BRICK COURT CHAMBERS
BARRISTERS

Attendance list

Commercial bargains: the inscrutable, the implicit and the illegal

19th October 2016

Speakers

Lord Hoffmann	Helen Davies QC	Simon Salzedo QC
Lord Hope	Jasbir Dhillon QC	Fionn Pilbrow
Sir Richard Aikens	Mark Hapgood QC	Laura Newton
Mark Howard QC	Tom Adam QC	Charlotte Thomas

Delegates

Louisa	Caswell	Addleshaw Goddard
Jon	Tweedale	Addleshaw Goddard
Jonathan	Davey	Addleshaw Goddard
James	Herring	Addleshaw Goddard
Clarissa	Coleman	Addleshaw Goddard
Duncan	Henderson	Addleshaw Goddard
Sivan	Daniels	Addleshaw Goddard
Canelle	Goldstein	Addleshaw Goddard
Gavin	Tagg	Adecco Group UK & Ireland
Hannah	Wright	Akin Gump
Joanna	Wood	Allen & Overy
Mahmood	Lone	Allen & Overy
Richard	Farnhill	Allen & Overy
Rebecca	Valori	Allen & Overy
Jason	Rix	Allen & Overy

Michaela	Widdowson-Kidd	Allen & Overy
Tom	Spackman	Allen & Overy
Rosie	Hoskins	Allen & Overy
Laitan	Eyiowuawi	Anthony Seddon
Paul	Onifade	Anthony Seddon
Ian	Dodds-Smith	Arnold & Porter
Michael	Bywell	Arnold & Porter
Patricia	Wade	Ashurst
Tom	Connor	Ashurst
Nigel	Parr	Ashurst
Christopher	Vigrass	Ashurst
Darren	Heath	Association of Corporate Treasurers
Josephine	Tubbs	AXA Investment Managers
Jenny	Reeves	Baker & McKenzie
Alex	Deal	Barker Gillette
Richard	Marke	Bates Wells & Braithwaite
Michael	Polonsky	Berwin Leighton Paisner
Sarah	McAtominey	Berwin Leighton Paisner
Matthew	Pack	Bird & Bird
Paul	Matthews	Birketts
Geoff	Mendelsohn	Bivonas Law
Susie	Dryden	Blake Morgan
Simon	Stokes	Blake Morgan
Richard	Portlock	Blake Morgan
Natasha	Harrison	Boies, Schiller & Flexner
Helen	Roberts	Bonelli Erede Pappalardo
Jonathan	Grigg	Boyes Turner

Christopher	Brierly	BP Legal
Ajay	Obhrai	British Medical Association
Frederick	Dupas	BT Group Legal
Hilary	Relf	BT Group Legal
Warren	Little	BT Group Legal
Dave	Hart	BT Group Legal
Sam	Whiting	BT Group Legal
Prakash	Mistry	BT Group Legal
Beverley	McBain	Building Research Establishment
Tom	Evans	Burford Capital
Kari	McCormick	Burges Salmon
Helen	Scott-Lawler	Burges Salmon
Priya	Thapar	Candey Parker
Ryan	Williams	Cavendish Legal Group
Elora	Mukherjee	Charles Russell Speechlys
Sergio	Ung	Chartered Institute of Management Accountants
Stephen	Surgeoner	Clifford Chance
Sam	Brown	Clifford Chance
Sachin	Trikha	Clifford Chance
Eraldo	D'Atri	Clifford Chance
Clare	Hatcher	Clyde & Co
Sarah	Grenfell	CMS Cameron McKenna
David	Bridge	CMS Cameron McKenna
Kushal	Gandhi	CMS Cameron McKenna
Louise	Boswell	CMS Cameron McKenna
Jessica	Foley	CMS Cameron McKenna
Fern	Wakley	Coca Cola Enterprises

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Sinead	O'Callaghan	Cooke, Young & Keidan
Alex	Radcliffe	Cooley
Alex	Leitch	Covington & Burling
Kenny	Henderson	Covington & Burling
Andrew	Bird	Cubism Law
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Tara	Saili	Dentons UKMEA
Suzanne	Gallagher	Devonshires Solicitors
Paul	Smith	DLA Piper UK
Alan	Owens	DWF
Marcus	McConnell	Enyo Law
Will	Foster	Enyo Law
Nick	Jones	Enyo Law
Emily	Husain	Enyo Law
Richard	Little	Eversheds
Chris	O'Sullivan	Eversheds
Wendy	Boucrot	Eversheds
David	Flack	Eversheds
James	Wagner	Faegre Baker Daniels
Ben	Longworth	Farrer & Co
Natalie	Quinlivan	FieldFisher
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Paul	Lomas	Freshfields Bruckhaus Deringer

Charlotte	Yan	Freshfields Bruckhaus Deringer
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Jonathan	Kelly	Freshfields Bruckhaus Deringer
Justin	Michaelson	Fried, Frank, Harris, Shriver & Jacobson
Robert	Herga	Gatwick Airport
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Hannah	Todd	Gide Loyrette Nouel
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John	Bolton	Government Legal Department
Laurence	Katz	Gunner Cooke
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Sarah	Boland	Herbert Smith Freehills
Harry	Edwards	Herbert Smith Freehills

Maximilian	Szymanski	Herbert Smith Freehills
Stewart	Burrows	Hill Dickinson
Roger	Tym	Hogan Lovells International
Eleanor	Midwinter	Holman Fenwick Willan
Nicola	Gare	Holman Fenwick Willan
Vicky	Hau	Holman Fenwick Willan
Catherine	Bates	Huawei
Cécile	de Lagarde	Hunters Solicitors
Shawn	Kirby	Ince & Co
Duncan	Curley	Innovate Legal
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Tracey	Lattimer	Jenner & Block
Christian	Tuddenham	Jenner & Block
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Naomi	Miles	Jones Day
Céline	Barnwell	Jones Day
Raoul	Colvile	Jones Day
Emma	Peart	Jones Day
Thomas	Francis	Joseph Hage Aaronson
James	Boyd	K & L Gates
Graeme	Baird	Kennedys
Paul	Renney	Keystone Law
Jane	Player	King & Spalding International
Sarah	Walker	King & Spalding International
Ruth	Byrne	King & Spalding International
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Elaine	Whiteford	King & Wood Mallesons

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Isabel	Waters	King & Wood Mallesons
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Richard	Foss	Kingsley Napley
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Anna	Huxster	Logos
Joanna	Constantis	Macfarlanes
James	Popperwell	Macfarlanes
Tamar	Halevy	Marriott Harrison
Andrew	Meadows	Marriott Harrison
Stuart	Pickford	Mayer Brown International
Ian	McDonald	Mayer Brown International
Susan	Rosser	Mayer Brown International
Chris	Roberts	Mayer Brown International
Rachel	O Grady	Mayer Brown International
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Ranjeet	Johal	Mills & Chody
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James	Oldnall	Mishcon de Reya
Simon	Style	Mishcon de Reya
James	Taylor	Mishcon de Reya
Polly	Blenkin	Mishcon de Reya
Anna	Crawford	Mishcon de Reya
Alicia	Wilson	Mishcon de Reya
Sara	Manchanda	Mishcon de Reya
Samantha	Wood	Mishcon de Reya
Stephanie	Walls	Morgan Cole
Jessica	Piper	Morgan Lewis
Akil	Jackson	Myers Fletcher & Gordon
Tom	Dane	Nabarro
Neal	Gibson	Nabarro
Tim	Sales	Nabarro
Adam	Greaves	Nabarro
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Clive	Gringras	Olswang
Luke	Pardey	Olswang
Cathryn	Hopkins	Olswang
Dervla	Broderick	Olswang
Charles	Hopper	Olswang
Emma	Cross	Olswang
Simon	Willis	Orrick, Herrington & Sutcliffe
Ashley	Morgan	Osborne Clarke
Charles	Crowne	Osborne Clarke
Tom	Frapwell	Osborne Clarke
Mark	Lloyd	Osborne Clarke
Neeva	Rice	Osborne Clarke
Daisy	Jones	Osborne Clarke
Keith	Oliver	Peters & Peters
James	Campbell	Pillsbury Winthrop Shaw Pittman
Danielle	Williamson	Pinsent Masons
Brandon	Nolan	Pinsent Masons
Daniel	Gardiner	Pinsent Masons
Tim	Cowen	Preiskel & Co
Ronnie	Preiskel	Preiskel & Co

Natalia	Porto	Preiskel & Co
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Ben	Summerfield	Reed Smith
Stuart	Shepherd	Reynolds Porter Chamberlain
Nick	Bird	Reynolds Porter Chamberlain
Andy	McGregor	Reynolds Porter Chamberlain
David	Cran	Reynolds Porter Chamberlain
Greg	Pooler	Reynolds Porter Chamberlain
Tim	Fogarty	Reynolds Porter Chamberlain
Jane	Martineau	Roose & Partners
Ian	Ross	Ross & Co
Kevin	Sach	Sach Solicitors
Edward	Anderson	Sainsbury's
Judith	Flory	Sainsbury's
Manda	Holdsworth	Sainsbury's
Clare	Russell	Sainsbury's
James	Barker	Sainsbury's
Subir	Karmakar	Saunders Law
Paul	Ferguson	SC Andrew
Chris	Charlesworth	Schofield Sweeney
Annemaree	McDonough	Shepherd & Wedderburn
John	Schmidt	Shepherd Wedderburn
Claire	Stockford	Shepherd Wedderburn
Tom	Stables	Shepherd Wedderburn
Marisa	Berardi	Sheridans
Mei	Wong	Sheridans
Harriet	Campbell	Shoosmiths

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Ross	Rymkiewicz	Skadden Arps Slate Meagher & Flom
Edward	Haxton	Skadden Arps Slate Meagher & Flom
Sarah	de Gay	Slaughter and May
Natalie	Cooksey	Slaughter and May
Nicholas	Chandler	Slaughter and May
Rachel	Gower	Slaughter and May
Ben	Holland	Squire Patton Boggs
Nicola	Phillips	Squire Patton Boggs
Sue	Millar	Stephenson Harwood
Jane	Leech	Stephenson Harwood
Haris	Zografakis	Stephenson Harwood
Ros	Prince	Stephenson Harwood
Max	Lemanski	Stephenson Harwood
Duncan	Bagshaw	Stephenson Harwood
Helena	Berman	Stephenson Harwood
Andrew	Myers	Stephenson Harwood
Dan	Saunders	Stephenson Harwood

Jo	Jones	Stephenson Harwood
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Laura	Jenkins	Stewarts Law
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Harold	Shupak	Summers Solicitors
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Claire	Green	Taylor Vinters
James	Clarke	Taylor Vinters
Andrew	Howell	Taylor Wessing
James	Marshall	Taylor Wessing
Natalie	Todd	Taylor Wessing
Adil	Essajee	Taylor Wessing
Gemma	Broughall	Taylor Wessing
Jack	Rabinowicz	Teacher Stern
Kirsten	Younger	Temple Bright
Sanjay	Desai	Temple Legal Protection
Nancy	Johnson	The Financial Conduct Authority
John	Hull	The Financial Conduct Authority
Emily	Di Cesare	The Law Society
Declan	Tomany	The Office of Gas and Electricity Market
Tom	Moisley	Thomas Cooper
William	Stansfield	Thomas Cooper
Robert	Sear	Thrings

Huw	Jenkin	Travers Smith
Sonny	Mallet	Travers Smith
Ned	Beale	Trowers & Hamlins
Alex	Burton	Trowers & Hamlins
Pavel	Klimov	Unisys
John	Kingston	Vannin Capital PCC
Rosemary	Ioannou	Vannin Capital PCC
Pomichael	Pomichael	Viktor Pomichael
Simon	Robert-Tissot	Viridian Law Limited
Francis	Mackie	Weightmans
John	Higham QC	White & Case
Shawna	Pasquale	White & Case
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Susan	Kelly	Winckworth Sherwood
Eleni	Polycarpou	Withers Worldwide
Deliya	Meylanova	Withers Worldwide
Lauren	Peaty	Withers Worldwide
Stuart	Hill	Wynterhill
Sarosh	Zaiwalla	Zaiwalla & Co
Azadeh	Meskarian	Zaiwalla & Co
Jon-Selous	Borlace	
Raja	Yellappan	
John	Walmsley	
Patrick	Little	
Caroline	Greenfield	
Stephen	Roith	
Marke	Raines	

Nicola	Rubbert	
Derek	Hodgson	

"RESTATING RESTATEMENTS" – IN DEFENCE OF *ICS V WEST BROM*

Fionn Pilbrow

The restatements

- *Prenn v Simmonds* [1971] 1 WLR 1381, HL
- *Reardon Smith Line v Yngvar Hansen Tangen* [1976] 1 WLR 989, HL
- *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, HL
- *Bank of Credit and Commerce International SA (in liquidation) and Ali* [2001] UKHL 8, [2002] 1 AC 251
- *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101
- *Rainy Sky SA v Kookmin Bank* [2011] WKSC 50, [2011] 1 WLR 2900
- *Arnold v Britten* [2015] UKSC 36, [2015] AC 1619

ICS v West Brom [1998] 1 WLR 896 at 912-913

… But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR. 1381, 1384–1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows.

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances

in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd. v Eagle Star Life Assurance Co Ltd* [1997] AC 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201:

> *"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense"*

ARNOLD V BRITTON [2015] UKSC 36: WHERE ARE WE NOW?

Laura Newton

The facts, in brief:

- A dispute over interpretation of service charge contribution provisions in the leases of a number of chalets in a caravan park in south Wales dating back to 1974.

- 14 of the leases contained the following clause 3(2): "*To pay to the lessors without any deductions in addition to the said rent as a proportionate part of the expenses and outgoings incurred by the lessors in the repair maintenance renewal* and renewal of the facilities of the estate *and the provision of services hereafter set out the yearly sum of £90 and VAT (if any) for the first year of the term hereby granted increasing thereafter by ten pounds per hundred for every subsequent year or part thereof."* Other versions of the lease contained variations on this clause.

The Respondent landlord's position in summary:

The service charge provisions in clause 3(2) of the 25 leases referred to in paras 6-9 above have the effect of providing for a fixed annual charge of £90 for the first year of the term, increasing each subsequent year by 10% on a compound basis. In practice this meant that a lease granted in 1980 would provide for an annual service charge in 2015 of £2,500, increasing to over £550,000 by 2072.

The Appellant tenants' position in summary:

Each service charge clause in the 25 leases requires the lessee to pay a fair proportion of the lessor's costs of providing the services, **subject to a maximum**, which is £90 in the first year of the term, and increases every year by 10% on a compound basis.

The applicable test, according to the majority judgment given by Lord Neuberger, at [15]:

"*When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*", to quote Lord Hoffmann in* Chartbrook Ltd v Persimmon Homes Ltd *[2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of*

(i) the natural and ordinary meaning of the clause,
(ii) any other relevant provisions of the lease,
(iii) the overall purpose of the clause and the lease,
(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and
(v) commercial common sense, but
(vi) *disregarding subjective evidence of any party's intentions*."

Lord Neuberger's 'seven factors' summarised:

1. Commercial common sense and surrounding circumstances should not undermine the language used by the parties.
2. The worse the drafting, the more readily the court can depart from the words' natural meaning. But the Court should not seek out infelicities in the language – some errors may be irrelevant to the issue at hand.
3. Commercial common sense is not to be invoked retrospectively.
4. The natural meaning should not be rejected simply because it is very imprudent.
5. The Court can only take account of facts known to both parties at the time of contracting.
6. If it is clear what the parties intended, the Court will give effect to it.
7. There is no special rule requiring the restrictive construction of service charges.

The majority's construction of the provision:

At [24]: "*The first half of the clause (up to and including the words "hereafter set out") stipulates that the lessee is to pay an annual charge to reimburse the lessor for the costs of providing the services which he covenants to provide, and the second half of the clause identifies how that service charge is to be calculated*."
At [27]: "*The reasonable reader of the clause would see the first half of the clause as descriptive of the purpose of clause 3(2), namely to provide for an annual service charge, and the second half as a quantification of that service charge.*"
At [28]: "*if, as I believe is clear, the purpose of the second part of the clause is to quantify the sum payable by way of service charge, then the fact that, in the future, its quantum may substantially exceed the parties' expectations at the time of the grant of the lease is not a reason for giving the clause a different meaning. As already explained, the mere fact that a court may be pretty confident that the subsequent effect or consequences of a particular interpretation was not intended by the parties does not justify rejecting that interpretation.*"

Lord Carnwath's dissenting minority judgment:

Lord Carnwath was of the view that the Court had a responsibility "*to ensure that such clauses are interpreted as far as possible not only to give effect to their intended purpose, but also to guard against unfair and unintended burdens being placed on the lessees*" [123]. He held that the clause contained an ambiguity, arising from two different descriptions of the amount payable – first, the "proportionate part" and secondly, a "yearly sum". This ambiguity was to be resolved, he concluded at [158], in favour of the tenants:

> "*It will be apparent from my detailed analysis that I regard the consequences of the lessor's interpretation as so commercially improbable that only the clearest words would justify the court in adopting it. I agree with Judge Jarman QC that the limited addition proposed by the lessees does not do such violence to the contractual language as to justify a result which is commercial nonsense.*"

Lord Carnwath's approach to construction of this clause made extensive reference to the factual matrix and in particular the published Retail Price Index (RPI) and inflation rates over the relevant period.
Lord Carnwath reasoned that:

- The historic inflation figures were admissible in principle. [104]

- The use to be made of the historic inflation figures was more difficult: it was a reasonable working assumption that the figures up to and including those for each of the relevant years (or the then most recently published figures) would been have been known to the parties at the time, and therefore must be taken as part of the relevant factual matrix. [105]
- However, it was highly artificial to be asked to take account of the bare statistics, without reference to the political and economic circumstances which surrounded them, so far as they were common knowledge at the time. The Court was not required to assume total ignorance of current events, in the parties or their reasonable observers, nor was it required to assume that predictions about future inflation were made in a vacuum. [106]

Lord Carnwath examined the rival constructions by what he described as an iterative process, testing each rival meaning of the various clauses in the differing versions of the leases against the factual matrix including the rate of inflation at the time.

Lord Carnwath noted at [150] and [151] the absence of evidence from Mrs Arnold, the Respondent, who was directly involved in the variations in 2000: "*If there was in Mrs Arnold's thinking a rational explanation for these particular variations, she has not taken the opportunity to disclose it*." In the absence of such evidence, Lord Carnwath was not willing to draw inferences as to what was in the minds of Mrs Arnold and her daughter (see [152]).

***Arnold v Britton* in context**

- *Arnold v Britton* is the latest in a line of cases emphasising the importance of the natural and ordinary meaning of a contract over what might make commercial sense or represent a fairer bargain between the parties: see *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28; *In Re Sigma Finance Corporation* [2009] UKSC 2; *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38; and *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.
- The decision is consistent with the recent emphasis of the courts that commercial common sense is not to be elevated to an overriding criterion of construction: see for example the decision of the Court of Appeal in *BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd* [2013] EWCA Civ 416 at [24].
- Thus *Arnold v Britton* does not mark a significant departure from the previous case law, but a continuation of the trend towards emphasis on the language used by the parties. As Lord Hodge summarised the current state of the law at [76-77] in *Arnold v Britton*, the process of construction is essentially one unitary process which involves an iterative process by which each of the rival meanings is checked against the provisions of the contract and its commercial consequences are investigated. But there must be a basis in the words used and the factual matrix for identifying a rival meaning. The role of the construct, the reasonable person, is to ascertain objectively, and with the benefit of the relevant background knowledge, the meaning of the words which the parties used.

ELECTRONIC SIGNATURES: VALID OR INVALID?

Mark Hapgood QC

The use of electronic signatures is on the increase**.** This is important because "commercial contracts drafted by solicitors operate in every aspect of our economy and can govern deals worth millions, or even billions of pounds" (Law Society President, Robert Bourns, 25.07.16).

Background

EU Regulation No. 910/2014 on electronic identification for electronic transactions (done at Brussels 23 July 2014, with direct effect in all Member States from 01.07.16) provides:

> **Recital (49).** "This Regulation should establish the principle that an electronic signature should not be denied legal effect on the grounds that it is in electronic form or that it does not meet the requirements of the qualified electronic signature. **However it is for national law to define the effect of electronic signatures, except for the requirements provided for in this Regulation according to which a qualified electronic signature should have the equivalent legal effect of a handwritten signature**."
>
> **Art 3.** "Electronic signature" means data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign." See also the definitions of "advanced electronic signature" in Art 26, and "qualified electronic signature" in Art 3. Most electronic signatures are neither advanced nor qualified.
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> **Art 25.1.** "An electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures."

Evidential status of electronic signatures

Section 7 of the Electronic Communications Act 2000 ("ECA") provides that, in any legal proceedings, an electronic signature incorporated into a particular electronic communication shall be admissible in evidence in relation to any question as to the authenticity of that communication or as to the integrity of that communication. If the authenticity of a document signed using an electronic signature were to be challenged, an English court would accept the document bearing the electronic signature as *prima facie* evidence that the document was authentic and, unless the opponent adduced some evidence to the contrary, that would be sufficient to deal with the challenge. These are the same principles that an English court would apply in relation to wet-ink signatures.

Examples of statutes imposing a requirement for a written signature: **(a) section 4 of the Statute of Frauds 1677** requires a guarantee or a memorandum or note thereof to be in writing and signed by the guarantor or some other person authorised by the guarantor to do so; **(b) section 2 of the Law of Property (Miscellaneous Provisions) Act 1989** (the LP(MP)A 1989) requires a contract for the sale or other disposition of an interest in land in England and Wales

to be in writing and signed; **(c) section 53(1) of the Law of Property Act 1925** (the LPA 1925) requires a disposition of an equitable interest to be in writing, signed by the person disposing of it or by his properly authorised agent; **(d)** a statutory assignment within **section 136 of the LPA 1925** must (among other requirements) be in writing and signed by the assignor; **(e)** under **section 83 of the Bills of Exchange Act 1882**, a promissory note must (among other requirements) be in writing and signed by the maker.

Modification of statutory requirements for signatures

Section 8 of the ECA provides for the UK government to modify by statutory instrument (SI) any enactment which requires something to be done or evidenced in writing, to be authorised by a person's signature or seal or to be delivered as a deed or witnessed. Although more than 50 such SIs have been enacted under the ECA, there are many statutory provisions imposing execution formalities which have not been addressed in this manner. The fact that an SI has not been enacted under the ECA in respect of a particular statutory provision imposing an execution formality does not mean that a contract subject to such provision cannot be executed using an electronic signature (and this is supported by the Regulation 910/2014).

Validity of electronic signatures at Common Law

The view that electronic signatures have the same legal effect as handwritten signatures derives from three factors. As the Practice Note explains:

(i) **Writing:** The Interpretation Act 1978 defines 'writing' to include 'typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form'. Where the contract is represented on a screen (including a desktop, laptop, tablet or smartphone) in a manner which enables a person to read its terms properly, it will be 'in writing' at that point. For example, in *Golden Ocean Group Limited v Salgaocar Mining Industries PVT Ltd and another* [2012] EWCA Civ 265 (Golden Ocean), the Court of Appeal found that the exchange of a number of emails could lead to the conclusion of an agreement in writing for the purposes of the Statute of Frauds 1677.

(ii) **Signature:** The test for determining whether or not something is a signature is whether the mark which appears in a document was inserted in order to give, and with the intention of giving, authenticity to it. Therefore, provided that the signatory inserts an electronic signature into the appropriate place (eg next to the relevant party's signature block) in a document with the intention of authenticating the document, a statutory requirement for that document to be signed will be satisfied. It does not matter how the signatory inserted the electronic signature into the document, nor does it matter in what form that signature was inserted (eg a handwritten signature, a generic handwriting font, a typed font, etc.). *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch) is authority that typing a name into an email satisfies a statutory requirement for a document to be signed (and this position was confirmed in *Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch)), and Golden Ocean is authority that an electronic signature has the same legal status as a wet-ink signature, the key question being whether or not the purpose of the signature is to authenticate the document.

(iii) **Under hand:** A document is generally understood to have been executed under hand if it has been executed otherwise than by deed. The insertion of an electronic signature with the

relevant authenticating intention would be sufficient for a document to have been executed under hand.

Deeds

A document is validly executed as a deed by a company incorporated under the CA 2006 if it is **duly executed** and is **delivered as a deed** (s. 46).

Due execution by a company is governed by CA s.44, which requires signature (i) by two directors; or (ii) by one director and the company secretary; or (iii) by a director in the presence of a witness who attests the signature. See below for electronic signatures in the presence of a witness. Electronic signature should satisfy the statutory requirements.

Delivery as a deed can in principle be achieved through electronic signing, but the parties will have to take steps to ensure the signing arrangements adequately address when delivery takes place, particularly if the parties propose that their lawyers hold their signed documents to the order of the relevant party prior to the deed coming into effect.

Signature in the presence of a witness

Section 1(3) of the LP(MP)A 1989 provides that an instrument is validly executed as a deed by an individual (including an individual acting under a power of attorney) if it is signed by him in the presence of a witness who attests the signature (and, by section 1(4), 'sign' includes making ones mark on the instrument). Section 44 of the CA 2006 provides that another of the ways in which a document can be validly executed by a company incorporated under the CA 2006 is if it is signed on behalf of the company by a director of the company in the presence of a witness who attests the signature. In principle, there appears to be no reason why, where a suitable signatory signs a deed using an electronic signature and another individual genuinely observes the signing (ie he or she has sight of the act of signing and is aware that the signature to which he or she is attesting is the one that he or she witnessed), he or she will be a witness for these purposes. If that witness subsequently signs the adjacent attestation clause (using an electronic signature or otherwise), that deed will have been validly executed. The practical means of witnessing different forms of electronic signature will need to be settled on a case-by-case basis. However, it is best practice for the witness to be physically present when the signatory signs, rather than witnessing through a live televisual medium (such as a video conferencing facility), in order to minimise any evidentiary risk as to whether the person genuinely witnessed the signing.

Other aspects which need care and attention

Examples: (i) originals and counterparts; (ii) combining execution methods; (iii) conflict of laws issues.

The Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees (the JWP) has issued (21.07.16) an important practice note on the execution of documents using electronic signatures. As the Note records, as market practice and technology evolve, the use of electronic signatures is becoming increasingly common in a range of commercial transactions, and that trend is expected to continue.

The JWP was advised by Mark Hapgood QC, and he approved the practice note before it was published. A copy can be accessed on the "Advice and practice notes" section of the Law Society's website.

BRICK COURT
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THE (STILL?) *"NOTORIOUSLY UNTIDY"* ILLEGALITY CASE-LAW: A CRIB-SHEET

Charlotte Thomas

I: Pre-*Tinsley*: unstructured 'public conscience' test

- CA decisions (e.g. *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 (CA)), seeking to rationalise a mass of conflicting authority, applied the illegality doctrine where it would be an *"affront to the public conscience"* to allow the claim.

II: *Tinsley v Milligan* [1994] 1 AC 340 (HL): the 'reliance' test

- Facts: C and D bought a house in the sole name of C, but on the understanding that they were joint beneficial owners of the property. The purpose of this arrangement was to enable both parties to make false claims for welfare benefits. The parties quarrelled. C asserted sole ownership of the house. D sought to establish a resulting trust. (NB no presumption of advancement.)
- The HL unanimously rejected the 'public conscience' test. Lords Jauncey, Lowry and Browne-Wilkinson held that a claimant to an interest in property is entitled to recover if not forced to plead or rely on illegality. The effect of illegality is procedural rather than substantive. Here, the reason why the property was in C's name only was not part of D's resulting trust claim and so did not defeat it. D would have had to rely on her own illegal conduct to defeat a presumption of advancement (*cf Collier v Collier* [2002] EWCA Civ 1095).
- Lord Goff (who would have decided D's equitable claim by applying a wide clean hands maxim) called for Law Commission involvement and expressed interest in a structured statutory discretion.

III: *Tinsley* distinguished, softened, or criticised

- **Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (CP 154, 1999); *The Illegality Defence in Tort* (CP 160, 2001)**: Suggested that the illegality doctrine should be governed by a structured statutory discretion (the New Zealand Illegal Contracts Act 1970 model).
- ***Nelson v Nelson* [1995] HCA 25**: Facts similar to *Tinsley*, but the presumption of advancement applied. The HCA rejected both approaches in *Tinsley*. The question was whether the resulting trust was tainted by its association with or furtherance of a policy contrary to the statute. The court had a statutory power to require payment of the illegally obtained benefit to the state.
- ***Gray v Thames Trains Ltd* [2009] UKHL 33**: C had PTSD resulting from D's negligence and in consequence of his PTSD committed manslaughter. He sued in respect of his losses. Lord Hoffmann explained that the *ex turpi causa* maxim *"expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations"* ([30]). He identified a 'wider principle' that C cannot recover in respect of the consequences of his own criminal act, to which the ordinary tortious test of causation should apply. *"Metaphors"* such as

"inextricable link" (introduced in *Cross v Kirkby* [2000] EWCA Civ 426) should be avoided ([54]). The *Tinsley* reliance rule is *"applicable to a different kind of situation"* ([31]). C could not recover damages in respect of his detention, nor in respect of his liability to compensate the victim's relatives.

- ***Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39**: Decision on attribution. Lord Phillips ([21], [25]): The *Tinsley* reliance rule concerned the effect of illegality on title to property; in a claim to enforce a contract, the question is whether the contract is for an illegal purpose. In general, it is necessary to consider the policy underlying the *ex turpi causa* principle.
- **Law Commission, *The Illegality Defence* (CP 189, 2009, and Law Com 320, 2010)**: The Law Commission concluded that statutory reform was required to give courts a discretion only in respect of trusts (where *Tinsley* applied), since recent HL cases showed that the courts could develop the law in cases factually dissimilar from *Tinsley*. It suggested that the courts should consider the policy factors underlying the illegality defence, which included (i) furthering the purpose of the rule infringed, (ii) consistency, (iii) that the claimant should not profit from his own wrong, (iv) deterrence, and (v) integrity of the legal system. These factors should be balanced against C's legitimate expectation that his legal rights will be protected, and a proportionate response reached (CP 189, para 3.142).

IV: Recent history of disagreement between Supreme Court judges

- ***ParkingEye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338**: A contract for collecting parking charges from overstaying supermarket customers was purportedly terminated by D supermarket on the basis that illegal representations were made by C in demand letters sent to customers.
    - Sir Robin Jacob (with whom Laws and Toulson LJJ agreed) ([39]): Asked whether imposing the illegality defence would be disproportionate in light of the specific policies underlying the doctrine; this is consistent with *Tinsley* because it is not the same as a public conscience test.
    - Toulson LJ ([52]-[53]): As suggested by the Law Commission, the court should look openly at and balance the policy factors in each case; rules should be developed flexibly so as to give effect to the policy factors.
- **J Sumption, 'Reflections on the Law of Illegality' (2012) 20 RLR 1**: Acknowledged that the *Tinsley* reliance test is *"extremely technical"* and argued that the minority test is logically correct. Supported the replacement of the current law's *"complexity, capriciousness and injustice"* by a statutory structured discretion, as initially favoured by the Law Commission.
- **J Mance, 'Ex turpi causa – when Latin avoids liability' [2014] Edinburgh Law Review 175**: Notes that the *Gray* causation test is capable of inconsistent application; *"Causation, like much else in the law, depends on context."* Further Law Commission involvement recommended, and cautious approval of the New Zealand statutory discretion approach expressed.
- ***Hounga v Allen* [2014] UKSC 47**: C, a Nigerian national who had been working in breach of immigration law, brought a claim in the statutory tort of discrimination for

dismissal from her employment. C had also in the lower courts brought contractual claims for unfair dismissal and unpaid wages.

- Lord Wilson (with whom Lady Hale and Lord Kerr agreed) ([30], [42]): The *Tinsley* reliance test carries *"maximum precedential authority"* but has been criticised; it should be softened by having regard to underlying policy. The judge must (i) ask which aspect of public policy founds the illegality defence, then (ii) consider whether another aspect of public policy runs counter to application of the defence, then (iii) weigh these two up. (It seems, though it is not clear, that Lord Wilson's view is that this approach should be taken even in tort cases, though C would also succeed under the inextricable link test; Lord Mance's extra-judicial criticism of *Gray* is endorsed.) Such public policy considerations dictate that C's claim in tort should be allowed.
- Lord Hughes (with whom Lord Carnwath agreed) ([59]): There was not a *"sufficiently close connection"* between C's unlawful conduct and the tort to bar her claim; the story would have been different in respect of the abandoned contractual claims, which would have depended on a lawfully enforceable contract of employment.

- ***Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55**: D generics company sought damages on cross-undertaking in patent dispute case after C's European patent found invalid. But the products which D would have sold would have infringed a valid Canadian patent. D said it should still be entitled to damages on the cross-undertaking less whatever damages the Canadian court would have awarded against it.
  - Lord Sumption (with whom Lords Neuberger and Clarke agreed) ([19], [24]): The *ex turpi causa* rule is a *"rule of judicial abstention"* which precludes the judge from performing his ordinary adjudicative function. It is founded on a *"principle of consistency"*. *Tinsley* conclusively rejected the relevance of judicial discretion and the CA was wrong to have applied policy considerations. The *Gray* causation test applies in tort cases and is not discretionary. Disposal of the appeal turned on the lack of turpitude.
  - Lord Mance ([33]-[34]): Appeared to favour a rule-based approach, but agreed with Lord Sumption in deciding the case on the turpitude point.
  - Lord Toulson ([46], [62]-[64]): Agreed that the appeal should be dismissed, as there was no good public policy reason to apply the illegality defence to these facts. In deciding whether to apply the illegality defence based on public policy considerations, the CA was following *Hounga*; full re-analysis of *Tinsley* would have to take place another time.
- ***Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23**: Decision on attribution; full argument on the illegality doctrine not heard, but positions staked out.
  - Lord Sumption ([102]): Continued to support the rule-based approach; rationalised *Hounga* by saying that it was a special case of competing public policy overriding the *ex turpi causa* doctrine.
  - Lords Toulson and Hodge ([173]): Supported consideration of the policy underlying the individual defence in order to decide whether it should defeat a

given claim; approved the *Hounga* analysis and did not agree that *Servier* could be squared with it.

- Lord Neuberger (with whom Lords Clarke and Carnwath agreed) and Lord Mance ([15], [34]): The burgeoning conflict in the case-law had left the law in urgent need of resolution by a panel of seven or nine Justices.

V: *Patel v Mirza* [2016] UKSC 42: a resolution, or more confusion?

- Facts: Claim for restitution of unjust enrichment brought by C in respect of sum transferred pursuant to a contract to carry out unlawful insider dealing.
- All judges start from the premise that the goal of the *ex turpi causa* principle is to preserve consistency in the legal system (*Hall v Hebert* [1993] 2 SCR 159—in which McLachlin J rejected a discretionary power based on considerations of public policy). All judges also agree that the claim should be allowed.
- Lord Toulson (with whom Lady Hale and Lords Kerr, Wilson and Hodge agreed): *Tinsley* is no longer good law. It is necessary to consider (i) the purpose of the prohibition which has been transgressed, (ii) other relevant public policies, then (iii) proportionality. Relevant factors under the proportionality test may include the seriousness of the conduct, its centrality to the contract, whether it was intentional, and any disparity in the parties' respective culpability (NOT punishment) ([101], [107], [120]). This flexible approach is not too uncertain: the courts' attempts to generate a rule-based approach have created great uncertainty; flexible approaches are said to work well in other jurisdictions; and uncertainty is of less importance in relation to people contemplating unlawful activity ([113]). Claims in unjust enrichment will not fail simply because the consideration which has failed is unlawful, though may where the illegality is especially iniquitous or in other *"rare"* cases; C in *Hounga* may well have succeeded in a claim for *quantum meruit* ([119], [121]). Lord Kerr emphasised that it must be possible to examine the effect of the illegality in cases concerning recovery of value transferred under an illegal contract to avoid what Birks called *"self-stultification"* ([141]).
- Lord Neuberger ([146], [162], [172], [186]): The presumptive outcome in cases where D has received money under an illegal transaction should be restitution (the 'Rule'). Exceptions may apply (*inter alia*) where D is a member of a class protected by the legislation, or D is unaware of the illegality. When identifying exceptions to the Rule, Lord Toulson's trio of considerations constitute the best guidance ([174]).
- Lords Mance, Clarke and Sumption ([207], [217], [265]): A non-discretionary rule-based approach is to be preferred and the *"wholesale abandonment of a clear cut test"* by the majority is deplored. Lord Mance explained that the principle is that parties are entitled to reverse the effects of an illegal transaction, if possible ([197]). Lord Sumption explained ([239], [284]) that the principle is that a person may not derive a legal right from his own illegal act, which is expressed in the reliance test (albeit that this test was misapplied in *Tinsley*). This rule is qualified by *"principled exceptions"* where the parties are not on the same legal footing (e.g. C's participation in the illegal act is involuntary) and where an overriding statutory policy requires that C should have a remedy, as in *Hounga* ([241]-[244]).

CRIME BUT NO PUNISHMENT: THE STRANGE NEW WORLD OF *PATEL V MIRZA* [2016] 3 WLR 399

Tom Adam QC

The facts

1 The facts of this case are remarkably simple. Mirza thought he was going to get some inside information about RBS shares and was going to execute a spread bet on it. The way that the spread bet worked was that the more money Mirza could deposit, the higher the gearing he could achieve and the more profit he could make, so he was looking for "investors". Patel and Mirza agreed that Patel would put up some cash to join in the scheme and ultimately Patel paid him £620,000 (raised from a pool of further "investors") under an agreement that Mirza would use it in the scheme. The inside information never came through and Patel wanted his money back. Mirza said that he had paid it back, but that his bank had mistakenly paid it to a mutual contact. Patel first sued the contact (who was bankrupt) and then sued Mirza. The claim was put in various ways, including breach of contract, trust and unjust enrichment.

2 Things to note:

a. Insider dealing is a crime: s52 of the Criminal Justice Act 1993.

b. The contract between Patel and Mirza was, therefore, a contract to commit a criminal offence. It was also in itself a crime, since it was a criminal conspiracy.

c. One crook (Patel) was thus suing another crook (Mirza) for return of the seed capital which he had invested in an unsuccessful joint venture to commit a crime.

The results

First instance

3 David Donaldson QC (sitting as a deputy and raising the point of his own initiative) rejected the claim.

a. The contract was obviously for an illegal purpose and Patel was (therefore) obviously relying on his own illegal act in bringing the claim. This barred his claim, since the established rule was that no claim will be allowed if the claimant has to rely upon his own illegal acts in order to make his claim good: the "reliance test" (**Tinsley v Milligan**).

b. Although there is an exception to the reliance rule, in the shape of a doctrine allowing a claimant to recover money paid under an illegal contract if he has

withdrawn from the illegal scheme before it has been put into effect, Patel had not withdrawn voluntarily and so could not come within it.

Court of Appeal [2015] Ch 271

4 All three LJJ allowed the appeal, but for differing reasons.

5 Rimer and Vos LJJ applied the same reasoning as the judge. They agreed with him that the reliance test meant that Patel's claim would fail unless he could come within the "withdrawal" exception. However, they held that that exception did in fact apply because it extended not just to a voluntary withdrawal, but to any withdrawal which took place before the illegal transaction had been wholly or partly carried out. They held that the payment by Patel did not count as part-execution of the scheme, merely as a preparatory act, and so he was to be treated as having withdrawn from it.

6 Gloster LJ, however, took a different course. She explored from first principles whether it would be contrary to public policy to allow Patel to get his money back and concluded that it would not, essentially because Patel was not seeking to enforce the illegal contract but was to enforce a "collateral right". This reasoning allowed her to say that Patel was not (objectively assessed) relying on his own illegality, and thus that he passed the "reliance test".

Supreme Court [2016] 3 WLR 399

7 All nine Justices agreed that Patel could bring his claim and get his money back, and that the doctrine of illegality was no barrier. But there was a sharp disagreement about the legal basis on which the claim should succeed.

a. The minority (JJSC Mance, Clarke and Sumption) held that the **Tinsley v Milligan** "reliance test" was good law and should be maintained: the Courts would not entertain a claim which had to be based on the claimant's own illegal acts. This was practical, because it was the narrowest test and excluded the fewest people from access to justice; it was also principled, because it maintained the consistency of the legal system. There could, therefore, be no claim on the contract itself, because that would be based on illegality. However, there could be a claim for restitution, since *"an order for restitution would not give effect to the illegal act or any right derived from it. It would simply return the parties to the status quo ante where they should always have been"* (Lord Sumption at [268]; see too Lord Mance at [202]).

b. The majority, however, were keen to use this case as an opportunity to revisit the entire law of illegality, in particular the "reliance test". In what can fairly be described as a revolution, they rejected that test and held that it should no longer be applied. (This is the conclusion reached by Lord Toulson at [110] after a

very lengthy meander through the law.) It is to be replaced by an assessment of whether enforcement of the claim *"would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality …"* [120]. This assessment is to be undertaken as follows:

> … 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 by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

c. As to relevant "factors", Lord Toulson cited with approval a list of nine factors identified by Professor Burrows: see at [93]

> (a) how seriously illegal or contrary to public policy the conduct was; (b) whether the party seeking enforcement knew of, or intended, the conduct; (c) how central to the contract or its performance the conduct was; (d) how serious a sanction the denial of enforcement is for the party seeking enforcement; (e) whether denying enforcement will further the purpose of the rule which the conduct has infringed; (f) whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy; (g) whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct; (h) whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system.

d. On this basis, Patel could recover his money because to allow his claim could not be *"regarded as undermining the integrity of the justice system"* [121].

Implications for the future

8 In general terms, the majority decision represents a completely new approach to the assessment of illegality cases and cases have therefore become extremely difficult to predict. (Though perhaps they always were – see the acute divisions of view among the nine judges who heard ***Stone & Rolls v Moore Stephens*** on its passage from first instance to the House of Lords.) The new approach introduces *"… not only a new era but entirely novel dimensions into any issue of illegality. Courts*

would be required to make a value judgment, by reference to a widely spread mélange of ingredients, about the overall 'merits' or strengths, in a highly unspecific non-legal sense, of the respective claims of the public interest and each of the parties" (Lord Mance at [206]).

9 Some specific instances:

a. "Money back" claims? Can a claimant always recover money paid to further an illegal venture?

b. "Lost profit" claims? Are they always hopeless?

c. Crimes under foreign laws?

d. Unavoidable insurance policies? Is the proposition that no-one can contract out of the consequences of his own fraud (***HIH v Chase Manhattan*** [2003] 2 Lloyd's Rep 61 at [16] and [76]) still good law?

10 Has the Supreme Court *"simply substituted a new mess for the old one"*? (Lord Sumption at [266])

What is turpitude?

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19 October 2016

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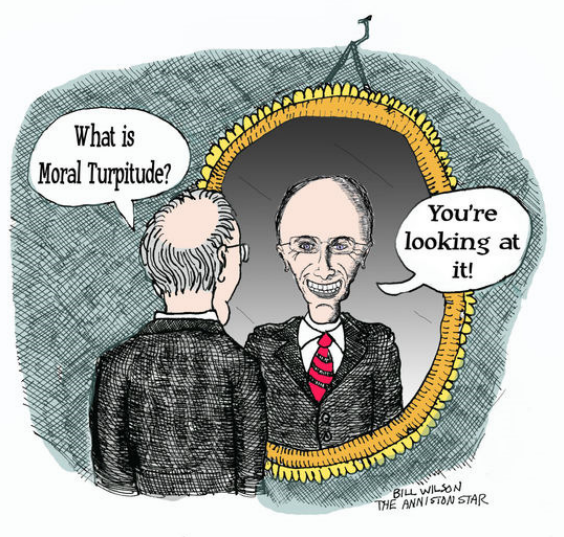

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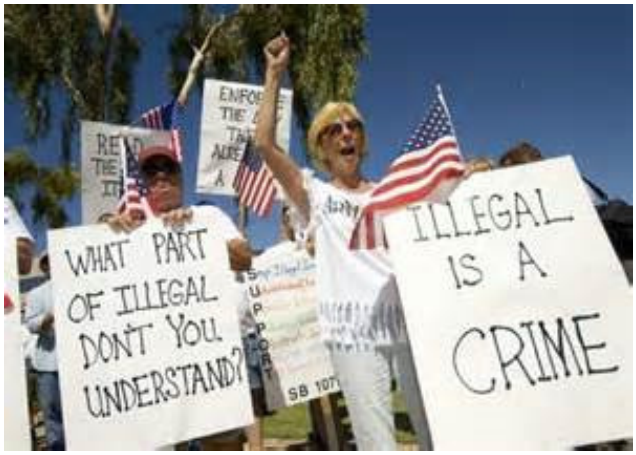

Les Laboratoires Servier v Apotex [2015] AC 430

Facts 1

- Servier had patented a drug in Europe and in Canada.
- Apotex manufactured a generic equivalent in Canada for sale in various places including the UK.
- Servier obtained an injunction restraining Apotex from selling in the UK, having given the usual cross-undertaking to pay damages if the injunction was wrongly granted.

Facts 2

- The English Court held that the European patent was invalid, the injunction should be discharged and an inquiry held into damages.
- The Canadian Court held that the Canadian patent was valid and manufacture in Canada had and did infringe.
- In the inquiry, Servier pleaded that Apotex should not be awarded damages, because the profits which they lost would have been made by committing in Canada the tort of infringement of the Canadian patent.

Issues

- Could the tort of infringement of a Canadian patent qualify as "turpitude" for the purpose of the *ex turpi* principle?
- No issue made of the fact that the putative turpitude was a breach only of foreign law: see contract cases like *Regazzoni v Sethia* [1958] AC 301 and *Foster v Driscoll* [1929] 1 KB 470.
- Very few directly relevant authorities.
- Turpitude treated like the proverbial elephant.

Arnold J [2011] RPC 574

- Claim was barred by *ex turpi causa*.
- Breach of Canadian patent was sufficiently serious in all the circumstances of the case. Relevant circumstances included:
  - Illegality was not induced by Servier
  - Apotex was aware of the relevant facts – existence of Canadian patents
  - Although Apotex did not believe it was infringing, it acted intentionally, taking the risk that it might be infringing
  - Claim and illegality were so closely related as to engage policy against inconsistency in the law.

Court of Appeal [2013] Bus LR 80

- Claim not barred.
- Apotex conceded that it must give credit for the sum it would have been ordered by Canadian court to pay in damages if it had imported to England for the relevant period.
- Both parties' positions were too dogmatic and inflexible.
- "The Court is able to take into account a wide range of considerations in order to ensure that the defence only applies where it is a just and proportionate response to the illegality involved in the light of the policy considerations underlying it."

Lord Sumption (Lords Neuberger and Clarke agreeing)

- CA approach wrong because it was '*discretionary in all but name*'.
- "*The question what is involved in 'founding on an immoral or illegal act' has given rise to a large body of inconsistent authority which rarely rises to the level of general principle*".
- Lord Mansfield "*meant acts which would engage the interests of the state or, as we would put it today, the public interest.*"
- Avoiding inconsistency in the law: *Hall v Herbert*

Lord Sumption 2 – what counts

- The paradigm case is a criminal act.
- Quasi-criminal acts engage the public interest in the same way, including:
  - cases (including torts) of dishonesty and corruption;
  - some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties;
  - Infringements of statutory rules for the protection of the public interest and attracting civil sanctions of a penal character, such as competition law.
- Contracts prohibited by law (which give rise to no enforceable rights).

Lord Sumption 3 - exceptions

- Cases of strict liability (including crimes) where the claimant was not privy to the facts making his act unlawful.
- An exception to the exception: recovery of damages for the sentence of a criminal court or other penal sanction.

Lord Mance

- Shorter separate judgment, agreeing with Lord Sumption on the question what is turpitude.

Lord Toulson

- "*I would make no criticism of the Court of Appeal for considering whether public policy considerations merited applying the doctrine of illegality to the facts of the present case*."
- Agrees that they did not, especially in the light of the concession re Canadian damages.

Patel v Mirza

- Lords Sumption, Mance and Clarke stick to their guns.
- Lord Neuberger changes sides.
- Lord Toulson's view now in the majority.
- Implicit in Lord Toulson's judgment and explicit in Lord Kerr's is that in *Servier v Apotex*, the Court of Appeal's approach is to be preferred to that of the Supreme Court. I.e., even a (foreign) tort of strict liability can engage the ex turpi principle.

Conclusions

- Majority reasoning in *Servier v Apotex* probably does not survive *Patel v Mirza.*
- It follows that there is no list of what counts as turpitude/illegality.
- Instead, any act which is any sense unlawful (including, say, a tort of strict liability as in *Servier v Apotex*) potentially opens up an argument of illegality, to be determined on the "range of factors" approach.
- Presumably proportionality will be the answer to many such arguments, but that could be hard to determine short of trial.