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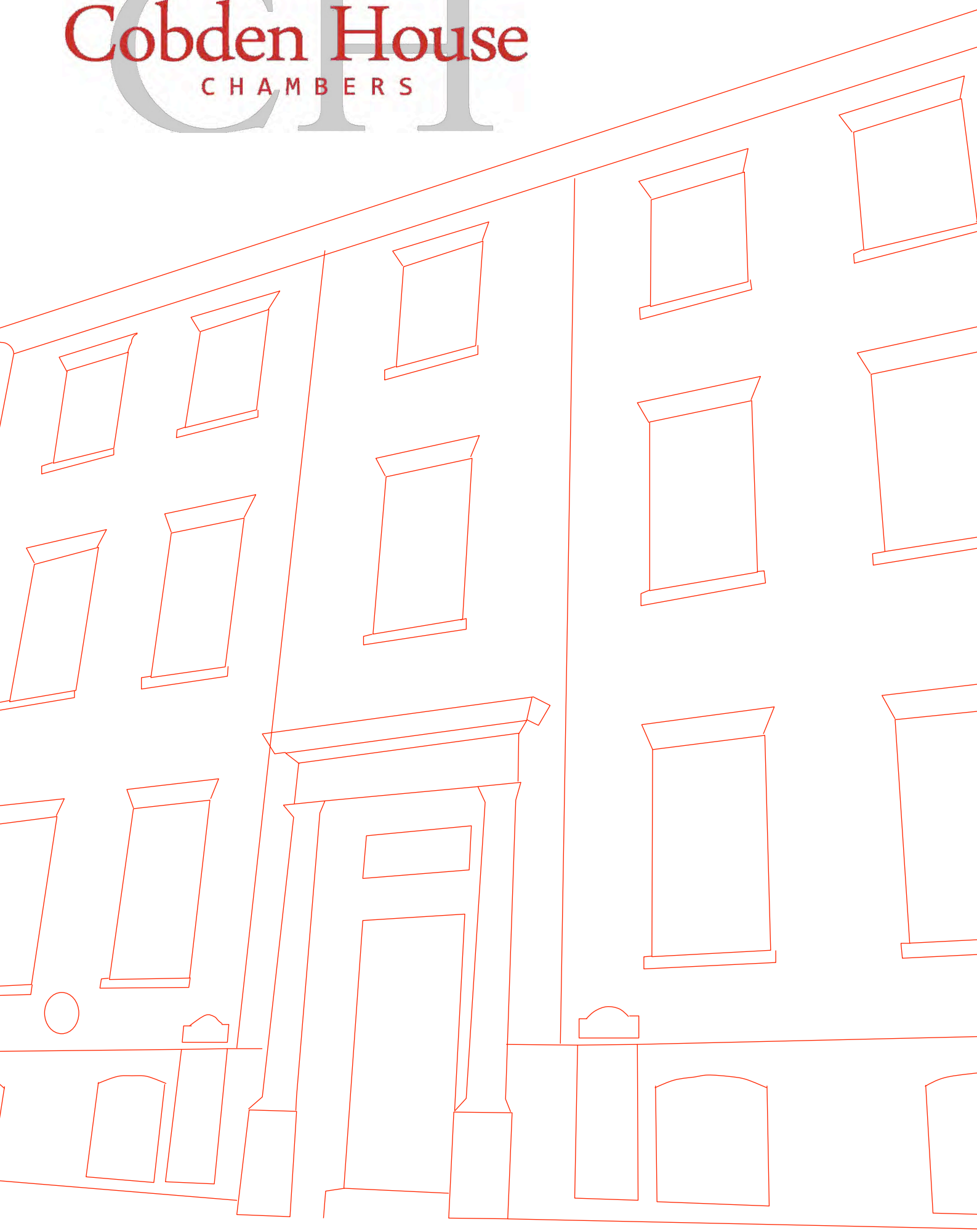

Cobden House

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(door tenant)

Matthew Kime
(IP specialist – door tenant)

Sam Keeling-Roberts

Easements

Winterburn v Bennett [2016] EWCA Civ 482

This case clarifies the steps that a landowner must take to prevent those who use his land without permission from acquiring rights over that land.

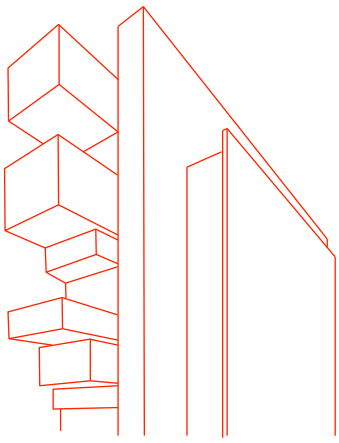
The Winterburns ran a fish and chip shop in Keighley, West Yorkshire. Their suppliers and customers routinely parked on the car park attached to the nearby Conservative Club, notwithstanding the presence of obvious signs which stated: *"Private car park. For the use of Club patrons only. By order of the Committee."* The First Tier Tribunal found that nobody who used the car park *"took the slightest notice of the signs"*.

The Winterburns brought a claim for a declaration that they, their suppliers and customers had acquired the right to park on the car park by prescription by lost modern grant. They had to show 20 years' uninterrupted user *"as of right"*; or without force, without secrecy, and without permission. The absence of *"force"* was the determining factor.

The First Tier Tribunal held that more than 20 years' user without force, secrecy or permission was established; but the Upper Tribunal disagreed. The Court of Appeal confirmed the decision of the Upper Tribunal, holding that the presence of the signs meant that the user was not *"without force"*. Lord Justice David Richards held that *"the phrase 'without force' carries rather more than its literal meaning"*, stating that *"it is not enough for the person asserting the right to show that he has not used violence"* and that *"he must show that his user was not contentious or allowed only under protest"*.

The Court went on to note that *"the whole law of prescription rests upon acquiescence"*, and that *"it cannot be said that to avoid acquiescence the owner must take steps through physical means or legal proceedings actually to prevent the wrongful user"*. Approving the case of *Taylor v Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250, the Court went on to hold that *"the signs were by themselves sufficient to make contentious the parking of cars and other vehicles by the appellants, their suppliers and customers"*. David Richards LJ then stated that the owner must *"object and continue to object"* and that his protest must be *"proportionate to the user"*. In this case, the signs were a proportionate protest, and any reasonable person would understand their meaning and effect. That the signs did not have the effect of stopping the wrongful parking did not require the owner to do more; the user was not *"as of right"*; and no right was acquired.

In conclusion, the Court noted that *"most people do not seek confrontation and do not have the means to bring legal proceedings"*, and that *"the law of property should not require confrontation in order for people to retain and defend what is theirs"*. Those who choose to ignore *"appropriate, peaceful and inexpensive"* signs should not be entitled to obtain legal rights over that land.



Gary Lewis

Landlord and Tenant

Smith v Contour Homes (Manchester County Court, 1 April 2016)

On 12th May 2016, His Honour Judge Main QC handed down judgment in a case which is understood to be one of the first cases of its kind to consider and apply the Supreme Court guidance in the case of *Akerman-Livingston v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15 in a residential landlord and tenant context.

Background

The claim started life as an accelerated possession claim arising out of the tenant's conviction for indecent exposure at the property with his having masturbated at the front door in view of neighbouring residents. Upon investigation, it transpired that the tenant had a previous conviction for like-behaviour albeit at a local church and prior to the commencement of the starter tenancy. The landlord was therefore concerned as to the risk of repeat behaviour upon neighbouring residents and served a Section 21 Notice and thereafter issued its claim for possession.
No issue was taken with the Section 21 Notice. Rather, the tenant sought to defend the otherwise mandatory claim on the following grounds:

- Public Law Grounds – the landlord had considered an irrelevant factor or had alternatively given undue weight to it (namely the pre-tenancy conviction).
- Human Rights Grounds – the personal circumstances of the tenant rendered an order for possession disproportionate and contrary to his rights secured by Article 8.
- Equality Act Grounds – the landlord had breached Section 15 of the Equality Act 2010 in that the tenant was disabled by reason of a schizoaffective disorder; his behaviour occurred as a result of such disability and his eviction was disproportionate so as to mean that the landlord was therefore unlawfully discriminating against him.

In reply, the landlord maintained that the Defence fell short of being *"seriously arguable"* as per the now well known Supreme Court guidance in *Manchester City Council v Pinnock* [2010] 3 WLR 1441 and *Hounslow LBC v Powell* [2011] 2 WLR 287. In particular, the landlord sought to rely upon the Court of Appeal decision in *Akerman* (as it then stood) to the effect that the Article 8 and Section 15 proportionality tests were the same such that the tenant had to demonstrate *"exceptional personal circumstances"*.

First Instance Decision(s)

District Judge Hovington initially heard the case in January 2015 and therefore prior to the Supreme Court decision in *Akerman*. Judgment was reserved and, though a draft judgment was circulated on 5th March 2015 and therefore six days before the Supreme Court's decision on 11th March 2015, it was not to be handed down until some time after in April 2015. By the draft judgment, District Judge Hovington had agreed with the landlord in every respect and, most notably, had relied upon the Court of Appeal decision in *Akerman* which of course was bad law as at the date of handing down. Accordingly and in consideration of the Supreme Court's approach in overturning the Court of Appeal, the Section 15 proportionality issue was adjourned for trial. That approach was to the effect that: The burden of proving proportionality is on the landlord [27 & 33].

- The landlord must show that the impact on the tenant's rights is not disproportionate to the likely benefit of the steps taken [para.28].
- While still relevant, the vindication of the landlord's property rights is not a trump card like with Article 8 cases, as per *Pinnock* and *Powell* given that the protection to the rights under the 2010 Act are stronger [30, 34 & 55].
- It is to be considered whether there is any lesser measure which might achieve the landlord's aims and a balance is to be struck between the

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- seriousness of the impact upon the tenant and the importance of the landlord's aims [31].
- Further, it is to be considered whether the landlord has done all that can reasonably be expected of it to accommodate the disability [32].
- The Court must consider the particular type of alleged discrimination and under Section 15 the landlord would have to show that there was no less drastic means of solving the problem and that the effect upon the occupier was outweighed by the advantages [34].

At the trial in September 2015, the sole issue for determination was as to whether the landlord could show that the eviction of the tenant was a proportionate means of achieving a legitimate aim in accordance with Section 15 of the 2010 Act. Notwithstanding the high threshold upon the landlord, District Judge Hovington found that the landlord came to proof and ordered possession. It was held that:

- The landlord's aim of protecting neighbouring residents from the risk of experiencing further inappropriate and offensive sexualised behaviour was a legitimate one.
- The tenant's eviction was proportionate in light of, inter alia, the tenant having support in place to ensure that he would not be rendered street homeless; the rights of the neighbouring residents and the underlying risk of the behaviour recurring by reason of past behaviour and the tenant's continued use of cannabis (as agreed by the expert psychiatric evidence).
- There was no less drastic means of the landlord achieving its aim in the circumstances where an injunction was not an appropriate remedy – the landlord not being a local authority and being helpless to eliminate or control the tenant's cannabis use.

Appeal Decision

The tenant appealed the decision on the basis that District Judge Hovington had erred in applying the guidance in *Akerman* and, in particular, had erred in finding that an injunction was not a viable and less drastic means of achieving its aims. The appeal was listed for hearing on 18th March 2016. By his judgment dated 1st April 2016, His Honour Judge Main QC upheld the decision on the basis that:

- The narrow issue of proportionality had to be considered in a context where the aim to be achieved (to protect other residents from the risk of repeat behaviour) and the way in which it was sought to be achieved (by eviction) had to be outweighed by the impact upon the tenant and there had to be considered whether there were other measures available to the landlord to realistically achieve that aim [36 – 39].
- Of particular note was the fact that the tenant was an unrepentant and habitual cannabis user whilst he also continued to use alcohol – both of which increased the risk of repeat behaviour and were recognised by the expert's report. Further, the tenant had not always been compliant with his medication and showed no insight into his mental illness and need for treatment [41 – 42].
- While there was a causal connection between the tenant's disability and the behaviour giving rise to the proceedings, the incident more reflected, when the tenant was stressed, his abuse of alcohol and drugs [43].
- Significantly, an injunction could only operate reactively and the tenant's third party support could only monitor the tenant so far – there was no guarantee as to the tenant's future behaviour as was reflected by his support missing the red flags when the behaviour had previously taken place [44].

Comment

Although the case is no more than a persuasive county court decision, it proves to be useful to both landlords and tenants in a number of respects:

- From a landlord-perspective, the decision offers some comfort following the initial concerns that the Supreme Court guidance would render the Section 15 proportionality test far too difficult to prove. For the purpose of necessity of

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eviction, it also underlines the importance of identifying from an early stage as to what exactly is the aim that is sought to be achieved (crucially here, the aim was to eliminate the risk of repeat behaviour).

- From a tenant-perspective, the most notable point is to avoid an over-reliance upon an injunction being a 'less drastic means' in each and every case of this kind. The tenant should first consider the aim put forward by the landlord before considering the alternative steps that could and/or should have been taken to achieve that aim without the need for eviction.

Finally and by way of a general observation, the case highlights the relevancy of the level of the causal link as between the disability and the offending behaviour giving rise to the proceedings. That is, the weaker the causal link the easier it will be for the landlord to satisfy the Court as to proportionality. In the instant case, great weight was given to the causal link being weakened by the use of drugs and alcohol as opposed to a full psychotic episode.

Gary Lewis represented the landlord both at first instance and on appeal

Arron Walthall

Ex Turpi Causa

Patel v Mirza [2016] UKSC 42

In *Patel v Mirza*, nine Judges of the Supreme Court considered how the law should deal with cases that involve illegality. Although the claim involved a contractual dispute, the Court's analysis will also apply to other types of case, such as those in tort or for breach of trust.

The facts

The claim involved a contract between Mr Patel and Mr Mirza that failed. Mr Patel had given Mr Mirza £620,000 to bet on the value of RBS shares on the understanding that Mr Mirza had contacts within RBS who could inform him of upcoming government announcements that would affect the bank's share price. Although Mr Mirza never placed the bet, he refused to repay the money. The question that the Court had to address was whether or not Mr Patel's unjust enrichment claim to recover his £620,000 was barred by virtue of the fact that their agreement constituted a conspiracy to commit insider dealing contrary to section 52 of the Criminal Justice Act 1993 [11 -12].

The new test

Ultimately, there was little controversy in the Court's finding that Mr Patel ought to recover his money. The case was, however, ground breaking for the majority's treatment of the illegality defence in general.

Lord Toulson delivered the majority's judgment with the agreement of Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge. Lord Neuberger was also largely in accord [174-175, 186]. There were 3 dissenting judges - Lord Mance, Lord Clarke and Lord Sumption.

Within the majority judgment, Lord Toulson provided the following guidance. Firstly, Courts in future should ask *"whether the relief claimed should be granted"* rather than whether any particular case is 'tainted' by illegality [109]. Secondly, it would be contrary to public policy to grant the relief claimed in any particular case if the result would harm the integrity of the legal system [100 - 101 and 120]. Thirdly, whether or not granting relief would harm the integrity of the legal system depends upon:

a) The underlying purpose of the prohibition that has been transgressed
b) Any other relevant public policies that may be rendered ineffective or less effective if the claim were denied
c) Proportionality

[101, 120]

The integrity of the legal system

The concept of *"the integrity of the legal system"* was at the heart of Lord Toulson's Judgment. He adopted it from McLachlin J sitting in the Supreme Court of Canada in *Hall v Hebert* [1993] 2 SCR 159, who explained why allowing recovery can, in some cases, damage the integrity of the legal system: *"it would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law."* Lord Toulson also summarised it as follows: *"the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand"* [99].

Proportionality

Whilst *"the integrity of the legal system"* is a relatively new concept, the Civil Courts are far more familiar with idea of proportionality. Nevertheless, Lord Toulson also gave guidance as to the factors that Courts should take into account when considering whether it would be disproportionate to deny relief. These include:

a) The seriousness of the conduct
b) Its centrality to the case
c) Whether it was intentional
d) Whether there was a marked disparity in the parties' respective culpability

[106]

In addition, Lord Toulson described a list of factors proposed by Professor Andrew

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Burrows of Oxford University as *"helpful"* [106] when considering proportionality. Accordingly, the Courts may also have to consider:

a) How seriously illegal or contrary to public policy the conduct was
b) Whether the party seeking enforcement knew of, or intended, the conduct
c) How central to the contract or its performance the conduct was
d) How serious a sanction the denial of enforcement is for the party seeking enforcement
e) Whether or not denying enforcement will further the purpose of the rule which the conduct has infringed
f) Whether or not denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy
g) Whether or not denying enforcement will ensure that the party seeking enforcement does not profit from the conduct
h) Whether or not denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system [93]

These factors were endorsed, in more general terms, by Lord Neuberger [173]. Nevertheless, both Lord Toulson [107] and Lord Neuberger [173] stressed that each case will depend upon its own facts and that the factors set out above are not a definitive or prescriptive list.

Additional principles

Finally, it is possible to identify the following additional principles that might influence the Courts' approach to illegality in future:

a) In cases of unjust enrichment, the Court will rarely deny the claimant a remedy [Lord Toulson at 116, 121; Lord Neuberger at 145]

b) The test is the same in equity and under the common law [Lord Neuberger at 152]

c) The Civil Courts' function is not to punish individuals [Lord Toulson at 108, 120; Lord Neuberger at 184]

d) A party's repentance is an irrelevant consideration [Lord Neuberger at 156, also Lord Sumption at 252]

e) The fact that the illegal course of action has been carried out in whole or in part does not automatically bar relief [Lord Neuberger at 167; also Lord Mance at 198 and Lord Clarke at 220]

f) The Court should not deny the claimant a remedy if the prohibition was intended to protect him [Lord Neuberger at 162, 182]

g) It may be more repugnant to the public interest for the recipient of a bribe to keep the money than for the payer to recover it [Lord Toulson at 118]

h) The claimant should be denied relief if the defendant was unaware of the illegality and has changed his position such that it would be oppressive to uphold the claimant's rights [Lord Neuberger at 162, 182]

i) The Courts should not frustrate efforts being made by the relevant authorities under the Proceeds of Crime Act 2002 [Neuberger: 184].

Conclusion

The Supreme Court has created a new and radical approach to illegality that introduces a flexible test based upon the need to balance a multitude of factors. Whilst it has the advantage of empowering the judiciary to deal with each individual case in a way that upholds the integrity of the legal system, it also carries the risk of being unpredictable in its practical application. As Lord Sumption warned, there may be *"no principle whatever to guide the evaluation other than the judge's gut instinct"* [262iv]. Whether it is therefore *"likely to generate a great deal of wasteful and unnecessary litigation"* [263] is yet to be seen.