

# Finding Principle in Illegality: Reflections on *Tinsley v Milligan*

Matthew Chan<sup>1</sup>

## I. INTRODUCTION

In a lecture to the Chancery Bar Association in 2012,<sup>2</sup> Lord Sumption stated that ‘the law of illegality is an area in which there are few propositions, however contradictory or counter-intuitive, that cannot be supported by respectable authorities at the highest levels.’<sup>3</sup> The prescience of his statement was borne out by a series of recent decisions handed down by the Supreme Court, revealing various fundamental differences within the judiciary as to how the doctrine of *ex turpi causa*, or the law pertaining to the ‘illegality defence’, should be applied in practice. Accordingly, there is considerable judicial uncertainty as to the residual significance, if any, of the House of Lords decision in *Tinsley v Milligan*.<sup>4</sup> Most recently, Lord Sumption himself held in *Jetivia SA v Biltta (UK) Ltd*<sup>5</sup> that the ‘reliance test’ expounded in *Tinsley v Milligan* epitomised the inflexible approach that should generally be taken with respect to the illegality defence. In contrast, Lords Toulson and Hodge downplayed the significance of *Tinsley*, saying that the application of the illegality defence was not based on a rigid application of the *Tinsley* test, but that it was necessary to consider the policy underlying the illegality defence in order to decide whether it should defeat a given claim.

Indubitably then, the *Tinsley* test is at once central to a discussion of the illegality doctrine, and productive of many conceptual and practical difficulties concerning the same. This article seeks to do three things. Firstly, having examined the House of Lords judgment in *Tinsley*, it will be argued that its direct precedential reach is considerably attenuated in areas of the law not directly falling within its factual scope. Secondly, it will be considered if the retention of the *Tinsley* test in areas where it necessarily remains binding authority is, on balance, normatively justified. Finally, having argued that it is not, the possibility and implications of reform in the area will be discussed.

## II. TINSLEY V MILLIGAN

The essence of the doctrine of *ex turpi causa non oritur actio* is perhaps best encapsulated by Lord Mansfield CJ in *Holman v Johnson*:<sup>6</sup>

No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted.

While Lord Mansfield thus plainly presented the doctrine to be simply a public policy of judicial abstention in the presence of illegality, the policy effectively, albeit incidentally,<sup>7</sup> operates as a defence insofar as a defendant may plead that, notwithstanding any substantive merit to the claimant's claim, the claimant should by reason of his own illegality be unable to succeed in his claim.

---

<sup>1</sup> Exeter College, Oxford.

<sup>2</sup> Lord Sumption, ‘Reflections on the law of illegality’ (Chancery Bar Association, London, 23 April 2012). The lecture was subsequently published in [2012] RLR 1.

<sup>3</sup> Lord Sumption [2012] RLR 1, 1.

<sup>4</sup> [1993] UKHL 3, [1994] 1 A.C. 340.

<sup>5</sup> [2015] UKSC 23, [2015] 2 W.L.R. 1168.

<sup>6</sup> (1775) 1 Cowp 341 (KB) 343.

<sup>7</sup> See, e.g., the decision of the Singapore High Court in *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] SGHC 97 [78].

Although Lord Mansfield's formulation of *ex turpi causa* was stated simply and categorically, the twentieth century saw a mass of litigation that obfuscated the application of the doctrine. In a bid to explicate and resolve this issue of conflicting authority, the Court of Appeal sought to treat the whole body of authority as having ensued from an essentially discretionary process. Thus in *Euro-Diam Ltd v Bathurst*,<sup>8</sup> the illegality defence was held to apply when, in all the circumstances, it would be an 'affront to the public conscience' to allow the plaintiff's claim.<sup>9</sup> It was in this context that *Tinsley v Milligan* came before the House of Lords. Ms Tinsley and Ms Milligan contributed to the purchase of a home together, but had the legal title conveyed to Ms Tinsley alone, so that Ms Milligan could make fraudulent claims to social security benefits. After the parties fell out with each other, Ms Milligan sought a declaration that the property was held by Ms Tinsley on trust for both parties. Having applied the 'public conscience' test as set out above,<sup>10</sup> the Court of Appeal found in favour of Ms Tinsley. However, the House of Lords unanimously rejected the public conscience test. Lord Goff noted that:<sup>11</sup>

the adoption of the public conscience test... would constitute a revolution in this branch of the law, under which what is in effect a discretion would become vested in the court to deal with the matter by the process of a balancing operation, in place of a system of rules, ultimately derived from the principle of public policy enunciated by Lord Mansfield CJ in *Holman v Johnson*...

Having sounded the death knell for the 'public conscience' test and any substantial role of discretion in the application of the illegality defence, the court was then divided as to what its replacement was, or should be. The majority favoured a 'reliance test', whereby a party to an illegality could recover by virtue of a legal or equitable property interest he could establish his title with *relying* on his own illegality.<sup>12</sup> It had been established in *Bowmakers v Barnet Instruments*<sup>13</sup> that a plaintiff could enforce *legal* property rights provided that he did not need to rely on an illegal contract for any purpose other than to provide the basis of his claim to a property right;<sup>14</sup> thus '[i]f the law is that a party is entitled to enforce a property right acquired under an illegal transaction... the same rule ought to apply to any property right so acquired, whether such right is legal or equitable'.<sup>15</sup> Applying the reliance test to the facts, the majority thus found in favour of Ms Milligan. Given her financial contribution to the purchase of the house, a presumption of resulting trust arose which was not rebutted; thus Ms Tinsley was held to be holding the house on trust for both parties in equal shares.

The minority found instead for Ms Tinsley. Lord Goff held that the 'so-called *Bowmakers* rule' did not apply in the present case, (*inter alia*) because a claimant who had not come to a court of equity with 'clean hands' could not obtain the assistance of the court, even if he or she could *prima facie* establish a claim without recourse to the underlying fraudulent or illegal purpose.<sup>16</sup> Thus, having argued that the 'clean hands' maxim was 'more broadly based' than the rule laid down in *Bowmakers*, Lord Goff (with whom Lord Keith agreed) held that Ms Milligan's claim must fail given that her claim was tainted by virtue of her illegal agreement with Ms Tinsley.<sup>17</sup>

---

<sup>8</sup> [1990] 1 QB 1 (CA).

<sup>9</sup> *ibid* 35.

<sup>10</sup> [1992] Ch 310 (CA) 321.

<sup>11</sup> *Tinsley* (n 4) 363.

<sup>12</sup> *ibid* 375 (Lord Browne-Wilkinson).

<sup>13</sup> [1945] KB 65 (CA).

<sup>14</sup> *Tinsley* (n 4) 370.

<sup>15</sup> *ibid* 371.

<sup>16</sup> *ibid* 358.

<sup>17</sup> *ibid* 362.

It may thus be noted that the ratio in *Tinsley* comprised two distinct elements. Firstly, the House of Lords (unanimously) *rejected* the public conscience test as it had been applied by the Court of Appeal in cases such as *Euro-Diam* and *Tinsley* itself. Secondly, the House of Lords (by a bare majority) *formulated* a ‘reliance principle’ as applying at equity as well as in law.

The distinction between the two is, for present purposes, analytically important. As will be evident, it is not seriously doubted by anyone that the ‘reliance test’ *per se* is *not* a universal test for determining whether the illegality defence applies. On the other hand, doubt persists amongst the judiciary as to whether the rejection of the public conscience test necessarily entails that a court is to have no discretion in applying the illegality defence, and whether this is to be the case regardless of the context in which the claim is brought (e.g. in contract, tort, or trusts).

This doubt was manifest in the judgment of *Jetivia*. The directors of Bilta (UK) Ltd had caused it to enter into a series of carousel frauds with various parties, including Jetivia SA, between April and July 2009. After Bilta was compulsorily wound up in November 2009 pursuant to a petition presented by HMRC, its liquidators brought proceedings against its directors and Jetivia, claiming that the parties were parties to an unlawful means conspiracy to injure Bilta by a fraudulent scheme. Jetivia argued, *inter alia*, that the illegality defence applied on the facts to defeat Bilta’s claim.

Although the Supreme Court was unanimous in dismissing Jetivia’s appeal and held that the illegality defence did not apply *on the facts* because the wrongful activity of Bilta’s directors simply could not be attributed to Bilta in the proceedings, this result belied the considerable difference in opinion as to the *general* basis of the illegality defence. Lord Sumption held that the illegality defence was based on a rule of law which the court was required to apply if and only if it applied. As had recently been confirmed by the Supreme Court in *Les Laboratoires Servier v Apotex*,<sup>18</sup> the application of the defence was not a discretionary power, nor was it ‘dependent upon a judicial value judgment about the balance of the equities in each case’.<sup>19</sup> He concluded that in this sense, the House of Lords decision in *Tinsley* remained good law. In contrast, Lords Toulson and Hodge felt that the applicability of the illegality defence was not based on a rigid application of the *Tinsley* ‘reliance test’; in fact, it was not based on a rigid approach at all. Citing Lord Wilson’s judgment in *Hounga v Allen*<sup>20</sup> with approval, they held that it was necessary to consider the policy underlying the illegality defence in order to decide whether it should defeat the claim at hand.<sup>21</sup> The thorniness of the issue is best illustrated by the reluctance of the majority to comment substantively on the basis of the defence. Lord Neuberger (with whom Lords Clarke and Carnwath agreed) noted that the proper approach which should be adopted to a defence of illegality was a ‘difficult and important’ topic,<sup>22</sup> but refrained from discussing it further: there had been no real argument in the topic, and the issue of what approach to take to illegality was not determinative of the outcome.<sup>23</sup> Lord Mance exhibited similar restraint, remarking only the need for ‘further examination’ of the issue if fuller argument was provided in future cases.<sup>24</sup>

---

<sup>18</sup> [2014] UKSC 55, [2015] A.C. 430.

<sup>19</sup> *Jetivia* (n 5) [62].

<sup>20</sup> [2014] UKSC 47, [2014] 1 W.L.R. 2889.

<sup>21</sup> *Jetivia* (n 5) [171].

<sup>22</sup> *ibid* [13].

<sup>23</sup> *ibid* [15].

<sup>24</sup> *ibid* [34].

### III. AN EXAMINATION OF THE CASE LAW

It is evident from the foregoing discussion that despite recent and copious Supreme Court debate on the basis of the illegality defence, the issue remains frustratingly unresolved. An examination of the case law that pertains to the illegality defence will reveal that – perhaps unsurprisingly – the ‘reliance test’ has minimal application in areas of law other than trusts. It will further be submitted that although *Tinsley* has been interpreted in subsequent cases to stand for a *general* proposition that judges are not to apply discretion in considering the illegality defence, as a matter of positive law, the account of Lords Toulson and Hodge in *Jetivia* is a better description of the law on illegality than that of Lord Sumption, inasmuch as courts have habitually considered policies underlying the illegality defence to determine if it should apply in each case, even if they have at times ostensibly accepted the authority of *Tinsley*.

#### A. THE RELIANCE TEST

In the law of tort, the courts have largely departed from the ‘reliance test’ in deciding if illegality applies on the facts. Notably, the ‘inextricable link’ test in *Cross v Kirkby*<sup>25</sup> is commonly cited as an alternative to the *Tinsley* test in the tortious context.<sup>26</sup> The parties in *Cross* had gotten into an altercation initiated by the claimant, who eventually suffered a skull fracture after being hit on the head with a baseball bat by the defendant. The Court of Appeal held that the claimant’s claim in assault and battery failed because it was defeated by the illegality defence; where the claimant was behaving unlawfully or criminally, his claim was liable to be defeated *ex turpi causa* if it was established that the facts which gave rise to it were ‘inextricably linked’ with his criminal conduct.<sup>27</sup>

Subsequently, the test was refined, albeit materially retained, by the House of Lords in *Gray v Thames Trains*<sup>28</sup> in the context of negligence. The claimant had suffered post-traumatic stress disorder (PTSD) after being injured in a major railway accident caused by the defendant’s negligence. He later killed a man and was convicted of manslaughter by reason of diminished responsibility. It was not held to be in doubt that he would not have committed the offence but for the PTSD. He sought damages from the defendant, *inter alia* for loss of earnings and loss of liberty. His action failed before the Lords. Lord Hoffmann stated that the illegality defence had a narrower and a wider manifestation. In its narrower form, a civil court would not award damages to compensate a claimant for the injury or disadvantage which a criminal court had imposed on him by way of punishment for a criminal act. In its wider form, it held that one could not recover for damages in respect of the consequences of one’s own criminal act.<sup>29</sup> In considering when the wider form of the defence was to apply, Lord Hoffmann considered variants of the test espoused in *Cross*, but thought that ‘metaphors’ such as ‘inextricably linked’ were ‘unhelpful’.<sup>30</sup> He then concluded that the ordinary test of causation should be adopted when determining whether the illegality defence should apply.<sup>31</sup>

This distinction, between causing something and merely providing the occasion for someone else to cause something, is one with which we are very familiar with in the law of torts... Can one say that, although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the Claimant? [...] Or is the position that although the damage would not have happened without the criminal act of the Claimant, it was caused by the tortious act of the Defendant?

---

<sup>25</sup> [2000] EWCA Civ 426.

<sup>26</sup> See eg. *Hounga* (n 20) [31].

<sup>27</sup> *Cross* (n 25) [103] (Judge LJ); see also [76] (Beldam LJ).

<sup>28</sup> [2009] UKHL 33, [2009] 1 A.C. 1339.

<sup>29</sup> *ibid* [51].

<sup>30</sup> *ibid* [54].

<sup>31</sup> *ibid*.

As it stands, the causation approach generally remains good law in areas of tortious liability. Certainly, lower courts have regarded it as the definitive approach in negligence cases.<sup>32</sup> Accordingly, the reliance test is not generally regarded as relevant in tort. Although Lord Hoffmann had considered arguments relating to *Tinsley* in *Gray*, he shortly dismissed its relevance to the facts: '[t]he questions of fairness and policy are different and the content of the rule is different. One cannot simply extrapolate rules applicable to a different kind of situation'.<sup>33</sup>

A more explicit qualification of the ambit of the reliance test may be found in *Stone & Rolls Ltd v Moore Stephens*.<sup>34</sup> *Stone & Rolls Ltd* had been wholly owned by its director, who fraudulently siphoned company assets away and falsified its accounts. Following its liquidation, its creditors, acting in the name of the company, sued the company auditors for failing to detect the fraud. The House of Lords, by a bare majority, held that the auditors could not be sued by the company's liquidator. Although the complexities of the case are substantial and cannot be wholly addressed in this article, it suffices for present purposes to note that the House of Lords narrowly construed the ambit of the *Tinsley* reliance test:<sup>35</sup>

The House in *Tinsley v Milligan* did not lay down a universal test of *ex turpi causa*. It was dealing with the effect on illegality on title to property... The House did not hold that illegality will never bar a claim if the claim can be advanced without reliance on it. On the contrary, the House made it plain that where the claim is to enforce a contract the claim will be defeated if the defendant shows that the contract was for an illegal purpose, even though the claimant does not assert the illegal purpose in making the claim...

It is submitted that the House of Lords' decision to limit the ambit of the reliance test in *Gray* and *Stone & Rolls* can be defended both doctrinally and practically. Firstly, purely as a matter of doctrine, the majority decision in *Tinsley* was squarely justified in terms of the passing of *proprietary* rights. Lord Browne-Wilkinson sought to elide the position on equitable proprietary rights with that on legal proprietary rights; in doing so, he did not explicitly purport to be laying down a rule that would cover situations where merely *personal* rights were involved.

Secondly, it is from a practical viewpoint clear that the language of 'reliance' is inapt and unhelpful in cases where personal rights are involved. By way of illustration, a court might reasonably hold that the claimant in *Cross* had to 'rely' merely on the fact that the defendant had assaulted him with a baseball bat and thus award him damages in accordance with ordinary tort principles; but equally, given that this latter assault had been provoked by the claimant himself, the court could find that the claimant had to 'rely' on his own illegal conduct for the purpose of establishing his claim, and thus deny him relief. This ambiguity demands that the court reach its conclusion on factors extrinsic to amorphous notions of 'reliance'. As such, it is highly questionable whether the latter can ever be of much discriminating value in cases where proprietary rights are not concerned.

With that having been said, recognising that the reliance test is not (and should not be) universally applicable in respect of the illegality defence does not begin to resolve the fundamental disagreement amongst the bench in *Jetivia*. Lord Sumption did not dispute that the reliance test was so limited in application. For instance, it is evident from his judgment in *Apotex* that he recognises that the *Tinsley* reliance test is not applicable in tort.<sup>36</sup> However, what he contends, in contradistinction to Lords Toulson and Hodge, is that *Tinsley* conclusively rejected the existence of any discretionary element in courts' invocation of the illegality defence. It is thus to this element of *Tinsley* that we must turn to now.

---

<sup>32</sup> See *Delaney v Pickett* [2011] EWCA Civ 1532, [2012] 1 W.L.R. 2149; *Joyce v O'Brien* [2013] EWCA Civ 546, [2014] 1 W.L.R. 70.

<sup>33</sup> *Gray* (n 28) [31].

<sup>34</sup> [2009] UKHL 39, [2009] 1 A.C. 1391.

<sup>35</sup> *ibid* [21].

<sup>36</sup> *Apotex* (n 18) [19].

## B. THE ROLE OF DISCRETION

In *Jetivia*, Lord Sumption referred to *Apotex* in support of his contention that the illegality defence is ‘based on a rule of law... not a discretionary power on which the court is merely entitled to act’.<sup>37</sup> In *Apotex*, the appellants, Servier, held patents in UK and Canadian law for a drug called perindopril erbumine. The respondents, Apotex, were a Canadian group that began to import and sell generic perindopril erbumine tablets in the UK. Servier obtained an interim injunction against Apotex by giving a cross-undertaking for damages, promising to compensate the latter for any loss caused by the injunction if it later turned out that it should not have been granted. Apotex became entitled to compensation when the court found the UK patent to be invalid. Servier challenged the award for damages on the basis of illegality, arguing that it was contrary to public policy for Apotex to recover damages when the manufacture of the product in Canada would have been unlawful in infringing their Canadian patent.

The Court of Appeal held<sup>38</sup> that the infringement of Servier’s Canadian patent was not a relevant illegality for the purposes of the defence, because in dealing with the illegality defence, the court was entitled ‘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’<sup>39</sup> (italics added). The Supreme Court reached the same result but, by a majority, rejected the reasoning of the lower court. Crucially, Lord Sumption, with whom Lord Neuberger and Lord Clarke agreed, held that the Court of Appeal had been wrong to treat the question as depending on the culpability of the illegality, the proportionality of the application of the defence or the general merits of the particular case.<sup>40</sup> As in his judgment in *Jetivia*, he pointed out that the House of Lords decision in *Tinsley* had rejected the ‘public conscience’ test with respect to the illegality defence on the ground that it imported a discretionary element into what was in reality a rule of law;<sup>41</sup> thus, the Court of Appeal decision was inconsistent with *Tinsley*. In the minority, Lord Toulson also dismissed the appeal but dissented from the majority reasoning. Rather, he agreed with the Court of Appeal that public considerations *should* be taken into account in the determination of the illegality defence, given that the defence is based on public policy.<sup>42</sup>

While it is thus largely unarguable that the majority reasoning in *Apotex* affirms the relevance of *Tinsley*, *Hounga v Allen* appears to be a considerable obstacle to Lord Sumption’s position in *Jetivia*. The respondents offered to employ the claimant as a home help in the UK in return for schooling and £50 per month, and they helped her obtain false identity documents with which she entered the UK and obtained a six-month visitor’s visa. Later the respondents evicted the claimant from the house, dismissing her from employment. The claimant issued proceedings for unlawful discrimination in relation to her dismissal.<sup>43</sup> In allowing the claimant’s appeal, the Supreme Court held that the illegality defence did not defeat the complaint of discrimination. Lord Wilson, delivering the lead judgment, held that:<sup>44</sup>

[t]he defence of illegality rests upon the foundation of public policy [...] So it is necessary, first, to ask “What is the aspect of public policy which founds the defence?” and second, to ask “But is there another aspect of public policy to which application of the defence would run counter?”

---

<sup>37</sup> *Jetivia* (n 5) [62].

<sup>38</sup> [2012] EWCA Civ 593.

<sup>39</sup> *ibid* [73] (Etherton LJ).

<sup>40</sup> *Apotex* (n 18) [19].

<sup>41</sup> *ibid* [18].

<sup>42</sup> *ibid* [62].

<sup>43</sup> Contrary to the Race Relations Act 1976.

<sup>44</sup> *Hounga* (n 20) [42].

On the facts, the illegality defence was held to be inapplicable because while there were scarcely any public policy reasons why the defence should be applied to defeat the claim, to *reject* the defence's application would serve to uphold a governmental policy to combat human trafficking and protecting its victims.<sup>45</sup>

*Prima facie*, *Hounga* appears to be starkly inconsistent with Lord Sumption's assertion that courts generally eschew a 'discretionary weighing of the equities'<sup>46</sup> in applying the illegality defence, in accordance with *Tinsley*. Indeed, while Lord Wilson explicitly acknowledges the *Tinsley* test,<sup>47</sup> he then found<sup>48</sup> that the effect of the reliance test was 'soften[ed]' by the House of Lords decision in *Stone & Rolls*. His subsequent approach of considering the public policy factors for and against applying the illegality defence in the present case thus viably supports the contention of Lords Toulson and Hodge that the application of the illegality defence depended on a consideration of the policy factors underlying it.

Indeed, in addressing *Hounga*, Lord Sumption in *Jetivia* had to concede that there were exceptions to the applicability of *Tinsley*; in some cases 'an examination of competing policies may be required, and that is where a competing public policy... requires the imposition of civil liability notwithstanding that the claim is founded on illegal acts'.<sup>49</sup> Thus, he said that '[t]he court [in *Hounga*] was not purporting to depart from *Tinsley v Milligan* without saying so. It simply recognised the case before it in which a competing public policy required that damages should be available even to a person who was privy to her own trafficking'.<sup>50</sup> Accordingly, he felt sceptical about the significance of *Hounga* as a statement of principle of general application.<sup>51</sup>

In response to Lord Sumption's explanation of *Hounga*, two things may be remarked. Firstly, by conceding that there could be 'public policy' exceptions that displace a strict application of the *Tinsley* approach, Lord Sumption's view becomes considerably more difficult to distinguish from that of Lords Toulson and Hodge. After all, to say that in certain (admittedly exceptional) cases countervailing policy considerations may cause the illegality defence to be disapplied is to presuppose that the courts must in such cases consider and weigh the policies *for* and *against* the applicability of the defence; this must be true if not all 'competing public polic[ies]' are to be allowed to trump the policy underlying the defence. It is clear that this is a short way from holding that public policy considerations are *generally* to be considered when deciding on illegality.

Secondly, it is questionable if *Hounga* is as exceptional as Lord Sumption represented it to be. In particular, it is argued that in some cases, despite ostensible adherence to the no-discretion principle in *Tinsley*, courts in fact engage in a discretionary 'balancing of equities' exercise in deciding whether or not the illegality defence should apply.

An eminent example is the approach set out by Lord Hoffmann in *Gray*. In *Apotex*, Lord Sumption held that neither the 'narrower' nor the 'wider' limbs of the illegality defence in *Gray* depended on the court's assessment of the significance of the illegality, the proportionality of its application or the merits of the case; the narrow rule 'operated automatically' while the wider rule 'was simply a question of causation'.<sup>52</sup> With respect, however, he was being overly sanguine about the

---

<sup>45</sup> *Hounga* (n 20) [45], [52].

<sup>46</sup> *Jetivia* (n 5) [99].

<sup>47</sup> *Hounga* (n 20) [28].

<sup>48</sup> *ibid* [30].

<sup>49</sup> *Jetivia* (n 5) [101].

<sup>50</sup> *ibid* [102].

<sup>51</sup> *ibid*.

<sup>52</sup> *Apotex* (n 18) [19].

implications of the causation approach. It is trite that the concept of causation in tort is profoundly knotty. Policy considerations have on multiple occasions come to the fore in courts' attempts to refine the concept of factual causation in certain exceptional contexts,<sup>53</sup> whereas the concept of legal causation is by definition premised on the interplay between policy factors adjudged to be relevant in determining if liability should arise in a given case.<sup>54</sup> As Lord Mance remarked extra-judicially on the causation approach adopted in *Gray*, the distinction between 'causing' and 'occasioning' is capable of being inconsistently applied; it is 'not a matter of mathematics, but ultimately of judgment by the court as to the relative weight which ought to be attached to the different events, and in that sense one of policy'.<sup>55</sup>

Unsurprisingly, the problems with the causation approach have not been lost on the lower courts. The Court of Appeal judgment in *McCracken v Smith*<sup>56</sup> (incidentally delivered on the same day as the Supreme Court delivered theirs in *Jetivia*) presents an illuminating example. The respondent suffered a brain injury while riding pillion on a trial bike that collided with a minibus, driven by the appellant. The rider, his friend, did not have a valid driving licence or insurance, and neither party was wearing a helmet. At first instance,<sup>57</sup> it was held that both the friend and the appellant had been negligent and were liable to the respondent in damages, albeit lessened to the extent of the respondent's contributory negligence. The Court of Appeal considered an appeal by the appellant that the judge at first instance had wrongly declined to apply the illegality defence with respect to the respondent's claim against him, given that the respondent had engaged in a joint enterprise with his friend to ride the bike dangerously. Delivering the leading judgment, Richards LJ professed difficulties with applying the causation approach:<sup>58</sup>

[T]he situation cannot be accommodated neatly within the binary approach of Lord Hoffmann in *Gray*... The accident had two causes, properly so called – the dangerous driving of the bike and the negligent driving of the minibus – and it would be wrong to treat one as the mere “occasion” and the other as the true “cause”. [The respondent's] injury was the consequence of both, not just of his own criminal conduct and not just of [the appellant's] negligence.

Having concluded that the fact that the criminal conduct was one of the two causes was not a sufficient basis for the illegality defence to apply, Richards LJ held that the right approach was to reject the illegality defence but to reduce the respondent's damages in accordance with principles of contributory negligence,<sup>59</sup> an approach that served the public interest insofar as it accounted for the fault of both the appellant and the respondent.<sup>60</sup>

*McCracken* thus gives the lie to Lord Sumption's pronouncement on the causation approach. In holding both that there were two 'causes' of the injury and that the illegality defence should not apply, Richards LJ clearly took into account issues such as the significance of the illegality, proportionality and the merits of the case. As he pointed out, any broad test of causation was almost by definition satisfied on the facts;<sup>61</sup> it would thus have been difficult for him to mechanically apply the causation approach to reach a decision on the illegality defence *without* any reference to merits.

---

<sup>53</sup> See, e.g., *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 A.C. 32; *Sienkiewicz v Greif* [2011] UKSC 10, [2011] 2 A.C. 229.

<sup>54</sup> See, e.g., *The Wagon Mound (No 2)* [1967] 1 AC 617 (PC).

<sup>55</sup> Lord Mance, 'Ex turpi causa – when Latin avoids liability' [2014] *Edinburgh Law Review* 175, 184.

<sup>56</sup> [2015] EWCA Civ 380.

<sup>57</sup> [2013] EWHC 3620 (QB) (Keith J).

<sup>58</sup> *McCracken* (n 56) [51].

<sup>59</sup> *ibid* [52].

<sup>60</sup> *ibid* [53].

<sup>61</sup> *McCracken* (n 56) [54].



In contract, the courts have evinced a similar willingness to look at policy factors in applying the illegality defence. Notably, despite ostensible reference to the *Tinsley* test, the Court of Appeal in *Parkingeye v Somerfield Stores*<sup>62</sup> also tied their decision to a consideration of policies that underlay the illegality defence. The respondent operated an automated car parking system in car parks operated by the appellant. When the appellant terminated their contract prematurely, the respondent sued for damages for breach of contract. The appellant claimed that the contract was void for illegality because of the unlawful means the respondent had used to collect some of the fines. In finding that the illegality defence should not apply, Sir Robin Jacob, with whom Laws LJ agreed, found it significant that the ‘facts of the case, considered with a sense of proportionality, [did not] involve such an invasion of any of the policy rationales as to deprive ParkingEye of its remedy’.<sup>63</sup> Interestingly, Sir Robin had no difficulty with concluding that a proportionality-based consideration of relevant policy concerns was wholly consistent with the authority of *Tinsley*.<sup>64</sup>

In applying the “disproportionate” test I do not think I am exercising a judicial discretion. It was settled by *Tinsley v Milligan* that a defence of illegality point cannot be solved by applying a discretion based on public conscience. Proportionality as I see it is something rather different. It involves the assessment of how far refusal of the remedy furthers one or more of the specific policies underlying the defence of illegality.

Even if we accept that Sir Robin was not reviving the ‘public conscience’ test that was rejected in *Tinsley*, it remains, with respect, difficult to see how he was not exercising a discretion. His proportionality approach entailed weighing policy considerations that supported applying the illegality defence against the considerations that militated against such application. Given that these considerations are hardly amenable to precise or fixed valuation, the court surely had to make value judgments as to whether and to what extent certain policies should be considered significant, which patently involves the exercise of judicial discretion. While it can at least be accepted that a consideration of proportionality differs *notionally* from a ‘public conscience’ test, it remains *practically* indistinguishable from the approach furthered by Lords Toulson and Hodge.

In conclusion, it is highly doubtful that *Tinsley* remains influential in the law on illegality, insofar as it appeared to reject the role of judicial discretion in determining if the illegality defence was to apply. *Hounga* is an obvious and prominent example of the courts explicitly reasoning by balancing conflicting policies; but *Gray* and *Parkingeye* are further instances of courts reasoning in a discretionary fashion, despite appearances to the contrary (e.g. the veneer of a hard-edged causation test, or an explicit admission of the binding authority of *Tinsley*). All that can be said with some certainty is that, as a matter of positive law, the *Tinsley* reliance test still applies to cases within the direct factual context of trusts. It remains to be discussed whether the reliance test is a normatively justifiable approach in areas where it *does* indubitably apply.

## IV. TINSLEY: A CRITIQUE

### A. CRITICISM

As is evident from a survey of the authorities, it is highly doubtful that *Tinsley* remains the test for illegality in all or even most circumstances. Crucially, however, aside from being dismissive of its relevance to the particular circumstances, courts have often been critical of the formulation of the reliance test itself.

---

<sup>62</sup> [2012] EWCA Civ 1338, [2013] Q.B. 840.

<sup>63</sup> *ibid* [40].

<sup>64</sup> *ibid* [39].

By far the main criticism of the *Tinsley* reliance test has been the exclusive focus on the procedural issue of whether the claimant was required to plead his or her illegality. No heed is given to 'substantive' issues, such as whether and to what extent the claimant's claim is otherwise meritorious in any way, or whether the policies underlying the illegality defence would be furthered by its application in the given case. As the High Court of Australia observed in *Nelson v Nelson*:<sup>65</sup>

Regard is had only to the procedural issue; and it is that issue and not the policy of the legislation or the merits of the parties which determines the outcome. Basing the grant of legal remedies on an essentially procedural criterion which has nothing to do with the equitable positions of the parties or the policy of the legislation is unsatisfactory, particularly when implementing a doctrine which is founded on public policy.

Given that the *Tinsley* test is intrinsically blind to the general 'merits' of the claim and thus in that sense operates 'arbitrarily', it has unsurprisingly drawn much flak for '[having] the potential to force the courts into unjust decisions'.<sup>66</sup> As we have already seen, the result in *Tinsley* itself hinged on the operation of a presumption inherent in trusts law that had nothing to do with the merits of the case.

Admittedly, it is at least arguable that applying the reliance principle in *Tinsley* gave rise to a fair result. Finding that the illegality defence operated to bar Ms Milligan's claim would have left Ms Tinsley with the full benefit of Ms Milligan's money although the two were equally culpable in entering into the illegal transaction. Indeed, Lord Goff, who would have defeated Ms Milligan's claim, confessed that his approach would have produced an unduly harsh result for her.<sup>67</sup> In the light of this, it might be argued that the majority achieved the 'fairer' result in resorting to the reliance principle. (Indeed, Lord Sumption has suggested extra-judicially that such principle was contrived precisely to avoid the 'distasteful' result that Lord Goff's approach would have achieved.<sup>68</sup>) Nevertheless, the result as mentioned owed everything to the automatic operation of the presumption of resulting trust in that instant case; following the House of Lords' formulation of the reliance principle, there is nothing to prevent the principle being applied to reach unjust results. Indeed, Lord Browne-Wilkinson distinguished the facts of *Tinsley* from a case where the presumption of advancement would apply: on a transfer from a man to his wife or children, equity presumes an intention to make a gift. In such cases, then, the claimant would generally have to adduce evidence to rebut such presumption and in doing so would normally have to plead his underlying illegal purpose where it existed.<sup>69</sup>

*Collier v Collier*<sup>70</sup> was just such a case where the presumption of advancement applied. Mr Collier put his night-club and recording studio premises in his daughter's name to hold for him and thus keep it from falling into the hands of his creditors threatening his bankruptcy. However, his daughter later refused to return it when he asked. Given that the presumption of advancement operated and Mr Collier was unable to show the real reason for the transfer of assets without pleading his own illegal purpose, his claim failed, and his daughter, a joint partner in his original illegal plan, gained a windfall. Whatever one might think of the merits of Mr Collier's claim, it is surely disturbing to consider that his claim would probably have succeeded *but for* the fact that he was the father of his partner in crime, thus triggering the presumption of advancement instead of the presumption of resulting trust. Indeed, in deciding the case in the Court of Appeal, Mance LJ (as he then was) was palpably dissatisfied with the fact that the application of the *Tinsley* test led to an opposite result to that in *Tinsley* itself, despite uncanny similarities on the facts:<sup>71</sup>

---

<sup>65</sup> (1995) 184 CLR 538, 609 (McHugh J).

<sup>66</sup> Law Commission, *The Illegality Defence* (Law Com No 320, 2010) para 2.15.

<sup>67</sup> *Tinsley* (n 4) 363.

<sup>68</sup> Lord Sumption (n 3) 4.

<sup>69</sup> *Tinsley* (n 4) 372.

<sup>70</sup> [2002] EWCA Civ 1095.

<sup>71</sup> *ibid* [105].

[I]t can hardly be suggested that any real difference in opprobrium exists between the conduct of the successful Ms Milligan and the father in [...] the present case.

He however professed to being bound by *Tinsley* as a matter of precedent, although he suggested reform of the law in future.<sup>72</sup>

Most tellingly, even though Lord Sumption has consistently posited that the *Tinsley* test generally remains the definitive approach to illegality as a matter of law, it should not be thought that he is unaware, or supportive, of the unideal formulation or effects of the test. In his lecture to the Chancery Bar, he dryly noted that following *Tinsley*, '[t]he test of relevance thus came to depend on the effect of presumptions devised by equity for a very different purpose, and on the incidence of the burden of proof.'<sup>73</sup> Having considered the application of the reliance test in *Collier*, a case where 'the moral equities were the same', he noted that '[i]n an area of law which turns on principle and public policy, this concentration on form over substance seems difficult to justify'.<sup>74</sup>

## B. IS TINSLEY DEFENSIBLE?

In the light of the ostensibly overwhelming criticism of the *Tinsley* test, stemming both from its 'merit-blind' nature and from its propensity to compel the courts to do injustice in certain circumstances, one is left wondering if *Tinsley* is at all normatively defensible. Two 'defences' of the *Tinsley* reliance test shall be examined here.

Firstly, it has been observed that the criticism of the decision in *Tinsley* has thus far been substantially based on the interplay between the presumption of resulting trust and the presumption of advancement, and the fact that their application had been premised on what is presently considered archaic and sexist assumptions (e.g. that a husband or father generally intends to make gifts to his wife or children, while a wife or mother lacks this intention). Given that the presumption of advancement has now been abolished by statute,<sup>75</sup> it might be argued that the criticism of *Tinsley* is now *pro tanto* less warranted. Indeed, in deciding not to implement the suggestions of the Law Commission to conduct statutory reform of the illegality defence as it applies in trusts law,<sup>76</sup> the Government stated that they were 'not satisfied that there is a sufficiently clear and pressing case for reform', citing the abolition of the presumption of advancement as a key reason for this view.<sup>77</sup> However, while criticism of the presumptions should indeed be analytically decoupled from criticism of the reliance test in general, it is surely erroneous to conclude that the presumption of advancement was the only, or even the predominant, problem with the reliance test. McHugh J's criticism of the test in *Nelson* was centred around the broader *irrelevance* of applicable public policy and the merits of the case, a malady of which the overriding *relevance* of presumptions is but a symptom. It is a *non sequitur* to hold that just because the existence of the presumption of advancement gives rise to particularly egregious applications of the reliance test, its abolition will completely or substantially resolve the deeper problems plaguing the test.

---

<sup>72</sup> *Collier* (n 70) [106].

<sup>73</sup> Lord Sumption (n 3) 5.

<sup>74</sup> *ibid.*

<sup>75</sup> s 199(1) Equality Act 2010: 'The presumption of advancement (by which, for example, a husband is presumed to be making a gift to his wife if he transfers property to her, or purchases property in her name) is abolished.' However, it should be noted that the Equality Act 2010 has never been brought into force.

<sup>76</sup> See Section 5 below.

<sup>77</sup> Ministry of Justice, *Report on the implementation of Law Commission proposals* (2012) 14-15.

Secondly, as Lord Sumption pointed out in *Jetivia*, the purely procedural nature of the reliance test appears to be far more amenable to clear and certain application than its main rivals, insofar as it was capable of devising ‘principled answers which are no wider than is necessary to give effect to the policy stated by Lord Mansfield and are certain enough to be predictable in their application’.<sup>78</sup> Indeed, the ‘merit-blind’ nature of the *Tinsley* test may paradoxically be a strength even if it is also a weakness, insofar as one is generally able to tell in advance how the test would apply to the facts of a given case. This may be contrasted with the ‘inextricable link’ test in *Cross* and even the causation approach in *Gray*. As was noted by Lord Hoffmann in *Gray*, the metaphor of ‘inextricable link’ is unhelpful; the phrase merely begs the questions of what sort of ‘links’ would have to exist between the claimant’s criminal conduct and his claim, and how ‘inextricable’ such a link would have to be. Further, the judgment in *McCracken* amplifies any doubts one might have as to whether the causation approach constitutes a substantial improvement over the ‘inextricable link’ test where clarity and certainty of application are concerned. As such, if the *Tinsley* test is to be faulted for being blind to the policy considerations underlying the illegality defence, it may tenably be rebutted that the courts applying the ‘causation’ or ‘inextricable link’ tests have indeed nothing *but* (necessarily open-textured) policy considerations to go on with.

Like the first argument, however, the second stops far short of a complete justification of the *Tinsley* test. The importance of clarity and certainty must of course not be understated, but it is tristic that the courts have no business in applying a test that does not further desirable judicial aims, regardless of how clear or certain it may be. Given that it is common ground that the illegality defence is based on considerations of public policy, it would be inexplicable to hold that courts are to cleave rigidly to a test that only occasionally and incidentally produces results that uphold that policy. This argument derives greater force when it is remembered that the policy underlying the defence ‘is not based upon a single justification but on a group of reasons, which vary in different situations’:<sup>79</sup> if a single rigid test is unable to consistently uphold a single discrete public policy, it is puzzling how it can adequately give weight to multiple such policies at the same time, especially when their furtherance would lead to conflicting results in a given case. Finally, the need to examine policy underpinning the illegality defence is made all the more crucial in cases where policy factors *extrinsic* to the defence may seem to compel its disapplication; the dilemma that faced the Supreme Court in *Hounga* provides a paradigm example. As we have seen, Lord Sumption’s dismissal of *Hounga* as exceptional is perforce unsatisfactory, because it begs the question of *how* exceptional it was, and *why*. Specifically, why in *Hounga* was a ‘competing’ public policy allowed to disapply the illegality defence where it otherwise would have applied? The notion of ‘competition’ is here instructive: the offending public policy must be weighed against the policy underlying the defence, and it is preferable that the courts do this transparently, as Lord Wilson did in *Hounga*, rather than opaquely.

A final example will demonstrate that explicit discussion of policy considerations can be profitable to the law on illegality and to the general law, and paradoxically lead to greater clarity than if a single inflexible test were employed. In the recent Court of Appeal decision in *R (Best) v Chief Land Registrar*,<sup>80</sup> the Government had appealed against a decision that a squatter could rely upon his adverse possession of a residential property in order to claim title to the property even though his occupation amounted to a criminal offence under section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA). The court noted that:<sup>81</sup>

---

<sup>78</sup> *Jetivia* (n 5) [62].

<sup>79</sup> *Gray* (n 28) [30] (Lord Hoffmann).

<sup>80</sup> [2015] EWCA Civ 17.

<sup>81</sup> *ibid* [52] (Sales LJ).

...there is not one single rule with blanket effect across all areas of the law. Instead, there are a number of rules which may be identified, each tailored to the particular context in which the illegality principle is said to apply.

Having referred closely to Lord Wilson's approach in *Hounga*, the court thus considered it necessary to consider the aspect of public policy which founded the illegality defence, and then weigh this against the countervailing public policy considerations that ran counter to the defence. After considering the respective public policy considerations underlying the law on adverse possession – as embodied in the provisions of the Land Registration Act 2002 (LRA) – and s 144 LASPOA, the court concluded that the defence should not apply in the present case. It is submitted that this explicit sensitivity to the respective regimes of LASPOA and adverse possession is welcome, insofar as it allowed the court to acknowledge and weigh the demands of public policy openly, something that would necessarily have been precluded by a mechanistic application of the *Tinsley* test.

## V. IDEAS FOR REFORM

It is by now hopefully evident that it is time for reform to free the common law from the straitjacket of *Tinsley*. Quite like in *Tinsley* itself, however, there is a far stronger consensus on what should *not* be law than on what *should* be.

A study of possible reforms would be remiss if it did not discuss the proposals of the Law Commission in this area. A consultation paper published in 2009<sup>82</sup> (“CP 189”) and a report presented to Parliament in 2010<sup>83</sup> (“LC 320”) make evident the Commission's distaste for the *Tinsley* reliance test, for many of the reasons discussed above. Accordingly, in CP 189, the Commission initially suggested statutory reform for the illegality defence as and where it applied, but later resiled from that in LC 320, stating that recent House of Lords judgments in *Gray* and *Stone & Rolls* had indicated a judicial move away from *Tinsley* in areas such as contract and tort, such that statutory reform no longer appeared to be required in cases that were factually dissimilar to *Tinsley*.<sup>84</sup> As such, statutory reform was recommended only for trusts cases which fell squarely within the ambit of *Tinsley*, wherein courts were to be granted a structured discretion to apply the illegality defence.<sup>85</sup> This discretion would thus take into account a non-exhaustive list of factors comprising: (1) the conduct and intention of the parties; (2) the value of the equitable interest at stake; (3) the effect of allowing the claim on the criminal purpose; (4) whether refusing the claim would act as a deterrent; and (5) the possibility that the person from whom the equitable interest was being concealed may have an interest in the value of the assets of the beneficiary.<sup>86</sup>

In a subsequent article,<sup>87</sup> Andrew Burrows lauded the Commission for their efforts in catalysing reform in the law of illegality. Noting piecemeal judicial reforms initiated by the House of Lords in *Gray*, and the Court of Appeal in *Apotex* and *Parkingeye*, he concluded that the law:<sup>88</sup>

---

<sup>82</sup> Law Commission, *The Illegality Defence: A Consultative Report* (Law Com CP No 189, 2009).

<sup>83</sup> Law Commission, *The Illegality Defence* (Law Com No 320, 2010).

<sup>84</sup> *ibid* para 1.18. See generally Part 3: Illegality and Other Claims.

<sup>85</sup> *ibid* para 1.17. See generally Part 2: Illegality and Trusts.

<sup>86</sup> Law Com No 320 (n 83) para 2.80.

<sup>87</sup> Andrew Burrows, ‘Alternatives to Legislation: Restatements and Judicial Law Reform’ in Gullifer and Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law* (Hart Publishing 2014).

<sup>88</sup> *ibid* 50.

...has therefore been put on a more flexible basis that allows the courts to cut through to the underlying policies and to reach a proportionate result. That has been done without the legislation that I, for one, thought would be needed.

With the benefit of hindsight, it must surely now be clear that the law has *not* clearly evolved in the way contemplated either by the Commission or by Burrows. The Court of Appeal decision in *Apotex* of course went on to be overruled in the Supreme Court after the publication of Burrows' article, and our foregoing analysis of *Jetivia* has confirmed that the law of illegality remains unsatisfactorily turbid, not just with respect to cases involving trusts. For instance, Lord Neuberger's ambivalence over the applicability of *Tinsley* in that case<sup>89</sup> was not intended to be limited to trusts law, and even in *Parkingeye*, Sir Robin reached his decision on the footing that the reliance test was applicable in the law of contract.<sup>90</sup> Thus, reform in this area of the law necessarily remains illusive, but – if we are to accept the criticisms thereof – necessary.

How then should reform proceed, and along what lines? If we accept that judicial efforts have not succeeded in satisfactorily reforming the illegality defence over the last five years, the necessity of legislative reform may seem ineluctable, even in cases that are not ostensibly caught by the precedential ambit of *Tinsley*. Certainly, other jurisdictions have enshrined in statute rules that are analogous to the UK illegality defence. For instance, in New Zealand, the Illegal Contracts Act 1970 governs the effect of illegality in the law of contract. Under the Act, every 'illegal contract'<sup>91</sup> 'shall be of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract'.<sup>92</sup> The court is given an unstructured remedial discretion in such cases: it has the power to grant relief '...as the court in its discretion thinks just'.<sup>93</sup>

Crucially, however, it is submitted that the discussion above makes it evident that an unbounded discretion such as that granted in the 1970 Act is undesirable, at least in the UK context. Given that the illegality defence is based on considerations of public policy, it must be evident that enabling courts with a formless statutory discretion does not clearly lead them to vindicate those considerations. It is instructive to note that implementing such discretion by legislation would effectively amount to raising (and immortalising) the spectre of the public conscience test that had confronted the House of Lords in *Tinsley*; as Lord Goff implied<sup>94</sup> in that case, the discretion afforded by the public conscience test was not likely going to be capable of giving sufficient effect to the principle of public policy enunciated by Lord Mansfield in *Holman v Johnson*.

While the Commission's recommendation of a 'structured' discretion might thus appear to be preferable to both a rigid technical test and a conferral of unfettered discretion, insofar as it compels explicit judicial consideration of public policy, it must be queried whether a statutory solution helps in any way in the vindication of applicable public policy factors. Quite obviously, while the Commission has recommended several factors that courts should take into account in applying the illegality defence, not all of the suggested factors *directly* reflect public policy considerations: for instance, the first factor (conduct and intention of relevant parties) is stated to *derive* from multiple policies that justify the illegality defence, particularly deterrence and the protection of the integrity of the legal system.<sup>95</sup> However, if courts are ultimately to have regard to the underlying public policy factors when applying statutory factors (as they would inevitably be compelled to do, in the absence of further statutory elaboration), it is unclear whether the statute would do any work at all. On the contrary, any net effect

---

<sup>89</sup> *Jetivia* (n 5) [17].

<sup>90</sup> *Parkingeye* (n 62) [36].

<sup>91</sup> As defined by the common law: Illegal Contracts Act 1970 (NZ), s 3.

<sup>92</sup> Illegal Contracts Act 1970 (NZ), s 6.

<sup>93</sup> Illegal Contracts Act 1970 (NZ), s 7.

<sup>94</sup> *Tinsley* (n 4) 363.

<sup>95</sup> Law Com No 320 (n 83) para 2.67.

of the statute must surely be obfuscatory, given that it might detract from the ultimate and paramount need to apply the defence *if and only if* a balance of public policy considerations demands it. Furthermore, as the Commission concedes,<sup>96</sup> the policy rationales underlying the defence are multiple and varied; given that there can be no hierarchy of rationales, it is more than a little unsatisfactory that the Commission suggested statutory factors that were designed to uphold *six* discrete policy rationales<sup>97</sup> without substantially explaining why these should be considered and vindicated to the exclusion of the others. Although the Commission clearly stated that the factors were intended to be non-exhaustive,<sup>98</sup> it would be unsurprising, indeed natural, if courts were nevertheless to deem that the named factors were more significant than other public policy factors for no other reason than the fact that they were named, even if other factors should otherwise be deemed to be more relevant in a given case. Finally, statutory reform also inhibits the development of new rationales for the illegality defence – indeed, the possibility that the law may be frozen in a way that makes desirable change difficult<sup>99</sup> is regrettably endemic to all instances of legislative reform.

In summary, it is argued that the Law Commission was right in advocating reform with respect to the illegality defence, especially given the inflexibility of the *Tinsley* test and the lack of clarity as to its precedential scope. However, it was too sanguine in noting that reform in areas outside of trusts was well underway following the cases of *Gray* and *Stone & Rolls*; even if the courts had taken promising steps toward desirable reform in those cases, they have surely since backtracked. Furthermore, it failed to note that the attractiveness of legislative reform in this area was merely specious. In an area of the law so thoroughly justified by multiple and context-sensitive public policy considerations, it is at best unhelpful, and at worst distracting, to prescribe factors that the courts must take into account when considering the defence, even if such factors are intended as proxies for said considerations. The courts must be the engineers of reform; they must recognise that reform outside the area of trusts law is no less pressing than reform inside it; and they must not shy away from the need to explicitly tackle policy considerations in deciding whether or not to apply the illegality defence.

## VI. CONCLUSION

In the second of a series of celebrated lectures,<sup>100</sup> Benjamin Cardozo stated shortly that '[t]he rule that misses its aim cannot permanently justify its existence'.<sup>101</sup> This teleological approach is eminently applicable to the law relating to the illegality defence, which has since *Holman v Johnson* been firmly and fundamentally grounded in public policy. Thus even insofar as *Tinsley v Milligan* operated to straitjacket the defence by rejecting judicial discretion and imposing a value-free test founded on procedural reliance, courts have often escaped its rigidity by explicitly distinguishing the case (as in *Gray*) or implicitly departing from it (as in *Parkingeye*). However, this subversion of *Tinsley* has not been wholly desirable: trusts cases that are factually similar to *Tinsley* are ineluctably bound by it, and alternative approaches to the illegality defence remain unsatisfactory vehicles of the public policy considerations that underpin the illegality defence. The current rules that apply to the defence are eminently capable of missing their aim; one should thus not be overly reluctant to conclude that their existence is not, and cannot, be justified.

---

<sup>96</sup> Law Com No 320 (n 83) para 2.5.

<sup>97</sup> *ibid.*

<sup>98</sup> *ibid* para 2.78.

<sup>99</sup> See Burrows (n 87) 43.

<sup>100</sup> Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921).

<sup>101</sup> *ibid* 66.