

“Lost years claims”: a rare re-opening following determination on damages

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Head (Executrix of the Estate of Michael Head deceased) v The Culver Heating Company Limited [2021] EWCA Civ 34

Introduction

This was a Court of Appeal decision following a hearing in December 2020. The parties to the Claim were the estate of the late Appellant, Michael Head and his former employer the Culver Heating Company Limited as Respondent.

Background

The background facts were as follows: Mr Head was exposed to asbestos while working for Culver; he worked for the company from 1974-1979 and 1980-1981. He began experiencing symptoms of mesothelioma in December 2017 and, sadly, within a number of weeks it was obvious that the disease would result in his death.

Mr Head had founded and been Managing Director of his own heating and ventilation company (Essex Mechanical Services Limited). That company was referred to within the judgment (and this article) as EMSL. EMSL had been incorporated in 2004 and Mrs Head and his two adult sons all worked for EMSL in various capacities.

He issued a claim in the High Court in September 2018 and judgment was entered in November 2018 for damages to be assessed. Given the concerns about Mr Head's ability (through deterioration or death) to give evidence at trial the Appellant gave evidence through the court examiner in December 2018. He was well enough to give evidence at the trial, which was held in April 2019 before HHJ Clarke.

High Court

At trial HHJ Clarke ordered just over £80,000 in agreed damages, and Culver agreed to indemnify Mr Head for the cost of medical treatment until death. An award of £95,000 was made in respect of PSLA, which was not appealed.

However, the “lost years” claim was the source of great contention between the parties; on behalf of Mr Head, it was argued that he should be awarded just under £4.5million. For Culver, the argument was for no award at all in respect of “lost years”.

HHJ Clarke agreed with Culver and awarded no damages in respect of the lost years claim. Her rationale was as follows:

“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?”

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.

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.

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'¹

Permission to appeal was refused by HHJ Clarke. A renewed application to appeal was made to Simler LJ who considered it on the papers and initially refused it. However, Counsel for Mr Head made an application under CPR 52.30² and the principle in *Taylor v Lawrence* and HHJ Clarke revoked her order refusing permission and referred the issue to the full court at a rolled-up hearing. The Court of Appeal determined that it was necessary to reopen the determination of the appeal in order to avoid real injustice. The Court of Appeal noted, through Lord Justice Bean, that “the overwhelming majority of *Taylor v Lawrence* applications are entirely unfounded but this one was a rare exception, perhaps the most striking one [he had] seen during six years' service in this court” (para 6 CoA decision).

Permission to appeal was therefore granted at the outset of the hearing, and the Court proceeded to hear the appeal as follows.

Mr Head died in November 2019 follow the trial and judgment by HHJ Clarke.

Court of Appeal

Seven Grounds of appeal were advanced on behalf of Mr Head's estate in the Court of Appeal

*“(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*

¹ Paragraphs 8-12 of High Court judgment

² The Court of Appeal or High Court will not re-open a final determination of any appeal unless it is necessary to do so in order to avoid real injustice, the circumstances are exceptional and make it appropriate to re-open the appeal and there is no alternative effective remedy

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*.³ [emphasis added]

Lord Justice Bean, giving the leading decision, held that the distinction "properly to be drawn is between loss of earnings from work and loss of income from investments"⁴. The Court of Appeal drew the distinction between a scenario where, by the time of his mesothelioma

³ Paragraph 13 CoA Judgment

⁴ Paragraph 30 CoA Judgment

diagnosis he had retired from work then there would be no loss of future earnings and therefore such a claim would be zero. However, that was not what had happened in the circumstances of Mr Head's claim; he was not a passenger but was in fact the "driving force within the company"⁵. The Court of Appeal concluded as follows:

*"Mr Head's evidence, accepted by [HHJ Clarke], 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.**"⁶[emphasis added]*

The appeal was allowed, the decision of HHJ Clarke on the lost claims element was set aside and the case remitted for an assessment of those damages.

Comment

As stressed by Lord Justice Bean, applications to re-open decisions following final determinations of damages are rare. The Court of Appeal acknowledged that the case was clearly not straightforward, but ultimately concluded that the appeal should be allowed in order to avoid real injustice.

2 March 2021

⁵ Paragraph 32 CoA Judgment

⁶ Paragraph 35 CoA Judgment

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