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TAN Hong Chia

Adjunct Researcher, Centre for Banking & Finance Law, Faculty of Law, National University of
Singapore

hongchia@u.nus.edu

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<http://law.nus.edu.sg/cbfl/>

Centre for Banking & Finance Law

Faculty of Law

National University of Singapore

Eu Tong Sen Building

469G Bukit Timah Road

Singapore 259776

Tel: (65) 66013878

Fax: (65) 6779 0979

Email: cbfl@nus.edu.sg

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ABSTRACT:

This paper proposes the adoption of a modified form of the structured discretion approach (“the proposed approach”) recommended by the Law Commission of England and Wales to determine whether a claim should be denied due to illegality. Although the Law Commission’s structured discretion approach was never expressly accepted and adopted in its generality, various guises of it have since appeared in English and Singapore case law involving different claims affected by illegality in different ways.

Most recently, the Singapore Court of Appeal and the UK Supreme Court rendered decisions concerning the doctrine of illegality in *Ting Siew May v Boon Lay Choo & Anor* and the *Hounga v Allen & Anor*. The Singapore Court of Appeal laid down an approach whereby a court may enforce a claim tainted by illegality if, on a weighing of various factors, to deny the claim would be a disproportionate response to the illegality, while the majority of the Supreme Court held that a claim tainted by illegality may be enforced if to deny the claim would affront against another public policy.

In making the case for the propose approach, this paper will (i) argue that the various rationales that have been articulated as underlying the illegality doctrine are merely manifestations or facets of the same principle that the court should not appear to condone an illegality as to do so may undermine the contravened law and ultimately endanger the integrity or coherence of the legal system, (ii) argue that a narrow judicial discretion to allow claims tainted by illegality is necessary in the doctrine, (iii) examine previous approaches such as the reliance test and their deficiencies, (iv) argue that the approach laid down by *Ting Siew May* conflates the examination of factors pertaining to whether the rationale underlying the illegality doctrine is engaged such as to invoke its application, namely the remoteness or connectedness of the illegality to the claim and the knowledge or participation of the claimant in the illegal performance or unlawful purpose, with the examination of factors pertaining to whether denying the claim would be disproportionate to the illegality, (v) argue that the threshold for enforcing a claim notwithstanding illegality on the basis of disproportionality should be a high one, and (vi) propose a test of “which illegality is more closely connected to the claim” for application to the situation where denying the claim would affront against public policy, which the majority of the Supreme Court in *Hounga v Allen*

ruled is a basis for enforcing a claim which would otherwise be unenforceable due to illegality.

Finally, this paper will propose a 5-step approach incorporating, in the last stage, discretion for the court to allow a claim tainted by illegality if to deny the claim would be disproportionate to the illegality.

I. INTRODUCTION

The doctrine of illegality stands out in the law for the unflattering criticisms it has attracted from both commentators and judges alike. To provide a sampling, it has been variously described as “notoriously knotty territory”¹, “riddled with complexity and confusingly fine distinctions”², “confused (and confusing)”³ by the Singapore Court of Appeal and “an area in which there are few propositions, however contradictory or counter-intuitive, that cannot be supported by respectable authorities at the highest levels” by Lord Sumption extra-judicially.

The basic difficulty that plagues the doctrine is this: how should the line between situations in which illegality renders a claim unenforceable and situations in which it does not be drawn, and on what basis should such a line be drawn? As Lord Mance puts it, “the underlying problem [is] of how to react to illegal behaviour”⁴.

Inherent in this question is of course the assumption that the doctrine of illegality should not be absolute in its application, and that in certain cases, a claim tainted⁵ by illegality should nonetheless be enforceable by the courts. As a logical proposition, the assumption is eminently sensible⁶. For instance, where the effect of rendering the claim unenforceable is wholly out of proportion to the illegal behaviour, “most people’s moral instincts”⁷ would be that the doctrine should not apply.

Yet English law has tried to set its face against allowing exceptions to the operation of the doctrine. Lord Goff, in his minority speech in *Tinsley v Milligan*, stated that⁸:

...as Lord Mansfield CJ made clear, the principle is not a principle of justice: it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation. Moreover *the principle allows no room for the exercise of any discretion by the court in favour of one party or the other...*
[emphasis added]

Not surprisingly, the Courts have, when confronted with deserving claimants that evoked judicial sympathies but being unable to disapply the doctrine once it is invoked on the facts, evaded the operation of the doctrine by other means. In his reflections on the law of illegality, Lord Sumption thus ventured:

¹ *Parkingeye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338 per Sir Robin Jacob at [28].

² Paul S Davies, The illegality defence - two steps forward, one step back? *Conv.* 2009, 3, 182

³ *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 per Andrew Phang JA at [3]

⁴ Jonathan Mance, *Ex turpi causa - when Latin avoids liability*, *Edin. L.R.* 2014, 18(2), 175

⁵ Alexander Loke observed in his proposed Tainting Illegality Framework that the term “tainting” more appropriately reflects the operation of the illegality doctrine, as compared to stating that an illegality “turns” a contract into an illegal one: Loke, A. F. H. (2013), *Tainting illegality*. *Legal Studies*. doi: 10.1111/lest.12027

⁶ For instance, the Law Commission stated that “it clearly cannot be in every case that a contract is unlawfully performed, even where this was the original intention, that the offending party loses his or her remedies. Such a proposition would result in the widespread forfeiture of contractual remedies as a result of minor and incidental transgressions” in Law Commission, *The Illegality Defence: A Consultative Report* (LCCP No 189: 2009) at para 3.31

⁷ Lord Sumption, *Reflections of the law of illegality*, *Restitution Law Review* 2012 at 2.

⁸ [1993] 3 All ER 65 at 72

... I suspect that the main reason why English law has got itself into this mess has been a distaste for the consequences of applying its own rules... the courts have been able to escape the harshness of the law, but they have done it by cheating, a process which is not conducive to either clarity or coherence in the law...

Examples of the means by the Courts have employed to evade the doctrine will be borne out in an examination⁹ of some of the approaches that have been taken by the courts in reacting to illegality. But first, the structured discretion approach proposed by the Law Commission of England and Wales deserves early mention, for guises of it has crept into case law, notwithstanding Lord Goff's stern rejection of the notion that the illegality doctrine permits "the exercise of any discretion by the court".

In 1999¹⁰ and 2001¹¹, the Law Commission proposed legislative reform to replace the common law illegality doctrine with a statutory structured discretion for the courts in cases of trusts and contracts, and tort respectively. The discretion is said to be structured as the Courts must take into account the factors set out. The 5 factors which the Law Commission provisionally proposed¹² are:

- (i) the seriousness of the illegality involved;
- (ii) the knowledge and intention of the party seeking to enforce the contract, seeking to recover benefits conferred under it, or seeking the recognition of legal or equitable rights under it;
- (iii) whether denying the claim would deter the illegality;
- (iv) whether denying the claim would further the purpose of the rule which renders the transaction or plaintiff's conduct illegal; and
- (v) whether denying relief would be proportionate to the illegality involved.

A structured discretion can be contrasted with the unstructured¹³ form of discretion, such as that of the public conscience test mooted in the English Court of Appeal¹⁴, which survived for 6 years¹⁵ before being unanimously rejected by the House of Lords as being "too imponderable"¹⁶.

However, in a consultative report in 2009¹⁷ and a final report in 2010¹⁸, the Law Commission backtracked¹⁹ on its recommendation for legislative reform to introduce the structured discretion, citing,

⁹ In Section II of the paper

¹⁰ Law Commission of England and Wales, *Illegal Transactions: the Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at paras 7.27–7.28

¹¹ Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at paras 6.6–6.8,

¹² Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 7.18.

¹³ *Nelson v Nelson* (1995) 184 CLR 538 at 612 per McHugh J

¹⁴ *Saunders v Edwards* [1987] 1 WLR 1116, *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1.

¹⁵ *Hounga v Allen* [2014] UKSC 47 at [28] per Lord Wilson

¹⁶ *Tinsley v Milligan*

¹⁷ Law Commission, *The Illegality Defence: A Consultative Report* (LCCP No 189: 2009).

¹⁸ Law Commission, *The Illegality Defence* (Law Com No 320: 2010).

¹⁹ Except for a limited class of trust

inter alia, recent cases suggesting “that the courts are beginning to find their own way in striking an appropriate balance with the use of the illegality defence”²⁰. It thus recommended instead that the courts should

...balance the strength of [the] policies [underlying the illegality doctrine] against the objective of achieving a just result, taking into account the relative merits of the parties and the proportionality of denying the claim...²¹

The Law Commission’s recommendations have been taken up to varying extents by the English and Singapore Courts. In particular, 2 recent decisions by the highest Courts in the United Kingdom (“UK”) and Singapore are of interest.

A. Ting Siew May²²

In *Ting Siew May v Boon Lay Choo & Anor*, the Singapore Court of Appeal laid down the approach that a court may enforce a claim tainted by illegality if, on a weighing of various non-exhaustive factors, to deny the claim would be a disproportionate response to the illegality.

The case involved a claim by the purchasers of a piece of residential property²³ against the vendor for, *inter alia*, specific performance of the Option agreement to purchase the property.

The Option agreement was entered into on the 13 October 2012 but had been backdated at the request of the purchaser to 4 October 2012 for the purpose of circumventing a notice issued by the Monetary Authority of Singapore (“MAS”) on the 5 October 2012 lowering the loan-to-value ratio of residential property loans that may be granted to borrowers from 80% to 60% (“the notice”).

The policy intention underlying the notice, as set out in an accompanying press release by MAS, was “to cool the [property] market, and avoid a bubble that will... destabilize [the] financial system”²⁴. The notice was issued pursuant to the Banking Act²⁵ and only imposed an obligation on banks and not borrowers. Non-compliance would render a bank liable to conviction of a criminal offence and to a fine²⁶.

The purchasers subsequently accepted a bank loan on the basis of the backdated Option. However, one day before the Option expired, the vendor, who claimed to have only learnt about the MAS notice later, withdrew her offer stating by her solicitor that she did “not want to be a party to any illegality”²⁷. The purchasers’ proposal to proceed with completion on the basis of the Option’s actual date was not accepted by the vendor.

²⁰ Law Commission, *The Illegality Defence: A Consultative Report* (LCCP No 189: 2009) at para 7.64

²¹ Law Commission, *The Illegality Defence: A Consultative Report* (LCCP No 189: 2009) at para 7.69

²² *Ting Siew May v Boon Lay Choo & Anor* [2014] 3 SLR 609

²³ The agreed purchase price was S\$3.6m: at [8].

²⁴ At [18]

²⁵ Cap 19, 2008 Rev Ed, section 55

²⁶ At [117].

²⁷ At [9].

At first instance, the High Court granted the purchasers' order for specific performance. Lionel Yee JC held that:

... The illegal manner in which the financing was intended to be procured by the Plaintiffs was a matter which was merely incidental to the contract constituted by the Option to Purchase and is therefore too remote to render the Option to Purchase unenforceable. As regards the reliance principle, there is similarly no need in the present case for the Plaintiffs to rely on the backdating to found their claim against the Defendant²⁸.

On appeal by the vendor, the Court of Appeal overturned the High Court's decision and held that the Option was unenforceable for illegality. The decision is notable for the factors-based approach that it laid out.

Andrew Phang JA, giving the judgment of the Court, accepted the need for exception to the operation of the doctrine:

... It is acknowledged that there might conceivably be legal wrongs intended to be committed... that are relatively trivial... [The possibility] of uncertainty does not justify precluding in a blanket fashion the exercise of... discretion by the court.²⁹

The learned judge then considered³⁰, namely, the remoteness test applied by the English Court of Appeal in *Madysen*³¹, the "disproportionate test" applied by Sir Robin Jacob in *ParkingEye*³², the 3 factors considered by Toulson LJ in the same case³³, and the 5 factors in the Law Commission's structured discretion proposal. Before laying down the factors-based approach, Phang JA provided a reconciliation of the aforementioned tests:

... At first glance, it would appear that Toulson LJ and Sir Robin Jacob... applied different tests to arrive at the same result... A closer examination... however, demonstrates that all three judges... were really in agreement that the general approach of the courts should be to look at the various policy considerations underlying the defence of illegality to assess whether refusal of the remedy sought would be a proportionate response to the illegality³⁴...

... It would however appear that "remoteness" or "proximity" was the decisive test which was adopted in *Madysen*³⁵...

²⁸ *Boon Lay Choo and another v Ting Siew May* [2013] 4 SLR 820 at [33].

²⁹ At [46] and [47]

³⁰ From [59] to [68]

³¹ *21st Century Logistic Solutions Ltd v Madysen Ltd* [2004] 2 Lloyd's Rep 92

³² *ParkingEye Ltd v Somerfield Stores Ltd* [2013] 2 WLR 939

³³ The 3 factors are (a) the object and intent of the claimant; (b) the centrality of the illegality; and (c) the nature of the illegality whereas Sir Robin Jacob applied the "disproportionate" test.

³⁴ At [60]

³⁵ At [63]

... In our view, there is, in substance, no real difference between the approaches taken in ParkingEye and Madysen. For instance, if the illegal conduct is too remote from the contract concerned, then it could be argued that to find that that contract is rendered void and unenforceable because of that illegal conduct would be to administer the doctrine of illegality and public policy in a disproportionate manner³⁶....

The factors-based approach that the Court of Appeal laid down therefore comprised of a non-exhaustive³⁷ list of the 5 factors proposed by the Law Commission, Sir Robin Jacob's proportionality test, and the remoteness test in *Madysen*³⁸. According to Phang JA, the factors "should not be applied in a ridged... fashion"³⁹ and should be "weighed and considered in the context of the particular facts"⁴⁰. The approach is to weigh the factors to determine if denying the claim is a proportionate response to the illegality in each case⁴¹. Proportionality, the Court stated, is both a factor and "an overarching principle"⁴².

... In the final analysis, the question is whether, on the facts and circumstances of each individual case, the refusal to enforce the contract is a proportionate response to the unlawful conduct concerned⁴³...

In applying the approach, Phang JA found that the illegality was "not trivial" as the MAS notice was not merely "administrative in nature"⁴⁴, that allowing the claim would "undermine the purpose"⁴⁵ of the notice, that the illegal purpose was not too remote from the Option as the backdating resided "within the Option itself and not outside it"⁴⁶, and that the purchasers' loss of the opportunity to purchase the property and the intervening increase in its market value, or the incurrence of cancellation fees for the bank loan from denying their claim did not render denying the claim a disproportionate response to the illegality⁴⁷.

This approach shall be subsequently referred to in this paper as the *Ting Siew May* approach.

Although the Law Commission contemplated⁴⁸ that its structured discretion proposal, from which Phang JA drew the 5 factors from to amalgamate into the *Ting Siew May* approach, is to be of general

³⁶ At [64]

³⁷ At [71]

³⁸ At [70]

³⁹ At [71]

⁴⁰ At [71]

⁴¹ At [66]

⁴² At [68]

⁴³ At [77]

⁴⁴ At [83]

⁴⁵ At [84]

⁴⁶ At [85]

⁴⁷ At [93]

⁴⁸ Before back-tracking on its recommendations for legislative reform in CP 189 in 2009, save for certain trusts.

application to trusts⁴⁹, contractual⁵⁰ and tort⁵¹ claims affected by illegality, it appears that the *Ting Siew May* approach is limited to “contracts entered into with the object of committing an illegal act”⁵², notwithstanding that portions⁵³ of the judgment appeared to recognize that the approach it laid down is capable of general application.

In so far as this is the case, it is an unfortunate missed opportunity for Singapore’s highest court to clarify and reform the doctrine of illegality along the grain of calls⁵⁴, to which the voices of Lords Sumption⁵⁵ and Mance⁵⁶ were recently added, for reform to the doctrine through the introduction of a judicial discretion.

Nevertheless, the *Ting Siew May* decision and *Hounga v Allen* decision, which will be considered next, may be seen as reflecting a movement in the law towards the adoption of a structured discretion to countervail against the denial of enforcement of claims affected by illegality at the highest levels.

B. Hounga v Allen

The United Kingdom Supreme Court’s recent decision of *Hounga v Allen and another*⁵⁷ is notable for the majority’s holding that a claim tainted by illegality may be enforced if to deny the claim would affront against another public policy.

The case concerned a claim brought on behalf of Miss Hounga under the Race Relations Act 1976 in respect of the abuse and harassment she suffered prior to her dismissal and her dismissal as a domestic worker for Mrs Allen in breach of the Act. Miss Hounga was brought to the UK from Nigeria at the age of 14 illegally under a false identity, after accepting an offer from Mrs Allen’s relatives to go to the UK to work for Mrs Allen for £50 a month, boarding and education in England. At first instance, it was established that Miss Hounga participated in the illegality by swearing a false affidavit to secure a visitor’s visa knowingly that it was illegal for her to do so and to work in the UK. Miss Hounga was not paid any wages nor enrolled in a school as promised. About a year and a half later, she was evicted by

⁴⁹ Law Commission of England and Wales, *Illegal Transactions: the Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at paras 7.27–7.28

⁵⁰ Law Commission of England and Wales, *Illegal Transactions: the Effect of Illegality on Contract and Trust* (Consultation Paper No 154, 1999) at paras 7.27–7.28

⁵¹ Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at paras 6.6–6.8,

⁵² See [66], [70] and [77].

⁵³ For instance, at [77], Phang JA referred to “unlawful conduct” instead of the illegal purpose or intention in posing the question of whether denying the claim is a proportionate response. He also observed, at [65], that “proportionality has long formed part of the judicial approach towards the doctrine of illegality”.

⁵⁴ For instance, see Tey TH, *Reforming illegality in private law* (2009) 21 SACJL 218 at [85].

⁵⁵ “What these considerations suggest to me is that only way in which the complexity, capriciousness and injustice of the current English law can be addressed is by making the consequences of finding that a claim is founded on the Claimant’s illegal act subject to a large element of judicial discretion”: Lord Sumption, *Reflections of the law of illegality*, *Restitution Law Review* 2012 at 12.

⁵⁶ “[A]t least [the discretion’s] aim here would be to achieve an element of equity in iniquity... the deceptively simple maxim *ex turpi causa* is now encrusted with so many qualifications and exceptions, that the uncertainty that it generates seems at least as likely to give rise to disputes as any discretionary regime”: Jonathan Mance, *Ex turpi causa - when Latin avoids liability*, *Edin. L.R.* 2014, 18(2), 175 at 191

⁵⁷ [2014] UKSC 47

Mrs Allen (after being physically abused) and subsequently found and taken to the social services authorities. Miss Houniga's contractual claims for unfair dismissal breach of contract and unpaid wages were denied at first instance due to illegality, and did not reach the Supreme Court⁵⁸. Her claim under the Race Relations Act was allowed at first instance, but then subsequently denied by the Court of Appeal on Mrs Allen's appeal, and reached the Supreme Court on appeal.

After holding on the facts that the claim was not barred by illegality as there was insufficient connection between the illegality and the claim⁵⁹, a conclusion which the members of the panel unanimously agreed on⁶⁰, Lord Wilson, with whom Lady Hale and Lord Kerr agreed, nevertheless continued on and posed this question:

But is there another aspect of public policy to which application of the defence would run counter?⁶¹

After considering the law on human trafficking, Lord Wilson held that:

... to uphold Mrs Allen's defence of illegality to her complaint runs strikingly counter to the prominent strain of current public policy against trafficking and in favour of the protection of its victims. The public policy in support of the application of that defence, to the extent that it exists at all, should give way to the public policy to which its application is an affront⁶²...

This is a significant development in the doctrine of illegality supported by a 3:2 majority⁶³ of the Supreme Court for, as Alan Bogg observed⁶⁴, "public policy has generally been regarded as a doctrine that defeats contract and tort claims", and not one that "countervails against the denial of... claims".

Of greater relevance to this paper is the analysis of Lord Wilson's holding as one providing for a form of structured judicial discretion. Judicial discretion is described by John Bell as providing the judge with "a choice over the standards to be applied, or where 'open-ended' standards are provided as criteria for decision-making"⁶⁵.

⁵⁸ At [18]

⁵⁹ "Entry into the illegal contract on 28 January 2007 and its continued operation until 17 July 2008 provided... no more than the context in which Mrs Allen then perpetrated the acts of physical, verbal and emotional abuse by which... she dismissed Miss Houniga from her employment" per Lord Wilson at [40]. "[T]here is insufficiently close connection between her immigration offences and her claims for the statutory tort of discrimination, for the former merely provided the setting or context in which that tort was committed" per Lord Hughes at [67].

⁶⁰ See [40] and [67].

⁶¹ At [42]

⁶² At [52]

⁶³ Lord Hughes, with whom Lord Carnwath agreed stated that he was "he unable to go quite so far in the basis for [his] conclusion as Lord Wilson feels able to" (at [53]) and that "it is not possible to read across from the law of human trafficking to provide a separate or additional reason for this outcome" (at [67]).

⁶⁴ Alan Bogg, "*Hounga v Allen: Trojan Horse Comes to the Rescue of 'Illegal' Migrants*", (OxHRH Blog, 17 September 2014) <http://ohrh.law.ox.ac.uk/?p=13660> (accessed 13 October 2014)

⁶⁵ John Bell, *Policy arguments in judicial decisions*, Oxford University Press (New York: 1983) at 25.

As such, the subjugation of the public policy in support of the doctrine of illegality to the public policy against human trafficking can be seen as an exercise of judicial discretion to allow a claim which would otherwise be unenforceable for illegality (though this is not the case on the facts on *Hounga v Allen* as both the majority and minority held that the illegality doctrine was not invoked).

C. Other notable cases

Even prior to *Ting Siew May* and *Hounga v Allen*, guises of the Law Commission's structured discretion proposal had already crept into English law through decisions of the Court of Appeal.

In *Parkingeye v Somerfield Stores*⁶⁶, Sir Robin Jacob applied what he termed the “disproportionate test”⁶⁷ to an illegality comprising of a provisional unlawful intention to send letters containing falsehoods for the purpose of seeking payment under a contract collateral to the one for which a contractual claim for damages for wrongful repudiation was brought⁶⁸. The disproportionate test involved:

... the assessment of how far refusal of the remedy furthers one or more of the specific policies underlying the defence of illegality. Those policies... as: furthering the purpose of the rule which the illegal conduct has infringed; consistency; the claimant should not profit from his or her wrong; deterrence; and maintaining the integrity of the legal system⁶⁹...

Of the 4 factors therein, the only factor common to the 5 factors proposed by the Law Commission is whether denying the claim would further the rule which the illegal conduct infringed.

Mindful of the House of Lords' rejection of the unstructured “public conscience” discretion in *Tinsley v Milligan*, Sir Robin Jacob disclaimed⁷⁰ that the test involved the exercise of judicial discretion. However, it would certainly seem that the “disproportionate test” is an instance where “open-ended” standards are provided as criteria for decision-making⁷¹, and therefore constituted the exercise of judicial discretion. In any case, it stands in stark contrast to the stance in *Tinsley v Milligan* that “the axe falls indiscriminately and the claim is barred, however good it might otherwise be. There is no discretion to permit it to succeed.”⁷²

Going back 7 years, in *Vakante v Governing Body of Addey and Stanhope School (No 2)*⁷³, a case concerning a statutory tort claim for unlawful discrimination by dismissal on racial grounds, Mummery

⁶⁶ [2012] EWCA Civ 1338

⁶⁷ At [39]

⁶⁸ See [18] and [23].

⁶⁹ At [39]

⁷⁰ At [39]

⁷¹ John Bell, *Policy arguments in Judicial Decisions*, Oxford University Press (New York: 1983) at 25.

⁷² *Moore Stephens (a firm) v Stone & Rolls Ltd (in liquidation)* [2008] EWCA Civ 644 per Rimer LJ at [16], cited by Lord Wilson in *Hounga v Allen* at [29].

⁷³ [2004] EWCA Civ 1065

LJ, with whom Lord Slynn and Brooke LJ agreed, in applying the “inextricable link” test, incorporated similar factors to those set out in the Law Commission’s structured discretion proposal:

... the circumstances surrounding the applicant's claim and the illegal conduct, the nature and seriousness of the illegal conduct, the extent of the applicant's involvement in it and the character of the applicant's claim are all matters relevant to determining whether the claim is so "inextricably bound up with" the applicant's illegal conduct⁷⁴ ...

Noting Bogg and Novitz’s criticism of Mummery LJ’s decision, Lord Wilson agreed in *Hounga v Allen* that “there was a loosening of the inextricable link test and an entry into it of factors which, logically, might not have been entitled to entry.”⁷⁵

II. PREVIOUS ATTEMPTS

In this section, some approaches that have been taken to resolving claims affected by illegality will be examined with a view to demonstrating why judicial discretion to allow claims tainted by illegality is necessary in the doctrine, notwithstanding its drawback of uncertainty.

As alluded to at the outset, one reason why the doctrine of illegality is a mess of “a hundred artificial distinctions”⁷⁶ wherein “inconsistencies and absurdities”⁷⁷ are exhibited in the case law is the struggle to covertly avoid application of the doctrine where its application would be unjust. One consequence of this is the muddying up of what, it is submitted, is a vital conceptual distinction between 2 inquiries that logically flow from the basic difficulty framed in Section I.

In drawing the line between situations in which illegality renders a claim unenforceable and situations in which it does not, it is important to recognize that there are 2 categories of considerations.

The first category pertains to the inquiry of whether the claim is sufficiently affected by the illegality. The considerations in this category include whether the illegality pleaded in defence of the claim is sufficiently connected to the claim and the claimant’s involvement in the illegality by virtue of her knowledge or participation.

To take an extreme example using the facts of *Pearce v Brooks*⁷⁸, where a claim was brought for hire and compensation for damage to a brougham let out by the claimant to a prostitute for the purpose of soliciting, if the claim against the prostitute had been instead for unpaid groceries, the fact that the defendant was engaged in prostitution and that the claimant knew of it would not give rise to the application of the illegality doctrine. Quite simply, one has nothing to do with the other⁷⁹. Similarly, if the carriage owner had no knowledge that the hirer intended to use the brougham to solicit in the course

⁷⁴ At [9]

⁷⁵ At [35]

⁷⁶ Lord Sumption, *Reflections of the law of illegality*, Restitution Law Review 2012 at 2.

⁷⁷ Lord Sumption, *Reflections of the law of illegality*, Restitution Law Review 2012 at 2.

⁷⁸ (1866) LR 1 Exch 213

⁷⁹ An example in the context of a tort claim is given by Lord Asquith: “if A and B are proceeding to the premises which they intend burglariously to enter, and before they enter them, B picks A's pocket and steals his watch, I cannot prevail on myself to believe that A could not sue in tort... The theft is totally unconnected with the burglar” in *National Coal Board v England* [1954] AC 403 at 428.

of prostitution, his claim would not be barred for illegality given the absence of his involvement in the illegality.

The second category pertains to the inquiry whether a claim that is sufficiently affected by illegality ought nevertheless to be allowed given that it would be unjust to do so. The considerations in this category would include factors such as the severity of the illegality and, whether the consequences to the claimant of the claim being denied are wholly out of proportion to the illegality.

As may be seen, in the final analysis, both categories affect the drawing of the line between situations in which illegality renders a claim unenforceable and situations in which it does not. However, they come into play at different stages. The second category is only relevant if the claim is found to be sufficiently affected by illegality, or as Hutchinson J puts in, the illegality is one which “the court should take notice”⁸⁰.

A muddying of the distinction between these 2 categories of considerations can be observed from some of the approaches that have been taken to resolve claims affected by illegality.

A. Public conscience test

In the English Court of Appeal decision of *Euro-Diam Ltd. v Bathurst*⁸¹, Staughton J, referring to the conscience test adopted by Hutchinson J in *Thackwell v Barclays Bank plc*⁸² stated:

...The precise degree of proximity between the plaintiffs' claim and criminal behaviour, which is necessary to bring the Beresford principle into force, will vary with the circumstance of a particular case. That is why Hutchinson J. described it as a conscience test. The more remote the crime, the less reason to apply the principle... So, in my judgment, a claim may be said to be tainted with illegality in English law by virtue of... the Beresford principle if the claim is so closely connected with the proceeds of crime as to offend the conscience of the court⁸³...

However, Staughton J's reformulation is actually a distortion of the conscience test set out by Hutchinson J, who stated that the Court should:

...answer two questions: first, whether there had been illegality of which the court should take notice and, second, whether in all the circumstances it would be an affront to the public conscience if by affording him the relief sought the court was seen to be indirectly assisting or encouraging the plaintiff in his criminal act⁸⁴...

Whilst Hutchinson J intended for the conscience test to be applied at the second stage after an illegality which the court should take notice has been established at the first stage, Staughton J's formulation

⁸⁰ [1986] 1 All ER 676 at 687

⁸¹ [1988] 2 W.L.R. 517

⁸² [1986] 1 All ER 676

⁸³ *Euro-Diam Ltd. v Bathurst* [1988] 2 W.L.R. 517

⁸⁴ [1986] 1 All ER 676 at 687

conjoined the conscience test to the issue whether the illegality is too remote from the claim, resulting in an awkward conflation of the 2 categories of considerations. It is no wonder then that McHugh J thought that:

... The so called ‘public conscience’ test, although providing a flexible approach, leaves the matter at large. Greater certainty in the application of the illegality doctrine will be achieved if the courts apply principles instead of a vague standard such as the ‘public conscience’⁸⁵...

B. Reliance test and its subsequent “softening”

Although the reliance test cannot be faulted on the same basis, its refusal to admit considerations in the second category has led to arbitrary and haphazard results. This is best illustrated by the diametrically opposing results obtained in *Tinsley v Milligan* and *Collier v Collier*⁸⁶ “although the moral equities were the same”⁸⁷ in both cases. The claimant, Mr Collier, had put property the name of another for an unlawful purpose, to thwart his creditors. The difference between the 2 cases is that as Mr Collier transferred the property to his daughter, the presumption of advancement applied and he was thus unable to recover it without relying on the illegality.

In addition, the narrow view⁸⁸ taken by the majority of the House of Lords in *Tinsley v Morgan* of when an illegality is before the Court so as to be able to obtain the correct result with the reliance test has also undermined the coherence of the first stage of analysis of whether the claim is sufficiently affected by the illegality. Earlier cases have established that “the law is not only interested in the way in which parties are forced to plead their cases... [but] also... in the substance of the actual dealings”⁸⁹. In *Re Mahmoud v Ispahani*, Scrutton LJ stated as such:

... the Court is bound, once it knows that the contract is illegal, to take objection and to refuse to enforce the contract, whether its knowledge comes from the statement of the party who was guilty of the illegality, *or whether its knowledge comes from outside sources*. The Court does not sit to enforce illegal contracts⁹⁰... [emphasis added]

This also explains why the carriage owner in *Pearce v Brougham* failed in his claim against the prostitute:

... the claim for hire could be advanced on the basis of an apparently innocent contract (hire of a carriage), but, once the court came to know of the illegality, this could not be ignored⁹¹...

⁸⁵ *Nelson v Nelson* (1995) 184 CLR 538 at 612

⁸⁶ [2002] EWCA Civ 1095

⁸⁷ Lord Sumption, *Reflections of the law of illegality*, *Restitution Law Review* 2012 at 5.

⁸⁸ The narrow approach turns on whether the claimant is forced to plead or rely on the illegality.

⁸⁹ Jonathan Mance, *Ex turpi causa - when Latin avoids liability*, *Edin. L.R.* 2014, 18(2), 175 at 178

⁹⁰ [1921] 2 KB 716 at 729

⁹¹ Jonathan Mance, *Ex turpi causa - when Latin avoids liability*, *Edin. L.R.* 2014, 18(2), 175 at 179

Given the foregoing, it is therefore not surprising that an attempt has been made to “soften the effect of the reliance test”⁹². In *Stone & Rolls Ltd v Moore Stephens*⁹³, Lord Phillips stated:

Mr Sumption relies on [*Tinsley v Milligan*] as establishing a general principle that is the converse of that applied by the majority of the House. This is that if the claimant has to rely on his own illegality to establish his claim the courts will never entertain the claim ('the reliance test').

Although *Tinsley v Milligan* does not establish a general rule that if a claimant founds his claim on his own illegal conduct, the defence of *ex turpi causa* will apply, earlier cases support this principle...

I do not believe, however, that it is right to proceed on the basis that the reliance test can automatically be applied as a rule of thumb. It is necessary to give consideration to the policy underlying *ex turpi causa* in order to decide whether this defence is bound to defeat S&R's claim⁹⁴...

Lord Phillips' remarks, it is submitted, along with the cases considered earlier in Section I, form part of a trend of guises of the structured discretion approach creeping into English law⁹⁵.

C. The inextricable link test

As considered in Section I, the Court of Appeal decision of *Vakante v Governing Body of Addey and Stanhope School (No 2)*⁹⁶ (“*Vakante*”) incorporated similar factors to those set out in the Law Commission's structured discretion proposal into the “inextricable link test”, which had been stated by Beldam LJ in *Cross v Kirkby*⁹⁷ as such:

... In my view the [illegality doctrine] applies when the claimant's claim is so closely connected or inextricably bound up with his own criminal or illegal conduct...

The inextricable link test which was originally formulated in respect of the first category of considerations pertaining to whether a claim is sufficiently affected by the illegality, was conflated with considerations from the second category pertaining to whether a claim that is sufficiently affected by illegality ought nevertheless to be allowed.

For instance, the nature and seriousness of the illegal conduct should not be a relevant consideration in determining whether a claim is sufficiently affected by the illegality. The inquiry is the proximity of the illegality, whether serious or trivial, to the claim. The irrelevance of the severity of the illegality at this

⁹² *Hounga v Allen* [2014] UKSC 47 at [30] per Lord Wilson

⁹³ [2009] AC 1391

⁹⁴ At [25]

⁹⁵ In *Hounga v Allen*, Lord Wilson stated that he “consider[ed] that Lord Philips was correct to soften the effect of the reliance test by the need to consider the underlying policy” at [30].

⁹⁶ [2004] EWCA Civ 1065

⁹⁷ [2000] EWCA Civ 426, *The Times* 5 April

stage accords with the rationale underpinning the doctrine of illegality, which is that claims tainted by illegality should not be enforced as in doing so, the Courts may appear to condone the illegality and ultimately endanger the coherence of the legal system.

This will be further considered in Section III, where it will be argued that rationale⁹⁸ underpinning the illegality doctrine is the touchstone against which the formulation of a principled approach to dealing with claims tainted with illegality can be tested. Seen in this light, the severity of the illegality is a consideration which is only relevant at the later stage of deciding whether barring the claim for illegality is unjust such as where the consequences of doing so are great and the illegality is trivial. Put it another way, to say, at the first stage where the issue is that of whether the illegality is sufficiently connected to the claim such that the Court will take notice of the illegality where that claim is before it, that the Courts may condone minor illegalities but not serious illegalities will totally undercut the rationale. First, it does not seem possible to draw the line between minor and serious illegalities on a principled basis. Second, the coherence of the legal system is jeopardized by inconsistencies whether the inconsistency is between the enforcement of a claim affected by illegality on one hand and the rule giving rise to that minor or serious illegality on the other hand.

This is not to say that even with the greater clarity achieved by conceptually distinguishing the 2 categories of considerations, the inextricable link test is easy to apply in determining whether the illegality is sufficiently connected to the claim. This difficulty is borne out by the different results obtained in *Vakante* and *Hounga v Allen*. Both cases involved claims under the Race Relations Act (as opposed to contractual claims), and illegalities comprising of immigration offences. However, the Court of Appeal, in the former case, unanimously concluded that:

... the complaints by Mr V of his discriminatory treatment in employment are so inextricably bound with the illegality of conduct in obtaining and continuing that employment with the Respondent that, if it were to permit him to recover compensation for discrimination, the tribunal would appear to condone his illegal conduct⁹⁹...

On the other hand, the Supreme Court unanimously agreed¹⁰⁰ in the latter case that:

... there is insufficiently close connection between her immigration offences and her claims for the statutory tort of discrimination, for the former *merely provided the setting or context in which that tort was committed*, and to allow her to recover for that tort would not amount to the court condoning what it otherwise condemns¹⁰¹ (emphasis added)...

⁹⁸ In this paper, the term “rationale” as opposed to “policy” will be used for clarity, as the latter has been used to mean a variety of different things and is therefore ambiguous. For example, policy as used in the term “heads of public policy” in the context of illegality at common law relates to the “categorisation [of relevant rules of law]... largely for the purpose of ease of exposition”: E McKendrick, *Contract Law*, Palgrave Macmillan (United Kingdom: 2013) at 272.

⁹⁹ Per Mummery LJ at [36]

¹⁰⁰ Perhaps paradoxically, Lord Wilson stated, in reference to the loosening of the inextricable link test in *Vakante*, that “whether the loosened test led the Court of Appeal to make the wrong decision is much less clear” (at [35]).

¹⁰¹ Per Lord Hughes at [67]

Indeed, as Lord Wilson observed in pointing out “[t]he subjectivity inherent in the requisite value judgment”¹⁰² in the inextricable link test, “[t]here judges in the Court of Appeal [in the same case] were of the view... that Miss Hounga’s complaint was inextricably linked to her own unlawful conduct – ‘*obviously so*’¹⁰³” (emphasis added).

Judicial sympathy for Miss Hounga’s plight was evident in Lord Wilson’s rumination that:

... should Mrs Allen's cruel misuse of Miss Hounga's perceived vulnerability arising out of the illegality, by making threats about the consequences of her exposure to the authorities, be a further justification for the defeat of her complaint? ... such threats are an indicator that Miss Hounga was the victim of forced labour but in the hands of the Court of Appeal they become a ground for denial of her complaint¹⁰⁴...

It is noteworthy that unlike Lord Hughes, Lord Wilson appeared less certain about the Court’s conclusion that Miss Hounga’s claim was not inextricably linked to her illegality:

... I, for one, albeit conscious of the inherent subjectivity in my so saying, would hold the link to be absent¹⁰⁵...

This may explain his Lordship’s apparent preference to base his conclusion on the ground that “[t]he public policy in support of the application of [the illegality] defence... should give way to the public policy to which its application is an affront”. As will be elaborated in Section V, this ground is incorporated as stage 4 of the proposed approach with suggested modifications.

It is suggested that the Court of Appeal’s conclusion in *Vakante* and *Hounga v Allen* that the discrimination claims were inextricably to with the claimants’ immigration offences is a more natural conclusion from the application of the test to determine whether the claim is sufficiently connected to the illegality. The Supreme Court’s holding that Miss Hounga’s illegality merely provided the setting or context to her statutory claim appears to reflect a similarity in analysis to the “extremely technical”¹⁰⁶ reasoning underpinning the reliance test.

D. The need for judicial discretion in the doctrine

From the foregoing discussion in this Section, it can be seen that there is a need for exception to the illegality doctrine where it applies. Even where the Courts have endorsed a strict approach, they have sometimes tried to ameliorate against the harshness of the rule by evasion on technical grounds, or by incorporating considerations of policy, irrelevant factors, or a vague standard such as “public conscience” into the assessment of whether a claim is sufficiently connected to the illegality.

¹⁰² At [38]

¹⁰³ At [38]

¹⁰⁴ At [39]

¹⁰⁵ At [40]

¹⁰⁶ Lord Sumption, *Reflections of the law of illegality*, *Restitution Law Review* 2012 at 4.

It is argued that the exception should be provided for in the form of a judicial discretion against the application of the doctrine. In his extra-judicial call for reform, Lord Sumption opined in conclusion that the:

... only way in which the complexity, capriciousness: and injustice of the current English law can be addressed is by making the consequences of finding that a claim is founded on the Claimant's illegal act subject to a large element of judicial discretion... There is still no satisfactory or consistent basis on which a court can take account of the gravity of the illegal acts or the degree of the Defendant culpability, and it is difficult to see how this can be accommodated within a legal principle from which all discretionary elements have been excluded¹⁰⁷...

Indeed, this is supported by the trend of guises of the structured discretion approach creeping into English law, as shown by the consideration of some recent cases in Section I.

It is noted that objections have been voiced against the adoption of a discretionary approach, even where the discretion is structured such as that proposed by the Law Commission. Graham Virgo commented:

The real concern with the proposals of the Law Commission is whether even a 'structured discretion' will result in too much uncertainty in an area where clarity is vital¹⁰⁸.

Although this paper's argument¹⁰⁹, for reasons unrelated to uncertainty, that the judicial discretion to disapply the doctrine should be a narrow one will militate against concerns of the uncertainty that may arise, there are strong reasons¹¹⁰ why uncertainty is a poor objection to the introduction of judicial discretion. In the first place, as Paula Giliker points out:

... such transactional uncertainty may only be addressed by lessening the unjust consequences of a finding of illegality. If the courts can be confident that such a finding will not lead to injustice, then a more coherent and structured concept of "illegality" will develop. *The current uncertainty rests primarily on judicial attempts to circumvent the consequences of illegality*¹¹¹ (emphasis added)...

III. RATIONALE UNDERPINNING THE DOCTRINE OF ILLEGALITY

Here, an examination of the various rationales that have been articulated as underlying the illegality doctrine will be taken with a view to establishing the suggestion that they are merely manifestations or

¹⁰⁷ Lord Sumption, *Reflections of the law of illegality*, *Restitution Law Review* 2012 at 12.

¹⁰⁸ G Virgo, *The Principles of the Law of Restitution*, Oxford University Press (New York: 2006) at 737.

¹⁰⁹ In Section V of the paper.

¹¹⁰ In the same vein as Giliker, Lord Mance observed: "But the deceptively simple maxim *ex turpi causa* is now encrusted with so many qualifications and exceptions, that the uncertainty that it generates seems at least as likely to give rise to disputes as any discretionary regime": Jonathan Mance, *Ex turpi causa - when Latin avoids liability*, *Edin. L.R.* 2014, 18(2), 175 at 192

¹¹¹ P Giliker, 'Restitution, Reform and Illegality: An End to Transactional Uncertainty?' [2001] *SJLS* 102 at 114.

facets of the same principle that the court should not appear to condone an illegality as to do so may undermine the contravened law and ultimately endanger the integrity or coherence of the legal system.

A. The significance of the rationale

As prefaced in the previous section, the identification of the rationale underpinning the illegality doctrine is intended to promote conceptual clarity in the doctrine by expressly drawing the link between the rules in the doctrine and its rationale. The manner in which this link is drawn is by positioning the rules as tests to answer this question:

Is the rationale of the illegality doctrine engaged?

For instance, where the unlawful intention of the claimant in entering into the contract is too remote from the claim, the rationale of the illegality doctrine is not engaged as the Court would not appear to condone the illegality in enforcing the claim since it is too remote, and the coherence of the legal system is not jeopardized.

This perspective can be seen in Lord Sumption's reasoning process that:

... If the Claimant's loss has been caused by the combined effect of [the Defendant's breach of duty and by the Claimant's illegal act], *then the real question must be whether the illegal act engages the public policy. That must necessarily, as it seems to me, depend on what the public policy is and what object it seeks to achieve*¹¹²... (emphasis added)

Making express the link between the rules in the doctrine and its rationale provides the conceptual grounding for, it is submitted, the important distinction between rules or considerations that are relevant to whether the rationale of the illegality doctrine is engaged and those that are not. This corresponds to the distinction referred to in the previous section between the first category of considerations pertaining to whether the claim is sufficiently affected by the illegality, and the second category pertaining to whether a claim that is sufficiently affected by illegality ought nevertheless to be allowed given that it would be unjust to do so.

Therefore, Lord Sumption was referring to the first category when he observed that:

... [t]he various tests which have been proposed (such as the reliance test, the "inextricable linkage", and so on) are simply evidential tests which may assist in deciding whether the claim is or is not founded on the illegal act¹¹³...

¹¹² Lord Sumption, *Reflections of the law of illegality*, Restitution Law Review 2012 at 8.

¹¹³ Lord Sumption, *Reflections of the law of illegality*, Restitution Law Review 2012 at 10.

B. Rejected rationales

It is now clear that deterrence and punishment do not satisfactorily explain the illegality doctrine¹¹⁴.

In *Tinsley v Milligan*, Lord Lowry stated:

I am not impressed by the argument that the wide principle acts as a deterrent to persons in A's position. In the *first* place, they may not be aware of the principle¹¹⁵

The failure of deterrence to explain the doctrine is also borne out in cases such as *Collier v Collier* where the axe fell such as to reward the daughter's participation in the illegality by conferring upon her a windfall.

In relation to punishment as a rationale for the doctrine, the Law Commission observed in its 2001 Consultation Paper that:

... [The doctrine] is generally invoked by the defendant, who cannot always be seen as the victim of wrongdoing, and who, as a tortfeasor, contract breaker or betrayer of trust, is not "innocent" in the way that a claimant seeking exemplary damages is¹¹⁶...

C. Consistency and the integrity of the legal system

In the Canadian Supreme Court decision of *Hall v Hebert*¹¹⁷, McLachlin J stated, in relation to the power to bar recovery on the ground of illegality, in a passage cited by Lord Wilson in *Hounga v Allen*, that:

... [t]he basis of this power, as I see it, lies in [the] duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage[s] award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand¹¹⁸...

It seems clear, from McLachlin J's elaboration that the law cannot give by its right hand what it takes with the left, that the learned judge was referring to integrity in the sense of the coherence of the legal system. The coherence or integrity of the legal system may be jeopardized by the inconsistency of the law, on the one hand in proscribing a particular conduct, and on the other hand in enforcing a claim tainted by the contravention of that proscription.

¹¹⁴ Deterrence was cited by the Law Commission in its 1999 Consultation Paper 154 (para 6.10) as a valid rationale but subsequently doubted in the 2001 Consultation Paper 160 (para 4.28)

¹¹⁵ [1994] 1 AC 340 at 368.

¹¹⁶ Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at paras 4.16 to 4.19

¹¹⁷ [1993] SCR 159

¹¹⁸ [1993] SCR 159 at 196

However, in the House of Lords decision of *Gray v Thames Trains Ltd*¹¹⁹, where Mr. Gray, who killed a man out of homicidal tendencies caused by an injury arising out of the admitted negligence of the defendant, claimed damages for losses arising from his imprisonment and losses not attributable to his imprisonment, Lord Hoffman held, in relation to the denial of Mr. Gray's latter claim, that:

... it cannot, as it seems to me, be justified on the grounds of inconsistency in the same way as the narrower rule [denying the claim for losses arising from the imprisonment]. Instead, the wider rule has to be justified on the ground that it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct¹²⁰...

It is argued that the view of consistency taken by Lord Hoffman is overly narrow. Inconsistency in the legal system is engendered not only where "someone [is] compensated for a sentence imposed because of his own personal responsibility for a criminal act"¹²¹. The rationale of inconsistency is wider than the rationale that "the punishment inflicted by a criminal court is personal to the offender, and that the civil courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment", which it is argued is merely an instance of the consistency rationale¹²².

Indeed, it would seem that the very reason why it "it is offensive to public notions of the fair distribution of resources that a claimant should be compensated... for the consequences of his own criminal conduct" is that the conduct is one regarded by the criminal law as illegal. Apart from the inconsistency of the law from doing so, it is hard to fathom an independent reason why it would be offensive for public resources to be used to compensate Mr. Gray for the consequences of his criminal conduct, where it is established that the defendant's tort is the effective cause of this loss.

In explaining his view that "consistency is the rationale not just of [Lord Hoffman's] narrower principle but of the wider one as well", Lord Sumption opined that:

"if manslaughter had not been illegal, the courts would have had no difficulty in holding that any loss arising from the victim's death was caused by the negligence of Thames Trains, notwithstanding that a voluntary act of the Claimant was necessary as well. What barred the claim in Gray's case was not the relative causal efficacy of the negligence and the killing, but the illegal character of the killing"¹²³

D. Condoning the illegality or undermining the law

The Courts have sometimes justified the application of the illegality on the basis that it may be seen to "condone the illegality" if it allowed the claim to be enforced.

¹¹⁹ [2009] UKHL 33; 1 AC 1399

¹²⁰ At [51]

¹²¹ At [44]

¹²² *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 at 38 per Denning J.

¹²³ Lord Sumption, *Reflections of the law of illegality*, *Restitution Law Review* 2012 at 8.

For example, in *Ting Siew May*, Phang JA stated that:

As a matter of public interest, the court should not appear to reward or condone a breach of the law¹²⁴.

Similarly¹²⁵, in *Vakante*, Mummery LJ stated:

... that the complaints by Mr V of his discriminatory... are so inextricably bound with the illegality...that, if it were to permit him to recover compensation for discrimination, the tribunal would appear to condone his illegal conduct¹²⁶...

Another basis that has been articulated is that enforcing the claim would “undermine the purpose of the rule which the illegal conduct has infringed”¹²⁷. This is also one of the 5 factors cited by the Law Commission for its structured discretion proposal¹²⁸

It is argued that the rationales of not appearing to condone the illegality and not undermining the purpose of the contravened rule are not ends in themselves. It is suggested that ultimately, the reason why the Court should not appear to condone the illegality or undermine the contravened rule, self-evident as these propositions are, is that to do so would create an consistency in, and jeopardize the coherence of the legal system.

E. Universality of the rationale

Given the nature of the rationale underpinning the illegality doctrine, it is submitted that Lord Sumption is right in saying that “it is not, in my view, right to say that the rationale of the public policy varies according to the situation”¹²⁹. In other words, the rationale underpinning the illegality doctrine should be universal and the same whether the claim is founded in contract or tort, or whether the illegality involves a statutory contravention or not.

¹²⁴ At [46]

¹²⁵ Other examples can be found in *Cross v Kirkby* [2000] EWCA Civ 426 at [76] per Beldam LJ, and *Mary Houna v Adenike Allen (née Aboyade-Cole), Kunle Allen* [2012] EWCA Civ 609 at [63]

¹²⁶ At [36]

¹²⁷ *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 per Andrew Phang JA at [84]. See also Jonathan Mance, *Ex turpi causa - when Latin avoids liability*, Edin. L.R. 2014, 18(2), 175 at 192.

¹²⁸ Law Commission of England and Wales, *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at para 7.18.

¹²⁹ Lord Sumption, *Reflections of the law of illegality*, *Restitution Law Review* 2012 at 9.

IV. CRITIQUE OF THE *TING SIEW MAY* APPROACH

As set out in Section I, the Court of Appeal in *Ting Siew May* laid down a factors-based approach comprising of a non-exhaustive¹³⁰ list of the 5 factors¹³¹ proposed by the Law Commission, Sir Robin Jacob's proportionality test, and the remoteness test in *Madysen*¹³². According to the Court,

... these factors should be applied to each individual case, and weighed and considered by the court in the context of the particular facts of that case itself¹³³...

While the *Ting Siew May* decision is laudable for accepting the need for exception to the operation of the doctrine and the adoption of proportionality as an "overarching principle"¹³⁴, it is argued that the factors-based approach it laid down conflated the examination of factors pertaining to whether the rationale underlying the illegality doctrine is engaged such as to invoke its application with the examination of factors pertaining to whether denying the claim would be disproportionate to the illegality.

As argued earlier, an important conceptual distinction should be made between considerations that are relevant to whether the rationale of the illegality doctrine is engaged and those that are not. The rationale of the illegality doctrine is engaged if the claim is sufficiently affected by the illegality, such that to enforce the claim may undermine the contravened law and ultimately endanger coherence of the legal system. The considerations referred to as irrelevant to whether the rationale of the illegality doctrine is engaged are those that pertain to whether a claim, which is sufficiently affected by illegality, ought nevertheless to be allowed given that it would be unjust to do so.

Therefore, the fact that the illegal purpose was not too remote from the Option, and that the purchasers had "intentionally requested" the backdating (as opposed to being uninvolved in the illegality) establish that the claim to enforce the Option is sufficiently affected by the illegality. This is the first stage of analysis. It is only at the next stage of analysis that the fact that the illegality was "not trivial" as the MAS notice was not merely "administrative in nature"¹³⁵, and that the consequence to the purchasers of denying the claim comprising of their loss of the opportunity to purchase the property and incurrence of cancellation fees for the bank loan become relevant in assessing whether denying the claim a disproportionate response to the illegality¹³⁶.

Related to the point that the factors in the *Ting Siew May approach* belong to different stages of analysis is that the weighing exercise called for by the Court of the factors may be an impossible one, given that the factors are incommensurable. Even if it is possible to compare the summation in weight of, presumably, the severity of the illegality, the extent of remoteness or lack thereof of the unlawful

¹³⁰ At [71]

¹³¹ (i) the seriousness of the illegality involved; (ii) the knowledge and intention of the party seeking to enforce the contract, seeking to recover benefits conferred under it, or seeking the recognition of legal or equitable rights under it; (iii) whether denying the claim would deter the illegality; (iv) whether denying the claim would further the purpose of the rule which renders the transaction or plaintiff's conduct illegal; and (v) whether denying relief would be proportionate to the illegality involved.

¹³² At [70]

¹³³ At [71] per Phang JA.

¹³⁴ At [68]

¹³⁵ At [83]

¹³⁶ At [93]

purpose to the Option, against that of the consequences of denying the purchaser's claim, it is respectfully submitted that to do would be confusing due to the conflation of what should be 2 distinct stages of analysis.

In addition, it is also hard to understand why a greater degree in proximity of the illegality to the claim should result in one side of the scale having greater weight as against the other in deciding whether to exercise discretion to enforce a claim otherwise tainted by illegality.

V. THE PROPOSED 5-STEPS APPROACH

The trend of guises of the structured discretion approach creeping into case law, as well as the prominent addition of two Justices of the UK Supreme Court to the voices calling for reform to the doctrine of illegality This through the introduction of a judicial discretion have been already been noted.

The following 5-steps approach is proposed as a suggestion of how a structured discretion approach can be implemented in a principled manner, building upon the foregoing discussion on, firstly, the conceptual distinction between the 2 inquiries¹³⁷ that logically flow from the basic difficulty in drawing the line between situations in which illegality renders a claim unenforceable and situations in which it does not be, and secondly, on basing drawing of the line on whether the rationale of the illegality doctrine, that the court should not appear to condone an illegality as to do so may undermine the contravened law and ultimately endanger the integrity of the legal system, is engaged at the first stage, and should be disengaged at the second stage.

A. Step 1 – Is the illegality sufficiently connected to the claim?

It is suggested that the inextricable link test, which was developed in the context of claims in tort¹³⁸, and the remoteness test¹³⁹ articulated in the context of contracts entered into with an unlawful purpose, are merely different expressions of the same inquiry of whether the illegality pleaded is sufficiently connected to the claim.

Alexander Loke explained it as such:

... the remoteness principle [is associated] with the notion of connectedness inherent in the process of tainting¹⁴⁰... [W]ithin the broader framework of illegality, the concept of 'proximity' that animates the remoteness principle nicely connects tainting illegality in contract to the 'inextricably linked' test that determines the applicability of the illegality defence in the context of tortious claims¹⁴¹...

¹³⁷ The first inquiry is whether the claim is sufficiently affected by the illegality, and the second inquiry is whether a claim that is sufficiently affected by illegality ought nevertheless to be allowed given that it would be unjust to do so.

¹³⁸ [2014] UKSC 47 *Hounga v Allen and another* at [31]

¹³⁹ *21st Century Logistic Solutions Ltd v Madysen Ltd* [2004] 2 Lloyd's Rep 92

¹⁴⁰ Loke, A. F. H. (2013), *Tainting illegality*. Legal Studies. doi: 10.1111/lest.12027 at 7.

¹⁴¹ Loke, A. F. H. (2013), *Tainting illegality*. Legal Studies. doi: 10.1111/lest.12027 at 12.

Therefore, in *Saunders v Edwards*¹⁴², where the claim was founded on the tort of deceit for fraudulent representation by the vendor to the purchasers that the flat sold included a roof terrace, the illegal arrangement between the parties to misrepresent the sale price to avoid a portion of the stamp duty that would have otherwise been payable was held by the Court of Appeal to be “wholly unconnected with [the] cause of action”¹⁴³

If the answer to this question is in the negative, then the rationale of the illegality doctrine is not engaged, and one proceeds to the second step.

B. Step 2 – Does the claimant’s involvement in the illegality meet the requisite threshold?

The second step is applicable where the claimant is the “innocent party” but may be said to have some degree of involvement by virtue of his knowledge or participation in the illegality. Where the illegality is unbeknown to the claimant, the illegality doctrine does not apply.

For instance¹⁴⁴, in *Siow Soon Kim and Others v Lim Eng Beng alias Lim Jia Le*¹⁴⁵, it was held that that:

... [W]henever the question of illegality is raised, it is necessary to examine the intention of the parties... There was nothing illegal in... putting the cash in a separate account. The respondent was not informed that the scheme was for the purposes of evading tax... The culprit was really the first appellant, and he should not be allowed to rely on an illegal scheme hatched by himself, and unknown to the respondent, to deny the latter his just entitlement¹⁴⁶...

There is some uncertainty as to the requisite degree of involvement required of the claimant such as to invoke the illegality doctrine. In *Ashmore Benson Pease & Co Ltd v A V Dawson*¹⁴⁷, Scarman LJ stated that:

... But knowledge by itself is not, I think, enough. There must be knowledge plus participation.¹⁴⁸...

On the other hand¹⁴⁹, in *Langton v Hughes*¹⁵⁰, it was stated that:

¹⁴² [1987] 1 WLR 1116

¹⁴³ [1987] 2 All ER 651 at 660 per Kerr LJ.

¹⁴⁴ See also *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 2 QB 374

¹⁴⁵ [2004] SGCA 4

¹⁴⁶ At [39] and [40] per Chao JA.

¹⁴⁷ [1973] 1 WLR 828.

¹⁴⁸ [1973] 1 WLR 828 at 835–836.

¹⁴⁹ See also *Pearce v Brooks* (1866) LR 1 Exch 213.

¹⁵⁰ (1813) 1 Maule and Selwyn 593

... [T]he rule of law attaches on them, which prohibits a party from recovering the price of goods sold, where he knows at the time of sale that they are to be used in contravention of an Act of Parliament¹⁵¹...

It is argued that mere knowledge by the claimant of the illegality should not be sufficient to invoke the application of the illegality doctrine. It has been suggested the rationale underpinning the illegality doctrine is the touchstone against which its rules should be tested. On this basis, the question is whether inconsistency is engendered in the law by enforcing the claim given the claimant's knowledge of the illegality. In the context of Singapore law¹⁵², it is noteworthy that Section 424¹⁵³ of the *Criminal Procedure Code*¹⁵⁴ only imposes a duty, on a person with knowledge of the commission of a crime, to report it to the police in respect of certain prescribed offences, and not all crimes.

Therefore, it is argued that save in respect of the offences prescribed by Section 424, the enforcement by the Court of a claim affected by illegality of which the claimant only has mere knowledge of would not introduce an inconsistency in the law, and should therefore not be sufficient to invoke the application of the illegality doctrine¹⁵⁵.

C. Step 3 – Whether on an examination of the objectives of the contravened law, it would be undermined by allowing the claim to be enforced.

If the inquiries in both the first or second step are answered in the positive, then the rationale of the illegality doctrine is *prima facie* engaged, and one proceeds to the third step.

The liability for the application of the illegality doctrine to be disengaged, or more precisely to be found to not have been engaged, at this step again can be reasoned in relation to the rationale of the illegality doctrine to avoid introducing inconsistencies in the law so as to preserve the integrity of the legal system.

¹⁵¹ (1813) 1 Maule and Selwyn 593 at 598 per Le Blanc J.

¹⁵² See also the section 39(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act which imposes a duty to lodge “suspicious activities reports” in respect of knowledge or suspicion, of property used in connection with Drug Trafficking and Criminal Conduct, arising in the course of trade, profession, business or employment.

¹⁵³ Every person aware of the commission of or the intention of any other person to commit any arrestable offence punishable under Chapters VI, VII, VIII, XII and XVI of the Penal Code (Cap. 224) or under any of the following sections of the Penal Code: Sections 161, 162, 163, 164, 170, 171, 211, 212, 216, 216A, 226, 270, 281, 285, 286, 382, 384, 385, 386, 387, 388, 389, 392, 393, 394, 395, 396, 397, 399, 400, 401, 402, 430A, 435, 436, 437, 438, 440, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 489A, 489B, 489C, 489D and 506, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, immediately give information to the officer in charge of the nearest police station or to a police officer of the commission or intention.

¹⁵⁴ Cap 68, 2012 Revised Edition

¹⁵⁵ Cf Alexander Loke's view that “while tainting through participation ordinarily requires ‘active involvement’ in the contravening party's purposes or contravention, the degree of involvement may need to be adjusted according to the policies animating the regulatory scheme... The degree of involvement before tainting by participation takes place may differ depending on the policy imperatives of the regulatory regime”: Loke, A. F. H. (2013), *Tainting illegality*. Legal Studies. doi: 10.1111/lest.12027 at 20.

It is therefore necessary to examine the objective of the contravened law to determine if the enforcement of the claim would undermine that law¹⁵⁶. Lord Hughes thus stated:

En route to the answer in an individual case... [the court] will no doubt also consider the purpose of the law which has been infringed and the extent to which to allow a civil claim nevertheless to proceed will be inconsistent with that purpose¹⁵⁷.

In some cases the contravened law expressly states the consequences with respect to the enforceability of claims affected by its contravention. Section 95(8) of the Singapore *Securities and Futures Act*¹⁵⁸ provides that the “lapsing, revocation or suspension of a capital markets services license shall not operate so as to... avoid or affect any agreement, transaction or arrangement relating to the regulated activities entered into by the holder of the licence”. Therefore, notwithstanding that the claim may be sufficiently connected to the carrying on of activities for which a capital market services license is required by a claimant whose licensed has lapsed, the illegality doctrine should not apply as any inconsistency that may have been introduced in the law is “cured” by Section 95(8).

Although this approach is typically articulated in the context of statutory illegality, it is argued that it is of relevance to illegality generally. McKendrick observed as such:

Although both of these cases concern statutory illegality, it is suggested that the question which should be asked in all cases is: was it the purpose of the statute (or the common law rule) that the illegal act committed in the course of the performance of a contract should invalidate the contract?¹⁵⁹

As may be inferred from the proposal that the illegality doctrine is *prima facie* invoked upon the satisfaction of the inquiries in the first and second step, it is contemplated that the burden on establishing that the objectives of the contravened law would not be undermined by allowing the claim to be enforced should lie on the party alleging it¹⁶⁰. This is because, as Alexander Loke observed:

... [T]here is a limit to divining whether the statute contemplates the invalidation of contractual rights; depending on the issue presented and its context, it might stretch credulity to speak of the statute impliedly prohibiting the contract or impliedly prohibiting the assertion of contractual rights¹⁶¹...

¹⁵⁶ See for example *Shaw v Groom* [1970] 2 QB 504, *Catley v Herbert* [1988] 1 NZLR 606, and *Accident Compensation Corp v Curtis* [1994] 2 NZLR 519. *Cf Re Mahmoud and Ispahani* [1921]2 KB 716.

¹⁵⁷ *Hounga v Allen* [2014] UKSC 47 at [55] per Lord Hughes

¹⁵⁸ Cap 289, 2006 Revised Edition.

¹⁵⁹ E McKendrick, *Contract Law*, Palgrave Macmillan (United Kingdom: 2013) at 273.

¹⁶⁰ * TENTATIVE POINT, SUBJECT TO FURTHER RESEARCH ON EVIDENCE LAW.

¹⁶¹ Loke, A. F. H. (2013), Tainting illegality. *Legal Studies*. doi: 10.1111/lest.12027 at 14.

D. Step 4 – Where there are 2 illegalities, which illegality is the claim more closely connected with

The fourth step incorporates, with modifications, the holding of the majority of the Supreme Court in *Hounga v Allen* that “[t]he public policy in support of the application of [the illegality] defence... should give way to the public policy to which its application is an affront “.

As noted earlier, Lord Wilson appeared to prefer to base his conclusion on the above ground rather than on the inextricable link test. The Supreme Court’s holding that Miss Hounga’s illegality merely provided the setting or context to her statutory claim was also doubted.

In so far as the minority’s objection that “it is not possible to read across from the law of human trafficking to provide a separate or additional reason for [the] outcome” is founded on the concern that allowing public policy to countervail against the application of the illegality doctrine is to get astride the unruly horse ¹⁶² which may lead the rider from the sound law, the modification that the countervailing force must arise from another illegality, as opposed to public policy read from the law, is suggested.

The second suggestion is that in such cases where the Court may appear to condone either of 2 illegalities in allowing or denying the claim, the test that should be adopted is to ask which illegality the claim is more closely connected to. This allows the Court to avoid being put in the difficult and awkward position of having to “prefer” one law over another for the purposes of deciding whether to allow or deny the claim.

Applying to the facts of *Hounga v Allen*, assuming that Mrs Allen committed an offence under UK law for her role in trafficking Miss Hounga, and given that Miss Hounga also committed immigration offences, the Court may appear to condone Mrs Allen’s illegality in denying the claim, and appear to condone Miss Hounga’s illegality in allowing the claim. Applying the proposed test of which illegality the claim is more closely connected to, it appears that, for the contractual claim for wages, the illegality that the claim is more closely connected to is working illegally in the UK rather than trafficking, and for the claim based on the Race Relations Act, the illegality the claim is more closely connected is trafficking, given that the award of compensation is to compensate H “for injury to feelings consequent upon her dismissal, in particular the abusive nature of it”¹⁶³. Therefore, the former claim should be denied whilst the latter claim allowed.

E. Step 5 – Whether the claim, which would otherwise be unenforceable for illegality, should nonetheless be allowed on the basis that the effect on the Claimant of denying the claim is wholly disproportionate to the illegality

The final step incorporates the judicial discretion to allow claims tainted by illegality which was argued to be necessary in the doctrine, notwithstanding its drawback of uncertainty.

¹⁶² *Richardson v Mellish* (1824) 2 Bing 229 per Burrough J at 252

¹⁶³ *Hounga v Allen* [2014] UKSC 47 at [44] per Lord Wilson

It is submitted that the judicial discretion should be confined narrowly and be exercised only where the disproportionality of the consequences to the Claimant of denying her claim to the illegality is so great as to constitute injustice. Given the importance of the rationale of the illegality doctrine in preserving the integrity of the legal system, it is suggested that only the occasioning of injustice justifies exception to the application of the illegality doctrine.