lord Neuberger, Lord Kerr, Lord Wilson, Lord Hodge and Lady Hale; against Lord Mance, Lord Clarke and Lord Sumption). Lord Toulson delivered the principal opinion in support of the policy-based test. His Lordship said that "Mr Patel is seeking to unwind the arrangement, not to profit from it" (at [115]) and that:

> "no particular reason has been advanced … to justify Mr Mirza's retention of the monies beyond the fact that it [sic] was paid to him for the unlawful purpose of placing an insider bet" (at [116]).

It followed, Lord Toulson said, that the policy-based test did not preclude recovery. Lord Toulson also wrote:

> "I would hold that a person who satisfies the ordinary requirements of a claim in unjust enrichment will not prima facie be debarred from recovering money paid or property transferred by reason of the fact that the consideration which has failed was an unlawful consideration" (also at [116]).

The result, his Lordship indicated, was that cases in which a claim in unjust enrichment would fail for illegality would "be rare" (at [121]). The effect of the decision in *Patel* is, therefore, severely to confine the illegality doctrine, at least in the law of unjust enrichment (with the result that complaints that the policy-based test leads to an overly expansive illegality doctrine (see e.g., at [262(iv)] per Lord Sumption) seem to be misplaced).

The foregoing describes the essential conclusions reached in *Patel*. The rest of this note addresses several important questions that arise from the Justices' reasons. The first concerns the role that remains, if any, for other tests regarding the illegality doctrine. *Patel* does not merely endorse the policy-based test; it also flatly rejects the reliance test. Lord Toulson stated that *Tinsley v Milligan* "should no longer be followed" (at [110]). The demise of the reliance test should not be mourned. There are numerous fatal objections to it. One such objection is that it has never been explained precisely why it should matter that the claimant needs to rely on his or her illegality. Simply to assert (as Lord Sumption did at [239]) that a claimant cannot rely on the illegality is merely to restate the reliance test; it does *not* justify it. Another objection is that it is often a matter of luck whether a claimant needs to rely on his illegality. Whether or not the claimant has to rely on it depends on whether the fact to which the illegality pertains relates to an element of the claimant's cause of action (in which case the claimant will need to rely on it) or is instead a matter of defence (in which event the claimant will not). However, because issues are often allocated as between the action/defence categories apparently at random, the reliance test leaves the illegality doctrine hostage to luck.

But what room, if any, remains in the wake of *Patel* for other tests? In the context of proceedings in negligence, the courts have generally applied the causal approach endorsed by Lord Hoffmann in *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 A.C. 1339, according to which the claimant will fail if the damage was caused by his or her own illegal act (see e.g., *Joyce v O'Brien* [2013] EWCA Civ 546; [2014] 1 W.L.R. 70). It is doubtful whether *Patel* leaves any space for this causal approach. There is little in Lord Toulson's reasons to suggest that the policy-based test is to be confined to the law of unjust enrichment. Nevertheless, given that the causal approach was not explicitly denounced, and because *Patel* is a decision in the law of unjust enrichment, the causal analysis will probably continue to be employed in the negligence context, perhaps with the policy-based test being used as a cross-check.

A second important question is which policy factors are relevant to the policy-based test and what weight does each carry? Lord Toulson declined to identify the material factors exhaustively. His Lordship said:

> "I would not attempt to lay down a prescriptive or definitive list … Potentially relevant factors include the seriousness of the conduct, its centrality …, whether it was intentional and whether there was a marked disparity in the parties' respective culpability" (at [107]).

His Lordship did not comment expressly upon the relative weight of these factors. It seems that the significance of individual factors must vary from case to case.

A third question is whether the policy-based test is satisfactory (for argument in support, see Buckley (2015) 131 L.Q.R. 341). It is touted for its flexibility. But what are the policy-based test's drawbacks? The complaint that is typically made of it is that it is intolerably uncertain in its application (see e.g., at [263]–[265] per Lord Sumption). Lord Toulson offered several points in reply to this criticism (at [113]). His Lordship argued that other approaches have not yielded certainty. This is true, but no answer to the complaint in question. Simply because other approaches suffer from uncertainty does not mean that the policy-based test should be accepted.

Lord Toulson's next retort was that he "was not aware of evidence that uncertainty has been a source of serious problems in those jurisdictions which have taken a relatively flexible approach". This remark is puzzling as no other jurisdiction adopts an approach to the illegality doctrine that is nearly as flexible as the policy-based test (cf. s.7 of the Illegal Contracts Act 1970 (NZ)). Thus, in *Hall v Herbert* [1993] 2 S.C.R. 159 the Supreme Court of Canada emasculated the illegality doctrine. In that jurisdiction, a claim (in tort) will fail for illegality only if it would involve the civil law coming into conflict with criminal law. McLachlin J., delivering the principal reasons, embraced a very specific meaning of "inconsistency" (at 179–180), a point that has been disregarded so regularly in judicial consideration of her reasons in Britain that one suspects that the oversight is deliberate. As a careful reading of her reasons (and of the work of Weinrib, on which her reasons are based (Weinrib (1976) 26 U.T.L.J. 28)) reveals that an inconsistency arises only where granting a remedy would facilitate wrongful profiting or the evasion of a criminal law sanction. This test is very far from discretionary in nature. Illegality in Australia is governed primarily by statute. Those statutes, broadly speaking, deny recovery where the claimant's illegality is serious and closely connected to the damage about which complaint is made (see e.g., Civil Liability Act 2002 (NSW) s.54). These provisions are notable for their inflexibility.

Finally, Lord Toulson indicated that certainty might not be terribly important when it comes to people who are "contemplating unlawful activity" (at [113]). This sentiment was echoed by Lord Kerr, who wrote:

> "Certainty or predictability of outcome may be a laudable aim for those who seek the law's resolution of genuine, honest disputes. It is not a premium to which those engaged in disreputable conduct can claim automatic entitlement" (at [137]).

This idea has found traction in other contexts. Criminal law theorists have argued, for example, that certain defences to criminal liability, such as immunities, *should* be ambiguous. Paul Robinson observed that where a defendant is exempt from criminal liability only because of the application of a "nonexculpatory public policy defense", the defendant's conduct is "generally deplored". He argued (see (1982) 82 Colum. L.Rev. 199 at 272–273) that, consequently:

> "vagueness and ambiguity in these defences may serve the useful purpose of deterring undesirable conduct by persons who in fact qualify for them … A chilling effect may have beneficial consequences".

This argument is obviously controversial. One response to it is that even if uncertainty in the law might discourage unwanted behaviour, such uncertainty tends to provoke litigation, which has its own costs (a point made by Lord Neuberger at [158]).

Thus, for the reasons that have been given, Lord Toulson seems not to have a compelling response to the uncertainty objection. To what other objections is the policy-based test vulnerable? Another line of attack concerns the factors to which the test is sensitive. Consider deterrence. This is a consideration to which the test responds (see e.g., *Hounga v Allen* [2014] 1 W.L.R. 2889 at [44]). However, it will be rare that denying recovery for illegality will have any meaningful deterrent effect given that the doctrine is not, surely, a matter of public knowledge. Even if the doctrine has the potential to influence behaviour, in cases in which the parties are jointly engaged in illegality, denying recovery makes offending *cheaper* for the defendant. As an objection to the policy-based test, however, this complaint is of limited force. This is because it focuses on the factors to which the test looks rather than on the test itself. If unconvincing factors were stripped from the test, this complaint would not bite.

A different criticism of the policy-based test is that it requires the courts to weigh incommensurable factors (for sophisticated development of this idea in another context, see Stevens, "Contributory Fault—Analogue or Digital?" in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Tort* (2015) at p.255). This objection proceeds as follows. If factors are to be weighed against each other, there must be some common metric. However, the policy-based test identifies no such metric. Thus, the need, for example, to prevent wrongful profiting cannot be pitched against, for instance, the desirability of responding proportionately to the seriousness of the claimant's offending. The policy-based test is, therefore, flawed because it requires the courts to do the impossible. Requiring judges to compare the factors in play is akin to asking them whether five litres is greater than two meters. One reply to this criticism is that judges seem to have no difficulty weighing the factors to which the policy-based test is sensitive. A (compelling) retort to this, however, is that that fact is beside the point: that responses can be given to an incoherent question does not make the question coherent.

A fourth question is what are the ramifications of *Patel*? One important consequence of the entrenchment of the policy-based test is that, generally speaking, appeals regarding the illegality doctrine are now extremely unpromising. It is well established that the circumstances in which appellate disturbance of a first instance decision is warranted depend on the nature of the decision below (see e.g., *South Cone v Bessant* [2002] EWCA Civ 763; [2003] R.P.C. 5 at [26]). In relation to discretionary decisions, the appellate court must recognise that "different judges may legitimately take different views" and "those differing views should be respected, within the limits of reasonable disagreement" (*Jackson v Murray* [2015] UKSC 5; [2015] 2 All E.R. 805 at [28]). In the absence of an identifiable error, an appellate court should interfere only where it concludes that the court below reached a decision which "was not one which was reasonably open to it" (also at [28]). Since the policy-based test gives trial judges considerable freedom to decide which factors are material and the weight that they carry, the test is highly discretionary. Consequently, decisions regarding the illegality doctrine will be largely impervious to appellate review.

By way of conclusion, a few points regarding the judicial methodology adopted in *Patel* merit comment. The first concerns the fact that the Justices understood there to be just two options before them. Either the policy-based test could be embraced or the solution in *Tinsley v Milligan* could be endorsed. Thus, Lord Kerr said:

> "The way is now open for this court to make its choice between, on the one hand, cleaving to the rule-based approach exemplified by *Tinsley* … and, on the other hand, a more flexible approach, taking into account the policy considerations …" (at [133]).

This, however, is a false choice. It is mystifying why the many other possible tests for which the Supreme Court could have opted (such as the Canadian rule, which has been referred to above) were removed from the table at the outset. It seems that this blinkered view of the problem was self-imposed, with Lord Sumption revealing that neither party had argued for the policy-based test (at [261]).

Another interesting methodological point concerns the fact that the division in the Supreme Court between the merits of a more discretionary analysis and a rule-based approach is not confined to the context of illegality. As Graham Virgo observes, this is just one theatre in which this conflict has been fought (see Virgo (2015) 6 U.K.S.C.Y. 233 at 233). Oddly, the combatants appear to have switched sides periodically. For example, Lord Toulson's reasons in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] A.C. 1732, a case about the duty of care element in the tort of negligence, marginalised the nakedly policy-based *Caparo* test in the course of advancing a rule-based articulation of the assumption of responsibility test. This, of course, is diametrically opposed to the position that he adopted in *Patel*.

Finally, observe that *Patel* in essence gives effect to proposals that the Law Commission had advanced in its investigation of the illegality doctrine (see Law

Commission, *The Illegality Defence in Tort: A Consultation Paper* (2001) CP No.160, at para.6.5ff; Law Commission, *The Illegality Defence* (2010) No.320, at para.2.22) on which the legislature did not act. This is one of the most controversial aspects of *Patel*. While it is true that there may be many reasons for legislative inaction (for searching discussion, see Atiyah (1985) 48 M.L.R. 1 at 25–28) with the result that inaction does not mean that Parliament disapproved of Law Commission's proposals, it is striking that the Supreme Court proceeded in the way that it did in the circumstances. ☙

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CIVIL LIABILITY CONTRIBUTION—THE NEW ZEALAND SUPREME COURT TACKLES THE "SAME DAMAGE" ISSUE

The New Zealand Supreme Court recently had occasion to review the law on when a right to claim contribution arises between co-obligors, under statute or in equity. In *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24 the majority of the court took a broad, impressionistic view of what was the damage caused by the obligors, finding that prima facie a right to claim contribution arose under statute and in equity where there was a single harm to which both obligors had contributed in some way.

Elias C.J. effectively reinterpreted the "co-ordinate liability" test traditionally employed in equity and under the English Civil Liability (Contribution) Act 1978 (and corresponding legislation elsewhere), finding that liability will be co-ordinate where the harm for which the claim for contribution is made is in substance the same. She also opined that the approach to be taken is the same whether the claim is made under statute or in equity. Glazebrook J. and William Young J., who also allowed the claims for contribution to proceed, took a similarly liberal view of the meaning of "same damage", but supported their conclusions with different reasons. All three of the majority judges rejected the need to focus on the nature or extent of the liabilities for either the statutory or the equitable claim, preferring to focus on the harm (interpreting that word in a broad sense) caused to the claimant. The move away from the need to find any more in the way of co-ordination between the liabilities of the two wrongdoers means that the law in New Zealand on when a right to claim contribution will arise, whether under statute or in equity, appears to be taking a different path from that in other jurisdictions, in particular the UK.

Hotchin was a strike-out application, such that the court had to assess whether there was an arguable case for the claim for statutory or equitable contribution. The law of contribution in New Zealand is partly covered by statute and partly by the common law. The Law Reform Act 1936 (NZ) s.17(1)(c) (in summary) permits one tortfeasor to claim contribution from another tortfeasor who is liable in respect of the same damage, overturning the rule in *Merryweather v Nixan* (1799) 8 T.R. 186; 101 E.R. 1337 barring contribution between tortfeasors. If the liability of the obligor seeking contribution is not a tortious one, a claim for contribution can be brought in equity (as was the case in *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11; [2012] 2 N.Z.L.R. 276). In *Hotchin*, the claims were brought on the alternative bases of statute and equity, as it was not clear whether the obligor seeking contribution had liability in tort to the claimant.

The facts of *Hotchin* presented some difficult and unique issues which will be challenging for the trial judge if the case proceeds to trial. Here the regulator brought a claim on behalf of around 4,500 investors against the directors of a finance company, in relation to certain alleged misrepresentations in a prospectus relating to the state of the issuer's financial affairs. Under the Securities Act 1978 (NZ) (now repealed and replaced by the Financial Markets Conduct Act 2013 (NZ)), persons liable for a misleading prospectus included the issuer and all directors who signed the prospectus. The directors settled the claim with the regulator, but one of them, Mr Hotchin, claimed that the trustee supervising the issue had also been negligent, and was liable to contribute to the settlement amount (of several million dollars) that Mr Hotchin had (jointly with the other directors) paid to the regulator.

The trustee's alleged negligent act occurred about seven months after the prospectus had been issued. Between the time that the prospectus was issued and the trustee's alleged failure to act, the issuer's financial situation had deteriorated further. The claim against the trustee was in tort; the claim against the director was (based on the regulator's proceedings) for breach of a statutory liability but was potentially also tortious (for misleading statements). Certain assumptions were made for the purposes of the Supreme Court hearing, so there was never full consideration of whether the director was liable to the investors in tort (or even under statute, as the matter settled before the case went to trial), or what was the damage for which the director would be liable, if the duty in tort had been breached (or statutory liability established). Therefore the court never engaged in a close analysis of what was the loss caused by each obligor's wrongful act or more generally for which each obligor was responsible. Such analysis was arguably necessary in order properly to assess the "same damage" issue.

Given that lack of analysis, it is suggested that the basis of the court's majority finding that there was an arguable case that a right to claim contribution arose both under statute and in equity appears to be somewhat insubstantial, meaning the contribution claims may not withstand the scrutiny that a trial ought to give them, in particular once the issue of the director's liability receives close attention. However, the case clearly indicates the direction in which the majority of the Supreme Court wishes to see the law on contribution move in New Zealand.

Previous cases confirm that "same damage" under s.17 of the Law Reform Act does not mean "same damages", just as is the case under the English Act of 1978: see for example *Royal Brompton Hospital NHS Trust v Hammond (No.3)* [2002] UKHL 14; [2002] 1 W.L.R. 1397 at [27]. In relation to the statutory claim in *Hotchin*, however, the loss caused by each of the director's actions and the trustee's actions were (in this author's view) not the same, in particular because the director was not under tort law liable for any loss resulting from a decline in the financial condition of the issuer after an investor invested in reliance on the prospectus. Under the law hitherto, as recognised by the minority in *Hotchin* (at [244]), the loss resulting from reliance on a misleading prospectus is the difference between

☙ Breach of contract; Ex turpi causa; Illegal contracts; Insider dealing; Unjust enrichment