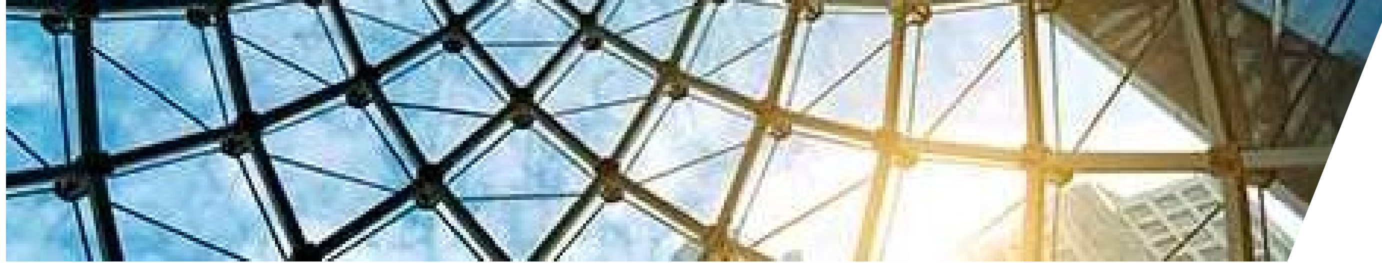

Dziugys v Ersan and Co: the Limits of Botched Litigation Claims

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INTRODUCTION

In *Dziugys v Ersan and Co* [2024] 434 (KB), the High Court rejected a claim for professional negligence against a solicitor arising from a failed personal injury action.

This note reviews the decision.

Botched litigation claims can be hard to defend. There are those where it is obvious to everyone but the defendant solicitors that the underlying claim was hopeless, yet it was doggedly pursued until a Judge finally put it out of its misery. Then there are those where the claimant might have won if it were not for the bungling incompetence of his solicitors. Such cases commonly feature a trail of missed deadlines, unless orders and periods of inactivity leading to the inevitable striking out order.

Dziugys was a different sort of case altogether. It is instructive of the limits of this sort of claim.

THE PERSONAL INJURY CLAIM

Mr Dziugys was a motorcycle courier. He was riding along the fast lane of the M4 motorway. The lane was blocked by a Land Rover which had crashed into the central reservation. He moved into the middle lane to avoid it. He was then hit by a truck. He was dragged underneath it. His motorcycle burst into flames. He was seriously injured. He blamed it all on the negligence of the truck driver. He retained a firm of solicitors named Hafezi to bring a personal injury claim against the company which owned the truck and employed the driver. Hafezi acted on a CFA. ARAG provided ATE cover.

The truck owner applied for summary judgment. This was unsuccessful. The action proceeded. Disclosure took place. Two witness statements were for Mr Dziugys. Hafezi ceased trading. At an advanced stage of the proceedings. Mr Dziugys retained Ersan and Co in its place. The case went to trial. Counsel for Mr Dziugys made an oral application to amend the Particulars of Claim. It was allowed. Mr Dziugys was called to give evidence. In the usual way, he was taken to his witness statements. He confirmed that they were his and confirmed that it was his signature on the statements of truth. But he resiled from this when cross examined on inconsistencies between the two statements. He said that one of the statements was not his. He claimed that his signature had been forged. The Judge found him "*an utterly unreliable witness"*. He gave judgment for the truck owner and ordered Mr Dziugys to make a payment on account of costs.

After the trial, Mr Dziugys presented Ersan and Co with an opinion from a handwriting expert which supported his claim that the signature on the witness statement was not his. He asked about the time limit for appealing the judgment. Ersan and Co did not directly answer the question but advised that an appeal would not succeed. They pointed out that the Judge simply did not accept his version of events. They suggested that he take up the issue of the signature with his previous solicitors. ARAG asked Ersan and Co for the case file. They supplied it and did not make a copy.

THE PROFESSIONAL LIABILITY CLAIM

Mr Dziugys asked for his file. Ersan and Co explained that they no longer had it. ARAG initially refused to return it, but eventually did when pressed. Mr Dziugys then brought proceedings against Ersan and Co as a litigant in person. He alleged that the firm had breached its duties before, during and after the trial.

He maintained that, before trial, the firm should have spotted the forged signature, ensured that certain photographs depicting the position of the Land Rover were in the trial bundle, obtained tachograph cards[1] from the truck operator and taken a statement from the driver of the Land Rover.

Notwithstanding that Counsel had appeared for him at trial, Mr Dziugys sought to blame the defendant solicitors for allegedly obtaining permission to amend without instructions from him and failing to "*step in"* when he was cross examined on inconsistencies between the two statements.

After the trial, he complained, the firm had ignored his request to appeal the judgment and had refused to return the case file.

THE JUDGMENT

The claim failed. In common with the Judge in the underlying proceedings, Sarah Clarke KC (sitting as a Deputy Judge of the High Court) found the Claimant to be an unreliable witness.

Beginning with the alleged pre-trial breaches, the Judge accepted that a particularly diligent solicitor might have noticed that the Claimant's name was not printed beneath 'his' signature on the witness statements and made enquiries. However, in circumstances where the statements had been prepared by an ostensibly legitimate, competent and honest firm of solicitors with duties to the court and no apparent motivation for forging a signature, the Defendant had no reason to suppose that they were not genuine.

She found that the Claimant failed to meet the burden of proof that any photographs which existed were not in the trial bundle. She accepted the solicitor's evidence that whatever photographs had been disclosed would have been in the trial bundle. She also concluded that extensive evidence was available as to the position of the Land Rover and no further photographic evidence was needed.

The Judge found that the Defendant was entitled to conclude that Hafezi had already dealt with gathering evidence before it was retained. As such, it was not in breach of duty for failing to obtain tachograph records or a statement from the Land Rover driver.

Turning to events at trial, she accepted the solicitor's evidence that the Claimant gave instructions for amendments to be made to the Particulars of Claim. She found that there was nothing which the Defendant could reasonably have done to 'step in' while the Claimant was giving evidence.

As to subsequent developments, the Judge found as a fact that the Defendant did not fail to act on the Claimant's instructions to appeal against the judgment but rather advised against appealing. She was satisfied that this advice was entirely reasonable. She found, as the solicitor had effectively accepted when giving evidence, that it was a mistake not to respond to the Claimant's question about the deadline for an appeal, but that this did not amount to professional negligence.

It was, she concluded, reasonable to provide the case file to ARAG in circumstances where the Claimant faced an adverse costs order and ARAG would have entitled to refuse to meet it without sight of the file. She accepted that it would have been best practice to copy the file before parting with it but concluded that a failure to do so was not negligent.

For completeness, the Judge added that the claim must in any event fail for want of causation. The Judge was satisfied that none of the things which the Claimant alleged the Defendant should have done would have made any difference. The Claimant had failed to demonstrate that there was a real and substantial chance of a more favourable outcome.

DISCUSSION

The case is on rather singular facts and raises no new point of law. It is nevertheless interesting.

Mr Dziugys was the sort of claimant for whom one might expect the court to have sympathy, but this did not preclude it from taking a robust approach.

The distinction between the particularly diligent and the ordinarily competent solicitor has been drawn before in the authorities and is fundamental. It will almost always be possible to think of more which the solicitor could have done to

[1] These would have evidenced the speed of the truck and for how long it had been driven

protect the client's interests, but it does not follow that it was negligent. As Oliver J put it in the well-known case of *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1978] 3 All ER 571, "*It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it. upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do…"*

Practitioners who take over an ongoing matter from another firm of solicitors are in a difficult position. They are likely to know nothing of the competence or thoroughness of their predecessors, but the client is not going to want to pay them to carry out a comprehensive audit of their work. This decision provides some comfort that they will not be treated as insurers of the other firm's work. The outcome, however, might be different in the case of a glaring error or omission.

The editors of *Jackson & Powell on Professional Liability* cite cases such as *Browning v Brachers* [2004] EWHC 16 in support of the proposition that "*it will generally be negligent to fail to collect essential evidence,*" but there is a distinction between what is essential and what might be thought helpful. If, for example, there was a requirement for a claimant to adduce expert evidence in support of the claim, it would be hard to resist the conclusion that the claimant's solicitor was negligent for failing to do so. It will not always be so clear cut.

It will again often be possible to identify evidence which could have been brought before the court. There might be peripheral witnesses who could have been tracked down and proofed. There might be WhatsApp messages which were not reviewed in the disclosure phase. There might be helpful documents which were not in the trial bundle. It is one thing to identify additional evidence, but quite another to say that the solicitor was negligent for not getting it before the court. A great deal of judgment is called for in dealing with evidence. One practitioner might deem it worthwhile following up a line of enquiry which another would consider a waste of costs. Whether there is a breach will be fact specific.

The claimant will then need to argue that the missing evidence might have made all the difference. This can never be said with certainty. In a case such as this, therefore, causation is determined on a loss of a chance basis outlined in the well-known case of *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602. The claimant must first show that it had a real and substantial chance of securing a better outcome. The bar is set low. A 10% chance is deemed to be real and substantial. Nevertheless, this case shows that it should not be assumed that a claimant will easily surmount it.

A claimant will face a particular challenge where, as here, the court found him to be an unreliable witness. There is an analogy with *Radia v Marks* [2022] EWHC 145 (QB) in which the claimant got nowhere in trying to persuade the court that he was found unreliable in underlying proceedings because an expert had been negligent rather than because he had lied.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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