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Case No: QA-2022-00039
QA-2022-00048

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT (MAYOR'S & CITY OF LONDON)
ORDER OF HHJ HELLMAN DATED 21 JANUARY 2022
COUNTY COURT CASE NO. F36YM270

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2023

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

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Between :

(1) MR FAROOK OWADALLY
(2) MS SEEMA KHAN

Claimants & Respondents

- and –

(1) PLANOLOGY LTD

First Defendant & Appellant

(2) HAWKINS RYAN SOLICITORS (a firm)

Second Defendant

(3) BELL BUTTRUM LTD

Third Defendant & Appellant

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Mr Peter Dodge (instructed by Clyde & Co LLP) for the First Defendant & Appellant
Mr Nicholas Baldock (instructed by Beale & Co Solicitors) for the Third Defendant & Appellant
Mr Richard Liddell KC & Mr Christopher Greenwood (instructed by Brett Wilson LLP) for the Claimants & Respondents

Hearing date: 16th January 2023

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Approved Judgment

This judgment was handed down remotely at 12noon on 17th February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Mrs Justice Collins Rice :

Introduction and background

1. In October 2013, Mr Owadally and Ms Khan bought a listed residential property, 99 Star Street in London, to develop as flats for their occupation and for rental. They engaged Planology's planning consultancy services for the intended development, and Bell Buttrum for structural engineering and party wall services. Hawkins Ryan Solicitors acted for them on the purchase.

2. Some initial works began on the building – stripping it out and removing the roof with a view to replacement. But on 14th November 2013, the local authority, Westminster City Council, intervened to say all this work required listed building consent, which had not been obtained, so the work was not permitted. The builder thereupon put up a temporary roof and undertook strengthening work, pending the owners' application for retrospective listed building consent. But the Council then said these further works were not permitted either. The application for retrospective permission was refused.

3. The Council prosecuted Mr Owadally and Ms Khan under the Planning (Listed Buildings and Conservation Areas) Act 1990. That makes it a criminal offence to '*execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised*'. It is an offence of strict liability – no elements of knowledge or intention are mentioned in the Act. After trial in the Magistrates' Court, Mr Owadally and Ms Khan were each convicted on the four counts they faced. They appealed to the Crown Court. Two of their convictions were quashed and the other two upheld (one was narrowed). Mr Owadally and Ms Khan are accountants; their professional body, ACCA, thereupon brought disciplinary proceedings against them, which resulted in sanctions.

4. Mr Owadally and Ms Khan then issued County Court proceedings alleging professional negligence against Planology, Hawkins Ryan and Bell Buttrum. They said these professionals wrongly failed to advise them before they began the work on the building that listed building consent was required, and failed to advise and act competently in relation to the listed building requirements and processes more generally. They said the defendants' negligence was the cause of their own prosecution and conviction. They claimed general and special damages. The latter included a claim for over £1m losses in relation, among other things, to the criminal proceedings (fine, victim surcharge and adverse costs, as well as their own legal fees), the ACCA proceedings, and consequential losses of the interrupted development.

5. Planology and Bell Buttrum made separate applications for the claim to be struck out and/or for summary judgment. Those applications came before HHJ Hellman, sitting in the County Court (Mayor's and City of London), on 18th August 2021. He rejected the applications on all grounds.

6. This is the appeal of Planology and Bell Buttrum in relation to two of the bases on which they had sought a terminating ruling.

The decision under appeal

7. Planology and Bell Buttrum, the Appellants, had submitted in the County Court that the claim brought by Mr Owadally and Ms Khan, the Respondents, should not have been brought, had no real prospect of success or alternatively was an abuse of the court's process – because the losses and damages claimed all flowed from the Respondents' own criminal conduct, and therefore fell foul of the legal principle that civil causes of action cannot be founded on a claimant's own wrongdoing ('*ex turpi causa non oritur actio*').

8. The judge directed himself to the leading authorities on that principle: *Gray v Thames Trains [2009] AC 1339 HL*, *Les Laboratoires Servier v Apotex [2015] AC 430*, *Patel v Mirza [2017] AC 467*, and *Henderson v Dorset Healthcare University NHS Foundation Trust [2021] AC 563 SC*. His conclusion, in its entirety, was as follows:

> [22] C has no real prospect of establishing that their convictions were for trivial offences. But in my judgment they do have a real prospect of establishing (i) that they were not privy to one of the facts making their act unlawful, namely that the building works would affect the character of the Property as a building of special architectural or historical interest, an issue which was the subject of expert evidence both at trial and on appeal; and (ii) that in those circumstances the *ex turpi* defence is not engaged. I am therefore not satisfied on Ground 1 that the statement of case discloses no reasonable grounds for bringing the claim; or that the statement of case is an abuse of the court's process. Neither am I satisfied on Ground 1 that a case for summary judgment has been made out.
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> [23] Even had I been satisfied that Ground 1 was made out, that would not have been a complete answer to the claim, because it derives in part from actions for which C was convicted at first instance but acquitted on appeal.

The appeals

9. The Appellants bring separate, but in substance identical, appeals on two related grounds. The first concerns the County Court judge's description and application of the law on claims arising from circumstances involving unlawful conduct by the claimant (the illegality ground). The judge himself gave permission to appeal on this ground, on the basis the Appellants had '*a real prospect of establishing that the Court misapplied the Apotex test to the facts of the case*'.

10. The second ground (the abuse of process ground) concerns the judge's conclusion on abuse of process, including its elision with his decision on illegality. Permission to appeal on this ground was granted by Sir Stephen Stewart in the High Court, with a direction that the appeals be heard together.

The legal framework

(a) Appeals

11. By Civil Procedure Rule 52.21, an appeal court will allow an appeal where it finds the decision of the lower court to be 'wrong' (there is no allegation of procedural or other irregularity in the present case). An appeal court does not generally receive evidence which was not before the lower court, but may draw any inference of fact which it considers justified on the evidence which was.

(b) Terminating rulings

12. CPR 3.4(2) provides that a court may strike out a statement of case if it appears that it discloses no reasonable grounds for bringing the claim, or that it is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings.

13. CPR 24(2)(a)(i) provides for a court to give summary judgment against a claimant, on the whole of a claim or on a particular issue, if it considers the claimant has no real prospect of succeeding on the claim or issue, and there is no other compelling reason why the case or issue should be disposed of at a trial.

14. The distillation of the applicable principles on an application for summary judgment set out in the White Book commentary at [24.2.3] is drawn from the leading authority of *Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)* at [15], approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin Five [2009] EWCA Civ 472*, and includes the following.

15. A court must consider whether a claimant has a realistic, as opposed to fanciful, prospect of success. A claim must be more than merely arguable; it must carry some degree of conviction. In reaching its conclusion about that, a court must not attempt to conduct a mini-trial. But that does not mean it must take at face value and without analysis everything a claimant says: in some cases it may be clear there is no real substance in the factual assertions made, particularly if contradicted by contemporaneous documents. The court must take into account not only the evidence before it on an application for summary judgment, but also the evidence that can reasonably be expected to be available at trial. That, however, does not extend to 'Micawberism' – the mere hope that something may turn up later.

(c) Abuse of process

16. The power to strike out a claim as being an abuse of process is a broad and flexible one, and must be applied in a fact-sensitive manner. The aspect of it most clearly focused on in this case is described by Lord Diplock, giving the judgment of the House of Lords in *Hunter v Chief Constable of West Midlands Police [1982] AC 529*, in this way (p.541):

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the

> intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

17. *Hunter* involved the 'Birmingham Six' trying to bring a civil claim alleging police assault. At their earlier criminal trial on charges arising from the well-known pub bombing, a 'voir dire' had been held which had established to the criminal standard that they had not been assaulted by the police. The civil claim was held to be a collateral attack on that finding, and an abuse of process. Lord Diplock said the 'dominant purpose' of the civil claims had not been to recover damages, but to undermine the foundations of their convictions with a view to putting pressure on the Home Secretary to release them earlier from their life sentence imprisonment. The 'identical question' to that in the civil claims had already been finally decided by a competent court, and a litigant was not to be permitted by changing the form of proceedings to set up the same case again.

18. The House of Lords considered *Hunter* in *Arthur JS Hall v Simons [2002] 1 AC 615* and confirmed that the basic principles had been stated clearly there, and that the remedy remained flexible, to be applied to the facts of each case (p.705). Giving the leading judgment, Lord Hoffmann said this (p.702):

> Criminal proceedings are in my opinion in a special category because although they are technically litigation between the Crown and the defendant, the Crown prosecutes on behalf of society as a whole. … So a conviction has some of the quality of a judgment in rem, which should be binding in favour of everyone. … [T]his policy is reflected in section 13 of the Civil Evidence Act 1968, which provides that in an action for libel or slander, proof of the plaintiff's conviction is conclusive evidence that he committed the offence of which he was convicted.
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> But one should not exaggerate this argument. The policy reasons which justify making the conviction conclusive evidence in a defamation action do not necessarily apply to other actions. I said that a conviction has some of the quality of a judgment in rem but, as a matter of law, it remains a judgment between the Crown and the accused and that is often the right way to consider it. The Court of Appeal is generally thought to have taken the technicalities of the matter much too far when it decided in *Hollington v F Hewthorn & Co Ltd [1943] 1 KB 587* that in civil proceedings a conviction was res inter alios acta and no evidence whatever that the accused had committed the offence. But when Parliament reversed this rule in section 11(1) of the Civil Evidence Act 1968, it did not say that the conviction would be conclusive evidence, so that the issue could not be relitigated. It said only that the conviction was admissible evidence for proving that he committed the offence.

19. More recently, the Court of Appeal reviewed the caselaw in *Michael Wilson & Partners Ltd v Sinclair [2017] 1 WLR 2646* and distilled from it the following principles (at [28]):

> (1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated… These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other… Both or either interest may be engaged.
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> (2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse …; and the court's power is only used where justice and public policy demand it…
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> (3) To determine whether proceedings are abusive the court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process…
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> (4) In carrying out this analysis, it will be necessary to have in mind that (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules'…; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated…; or, as Lord Hobhouse put it in the *Arthur JS Hall* case, if there is an element of vexation in the use of litigation for an improper purpose.
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> (5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process…
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> (6) An appeal against a decision to strike out on the grounds of abuse, described … as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not the exercise of a discretion. Nevertheless, in reviewing the decision, the court of appeal will give considerable weight to the views of the judge…

20. My attention was also drawn to the comment in *Crypto Open Patent Alliance v Wright [2021] EWHC 3440 (Ch)*, at [48] and following, to the effect that a previous court ruling may be treated as *admissible* as having some probative value, but there may need to be some evaluation of the *weight* to be attached to it '*for example because the witnesses available and the issues at stake in the first proceedings might well be very different from those on the second*'.

(d) The case law on the 'illegality defence' in civil claims

21. The four Supreme Court / House of Lords authorities to which the County Court judge was directed were also an important focus of this appeal.

22. In *Gray v Thames Trains*, the claimant had been involved in a major rail accident. He said this brought on mental health problems, under the effects of which he committed homicide and was convicted of manslaughter on grounds of diminished responsibility. He brought a claim in negligence against the railway company. Lord Hoffmann reviewed the authorities on civil claims involving a claimant's wrongdoing and identified two principles.

23. First, there was a 'narrower principle' that '*the punishment inflicted by a criminal court is personal to the offender, and that the civil courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment*'. This narrower principle is based on avoiding inconsistency: where a criminal court fixes an individual with personal legal responsibility and punishment, a civil court should not lend itself to undoing that: '*If the law of negligence were to say, in effect, that the offender was not responsible for his actions and should be compensated by the tortfeasor, it would set the determination of the criminal court at nought. It would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute.*' So claims for damage caused by the lawful *sentence* of a criminal court were within this narrower principle.

24. Second, there is a 'wider principle' which relies not on avoiding inconsistency, but on a general principle that '*it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct*'. This principle may apply to claims for losses caused not just by the sentence of a criminal court but by the wrongful conduct of a claimant. So '*the operation of the principle arises where the claimant's claim is founded upon his own criminal or immoral act. The facts which give rise to the claim must be inextricably linked with the criminal activity. It is not sufficient if the criminal activity merely gives the occasion for the tortious conduct of the defendant*'. A distinction is made between '*causing something and merely providing the occasion for someone else to cause something*'.

25. The claimant in *Gray* was not permitted to recover from the train company.

26. The facts of the *Apotex* case were different; here the illegality involved international patent infringement. The Supreme Court held there was no justification arising from the illegality defence for forfeiture of the claimants' rights arising from undertakings given by the defendants in reliance on the patent's validity. The defence was not engaged on the facts of the case.

27. In his leading judgment, Lord Sumption JSC described a criminal offence as the paradigm case of an illegal act engaging the illegality defence, and the defence itself as

> arising in the public interest, irrespective of the interests or rights of the parties. It is because the public has its own interest in conduct giving rise to the illegality defence that the judge may be bound to take the point of his own motion, contrary to the ordinary principle in adversarial litigation. … [I]n general, although described as a defence, it is in reality a rule of judicial abstention. It means that rather than regulating the consequences of an illegal act (for example by restoring the parties to the status quo ante, in the same way as on the rescission of a contract) the courts withhold judicial remedies, leaving the loss to lie where it falls. … The *ex turpi causa* principle precludes the judge from performing his ordinary adjudicative function in a case where that would lend the authority of the state to the enforcement of an illegal transaction or to the determination of the legal consequences of an illegal act. (at [23]).

28. But he added ([29]) that '*there may be exceptional cases*' where even criminal acts will not constitute '*turpitude*' for the purposes of the illegality defence. In particular, '*there is a recognised exception to the category of turpitudinous acts for cases of strict liability, generally arising under statute, where the claimant was not privy to the facts making his act unlawful*'. In such cases, where the wrong alleged against a defendant may consist precisely in causing an innocent claimant to commit an offence of strict liability, there may be a reason for holding the illegality defence not to apply at all (or, at any rate, not outside the 'narrower principle'). In such cases a court may be required to determine whether the claimant was in fact '*privy to the illegality*'.

> To that extent, an inquiry into the claimant's moral culpability may be necessary in such cases before his act can be characterised in law as 'turpitude'. This may be a difficult question, but it is not a question of degree. The conclusion will be a finding that the claimant was aware of the illegality or that he was not. It is a long way from the kind of value judgment implicit in the search for a proportionate relationship between the illegality and its legal consequences of the claim.

29. The facts of *Patel v Mirza* were different again. Here, the claimant was seeking to recover a large sum of money paid on the understanding it would be used for unlawful insider dealing (it was not in fact so used). In his leading judgment, Lord Toulson JSC summarised the position at [120]:

> The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the

> public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

30. The Court found accordingly that the claimant satisfied the ordinary requirements of a claim for unjust enrichment and should not be debarred from enforcing it by reason only of the fact the money he sought to recover was paid for an unlawful purpose.

31. Lord Sumption's judgment in *Patel v Mirza*, however, not only included an analysis of the legal principle that '*a person may not rely on his own illegal act in support of his claim*' but also focused, again, on what he described as 'significant exceptions' to that rule. Describing one of them, he said this, at [242]:

> One comprises cases in which the claimant's participation in the illegal act is treated as involuntary: for example, it may have been brought about by fraud, undue influence or duress on the part of the defendant who seeks to invoke the defence. The best-known example is *Rhodes v Burrows [1899] 1 QB 816*, where the illegality consisted in the plaintiff having enlisted in the defendant's private army for the Jameson raid, contrary to the Foreign Enlistment Act 1870. The illegality principle was held not to arise because he had been induced to do so by the defendant's fraudulent misrepresentation that the raid had the sanction of the Crown, which, if true, would have made it legal. Cases in which the illegality consisted in the act of another for which the claimant is responsible only by virtue of a statute imposing strict liability, fall into the same category: see *Osman v J Ralph Moss Ltd [1970] 1 Lloyd's Rep 313; Les Laboratoires Servier v Apotex [2015] AC 430*, para 29. In such cases, however, the construction and purpose of the statute in question will call for careful attention.

32. The relationship between the 'trio of considerations' described by Lord Toulson in *Patel v Mirza*, and the decision in *Gray*, was considered by the Supreme Court in *Henderson v Dorset Healthcare Trust*. This was another case in which a claimant had committed manslaughter (diminished responsibility); this time she brought a claim in negligence against the healthcare trust of whose community mental health team she was a patient at the time of the homicide. The Court held the claim bad for illegality, confirming *Gray* and *Patel* were both good law and consistent with each other.

33. Giving the judgment of the Court, Lord Hamblen JSC said this about the judgments in Gray '*in so far as they relate to public policy*' (at [58]):

> (1) Both the narrow claim and the wide claim failed on the grounds of public policy.
>
> (2) All judges considered that the relevant policy in connection with the narrow claim was the need to avoid inconsistency so as to maintain the integrity of the legal system: 'the consistency principle'.
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> (3) Lord Hoffmann did not consider that this applied to the wide claim but held that a related policy did, namely that 'it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct (para 51). I understand this to mean that allowing a claimant to be compensated for the consequences of his own criminal conduct risks bringing the law into disrepute and diminishing respect for it. It is an outcome of which public opinion would likely disapprove and would thereby undermine public confidence in the law: 'the public confidence principle'.
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> (4) The public confidence principle is also applicable to the narrow claim. It is related to the consistency principle since one of the reasons that the public would be likely to disapprove of the outcome is the inconsistency which it involves between the criminal law and the civil law.
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> (5) Although Lord Rodger appeared to consider that the consistency principle did not apply to the wide claim, the policy reasons he gives for rejecting the claim reflect that principle. The reason that a person cannot 'attribute … to others' acts for which he has been found criminally responsible, or 'seek rebate' of the consequences of those acts, is that it would be inconsistent with that finding of criminal responsibility. If a person has been found criminally responsible for certain acts it would be inconsistent for the civil courts to absolve that person of such responsibility and to attribute responsibility for those same acts to someone else.
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> (6) Whilst the consistency principle more obviously applies to the narrow claim, on analysis it applies to the wide claim as well. In relation to the narrow claim the inconsistency is with both the criminal court's finding of responsibility and the sentence it has imposed. In relation to the wide claim it is with the former only.

34. The Court cited with approval Lord Sumption's reference in *Apotex* to exceptional cases where a criminal act will not constitute 'turpitude'. These may include trivial offences, or strict liability offences where the claimant 'is not privy to the facts making his act unlawful'. But the serious criminal offence of manslaughter by reason of diminished responsibility did not come close to falling within such an exception and clearly engaged the defence.

35. The Court considered the 'trio of considerations' in *Patel v Mirza* did not lead to any different outcome from the application of the principles in *Gray*. The Court concluded (at [145]) that '*Gray should be affirmed as being Patel-compliant' – it is how Patel 'plays out in that particular type of case'. The clearly stated public policy based rules set out in Gray should be applied and followed in comparable cases*'.

Analysis

(a) Preliminary

36. My task on this appeal is to consider if the County Court judge was 'wrong' not to terminate the case on either or both of the grounds that (a) the Respondents' negligence claim was an abuse of process in amounting to a collateral attack on, or an attempt to relitigate, matters finally determined in the criminal proceedings against them or (b) their claim disclosed no reasonable grounds for bringing it, or alternatively they had no real prospect of succeeding on it and there was no other compelling reason why it should proceed to trial, because the claim would be defeated by the illegality defence. The abuse and illegality grounds are distinct, but related; both turn on the proper consequences for the Respondents' civil claim of the previous criminal proceedings against them.

37. Two points limit the scope of my task. First, the question whether the judge was 'wrong' is not about whether I agree with him or would have made the same decision. It is about whether the decision he took was vitiated by error of law, fact or principle, or otherwise not properly open to him on the facts of the case. Second, I am not considering a decision on the full merits of the parties' cases, but a decision about early termination without trial. Both points put me at some distance from the merits of the underlying negligence claim as such.

38. The County Court judgment itself provides limited material on its face, including as regards my giving 'considerable weight' to the views of the judge on the question of abuse of process. The decision is very succinctly put. The Court evidently addressed itself to the relevant authorities on the illegality defence, and the judgment seems to rely principally on the identification by Lord Sumption in *Apotex* of '*exceptional cases*' where it may be that '*a criminal act will not constitute turpitude'*, and the examples given as including '*strict liability offences where the claimant is not privy to the facts making his act unlawful*'. The present case concerned strict liability offences. The Court considered the Respondents had a real prospect of establishing at trial they were 'not privy' to – did not know – the fact that the works to the building '*would affect its character as a building of special architectural or historic interest*', a component of the offences for which they were convicted. Thus the Court concluded the Respondents had a real prospect of defeating the illegality defence and succeeding on their claim at trial, and a reasonable ground for bringing the claim, so the claim was not therefore an abuse of process. In any event, the decision notes the claim goes

wider than the extant convictions; it extends to matters arising out of the convictions quashed on appeal.

39. What does not appear in this succinct reasoning is any analysis of how far and why the illegality defence, and any exceptions, were engaged by this case in the first place. Perhaps the judge thought it was obvious, or that it was sufficient for his purposes if on any basis a possible way through was apparent. But the authorities seem wary of shortcuts. The 'trio of considerations' in *Patel*, which *Henderson* suggests is a general approach, requires 'disciplined' thinking; and what Lord Sumption says about possible exceptions is similar: the construction and purpose of a strict liability statute may need 'careful attention', and evaluating a claimant's knowledge may be 'difficult'. There is no reference to thinking like this in the County Court ruling. Nor is there any (distinct) analysis or reasoning for the conclusion on abuse of process.

40. The Appellants invite me in these circumstances to do two things: go back to the authorities to see how realistic the Respondents' prospects really were of getting past the illegality objection, and go back to the factual material before the County Court, in particular the decisions of the criminal courts. They say this factual material does not support the decision to permit the Respondents' claim to continue to trial – the Respondents have no real prospect of defeating the illegality defence on the facts and authorities, and their claim is an obvious abuse of process in seeking to revisit or undo the criminal proceedings.

(b) The findings of the criminal courts

41. The four charges the Respondents faced in Westminster Magistrates' Court, along with Mr David Williams of Bell Buttrum, related to the initial stripping out work, the removal of chimney breasts in particular, the subsequent strengthening work, and the temporary roof (being higher than the original). The judgment dated 3rd May 2016 came after a 9-day trial.

42. The Court had received legal submissions on the nature of the offences charged. The Respondents said they *implied* an element of mens rea or fault, notwithstanding the statutory silence. At section 8 of the judgment, the Court firmly rejected that, concluding '*it is not appropriate to import mens rea into any element*' of the statutory offence; '*mens rea and fault*' was plainly irrelevant. The Court made this observation:

> The probable reason for the section being constructed in that way is because it purports to impose strict liability in order to deter and prevent breaches of the statute. Although damage to listed buildings can subsequently be corrected, irreversible harm may already have been done. Importing concepts of mens rea and fault would make the objects of this statute unworkable. It would be open to an accused to simply put the blame on others, including professional advisers and builders who would frequently be involved, in order to avoid criminal liability. Such issues are intended to be matters of mitigation, not defence.

So '*cause to be executed*' did not imply '*fault or culpability*', it just meant '*bringing about a result*'.

43. The Court had before it oral and written witness evidence (not, however, from the estate agents, Hawkins Ryan or Planology) and a quantity of email correspondence including '*emails written by individuals who are not witnesses or defendants in these proceedings. The contents of such emails are of limited evidential value in these criminal proceedings.*' The Respondents had said they had been unaware permission was needed for any of the works; they had throughout relied on professional advisers, who gave negligent advice. The Court said their knowledge was irrelevant, and so was this evidence.

44. Recording his findings and conclusions at section 11 of the judgment, the District Judge deduced the 99 Star Street project had involved the participation of all the defendants, together with other individuals, forming a team which had, in various combinations, worked together before. The project went wrong, a degree of panic had set in, and all the participants had since '*been seeking to minimise or evade their own responsibilities in the matter and to blame others. They have deliberately misunderstood clear instructions, and also sent a large number of contradictory and/or exculpatory emails*'.

45. The District Judge found neither Respondent had given '*completely accurate evidence*'. He did not accept they were relatively inexperienced in property redevelopment and had simply left the professionals to it. They were astute and experienced businesspeople, who had substantial business investment in a larger property portfolio. Both were in control of, and fully involved in, all aspects of the works; they caused them to be executed.

46. He noted Mr Williams's evidence was in direct conflict with the Respondents' – each blaming the other – and did not find some of it '*capable of belief*'. He had had authority to instruct the builder, which was more than simply being an adviser. He too had caused the works to be executed.

47. The District Judge accepted the evidence of the Council witnesses that the works were carried out in a manner affecting *its character as a building of special architectural or historic interest* and could not place real weight on the contrary evidence of the Respondents' experts.

48. Mr Owadally and Ms Khan were found guilty on all four charges. Mr Williams of Bell Buttrum was found guilty on one of four charges.

49. They appealed to the Crown Court. The ruling of Recorder Campbell QC on the Respondents' appeal, running to 22 pages, was given at Southwark on 25th August 2017 after a 5-day hearing. The appeals had been on two grounds – the nature of the alterations (the 'affecting character' point) and the question of each appellant's personal involvement (the 'causing' point). Both were accepted to raise issues of fact alone. It seems that during the hearing concessions were made, narrowing the focus to the 'causing' point. The Respondents said they had not in fact authorised the works undertaken.

50. Again, the court had before it a quantity of contemporary documentation, including emails, but had not received evidence from some of the actors, including the builder, the lawyers, the estate agent and Planology.

51. The Court's ruling reaches narrative factual conclusions. It found the Respondents relatively experienced in property dealing. They knew the property was listed before they bought it: an email from Ms Khan to Mr Williams denying that was 'not correct'. She had tried to mislead the Council about this.

52. The ruling rejected Ms Khan's evidence that she had not understood the drawings and plans for the works. It rejected the Respondents' evidence that they had been unaware of and 'shocked' by the state of the building after the initial works. It noted they had not said in their police interviews, nor maintained in the Magistrates' Court, that the works had been done without their consent; instead they had claimed to be entirely reliant on professional advice. This Recorder found that was their true position; in relation to Ms Khan he said, '*you have at all times genuinely believed that you were acting on advice but you only remembered your untrue defence when specifically prompted about it*'. The ruling records the 'sheer implausibility' that anyone other than the Respondents 'caused' the works, given their close and sustained involvement in the project, and 'no rational reason' for the builders or anyone else to have acted without instruction. There was no sign of the normal reactions to discovering unexpected and unauthorised works. The Respondents' evidence the initial works were without their authorisation was 'false'.

53. In relation to the subsequent work, it concluded the Respondents did *not* instruct the *continuation* of work on the chimney breasts, nor the strengthening work, after the Council intervened. But they *had* authorised the work on the temporary roof. It was done in accordance with a builder's quotation for a roof 10cm higher than the demolished roof. The Recorder '*did not believe*' Mr Owadally's evidence that this was '*just a coincidence*'.

54. Mr Williams appears to have had his conviction quashed in a separate decision; it is not clear on what basis.

(c) Abuse of process

55. I turn first to the question of whether, in all these circumstances, the County Court judge was 'wrong' to refuse to strike out the Respondents' negligence claim as an abuse of process.

56. The Respondents do not now dispute, in their claim or on this appeal, the facts constituting their criminal liability as upheld in the Crown Court. They accept they 'caused' the initial stripping-out work to be done, and the later roof work, and committed the offences as convicted. They accept they knew the property was listed. But they say they acted throughout in reliance on inaccurate and negligent professional advice, which was to blame for their predicament.

57. This is not therefore a case like *Hunter* where a civil claim is trying for a different answer to the *factual* matrix on which the criminal convictions *depend* ('the identical question'). There is no remaining dispute about the facts constituting the ingredient

elements of the convictions – what the Crown Court Recorder called the 'causing' point and the 'affecting character' point.

58. Nor is it a case in which the issue at the core of the Respondents' claim – the potential negligence of their advisers – has been the subject of determination, or even consideration, in another court. It was irrelevant to the determination of criminal liability. So the Appellants have not already been 'vexed' by litigation on their duty of care to the Respondents, whether that duty has been breached, and whether they are tortiously responsible for losses flowing from any such breach. Evidence going to these issues (and the full range of relevant witnesses) was not examined in the criminal proceedings. This is not a classical re-litigation case with the same parties or issues in the two sets of actions.

59. Nor is there any real doubt the Respondents' 'dominant purpose' in bringing their claim is financial compensation. That is clearly their motivation. Their claim is of a piece with the criminal courts' characterisation of a continuing *commercial*, as opposed to narrowly regulatory, dispute about who in the wider team should properly bear the losses of the development project.

60. The authorities' guidance is that the issue of abuse of process has to be approached in a broad and flexible way. A court must make a *close 'merits based' analysis* of the facts, taking into account the private and public interests involved. It must focus on whether in all the circumstances a party is abusing or misusing the court's process and bringing a claim unfairly or improperly.

61. So the Appellants draw attention in this context principally to the factual findings in the criminal courts which are adverse to the Respondents and their honesty and credibility. They criticise them for now reverting to their position before the District Judge, the Recorder having found their position in the Crown Court implausible and 'false'. The Appellants say the Respondents' civil claim relies on sworn witness statements that cannot be reconciled with their sworn evidence before the Crown Court. They also point out that some of the Respondents' evidence in the civil claim has already had to be withdrawn or corrected because of factual inconsistencies, including with contemporary documentation.

62. The Appellants invite me to draw a number of conclusions from this. They say that even if the Respondents' claim is not strictly reduplicative, or inconsistent with the *ratio*, of the criminal proceedings, it is inconsistent with some of the findings of fact made in the criminal courts. They give examples:

    i) The Magistrates' Court rejected as misleading the Respondents' evidence they simply handed the whole project over to the professionals. The Respondents reply that that is not the position they now advance in the civil claim, no relevant *findings* were made on this issue, and the rejection of their evidence may go to the issue of their credibility in the civil claim but not to whether it is abusive.

    ii) The Magistrates' Court found the Respondents were in control of and fully involved in the programme of works. The Respondents reply they do not dispute that in the civil claim.

iii) The Magistrates' Court found it 'hard to accept' the Respondents did not realise listed building consent was needed for the internal works. The Respondents reply neither of the criminal courts made a finding that their evidence on this point was untrue.

iv) The Crown Court noted Mr Owadally told Mr Williams they were going to remove the roof timbers and chimney breast. The Respondents reply they do not dispute that.

v) There was evidence before the Crown Court, and the Recorder so found, that the Respondents knew permission was required for works to listed buildings. The Respondents reply that the Crown Court had simply *noted* an email from Ms Khan after the initial works saying she did not know the property was listed, and that if she had she would have applied for the necessary consents. But its finding was limited concluding she did know the property was listed, not that she knew *at the time* the extent of the consents needed; there is a continuing dispute about what they had understood about the need for consent to *internal* works in particular.

vi) The Crown Court found the Respondents ordered the removal of the chimney breasts because they discovered their neighbour had been given permission to do the same some years earlier and assumed they would also be given permission. The Respondents reply there is a live issue about *what sort of* 'permission' was being talked about here.

vii) The Crown Court found it was no coincidence the roof was raised by the precise amount mentioned in the builder's quotation. The Respondents say there is a live issue nevertheless about the discrepancy between the quotation's reference to the 'ceiling' (internal) and what was done to the roof (external).

63. Taken by themselves, I find it hard to see – including for the reasons advanced by the Respondents in their point-by-point replies – that their *pleaded* claim is in any of these respects *necessarily* inconsistent with the findings in either criminal court. But even if it is, that would not necessarily make their claim abusive. The Appellants contend, in effect, that the criminal courts' factual rulings (or the Crown Court's, where they are inconsistent) should be taken as a whole, and the Respondents should not be permitted to reopen anything found there in civil proceedings. But the House of Lords confirmed in *Arthur JS Hall* – as does s.11 of the Criminal Evidence Act 1968 – that even a *conviction* is not necessarily conclusive in a civil claim as to all the facts of which it is constituted. I was shown no authority that the findings of criminal courts on matters not going to the constituent elements of the offences charged, and based on evidence necessarily selected for and limited by its relevance to those elements, should be regarded as indisputable in all other courts for all other purposes, so making any attempt to do so inevitably abusive.

64. Then the Appellants say the Respondents' claim is necessarily founded on the abjuring of previously sworn evidence which the Crown Court held false. They say that in itself makes it abusive, and in any event the County Court judge should have concluded the Respondents' claim could not possibly survive the inevitable destruction, in these circumstances, of their credibility under cross-examination.

65. In the criminal proceedings, the Respondents (a) failed altogether in the Magistrates' Court with a defence of dependence on professional advice, since no element of personal knowledge or fault was required for conviction and their conduct satisfied the *actus reus* elements of the offence; and (b) failed in part in the Crown Court with a defence that their conduct did not after all satisfy the *actus reus* elements because they were not their own acts – they were the unauthorised acts of others. The civil proceedings are pleaded on the basis that, in the respects found by the Crown Court, their conduct did satisfy the *actus reus* elements of the criminal offences, but that, while the element of personal fault was irrelevant in the criminal courts, the proper attribution of personal fault is not only relevant but of the essence in the civil proceedings – and the civil claim is anyway much wider in its factual reach.

66. The Respondents' position has clearly evolved, but not necessarily in an illogical or irreconcilable way. Their inconsistent evidential history, and the criminal courts' views of their credibility as witnesses, are undoubtedly matters which may feature prominently in any trial of the civil claim. The task of the Respondents in such a trial would be to persuade a court that, whatever untruths they may have told in the past, their claim remains sound. That is a possibly challenging, but neither an inevitably hopeless, nor an inherently abusive, task in and of itself. I was shown no authority that a claim *must* be regarded as too inherently tainted to be tried if it is brought by a claimant whose evidence has been rejected with criticism in previous related litigation. That looks more like an issue for a trial than a reason to prevent one.

67. Pausing there to summarise, in relation to these submissions of the Appellants: I am unpersuaded the Respondents' claim must have been held by the County Court judge either reduplicative of or a collateral challenge to the criminal proceedings. Their claim as pleaded is consistent with the legal and factual ingredients of their convictions. It concerns issues of fault not decided in, considered by, or relevant to the criminal proceedings. Its purpose is to address, attribute and/or redistribute the financial consequences of the redevelopment project as a whole. I am unpersuaded any of the factual findings of the criminal courts are necessarily fatal to or inconsistent with the Respondents' claim; alternatively I am unpersuaded any possible inconsistency should not or could not properly and fairly be considered and resolved at trial on the basis of a fresh evidential matrix. I am unpersuaded the rejection of points of the Respondents' evidence in the criminal courts *by itself* makes their claim abusive, unreasonable or disclosing no real prospect of success; these matters go to credibility rather than abusiveness.

68. On what might be called these standalone abuse grounds, therefore, I am unpersuaded the court below should be regarded as 'wrong' to have declined the Appellants' application for a terminating ruling. On any close merits-based analysis of the facts, it seems to me that more would have needed to be shown than was before me, or presumably before the County Court judge (no transcript is available), to require, or perhaps even to justify, a conclusion that this claim is an inherent abuse of court process. The claim is clearly vigorously disputed. The Respondents' credibility and consistency of position is clearly in issue, but that could properly be regarded as a matter for a trial judge to consider, in the context of all the other evidence – including from witnesses not appearing in and not relevant to the criminal proceedings – that has a proper bearing on establishing the components of the negligence claim.

69. However, that brings me to the final element of the Appellants' case on abuse of process. That is that the entire criminal proceedings – including the criticisms made of the Respondents' evidence and positions, their convictions, and the fact that each was fined £15,500 and ordered to pay the Council's costs – are inconsistent with any real prospect the Respondents could successfully overcome a defence of illegality. So proceeding to trial is a pointless exercise, a waste of time and resource, and hence inherently abusive.

70. On this point the 'abuse of process' and 'illegality defence' grounds of appeal materially overlap. We spent the greater part of the appeal hearing on the illegality ground. I turn therefore to that ground, noting the degree of overlap.

(d) The 'illegality defence'

(i) The potential issues for a liability trial

71. The Appellants urged me to consider this an obvious case of a claim bad for illegality, and resist any attempt by the Respondents to make it seem complex. How complicated the potential issues are is material: if this is a straightforward case, or perhaps raises a clear legal point, an application for a terminating ruling may require a court to grasp the nettle and deal with it there and then; but if legal or factual complexity is engaged, trying to do so could turn into 'mini-trial'. The issue at stake is the Respondents' entitlement to a trial of their claim and of the defences raised to it.

72. With that in mind, I have reflected on the issues a trial of this claim, defended on grounds of illegality, would potentially have to deal with. They include whether the Respondents could avoid that defence in the first place and, if not, whether they could bring themselves within an exception. As I say, it seems the County Court judge assessed the prospects for the second question quickly in the affirmative, without discussing the first. But each stage falls to be addressed in considering whether he was 'wrong' to allow the case to proceed.

73. Based on their particulars of claim, the Respondents do seek to recover money spent on fines and other financial orders imposed by the Crown Court, so engaging the 'narrower principle'. They seek compensation for other losses flowing from the unlawful works, potentially falling within the 'wider principle'. It seems, too, they seek compensation for further losses flowing from (a) the works in relation to which they were acquitted of criminal responsibility on appeal, (b) the fact the project had to be aborted or rethought because listed building consent was required and not in prospect for future planned works and also, possibly, (c) other alleged failures of the defendants to fulfil their professional obligations. The potential engagement of the defence may be less clear here.

74. The Appellants urge strongly that because the Respondents are expressly seeking to recover money paid under order of the Crown Court as a consequence of their convictions, this is a paradigm example of an impermissible claim: it falls squarely within the 'narrower principle' in *Gray* and should have been struck out for illegality without more ado.

75. That is an unqualified proposition, and I have to test whether the County Court judge had any proper choice but to accept it. The Respondents do maintain the authorities

are not as simple and straightforward on this point as the Appellants say. They point to the guidance in *Henderson* that while *Gray* is the correct starting point for 'comparable' cases, it is only one example of the 'playing out' of the trio of considerations in *Patel*. This is not a case like *Henderson* and *Gray*, where strong public policy considerations associated with punishing homicide in all gradations led to unequivocal decisions; it is not 'comparable'.

76. Instead, the Respondents say, the starting point is the *Patel* trio of considerations, and how they would 'play out' on the facts of this case. That would require assessing the potential damage to the coherence of the justice system and to the public interest if this claim were allowed, having regard to (a) the underlying purpose of the ban on causing unauthorised works to be executed affecting the character of a listed building, which has been transgressed, and whether that purpose would be enhanced by refusing the claim, (b) any other relevant public policy on which refusing the claim may have an impact – including perhaps the public interest in holding regulated professions and others holding themselves out as competent experts to account for negligence, and (c) whether refusing the claim would be a proportionate response to the illegality, bearing in mind that punishment, as such, is a matter for the criminal court.

77. All this, the Respondents say, would require a thoughtful approach to the statutory policy, public interest and fairness issues a court must consider. They say they had a real prospect of succeeding on this at trial; and these are so inherently matters of judgment and balance they make a 'compelling reason' for the case to go to trial anyway. The 'consistency' and 'public policy' principles engaged by the illegality defence are distinctively evaluative and inherently unsuitable for determination on an application for a terminating ruling; they need to be considered by way of legal submissions on a full factual and evidential basis, not something less than an interlocutory mini-trial.

78. I can see that from first principles *Patel* supports that thoughtful and evaluative approach. The challenge for the Respondents, however, is that how the *Patel* approach 'plays out' is also confirmed to be sensitive to the circumstances of individual cases. If the facts of this case are not 'comparable' to the facts of the homicide cases, neither are they 'comparable' to the facts of *Patel*. *Patel* was not a criminal conviction case, and this is. The Appellants say it is paradigmatic and straightforward on that account.

79. The salient feature of the criminality in this case, however, is that the offences were of strict liability. So salient is that feature, it appears to have led the County Court judge to go straight to the strict liability 'exception', and the dicta of Lord Sumption in *Apotex* and *Patel*, without pausing over the application of the illegality defence in the first place. The Appellants say this was a mistake; had he done so, he would have had to find the 'narrower principle' in *Gray* (which survives *Patel*) applied. And, they say, there is no clear authority for exceptions to the narrower principle, even in cases of strict liability convictions.

80. It is true I was not shown any authority directly on the point of how the *Patel* considerations – accepting them as a general starting point – 'play out' in a case of *conviction* for *strict liability offences* where the *narrower rule* is engaged. Those are key facts in the present case. Lord Sumption in *Apotex* at [29] observed that 'the

exception' for strict liability offences '*would not necessarily have applied*' in the 19th century *Burrows* case if Mr Burrows

> had been claiming damages arising directly from the sentence of a criminal court or from some other penal sanction imposed on him by law. That situation would have engaged Lord Hoffmann's 'narrower rule', and in that context it
>
> > "must be assumed that the sentence … was what the criminal court regarded as appropriate to reflect the personal responsibility of the accused for the crime he had committed".

81. However, he does not say 'the exception' is definitively excluded in all such circumstances, or that the assumption referred to is an automatic and unvarying axiom for deciding cases within the 'narrower principle'. In his observations at [242] in *Patel* he had cited without criticism the *Osman* case, in which the Court of Appeal approved recovery of a criminal fine for driving without insurance, in a negligence claim against insurance brokers who had advised the claimant he was insured – an apparent example of the permissibility of civil recovery even within the narrower rule.

82. In these circumstances, the facts of the present case seem to me to raise potential issues, which are not straightforward, about the application of the illegality defence. It engages both the narrower and wider principles (the latter both within, *and* potentially beyond, the matters for which the Respondents were convicted), and involves convictions for strict liability offences. One relevant question, for example, may be whether *Osman* is a 'comparable' case.

83. Issues potentially arise in relation to the strict liability feature in particular. What Lord Sumption says about strict liability offences is not simple, and not indicative of a simplistic approach. It implies a thoughtful approach to the facts and offences relevant in individual cases. For example, in *Apotex* he said inquiry into the moral culpability of a claimant may be necessary (and difficult), including into what a claimant *knew* about *the facts* constituting the illegality (and perhaps about the *illegality itself*). In *Patel* he focused on whether the illegality could properly be regarded as *involuntary* and whether it 'consisted in *the act of another* for which the claimant is responsible only by virtue of a statute imposing strict liability' (emphasis added).

84. And in relation to the strict liability offences themselves, '*the construction and purpose of the statute in question will call for careful attention*'. Perhaps that is because they pose a particular interpretative, and public policy, conundrum for illegality defence cases. As a matter of logic, there may be no inevitable 'clash' within the legal system between the imposition of no-fault criminal liability and the availability of fault-based civil recovery. Unlike fault-based criminal liability, it cannot necessarily be said that a (criminal) court has already *finally* calibrated the fault of an offender, since fault is simply irrelevant to its task (other than by way of sentencing; no transcript of sentencing remarks or other evidence of basis of sentence is available in this case). Hence the importance of careful and contextual statutory interpretation. In making a defendant's knowledge and intention irrelevant to criminal liability, did Parliament intend that to be the last word on the matter,

deliberately excluding the possibility of any sort of fault-based reckoning thereafter? Or does the statute impose no-fault *primary* liability on a class of offenders for purposes (perhaps regulatory deterrence and enforcement) which may be compatible with, or indifferent to, the subsequent allocation of fault-based *secondary* or financial liability? There may not be a one-size-fits-all answer to that question based on 'consistency' alone.

85. None of the House of Lords / Supreme Court authorities dealt with offences of strict liability on their facts, nor therefore with precisely how the *Patel* trio of considerations 'plays out' in a strict liability conviction case. Lord Sumption's identification in *Apotex* and *Patel* that strict liability offences raise special issues for the application of the illegality defence does not generate automatic answers, or encourage something other than the thoughtful approach more generally advocated in the *Patel* trio of considerations. Whether strict liability cases are true exceptions to, or just the 'playing out of', the principles-based approach to the illegality defence, the guidance of the authorities is that the *nature and purpose* of the statutory prohibition, *other* relevant public or legal policy or public interest considerations, and the *proportionality* of depriving a claimant of a claim which is otherwise soundly pleaded in fact and law, are still relevant considerations - not necessarily excluding in 'narrower principle' cases.

86. Cases falling within the 'narrower principle'– seeking civil redress from third parties for the direct penal consequences of conviction – may be acute examples where strong public policy interests favour the illegality defence. But even in these cases a trial judge may still need to *think* about the nature and purpose of the prohibition, other public policy considerations, and proportionality; perhaps not least where the offences are of strict liability.

87. Then again, Lord Sumption's indication that the knowledge and hence (moral) responsibility of a claimant convicted of strict liability offences – 'turpitude', to use the archaic term – may need to be considered, and that this is a *binary* matter distinct from any general evaluation of proportionality, adds up to a further distinctive proposition. In a case such as the present, where no question of fraud, duress or undue influence is pleaded, it appears to require a trial judge to make findings of fact about the Respondents' knowledge of matters such as the building's listed status, the *particular* works undertaken or to be undertaken, the legal requirement for authorisation of those particular works, and the absence of listed building consent. If they are found to have acted with full knowledge of *all* these matters, the strict liability factor may not assist them. If their knowledge is found to be incomplete, then it *may* do, but careful consideration of the offences themselves, including the legislative policy in making them offences of strict liability in the first place, must still be undertaken. (This latter was touched on by the District Judge (Magistrates' Court) in the passage cited above; but whether the underlying legislative policy of imposing no-fault *criminal* liability, including for deterrent and Council enforcement purposes, is or is not inconsistent with the recoverability of damages for any causative *tortious* liability in relation to negligent professional advice would need to be fully addressed.)

(ii) Was the County Court judge 'wrong' to remit the defence to trial?

88. I do not, in these circumstances, find the application of the authorities to the facts of this case a straightforward matter. I am not persuaded there is or was only one proper, much less obvious, answer to the applicability of the illegality defence here, available to the County Court judge at the interlocutory stage. The trio of considerations in *Patel* indicates a thoughtful and evaluative approach, to which more than one answer is realistically possible in this case, *even* on the 'playing out' of the 'narrower rule', because of the special features of statutory strict liability offences. Two views are in potential contention – that Parliament intended to exclude civil recovery by making criminal liability for what the Respondents did strict, and conversely that it did not. Either seems to me arguable with a real prospect of success, considered from the point of view of a County Court application for termination without trial. And that is the limited perspective relevant to my task of determining whether the County Court judge was 'wrong' to permit the illegality defence to go forward for trial.

89. He did so on the narrowly articulated point that the Respondents had a real prospect of establishing at trial, as a matter of fact, that they did not know at the relevant time the building works would affect the character of the property as a building of special architectural or historical interest. That was an assessment which appears to me, *so far as it goes*, to have been properly open to him on the facts and evidence before him: no finding excluding that possibility had been made in the criminal proceedings, and although there was some evidence there to the contrary, it was fairly unspecific (relating to their past business experience and general familiarity with property development). I am satisfied the factual proposition as to the Respondents' imperfect state of knowledge was capable of carrying some degree of conviction, on the documentary evidence available to the County Court, and the evidence which could reasonably be expected on this precise point to be developed and deployed at trial.

90. If the Respondents' knowledge of the 'affecting character' point turned out to be incomplete, then the County Court judge seems to have assumed they would have a real prospect of escaping the illegality defence on the strict liability 'exception'. To do so would still, on Lord Sumption's dicta, have required a careful analysis of the statutory prohibition. But on the basis the County Court judge apparently had in mind – Lord Sumption's binary 'turpitude' test – it would not have been enough for the terminating ruling the Appellants sought that there was evidence the Respondents had *some* knowledge of the requirements for listed building consent, or more than they cared to admit to, or that they had been found to have told untruths in the criminal proceedings about what they knew (when they were not in any event required to establish anything about their state of knowledge). The 'affecting character' point had after all had to be the subject of *expert* evidence in the criminal proceedings. Whatever evidence there was about the Respondents' general experience, I can see no evidence they were experts. On a binary test, either they were (fully) 'privy' to the facts and prohibitions rendering their conduct unlawful, or they were not. That was a matter on which the judge was entitled to conclude the Respondents had a prospect of success which was more than fanciful.

91. The question that remains, however, is the potential significance of this point, and in particular the proper applicability of this otherwise sound analysis to the 'narrower principle' aspects of this case. I have set out some reasons to think there is room for argument about that, and that the Respondents' prospects of success cannot be ruled out as unreal even here. But even if I am wrong about that, then two further

considerations continue to leave me unpersuaded the County Court judge was wrong not to deprive the Respondents of a trial.

92. The first is this. Even if the judge had concluded – that is, had been entitled or even required to conclude – that the Respondents' claim was bad for illegality in so far as it fell within the narrower principle, I am satisfied that, as a matter of his case management discretion, it was properly open to him to permit the whole case to go forward rather than chop it up at an interlocutory stage. The thoughtful, evaluative *Patel* approach is, on the authorities, at least arguably the right starting point for the *wider* principle even in conviction cases (and the convictions here neither cover the whole subject matter of the claim, nor exhaust the wider questions about the Respondents' own wrongdoing). Issues about the 'exception' to at least the *wider* principle for strict liability cases appear properly to arise. There does appear to be realistic scope for arguing that at least some of the Respondents' claim relating to the whole project falls outside the ambit of the defence altogether. The judge was in my view entitled to conclude these significant issues were proper matters for trial since the Respondents had a realistic prospect of succeeding on them, and that it was preferable for all aspects of the case to be heard together. That may, indeed, have been the essence of the decision he in fact took, reading the second paragraph of his conclusions.

93. The second is this. The County Court judge was in my view entitled to consider it ultimately fairer to both parties for the application of the illegality defence to be analysed carefully and contextually not at the interlocutory point but on the full facts of the case, with considered and applied reasons recorded. It may be that a firm ruling against the propriety of the Respondents' claim, or at least their attempt to recover the fines they paid, is in the end called for. But the County Court judge cannot in my view be considered 'wrong' to defer definitive resolution to full trial. There appears to be no direct authority on the illegality defence in a case with this precise combination of factors. The desirability of a careful analysis of the law and explanation of its application to the facts of the case, itself requiring full submissions and evidence, was within the spectrum of proper decisions about what the interests of justice required here. The case for this claim to go to trial, and for the avoidance of an interlocutory mini-trial, was capable of being properly thought compelling.

94. The Appellants did not discharge their burden of persuading the County Court judge, or me, that the Respondents' prospects of surviving an illegality challenge to their claim, in whole or in part, must be taken to be fanciful. There are genuine points to consider, given the present outline factual matrix. Whatever the eventual outcome – and however difficult or easy it proves in the long run – I do not think it can fairly be said the judge was wrong not to have bottomed them out at the interlocutory stage, or indeed that the only decision properly open to him was to grant the Appellants' application.

Conclusions and decision

95. The illegality defence has been the subject of careful consideration in recent years in a series of Supreme Court / House of Lords decisions, and detailed and valuable guidance is available. None of these cases deals directly with the factual matrix in the present case, and there is an exercise to be done in reflecting on the guidance and applying it thoughtfully to the full set of relevant circumstances. It can properly be

considered that a full trial is the right place for justice to be done to that exercise. The illegality defence is not a simple concept conducive to mechanistic determination at a preliminary stage.

96. The Appellants' case on illegality, considered as it stands at this early stage, appears to be at its strongest in relation to the fact that this is a conviction case and attracts the 'narrower principle' in *Gray*. There are dicta in Lord Sumption's judgment in *Apotex* that, even in a strict liability case where a claimant can establish lack of 'turpitude', they will '*not necessarily*' be able to defeat an illegality defence where the 'narrower principle' applies. But that formulation, and the *Osman* case which he cited, leave open at least some room for argument on the facts, in which a real prospect of the Respondents succeeding cannot at present be ruled out.

97. I am satisfied the County Court judge was entitled, on the materials before him and bearing in mind the further evidence that would be expected to be available in a negligence trial, to find, as he did, that the Respondents had a real, as opposed to fanciful, prospect of establishing they lacked 'turpitude' (full relevant knowledge). I am satisfied there is room for argument about the application of the law to their circumstances if they do establish that, giving them a real, not fanciful, prospect of establishing their claim is not (fully) met by an illegality defence – *even* to the extent the 'narrow principle' is engaged.

98. I am satisfied in any event that the judge would have been entitled to consider the application of the illegality defence a sufficiently fact-sensitive and evaluative matter to be inappropriate for determination on an application for a terminating ruling, and that this itself would have been capable of being considered a good reason for the case to continue to trial. And I am satisfied that even if the Appellants had persuaded the judge, and me, that the 'narrower principle' aspect of the Respondents' claim was obviously bad for illegality, he would properly have been entitled as a matter of case management to permit the whole case to go forward for consideration in the round rather than having to carve out that aspect at an interlocutory stage.

99. I have set out why I was unpersuaded of the Appellants' standalone arguments that this claim was an abuse of the court's process. For the reasons I have given for concluding the judge was not wrong to let the claim and the illegality defence go forward to trial, I am also unpersuaded that that must be viewed as a pointless and abusive exercise.

100. In all of these circumstances, I cannot be satisfied the County Court judge was wrong – it was not properly open to him – to refuse the Appellants' application for a terminating ruling depriving the Respondents of a trial of their claim.

101. These appeals are dismissed accordingly.