

Day v Womble Bond Dickinson (UK) LLP [2020] EWCA Civ 447

Would your 12 year old understand when to stop?

By this notable decision the Court of Appeal has offered a useful illustration of the strict limits to the scope for claims by previously convicted claimants against their former lawyers, alleging negligence in respect of the defence of the earlier criminal proceedings.

In an acerbic judgment, Coulson LJ, with whom his colleagues agreed, dismissed most of Mr Day's appeal against the striking out of his claim - yet permitted Mr Day to continue his claim against Womble Bond Dickinson LLP in one respect, regarding the additional legal fees he claimed he would not have incurred had he been properly advised to choose the Magistrates' Court rather than the Crown Court as the venue for his criminal trial, when prosecuted by Natural England.

Mr Day pleaded guilty, was fined £450k+ and brought an appeal against sentence in numerous respects

The wealthy Mr Day bore "a very considerable degree of responsibility" for having cut down 43 trees and creating a vehicle track through his land at Gelt Wood, despite knowing that the area was protected as a Site of Special Scientific Interest (SSSI). Local residents who reported Mr Day for these crimes faced his "deeply unattractive" conduct which could be summarised as saying "don't mess with me". Even better, "particular features of the appellant's mitigation - which the trial judge rejected - included the repeated suggestion that the fault lay with others and that he had been let down by professionals who had failed to advise him on various matters." The trial judge also noted the absence of "a scintilla of apology and meaningful acceptance of responsibility" on the part of the appellant.

Mr Day chose to have his case heard in the Crown Court on advice from leading counsel. After preliminary issues were determined, Mr Day pleaded guilty and a Newton trial was held (to hear evidence regarding sentencing) in which he called evidence but did not give evidence himself. The Crown Court fined him £450,000, with a similar amount in addition for prosecution costs.

Ever the optimist, Mr Day sacked his first legal team (including his solicitors, Womble Bond Dickinson) and brought an appeal to the Court of Appeal Criminal Division with the benefit of new leading counsel, junior counsel and solicitors. The Court of Appeal roundly rejected his appeal against sentence and held, among other things, "a fine significantly greater than that imposed by the judge would have been amply justified for his grossly negligent conduct in pursuit of commercial gain, particularly when so seriously aggravated by his conduct in obstructing justice. A fine in seven figures should not therefore be regarded as inappropriate in cases where such a fine was necessary (1) to bring home to a man of enormous wealth the seriousness of his criminality in cases such as this where there was gross negligence in pursuit of commercial gain, (2) to protect the public interest in SSSIs and (3) to deter others..".

Mr Day brought a claim against Womble Bond Dickinson for professional negligence

Mr Day's claim against Womble Bond Dickinson had a number of strands, including the following allegations:

- Failure to pursue an abuse of process argument. If the argument had been pursued, he alleged it was “substantially more likely than not that he would have been acquitted if properly defended”.
- Failure to properly advise regarding choice of venue. If proper advice had been given to choose the Magistrates’ Court, he alleged the fine would have been no more than £40,000 and he would not have incurred additional legal costs in his defence of the claim.

Strike out on grounds of abuse of process and collateral attack on his existing conviction

HHJ Deborah Taylor struck out Mr Day’s claim against Womble Bond Dickinson because it was:

- An abuse of process
- A collateral attack on his existing conviction and/or bound to fail by reason of the doctrine of illegality

The Appeal

Mr Day appealed, which provided the opportunity for the Court of Appeal to revisit the scope for professional negligence claims alleging that a convicted defendant would have fared better but for negligence by his erstwhile lawyers.

The principle of illegality prohibited compensation for illegal acts

The Court of Appeal examined the authorities on the illegality principle. In brief, the relevant ratio of *Gray v Thames Trains Ltd & Anr* [2009] UKHL 33 can be stated as follows:

1. It is a rule of law and a manifestation of public policy that a civil court will not award damages to compensate a claimant for a disadvantage which the criminal courts have imposed on him or her by way of punishment for a criminal act for which he or she was responsible [28] (the “narrow rule”).
2. You cannot recover compensation for loss which you have suffered in consequence of your own criminal act [30] (the “wider rule”).

The applicable policy considerations and the rationale for the rule were then said to be those identified by Lord Toulson in *Patel v Mirza* [2016] UKSC 42 at paragraph 120, as confirmed in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2018] EWCA Civ 1841:

“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...”

The inconsistency principle requires the civil law to be consistent with the criminal law's verdict and punishment

Coulson LJ also stated that it would be incoherent if the civil law produced a result which was inconsistent with the verdict and punishment imposed by the criminal law; the court could not condone illegality by giving with one hand what it had taken with the other.

Mr Day's appeal could not succeed because the claim contravened the principles of illegality and inconsistency – in most respects

Coulson LJ concluded, rightly, that it was an abuse of process for Mr Day to allege that Womble Bond Dickinson were negligent because they failed to make an abuse of process argument before his Crown Court trial. The essence of that case was that had an abuse of process argument been successful before the Crown Court trial, Mr Day would not have been found guilty and would not have received any fine or order to pay the prosecution's costs, and his claim was therefore directed at obtaining compensation for the criminal sanction and its consequences which his conduct had merited. The allegation therefore was in contravention of the narrow rule of illegality and was a collateral attack upon Mr Day's conviction and sentence, such that it constituted an abuse of process.

Coulson LJ also correctly concluded that it contravened the principle of illegality for Mr Day to be able to claim compensation in relation to the fine imposed by the Crown Court insofar as it was larger than the fine which the Magistrates' Court would have imposed had the case proceeded there. Mr Day alleged that had he been properly advised to choose the Magistrates' Court, the maximum fine would have been £40,000. This attempt to recover compensation for the larger sum he had had to pay in the Crown Court was inconsistent with the fine meted by the Crown Court and this part of his case remained struck out too.

The court was also unpersuaded that Mr Day's case fell within the type of exception found in *Walpole & Anr v Partridge & Wilson* [1994] QB 106, where a clear error of law was made by the Crown Court and the claimant's legal team had failed to identify that error of law or to raise it on appeal to the Court of Appeal Criminal Division. Mr Day, by contrast, had sacked his legal team and obtained new representation to appeal his case to the Court of Appeal Criminal Division, where "every possible point was taken by the appellant".

Mr Day's claim for additional legal fees was not struck out

Interestingly, Coulson LJ found that the illegality principle did not prevent Mr Day from recovering the additional legal fees that he would not have paid, had his trial taken place in the Magistrates' Court rather than the Crown Court. Mr Day was permitted to continue with his case that had he been properly advised, he would have had a trial in the Magistrates' Court and he would not have incurred as high legal fees as he did in the Crown Court in respect of his own representation. With evident reluctance Mr Day's appeal was allowed to that small extent, so as to enable him to pursue a claim for loss to that limited extent.

It is somewhat odd that Coulson LJ allowed the appeal to that limited extent, which presupposed that Mr Day's trial and sentencing would have taken place in the Magistrates' Court, in light of his comments regarding causation. In the Court of Appeal Criminal Division, the Lord Chief Justice had held that a seven-figure sum was appropriate by way of a fine in this case. With that in mind, Coulson LJ said "It is straining credulity to suggest that, once they were aware of all the facts, there was any realistic prospect that the Magistrates would still

have accepted jurisdiction to sentence the appellant, in circumstances where the Lord Chief Justice considered that the appropriate sentence was a fine fifty times higher than any which the Magistrates could have imposed.” That rather indicates that there was a vanishingly small prospect of the Magistrates agreeing to deal with the matter, and while the Court of Appeal may have been constrained by the issues on appeal, it would perhaps have been more satisfactory to leave struck out this unmeritorious part of the claim too, and thus to bring an end to Mr Day’s chequered history of legal proceedings.

The intelligent 12 year old child

As a final note, Coulson LJ offered this somewhat unusual summation of the reasons why most of the claim had to fail:

“Throughout his submissions, [counsel for Mr Day] referred to the test he considered applicable to this application to strike out, namely whether an intelligent twelve-year old child would understand why an otherwise arguable claim against the appellant’s previous solicitors should be prevented at an early stage from going any further. It was unclear to me what the source of this test was, but I am happy to adopt it to summarise my conclusions. It seems to me that [Mr Day’s counsel’s] putative twelve year old child would appreciate quite quickly that it was sensible and necessary for the final decisions in criminal courts to be just that - final - and that subsequent satellite litigation, re-arguing points that could and should have been raised before, and which went (directly or indirectly) to undermine the conviction and its consequences, was inappropriate, wasteful of resources, and likely to bring the law into disrepute.”

Conclusion

In conclusion, criminals who wish to bring claims of professional negligence against their former lawyers continue to face high hurdles, despite the limited success of Mr Day’s appeal. Where an unsuccessful appeal has previously been brought to the Court of Appeal Criminal Division raising all relevant errors of law, it is particularly unlikely that the professional negligence claim will succeed.

Case note by Alicia Tew, Hailsham Chambers

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