Case No: B3/2011/3208

Neutral Citation Number: **[2012] EWCA Civ 1505**
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MEDWAY COUNTY COURT
HHJ SCARRATT
OUA31437

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st. November 2012

Before:

LADY JUSTICE HALLETT
LORD JUSTICE ETHERTON
DAME JANET SMITH

- -

Between:

JOSEPH JOHNSON	**Appellant**
- and -	
MINISTRY OF DEFENCE	**First Respondent**
and	
HOBOURN EATON LIMITED	**Second Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Simon Levene (instructed by **Onyems & Partners**) for the **Appellant**
Richard Seabrook (instructed by **Kennedys Llp**) for the **First Respondent**
William Vandyck (instructed by **DAC Beachcroft** Llp) for the **Second Respondent**

Hearing date: 23rd October 2012

- -

Judgment
As Approved by the Court

Dame Janet Smith:

Introduction

1. This is an appeal from the order made by HH Judge Scarratt in the Medway County Court on 30 November 2011. He dismissed a claim commenced by Mr Joseph Johnson in June 2010 against two former employers in which he alleged that, in the 1960s and 1970s, he had been exposed to excessive noise and had suffered deafness as a result. The judge dismissed the claim on limitation grounds, holding that, for the purposes of sections 11 and 14 of the Limitation Act 1980 (the Act), Mr Johnson had had knowledge of his cause of action by 2001. Further, the judge declined to exercise his discretion under section 33 of the Act so as to permit the action to proceed. Mr Johnson now appeals to this court with permission granted by the Court (Ward and Patten LJJ). Although the grounds of appeal covered both aspects of the judge's judgment, Mr Simon Levene, who appeared for Mr Johnson both in this court and below, abandoned the grounds relating to section 33 and the appeal proceeded only on the question of whether the judge had been right to hold that Mr Johnson had knowledge of his cause of action before June 2007.

The law

2. Section 11 of the Act provides for a special time limit in personal injury actions. Section 11(3) provides that an action shall not be brought after the expiration of the period applicable in accordance with subsections (4) and (5). Only subsection (4) is relevant in this appeal. It provides:

> (4) ….the period applicable is three years from –
>
> (a) the date on which the cause of action accrued; or
>
> (b) the date of knowledge (if later) of the person injured.

3. Section 14 defines date of knowledge for the purposes of section 11. So far as relevant to this appeal it provides:

> …. in sections 11 and 12 of this Act, references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts –
>
> (a) that the injury in question was significant: and
>
> (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance of breach of duty and
>
> (c) …
>
> (d) …

> and knowledge that any acts or omissions did or did not, as a mater of law, involve negligence, nuisance or breach of duty is irrelevant.
>
> (2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
>
> (3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire -
>
> (a) from facts observable or ascertainable by him, or
>
> (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;
>
> but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

The facts

4. The appellant was born in 1940. He worked at Chatham Dockyard for the predecessors of the Ministry of Defence from 1965 to 1970 and from 1974 to 1979. He was exposed to very loud noise and, subject to its limitation defence, the MOD, now the first respondent, admitted liability in the action. From 1969 to 1970, the appellant was employed by the second respondent, Hobourn Eaton Ltd, at premises in Strood, Kent where, he alleged, he was exposed to loud noise. The second respondent denied liability and also relied on limitation. A district judge ordered the preliminary trial of the limitation issues.

5. At the limitation hearing, the judge accepted the appellant's evidence as honest. The appellant said that he had become aware of a problem with his hearing by about 2001. At this time, he was having difficulty in hearing conversation against background noise, his friends were telling him that he was going deaf and he noticed that he tended to lean forwards and to cup his hand behind his ear to improve his hearing. He was aware that many years earlier he had worked in very noisy environments and knew that exposure to loud noise was capable of causing hearing loss. He had seen signs in his working areas advising that ear defenders should be worn; indeed he had tried the defenders but had found them very uncomfortable and had not persisted in their use. However, when his hearing deteriorated in about 2001, he did not associate this in his mind with his exposure to noise in the 1960s and 1970s. It did not occur to him that his deafness might have been caused by noise. He put his difficulties down to ageing and the occasional build-up of wax. Nor did it occur to him that he might have a claim against his past employers. He did not consult his doctor about his hearing

until 2006, by which time his hearing had worsened. Even then, he did not go to his doctor specifically about his hearing. He was at the doctor's on account of his sciatica and, while there, asked his doctor whether there was any wax in his ears. The doctor examined his ears, pronounced them to be clear of wax and advised that any hearing difficulty was probably due to his age, which was then 66.

6. Nothing further happened until 2007 when the appellant was approached by the representative of a claims management company on the car park of his local supermarket. He was then told that he might have a claim against his former employers and was sent to see a consultant ENT surgeon, Mr Ellis Douek. The audiogram attached to his report, dated 15 April 2009, shows that the appellant suffers from severe deafness. He has now been given a hearing aid. Mr Douek expressed the view that noise was a major cause of the deafness. However, the audiogram is not entirely typical of noise-induced deafness and, if the claim were to go to trial, the respondents would contend that there were other natural causes also contributing to the appellant's deafness.

The judgment below

7. The appellant's case on limitation was that he did not know until he saw Mr Douek in 2009 that he had a significant injury or that his injury was attributable to exposure to noise. The judge held that, by 2001, the appellant had actual knowledge that he had a significant injury (for the purposes of section 14(2) of the Act). There is no appeal against that holding. Acceptance of that was sensible if not inevitable. By 2009, the appellant had severe deafness; if the only factor causing deterioration in the eight preceding years was the ageing factor, it is clear that by 2001, he must have been significantly deaf in the sense that, if he had known that he had a claim against his employers, it would have been worth suing them: see section 14(2) of the Act.

8. This appeal turns on the judge's holding in respect of attributability. Starting at paragraph 13 of his judgment, the judge said:

> "13. Section 14(1)(b) of the Act deals with attributability: the test is "*capable of being attributed*". I have considered the Claimant's actual knowledge and have found …. that he was aware that he worked at times in noisy environments and was further aware that this could cause some hearing difficulties notwithstanding his view at the time that the onset of old age and occasional build-ups of wax were, perhaps, causative. That being the case, there is no need for me to make formal findings as to constructive knowledge pursuant to section 14(3) of the Act although it is apparent from all the evidence that the claimant must have been fixed with such constructive knowledge by 2006 at the very latest.
>
> 14. Broad knowledge of the essence of the cause of the relevant act or omission to which the injury is attributable satisfies section 14(1)(b) of the Act and "attributable" means "capable of being attributed in the sense of being a real

> possibility – see the principles set out by Brooke LJ in *Spargo v North Essex Health Authority*[1997] PIQR P235.
>
> 15. I find therefore that the claimant had actual knowledge at the time of the onset and development of symptoms in 2001. If I am wrong about that date, it is unassailable on the evidence, in my judgment, that by 2006 he did not (*sic - from the context the judge must have inserted the word 'not' in error)* have actual knowledge of his condition and the probable cause of the same. As was said in *Ministry of Defence v AB and others* [2010] EWCA Civ 1317 – "*it is the knowledge of possibilities that matters; a claimant needs only enough knowledge for it to be reasonable for him to set about an investigation'.*

9. The judge then held that the appellant had failed to establish that his date of knowledge was after June 2007. He then considered section 33, refused to exercise his discretion to allow the action to proceed and dismissed the action.

The appeal to this Court - submissions

10. Mr Levene for the appellant submitted that the judge had erred in moving straight from his findings of fact to the conclusion that by 2001 (or 2006) the appellant had actual knowledge of his cause of action for the purposes of sections 11 and 14 of the Act. It was not disputed that the appellant knew by 2001 that he had a hearing problem, knew that he had worked in noisy environment many years ago and knew that noise was capable of causing deafness. However, he did not know at that time (or even in 2006) that his deafness might have been caused by noise. In the circumstances, he could not know that without the help of expert advice. The judge had been wrong to hold that he had knowledge without the advantage of any expert advice. The judge should have applied his mind to the issue of constructive knowledge under section 14(3). He had not done so.

11. Mr Levene recognised that, if that submission were accepted, the logical consequence would be remission to the County Court for the judge to make findings on constructive knowledge. That, he submitted, would be undesirable on cost grounds. He would invite this Court to make the necessary findings on constructive knowledge. The proper conclusion would then be that the appellant had acted reasonably (or at least not unreasonably) in not seeking expert advice until either 2007 when the claims management representative told him he might have a claim or even 2009 when he saw Mr Douek. Until then, it had been reasonable for him to think that this hearing was simply due to ageing. He had not noticed any hearing loss while working for the respondents. More than 20 years passed before he noticed his deafness. It was not unreasonable that he had failed to put two and two together and realise there might be a connection between his work and his deafness.

12. Although, in his skeleton argument, Mr Richard Seabrook for the first respondent, sought to uphold the judge's holding on actual knowledge, in the course of oral argument, he accepted that he was in difficulty on that issue. He agreed that the judge should have considered constructive knowledge under section 14(3) but had not done so. He also agreed that, in order to save costs, his client would wish this court to

decide the section 14(3) issue. He submitted that the result would be the dismissal of the appeal. The appellant had sufficient knowledge of the background facts to make it unreasonable for him not to enquire further. He should have gone to his general practitioner and should have asked him, with an open question, why he was going deaf. If he had done that, instead of asking whether his deafness was due to wax, the doctor would probably have asked him about his working history and between them they would have arrived at the conclusion that the deafness might be due to noise.

13. Mr William Vandyck for the second respondent did not formally abandon the stance taken in his written argument that the judge had been right on actual knowledge. However, he did not pursue that argument with vigour. He virtually accepted that the judge ought to have made findings on constructive knowledge and asked this court to perform that task. He submitted that the correct approach to section 14(3) was that explained by Lord Hoffmann in *Bracknell Forest Borough Council v Adams* [2005] PIQR p 11. Section 14(3) required an objective approach. What would a reasonable person in the factual circumstances of the claimant have done about seeking expert advice? Any personal characteristics of the claimant should be ignored. Mr Vandyck also submitted that, since *Bracknell*, the approach to constructive knowledge had become more demanding of claimants. A claimant who knew that he had suffered a significant injury could reasonably be expected to show a degree of curiosity about the possible cause of his condition. If he failed to do so, he would be fixed with constructive knowledge and would not be entitled to proceed with his action as of right. He would, however, be able to explain his lack of action in the context of his section 33 application. This approach was fair to both parties. In the present case, the appellant had had all the knowledge which would have prompted a reasonable man to seek expert advice. A reasonable man in the appellant's position would have asked his general practitioner about the cause of his deafness. If he had done that, the likelihood is that the GP would have asked him about his working history and it would then have emerged that the appellant had been exposed to noise. The possibility of a connection would probably have then emerged.

14. Towards the end of the hearing, reference was made to a number of authorities on the issue of 'curiosity' which were not available to the court. Counsel were given permission to make further written submissions and did so.

15. Mr Levene referred to a number of cases in which 'curiosity' had been discussed and submitted that the question of whether a reasonable person would seek expert advice about his condition had to be considered in context. The seriousness of the claimant's condition was an important factor. In *Forbes v Wandsworth Health Authority* [1997] QB 402, Stuart-Smith LJ observed that a man whose leg had unexpectedly been removed in the course of an operation might reasonably be expected to be curious about why that had happened. In *Bracknell* itself, the claimant was suffering from severe dyslexia, which on his account had ruined his life so far. He was reasonably to be expected to make enquiries about its cause and whether it could have been alleviated. In contrast, this appellant's deafness was not ruining his life. Nor was the onset of his deafness sudden. That was an important factor. If something dreadful happened suddenly, a claimant could more readily be expected to ask why it had happened; that was the case in *Forbes.* That was not necessarily so where a condition had been present from birth, as for example in *Whiston v London Strategic Health Authority* [2010] EWCA Civ 195 and *Khairule v North West Strategic Health*

Authority [2008]EWHC 1537 (QB) per Cox J. Mr Levene submitted that, although noise induced deafness was not present from birth, it was of insidious onset and there were real similarities between that sort of condition and one which had been present from birth or childhood. In all the circumstances, we should hold that it was not unreasonable for the appellant not have sought expert advice.

16. He also submitted that, even if the appellant had asked his GP about his deafness, we could not conclude that the doctor would probably have asked him about his working conditions. When, in 2006, the appellant asked him whether there was wax in his ears, the doctor had simply replied that there was not and that any defect in hearing was probably be due to age. There was, submitted Mr Levene, no reason to suppose that the GP would have been any more thorough in his consideration of the appellant's condition than he had been in 2006.

17. Mr Seabrook and Mr Vandyck both put in helpful submissions in relation to the cases in which 'curiosity' had been discussed. These, they said, fortified the submissions they had made during the hearing. Both also made submissions on the vexed question of who bears the burden of proof under sections 11 and 14. There are decisions going both ways although the editors of the White Book consider that the burden lies on the claimant. I do not propose to set out the arguments on this topic because, in my view, the problem does not arise on this appeal. The issue may have to be authoritatively resolved at some stage but this is not the case for it. Here we are not finding facts, we are making a judgment about what a reasonable man would have done in the appellant's circumstances. Burden of proof does not arise.

Discussion

18. First, I would accept Mr Levene's submission that the judge erred in moving straight from his findings of primary fact to the conclusion that, by 2001 and without the benefit of any expert advice, the appellant had actual knowledge that his significant deafness might be attributable to exposure to noise at work. Knowledge that his deafness was significant coupled with knowledge that he had in the past been exposed to loud noise which he knew was capable of causing deafness did not, of itself, amount to knowledge that *his* deafness might be attributable to noise. It did not amount to knowledge of the possibility that his deafness might be caused by noise. The judge had accepted as honest the appellant's evidence that it had not occurred to him that his deafness might be associated with noise exposure. Therefore he could not be said to have knowledge of attributability. The brief passage which the judge cited from the Court of Appeal decision *Ministry of Defence v AB* (the atomic veterans case) was, with respect to the judge, taken out of context. There, the claimant veterans had long believed or at least consciously suspected that their various illnesses were due to exposure to radiation. What they lacked was medical evidence which would confirm it. But the Court of Appeal held that they had knowledge of attributability (in that they knew of the possibility that their conditions were related to radiation) and the Supreme Court upheld that view, albeit by a narrow majority.

19. Before leaving this aspect of the case, I must observe that it is not clear to me why the judge thought that, if he were wrong about the appellant having actual knowledge by 2001, he certainly had it by 2006. Nothing had changed between 2001 and 2006 save

that the deafness had become worse. But if it is established that it was significant by 2001 that could not be the factor the judge had in mind. Nor can the judge have had in mind the evidence of the appellant's discussion with his GP in 2006 about whether there was wax in his ears. That could not have resulted in any improvement in the appellant's understanding about the possible attributability of his condition. So the judge's observation is something of mystery.

20. The real issue in the appeal is constructive knowledge. It is common ground that the judge should have considered whether the appellant had constructive knowledge within the meaning of section 14(3) of the Act but did not. All parties wish us to consider it and in my view we should do so, relying on the judge's findings of primary fact but exercising our own judgment about what a reasonable person in the appellant's position could reasonably have been expected to do about seeking expert advice.

21. In my view, the law is now clear as to the correct approach to section 14(3). It is to be found in Lord Hoffmann's speech in *Bracknell*. At paragraph 33, Lord Hoffmann stressed that the test is an objective one. He said:

> "Section 14(3) uses the word "reasonable" three times. The word is generally used in the law to import an objective standard, as in "the reasonable man". But the degree of objectivity may vary according to the assumptions which are made about the person whose conduct is in question. Thus reasonable behaviour on the part of someone who is assumed simply to be a normal adult will be different from the reasonable behaviour which can be expected when the person is assumed to be a normal young child or a person with a more specific set of personal characteristics".

22. Pausing there, there is no suggestion that this appellant is anything other than a normal adult. So in a case like the present, the court does not ask whether what the claimant did or did not do was subjectively reasonable - still less 'not unreasonable' as Mr Levene submitted. Rather, as the respondents submitted, when considering whether a claimant had constructive knowledge of the attributability of his condition, the court asks whether a normal adult in the position and with the knowledge of the claimant would have sought expert advice about the cause or attributability of his condition. Put another way, considered objectively, should the claimant reasonably have been expected to seek expert advice?

23. In deciding what a normal adult would do or could reasonably be expected to do, Lord Hoffmann provided further assistance. At paragraph 43 he said:

> "Section 14(3) requires one to assume that a person who is aware that he has suffered a personal injury, serious enough to be something about which he would go and see a solicitor if he knew he had a claim, will be sufficiently curious about the causes of his injury to seek whatever expert advice is appropriate"

24. It appears to me that Lord Hoffmann was there saying that anyone who has suffered a significant injury should be assumed to be sufficiently curious that he will seek expert advice. However, I am not sure that Lord Hoffmann meant that that assumption must apply in every case. The test is what a person with the essential characteristics of the claimant (such as age and mental capacity) would do if acting reasonably. It seems to me that what Lord Hoffmann must have meant was that there would be an assumption that a person who had suffered a significant injury would be sufficiently curious to seek advice unless there were reasons why a reasonable person in his position would not have done. Such a reason might be that the condition, although in law significant, was something that the claimant had become so used to it (for example because it had been present from birth or childhood) that a reasonable person would not be expected to be curious about its cause: see for example *Whiston v London Strategic Health Authority* [2010] EWCA Civ 195. So the degree of curiosity to be expected of the reasonable person will depend on the seriousness of the condition and the way in which it manifested itself. The unexpected removal of a leg on the operating table would be expected to excite a high and immediate degree of curiosity. A distinction is to be drawn between that type of situation and a condition present from birth or early childhood; in such a case, the reasonable person would not necessarily be curious about the cause. However, the House of Lords intended to impose a fairly demanding test on claimants. For example, in *Bracknell* itself, the House was of the view that severe dyslexia should excite curiosity even though the condition was of longstanding and the claimant's appreciation of it and its effect upon his life must have been a gradual process.

25. As Lord Hoffmann pointed out, there are good policy reasons for this objective and more demanding standard. If a claimant is entitled to bring an action *as of right*, many years, possibly decades, after the relevant events, there may be real unfairness to defendants. So the *right* to bring a long delayed action must be circumscribed. By imposing an objective test of what a reasonable person would have done, the period in which a claimant has a right to bring his claim may well be restricted. But it does not follow that he will necessarily be prevented from bringing his claim. The court will be able to consider his subjective reasons for not seeking expert advice at an earlier time and may regard them as reasonable. When exercising its discretion under section 33, the court will balance that factor with all the other circumstances of the case in deciding whether it is just and equitable to allow the case to proceed. Those circumstances will almost always include the prejudice which the defendants will suffer in attempting to defend the claim after a long lapse of time. If the claimant has delayed longer than a reasonable person would have delayed, it is only fair and just that the defendants' difficulties should be taken into account.

26. There will be some cases (and this is one) where the court has concluded that a reasonable person in the claimant's position could reasonably have been expected to seek advice from a particular source, such as his own GP, and that he could not reasonably have been expected to seek advice from a higher authority. In such a case, the court may have to consider whether, if advice had been sought from that particular source, the advice he would probably have received would have given the claimant the knowledge he needed.

27. I turn now to the facts of the present case. By 2001, at the age of 61, the appellant had hearing loss which was quite serious, although not such as to destroy his

enjoyment of life. He was having difficulty in hearing on social occasions. This condition had developed gradually over a period of time and I do not think he had suddenly become aware of it. The realisation that he had a problem must, I think, have dawned on him gradually. He did not associate his deafness with his previous working conditions. He had not been exposed to noise for over 20 years. He had not noticed any deterioration in his hearing while employed in loud noise. While working in loud noise he could not be expected to have known that his hearing was being damaged by noise in the sense that his 'reservoir' of hearing was being depleted, so that as he got older the additional deterioration in his hearing would result in a noticeable loss of hearing.

28. Would a reasonable man in his situation and with his knowledge be curious to know the cause of his deafness? I find this question not entirely easy and I think the circumstances are 'close to the line'. I must apply an objective test and one which reflects what Dyson LJ (as he then was) in *Whiston* called the 'tightened up' approach required since *Bracknell.* Applying that test, I come, not without hesitation, to the conclusion that a reasonable man in the 21st century would be curious about the onset of deafness at the relatively early age of 61 and would wish to find out what was causing it. In the circumstances of this case, I think that a reasonable man would have consulted his GP about his deafness. That is so, even though I accept that a reasonable man might not think of the possibility of bringing a claim for damages. In my view, a reasonable man would simply want an explanation for his condition and possibly also to discover whether there was any medical treatment which could improve his position.

29. Would consulting his GP have afforded the appellant the knowledge of attributability that he needed? I do not accept Mr Levene's submission that, even if the appellant had consulted his GP in the early 2000s, he would not have been given advised that his condition might be attributable to noise exposure. In 2006, the GP was not consulted specifically about the cause of the deafness; he was only asked if there was wax in the appellant's ears. I think it probable that, if he had been asked what the cause might be, as an open question, in say 2001 or shortly thereafter, the GP would have thought of the possibility of noise deafness and would have asked the appellant about his working history. Not only is noise exposure well known to be a cause of deafness but this GP was in practice in Kent, not far from the Chatham Dockyards. Shipbuilding was a notoriously noisy business in the 1960s and 1970s due to the use of percussive tools and it would, in my view, be most surprising if the GP had not come across middle-aged and elderly patients who were deaf as a result of their employment in that dockyard. I realise that there was no evidence to that effect in this case but I consider that I ought to take judicial notice of that likelihood, based upon my personal experience of noise deafness cases over a period of nearly 40 years. It follows that I think it probable that if the GP had been consulted as to the cause of the deafness, he would have asked about the appellant's employment history and the possibility of noise deafness would have come to light.

30. I should make it plain that, if the appellant had consulted his GP, as I think a reasonable man would have done, and if the GP had not asked the appropriate questions so as to bring to light the possibility of noise as a cause, I would not have expected the appellant, as a reasonable man, to seek expert advice from a more

specialist source, such as an ENT surgeon. If he had not been properly advised by the GP, he would not have been fixed with constructive knowledge.

31. My conclusion is that a reasonable man in the circumstances and with the factual knowledge of this appellant would have consulted his GP by about the end of 2002. I would be prepared to allow some 'thinking time' between the time when he realised that he had a significant condition and the date on which he ought reasonably to have taken expert advice. The time to be allowed must depend on the nature of the condition but, with a condition such as deafness which presents in an insidious way, I would be prepared to allow about a year for consideration.

32. It follows that I would hold that, by about the end of 2002, the appellant should be deemed to have had knowledge that his deafness might be attributable to exposure to noise while in the employment of the defendants. The primary limitation period therefore expired by the end of 2005 and, as the claim was not commenced until 2010, it was statute-barred. As Mr Levene has accepted that the judge did not err in his consideration of section 33, I would dismiss the appeal.

Lord Justice Etherton: I agree

Lady Justice Hallett: I also agree.