
CASE COMMENT ON PATEL V. MIRZA: EQUITY IN CONTRACTS TAINTED WITH ILLEGALITY

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1. Title and Citation of the Case

Patel v. Mirza, [2016] UKSC 42

2. Facts of the case

The claimant (Mr. Patel) paid £620,000 to the defendant (Mr. Mirza) under an agreement that he would use it to bet on the movement of shares of Royal Bank of Scotland (RBS) on the basis of insider information. Mr. Mirza expected to obtain the said information from his RBS contacts regarding an anticipated government announcement which would affect the price of shares. This agreement amounted to a conspiracy to commit insider dealing under Section 52 of the Criminal Justice Act 1993¹. However, Mr. Mirza's expectation of a government announcement proved to be mistaken, and so the intended betting did not take place. Mr. Mirza failed to repay the money to Mr. Patel despite promises to do so. So, Mr. Patel filed a suit to recover the money.

3. Procedural History

Initially, the case was filed in high court where the trial judge held that Mr. Patel's claim was unenforceable.

Then, the case was appealed by Mr. Patel in the Court of Appeals where the court upheld Mr. Patel's claim, on the ground of *locus poenitentiae exception* (withdrawing from an illegal act before it takes place), reasoning that since the illegal purpose was abandoned before performance, the money could be recovered.

Finally, the case was appealed in the Supreme Court, which ruled in favour of Mr. Patel. It also overruled the reliance rule and established a new rule which is more flexible and based on the

¹ Criminal Justice Act 1993, s 53 [UK]

principle of unjust enrichment and proportionality.

4. Issues Raised

1. Whether the doctrine of illegality (based on the maxim *ex turpi causa non oritur actio*) prevents a party to an illegal contract from recovering money on the basis of unjust enrichment?
2. Whether the court should nevertheless apply the reliance principle despite its critique in prior cases?

5. Decision, Reasoning and Key Principles

The court answered both questions in the negative.

The court initially considered the illegality doctrine which states that if a cause of action is founded on illegality it will fail (*the maxim ex turpi causa non oritur actio*).² This doctrine is based on the principle that the court should not assist someone to benefit from his own illegal actions. But on the other hand, it is also argued that such an approach has no regard for the justice of the case as between the parties or countervailing policy consideration. The court emphasized how often rigidity in applying the illegality doctrine has led to its unfair application, like in cases of Unlawful Employment (*Hounga v Allen*).³ Considering situations like this, the court decided to modify the doctrine of illegality. So, the court held that the claimant could recover money based on the principle of unjust enrichment. Thus, the court overruled the reliance principle established in *Tinsley v. Milligan*.⁴

The court then established a new rule based on proportionality. The new rule is applied on the basis of “**a trio of considerations**”: (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. The court while applying the trio of considerations in this case considered that while the act was done to commit insider trading, it never took place. The court also considered that allowing Mr. Mirza to keep the money would breach the principle of unjust enrichment. The court

² *Holman v. Johnson*, (1775) 1 Cop 341

³ *Hounga v. Allen*, [2014] UKSC 47

⁴ *Tinsley v. Milligan*, [1993] 3 All ER 65

recognized that he was merely seeking to unwind the arrangement and not trying to profit from his admitted wrongdoing. Thus, the court held it to be the proportionate response and allowed Mr. Patel to recover his money.

The key principle in this case is the newly established policy-based approach based on the trio of considerations. This case also emphasizes that a person who satisfies the ordinary requirements of a claim in unjust enrichment should not primarily be debarred from recovering money paid or property transferred by reason of the fact that the consideration which had failed in whole or in part was an unlawful consideration.

6. Critical Analysis and Reflection

I think that the court was correct in overruling the reliance principle as it was subject to criticism over the years. However, while developing the new principle, the court overlooked some key points.

We shall start by considering the circumstances leading to a new approach. The new rule was created because the previously used reliance rule from *Tinsley v. Milligan*⁵ was criticised for being overly technical as that could lead to arbitrary decisions. The courts recognised the need to modify the old approach considered it to be the domain of the legislature to develop the new principle. Afterwards, the law commission in its report⁶ held that the matter is not urgent enough for the legislature to take up so the judiciary should legislate upon the matter. In developing this rule, the court had to steer a middle ground between two unacceptable positions. It had to balance not helping a party enforce an illegal agreement and not immediately refusing all assistance to a claimant simply because their transaction involves unlawfulness. The new policy-based approach has been reiterated in many cases like *Hawkins v. Abarbanel*,⁷ *Stoffel & Co. v. Grondona*,⁸ etc.

The new approach has two drawbacks. These drawbacks were also considered by Lord Sumption and others causing them to differ from the majority led by Lord Toulson in the reasoning, despite concurring with the outcome. Firstly, it is unprincipled and discretionary

⁵ *Tinsley v. Milligan*, [1993] 3 All ER 65

⁶ The Illegality Defence: A Consultative Report (2009) (Consultation Paper No 189), para 3.27

⁷ *Hawkins v. Abarbanel Ltd (Cayman Islands)*, [2025] UKPC 58

⁸ *Stoffel & Co v. Grondona*, [2020] UKSC 42

because it extends judicial discretion to situations where a contract was previously considered automatically void and secondly, the highly discretionary 'trio of considerations' principle leads to uncertain outcomes. This uncertainty is based on the inescapable truth that some judges are more censorious than others. The Singapore court of appeal also critiqued and ultimately declined to apply the new approach in *Ochroid Trading Ltd v Chua Siok Lui*.⁹ Moreover, a rule-based approach provides greater clarity and predictability for commercial parties.

Robert Stevens also implicitly criticizes the new approach by opposing the increasing trend of judges becoming more "political" and intervening in matters of public policy.¹⁰ This critique is based on the ground that Judges lack political or technical competence to weigh policy. Policy balancing is the domain of legislature. Therefore, I believe that although the new approach is an upgrade from the previous one, it is still far from perfect due to the above-mentioned concerns.

Now, we will take a look at how the Indian courts have tackled cases involving principles similar to *Patel v. Mirza*.¹¹ For this, I will refer to Krishnaprasad's text which talks about how the new policy-based approach is not applied explicitly in India.¹² The text contrasts between *Patel v. Mirza*,¹³ and the ICA, 1872.¹⁴ While the former takes a policy-based approach, the latter leaves limited room for judicial discretion as it lays down stringent rules regarding the effect of illegality. Section 23, of the ICA, 1872¹⁵ bases illegality on the principle that 'an agreement is void if its object or consideration' is unlawful. Although, Section 65¹⁶ states the obligation of a person who has received advantage under void agreement, or contract that becomes void. However, it is not applicable for contracts that were illegal from their inception. Unlike UK, in India, statutory rules govern repayment in illegal contracts and not the principle of proportionality. This is reiterated in the landmark case of *Loop Telecom and Trading Limited v. Union of India*,¹⁷ which also establishes the *maxim in pari delicto potior est conditio defendentis* (where both parties are equally in fault, the condition of the possessor is the better

⁹ *Ochroid Trading Ltd v Chua Siok Lui*, [2018] 1 SLR 363 (CA)

¹⁰ Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart Publishing 2005) [2]

¹¹ *Patel v. Mirza*, [2016] UKSC 42

¹² Thomas Sebastian and Aman Ahluwalia, 'Illegality' in KV Krishnaprasad and others (eds), *Foundations of Indian Contract Law* (Oxford University Press 2024) 212-236

¹³ *Patel v. Mirza*, [2016] UKSC 42

¹⁴ Indian Contract Act, 1872

¹⁵ *ibid*, s 23

¹⁶ *ibid*, s 65

¹⁷ *Loop Telecom and Trading Limited v. Union of India*, [2022] 6 SCC 762

one).

Now, I will provide an illustration to make the distinctions between the rule in UK and India clearer. Consider a hypothetical case, in which you pay money to someone to secure a job in the railways via illegal means. In case of a breach, an Indian court would typically decide that since the object of the contract is void under Section 23,¹⁸ the agreement is void ab initio. Moreover, even Section 65¹⁹ would not allow us to recover money as it does not apply to situations in which the contract was illegal from the start. Thus, the court would deny recovery, based on the statutory rule that money paid for an unlawful object is non-recoverable, reflecting the greater emphasis on judicial restraint and statutory supremacy. This is in contrast to the UK, where we may recover that sum based on the ‘trio of considerations’ principle.

7. Conclusion

The outcome in *Patel v. Mirza*,²⁰ returning the parties to the position they were in, before the illegal scheme is undeniably just. However, its application in more complex real-life scenarios will be subject to the courts' balancing act. While the majority's flexible framework is an improvement from the arbitrary reliance principle, it has arguably created a less certain legal landscape by trading procedural certainty for substantive justice. This trade-off is the central point of contention, with the application of trio of considerations by the courts also being a concern. Thus, I would contend that although the new approach is better than the previous one, it is not free of flaws.

¹⁸ Indian Contract Act 1872, s 23

¹⁹ *ibid*, s 65

²⁰ *Patel v. Mirza*, [2016] UKSC 42

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