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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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BETWEEN:

MARGARET DACK

Plaintiff/Appellant

and

MINISTRY OF DEFENCE

Defendant/Respondent

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BURGESS J

Introduction

[1] This is an appeal by Margaret Dack (the plaintiff) in relation to an order of the Master on 27 October 2015, staying the plaintiff's proceedings for damages for negligence in relation to medical treatment whilst in the care of 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 Northern Irish forum.

[2] Mr Rooney QC and Mr Sean Smyth B.L. appeared on behalf of the Plaintiff and Mr Aldworth QC appeared behalf of the Defendant. The court is grateful for their oral and written submissions.

Factual Background

[3] The Plaintiff was born in Northern Ireland. In 1970 she married a Mr Barry Dack, a soldier in the Parachute Regiment. From 1970 and in the following years

(until 1973 or 1977) Mr Dack was based in Aldershot but at various times, for operational reasons, was based in Holywood Barracks, Holywood, Northern Ireland.

[4] In or about November 1972, the Plaintiff was visiting her parents in Belfast. She was pregnant. She experienced a feeling of weakness down her left side. She attended Dunmurry Health Centre and was referred to the Royal Victoria Hospital where she was detained overnight. She was then transferred to the Musgrave Park Hospital (Military Wing) since she was married to a member of the Army. She was transferred from Musgrave Park Hospital to Cambridge Military Hospital, Aldershot, on 2 December 1972.

[5] Despite efforts being made to trace the relevant notes and records both of the Royal Victoria Hospital and the Musgrave Park Hospital, none of these are available. Instead available is a record dated 26 April 1973 which records:

> "This lady was transferred from Musgrave Park Hospital on 2.12.72, which she was considered to had (sic) suffered her first attack MS but all heart and middle cerebral artery could not be excelarated (sic)".

[6] Given the absence of the records it is not clear whether a diagnosis of MS was made in the Musgrave Park Hospital, but certainly the records disclose that in the early part of 1973, a diagnosis of MS was made in the hospital in England. As a result on 21 February 1973 she was started on a course of ACTH. Following improvement she was discharged on 10 April 1973 and was to be seen on review.

[7] The medical records show that the diagnosis of severe MS continued to be the view of the medical authorities and based on that advice, the Consultant Neurologist strongly recommended sterilisation. As a result the Plaintiff and her husband decided she would undergo sterilisation which took place on 30 October 1975 at Cambridge Military Hospital, Aldershot.

[8] On or about 29 March 2007, the Plaintiff was examined by a Consultant Neurologist at Norwich University Hospital. He indicated to the Plaintiff that it was more likely that she had a vascular event rather than MS. Following an MRI scan, the Neurologist suspected that the appearances shown on the scan were residua from a venous sagittal sinus thrombosis. It indicated that there was "certainly thought to be no evidence of MS".

[9] The Defendants point to the treatment and diagnosis both of MS and the later diagnosis indicating the previous diagnosis was "wrong" was carried out in England and at no time did the Plaintiff return to Northern Ireland for any treatment in respect of her condition.

[10] The Plaintiff remained in England given her husband's remaining in the Army and that appears to be the position until 2009 when she separated from her husband, and returned to live in Northern Ireland. She has remained in Northern

Ireland since then. In terms of involvement with medical issues, the Plaintiff was examined in England by an expert on her behalf for the purposes of these proceedings. It is clear that all other witnesses in relation to the medical position will be residing in England.

[11] For the purposes of this ruling I am entirely satisfied that throughout her life the Plaintiff has been domiciled in Northern Ireland, her sojourn in England being linked to her husband's employment. As soon as their marriage ran into difficulty she returned to Northern Ireland and has resided here for the last 6 or more years.

[12] The Plaintiff's medical condition means that she is dependent on a wheelchair. She has carers who come to her home on 3 occasions per day. She requires help to get in and out of bed, dressed, use the bathroom when washing and toilet and prepare meals. The Plaintiff is stated in the affidavit of Ms Tanya Waterworth to be totally dependent on others as regards transport.

[13] The Defendant is based in each part of the United Kingdom, although the main offices of the Defendant are in England.

[14] The Plaintiff wishes to use the services of a particular firm, McCartan, Turkington, Breen, who practice in Northern Ireland and who have experience and expertise in medical negligence cases. However, I believe it would be fair to say that such expertise would be replicated by many firms both in Northern Ireland and in England and Wales. Indeed in this case where potentially the issue will be one of damages as opposed to liability, there would be no difficulty if proceedings were to be in England and Wales with a Northern Ireland firm co-operating with a firm in England and Wales for the purposes of the formal proceedings themselves.

[15] On 9 July 2012 in Northern Ireland, McCartan, Turkington, Breen commenced proceedings in the High Court of Justice on behalf of the Plaintiff. An appearance was entered on 12 April 2013. No action was taken at that time by the Defendant seeking to stay the action in Northern Ireland and having it commenced in England and Wales as the more convenient jurisdiction. The Statement of Claim was served on 25 February 2015, some 2 ½ years later. The court is not aware of what, if any, communications were taking place between the parties. However, the defendant at that time would have been fully aware of the nature of the action and would have had access to all of the records which now ground their argument that the matter should be dealt with in England and Wales. No explanation is given as to why it has now taken some 2 ½ years for this application to be made. One can only assume that in the meantime, in order to prepare for and issue the Statement of Claim, a considerable amount of work has been undertaken by the Plaintiff's solicitors in the pursuit of the claim.

[16] The summons seeking an order staying these proceedings on the grounds of "forum non-conveniens" was issued on 27 April 2015. The Defendant has not identified the location of the court in England and Wales which it is suggested is the

natural or appropriate forum and which it suggests is "clearly or distinctly more appropriate than the High Court in Northern Ireland". 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] The court can take judicial notice of the fact that communication between Northern Ireland and England and Wales is nowadays relatively straightforward. There is easy access by air to many airports, although without identifying the location of the court in England and Wales it is uncertain whether that would be convenient to any particular airport. The same, of course, cannot be said for anyone travelling from England and Wales to Northern Ireland. There is nothing in the proceedings to indicate that any of the experts are coming from anywhere other than England and Wales. In any case should they be outside that jurisdiction they would have the same issue of travel to England and Wales as they would to Northern Ireland. In addition, through Skype, it is now possible, and common, for witnesses to given evidence from remote locations without the necessity of travel. Therefore for the purposes of this judgment, I am satisfied that the only matter which would be relevant to the issue of convenience of travel would be the difficulties potentially encountered by the Plaintiff should she be required to go to England and Wales - and particularly were she required to remain in England and Wales during the course of any proceedings. She requires full-time care and attention, not just in travelling but in every aspect of her day-to-day life. The fact that she was able to travel to England and Wales for the examination by the expert on behalf of her solicitors, does not assist the Defendant as that would have been a targeted date on one occasion.

Legal Principles

[18] By virtue of section 46 of the Civil Jurisdiction & 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 47. 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. The principles to be applied have been well rehearsed in a number of cases commencing with the House of Lords decision in ***Spiliada Maritime Corp v Cansulex Limited*** *[1986] 3 All ER 843* The distillation of the principles are set out by Stephens J in *Jenkins v Ministry of Defence [2015] NIQB 66*. At paragraph [20] he states:

> "… 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).
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> (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."

[19] I am satisfied, dealing with this last point, that in this particular case there is no "legitimate personal or juridical advantage" which would allow me to take it into account in deciding whether or not to grant a stay.

Application of the principles to the facts of the present case.

[20 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. The Defendant is established in every part of the United Kingdom, and therefore its connection with a Northern Irish forum is not a fragile one.

[21] I then consider the other factors put forward by the Defendant and test those against both the principle of suitability for the interests of all of the parties and the ends of justice: and that England and Wales has been shown as clearly and distinctly more appropriate than the Northern Irish forum. These factors are:

(i) The law in respect of all aspects of the action, both as to liability and the approach to damages, is the same both in Northern Ireland and in England and Wales. This, therefore, is neutral.

(ii) The issue of substantial inconvenience or expense has not been shown for the reasons set out in paragraph [17] above. While there I considered that the issue of expense may well be neutral, there is a potentially greater inconvenience to be caused to the Plaintiff being required to attend in England rather than other witnesses coming to Northern Ireland (if indeed their attendance in Northern Ireland is required).

(iii) I have considered the factor of "real and substantial connection which is based on the diagnosis having been made in England and Wales as indeed was the treatment for a period of over 20 years". I accept this must be afforded weight, but at the end of the day the alleged misdiagnosis and its consequences are based on the medical records. This is not the case, for example, of a road accident where liability may depend on location and the evidence of witnesses to the accident – where the allegation as to the impact of injuries may depend on credibility informed by hospital records and witnesses (for both plaintiff and defendant). Indeed in this case there is no certainty that the witnesses involved going back some 40 years and more from the initial diagnosis would be available if required. I therefore have decided on balance that this factor carries some, but not substantial, weight.

(iv) I have noted the passage of time from the service of the Writ until the date of the summons, a period of 3 ½ years during which the Plaintiff's solicitors were engaged in the preparation of the case and in circumstances where the Defendant did not require the service of a Statement of Claim as to the liability in the matter or certain aspects of the potential heads of damage – such as the operation of sterilisation which the Plaintiff was required to undergo. That delay has not been explained to the court.

(v) The Defendant has established that the forum of England and Wales is available but I do not consider it is established that the forum of England and Wales is clearly or distinctly more appropriate than the Northern Irish forum.

Conclusion

[23] I allow the appeal and remove the stay on proceedings in Northern Ireland.

ADDENDUM

Since the giving of this judgment I have been advised that the reason for the application not being made earlier was that the Belfast Health & Social Care Trust

had been joined as a defendant to the action – which it is accepted would have been a relevant factor in any application. The Plaintiff discontinued against the Trust on 25 February 2015, and the application was made on 27 April 2015, which I consider acceptable.