



Neutral Citation Number: [2021] EWCA Civ 34

Case No: B3/2019/1562

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HER HONOUR JUDGE MELISSA CLARKE
CO/4645/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2021

Before :

LORD JUSTICE BEAN
LORD JUSTICE MALES
and
LADY JUSTICE ANDREWS

Between :

DEBORAH HEAD (EXECUTRIX OF THE ESTATE OF Appellant
MICHAEL HEAD DECEASED)
- and -
THE CULVER HEATING CO LIMITED Respondent

Harry Steinberg QC and Kate Boakes (instructed by Fieldfisher LLP) for the Appellant
Michael Kent QC (instructed by BLM) for the Respondent

Hearing date: 16 December 2020

Approved Judgment

Lord Justice Bean :

1. Michael Head was born on 11 August 1958 and as a young man in 1974-79 (and again briefly in 1980-81) was exposed to asbestos while working for the Defendant company. Later he became the founder and managing director of his own heating and ventilation company, Essex Mechanical Services Ltd (“EMSL”). In December 2017 he began to experience symptoms of mesothelioma. Within a matter of weeks it became apparent that the disease would take its inevitable and fatal course.
2. Mr Head issued a claim for damages in the High Court on 19 September 2018. On 28 November 2018 Master Gidden entered judgment for damages to be assessed; it appears that the Defendant reserved the right to argue contributory negligence but in the event that was not pursued. An order was made for an expedited trial in the specialist mesothelioma list.
3. Mr Head gave evidence before a court examiner on 12 December 2018, as a precaution in case he were to die or suffer a further deterioration in his health preventing him from giving evidence at trial. As it turned out he was able to give evidence at the trial, which took place before Her Honour Judge Melissa Clarke on 11-12 April 2019.
4. Some of the items of damage were not in dispute. The judge made agreed awards totalling £80,688.10 and the Defendant also agreed to indemnify Mr Head against the cost of medical treatment during what little time remained to him. The judge heard submissions on what level of award was appropriate for pain and suffering and loss of amenity and made an award of £95,000, against which there has been no appeal. But on the principal issue, namely what damages should be awarded for Mr Head’s “lost years” claim the parties were very far apart indeed. Mr Steinberg QC and Ms Boakes contended for an award of £4,421,683. Mr Kent QC argued that there should be no award at all. The judge accepted the submissions of Mr Kent and valued the lost years claim at zero.
5. I have a good deal of sympathy for the judge. This was not a straightforward case: and her task was made more difficult by the absolutist submissions on behalf of the Claimant, and the almost equally absolutist submissions on behalf of the Defendant.
6. The judge refused permission to appeal to this court. A renewed application was initially refused by Simler LJ who considered it on the papers but, following an application made by Mr Steinberg and Ms Boakes under CPR 52.30 and the principle in *Taylor v Lawrence*, she revoked her order refusing permission and referred that question for determination by the full court at a rolled-up hearing. The overwhelming majority of *Taylor v Lawrence* applications are entirely unfounded but this one was a rare exception, perhaps the most striking one I have seen during six years’ service in this court. For the reasons which follow I consider that it was indeed necessary to reopen the determination of this appeal in order to avoid real injustice. We granted permission to appeal at the outset of the hearing before us.
7. Mr Head died on 7 November 2019, that is after the trial and the judgment at first instance. His widow was appointed to carry on the appeal, by order of Master Bancroft-Rimmer dated 11 February 2020, as executrix of Mr Head’s estate.

However, the case remains as it was at trial, a claim by Mr Head and now by his estate rather than a claim by his dependants under the Fatal Accidents Act 1976.

Findings of fact about EMSL and Mr Head's role in it

8. The narrative of how Mr Head had established EMSL and the part he played in it was undisputed. The judge said:-

“24. Mr Head founded and has been running a heating and ventilation services business since 1987. He is currently the managing director of EMSL, a company that he incorporated in 2004.

25. There are three other directors, who are his wife, Mrs Deborah Head, and their two adult sons, Dale and Aaron, all of whom work for EMSL. Mrs Head is also the Company Secretary.

29. Mrs Head works for EMSL doing administrative work relating to the Servicing Business for two days a week, one of which she often works from home. ...

30. Mr Head, Dale and Aaron work full time for EMSL. Dale Head is 32 years old and has worked for EMSL since he was 17. Aaron is 26 years old and has worked for EMSL since he was 20, having first obtained a University degree. Dale fulfils a management role, and it is intended that he should take over as Managing Director when Mr Head is no longer able to work. Aaron works 'on the tools'. Both were made directors of EMSL in April 2016, before Mr Head's diagnosis. Mr Head's evidence is that he appointed them because it was time.....

32. Each of the directors takes a salary from the company. In the year ended 30 April 2018 the salaries were £45,533 for Mr Head, £46,483 for Mrs Head, £52,738 for Dale and £37,277 for Aaron.....

36. EMSL has historically not paid out all of its profits. Mr Head has chosen to leave in EMSL profits which are not extracted from the company by way of dividends declared and paid or directors' salaries. Those go to improve the net asset value of EMSL. He explained in oral evidence that the financial stability of EMSL is a key part of his management strategy and accordingly EMSL carries no indebtedness beyond trade debts.

37. It does not appear to be disputed that Mr Head is the driving force behind the business. Mr Head said in oral evidence "I head up the company. I built it over many years. I make the decisions in relation to the direction the company goes in. I am involved on a daily basis with it. I tender and price contracts. I negotiate with clients. I have good personal relationships with

the company's clients over many years which has led to the prosperity of the company". Mrs Head in her witness evidence said it was "essentially... Mike's business. He built it up from scratch. He made all the contacts and is the force behind everything". She puts the success of the business down to Mr Head's efforts and expertise.

38. Mr Head described in his oral evidence a change in strategy in [the] direction of EMSL that he had devised and implemented in 2014: (i) to avoid external borrowings; (ii) focus on leveraging existing very close and long-standing customer relationships by entering into direct contracts with those customers rather than tendering for numerous sub-contracts; and (iii) focus on a high level of customer service, by delivering innovative solutions on time and on budget, which requires a high degree of skill in problem-solving and pricing contracts. It is the delivery of that strategy that has been his personal responsibility, rather than the execution of the work, which has been for his employees. I am satisfied that the success of that strategy is what has caused what the experts have identified as an increase in the profitability of EMSL since 2014.

39. Also not disputed is Mr Head's evidence that if he had not contracted mesothelioma, his intention would have been to work full time until 65, reducing to about 80% from 65 until 70. After 70, he intended to maintain a 'front of house' presence working at about 50%, continuing to maintain client relationships and acting as wise counsel for his sons, no longer taking a salary although continuing to receive dividends on his shares. His intention, and that of the rest of the family, was that as he reduced his involvement in the company the responsibilities of his sons Dale and Aaron would increase, with Dale eventually taking over as Managing Director.

...

44. Mr Head confirmed in oral evidence that he doesn't fear for the company, inasmuch that he trusts his sons, he thinks they are capable, and he has no fears, for example, about EMSL going out of business, but he sees the accelerated timetable for handover to his sons from that which he otherwise anticipated as introducing uncertainty about EMSL's profitability in the future. Mrs Head says that she does fear for the profitability of EMSL, as she thinks her sons "simply have not got the years behind them to have the requisite knowledge to run the company".

...

73. I am satisfied on the evidence before me that EMSL is a successful business, with a strong financial foundation, with an established reputation, which will continue to be managed by family members in whom Mr Head reposes trust. There is no evidence before me that the customers with whom Mr Head through EMSL has built up a trusted relationship over decades will not continue to rely on EMSL once it is managed by Mr Head's sons. After all, those carrying out the actual work (i.e. the employees and sub-contractors) will not change, and Mr and Mrs Head's evidence was that there was no intention that the strategy of EMSL would change. For those reasons, I accept the opinion of the expert forensic accountants that it is more likely than not that the profitability of EMSL will not diminish following Mr Head ceasing to be actively involved in the company and Mr Head's estate will continue to have the benefit of income from capital in the form of dividends payable on his shareholding in EMSL.

...

93. Accordingly, *I am satisfied that Mr Head's real loss of earnings or earning capacity includes 90% of EMSL's profits after directors' salaries and corporation tax, subject to a deduction equal to the value of Mrs Head's contribution to EMSL (again per Ward v Newalls)*. In the circumstances, one might expect this deduction to equate to her actual salary. However, both experts agree that Mrs Head's salary is above the market rate for her work for EMSL, and has been set at that level to maximise tax efficiencies, so it does not properly reflect her contribution to EMSL. They dispute what the appropriate notional salary of Mrs Head should be.

...

96. In my judgment Mrs Head provides more value to EMSL than £10 per hour for the administrative work she does, due to her experience and long service to EMSL alone. Add to that her additional responsibilities and potential liabilities as a director of the company, and in my view Mr Stanbury's figure is too low. I agree Mr Forth's figure is too high. I would give her role the full-time equivalent of £30,000 per annum, which for the two days a week she works equates to £12,000 per annum.” [emphasis added]

9. The judge went on to consider what proportion of net income should be deducted to allow for Mr Head's notional living expenses during the lost years and assessed it at 45%. She found that Mr Head's life expectation, if he had not contracted mesothelioma, had been 23.8 years from August 2018.

The lost years claim

10. The judge summarised this issue and her decision on it at paragraphs 8-12 of her judgment:-

“8. The issue is this: is it a relevant factor in arriving at the 'lost years' calculation that a significant part of Mr Head's earnings, namely his dividend income from EMSL shares, is likely to survive his death?

9. The Defendant says yes, and relies on the authority of *Adsett v West* [1983] Q.B. 826, a first instance decision of McCullough J in which he applied the principles of damages for the 'lost years' derived from *Pickett v British Rail Engineering Ltd.* [1980] AC 136 and *Gammell v Wilson; Furness v B & S Massey Ltd.* [1982] A.C. 27. McCullough J distinguished between earned income arising from a claimant's capacity to work and income derived from capital which survived a claimant's death and held, broadly speaking, that the former was recoverable in damages in a 'lost years' claim subject to an appropriate deduction for living expenses, and the latter was not.

10. Mr Head says no, and distinguishes this case from *Adsett v West* on the facts, which he says support his claim for full recovery of his earnings from EMSL, subject to an appropriate deduction for living expenses. Mr Head's secondary position, that *Adsett v West* was wrongly decided, was not pressed by his counsel at trial.

11. For the reasons which I give in this judgment, I am satisfied that:

- i) the principles of *Adsett v West* apply;
- ii) on the balance of probabilities, the profitability of EMSL is likely to continue after Mr Head's death, therefore the dividend income from the shares that he and Mrs Head hold in EMSL is likely to survive his death;
- iii) this dividend income is greater than the 'surplus' income he currently enjoys;
- iv) per *Adsett v West*, there is no loss in the 'lost years'.

12. Accordingly I assess that claim at nil.

13. I know how disappointing this result will be for Mr Head and his family. However I consider it is testament to his hard work, care, ingenuity, talent and sound management of EMSL over many decades, that EMSL will continue to produce dividend income for the financial wellbeing of his family, even

when he is gone. That is a legacy of which he can justly be proud.”

11. The judge’s detailed reasoning is contained at paragraphs 112-125 of the judgment:-

“Issue (v) - Determine whether the earnings which will continue to be earned after Mr Head's death are sufficient to cover the 'surplus' income, in which case there is no loss from the 'lost years', or whether there is a shortfall.

112. Mr Head's case is that the whole of his income from EMSL has been and in the future would have been earned income and so should be taken into account in any lost years calculation so that he can be compensated in damages for this loss.

113. Mr Steinberg distinguishes *Adsett v West* as in this case, he submits, the earnings which Mr Head has lost are not a return on any kind of investment in EMSL, but a reflection of his acumen, experience, skill and hard work. They are the fruits of his labour as the driving force of EMSL, and not, as in *Adsett v West*, the investment return on a passive holding in a business, which would continue to yield the same income irrespective of his capacity for work.

114. The Defendant's case is that all save Mr Head's director's salary is investment income from EMSL and will continue to accrue. Mr Kent submits that although *Adsett* was concerned with income from partnership shares in a business in which the deceased was not involved, the principle identified by McCullough J that income which does not cease with the claimant's death is not lost for the purposes of a 'lost years' calculation, is equally applicable in this case. Mr Kent made clear in his closing submissions that the Defendant does not ask the court to make a distinction between dividends on the one hand and salary on the other, in these circumstances, but between what has been earned by Mr Head and what will be lost by his premature death.

115. I agree with Mr Kent. I have set out in my discussion of the law my view that the principle derived from *Pickett* and enunciated by McCullough J in *Adsett v West* is that where earnings enjoyed in life survive and continue to be earned after death, those earnings have not been lost and cannot form part of a 'lost years' claim. That is the issue summarised by Mr Ashworth Q.C. for the defendants in *Adsett*, for whom McCullough J found: "Mr Ashworth submits that to take it into account would be to compensate for a loss which has not occurred; the deceased is dead; his earning capacity died with him, but his capital lives on; it has been earning interest ever since, and will continue to do so just as if he had lived".

116. For that reason it perhaps does not matter that I disagree with Mr Steinberg's characterisation of dividend income from Mr Head's shareholding in EMSL as "not a return on any kind of investment in EMSL". It is a return on his investment in EMSL in my judgment – both directly in terms of his policy of retaining profits in EMSL which increases the value of the company in which he owns 90% of the shares, and indirectly in the hard work that he has put into EMSL which has gone into creating value in the company, for example in building and maintaining client relationships to burnish the reputation of the company, reflected in financial terms in the value of its goodwill.

117. Mr Kent drew a distinction between EMSL and a one-man business incorporated for tax-efficiency reasons, where in reality the work is all being done by that man, so that when he dies or becomes unable to work the earnings dry up and cease. EMSL is a business with a multi-million pound turnover. I have accepted the forensic accountancy experts' opinion that the profitability of EMSL is likely to continue. I have assessed the estimated future expected net profit of EMSL before directors' salaries, tax and distribution of dividends at £580,000 per annum. After directors' salaries and tax are paid, 90% of what is left is attributable to Mr Head's shareholding, held by him and through Mrs Head, and will continue to be attributable to Mr Head's shareholding after his death, wherever he leaves those shares by testamentary disposition.

118. Although I will be assisted by the accountants doing their calculations to find the exact figures arising from the determinations I have reached, I am satisfied on a rough calculation that the net dividends which Mr Head's shareholding will continue to earn after his death will be no less £172,465 per annum (from Schedule 4 to the joint statement), and that this will exceed the surplus earnings currently enjoyed by Mr Head (being calculated from his salary plus extracted dividends attributable to his and Mrs Head's shareholding less deduction of tax on those elements, less deduction of 45% for living expenses, plus retained dividends added back in) of about £158,000 per annum. Accordingly, on the pleaded case, in my judgment, there is no loss of income in the 'lost years' which must be compensated in damages.

119. Mr Kent rightly points out that the court will not be happy to send Mr Head away with nothing in relation to the 'lost years', and I have considered carefully whether there is any other award that can properly be made.

120. There are a number of potential claims which Mr Head could have, but has not pleaded, and for which he does not contend. I remind myself that Mr Steinberg stated clearly in his

closing submissions that Mr Head's claim is maintained as pleaded. Those are potential claims for (i) loss of profitability of EMSL and/or loss of value in EMSL arising from Mr Head's illness and premature death; and (ii) the replacement costs of employing additional staff required for the same reason.

121. In relation to loss of profitability, Mr Kent made clear that the Defendant accepts that if the absence of Mr Head from the business due to his illness and premature death has an adverse impact on the value of his shareholding in EMSL, and/or its profitability and therefore the dividends that EMSL is able to pay in the future, then that is something which the court may compensate in damages. I conclude that I cannot make such an award, because no such claim is pleaded and although it may appear obvious that the open market value of EMSL is diminished if the Managing Director responsible for the success of the company is no longer in position, in my judgment there is no evidence before the court to enable it to assess or even estimate the value of such a claim:

i) the experts have not been asked to and have not turned their minds to any claim for diminution in value or profitability of EMSL although they could have been asked to opine had such a claim been pleaded;

ii) the evidence before me relevant to value is that Mr Head has never considered selling EMSL and Mrs Head, Dale and Aaron continue to have no intention to sell EMSL. They fully intend to keep it as a private family company, and its value to them is in relation to the earnings it produces. Accordingly I do not even have a baseline valuation of EMSL from which to assess diminution;

iii) The experts agree that it is more likely than not that EMSL will maintain its profitability in the future and I have accepted that opinion.

122. In relation to a claim for replacement costs, this was suggested by the Defendant's accountant Mr Forth at para. 3.10 of his report: "it might be necessary to look at what replacement costs, if any, the family business may incur after Mr Head's death as a basis of claim". He explained further in cross-examination by Mr Steinberg that since there appeared to be no intention to put in any management over the heads of the family, and rather it was anticipated that Dale Head would take over his father's role, he believed that a sensible basis for a claim for replacement costs would be the costs of employing someone to carry out Dale's current duties. However, once again Mr Head has pleaded no claim for replacement costs of any kind, has put forward no evidence to support the quantification of such a claim, and Mr Steinberg does not argue

that such an award should be made. Indeed the tenor of his cross-examination of Mr Forth on the point was that Mr Forth should not have addressed a potential claim which had not been brought.

123. Nonetheless, Mr Kent offers that, although these claims have not been made, if the court were to treat this as a jury point, and find that there are too many imponderables about how the business might be affected by the accelerated handover of management from father to sons, and so decide to make a *Blamire v Cumbria* award based on a broad-brush assessment valuing the risk to the profitability or value of EMSL of the accelerated handover of its management from father to sons, the Defendant will not resist it.

124. I return to the basic principle enunciated by Lord Scarman in *Gammell v Wilson* at page 78: "The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime" which must be "at least capable of being estimated" if "sufficient facts are established to enable the court to avoid the fancies of speculation". Mr and Mrs Head have both stated in oral evidence that they are concerned about whether Dale and Aaron are ready to take on the challenges before them, although Mr Head did not express those concerns in his witness statement or deposition. I entirely accept that those are real fears, honestly expressed. However I have accepted on the balance of probabilities the experts' shared opinion that EMSL can weather the handover without an adverse impact on its profitability. Of course nothing is certain about the future, and there is always a risk that they are wrong. However I have no basis at all for assessing either the probability of that risk, or what a fair compensation award for that risk would be, which puts this in the realms of speculation, in my judgment. Nor, importantly, does Mr Head through Mr Steinberg ask for such an award.

125. In these circumstances, where a risk to EMSL's profitability is neither pleaded nor evidenced nor argued, I make no such award."

12. In an appendix to their skeleton argument Mr Steinberg and Ms Boakes set out in tabular form the calculation at paragraph 118 of the judgment:

| Mr Head's Existing Income (all sources) | | Income deemed to survive Mr Head's death | |
|---|--|---|---|
| Salary (net) | £27,911 | Salary | NA |
| 39% net dividend (extracted) | £67,261 | 39% net dividend (extracted) | £62,261 |
| 61% net dividend (retained) | £105,204 | 61% net dividend (retained) | £105,204 |
| Less 45% living expenses on salary and extracted dividends | (£42,827) i.e. (27,911+67,261) x 0.45 | No living expenses post death | NA |
| Surplus income | £157,548 | Total held to survive death | £172,465 |
| | | Loss of income in lost years | Nil (i.e. the estate is £14,917 better off) |

Grounds of appeal

13. There are seven grounds of appeal on which the Claimants argue the judge was wrong to find that Mr Head had sustained no loss of income in the lost years:-

(1) The decision was based on a misunderstanding of the expert accountancy evidence and a mistaken assumption that those experts had agreed that the profits of EMSL would continue undiminished after the Claimant's death.

(2) Contrary to *Pickett v British Rail Engineering Ltd* the Judge failed to assess what the Claimant had personally lost by the diminution of his life expectancy. The claim is wholly personal, but the Judge held that the lost years claim could have been pleaded by reference to the company's loss of profit or the replacement cost of employing additional staff. This illustrates the underlying error of principle.

(3) The Judge did not include dividend income or retained profits in her assessment of what had been lost. This was inconsistent with her findings that: (i) the Claimant was "the driving force of ESML" [87] and would have continued to run the business but for the mesothelioma, (ii) that retained profits were a form of saving [106]; (iii) that profits were distributed and extracted by the Claimant on advice from his accountant and that he would have changed the split balance if the tax regime made it more efficient [87]; and, (iv) that his "real loss of earnings or earning capacity includes 90% of ESML's profits" after deductions for directors salaries and tax [93].

(4) The Judge was wrong to treat the Claimant's dividend income from EMSL as if it were the yield from a passive investment, such as a blue-chip stock with an annual dividend, rather than a means by which the Claimant distributed the fruits of his own labour in a tax efficient way.

(5) Accordingly, the Judge did not include a substantial part of the Claimant's income which, on her own findings, he would have derived from his efforts, and therefore failed properly to assess his loss of earning capacity. This was wrong in the light of *Pickett* and *Adsett v West* [1983] QB 826.

(6) The Judge erred in finding that there was no loss to the Claimant because he could leave his shares in EMSL by testamentary disposition [117]. The lost years claim should reflect the annihilation of his future earning capacity by the illness. He cannot simply transfer that value to someone else since it relies on his future efforts, which will be extinguished by his death. He is poorer for this because he has been deprived of something which would otherwise have a present value; *Pickett* per Lord Wilberforce at 149C-E. It was wrong to find that there is no loss simply because EMSL may be managed by others and may continue to make a profit for someone else. He cannot make a testamentary disposition of his own future earning capacity.

(7) The Judge held, following *Ward v Newall's Insulation* [1998] 1 WLR 1722, that she must look at the reality of the situation, but then failed to do so in making her assessment of the loss. She accepted that the split between salary and dividend was for tax reasons. But she assumed, at [118], that the whole of the Claimant's net profit, not taken by him as salary, would continue. In other words, that only the salary element would be extinguished by his death. Accordingly, this was a distinction based solely on how the Claimant had in the past extracted and distributed the profits for the purposes of tax efficiency. This ignored the Judge's own finding and was wrong in the light of *Ward*.

The authorities on lost years claims

14. The decision of the House of Lords in *Pickett v British Rail Engineering Ltd.* [1980] AC 136 is the foundation of the modern law. Lord Wilberforce said at 150C [emphasis added in this and subsequent citations]:

"My Lords, in the case of the adult wage earner with or without dependents who sues for damages during his lifetime, I am convinced that a rule which enables the "lost years" to be taken account of comes close to the ordinary man's expectations than one which limits his interest to his shortened span of life. The interest which such a man has in the *earnings* he might hope to make over a normal life, if not saleable in the market, has a value which can be assessed. A man who receives that assessed value would surely consider himself and be considered compensated – a man denied it would not".

15. Lord Salmon said at 152G:

"In the overwhelming majority of cases a man works not only for his personal enjoyment but also to provide for the present and future needs of his dependants. It follows that it would be grossly unjust to the plaintiff and his dependants were the law to deprive him from recovering any damages for the loss of *remuneration* which the defendant's negligence has prevented him from earning during the "lost years". There is, in my view, no principle of the common law that requires such an injustice to be perpetrated".

16. Lord Scarman said at 170F:

"The plaintiff has lost the *earnings* and the opportunity, which, while he was living, he valued, of employing them as he would have thought best. Whether a man's ambition be to build up a fortune, to provide for his family, or to spend his

money upon good causes or merely a pleasurable existence, loss of the means to do so is a genuine financial loss. The logical and philosophical difficulties of compensating a man for a loss arising after his death emerge only if one treats the loss as a non-pecuniary loss – which to some extent it is. But it is also a pecuniary loss – the money would have been his to deal with as he chose, had he lived".

17. In *Gammell v Wilson* Lord Scarman said at page 78:

"The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellant in *Gammell's* case was disposed to argue by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings of the lost years. The loss is pecuniary. As such it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate that it can. In civil litigation it is the balance of probabilities which matters... in all cases it is a matter of evidence and a reasonable estimate based upon it."

18. *Ward v Newalls Insulation* [1998] 1 WLR 1722 was a decision of this court in a mesothelioma claim. Mr Ward and Mr Eid were the working partners in an insulation contracting business. Mrs Ward and Mrs Eid were sleeping partners who did not work in the business: they were partners because that was the most tax-efficient arrangement. Mr Ward was diagnosed with mesothelioma and brought a lost years claim. At first instance Judge Fricker QC held that Mr Ward's loss of earnings was 25% of the profits of the business. This court held that the correct figure was 50%. Henry LJ said that the issue before the court could be encapsulated in the question: "What was Mr Ward's real loss of earnings and/or earning capacity?" He said that the reality that Mr Ward could and would have reorganised his affairs if it had been suggested to him that the legal effect of the partnership arrangement was to halve the damages to which he was otherwise entitled, adding: "Thankfully, that is not the law".
19. The Defendant's submissions in the present case focussed, as did the reasoning of the trial judge, on the decision of McCullough J in *Adsett v West* [1983] QB 826. This was a claim brought for the benefit of the estate of Richard Adsett, a single man of 26 years old killed in a road traffic accident by the negligence of the defendant. As the judge noted, such a claim on behalf of the estate can no longer be made since the coming into effect of the Administration of Justice Act 1982, but it is common ground that this does not affect the principles of assessment relevant to the present case.

20. Richard Adsett's father Stanley (the plaintiff and administrator of his estate) was a successful businessman with three well-established businesses, run as partnerships. From the age of 17, Richard Adsett had worked in one or other of these three business. He had been given a capital share in each of the partnerships. His income derived in part from earnings from his work and in part from these investments. The court was told that had Richard lived, his father would have been likely to pass to him, either in his (Stanley's) lifetime or on his death, his own much larger share in the partnerships.
21. There were a number of issues which McCullough J had to determine, but he described the one with which we are concerned in the following terms at 830E:

"The case is unusual in that it calls for a decision not just as to the damages to be awarded on account of the deceased's inability to earn money by working in the "lost" years but as to whether any, and if so what, damages are to be awarded on account of his inability to enjoy the interest on the capital which he had already acquired in his lifetime and on such further capital as he might have acquired from his father."

22. He summarised the parties' positions so far as relevant at 841A:

"I turn next to the question of what attention is to be paid to the fact that a proportion of the income which the deceased would have enjoyed in the lost years would have been earned by capital of which he died possessed. Mr Machin [QC, for the plaintiff] submits that no distinction can be drawn between it and the income which he would have earned by work; he lost the opportunity to deal with and dispose of the one as much as the other. The fact that it is now in the hands of his estate, which happens to be suing in his place, is immaterial. Mr Ashworth [QC, for the defendant] submits that to take it into account would be to compensate for a loss which has not occurred; the deceased is dead; his earning capacity died with him, but his capital lives on; it has been earning interest ever since, and will continue to do so just as if he had lived."

23. McCullough J held at 842C-H:

"To my mind there is a clear factual distinction, which the ordinary man would at once appreciate, between earned income and investment income. Immediately before he dies the deceased has lost his earning capacity, but his capital remains and with it its capacity (not his) to produce investment income. All that is common to the two is that he has lost the opportunity to use each as and when they accrue and he has lost the enjoyment of doing so.

As I read Lord Wilberforce's remarks in the last of the passages that I cited [from *Pickett* at 151A], what he thought

significant was the victim's loss of opportunity to use his earnings. In his opinion "the basis, in principle, for recovery lies in the interest which he has in making provision for dependants and others". (p. 151).

By dying, a man loses the opportunity to provide for his dependants and others out of future *earnings* from work, but he does not lose the opportunity to provide for them out of income earned by capital of which he dies possessed. This he can achieve by suitable testamentary disposition, if this is required. The only opportunity which has gone is the opportunity to change his will – or to make one if he has not done so already.

Lord Wilberforce, like Lord Salmon and Lord Edmund-Davies referred throughout to loss of earnings, never to loss of income or loss of financial expectation. In light of Lord Russell of Killowen's dissenting opinion which dealt with financial expectations other than earnings, and of which I assume they had advance intimation, it must follow that none of the three wished his opinion to be taken as extending beyond the loss of earnings.

Lord Salmon said that it would be grossly unjust to the plaintiff and his dependants if the law were to deprive him from recovering for the loss of his earnings during the lost years. But there is no such injustice in excluding a claim of the type which Mr Machin makes here, for a man can, as I have said, provide for his dependants from the capital of which he dies possessed"

24. At 846F he concluded:

“Accordingly I reject Mr Machin's submissions on this part of the case and in approaching the loss of income for the lost years I shall ignore the income which would have resulted from the capital which the deceased already owned at death.”

25. Thus far I do not consider the judgment in *Adsett v West* particularly controversial. More problematic to my mind is a passage cited to and relied on by the judge, immediately after the last sentence just quoted at 846F:

“This decision leads to two consequential questions. The first is best explained by illustration. Suppose that during the lost years a deceased would have earned £5,000 per annum net from work and £5,000 per annum net from investments and would have had a surplus of £3,000 per annum. Does the £5,000 which survives extinguish the lost £3,000 per annum as Mr Ashworth submits? Or, as Mr Machin submits, is only half to be extinguished on the argument that his surplus would have

derived (so far as one can tell) as much from his earned as from his unearned income?

In my judgment, the answer is to be obtained not by asking which part of his income enabled him to save, but by considering the position of the deceased immediately before he died. He would then be deprived of his ability to earn £5,000 per annum from work. And he would be deprived of the need for £7,000 per annum to enable him to live and have his pleasures. Since £5,000 per annum would remain, and since this would more than provide for his surplus, his surplus would remain intact. The tort would not have taken it away. Therefore, I conclude the £5,000 should be deducted in full."

26. This led Judge Clarke to her critical conclusion that "the real distinction being drawn by McCullough J in *Adsett v West* is not between earned income and income from capital but from income which is lost on death and income which survives death".
27. The most recent authority cited to us was the decision of Cavanagh J on 7 September 2020 in *Rix v Paramount Shopfitting Co Ltd* [2020] EWHC 2398 (QB). The claim was not issued until after the death of Mr Rix from mesothelioma, and was principally a financial dependency claim by his widow under the Fatal Accidents Act 1976, but in other respects the facts were similar to those in the present case save that, unlike Mrs Head, Mrs Rix did not work in the business at all. The business was at least as profitable after Mr Rix's death as it had been in his lifetime, if not more so. Mr Kent represented the Defendant in that case too, and argued [see paragraph 31 of the judgment] that since Mrs Rix was "better off, in purely financial terms, than she was when her husband was alive", there should be no financial dependency award. Cavanagh J said at [66-67]:

"I do not accept this submission. Whilst there will no doubt be cases in which it is difficult to differentiate between capital or income-generating assets, which are unaffected by the deceased's death, and which continue to provide an income after death, and the income from the work and skill of the deceased, this is not such a case. In my judgment it would be wrong to regard Mr and Mrs Rix's shareholding in the family business at the time of his death as being an income-generating asset, independent of the work and labour of Mr Rix himself. It is clear that, until very shortly before his death, Mr Rix remained the prime mover in the business. He was primarily responsible for its health and prosperity, as a result of his flair, energy and hard work. The business was still expanding, having just moved into new premises. He was the person with the contacts and the know-how.....In the present case, the reality was that the income that Mr and Mrs Rix earned, both from salary and from dividends, was the result of Mr Rix's hard work and flair. This is not a case in which the income at issue was the investment return on a passive holding in a business, which would continue to yield the same income irrespective of the deceased's capacity for work. If that had

been the case, then the earnings would not have been part of Mrs Rix's financial dependency.”

Discussion

Ground 1

28. The dispute about the question which the experts were asked to resolve is a puzzling one, since if the judge was right to approach the lost years issue as she did I question why it was necessary to instruct experts at all. The Defendant's submission, which the judge accepted, can be summarised thus: (a) the Claimant has not proved that the profitability of EMSL will diminish after Mr Head's death; (b) therefore the dividend income of his estate will be the same as his dividend income would have been had he lived; (c) his personal living expenses exceeded his salary; (d) therefore there is no loss at all. If that is the correct approach in law, then the only significance of the level of expected profit of the company is to test whether Mr Head's living expenses, calculated at 45% of his dividends, exceeded his net salary. The analysis depicted in the table set out above could be simplified to read as follows: salary £27,911; living expenses, £42,827; ergo, no loss.
29. However, it is unnecessary to resolve Ground 1, since I consider that on Grounds 2 to 7, which are essentially interlinked, the Appellant is entitled to succeed.

Grounds 2-7

30. Like McCullough J in *Adsett*, I consider that the distinction properly to be drawn is between loss of earnings from work and loss of income from investments. Most victims of mesothelioma do not earn enough to be able to live off investments. But if we imagine one who, after a few years in the insulation industry, won the National Lottery and then lived off investments before being diagnosed, he would have no claim for loss of earnings in the lost years.
31. Richard Adsett was not quite in that category. But his shareholdings in the businesses, and the dividend income which they generated, were not the fruits of his own labour: the shareholdings were gifts from his father. The gross figure for the loss of earnings claim was properly limited to what he was paid for his work.
32. If a claimant has by the time of the mesothelioma diagnosis retired from work then there will be no loss of future earnings, though there may be a claim for loss of pension. Suppose that Mr Head had, before experiencing any symptoms from mesothelioma, decided to cease all active involvement in EMSL, put his feet up and enjoy his retirement while retaining his shareholding in the company. (In such circumstances some company directors, particularly if they have founded the business and handed on its management in amicable circumstances, are given the title of Honorary President of the company.) If that is what Mr Head had done, with or without a title, then the loss of earnings claim would indeed be zero. But that is not, of course, what happened: far from it. Mr Head was not the Honorary President of the company, nor any sort of passenger: he was, and would have remained for some time, the driving force within the company, as the judge accepted.

33. The company paid Mr Head a very modest salary, the level of which the judge accepted was fixed for reasons of tax efficiency and did not reflect the value of his work. With respect, it seems to me to make no sense at all – and to be entirely contrary to *Ward v Newalls* - to say that this was the full extent of his earnings from work, and that all the rest of his income from EMSL at the time of his death was, and would have continued to be, income from capital rather than earnings from work. As Cavanagh J did in the *Rix* case, I consider that at the time of Mr Head's death all the income which he and his wife received from the company (save for the small deduction in respect of Mrs Head's work) was the product of his hard work and flair, not a return on a passive investment.
34. Mr Head was free to dispose of that income in whatever way he chose. By contrast, as Mr Steinberg rightly observed, he could not make a testamentary disposition of his own future earning capacity. It was not necessary for him to be able to plead and prove what the cost of a replacement would be to EMSL: that would be to mischaracterise the nature of a lost years claim, which requires assessment of the value of the earnings or earning capacity which the claimant personally has lost.
35. Mr Head's evidence, accepted by the judge, was that he would have continued to work until the age of 65 full time; then until the age of 70 on an 80% basis; then reduced to a 50% basis. From the age of 70 he would no longer have drawn a salary, but would have continued to receive dividends. As he reduced his involvement, the responsibilities of his sons Dale and Aaron would increase, with Dale taking over as Managing Director. The later part of this period was understandably not explored in detail, but it seems sensible to assume that he would have wound down his efforts in his mid-late 70s, reducing, say, to 25% at age 75. Once he no longer worked full time, his dividend income from EMSL (on the assumption made in this case of it remaining at a constant level) could properly be treated pro rata as income from investments rather than earnings from work. When he ceased work altogether, his income from any shares he retained would have become entirely income from investments. It seems sensible to assume also that as his sons would have taken over an increasing share of responsibility for the fortunes of the company, they would have received a greater share of its profits. That might be in the form of salary or shares, depending on tax efficiency, but in either event, the increase in the share of the company's profits attributable to the sons' labour during the handover period would mean a corresponding reduction in Mr Head's own share.
36. I would therefore allow the appeal, set aside that part of the judge's decision in which she assessed damages for the lost years claim at nil, and remit the case (in default of any agreement between the parties) for an assessment of those damages, in accordance with the previous paragraph of this judgment, by the Senior Master of the Queen's Bench Division or such other Master as she shall nominate.

Lord Justice Males:

37. I agree.

Lady Justice Andrews:

38. I also agree.