

## Case Commentary: *Ochroid Trading v Chua Siok Lui*<sup>1</sup>

### **I. Introduction**

1. Where a contract is illegal, the contract is void and the courts will not enforce the contract.<sup>2</sup> Despite the simplicity of the foregoing logic, the concept of illegality in contract law – often used as a defence mechanism in lawsuits – has long vexed students and practitioners alike. As Lady Justice Gloster in *Patel v Mirza*<sup>3</sup> (“**Patel**”) remarked, it is “almost impossible to ascertain or articulate principled rules from the authorities relating to the recovery of money or other assets paid or transferred under illegal contracts”.<sup>4</sup>
  
2. In Singapore, the Court of Appeal (“CA”) in *Ting Siew May v Boon Lay Choo*<sup>5</sup> (“**Ting Siew May**”) sought to overcome this difficulty by establishing a two-stage approach to the application of the principles of statutory illegality, common law illegality and restitutionary recovery. At the first stage, a contract may be struck down for being illegal under a *statute* if the statute expressly or impliedly prohibits it,<sup>6</sup> or considered void *at common law* if it falls within an established head of common law illegality.<sup>7</sup> However, at the second stage, even if a contract is illegal and therefore void under a statute, the plaintiff could still seek to recover the benefits conferred under the contract on a *restitutionary* basis.<sup>8</sup>
  
3. In the later case of *Ochroid Trading Ltd v Chua Siok Lui*<sup>9</sup> (“**Ochroid**”), the CA affirmed the *Ting Siew May* framework and the principles encapsulated within. In coming to its decision, the CA in *Ochroid* also considered and rejected the approach adopted by the UK Supreme Court in *Patel*, which, essentially, determines whether a contract should be struck down for illegality based on a range of factors.

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<sup>2</sup> *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 (“*Ochroid*”) at [22].

<sup>3</sup> *Patel v Mirza* [2014] EWCA Civ 1047 (“*Patel*”).

<sup>4</sup> *Id.*, at [47].

<sup>5</sup> *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 (“*Ting Siew May*”).

<sup>6</sup> *Id.*, at [103]–[116].

<sup>7</sup> *Id.*, at [27].

<sup>8</sup> *Id.*, at [126].

<sup>9</sup> *Ochroid*, *supra* n 2, at [12].

4. This article will analyse *Ochroid*, and argue in support of the two-stage framework endorsed therein. In the authors' view, in clarifying the rationale for the defence of illegality in contract law, this framework provides greater certainty as it restrains judicial discretion in this extremely complicated area of law, and, because of its rigour, negates the need for the enactment of legislation to achieve the same effect.
5. In Part II, the material facts of *Ochroid* will be summarised. Parts III, IV and V cover the analysis and discussion of the decisions of the High Court and the CA. Part VI explores the doctrinal difficulties of illegality by drawing a comparison between *Ochroid* and the UKSC decision in *Patel*. Part VII considers and rejects the possibility of codifying the doctrine of illegality in statute. Lastly, Part VIII concludes the article with the overall position taken by the authors.

## II. Material Facts

6. Mr Sim and Ms Chua ("**Respondents**") ran a sole proprietorship, VIE Import and Export ("**VIE**").<sup>10</sup> Over the course of about three years, they entered into 740 agreements ("**Agreements**") with Mr Ole ("**Second Appellant**"), Orion ("**First Appellant**", which was owned and controlled by Mr Ole) and Mr Ole's wife. The Appellants disbursed more than \$58 million to the Respondents under the Agreements.<sup>11</sup> The Agreements, on their surface, stipulated that the monies were to be repaid with a "profit".<sup>12</sup> However, the Respondents failed to repay the Appellants under 76 of the Agreements.<sup>13</sup> The Appellants sued, *inter alia*, for (i) breach of contract for the entire outstanding sum, *i.e.*, the principal sums advanced plus the "profit"; or (ii) in the alternative, in unjust enrichment to recover the monies provided as opposed to contractual damages.<sup>14</sup>

## III. Decision of High Court

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<sup>10</sup> *Id.*, at [6].

<sup>11</sup> *Ibid.*

<sup>12</sup> *Id.*, at [8].

<sup>13</sup> *Id.*, at [11].

<sup>14</sup> *Ibid.*

7. The Appellants' claims were dismissed by the High Court.<sup>15</sup> In respect of the breach of contract claim, the High Court judge essentially found that the Agreements were loans, and as such the Appellants were unlicensed moneylenders under the Moneylenders Act (“**the MLA**”).<sup>16</sup> The Agreements were thus unenforceable under the MLA, which prohibits unlicensed moneylending in Singapore.<sup>17</sup> Since the Agreements were illegal and hence unenforceable, the Appellant's alternative claim in unjust enrichment would also fail, as a backdoor attempt to enforce unenforceable loan contracts.<sup>18</sup>

#### **IV. Issues on Appeal**

8. There were two issues on appeal. The first issue was whether the Agreements contravened the MLA and were thus unenforceable.<sup>19</sup> If so, the court would then address the second issue of whether there could nevertheless be restitutionary recovery of the principal sum disbursed under the Agreements, pursuant to the alternative cause of action in unjust enrichment.<sup>20</sup> In other words, the second issue was premised on a separate ground which was permissible even when the contract at issue was void and enforceable for being unlawful.<sup>21</sup>

#### **V. Decision of CA**

9. The present legal position as to the doctrine of illegality was outlined by the CA in detail. At the first stage, a contract may be struck down for being illegal under a *statute* or at *common law*.<sup>22</sup> At the second stage, even if a contract is illegal and therefore void, the plaintiff could still seek to recover the benefits conferred under the contract on a restitutionary basis.<sup>23</sup>

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<sup>15</sup> *Id.*, at [13].

<sup>16</sup> Moneylenders Act (Cap 188, 1985 Rev Ed) (“MLA”).

<sup>17</sup> *Ochroid*, *supra* n 2, at [14].

<sup>18</sup> *Id.*, at [15].

<sup>19</sup> *Id.*, at [18].

<sup>20</sup> *Ibid.*

<sup>21</sup> *Id.*, at [50].

<sup>22</sup> *Id.*, at [176].

<sup>23</sup> *Id.*, at [42].

**A. Doctrine of Illegality in Singapore – Two-Stage Framework**

*(1) First Stage: Is the Contract Prohibited?*

10. A contract is void for illegality under a *statute* if the statute expressly or impliedly prohibits it,<sup>24</sup> or *at common law* if it falls within an established head of common law illegality.<sup>25</sup>

(a) Statute

11. If the contract is allegedly illegal under a statute, the court will examine the legislative purpose of the relevant provisions to determine whether the provisions specifically prohibit the contract itself.<sup>26</sup> The contract may either be expressly or impliedly prohibited by a statute.<sup>27</sup> If so, there can be no recovery pursuant to the contract.<sup>28</sup>

(b) Common Law

12. A contract is illegal at common law if it falls foul of one of the established heads of common law public policy,<sup>29</sup> including contracts to commit a crime, tort, fraud or sexual immorality.<sup>30</sup> Such contracts are illegal *per se* and therefore void.<sup>31</sup>

13. Besides contracts which are in and of themselves illegal, there exists another category of contracts which are not illegal *per se* but are tainted by illegality, i.e., they involve the commission of a legal wrong either in their formation, purpose or manner of performance.<sup>32</sup> This category of contracts was examined by the CA in *Ting Siew May*. In that judgment, the CA held that contracts which are not unlawful *per se* but *entered into with the object of committing an illegal act* should be subject to an added layer of scrutiny. Hence, the principle of proportionality should be applied before the court determines whether the

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<sup>24</sup> *Id.* at [103]–[116].

<sup>25</sup> *Id.* at [176].

<sup>26</sup> *Id.* at [27].

<sup>27</sup> *Id.* at [176].

<sup>28</sup> *Ibid.*

<sup>29</sup> *Id.* at [29].

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Id.* at [31].

contract is unenforceable.<sup>33</sup> Contracts falling within this category are therefore not automatically unenforceable: if the legal wrong intended to be committed by one or more parties is relatively trivial, the court may find it disproportionate to render the contract void and unenforceable.<sup>34</sup> Some non-exhaustive factors for assessing proportionality are:

- (i) the nature and gravity of the illegality;
- (ii) the remoteness or centrality of the illegality to the contract;
- (iii) the object, intent, and conduct of the parties; and
- (iv) the consequences of denying the claim.<sup>35</sup>

(2) *Second Stage: Restitutionary Recovery*

14. However, even if a contract is void and unenforceable at the first stage because of its unlawfulness, the benefits transferred by the plaintiff may still be recoverable on a restitutionary basis at the second stage.<sup>36</sup> In other words, the plaintiff would be *restored* to his original position instead of being compensated for his losses. There are three possible legal avenues for such recovery: not *in pari delicto*, *locus poenitentiae* and independent cause of action.<sup>37</sup>

(a) Not In Pari Delicto

15. Restitutionary recovery is available to a party who is not equally at fault *vis-à-vis* the other party (i.e. not *in pari delicto*).<sup>38</sup> There are only three situations in which not *in pari delicto* can apply:

- (i) the relevant legislation which prohibited the contract was a class protection statute which protected the class of persons to whom the plaintiff belonged;
- (ii) the plaintiff entered into the contract on the basis of fraud, duress or oppression; and

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<sup>33</sup> *Id.*, at [35]. This category of contracts include contracts entered into with the object of using the *subject matter* of the contract for an illegal purpose, contracts entered into with the intention of using the *contractual documentation* for an illegal purpose, contracts which are intended to be performed in an *illegal manner*, and contracts entered into with the intention of contravening a statutory provision, although not prohibited by that provision *per se*.

<sup>34</sup> *Id.*, at [36].

<sup>35</sup> *Id.*, at [70].

<sup>36</sup> *Id.*, at [176].

<sup>37</sup> *Ibid.*

<sup>38</sup> *Id.*, at [43].

(iii) the plaintiff entered into the illegal transaction because of a mistake as to the facts constituting the illegality.<sup>39</sup>

(b) Locus Poenitentiae

16. The second avenue of restitutionary recovery allows a party to an illegal contract to obtain restitutionary recovery if he “repents” in time, i.e., before the illegal purpose is effected.<sup>40</sup> His withdrawal from the illegal contract must be both genuine and voluntary.<sup>41</sup> The rationale behind this doctrine is to encourage contracting parties to back out of illegal contracts.<sup>42</sup>

(c) “Independent Cause of Action” Exception

17. In the third situation, a party bringing a standalone legal action to recover the benefits conferred under an illegal contract may succeed, if that party is not relying on the illegal contract in a *substantive* legal manner when seeking recovery, i.e., suing in violation or breach of contract.<sup>43</sup> This is because the party’s cause of action falls outside the boundaries of contract law altogether,<sup>44</sup> rendering the contractual principles of illegality inapplicable in this context. The CA referred to this form of restitutionary recovery as an “*exception*” – notwithstanding the illegal nature of the contract, recovery is justified because it does not allow the plaintiff to profit from the illegal contract, but simply puts the parties in the position they would have been in if they had never entered into the illegal transaction.

18. The independent causes of action which have been recognised as allowing the recovery of benefits conferred under an illegal transaction include claims in tort and in the law of trusts premised on the plaintiff’s property or title.<sup>45</sup>

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Id.*, at [44].

<sup>41</sup> *Id.*, at [176].

<sup>42</sup> *Id.*, at [44].

<sup>43</sup> *Id.*, at [50].

<sup>44</sup> *Ibid.*

<sup>45</sup> *Id.*, at [51]. See *Top Ten Entertainment Pte Ltd v Lucky Red Investments Ltd* [2004] 4 SLR(R) 559 which endorsed the “exception” to the doctrine of illegality in the case of property rights.

19. The *Ochroid* court further considered the possibility that restitutionary recovery could also be obtained through yet another independent cause of action: unjust enrichment.<sup>46</sup> To succeed in a claim in unjust enrichment, the following requirements must be satisfied:
- (i) the defendant must have benefited from or enriched by the illegal contract;
  - (ii) the defendant was enriched at the expense of the claimant;
  - (iii) the enrichment was unjust; and
  - (iv) no defence applied.<sup>47</sup>
20. A possible defence to unjust enrichment which was specifically considered by the CA in *Ochroid* is one that is premised on illegality and public policy.<sup>48</sup> The CA explained that the concept of illegality and public policy, when operating as a *defence to an unjust enrichment* claim, is a *separate and distinct* concept from the *doctrine* of illegality and public policy in a *contractual* sense.<sup>49</sup> Furthermore, the defence of illegality and public policy need not immediately bar restitutionary recovery.<sup>50</sup>
21. The CA further decided that the principle of stultification should determine the extent to which the defence of illegality should preclude restitutionary recovery: a restitutionary claim in unjust enrichment would be precluded if allowing it would undermine the *fundamental* policy that rendered the underlying contract void and unenforceable in the first place.<sup>51</sup> This is because “to allow the claim in such a situation would be to make a mockery or nonsense of the law that rendered the contract void and unenforceable to begin with”.<sup>52</sup> Besides unjust enrichment, the CA tentatively proposed to also apply the principle of stultification to other independent causes of action, such as the recovery of the plaintiff’s property in tort or the law of trust.<sup>53</sup>

## **B. Application of Law to Facts**

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<sup>46</sup> *Id.*, at [60] and [62].

<sup>47</sup> *Id.*, at [213].

<sup>48</sup> *Id.*, at [143].

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Id.*, at [145].

<sup>52</sup> *Id.*, at [148].

<sup>53</sup> *Id.*, at [168].

22. The CA then applied the above to the facts of *Ochroid*.

(1) *First Stage: Is the Contract Prohibited?*

23. The CA agreed with the lower court that the transactions at issue were loans and not profit-sharing joint venture investments,<sup>54</sup> and that the Appellants were therefore unlicensed moneylenders under the MLA.<sup>55</sup> Firstly, the First Appellant had no primary business other than the loans disbursed to the Respondents.<sup>56</sup> Secondly, there was a system and continuity in the transactions.<sup>57</sup> Specifically, the \$58 million owed under the Agreements was disbursed over a substantial period of three years.<sup>58</sup> Thirdly, the present factual matrix *did not* fall outside the scope of MLA as – contrary to the Appellants’ argument – the statute was not a piece of “social legislation” that protects vulnerable individuals from only “loan sharks”; instead, it prohibits anyone from engaging in the business of moneylending within the meaning of the MLA without a license.<sup>59</sup> Hence, the CA held that the Agreements were unenforceable under the MLA.<sup>60</sup>

(2) *Second Stage: Is It Possible to Claim Alternatively on a Restitutionary Basis?*

24. Recovery of the outstanding principal sums was still possible if the Appellants’ alternative claim in unjust enrichment could be made out. The third legal avenue of independent cause of action in unjust enrichment for restitutionary recovery was therefore considered by the CA.<sup>61</sup> The first three elements of the Appellants’ alternative claim in unjust enrichment were easily satisfied.<sup>62</sup> On the facts, the Respondents did benefit from the loan at the

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<sup>54</sup> *Id.*, at [201].

<sup>55</sup> *Id.*, at [203].

<sup>56</sup> *Id.*, at [204].

<sup>57</sup> *Id.*, at [205].

<sup>58</sup> *Id.*, at [196(b)].

<sup>59</sup> *Id.*, at [206].

<sup>60</sup> *Id.*, at [211]. Since the Agreements were prohibited by statute, the principle of proportionality (which applies only to contracts entered into with the object of committing an illegal act at common law) was not considered.

<sup>61</sup> In the present case, the first and second avenues of restitutionary recovery (not *in pari delicto* and *locus poenitentiae*) were irrelevant because they were not pleaded by the Appellants. The facts also do not support these two claims were they pleaded.

<sup>62</sup> *Id.*, at [214]. See para 18 of the main text above.



Appellants' expense, and the unjust factor was the total failure of consideration in not repaying the loan amounts.<sup>63</sup>

25. The fourth element was the crux of the alternative claim, i.e., whether the defence of illegality operated to defeat the independent claim in unjust enrichment.<sup>64</sup> Applying the principle of stultification, the CA found that to permit recovery of the principal sums would undermine the fundamental policy underlying the MLA.<sup>65</sup> Specifically, unlicensed moneylenders should be precluded from recovering any compensation whatsoever for their illegal loans.<sup>66</sup> This is because the prohibition in the MLA reflects the strong need to deter illegal moneylending as a serious social menace in Singapore.<sup>67</sup> Permitting recovery of the principal sums lent would certainly make a nonsense of the statutory prohibition which rendered the Agreements void and unenforceable in the first place.<sup>68</sup>

## VI. Comparison with UKSC decision in *Patel*

26. The UKSC's latest ruling in *Patel* similarly dealt with illegality as a concept in contract law as well as a defence in unjust enrichment. *Patel* was a case concerning a contract which was not illegal *per se* but entered into with the object of committing an illegal act.<sup>69</sup> There, the UKSC laid down different rules for contracts affected by illegality in contract law or in unjust enrichment.<sup>70</sup> It is also notable that the *Patel* court had a differing minority opinion.<sup>71</sup>

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<sup>63</sup> *Ibid.*

<sup>64</sup> *Id.*, at [215].

<sup>65</sup> *Ibid.*

<sup>66</sup> *Id.*, at [219].

<sup>67</sup> *Ibid.*

<sup>68</sup> *Id.*, at [215].

<sup>69</sup> *Patel*, *supra* n 3. In *Patel*, Patel transferred funds to Mirza for the purpose of betting on the price of certain shares based on insider information that Mirza would soon come into possession of. However, Mirza never got the said information and, as a result, the intended betting did not take place. Mirza failed to repay the Patel his money, despite promises to do so. Patel then sought to recover the sums on the grounds of contract and unjust enrichment. The issue of illegality was of relevance because the parties' agreement could amount to a conspiracy to commit an offence of insider trading under the UK's statutory law.

<sup>70</sup> *Ochroid*, *supra* n 2, at [109].

<sup>71</sup> *Id.*, [95]–[107].

27. While the majority in *Patel* held that the rule-based approach would “fail to deliver on its principal virtues of ease of application and predictability of outcome”,<sup>72</sup> the CA in *Ochroid* is concerned about the “further uncertainty” which the “range of factors” approach may introduce.<sup>73</sup>
28. The CA in Singapore has decided to apply a balancing exercise based on proportionality to a very limited category of contracts tainted by illegality,<sup>74</sup> the majority in *Patel* adopted a broader “range of factors” test across the entire field of illegal contracts at common law.<sup>75</sup> The “range of factors” test in its application differs from the Singapore position in two significant aspects. First, applying the “range of factors” test, the UK court can decide that a contract is not void even if it falls within one of the established categories of illegality at common law.<sup>76</sup> The contrary is true of the Singapore position: except for contracts which are not illegal *per se* but entered into with the object of committing an illegal act, contracts that are illegal under a statute or at common are void and cannot be “saved” at all.<sup>77</sup> Secondly, in the UK proportionality is but one of the factors to be considered in the “range of factors” test.<sup>78</sup> In Singapore, the principle of proportionality is the *only* balancing exercise that will be applied to contracts which are not illegal *per se* but entered into with the object of committing an illegal act.<sup>79</sup> Although uncertainty may still arise in some Singapore cases, arguably, they are limited to the residuary areas of contracts tainted by illegality and defence of illegality to restitutionary claims, where the balancing approaches of proportionality and stultification apply respectively. Comparing the two approaches, it is evident that the UK position allows their courts to exercise a much higher degree of discretion in deciding whether to strike down a contract for illegality.

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<sup>72</sup> *Id.*, at [87].

<sup>73</sup> *Id.*, at [123].

<sup>74</sup> *Id.*, at [39].

<sup>75</sup> *Id.*, at [40].

<sup>76</sup> *Id.*, at [84].

<sup>77</sup> *Id.*, at [110].

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

29. In contrast, the minority in *Patel* precluded any recovery under an illegal contract but held that there was a general right to restitution of money paid under an illegal contract.<sup>80</sup> The current law in Singapore aligns more closely to the minority’s position in that there can be no recovery if a contract has been prohibited pursuant to either statute or common law.<sup>81</sup> However, there is still a significant difference, in that there is no general right to restitutionary recovery under Singapore law unless the plaintiff’s restitutionary claim falls within one of the three possible legal avenues for restitutionary recovery.<sup>82</sup> Furthermore, in Singapore, there is a separate category of contracts which are tainted by illegality and subjected to the principle of proportionality.<sup>83</sup>

## VII. Legal Implications

### A. Common law Doctrine of Illegality

30. While it may be argued that the approach in *Ochroid* results in injustice as the plaintiff would, more likely than not, be denied recovery because the contract at issue is void at law, the authors argue that the Singapore approach is still defensible for three reasons.

31. Firstly, there is no reason for the law to tolerate illegal contracts. In this regard, contracts which are not illegal *per se* but are tainted by illegality are less egregious. Therefore, the harshness of this strict approach is mitigated by the principle of proportionality, which would ensure that the result is not disproportionate to the illegality in the contract. Further, restitutionary relief and the related principle of stultification might still be available to the defendant. Thus, it is submitted that the approach in *Ochroid* is a clear and principled one.

32. Secondly, judicial discretion should be restrained. The CA reiterated that the main rationale for the defence of illegality was public policy.<sup>84</sup> However, the concept of public policy is not without its difficulties. Indeed, in *Ochroid*, it was recognised that the “elusive nature of the concept of public policy” is “an unruly horse and must therefore be applied wisely”.<sup>85</sup>

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<sup>80</sup> *Id.*, at [95].

<sup>81</sup> *Id.*, at [112].

<sup>82</sup> *Ibid.*

<sup>83</sup> *Id.*, at [36].

<sup>84</sup> *Id.*, at [23].

<sup>85</sup> *Id.*, at [20].

It is submitted that the approach taken in *Ochroid* provides a clear framework for cases involving illegality, and, in turn, better protects both parties' interests as it affords less judicial discretion in cases involving common law illegality. Indeed, Lord Sumption, who was the minority in *Patel*, was of the view that the "range of factors" test "converts a legal principle into an exercise of judicial discretion, in the process exhibiting all the vices of 'complexity, uncertainty, arbitrariness and lack of transparency' which Lord Toulson attributes to the present law."<sup>86</sup>

33. Lastly, the *Ochroid* approach allows the law to be developed incrementally. The CA was bound by precedents that have classified certain classes of contracts as void under common law. As acknowledged by the CA, "to confer on the court a further discretion to permit recovery pursuant to the prohibited contract would render the doctrine of common law contractual illegality nugatory".<sup>87</sup>

#### **B. Possibility of Statutory Reform**

34. To address the uncertainty inherent in the concept of illegality, the court in *Ochroid* considered adopting legislation similar to the New Zealand Illegal Contracts Act 1970.<sup>88</sup> The Illegal Contracts Act 1970 provides that every illegal contract shall be of no effect,<sup>89</sup> subject to the court's discretion to grant relief after considering certain factors,<sup>90</sup> or to the "express provisions of any other enactment".<sup>91</sup> This allows the Legislature to determine the interplay between criminal offences and the civil law.<sup>92</sup> Notably, the UK Law Commission in 2009 rejected a statutory model based on New Zealand's approach.<sup>93</sup> It stated, *inter alia*,

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<sup>86</sup> *Patel*, *supra* n 3, at [265].

<sup>87</sup> *Ochroid*, *supra* n 2, at [118].

<sup>88</sup> *Id.*, at [13].

<sup>89</sup> Illegal Contracts Act 1970 (NZ), s 6.

<sup>90</sup> *Id.*, s 7(3).

<sup>91</sup> *Id.*, s 7(7).

<sup>92</sup> Benjamin Joshua Ong, "Illegality and the civil law in Singapore: Lessons from the UK? *Patel v Mirza* [2016] 3 WLR 399; [2016] UKSC 42", in *Singapore Law Gazette* (2017) <[https://ink.library.smu.edu.sg/sol\\_research/2208/](https://ink.library.smu.edu.sg/sol_research/2208/)> (accessed 27 December 2018).

<sup>93</sup> United Kingdom, The Law Commission, *The Illegality Defence: A Consultative Report* (Consultation Paper No 189) at [3.118] (Chairman: The Rt Hon Lord Justice Etherton) <[http://www.lawcom.gov.uk/app/uploads/2015/03/cp189\\_Illegality\\_Defence\\_Consultation.pdf](http://www.lawcom.gov.uk/app/uploads/2015/03/cp189_Illegality_Defence_Consultation.pdf)> (accessed 27 December 2018).

that such an approach would not relieve the court of struggling with the “tangled mess of current rules” to determine whether the contract is an illegal contract.<sup>94</sup> The *Patel* judges also disagreed on whether such a statute would allow for too much judicial discretion.<sup>95</sup>

35. In *Ochroid*, the CA also acknowledged the criticisms that such legislation leads to “excessive vagueness and uncertainty”.<sup>96</sup> However, such legislation may not in fact be necessary at all, since it would be similar to the approach taken in *Ochroid*, where the court first considers whether the contract is expressly or impliedly prohibited by statute. Further, such legislation should not be adopted as it would be akin to adopting the “range of factors” test, which the CA has already rejected.

### VIII. Conclusion

36. The authors have analysed the nuances of the extensively reasoned judgment of *Ochroid* as well as the inherent difficulties of the concept of illegality. The authors take the view that the CA in *Ochroid* lays down a clear and principled framework for cases involving the defence of illegality, and, at the same time, strikes a balance between the interests of the plaintiff and defendant by allowing the possibility of restitutionary recovery. The *Ochroid* framework may not be wholly adequate in addressing all issues of and related to illegal contracts, but statutory development is not necessarily a more effective solution. On balance, it is perhaps better for the Singapore legal system to develop this area of law through case law such as *Ochroid*.

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<sup>94</sup> *Ibid.*

<sup>95</sup> *Patel*, *supra* n 3, [25], [207] and [259]–[261].

<sup>96</sup> *Ochroid*, *supra* n 2, at [122].