

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IAN SHAW SUITER and ALFRED DAVID SUITER

Plaintiffs:

v

WILLIAM FRANCIS EVES and  
O'HANLON BROTHERS LIMITED (No. 2)

Defendants:

STEPHENS J

**Introduction**

[1] I gave judgment in relation to the issue of liability on Tuesday 3 March 2015. I had also been asked by the parties to address and determine six questions in relation to the amount of damages. I also gave judgment in relation to those six questions on 3 March 2015. In relation to liability I found in favour of the plaintiffs without any reduction for contributory negligence. In relation to the amount of damages I held that the plaintiffs had established on the balance of probabilities that but for the fatal road traffic collision on 2 August 2007, the deceased would have been employed in Iraq by OMA Middle East Limited as an operations manager between 15 September 2007 and 1 April 2010.

[2] After I had determined the six questions in relation to the amount of damages negotiations took place between the parties. There was a meeting of the accountants for each party and they prepared a Scott schedule. However, it was not possible to finally agree a figure because there was an outstanding issue in relation to the question as to whether the deceased's earnings in Iraq would have been subject to UK tax. That was not one of the 6 questions which I had heard and determined. At a review hearing I was informed that the parties could not reach agreement and accordingly I listed the matter for a further hearing on Tuesday 10 March 2015.

[3] On 10 March 2015 Mr McNulty Q.C. who appeared on behalf of the plaintiffs, indicated that in relation to this outstanding issue, he was proposing to recall Mrs Suiter and Mr Neil Suiter and that he was in addition proposing to call Ms Niblock of ASM Chartered Accountants. Mr Ringland Q.C., who appeared on behalf of the defendants, objected to further evidence being given by Mrs Suiter and Mr Neil Suiter on the basis that their evidence in relation to the issue as to whether the earnings were tax exempt should have been given when they were initially called. He reminded the court that no evidence in chief was given by either of the witnesses on this issue and he stated that he had deliberately not cross-examined in relation to it.

[4] I considered that it was entirely sensible for the parties to identify factual issues for the trial judge to determine in relation to the amount of damages so as to enable the accountants thereafter to calculate the appropriate figure. However, for such a system to work all the issues have to be identified and that involves a mutual process between the parties. The obligation was on both parties to identify all the relevant issues. If there was an oversight by one or other or both parties in identifying an issue then, subject to any question of, for instance, prejudice, delay, abandonment or some inappropriate conduct, I ruled that it was appropriate for further evidence to be led in relation to the identified issue.

[5] It was at all stages expressly envisaged that the accountants would be called, that is Ms Niblock for the plaintiffs and Ms Holywood of Price Waterhouse Cooper for the defendants. I decided that there was no reason why in the exercise of discretion Mrs Suiter and Mr Neil Suiter could not be recalled. I permitted them to be recalled and if that also involved the plaintiff's re-opening their case then I also permitted that to occur.

[6] I should also add, by way of introduction, that an issue arose as to the identity of the accountant to be called on behalf of the defendants. In the event the defendants wished to call Mr Fleetwood of Price Waterhouse Cooper and not Ms Holywood. Mr Fleetwood had not prepared an expert's report. The fact that he was to be called had not been disclosed to the plaintiff's advisers until the very last minute. The reason that the defendants wished to call Mr Fleetwood as opposed to Ms Holywood is that he is a tax expert with experience of applying for tax exemption for those working abroad. Ms Holywood is a forensic accountant and therefore in her evidence as to this issue she would have been relying on what she had been told by Mr Fleetwood. She would have been giving hearsay expert evidence. I permitted the defendants to call Mr Fleetwood on the basis that if having heard his evidence the plaintiff wished to engage and call an equivalent expert they would be at liberty to do so.

[7] In my judgment there was a realisation on behalf of both the plaintiffs and the defendants that there was this outstanding issue and there was a realisation on behalf of both the plaintiffs and the defendants of the nature of the evidence that was to be called. I considered it appropriate to hear all the evidence that the parties

wished to present to me in relation to it so that Mrs Suiter and Mr Neil Suiter were recalled, Ms Niblock was called on behalf of the plaintiffs and Mr Fleetwood was called on behalf of the defendants. I indicated that if any particular problem emerged that the plaintiffs were at liberty to call further accountancy evidence. In the event the plaintiffs were content to rely on the evidence of Ms Niblock.

### **The further issue**

[8] In order for the deceased to be non-taxable he would have to meet the following criteria:

- (a) He would have to work outside the United Kingdom for more than one complete tax year.
- (b) During the period 15 September 2007 to 1 April 2010 the deceased could not be in the UK for more than 230 days in total, ie on average he would have had to be in the UK less than 91 days in a tax year and no more than 183 in any complete tax year.

[9] Prior to 5 April 2008 the day a tax payer arrived in the United Kingdom and the day that he left the United Kingdom, were not included in the calculations of the number of days that the tax payer was in the United Kingdom. That changed on 5 April 2008 so that the day of arrival and the day of leaving were included.

[10] In order for HMRC to agree that a tax payer was not subject to UK tax the tax payer has to complete form P85 and submit that form to HMRC. Thereafter, the tax payer has to complete a tax return on the basis that he is exempt from UK tax. HMRC can challenge the tax payer's exemption and the onus would be on the tax payer to establish that he or she qualified. In order to demonstrate that he or she was outside the United Kingdom the tax authorities would request a variety of documents including documents such as:

- (a) passports;
- (b) flight documentation;
- (c) bank statements;
- (d) automatic till machine and credit card statements;
- (e) hotel receipts;
- (f) employer's records in relation to the tax payer's employment; and
- (g) a calendar or diary preferably kept contemporaneously and if not then retrospectively constructed.

[11] The advice from HMRC is that Form P85 should be submitted before the tax payer goes to work abroad. However, this not an absolute requirement in that it can be submitted subsequently.

### **Factual findings**

[12] The deceased had worked in Iraq in a security capacity in Basra. There was no evidence that he had submitted a Form P85 in relation to that period of employment. The inference that I draw is that, up to the date of his death, the deceased had not submitted Form P85 for the employment that he had in fact carried out in Iraq.

[13] There was evidence from Mrs Suiter and Mr Neil Suiter in relation to the period of employment prior to his death that the deceased was aware of the requirement to only be in the United Kingdom, in effect, for no more than 90 days in a tax year. That he was also aware of this requirement in relation to employment which he was going to undertake in Iraq. That in the past he had been careful to stay out of the United Kingdom by, for instance, staying in Dublin or Donegal and taking a holiday in Dubai, Paris and Portugal. I accept that he had been aware of the requirement to stay out of the United Kingdom and that he knew that it was in effect for all but 90 days in a tax year. In accepting that evidence I make it clear that my assessment of Mrs Suiter and her son was that they were totally credible witnesses in the widest meaning of the concept of credibility.

[14] Both Mrs Suiter and Mr Neil Suiter gave evidence that the deceased did not have his own accountant and that he did not organise his affairs with the benefit of professional advice except for advice that he was given on an informal basis. That his knowledge of the requirements in relation to a tax exempt status was garnered from conversations with other police officers and informal advice from a friend who was an accountant. I consider that the clearest evidence that an individual would have been tax exempt, in relation to earnings from employment abroad, would have been a submission by that individual of Form P85 in advance of going abroad together with formal written advice from an accountant followed by the collection of records to establish that the individual was not in the United Kingdom. The deceased had not obtained formal, as opposed to informal, advice from an accountant, there was no detailed evidence as to the nature of the advice that he was given by that accountant on an informal basis. There was general evidence that he was an organised individual, which I accept, but in order to be organised one has to have knowledge as to what has to be organised. I consider that the deceased did not know that it was preferable to submit a Form P85 before taking up employment abroad and I also consider that he did not know the full range and type of documents that HMRC would wish to see before accepting that he had remained outside the United Kingdom. I consider that he had not set about arranging the preservation and collation of such documents in relation to the spell of employment which he had had in Iraq.

[15] The question then would have been as to whether by chance he had kept some or all of those documents or alternatively whether he could have obtained copies of them. It cannot be demonstrated that the documents had been kept by him because all the documents which he had retained including his diaries were destroyed after his death. This was done as part of a general clean out and also I consider for emotional reasons. So one cannot see any documents in relation to the earlier period of employment and say from those documents that he would have kept documents in relation to the future employment that he would have had in Iraq but for the road traffic collision.

[16] So the position is I accept that the deceased was an inquiring individual. I accept that he enquired as to and was informed as to the necessity to be in the United Kingdom for in effect no more than 90 days each year. I accept that if he knew about Form P85 and the recommendation that it was to be lodged prior to taking up employment abroad he would have taken that step before leaving for Iraq in September 2007 and would have completed a Form P85 in relation to his earlier period of employment in Iraq. I consider that he did not know of that requirement at the date of his death. I accept that he would have known in a general way that he had to prove that he was outside the United Kingdom but I consider that it has not been established that he knew the extent of the documents that he should have kept. I consider that the deceased would have had no difficulty in producing records from OAM Middle East Ltd establishing the days that he was actually working in Iraq. That company would in the ordinary course of events have been able to generate documents establishing when the deceased was at work. The deceased's work was of a nature and type that would have enabled such documents to be generated in contrast to say a commission agent whose work patterns are not under close supervision by his employer.

[17] The difficulty that the deceased would have faced would have related to the periods of time that he was not at work in Iraq and demonstrating during those periods that he was not in the United Kingdom. I accept the underlying truthfulness and reliability of the evidence given by Mrs Suiter and Neil Suiter that the deceased would have remained outside the United Kingdom. I consider that there would by chance, rather than design, have been sufficient documents capable of being obtained that would have established that he was in fact outside the United Kingdom. Accordingly, though the position with HMRC would not have been straightforward I consider that the deceased would have been able to establish a tax exempt status.

## **Conclusion**

[18] I resolve the further issue in favour of the plaintiffs.