[2025] JMCC Comm 18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2022CD00526

BETWEEN	**OXFORD FINANCE LIMITED (Formerly ALLIANCE FINANCE LIMITED)**	**CLAIMANT**
AND	**CORE DEVELOPMENT & CONSTRUCTION LIMITED**	**1st DEFENDANT**
AND	**JASON SMITH**	**2nd DEFENDANT**

IN CHAMBERS BY VIDEO-CONFERENCE

Appearances: Mr. John Graham KC and Ms. Peta-Gaye Manderson instructed by John G Graham & Co for the Claimant

Mr. Sundiata Gibbs and Ms. Annay Wheatle instructed by Hylton Powell Attorneys-at-Law for the Defendants

Heard: 11th June 2024 and 2nd May 2025

Summary Judgment – Breach of Contract – Whether Contract is unenforceable for being in breach of Statute – Statutory Illegality vs Common-Law Illegality – Unjust enrichment – Breach of Contract

BROWN BECKFORD J

INTRODUCTION

A tale as old as time unfolds,
A debt unpaid, a promise cold.
The ink had dried, the terms were set,
Yet silence met the lender's debt.

but here's the twist,

The debtor speaks with law's defence,
The breach of act, a firm pretence.
"Enforce it not," they boldly plea,
"The debt is void, it's not for me."

[1] Oxford Finance Limited (formerly Alliance Finance Limited), the Claimant, granted a loan, in United States Dollars currency, to Core Development and Construction Limited. Its Director, Jason Smith was the guarantor for the loan. The loan was not repaid in accordance with the terms of the contract. Oxford Finance Limited commenced a claim against them as 1st and 2nd Defendants, respectively, for an alleged breach of contract arising from unpaid foreign currency loans and accrued interest. The law prohibits engaging in the business of buying, selling, borrowing, or lending foreign currency or foreign currency instruments in Jamaica unless one is an authorized dealer. At the time of making the loans, the Claimant did not have the required license and was subsequently convicted for unauthorized foreign currency lending pursuant to **S.22A (2) of The Bank of Jamaica Act**.

[2] In its Amended Claim, the Claimant claimed:

(i) The principal sum of US$370,221.54 (the equivalent of JM$73,046,072.96 converted at a rate of US$1:00 to JM$156.50 on the 2nd July,2021).

(ii) Interest accrued on the principal sum from the 8th August, 2018 to the 31st August 2021 in the sum of US$96,526.53 (the equivalent of JM$15,106,401.95) converted at a rate of US$1:00 to JM$156.50 on the 2nd July 2021).

(iii) A declaration that the Defendants are estopped from denying the existence of the contract.

(iv) In the alternative, damages for unjust enrichment in the sum of US$370,221.54 plus interest accrued on the principal sum from the 9th August 2018 to the 31st August 2021.

(v) In the further alternative, damages for unjust enrichment in the sum of US$206,896.56 plus interest accrued on the principal sum from the 9th August 2018 to the 31st August 2021.

(vi) Costs.

(vii) Such further and other relief as this Honourable Court thinks just

[3] In response to the Amended Claim, the Defendants filed an Amended Defence contending that:

(i) The 1st Defendant only received the sum of US$206,896.56.

(ii) The Loan Agreements were in contravention of **S.22A of The Bank of Jamaica Act**.

(iii) The Loan Agreements are unenforceable, and the Defendants therefore do not have to repay the sums borrowed.

(iv) The grant of unjust enrichment is not available to the Claimant because to grant such relief would be contrary to the objective of **S.22A of The Bank of Jamaica Act**.

[4] The Defendants have made an application for Summary Judgment grounded on the premise that pursuant to **Rule 15.2(a) of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020)**, the Claimant has no realistic prospect of succeeding on its claim, as the contracts which were alleged to have been breached were prohibited by **S.22A of The Bank of Jamaica Act** and are therefore unenforceable.

BACKGROUND

[5] The Claimant and 1st Defendant are companies duly incorporated under the laws of Jamaica. The 2nd Defendant is a businessman and Director of the 1st Defendant. In December 2014, the Claimant entered into an agreement to lend Windsor Commercial Limited **("Windsor")** One Hundred and Fifty Thousand United States Dollars **(US$150,000.00) ("2014 Loan Agreement")**. Subsequently, in or around June 2015, the Claimant entered into an agreement to loan the 1st Defendant Two Hundred and Six Thousand Eight Hundred and Ninety-Six Dollars and Fifty-Six cents **(US$206,896.56) ("2015 Loan Agreement")**. The 2nd Defendant is a Director of both companies and also agreed to guarantee the repayment of the principal sums in both transactions. The principal sums were duly disbursed to the borrowers under each agreement. Subsequently, in 2018, the Claimant and 1st Defendant executed a new written agreement **("2018 Loan Agreement")** consolidating the amounts loaned under the 2014 and 2015 Loan Agreements, totaling Three Hundred and Seventy Thousand Two Hundred and Twenty-One Dollars and Fifty-Four Cents **(US$370,221.54)**. The 2018 Loan Agreement set out repayment terms over thirty-two **(32)** months with an 8% interest rate per annum. The Defendants contend that the 2018 agreement was intended to reflect the terms of the 2014 and 2015 loans separately but inaccurately did so.

[6] The Claimant was charged for, and in January 2022, plead guilty to several counts of the offence of carrying on the business of lending foreign currency without being an authorized dealer, contrary to **S.22A (2) of The Bank of Jamaica Act**. The Claimant was sentenced to pay a fine with respect to each count.

[7] By letters dated 10th November 2022, the Claimant issued a formal demand to the 1st and 2nd Defendants for payment of the sum of Three Hundred and Seventy Thousand Two Hundred and Twenty-One Dollars and Fifty-Four Cents **(US$370,221.54)** plus 8% interest per annum. The Defendants failed to meet the demand for payment. The Claimant commenced its action having failed to secure repayment of the principal and interest.

SUBMISSIONS ON BEHALF OF THE APPLICANTS/DEFENDANTS

[8] Counsel on behalf of the Defendants, Mr. Sundiata Gibbs, contended that Summary Judgment ought to be granted in favour of the Defendants as the Claimant's claim has no realistic prospect of success. He relied on **Rule 15.2(a) of the CPR**, **Swain v Hillman** [2001] 1 ALL ER 91 and **Gordon Stewart v Merrick Samuels** (unreported) SCCA No. 2/2005 (delivered November 18, 2005). Counsel's contention was grounded on the premise that the contracts between the parties are unenforceable on the basis of illegality. Further, restitution for unjust enrichment is not available to the Claimant, as granting such a relief would be contrary to statutory policy.

[9] It was argued that the Loan Agreements, which the Claimant has sued to enforce, contravene **S.22A of The Bank of Jamaica Act** which prohibits unauthorized foreign currency lending. Counsel emphasized that the Claimant had pleaded guilty to breaching **S. 22A(2)**, and this in turn reinforced the illegality of the contract.

[10] Citing **Chitty on Contracts** (31st Edition), **Victorian Daylesford Syndicate v Dott** [1905] 2 Ch 624 and **Dennis v Hew** [2018] JMSC Civ 41, Counsel argued that statutes prohibiting money lending by unauthorized persons are intended to protect the public by regulating exchange rate risks. In light of this, it was submitted that based on this illegality the loan agreements between the parties are unenforceable.

[11] It was further argued that restitution for unjust enrichment is not available when it contradicts statutory policy. Counsel submitted that the prohibition under **S.22A** is regulatory in nature, and aimed at protecting the financial system and mitigating exchange rate risks. As such, restitution would undermine the statutory objective. He relied on the authorities of **Halsbury's Laws of England Contract (Volume 22 (2019))**, **Boissevain v Weil [1950] ALL ER 728** and **Belize International Services Limited v the Attorney General of Belize** [2020] CCJ 9 (AJ) BZ.

[12] In light of this, Counsel for the Defendants submitted that the Claimant has no real prospect of success in enforcing the loan Agreements or recovering under unjust

enrichment. He therefore urged the Court to grant Summary Judgment in favour of the Defendants.

SUBMISSIONS ON BEHALF OF THE RESPONDENT/CLAIMANT

[13] Counsel on behalf of the Claimant, Mr. John Graham KC, contended that in granting Summary Judgment, the Court has to consider whether the Applicant has a real prospect of success pursuant to **Rule 15.2(a) of the CPR**. Counsel relied on **Barbican Heights Limited v. Seafood and Ting International Limited [2019] JMCA Civ 1**. To that end, it was contended that **S.22A of The Bank of Jamaica Act** did not render the Loan Agreements unenforceable. **S.22A(2)**, he submitted, prohibits unauthorized foreign currency lending but does not expressly bar enforcement. Counsel argued that common law principles of illegality apply rather than statutory illegality. He relied on **Patel v Mirza** [2016] UKSC 42 and **Energizer Supermarket Ltd v Holiday Snack Ltd** [2022] UKPC 16.

[14] Counsel Mr. Graham, invoking the test established in **Patel v Mirza** (supra), contended that enforcing the Loan Agreements would not compromise the integrity of the Bank of Jamaica's regulatory framework. He reasoned that the purpose **of S.22A** is to facilitate the Bank's oversight and regulation of foreign currency lending, and refusing enforcement would not advance this objective. He relied on **S.5 of The Bank of Jamaica Act**.

[15] It was further maintained that public policy supports the enforcement of contracts voluntarily entered into by the parties. Counsel argued that even if the Loan Agreements were unlawful, the Defendants willingly entered into them, and the principle of freedom of contract should not be lightly set aside. This, it was submitted, was supported by **SR Projects Ltd v Rampersad** [2022] UKPC 24, where the Privy Council upheld a loan agreement despite regulatory non-compliance, emphasizing that enforcement was justified where the lender had been misled.

[16] In light of the authorities of **Patel v Mirza** *(supra)* and **Projects Ltd v Rampersad** *(supra)*, Counsel Mr. Graham submitted that the Claimant's claim for enforcement and restitution based on unjust enrichment should be upheld. He argued that denying enforcement would not further the statutory objective, and the principle of proportionality supports the Claimant's right to recover. Consequently, Counsel submitted that the Claimant has a real prospect of successfully bringing the claim, and he therefore urged the Court to reject the Defendants' application for Summary Judgment.

ISSUES

[17] S.22A (2) of The Bank of Jamaica Act provides that:

> *No person shall carry on the business of buying, selling, borrowing or lending foreign currency or foreign currency instruments in Jamaica unless he is an authorized dealer.*

There is no dispute that the Claimant breached **S.22A(2) of the Act**. The Claimant was convicted of the offence of carrying on the business of lending foreign currency without being an authorized dealer. The central issue is whether this illegality rendered the loan contract between the Claimant and the Defendant unlawful and unenforceable. The secondary question is whether there is any relief available to the Claimant.

LAW AND ANALYSIS

*Whether the Claimant's contravention of **S.22A (2) of The Bank of Jamaica Act** has rendered the loan agreements between the parties unenforceable?*

[18] The underlying legal principle is that a court will not enforce a contract that is expressly or impliedly prohibited by statute. This principle has been expressed in many cases and scholarly writings. Some, noted here, have been referenced by Counsel in their submissions. Often quoted is **Halsbury's Laws of England (Volume 22 (2019))** where the editors state, "*the second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statutes if the contract is of this class it does*

not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable, whether the parties meant to break the law or not".[1]

[19] More recently in **Patel v Mirza** [2016] UKSC 42 **("Patel")**, Lord Toulson opened his judgement with the words of Lord Mansfield in **Holman v Johnson** (1775) 1 Cowp 341, 343, who said:[2]

> *If, from the plaintiffs own stating 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. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.*

Lord Toulson continued, "*The courts must obviously abide by the terms of any statute*..."[3]

[20] The Caribbean Court of Justice in **Belize International Services Limited v The Attorney general of Belize** [2020] CCJ 9 (AJ) BZ **("Belize International")** stated that a contract prohibited by statute was unenforceable because a court of law was bound to give effect to the terms of the statute.

[21] These seemingly bright-line statements do not however stand alone. The courts, in both **Patel** and **Belize**, made it clear that a contract that was prohibited by law would not prevent the return of monies or other property or benefit transferred under the contract, if such restitutionary relief did not entail the enforcement of the contract.

[22] The Claimant's contention is that though the Claimant was in contravention of the law, the statute did not make the contract entered into by the parties unenforceable. The doctrine of common law illegality therefore applied by virtue of which restitution could be made to the Claimant. For this proposition, they relied on what is now referred to as the "range of factors test" outlined by the majority in **Patel**.

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[1] para 243
[2] [2016] UKSC 42, para 1
[3] Ibid., para 109

[23] In **Patel**, the plaintiff, Mr. Patel, had transferred money to Mr. Mirza, the defendant, intending to use it for betting on Royal Bank of Scotland share prices based on insider information he had expected to receive through contacts at the Bank. This agreement constituted a conspiracy to commit insider dealing under **S.52 of the Criminal Justice Act 1993**. However, the anticipated information never materialized, and no bets were placed. Mr. Patel sought restitution, arguing that the basis for the payment had failed and Mr. Mirza was unjustly enriched. In response, Mr. Mirza contended that restitution should be denied due to the agreement's illegality.

[24] Lord Toulson with whom the majority agreed said:[4]

> *The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted.*

[25] The "range of factors" test articulated in **Patel** is premised on the principle that enforcing an illegal contract should not be permitted where doing so would be detrimental to the integrity of the statute. Lord Toulson, in delivering the judgment of the majority, outlined three key considerations in determining whether public interest would be harmed by enforcement. They are as follows:

(1) The underlying purpose of the prohibition that has been breached, and whether denying the claim would serve that purpose.

(2) Any competing public policy considerations that might be affected by the denial of the claim.

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[4] [2016] UKSC 42, para 109

(3) Whether denying the claim would constitute a proportionate response to the illegality, taking into account factors such as the seriousness of the conduct, its centrality to the contractual arrangement, whether the conduct was intentional, and any disparity in the parties' culpability.

[26] Notably, though the minority disagreed with the range of factors approach favoured by the majority, and opted instead to apply the existing reliance test, they too dismissed the appeal, and like the majority, held that Mr. Patel was entitled to the restitution of the money despite the illegality arising from the agreement.[5]

[27] The Defendants contend that the case at bar is a case of statutory illegality and that the "range of factors" test laid down in **Patel** is not applicable to this case, as **Patel** was restricted to cases of common law illegality. They rely on Lord Toulson's statement at para 106. Counsel for the Defendants relied on **Belize International** in their rejection of **Patel** in cases of statutory illegality.

[28] In **Belize International**, the government of Belize had entered into a contract with Belize International Services Ltd. **("BISL")** to assist it with the development and management of the International Business Companies Registry and the International Merchant Marine Registry of Belize, both of which were government-owned entities. This agreement was renewed on its expiration. Subsequently, the parties amended the original agreement to extend its term. The government later took the position that the Extension Agreement was unlawful, which would therefore render the agreement expired at the end of the renewal period. BISL sued the government who raised, among others, the defence that the Extension Agreement was unlawful in that it was in breach of the Constitution, the Finance and Audit (Reform) Act and the Financial Orders and Stores Orders. The Extension Agreement was held by the lower courts to be illegal and unenforceable. This was the question before the CCJ.

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[5] Ibid., paras 202-203, 210 and 241-243

[29] Anderson and Rajnauth-Lee JJCCJ acknowledged, as was done in **Patel**, that the defence of illegality in contract law was a ***"notoriously difficult area of the law"***.[6] In addressing the question whether the Extension Agreement was illegal and unenforceable they set out four propositions on which they said the common law doctrine of illegality was founded. Firstly, they reiterated the fundamental principle that a contract prohibited by law, either by statute or common law, would not be enforced by the courts as the court was bound to give effect to the statute. To do otherwise would be contrary to public policy. Secondly, a contract that was not prohibited by law, but which was otherwise tainted with illegality, might be enforced by the courts if to refuse enforcement would be disproportionate to the degree of illegality involved. Remedies could include severance and restitution. Thirdly, the prohibition by law of a contract would not prevent the return of monies or other property or benefit transferred under the contract, if such restitutionary relief does not entail the enforcement of the contract. Such a case would not entail an enforcement of the contract but would instead be an unwinding of the contract, restoring the parties to their pre-contract positions. Fourthly, the return of monies or other property or other benefit transferred under the contract will be denied, even where no enforcement of the contract is involved, if such restitutionary relief would undermine or stultify the law prohibiting the contract.

[30] The Justices examined the distinction between statutory illegality, where the statute by clear words or by clear implication prohibits the contract, and common law illegality, where the contract runs counter to one of the established heads of common law public policy. They contended this was a distinction introduced by the majority in **Patel** who determined that the "range of factors" test applied only to common law illegality. They pointed to the seminal principle that a court was bound to give effect to statutory provisions prohibiting a particular contract. This led to their statement in paragraph 59 which is relied on heavily by Counsel for the Defendants, that:[7]

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[6] [2020] CCJ 9 (AJ) BZ, para 20
[7] Ibid., para 59

> *It must be entirely clear that a contract prohibited by statute is unenforceable because a court of law is bound to give effect to the terms of the statute. Where a statute prohibits a contract (whether expressly or by implication) it cannot lie in the mouth of any court to give effect to such a contract (in the absence of legislative provision such as that in section 62 of the UK Criminal Justice Act 1993) by reference to the "range of factors test". That would necessarily be perverse and a threat to the rule of law. It would raise profound philosophical considerations going to separation of powers and democratic rule. Where the contract is rendered illegal and void by statute there is nothing to enforce and that is the end of the matter.*

[31] They were of the view that there was no obvious reason for the majority's distinction between statutory illegality and common law illegality, as both would be void and unenforceable. They considered that it might be more appropriate to do away with a particular common law category if a court was of the view that a contract of that category ought not to be prohibited. For this reason, they indicated they would adhere to the law as it existed before **Patel** and not apply the "range of factors" test to determine whether to enforce a contract prohibited by common law illegality, and would instead adhere to the law which existed prior to **Patel**.

[32] Burgess JCCJ, with Jamadar JCCJ concurring, confronted head-on whether the "range of factors" test applied to cases of statutory illegality. He pointed out that Lord Toulson's statement at paragraph 109 was directed to the application of the "common law doctrine of illegality" and not to common law illegality. **Patel** was therefore applicable to both common law illegality and statutory illegality. This, he said, was inescapable from the context of the case which concerned illegality based on a contravention of the **Criminal Justice Act 1993**. He therefore concluded that the "range of factors" tests applied to both statutory illegality and common law illegality, subject to the obligation of the court to abide by the terms of any statute. He further stated that there was no reason in principle why a distinction should be drawn between the concepts of common law illegality and statutory illegality for the purposes of applying the "range of factors" test. He concluded that based on settled principles of judicial precedent, **Patel's** "range of factors" test applies in Caribbean jurisdictions. He made mention of jurisdictions that applied **Patel** and made specific mention of the comments of McDonald-Bishop JA (as she then was)

in **Alexander House Ltd v Reliance Group of Companies Ltd** [2018] JMCA Civ 18 **("Alexander House")**.

[33] Burgess JCCJ noted that the court in **Patel** did not consider the question of whether the legislation impliedly prohibited the contract in question. This interpretation question, he said, should be considered before the public policy question and the proportionality analysis. It was pointed out that though the agreement between Mr. Patel and Mr. Mirza was to carry out the illegal activity of insider trading in breach of **S.52 of the Criminal Justice Act 1993**, the Act itself provided at **S.63(2)** that no contract should be void or unenforceable by reason of the prohibition of insider dealing in **S.52**.

[34] Wit JCCJ, finding that the agreement as executed was not inconsistent with the constitution and therefore not void or unenforceable, declined to break the deadlock. He asserted that the proper approach to an illegality defence had not been discussed in the lower courts, and given the importance of that area of law, it should be dealt with by a full bench of the court.

[35] The result was that, contrary to the submissions of Counsel for the 1st and 2nd Defendants, the "range of factors" test in **Patel** was not confined to cases of common law illegality in **Belize**, given that the justices who opined were evenly split. As in **Patel**, despite the differing approaches, the Justices were at one in the resolution of the appeal.

[36] I must point out that **Patel** was definitively accepted by the Court of Appeal in **Cockings (Herbert) v Cockings (Grace)** [2018] JMCA Civ 17 **("Cockings")**. Phillips JA reviewed the trial judge's decision in light of **Patel**, which was decided after. Clear acceptance of **Patel** as relevant law can be seen in paragraph 55. Applying **Patel**, the court was now required to:[8]

> *Based on these guiding principles, the court, in the instant case, based on the "public interest" test outlined in Patel, is now required to:*

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[8] [2018] JMCA Civ 17, para 57

> *(a) consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim;*
>
> *(b) consider any other relevant public policy on which the denial of the claim may have an impact; and*
>
> *(c) consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.*

[37] Phillips J made mention of the common law doctrine of illegality but did not make a distinction between statutory illegality and common law illegality with regard to the applicability of **Patel**. **Cockings** was a case of common law illegality, in which Mr. Cockings sought to transfer property to his ex-wife with a view to shielding the property from forfeiture by virtue of his illegal drug dealing activities.

[38] In **Alexander House**, McDonald-Bishop JA alluded to the concepts of statutory illegality and common law illegality when she considered the enforceability of a power of sale in the context of a challenge to the legality and enforceability of a mortgage instrument. In adopting the rationale from **Patel**, McDonald-Bishop JA accepted the position that the existence of an illegal contract does not, in itself, automatically preclude a claimant from recovering sums paid to the defendant. She stated:[9]

> *[61] In Patel v Mirza, the issue related to a claim for the return of money paid by the claimant to the defendant, pursuant to a contract to carry out an illegal activity, which was not carried out due to circumstances beyond the parties' control. The Supreme Court of England reaffirmed the position that a civil court will not enforce an illegal contract, but the majority of the court adopted a more modern approach and held that the claimant was not precluded from recovering the moneys that he paid to the defendant. The majority ordered restitution despite the tainted contract.*
>
> *[62] Lord Toulson, speaking for the majority, noted:*
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> > *"The question whether a statute has the implied effect of nullifying any contract which infringes it requires a purposive construction of the statute, as illustrated by the decision of the Court of Appeal in*

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[9] [2018] JMCA Civ 18, paras 61-62 and 64-65

> ***Hughes v Asset Managers plc*** *... which the Commission commended."*
>
> *...*
>
> *[64]* ***Hughes v Asset Managers plc and Patel v Mirza have made it abundantly clear that the question whether a statute has the effect of nullifying any contract which infringes it requires a purposive construction of the statute. Mr Foster, with the aid of Mr Cowan in their written submissions, also submitted that the challenge to the validity of a mortgage based on a silent statutory prohibition does not make the underlying contract between the parties void and unenforceable****.* (Emphasis mine)
>
> *[65] Patel v Mirza also demonstrates that a mere finding of illegality does not necessarily lay the matter of recoverability under the contract finally and conclusively to rest. This decision stands as strong persuasive authority which could influence a trial judge to make an order for restitution for unjust enrichment or to adopt the reasoning of the minority and make no such award…*

[39] This distinction between statutory illegality and common law illegality lies at the heart of the submissions to the Court.[10] Statutory illegality occurs where the legislative intent is to prohibit the contract and not merely the way in which it is performed. The contract may be expressly prohibited by the statute or clearly implied. Common law illegality occurs where the contract runs counter to one of the established heads of common law public policy. The usual example is an agreement to commit a crime. In a case of statutory illegality, the court must give effect to the terms of the statute as to do otherwise would be perverse and a threat to the rule of law.

[40] This distinction between statutory illegality and common law illegality was also addressed by the Privy Counsel in **Energizer Supermarket Ltd v Holiday Snack Ltd** [2022] UKPC 16 **("Energizer Supermarket")**, where it was pointed out that the distinction between statutory illegality and common law illegality was not the source of the illegality, but rather the effect of the illegality. With statutory illegality, a court would be concerned with applying what is laid down in the statute, whether expressed in the law or implied

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[10] The difference was addressed in **Belize International** in paragraphs 42 to 56.

from the context, as to the effects of the illegality. This was what was meant by Lord Toulson's comment that the "*courts must obviously abide by the terms of any statute"*. Where the effects of the illegality had not been laid down in the statute, then common law illegality was to be applied. The distinction was to be determined by ordinary statutory interpretation. Here the Privy Council seemed to accept, contrary to Burgess and Jamadar JJCCJ, that **Patel's** "range of factors" test applied to common law illegality and not statutory illegality. The court pointed out that common law illegality did not arise where there is statutory illegality.[11]. This was also made clear in **Henderson v Dorset Healthcare University NHS Foundation Trust [2021] AC 563 ("Henderson")**, where it was emphasized that **Patel** concerned common law illegality rather than statutory illegality.[12]

[41] This distinction between statutory illegality and common law illegality and the different effect on contract is not new to this jurisdiction. In **Smith's Trucking Service & Anor v Jamaica Redevelopment Foundation Inc** [2012] JMCA Civ 63 **("Smith's Trucking")**, Morison JA (as he then was) pointed out that where there was no express provision in the statute, the matter was one of construction of the statute. He approved the dicta that courts should be slow to imply the statutory prohibition of contracts and should only do so where the implication is quite clear, stating:[13]

> *It is also a fundamental principle that "the court will not enforce a contract which is expressly or impliedly prohibited by statute." (Halsbury's Laws of England 4th edition reissue, para 869). Of course, if there is no express provision, the matter is one of construction of the statute, which may affect either the formation or the performance of the contract (para 870).*

[42] Morrison JA went on to conduct a review of the relevant authorities which the Court finds useful to set out in full.[14]

> *[54] The authorities of some antiquity set out the principle as stated above with the same clarity. In **De Begnis v Armistead**, which related to the*

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[11] [2022] UKPC 16, 40
[12] [2021] AC 563, para 74
[13] [2012] JMCA Civ 63, para 53
[14] [2012] JMCA Civ 63, paras 54-57

recovery of money payable under an agreement between the parties to share the profits to be derived from opera and ballet performances in a theatre known by them to be unlicensed, contrary to the specific provisions of a statute, Tindal CJ indicated that he had no doubt that the agreement between the parties was an illegal agreement. He endorsed the dictum of Holt CJ in ***Bartlett v Vinor*** *(Carth. 252) to this effect:*

> *"Every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute"*

He also endorsed the dictum of Lord Ellenborough in Langdon v Hughes (1 M & S 596) who said this:

> *"what is done in contravention of the provisions of an act of parliament, cannot be made the subject of an action."*

[55] In ***M'Kinnell v Robinson****, the defendant refused to pay the plaintiff's claim for monies lent on the basis that the amount had been borrowed by him, as the plaintiff well knew, to settle his gaming debts which arose out of his playing an illegal game of Hazard in an illegal gambling room. Lord Abinger CB had no difficulty in stating that the law had been fully settled that the repayment of money, lent for the express purpose of accomplishing an illegal object cannot be enforced. In this case he stated that the monies had been lent for the express purpose of "a violation of the law, and enabling the borrower to do a prohibited act". The defendant succeeded.*

[56] In ***re An Arbitration between Mahmoud and Ispahani****, the facts were that the plaintiff who had a licence to sell linseed oil sold same to the defendant who misrepresented that he too had a licence when he did not. It was unlawful at the time to buy or sell linseed oil without a licence pursuant to a 1919 Order. The defendant refused delivery and relied on the prohibition to reject the claim of the plaintiff. He succeeded. It was held that the contract of sale was prohibited and that the prohibition was in the public interest, so no claim could be made under the contract. Bankes LJ made this clear statement:*

> *"The Order is a clear and unequivocal declaration by the Legislature in the public interest that this particular kind of contract shall not be entered into…"*

He added, as set out before in para [30] herein but which bears repetition:

> *"..as the language of the Order clearly prohibits the making of this contract, it is open to a party, however shabby it may appear to be, to say that the Legislature has prohibited this contract, and therefore it is a case in which the Court will not lend its aid to the enforcement of the contract."*

Scrutton LJ made his contribution forcefully in this way. He indicated that the law had been laid down in ***Cope v Rowlands****, (2 M&W 157) where Parke B in delivering the judgment of the court had stated:*

"It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect."

The learned judge was adamant that it mattered not whether the prohibition in the statute was in protection of the revenue or any other object, although this approach has been viewed differently in the Court of Appeal of the Eastern Caribbean States (see ***Weekes v Gibbons****). Scrutton LJ indicated that;*

> *"The sole question is, whether the statute means to prohibit the contract?' If the contract is prohibited by statute the Court is bound not to render assistance in enforcing an illegal contract." (emphasis supplied)*

It was also his view that it mattered not whether the contract could be performed lawfully or unlawfully. In that case, the contract was absolutely prohibited, and if the act is prohibited by statute for the public benefit, "the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality".

[57] In ***Spector v Ageda****, sums were lent by the plaintiff solicitor to liquidate sums previously lent by her sister to borrowers, which she knew included an amount representing compound interest which was in breach of the Moneylenders Act, and illegal. The sister was not licensed under the Act. Megarry J in a painstakingly thorough analysis of fairly complicated facts, involving other issues, stated at page 510C-D:*

> *"It seems to me that where, as here, the subsequent transaction is entered into by a person who not only knows of the partial illegality of the prior contract but also is in a real degree responsible for it and wishes to avoid the consequences of it (as I think that Mrs Spector probably did) then unless that partial illegality is shown to relate solely to some defined portion of the subsequent transaction, so that only that defined portion is affected, the whole of the subsequent transaction will be affected by the illegality."*

Earlier, he also made it clear at page 509-D that:

> *"…if Mrs Spector lent money to the borrowers knowing that it was to be used for the discharge of an illegal loan, Mrs Spector's loan is also tainted with illegality, and she cannot enforce repayment of her loan."*

[43] One defining question Morrison JA posed was whether the claimant had to disclose the illegality in order to succeed. This position has been overtaken by the principles of **Patel**. In **Stoffel & Co (Appellant) v Grondona (Respondent)** 2020 UKSC 42 **("Stoffel")**, Lord Lloyd Jones, with whom Lord Reed, Lord Hodge, Lady Black and Lady Arden agreed, stated that the change of law brought about by **Patel** meant that: (1) the question whether a claimant must rely upon illegal conduct to establish a cause of action is no longer determinative of an illegality defence, and (2) while profiting from one's own wrong conduct remained a relevant consideration, it is no longer the true focus of the inquiry. He stated:[15]

> *...As Lord Toulson explained in Patel at paras 99-101 (cited at para 22 above), adopting the reasoning of McLachlin J in Hall v Hebert supra, at pp 175-176, the notion that persons should not be permitted to profit from their own wrongdoing is unsatisfactory as a rationale of the illegality defence. It does not fully explain why particular claims have been rejected and it leads judges to focus on the question whether a claimant is "getting something" out of the wrongdoing, rather than on the question whether to permit recovery would produce inconsistency damaging to the integrity of the legal system...*

[44] The Privy Council in the case of **SR Projects Ltd v Rampersad** [2022] UKPC 24 **("SR Projects")**, also a licensing case, referred to the dicta of Devlin LJ in **Archbolds (Freightage) Ltd v S Spanglett Ltd [1961] 1 QB 374, 389**, stating:[16]

> *In Archbolds (Freightage) Ltd v S Spanglett Ltd [1961] 1 QB 374, 389, Devlin LJ observed that "it does not follow that because it is an offence for one party to enter into a contract, the contract itself is void." He stressed the need to "have regard to the language used and to the scope and purpose of the statute" and concluded that, in that case:*
>
> > *"the purpose of this statute is sufficiently served by the penalties prescribed for the offender; the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute. Moreover, the value of the relief given to the wrongdoer if he could escape what would otherwise have been his legal obligation might, as it would in this*

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[15] 2020 UKSC 42, para 46
[16] [1961] 1 QB 374, 389, para 51

> *case, greatly outweigh the punishment that could be imposed upon him, and thus undo the penal effect of the statute."*

[45] He continued:[17]

> ***A critical development has been to see the proposition that a contract prohibited by statute is void, not as a rule of common law, but as, in the first instance, a question of interpretation of the statute.*** *In Henderson [2021] AC 563, para 75, the Supreme Court approved the following statement of the law by Underhill LJ in Okedina v Chikale [2019] EWCA Civ 1393; [2019] ICR 1635, para 12: Page 18*
>
> > *"The underlying principle is straightforward: if the legislation itself has provided that the contract is unenforceable, in full or in the relevant respect, the court is bound to respect that provision. That being the rationale, the knowledge or culpability of the party who is prevented from recovering is irrelevant: it is a simple matter of obeying the statute."*
>
> *Or, as Lord Hamblen succinctly put it in Henderson at para 74: "Where the effects of the illegality are dealt with by statute then the statute should be applied."* (Emphasis mine)

[46] The current state of the law, as I understand it, simply put, is that where the statute itself provides that the contract is unenforceable, whether expressly or impliedly, then the court must respect that provision and apply the statute. Where the statute does not expressly provide for the effects of the illegality, then the court must conduct an analysis to determine whether it is the clear implication that any contract made in contravention of statute is unenforceable. This is a question of interpretation of the statute. Where the statute does not provide that a breach renders the contract unenforceable, then the relevant considerations would be to determine whether it was in the public interest to enforce the contract, applying **Patel**. Some further guidance on the application of **Patel** was given in **Henderson**. Lord Hamblen, with whom Lord Reed, Lord Hodge, Lady Black, Lord Lloyd-Jones, Lady Arden and Lord Kitchin agreed, stated that **Patel** was intended to provide guidance as to the proper approach to the common law illegality defence across civil law more generally. He pointed out that **Patel** did not represent year zero of

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[17] Ibid., para 52

the applicable law, and that the precedents built up in previous illegality cases remained valuable and applicable unless it was shown that they were incompatible with the approach in **Patel**. This was necessarily so as the principles identified by Lord Toulson were to be found in existing case law.

[47] The Court of Appeal recently addressed the enforceability of illegal contracts in **Caribbean Real Estate Investment Fund v King (Valrine)** [2023] JMCA Civ 18 **("Caribbean Real Estate")**. The case examined the consequences of failing to obtain a license required under the **Real Estate (Dealers and Developers) Act**.

[48] Brooks P conducted an examination of the relevant cases. He stated:[18]

> *[16] The principle guiding the assessment of these issues is that a court will not enforce an illegal contract. Parke B made this point in **Cope v Rowlands** 2 M & W 149; (1836) 150 ER 707 at page 710 of the latter as follows:*
>
> > *"**It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect**. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only because such a penalty implies a prohibition." (Emphasis supplied)"*
>
> *[17] Additionally, in **In re An Arbitration Between Mahmoud and Ispahani** [1921] 2 KB 716, a government Order stipulated that both the buyer and seller of linseed oil needed licences to conduct that transaction. The plaintiff had the licence to sell linseed oil but the defendant did not have a licence to purchase it. The plaintiff sold linseed oil to the defendant. The Court of Appeal had to consider whether the contract was lawful where the defendant did not have a licence when the contract was made. Bankes LJ, at page 726, opined that such a contract could not be enforced. Scrutton LJ relied on the dictum in **Cope v Rowland** and ruled that if a statute forbids a conduct, the court cannot enforce an illegal contract. He said this at page 729 as follows:*
>
> > *"…If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract. …In my view*

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[18] [2023] JMCA Civ 18, paras 16-22

> *the Court is bound, once it knows that the contract is illegal, to take the objection and to refuse to enforce the contract, whether its knowledge comes from outside sources. The Court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the Court refuses to enforce such a contract. The other point is that, where a contract can be performed lawfully or unlawfully, and the defendant without the knowledge of the plaintiff elects to perform it unlawfully, he cannot plead its illegality. That in my view does not apply to a case where the contract sought to be enforced is altogether prohibited, and in this case to contract with a person who had no licence was altogether prohibited. It was not that the plaintiff might lawfully contract with the defendant and chance his getting the licence before the plaintiff delivered the goods. The contract was absolutely prohibited; and in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition…"*

[18] Satrohan Singh JA, in delivering his judgment in ***Weekes v Gibbons****, cited, with approval, at page 145 of the report, a portion of that quote from* ***In re An Arbitration Between Mahmoud and Ispahani****.*

[19] The learned editors of Cheshire Fifoot & Furmston's Law of Contract, 17th edition, page 454, made the point that a contract is illegal if the existence of the contract is prohibited and that contract is void from the moment it was created. They said:

> *"A contract is illegal as formed if its very creation is prohibited, as for example where one of the parties has neglected to take out a licence as required by statute. In such a case it is void ab initio. It is a complete nullity under which neither party can acquire rights whether there is an intention to break the law or not." (Italics as in original)*

[20] … In ***Cope v Rowlands****, Parke B considered the question of whether a particular statute meant to prohibit a contract by a broker. He stated that the court must determine whether the statute only imposed the penalty to obtain revenue, and therefore only requires the person acting as a broker to pay a penalty, if he or she does not comply with the revenue requirement. He further stated that the court must consider whether the purpose of the legislation is to protect the public and prevent persons from acting as brokers without the necessary licence. Parke B went on to show that the requirements in that statute for particular standards and ethical behaviour demonstrated that the licence requirement was intended for the benefit of the public.*

[21] Buckley J at page 630 of ***Victorian Daylesford Syndicate Ltd v Dott*** *[1905] 2 Ch 624, determined that once the objective of the statute is to prohibit an act, so as to protect the public, that act is illegal. In the context*

of assessing a complaint against a moneylending contract, he said, on page 629 of the report:

> *"There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced."*

He also highlighted, relying on authorities such as Cope v Rowlands, that statutes may impose a penalty for the protection of the revenue or it may impose a penalty for the additional purpose of protecting the public. He later said at page 630 that:

> *"If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal."*

[22] Satrohan Singh JA, at pages 146 to 147 of Weekes v Gibbons, considered the relevant portions of the Registration of Building and Civil Engineering Contracting Undertakings Ordinance 1968 which required the registration of building and civil engineering contracts. He determined, at page 147, that since contracts should only be registered if they exceeded $10,000.00, as well as the fact that it did not apply to the Crown and the provision of additional penalties for continuing offences, the contract was not "absolutely prohibited". He found that the contract could be performed without registration provided that the contractor is willing to pay the initial and continuing penalties or if the contractor, upon discovery of the breach, registers. He also added that the only remedy for the breach was the enforcement of the penalty. He concluded that the registration requirement was not for the protection of the public and it did not absolutely prohibit the performance if there was no registration.

[49] Victorian Daylesford Syndicate, Limited v Dott [1905] 2 Ch 62, referred to by Brooks P in **Caribbean Real Estate**, concerned a moneylending transaction. Buckley J was required to assess whether the provisions of **The Moneylending Act** were framed in such a manner as to render the contract in question unlawful and unenforceable. Buckley J reaffirmed the established principle that any contract expressly or impliedly prohibited by statute is illegal and therefore unenforceable. He categorized such statutes into two distinct groups: (1) those in which penalties are imposed solely for the purpose of protecting revenue, and (2) those where penalties serve not only revenue related objectives but also function to safeguard public interests. He emphasized that if a statutory provision is determined to have a public protection purpose, then any contract contravening that provision is deemed to be impliedly prohibited and thus illegal. In his analysis, Buckley J found that the issue at hand was unequivocally clear, with no element

of revenue protection at play. He concluded that the licensing requirements imposed on moneylenders were designed exclusively for the protection of the public, thereby reinforcing the principle that statutory objectives play a crucial role in determining the legality and enforceability of contracts.[19]

> *obviously and notoriously for the protection of those who deal with him (money lenders). The purpose is a public purpose, and therefore upon all the authorities the act for the doing of which a penalty is imposed is an act which is impliedly prohibited by the statute, and is consequently illegal.*

[50] In **Caribbean Real Estate**, Mrs. King was required to perform the contract. The Appellant had sought orders for specific performance or a power of attorney to carry out the obligations of Mrs. King, as well as, in the alternative, damages for breach of contract. The Appellant therefore sought to have the contracts, as it was, performed. There was no issue of restitutionary relief. What the claimant wanted was for the contract to be performed. Brooks P concluded that the contract entitling the Appellant to receive certain sums was illegal and therefore unenforceable. Consequently, the Appellant had no legal basis to pursue a claim under the contract, resulting in the dismissal of the counterclaim.

[51] The Court of Appeal seemed to have accepted that **Caribbean Real Estate** was a case of statutory illegality. **Patel** was not mentioned at all in the judgment. The cases of **Energizer Supermarket**, **SR Projects** and other subsequent cases expounding on the principles enunciated in **Patel**, which dealt with the different approaches to be taken to cases of statutory illegality and common-law illegality, were also not considered.

[52] In this consideration, the case of **Energiser Supermarket** is of some assistance. In that case a distinction was drawn between an instance where making the contract without the licence was prohibited, and one where the agreement could be lawfully performed by the subsequent grant of a license. In **Energiser**, the Privy Council considered that the contract for the laying of a gas pipeline was separate from the licencing regime for the laying of a gas pipeline. The court found that the words, context

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[19] [1905] 2 Ch. 624, pg 630

and purpose of **The Petroleum Act** were consistent with the licencing regime being enforced through criminal law, thereby leaving contractual and proprietary rights to be enforced in the normal way, according to the normal rules through civil law. Finding that **The Petroleum Act** did not expressly or impliedly prohibit the agreement, the court went on to consider whether enforcement could be denied for common law illegality.

[53] In considering whether the applicable legislation in **SR Projects** expressly or impliedly prescribed the consequences of a breach of the statutory prohibition, the court considered the purpose of the legislation, that it would be unreasonable for the public to acquaint themselves with the statutory requirements, that a range of sanctions were provided for breaches of the regulations which could be invoked in a manner proportionate to the breach, and that rendering all contracts unenforceable by the lender or depositor would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute. Further, it would enable the society to profit from its wrongdoing by relieving it of its contractual obligations, limiting the lender or depositor to restitution of the sums lent. The court found that it could not have been the intent of the legislature to prohibit such contracts.

[54] In **Rogelio Antonio Hawkins v Abarbanel** Limited (Unreported, CICA, 11 January 2024), the Cayman Islands Court of Appeal agreed with the lower court that a lender who did not have the requisite licence was still entitled to enforce its loan agreement with the borrower and the accompanying security, as the relevant Acts did not expressly prohibit the enforcement of contracts made by an unlicensed person. The court found:

(1) That the purpose of the Acts was to control the level of participation in business by persons who were not Caymanian, and not to protect a certain section of the public who would be liable to exploitation.

(2) That the statutes had their own mechanisms for dealing with the breach.

(3) That judges of England, Canada and Australia have consistently warned that courts should be slow to infer a prohibition of contracts where the legislation contains no express prohibition, and has its own mechanisms for dealing with the breach.

This case echoes the words of Morrison JA in **Smith's Trucking**, that a court should be slow to imply the statutory prohibition of contracts, only doing so where the implication is clear.

[55] The first question in determining the present application is whether the statute expressly or impliedly provides for the effect of the illegality. There is no express provision in the statute as to the effect of the illegality. **S.22A** was considered by Tie J in **Dennis v Hew** [2018] JMSC Civ 41 **("Hew")**, who found that **S.22A** rendered any contract made in contravention of its provisions illegal. She did not however consider, as it was not raised, whether the statute provided for the effects of the illegality, that is, whether it was a case of statutory illegality or common law illegality.

[56] In **Hew**, Tie J declined to apply **Patel** on the basis that there was no claim for unjust enrichment, and that even if there was, the intended bet, which was the purpose of the transfer, did not take place. The defendant therefore had received the money without acting on the contract. There was no evidence that she said Mr. Hew had retained the money for himself and not invested it, which would be reflective of unjust enrichment. In that event, **Hew** could be distinguished from the instant case where there is a claim for unjust enrichment and the 1st Defendant clearly enjoyed the benefit of the loan.

[57] In considering whether **The Bank of Jamaica Act** impliedly barred the making of any contract for a foreign currency loan without a license, the penalty section of **S.22D** may offer some insight. It provides:

> *22D. — (1) Any person who contravenes any provisions of this Part or Part IVB or fails to comply with any requirement imposed by or under this Part or Part IVB shall be guilty of an offence and shall be liable-*

> *(a) on summary conviction in a Resident Magistrate's Court to a fine not exceeding fifty thousand dollars or to imprisonment. for a term not exceeding one year or to both such fine and imprisonment;*
>
> *(b) on conviction before a Circuit Court to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.*
>
> *(2) Where an offence is committed under this Part or Part IVB the Court may, if it thinks fit—*
>
> *(a) in relation to an offence involving any foreign currency or foreign currency instrument, order the foreign currency or foreign currency instrument, as the case may be, to be forfeited; and*
>
> *(b) impose a larger fine not exceeding three times the amount or value of the currency or instrument, as the case may be.*
>
> *(3) No proceedings for an offence punishable under this Part or Part IVB shall be instituted, except by or with the consent of the Director of Public Prosecutions.*
>
> *(4) Subsection (3) shall not be construed as preventing the issue or execution of a warrant for the arrest of any person in respect of such an offence or the remanding in custody or on bail of any person charged with such an offence.*

[58] The statue provides for a fine and or imprisonment. It also goes on to provide that the court may, if it thinks fit, order the foreign currency or foreign currency instrument to be forfeited and impose a larger fine not exceeding three times the amount or value of the currency or instrument. It seems to the Court to be inescapable that in the appropriate case, a court could deny the lender the benefit of the contract he has entered into in breach of the statute, otherwise he would retain such benefit. In this way the criminal law already provides a sanction where a contract is made in contravention of the statute. There also appears to reside in the Director of Public Prosecutions a discretion as to whether to bring criminal charges for a breach of **S.22**. In those circumstances, it could not be said that the statute clearly intended to completely prohibit the making of such contracts.

[59] The conclusion the Court reaches is that the contract between the Claimant and 1st Defendant was not a contract prohibited by the statute and thus was not a case of

statutory illegality. Consequently, the Claimants' contention that this is a case of common law illegality, and that the principles of **Patel** are to be applied, succeeds.

[60] The question for the trial judge will be, in the words of Lord Toulson, "*whether allowing recovery for something which was illegal would produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system."*[20] Lord Toulson concluded that:[21]

> *The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.*

These are matters to be properly ventilated in a full hearing.

VALIDITY OF GUARANTEE

[61] A word on the validity of the guarantee. The guarantee will be tainted with the illegality of the loan contract. Morrison JA in **Smith's Trucking** articulated the relevant law as follows:[22]

> *It is also accepted that:*

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[20] [2016] UKSC 42, para 100
[21] Ibid., para 120
[22] [2012] JMCA Civ 63, para 53

> *"A contract or security not in itself illegal will be tainted with illegality and hence be unenforceable if it is founded upon another, illegal contract... the second contract will be enforceable if, though factually connected with the original illegal contract, it is remote from it and cannot be said in reality to spring from, or be founded on it." (Halsbury's, para 878)*

One of the leading authors on the law of contract, Sir Guenter Treitel, in his text states the principle in this way:

> *"Collateral transactions may be infected with the illegality of a principal contract if they help a person to perform an illegal contract, or if they would, if valid, make possible the indirect enforcement of an illegal contract. Thus a loan of money is illegal if it is made to enable the borrower to make or to perform an illegal contract, or to make an illegal payment or to pay a debt contracted under an illegal contract."*

POSTSCRIPT

[62] In the matter of **James, Dalma (Trustee for the Bankrupt for the Estate Jennifer Messado in Bankruptcy) v Stewart, Lauriston and Tanique Stewart** [2025] JMCC Comm 06, in applying **Patel**, I did not have the benefit of reviewing the authorities discussed above. I did not therefore, draw the distinction between statutory and common law illegality with respect to the contracts examined therein. The relevant section **(S.7)** did not provide expressly that the contract would be unenforceable as in other sections **(S.8)**, which would have therefore warranted this analysis.

ORDERS

1. Application for Summary Judgment is refused.
2. Cost of the application to the Claimant/Respondents to be taxed if not sooner agreed.
3. Defendants'/Applicants' Attorney-at-Law to prepare file and serve Order.

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Judge