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The 'one man company' after *Patel v Mirza*: attribution and illegality in *Singularis Holdings v Daiwa Capital Markets*

JAMES C FISHER

Sophia University, Tokyo, Japan

Abstract

This note discusses the UK Supreme Court's decision in Singularis Holdings v Daiwa Capital Markets *in the context of other recent decisions on corporate attribution and the illegality principle in English law. It particularly considers* Daiwa*'s implications for the relationship between the illegality doctrine and other legal principles in the wake of* Patel v Mirza. *The court employed a context-sensitive, teleological approach to attribution, one consequence of which was the conclusive consignment of the House of Lords' decision in* Stone & Rolls Ltd v Moore Stephens *to irrelevance. It nonetheless privileges orthodox, pre-*Patel*ian authority in the disposal of the case. The court's approach suggests that* Patel *is perceived as the high-water mark for expansive, policy-sensitive understanding of the illegality principle, and that its disruptive potential is likely to be carefully constrained in future decisions of the Supreme Court.*

Keywords: *Singularis Holdings v Daiwa Capital Markets;* illegality; attribution; *Patel v Mirza*; *Stone & Rolls Ltd v Moore Stephens*; *ex turpi causa*; directors' duties; fraud.

Introduction

The facts of *Singularis Holdings v Daiwa Capital Markets*[1] were simple and not long ago would hardly have warranted the attention of the Supreme Court. Nonetheless, the recent volatility in the English illegality doctrine forced from the court an authoritative restatement of the law concerning the corporate attribution of a director's unlawful conduct.

Violent disagreement about the illegality principle's nature, justification and operation is inevitable since, to a degree far greater than most questions of legal doctrine, the principle forces lawyers to confront some of the most profound theoretical and ideological questions that divide juristic thinkers. It raises uncomfortable questions about the distinction between legal and non-legal arguments, and therefore about law's normative autonomy as a site of structured, internally self-validating reasoning. It moreover exposes the tension between (i) the equality, clarity and predictability promised by uniform legal rules and (ii) episodic justice in concrete disputes, which is maximised by flexibility and judicial discretion.

1 [2019] UKSC 50.

For a short while, it seemed as though the Supreme Court's 2016 decision in *Patel v Mirza*[2] had settled – at least as a matter of positive law – the debate over the proper operation of the illegality principle, which had received a flurry of judicial attention at the highest level since *Hounga v Allen*[3] was decided in 2014. However, just as the law seemed conclusively to have rejected a formalistic, procedural rule in favour of a flexible principle attentive to public policy, a sequence of Court of Appeal decisions resisted litigants' suggestions that *Patel* invited departure from older authorities. Appellate decisions in the wake of *Patel* have generally remained loyal to older cases which sit imperfectly with *Patel*'s approach to illegality. *Daiwa* continues this trend, for the first time at the Supreme Court level.

1 Facts, arguments and disposal

Singularis Holdings was a Cayman Islands-incorporated company that existed to manage the personal wealth of Saudi Arabian tycoon Maan Al Sanea. He was the sole shareholder as well as the chairman, president and treasurer. Although there were directors other than Al Sanea, he had been delegated sweeping management powers, particularly with respect to authorising instructions to the company's bankers. When the company's financial situation became fragile, Al Sanea instructed its bankers, Daiwa Capital Markets, to make a series of payments from the company's account to two other companies – a misapplication of company funds in breach of Al Sanea's fiduciary duties.[4]

Singularis subsequently entered voluntary liquidation and its liquidators sued Daiwa for recovery of the sums paid away according to Al Sanea's instructions,[5] on the basis either (i) that Daiwa had dishonestly assisted in Al Sanea's breach of his fiduciary duty, or (ii) that Daiwa had breached the duty of care recognised in *Barclays Bank plc v Quincecare Ltd*.[6] That duty obliges banks to investigate before executing orders from a director of a client company if the circumstances lead reasonably to suspicion that such orders constitute a fraud against the company. A bank is liable if it executes an order knowing it was made dishonestly, ignoring obvious dishonesty, or recklessly having failed to make the confirmatory enquiries a reasonable, honest person would make in the circumstances.

Rose J dismissed the first argument, holding that Daiwa had acted honestly and was therefore not liable for assisting in the misapplication of company funds. The dishonest assistance point was not appealed, so the Court of Appeal and Supreme Court dealt only with Daiwa's liability in negligence for breach of its *Quincecare* duty of care. At trial, Rose J held that Daiwa had indeed breached its duty to Singularis, identifying 'many obvious, even glaring, signs that Mr Al Sanea was perpetrating a fraud on the company'.[7] She awarded the sums claimed, less a 25 per cent reduction reflecting the contributory negligence attributable to Singularis. The Court of Appeal unanimously upheld her decision.[8]

2 [2016] UKSC 42, [2017] AC 467.

3 [2014] UKSC 47, [2014] 1 WLR 2889.

4 [2017] EWHC 257 (Ch), [2017] Bus LR 1386, [120]–[127].

5 Less whatever was recovered from Mr Al Sanea personally or from the recipients of the impugned payments.

6 [1992] 4 All ER 363.

7 *Daiwa* (n 4) [192], per Rose J (further specifics at [193]–[202]).

8 [2018] EWCA Civ 84, [2018] 1 WLR 2777.

The Supreme Court thought it 'incontrovertible' that Daiwa had breached its *Quincecare* duty to Singularis,[9] and that Rose J's decision must stand unless there existed some impediment to the negligence action. Daiwa submitted that Singularis' otherwise valid negligence claim must nonetheless fail for one (or more) of three reasons. Each of these putative obstacles to Singularis' claim presupposed that Al Sanea's fraud against the company should be attributed to the company itself.

First, Daiwa argued that Singularis' claim was incompletely constituted for want of causation since its losses were legally attributable not to Daiwa's negligence, but to Singularis' own. Second, and connectedly, Daiwa argued that Singularis' claim in negligence was defeated by Daiwa's own 'equal and opposite' claim in the tort of deceit.[10] Third, Daiwa argued that Singularis' claim was barred by the illegality rule as formulated in *Patel*. In a concise single judgment, the Supreme Court upheld the decisions of Rose J and the Court of Appeal, declaring that 'for the purpose of the *Quincecare* duty of care, the fraud of Mr Al Sanea is not to be attributed to the company' and that, even if it were so attributed, 'none of the defences advanced by Daiwa would succeed'.[11]

2 Causation and/or a countervailing action in deceit

Daiwa invoked *Reeves v Commissioner of Police of the Metropolis*[12] to argue that Singularis' negligence claim must fail on causal grounds. In *Reeves*, Lord Hoffmann had identified 'a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves'.[13] Daiwa submitted that, through the actions of its fraudulent director, Singularis had in law inflicted the losses in question on itself, and they were therefore not causally attributable to Daiwa's breach of duty. Rather, this was a case in which the claimant 'must look after themselves and take responsibility for their actions'.[14]

The Supreme Court swiftly exposed the flaw in that submission. The distinction that Lord Hoffmann identified relates to the judicial decision whether or not to recognise a novel duty of care. For reasons of policy and ideology, the law will be far slower to recognise a duty to prevent another person harming their own interests than a duty to protect against harm inflicted by third parties. The Supreme Court in *Daiwa* approved Lord Hoffmann's explanation that, in determining whether such an exceptionally recognised duty has been breached, it would be 'self-contradictory to say that the breach could not have been a cause of the harm because the victim caused it to himself'.[15]

The crucial, and sensible, point in Lord Hoffmann's opinion is that the law should explicitly accept the dilemma surrounding liability for others' self-inflicted harm as *normative*, rather than disguise it as an analytical problem about causality. The clarity and integrity of the law both benefit from such transparency. Obviously, in these situations both the claimant's action and the defendant's omission to prevent that action (or its consequences) are historically necessary conditions – 'but-for causes' – of the claimant's loss. The real dilemma concerns what allocation of responsibility between these causal agents is just and appropriate.

9 *Daiwa* (n 1) [12].
10 Ibid [1].
11 Ibid [38].
12 [2000] 1 AC 360.
13 Ibid 368.
14 Ibid.
15 Ibid.

In *Daiwa*, the Supreme Court correctly explained that this dilemma had already been authoritatively settled, as reflected by the emergence of *Quincecare* liability in the first place. The *Quincecare* duty represents a balance between competing interests and policies in obliging banks to prevent their customers suffering losses necessarily 'caused by people for whom the customer is, one way or another, responsible'.[16] It follows that liability for breach of that duty could not be avoided by the causal analysis Daiwa deployed.

The Supreme Court employed the same analysis to dispense with the submission that Daiwa's countervailing action in deceit meant that Singularis' negligence claim must be dismissed for circularity. It adopted the insight of the Court of Appeal, which had found 'surprising' the suggestion that Daiwa could escape liability for breach of its *Quincecare* duty – a duty to act against precisely this kind of fraud – by invoking 'the fraud that was itself a pre-condition for its liability'.[17] The court's dismissal of these ambitious defensive submissions maintains the coherence of the law in this area. *Quincecare* liability can, after all, only arise in the presence of this kind of fraud and is hardly comprehensible as a doctrine if the presence of such fraud defeats the liability that depends on it.

3 Illegality

Both Rose J and the Court of Appeal also rejected Daiwa's submission that Singularis' action was barred by the illegality rule, even assuming that Al Sanea's actions were regarded at law as the actions of his company.

Patel, now the leading case on the illegality principle, requires courts to determine the engagement or otherwise of the illegality principle by considering:

> (a) … the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) … any other relevant public policy on which the denial of the claim may have an impact and (c) … 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.[18]

In light of this authoritative formula, argument before the Supreme Court in *Daiwa* concerned: (i) whether allowing or barring the claim would better promote the integrity of the legal system; (ii) the contribution of *Quincecare* liability to the important goal of countering financial crime; and (iii) the proportionality of the illegality defence in light of the wrongdoing attributable to Singularis.[19]

Ultimately, the Supreme Court decided the case on attribution grounds, declining to attribute Al Sanea's wrongdoing to Singularis and thus excluding all Daiwa's defences, including the illegality principle. Nonetheless, the court examined and approved the inferior courts' approach to illegality.[20]

Rose J had reasoned that for the illegality principle to obstruct claims such as this would have negative public policy implications. Specifically, reducing the consequences for banks who negligently fail to scrutinise potentially fraudulent actions would endanger banks' role in combatting financial crime.[21] Moreover, 'denial of the claim would be an unfair and disproportionate response to any wrongdoing on the part of Singularis'.[22] The

16 *Daiwa* (n 1) [23].

17 *Daiwa* (n 8) [79]; endorsed by the Supreme Court (n 1) [25].

18 *Patel* (n 2) [120], per Lord Toulson.

19 Summarised by the Supreme Court (n 1) [20].

20 Ibid [21].

21 *Daiwa* (n 4) [219].

22 *Daiwa* (n 1) [18].

Court of Appeal upheld this approach and reiterated the need to preserve the substance of the *Quincecare* duty, which served to promote legality and accountability in finance. The total failure of Singularis' claim – the necessary consequence of a successful illegality defence – would be disproportionate because Daiwa's negligence was particularly egregious.[23] For the Court of Appeal, greater fairness would be achieved by allowing the claim to succeed but reducing Singularis' damages to reflect its own contributory negligence.

The Supreme Court recalled this reasoning without any suggestion that the lower courts' understanding or implementation of the illegality doctrine was flawed. While Lady Hale (for the court) reiterated Lord Neuberger's declaration in *Patel* that assessing the effect of the illegality principle on a claim is 'not akin to the exercise of discretion',[24] she did not suggest that the lower courts' approach had offended this.

4 The logically prior question: attribution

All Daiwa's oppositions to liability for breach depended on the central contention that, because Al Sanea was the sole 'controlling mind and will' of the company,[25] his wrongdoing must be regarded at law as the company's own, a proposition that both Rose J and the Court of Appeal had rejected.[26] The Supreme Court sought to go 'back to basic principles' to decide the issue of attribution and, ultimately, the relevance of illegality. This may be read as tacit acceptance that the question of attribution in the context of illegality had become muddied as a result of rapidly changing understandings of the illegality principle and its relationship with other legal doctrines.

The court's 'starting point' was the central axiom of company law; the distinct legal personality of properly incorporated companies.[27] Fidelity to that principle doomed a rather desperate final defence attempted by Daiwa, namely that 'the law should not treat a company more favourably than an individual'.[28] To this, the Supreme Court retorted simply that 'companies are different from individuals', precisely because of their distinct legal personality[29] and the consequent need for rules of attribution to determine when human actions are to be regarded in law as the actions of that distinct legal person. A bold argument of principle that conducting business as a company (rather than as private persons) should not affect the legal liabilities of the human beings engaged in enterprise was never likely to be favourably received. After all, to alter that legal position *vis à vis* the world at large is the whole point of incorporation. The English courts are abidingly reticent to articulate systematically the outer limits of corporate personality, and 'veil piercing' consequently remains under-theorised.[30] Although the law may depart from the

23 *Daiwa* (n 8) [66].

24 *Patel* (n 2) [175].

25 *Daiwa* (n 1) [26].

26 *Daiwa* (n 4) [208]–[215] and (n 8) [50]–[60].

27 *Salomon v A Salomon and Co Ltd* [1897] AC 22.

28 *Daiwa* (n 1) [37]. Daiwa had cited for comparison *Luscombe v Roberts* (1962) 106 SJ 373, in which a solicitor failed against his negligent accountants because he knew that his own actions were unlawful.

29 *Daiwa* (n 1)[34].

30 Pey Woan Lee, 'The enigma of veil piercing' (2015) 26(1) International Company and Commercial Law Review 28; Marc Moore, 'A temple built on faulty foundations: piercing the corporate veil and the legacy of *Salomon v Salomon*' (2006) JBL 180. Cf the more frequent veil-piercing in jurisdictions with a more socially integrated approach to the limits of the corporate form: Kimberly Bin Yu and Richard Krever, 'The high frequency of piercing the corporate veil in China' (2015) 23(2) Asia Pacific Law Review 63.

'unyielding rock' of *Salomon v Salomon*,[31] the power to do so is deployed with extreme trepidation.[32] The company's separate personality – 'the whole foundation of English company and insolvency law'[33] – will not be disregarded just because it impedes some other legal policy or initiative.[34] Separate personality does – and *must* – frustrate certain other legal priorities if the corporate form is to be meaningful. Certainly, there have always been forceful normative objections to the corporate form's capacity to absorb or dissipate liabilities that would otherwise settle on identifiable persons of flesh and blood. But such grand first-order debates of legal and social policy are primordial, overtly political and beyond realistic challenge in a specific attribution dispute.

From this starting point, the Supreme Court proceeded to describe how the law must determine when acts of one person (a director) are treated as those of another (the company). It invoked the 'classic exposition' of this investigation,[35] namely Lord Hoffmann's speech in *Meridian Global Funds Management Asia Ltd v Securities Commission*.[36] In characteristically Hoffmannian fashion, his Lordship in that case modelled attribution as a sequential, teleological and, crucially, *interpretative* enquiry. As the Supreme Court presented this approach:

> The primary rule is contained in the company's constitution, [and/or] its articles of association ... But this will not cover the whole field of the company's decision-making. For this, the ordinary rules of agency and vicarious liability ... will normally supply the answer. However there will be some particular rules of law to which neither of these principles supplies the answer. The question is not then one of metaphysics but of construction of the particular rule in question.[37]

Daiwa had relied on *Bilta (UK) Ltd v Nazir (No 2)*[38] and, ultimately, *Stone & Rolls Ltd v Moore Stephens*[39] as authority for the proposition that the actions of a sole 'directing mind and will' (as they characterised Al Sanea) must be attributed to the company in the context of a claim such as this, even if his actions would not otherwise be so attributed. This obliged the Supreme Court to restate the reasoning of the seven-member panel in *Bilta (No 2)*, and clarify the status of *Stone & Rolls* in the wake of that decision.

In *Bilta (No 2)*, the Supreme Court 'held unanimously that where a company has been the victim of wrongdoing by its directors, the wrongdoing of the directors cannot be attributed to the company as a defence to a claim brought against the directors' in the name of the company. In contrast to this situation, Daiwa did not concern a claim against a fraudulent director, but against a third party who sought to rely on the illegality defence by attributing the director's default to the claimant company, recalling the facts of *Stone & Rolls*. With respect to such situations, Lords Sumption and Neuberger in *Bilta (No 2)* (with whom Lords Clarke and Carnwath concurred) understood *Stone & Rolls* to stand for two propositions. First, illegality can never be invoked by a third party (such as Daiwa) to defeat the company's claim against it if there are innocent shareholders or directors.

31 *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415, [66] per Lord Sumption.

32 High authority had previously questioned (*obiter*) whether the veil could *ever* validly be disregarded: *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337.

33 *Prest* (n 31) [8].

34 See, for instance, *Rossendale Borough Council v Hurstwood Properties Ltd* [2019] EWCA Civ 364, where separate personality was respected, despite its use for widespread evasion of rate payment.

35 *Daiwa* (n 1) [28].

36 [1995] 2 AC 500, 506–507.

37 *Daiwa* (n 1) [28].

38 [2015] UKSC 23, [2016] AC 1 (reported as *Jetivia SA v Bilta (UK) Ltd*).

39 [2009] UKHL 39, [2009] 1 AC 1391.

Second, the defence is *sometimes* available provided there are no such innocent shareholders or directors. The second proposition that a majority in *Bilta (No 2)* felt able to extract from *Stone & Rolls* appears to have propagated a belief in 'a rule of law that the dishonesty of the controlling mind in a "one-man company" could be attributed to the company ... whatever the context and purpose of the attribution in question'.[40] The Supreme Court in *Daiwa* emphatically denied any support in *Bilta (No 2)* for such a rule, endorsing instead Rose J's interpretation of the case: 'the answer to any question whether to attribute the knowledge of the fraudulent director to the company is always to be found in consideration of the context and the purpose for which the attribution is relevant'.[41]

The court in *Bilta (No 2)* – at least those members who thought *Stone & Rolls* stood for anything beyond its own facts – presented its contribution as a *negative* rule about attribution in the context of illegality, rather than a positive one. The presence of innocent actors precludes the defence, but their absence does not alone secure it. Beyond that negative rule, the question of attribution in the context of illegality is always a purposive, context-sensitive enquiry. The court in *Daiwa* therefore emphasised that, while the enquiry may resolve differently depending on whether its purpose is to apportion responsibility 'between the company and its agents' or 'between the company and a third party',[42] there is no *automatic* answer in the latter situation, even in the case of a so-called one-man company.

Its many critics have been awaiting the purging of *Stone & Rolls* from the law of attribution and illegality for some time. Already in *Bilta (No 2)* it attracted damning judicial passive aggression, characterised as a decision that 'stands as authority … that on the facts of that case no claim lay against the auditors, but nothing more'.[43] For Lord Neuberger it was 'not in the interests of the future clarity of the law for it to be treated as authoritative or [generally] of assistance'.[44] Nonetheless the fact that the court felt able to deduce at least some enduring principle from *Stone & Rolls* – the negative rule identified above – may have stayed its execution. The court in *Daiwa* was less merciful and has brought welcome clarity to the law by announcing that '*Stone & Rolls* can finally be laid to rest.'[45]

5 The relationship between attribution and illegality

Concluding its judgment, the Supreme Court perceived a simple case at the heart of the prolonged dispute:

> When it appeared that the company was running into difficulties, its 'directing mind' and sole shareholder fraudulently deprived the company of ... money by directing Daiwa to pay it away. Daiwa should have realised that something suspicious was going on and suspended payment until it had made reasonable enquiries to satisfy itself that the payments were properly to be made. The company ... has been the victim of Daiwa's negligence.[46]

40 *Daiwa* (n 1) [33].

41 *Daiwa* (n 4) [182] (endorsed by the Supreme Court: n 1 above [34]).

42 *Daiwa* (n 1) [30].

43 *Bilta (No 2)* n 38 [154], per Lords Toulson and Hodge.

44 Ibid [30], per Lord Neuberger. See further Ernest Lim, 'Attribution and the illegality defence' (2016) 79(3) Modern Law Review 476.

45 *Daiwa* (n 1) [34].

46 Ibid [39].

There is an explanation for why a case the court rightly accepted *post mortem* as 'bristling with simplicity'[47] nevertheless produced lengthy and complex judgments below and ultimately required resolution in the Supreme Court. That explanation lies in the enduring confusion over the attribution question in the context of illegality.

The law on illegality has been in rapid flux over recent years due to a quick-fire succession of Supreme Court decisions promulgating frankly inconsistent accounts of the doctrine.[48] Even when an ostensible settlement finally emerged (in *Patel*), it was in the form of an open-textured, contextually specific and policy-laden approach which – judicial denials notwithstanding[49] – is hard to distinguish in practice from a discretion.[50] *Patel* left enduring questions about the interaction between its own policy-laden illegality test and other relevant legal doctrines, and the status of a large amount of prior case law.

The approach to illegality confirmed in *Patel* represented a profound shift in the law's understanding of the relationship between illegal action and private law claims. *Patel*'s test derived from Lord Wilson's opinion in *Hounga v Allen*.[51] Although some commentators had presented this as a narrow exception to the (then) authoritative approach in *Tinsley v Milligan*,[52] confined to cases of a similar character,[53] nothing in Lord Wilson's *ratio* required any such limitation, and subsequent decisions confirmed the generality of the new approach to illegality. Particularly, they confirmed its ability to collapse distinctions between causes of action in private law. In *Bilta (No 2)*, the Supreme Court held unanimously that the crimes of a company director also constituting a breach of fiduciary duty could not be attributed to the company when the liquidators sued the director for that breach. Their reasoning, however, differed markedly. For Lord Sumption, the rules of corporate attribution applied 'regardless of the nature of the claim or the parties involved'; in this type of case, an exception *integral* to those same rules denied attribution because it would defeat the object of the directors' duties.[54] The majority, however, held that '[t]he primary question for the court is whether [the company's] claim against the directors ... is barred by the doctrine of illegality', which meant there was 'no need … to get into the subject of attribution'.[55] The success or failure of the action turned on 'whether it is contrary to public policy' that the claim should succeed.[56] Ultimately, they held that there was a significant public interest in enforcing the duty owed by an insolvent

47 Ibid.

48 See James C Fisher, 'The *ex turpi causa* principle in *Hounga* and *Servier*' (2015) 78(5) Modern Law Review 854. Cf eg Nicholas Strauss, 'Ex turpi causa oritur actio?' (2016) 132 Law Quarterly Review 236 and Lim (n 44) 484. In response to the latter, see James C Fisher, 'The latest word on illegality' [2016] Lloyd's Maritime and Commercial Law Quarterly 483, 484–485, note 12.

49 See *Patel* (n 2) [175], per Lord Neuberger.

50 Lord Neuberger's insistence in *Patel* that the illegality rule does not create a discretion is curious in light of his earlier observation that 'once a judge is required to take into account a significant number of relevant factors, and the question of how much weight to give each of them is a matter for the judge, the difference between judgment and discretion is … pretty slight': ibid [173]. It remains likely that in practice judges will respond with 'a value judgment, by reference to a widely spread mélange of ingredients, about the overall "merits" or strengths, in a highly non-legal sense, of the respective claims of the public interest and of each of the parties': ibid [206], per Lord Mance. See further Fisher, 'The latest word on illegality' (n 48) 486–487.

51 *Hounga* (n 3).

52 [1994] 1 AC 340

53 See eg Alan Bogg and Sarah Green, 'Rights are not just for the virtuous: what Hounga means for the illegality defence in the discrimination torts' (2015) 44 Industrial Law Journal 101, 122.

54 *Bilta (No 2)* (n 38) [86].

55 Ibid [131].

56 Ibid [166].

company's directors to the creditors and, on that basis, declined to allow the illegality doctrine to obstruct the claim. On this approach, whenever illegality exists in the factual matrix, the attribution question is subsumed into the illegality test – namely whether public policy, holistically considered, demands the success of the claim, or its defeat. The fact that the action concerns breach of a director's duties becomes just one more ingredient – albeit an important one – in the cocktail of policy considerations that go into answering that most sweeping of questions.[57] As will be explained below, *Patel* similarly regarded the presence of illegality as an invitation to adjudicate directly by first-order considerations of public policy, rather than through 'dry' doctrinal formulae.

Daiwa is significant chiefly because it at least partially arrests this trajectory. On the one hand, the court accepted that attribution is always a purposive, contextual enquiry which 'has to be seen in the context of the possible defences to which it might give rise'.[58] In emphasising this element of *Meridian Global*, it differed markedly from Lord Sumption's more general understanding of attribution in *Bilta (No 2)*.[59] Because the 'starting point' is that directors' acts are not in law those of the company, the law always demands a specific, purposive justification for attribution, which cannot be generally assumed. But on the other hand, with respect to the *place* of the illegality rule in attribution cases, the court in *Daiwa* echoed Lord Sumption's minority position in *Bilta (No 2)*. The court approached the attribution and illegality enquiries as logically separable, cumulative questions, rather than deciding attribution *through* the policy balancing test. This is conspicuously distinct from the majority approach in *Bilta (No 2)* and, for that matter, with *Patel*.

In *Bilta (No 2)*, the majority was determined to integrate policy balancing into the decision even though the same outcome could be reached through narrower, technical reasoning. *Patel* confirmed that approach. Lords Sumption, Mance and Clarke allowed the claimant's action for restitution for total failure of basis on orthodox, *Tinsley* reliance grounds. The claimant did not have to invoke the illegal purpose of the transfer to establish a cause of action, which must therefore succeed regardless of the circumstantial criminality. But the majority thought it unprincipled to decide the case without integrating into its decision the criminal character of the parties' project. For the majority, the criminal character of the parties' arrangement must determine the success or failure of the claim, even though reference to illegality was unnecessary to establish a complete cause of action.[60]

The crucial point of *Patel* therefore lies in the conscious rejection of a long-standing normative assumption, namely that the law should try to distinguish between (i) illegality *constitutive* of a claim and (ii) illegality that is merely part of its history. *Tinsley* and its legacy regarded the latter as irrelevant to the parties' formal relationship in private law, even though it may in some moralistic sense taint their interaction.[61] *Patel* insists instead that

57 Lord Sumption rejected that approach because the illegality defence was a rule of law whose engagement was not informed by competing public policy considerations in particular cases: ibid [99]–[102].

58 *Daiwa* (n 1) [12].

59 Namely that attribution should be *prima facie* assumed and only subsequently scrutinised in light of pertinent exceptions. Lord Sumption had invoked *Meridian Global* in his *Bilta (No 2)* judgment, but his own approach was analytically distinct, subverting conventional company law analysis: see Lim (n 44) 479.

60 *Patel* (n 2) [139], per Lord Kerr: 'In this case, the formation of the contract, its purpose and its performance all involved illegality. Under the single reliance master rule, it is said that all of this can be ignored because it is not necessary [for the claimant] to rely on the terms of the agreement ... This cannot be the correct way in which to deal with the impact of illegality ... It is surely better and more principled to examine why illegality should or should not operate to deny [the claimant] a remedy.'

61 In discussion of *Bilta (No 2)*, Lim conversely suggests that it was in fact 'unnecessary to depart from *Tinsley* in order to support the flexible approach in *Hounga*' (n 44) 485.

illegality is *always* definitional of the parties' relationship in private law. Where illegality can be found, it is wrong – indeed, 'unprincipled' – to decide the dispute other than by reference to the public policy considerations at stake. Full fidelity to the logical consequences of *Patel* would therefore have seen the *Daiwa* court deploy a holistic, policy-attentive balancing exercise *even though* – as the court's actual *ratio* proved – the same outcome could be reached through orthodox rules of attribution. It is striking therefore that the court effectively sidelined the *Patel* illegality doctrine.

6 *Daiwa*'s place in the *Patel* settlement

Daiwa can be read as a signal that *Patel* will not be permitted entirely to collapse the structures and categories of private law into policy-based impressionism. Notably, none of the justices in *Daiwa* had sat in either *Hounga* or *Bilta (No 2)*, and only one (Lady Hale) had sat in *Patel*. It is tempting to infer that the balance of opinion on this most divisive of private law doctrines has once again shifted at the highest level, producing a Supreme Court suspicious of *Patel*'s anti-formalist potential. Certainly, *Daiwa*'s reasoning arrests the momentum that policy-based reasoning had gained across that trilogy of cases. Despite generally approving the approach of the Court of Appeal below, Lady Hale expressed 'reservations' about one of its suggestions in particular, namely that, in evaluating an illegality defence, 'an appellate court should only interfere if the first instance judge has proceeded on an erroneous legal basis, taken into account matters that were legally irrelevant, or failed to take into account matters that were legally relevant'.[62] Here, disguised as a technical question about the intensity of appellate supervision, lies the fundamental ideological division that continues to haunt and complicate the illegality principle. The Court of Appeal's language is that of review over a discretion. If the illegality principle operates as a (structured) discretion which does not admit of a single correct answer, then an essentially *procedural* supervision of first-instance decision-making indeed appears appropriate. But if applying the illegality rule is truly an exercise in formal legal analysis, 'an appellate court is as well placed to evaluate the arguments as is the trial judge',[63] and the judge's conclusions should be subject to appeal in the ordinary way. Lady Hale reiterated Lord Neuberger's declaration in *Patel* that assessing the effect of the illegality principle is 'not akin to the exercise of discretion'.[64] She tantalisingly referenced 'cases concerning the illegality defence pending in the Supreme Court', in which 'it should not be assumed that this court will endorse the approach of the Court of Appeal' on this question.[65]

All these pending cases concern *Patel*'s impact on the force of prior authority. In each, the Court of Appeal has reasoned conservatively. It has either rejected invitations to depart from prior precedent on the strength of *Patel*, or relegated *Patel* to a superficial role as the formal clothing for conclusions which in substance derive from cases which reflect a far narrower conception of the illegality principle.

In *Stoffel v Grondona*,[66] the defendant conveyancing solicitors had negligently failed to register the transfer of title to property the claimant had purchased using a fraudulently obtained mortgage loan. When the claimant defaulted on repayments and the mortgagee sought a money judgment against her, she sued the defendant solicitors for losses incurred due to the property's non-availability as security. The first instance trial pre-dated

62 *Daiwa* (n 8) [65].

63 *Daiwa* (n 1) [21].

64 *Patel* (n 2) above [175].

65 *Daiwa* (n 1) [21].

66 [2018] EWCA Civ 2031.

Patel, and the judge therefore applied the *Tinsley* reliance rule, upholding the claimant's action because she did not need to rely on the illegality of her fraudulent mortgage application to show a fully constituted action in negligence against the solicitors. The Court of Appeal applied instead the formula established in the (recently decided) *Patel*, but concluded that the public policy balancing test favoured allowing the claim. There was a strong public interest in enforcing solicitors' duties of care to their clients, and denying the claim would not *per se* advance the (likewise important) policy of preventing mortgage fraud. Barring the action would be a disproportionate response to the claimant's wrongdoing because (i) she herself had not profited from the illegality, and (ii) the mortgagee institution did not complain of the fraud. The final point is revealing. Concealed within the court's application of the *Patel* formula was the normative position so definitional of *Tinsley* and so unpersuasive to the majorities in *Bilta (No 2)* and *Patel* itself: claims should succeed if the illegality is merely a part of the history of the dispute, incidental to the parties' relationship as determined by specific, formal rules of private law. The potentially radical *Patel* structure may provide the form, but the substance of the decision derived from a *Tinsley*an, rather than *Patel*ian, vision of the relationship between public policy and private rights.

To similar effect is the Court of Appeal's decision in *Henderson v Dorset Healthcare University NHS Foundation Trust*.[67] The claimant sued the defendant Trust in negligence, seeking damages for various losses – the consequences of her committing manslaughter attributable to the negligent provision of psychiatric care. The Trust accepted liability but submitted that recovery was barred by the illegality rule. The Court of Appeal ruled, on the strength of *Clunis v Camden & Islington Heath Authority* and *Gray v Thames Trains*,[68] that the claimant's limited degree of personal culpability for the crime did not affect the application of the illegality rule. Those decisions had each barred the kinds of loss Ms Henderson was claiming irrespective of the claimants' precise degree of personal wrongdoing, binding the court to dismiss her claims unless there had been a subsequent Supreme Court decision with which those previous cases were inconsistent. The Court of Appeal understood *Patel* to have cemented Lord Wilson's 'flexible and nuanced' formula in *Hounga* – which required a court to ask 'what aspect of public policy founds the [illegality] defence and whether there is another aspect of public policy to which application of the defence would run counter' – as authoritative for claims in contract and unjust enrichment (the context of *Patel* itself). But it failed to 'discern in the majority judgments in *Patel* any suggestion that *Clunis* or *Gray* were wrongly decided or ... cannot stand with the reasoning in *Patel*'.[69]

Patel's strongest claim to have changed the trajectory of decisions in the Court of Appeal is in *XX v Whittington Hospital NHS Trust*.[70] The claimant had been left infertile by clinical negligence and sought to enter a commercial surrogacy arrangement in California, where such arrangements are lawful and binding, using her own and/or donated eggs. The trial judge had barred her action for the costs of such an arrangement on the strength of prior authority,[71] which bound him to regard crucial elements of the claimant's plans as contrary to public policy. The Court of Appeal conversely permitted recovery of the costs necessary to undertake a commercial surrogacy in either jurisdiction, using either

67 [2018] EWCA Civ 1841.

68 [1998] QB 978 and [2009] UKHL 33, [2009] AC 1339, respectively.

69 *Henderson* (n 67) [125].

70 [2018] EWCA Civ 2832.

71 *Briody v St Helen's and Knowsley Area Health Authority* [2002] QB 856.

her own or donated eggs,[72] overturning as unprincipled and outdated any distinction between those scenarios.[73] *Patel* was instrumental in persuading the court that the correct outcome could not automatically be determined from prior analogous case law. The judgment emphasised the elastic nature of public policy considerations,[74] and drew explicitly on *Patel* as demanding a re-evaluation of the policy basis of prior decisions. Further, barring recovery would be disproportionately severe on the claimant since it would effectively deprive her of the prospect of a biological family. Even here, however, too much should not be made of *Patel*'s contribution to a decision at odds with prior case law. Reproductive health is an overtly policy-sensitive area. There have been major changes in social values and practice even in recent years, as the Court of Appeal emphasised, and the policy conclusions at the root of prior case law may by now have attracted judicial reconsideration even without *Patel*. More crucially, the same outcome would have resulted from proper application of the reliance rule. As the court noted, the claimant was not contemplating anything that would render her criminally liable.[75] The relevant primary legislation – the Surrogacy Arrangements Act 1985 – relates only to commercial surrogacy in the UK and does not affect the legality of a British citizen engaging in it overseas.[76] Even for domestic arrangements, it criminalises only the conduct of commercial surrogacy business, not those who pay for the help of a surrogate.[77] *XX* is not a case of *Patel* imposing public policy reasoning onto what would otherwise be a technical decision detached from policy considerations, or producing an outcome that could not have resulted but for *Patel*.

The Court of Appeal's general approach in these cases implies judicial sensitivity to the risk that *Patel*, if left unchecked, could adversely affect the clarity and coherence of private law. *Daiwa* suggests that, when these cases are decided on final appeal, the Supreme Court will emphasise the enduring authority of pre-*Patel* case law, rather than the flexibility of the illegality principle in light of *Patel*.

Critics of *Patel* may welcome such a retrenchment in the law of illegality. Nonetheless, as a matter of strict law it is hard to see how *Patel* can really leave unscathed the authority of leading cases indebted to a very different vision of the illegality doctrine and its place in the law. The incompatibility is perhaps most manifest in *Daiwa* itself, but it is also apparent in *Henderson*, in which the Court of Appeal adopted an unnaturally restrictive understanding of *Patel*. The *Patel* illegality rule is, at a basic level, inconsistent with the understanding of illegality which provides the logical grounding for decisions like *Clunis* and *Gray*, notwithstanding the fact that the justices in *Patel* considered those older decisions unproblematic. Despite dutifully incanting Lord Mansfield's primordial statement of principle that the illegality doctrine 'is not designed to achieve justice between the parties', the majority in *Patel* declared it important to avoid an 'incongruous result in legal and moral terms'[78] and to 'strive for the most desirable policy outcome'.[79] This requires a court to 'tak[e] into account a range of factors'[80] to establish 'whether the

72 *Henderson* (n 67) [84].
73 Ibid [94], [105].
74 Ibid [64].
75 Ibid [68].
76 Ibid [55], [76].
77 Ibid [56].
78 *Patel* (n 2) [127].
79 Ibid [91].
80 Ibid.

public interest ... should result in denial of the relief claimed'.[81] The court declined 'to lay down a prescriptive or definitive list' of the relevant considerations,[82] but Lord Toulson suggested these would 'include the seriousness of the [claimant's] conduct ... whether it was intentional and whether there was marked disparity in the parties' respective culpability'.[83] Structural blindness to the claimant's moral culpability – a refusal to go 'behind the conviction' – made sense when the illegality rule was supposed to operate independently of policy and episodic justice. The *Tinsley* reliance rule was, after all, a reaction against the moralistic 'public conscience' test of 1980s Court of Appeal jurisprudence.[84] In *Les Laboratoires Servier v Apotex*, Lord Sumption summarised it as precluding any judicial power to 'apply the illegality defence or not according to the relative importance which they attach to the policy underlying it by comparison with desirability of allowing an otherwise sound claim to succeed'.[85] But that is explicitly what *Patel* requires courts to do. Ultimately, there can be only one authoritative test for the operation of the illegality rule, which cannot be both (i) a reliance enquiry blind to the claimant's precise degree of moral responsibility – the animating principle in *Clunis* and *Gray* – and (ii) a public policy balancing test intimately focused on factors such as the moral quality of the claimant's actions. The Supreme Court in *Daiwa* was tolerant of sensitivity to the extent of the parties' respective wrongdoing. That plainly accords with *Patel*, but ineluctably puts logical pressure on prior cases which deny the relevance of comparative subjective wrongdoing. Despite this, on the whole *Daiwa* suggests that the Supreme Court also regards *Patel* as the high-water mark in the ascendency of the wide view of the illegality doctrine.

Such a recent and high-profile decision as *Patel* – the decision, moreover, of an expanded panel of the Supreme Court – is unlikely to be directly impugned at the highest level for many years, but its disruptive potential is likely to be forestalled when these several illegality cases receive the attention of the current justices. It is tempting to associate the dissipation of *Patel*'s momentum with a more general turn in private law, in which the courts have moved to compartmentalise public policy reasoning – not actually excluding it, but ensuring it operates within the architecture of formal law. Most conspicuously, in *Robinson v Chief Constable of West Yorkshire Police*,[86] Lord Reed's leading judgment declared 'mistaken' the belief – deriving from the opinion of Lord Bridge in *Caparo Industries v Dickman*[87] – that 'the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts'.[88] Rather, in considering the appropriateness of duties of care in novel situations, a court should look principally to the established authorities so as to develop the law 'incrementally and by analogy'. It would be 'unnecessary and inappropriate' and indeed 'a recipe for inconsistency and uncertainty' to ask again whether such duties were fair, just and reasonable, since this will anyway be an important part of analysing whether a proposed novel duty is relevantly analogous to one accepted in prior decisions.[89]

81 Ibid [109].

82 Ibid [107].

83 Ibid.

84 Leading examples include *Saunders v Edwards* [1987] 1 WLR 1116 and *Euro-Diam v Bathurst Ltd* [1988] 2 WLR 517.

85 [2014] UKSC 55, [2015] 1 AC 430, [99].

86 [2018] UKSC 4.

87 [1990] 2 AC 605.

88 *Robinson* (n 86) [21].

89 Ibid [26].

Concluding reflections

Daiwa took place in the shadow of a sudden and dramatic retheorisation of the purpose, justification and operation of the illegality doctrine in English law. It was fundamentally a simple dispute and the Supreme Court dealt impressively with various attempts to exploit confusion in this area of the law, correctly dispensing with each argument for attribution.

More generally though, *Daiwa* and other cases in *Patel*'s wake cast the higher courts as engaged in an oyster-like process – clothing a potential irritant in a familiar substance to prevent damage to the system from within. The 'irritant' in this metaphor is the bold, flexible and expansionist illegality doctrine that emerged out of a line of Supreme Court authority begun in *Hounga* and culminating in *Patel* – a doctrine that privileges what one dissenter derided as 'a widely spread mélange of ingredients, about the overall "merits" or strengths, in a highly non-legal sense, of the respective claims of the public interest and of each of the parties'.[90]

English law still seems unable, or unwilling, to decide with conviction what it wants the illegality rule to be and to do, and consequently how it should relate to the fundamental organising rules for specific causes of action. As soon as there emerged an illegality principle sufficiently malleable and expansive to displace other means of resolving disputes – just as *Bilta (No 2)* recast a case about attribution into one about illegality – the law baulks and retreats into orthodoxy. The courts seem now at pains to emphasise the continued authority of cases decided on plainly un-*Patel*ian logic. This may simply be the common law's dialectical evolution at work: the emergence of synthesis out of thesis (*Tinsley*) and antithesis (*Patel*). Whether the process will produce something of pearlescent refinement remains to be seen – more will be clear once the Supreme Court gives judgment in *Henderson*, *Stoffel*, and *XX*. But if the conclusion on which the law ultimately settles is that the new, flexible and policy-attentive illegality formula – so long demanded by *Tinsley*'s eminent detractors[91] – leaves intact the old leading cases and does not actually require courts to reach different conclusions, what precisely was the point?

90 *Patel* (n 2) [206], per Lord Mance.

91 See, generally, eg Law Commission, *The Illegality Defence: A Consultative Report* (Law Com Consultation Paper No 189, 2009).