Property: No reward for a cynical breach of a restrictive covenant

Adam Swirsky

When a developer originally applied to the Upper Tribunal (Lands Chamber) to modify a restrictive covenant under section 84(1) Law of Property Act 1925 the tribunal allowed the application despite the fact that the developer had built on land burdened by a covenant restricting the land's use to a car park. The developed land was situated next to the Claimant's hospice and the developer argued and the tribunal accepted that, because the developer had built 23 units for social housing, the covenant was contrary to the public interest.

The Court of Appeal and now the Supreme Court disagreed (**Millgate Developments Ltd and another v Alexander Devine Children's Cancer Trust and another [2020] UKSC 45**). Although the Supreme Court was satisfied that the Tribunal had taken the developer's cynical conduct into account, it found, exceptionally, that something had gone fundamentally wrong with the exercise of its discretion because the Tribunal had failed to take into account two factors of particular importance.

The first of these omissions was to disregard the fact that, had the developer respected the rights of the trust by applying for planning permission on nearby land, there would then have been no need to apply to discharge the covenant and the Claimant's hospice would have been unaffected. The second was, had the developer respected the rights of the trust by applying under section 84 before starting to build, it was likely that the developer would not have been able to satisfy the "contrary to the public interest" jurisdictional ground.

In respect of these factors, the court pointed out that, first, it was important to deter a cynical breach under section 84 but it was especially important to do so where that cynical conduct had produced a land-use conflict that could reasonably have been avoided altogether by submitting an alternative plan and, second, it was not in the public interest that those who deliberately breached a restrictive covenant should be able to secure the modification of the covenant in reliance on the state of affairs created by their own deliberate breach.

The case is important because it underlines the court's approach to applications made under section 84 where there has been a cynical disregard of a restrictive covenant but also because it demonstrates that, in an appropriate case, an appeal court will interfere with the exercise of a discretion by a lower tribunal.

Standard of proof in inquests: R (on the application of Maughan) v HM Senior Coroner for Oxfordshire [2020] UKSC 46

Oscar Davies

In the recent judgment of ***R (on the application of Maughan) v HM Senior Coroner for Oxfordshire* UKSC 46**, the Supreme Court clarified that the standard of proof for all conclusions at an inquest – including unlawful killing and suicide – is the balance of probabilities, rather than the criminal standard of proof.

In this case, a prisoner, James Maughan, died by hanging in his prison cell. Two elements must be established before suicide can be found: it must be shown that the deceased took his own life and that he intended to kill himself (or another).

At his inquest, the Coroner directed that the jury could not reach a short-form conclusion of suicide because the evidence was insufficient to establish suicide to the criminal standard. Instead, the Coroner invited a narrative conclusion, in which the jury concluded that on the balance of probabilities that Mr Maughan had intended to hang himself. His family brought the claim which resulted in this appeal on the basis that that conclusion was not open to the jury because the criminal standard of proof should have been applied to narrative, as well as short-form, conclusions of suicide.

By a 3-2 majority (with Lady Arden giving the leading judgment), the Supreme Court dismissed the appeal, holding that the applicable standard of proof is the civil standard. Lord Kerr and Lord Reed gave dissenting judgment: they would both have allowed the appeal and held that there would be nothing untoward in applying a higher standard of proof to determinations of suicide and unlawful killing; this would not create inconsistency.

Lady Arden gave four particular factors which led her to dismiss the appeal:

1. The common law does not demonstrate any cogent reason for not applying the civil standard;
2. The criminal standard may lead to suicides being under-recorded and to lessons not being learnt;
3. The changing role of inquests and changing societal attitudes to suicide tend in favour of reviewing the standard of proof – inquests are now concerned with the investigation of deaths, and not with criminal justice; and suicide is no longer a crime;
4. Other commonwealth jurisdictions apply the civil standard to suicide verdicts.

There is now a clear approach to be taken across all inquests, whether in short form or narrative: the standard of proof is the balance of probabilities.

An effect of this lower standard of proof is likely to be a rise in unlawful killing inclusions. It is also likely to be easier for coroners to conclude that someone has committed suicide than it was before *Maughan* because they no longer have to be 'sure' about the deceased's intentions.

Property: Illegality Defence: Stoffel & Co v Grondona [2020] UKSC 42

Dominic Bright

How does the new, policy-based approach to the illegality defence apply?

Illegality defence

In *Tinsley v Milligan* [1994] 1 AC 340 (HL), the *traditional* illegality principle was applied. The parties had to rely on their own illegality to establish their case. Relief was refused.

In *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 at [120], Lord Toulson (with whom Lady Hale, and Lords Kerr, Wilson and Hodge agreed) rejected the *traditional* application in these terms (with emphasis added):

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system … In assessing whether the public interest would be harmed in that way, *it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced*

by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts."

Facts

Ms Grondona ("G") had an agreement with Mr Mitchell ("M"). G agreed to mortgage loans for four properties. M agreed to pay half of the net profit of the properties to G upon sale.

The freehold interest in one of the properties ("the property") was bought by Ms Hedley ("H"). H obtained finance from BM Samuels Finance Group plc ("Samuels"). Samuels obtained a registered charge.

M paid £30,000 to H for a lease of part of the freehold of the property. M took out a loan of £45,000 for six months. It was secured by a legal charge with Samuels ("the Samuels charge").

The leasehold interest was registered in M's name. The Samuels charge was registered.

G purchased the leasehold interest in the property from M for £90,000. Three times the price that M paid when it was created. To do so, G obtained a mortgage from Birmingham Midshires for about £75,000 ("the Birmingham Midshires mortgage").

The advance was to be secured by a charge ("the Birmingham Midshires charge").

The Birmingham Midshires mortgage was procured by fraud. G made dishonest misrepresentations. The purpose was to avoid funding the purchase of the property by G.

Stoffel & Co ("Stoffel") are solicitors. Stoffel acted in the conveyance for G, M and Birmingham Midshires. M executed the 'Transfer of Whole of Registered Title' ("the Form TR1") of the property in favour of G. M also delivered the TR1 to Stoffel.

Stoffel paid about £75,000 by way of mortgage advance from Birmingham Midshires to Samuels. This was for the Samuels charge to be discharged. Samuels provided Form DS1 releasing the Samuels charge ("the Form DS1").

Stoffel failed to register the Form TR1, the Form DS1, or the Birmingham Midshires charge ("the forms"). M remained the registered proprietor of the property. Samuels remained the registered proprietor of the Samuels charge.

Procedural history

G defaulted on payments under the Birmingham Midshires charge.

Birmingham Midshires brought proceedings against G. It was defended.

G also brought proceedings against Stoffel for an indemnity and / or a contribution and / or damages for breach of duty and / or breach of contract.

Stoffel defended on the basis that the claim was debarred by illegality. The purpose of putting the property into G's name, and obtaining the Birmingham Midshires mortgage, was illegal. It was a conspiracy to obtain finance for M by misrepresentation. The purpose of instructing Stoffel was to further that fraud.

Birmingham Midshires amended its claim. It claimed directly against Stoffel, Samuels and M.

The first and second were settled. Summary judgment was obtained against G.

County Court

HHJ Walden-Smith held that G's claim was not debarred by illegality.

Tinsley was applied. The claim against Stoffel for failing to register the forms was conceptually separate. It did not rely on illegality. The reason for the conveyance was irrelevant.

G was awarded damages of about £80,000.

Court of Appeal

Stoffel appealed. G cross-appealed on quantum.

Patel was handed down after judgment by HHJ Walden-Smith. *Patel* was applied. Debarring the claim against the negligent solicitors would not enhance the fight against mortgage fraud. It would be disproportionate to the wrongdoing.

The appeal, and cross-appeal on quantum, was dismissed.

Supreme Court

Lady Hale, and Lords Hodge and Briggs, granted Stoffel permission to appeal on application of the *Patel* guidelines. It is interesting to note that Lady Hale and Lord Hodge were in the majority in *Patel,* however, Lord Briggs was subsequently elevated.

G had a complete cause of action. The issue was whether there was a defence of illegality.

Discussion

Lord Lloyd-Jones (with whom Lords Reed and Hodge, and Ladies Black and Arden agreed) applied the three considerations in *Patel* at [101]. They are set out above.

First consideration: underlying purpose

G was knowingly and dishonestly involved in a mortgage fraud. The sale between M and G was tainted with illegality. G's conduct was proscribed under section 15 of the Theft Act 1968.

Stoffel knew nothing about it. Stoffel were retained to facilitate the fraud.

Purposes for criminalising mortgage fraud were analysed.

Deterrence

Prosecutions are difficult. Accordingly, the deterrent effect is limited. Refusal of relief to a party involved in mortgage fraud would enhance the deterrent effect.

Lord Lloyd-Jones doubted that permitting a civil remedy to persons in G's position would undermine this policy to any significant extent: "The risk that they may be left without a remedy if their solicitor should prove negligent in registering the transaction is most unlikely to feature in their thinking."

Protection of mortgagees from loss

Lord Lloyd-Jones considered that "it is difficult to see how refusing [G] a civil remedy against her solicitors for negligence in failing to register the transfer would enhance [the] protection [of mortgagees from loss]." Registration "was not a necessary step in perpetrating the fraud".

In fact, a civil remedy protected *mortgagees:* "Were [G] to recover compensation from [Stoffel], that could be applied to meet or reduce her liability to Birmingham Midshires".

Second consideration: countervailing public policies

These concern professional duties, remedies in default, and the effect of the transaction.

Professional diligence & remedy in default

Conveyancing solicitors should perform their duties without negligence. Default should entitled clients to seek a civil remedy for loss suffered. Permitting escape after discovery of a misrepresentation "would run entirely counter to these policies."

Further, "there is more likelihood that mortgage fraud would be prevented if solicitors appreciate that they should be alive to, and question, potential irregularities". There were three potential irregularities capable of providing notice of the possibility of fraud.

Effect of transaction on property rights

Lord Lloyd-Jones was clear that "unless a statute provides otherwise expressly or by necessary implication, property can pass under a contract which is illegal as a contract."

G and M *intended* to register the legal title of the property, so that it passed to G. Had Stoffel registered the Form TR1, legal title *would* have passed. In the event, legal title did *not* pass.

As M had done everything that he could do to effect the *legal* transfer, G was entitled to an *equitable* interest in the property. This gave rise to an important countervailing public policy:

> "Once an equitable interest in the property has passed to [G], she should have available to her as the holder of that interest the remedies provided by law for its protection. It would … be incoherent for the law to accept on the one hand that an equitable interest in the property passed to [G], notwithstanding that the agreement for sale was tainted with illegality, while on the other refusing, on the basis of the same illegality, to permit proceedings against a third party in respect of their failure to protect that equitable interest by registering the Form TR1 at the Land Registry."

Third consideration: proportionality

Conclusions on the first and second considerations meant that "it is not strictly necessary to go on to consider the third … namely whether denial of the claim would be a proportionate response to the illegality."

Centrality of illegality

Lord Lloyd-Jones found that two features "demonstrate the lack of centrality of the illegality to the breach of duty of which [G] complains."

First, the fraud had *already* been achieved by the time that Stoffel were required to register the transactions. Secondly, *equitable* title to the property had *already* passed to G, albeit that *legal* title could only pass on *registration* of the transfer.

The essential facts founding the claim can be established *without* reference to illegality. The claim for breach of duty is *conceptually separate* from the fraud on the mortgagee.

Profiting from wrongdoing

Lord Lloyd-Jones reasoned (with emphasis added) that:

> "For one branch of the law to enable a person to profit from behaviour which another branch of the law treats as criminal or otherwise unlawful would tend to produce inconsistency and disharmony in the law and so cause damage to the integrity of the legal system. In the present case *it is not suggested by either party that by suing* [Stoffel, G] *is seeking to profit from her wrongdoing.*"

It was submitted that the policy consideration – that one should not be allowed to profit from her own wrongdoing – applies *equally* to the loss resulting from Stoffel's wrongdoing.

Lord Lloyd-Jones responded (with emphasis added) that:

> "Clearly, it would be objectionable for the court to lend its processes to recovery of an award calculated by reference to the profits which would have been obtained had the illegal scheme succeeded. This, however, is not a claim to recover a profit but a claim for compensation for property lost by the negligence of [Stoffel]. … *This is not a case of the court assisting a wrongdoer to profit from her own wrongdoing.*"

It was argued that G would profit from her fraudulent transaction. If her claim succeeds, "she will acquire the means of meeting a substantial judgment against her." This is *not* the correct analysis. In any event, "the notion that persons should not be permitted to profit from their own wrongdoing is unsatisfactory as a rationale of the illegality defence."

Lord Lloyd-Jones concluded that: "The true rationale of the illegality defence … is that recovery should not be permitted where to do so would result in an incoherent contradiction damaging to the integrity of the legal system." G's claim did not.

Disposal

The Court of Appeal correctly followed the new, policy-based approach to the illegality defence. The claim was not barred. The appeal was dismissed.