IN THE COUNTY COURT AT STOKE ON TRENT

Claim No: B44YJ595

B E T W E E N:-

MR STEVEN LOVATT

Claimant

-and-

THE DEPARTMENT OF ENERGY AND CLIMATE CHANGE (1)

INDESIT COMPANY UK LIMITED (2)

Defendant

ORDER

Before Recorder Male QC

UPON hearing the evidence at the trial on 2-3 October 2017 and considering written submissions from the Claimant and the 1st Defendant

AND UPON the 2nd Defendant having compromised the claim against it prior to the start of the trial

AND UPON reserved judgment previously circulated in draft being handed down

IT IS ORDERED that:-

1. There be judgment for the Claimant against the 1st Defendant in the sum of **£1,334.00** net of the apportionment, together with interest of **£74.76** until 29th December 2017 and increasing at a rate of **£0.07** per day thereafter.

2. The 1st Defendant do pay the Claimant's costs, including costs not anticipated within the budget that arose as a result of **(a)** the 1st Defendant being permitted to rely on the evidence of Mr. Parker, Consultant ENT Surgeon; **(b)** the parties being permitted to adduce oral evidence of the experts at trial; and **(c)** the additional submissions having to be prepared following the conclusion of the evidence. Such costs to be assessed on a standard basis, if not agreed.

3. By 4 pm on 19 January 2018 the 1st Defendant shall pay the said sums of damages and interest as set out at paragraph 1 of this Order and the sum of **£20,000** on account of costs.

Dated this 29th day of December 2017

Claim No. B44YJ595

IN THE STOKE ON TRENT COUNTY COURT

BETWEEN:

MR STEPHEN LOVATT

Claimant

-and-

SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE (1)
INDESIT COMPANY UK LIMITED (2)

Defendants

JUDGMENT

Introduction

1. In this multi-track case, the Claimant ("Mr. Lovatt"), who was born on 13 April 1953, claims damages for noise-induced hearing loss ("NIHL") and tinnitus allegedly suffered during his employment between 1969/70 and 1977/8 as an electrician with the First Defendant's predecessor in title, the National Coal Board ("the NCB"), at Holditch Colliery Chesterton, Stoke-on-Trent. For ease of reference, I will use the expression "the First Defendant" to refer to the NCB.

2. Mr. Lovatt also claimed damages for alleged exposure to noise during his employment with the Second Defendant between about 1986/7 and 2004/5. That claim was settled shortly before trial by the payment of a sum of money in respect of damages and costs to Mr. Lovatt as recorded in a Tomlin order.

3. I heard the evidence on 2 and 3 October 2017. Mr. Lovatt attended and was cross-examined. The two medical experts, Dr Mohammed Iqbal, Consultant Audiological Physician, on behalf of Mr. Lovatt and Mr. Andrew Parker, Consultant ENT Surgeon, on behalf of the First Defendant, attended and were cross-examined. In addition, there was a report from a single joint expert, Mr. Tim Ward BSc, MIOA, who gave expert engineering evidence. Mr. Ward did not attend for cross-examination, but Part 35 questions had been put to him by both Defendants.

4. Mr. Lovatt was represented by Ms Nadia Whittaker and the First Defendant by Ms Sophie Allan. I am grateful to both Counsel for the assistance which they gave me in their skeleton arguments, during the evidence and for their very full closing submissions.

5. At the start of the evidence, the issues identified in the skeletons were: (1) breach of duty; (2) causation; (3) limitation; and (4) quantum. At the end of the factual evidence, I asked Ms Allan whether limitation was pursued. I was told that it was not. This was confirmed in her written closing.

6. The evidence was finished fairly late in the afternoon of the second day. Both parties were anxious to avoid the costs of a further day's hearing and so I directed the exchange of written submissions by close of play on 24 October 2017 with written responses if required. I received the Claimant's Closing ("the CC") on 23 October 2017. The First Defendant's Closing ("the FDC") was lodged at Court in time, but it did not reach me until 31 October 2017. On 10 November 2017 I received written comments in response from each party to the other party's closing.

7. Having considered the two closings and the responses, I concluded that I could prepare this judgment without the need for an oral hearing which had been provisionally arranged for 4 December 2017.

8. The CC and the FDC are very detailed. I intend no disrespect to Ms Whittaker and Ms Allan by not dealing with each and every point which they raised. I will concentrate on the main points which they raised.

9. Having read the skeletons and listened to the oral evidence, the clear impression which I formed at the end of the second day was that one particular issue was central to the resolution of this dispute and that, without that issue, this case might not have been fought, bearing in mind the sums involved. That clear impression was confirmed by my reading of the CC, the FDC and the responses. That one issue concerns the reliability of the occupational audiograms in the evidence which were disclosed by the Second Defendant and which are at [B1/213 and 214]. In the CC that issue was described as the "core issue" and in the FDC as "the primary issue".

10. In these circumstances, I will deal with that particular issue at the outset after I have described Mr. Lovatt's employment with the First Defendant. I will then consider (1), (2) and (4) above in the light of my findings in relation to those occupational audiograms.

Mr. Lovatt's employment with the First Defendant

11. Mr. Lovatt was employed by the First Defendant as an electrician from 1969/70 to 1977/78. He would be working alongside a time served electrician. His work is described in detail in his witness statement, the contents of which I accept. I will only summarise Mr. Lovatt's work here.

12. The areas which he worked in which exposed him to high levels of noise were when he was working at the coal face or when working on mine developments where new tunnels were being developed. This would account for about 80% of his time underground. When he was working in close proximity to the coal face, he would be

working near large coal cutting machines. When he was working with the development teams, he would be working in close proximity to tunnel boring machines. It would normally take him around 30 minutes to get to the area he was working at and 30 minutes to return, riding along conveyor systems and man carriers, which, Mr. Ward says, were also noisy.

13. There were odd occasions when he would work on other conveyor systems or haulage engines which were further away from the main areas of noise, but on average this would only take up 10% of his time underground.

14. In all the time he was employed by the First Defendant, Mr. Lovatt was never provided with any form of hearing protection, nor given any warnings on how to protect himself from the dangers of exposure to noise. Nor was he given any form of hearing test.

15. In terms of the surveys relied upon by Mr. Ward in his report, the description of Mr. Lovatt's work most closely corresponds to that of a "face electrician". According to Mr. Ward, face electricians would have had a daily personal noise exposure level in the range 85-91dB: see [B1/131]. The average exposure of face electricians was between 87 and 88 dB Lepd: see [B1/132]. According to Mr. Ward, Mr. Lovatt's noise exposure would have exceeded 90 dB on some but not all days: see [B1/96], Mr. Ward also concluded that Mr. Lovatt's total NIL was 102.3dB: see [B1/130].

16. Mr. Lovatt's employment with the Second Defendant is not relevant to the issues which I have to decide, save in relation to: (1) the matter of the occupational audiograms, (2) the question of headphones and (3) the apportionment of his NIL between his different employers. I will deal with (1) and (2) next. As to (3), Mr. Ward's initial apportionment is at [B1/102] and was then revised at [B1/130] after Part 35 questions were put to him.

The occupational audiograms

17. The occupational audiograms are dated "13.09.01" and "6/5/05". As I mentioned earlier, Mr. Lovatt was employed by the Second Defendant between about 1986/7 and 2004/5. There is an issue of timing as to the later audiogram, as to whether the date should be "06/5/04" and also an issue as to whether the later audiogram relates to Mr. Lovatt. There are also issues as to the reliability of both audiograms.

18. Subject to the resolution of these issues, these audiograms are the closest in time to Mr. Lovatt's employment with the First Defendant. They could, therefore, be of considerable assistance to me in deciding whether or not Mr. Lovatt suffered NIHL while employed by the First Defendant. In this regard, Mr. Parker relies upon these two occupational audiograms to support his opinion that Mr. Lovatt did not suffer NIHL while employed by the First Defendant.

19. In particular, Mr. Parker says, and I summarise, that the later audiogram "does not show features consistent with noise exposure": see [B1/188]. In the case of the earlier audiogram, he says, and again I summarise, that TDH39 headphone would have been used, and that once allowance has been made for the use of these headphones by subtracting 6dB from the thresholds at 6KHz, this audiogram does not show "any evidence that [Mr. Lovatt] has been noise deafened": see [B1/189]. I will consider these two audiograms in the order in which Mr. Parker takes them, dealing with the later one first.

The later occupational audiogram

20. As mentioned above, there are issues as to whether or not this audiogram relates to Mr. Lovatt and also as to its date. It will therefore be convenient if I first consider Mr.

Lovatt's evidence. His first witness statement is dated 11 December 2014. Shortly before trial, he gave a second witness statement dated 19 September 2017.

21. At the trial application was made to introduce that second witness statement. The First Defendant opposed that application. I allowed the second witness statement to be introduced with my detailed reasons to be given later which I now do. I considered that any failure to comply with the directions for exchange of evidence was not serious or significant for the reasons explained by Mr. Lovatt's Solicitor, Mr. Maguire, in his witness statement in support of the application. Also, it seemed to me that there was a good reason for that failure as explained by Mr. Maguire in his statement. Considering all the circumstances, including the fact that, in any event, Mr. Lovatt was likely to be cross-examined on the circumstances surrounding both audiograms, I considered it appropriate to allow the introduction of the second witness statement. In this regard, it seemed to me to be inevitable that Mr. Lovatt would have to be cross-examined on whether or not there was a second audiogram and the circumstances surrounding both audiograms because Dr Iqbal criticised the reliability of the occupational audiograms and the circumstances in which they were undertaken expressing concern that they were performed close to work with the noises of machines being heard at all times. He considered that ambient noise above a certain level would make the audiograms unacceptable. In view of these comments by Dr Iqbal it seemed to me that cross-examination of Mr. Lovatt on the sort of issues raised in his second witness statement was inevitable and it was appropriate to allow that statement into evidence.

22. Regarding Mr. Lovatt's evidence, I consider that he was a truthful witness who was doing his best to assist the Court on matters which took place some years ago. In the case of the later occupational audiogram, it bears the date of 6/5/05, although the First Defendant says that this is a mistake for 6/5/04. So, it relates to events over 12 or 13 years before the trial. The first occupational audiogram in 2001 relates to events even

longer ago. Due to the passage of time, there must be a significant risk that Mr. Lovatt's recollection of events so long ago is faulty.

23. In his second witness statement, Mr. Lovatt disputed that the second occupational audiogram was ever undertaken. In that statement, he said that he believed it was a mistake or error for the following reasons:

> **"(a) I have no recollection of being tested a second time.**
> **(b) I was not employed by the 2nd Defendants in 2005, my employment terminated in September 2004. In May 2005 I was working for a company called Screwfix.**
> **(c) I had ceased working for the company on or about 20th May 2004 when I took sick leave due to an issue concerning another injury to my hand/arm called Tendonitis which was responsible for my employment terminating with the 2nd Defendants in September 2004.**
> **(d) On 6th May 2005 I would have been 52 years of age not 51 years of age as described.**
> **(e) The initials of the examiner are described as "EB" this is I believe a reference to Ellenn Betesta who was an Occupational Health Nurse employed by the 2nd Defendants. I knew Ms Betesta very well as she was involved in overseeing my other medical condition Tendonitis and was involved in the medical assessment that led to my employment being terminated in September 2004."**

24. Against these reasons, the fact of the matter is that both audiograms were disclosed by the Second Defendant. Also, the fact that Mr. Lovatt only claimed that he was unaware of the later audiogram shortly before trial is surprising, especially as that audiogram was the subject of discussions and reporting by the medical experts. Also, the later audiogram bears Mr. Lovatt's works number, i.e. 119156, the name is correct and the age of 51 mentioned on it is correct if the date was 6/5/04. These facts all point to there being a mistake in the date. As the First Defendant argues, the date of 6/5/05 could therefore be a mistake for 6/5/04 and Mr. Lovatt's recollection could be faulty.

25. Also, in the FDC my attention was drawn by the First Defendant to the Second Defendant's policy that "employees leaving the company particularly those who have been employed in high noise areas will be tested before leaving". The First Defendant said that this provides an explanation as to, amongst other things, why the later audiogram might have taken place so close to the date when Mr. Lovatt stopped working and why Mr. Lovatt did not have a copy of the later audiogram. Again, these are further reasons why there may be a mistake in the date and Mr. Lovatt's recollection could be faulty.

26. In view of all these matters relied upon by the First Defendant, it seems to me that, if they stood on their own, Mr. Lovatt's reasons (b), (c) and (d) might not stand up to scrutiny.

27. However, against these matters there are also Mr. Lovatt's reasons (a) and (e) which he elaborated upon in his oral evidence. In my judgment, reason (e) has the ring of truth to it. It was clear from Mr. Lovatt's evidence that there was "history", probably bad blood, between him and Ms Betesta. In these circumstances, it seems to me that it is likely that he would have remembered having a second audiogram undertaken by her, bearing in mind her involvement in the medical assessment that led to the termination of his employment. This is supported by Mr. Lovatt's reason (a). It is also supported by his evidence that he would have kept a copy of the later test if it had been done, as he did with the first test. Also, it seems to me that too much can be made of the point that Mr. Lovatt only raised this issue late in the day because in his first witness statement he refers to being given "a hearing test". (My emphasis). He did not refer to having two hearing tests.

28. Counsel dealt with this question in some detail in the FDC and the CC. Taking account of all the points which they raised, looking at the evidence as a whole and in the light of my favourable assessment of Mr. Lovatt's evidence, on the balance of

probabilities I conclude that Mr. Lovatt did not undergo the later occupational audiogram.

29. In case I am wrong in this conclusion, I should say that, in any event, I regard the later occupational audiogram as unreliable. As I understood Mr. Parker's evidence, he accepted that the later occupational audiogram for the right ear was unreliable. I also understood Ms Allan to accept this: see the FDC at para. 26.4. That is also my view on the evidence as the reading for that ear seems to me to be out of kilter with other readings. Also, as I explain below, I consider that there are matters relating to the 2001 audiogram which make it unreliable and that some of those matters also affect the reliability of the later occupational audiogram.

30. In short, I consider that I cannot rely upon the later occupational audiogram.

The 2001 audiogram

31. My starting point in considering the reliability of this audiogram is, again, the evidence of Mr. Lovatt. He said, and I accept, that the medical surgery where the tests took place serviced the entire plant and was very busy. It was so busy that the company employed a full time nurse and a nursing assistant. According to Mr. Lovatt, and again I accept his evidence, the surgery was very busy all day with many employees coming in and out throughout the day because they were injured or unwell or attending for tests.

32. Bearing in mind that Mr. Lovatt had other medical conditions, I accept that he was a regular in the surgery and that he was familiar with its location and operation. Effectively, despite the two sets of doors mentioned by Mr. Lovatt, the surgery was a busy and noisy thoroughfare. Also, the machines in the Vitreous Enamel Department were about 5/10 yards away. Mr. Ward's report shows that these machines were very

noisy: see [B1/130]. I am satisfied from Mr. Lovatt's evidence that both the 2001 audiogram and the later audiogram were undertaken in very noisy surroundings, including the noise from machinery.

33. In these circumstances, simply as a matter of common sense, it seems to me there must be doubt about the reliability of the 2001 audiogram because it was undertaken in noisy surroundings. However, my decision does not rest on common sense alone. As I understand the relevant guidelines or requirements from the British Audiology Society, in carrying out such tests, care has to be taken regarding excessive ambient noise: see the CC at para. 6(ii)(a). Making full allowance for the fact that headphones were used, I am troubled by the fact that there was likely to have been substantial background noise at the time of this test. The same point applies to the later occupational audiogram.

34. Furthermore, apart from what Mr. Lovatt told me, I have no information about the circumstances of this test. So, for example, I do not know whether the tester considered if Mr. Lovatt was exposed to any loud noise in the previous 24 hours, whether his ears were occluded by wax and whether Mr. Lovatt (or indeed the tester) were suffering from fatigue. As I understand the expert evidence, these are relevant factors which might lead to the test having to be postponed. And, as Mr. Lovatt's and Mr. Ward's evidence show, Mr. Lovatt was working in noisy conditions.

35. It was also apparent from the exchanges between Counsel and the two experts that the type of headphones being used to carry out the test is relevant to an assessment of the reliability of the audiograms. I do not know whether the equipment apparently supplied to the Second Defendant in 1991 was the equipment actually used by its employees in 2001. It seemed to me that Mr. Parker's assertion that the headphones either were, or were likely to be, TDH39 headphones was speculation. As I

understood his evidence, Dr. Iqbal disputed whether the headphones were, or were likely to be, TDH39s.

36. Due to the settlement by the Second Defendant of Mr. Lovatt's claim against it, I have no evidence from the Second Defendant about the conditions in which the testing was carried out, or about the nature and circumstances of the testing, or about the kind of headphones that would have been used. In contrast, the evidence which I do have is that of Mr. Lovatt, which leads me to view the 2001 audiogram with considerable suspicion as it seems to me that it was tainted or contaminated by the conditions in which it was undertaken as described by Mr. Lovatt in his evidence which I have accepted.

37. The First Defendant had various arguments as to why the sound of machinery would not have mattered. So, for example, it suggested that the effect would have been to make the measured thresholds worse, not better: see the FDC at para. 23. Also, it suggested that the process of Bekesy audiometry makes it highly unlikely that such mistakes would occur: see the FDC at para. 24. Further, it was suggested that, even if the test results were "contaminated" with noise, the effect is likely to have been uniform.

38. I have considered these arguments but, if they are correct, they beg the question as to why the British Audiology Society recommends that the tests be carried out in conditions where there is not excessive ambient noise. If I was to accept these arguments, I would be relying upon measurements obtained in circumstances in conflict with the Society's recommendations. Also, I consider that I would be relying on "contaminated" test results. Unless both the experts agreed that I could do so, I would be very reluctant to rely upon such tests. The experts did not both agree. Indeed, they had very different views on the reliability of the audiograms. Absent agreement between the experts, I do not accept the First Defendant's arguments.

39. Also, in the absence of any, or any reliable, evidence as to the type of headphones used in 2001 and later, and in the light of the difference of opinion between the two experts on the type of headphones likely to have been used, I do not accept that they were TDH39s. It follows that I cannot accept Mr. Parker's subtraction of 6dB from the thresholds of 6 kHz: see [B1/189]. As I understood Mr. Parker's evidence, this subtraction was necessary to support his reliance upon the 2001 audiogram as showing no notching and, hence, no evidence of noise deafening.

40. I should add that I am also reluctant to rely upon Mr. Parker's reliance upon research about the value of occupational audiometry when I have not been provided with the papers which underlie this research.

41. In any event, there were features of the 2001 audiogram which I found surprising and which suggested to me that they were not reliable. In this regard, as I read the 2001 audiogram, it shows very good hearing thresholds in the frequencies of 3-6kHz in the right ear. However, as I understand it, these are the frequencies most susceptible to noise damage. This does not strike me as plausible for a man who by 2001 was exposed to noise of around 100 dB NIL: see Mr. Ward's report at [B1/130] and see also the submissions at pp. 16-18 of the CC which I accept.

42. It follows that there must be a real question mark over the reliability of the 2001 audiogram because it shows that a man exposed to noise in excess of 100 dB has hearing thresholds at the most noise-sensitive frequencies better than would be expected for an average person of their age not exposed to any noise.

43. Also, it seemed to me that Mr. Parker had no satisfactory explanation for the upside-down "V" shape that appears in both ears in 2001, whereas Dr. Iqbal considered that this was due to the effect of Mr. Lovatt hearing the noise of the machinery at the time of the assessment. I prefer Dr. Iqbal's view. It is consistent with the evidence of Mr.

Lovatt about conditions in the surgery and the effect of the nearby noisy machinery which I have accepted.

44. Also, I found Ms Whittaker's coloured composite graph showing the results of the audiograms very helpful. I found it instructive to compare the relative consistency of the thresholds at the noise-sensitive frequencies in Dr Iqbal's and Mr. Parker's audiograms and to contrast them with their disparity with the 2001 audiogram. This is especially so in the right ear. It seemed to me that Ms Whittaker's coloured representation shows that there is something wrong with the 2001 audiogram. The alternative is that there is something wrong with both Dr Iqbal's and Mr. Parker's audiograms, but that seems unlikely and was not suggested by either side at the trial.

45. The CC and the FDC raise a number of detailed arguments. I have not dealt with each and every point raised by Counsel but, having dealt with the main points raised by them, I consider that, in addition to my concerns about the circumstances in which the 2001 audiogram was carried out, there are other matters which lead me to conclude that it is not reliable.

Summary on the occupational audiograms

46. In summary, I conclude that the later audiogram does not relate to Mr. Lovatt. In any event, and in case I am wrong in this conclusion, I consider that both it and the 2001 audiogram are unreliable and do not truly reflect Mr. Lovatt's hearing threshold.

47. It follows from this conclusion that the occupational audiometry does not undermine the weight of the evidence from the 2014 audiogram carried out by Dr Iqbal. This audiogram shows clearly defined "notches" which demonstrate that Mr. Lovatt has been noise-deafened. I understand this to be accepted by Mr. Parker, assuming as I have found, that the occupational audiometry is not to be relied upon.

48. These findings resolve in Mr. Lovatt's favour what I understood to be the main issue between the parties. I will now go on to consider matters in the light of these findings.

(1) Breach of duty

49. From the CC and the FDC, it seems to be agreed that the main question is how a reasonable employer would have acted and, in particular, whether a reasonable employer would have acted in the manner in which the First Defendant acted. In this regard, I was referred to "Noise and the Worker" and the Code of Practice mentioned below.

50. There is an issue between the parties as to whether the First Defendant's approach to the control of noise at the colliery should have been informed by "Noise and the Worker" which was first published by HMSO in 1963, with a second edition in 1968. (Mr. Lovatt's employment commenced in 1969/70). This document recommended that reductions should be made to a level roughly equivalent to a daily exposure of 90 dB(A). From 1972 the "Code of Practice for Reducing the Exposure of Employed Persons to Noise" stipulated a threshold daily exposure of 90 dB(A).

51. The Claimant says that "Noise and the Worker" should have informed the First Defendant's approach, whereas the First Defendant disputes its relevance.

52. Mr. Ward says in para. 3.2 of his report that the advice in "Noise and the Worker" related to "Factories" and that its relevance to the mining industry is a matter for the Court. For the reasons set out below, I consider that "Noise and the Worker" provided relevant guidance that should have informed the First Defendant's approach to the control of noise, even though the workplace was a colliery and not a factory.

53. First, on my reading of the Statements of Case, (see [B1/6 to 13] for the Particulars of Claim and [B1/16-21] for the Defence) the relevance of "Noise and the Worker" is not seriously disputed by the First Defendant. All that the First Defendant does in paragraph 21 of its Defence is to not admit its relevance and put Mr. Lovatt to proof. In these circumstances, in the light of CPR 16.5(5), I doubt whether this point is open to the First Defendant.

54. Secondly, however, setting aside this pleading point, in the light of what Lord Mance said in Baker v. Quantum Clothing Group Limited [2011] UKSC 17 at para. 15 about how the "publication entitled Noise and the Worker drew the attention of employers to the need to protect their workers from excessive noise", I reject the First Defendant's point.

55. Also, from 1972, there was the guidance in the 1972 Code of Practice. The First Defendant's suggestion in the FDC that it should have a period of time to act on the guidance might be relevant if there was any evidence that the First Defendant ever did anything in response to that guidance. However, the fact of the matter is that the evidence before me discloses that the First Defendant did nothing and took no steps at all to protect its workers from excessive noise. I consider that the 1972 Code of Practice provided relevant guidance that should have informed the First Defendant's approach to the control of noise.

56. Having accepted Mr. Lovatt's case that Noise and the Worker and the 1972 Code of Practice should have informed the First Defendant's approach to the control of noise, it seems clear to me that those documents did not actually inform its approach to noise because Mr. Lovatt's evidence shows that the First Defendant did nothing. This is confirmed by what Mr. Ward says to which I now turn.

57. In para. 3.14 of his report, under the heading "Claimant's Exposure", Mr. Ward concluded as follows:

> **"3.14 On the above analysis, the Claimant's noise exposure with the First Defendant would have exceeded the criteria for action set out in Noise and the Worker, and the 'recommended limit' of the 1972 Code of Practice, on some but not all days, in my opinion."**

58. In paras. 3.31 to 3.33 of the report, under the heading "Obligations – First Defendant", Mr. Ward concluded as follows:

> **"3.31 If the Court accepts my analysis, the Claimant's noise exposure with the First Defendant would have varied, and on some days would have reached a level such as to require the Defendant, in my opinion, to take preventive and precautionary measures. Measures should have included, in my opinion, the provision of suitable hearing protection, instruction and training in the use of hearing protection including how and under what circumstances it should have been used, and enforcement of the use of hearing protection as required. It would not have been the case, in my opinion, that the Claimant would have been expected to have been provided with and used hearing protection on every working day. The Defendant would further have been under an obligation, in my opinion, to seek to reduce the Claimant's noise exposure through technical and organisational means, so far as reasonably practicable.**
>
> **3.32 The Claimant says that he was never provided with any form of hearing protection by the First Defendant, and never given any warnings or advice to protect himself from the dangers of noise, either verbally or in writing.**
>
> **3.33 The [First] Defendant has provided no evidence on these matters."**

59. I do accept Mr. Ward's analysis. It follows that on some days Mr. Lovatt's noise exposure with the First Defendant would have reached a level such as to require the First Defendant to take preventive and precautionary measures. The First Defendant

called no evidence. I am satisfied from Mr. Lovatt's evidence, that the First Defendant took no preventive and precautionary measures.

60. In circumstances where Mr. Ward says that the noise exposure was such as to require the First Defendant to take preventive and precautionary measures and the evidence is that the First Defendant took no such measures, I conclude that there was a breach of duty. The First Defendant did not act as a reasonable employer would have acted.

61. The First Defendant sought to resist this conclusion on various grounds as set out in the FDC. Dealing with the main points raised by the First Defendant, it said that the First Defendant's premises were not a factory within the meaning of "Noise and the Worker". I have dealt with this point earlier. Also, in any event, it seems to me from Mr. Ward's report that he regarded the 90 dB(A) level as relevant to the approach which the First Defendant should have taken even in a colliery. Also, that threshold was stated in the 1972 Code of Practice to be of application to all in industry who were exposed to noise. Mr. Lovatt's employment was from 1969/70 to 1977/78.

62. Next, the First Defendant relied upon the evidence of the daily personal noise exposure level of face electricians producing an average daily personal noise exposure of 87-88 dB: see para. 7.6 of the FDC. It suggested that there would have been an "even" spread of noise levels and that the vast majority of exposure would have been to 90 dB Lepd or less and there may have been only occasional exposure which was, it said, (marginally) in excess of 90 dB.

63. It seems to me that the difficulty with this argument is that it seeks to divert the Court away from what Mr. Ward said in his report. Mr. Ward was quite clear that Mr. Lovatt's noise exposure would have exceeded the criteria for action set out in Noise and the Worker and the recommended limit of the 1972 Code of Practice on some but

not all days. He was also quite clear that the First Defendant should have taken some, but did not take any, preventive or precautionary measures.

64. Also, in so far as the First Defendant seeks to rely upon the fact that there were some days when Mr. Lovatt was not exposed to excessive noise, it seems to me to be an unattractive argument because it ignores the fact that there were other days when he was exposed to excessive noise. As Ms Whittaker said in her skeleton "the fact that there would have been other days when the hazardous level of daily noise would not have been reached cannot be used to excuse the breach of duty on those days on which it did occur". I agree.

65. As Swanwick J said in Stokes v. Guest, Keen and Nettleford (Bolts and Nuts) Ltd [1968] 1 WLR 1776 and 1783 "the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know". Ms Whittaker went on to say in her skeleton, that it is inconceivable that a reasonable and prudent employer who knows or should know that a daily noise exposure at or above 90 dB(A) Lepd creates a foreseeable risk to its employees would disregard such a risk simply because there are other days on which noise exposure does not reach this threshold. Again, I agree.

66. The First Defendant also argued that the employment situation of a vast underground ever-changing area of a colliery was very different to that of a factory or other static premises and that equipment suitable for testing underground did not become available until the mid-1970s. It therefore says that it is difficult to see how the First Defendant could reasonably have taken steps to assess the daily personal noise exposure of underground workers such as Mr. Lovatt when the necessary equipment had not yet been made available: see para. 7.7 of the FDC. The difficulty with this argument is that, as I have found and as Mr. Ward confirms, the Second Defendant did nothing at all. So, as Mr. Ward says, and I accept, Mr. Lovatt was never even

provided with any form of hearing protection by the First Defendant, nor given any warnings nor given any advice as to how to protect himself.

67. As to "Noise and the Worker", in addition to relying upon the fact that it is in respect of factories which I have already dealt with, the First Defendant also says that it is difficult to discern what level of noise is identified as being excessive and that there is nothing in the guidance which suggests that it would be unsafe for employees to have an average Lepd of 87-88 dBA: see para. 7.8 of the FDC. Again, this seems to me to be an attempt to shelter behind an average which I have dealt with earlier and where I agree with the criticisms made by Ms Whittaker in the CC.

68. As to the 1972 Code of Practice, the First Defendant says that none of the guidance is of real application to the circumstances of the First Defendant, where noise levels at locations and noise exposure might be markedly different on different days. Also, as Mr. Ward's average Lepd figures were derived from surveys carried out by the First Defendant over months and years, it is submitted that there would be a marked variation of noise levels on a daily perhaps hourly basis and so it would not be reasonable to have expected the First Defendant to have determined on which specific days "excessive" noise exposure was likely to occur: see para. 7.9 of the FDC.

69. Again, it seems to me that these are attempts to turn averages to the First Defendant's advantage which I have rejected earlier. Also, it seems to me that, if the First Defendant wants to rely upon these matters, which I consider to be an attempt to undo the harm caused to it by Mr. Ward's report, it should have put all such matters fully to Mr. Ward.

70. Towards the end of its submissions on breach of duty in the FDC, the First Defendant says that it is for Mr. Lovatt to prove: (1) the proportion of negligent exposure; (2) that it made a material contribution to his hearing damage; and (3) the extent of such

contribution and that there is no such evidence before the Court. Also, the First Defendant says that, even if there was a finding that the negligent exposure had made a material contribution to Mr. Lovatt's hearing difficulties, he would only be entitled to damages in respect of damage caused by the days on which noise levels were in excess of 90 dBA.

71. I am satisfied that the First Defendant was in breach of duty and made a material contribution to Mr. Lovatt's hearing damage. Mr. Ward puts the NIL at 102.3 dB. He puts the contribution made by the First Defendant to Mr. Lovatt's NIL at 23%. I deal below with the time that the First Defendant was in breach of its duty.

72. Finally, by way of a summary in the FDC, the First Defendant summarily avers that: (1) it was reasonable to rely on average levels of personal noise exposure which were clearly below the maximum threshold Lepd; and (2) it was not reasonable to expect an underground employer such as the First Defendant to foresee that occasional exposure to noise levels marginally in excess of the recommended threshold would be dangerous in circumstances where the average noise exposure was well within such limits: see the FDC, para. 7.11.

73. I reject both these summary averrals. I have already dealt with the matter of relying upon averages where I agree with the criticisms made by Ms Whittaker in the CC. As to what was reasonably foreseeable, in the light of Mr. Ward's evidence and what I have said above about the relevant publications, I consider that it was reasonably foreseeable that the level of exposure spoken to by Mr. Ward would be dangerous to a worker such as Mr. Lovatt.

74. Mr. Ward's conclusion was that Mr. Lovatt's exposure was "on some but not all days". In their Part 35 questions neither party asked Mr. Ward what he meant by "some but not all days". However, Mr. Ward was provided with, amongst other

things, the Statements of Case and Mr. Lovatt's first witness statement. In his first witness statement, Mr. Lovatt explained in detail how he spent his time and when and where he was exposed to noise. I have summarised that evidence earlier in this judgment. In addition to what I said there, I note that there were also days when he was on courses (see [B1/285-293]) or was seriously absent from work (see [B1/296 and 306]).

75. In the CC, Mr. Lovatt invites me to accept his unchallenged evidence that he spent 80% of his time underground working at the coal face or on mine developments, both of which were exceptionally noisy and about 10% on haulage engines which were further away from the main area of noise and that he travelled to the coal face and back for 1 hour a day. Mr. Lovatt submits that all of his work at the coal face is likely to have been at or about 90 dB(A) L_{EP}'d and the travelling would have been – as Mr. Ward puts it – in 'around the high-80s to low-90s': see the CC at p.9.

76. Mr. Lovatt says that this should lead to the conclusion that the risk of exposure at or in excess of the relevant threshold prevailed and should be assessed at no less than about 90% of his time underground such that the Court should find that the First Defendant was in breach of its duty for no less than 90% of the total contribution made by it to his NIL assessed by Mr. Ward at 23%.: see the CC at p.9.

77. The First Defendant does not suggest any specific percentage corresponding to Mr. Lovatt's suggested 90%.

78. It seems to me that Mr. Lovatt's suggested 90% is excessive and makes inadequate allowance for his time away from the main areas of noise and no allowance for his time on courses and his serious absences from work. Doing the best I can, I would put the relevant percentage at 80%.

(2) Causation

79. I have explained earlier why I do not regard the 2001 and later occupational audiograms as reliable. That leaves the audiograms undertaken by Dr Iqbal and Mr. Parker. At one stage before the trial, Dr Iqbal's audiograms were criticised by Mr. Parker. However, that was because Mr. Parker had received an inadequate copy by fax. When Mr. Parker was provided with an adequate copy, the criticisms were withdrawn by him.

80. On the basis of Dr Iqbal's audiograms, and applying the guidance in Coles et al "Guidelines on the diagnosis of noise-induced hearing loss for medico-legal purposes", Clinical Otolaryngology, 2000, 25, 264-267, I am satisfied that NIHL can properly be diagnosed. As I understand Mr. Parker's evidence, if the occupational audiograms were not relied upon, he did not dispute this conclusion.

81. Accordingly, I am satisfied: (1) that Mr. Lovatt has NIHL; (2) that in breach of duty the First Defendant exposed him to harmful levels of noise; and (3) that the First Defendant's breach made a material contribution to Mr. Lovatt's condition.

(3) Quantum

82. In view of the sums involved, during the course of the hearing I asked the parties to try to agree quantum, but they were unable to do so.

83. As to NIHL, Dr Iqbal and Mr. Parker agree that, at the time of Dr Iqbal's audiograms, Mr. Lovatt's excess hearing loss was 11-14dB. I agree with the First Defendant that this is a modest hearing loss. In this regard, the loss of amenity recorded by Mr. Iqbal was limited: see section 2.1 of his report at [B1/137]. Also, the symptoms have not been such as to lead Mr. Lovatt to make any enquiries about hearing aids.

84. As to tinnitus, Mr. Lovatt said that he experiences what he would describe as a buzzing noise in both his ears. It normally lasts for between five to ten minutes and normally occurs two to three times each week. According to the Joint Statement, [B1/144] Dr Iqbal considers the tinnitus to be of mild severity and, on the balance of probabilities, considers it to be due to age and NIHL. According to the Joint Statement, in Mr. Parker's opinion the tinnitus is physiological (i.e. within normal experience) and is not noise induced. However, in Mr. Parker's report, when commenting on Dr Iqbal's answers to Part 35 questions, Mr. Parker says that he agrees with Dr Iqbal that tinnitus starting sometime after cessation of alleged exposure will be at least in part noise induced provided there is NIHL and no new act (such as a head injury or meningitis) has intervened. That is what I have found to be the case, i.e. that there is NIHL and that no new act has intervened.

85. In these circumstances, in view of my findings and in view of what Mr. Parker said in his report, it seems to me that, as per Dr Iqbal, the tinnitus is in part due to age and part due to NIHL. When I consider the Judicial College Guidelines, I will proceed on the basis that there is very slight tinnitus.

86. Counsel referred me to the Judicial College Guidelines (2017) pp. 18 to 20 at 5(B)(d). Ms Allan said that if, as I have found, there was more than de minimis tinnitus attributable to noise, then bracket (iv) might be appropriate, but at the bottom of the bracket due to the modest nature of the symptoms. She submitted that an award of £5,000 to £6,000 was appropriate if tinnitus was more than de minimis. Ms Whittaker referred me to brackets (iii) and (iv). She said that if the Court accepted that tinnitus represented a compensatable symptom an award of in the region of £12,000 was appropriate.

87. I will not set out the full text to 5(B)(d). Brackets (iii) and (iv) are as follows:

(iii) Mild tinnitus with some NIHL - £10,040-£11,890.

(iv) Slight or occasional tinnitus with slight NIHL - £5,870 to £10,840.

88. In the light of what Dr Iqbal and Mr. Parker said, it seems to me that Mr. Lovatt has very slight tinnitus with slight NIHL. Taking account of all that the experts told me, I consider that the appropriate award is £7,250.

89. As to hearing aids, Mr. Parker and Dr Iqbal agree that Mr. Lovatt would benefit from hearing aids. However, Mr. Lovatt's evidence was that he has made no enquiries as to hearing aids, whether through his GP or privately. Mr. Lovatt was advised in 2014 (see [B1/26] at para. 8) that he would benefit by a referral to a Rehab Audiologist with a view to fitting hearing aids. Despite this advice, he has taken no such steps. Mr. Lovatt's oral evidence was that he did not want hearing aids because he did not want anything in his ears. From listening to Mr. Lovatt, and I have said earlier how impressed I was by his evidence, I got the clear impression that he did not want and did not intend to get hearing aids and that he would not be spending any money on them. On the balance of probabilities, it seems to me that Mr. Lovatt is not going to incur the expense of having hearing aids and that, therefore, as per the reasoning in Woodrup v. Nicol [1993] PIQR Q104 which Ms Allan relied upon, the cost should not be recoverable.

90. I should add that, in any event, I am satisfied from what Mr. Lovatt said in cross-examination that his first port of call would be the NHS and also that he would be content with NHS hearing aids which, bearing in mind his age and his post code, I understand would be available for free on the NHS to a man of that age living where he does.

91. In these circumstances, I decline to award any sum for hearing aids.

92. Next, there is the question of apportionment. Mr. Lovatt accepts that the damages must be apportioned in accordance with the principles set out in Holtby v. Brigham & Cowan (Hull) [2000] 3 All ER 421. This means that I have to apportion the damages on a time exposure basis, taking into account all causative exposure and apportioning liability for such culpable exposure by the First Defendant as I have found.

93. On page 26 of the CC, Mr. Lovatt works from the apportionment schedule that was prepared by the Second Defendant which shows that 32.90% of Mr. Lovatt's employment time was with the First Defendant. However, earlier in the CC at page 9, Mr. Lovatt works from the 23% which I mention in the next paragraph.

94. In para. 37 of the FDC, the First Defendant works from the apportionment schedule that Mr. Ward produced when answering Part 35 questions (see [B1/130] which produces 23%.

95. I consider that I should apply the figure of 23% produced by Mr. Ward, as he is the single joint expert and I know his reasoning in support of that figure. I do not know why the Second Defendant produced 32.90%, the Second Defendant not having appeared before me due to the settlement of Mr. Lovatt's claim against it. Also, in the CC, Mr. Lovatt seems to be in two minds as to whether the correct figure is 32.90% or 23%. I consider that the correct figure is 23%. In the CC at p.9, Mr. Lovatt applied 90% to this 23%, but earlier in this judgment I rejected that 90% and assessed the relevant percentage at 80%.

96. I am providing this judgment to the parties by email for the correction of any typographical errors, but not for any further submissions except as mentioned hereafter. I would ask the parties to carry out and agree the necessary calculations for the damages and interest in the light of the decisions in this judgment. I would also ask them to seek to agree costs. If the parties cannot agree the necessary calculations,

then I will deal with any issues relating to them on written submissions. Likewise, if the parties cannot agree costs, I will also deal with that matter on written submissions. Finally, I would ask the parties to provide me with a draft of the order which they wish me to make.

Recorder Male QC

12th December 2017

(Corrections made on 29th December 2017)