Neutral Citation No. [2015] NIQB 66 | *Ref:* **STE9715**

Judgment: approved by the Court for handing down | *Delivered:* **21/07/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between

JONATHAN GRAHAM JENKINSON

Plaintiff/Appellant

and

MINISTRY OF DEFENCE

Defendant/Respondent

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STEPHENS J

Introduction

[1] This is an appeal by Jonathan Graham Jenkinson ("the plaintiff") in relation to an order made in the county court on 31 March 2015 staying the plaintiff's noise induced hearing loss proceedings against the Ministry of Defence ("the defendant") which order was made on the basis that the most suitable or appropriate jurisdiction for the determination of the plaintiff's claim was the jurisdiction of the courts of England and Wales. The plaintiff contends that the appeal should be allowed on the basis that proceedings have been commenced lawfully as of right in Northern Ireland and that the defendant has not established (a) that Northern Ireland is not the natural or appropriate forum and (b) that there is another available forum which is *clearly or distinctly* more appropriate than the Northern Irish forum.

[2] Mr O'Donoghue QC and Mr David Dunlop appeared on behalf of the plaintiff and Mr Aldworth QC appeared on behalf of the defendant. I am grateful to counsel for the assistance that I derived from their carefully prepared and well-reasoned oral and written submissions.

Factual Background

[3] The plaintiff's noise induced hearing loss claim arises from his service as a soldier in the Welsh Guards and in the Royal Infantry Regiment. His total service was for 23 years between 1990 and 2013 but he accepts that proper hearing protection precautions were introduced in or about 2005/2006. The alleged period of exposure to an excessive level of noise was over the 15-16 year period between 1990 and 2005/2006. The exposure over that period was on an intermittent basis.

[4] The plaintiff was born in England. His home, whilst not stationed in Northern Ireland or abroad, has always been in England. He presently resides in Shropshire.

[5] The defendant is based in each part of the United Kingdom though the main offices of the defendant are in England. The loss adjusters engaged by the defendants for noise induced hearing loss claims are based in Scotland. The garrison headquarters of the Welsh Guards is in London.

[6] The plaintiff's expert medical witness carries on practice in Wrexham.

[7] The essential nature of the plaintiff's service was that he was based in a number of different countries, including Northern Ireland and England and within at least some of those countries he was based at a number of different locations. The essential nature of the plaintiff's alleged exposure to excessive noise is that it occurred on an intermittent basis at all the places at which he served. That he was exposed to excessive noise in many different countries and at many different locations within some of those countries.

[8] The plaintiff's army service included three tours of duty in Northern Ireland. He also served in Canada, USA, Belize, Germany, Cyprus, Gibraltar, Bosnia & Herzegovina, England, Afghanistan and Iraq.

[9] The tours of duty in Northern Ireland were in different parts of the province. From 1992 until 1994 he was based at Ballykelly, County Londonderry. In 1997 he was based at Forkhill, South Armagh. From 2003-2004 he was based at Ebrington and Maydown, County Londonderry. During these periods of service the plaintiff alleges that he was exposed to excessive noise during firearms training, anti-ambush type training as well as helicopter noise exposure and also, but with less emphasis, to excessive noise from the use of radio equipment. The relevant ranges at which the plaintiff alleges that he was exposed to noise were at Magilligan, County Londonderry and various pipe ranges in both County Fermanagh and County Armagh. The plaintiff does not allege that he served in Belfast. So the alleged noise exposure in Northern Ireland was in Counties Armagh, Fermanagh and Londonderry though it would wrong to confine it to those counties because I infer that the exposure to the noise of helicopters would have included other counties within Northern Ireland. Helicopters were a commonly used and in some areas a

preferred, means of transportation for army personnel so the plaintiff may have been exposed to the noise of helicopters when being transported from for instance Aldergrove or Belfast. The alleged period of exposure in Northern Ireland was for approximately 3-5 years out of a total of 15-16 years of the total alleged period of intermittent noise exposure. Accordingly on a very rough basis up to one third of the exposure was in Northern Ireland. I say on a very rough basis because there is no available evidence at present, and there may never be, as to the relative frequency of exposure in Northern Ireland compared to other locations and as to the noise levels in Northern Ireland compared to other locations.

[10] The plaintiff had a number of postings in England but not at the same locations. When stationed in England the places at which he served included Aldershot, Brecon, Bristol, Hounslow, Shrewsbury and York. Again the plaintiff alleges that he was exposed to excessive levels of noise on an intermittent basis at each of those locations.

[11] The difference between the plaintiff's noise exposure in England, Northern Ireland, Canada, USA, Belize, Germany, Cyprus, Gibraltar, and Bosnia & Herzegovina, on the one hand and Afghanistan and Iraq on the other is that he was in combat in those two countries. He accepts that it was after explosions in Afghanistan and in Iraq that he became aware of potential problems with his hearing and that such explosions did occur during armed combat. He also accepts that insofar as any such explosion caused or contributed to his hearing loss and tinnitus it is accepted that combat immunity applies. One of the issues at trial will be how much of his noise induced hearing loss and tinnitus is attributable to the explosions in Afghanistan and Iraq and how much is due to non-combat exposure at the other locations at which he served.

[12] The plaintiff wishes to use the services of a particular firm of solicitors who practice in Northern Ireland and who have expertise in noise induced hearing loss claims. That firm is Reid Black Solicitors Limited who have specialised in the conduct of claims for compensation involving police, military and civilian noise exposure since 2006 and who have acted in excess of 5,000 claims advanced by plaintiffs against the defendant relating to noise induced hearing loss suffered by soldiers who have served in Northern Ireland. He has instructed that firm to act on his behalf. The evidence of expertise in noise induced hearing loss claims is also to be seen in the context of the heavy industries in Northern Ireland, such as Harland & Wolff Limited, and a number of other industries whose work forces were exposed to excessive levels of noise and an armed police force whose members were exposed to excessive levels of noise during weapons training. It is to be seen in the context of the considerable experience built up since the late 1970's amongst both professions in Northern Ireland in dealing with noise induced hearing loss claims commencing with cases such as *Watty v Harland & Wolff Limited* [1978] 2 NIJB and *Frazer and McCreery v Harland & Wolff Limited* [1978] 2 NIJB. In *Nichol & others v Harland & Wolff Limited* [1982] NI 1 MacDermott J set out the history of that early litigation and subsequently in *Baxter v Harland & Wolff Limited* [1990] NI 147 MacDermott LJ dealt

with a number of issues including whether the scale of damages should be increased. There has been a considerable volume of litigation in Northern Ireland commencing in the late 1970's with claims by civilian employees exposed to noise at their place of work which was followed by claims by members of the police force and members of the army.

[13] On 22 September 2014 in Northern Ireland Reid Black Solicitors Limited commenced proceedings in the county court for the division of Belfast on behalf of the plaintiff.

[14] The defendant accepted service of the proceedings but reserved its position in relation to the question as to whether the proceedings in Northern Ireland should be stayed. In order to make a decision in relation to an application to stay the proceedings the defendant sought information as to where it was alleged that the plaintiff was exposed to noise. The initial reply on behalf of the plaintiff was not informative. In relation to the question as to where the plaintiff was exposed to noise the defendants also considered the medical report which the plaintiff's advisors disclosed. That report is dated 2 July 2014 and it was prepared by Mr Snow FRCS, who practices in the Department of Otolaryngology and Head and Neck Surgery at Wrexham Maelor Hospital, Wrexham. The plaintiff gave a history that he had been aware of hearing problems since 2009 after being exposed to explosions in Afghanistan. In relation to weapons used and other military noise exposure the plaintiff identified a number of weapons though he did not specify where he used them. He identified being regularly transported in helicopters without ear protection. Also under the heading "Other Noise" he identified "radio equipment used in Northern Ireland".

[15] On 12 January 2015 the defendant commenced an application to stay the plaintiff's claim on the grounds of forum non-conveniens which in turn prompted the plaintiff to provide an amended reply to the defendant's Notice for Particulars bringing greater definition to noise exposure in Northern Ireland.

[16] The defendant has not identified the location of the county court in England & Wales which it suggests is the natural or appropriate forum and which it suggests is *clearly or distinctly* more appropriate than the county court for the division of Belfast. It has approached the application on the basis that it is only appropriate to consider whether the courts of England and Wales are *clearly or distinctly* more appropriate than the courts of Northern Ireland.

[17] No issue was taken by the defendant as to the speed, relative ease and favourable cost of travel between regional airports in England and Wales and Belfast in comparison to for instance rail travel within England and Wales. No issue was taken by the defendant that it has settled many thousands of claims for hearing loss sustained by soldiers without any liability challenge.

[18] The plaintiff's solicitors indicated that if appropriate an undertaking would be given to the court that no additional travel costs of the plaintiff or his witnesses would be claimed from the defendant over and above those that would have been incurred if the case was heard in whichever part of England was appropriate if the proceedings in Northern Ireland were stayed. The plaintiff's solicitors also indicated that a similar undertaking could be given to pay the additional travel costs of the defendant's witnesses.

Legal Principles

[19] By virtue of Section 46 of the Civil Jurisdiction and Judgments Act 1982 proceedings can be served on the defendant in any of the UK jurisdictions though the power to stay proceedings on the ground of forum non-conveniens is saved by Section 49. Accordingly, the proceedings have been lawfully served in Northern Ireland as of right and the issue for determination is whether the proceedings should be stayed on the basis of forum non-conveniens.

[20] The principles to be applied in relation to forum non-conveniens were set out by the House of Lords in *Spiliada Maritime Corp v Cansulex Limited* [1986] 3 All ER 843. The latin tag "forum non-conveniens" is only apt if the translation of "conveniens" is "appropriate" as the question is not one of convenience, but of suitability or appropriateness of the relevant jurisdiction. The object is to find that forum which is more suitable for the ends of justice. Lord Goff of Chieveley, with whom the other Law Lords agreed, provided a summary of the applicable legal principles. I set out those principles in so far as they are relevant to this case with amendments in brackets substituting "Northern Ireland" or "Northern Irish" for "England" or "English."

> "(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
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> (b) …, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay …. It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of

which justice requires that the trial should nevertheless take place in this country (see (f), below).

(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the [Northern Irish] court will not lightly disturb jurisdiction so established. … there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions …, or in Admiralty, in the case of collisions on the high seas. I can see no reason why the [Northern Irish] court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. … In my opinion, the burden resting on the defendant is not just to show that [Northern Ireland] is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the [Northern Irish] forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in [Northern Ireland] as of right …; …. I may add that if, in any case, the connection of the defendant with the [Northern Irish] forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in *MacShannon's case* [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the *Société du Gaz* case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in *The Abidin Daver* [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to

which see *Crédit Chimique v. James Scott Engineering Group Ltd.*, 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay; ….

(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the *The Abidin Daver* [1984] A.C. 398, 411, per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage."

[21] Lord Goff also considered the correct approach on an application for a stay of the treatment of "a legitimate personal or juridical advantage." The parties agreed that there was no such advantage to be considered in this case and that if there was an advantage that it was not appropriate for it to be taken into consideration in deciding whether or not to grant a stay.

Application of the principles to the facts of the present case

[22] The proceedings were commenced in Northern Ireland as of right. The defendant has to show that Northern Ireland is not the natural or appropriate forum for the trial, and has to establish that there is another available forum which is clearly or distinctly more appropriate than the Northern Irish forum.

[23] I consider that this is a case where there are pointers to a number of different jurisdictions in that the plaintiff served in many different countries and at different locations within a number of those countries. For instance it is a totally different case from a plaintiff who lives in England and predominantly worked in a factory at one location in England but for a relatively short period of time lived in Northern Ireland and worked at another factory in Northern Ireland. In such a case, if there was a dispute as to noise exposure involving witnesses being called from both factories, then Northern Ireland would not be the natural or appropriate forum for the trial and there would be another available forum which is clearly or distinctly more appropriate than the Northern Irish forum. I consider this case falls within the

category of cases in which it can be said that there is no particular forum which can be described as the natural forum for the trial of the action. The result is that there is no reason why the Northern Irish court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right, see paragraph [20] (c) above. On that ground I allow the appeal and remove the stay.

[24] If I am incorrect in that conclusion I have considered the question as to whether the defendant has established that there is another available forum which is clearly or distinctly more appropriate than the Northern Irish forum.

[25] Claire Demelas, solicitor, in her affidavit grounding the application for a stay, avers at paragraph 7 in relation to combat immunity that "potential" witnesses are likely to be service personnel and former service personnel based in England and Wales who served with, or commanded the plaintiff. At paragraph 8 she avers not that these "potential" witnesses are based in England and Wales but they are "likely" to be based in England and Wales. The defendant has not identified any of these potential witnesses. I am not satisfied that any of them or any significant number of them are based in England and Wales as opposed to being based abroad.

[26] The plaintiff accepts that exposure to the noise of explosions in Iraq and Afghanistan is subject to combat immunity and accordingly it is not necessary to call any of these "potential" witnesses whom it is stated are "likely" to be based in England and Wales to give evidence to establish that defence. Theoretically there could be an issue as to the number of explosions in Iraq and Afghanistan and as to whether the plaintiff's admission covers all of those explosions. Theoretically there could be an issue as to how close the plaintiff was to a particular bomb explosion and as to the type of explosion. Theoretically also there could be issues as to the type of weapons fired by the plaintiff at all of the locations at which he served in an attempt to establish that the noise levels were modest in comparison to the likely noise levels generated by explosions in Iraq and Afghanistan. Such evidence could be from individuals who served alongside the plaintiff at all the various locations and/or from a noise expert. In no previous case has such evidence been called but rather the parties have relied on the medical evidence to distinguish between noise from weapon firing and noise from other sources. Weapon firing produces an asymmetrical hearing loss. The hearing loss from a bomb explosion tends to be symmetrical as does hearing loss from helicopter noise, though there can be exceptions which usually depend on the degree of asymmetry and the history given by the plaintiff, as in this case, that his left ear was more exposed to the explosions than his right. There can be ambiguities and areas of a dispute in relation to the medical attribution of hearing loss to the different causes but those ambiguities and disputes have never been informed by evidence from service personnel who served with or commanded a particular plaintiff or by any evidence from a noise expert. The defendant seeks to establish the existence of these matters, namely the need to call these witnesses and the evidential burden rests on the defendant. The defendant has not discharged the burden of establishing that these "potential" witnesses are necessary and has failed to discharge that evidential burden.

[27] Even if the defendant had discharged the burden of establishing that these "potential" witnesses were necessary it has not discharged the burden of establishing that they are based in England and Wales nor has it discharged the burden of establishing that it will be any more costly for them to travel to Belfast as opposed to travelling to the appropriate court in England and Wales.

[28] The noise exposure is alleged to have occurred in many different countries including but not confined to Northern Ireland and England and Wales. In so far as the exposure occurred in Northern Ireland and in so far as it occurred in England and Wales there is a real and substantial connection to both jurisdictions. That factor is not, of itself, of assistance to the defendant in establishing that England and Wales is clearly or distinctly more appropriate than the Northern Irish forum. All it establishes, of itself, is that there is a real and substantial connection to both forums. The respective percentages of time of service in Northern Ireland as against England and Wales and therefore in rough terms the respective percentages of exposure to noise in both jurisdictions does not, of itself, alter the real and substantial connection with each. The defendant has to go further because the respective percentage of noise exposure as between the two jurisdictions is of no significance unless it leads to the conclusion that England and Wales is clearly or distinctly more appropriate. If it is assumed that there was more alleged noise exposure in England and Wales than in Northern Ireland will this mean that there are more witnesses in England and Wales that will be called at the trial of this matter? The defendant bears the evidential burden of establishing that this is so. I prefer the evidence of the plaintiff's solicitor that it is highly unlikely that any service personnel will be called at the trial of this action in relation to noise exposure which is alleged to have occurred in England and Wales or in Northern Ireland. The defendant has settled thousands of cases without calling a single service witness.

[29] The plaintiff resides in England which will involve travel to Northern Ireland. That is an inconvenience to the plaintiff and the defendant could be liable for the relatively modest costs of travel to Northern Ireland but against that the defendant is established in every part of the United Kingdom. Its connection with the Northern Irish forum is not a fragile one. Furthermore the plaintiff wishes to avail in Northern Ireland of the undoubted expertise of a firm of solicitors of his own choice which firm has considerable experience in this type of litigation. The factor of residence of the plaintiff is not sufficient to establish that the forum of England and Wales is clearly or distinctly more appropriate than the Northern Irish forum.

[30] The plaintiff's medical expert carries on practice in Wrexham and would in any event have to travel to the appropriate court in England and Wales. The defendant has not discharged the onus of establishing that the costs of travel would be greater than the costs of travel to Northern Ireland.

[31] The defendant wishes to have the plaintiff medically examined but there is no affidavit evidence indicating where the defendant's expert carries on practice;

whether in Northern Ireland or in England. If in England then there is no analysis of the cost of travel by the plaintiff to that expert for the purposes of an examination or of the cost of travel by that expert for the purposes of the hearing to a court in England and Wales or to Belfast. There has been no consideration as to whether the cost of travel of either the defendant's expert or the plaintiff's expert could be avoided by the use of a video link.

[32] The defendant has established that the forum of England and Wales is available but I do not consider that it has established that the forum of England and Wales is clearly or distinctly more appropriate than the Northern Irish forum.

Conclusion

[33] I allow the appeal and remove the stay on proceedings in Northern Ireland. In arriving at that conclusion I have not relied on the undertakings which were proffered by the plaintiff's solicitor accordingly do not require any such undertaking to be given to the court.