Neutral Citation Number: [2020] EWHC 2386 (QB)

Case No: D40YM394/BM00051A

**In the High Court of Justice**
**High Court Appeal Centre Birmingham**
**On appeal from the Walsall County Court**
**Order of Miss Recorder McNeill dated 27 February 2020**
**County Court case number: D40YM394**
**Appeal ref: BM00051A**

Birmingham Appeal Centre
Priory Courts, 33 Bull Street,
Birmingham B4 6DS

Date: 07/09/2020

**Before** :

**MR JUSTICE MARTIN SPENCER**

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**Between :**

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| **JAMES HINSON** | **Claimant/ Appellant** |
| **- and -** | |
| **HARE REALIZATIONS LIMITED (2)** | **Defendant/ Respondent** |

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**Mr Rashid Ahmed and Mr Zeeshan Raza** (instructed by **Walker Preston Solicitors**) for the **Claimant/Appellant**
**Mrs Vlora Smedley** (instructed by **DWF Law LLP**) for the **Defendant/Respondent**

Hearing dates: 13 July 2020

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# APPROVED JUDGMENT

**MR JUSTICE MARTIN SPENCER**

**Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.30am on 7 September 2020.**

**MR JUSTICE MARTIN SPENCER :**

## Introduction

1. Pursuant to permission granted by myself on 17 June 2020, the Claimant, Mr James Hinson, appeals against the decision of Miss Recorder McNeill QC dated 27 February 2020 whereby she refused his application to adjourn the trial and to rely on an expert acoustic engineering report in place of the report from the single joint expert who had been instructed by the parties. Having dismissed the application to adjourn, the learned Recorder proceeded to hear the evidence and, having exercised her discretion to override the provisions of section 11 of the Limitation Act 1980 and allow the claim to proceed pursuant to section 33 of the Limitation Act, she dismissed the claim on its merits on the basis that the Claimant had failed to persuade her that he had been subjected to a daily exposure of more than 90 dB (A) which, it was agreed, he needed to do if the claim was to succeed.

## The background facts

2. The Claimant was employed by the second Defendant, Hare Realizations Limited (hereafter "the Defendant"), for about 10 years between 1976/77 and 1986/77. He worked in the Machine Shop and claimed to have been exposed to high levels of noise without being provided with any or adequate hearing protection or any training regarding the risks associated with exposure to excessive noise.

3. Proceedings were issued in September 2017 and Particulars of Claim were served on 7 December 2017 alleging negligence and breach of statutory duty and seeking damages for Noise Induced Hearing Loss ("NIHL"). The claim was supported by a medical report from a consultant ENT surgeon, Mr Graham Cox, dated 23 August 2016. A defence denying liability was served on 13 September 2018.

4. On 23 November 2018, District Judge Sehdev made an order allocating the claim to the fast-track and giving directions. There were then discussions between the parties as to the instruction of a single joint expert to produce an engineering report and, from a pool of proposed experts, the Claimant selected Ms Laura Martin of Strange, Strange and Gardner on 21 December 2018. The Defendant agreed the instruction of Ms Martin on 2 January 2019 and also agreed the Claimant's draft letter of instruction. Formal instructions were accordingly sent to Ms Martin on 4 March 2019.

5. Ms Martin's report was sent to the parties on 27 August 2019. That report did not support noise levels which would have been sufficient to enable the Claimant to succeed in his claim.

6. On 11 September 2019, the Claimant's solicitors raised questions of Ms Martin pursuant to part 35 CPR, to which she replied on 3 October 2019. This was followed by a letter from the Defendant's solicitors to the Claimant's solicitors on 11 October 2019 highlighting what was, in their view, the lack of merits and prospects of success in relation to the claim.

7. The trial was originally listed to be heard on 5 November 2019, but was vacated due to lack of judicial availability and relisted for 6 December 2019. At that stage, there

had been no application to adjourn the trial or for permission for the Claimant to rely upon an alternative expert. The second trial date was also vacated, this time on the Claimant's application as he was in hospital and unable to attend. On 19 December 2019, the court relisted the trial to take place on 27 February 2020.

8. What then happened was that, on 20 December 2019, in discussions with another expert, Mr Adrian Watson, in relation to another claim for NIHL, the Claimant's solicitor learned that there were, or might be, deficiencies in Ms Martin's report relating to the applicability of the PERA Survey of Noise in Engineering Workshops (1996) setting out typical machine shops noise levels: for more detail, see paragraph 15 below in this judgment. Taking advantage of the further delay, on 23 December 2019 the Claimant applied to the court to put further Part 35 questions to the single joint expert, based upon what the solicitors had learned from Mr Watson on 20 December. District Judge Riley granted permission to the Claimant to put the further Part 35 questions to Ms Martin on 9 January 2020. At that hearing, the Claimant's then counsel, Mr Farrell, referred to the fact that those instructing him had had a conversation with another expert on 20 December 2019 and had made their application to put the further Part 35 questions to Ms Martin three days later. Ms Martin provided her responses to the further Part 35 questions on 6 February 2020.

9. On 10 February 2020, the Claimant's solicitors wrote to the Defendant's solicitors advising that they were "obtaining the Claimant's instructions" in the light of Ms Martin's further replies: at the same time, the Claimant's solicitors commissioned an expert report from Mr Watson, although they did not inform the Defendant that they were doing so. Mr Watson's report, which was favourable to the Claimant, was received by the Claimant's solicitors on 24 February 2020, three days before the date listed for trial, and an application was immediately issued for an order that:

    i) The trial listed for 27 February 2020 be vacated and be relisted for a two-day trial;

    ii) The case be reallocated to the multi-track (having previously been on the fast-track);

    iii) The Claimant be given permission to rely upon Mr Watson's report, with Ms Martin to continue as the Defendant's expert.

    The draft order attached to the application also provided for further directions to be given. I would comment that it was somewhat presumptuous of the Claimant's solicitors to assume that, if the Claimant was given permission to rely upon the report of Mr Watson, that the Defendants should be forced to rely upon the report of Ms Martin as the Defendants' expert, she having been previously instructed on a joint basis: the Defendants might have sought permission to rely on their own, different expert.

10. The Claimant's application was supported by a witness statement from Mr Naveed of Walker Preston, solicitors, and was opposed by the Defendant which submitted a witness statement from Mr Peter Emenanjo dated 26 February 2020. In that statement, Mr Emenanjo informed the court that the Claimant's solicitors had not given the Defendants' solicitors any indication of their intention to obtain further acoustic engineering evidence and, having set out the chronology of the procedure, stated:

"The above timeline illustrates three key points:

i) The Claimant has purposefully withheld their intentions from the Defendant,

ii) The Claimant has taken unfair advantage of court resources and procedure

iii) The Claimant has exhibited disregard for the integrity of the single joint expert."

**The decision of Miss Recorder McNeill QC**

11. Having set out the chronological background, the learned Recorder set out the parties' respective submissions. The Claimant had submitted that the claim could not be dealt with justly unless the Claimant had permission to rely on Mr Watson's evidence and argued that she should apply the approach set out by Eady J in *Bulic v Harwoods* [2012] EWHC 3657. It was argued that the pertinent matters to be considered were the fact that the expert evidence in question was central to the case, it was of a technical nature and the Claimant had lost confidence in the single joint expert for good reason so that a "balance of grievance" test should be applied.

12. For the Defendant, reliance was placed on the witness statement of Mr Emenanjo and considerable emphasis was placed on the lateness of the application. It was pointed out that this was a relatively low value, fast-track claim where the claim for damages for pain, suffering and loss of amenity was limited to £5,000. Submissions were made about the relative merits of the reports of Ms Martin and Mr Watson but the strongest emphasis was placed on the overriding objective involving considerations of "saving expense, dealing with cases in a manner which is proportionate to the amount of money involved and the complexity of the issues and dealing with case expeditiously and fairly; also allotting an appropriate share of the court's resources while taking into account the need to allot resources in other cases also."

13. The learned Recorder expressed her conclusions as follows:

> "30. In exercising my discretion as to whether to grant the claimant's application to adjourn the trial, I must give effect to the overriding objective of dealing with cases justly, and at proportionate cost, taking into account all the circumstances and applying the guidance in *Bulic.*
>
> 31. I accept that the evidence of the single joint experts in this case, Mrs Martin, were central to the case and of a technical nature. It was necessary or appropriate for me to determine on this application the merits of her expert opinion, when compared with that of Mr Watson.
>
> 32. There was some force in the claimant's submission that Ms Martin's evidence was not supported by the sort of detailed calculations that are often seen in this type of report and which are shown in Mr Watson's report. I accepted that the claimant had lost confidence in Mrs Martin and would be aggrieved if this case was permitted to proceed because the claimant would

then lose the benefit of a claim which might have reasonable prospects of success. The low value of the claim was relevant in exercising my discretion but was not conclusive.

33. I accepted that the claimant had lost confidence in Mrs Martin for a genuine reason and, on balance, that the reason was a good reason. This case was, however, very far from the sort of case where the single joint experts' opinion is obviously lacking in cogency or displays a clear lack of analysis or even partiality. On the face of the two reports, it is perfectly possible that the judge at trial would prefer the evidence of Mrs Martin, I cannot say.

34. Looking at this application in the light of the overriding objective, I take into account that this case was ready to proceed in November 2019 and was postponed only because of a lack of judicial availability. I further take into account that in December 2019 the case was postponed because the claimant was not available. It is reasonable to assume that on both those dates the parties were ready to proceed. The application to vacate was being made only on the third occasion of listing.

35. Mrs Martin is an expert with an appropriate expertise from a well-known firm of experts whose name was put forward by the claimant. There is no explanation as to why a complete list of part 35 questions could not have been asked of Mrs Martin at a much earlier stage so that answers could have been provided in time not to jeopardise this trial date. I note that the first replies were received on 3 October 2019.

36. This is a relatively low value case in which very considerable cost has already been incurred, not least because of earlier postponements, and where the costs of the trial would be very substantially increased if the case proceeded with two experts as a two day multi-track case.

37. I do not read *Bulic* as requiring the grant of an application to adjourn, however late it is made, solely because a single joint experts' report is essential to the case, of a technical nature and a party has lost confidence in the expert for good reason. There was no application to adjourn the trial in *Bulic*. In assessing the balance of grievance, the claimant will be aggrieved at not being able to rely on evidence which might enable him to win his case; but the defendant will also have a strong sense of grievance if this low value case is adjourned for the third time, on the date of trial, with the inevitability of the defendant incurring further very considerable costs, where the single joint expert was proposed by the claimant and where her evidence may well be preferred to that of Mr Watson if the case went to trial.

> 38. Taking into account all the above matters, in my discretion I refuse the application to vacate and, it follows, the claimant's application to rely on Mr Watson's evidence."

**The Claimant's Arguments on Appeal**

14. On this appeal Mr Ahmed, representing the Appellant, started by referring to the decision of the Court of Appeal in *Daniels v Walker* [2000] 1 WLR 1382 and the decision of Eady J in *Bulic v Harwoods* [2012] EWHC 3657 (QB). Relying on those authorities, he referred to the learned Recorder's favourable findings, from the point of view of the Claimant, that the evidence of the single joint expert was central to the case and of a technical nature: see paragraph 31 of her judgment. He also referred to the learned Recorder's acceptance that the Claimant had lost confidence in Ms Martin for a reason which was both genuine and a good reason. He submitted that the test for the exercise of discretion as to whether to allow a party to replace a single joint expert with his own expert has a low threshold and there is no requirement of exceptionality.

15. Mr Ahmed referred to the detailed background to the instruction of Mr Watson. Thus, in the application, at box 10, it was stated:

> "6. On 20 December 2019 and during discussions with a noise expert in a separate claim, it was brought to the Claimant's solicitors' attention that although the PERA Survey of Noise in Engineering Workshops (1996) set out typical machine shops noise levels in the range of 77–87 dB(a) that:
>
> 1) Due to the date of its publication, it did not have regard for short periods of noise exposure from the use of short periods of high intensity noise such as compressed air lines to blow away swarf for example;
>
> 2) The noise levels in the PERA report would be, for example 2-3 dB(a) higher in a typical machine shop, if noise exposure from the use of short periods of high intensity noise such as compressed air lines to blow away swarf was included;
>
> 3) This would mean the typical machine shop's noise levels were in the range 80-90 dB(a); and
>
> 4) A total of 75 machine operators using different machines and compressed air lines throughout the working day was not the 'typical' machine shop referred to in the PERA Survey of Noise in Engineering Workshops (1996) in any event.
>
> 7) This is, of course, very technical information and was not known by the Claimant's solicitors at the time part 35 questions were raised of the SJE. Indeed this was not

> known by the Claimant's solicitors prior to the trials on 5 November 2019 and 9 December 2019, both vacated."

What this showed was that, serendipitously, the Claimant's solicitors learned as a result of seeing the expert in a different case that there were aspects of Ms Martin's report which were capable of challenge on a different basis and that the Claimant's solicitors acted promptly in seeking to put further part 35 questions to Ms Martin based on this new information. Having received those part 35 responses, the solicitors were then quick to instruct Mr Watson and then made their application to adjourn promptly once Mr Watson's report was available. Thus, although it was unfortunate that the application had been made only three days before the trial, Mr Ahmed submitted that there could be no reasonable criticism of Claimant's solicitors and they could not be "blamed" for delay. He did accept, though, that neither the court, nor the Defendant, had been informed of the Claimant's intention to instruct Mr Watson.

16. In the light of the above, Mr Ahmed submitted that although, at paragraph 36 of her judgment, the learned Recorder took into account matters which were relevant, they should not have weighed as heavily as they did in circumstances where the Claimant was not to blame. He submitted that, at paragraph 37 of her judgment, the learned Recorder asked herself the wrong question, as the case of *Bulic* was not concerned with an application to adjourn the trial. He submitted that it was enough for an application of this kind to succeed if the Claimant would lose the benefit of a claim which might have reasonable prospects of success where the report in question is technical and goes to a substantive issue.

17. In written submissions, Mr Ahmed also submitted that the value of the claim should not be a conclusive factor, referring to *dicta* of Warby J in *Stocker v Stocker* [2015] EWHC 1634 (QB). Mr Ahmed also referred to various *dicta* in other decisions: Lord Woolf in *Biguzzi v Rank Leisure PLC* [1999] 1 WLR 1926 at page 1934 F, Sir Thomas Bingham MR in *Abbey National Mortgages PLC v Key Surveyors Nationwide Limited* [1996] 3 All ER 184 at 186-187 and he also referred to the difficulties for a Claimant who is not allowed his own expert in challenging the evidence of a single joint expert where that evidence is technical and central to the case. Finally, Mr Ahmed also drew on Article 6 ECHR - the right to a fair trial - in support of his contention that the learned Recorder erred in refusing the application.

**The submissions of the Respondent on Appeal**

18. For the Respondent, Miss Smedley submitted that the court, on this appeal, is faced with the same question as was before Eady J in *Bulic*, namely whether the decision of the judge below was "wrong" on a review hearing, whereby it is necessary to ask whether the judge erred in law or took into account something that was irrelevant or vice versa, or stepped outside the ambit of her reasonable discretion within which there is room for reasonable disagreement. Eady J referred to this being a "significant hurdle" to surmount and Miss Smedley adopted this, submitting that the Claimant in this case has a significant hurdle to surmount to persuade the court that the learned Recorder exercised her discretion wrongly.

19. Miss Smedley further submitted that the judgment of the learned Recorder was fair and balanced, that it did not rely on any particular factor to the exclusion of others, so that, for example, although the fact that this is a low value claim was a relevant factor, it was not a conclusive factor, and was not treated as such by the learned Recorder. She submitted that there was no factor which the learned Recorder took into account which she was not entitled to take into account and, irrespective of the question whether the Claimant's solicitors were to blame for the lateness of the application, that lateness was nevertheless a relevant factor. She submitted that if the Claimant's submissions on this appeal were correct, there would be no scope for the application of the "balance of grievance" or for the application of the overriding objective. So far as the balance of grievance was concerned, Miss Smedley relied upon the fact that the Defendant had not been informed of the Claimant's intention to instruct their own expert prior to 24 February and that the Defendant was entitled to assume that the trial would proceed on 27 February as a fast-track trial rather than be faced with yet another adjournment and the possibility of significant extra costs arising from a multi-track trial where the Defendant might need to instruct its own expert with significant additional costs.

**Discussion**

20. The starting point is, as Miss Smedley submitted and as was observed by Eady J in *Bulic's* case at paragraph 9, that the hurdle faced by a claimant in seeking to persuade an appellate court that the exercise of discretion by a judge at first instance was erroneous is a significant one. I would need to be satisfied that the learned Recorder had misdirected herself in law or had applied the wrong test or had taken into account matters which were irrelevant or had failed to take into account relevant matters which had they not been taken into account or been taken into account, or should have made a significant difference.

21. In my judgment, the correct approach to applications by parties to abandon a single joint expert and adduce their own expert evidence is that set out by Eady J in *Bulic's* case. Eady J referred to the decision of the Court of Appeal in *Daniels v Walker*, where Lord Woolf said:

> "… where a party sensibly agrees to a joint report and the report is obtained as a result of joint instructions in the manner I have indicated, the fact that a party has agreed to adopt that course does not prevent that party being allowed facilities to obtain a report from another expert or, if appropriate, to rely on the evidence of another expert. In a substantial case such as this, the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is to be hoped that in the majority of cases it will not only be the first step but the last step. If, having obtained a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert's report which he or she may wish to challenge, then they should, subject to the discretion of the court, be permitted to obtain that evidence."

In my view, the words "subject to the discretion of the court" are important. As Eady J said in *Bulic's* case, the Court of Appeal did not intend to apply any straitjackets to the court. Eady J said:

> "15. … In referring simply to requiring a 'good reason' [Lord Woolf] was clearly recognising the need for flexibility. What is a 'good reason' in one case may prove quite inadequate in another. None of these judicial observations, made in the context of applying broad principles to very specific factual circumstances, should detract from the breadth of the court's discretion from the general terms in which the guidance was given in the earlier cases."

22. Eady J also referred to the decision of HHJ MacDuff QC (as he then was) in *Kay v West Midlands Strategic Health Authority* which had been relied upon by Judge Simpkiss at first instance in *Bulic's* case, where Judge Mac Duff stated:

> "Where a party requests a departure from the norm and makes what one can term a *Daniels v Walker* application, all relevant circumstances are to be taken into account but principally the court must have its eye on the overall justice to the parties. This includes what I have called the balance of grievance test. The application will only succeed in circumstances which are seen to be exceptional and to justify such a departure from the norm."

In *Bulic's* case, Eady J emphasised the importance of the overriding objective and Judge MacDuff's reference to the "overall justice to the parties". He pointed out that what represents justice between the parties will be very fact sensitive so that it may be distracting to focus too analytically on the reasoning in other cases, however authoritative where the facts were not truly comparable.

23. In my judgment, in the present case, the learned Recorder was faced with the clear task of balancing the interests of the parties, taking into account not only the overriding objective but also the interests of justice generally in seeing that cases are decided expeditiously, at proportionate cost and without undue inconvenience to other parties. In my judgment, the approach of the learned Recorder to this task was impeccable. She was fully aware of the interests of the Claimant and in particular the fact that the evidence of the single joint expert was central to the issues in the case, was technical and that the Claimant had good reason for wishing no longer to rely upon that report. She also took into account that, for whatever reason, the application was being made at a late stage in a case which had already been adjourned twice, albeit not for reasons for which any blame could be attached to the Claimant. She took into account the fact that, but for the non-availability of a judge, the case would have been decided the previous November without any such application being made and the fact that the single joint expert had been chosen by the Claimant and the Claimant had raised questions of that expert on two occasions. She took into the account the fact that if she acceded to the Claimant's application, what would otherwise would have been fast-track trial would become a multi-track trial with a significant increase in costs. Finally, she took into account the late stage of the application and the fact that it would involve the breaking of a fixture with potential

waste of court time and inconvenience to other parties. In my judgment she did not emphasise any particular aspect unduly, to the exclusion of other aspects, but she weighed up all those matters before deciding to exercise her discretion in the way that she did. I take the view that the decision by the learned Recorder was well within the generous ambit of her discretion and that it cannot be said that she erred in law or applied the wrong test or otherwise so misdirected herself that her decision is capable of challenge.

24. I gave permission to appeal in this matter on the basis that it seemed to me that there were issues surrounding the circumstances in which the court should or should not allow a party to abandon a single joint expert and instruct his own expert which might raise questions of general importance, particularly, perhaps, in low value NIHL cases where the single joint expert's opinion will often be determinative of the outcome in the case. However, having heard the argument, I became convinced that the approach of Eady J in *Bulic's* case, and the approach of the learned recorder in this case effectively following Eady J, was absolutely the right one and even though, in that case and on its particular facts, Eady J allowed the appeal and overturned the exercise of discretion by the judge below, the principles with regard to the appropriate approach of the court to such applications which he set out in his judgment were absolutely the right ones and, more importantly, had been applied appropriately by the learned Recorder in this case. In those circumstances, the appeal is dismissed.