An "Unruly Horse" in a "Shadowy World"?: The Law of Illegality after *Nelson v Nelson*

1. *Introduction*

The effect of illegality in a civil action has never been comprehensively formulated. This is partly because illegality straddles tort, contract and equity and in part because it covers an extraordinarily wide range of possible illegal conduct. The more egregious cases are easily answered in isolation but provide little assistance for the extrapolation of legal principle. At base, the issue is the effect to which contravention of a public obligation affects the assertion of a private right. Confounding this is the ability to identify the existence, nature and extent of such a contravention. Such an inquiry is particularly important when the asserted right is equitable, given equity's traditional reliance upon good conscience.

The High Court of Australia has recently considered a doctrine of illegality in the case of *Nelson v Nelson*.[1] Although the ratio decidendi of this case concerns the effect of illegality on the ability to assert the existence of a resulting trust, four of the five Justices have laid the foundations for a cohesive doctrine of illegality in a form which is eminently suitable for application to contract and, possibly, to tort. Most importantly, the interpretation accords with and aids the interpretation of much previous authority in all of these areas, a salient exception being the rejection of a recent decision of the House of Lords in *Tinsley v Milligan*.[2]

2. *The Facts*

On 3rd November 1987, Mrs Bettie Nelson provided the entirety of the purchase price of Torrens Title property situated at 5 Bent Street, Sydney. The Bent Street property was registered in the names of her two children, Peter and Elizabeth. On 31st August 1989, Mrs Nelson purchased a property in her own name at 3 Kidman Lane, Paddington. The Bent Street property was sold on 23rd October 1990.

The factor giving rise to the litigation surrounded Mrs Nelson's acquisition of the Kidman Lane property. The day before its acquisition, Mrs Nelson acquired $150,000 subject to the provision of a mortgage over the Bent Street property. She also obtained $25,000 as a subsidised advance at a low rate of interest, available to Mrs Nelson under the provisions of the *Defence Service Homes Act* 1918 (Cth). Critically, in order to obtain this advance, Mrs Nelson completed a statutory declaration denying that she owned or had a financial interest in a house or dwelling other than that for which the subsidy was sought. Section 18(b)(i) of the Act provided that owning or having an interest in such a house would have rendered her ineligible for the subsidised loan.

1 *Nelson and another v Nelson and others* (1995) 184 CLR 538; 132 ALR 133 (hereafter "*Nelson*").

2 [1994] 1 AC 340 (hereafter "*Tinsley*").

Elizabeth later fell out with Mrs Nelson and Peter and the distribution of the balance of the proceeds of the sale of the Bent Street property was disputed.

3. *The Litigation Preceding the High Court's Determination*

A. *The Supreme Court of New South Wales*

Mrs Nelson and Peter Nelson brought suit claiming that the proceeds of sale were held upon resulting trust for Mrs Nelson, she having supplied the purchase money for the property. Elizabeth Nelson cross-claimed, alleging that the provision of purchase money by Mrs Nelson constituted an advancement to Peter and her, and that she and Peter were each entitled to one half of the proceeds of sale.

Master Macready held that the relationship of mother and child did give rise to a presumption of advancement.[3] He found that Mrs Nelson always intended to retain ownership of the Bent Street property and had no intention to confer a beneficial interest on her children. While this would normally be sufficient to rebut the presumption, the Master held that Mrs Nelson's actual intention was coloured by an intent to commit an illegal design. This was the concealment of her interest in the Bent Street property, by registration solely in the names of Peter and Elizabeth, in order to preserve her entitlement to the subsidised loan for the purchase of the Kidman Street property. While not "of itself" illegal while inchoate,[4] Mrs Nelson indeed proceeded illegally to claim this subsidy and thus carried the illegal design into effect.

Taken as a whole, her "true" intention contained sufficient illegality to disbar Mrs Nelson from rebutting the presumption, with the result that the equitable title to the Bent Street property was at home with the legal title in the original transfer, that no resulting trust could be asserted, and that Peter and Elizabeth were each entitled to one half of the proceeds of sale.

B. *The New South Wales Court of Appeal*

Mrs Nelson and Peter appealed. They raised but did not press their submission that the presumption of advancement did not apply as between mothers and children, given a recent decision of that Court against them on this point in *Brown v Brown*.[5] They proceeded on the footing that, if it were to apply, it had been rebutted.[6]

Justice Sheller, with whom Meagher and Handley JJA agreed, considered that equity would not allow a donor to effect an unlawful purpose, such as evading creditors or defrauding the revenue, when transferring property "by cloaking the truth about its ownership".[7] When property is transferred in situations in which the presumption of advancement applies, Sheller JA held that the donor is always able to lead evidence unrelated to the unlawful purpose to rebut the presumption. However, the donor may only lead evidence which is

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3 *Nelson and another v Nelson and others* (1994) 33 NSWLR 740 at 745 (hereafter "*Nelson*").
4 Above n1 per Deane and Gummow JJ at 545.
5 *Brown v Brown* (1993) 31 NSWLR 582.
6 Above n3 per Sheller JA (Meagher and Handley JJA concurring) at 745.
7 Id at 748.

related to the unlawful purpose if "the intending law breaker recanted before any necessity arose of using the cover thus provided or else virtuously refrained from using it".[8] Once the unlawful purpose has been carried into effect, evidence of it can no longer be led.

Critically, Sheller JA adopted a broad view of what constituted evidence of an illegal purpose once that purpose had been carried out. His Honour held that, even when a transfer of property is explicable on other grounds, it is "not permissible" to rely on any lawful intention which is "incidental to or the corollary of" the intention in carrying out the illegal purpose.[9] His Honour held that the actual absence of any intention by Mrs Nelson to benefit her children was merely incidental to her conduct in obtaining the loan illegally and that she had to rely upon her illegal purpose if she was to rebut the presumption.

Justice Handley noted that rebutting a presumption of advancement requires an inquiry into the "actual intention" of the donor "in the light of the whole of the evidence".[10] His Honour held that the illegal purpose "formed or affected" Mrs Nelson's intention not to confer any benefit upon her children and was thus revealed and inseverably bound up in her dealings. Accordingly, Mrs Nelson was bound to rely upon her unlawful conduct if she were to rebut the presumption and the appeal was dismissed.

4. *The Decision of the High Court*

A. *The Presumption of Advancement*

The High Court unanimously allowed Mrs Nelson's appeal. The threshold question of the application of the presumption of advancement was simply dealt with. A majority of justices agreed that the presumption applies equally to mothers as to fathers,[11] approving the reasoning of the New South Wales Court of Appeal in *Brown v Brown*.[12] Justice Dawson stated that:

> [i]n modern society there is no reason to suppose that the probability of a parent intending to transfer a beneficial interest in property to a child is any the more or less in the case of a mother than in the case of a father.[13]

B. *Rebutting the Presumption*

The Court unanimously held that Mrs Nelson was able to rebut the presumption of advancement. All members held that evidence of the illegal purpose was not material to this determination and, in so doing, rejected the approach of the Court of Appeal in *Nelson* and of the House of Lords in *Tinsley*.[14]

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8 Id at 749, citing *Martin v Martin* (1959) 110 CLR 297 at 305.
9 Id at 750.
10 Id at 741-2.
11 Above n1 per Dawson J at 574-6, per Toohey J at 583-6 and per McHugh J at 601.
12 Above n5; Above n1 per Dawson J at 574, per Toohey J at 586, per McHugh J at 601.
13 Above n1 at 575.
14 Above n2.

The ability to rebut a presumption of advancement in a case involving illegality was perhaps most clearly expressed by Deane and Gummow JJ, who stated that the presumption of advancement is quite separate from, and is to be considered antecedently to, the illegal purpose which exists in a case.[15] Their Honours noted that where the presumption exists, it can be rebutted simply by leading evidence to show that the actual intention of the donor was not to bestow a gift upon the recipient. Conversely, evidence may be led to support an intention to bestow a gift and confirm the presumption. In this case, an intention not to bestow a gift by Mrs Nelson had clearly been evinced and the presumption was accordingly rebutted. When a presumption of advancement is rebutted, however, there is then a reason to suppose that the equitable title is not at home with the legal title and a resulting trust arises. The issue of illegality only arises in respect of the enforcement of this trust.

Justices Dawson, Toohey and McHugh employed identical reasoning,[16] with McHugh J noting that "[t]he circumstances surrounding a relationship may be used to rebut the presumption, but they cannot be used to prevent it from arising".[17]

C. *The Effect of the Illegality: The Submissions Rejected*

The Court was offered three possible approaches as to the effect of illegality upon the resulting trust: the reasoning of the NSW Court of Appeal in *Nelson*[18] and the majority and minority views of the House of Lords in *Tinsley*.[19] None was accepted and the Court instead produced two different approaches of its own.

(i) The Judgment of the NSW Court of Appeal

The Court unanimously rejected the proposition that equity would never intervene once an illegal purpose had been carried out.[20] Their Honours reasoned that such an approach would ignore the substantive merits of the parties involved and peremptorily deny a curial remedy to participants in any form of illegal conduct.[21] Rather, equity may intervene contingently on a closer evaluation of the illegal purpose.

(ii) The Majority Judgment in Tinsley

The majority of the House of Lords in *Tinsley* stated that

> the fusion of law and equity has led the courts to adopt a single rule (applicable both at law and in equity) as to the circumstances in which the court will enforce property interests acquired in pursuance of an illegal transaction, viz., the *Bowmakers* rule [1945] KB 65. *A party to an illegality can recover by virtue of a legal or equitable property interest if, but only if, he can establish his title*

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15 Above n1 at 547 and 549.
16 Id at 580-1, 586-7 and 603 respectively.
17 Id at 603.
18 Above n3.
19 Above n2. The minority judgment of the House of Lords was similar to the minority judgment of Ralph Gibson LJ in the Court of Appeal.
20 Above n1 per Deane and Gummow JJ at 563-4, per Dawson J at 580, per Toohey J at 588-9, 591 and 595 and per McHugh J at 603-4.
21 Id per Deane and Gummow JJ at 561-4 and per McHugh J at 603-4.

> *without relying on his own illegality.* In cases where the presumption of advancement applies, the plaintiff is faced with the presumption of gift and therefore cannot claim under a resulting trust unless and until he has rebutted that presumption of gift: for those purposes the plaintiff does have to rely on the underlying illegality and therefore fails.[22] (emphasis added)

All members of the High Court rejected this approach as an exaltation of form over substance which ignored the substantive equities of the parties.[23] Applying this rule creates a highly artificial distinction between resulting trusts in which a presumption of advancement is applicable and those in which it is not. An individual who acts with an illegal purpose will fail in the former case and succeed in the latter. As McHugh J noted,

> if Mrs Nelson had had the property placed in the name of a friend or relative — *or anybody other than her children* — she could recover the proceeds of the sale of the Bent Street property, notwithstanding her illegal purpose.[24] (emphasis added)

(iii) The Minority Judgment in Tinsley

The minority of the House of Lords adopted a statement of Lord Mansfield in *Holman v Johnson*[25] that:

> "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act" so that neither party may assert their right: the loss *lies where it falls.*[26]

This wholly disabling principle, termed the "wide principle", would cause Mrs Nelson to fail, having to base her cause of action on the illegal procurement of the subsidised loan. The equitable interest would then conform to the position at law, where Peter and Elizabeth were each half owners, leaving the loss lying upon Mrs Nelson.

All members of the High Court disapproved of this approach, but for differing reasons. Justices Deane and Gummow pointed out that the proposition enunciated in *Holman v Johnson* was not as absolute as stated by the minority of the House of Lords: their Honours traced the historical approach of equity to illegality and found that this prohibition was merely one strand of principle deployed by equity when dealing with statutory illegality.[27] Their Honours identified a broader formulation of the effect of statutory illegality and demonstrated that equity would deprive a plaintiff of a cause of action only where the trust or contract asserted was a fraud upon the law, in that the person attempting to assert the equitable right was doing so " 'to evade, to disappoint, the provision of the Legislature, to which he is bound to submit'."[28] When the effect of asserting the right would be to recognise some contravention of statute which did not go to the root of the statute, equity would not refuse to intervene, but would inter-

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22 Above n2 at 375.
23 Above n1 at 557-8, 579-80, 592-3 and 608-10.
24 Id per McHugh J at 609.
25 (1775) 1 Cowp 341 at 343 [98 ER 1120] at 1121.
26 Above n2 at 354-6.
27 Above n1 per Deane and Gummow JJ at 558-61.
28 Id per Deane and Gummow JJ at 561 citing *Muckleston v Brown* (1801) 6 Ves Jun 53 at 69 [31 ER 934 at 942].

vene on terms.[29] The minority judgment thus erroneously applied to illegality at large the "wide principle" which was, in point of fact, confined to just one part of the whole.

Justice McHugh employed similar reasoning,[30] while Dawson and Toohey JJ disapproved of the "wide principle" in favour of their own approaches.[31]

D. *The Effect of the Illegality: The Doctrines Propounded*

(i) Illegality as Unclean Hands

The High Court presented two different views as to the effect of illegality upon resulting trusts. The minority analysis, presented by Dawson J, identified the illegal act as being solely "the fraud involved in obtaining a subsidised advance upon a false basis."[32] Justice Dawson stated that "[t]he illegality of that act was not dependent upon any policy revealed by the *Defence Service Homes Act* but arose from the nature of the act itself."[33] His Honour held that an illegal act does not, of itself, prevent the assertion of an equitable right: while the illegal purpose is not carried out, the right is in the nature of a *locus poenitentiae* which may be asserted up until the illegal purpose is carried out.[34]

Once the illegal act is completed, Dawson J adopted the maxim of clean hands as the basis for determining the claim and held that:

> illegal conduct on the part of a person claiming equitable relief does not in every instance disentitle that person to the relief. The illegality must have "an immediate and necessary relation to the equity sued for".[35]

Justice Dawson held that the purchase of the Bent Street property involved no fraud in itself and that the registration in the names of Peter and Elizabeth merely preserved the ability in future to pursue an illegal purpose. Such a purpose could have been recanted in the "considerable time" before it was finally effectuated, and, even then, was not relied upon "in any direct or necessary way"[36] to support Mrs Nelson's claim. Drawing upon the assertion that, had the interest been legal it would have been recoverable during this period notwithstanding the maxim *ex turpi causa* — presumably because the unlawful purpose had not been effected — and desiring unity in operation of the effect of illegality upon the rules governing legal and equitable title, Dawson J held that Mrs Nelson's illegal purpose was merely incidental to her equitable claim and that she could therefore recover.

However, Deane and Gummow JJ and McHugh J expressly rejected the use of clean hands to determine the consequences of illegality.[37] Justices

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29 Id at 563-4.
30 Id at 608.
31 Id at 579-81 and 595-7 respectively.
32 Id at 573.
33 Id at 573-4.
34 Id at 577-81; see *Martin v Martin* (1959) 110 CLR 297.
35 Id at 577 and 581, citing *Dering v Earl of Winchelsea* (1787) 1 Cox Eq 318 at 319 [29 ER 1184 at 1185].
36 Id at 581.
37 Id at 550-2 and 608-9.

Deane and Gummow pointed out that the equitable doctrine of clean hands has an ambit of operation which is not conterminous with the doctrine of illegality: clean hands focuses more upon the relative merits of the parties and is a discretionary defence which may deny a plaintiff relief in equity and leave them to relief at common law, while illegality acts to destroy rights at both law and equity.[38] Justice McHugh added that:

> the rationale for the two doctrines is distinct: the clean hands doctrine arises from the relationship between the parties to the proceedings, the illegality doctrine derives from public policy considerations.[39]

(ii) Illegality as a Public Policy Consideration

The majority analysis, presented by all other Justices but expressly disclaimed by Dawson J,[40] involves an inquiry as to whether the enforcement of a resulting trust tainted by statutory illegality would be associated with or in furtherance of a purpose in contravention of the policy evinced by the statute. Their Honours stated that the general principle is to determine:

> "whether the policy against the unjust enrichment of the grantee is outweighed by the policy against giving relief to the payor who has entered into an illegal transaction."

However, where the illegality flows from statute, the matter is not at large in the manner suggested above. *Rather it is a question of the impact of the statute itself upon the institution of the resulting trust.* As the matter is put by White and Tudor in their notes to *Dyer v Dyer*:

> "There will be no resulting trust if the policy of an Act of Parliament would be thereby defeated."[41] (emphasis added)

That is, the illegality is not *per se* fatal to an equitable cause of action, but if implication or enforcement of the trust would defeat the policy underlying the statute by overriding the intention of the legislature, it will not be upheld.[42] As Deane and Gummow JJ pointed out, this is on all fours with the refusal to enforce express trusts or contracts to the same effect.[43] Conversely,

> even though a transaction might be tainted with illegality on the ground that its performance is contrary to public policy, *equity will interfere on further grounds of public policy if the transaction ought not to be allowed to stand even where the plaintiff is particeps criminis.*[44] (emphasis added)

All four Justices adopted the method elucidated in *Yango Pastoral*[45] to determine the policy of the statute and the effect of the impugned conduct upon it.[46]

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38 Id at 550-1. See also Meagher, R P, Gummow, W M C and Lehane, J R, *Equity: Doctrines and Remedies* (1992) at 82-4.

39 Id at 608-9.

40 Id at 582.

41 Id at 564, footnotes omitted.

42 Id per Deane and Gummow JJ at 564-7, per Toohey J at 594-5 and per McHugh J at 608, 611-4 and 616-7.

43 Id at 552-5 and 560-3, citing *Muckleston v Brown* above n28, *Kasumu v Baba-Egbe* [1956] AC 539 and *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428.

44 Id at 563, citing Jacobs J in *Money v Money* (No 2) [1966] 1 NSWR 348.

45 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410.

46 Above n1 per Deane and Gummow JJ at 551-2, per Toohey J at 594-5 and per McHugh J at 613-4.

Where conduct is not directly prohibited by legislation but is "associated with or in furtherance of illegal purposes",[47] Deane and Gummow JJ phrased the inquiry as a balancing of public policy, considering the consequences and proportionality of refusing a remedy as against the judicial recognition or sanction of a resulting trust in the face of the illegal purpose.[48]

Justice Toohey reasoned to similar effect, stating that:

> [a]lthough the public policy in discouraging unlawful acts and refusing them judicial approval is important, it is not the only relevant policy consideration. There is also the consideration of preventing injustice and the enrichment of one party at the expense of the other.[49]

Justice McHugh employed a broader approach, stating that:

> [a] court that finds that an agreement is unlawful or has an unlawful purpose has merely set the stage for a further inquiry: *are the circumstances surrounding the agreement such that the court should deny a relevant remedy to the party seeking the assistance of the court?*[50] (emphasis added)

His Honour was of the view that:

> courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless: (a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or (b)(i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct; (ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and (iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies.[51]

All four Justices noted that a further relevant consideration in the balancing exercise is the extent to which the Act provides a penalty or remedy for a breach: the existence of such mechanisms tends to indicate that a breach of the statute is sufficiently served by them.[52] Further, where the illegal conduct contravenes other statutes, such as an Oaths Act or a Crimes Act, it may be sufficiently dealt with by penalties imposed under those Acts.[53] Indeed, the imposition of additional sanctions by means of a civil suit may well be unduly harsh when statutory mechanisms effectively cover the field.[54]

Their Honours identified the illegality as the obtaining of the subsidised loan by deceit[55] and the policy of the Act as being to provide "assistance to

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47 Id at 552 citing Jacobs J in *Yango Pastoral* above n45.

48 Id at 566-7 considering *In re Torrez* (1987) 827 F 2d 1299 and *Hainey v Narigon* (1966) 55 Cal Rptr 638.

49 Id at 597 (footnote omitted).

50 Id at 604.

51 Id at 613 (footnote omitted).

52 Id per Deane and Gummow JJ at 570, per Toohey J at 595-6 and per McHugh J at 614.

53 Here, the *Crimes Act* 1914 (Cth) referred to by Deane and Gummow JJ at 570, by Toohey J at 590, by McHugh J at 616 and the *Statutory Declarations Act* 1959 (Cth) referred to by Toohey J at 590.

54 Above n1 per Deane and Gummow JJ at 570, per Toohey J at 595-6 and per McHugh J at 610 and 613-4; see *Yango Pastoral* above n45 per Mason J at 429, per Jacobs J at 433.

55 Above n1 at 570-1, 594-5 and 613-4.

members of the defence forces and certain other persons to acquire homes."[56] Mrs Nelson's conduct was not such as to defeat or destroy this purpose nor even to contravene a requirement which was substantially connected to the purposes of the legislation.[57] As Toohey J noted:

> the Act does not prohibit the purchase of a dwelling-house with the aid of a subsidy obtained by making a false statutory declaration. It says nothing about such a purchase. If there is any such prohibition, "that prohibition must be ascertained or identified by a process of implication". But no such implication can be drawn. And it would be an extraordinary consequence if the implication were drawn. Take the case of a purchaser of a dwelling-house, taking the title in his or her own name, who makes a false declaration under the Act as to ownership of another dwelling-house. Could the seller refuse to complete the sale if the existence of the false declaration became known? The answer must surely be no.[58]

Their Honours considered the windfall which would accrue to Elizabeth were Mrs Nelson's claim to be denied and the fact that Mrs Nelson would be denied that portion of the purchase price she lawfully provided, $150,000, due to her conduct in obtaining the remaining $25,000.[59] The existence of provisions enabling the Commonwealth to demand the return of fraudulently obtained monies, together with the existence of other penal provisions, was held to constitute sufficient sanction for the breach of the Act,[60] consistently with the principles set out in *Yango Pastoral*.

(iii) Relief

All Justices concluded that Mrs Nelson was able to enforce the resulting trust. However, Deane, Gummow and McHugh JJ imposed limitations upon her relief, requiring her to do equity according to the requirements of good conscience. This required mulcting Mrs Nelson of her illegally obtained benefit, a sum representing the difference between what she would have paid had she taken the $25,000 loan on its "usual" terms and the terms upon which she did in fact obtain the loan.[61] This sum was to be paid to the Commonwealth within a certain period, discharging her liability under the Act, otherwise going to Elizabeth Nelson.

Justices Dawson and Toohey dissented upon this point. Their Honours would have granted Mrs Nelson unconditional relief on the grounds that the accounting between her and the Commonwealth was a matter for these two parties and was not to be determined as between Mrs Nelson and Elizabeth Nelson.[62]

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56 Id per McHugh J at 615; see also at 570-1 and 589-90.
57 Id at 566.
58 Id at 594, citing *Yango Pastoral* above n45 (footnote omitted).
59 Id at 545-6, 597 and 609-10.
60 Id at 570, 595-6 and 614.
61 Id at 572 and 617-8.
62 Id at 581-2 and 597-8.

5. *Analysis*

A. *Rebutting the Presumption of Advancement*

A striking theme of the reasoning of the Court was its careful demarcation between the processes of rebutting the presumption of advancement and enforcing the resulting trust arising from a successful rebuttal. The conflation of the two processes is evident in the analyses of the Court of Appeal in *Nelson* and the decisions of the majority of the House of Lords and the minority of the Court of Appeal in *Tinsley* and has engendered the bulk of the conceptual confusion in this area. If the notion of consummating or showing intention of an illegal purpose is divorced from that of whether there is or is not an intention to bestow a gift, the inquiry into rebutting the presumption in these cases returns to the generally applicable rule for advancement: the question becomes "was a gift actually intended?"; and an answer "no, but it was done to evade tax" becomes as effective to rebut the presumption as a simple "no".

The problem inherent in mixing the two inquiries is the difficulty of identifying the illegal purpose and determining whether it has been consummated.[63] Indeed the Court of Appeal in *Nelson* surely fell into error in this regard. The only act that offended against statute occurred when Mrs Nelson obtained the subsidised loan for the Kidman Street property by falsely disclaiming any interest in any house or dwelling at a time when she was found to have claimed full beneficial ownership in the Bent Street property. Mrs Nelson contravened the provisions of the *Defence Service Homes Act* 1918 (Cth) by obtaining a subsidised loan for which she was not eligible. This conduct may have exposed her to prosecution under the *Statutory Declarations Act* 1959 (Cth) or the *Crimes Act* 1914 (Cth).[64] However, at the time Mrs Nelson acquired the Bent Street property — the proceeds from the sale of which were at the heart of the dispute — she had not yet committed these breaches and any illegality, save possibly conspiracy, was inchoate.

Although Mrs Nelson may have arranged her affairs when acquiring the Bent Street property so as to permit an illegal act to be carried out in future, illegal conduct surely only crystallised during the purchase of the Kidman Street property. Hence, the conflation by the Court of Appeal of the acquisition of two properties which, in time, incidentally, bridged major amendments to the *Defence Service Homes Act* 1918 (Cth),[65] into one "illegal purpose" of "obtaining a subsidised loan by concealment"[66] was surely erroneous.

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63 See, for example, *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 18-20; *Weston v Beaufils* [No 2] (1994) 50 FCR 476 at 498 and the distinctions made between an illegal purpose, a legal transaction in pursuit of that purpose and an illegal transaction in *Tribe v Tribe* [1996] Ch 107 at 121 and 123.

64 Above n1 per Deane and Gummow JJ at 570, per Toohey J at 590 and per McHugh J at 616.

65 Id per Deane and Gummow JJ at 555-6 and 568-70. At the time Mrs Nelson acquired the Bent Street property, the Act provided for the advancement of monies to eligible purchasers. It was not until more than a year later that it was amended to empower the provision of a "subsidised loan".

66 Above n3 at 750.

Thus, Mrs Nelson's intention as to advancement could and should only have been her actual intention at the time of acquiring the Bent Street property: and this was found, concurrently,[67] to have been against advancement. In divorcing advancement from illegality, *Nelson* is a logical extension of existing authority. Where property is transferred without consideration and in circumstances in which the presumption of advancement applies, the fact that it was done with the intention to effect an illegal purpose is immaterial to rebutting the presumption so long as the illegal purpose is not carried out.[68] This is trite, archetypal *locus poenitentiae* reasoning. *Nelson* introduces the qualification that, even when the purpose is fully (or, presumably, partially[69]) effectuated, it is no longer *necessarily* fatal.[70] Equity "may intervene, albeit with the attachments of conditions, lest there be 'no redress at all against the fraud nor any body to ask it' ".[71]

B. *The Future of the Presumption of Advancement*

While all Justices save Dawson J spoke of the presumption of advancement as one of the "entrenched 'land-marks' in the law of property",[72] both Toohey and McHugh JJ appear to contemplate its possible demise. Justice Toohey observed that the presumption no longer sits well with the various rationales advanced to support its existence,[73] while McHugh J approached the issue stating "[t]he real question is whether the courts should continue to hold that the presumption applies to either parent."[74] However, both Justices conceded that the presumption was too deeply entrenched as between parents and children to be overturned by judicial decision and was a matter for the legislature.[75] Such sentiments about the presumption of advancement were echoed by the English Court of Appeal in *Tribe v Tribe*, in which Nourse LJ noted the "perversity in its elevation to a decisive status" at a time when it has "for other purposes fallen into disfavour".[76]

C. *Illegality*

Nelson provides clear and principled guidance to a doctrine of illegality in equity in the light of a comprehensive review of previous authority. It accords

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67 Id at 745.

68 *Martin v Martin* above n34 at 305; *Nelson* above n1 at 562. See also *Tribe v Tribe* above n63 and *Maysels v Maysels* (1974) 45 DLR (3d) 337 at 340-341. Ironically, there could well have been an action along these lines in that the property the sale of which provided the bulk of the funds for the purchase of the Bent Street property had itself been transferred without paid consideration by Mrs Nelson's husband to himself and another, using a pseudonym, to enable the latter "to hide his financial dealings from his wife from whom he had recently separated": *Nelson* above n3 at 743.

69 Cf *In re Great Berlin Steamboat Co* (1884) 26 Ch D 616.

70 Cf *Perpetual Executors and Trustees v Wright* (1917) 23 CLR 185 at 196. See also *Tinsley* [1992] Ch D 310 per Nicholls LJ at 323 and per Lloyd LJ at 340.

71 Above n1 at 559.

72 *Calverley v Green* (1984) 155 CLR 242 per Deane J at 266; cited in *Nelson* above n1 by Deane and Gummow JJ at 548, Toohey J at 584 and McHugh J at 602.

73 Above n1 at 585-6.

74 Id at 601.

75 Id per Toohey J at 583-4 and per McHugh J at 602.

76 Above n63 at 118.

with academic entreaties[77] arising from the decision in *Tinsley* but also provides reasoning which, if adopted, could radically reshape or even recast the doctrine of illegality at law.

(i) The Rejection of Tinsley

The rejection of both of the propositions in *Tinsley* is to be commended. The majority's *"Bowmakers"* procedural rule is not conducive to deterring lawbreaking, as its operation is predictable enough to allow the unscrupulous to use it to their advantage,[78] and it is not a sound principle of justice when applied to innocent parties since it assigns essentially random windfalls and losses regardless of the merits of the case. The minority's rule is equally unsatisfactory as it denies a court of equity the chance to do equity when any illegality, however incipient or serendipitous, is revealed, regardless of the other circumstances of the case.[79] It is too stark in effect, exemplifying a principle of "all or nothing" at odds with equity's usual approach, which favours a flexible approach attuned to the merits of the particular case. These criticisms echo the concerns of Deane J in *Chan v Zacharia*, in that "[t]here is "no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them"."[80]

(ii) A Problem with Clean Hands?

It is attractive to resolve the effect of statutory illegality upon resulting trusts by invoking the equitable maxim of clean hands. After all, what could better exemplify turpitude than participation in some illegal transaction? Such an approach commended itself to Dawson J.[81] Yet it conceals substantial problems. First, as pointed out by Deane and Gummow JJ and McHugh J, the maxim of clean hands has not, in fact, been historically concerned with contravention of statute:[82] it is a discretionary bar based on conduct as between parties to the litigation rather than upon the public generally.[83] Even where the relations *inter se* are sullied by a breach of statute, equity may grant a remedy if no "improper" conduct exists as between the two parties and no illegal enterprise is effected.[84] Mrs Nelson's assertion of equitable title against Elizabeth reveals no obloquy in her conduct as against Elizabeth: her conduct as against the Commonwealth is another matter and, accordingly, is to be dealt with differently, by the doctrine of illegality.

Secondly, using clean hands as the basis for illegality requires that the starting point be that a claimant who has been involved in illegal conduct has unclean hands and thus, *prima facie*, cannot be heard to assert an equitable inter-

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77 Stowe, H, "The 'Unruly Horse' has Bolted: *Tinsley v Milligan*" (1994) 57 *Mod LR* 441; Enonchong, N, "Illegality: The Fading Flame of Public Policy" (1994) 14 *Oxford JLS* 295; Enonchong, N, "Illegality in French and English Law" (1995) 44 *ICLQ* 196.

78 Although this rationale was only stated expressly by Lord Lowry at 368; see *Nelson* above n1 per Dawson at 579 and per McHugh J at 609-10.

79 Id at 557-9, 577-8 and 581, 591-3 and 606-10.

80 *Chan v Zacharia* (1984) 154 CLR 178 at 205 (footnotes omitted).

81 Above n1 at 577.

82 Id at 550-2 and 608-9.

83 See Meagher, Gummow and Lehane, above n38 at 83.

84 *Lord St John v Lady St John* (1805) 11 Ves 526 at 535.

est. To enable the claimant to assert the interest successfully requires some qualification of this starting position: some washing of hands or overlooking of uncleanliness. In *Nelson*, Dawson J required this to be that "[t]he illegality must have 'an immediate and necessary relation to the equity sued for' ".[85] However this, with respect, begs the question. His Honour held that, because Mrs Nelson was in a position to assert her beneficial interest in the Bent Street property in the "considerable" time between its purchase and her acquisition of the loan for the Kidman Street property, coupled with the fact that the interest, had it been legal, would have been recoverable during this period "withstanding the maxim ex turpi causa", Mrs Nelson, in her claim for equitable relief, did not place "reliance upon her fraudulent conduct in any direct or necessary way".[86]

Yet surely the length of time between the two transactions and the possibility of repentance — hypothetical in the event — ought to be immaterial: what if Mrs Nelson had acquired the Kidman Street property immediately after selling the Bent Street property? Would the two transactions then be sufficiently proximate that, for claiming in respect of an executory possibility of illegality at the time of the first purchase, her conduct in the second, *later* purchase became more than merely "indirect"? If so, Dawson J's approach would seem to produce a result different from that of the rest of the Court, which would seem to treat her conduct, whenever it occurred, as equally but insufficiently noxious to preclude recovery.

Further, what of the fact situation in *Tinsley* itself, where the illegal purpose was not merely a possibility at the time of purchase, as in *Nelson*, but was past, on-going and intended to continue.[87] Presumably, the only way to distance the illegality from the equity sued for sufficiently to recover would be to ignore the on-going illegality and to consider the case as a regular case of a resulting trust arising from equal provision of purchase monies but registration in the name of one party only.[88] Yet such an approach would effectively usher in the requirement of needing or not needing to plead illegality to assert the claim. Alternatively, if the illegal actions are not ignored but are merely peripheral to the property dealing, where and how does one draw the line between the illegality in *Nelson* or *Tinsley* and the admittedly more egregious hypothetical situations posed by Lord Goff, where the illegality consists of terrorism or armed robbery?[89] Once some forms of illegality are irrelevant but others relevant, public policy must surely become relevant at some stage to discern between the two: and Dawson J's argument, which expressly disclaims any such consideration,[90] must encounter difficulty.

(iii) Public Policy: "Unruly Horse" or "Shadowy World"?

Justice Toohey frankly acknowledged that "[o]nce we are in the realm of public policy we are in a rather shadowy world"[91] and precisely this "imponderability"

85 Above n1 at 581, citing *Dering v Earl of Winchelsea* above n35.
86 Ibid.
87 Above n70 per Nicholls LJ at 317 and above n2 per Lord Goff at 352.
88 *Robinson v Preston* (1858) 4 K & J 505 (70 ER 211).
89 Above n2 per Lord Goff at 362.
90 Above n1 at 573-4 and 582.
91 Id at 595.

attracted unanimous condemnation from the House of Lords in *Tinsley*.[92] The vital difference appears to be that the High Court has formulated the exercise not as an unarticulated discretion but as a balancing of identified factors: the extreme sanction of denying a curial remedy in order to prevent or condone breaches of the law as against the equity of leaving the parties in their current situation.

Such a test is not at all out of character for a court of equity which is often called upon to make similarly intricate judgments, such as determining laches or the cleanliness of hands. As Deane and Gummow JJ pointed out, equity has historically recognised its ability to intervene contingently upon such a detailed forensic determination.[93] Secondly, as Deane and Gummow JJ demonstrated, the test is consonant with equity's traditional approach to illegality,[94] and indeed even with *Holman v Johnson*[95] itself, and should be viewed as a restatement casting aside more recent judgments which incorrectly ossified the "wide principle".[96]

Finally, it is not unlike determinations even at law. The courts have long been engaged in the balancing of public policy factors: the majority Justices referred to *Vita Food Products*[97] and *Yango Pastoral*[98] but their reasoning is equally supported by cases such as *Sankey v Whitlam*,[99] *Attorney General (NT) v Maurice*[100] or *Bunning v Cross*.[101] Although each case in such a regime will turn upon its own merits, it does not follow that it is impossible to draw sufficient guidance for parties to order their everyday transactions with some certainty.[102] That some element of judicial discretion undoubtedly exists and may be difficult to exercise is not, and should not, be fatal in itself,[103] particularly when the parameters by which it will be exercised are clearly spelt out and reflect traditional concerns of the law: particularly, the courts' reluctance to condone or facilitate breaches of the law[104] and their reluctance to leave a party unjustly enriched at the expense of another.[105]

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92 Above n2 at 363-4 and 368-9.
93 Above n1 at 563, citing *Money v Money [No 2]* [1966] 1 NSWR 348.
94 Id at 552-5, 562-3 and 564-7.
95 Above n25.
96 *Semble, Perpetual Executors and Trustees v Wright* above n70 at 196; *Gascoigne v Gascoigne* [1918] 1 KB 223; *In re Emery's Investments Trusts* [1959] Ch 410; *Palaniappa Chettiar v Arunasalam Chettiar* [1962] AC 294. See *Martin v Martin* above n8 at 305.
97 *Vita Food Products Inc v Unus Shipping Co* [1939] AC 277; see *Nelson* above n1 at 596-7.
98 *Yango Pastoral* above n45.
99 *Sankey v Whitlam* (1978) 142 CLR 1.
100 *Attorney General (NT) v Maurice* (1986) 161 CLR 475.
101 *Bunning v Cross* (1978) 141 CLR 54.
102 Above n1 per McHugh J at 612; see, analogously, *Carter v The Managing Partner, Northmore Hale Davy and Leake and others* (1995) 183 CLR 121; cf Shand, J, "Unblinkering the Unruly Horse: Public Policy in the Law of Contract" [1972] 30 *CLJ* 144 at 166.
103 Id per Toohey J at 596-7.
104 *Yango Pastoral* above n45; *Bunning v Cross* above n101.
105 *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267.

6. *Ramifications: A Unified Doctrine of Illegality?*

A. *Illegality and Equity*

Whilst *Nelson* deals with the effect of statutory illegality upon resulting trusts, the majority judgments contain indications that the test need not be narrowly confined. Justices Deane and Gummow drew upon "principles of illegality" at large for governance,[106] while Deane, Gummow and McHugh JJ dealt with traditionally disparate instances of equitable intervention in a manner showing a public policy determinant to be a common theme.[107] Whilst no general rule was adumbrated, it appears that equity may be the more rather than the less likely to intervene in heretofore unrecognised "categories" even when the illegality is not merely statutory. However, pragmatically, it seems that cases involving statutory illegality are more likely to arise given the large and increasing volume of modern regulatory legislation.[108]

B. *Illegality and Contract*

The approach developed by the majority is eminently suited to application in contract. Cases central to their Honours' approach, *Vita Foods* and *Yango Pastoral*, are both cases in contract and not in equity, and it is possible to discern from the judgment of Deane and Gummow JJ an intent that the same test could apply in contract as in equity.[109] Justice McHugh ventured further and specifically stated that "[t]he illegality principle is one of general application; it is not limited to proceedings in equity" and formulated his test in terms of "contract and trust" and "legal and equitable rights".[110]

The majority's approach would offer a coherent and reasoned test in an area which currently contains "substantive inconsistencies" and in which it is said to be "impossible to reconcile all the cases".[111] In elucidating the test in equity, the majority Justices threw light upon many of these cases and the way they may fall to be decided under such a test. Thus, the money-lending cases of *Kasumu*[112] and *Mayfair Trading*[113] are instances where the policy of the Act would have been defeated had the contract been enforced at the suit of the plaintiff, whether at law or in equity;[114] conversely, *Lodge*[115] illustrates that equity may operate despite a contract being rendered unenforceable at law, where the statutory infringement is not contrary to the purpose of the Act; lastly, *St John Shipping*[116] indicates that a contract may still be enforceable at

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106 *Nelson* above n1 at 549-52.
107 Id at 562 and 604-5; see cases cited at fnn 95, 97, 252-5.
108 Id at 562-3 and 611.
109 Id at 556-7.
110 Id at 608, 611 and 613.
111 Carter, J, and Harland, D, *Contract Law in Australia* (1996) par 1602. See also *Fire and All Risks Insurance Co v Powell* [1966] VR 513 at 527.
112 Above n43.
113 Ibid n43.
114 Above n1 at 563-4 and 617.
115 *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300.
116 Above n104; *Howard v Shirlstar Container Transport Ltd* [1990] 1 WLR 1292; *Euro-Diam Ltd v Bathurst* above n63; *Saunders v Edwards* [1987] 1 WLR 1116 per Nicholls LJ

law even when statutory illegality is present, provided that the illegality is not sufficiently grave.

It is sufficient to note that the High Court has currently reserved judgment in a case involving a contractual claim affected by statutory illegality, in *Fitzgerald v Leonhardt*,[117] which elicited comment about *Nelson* itself from the bench during the application for special leave.

C. *Illegality and Tort*

The most spectacular application of *Nelson* would be in tort. As the law regarding illegality currently stands, it appears that tort is driven apart from contract and equity, particularly for negligence.[118] However, it flows as a logical concomitant from the reasoning of McHugh J and from some of the authorities to which the Court referred in *Nelson* that the test could be used in tort, although it is outside the scope of this work to set out the reasons in full.

Justice McHugh drew upon cases involving intentional torts such as deceit,[119] conversion[120] and detinue[121] in which a public policy doctrine of illegality operated satisfactorily.[122] The vexed question is the application of illegality to negligence. The *Nelson* doctrine of illegality can be reconciled with recent English authority and with Australian authority save that in *Gala v Preston*.[123] The latter case stands as authority that illegality enters into consideration in negligence as part of the determination whether the requisite element of proximity exists and that illegality may negate an otherwise proximate relationship where it is not "possible or feasible for a court to determine what was an appropriate standard of care".[124] However, it is possible to introduce the *Nelson* doctrine of illegality in a manner consonant with other authorities and with the reasoning of the minority Justices in *Gala v Preston*. As demonstrated by Dawson J in that case, the "inability" to set a standard of care may in fact stem from "an unwillingness rather than an incapacity to do so",[125] a point persuasively made also by Murphy J in *Jackson v Harrison*.[126] Both Dawson and Brennan JJ were critical of merging illegality into the concept of proximity, Brennan J stating that it is "[b]etter to identify the consideration which negates the duty of care than simply to assert an absence of proximity".[127]

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at 1132 and per Bingham LJ at 1134. Note that this last case is decided in tort (at 1125 and 1131-2); cf per McHugh J at 611 fn 286.

117 *Fitzgerald v F J Leonhardt Pty Ltd*, special leave to appeal granted 5th February 1996, heard 7th February 1997; on appeal from the Court of Appeal of the Northern Territory, (1995) 5 NTLR 76.

118 Above n1 at 561.

119 *Saunders v Edwards* above n116.

120 *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65; *Thackwell v Barclays Bank plc* [1986] 1 All ER 676.

121 *Sajan Singh v Sardara Ali* [1960] AC 160.

122 Above n1 at 611-3.

123 *Gala v Preston* (1991) 172 CLR 243.

124 Id at 254-255.

125 Id at 276; see per Brennan J at 269 for an example of the possibility of setting a standard, albeit attenuated, in that very case.

126 *Jackson v Harrison* (1978) 138 CLR 428 at 463-6.

127 Above n123 at 261.

The means by which to do so would be to introduce the *Nelson* doctrine of illegality subsequently to the identification of proximity, in that illegality is not a bar to the action *per se* but may become so if it is sufficiently serious, balancing the public policies of discouraging breaches of the criminal laws and refusing them judicial sanction as against preventing injustice to a party. This accords with the judgments of Kitto and Walsh JJ in *Smith v Jenkins*[128] — contrary to the construction of this case by the majority in *Gala v Preston*[129] — and of Jacobs J (Aickin J agreeing) and Murphy J, who together constituted a majority, in *Jackson v Harrison.*[130] That public policy may indeed be the determinant for allowing or refusing to allow otherwise valid civil claims between participants to illegality was also recognised by Brennan, Dawson and Toohey JJ in *Gala v Preston*[131] and by dicta in other English cases.[132]

Thus, if McHugh J's test were taken to its logical conclusion it would conflict with but one High Court decision, at least insofar as negligence is concerned. It is submitted, however, that the uniformity which might come about by the adoption of a single doctrine of illegality for equity, contract and all forms of tort would be sufficiently desirable to warrant this course.[133] Such a test may encounter criticism that it supplants one "policy" consideration (proximity) with two (proximity and illegality) with consequent uncertainty, although it is submitted that it would, in fact, lead to a conceptually clearer formulation of this area.[134]

7. *Conclusion*

The High Court has, in *Nelson*, revitalised an area of equity which was in grave danger of falling under a regime of either of two principles which were ill-attuned to do justice in many cases. In its consideration of the rules which have historically applied and in its formulation of the test which is to apply to resulting trusts and illegality, the Court has employed a scholarly and well-reasoned approach which clarifies and qualifies the law in this area. Moreover, the strength of its reasoning and its use of authorities from contract and tort provide strong reason to believe that the doctrine of illegality formulated in *Nelson* may well transcend equity and re-enter the law.

BEN KREMER*

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128 *Smith v Jenkins* (1970) 119 CLR 397 per Kitto J at 402-3 and per Walsh J at 428-9.

129 Above n123 at 250.

130 Above n126 at 458 and 464-5.

131 Above n122 at 270-3, 277-80 and 287-92. See also *Italiano v Barbaro* (1992) 106 FLR 395 at 402.

132 *Pitts v Hunt* [1991] 1 QB 24 per Beldam LJ at 41 and 46 (but note McHugh J's reservations in *Nelson* above n1 at 612, fn 290); *Revill v Newbury* [1996] 2 WLR 239 per Evans LJ at 249.

133 Unfortunately in this sense, a case before the High Court which was to have considered illegality and negligence, *CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47, has just been settled at the date of writing. See eg, Graycar, R, and Morgan, J, "Unnatural Rejection of Womanhood and Motherhood: Pregnancy, Damages and the Law. A note on *CES v Superclinics (Aust) Pty Ltd*" (1996) 18 *Syd LR* 323.

134 Along the lines of Brennan J's reasoning in *Gala v Preston* above n123 at 270-3, especially at 271.

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