Case No: C36YP024, BM00074A
Neutral Citation Number: **[2020] EWHC 3744 (QB)**

IN THE CIVIL JUSTICE CENTRE AT BIRMINGHAM

Birmingham Civil & Family Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

BEFORE:

THE HONOURABLE MR JUSTICE SAINI

BETWEEN:

JOHN HUNT **CLAIMANT**

- and -

ANNOLIGHT LTD & OTHERS **DEFENDANTS**

Legal Representation
Mr Michael Trevelyan (Barrister) on behalf of Walker Preston Solicitors (the Appellant)
John Hunt (Claimant) in person
Mr Nikil Arora (Barrister) on behalf of the Third Defendant (Annolight Ltd)
Mr Denton Douglas (Barrister) on behalf of the Sixth Defendant (Paragon Trade Frames Ltd)

Other Parties Present and their status
None known

Judgment

Judgment date: 18 December 2020
Transcribed from 14:02:32 until 14:47:27

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Mr Justice Saini:

This judgment is in 5 parts as follows:

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I. Overview

1. This is an appeal against an order made by His Honour Judge Godsmark QC ("the judge") sitting at the County Court at Nottingham on 22 April 2020. By that order, the judge directed that the Claimant's Solicitor, Mr Abid Sarwar ("Mr Sarwar") of Walker Preston Solicitors ("the Firm"), attend the hearing of a number of applications in order to be cross-examined by the Defendants. The Firm had represented the Claimant, Mr Hunt, in proceedings for damages for noise induced hearing loss which were discontinued as described more fully later in this judgment. The Firm appeals against the judge's order with the permission of Foster J granted on 9 October 2020.

2. The applications included an application by certain of the Defendants in this claim for an order under Section 51 of the Senior Courts Act 1981 ("the 1981 Act") requiring that the Firm pay the wasted costs of the claim, which had been discontinued by the Claimant on 13 December 2019. There are issues before me in the appeal as to whether the judge had jurisdiction to make an order requiring Mr Sarwar to attend for cross-examination at the hearing of these applications and as to whether, if there was jurisdiction, the judge correctly exercised his discretion to make the order.

3. By way of preliminary observation, I need to say that this appeal is, to say the least, odd because, before the judge, Counsel representing the Firm, who also represents the Firm before me today, clearly submitted to the Judge that Mr Sarwar would probably be required to give evidence at the hearing of the relevant applications. No point was taken as to whether the judge had power to require his attendance or as to whether the judge should exercise it to require attendance. I will return to that matter in due course after describing the background to the claim.

II. The Facts

4. The claim form was issued in the Northampton County Court on 17 December 2016. By his claim, Mr Hunt sought damages in negligence and for breach of statutory duty against six defendants alleging injury in the form of noise-induced hearing loss. Mr Hunt was employed by the Defendants or their predecessors in title for periods between 1979 and about 2004.

5. One particular aspect of the claim, which I need to identify at this stage because it is relevant to one of the issues before me, is that as regards his claim against the Sixth Defendant, Paragon Trade Frames Ltd, Mr Hunt made a specific allegation in his Particulars of Claim that no hearing protection was provided to him by the Sixth Defendant, during his period of employment.

6. The claim was conducted on behalf of Mr Hunt by the Firm and Mr Sarwar is the supervising partner and director of the firm. The claim was pursued on Mr Hunt's behalf by other fee earners within the firm under Mr Sarwar's supervision. During the course of the claim two specific issues became highly relevant.

7. The first issue was whether Mr Hunt had at the times material to the claim against the Third Defendant been a director of the Third Defendant. Had he been a director the viability of his claim against the Third Defendant would have been seriously in doubt, see Brumder v Motornet Service & Repairs Ltd [2013] EWCA Civ 195.

8. The Third Defendant served a Part 18 request upon Mr Hunt seeking further information in this regard and a response dated 9 May 2019 was provided. That response signed, or apparently signed, by Mr Hunt stated in clear terms that Mr Hunt had not been a director of the Third Defendant.

9. The second important matter which arose in the proceedings relates to the issue of hearing protection. As I have indicated, a specific allegation was made in the Particulars of Claim that no hearing protection was provided by the Sixth Defendant during Mr Hunt's employment by them. Mr Hunt's solicitors in a letter dated 3 December 2014 also confirmed, after taking Mr Hunt's instructions, that hearing protection was not provided by the Sixth Defendant.

10. However, and rather confusingly, Mr Hunt's medical expert, Mr Zeitoun, in a report dated 1 August 2015, said that ear protection had in fact been provided for Mr Hunt's use. In a reversal of that position (in a further report dated 4 September 2015) Mr Zeitoun said the opposite, indicating that no hearing protection was provided to the Claimant. Unsurprisingly, this led to some Part 35 questions of Mr Zeitoun.

11. Mr Zeitoun's response to such questions, dated 26 November 2017, confirmed that he "was advised by the Claimant Solicitor that his understanding of the Claimant having been offered hearing protection was inaccurate". This is a rather convoluted way of making a point. But the net effect of what he was saying appears to be that as at 26 November 2017 Mr Hunt's case, made through the Firm, was that ear protection had not been provided.

12. This was all the more puzzling given that in an earlier Part 18 response, signed by Mr Hunt, he appeared to confirm that foam earplugs were introduced by the Sixth Defendant but their use was not enforced. At best, the position was highly confused on this central issue which, it is common ground before me on appeal, went to the heart of certain of the issues on causation and liability in this claim.

13. This is how matters stood when, after an aborted initial trial, the claim came on for trial before the judge on 12 December 2019 in the County Court at Lincoln. Counsel appearing at that hearing, who also appear before me today (that is, Counsel on behalf of the Third and Sixth Defendant) have informed me of what took place at that hearing. Their recollection is supported by the recitals to an order dated 12 December 2019 made by the judge and was not disputed.

14. In short, just before the trial began Mr Hunt's Counsel informed the Court that Mr Hunt had not in fact signed the Part 18 response of 9 May 2019 which, as I have already indicated, stated that he had not been a director of the Third Defendant at the material

time. The Court also noted that in fact information from Companies House showed that what was said in his Part 18 response was false in that Mr Hunt was a director of the Third Defendant at the material time.

15. Counsel for Mr Hunt indicated to the judge that Mr Hunt would discontinue the proceedings. At that point the Defendants made an oral application to the judge to disapply qualified one-way costs shifting and/or for the wasted costs of the proceedings to be paid by the Firm pursuant to CPR 46.8.

16. The judge made the following orders. First, that the Claimant do pay the Defendants' costs of the action. Second, that the determination of whether this costs order should be enforceable against the Claimant and/or should be paid by the Firm would be the subject of a hearing before His Honour Judge Godsmark QC or another judge. Third, the judge directed that the formal applications for costs to be enforceable against the Claimant or the Firm were to be made by 10 January 2020.

17. As regards the response to any such applications, the judge directed that any witness statement from the Firm had to be made by the supervising partner with the conduct of the claim. Appreciating that Mr Hunt might find himself without legal representation at this point, the judge directed that Mr Hunt be at liberty to provide a witness statement to the Court in the form of a letter to the Court signed by him with a statement of truth.

18. In accordance with these directions three applications were made. First, an application dated 3 January 2020 on behalf of the Third Defendant seeking the following relief:

> "1) the Claimant's notice of discontinuance dated 13 December 2019 is set aside and the matter be listed for a hearing to determine if the claim is fundamentally dishonest, and if the Claimant's costs protection should be set aside pursuant to CPR 44.16 subparagraph 1 and 44 PD 12.4 subparagraph A
> 2) the Claimant Solicitor shall accept personal liability to pay wasted costs of the Third Defendant and
> 3) the Claimant's claim to be dismissed following payment of the Third Defendant's wasted costs"

19. This was supported by a witness statement by the Third Defendant Solicitor, which raised the issue of the falsity of the 9 May 2019 Part 18 response concerning whether Mr Hunt had been a director of the Third Defendant. The Fifth Defendant also made an application on 10 January 2020 seeking essentially the same relief as the Third Defendant. That application was supported by a witness statement which also made a more general allegation that Mr Hunt's legal representatives had acted improperly, unreasonably and negligently and have caused the Fifth Defendant to incur costs.

20. Finally, the Sixth Defendant made an application in the same terms dated 8 January 2020. That was supported by a witness statement, which essentially relied upon the points I have summarised earlier concerning the moving and unclear position of Mr Hunt in relation to the hearing protection question.

21. Those applications came before the judge at a Case Management Conference (CMC) conducted by telephone on 22 April 2020. That hearing led to the order under appeal. At the hearing counsel representing the Third Defendant, the Fifth Defendant and the

Sixth Defendant appeared as well as counsel representing the Firm (which was still apparently on the record for Mr Hunt). However, there was no representation at that hearing on behalf of Mr Hunt and Mr Hunt did not appear in person.

22. I have a transcript of that hearing and I need to refer to it because the judge did not give a judgment setting out his reasons for requiring Mr Sarwar's attendance. He did not need to do so because Counsel appearing on behalf of the firm was at that stage, and as I have already indicated, submitting that Mr Sarwar would, in the situation then before the Court, probably be required to give oral evidence and indeed was not taking any point on jurisdiction.

23. I should read out precisely what he said and I should pick it up by identifying what Judge Godsmark says:

> "Judge Godsmark: So, the direction must be, I think, that what I need to do today is give directions that will ensure the opportunity for Mr Hunt to become engaged and look for a hearing date at which parties can attend to give evidence, perhaps a little time in the future. That's my view of the landscape, Mr Trevelyan, do you have anything to say about that?
> Mr Trevelyan: Your Honour, only that I agree with Your Honour's proposed way forward. I could say that I did have some concerns reading the Third Defendant's application and I hear, of course, what my learned friend for the Third Defendant now says. <u>But the Third Defendant's application in turn would always have been for a trial on fundamental dishonesty and at which at least Mr Hunt, it seems to me or possibly Mr Sarwar as well, would have been required to give oral evidence in any event.</u> So, I did have some concerns about whether this was really a matter which could be conducted today anyway, but I hear what Your Honour says of course."

(my underlining)

24. It is common ground before me that no submission was made to the judge that he did not have power to require the attendance of Mr Sarwar at the hearing of the Defendants' applications. It is also common ground that as opposed to submitting to the judge that he ought to exercise his discretion not to direct such attendance, the effect of what was being said by Counsel for the firm was that Mr Sarwar's attendance would probably be required in all the circumstances.

25. The basis for Counsel's position seems to have been that that attendance would be required (not only because an application for wasted costs had been made against Mr Sarwar's firm) but also because Mr Sarwar was potentially an important witness on the trial of the issue of fundamental dishonesty.

26. That is how matters stood at that point in time and it is rather surprising that it is the order that emerged from that hearing which is the subject of this appeal.

27. For completeness, I should record that before the CMC, Mr Sarwar had provided a witness statement which explained the Firm's position in relation to the Part 18 responses concerning the directorship. In that regard (although he was at that time constrained by privilege) the essence of Mr Sarwar's evidence was that the inaccurate Part 18 response (in relation to directorship of the Third Defendant) was in fact signed

by Mr Hunt. Notably, however, Mr Sarwar did not deal in any way with the substantial other, which was the confused and contradictory position put forward on behalf of Mr Hunt in relation to the hearing protection (or lack thereof) provided by the Sixth Defendant.

28. In accordance with the judge's order of 12 December 2019, Mr Hunt for his own part, and acting in person, submitted a letter by way of witness statement dated 27 May 2020. I do not need to go into the detail of that letter but it does seem to me that in that letter Mr Hunt is effectively waiving privilege in relation to his advice from the Firm. I described what Mr Hunt is there doing to Walker Prestons as effectively "throwing them under the bus". Counsel before me did not dissent from the description. He clearly blames the Firm for the situation which has arisen.

29. I turn then to the legal issues which arise in this appeal against this rather unusual background. As I have already indicated, at no point was it suggested to the judge that he had no power to require Mr Sarwar's attendance or that if he had such a power he should not exercise his discretion to require such attendance.

30. That is an unpromising start for any appeal but nevertheless I shall address the arguments on their merits given the full argument before me.

III. Jurisdiction

31. The first argument made by counsel for the firm is that there is no power to require the attendance of a legal representative and reliance is placed upon the terms of CPR 46.8(2), which provides:

> "The Court will give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order."

32. The essential argument made on behalf of the Firm is that this is a complete code regulating the procedure for dealing with wasted costs applications under section 51 of the 1981 Act, and that the legal representative has an unfettered choice either to make written submissions or to attend the hearing and that the Court has no additional power.

33. In support of this submission as to jurisdiction Counsel for the Firm relied strongly upon the judgment of Bingham LJ in the case Ridehalgh v Horsefield [1994] Ch 205. That was a case in which the Court of Appeal gave guidance about the proper approach to applications for wasted costs orders. Reliance was placed in particular upon the statements of principle at pages 239 to 240 in that judgment.

34. Relying upon a combination of what was there said and Rule CPR 46.8.2, the primary submission of Counsel for the Firm was that the judge simply had no power or jurisdiction to require Mr Sarwar to attend.

35. This very issue was the subject of a detailed decision of Underhill J sitting in the Employment Appeal Tribunal in the case of Godfrey Morgan Solicitors Ltd v Cobalt Systems Ltd, unreported 31 August 2011.

36. In that case a submission was made to the judge that it would never be appropriate for there to be cross-examination of a legal representative in respect of a wasted costs application. Between paragraphs 24 and 28, Underhill J analysed a number of cases, including Ridehalgh, and came to the conclusion that there was no rule or principle which deprived the Court of the ability to require a legal representative to attend for cross-examination. He underlined that in most cases cross-examination of such a representative would be inappropriate or disproportionate but held that as a matter of jurisdiction a Court could permit cross-examination of a legal representative.

37. Although I am not bound by the Godfrey Morgan case, in my respectful view the reasoning of Underhill J is convincing and correct. I propose to follow that decision. Specifically, the passages which are relied upon before me from the Ridehalgh case do not, as Underhill J explained, erect any jurisdictional bar against the cross-examination of a legal representative.

38. There is however an additional point which I raised with Counsel during argument. Under CPR 32.7, the Court has the power to require anyone who gives evidence in writing (other than at trial) to attend for cross-examination. This is often overlooked and is an important provision for those who choose to give interlocutory witness statements to bear in mind.

39. In this case, there is nothing to exclude the application of that power to Mr Sarwar who chose to provide his witness statement. CPR 32.7 would have provided the judge with jurisdiction (in addition to the principles in the Godfrey case), had the point been raised. I reject the submission that the wasted costs regime in CPR 46.8 is a complete procedural code which would exclude the Court's CPR 32.7 power, or the general power identified by Underhill J. When a complete code is intended the rule drafters they had made that clear: see CPR 36.1, for example.

40. As the notes at para. 32.71. of the White Book 2020 Vol. 1 make clear, the Court's power to require attendance for such cross-examination is fact and context dependent. Attendance of a solicitor under this rule can be ordered and has indeed occurred. See for example the case Republic of Djibouti v Boreh [2015] EWHC 769 (Comm); [2015] 2 All ER (Comm) 669. It is also sometimes the case that solicitors are required to give evidence and be cross-examined on their statements in disclosure disputes.

41. The first challenge based on jurisdiction fails. That leads me to the second issue which is, was the judge right as a matter of discretion to require Mr Sarwar to attend?

IV. Discretion

42. As I indicated at the outset of this judgment this case has the odd feature that the judge's exercise of discretion is being impugned on the basis of arguments which were not only not put to the judge, but which are in fact diametrically opposed to the arguments put to him. As explained by Lloyd LJ in the case of Allen v Bloomsbury Publishing Ltd [2001] EWCA Civ 943, it is inappropriate to criticise the exercise of discretion by a judge on the basis that he failed to consider matters which were never raised before him. As will already be clear, the position of the Firm is much more unattractive than even this, because the Firm was positively submitting Mr Sarwar's attendance was potentially required.

43. At the risk of stating the obvious, it is impossible to review the discretionary decision of the judge because nobody was saying the discretion should be not exercised to require Mr Sarwar's attendance, so the judge did not have to explain his decision. Therefore the normal approach on appeal cannot be applied.

44. Serious issues arise as to whether this (and indeed the appeal on jurisdiction) should be entertained at all. I refer to the White Book, Vol.1, para. 52.21.1.1 and Singh v Dass [2019] EWCA Civ 360. It is arguably abusive to mount an appeal on the present circumstances.

45. However, being generous to the Firm, I have considered the matter essentially de novo, based on the facts which have been argued before me. As I shall explain, I have no doubt that it is a proper exercise of discretion to require Mr Sarwar's attendance.

46. A number of matters are particularly relevant. First, the Firm is no longer acting for Mr Hunt. Second, it appears to be the case that privilege has been waived and there is no restriction on the Firm giving a full account of the position between itself and Mr Hunt. Third, it is clear to me on even a brief perusal of the witness statements that there are radically different accounts given by Mr Sarwar (the Firm) and Mr Hunt as to the facts which are central to certain of the issues to be determined by the judge on the hearing of the Defendants' applications. It may well be that it is rare to require the attendance of a representative to be cross-examined on an application of this type but in my judgment it is difficult to see how these issues could be resolved in a fair and proportionate way without oral evidence from Mr Sarwar. Fourth, I am confident that the nature of these issues is that they can be managed in accordance with the Overriding Objective, so as to avoid the hearing of the applications becoming a substantial piece of satellite litigation. That is one of the concerns which motivated Bingham LJ in his cautionary observations in the Ridgehalgh case.

47. Having allowed the Firm to make new and fresh submissions to me and have a "second bite at the cherry", this is overwhelmingly a case where Mr Sarwar should attend for cross-examination. The Judge's decision was clearly correct.

V. Conclusion

48. By way of postscript, I should add that after Counsel completed submissions but before I gave judgment, Mr Hunt appeared at court (regrettably, he had not been informed of a listing change). I explained to Mr Hunt the nature of the appeal and what had happened thus far. I invited him to make any submissions he wished to present, but he indicated that he did not wish to address me further. He will clearly have a chance to state his position when the matter returns to the judge.

49. The appeal is dismissed.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

The Transcription Agency, 24-28 High Street, Hythe, Kent, CT21 5AT
Tel: 01303 230038
Email: court@thetranscriptionagency.com