Neutral Citation Number: [2020] EWCA Civ 447

Case No: A2/2019/1130

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HER HONOUR JUDGE DEBORAH TAYLOR
[2019] EWHC 1102 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2020

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE FLOYD
and
LORD JUSTICE COULSON

- -

Between:

DAY	**Appellant**
- and –	
WOMBLE BOND DICKINSON (UK) LLP	**Respondent**

- -
- -

Mr Roger Stewart QC (instructed by **Elliot Mather LLP Solicitors**) for the Appellant
Mr Ben Hubble QC (instructed by **CMS Cameron Mckenna Nabarro Olswang LLP)** for the Respondent

Hearing date: 4th March 2020

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Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am, Thursday 26th March 2020."

LORD JUSTICE COULSON :

1. INTRODUCTION

1. In November 2010 the appellant caused the unauthorised cutting down of 43 trees, together with the construction of a vehicle track, in the Gelt Woods near Carlisle in Cumbria, a Site of Special Scientific Interest ("SSSI"). Criminal charges were brought in consequence. Following the 2-day trial of a preliminary issue, which he lost, the appellant pleaded guilty to those charges. He produced a written basis of plea which strived to minimise his involvement in the relevant events, and which Natural England, the relevant prosecuting authority, did not accept. There was then a 4-day Newton hearing to determine the degree of the appellant's culpability. Following that hearing, the judge found that the appellant's culpability was "very considerable" and fined him £450,000 and ordered him to pay £457,317.74 costs. The appellant appealed against both conviction and sentence. Both appeals were rejected by the Court of Appeal Criminal Division ("CACD") in a judgment dated 18 December 2014 ([2014] EWCA Crim 2683).

2. Despite the lack of success which has marked his engagement with the legal process thus far, the appellant commenced new proceedings on 6 July 2018, claiming damages for breach of contract and/or negligence against his former solicitors Womble Bond Dickinson ("WBD"). The basis of his original pleaded claim was that it was "substantially more likely than not that he would have been acquitted if properly defended". By a judgment dated 27 April 2019, Her Honour Judge Deborah Taylor, sitting as a Deputy High Court Judge ("the judge") struck out the claim for damages on the basis that it was a collateral attack on the appellant's conviction and sentence and/or was bound to fail by reason of the doctrine of illegality ([2019] EWHC 1102 (QB)). She found that, for the claim to succeed, the appellant had to prove one or all of a number of outcomes, "all of which are inconsistent with the current conviction and sentence".

3. The appellant sought permission to appeal. There were three grounds: (i) that the judge had been wrong to find that the doctrine of illegality meant that the claim should be struck out; (ii) that the judge had been wrong to find that the claim was an abusive collateral attack on an existing conviction; and (iii) that the judge was wrong to find that two specific claims, relating to a) WBD's failure to pursue an abuse of process argument, and b) the advice given by WBD as to choice of venue, were an abusive collateral attack. Males LJ refused permission to appeal on Grounds (i) and (ii). He granted permission on Ground (iii) on the basis that, although they might be very difficult to establish on the facts, it was arguable that these claims were available in principle to the appellant.

4. Accordingly, the twin issues that arise for determination on this appeal are whether the allegations of breach of contract/negligence in respect of an alleged failure to pursue an abuse of process argument, and an alleged failure to advise properly as to venue, were matters which, in principle, did not contravene the narrow rule as to illegality as formulated by Lord Hoffmann in *Gray v Thames Trains* [2009] UKHL 33; [2009] 1 AC 1339 and/or amount to an abusive collateral attack on the conviction and sentence imposed. This gives rise to a consideration of the scope of these principles and the extent - if at all - to which a convicted criminal can pursue claims against his legal advisors arising out of his criminal conduct and its consequences.

2. THE FACTUAL BACKGROUND

5. In October 2010, the appellant and his wife acquired the Hayton Estate near Carlisle which comprised about 500 acres, mainly of woodland. The Estate included the gorge of the River Gelt and the Gelt Woods. Part of this area was an SSSI, a designation intended to protect it. Unfortunately, it did not protect it from the appellant who, shortly after buying the Estate, caused the felling of 43 trees and the construction of a track wide enough to take vehicles, together with supporting banks and the like, through the Woods. Despite the appellant's vigorous efforts to obstruct them with threats and bullying, the local residents brought the matter to the attention of Natural England.

6. As a consequence, the appellant was charged with offences under Sections 28E(1) and 28P(1) of the Wildlife and Countryside Act 1981. The appellant was summoned before the Magistrates' Court and pleaded not guilty. He elected trial at the Crown Court. He then sought the determination of a preliminary issue as to whether the offences with which he was charged were offences of strict liability, and whether the matters relied on by the prosecution could in law amount to the appellant 'causing' the prohibited operations.

7. Following a 2-day hearing in April 2013, HHJ Peter Hughes QC ("the trial judge") held that the offences were ones of strict liability (indeed, it does not appear to have been seriously argued to the contrary) and that the question of causation would turn on the facts. Following this ruling, the appellant changed his plea to guilty. That did not prevent him from later challenging the preliminary issue ruling in the Court of Appeal in December 2014, as part of his appeal against conviction. That challenge was rejected in detailed terms: see [10] - [23] of the CACD judgment.

8. The appellant's guilty plea was accompanied by a lengthy document, drafted by leading counsel, entitled 'Basis of Plea and Points for Mitigation'. This document sought at every turn to minimise the appellant's responsibility for causing the carrying out of the prohibited operations. It was not accepted by Natural England. This necessitated a further 4-day Newton hearing, with a good deal of oral evidence from both sides (although the appellant himself declined to testify), to allow the trial judge to determine his level of culpability.

9. The trial judge's careful ruling at the end of that hearing, which runs to 31 pages, is a damning indictment of the appellant's conduct, and explains why the trial judge considered that he bore "a very considerable degree of responsibility" for what had happened. 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 was also very critical of the aggressive tactics he had adopted towards the local residents: as the judge put it, his "deeply unattractive" conduct towards them could be summarised as saying "don't mess with me". The trial judge also noted the absence of "a scintilla of apology and meaningful acceptance of responsibility" on the part of the appellant.

10. I note that the appellant's second ground of appeal against conviction centred on his contention that he had not intended to suggest that, by his guilty plea, he had caused the prohibited operations. As the CACD found at [27] - [28], not only was it difficult to see how there could have been any misunderstanding on that fundamental issue, but the

evidence which emerged at the 4-day Newton hearing precluded any possibility of the appellant arguing that he had not caused the operations. As the Lord Chief Justice summarised it, "the appellant had on the evidence subsequently heard before the judge plainly caused the operations." Accordingly, both grounds of appeal against conviction were rejected by the CACD.

11. Based on his factual findings following the Newton hearing, the trial judge imposed a fine of £450,000 and ordered the appellant to pay Natural England's costs in the sum of £457,317. The appellant appealed against the amount of the fine, arguing that it was disproportionate, and wrongly took into account his personal wealth. One of the arguments expressly raised in the CACD was that the judge should have taken into account the fact that Natural England had been prepared to have the matter tried summarily in the Magistrates' Court, where the maximum fine would have been £20,000 on each of the two counts.

12. The CACD rejected the appellant's appeal against sentence at [30] - [48]. Two particular points about the judgment should be noted:

    a) As to the question of the matter being tried summarily, the Lord Chief Justice said:

    "40. As to the relevance of the position of Natural England that it had been prepared to have the matter tried summarily, we were told that that was a decision taken by a junior solicitor. Although Natural England could not have resiled from that decision, if the appellant had accepted summary jurisdiction, once he had decided to elect to take the proceedings to the Crown Court, the judge was plainly bound to approach the case on the evidence as it appeared before him and not be influenced in any way by an earlier decision of Natural England."

    b) As to the amount of the fine, the Lord Chief Justice said:

    "46. The sentence imposed by the judge was imposed before the decision of this court in *R v Sellafield* which gave guidance as to the approach to fines to be imposed on companies of very significant size. Applying that same approach to individuals possessing the scale of wealth of the appellant, 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. In the case of deliberate conduct in similar circumstances, a fine in relation to a man of similar wealth should be significantly greater, as that would be necessary to reflect the greater culpability. The fine of £450,000 imposed on this appellant cannot therefore be viewed as disproportionate."

13. On 6 July 2018, the appellant began the present proceedings against WBD, his solicitors until the conclusion of the proceedings in the Crown Court (an entirely new legal team having been instructed for the appeal). On one view, it could be said that the claim

against WBD was a further manifestation of the traits previously noted by the trial judge (see paragraph 9 above), namely the appellant's refusal to accept responsibility for his conduct, and his willingness to blame others. The claim for damages against WBD was originally put in the following terms:

> "20 By reason of the matters aforesaid Mr Day has suffered loss and damage namely:
>
> a) The loss of chance of an acquittal either on grounds of abuse of process or by reason of a trial at which his evidence was heard. He contends that it is substantially more likely than not that he would have been acquitted if properly defended;
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> b) As a result of the negligence of the Defendant, he has incurred substantial additional legal costs and expenses;
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> c) In any event he was fined and incurred costs which were substantially more than would have been incurred in the Magistrates Court. The maximum fine which the Magistrates Court could have imposed for the two offences of which he was convicted would have been £40,000. In fact fines totalling £20,000 would have been the maximum likely with equivalent costs."

14. The plea at paragraph 20 c) in respect of the maximum fines available to the Magistrates Court was related to the point which had been unsuccessfully raised during the appeal against sentence (see paragraph 12a) above). The abuse of process argument was new, and was based on a purported conversation with a Mr Stainer, a land conservation officer employed by Natural England, who is alleged to have said that, if a plan was put in place to restore the area to the satisfaction of Natural England, no action would be taken against the appellant. The appellant subsequently undertook agreed remedial works. This abuse issue was not raised by WBD during the criminal proceedings in the Crown Court, or by the appellant's new legal team in the CACD.

15. WBD served a defence to the claim which took, at the outset, the point that the claim was barred by the doctrine of illegality. They denied the claim based on the abuse of process argument, pointing out that Mr Stainer was Natural England's local Land Management and Conservation Advisor and not therefore responsible for the prosecution of the appellant; that any conversation with Mr Stainer had occurred after the Enforcement Division of Natural England had invited the appellant for interview under caution but before the interview took place; and that the appellant was legally obliged to undertake the remedial works in any event. The response in relation to the allegation about choice of venue averred that this had been something which had been carefully considered at the time and that leading counsel's advice to the appellant had been – in the words of the relevant attendance note - that "there may be benefits to this matter going ahead in a Crown Court before a judge."

16. In keeping with their threshold defence that the proceedings were barred by the doctrine of illegality, WBD sought to strike out the proceedings. The hearing of the application took place before the judge in April 2019. Her approved judgment, allowing the application, was dated 27 April 2019.

3. THE JUDGMENT

17. Having set out the parties' various submissions, the judge's conclusions were admirably brief. She said:

> "44. I have concluded that the Statement of Case does not disclose a claim which the court can entertain, as it is an abuse of process, and must fail as a matter of law by reason of illegality. It is clear from *Gray* and *Patel v Mirza*, that the justification for the narrow rule when considering illegality in the context of bringing civil proceedings where there is a subsisting criminal conviction is the inconsistency of the law causing the loss, and the law ordering compensation. The points raised by Mr Stewart QC do not establish any competing policy justifying derogation from the narrow rule which applies to cases such as this where the claim is for the fine imposed and the costs ordered. The passages of Lord Toulson's judgment in *Patel v Mirza* at [101] and [107] do not support the contention that this area of law is unsettled. I do not consider that this is a case which falls within the class of cases which needs to be fully argued in order that the law may develop in an uncertain area of law: see *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 557 per Lord Brown-Wilkinson. This case falls within Lord Hoffmann's test in *Gray*, supported by Lord Toulson at [99] of *Patel v Mirza*. The punishment was lawfully imposed by HHJ Hughes QC in consequence of Mr Day's unlawful act to which he pleaded Guilty. The unlawful act preceded any intervention by WBD, or indeed Mr Stainer. There was and is no dispute that works were carried out which were not notified to NE and for which permission was not given. In addition, the Basis of Plea, which HHJ Hughes QC treated as, and Mr Stewart QC did not suggest was anything other than Mr Day's position, accepted a measure of responsibility. HHJ Hughes QC found he had a very considerable degree of responsibility and the sentence was imposed accordingly.
>
> *Abusive collateral attack on a subsisting conviction*
>
> 45. Further, the claim is an abusive collateral attack on a subsisting conviction. Mr Stewart QC's submissions clearly highlight that the aim of the proceedings is to show that Mr Day would have acted differently, and, on one scenario HHJ Hughes QC, and the Court of Appeal (if there had been an appeal) would have come to different conclusions, had WBD acted as Mr Day contends they should have done. The underlying requirement to succeed in this claim is proving one or all of a number of outcomes, all of which are inconsistent with the current conviction and sentence. Those include that the proceedings would have been held to be an abuse, and therefore stayed, or that Mr Day would have pleaded Not Guilty in the Magistrates Court, with a potential acquittal at trial. Or even if a conviction at trial, or on a plea in the Magistrates Court, that he would have been given a lower sentence and incurred lower costs. Those scenarios would be wholly at odds with the existing sentence and costs order imposed by HHJ Hughes QC and upheld in the Court of Appeal, and in the circumstances the claim is likely to bring the administration of justice into disrepute.
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> 46. Mr Stewart QC's submissions were predicated on the basis that WBD were negligent and therefore there must be a remedy. At this stage I am not concerned with deciding the merits of disputed issues of fact or negligence. But as a matter of policy, as Lord Hoffmann said in *Hall v Simon*, the remedy for those who may have been prejudiced by incompetent representation is to appeal through

the criminal courts or to the Criminal Cases Review Commission to overturn the conviction. Once the conviction has been overturned, the claim is no longer an abuse. Mr Day was represented by Leading and Junior counsel at all stages of the original proceedings, He has had the opportunity of appeal with different solicitors and Leading and Junior counsel. None of the issues he now raises regarding abuse of process or the negligence of WBD were apparently before the Court of Appeal. I reject the submission that a civil court is better placed to examine a case where allegations of this kind are made. The criminal appeal process has time, where appropriate, and the expertise necessary for consideration of what are criminal procedural issues which would be required to review a case which has gone through the Crown court and Court of Appeal. It is not, as was suggested, a question of protecting the amour propre of the courts that led the court in *Hall v Simons* to endorse the *Hunter* principle.

47.On this basis, unless Mr Day's case is within a category of exceptions to the general rule set out in *Hall v Simons* it must also be struck out as a clear abuse.

48. In my judgment this is not an exceptional case, and very different to *Walpole.* Here there is no error of law by the Court which should have been rectified on appeal. As Ralph Gibson LJ made clear, there is a public interest in rectifying errors by the Court, and the prevention of an attempt to rectify such an error may itself bring the administration of justice into disrepute. Not all potential points of law are the same, or create circumstances where such an approach can properly be taken. Mr Stewart QC argues that this is a clear case of a promise not to prosecute and likely to be successful. Even if the basis pleaded were accepted, the bar for success in an application of this kind in criminal proceedings is high, and the circumstances and the ability of Mr Stainer to make a binding promise, even if made, is contested by the Defence. It is not, like *Walpole* a case which demands an exceptional course.

49. More similar to this case is *Smith v Linskills (a firm)* 1 WLR 763 where at 770 A - D Sir Thomas Bingham MR set out the reasons for finding that Mr Smith had had a full opportunity to contest the charge against him. Mr Stewart QC submits that whilst Mr Day may have attended Court, been represented by Leading and Junior counsel throughout, had witnesses called on his behalf, and appealed with new Counsel and solicitors, he did so in a state of ignorance of the process and about how badly he had been advised and treated by WBD. Nonetheless I find, irrespective of the merits of his case, as Bingham MR said in *Smith v Linskills:*

> "*Even if it be true that valid criticism can be made of the conduct of his defence, it seems to us quite impossible to hold that Mr Smith lacked a full opportunity to contest the charge".*
>
> 50. In conclusion, the applications that the Statement of Case be struck out pursuant to CPR 3.4(2) and that reverse summary judgment be given against the claim, pursuant to CPR 24.2 success."

4.THE APPEAL

18. The appellant sought permission to appeal. The original Grounds of Appeal were in the following terms:

    i) The judge was wrong to find that the claim must fail, as a matter of law, by reason of the doctrine of illegality with the consequence that the claim should be struck out.

    ii) The judge was wrong to find that the claim is an abusive collateral attack on an existing conviction with the consequence that the whole claim should be struck out; alternatively

    iii) The judge was wrong to find that the claims in relation to choice of venue and abuse of process were an abusive collateral attack and should have permitted the same to proceed to a trial.

19. Males LJ refused permission to appeal on Grounds i) and ii). He said that those Grounds were based on the appellant's case that he was not guilty of the offences in question, despite his guilty pleas, so that the claims were an attack on the findings of the Crown Court. He concluded that the judge was right to conclude that there was nothing exceptional about those claims, so that they were barred and fell to be struck out.

20. Males LJ went on:

> "So far as Ground iii) is concerned, it is arguable that a claim (1) that an abuse of process argument was available to the claimant which the solicitors negligently failed to advance and/or (2) that the solicitors gave negligent advice as to venue as a result of which the claimant was exposed to a substantially greater sentence than would have been imposed in a Magistrates Court, does not involve or does not necessarily involve any assertion that the claimant was wrongly convicted. Those claims may face formidable difficulties on the facts, but whether they are available in principle is an issue which is appropriate for consideration by the Court of Appeal."

21. Two other matters should be noted in relation to the permission to appeal granted by Males LJ. First, there is a Respondent's Notice, in which WBD support the judge's findings in order to assert that the rule relating to illegality applied to bar the allegations in respect of abuse of process and choice of venue, and to argue that those allegations were not presented (and were not capable of being presented) in isolation in a way which did not involve an attack on the subsisting conviction and sentence.

22. Secondly, the appellant has proposed amendments to his Particulars of Claim, purportedly to take account of the judge's judgment and the refusal of permission to appeal on Grounds i) and ii). They are not agreed. Although some of the proposed amendments flow directly from these decisions, it appears to me that there remain pleaded allegations which are not now available to the appellant in any event. The continuing complaint at paragraph 15c), that WBD failed to formulate a proper case strategy "given that it was Mr Day's case that he had not caused or permitted the relevant offences" is perhaps the best example of the appellant's unwillingness, even now, to give up his underlying grievance that he was not guilty of these offences.

23. There is a significant amendment at paragraph 20(a) which now reads as follows:

> "20a. the loss of chance of Natural England not proceeding with the prosecution given the assertion of an abuse of process and/or the loss of the chance of the prosecution being stayed on the basis of the application of the doctrine. ~~an acquittal either on grounds of abuse of process or by reason of a trial at which his evidence was heard~~. He contends that it is substantially more likely than not that either Natural England would not have proceeded with the prosecution or it would have been stayed~~he would have been acquitted if properly defended;~~

The allegation at paragraph 20c) in respect of a trial in the Magistrates Court (see paragraph 13 above) remains unchanged.

24. During his oral submissions at the appeal hearing, Mr Stewart QC sought to divide up the appellant's claims for damages into three distinct heads. This categorisation was not presented to the judge. The heads of loss were said to be:

a) A claim for damages equivalent to the fine of £450,000. Mr Stewart submitted that this claim could be advanced on the primary basis that, if the abuse of process argument had been successful, there would have been no fine at all. Alternatively, the claim was for the amount of the fine, less £40,000 to reflect the maximum fine that could have been imposed by the Magistrates, had the matter remained there (as the appellant said he would have done, if the correct advice as to venue had been given).

b) A claim for damages equivalent to the £457,317 contribution that the appellant was ordered to make to the prosecution costs of Natural England. The argument is that, if the abuse of process argument had been successful, there would have been no such order for costs. Alternatively, if the venue argument had been successful, then it is said that the costs would have been a fraction of the actual sum ordered.

c) A claim for damages equivalent to the appellant's own costs. Mr Stewart accepted that the appellant would have always incurred some costs in the criminal proceedings but he said that this was a claim for the *additional* costs that the appellant incurred as a result of the negligent advice in respect of the abuse of process argument and/or venue. It was said that this would be the vast bulk of the costs incurred, although the claim for additional costs is not pleaded with any precision and no specific figure is identified.

5. THE APPLICABLE PRINCIPLES OF LAW

5.1 The General Rule

25. The general rule as to the recoverability of damages in the civil law is that, where there is a wrong, there should be a remedy.

26. This rule has been described as a cornerstone of any system of justice: see *Jones v Kaney* [2011] 2 AC 398, Lord Dyson at [113]. The same general statement of principle can be found in a number of other recent cases, including *Patel v Mizra* [2016] UKSC 42; [2017] 1 AC 467.

27. As Lord Dyson made plain in *Jones*, "to deny a remedy to the victim of a wrong should always be regarded as exceptional. As has been frequently stated, any justification must be necessary and requires strict and cogent justification." In the present case, the exception(s) relied on by the respondent can be found in the doctrine of illegality, the

prohibition on making a collateral attack on a subsisting conviction and sentence, and the rule against inconsistency.

5.2 Doctrine of Illegality

28. 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.

29. In *Gray v Thames Trains Ltd & Anr* [2009] UKHL 33; [2009] 1 AC 1339, the House of Lords allowed an appeal by the defendant employer to prevent the claimant from recovering damages for loss of earnings following his detention in a secure hospital after he had killed another man. He had been a passenger on one of the trains in the Ladbroke Grove disaster and suffered PTSD as a result. It was when suffering from that disorder that the claimant had killed. His plea of guilty to manslaughter on the ground of diminished responsibility was accepted by the Crown. The claim for general damages was found by the Court of Appeal to be precluded by the rule against illegality, but not the claim for loss of earnings during his detention. That result was reversed by the House of Lords, who said both claims were prohibited.

30. Lord Hoffmann said:

> "29. It must follow from *Corr's* case that the mere fact that the killing was Mr Gray's own voluntary and deliberate act is not in itself a reason for excluding the defendants' liability. Nor do the appellants say that it is. Their principal argument invokes a special rule of public policy. In its wider form, it is that you cannot recover compensation for loss which you have suffered in consequence of your own criminal act. In its narrower and more specific form, it is that you cannot recover for damage which flows from loss of liberty, a fine or other punishment lawfully imposed upon you in consequence of your own unlawful act. In such a case it is the law which, as a matter of penal policy, causes the damage and it would be inconsistent for the law to require you to be compensated for that damage...
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> 32. The particular rule for which the appellants contend may, as I said, be stated in a wider or a narrow form. The wider and simpler version is that which was applied by Flaux J: you cannot recover for damage which is the consequence of your own criminal act. In its narrower form, it is that you cannot recover for damage which is the consequence of a sentence imposed upon you for a criminal act. I make this distinction between the wider and narrower version of the rule because there is a particular justification for the narrower rule which does not necessarily apply to the wider version.
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> 33. I shall deal first with the narrower version, which was stated in general terms by Denning J in *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35, 38:
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> > "It is, I think, a principle of our law 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.…"

31. *Gray* was considered by the Supreme Court in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467. That was a rather different case dealing with an illegal agreement based on insider trading. The principal reason for the Supreme Court's decision was that a person who satisfied the ordinary requirements of a claim in unjust enrichment should be entitled to the return of his money or property and should not *prima facie* be debarred from recovering that money or property merely because the consideration which had failed was an unlawful consideration. Questions of public policy and the public interest were a secondary consideration[1].

32. Lord Toulson dealt with *Gray* in his detailed judgment. At paragraph 29 he said this:

> "29. Lord Hoffmann observed, at paras 30-32, that the maxim *ex turpi causa* expresses not so much a principle but a policy based on a group of reasons, which vary in different situations. The courts had therefore evolved varying rules to deal with different situations. Because questions of fairness and policy were different in different cases and led to different rules, one could not simply extrapolate rules applicable to one situation and apply them to another. It had to be assumed that the sentence was what the criminal court regarded as appropriate to reflect Mr Gray's personal responsibility for the crime he had committed. It was therefore right to apply the rule that he could not recover damages for the consequences of the sentence, reflecting an underlying policy based on the inconsistency of requiring someone to be compensated for a sentence imposed because of his personal responsibility for a criminal act. It was also to right to apply a wider rule that you cannot recover damage which is the consequence of your own criminal act, reflecting the idea 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."

He went on to deal with public policy issues in this way:

> "101. …I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law...
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> 109. The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in

[1] In a similar commercial context, the Court of Appeal adopted the same approach in *Stoffel & Co v Grondona* [2018] EWCA Civ 2031, where a claim for professional negligence in respect of conveyancing was upheld, despite the fact that the underlying transaction was tainted by fraud.

> denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted."

33. Lord Toulson's conclusions, in a case where there had been no criminal conviction or sentence, can be found at paragraph 120 in the following terms:

> "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."

34. There can be no doubt that the rule in *Gray* was not undermined by the decision in *Patel*: indeed, in the passages to which I have referred, Lord Toulson appears expressly to approve it. In any event, any uncertainty was resolved in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2018] EWCA Civ 1841. The effect of *Patel v Mirza* was dealt with at [77] - [91]. This court concluded:

> "87. Nevertheless, in view of the actual contractual and unjust enrichment issue in *Patel*, considerable caution must be taken, in the context of the rules of binding precedent, in determining whether there are any other cases in other areas of the law which the Supreme Court in *Patel* held by necessary implication to be overruled or such that they should no longer be followed.
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> 88. Lord Neuberger, for example, expressed his conclusion explicitly by reference to contract cases when he said (at [174]):
>
> "I have come to the conclusion that the approach suggested by Lord Toulson JSC in para 101 above provides as reliable and helpful guidance as it is possible to give in this difficult field. When faced with a claim based on a contract which involves illegal activity (whether or not the illegal activity has been wholly, partly or not at all undertaken), the court should, when deciding how to take into account the impact of the illegality on the claim, bear in mind the need for integrity and consistency in the justice system, and in particular (a) the policy behind the illegality, (b) any other public policy issues, and (c) the need for proportionality."

> 89. Again, Lord Toulson's discussion of proportionality was in the context of contract claims: see [107]. It is impossible to discern in the majority judgments in *Patel* any suggestion that *Clunis* or *Gray* were wrongly decided or to discern that they cannot stand with the reasoning in *Patel*. As we conclude above, *Clunis* was approved in *Gray*. *Gray* was referred to in the judgments of Lord Toulson ([28]-[32]), Lord Kerr ([129]) and Lord Neuberger ([153] and [155]) but in each case with approval of the way the matter had been approached by Lord Hoffmann in *Gray* in identifying the considerations underlying and justifying the rule of public policy. There was no suggestion of any kind that either the approach of Lords Hoffmann, Rodger and Scott or the decision in *Gray* was incorrect.
>
> 90. Furthermore, as is set out above, it is clear that the members of the appellate committee in *Gray* had considered issues which might undermine the application of the rule of public policy applicable in situations such as that in *Gray*, *Clunis* and the present case. They considered the situation where the mental illness of a claimant in tort proceedings against a health authority meant that, despite the conviction for manslaughter which predicates that the claimant committed the offence with intent to kill or to cause grievous bodily harm, they bore no or insignificant responsibility for the killing. As stated above, Lords Hoffmann, Roger and Scott were of the view that the claim against the health authority should, nevertheless, be barred on grounds of public policy.

5.3 Abuse of Process

35. A collateral attack on a subsisting conviction and sentence is an abuse of process and will be struck out pursuant to CPR 3.4(2)(6).

36. In *Hunter v Chief Constable of the West Midlands Police & Ors* [1982] AC 529 civil claims against the police for personal injury were struck out, having been considered by the judge at the trial which had led to their convictions for murder[2]. Lord Diplock said at 541B-C:

> "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.
>
> The proper method of attacking the decision by Bridge J in the murder trial that Hunter was not assaulted by the police before his oral confession was obtained would have been to make the contention that the judge's ruling that the confession was admissible had been erroneous a ground of his appeal against his conviction to the Criminal Division of the Court of Appeal. This Hunter did not do."

[2] Mr Stewart made much of the fact that the Birmingham Six, who were the claimants in *Hunter*, were of course subsequently cleared of murder. In my view, that has no bearing on the principles set out in Lord Diplock's speech, which remain good law.

37. The situation in *Walpole & Anr v Partridge & Wilson* [1994] QB 106, was different. There the claim in negligence centred on the defendants' failure to lodge an appeal against the appellant's criminal conviction, despite counsel's advice to the effect that there were valid grounds for such an appeal by way of case stated. That appeal would have centred on the contention that the Crown Court had erred in law. The Court of Appeal held that such proceedings were not an abuse of process because they did not amount to re-litigation of an issue decided in the criminal proceedings. The court concluded that the principle in *Hunter* was not that the initiation of such proceedings was necessarily an abuse of process, but that it may be. It was held that the case was an exception to the general principle outlined in *Hunter*. Ralph Gibson LJ said:

> "It was common ground that, so far as counsel had been able to discover, this point [namely the point which was not taken by way of case stated] has not before been considered in any reported case in this country. It seems to me to be clear beyond question that such a contention may constitute an exception. Let it be supposed that the plaintiff, having instructed his solicitors to pursue an appeal against the decision of the Crown Court, is deprived of the right of appeal by the defendants' breach of duty. Let it be supposed further that his claim shows that an obvious error of law was made by the Crown Court which, on appeal by case stated, must have resulted in the conviction being set aside. I can see no reason why the court should refuse to entertain such proceedings, and I can see no arguable basis for regarding such proceedings, by reason only of the collateral attack upon the decision of the Crown Court, as an abuse of process. It would, to the contrary, be an abandonment of the duty and of the function of the court to refuse to decide the issues in such proceedings."

38. The general run of cases to which the principle in *Hunter* has been applied is perhaps exemplified by *Smith v Linskills* [1996] 1WLR 763, to which the judge referred in her judgment. There a convicted burglar served a sentence of imprisonment and, on his release, issued proceedings against his former solicitors alleging negligence. The Court of Appeal dismissed the appeal against the judge's ruling, on a preliminary issue, that the claim was a collateral attack on the conviction. Bingham LJ (as he then was) said:

> "In his statement of principle already quoted, Lord Diplock referred to the need for the intending plaintiff to have had a full opportunity of contesting the decision against him in the first court. This was an echo of the judgment of Goff L.J. in *McIlkenny's* case [1980] Q.B. 283, 330H. In this case, Mr. Nicol argued, Mr. Smith had not enjoyed a full opportunity to contest the decision in the Crown Court, because the negligence of the defendant had prevented him deploying the full case which he would wish to have deployed.
>
> This argument is, in our judgment, founded on a misunderstanding of what Lord Diplock meant. It is plain from his speech (see [1982] A.C. 529, 542H and the authority relied on) that Lord Diplock was giving his ruling with reference to both civil and criminal cases. It is evident in civil cases particularly that a party may lack any opportunity to resist a hostile claim, as for example where judgment is entered against him on the ground of procedural default, or may lack a full opportunity, as when summary judgment is given against him. We understand Lord Diplock to have been intending to preserve a party's right to make a collateral attack on a decision made against him in such circumstances. We cannot think that Lord Diplock would have regarded Mr. Smith as lacking

> a full opportunity of contesting the Crown Court decision against him when he had had the benefit of a solicitor and counsel throughout the proceedings, had pleaded not guilty, had attended every day of the trial, had been able to give instructions to counsel on the cross-examination of prosecution witnesses, had given evidence himself, had called witnesses, had sought to establish an alibi, had had the benefit of submissions made to the jury on his behalf, had pursued an application for leave to appeal against his conviction, had settled grounds of appeal drawing attention to some at least of his complaints about the manner in which his case had been conducted by his solicitor and had renewed his application for leave to appeal to the full court on the initial refusal of leave. Even if it be true that valid criticism can be made of the conduct of his defence, it seems to us quite impossible to hold that Mr. Smith lacked a full opportunity to contest the charge. Were this the correct meaning of the rule, then the rule itself would be virtually meaningless, since it is hard to imagine a case in which a convicted defendant could not find some plausible ground upon which to criticize the preparation of the defence by his solicitor. We fully appreciate the great difficulty which faces any convicted defendant seeking to challenge his conviction on appeal on the grounds that his defence had been negligently conducted; this does not, however, lead to the conclusion that such a defendant lacked a full opportunity to contest the charge against him."

39. In relation to the public policy issues, Bingham LJ said:

> "We cannot of course shut our eyes to the possibility that a criminal defendant may be wrongly convicted, perhaps because his defence was ineptly prepared or conducted. When that occurs, it represents an obvious and serious injustice. There are two possible solutions. One is to relax the present restraint on seeking to establish that injustice by civil action. The other is to ensure that, in appropriate cases, the conviction itself can be reviewed. It seems to us clear that it is this second solution which has, over the past century, been favoured: by giving a criminal defendant a right of appeal; by providing a relatively low standard for the admission of fresh evidence on appeal; by empowering the appellate court to order a new trial; by giving the Home Secretary power to refer a case back to the Court of Appeal; and by proposals to establish a new review body.

40. *Hunter, Walpole,* and *Smith* were all considered by the House of Lords in *Hall v Simons* [2002] 1 AC 615, the case in which the advocate's and solicitor's immunity from suit was explained and restricted. However, the rule in *Hunter* was repeatedly restated (see Lord Steyn at 679E; Lord Browne-Wilkinson at 685C-D; and Lord Hoffmann at 706D). In the words of Lord Browne-Wilkinson:

> "It follows that, in the ordinary case, an action claiming that an advocate has been negligent in criminal proceedings will be struck out as an abuse of process so long as the criminal conviction stands. Only if the conviction has been set aside will such an action be normally maintainable."

5.4 Inconsistency Principle

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

42. Authority for that proposition can be found in *Gray*, where Lord Hoffmann said:

> "36. *Clunis's* case was followed by the Court of Appeal in *Worrall v British Railways Board* [1999] CA Transcript No 684 in which the plaintiff alleged that an injury which he has suffered as a result of his employer's negligence had changed his personality. As a result, he had on two occasions committed sexual assaults on prostitutes, for which offences he had been sentenced to imprisonment for six years. He claimed loss of earnings while in prison and thereafter. The Court of Appeal struck out this claim. Mummery LJ said:
>
> 'It would be inconsistent with his criminal conviction to attribute to the negligent defendant in this action any legal responsibility for the financial consequences of crimes which he has been found guilty of having deliberately committed'.
>
> 37. The reasoning of Mummery LJ reflects the narrower version of the rule. The inconsistency is between the criminal law, which authorizes the damage suffered by the plaintiff in the form of loss of liberty because of his own personal responsibility for the crimes he committed, and the claim that the civil law should require someone else to compensate him for that loss of liberty…"

43. The same principle of consistency and coherence was highlighted by Lord Toulson in *Patel v Mizra*:

> "99. Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand."

5.5 Summary

44. Throughout his submissions, on behalf of the appellant, Mr Stewart repeatedly criticised the judge for failing to start her analysis with a consideration of the general rule as to recoverability and concentrating instead on the exceptions. I do not consider that to be a fair criticism: the judge expressly referred to his underlying submission at [46], cited at paragraph 17 above.

45. However, for the avoidance of doubt, I turn to the two issues raised under Ground (iii) of the appeal on the express basis that, although the starting point is the general rule noted at section 5.1 above (which would suggest that the claims should not be struck out in principle), the question raised by this appeal is whether the claims are caught by the exceptions at sections 5.2-5.4 above (which, on the judge's analysis, meant that they fell to be struck out as a matter of principle).

6. THE ABUSE OF PROCESS ISSUE

46. As I understand it, the theoretical abuse of process argument would have been based on the proposition that an unequivocal assurance by the prosecutor was given to the appellant that he would not be prosecuted, and that he acted on that assurance to his detriment: see *R v Abu Hamza* [2006] EWCA 2918 and *Archbold* 2020 at paragraphs 4.93 and 4.94. The authorities discussed in those passages make plain that demonstrating an abuse of process on this basis is a high hurdle for a defendant to overcome.

47. Although it was not the basis of the application to strike out, and so does not arise for determination on this appeal, I should say that, in my view, the necessary ingredients of any abuse of process argument are not properly pleaded in the amended Particulars of Claim. In order for the first element to be established, Mr Stainer (as the person making the relevant representation) would have to have been a person responsible for (or at least involved in) the decision to prosecute on behalf of Natural England. The mere fact that he was an employee of the prosecutor is insufficient for an abuse argument: the cases suggest that the representor needs to be someone with significant authority, such as prosecuting counsel: see *R v Bloomfield* [1997] 1 Cr App R 135. It is not alleged in the careful pleading that Mr Stainer had any such role in the prosecution.

48. Secondly, the representation would have had to have been unequivocal: see *Abu Hamza* and *Bloomfield*. This would require the actual words used by Mr Stainer to be cited in the pleading or, at the very least, a plea that the words used amounted to an unequivocal representation. Neither is alleged here.

49. The third necessary ingredient, namely detriment, is also inadequately pleaded. The appellant would have to show that he had acted to his detriment in relying on the alleged assurance from Mr Stainer. But the pleading simply states that he agreed the scope of the remedial work and paid for it to be carried out. On the face of it, the carrying out of appropriate remedial work would have been the minimum requirement of Natural England in any event, and therefore the appellant's legal obligation regardless of prosecution. It is very difficult to see how the carrying out of this work was to the appellant's detriment if it was what he was obliged to do by law. Moreover, had the appellant not done the work, the fine would presumably have been even greater.

50. For these reasons, I am very doubtful as to whether the claim in respect of the theoretical abuse of process is properly pleaded or capable of being made out. But for the purposes of the appeal only, I will assume that it gives rise to at least an arguable ground of negligence.

51. In my view, the claim as to WBD's alleged failure to raise the theoretical abuse of process argument contravenes the doctrine of illegality and is an abusive collateral attack on the appellant's conviction and sentence which, if pursued, would or might give rise to an inconsistent result. My reasons for that conclusion are as follows.

52. The appellant now wishes to argue that there was an abuse of process argument which should have been run on his behalf in the criminal proceedings. That can only be in order to say that his subsequent conviction should not have occurred, and/or that the fine should not have been imposed, and that he should be compensated in damages as a result. The allegation can have no other substantive purpose. It is fanciful to say, as

Mr Stewart hinted, that the claim was being made because the appellant wanted the conduct of WBD "investigated" generally, and that it was an important policy consideration for legal advice to be competent. The abuse argument is being pursued because it is an essential part of the appellant's continuing refusal to accept his conviction and sentence. In such circumstances, it is hard to imagine a clearer collateral attack on the conclusions of the Crown Court (and in this case, on the decision in the CACD).

53. Mr Stewart submitted that it is perfectly possible for someone who is guilty of the underlying offence to run a successful abuse of process argument. So it is, but the stay imposed after a successful abuse argument occurs *before* that person has been convicted and sentenced; indeed, if there is a successful abuse argument, there will never be a trial at all. Here, of course, there was both a conviction and a sentence.

54. Mr Stewart accepted that he could not identify any authority in which a person convicted of a criminal offence and sentenced accordingly was able successfully to blame the conviction or sentence on his former solicitors because they had not run an abuse argument (or any other kind of argument which might have ended the proceedings) at an earlier stage. Instead, the authorities noted above are clear: the alleged failure to pursue a defence properly cannot give rise to subsequent, parasitic litigation against the former solicitors: see *Smith v Linskills*.

55. The authorities stress that a defendant who objects to his conviction and/or sentence has the right of appeal, and that that is the route which an aggrieved defendant in criminal proceedings must take if he or she considers that some argument or point was not advanced at the trial. Furthermore, the mounting of an appeal was the route which the appellant unsuccessfully took in the present case. It is contrary to public policy to allow those convicted of criminal offences to attack their conviction and sentence at a later date by identifying theoretical arguments which they say should have been advanced at an earlier stage, when those arguments could have been (but were not) raised on appeal.

56. Mr Stewart submitted that this case was an exception to the principle in *Gray* and *Hunter*, in two respects. First, he said that the authorities proceeded on the basis that the negligence came first, and the criminal act second. He said that this was a different case because here the criminal act came first, and the negligence arose subsequently. In my view, that was no answer to the principles to be derived from the authorities set out above. *Gray*, *Hunter* and the other authorities noted above were not cases on causation but authorities for a wider set of principles. Moreover, the causation argument was itself incorrect: whilst in *Gray* the negligence had preceded the criminal conduct, in *Smith v Linskills* the alleged negligence came subsequently. That did not prevent the claim from failing at the interlocutory stage. Indeed, I rather agree with Mr Hubble QC that, where the tortious act comes after the criminal conduct, it makes it even clearer that the party responsible for the tortious act (in this case WBD) can have had no responsibility for the consequences of the prior criminal conduct.

57. Secondly, Mr Stewart sought to rely on the alleged similarities between this case and *Walpole.* But I was unpersuaded by the comparison. *Walpole* was genuinely an exceptional case because there it appeared that, through the inadvertence of the defendant's solicitors, the Crown Court had made an error of law which had gone uncorrected. That was the public policy reason why the subsequent claim was permitted

to continue: that the law should not be left in an uncorrected state. The present case is entirely different because there was no error of law. No one suggests that the Crown Court or the CACD made any such error. In my view, therefore, the judge was right to find that this was the sort of unexceptional case identified by Bingham LJ in *Smith v Linskills*: to use his words, whatever criticisms could be made of WBD, it is "quite impossible to hold that [the appellant] lacked a full opportunity to contest the charge".

58. This brings me back to the incontrovertible fact that, had the abuse of process argument been regarded as even arguable, it would and should have been raised at the hearing before the CACD. In both the Crown Court, and then the CACD, every possible point was taken by the appellant. He left no stone unturned in seeking to avoid his liability for the destruction in Gelt Woods. In the CACD, he even sought to undo his earlier guilty plea. Furthermore, in relation to the argument about venue, in his appeal the appellant sought to rely on an alleged assurance from a junior solicitor at Natural England that they would not object to trial in the Magistrates' Court. In all the circumstances, therefore, if the appellant had received the alleged unequivocal representation from Mr Stainer, (rather than just a passing remark) and/or if he had acted on it to his detriment (rather than done what he was always obliged to do) he would and should have raised that no later than the hearing of his appeal against conviction and sentence.

59. As already noted, at the hearing of that appeal, the appellant was represented by an entirely new legal team. It was open to them to take any point which they thought would or might be of assistance in the furtherance of the appeals against conviction or sentence, regardless of any errors or omissions which might have been made before. That would therefore have included the abuse of process argument. It is all too common in hearings before the CACD for criticisms to be made of the defendant's previous legal advisors; there is even a special process by which, if privilege is waived, these criticisms are passed on to them so that their responses to the acts and omissions alleged can be considered as part of the appeal hearing. This process is designed to ensure that all the points available to a defendant are advanced before the CACD, regardless of what might have gone wrong in the Crown Court. It is also designed to ensure that there is not a constant stream of solicitors' negligence cases started by disgruntled criminal defendants, and to prevent a situation where every criminal case that ends with a conviction then gives rise to a subsequent claim in negligence against the lawyers, with the same issues being re-argued in a different court.

60. In the present case, if the abuse of process argument had been thought to have any mileage at all, it could and should have been raised in the CACD. That is what Sir Thomas Bingham MR specifically had in mind in *Smith v Linskills* (see paragraph 39 above). It was not mentioned. It cannot be raised now under the guise of a negligence claim against WBD.

61. Mr Stewart also submitted that, if the abuse of process argument had been successful, this case would never have gone to trial and that, as a result, the raising of the claim now in the negligence proceedings was not inconsistent or incoherent, and did not bring the law into disrepute. I do not accept that submission. It is impossible to ignore the fact that this case did go to trial and that the appellant was convicted and fined. It is these facts that mean that any attempt now to argue that it somehow should not have gone to trial at all offends against the inconsistency principle and runs the risk of inconsistency and incoherence.

62. Finally, I have considered whether, if the three different heads of loss said to flow from the failure to run the abuse argument, namely the fine, the contribution to the prosecution costs, and the appellant's own costs, are analysed separately, a different result would eventuate. In my view, the same result is produced. There is no basis for distinguishing between any of these heads when considering the claim based on the abuse of process issue. Each of these items of financial loss comprise the direct consequences of the appellant's criminal conduct and his subsequent conviction.

63. To the extent that it is necessary or appropriate, I should say that I consider this to be a fair and proportionate result (using the analysis outlined by Lord Toulson in *Patel v Mizra*). It is in accordance with the doctrine of illegality; it avoids an abusive collateral attack on the appellant's conviction; and it avoids both inconsistency and incoherence. There is no public policy which strongly suggests a different outcome; even the complaint that WBD would avoid liability for their own default (which I accept is in play) does not go very far, since the appellant had an opportunity to do something about that in the CACD and failed to take it.

64. For all these reasons, I would dismiss the appellant's appeal in respect of the abuse of process issue.

7. THE VENUE ISSUE

65. The appellant alleges that WBD should have advised him that the case should have remained in the Magistrates Court where the fine would have been so much less than the fine actually imposed. Again, I have a preliminary observation about the nature of the pleaded claim.

66. I consider it likely that, although immaterial for the purposes of the striking out application, the claim in respect of venue is likely to fail for reasons of causation. The suggestion appears to be that, if the appellant had chosen to be tried in the Magistrates Court, and if Natural England had agreed, then that is what would have happened. I acknowledge the WBD attendance note of 18 July 2012 which suggests that the Magistrates would have accepted jurisdiction, but I note that that was a statement apparently made when the Magistrates already knew that the appellant had elected trial at the Crown Court; when the facts of the offences had not been explained in any detail; and before the Magistrates could have made any proper investigation into the degree of the appellant's culpability.

67. On the facts of this case, it is likely that, when they were in full possession of the facts, the Magistrates would have sent this case to the Crown Court in any event. I have set out at paragraph 12b) above the Lord Chief Justice's observation that a seven-figure fine was appropriate in a case of this sort. 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.

68. As I have said, for the purposes of this appeal only, I am prepared to give the appellant the benefit of the doubt in relation to what the Magistrates may have done. But it seems to me that this issue of causation is one of the "formidable obstacles" that Males LJ had in mind when framing his permission to appeal.

69. Contrary to the abuse of process issue, which so obviously runs contrary to the appellant's conviction, I accept that the venue issue gives rise to slightly different considerations such that it is appropriate to analyse it by reference to the three heads of loss outlined by Mr Stewart at the appeal hearing (paragraph 24 above). That is primarily because the venue issue does not involve the assertion that, if proper advice had been given, a conviction would not have resulted.

70. I deal first with the claim for damages equivalent to the amount of the fine as a result of the alleged negligent advice as to venue. I consider that this claim was rightly struck out.

71. As the amended Particulars of Claim makes plain, the venue claim is made to support the assertion that the fine in this case should only have been £20,000 or £40,000 at most. I consider that that is a clear attack on the punishment imposed upon the appellant as a result of his conviction. The fine of £450,000 is the direct consequence of the appellant's criminal conduct. It is the punishment considered appropriate by the Crown Court and the CACD. The allegation in respect of the venue issue seeks to undermine the amount of the fine that was imposed; it seeks to reduce it by way of the claim for damages. It therefore offends against the doctrine of illegality and the inconsistency principle, as explained in *Gray*, and is a collateral attack on the conviction and punishment imposed by the criminal courts, contrary to *Hunter* and *Smith v Linskills*. In the words of Lord Toulson, it is "giving with the left hand what it takes with the right hand".

72. As to the second head of loss, namely the costs which the appellant was ordered to pay to Natural England, I consider that the same principles apply. In criminal proceedings, an order to pay the prosecution costs is one of the sanctions which the Crown Court is entitled to impose following a plea of guilty. Such orders are not common, and they are usually made in circumstances where the Crown Court considers that the conduct and means of the defendant warrants the making of such an order. It is therefore one of the "financial consequences" of the crime, as per Mummery LJ in *Worrall v British Railways Board* unreported [1999] CA Transcript No 684. But for the appellant's criminal conduct, such an order would not have been made.

73. Accordingly, I regard the claim to recover those costs against WBD as no different in principle to the claim in respect of the fine: it is a clear infringement of the narrow rule in *Gray* and it amounts to an abusive attack on the conviction and the fine imposed. Again, therefore, I agree that this claim was rightly struck out.

74. I have, however, concluded that the third head of loss claimed in consequence of the venue issue, namely the additional legal costs incurred by the appellant himself, is at least potentially in a different category. Those costs were not part of the punishment imposed by the criminal court. They will not necessarily have been caused by the criminal conduct if, for example, it could be shown that those costs are higher than they should have been because of the allegedly negligent advice about venue. Neither is it inconsistent or incoherent to say that, whilst the conviction, fine and costs ordered by the court are inviolable and cannot form the basis of a claim against WBD, the claim for the appellant's own additional costs could be, in principle, the legitimate subject of a negligence claim.

75. I reach this conclusion with reluctance, particularly given what I have said about the causation difficulties which I believe the venue issue will face. But as a matter of principle, which is all we are being asked to decide at this stage, I consider that it is open to the appellant to argue that his costs were higher than they should have been because of the alleged negligence on the part of WBD in respect of the appropriate venue. To that limited extent, I would allow the appeal.

8. CONCLUSIONS

76. These proceedings began as an express attack on the appellant's conviction and the fine that was imposed upon him. It is entirely unsurprising that the judge struck it out. Whilst the amendments that are proposed to the Particulars of Claim go some way to acknowledging the judge's ruling and the refusal of permission to appeal on Grounds i) and ii), these remain proceedings which generally fall foul of the doctrine of illegality and the inconsistency principle, and constitute an abusive collateral attack on the conviction and the sentence. I consider that, on an application of these principles, the claim in relation to the alleged failure to take the abuse of process argument must fail in full. It was properly struck out.

77. As to the allegation in respect of the advice given about venue, I consider that the claims in respect of the fine and the order to pay the prosecution costs fall foul of the same principles of illegality/inconsistency/collateral attack articulated above. I do however accept that the claim in relation to the appellant's own additional costs is a claim which, in principle anyway, and limited to the venue point, is not susceptible of being struck out at this stage.

78. Throughout his submissions, Mr Stewart QC 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 Stewart'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.

79. For these reasons, if my Lords agree, I would allow the appeal to the limited extent noted in paragraphs 74 and 75 above, and would dismiss the remainder.

LORD JUSTICE FLOYD:

80. I agree.

LORD JUSTICE McCOMBE

81. I also agree.