14 ILLEGALITY AND CAPACITY TO CONTRACT

Contracts may be void by reason of a statutory provision or on grounds of public policy. Alternatively, contracts may be illegal.

An example of contracts which statute renders void and unenforceable is gaming and wagering contracts, under s. 18 of the Gaming Act 1845.

SECTION 1: CONTRACTS VOID ON GROUNDS OF PUBLIC POLICY

A: CONTRACTS IN RESTRAINT OF TRADE

A restraint of trade is a contractual undertaking whereby one party agrees to restrict his freedom to trade or to conduct his business in a particular area for a specified period of time.

(a) Basic principles

Nordenfelt* v *Maxim Nordenfelt Guns & Ammunition Company Ltd
[1894] AC 535 (HL)

The defendant, who owned patents and operated a business of manufacturing quick-firing guns and ammunition, sold the business and its goodwill to a company. The agreement contained a covenant on the part of the defendant that for 25 years the defendant would not, directly or indirectly, engage in the business of a manufacturer of guns or ammunition except on behalf of the company, and would not engage in any business competing or liable to compete in any way with the business being carried on by the company. The House of Lords was asked to consider only the first part of the covenant (relating to engaging in a gun manufacturing business). Held:

it was valid because even though it was a worldwide restriction, there was only a limited number of customers (governments of this and other countries) so that the restriction was not wider than was necessary to protect the company and it was not injurious to the public interest. (The Court of Appeal had held that the second part was void because it went further than was necessary to protect the business acquired, see below.)

LORD MACNAGHTEN: In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and therefore void. In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognised that all partial restraints might be good, though it was thought that general restraints, that is, restraints of general application extending throughout the kingdom, must be bad. Why was the relaxation supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any inherent or essential distinction between the two cases. 'Where the restraint is general,' says Lord Macclesfield, in *Mitchel* v *Reynolds* (1711) 1 P Wms 181, 'not to exercise a trade throughout the kingdom,' the restraint 'must be void, being of no benefit to either party and only oppressive. . . .' Later on he gives his reason. 'What does it signify,' he says, 'to a tradesman in London what another does at Newcastle; and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other.' . . .

The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.

Notes

1. The presumption that contracts in restraint of trade are void can be rebutted by a party seeking to rely on the restraint showing that the restraint is reasonable as between the parties. Once this is established, the restraint can be relied upon unless the party seeking to prevent its enforcement shows that it is contrary to the public interest.

2. *Nordenfelt* v *Maxim Nordenfelt* concerned a covenant on the sale of a business (i.e., that the vendor would not carry on a business competing with the business purchased). These covenants are more likely to be held to be reasonable and enforceable because a price will be paid for the goodwill of the business, and therefore the purchaser has a legitimate interest in protect-

ing that goodwill and the business connections. It would be unfair to the purchaser if the vendor could then set up a competing business.

However, the restraint must be restricted to protecting only the goodwill of the business actually sold (see *British Reinforced Concrete Engineering Co. Ltd* v *Schelff* [1921] 2 Ch 563).

(b) Covenants between employer and employee

The restriction must seek to protect a *legitimate interest* of the employer (i.e., influence over customers or trade secrets) as opposed to protection against skills acquired by the employee which might render him a potential competitor. The restriction must be reasonable as between the parties and no wider than reasonably necessary to protect the business connections or confidential information of the employer. There are three factors: subject matter, area, and duration.

Herbert Morris Limited* v *Saxelby
[1916] 1 AC 688 (HL)

The plaintiff company, leading manufacturers of hoisting machinery in the UK, employed the defendant as a draftsman and then as an engineer on a two-year contract. The terms of this contract contained a covenant by the defendant that he would not, 'during a period of seven years from ceasing to be employed by the company, either in the United Kingdom of Great Britain or Ireland, carry on either as principal, agent, servant or otherwise, alone or jointly or in connection with any other person, firm or company, or be concerned or assist, directly or indirectly, whether for reward or otherwise, in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, or hand overhead travelling cranes'. The plaintiff company sought to enforce this covenant. Held: the covenant was wider than was required for the protection of the plaintiff company and was not enforceable.

LORD PARKER OF WADDINGTON: It will be observed that in Lord Macnaghten's opinion [in *Nordenfelt*] two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties, and, secondly, it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favour it is imposed; to be reasonable in the interests of the public it must be in no way injurious to the public.

With regard to the former test, I think it clear that what is meant is that for a restraint to be reasonable in the interests of the parties it must afford *no more than* adequate protection to the party in whose favour it is imposed. So conceived the test appears to me to be valid both as regards the covenantor and covenantee, for though in one sense no doubt it is contrary to the interests of the covenantor to subject himself to any restraint, still it may be for his advantage to be able so to subject himself in cases where, if he could not do so, he would lose other advantages, such as

the possibility of obtaining the best terms on the sale of an existing business or the possibility of obtaining employment or training under competent employers. As long as the restraint to which he subjects himself is no wider than is required for the adequate protection of the person in whose favour it is created, it is in his interest to be able to bind himself for the sake of the indirect advantages he may obtain by so doing. It was at one time thought that, in order to ascertain whether a restraint were reasonable in the interests of the covenantor, the Court ought to weigh the advantages accruing to the covenantor under the contract against the disadvantages imposed upon him by the restraint, but any such process has long since been rejected as impracticable. The Court no longer considers the adequacy of the consideration in any particular case. If it be reasonable that a covenantee should, for his own protection, ask for a restraint, it is in my opinion equally reasonable that the covenator should be able to subject himself to this restraint. The test of reasonableness is the same in both cases.

It was suggested in argument that the interests of the public ought to be considered and weighed in determining whether a restraint is reasonable in the interests of the parties. I dissent from this view. It would, indeed, entirely destroy the value of Lord Macnaghten's tests of reasonableness. The first question in every case is whether the restraint is reasonable in the interests of the parties. If it is not, the restraint is bad. If it is, it may still be shown that it is injurious to the public, though, as I pointed out in the case referred to, the onus of so showing would lie on the party alleging it.

My Lords, it appears to me that Lord Macnaghten's statement of the law requires amplification in another respect. If the restraint is to secure no more than 'adequate protection' to the party in whose favour it is imposed, it becomes necessary to consider in each particular case what it is for which and what it is against which protection is required. Otherwise it would be impossible to pass any opinion on the adequacy of the protection.

. . . It was argued before your Lordships that no distinction can be drawn between the position of the purchaser of the goodwill of a business taking a covenant from his vendor and the case of the owner of a business taking a covenant from his servant or apprentice. In both cases it was said that the property to be protected was the same and the dangers to be guarded against the same. I am of opinion that this argument cannot be accepted. The distinction between the two cases is, I think, quite clear, and is recognized both by Lord Macnaghten and Lord Herschell in the *Nordenfelt Case* [1894] AC 535. The goodwill of a business is immune from the danger of the owner exercising his personal knowledge and skill to its detriment, and if the purchaser is to take over such goodwill with all its advantages it must, in his hands, remain similarly immune. Without, therefore, a covenant on the part of the vendor against competition, a purchaser would not get what he is contracting to buy, nor could the vendor give what he is intending to sell. The covenant against competition is, therefore, reasonable if confined to the area within which it would in all probability enure to the injury of the purchaser.

It is quite different in the case of an employer taking such a covenant from his employee or apprentice. The goodwill of his business is, under the conditions in which we live, necessarily subject to the competition of all persons (including the servant or apprentice) who choose to engage in a similar trade. The employer in such a case is not endeavouring to protect what he has, but to gain a special advantage which he could not otherwise secure. I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld it had been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that

he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained.

In *Mason* v *Provident Clothing and Supply Co.* [1913] AC 724 it was argued, . . . that an employer might reasonably say 'I will not have the skill and knowledge acquired in my employment imparted to my trade rivals,' and that the validity of the restraint did not depend upon personal contact with the employer's customers, but upon the fact that the employee gained that general knowledge which put him into a position to compete with his master and made him a source of danger, against which the master was entitled to protect himself.

This argument was rejected by your Lordships' House, and the restraint in question was held bad, as being wider than was necessary to protect the employer from injury by misuse of the employee's acquaintance with customers or knowledge of trade secrets. In fact the reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is — having regard to the duties of the employee — reasonably necessary. Such a restraint has, so far as I know, never been upheld, if directed only to the prevention of competition or against the use of the personal skill and knowledge acquired by the employee in his employer's business.

My Lords, it remains to apply what I have said to the particular circumstances of the present case. Mr Herbert Morris, the managing director of the plaintiff company, very candidly admitted that the real object of the plaintiff company in imposing the restraint was to preclude competition on the part of the defendant after he had left the company's employment. The company objected, he said, to skill and knowledge acquired in its service being put at the disposition of any trade rival, and the skill and knowledge he referred to was the general skill and knowledge which an employee of any ability must necessarily obtain as opposed to knowledge of any matter and skill in any process in which the company could be said to have any property at all. . . . As directed against competition or against the use of this skill and knowledge, I am clearly of opinion that the restraint was in no way required for the plaintiffs' protection, and therefore unreasonable and bad in law.

An attempt was, however, made in argument to justify the restraint on the ground that it was no more than adequate for the protection of the plaintiffs' trade connection and trade secrets. I am of opinion that this attempt completely failed. With regard to the plaintiffs' connection, there is little or no evidence that the defendant ever came into personal contact with the plaintiffs' customers. For a period, it is true, he was manager of the London branch of the plaintiffs' business, and for another period sales manager at Loughborough. With the exception of these periods he was employed entirely in the engineering department. Had the restraint been confined to London and Loughborough and a reasonable area round each of these centres, it might possibly have been supported as reasonably necessary to protect the plaintiffs' connection, but a restraint extending over the United Kingdom was obviously too wide in this respect.

With regard to trade secrets, I am not satisfied that the defendant was entrusted with any trade secret in the proper sense of the word at all. . . .

Note

A 'trade secret' can always be protected even where there is no express clause in the contract. In *Forster & Sons (Ltd)* v *Suggett* (1918) 35 TLR 87, the

defendant was employed as the plaintiff's works manager and had been instructed in their confidential manufacturing processes for glass. The contract of employment contained a covenant whereby the defendant was not to divulge any trade secrets and was not to carry on or be interested in glass bottle manufacture or any other business connected with glass making carried on by the plaintiffs for five years after the termination of his employment. Sargant J granted an injunction to restrain the divulging of the trade secret, namely the confidential manufacturing processes, since this restriction was reasonable to protect the company's interests, even though it extended to the whole country and lasted for five years.

Mason v *Provident Clothing & Supply Company Ltd*
[1913] AC 724 (HL)

The defendant was employed as a canvasser by the plaintiffs for the district of Islington in London. The defendant covenanted not to work in any similar business for three years within 25 miles of London. Held: as the defendant's duties were confined to the district of Islington, the clause was wider than was reasonably necessary to protect the plaintiffs' interests.

LORD MOULTON: . . . Are the restrictions which the covenant imposes upon the freedom of action of the servant after he has left the service of the master greater than are reasonably necessary for the protection of the master in his business?

The first task of the Court, therefore, is to ascertain with due particularity the nature of the master's business and of the servant's employment therein. . . .

The nature of the employment of the appellant in this business was solely to obtain members and collect their instalments. A small district in London was assigned to him, which he canvassed and in which he collected the payments due, and outside that small district he had no duties. His employment was therefore that of a local canvasser and debt collector, and nothing more.

Such being the nature of the employment, it would be reasonable for the employer to protect himself against the danger of his former servant canvassing or collecting for a rival firm in the district in which he had been employed. If he were permitted to do so before the expiry of a reasonably long interval he would be in a position to give to his new employer all the advantages of that personal knowledge of the inhabitants of the locality, and more especially of his former customers, which he had acquired in the service of the respondents and at their expense. Against such a contingency the master might reasonably protect himself, but I can see no further or other protection which he could reasonably demand. If the servant is employed by a rival firm in some district which neither includes that in which he formerly worked for the respondents, nor is immediately adjoining thereto, there is no personal knowledge which he has acquired in his former master's service which can be used to that master's prejudice. The respondents would be in no different position from that in which they would be if the appellant had acquired his experience in the service of some other company carrying on a like business.

Considering the strictly local character of the employment, I have no hesitation in saying that I should be prepared to hold that [the] area [here] is very far greater than could be reasonably required for the protection of his former employers.

(c) Exclusive dealing agreements

Esso Petroleum Co. Ltd v *Harper's Garage (Stourport) Ltd* [1968] AC 269 (HL)

The parties entered into agreements relating to the supply of Esso petrol to two garages belonging to Harper. By these agreements Harper agreed to purchase petrol only from Esso, and in return they obtained a small discount on the price. For the first garage the tie was to last for four years and five months, but for the second garage a loan of £7,000 was made and the tie was to last for 21 years while the mortgage repayments were made on this loan. An injunction was sought to prevent Harper from buying petrol from another supplier. Held: these exclusive dealing agreements were within the restraint of trade doctrine because Harper had given up a right to sell other petrol. Although the restraint which operated for four and a half years was not longer than was necessary to afford adequate protection to Esso's legitimate interests in maintaining a stable system of distribution, the tie of 21 years went beyond a reasonable period, and therefore that restraint agreement was void.

LORD REID: . . . It is true that it would be an innovation to hold that ordinary negative covenants preventing the use of a particular site for trading of all kinds or of a particular kind are within the scope of the doctrine of restraint of trade. I do not think they are. Restraint of trade appears to me to imply that a man contracts to give up some freedom which otherwise he would have had. A person buying or leasing land had no previous right to be there at all, let alone to trade there, and when he takes possession of that land subject to a negative restrictive covenant he gives up no right or freedom which he previously had. . . .

In my view this agreement is within the scope of the doctrine of restraint of trade as it had been developed in English law. Not only have the respondents agreed negatively not to sell other petrol but they have agreed positively to keep this garage open for the sale of the appellants' petrol at all reasonable hours throughout the period of the tie. It was argued that this was merely regulating the respondent's trading and rather promoting than restraining his trade. But regulating a person's existing trade may be a greater restraint than prohibiting him from engaging in a new trade. And a contract to take one's whole supply from one source may be much more hampering than a contract to sell one's whole output to one buyer. I would not attempt to define the dividing line between contracts which are and contracts which are not in restraint of trade, but in my view this contract must be held to be in restraint of trade. So it is necessary to consider whether its provisions can be justified.

[Lord Reid referred to Lord Macnaghten's statement in the *Nordenfelt case*, page 581, and continued:] So in every case it is necessary to consider first whether the restraint went farther than to afford adequate protection to the party in whose favour it was granted, secondly whether it can be justified as being in the interests of the party restrained, and, thirdly, whether it must be held contrary to the public interest. I find it difficult to agree with the way in which the court has in some cases treated the interests of the party restrained. Surely it can never be in the interest of a person to agree to suffer a restraint unless he gets some compensating advantage, direct or indirect. And Lord Macnaghten said: ' . . . of course the quantum of consideration may enter into the question of the reasonableness of the contract.'

Where two experienced traders are bargaining on equal terms and one has agreed to a restraint for reasons which seem good to him the court is in grave danger of stultifying itself if it says that it knows that trader's interest better than he does himself. But there may well be cases where, although the party to be restrained has deliberately accepted the main terms of the contract, he has been at a disadvantage as regards other terms: for example where a set of conditions has been incorporated which has not been the subject of negotiation — there the court may have greater freedom to hold them unreasonable.

. . . [W]hether or not a restraint is in the personal interests of the parties, it is I think well established that the court will not enforce a restraint which goes further than affording adequate protection to the legitimate interests of the party in whose favour it is granted. This must I think be because too wide a restraint is against the public interest. . . .

When petrol rationing came to an end in 1950 the large producers began to make agreements, now known as solus agreements, with garage owners under which the garage owner, in return for certain advantages, agreed to sell only the petrol of the producer with whom he made the agreement. Within a short time three-quarters of the filling stations in this country were tied in that way and by the dates of the agreements in this case over 90 per cent had agreed to ties. It appears that the garage owners were not at a disadvantage in bargaining with the large producing companies as there was intense competition between these companies to obtain these ties. So we can assume that both the garage owners and the companies thought that such ties were to their advantage. And it is not said in this case that all ties are either against the public interest or against the interests of the parties. The respondents' case is that the ties with which we are concerned are for too long periods.

The advantage to the garage owner is that he gets a rebate on the wholesale price of the petrol which he buys and also may get other benefits or financial assistance. The main advantages for the producing company appear to be that distribution is made easier and more economical and that it is assured of a steady outlet for its petrol over a period. As regards distribution, it appears that there were some 35,000 filling stations in this country at the relevant time, of which about a fifth were tied to the appellants. So they only have to distribute to some 7,000 filling stations instead of to a very much larger number if most filling stations sold several brands of petrol. But the main reason why the producing companies want ties for five years and more, instead of ties for one or two years only, seems to be that they can organise their business better if on the average only one-fifth or less of their ties come to an end in any one year. The appellants make a point of the fact that they have invested some £200 millions in refineries and other plant and that they could not have done that unless they could foresee a steady and assured level of sales of their petrol. Most of their ties appear to have been made for periods of between five and 20 years. But we have no evidence as to the precise additional advantage which they derive from a five-year tie as compared with a two-year tie or from a 20-year tie as compared with a five-year tie.

The Court of Appeal held that these ties were for unreasonably long periods. They thought that, if for any reason the respondents ceased to sell the appellants' petrol, the appellants could have found other suitable outlets in the neighbourhood within two or three years. I do not think that that is the right test. In the first place there was no evidence about this and I do not think that it would be practicable to apply this test in practice. It might happen that when the respondents ceased to sell their petrol, the appellants would find such an alternative outlet in a very short time. But, looking to the fact that well over 90 per cent of existing filling stations are tied and that there

may be great difficulty in opening a new filling station, it might take a very long time to find an alternative. Any estimate of how long it might take to find suitable alternatives for the respondents' filling stations could be little better than guesswork.

I do not think that the appellants' interest can be regarded so narrowly. They are not so much concerned with any particular outlet as with maintaining a stable system of distribution throughout the country so as to enable their business to be run efficiently and economically. In my view there is sufficient material to justify a decision that ties of less than five years were insufficient, in the circumstances of the trade when these agreements were made, to afford adequate protection to the appellants' legitimate interests . . . A tie for 21 years stretches far beyond any period for which developments are reasonably foreseeable. Restrictions on the garage owner which might seem tolerable and reasonable in reasonably foreseeable conditions might come to have a very different effect in quite different conditions: the public interest comes in here more strongly. And, apart from a case where he gets a loan, a garage owner appears to get no greater advantage from a 20-year tie than he gets from a five-year tie. So I would think that there must at least be some clearly established advantage to the producing company — something to show that a shorter period would not be adequate — before so long a period could be justified. But in this case there is no evidence to prove anything of the kind. . . . I would add that the decision in this case — particularly in view of the paucity of evidence — ought not, in my view, to be regarded as laying down any general rule as to the length of tie permissible in a solus agreement . . . I must not be taken as expressing any opinion as to the validity of ties for periods mid-way between the two periods with which the present case is concerned.

Note

Lord Reid stated that the restraint of trade doctrine only applied where a person gave up a right that would otherwise have been enjoyed. Therefore, if an exclusive dealing transaction relating to land was inserted in a conveyance or lease of land, it would not be subject to the doctrine, since a person buying or leasing land has no previous right to trade there and would not be giving up any right previously held.

Potentially, this provides a method for petrol companies to avoid the operation of the restraint of trade doctrine in the context of exclusive dealing agreements. However, in the next case the Court of Appeal refused to allow this device to operate on the facts.

Alec Lobb (Garages) Ltd v *Total Oil GB Ltd*
[1985] 1 All ER 303 (CA)

In order to raise capital, the plaintiff company leased the land on which it carried on business as a garage and filling station to the defendant petrol company. The plaintiff company had earlier borrowed money from the defendant company and had an exclusive dealing agreement lasting for 18 years (the duration of the loan). The defendant company leased the land back to the proprietors of the plaintiff company (Mr and Mrs L) for an annual rental payment. The agreement contained a solus agreement to purchase the defendant's petrol exclusively for a 21-year period. Held:

although technically the individual plaintiffs had no right to trade on the land before the leaseback arrangement, the reality was that the lease and leaseback should be treated as one transaction designed to enable the plaintiffs to continue to trade on the property. The defendant company should not be in a better position than if the leaseback had been granted to the plaintiff company. The tie for 21 years was reasonable because the arrangement was a rescue operation designed to benefit the plaintiffs, the leaseback had break clauses after seven and 14 years so that Mr and Mrs L were not locked in for the 21 years, and the consideration for the lease (and the tie) equated with the market value.

Note
It is important to be aware that restrictions on free competition are subject to detailed legislative regulation (see Whish, *Competition Law*, 3rd edn).

(d) Exclusive service agreements

A. Schroeder Music Publishing Co. Ltd v *Macaulay*
[1974] 1 WLR 1308 (HL)

M, an unknown 21-year-old song writer, entered into a contract with S Ltd, music publishers, whereby they engaged his exclusive services for five years. Under the contract, M assigned full copyright for all of his compositions during the contractual period. However, S Ltd were not obliged to publish anything composed by M. If M's royalties exceeded £5,000 during a five-year period the contract was to be automatically extended for another five years, but although S Ltd could terminate the agreement on one month's notice, M had no such rights. M alleged that the agreement was contrary to public policy. Held: the agreement fell within the restraint of trade doctrine. It was unreasonable as between the parties since it was one-sided.

LORD REID: . . . I think that in a case like the present case two questions must be considered. Are the terms of the agreement so restrictive that either they cannot be justified at all or they must be justified by the party seeking to enforce the agreement? Then, if there is room for justification, has that party proved justification — normally by showing that the restrictions were not more than what was reasonably required to protect his legitimate interests? . . .

The public interest requires in the interests both of the public and of the individual that everyone should be free so far as practicable to earn a livelihood and to give to the public the fruits of his particular abilities. The main question to be considered is whether and how far the operation of the terms of this agreement is likely to conflict with this objective. The respondent is bound to assign to the appellants during a long period the fruits of his musical talent. But what are the appellants bound to do with those fruits? Under the contract nothing. If they do use the songs which the respondent composes they must pay in terms of the contract. But they need not do so. As has been said they may put them in a drawer and leave them there.

No doubt the expectation was that if the songs were of value they would be published to the advantage of both parties. But if for any reason the appellants chose

not to publish them the respondent would get no remuneration and he could not do anything. Inevitably the respondent must take the risk of misjudgment of the merits of his work by the appellants. But that is not the only reason which might cause the appellants not to publish. There is no evidence about this so we must do the best we can with common knowledge. It does not seem fanciful and it was not argued that it is fanciful to suppose that purely commercial consideration might cause a publisher to refrain from publishing and promoting promising material. He might think it likely to be more profitable to promote work by other composers with whom he had agreements and unwise or too expensive to try to publish and popularise the respondent's work in addition. And there is always the possibility that less legitimate reasons might influence a decision not to publish the respondent's work.

[I]t appears to me to be an unreasonable restraint to tie the composer for this period of years so that his work will be sterilised and he can earn nothing from his abilities as a composer if the publisher chooses not to publish. If there had been in clause 9 any provision entitling the composer to terminate the agreement in such an event the case might have had a very different appearance. But as the agreement stands not only is the composer tied but he cannot recover the copyright of work which the publisher refuses to publish.

It was strenuously argued that the agreement is in standard form, that it has stood the test of time, and that there is no indication that it ever causes injustice. Reference was made to passages in the speeches of Lord Pearce and Lord Wilberforce in *Esso Petroleum Co. Ltd* v *Harper's Garage (Stourport) Ltd* [1968] AC 269 with which I wholly agree. Lord Pearce said, at p. 323:

> It is important that the court, in weighing the question of reasonableness, should give full weight to commercial practices and to the generality of contracts made freely by parties bargaining on equal terms,

and Lord Wilberforce said, at pp. 332–333:

> But the development of the law does seem to show that judges have been able to dispense from the necessity of justification under a public policy test of reasonableness such contracts or provisions of contracts as, under contemporary conditions, may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations. That such contracts have done so may be taken to show with at least strong prima force that, moulded under the pressures of negotiation, competition and public opinion, they have assumed a form which satisfies the test of public policy as understood by the courts at the time, or, regarding the matter from the point of view of the trade, that the trade in question has assumed such a form that for its health or expansion it requires a degree of regulation.

But those passages refer to contracts 'made freely by parties bargaining on equal terms' or 'moulded under the pressures of negotiation, competition and public opinion.' I do not find from any evidence in this case, nor does it seem probable, that this form of contract made between a publisher and an unknown composer has been moulded by any pressure of negotiation. Indeed, it appears that established composers who can bargain on equal terms can and do make their own contracts.

Any contract by which a person engages to give his exclusive services to another for a period necessarily involves extensive restriction during that period of the common law right to exercise any lawful activity he chooses in such manner as he thinks best. Normally the doctrine of restraint of trade has no application to such restrictions: they

require no justification. But if contractual restrictions appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner, then they must be justified before they can be enforced.

In the present case the respondent assigned to the appellants 'the full copyright for the whole world' in every musical composition 'composed created or conceived' by him alone or in collaboration with any other person during a period of five or, it might be 10 years. He received no payment (apart from an initial £50) unless his work was published and the appellants need not publish unless they chose to do so. And if they did not publish he had no right to terminate the agreement or to have copyrights re-assigned to him. I need not consider whether in any circumstances it would be possible to justify such a one-sided agreement. It is sufficient to say that such evidence as there is falls far short of justification. It must therefore follow that the agreement so far as unperformed is unenforceable.

See also *Watson* v *Prager* [1991] 3 All ER 487, where the restraint required the boxer to accept and fulfil all commitments negotiated on his behalf by his manager, whereas the manager's duty to the boxer – namely to negotiate the highest possible boxing fees — was in conflict with the manager's interests as a boxing promoter.

The decision in the following case concerned, *inter alia*, an allegation that a recording agreement was unenforceable as an unreasonable restraint of trade:

Panayiotou v *Sony Music Entertainment (UK) Ltd*
[1994] EMLR 229

In 1983, the plaintiff, George Michael, and Andrew Ridgeley (the pop group 'Wham') had sought to claim that their recording contract with Inner Vision was void and unenforceable as an unreasonable restraint of trade. This dispute had been compromised by an agreement with Sony which terminated the agreement with Inner Vision and resulted in the parties entering into the 1984 agreement. The 1984 agreement was renegotiated with the plaintiff as a solo artist on the basis that it was binding and resulted in the 1988 agreement ('Wham' having split up in 1986). This agreement was itself renegotiated in 1990 to give effect to George Michael's international success.

In 1992 the plaintiff claimed that the 1988 agreement (as varied in 1990) was an unreasonable restraint of trade. Held: it would be contrary to public policy to entertain an argument that the 1984 settlement agreement was unenforceable as being in restraint of trade since it had settled a dispute relating to the 1982 agreement and it would not otherwise be possible to compromise a disputed restraint of trade by substituting a new agreement. Public policy favoured giving effect to the settlement reached since there had been no undue influence or improper pressure. The plaintiff had been separately advised and had an experienced negotiator. It followed that it would also be contrary to public policy to entertain that argument in relation to the 1988 agreement, so that the agreement did not attract the restraint of trade doctrine.

Notes

1. See Coulthard (1995) 58 MLR 73.

2. Although it was not strictly necessary to consider the *Nordenfelt* test, Parker J found that Sony's legitimate interest in the restraint was their desire to sell as many records as possible, and that the terms of the 1988 agreement were justified as being no more than was reasonably required to protect that legitimate interest. For example:

(a) Although the 1988 agreement could last a maximum of 15 years, it was not fixed and the plaintiff could shorten that period by delivering albums more quickly. The duration was justifiable to ensure that there were sufficient successes to pay for any failures.

(b) Although there was no obligation on Sony to exploit the master recording, Parker J considered that, since it was in their commercial interest to exploit it to the full, they would certainly do so.

(c) The agreement contained favourable terms on advances and the terms reflected the plaintiff's international status.

(d) Although it was possible for Sony to assign its rights, this was limited to companies within the same group and was considered unlikely.

(e) Although there was a restraint on re-recording for three years after the expiry of the agreement, this was considered a reasonable period to protect Sony's legitimate interest.

3. Parker J also considered the alleged defences to a restraint of trade under the first limb of the *Nordenfelt* test. He considered that, in any event, the plaintiff had affirmed the agreement because in 1992, knowing that the 1988 agreement could be challenged as unenforceable, he had requested and received an advance on an album (although this was later repaid). The plaintiff had also acquiesced in the agreement, so that it would be unfair and unconscionable for the plaintiff to assert that the 1988 agreement was unenforceable. Specifically, the judge considered the terms allowing for accelerated payment of advances which had led to the payment of £11 million in advances in 1988 and the favourable renegotiation in 1990. The plaintiff had also received expert legal advice and was aware of the restraint of trade doctrine.

(e) Severance of the objectionable parts of covenants

(i) *Striking out the objectionable part as it stands*

Goldsoll* v *Goldman
[1915] 1 Ch 292 (CA)

The plaintiff and the defendant were both in business as dealers in imitation jewellery at Old Bond Street and New Bond Street in London. The defendant sold his business to the plaintiff and covenanted that for two years he would not:

> . . . either solely or jointly with or as agent or employee for any person or persons or company directly or indirectly carry on or be engaged or concerned or interested in or render services (gratuitously or otherwise) to the business of a vendor of or dealer in real or imitation jewellery in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States of America, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefans Kirche, Vienna.

Held: the covenant was too wide in terms of subject matter since it referred to real jewellery when the defendant had not traded in real jewellery. It was also too wide in geographical area since the defendant had not traded abroad. However, these restrictions were severable from the rest of the promise, leaving a covenant that the defendant would not carry on the business of dealing in imitation jewellery in the UK or the Isle of Man. This restriction was reasonably necessary for the plaintiff's protection, and hence was enforceable.

Notes

1. This is an example of severance in a covenant relating to the sale of a business. It may be that the courts are less likely to sever in the case of covenants between employer and employee, where the bargaining power may be unequal.

Nordenfelt v *Maxim Nordenfelt Guns & Ammunition Company Ltd* [1894] AC 535 (page 581), is another example of severance in the context of a covenant on the sale of a business. The second part of the covenant, relating to engaging in any business competing with that of the company, was void because it went further than was reasonably necessary to protect the business acquired. However, it could be severed from the first part as the two were clearly separable promises.

2. In *Mason* v *Provident Clothing & Supply Company Ltd* [1913] AC 724 (page 586), (a covenant between employer and employee), the House of Lords refused to redraft a clause so as to render it reasonable. Therefore, the whole promise was void and unenforceable. Lord Moulton said (at pp. 745–6):

> It would in my opinion be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master. It is sad to think that in this present case this appellant, whose employment is a comparatively humble one, should have had to go through four Courts before he could free himself from such unreasonable restraints as this covenant imposes, and the hardship imposed by the exaction of unreasonable

covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to the anxiety and expense of litigation, the Court would in the end enable them to obtain everything which they could have obtained by acting reasonably. It is evident that those who drafted this covenant aimed at making it a penal rather than a protective covenant, and that they hoped by means of it to paralyse the earning capabilities of the man if and when he left their service, and were not thinking of what would be a reasonable protection to their business, and having so acted they must take the consequences.

(ii) *Severance must not alter the nature of the original covenant*

Attwood* v *Lamont
[1920] 3 KB 571 (CA)

The plaintiff carried on business in Kidderminster as a draper, tailor and general outfitter. The defendant, an employee in the tailoring department, covenanted that he would not at any time thereafter, 'either on his own account or on that of any wife of his or in partnership with or as assistant, servant or agent to any other person, persons or company carry on or be in any way directly or indirectly concerned in any of the following trades or businesses; that is to say, the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies' or children's outfitter at any place within a radius of 10 miles of' Kidderminster. The defendant set up business as a tailor at Worcester, outside the 10 miles' limit, but obtained and executed tailoring orders in Kidderminster. The covenant was held to be wider than was reasonably necessary for the protection of the plaintiff's business. The plaintiff argued that the covenant could be severed to leave only the restraint relating to tailoring. Held: the covenant was a single covenant for the protection of the plaintiff's entire business, and not several covenants for the protection of different businesses. Consequently, it could not be severed without altering the nature of the covenant.

YOUNGER LJ: . . . [T]his was not a case in which upon any principle this severance was permissible. The learned judges of the Divisional Court, I think, took the view that such severance always was permissible when it could be effectively accomplished by the action of a blue pencil. I do not agree. The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only.

Now, here, I think, there is in truth but one covenant for the protection of the respondent's entire business, and not several covenants for the protection of his several businesses. The respondent is, on the evidence, not carrying on several businesses but one business, and, in my opinion, this covenant must stand or fall in its unaltered form.

But, further, I am of opinion that even if this were not so this case is not one in which any severance, even if otherwise technically permissible, ought to be made. In my view the necessary effect of the application of the principle on which *Mason's Case*

[1913] AC 724 and *Morris* v *Saxelby* [1916] 1 AC 688 have both been decided has been to render obsolete the cases in which the Courts have severed these restrictive covenants when acting on the view that being prima facie valid it was their duty to bind the covenantee to them as far as was permissible. It may well be that these cases are still applicable to covenants between vendor and purchaser, for upon such covenants the effect of Lord Macnaghten's test upon the law as previously understood has been little more than a matter of words, and Lord Moulton's observations have no direct application to such covenants. But these authorities do not seem to me to be any longer of assistance in the case of a covenant between employer and employee. To such a covenant I think the statement of Lord Moulton in *Mason's Case* [see extract page 586] necessarily applies.

SECTION 2: ILLEGAL CONTRACTS

A: CONTRACTS PROHIBITED BY STATUTE

(a) Express prohibition

Re Mahmoud & Ispahani
[1921] 2 KB 716 (CA)

In 1919, under the Defence of the Realm Regulations, an Order was made prohibiting the purchase or sale of linseed oil without a licence. The plaintiff, who had a licence, sold linseed oil to the defendant, having been incorrectly assured by the defendant that the defendant also had the required licence. The terms of the plaintiff's licence specified that delivery was only to be made to persons who held a licence. The defendant subsequently refused to accept delivery of the linseed oil, pleading that, due to his own absence of a licence, the contract was illegal. Held: since the defendant had no licence the contract of sale was prohibited by the Order. It was therefore illegal and unenforceable by the plaintiff.

ATKIN LJ: . . . When the Court has to deal with the question whether a particular contract or class of contract is prohibited by statute, it may find an express prohibition in the statute, or it may have to infer the prohibition from the fact that the statute imposes a penalty upon the person entering into that class of contract. In the latter case one has to examine very carefully the precise terms of the statute imposing the penalty upon the individual. One may find that the statute imposes a penalty upon an individual, and yet does not prohibit the contract if it is made with a party who is innocent of the offence which is created by the statute. [H]ere it appears to me to be plain that this particular contract was expressly prohibited by the terms of the Order which imposes the necessity of a compliance with the licence. With great respect to the learned judge, I think the underlying fallacy in his judgment is that he has not directed his attention to the terms of the licence or to the terms of the Order which says that no sale shall be made unless it complies with the terms of the licence. When one looks at the licence one finds an express prohibition against the plaintiff selling to the defendant as the latter had not a licence.

Notes

1. If a contract is illegal by statute, neither party can enforce it. The innocence of the plaintiff in *Re Mahmoud & Ispahani* did not allow him to recover damages under the illegal contract.

2. An innocent party may have some remedy if he can establish the existence of a collateral undertaking by the other party to ensure that the contract is not illegal. However, this will only be of use in exceptional cases.

Strongman (1945) Ltd v *Sincock*
[1955] 2 QB 525 (CA)

Builders entered into a contract with the architect owner whereby they were to supply materials and carry out work at his premises. The architect owner orally promised to obtain all the licences required under the Defence (General) Regulations 1939. Licences were obtained for £2,150 of authorised costs, but the total value of the work carried out was £6,905. The architect had paid £2,900 and sought to avoid paying the balance by arguing that performance of the contract was illegal. The builders sought the unpaid sum or damages for breach of the warranty that the architect would obtain any necessary licences. Held: that although the builders could not recover the contract price, since the contract was prohibited by the regulations, the assurance amounted to a warranty or collateral promise by the architect that he would obtain any necessary licences, and they were entitled to damages for breach of that promise.

DENNING LJ: It is said that, if damages could be recovered, it would be an easy way of getting round the law about illegality. This does not alarm me at all. It is, of course, a settled principle that a man cannot recover for the consequences of his own unlawful act, but this has always been confined to cases where the doer of the act knows it to be unlawful or is himself in some way morally culpable. It does not apply when he is an entirely innocent party . . . [Counsel for the architect] referred us to the observations of this court in *In re Mahmoud & Ispahani* [1921] 2 KB 716. On a consideration of that case it seems to me that the court only decided that no action lay upon the contract for the purchase of goods. They did not decide whether there was an action for fraud or breach of promise or warranty: and I do not think that their observations were intended to express any view on the matter.

Question
Can this case be distinguished from *Re Mahmoud & Ispahani*?

(b) Contracts impliedly illegal in formation
The courts are reluctant to hold that a statute impliedly prohibits the making of a contract.

Archbolds (Freightage) Ltd v *S. Spanglett Ltd*
[1961] 1 QB 374 (CA)

The defendants owned a number of vans with 'C' licences, enabling them, under the Road and Rail Traffic Act 1933, to carry their own goods, but not the goods of others, for payment. The plaintiffs, believing that the defendants had 'A' licences enabling them to carry goods for others for

reward, employed the defendants to carry whisky from Leeds to London. The whisky was stolen en route owing to the driver's negligence, and the plaintiffs claimed damages for the loss. The defendants pleaded illegality, in that their van did not have an 'A' licence as required by statute. Held: this contract was not prohibited either expressly or impliedly by statute, and therefore was not illegal at its inception. Since the plaintiffs were unaware of the true facts and were innocent parties, they could recover damages for breach of contract.

PEARCE LJ: If a contract is expressly of by necessary implication forbidden by statute, or if it is ex facie illegal, or if both parties know that though ex facie legal it can only be performed by illegality or is intended to be performed illegally, the law will not help the plaintiffs in any way that is a direct or indirect enforcement of rights under the contract. And for this purpose both parties are presumed to know the law.

The first question, therefore, is whether this contract of carriage was forbidden by statute. The two cases on which the defendants mainly rely are *In re an Arbitration between Mahmoud and Ispahani* [1921] 2 KB 716 and *J. Dennis & Co. Ltd* v *Munn* [1949] 2 KB 327. In both those cases the plaintiffs were unable to enforce their rights under contracts forbidden by statute. . . . In neither case could the plaintiff bring his contract within the exception that alone would have made its subject-matter lawful, namely, by showing the existence of a licence. Therefore, the core of both contracts was the mischief expressly forbidden by the statutory order and the statutory regulation respectively.

In *Mahmoud's* case the object of the order was to prevent (except under licence) a person buying and a person selling, and both parties were liable to penalties. A contract of sale between those persons was therefore expressly forbidden. In *Dennis's* case the object of the regulation was to prevent (except under licence) owners from performing building operations, and builders from carrying out the work for them. Both parties were liable to penalties and a contract between these persons for carrying out an unlawful operation would be forbidden by implication.

The case before us is somewhat different. The carriage of the plaintiffs' whisky was not as such prohibited; the statute merely regulated the means by which carriers should carry goods. Therefore this contract was not expressly forbidden by the statute.

Was it then forbidden by implication? The Road and Rail Traffic Act, 1933, section 1, says: 'no person shall use a goods vehicle on a road for the carriage of goods . . . except under licence,' and provides that such use shall be an offence. Did the statute thereby intend to forbid by implication all contracts whose performance must on all the facts (whether known or not) result in a contravention of that section? . . .

The object of the Road and Rail Traffic Act, 1933, was not (in this connection) to interfere with the owner of goods or his facilities for transport, but to control those who provided the transport with a view to promoting its efficiency. Transport of goods was not made illegal but the various licence holders were prohibited from encroaching on one another's territory, the intention of the Act being to provide an orderly and comprehensive service. Penalties were provided for those licence holders who went outside the bounds of their allotted spheres. These penalties apply to those using the vehicle but not to the goods owner. Though the latter could be convicted of aiding and abetting any breach, the restrictions were not aimed at him. Thus a contract of carriage was not impliedly forbidden by the statute.

This view is supported by common sense and convenience. If the other view were held it would have far-reaching effects. For instance, if a carrier induces me (who am

in fact ignorant of any illegality) to entrust goods to him and negligently destroys them, he would only have to show that (though unknown to me) his licence had expired, or did not properly cover the transportation, or that he was uninsured, and I should then be without a remedy against him. Or, again, if I ride in a taxicab and the driver leaves me stranded in some deserted spot, he would only have to show that he was (though unknown to me) unlicensed or uninsured, and I should be without remedy. This appears to me an undesirable extension of the implications of a statute.

Question

What would the position have been in *Archbolds* v *Spanglett* if the plaintiffs had known that there was no 'A' licence?

Notes

1. *Re Mahmoud & Ispahani* (page 596), was distinguished in *Archbolds* v *Spanglett* because the statute in that case expressly prohibited the sale to an unlicensed person. In *Archbolds* v *Spanglett* the carriage of the whisky was not prohibited but the statute did regulate the manner of the transportation. This contract was not illegal from the beginning but was performed by the defendants in an illegal way.
2. In the next case, Kerr LJ identified the factors relevant in deciding whether a statute (the Insurance Companies Act 1974) rendered contracts made by unauthorised insurers illegal.

Phoenix General Insurance Co. of Greece SA v *Administratia Asigurarilor de Stat*
[1987] 2 All ER 152 (CA)

KERR LJ: . . . [I]t seems to me that the position can be summarised as follows.

(i) Where a statute prohibits both parties from concluding or performing a contract when both or either of them have no authority to do so, the contract is impliedly prohibited: see *Mahmoud and Ispahani's* case [1921] 2 KB 716, [1921] All ER Rep 217 and its analysis by Pearce LJ in the *Archbolds* case [1961] 1 All ER 417, [1961] 1 QB 374 with which Devlin LJ agreed.

(ii) But where a statute merely prohibits one party from entering into a contract without authority and/or imposes a penalty on him if he does so (i.e. a unilateral prohibition) it does not follow that the contract itself is impliedly prohibited so as to render it illegal and void. Whether or not the statute has this effect depends on considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant considerations.

(iii) The Insurance Companies Act 1974 only imposes a unilateral prohibition on unauthorised insurers. If this were merely to prohibit them from carrying on 'the business of effecting contracts of insurance' of a class for which they have no authority, then it would clearly be open to the court to hold that considerations of public policy preclude the implication that such contracts are prohibited and void. But unfortunately the unilateral prohibition is not limited to the business of 'effecting contracts of insurance' but extends to the business of 'carrying out contracts of insurance'. This is a form of statutory prohibition, albeit only unilateral, which is not covered by any authority. However, in the same way as Parker J in the *Bedford* case [1984] 3 All ER

766, [1985] QB 966, I can see no convincing escape from the conclusion that this extension of the prohibition has the unfortunate effect that contracts made without authorisation are prohibited by necessary implication and therefore void. Since the statute prohibits the insurer from carrying out the contract (of which the most obvious example is paying claims), how can the insured require the insurer to do an act which is expressly forbidden by statute? And how can a court enforce a contract against an unauthorised insurer when Parliament has expressly prohibited him from carrying it out? In that situation there is simply no room for the introduction of considerations of public policy. As Parker J said in the *Bedford* case [1984] All ER 766 at 775, [1985] QB 966 at 986:

> . . . once it is concluded that on its true construction the Act prohibited both contract and performance, that is the public policy.

(iv) It follows that, however reluctantly, I feel bound to agree with the analysis of Parker J in the *Bedford* case and his conclusion that contracts of insurance made by unauthorised insurers are prohibited by the 1974 Act in the sense that they are illegal and void, and therefore unenforceable. In particular, I agree with the following passages which led him to this conclusion ([1984] 3 All ER 766 at 772, [1985] QB 966 at 981):

> The express prohibition is on the carrying on of insurance business of a relevant class, but, as I have already mentioned, the definition in the case of each class begins, 'the effecting and carrying out of contracts of insurance'. What therefore is prohibited is the carrying on of the business of effecting and performing contracts of insurance of various descriptions in the absence of an authorisation. It is thus both the contracts themselves and the performance of them at which the statute is directed.

Hughes v *Asset Managers plc*
[1995] 3 All ER 669 (CA)

The argument advanced in this case was that since s. 1 of the Prevention of Fraud (Investments) Act 1958 required an individual who dealt with share purchases to have a licence to deal in securities under that Act, if at the relevant time the person dealing did not have such a licence then any purchase contract made by that person was void. Such a result would have avoided a loss consequent on the actual share purchase which had been made by the person giving the instruction to purchase. The trial judge held that the purchase contracts were not void. Held: on appeal, the purchase contracts were neither expressly nor impliedly prohibited by the Act. In addition, public policy considerations did not support the argument advanced because the aim of the Act was to protect the public by licensing professional dealers and this protection would be lost if contracts made by unlicensed dealers were void.

SAVILLE LJ: . . . I readily accept that the purpose of the 1958 Act was to protect the investing public by imposing criminal sanctions on those who, as principals or agents, engaged in the business of dealing in securities without being duly licensed. Parliament clearly intended to provide the investing public with the safeguard of the approval and licensing of professional dealers by the Board of Trade. However, I can

see no basis in either the words the legislature has used or the type of prohibition under discussion, or in considerations of public policy (induding the mischief against which this part of the 1958 Act was directed), for the assertion that Parliament must be taken to have intended that such protection required (over and above criminal sanctions) that any deals effected through the agency of unlicensed persons should automatically be struck down and rendered ineffective. On the contrary, it seems to me that not only is there really no good reason why Parliament should have taken up this stance, but good reason why parliament should have held the contrary view.

In this connection it must be remembered as Kerr LJ pointed out in *Phoenix General Insurance Co. of Greece SA* v *Administratia Asigurarilor de Stat* [1987] 2 All ER 152 at 176–177, [1988] QB 216 at 273–275, that rendering transactions void affects both the guilty and the innocent parties. The latter, just as much as the former, cannot enforce a void bargain or obtain damages for its breach. In the context of the section under discussion this could well produce very great hardship and injustice on wholly innocent parties; for example, where the dealer fails to perform a bargain which would have resulted in a profit or saved the investor from a loss. In other words, the argument put forward by the appellants necessarily involves the proposition that Parliament has chosen to provide a defence against claims for breach of contract in favour of the very people who have ignored its licensing requirements. I repeat that I can find nothing to indicate that this is what Parliament did, or intended to do, when enacting this statute, nor anything to indicate any good reason or public need for such a result. . . .

HIRST LJ: . . . In my judgment, upon the proper construction of s. 1(1) of the Prevention of Fraud (Investments) Act 1958, the contracts between the appellants and the respondents which are at issue in this case are not expressly forbidden by the statute. What is forbidden by s. 1(1)(b) is the dealing by the servant or agent of one of the two parties to the contract, in this case the respondents.

The question therefore is whether these contracts are impliedly forbidden. On this issue I gain the greatest assistance from the judgment of Kerr LJ in *Phoenix General Insurance Co. of Greece SA* v *Administratia Asigurarilor de Stat* [1987] 2 All ER 152, [1988] QB 216. The ratio of the relevant part of this judgment, to which Saville LJ has already referred, is that, because of the express prohibition in the Insurance Companies Act 1974 of 'carrying out contracts of insurance' of the relevant kind, contracts made without the necessary authorisation were impliedly prohibited and therefore void (see [1987] 2 All ER 152 at 176, [1988] QB 216 at 273–274 per Kerr LJ). . . Looking at that judgment as a whole, it is quite clear that, but for the embargo against carrying out contracts of insurance, the decision would have gone the other way. Although this part of that judgment is strictly obiter, it is of the greatest persuasive force and, indeed, was adopted and applied as the ratio of the decision in *Re Cavalier Insurance Co. Ltd* [1989] 2 Lloyd's Rep 430 at 443 by Knox J, who also reached his conclusion with the greatest reluctance because, though undesirable, it was inescapable. If [counsel for the purchaser] were right and these contracts were void, the innocent client might well suffer loss which he could not recover in the circumstances already described by Saville LJ, which (as Pearce LJ stated in *Archbolds (Freightage) Ltd* v *S Spanglett Ltd (Randall, third party)* [1961] 1 All ER 417 at 424, [1961] 1 QB 374 at 387) would be a most unsatisfactory result, and one which, in my judgment, would be inimical to public policy, which is the ultimate test to be applied.

I would add that I think the public interest under this statute was fully met by the exaction, in appropriate cases, of the quite severe penalties prescribed by s. 1(2) of the

1958 Act. I would therefore hold that these contracts are not impliedly forbidden by the statute, and for these reasons I would also dismiss this appeal.

(Nourse LJ agreed with both judgments.)

B: CONTRACTS WHICH ARE ILLEGAL IN THEIR PERFORMANCE

St John Shipping Corporation v *Joseph Rank Ltd* [1957] 1 QB 267

It was an offence under the Merchant Shipping (Safety and Load Line Conventions) Act 1932 to load a ship to such an extent that the load line was below water. The plaintiff charterers overloaded the ship and caused the load line to be submerged. The master was prosecuted and fined £1,200 for this offence. The defendants, who were the consignees of part of the cargo, withheld some of the freight due (equivalent to the amount due on the overloaded cargo) and argued that the plaintiffs had performed the charter in an illegal manner. Held: the plaintiffs could recover the freight due. Illegal performance of a contract did not render the contract illegal unless the contract as performed was one which the statute meant to prohibit. This Act merely punished infringements of the load line rules and did not prohibit the contract of carriage which was performed in breach of the rules.

DEVLIN J: . . . There are two general principles. The first is that a contract which is entered into with the object of commiting an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is enforceable at the suit of the party who is proved to have it. This principle is not involved here. Whether or not the overloading was deliberate when it was done, there is no proof that it was contemplated when the contract of carriage was made. The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. 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. A significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the statute prohibits, but what contracts it prohibits; but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable.

Two questions are involved. The first — and the one which hitherto has usually settled the matter — is: does the statute mean to prohibit contracts at all? But if this be answered in the affirmative, then one must ask: does this contract belong to the class which the statute intends to prohibit? For example, a person is forbidden by statute from using an unlicensed vehicle on the highway. If one asks oneself whether there is in such an enactment an implied prohibition of all contracts for the use of

unlicensed vehicles, the answer may well be that there is, and that contracts of hire would be unenforceable. But if one asks oneself whether there is an implied prohibition of contracts for the carriage of goods by unlicensed vehicles or for the repairing of unlicensed vehicles or for the garaging of unlicensed vehicles, the answer may well be different. The answer might be that collateral contracts of this sort are not within the ambit of the statute.

. . . [A]n implied prohibition of contracts of loading does not necessarily extend to contracts for the carriage of goods by improperly loaded vessels. Of course, if the parties knowingly agree to ship goods by an overloaded vessel, such a contract would be illegal; but its illegality does not depend on whether it is impliedly prohibited by the statute, since it falls within the first of the two general heads of illegality I noted above where there is an intent to break the law. The way to test the question whether a particular class of contract is prohibited by the statute is to test it in relation to a contract made in ignorance of its effect.

In my judgment, contracts for the carriage of goods are not within the ambit of this statute at all. A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or 'necessary inference,' that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent. Persons who deliberately set out to break the law cannot expect to be aided in a court of justice, but it is a different matter when the law is unwittingly broken. To nullify a bargain in such circumstances frequently means that in a case — perhaps of such triviality that no authority would have felt it worth while to prosecute — a seller, because he cannot enforce his civil rights, may forfeit a sum vastly in excess of any penalty that a criminal court would impose; and the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it. It is questionable how far this contributes to public morality. In *Vita Food Products Inc.* v *Unus Shipping Co.* [1939] AC 277, Lord Wright said: 'Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.' It may be questionable also whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression. Commercial men who have unwittingly offended against one of a multiplicity of regulations may nevertheless feel that they have not thereby forfeited all right to justice, and may go elsewhere for it if courts of law will not give it to them. In the last resort they will, if necessary, set up their own machinery for dealing with their own disputes in the way that those whom the law puts beyond the pale, such as gamblers, have done. I have said enough, and perhaps more than enough, to show how important it is that the courts should be slow to imply the statutory prohibition of contracts, and should do so only when the implication is quite clear. The Act of 1932 imposes a penalty which is itself designed to deprive the offender of the benefits of his crime. It would be a curious thing if the operation could be performed twice — once by the criminal law and then again by the civil. It would

be curious, too, if in a case in which the magistrates had thought fit to impose only a nominal fine, their decision could, in effect, be overridden in a civil action. But the question whether the rule applies to statutory offences is an important one which I do not wish to decide in the present case. . . .

The rights which cannot be enforced must be those 'directly resulting' from the crime. That means, I think, that for a right to money or to property to be unenforceable the property or money must be identifiable as something to which, but for the crime, the plaintiff would have had no right or title. That cannot be said in this case. . . .

Notes

1. In *Shaw* v *Groom* [1970] 2 QB 504, a rent book did not contain all the information required by statute, which was an offence punishable with a maximum fine of £50. When the landlord claimed arrears of rent, the tenant relied on the failure to provide a proper rent book as prohibiting the plaintiff from recovering any rent. The Court of Appeal held that the contract was not illegal since this provision was not intended to prevent the recovery of rent.

2. In *Anderson Ltd* v *Daniel* [1924] 1 KB 138, it was an offence to sell artificial fertilisers without giving the buyer an invoice stating the percentages of certain chemicals in the fertilisers. No invoice was issued by the seller, and since the object of the statute in requiring the invoice was to protect purchasers, this could only be achieved by rendering the sale without an invoice illegal. Scrutton LJ said (at pp. 147–9):

> When the policy of the Act in question is to protect the general public or a class of persons by requiring that a contract shall be accompanied by certain formalities or conditions, and a penalty is imposed on the person omitting those formalities or conditions, the contract and its performance without those formalities or conditions is illegal, and cannot be sued upon by the person liable to the penalities. . . . Now here the provision as to the invoice is clearly to protect a particular class of the public — namely, the people who buy artificial manures. The seller is required to give on or before or as soon as possible after delivery of the article an invoice stating the percentages of its ingredients. The vendors did not do so. It follows from the principle that I have stated that when they come to sue for the price they can be met with the defence that the way in which they performed the contract was illegal. . . . [T]he giving of the invoice is part of the performance of the contract. . . . [T]he vendors have committed an illegality in the performance of their contract, and that as the statutory provision was enacted for the protection of a class, including the purchaser who is now being sued, the vendors cannot recover the price.

The illegal performer of a contract which has become illegal because of the way in which it has been performed, cannot enforce that contract. In *Anderson Ltd* v *Daniel* the seller could not claim the price of the fertilisers because his failure to present the invoice had rendered the contract illegal.

3. The contract in *Archbolds* v *Spanglett* (page 597) had become illegal because of the way in which it was performed, but the innocent party, who was ignorant of the unlawful performance, could have sued upon it.

An innocent party can sue on a contract performed in an illegal manner unless that party 'participated' in the illegality.

Ashmore, Benson, Pease & Co. Ltd v *A. V. Dawson Ltd*
[1973] 1 WLR 828 (CA)

The plaintiff company had manufactured two 25 ton tube banks and had agreed with the defendants, a small road haulage firm, for the carriage of these tube banks to the port of shipment. The plaintiff company's transport manager was present when one of the tube banks was loaded onto the defendants' lorry in contravention of the Road Traffic Act 1960, s. 64(2), which specified that the maximum weight laden of the lorry was not to exceed 30 tons. The weight of the lorry with the tube bank was 35 tons, but the plaintiff company's transport manager raised no objection and did not insist on the use of a low loader, although he knew that this was the appropriate vehicle for such a load. On the journey one of the lorries toppled over damaging the tube bank. The defendants claimed that the contract was void for illegality because the plaintiffs' servants knew that carriage of such loads on these lorries was in breach of the statute. Held: (Phillimore LJ dissenting) although this contract was lawful in its inception, it had been performed in an unlawful manner to the knowledge of, and with the participation of, the plaintiffs' servants. Therefore the plaintiffs could not recover in damages.

Marles v *Philip Trant & Sons Ltd*
[1954] 1 QB 29 (CA)

The defendants, seed merchants, bought wheat, described as spring wheat known as Fylgia, from a third party. The defendants resold it under the same description to the plaintiff farmers. In fact it was not spring wheat and was known as Vilmorin. The plaintiffs recovered damages against the defendants. The defendants then claimed an indemnity and damages from the third-party supplier. The third party alleged that the defendants had not delivered a statement to the plaintiffs as they should have done under s. 1 of the Seeds Act 1920, specifying particulars of the variety, purity and germination of the seeds, so that the contract between the plaintiffs and the defendants was illegal. Held: the contract was not illegal in itself although it was illegal in the manner of its performance. That meant that the contract between the plaintiffs and the defendants was unenforceable by the defendants (they could not have sued for the price), but (Hodson LJ dissenting) the contract between the third-party supplier and the defendants was not unlawful and the defendants could recover from the supplier for their loss on the contract with the plaintiffs.

DENNING LJ: . . . There can be no doubt that the contract between the seed merchants and the farmer was not unlawful when it was made. If the farmer had repudiated it before the time for delivery arrived, the seed merchants could certainly have sued him for damages. Nor was the contract rendered unlawful simply because the seed was delivered without the prescribed particulars. If it were unlawful, the farmer himself could not have sued upon it as he has done. The truth is that it was

not the contract itself which was unlawful, but only the performance of it. The seed merchants performed it in an illegal way in that they omitted to furnish the prescribed particulars. That renders the contract unenforceable by them, but it does not renders the contract illegal. . . .

Once rid of the notion that the contract with the farmer was itself illegal, the question becomes: what is the effect of the admitted illegality in performance? It certainly prevents the seed merchants from suing the farmer for the price, but does it prevent them suing their supplier for damages? I think not. There was nothing unlawful in the contract between the seed merchants and their supplier, neither in the formation of it, nor in the performance of it. The seed merchants must therefore be entitled to damages for the breach of it. So far so good, but the difficulty comes when they seek to prove their damages. They want to be indemnified for the damages which they have been ordered to pay to the farmer. To prove those damages, they have to prove the contract with the farmer, and the circumstances under which the damages were awarded. It is said that once they begin to rely on their deliveries to the farmer, they seek aid from their own illegality; and that that is a thing which they are not allowed to do. The maxim is invoked: Ex turpi causa non oritur actio. That maxim must not, however, be carried too far. Lord Wright gave a warning about it 15 years ago in *Beresford* v *Royal Insurance Co. Ltd* [1938] AC 586 when he said: 'The maxim itself, notwithstanding the dignity of a learned language, is, like most maxims, lacking in precise definition. In these days there are many statutory offences which are the subject of the criminal law, and in that sense are crimes, but which would, it seems afford no moral justification for a court to apply the maxim. There are likewise some crimes of inadvertence which, it is true, involve mens rea in the legal sense but are not deliberate or, as people would say, intentional.' Those observations apply with especial force in this case. The omission by the seed merchants to deliver the prescribed particulars was an act of inadvertence. It was not a deliberate breach of the law. I venture to assert that there is no moral justification for the court to apply the maxim in this case. But is there any legal justification? A distinction must be drawn, I think, between an illegality which destroys the cause of action and an illegality which affects only the damages recoverable.

Question

Can this case be distinguished from *Anderson Ltd* v *Daniel* (page 604)?

C: CONTRACTS WHICH ARE UNLAWFUL, IMMORAL OR PREJUDICIAL TO THE INTERESTS OF THE STATE

Alexander v *Rayson*
[1936] 1 KB 169 (CA)

The plaintiff let a flat to the defendant at a total rent of £1,200 p.a. This was achieved by means of two documents. The first was a lease for £450 p.a. providing for certain services to be rendered by the plaintiff, and the second services agreement provided for the plaintiff to render certain services (which were substantially the same as those in the lease) in consideration of a payment of £750 p.a. The defendant refused to pay an instalment due under the documents, and when the plaintiff sought to recover, argued that the object of the two documents was to deceive the

local authority into reducing the rateable value of the flat by only disclosing the lease document to them. Held: since the plaintiff intended to use the lease and service agreement for an illegal purpose, the plaintiff could not enforce either the lease or the service agreement.

Notes

1. In *Pearce* v *Brooks* (1866) LR 1 Exch 213, the plaintiffs, coach-builders, had sued the defendant, a prostitute, for hire payments due on a brougham they had supplied to her. Since they had supplied this brougham in the knowledge that she was a prostitute and knowing that the brougham was to be used for an immoral purpose, it was held that they could not recover.

2. Another example of a contract which is illegal under this head is a contract involving corruption in public life. In *Parkinson* v *College of Ambulance Ltd & Harrison* [1925] 2 KB 1, Lush J held that a contract whereby money was given on the assumption that the payer would be rewarded with a knighthood, was contrary to public policy and illegal.

3. It is also contrary to public policy to allow a criminal or his estate to benefit from his crime (*Beresford* v *Royal Insurance Co. Ltd* [1938] AC 586).

D: MONEY OR PROPERTY TRANSFERRED UNDER AN ILLEGAL CONTRACT

As a general principle, money or property transferred under an illegal contract cannot be recovered. For example, in *Parkinson* v *College of Ambulance Ltd & Harrison* [1925] 2 KB 1, above, it was not possible for the payer to recover the money paid in the belief that he was to receive a knighthood, even though he had been defrauded. The parties were equally at fault so that one could not get his property back from the other.

However, if the parties are not *in pari delicto* (i.e., not equally guilty), then money paid by the wholly innocent party can be recovered.

Kiriri Cotton Co. Ltd v *Dewani*
[1960] AC 192 (PC)

KC Ltd let a flat in Uganda to Dewani, and Dewani paid a premium of Shs 10,000. This was a breach of the Uganda Rent Restriction Ordinance 1949, but neither party realised this. Dewani claimed the return of the premium. Held: Dewani could recover the premium since the parties were not *in pari delicto*. The purpose of the Ordinance was to protect tenants and the duty to observe it rested on the landlord.

Note

If a party 'genuinely repents' entering into a contract whose purpose is illegal, it is possible for that party to recover what has been transferred unless the contract has already been partially performed. However, see *Tribe* v *Tribe* [1995] 4 All ER 236, page 613, where the Court of Appeal held that repentence was not necessary.

Kearley v *Thomson*
(1890) 24 QBD 742 (CA)

The defendants were solicitors who were acting on behalf of a creditor petitioning against a bankrupt. The plaintiff, a friend of the bankrupt, agreed to pay the defendants their costs if they did not appear at the public examination of the bankrupt and if they did not oppose the order of discharge against the bankrupt. The money was paid and the solicitors did not appear at the public examination. However, before the application to discharge the bankrupt, the friend changed his mind and sought the return of his money from the defendants. Held: the plaintiff could not recover. The contract was illegal since it interfered with the administration of justice, and as the defendants had partially performed this contract, the plaintiff's repentance was too late.

FRY LJ: . . . [I]n the case of *Taylor* v *Bowers* (1876) 1 QBD 291 . . . Mellish LJ, in delivering judgment, says at p. 300: 'If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out.' I cannot help saying for myself that I think the extent of the application of that principle, and even the principle itself, may, at some time hereafter, require consideration, if not in this Court, yet in a higher tribunal: and I am glad to find that in expressing that view I have the entire concurrence of the Lord Chief Justice. But even assuming the exception to exist, does it apply to the present case? What is the condition of things if the illegal purpose has been carried into effect in a material part, but remains unperformed in another material part? As I have already pointed out in the present case, the contract was that the defendants should not appear at the public examination of the bankrupt or at the application for an order of discharge. It was performed as regards the first; but the other application has not yet been made. Can it be contended that, if the illegal contract has been partly carried into effect and partly remains unperformed, the money can still be recovered? In my judgment it cannot be so contended with success. Let me put an illustration of the doctrine contended for, which was that partial performance did not prevent the recovery of the money. Suppose a payment of 100*l.* by A to B on a contract that the latter shall murder C and D. He has murdered C, but not D. Can the money be recovered back? In my opinion it cannot be. I think that case illustrates and determines the present one.

I hold, therefore, that where there has been a partial carrying into the effect of an illegal purpose in a substantial manner, it is impossible though there remains something not performed, that the money paid under that illegal contract can be recovered back.

Money paid can be recovered if there is an independent proprietary right to it, without having to rely on the illegal contract.

Bowmakers Ltd v *Barnet Instruments Ltd*
[1945] KB 65 (CA)

The plaintiffs had been supplied with machine tools and had let them to the defendants under three hire-purchase contracts. War-time regulations provided that no person was to pay or receive any price for any machine

tool produced in the UK until a maximum price had been issued by the Ministry of Supply. All three contracts were assumed to contravene these regulations. The defendants failed to make hire-purchase payments due and sold the tools they had acquired under two of the contracts. They refused to return the tools held under the third contract. The defendants argued that the plaintiffs had no remedy because the contracts were in breach of the regulations and therefore illegal. The plaintiffs brought an action for conversion of the tools. Held: this action could succeed because it was not based on founding a claim on the contracts which were illegal but on the plaintiffs' proprietary right to their own goods.

DU PARCQ LJ: The question, then, is whether in the circumstances the plaintiffs are without a remedy. So far as their claim in conversion is concerned, they are not relying on the hiring agreements at all. On the contrary, they are willing to admit for this purpose that they cannot rely on them. They simply say that the machines were their property, and this, we think, cannot be denied.

Why then should not the plaintiffs have what is their own? No question of the defendants' rights arises. They do not, and cannot, pretend to have had any legal right to possession of the goods at the date of the conversion. [Counsel] is, we think, right in his submission that, if the sale by Smith to the plaintiffs was illegal, then the first and second hiring agreements were tainted with the illegality, since they were brought into being to make that illegal sale possible, but, as we have said, the plaintiffs are not now relying on these agreements or on the third hiring agreement. Prima facie, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. It would, indeed, be astonishing if (to take one instance) a person in the position of the defendant in *Pearce* v *Brooks* (1866) LR 1 Exch 213, supposing that she had converted the plaintiff's brougham to her own use, were to be permitted, in the supposed interests of public policy, to keep it or the proceeds of its sale for her own benefit. The principle which is, in truth, followed by the court is that stated by Lord Mansfield, that no claim founded on an illegal contract will be enforced, and for this purpose the words 'illegal contract' must now be understood in the wide sense which we have already indicated and no technical meaning must be ascribed to the words 'founded on an illegal contract.' The form of the pleadings is by no means conclusive. More modern illustrations of the principle on which the courts act are *Scott* v *Brown, Doering, McNab & Co.* [1892] 2 QB 724 and *Alexander* v *Rayson* [1936] 1 KB 169, but, as Lindley LJ said in the former of the cases just cited: 'Any rights which [a plaintiff] may have irrespective of his illegal contract will, of course, be recognized and enforced.'

In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim.

Notes

1. The defendants' rights to possession arose under a bailment contract. Although for two of the agreements the defendants' possession under the

bailment had terminated on the sale of the tools, under the other contract the defendants were still in possession of the tool, and the plaintiffs only had the right to possession of the tool by establishing the breach of that agreement. They would therefore have had to rely on the illegality of that agreement. To this extent the decision can be criticised, since in relation to the tool that was not sold the Court of Appeal appears to have enforced an illegal contract.

2. To what extent can this decision be justified as allowing the plaintiffs to obtain a remedy against the defendants and preventing the defendants from benefiting from their misconduct?

3. Although the decision on the facts in *Bowmakers* may be questioned, the principle has been recognised by the House of Lords in the next case.

Tinsley v *Milligan*
[1993] 3 All ER 65 (HL)

The plaintiff and the defendant were lovers and both supplied money for the purchase of a house. However, the house was put in the sole name of the defendant in order to enable the plaintiff to make false social security claims. Later there was a disagreement and the plaintiff moved out. She then claimed that she was entitled to a share of the property since she had an equitable interest resulting from her contribution to the purchase price. The defendant argued that she was not so entitled since the whole arrangement had been entered into in order to further an illegal purpose. Held: the majority (Lords Browne-Wilkinson, Jauncey and Lowry; Lords Keith and Goff dissenting) held that the plaintiff should succeed. She did not need to rely on the illegality in order to support her claim because the presumption of the resulting trust in her favour was raised by the fact that the house was held in the name of the defendant alone and by the fact that she had contributed to the purchase price. The reason why the house was in the sole name of the defendant did not need to be relied on to establish the claim. It was the defendant who had to raise the illegality in seeking to rebut the presumption of the resulting trust.

LORD BROWNE-WILKINSON: . . . My Lords, I agree with the speech of my noble and learned friend Lord Goff of Chieveley that the consequences of being a party to an illegal transaction cannot depend, as the majority in the Court of Appeal held, on such an imponderable factor as the extent to which the public conscience would be affronted by recognising rights created by illegal transactions. However, I have the misfortune to disagree with him as to the correct principle to be applied in a case where equitable property rights are acquired as a result of an illegal transaction.

Neither at law nor in equity will the court enforce an illegal contract which has been partially, but not fully, performed. However, it does not follow that all acts done under a partially performed contract are of no effect. In particular it is now clearly established that at law (as opposed to in equity) property in goods or land can pass under, or pursuant to, such a contract. If so, the rights of the owner of the legal title thereby acquired will be enforced, provided that the plaintiff can establish such title without pleading or leading evidence of the illegality. It is said that the property lies where it falls, even though legal title to the property was acquired as a result of the

property passing under the illegal contract itself. I will first consider the modern authorities laying down the circumstances under which a legal proprietary interest acquired under an illegal transaction will be enforced by the courts. I will then consider whether the courts adopt a different attitude to equitable proprietary interests so acquired.

The position at law is well illustrated by the decision in *Bowmakers Ltd* v *Barnet Instruments Ltd* [1944] 2 All ER 579, [1945] KB 65. . . .

[T]he following propositions emerge.

(1) Property in chattels and land can pass under a contract which is illegal and therefore would have been unenforceable as a contract.

(2) A plaintiff can at law enforce property rights so acquired provided that he does not need to rely on the illegal contract for any purpose other than providing the basis of his claim to a property right.

(3) It is irrelevant that the illegality of the underlying agreement was either pleaded or emerged in evidence: if he plaintiff has acquired legal title under the illegal contract that is enough.

I have stressed the common law rules as to the impact of illegality on the acquisition and enforcement of property rights because it is the appellant's contention that different principles apply in equity. In particular it is said that equity will not aid the respondent to assert, establish or enforce an equitable, as opposed to a legal, proprietary interest since she was a party to the fraud on the Department of Social Security. The house was put in the name of the appellant alone (instead of joint names) to facilitate the fraud. Therefore, it is said, the respondent does not come to equity with clean hands: consequently, equity will not aid her. . . .

In my judgment to draw such distinctions between property rights enforceable at law and those which require the intervention of equity would be surprising. More than 100 years has elapsed since the fusion of the administration of law and equity. The reality of the matter is that, in 1993, English law has one single law of property made up of legal and equitable interests. Although for historical reasons legal estates and equitable estates have differing incidents, the person owning either type of estate has a right of property, a right in rem not merely a right in personam. If the law is that a party is entitled to enforce a property right acquired under an illegal transaction, in my judgment the same rule ought to apply to any property right so acquired, whether such right is legal or equitable.

In the present case, the respondent claims under a resulting or implied trust. The courts below have found, and it is not now disputed, that apart from the question of illegality the respondent would have been entitled in equity to a half share in the house in accordance with the principles exemplified in *Gissing* v *Gissing* [1970] 2 All ER 780, [1971] AC 886, *Grant* v *Edwards* [1986] 2 All ER 426, [1986] Ch 638 and *Lloyds Bank plc* v *Rosset* [1990] 1 All ER 1111, [1991] 1 AC 107. The creation of such an equitable interest does not depend upon a contractual obligation but on a common intention acted upon by the parties to their detriment. It is a development of the old law of resulting trust under which, where two parties have provided the purchase money to buy a property which is conveyed into the name of one of them alone, the latter is presumed to hold the property on a resulting trust for both parties in shares proportionate to their contributions to the purchase price. In argument, no distinction was drawn between strict resulting trusts and a *Gissing* v *Gissing* type of trust.

. . .[D]oes a plaintiff claiming under a resulting trust have to rely on the underlying illegality? Where the presumption of resulting trust applies, the plaintiff does not have to rely on the illegality. If he proves that the property is vested in the defendant alone but that the plaintiff provided part of the purchase money, or voluntarily transferred

the property to the defendant, the plaintiff establishes his claim under a resulting trust unless either the contrary presumption of advancement displaces the presumption of resulting trust or the defendant leads evidence to rebut the presumption of resulting trust. Therefore, in cases where the presumption of advancement does not apply, a plaintiff can establish his equitable interest in the property without relying in any way on the underlying illegal transaction. In this case the respondent as defendant simply pleaded the common intention that the property should belong to both of them and that she contributed to the purchase price: she claimed that in consequence the property belonged to them equally. To the same effect was her evidence-in-chief. Therefore the respondent was not forced to rely on the illegality to prove her equitable interest. Only in the reply and the course of the respondent's cross-examination did such illegality emerge: it was the appellant who had to rely on that illegality.

Although the presumption of advancement does not directly arise for consideration in this case, it is important when considering the decided cases to understand its operation. On a transfer from a man to his wife, children or others to whom he stands in loco parentis, equity presumes an intention to make a gift. Therefore in such a case, unlike the case where the presumption of resulting trust applies, in order to establish any claim the plaintiff has himself to lead evidence sufficient to rebut the presumption of gift and in so doing will normally have to plead, and give evidence of, the underlying illegal purpose.

. . . In my judgment the time has come to decide clearly that the rule is the same whether a plaintiff founds himself on a legal or equitable title: he is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction.

As applied in the present case, that principle would operate as follows. The respondent established a resulting trust by showing that she had contributed to the purchase price of the house and that there was a common understanding between her and the appellant that they owned the house equally. She had no need to allege or prove *why* the house was conveyed into the name of the appellant alone, since that fact was irrelevant to her claim: it was enough to show that the house was in fact vested in the appellant alone. The illegality only emerged at all because the appellant sought to raise it. Having proved these facts, the respondent had raised a presumption of resulting trust. There was no evidence to rebut that presumption. Therefore the respondent should succeed.

Notes

1. While *Bowmakers* established that a person can enforce his right to money paid or property transferred if he can establish his legal title thereto without having to rely on the illegality, *Tinsley* establishes that founding an equitable interest in the property will also suffice.
2. See Berg [1993] JBL 513 and Enonchong (1995) 111 LQR 135.
3. Lord Goff was in the minority in considering that the court could not give equitable assistance to a claimant who had not come with 'clean hands'. His judgment is also important in that (at p. 80) he advocated reform of the law, possibly along the lines of the New Zealand Illegal Contracts Act 1970 which is based on discretionary relief, and stated that he would welcome an investigation of this question by the Law Commission on the basis that the present rules are 'indiscriminate in their effect, and are capable therefore of producing injustice'.

4. The *Bowmakers* principle was also applied by the Court of Appeal in *Skilton* v *Sullivan* (1994) *The Times*, 25 March. This case concerned a contract for the sale of koi carp (a fish). The plaintiff's subsequent invoice described the fish as 'trout', which was zero-rated for VAT purposes whereas koi carp was not. It was held that the contract itself was not illegal (it was illegal only in the way it was carried out), since the plaintiff had only formed a dishonest intent to defer paying the VAT after the contract had been made. The plaintiff could establish liability to pay by relying on the contract itself, which was lawful, and did not need to rely on the invoice, which constituted an unlawful act.

5. Lord Browne-Wilkinson indicated, however, that this principle would have serious shortcomings in practice, since if the presumption of advancement (to make a gift) applied — e.g., a transfer from husband to wife or from a father to his child — in order to seek to rebut it the plaintiff might need to rely on the illegal purpose and could not therefore successfully claim rights in the property.

This result seems somewhat strange and the Court of Appeal has since held that a transferor could withdraw from a transaction to transfer property for an illegal purpose as long as he did so before any part of the illegal purpose had taken place. This is sometimes referred to as '*locus poenitentiae*'. In such circumstances the transferor could recover the property by relying on the illegality to rebut a presumption of advancement.

Tribe v *Tribe*
[1995] 4 All ER 236 (CA)

The plaintiff owned 459 out of 500 shares in the family company. He was also the tenant of two leasehold premises which the company occupied as licensee. The landlords of these premises had required the plaintiff to carry out substantial repairs to these premises. The plaintiff had been advised that this would be costly and that he might be forced to sell the company or dispose of his shares. The plaintiff transferred his shares in the company to the defendant, one of his sons, and it was found that this had been done with the purpose of defrauding the plaintiff's creditors by making it appear that he did not own any shares in the company. Although the transfer was expressed to be for a consideration of £78,030, this was not paid.

In the end the plaintiff did not need to make the repair payments because the landlord of one of the properties accepted a surrender of the lease and the landlord of the other property sold the reversion to the plaintiff.

When the plaintiff asked the defendant to return the shares, the defendant refused. The plaintiff claimed that the defendant held the shares on trust and had agreed to redeliver them once the repairs issue was settled. The defendant denied any such agreement and argued that there was a presumption of advancement in his favour which the plaintiff could not rebut without revealing the illegal purpose behind the transfer. Held: there was an exception to the *in pari delicto* rule if the transferor had withdrawn

from the transaction before any part of the illegal purpose had been carried into effect. No creditors had in fact been defrauded so no part of the illegal purpose had been achieved. Therefore the father could give evidence of the illegality to rebut the presumption of advancement to the son and recover the shares.

NOURSE LJ: . . . The rule that no court will lend its aid to man who founds his cause of action on an immoral or illegal act has often led to seemingly unjust results. That is because, as Lord Mansfield CJ made clear when stating the rule in regard to contracts in *Holman* v *Johnson* (1775) 1 Cowp 341 at 343, [1775–1802] All ER Rep 98 at 99, it 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: see *Tinsley* v *Milligan* [1993] 3 All ER 65 at 72, [1994] 1 AC 340 at 355 per Lord Goff of Chieveley. But since such consequences are in general unacceptable to them, the courts have made exceptions to the rule. The exception here in point was recognised by Lord Goff ([1993] 3 All ER 65 at 73–74, [1994] 1 AC 340 at 356):

> In particular, an exception to the principle is to be found in cases in which the illegal purpose has not been carried into effect; but all those cases in which that exception has been recognised have proceeded on the basis that, absent those exceptional circumstances, the principle would have applied. It is not necessary to examine the nature of this exception for present purposes. It is often said to derive from *Taylor* v *Bowers* (1876) 1 QBD 291, [1874–80] All ER Rep 405, which was in fact a case at law. However, the exception was foreshadowed in a number of earlier cases in equity, notably *Platamone* v *Staple* (1815) Coop G 250, 35 ER 548, *Cecil* v *Butcher* (1821) 2 Jac & W 565, 37 ER 744 and *Symes* v *Hughes* (1870) LR 9 Eq 475; and it has since been applied in, for example, *Chetty* v *Sertial* ((1908) 24 TLR 462) and *Perpetual Executors and Trustees Association of Australia Ltd* v *Wright* (1917) 23 CLR 185.

The exception was also recognised by Lord Browne-Wilkinson ([1993] 3 All ER 65 at 89, [1994] 1 AC 340 at 374):

> There was originally a difference of view as to whether a transaction entered into for an illegal purpose would be enforced at law or in equity if the party had repented of his illegal purpose before it had been put into operation, ie the doctrine of locus poenitentiae. It was eventually recognised both at law and in equity that, if the plaintiff had repented before the illegal purpose was carried through, he could recover his property: see *Taylor* v *Bowers*, *Symes* v *Hughes*.

In both *Tinsley* v *Milligan* and the present case A transferred property into the name of B with the mutual intention of concealing A's interest in the property for a fraudulent or illegal purpose. Before *Tinsley* v *Milligan* the general rule that A could not recover the property was consistently applied irrespective of whether the presumption of advancement arose between A and B or not (see [1993] 3 All ER 65 at 73, [1994] 1 AC 340 at 356 per Lord Goff and the authorities there cited). But now the majority of their Lordships have made a clear distinction between the two cases. In holding that the general rule does not apply where there is no presumption of advancement, they have necessarily affirmed its application to cases where there is. Thus Lord Browne-Wilkinson pointed out that, in a case where the presumption of advancement applies, in order to establish any claim, the plaintiff has himself to lead evidence sufficient to rebut the presumption of gift and in so doing will normally have

to plead, and give evidence of, the underlying illegal purpose (see [1993] 3 All ER 65 at 87 and 90, [1994] 1 AC 340 at 372 and 375).

At the end of his judgment in the court below, Judge Weeks said:

> Finally, it is not for me to criticise their Lordships' reasoning, but with the greatest respect I find it difficult to see why the outcome in cases such as the present one should depend to such a large extent on arbitrary factors, such as whether the claim is brought by a father against a son, or a mother against a son, or a grandfather against a grandson.

I see much force in those observations. If the defendant had been his brother, grandson, nephew or son-in-law, the plaintiff would have succeeded without further inquiry. Moreover, in times when the presumption of advancement has for other purposes fallen into disfavour (see eg the observations of Lord Reid, Lord Hodson and Lord Diplock in *Pettitt* v *Pettitt* [1969] 2 All ER 385 at 388, 404, 415, [1970] AC 777 at 793, 811, 824) there seems to be some perversity in its elevation to a decisive status in the context of illegality. Be that as it may, we are bound by *Tinsley* v *Milligan* for what it decided. It decided that where the presumption of advancement arises the general rule applies. It did not decide that there is no exception where the illegal purpose has not been carried into effect. If anything, it may be said to support the existence of the exception in such a case (see in particular Lord Goff's reference to *Perpetual Executors and Trustees Association of Australia Ltd* v *Wright* (1917) 23 CLR 185 in *Tinsley* v *Milligan* [1993] 3 All ER 65 at 74, [1994] 1 AC 340 at 356).

[Nourse LJ then reviewed the authorities and continued:]

On this state of the authorities I decline to hold that the exception does not apply to a case where the presumption of advancement arises but the illegal purpose has not been carried into effect in any way. *Wright's* case, supported by the observations of the Privy Council in *Chettiar* v *Chettiar* [[1962] AC 294, [1962] 1 All ER 494] is clear authority for its application and no decision to the contrary has been cited. In the circumstances I do not propose to distinguish between law and equity, nor to become embroiled in the many irreconcilable authorities which deal with the exception in its application to executory contracts, nor even to speculate as to the significance, if any, of calling it a locus poenitentiae, a name I have avoided as tending to mislead. In a property transfer case the exception applies if the illegal purpose has not been carried into effect in any way.

I return to the facts of this case. The judge found that the illegal purpose was to deceive the plaintiff's creditors by creating an appearance that he no longer owned any shares in the company. He also found that it was not carried into effect in any way. [Counsel] for the defendant, attacked the latter finding on grounds which appeared to me to confuse the purpose with the transaction. Certainly the transaction was carried into effect by the execution and registration of the transfer. But *Wright's* case shows that that is immaterial. It is the purpose which has to be carried into effect and that would only have happened if and when a creditor or creditors of the plaintiff had been deceived by the transaction. The judge said there was no evidence of that and clearly he did not think it appropriate to infer it. Nor is it any objection to the plaintiff's right to recover the shares that he did not demand their return until after the danger had passed and it was no longer necessary to conceal the transfer from his creditors. All that matters is that no deception was practised on them. For these reasons the judge was right to hold that the exception applied.

I desire to add two comments. First, as to the facts. The judge said that he would have been minded to exercise his discretion, had he had one, in favour of the plaintiff.

He evidently thought that the defendant had acted basely by seeking to retain for himself assets which he knew the plaintiff had desired to protect for the benefit of the whole family. In a case of this kind a view of the general merits formed by the judge who has seen and heard the parties give their evidence deserves to be treated with the greatest possible respect. Second, as to the law. If Miss Milligan was able to recover against Miss Tinsley even though she had succeeded in defrauding the Department of Social Security over a period of years, it would indeed be a cause for concern if a plaintiff who had not defrauded his creditors in any way was prevented from recovering simply because the defendant was his son. For my part, I am glad to hold that that is not the law.

MILLETT LJ: . . . There are, in my opinion, two questions of some importance which fall for decision in the present case. The first is whether, once property has been transferred to a transferee for an illegal purpose in circumstances which give rise to the presumption of advancement, it is still open to the transferor to withdraw from the transaction before the purpose has been carried out and, having done so, give evidence of the illegal purpose in order to rebut the presumption of advancement. The second is whether, if so, it is sufficient for him to withdraw from the transaction because it is no longer necessary and without repenting of his illegal purpose. I shall deal with these two questions in turn.

(1) *The presumption of advancement and the locus poenitentiae*

In *Tinsley* v *Milligan* [1993] 3 All ER 65 at 86, [1994] 1 AC 340 at 370 Lord Browne-Wilkinson summarised the common law rules which govern the effect of illegality on the acquisition and enforcement of property rights in three propositions: (1) property in chattels and land can pass under a contract which is illegal and would therefore have been unenforceable as a contract; (2) a plaintiff can at law enforce property rights so acquired provided that he does not need to rely on the illegal contract for any purpose other than providing the basis of his claim to a property right; and (3) it is irrelevant that the illegality of the underlying agreement was either pleaded or emerged in evidence: if the transferee has acquired legal title under the illegal contract that is enough. The decision of the majority of their Lordships in that case was that the same principles applied in equity. It is, therefore, now settled that neither at law nor in equity may a party rely on his own fraud or illegality in order to found a claim or rebut a presumption, but that the common law and equity alike will assist him to protect and enforce his property rights if he can do so without relying on the fraud or illegality. This is the primary rule.

It is, however, also settled both at law and in equity that a person who has transferred property for an illegal purpose can nevertheless recover his property provided that he withdraws from the transaction before the illegal purpose has been wholly or partly performed. This is the doctrine of the locus poenitentiae and it applies in equity as well as at law: see *Symes* v *Hughes* (1870) LR 9 Eq 475 for the former and *Taylor* v *Bowers* (1876) 1 QBD 291, [1874–80] All ER Rep 405 for the latter. The availability of the doctrine in a restitutionary context was expressly confirmed by Lord Browne-Wilkinson in *Tinsley* v *Milligan* [1993] 3 All ER 65 at 85, [1994] 1 AC 340 at 374.

While both principles are well established, the nature of the relationship between them is unclear. Is the doctrine of the locus poenitentiae co-extensive with and by way of general exception to the primary rule? The question in the present case is whether a plaintiff who has made a gratuitous transfer of property to a person in whose favour the presumption of advancement arises can withdraw from the transaction before the

illegal purpose has been carried into effect and then recover the property by leading evidence of his illegal purpose in order to rebut the presumption. Closely connected with this question is its converse: is a plaintiff who has made such a transfer in circumstances which give rise to a resulting trust so that he has no need to rely on the illegal purpose, as in *Tinsley* v *Milligan* itself, barred from recovering if the illegal purpose has been carried out? If both questions are answered in the negative, then either the locus poenitentiae is a common law doctrine which has no counterpart in equity, or it is a contractual doctrine which has no place in the law of restitution.

. . . [In *Tinsley* v *Milligan*] Lord Browne-Wilkinson expressly confirmed the existence of the doctrine of the locus poenitentiae and its application in a restitutionary context; indeed, he founded part of his reasoning upon it. Moreover, it is in accordance with ordinary restitutionary principles. The fact that title has passed is no bar to a claim for restitution; on the contrary, this is the normal case. But to succeed at law it is necessary for the transferor to repudiate the transaction which gave rise to its passing, and this is what the locus poenitentiae allows him to do.

The locus poenitentiae is not therefore an exclusively contractual doctrine with no place in the law of restitution. It follows that it cannot be excluded by the mere fact that the legal ownership of the property has become lawfully vested in the transferee. It would be unfortunate if the rule in equity were different. It would constitute a further obstacle to the development of a coherent and unified law of restitution. . . .

There is no modern case in which restitution has been denied in circumstances comparable to those of the present case where the illegal purpose has not been carried out. In *Tinsley* v *Milligan* Lord Browne-Wilkinson expressly recognised the availability of the doctrine of the locus poenitentiae in a restitutionary context, and cited *Taylor* v *Bowers* as well as *Symes* v *Hughes* without disapproval. In my opinion the weight of the authorities supports the view that a person who seeks to recover property transferred by him for an illegal purpose can lead evidence of his dishonest intention whenever it is necessary for him to do so provided that he has withdrawn from the transaction before the illegal purpose has been carried out. It is not necessary if he can rely on an express or resulting trust in his favour; but it is necessary (i) if he brings an action at law and (ii) if he brings proceedings in equity and needs to rebut the presumption of advancement. The availability of the locus poenitentiae is well documented in the former case. I would not willingly adopt a rule which differentiated between the rule of the common law and that of equity in a restitutionary context. . . .

At heart the question for decision in the present case is one of legal policy. The primary rule which precludes the court from lending its assistance to a man who founds his cause of action on an illegal or immoral act often leads to a denial of justice. The justification for this is that the rule is not a principle of justice but a principle of policy (see the much-quoted statement of Lord Mansfield CJ in *Holman* v *Johnson* (1775) 1 Cowp 341 at 343, [1775–1802] All ER Rep 98 at 99). The doctrine of the locus poenitentiae is an exception which operates to mitigate the harshness of the primary rule. It enables the court to do justice between the parties even though, in order to do so, it must allow a plaintiff to give evidence of his own dishonest intent. But he must have withdrawn from the transaction while his dishonesty still lay in intention only. The law draws the line once the intention has been wholly or partly carried into effect.

Seen in this light the doctrine of the locus poenitentiae, although an exception to the primary rule, is not inconsistent with the policy which underlies it. It is, of course, artificial to think that anyone would be dissuaded by the primary rule from entering into a proposed fraud, if only because such a person would be unlikely to be a studious reader of the law reports or to seek advice from a lawyer whom he has taken fully into his confidence. But if the policy which underlies the primary rule is to discourage

fraud, the policy which underlies the exception must be taken to be to encourage withdrawal from a proposed fraud before it is implemented, an end which is no less desirable. And if the former objective is of such overriding importance that the primary rule must be given effect even where it leads to a denial of justice, then in my opinion the latter objective justifies the adoption of the exception where this enables justice to be done.

To my mind these considerations are even more compelling since the decision in *Tinsley* v *Milligan*. One might hesitate before allowing a novel exception to a rule of legal policy, particularly a rule based on moral principles. But the primary rule, as it has emerged from that decision, does not conform to any discernible moral principle. It is procedural in nature and depends on the adventitious location of the burden of proof in any given case. Had Mr Tribe transferred the shares to a stranger or distant relative whom he trusted, albeit for the same dishonest purpose, it cannot be doubted that he would have succeeded in his claim. He would also have succeeded if he had given them to his son and procured him to sign a declaration of trust in his favour. But he chose to transfer them to a son whom he trusted to the extent of dispensing with the precaution of obtaining a declaration of trust. If that is fatal to his claim, then the greater the betrayal, the less the power of equity to give a remedy.

In my opinion the following propositions represent the present state of the law.

(1) Title to property passes both at law and in equity even if the transfer is made for an illegal purpose. The fact that title has passed to the transferee does not preclude the transferor from bringing an action for restitution.

(2) The transferor's action will fail if it would be illegal for him to retain any interest in the property.

(3) Subject to (2) the transferor can recover the property if he can do so without relying on the illegal purpose. This will normally be the case where the property was transferred without consideration in circumstances where the transferor can rely on an express declaration of trust or a resulting trust in his favour.

(4) It will almost invariably be so where the illegal purpose has not been carried out. It may be otherwise where the illegal purpose has been carried out and the transferee can rely on the transferor's conduct as inconsistent with his retention of a beneficial interest.

(5) The transferor can lead evidence of the illegal purpose whenever it is necessary for him to do so provided that he has withdrawn from the transaction before the illegal purpose has been wholly or partly carried into effect. It will be necessary for him to do so (i) if he brings an action at law or (ii) if he brings proceedings in equity and needs to rebut the presumption of advancement.

(6) The only way in which a man can protect his property from his creditors is by divesting himself of all beneficial interest in it. Evidence that he transferred the property in order to protect it from his creditors, therefore, does nothing by itself to rebut the presumption of advancement; it reinforces it. To rebut the presumption it is necessary to show that he intended to retain a beneficial interest and conceal it from his creditors.

(7) The court should not conclude that this was his intention without compelling circumstantial evidence to this effect. The identity of the transferee and the circumstances in which the transfer was made would be highly relevant. It is unlikely that the court would reach such a conclusion where the transfer was made in the absence of an imminent and perceived threat from known creditors.

(2) *The doctrine of the locus poenitentiae*

It is impossible to reconcile all the authorities on the circumstances in which a party to an illegal contract is permitted to withdraw from it. At one time he was allowed to

withdraw so long as the contract had not been completely performed but later it was held that recovery was barred once it had been partly performed (see *Kearley* v *Thompson* (1890) 24 QBD 742, [1886–90] All ER Rep 1055). It is clear that he mus withdraw voluntarily, and that it is not sufficient that he is forced to do so because hi plan has been discovered. In *Bigos* v *Bousted* [1951] 1 All ER 92 this was (perhaps dubiously) extended to prevent withdrawal where the scheme has been frustrated by the refusal of the other party to carry out his part.

Academic articles, such as Grodecki 'In pari delicto potior est conditio defendentis' (1955) 71 LQR 254, Elkan 'Repudiation of illegal purpose as a ground for restitution' (1975) 91 LQR 313 and Merkin 'Restitution by withdrawal from executory illegal contracts' (1981) 97 LQR 420, are required reading for anyone who attempts the difficult task of defining the precise limits of the doctrine. I would draw back from any such attempt. But I would hold that genuine repentance is not required. Justice is not a reward for merit; restitution should not be confined to the penitent. I would also hold that voluntary withdrawal from an illegal transaction when it has ceased to be needed is sufficient. It is true that this is not necessary to encourage withdrawal, but a rule to the opposite effect could lead to bizarre results. Suppose, for example that in *Bigos* v *Bousted* exchange control had been abolished before the foreign currency was made available: it is absurd to suppose that the plaintiff should have been denied restitution. I do not agree that it was correct in *Groves* v *Groves* (1829) 3 Y & J 163, 148 ER 1136 and similar cases for the court to withhold its assistance from the plaintiff because 'if the crime has not been completed, the merit was not his'.

Notes

1. See Virgo [1996] CLJ 23 and Creighton (1997) 60 MLR 102.
2. This case further limits the availability of illegality as a defence to a proprietary claim. The area of operation of such a defence would appear to be restricted to instances where the presumption of advancement applies and the illegal purpose has been carried out at least to some extent. However, see the decision of the High Court of Australia in *Nelson* v *Nelson* (1995) 132 ALR 133, below.
3. The decision in *Tribe* can be subjected to criticism. The plaintiff did not withdraw because he had second thoughts about the illegal purpose: he withdrew only because he no longer needed to make the transfer. It had previously been thought that in order to rely on this exception to *in pari delicto* it would be necessary for the transferor to 'repent'. However, the Court of Appeal in *Tribe* v *Tribe* considered that no evidence of contrition was necessary. The only test was whether the transferor had withdrawn before the illegal purpose was carried into effect in any way. This indicates a clear relaxation of the principles.
4. The Court of Appeal concluded that the plaintiff had withdrawn before the illegal purpose had been carried into effect because that purpose was the defrauding of creditors and no creditors had been deceived. However, it might be argued that the purpose was broader than that, namely to make it appear that the plaintiff did not own the shares. Clearly that purpose had been carried into effect.
5. Illegality and the presumption of advancement was also in issue before the High Court of Australia in *Nelson* v *Nelson* (1995) 132 ALR 133, (1995)

70 ALJR 47. However, the illegal purpose in this case had been achieved. Mrs Nelson had purchased a house and then transferred it into the names of her son and daughter so that she would not own that house and could obtain a statutory subsidy for the purchase of a second house. The son and daughter sold the first house and Mrs Nelson claimed that they held the proceeds on trust for her. It was held that the presumption of advancement (which applied between mother and child) was rebutted and that she was entitled to the proceeds of sale of the house provided she repaid the subsidy she had received. The reasoning of the majority was that the plaintiff would be prevented from recovering her property only where that result was required by the policy of the statute that had been infringed. That was not the position here and she could overcome the illegality by restoring the wrongly received benefit.

This decision represents a move away from technicalities and the artificial distinction drawn by the House of Lords in *Tinsley* v *Milligan* between resulting trusts and rebutting the presumption of advancement. (See Phang (1996) 11 JCL 53 and Creighton (1997) 60 MLR 102.)

SECTION 3: CAPACITY TO CONTRACT — MINORS' CONTRACTS

With some exceptions, a contract between a minor (under 18) and an adult is not binding on the minor unless, after attaining 18, the minor ratifies the contract.

A: CONTRACTS INVOLVING CONTINUING OBLIGATIONS

This category includes tenancy agreements, marriage settlements, partnership agreements and agreements to take shares in a company which are only partly paid. The minor is at liberty to repudiate the obligations arising under these agreements as long as this is achieved during the minority or within a reasonable time of reaching majority (*Edwards* v *Carter* [1893] AC 360).

If repudiation takes place, the minor can only recover money paid or property transferred if there has been a total failure of consideration.

Steinberg* v *Scala (Leeds) Ltd
[1923] 2 Ch 452 (CA)

The plaintiff, while a minor, applied for shares in a company and paid the amount due on allotment. She paid the amounts due on the first call. She received no dividends and attended no company meetings. Eighteen months later, while still a minor, she repudiated the contract and requested repayment of the money she had paid to the company. Held: since she was a minor she was entitled to repudiate the contract, but as there had been no failure of consideration she could not recover the money paid to the company.

LORD STERNDALE MR: . . . I think the argument for the respondent has rather proceeded upon the assumption that the question whether she can rescind and the question whether she can recover her money back are the same. They are two quite different questions, as is pointed out by Turner LJ in his judgment in *Ex parte Taylor* (1856) 8 DM&G 254. He there says: 'It is clear that an infant cannot be absolutely bound by a contract entered into during his minority. He must have a right upon his attaining his majority to elect whether he will adopt the contract or not.' Then he proceeds: 'It is, however, a different question whether, if an infant pays money on the footing of a contract, he can afterwards recover it back. If an infant buys an article which is not a necessary, he cannot be compelled to pay for it, but if he does pay for it during his minority he cannot on attaining his majority recover the money back.' That seems to me to be only stating in other words the principle which is laid down in a number of other cases that, although the contract may be rescinded the money paid cannot be recovered back unless there has been an entire failure of the consideration for which the money has been paid. Therefore it seems to me that the question to which we have to address ourselves is: Has there here been a total failure of the consideration for which the money was paid?

Now the plaintiff has had the shares allotted to her and there is evidence that they were of some value, that they had been dealt in at from 9*s*. to 10*s*. a share. . . .

In those circumstances is it possible to say that there was a total failure of consideration? If the plaintiff were a person of full age suing to recover the money back on the ground, and the sole ground, that there had been a failure of consideration it seems to me it would have been impossible for her to succeed, because she would have got the very thing for which the money was paid and would have got a thing of tangible value.

I cannot see any difference when you come to consider whether there has been consideration or not between the position of a person of full age and an infant. The question whether there has been consideration or not must, I think, be the same in the two cases. . . .

B: CONTRACTS FOR NECESSARIES

These contracts are binding on a minor to the extent that the minor must pay a reasonable price for necessaries sold and delivered to him.

Sale of Goods Act 1979

3. Capacity to buy and sell

(2) Where necessaries are sold and delivered to a minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price for them.

(3) . . . 'necessaries' means goods suitable to the condition in life of the minor or other person concerned and to his actual requirements at the time of the sale and delivery.

Nash v *Inman*
[1908] 2 KB 1 (CA)

The plaintiff supplied clothing to the defendant, a Cambridge undergraduate, to the value of £145 10s 3d. The clothing included 11 fancy

waistcoats. The defendant argued that he was a minor at the time the goods were supplied and that they were not 'necessaries'. The defendant's father gave evidence that the son was already amply supplied with clothes. Held: the onus of proving that the goods supplied were suitable to the condition in life of the minor and that the defendant was not already adequately supplied with such goods, was on the plaintiff. The plaintiff had failed to establish this.

Question
Why is the minor liable only for the reasonable price of necessaries and not their actual cost?

C: BENEFICIAL CONTRACTS OF SERVICE

A minor is bound by an employment contract if, on the whole, it is for his benefit.

Doyle v *White City Stadium*
[1935] 1 KB 110 (CA)

The plaintiff, a minor, applied to the British Boxing Board of Control for a licence as a boxer and agreed to be bound by the rules of the Board. He was issued with a boxer's licence. A few months later the rules were altered. Instead of a rule which provided that a boxer's money was only to be stopped if he was disqualified for a deliberate foul, the new rule was that in any case of disqualification the boxer was only to receive certain expenses. The plaintiff had arranged to box in return for £3,000 (win, lose or draw) but he was disqualified for fouling. The Board withheld most of his £3,000. The plaintiff claimed the whole sum. Held: the contract as a whole between the plaintiff and the Board was beneficial to the plaintiff and therefore was binding on him.

LORD HANWORTH MR: I turn to *De Francesco* v *Barnum* (1890) 45 ChD 430, where Fry LJ says: 'I approach this subject with the observation that it appears to me that the question is this, Is the contract for the benefit of the infant? Not, Is any one particular stipulation for the benefit of the infant? Because it is obvious that the contract of apprenticeship or the contract of labour must, like any other contract, contain some stipulations for the benefit of the one contracting party, and some for the benefit of the other. It is not because you can lay your hand on a particular stipulation which you may say is against the infant's benefit, that therefore the whole contract is not for the benefit of the infant. The Court must look at the whole contract, having regard to the circumstances of the case, and determine, subject to any principles of law which may be ascertained by the cases, whether the contract is or is not beneficial. That appears to me to be in substance a question of fact.'. . .

The learned judge on the question of fact has held that the terms of the agreement in this case are favourable and to the advantage of the infant, and it seems therefore that the application of the rules cannot be held to be prevented by reason of the plaintiff's infancy.

D: RESTITUTION BY THE MINOR

The court has a discretion to order the return of non necessaries which the minor has obtained under an unenforceable contract.

Minors' Contracts Act 1987

3. Restitution

(1) Where —

(a) a person ('the plaintiff') has after the commencement of this Act entered into a contract with another ('the defendant') and

(b) the contract is unenforceable against the defendant (or he repudiates it) because he was a minor when the contract was made,

the court may, if it is just and equitable to do so, require the defendant to transfer to the plaintiff any property acquired by the defendant under the contract, or any property representing it.

E: GUARANTEES OF MINORS' CONTRACTS

Minors' Contracts Act 1987

2. Guarantees

Where —

(a) a guarantee is given in respect of an obligation of a party to a contract made after the commencement of this Act, and

(b) the obligation is unenforceable against him (or he repudiates the contract) because he was a minor when the contract was made,

the guarantee shall not for that reason alone be unenforceable against the guarantor.

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