

Supreme Court rules that defence of illegality will not save negligent solicitors (*Stoffel & Co (Appellant) v Grondona (Respondent)*)

The Supreme Court has unanimously dismissed the appeal in the case of *Stoffel & Co (Appellant) v Grondona (Respondent)* [2020] UKSC 42, holding that the respondent's claim for damages in respect of the appellant's negligence is not barred by the illegality defence. The Supreme Court confirmed that the Court of Appeal's application of the guidelines and policy-based approach adopted by the Supreme Court in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 was correct and in doing so concluded that public policy considerations outweigh the undesirability of allowing claims to proceed where they arise from a fraudulent transaction. Melody Ihuoma, barrister at 4 New Square and Alice Nash, barrister at Hailsham Chambers provide comment on the judgement.

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Stoffel & Co (Appellant) v Grondona (Respondent) [\[2020\] UKSC 42](#), [\[2018\] EWCA Civ 2031](#)

Background

Ms Grondona entered into an agreement with a business associate of hers, Mr Mitchell, whereby she would purchase a property (owned by Mr Mitchell) in her name, but for all intents and purposes Mr Mitchell was to be the owner of the property. The pair agreed that Mr Mitchell would, for example, be in charge of paying the mortgage and was to deal with all financial matters related to the property. In return, Ms Grondona would receive 50% of the profit on the future sale of the property. This arrangement was carried out so that Mr Mitchell could obtain finance that he could not obtain in his own name due to poor credit history.

Ms Grondona successfully secured a mortgage with Birmingham Midshires to purchase the property, however, Stoffel & Co, her solicitors, negligently failed to register the transfer of the property to Ms Grondona or the new lender's charge. Ms Grondona defaulted on her mortgage payments and Birmingham Midshires sought to enforce its security, however, due to the registration error, it was unable to do so. Ms Grondona was left liable for the mortgage without any interest in the property. She sued Stoffel & Co for the loss she suffered as a result of their negligence. Stoffel & Co argued that the property transaction had been fraudulent (in that the mortgage had been obtained by means of a number of misrepresentations) and therefore the illegality principle applied.

At first instance, Her Honour Judge Walden-Smith in the Central London County Court found in favour of Grondona. Stoffel & Co appealed this decision.

In the Court of Appeal, Lady Justice Gloster (at para 39), applying the principles in *Patel v Mirza*, held that the fraudulent nature of Grondona and Mitchell's agreement did not preclude Grondona from seeking damages as Grondona's 'illegal conduct was not central, or indeed relevant, to the otherwise proper and legitimate contract of retainer between the claimant and the defendant'.

The Court of Appeal held that it was not in the public's interest to allow negligent professionals to escape liability for their actions—indeed, it would be 'entirely disproportionate' to deny Grondona's claim.

For further information on the Court of Appeal's decision, see News Analysis: [The illegality principle—solicitors liable after inadvertently failing to give effect to a fraud \(Grondona v Stoffel\)](#).

Supreme Court judgment

The unanimous Supreme Court judgment was handed down by Lord Lloyd-Jones.

The Supreme Court considered one issue—whether the Court of Appeal erred in its application of the *Patel v Mirza* guidelines. Ihuoma confirms that ‘In a unanimous judgment, delivered by Lord Lloyd-Jones, the Supreme Court confirmed that the overriding consideration for the purpose of the illegality defence is “whether to allow a claim would damage the integrity of the law by permitting incoherent contradictions” (para [26]) or, in other words, whether to do so would lead to “inconsistency damaging to the integrity of the legal system” (para [23]).’

In *Patel v Mirza*, Lord Toulson had outlined a three-stage test for the illegality defence. The court is:

‘(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.’

Ihuoma notes that in *Stoffel*, ‘the Court made clear that these considerations are relevant precisely because they have a bearing on determining whether to allow a claim would damage the integrity of the law by permitting incoherent contradictions’.

The Supreme Court concluded, in balancing the policy considerations at stages (a) and (b), that Ms Grondona’s claim should not be barred by the illegality defence.

In considering (a) Lord Lloyd-Jones stated: ‘There clearly exists an important policy that the law should condemn mortgage frauds which are serious criminal offences. The appellants correctly identify deterrence as one underlying policy of the criminal law against fraud. I doubt, however, that permitting a civil remedy to persons in the position of the respondent would undermine that 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.’

In considering (b), the judge explained that ‘Important countervailing public policies in play in the present case are that conveyancing solicitors should perform their duties to their clients diligently and without negligence and that, in the event of a negligent breach of duty, those who use their services should be entitled to seek a civil remedy for the loss they have suffered. To permit solicitors to escape liability for negligence in the conduct of their clients’ affairs when they discover after the event that a misrepresentation was made to a mortgagee would run entirely counter to these policies. While denial of a remedy may sometimes be justified in such circumstances, this should only be on the basis that to afford a remedy would be legally incoherent.’

The court also considered the issue of proportionality, even though there was no need to do so given its findings at stages (a) and (b). The court considered whether Grondona’s fraud could be described as ‘central’ to her claim against Stoffel & Co. Ihuoma explains that ‘what emerges from the Court’s decision on this issue is that although, following *Patel v Mirza*, the question whether a claimant would have to rely on his or her illegal conduct in establishing a claim is no longer determinative, the issue of reliance may have a bearing on the issue of centrality. Nash adds that “though the old test of “reliance” is no longer the touchstone by which the defence of illegality stands or falls, the “centrality” of the illegal conduct is likely to be relevant to the proportionality of denying a remedy’. ‘On the facts, the Court found that the claimant could establish her claim without any need for reference to her fraud, which, in the Court’s view, was conceptually separate from her claim against her solicitors in negligence’, explains Ihuoma.

Ihuoma believes that the court’s judgment is ‘an important one and provides a useful illustration of the application of the new policy-based approach to the illegality defence (outlined in *Patel v Mirza* [\[2016\] UKSC 42](#)) in the context of a solicitors’ negligence claim’.

Nash notes that ‘This was an application of the *Patel v Mirza* principles to particular facts, and does not mean that an illegality defence will never succeed in the claims against professionals in future. It was significant that the transactions that the solicitors were retained to register were, on the facts, genuine: the firm was not employed to further the fraud itself. Had it been, the result might have been different. Further, the loss claimed should be carefully considered: had the claim been in respect of the profit Ms Grondona had expected to receive from the fraud, it is likely to have met with a frostier reception. What is clear, however, is that the fact that a claim is “tainted by illegality” in some way will not suffice. The

focus is on whether the success of the claim would produce an incoherent result; even if it would, it may be disproportionate to disallow the claim.’

Further analysis will follow shortly.

Written by Halima Dikko

Source: [Stoffel & Co \(Appellant\) v Grondona \(Respondent\)](#)

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