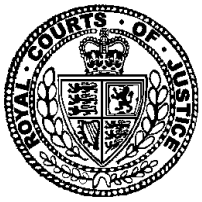

Neutral Citation Number: [2021] EWHC 1235 (QB)

Case No: HQ18A03334

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 May 2021

Before :

MR JUSTICE JOHNSON

- -

Between :

DEBORAH HEAD
(Executrix of the Estate of Michael Head, deceased)

Claimant

- and -

THE CULVER HEATING CO LIMITED

Defendant

- -
- -

Harry Steinberg QC and Kate Boakes (instructed by Fieldfisher LLP) for the Claimant
Michael Kent QC (instructed by BML Solicitors) for the Defendant

Hearing dates: 15-16 April 2021 and 6 May 2021

- -

Approved Judgment

Mr Justice Johnson:

1. Michael Head established and ran a highly successful and profitable business, Essex Mechanical Services Limited ("EMSL"). Following his death from mesothelioma on 7 November 2019 his two sons, Dale and Aaron, have continued to run the business. Before his death, he commenced these proceedings, by which he contended that the mesothelioma was due to his exposure to asbestos whilst he was employed by the Defendant from 1974 to 1979. The Defendant admitted liability. Damages were assessed by HHJ Melissa Clarke, sitting as a High Court Judge, in the sum of £176,281.10: [2019] EWHC 1217 (QB). The Judge accepted the Defendant's case that there was no net financial loss during the period of time by which mesothelioma had shortened Mr Head's life ("the lost years claim"). Following his death, Mr Head's wife, Mrs Deborah Head, was substituted as the claimant. She successfully appealed against the finding that no award should be made in respect of the lost years claim: [2021] EWCA Civ 34. That component of the claim has been remitted for re-determination in accordance with the Court of Appeal's judgment (see paragraph 37 below).

2. It is not disputed that the success of EMSL is attributable to Mr Head's immense hard-work and talent. The lost years claim comprises Mr Head's notional earning capacity through the vehicle of EMSL during the lost years (it being said that Mr Head would never have retired).

3. The Claimant contended that this claim amounted to over £4.4M. The Defendant argued that there was no loss, so the value was £0. The Defendant's argument was that dividends from EMSL will continue to be paid to Mr Head's estate following his death, that they should be treated as a return on investment capital which remains intact, rather than lost earning capacity, and that, following *Adsett v West* [1983] QB 826, they should not be included within the lost years claim. The Claimant was entitled to the salary that he would have drawn, but, when account was taken of the living expenses that had been saved, there was no net loss. HHJ Melissa Clarke agreed with this analysis. She did not therefore allow this element of the claim.

4. The Court of Appeal ([2021] EWCA Civ 34) expressed sympathy for the judge in the light of the "absolutist" position that had been adopted by the parties, which had made more difficult an assessment that was already not straightforward (see *per* Bean LJ at [5]). The Court of Appeal rejected each of those absolutist positions and set out the basis on which the damages should be assessed (see *per* Bean LJ at [35]-[36], at paragraph 37 below).

5. The parties have each adjusted their previous "absolutist" positions according to what they say is the effect of the Court of Appeal's judgment. The Claimant now says this aspect of the claim is worth around £3.7M, rather than £4.4M. The Defendant says that the claim is worth around £238,000, rather than £0. As the disparity between these figures indicates, the parties disagree as to the effect of the Court of Appeal's decision and its application to the assessment of the lost years claim.

6. The primary issues, distilled from the parties' competing lists of issues, and presented in neutral terms, are:

(1) What falls to be included in the lost years claim. Is it limited to salary and dividend income? Or does it extend to a share of EMSL's profits insofar as these were generated by Mr Head's work?

(2) If Mr Head had not contracted mesothelioma, to what extent would he have worked less and/or handed over ownership of the company as he approached old age?

(3) Should the calculation of the lost years claim take into account rental income that Mr Head would have received?

(4) What deduction should be made for living expenses?

7. The resolution of these primary issues gives rise to secondary issues. The permutations (and the complexity of arguing the secondary issues on a contingent basis) were such that the parties agreed that I should, in the first instance, resolve the primary issues, and the parties would then, in consultation with their expert witnesses, formulate any secondary issues which required determination by the court. Following a court hearing on 15 and 16 April 2021 I distributed a draft judgment (comprising paragraphs 9-70 below) in respect of issues (1)-(4), and gave permission for it to be shared with the expert accountants. In the light of that draft judgment the parties formulated the following additional issues:

(5) Would Mrs Head have retired when Mr Head reached the age of 70?

(6) Would there have been a cost incurred in respect of administrative work performed by someone other than Mrs Head and, if so, what cost?

(7) For the purpose of assessing the tax consequences, should Mrs Head's salary of £45,000, and her state pension, be taken into account?

(8) What figures should be taken for the salaries of Dale Head and Aaron Head in the 2018/19 tax year?

(9) What rate of interest should be applied, and in respect of which components of the award?

(10) What, if any, orders should be made under CPR 36.17(4)?

8. A further hearing (conducted remotely to avoid what would otherwise have been a significant delay before a court hearing could be arranged with the attendance of all participants) took place on 6 May 2021 to deal with these secondary issues. This composite judgment addresses all of the issues raised and assesses the total amount due in respect of the lost years claim.

EMSL and Mr Head's role in it

9. The Court of Appeal recorded that "[t]he narrative of how Mr Head had established EMSL and the part he played in it was undisputed" – see *per* Bean LJ at [8]. The following passages were quoted from the judgment of HHJ Melissa Clarke. They remain undisturbed by the Court of Appeal's judgment and undisputed by the parties:

"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 ESML. 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 Head 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 applied by Bean LJ].

(1) What falls to be included in the lost years claim?

10. The Court of Appeal remitted the assessment of damages and directed that it should be carried out in accordance with the approach that it identified in its judgment. The parties relied on the evidence of their respective expert accountants, as they had done before HHJ Melissa Clarke. I heard brief oral evidence from each. Each expert had provided a report in accordance with the (different) instructions that he had been given as to the effect of the Court of Appeal judgment. Insofar as they reach different conclusions, they agree that this is largely due to the differences in those instructions. I do not consider that their evidence directly assists on the question of what should be included in the lost years claim. That issue is resolved by the Court of Appeal judgment. The accountancy evidence comes into play at the subsequent stage of carrying out the calculations necessary to value the claim.

11. In the light of the disagreement between the parties as to the meaning and effect of the Court of Appeal judgment, it helps to consider that judgment in the context of the underlying facts, the earlier authorities, the judgment of HHJ Melissa Clarke, the grounds of appeal, and the arguments that were advanced by the parties.

12. Mr Head developed symptoms of mesothelioma when he was aged 59. At that point he was working full time. He died at the age of 61. Were it not for the mesothelioma, his life expectancy would have been a further 22.5 years. It is common ground that he would have worked for at least part of that period, and that he would have incurred

living expenses. His premature death meant that he lost any surplus future earning capacity (after deducting living expenses) that he otherwise would have enjoyed and which he would have been able to deploy as he had wished. That is a loss that accrued and could be capitalised before he died.

13. The entitlement to recover such damages is authoritatively determined in *Pickett v British Rail Engineering Ltd* [1980] AC 136 *per* Lord Wilberforce at 150D and 151A:

> "…in the case of the adult wage earner… who sues for damages during his lifetime, I am convinced that a rule which enables the 'lost years' to be taken account of comes closer 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 a 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.
> …
> …I would accept… that the amount to be recovered in respect of earnings in the "lost" years should be after deduction of an estimated sum to represent the victim's probable living expenses during those years."

14. Lord Wilberforce explained that the principled basis for recovery "lies in the interest which [the victim had] in making provision for dependants and others, and this he would do out of his surplus." Both Lord Wilberforce (at 151B) and Lord Salmon (at 158D) drew support for this approach from the judgments of the High Court of Australia in *Skelton v Collins* (1996) 115 CLR 94. Lord Salmon cited the following from the judgment of Windeyer J in *Skelton* at 129:

> "The next rule that, as I see the matter, flows from the principle of compensation is that anything having a money value which the plaintiff has lost should be made good in money. This applies to that element in damages for personal injuries which is commonly called 'loss of earnings.' The destruction or diminution of a man's capacity to earn money can be made good in money. It can be measured by having regard to the money that he might have been able to earn had the capacity not been destroyed or diminished. ...what is to be compensated for is the destruction or diminution of something having a monetary, equivalent... I cannot see that damages that flow from the destruction or diminution of his capacity to [earn money] are any the less when the period during which the capacity might have been exercised is curtailed because the tort cut short his expected span of life. …"

15. Lord Edmund-Davies (at 162G) cited the same passage, having observed (at 162D):

> "it appears to me simply not right to say that, when a man's working life and his natural life are each shortened by the wrongful act of another, he must be regarded as having lost

> nothing by the deprivation of the prospect of future earnings for some period extending beyond the anticipated date of his premature death."

16. Lord Scarman agreed with Lord Wilberforce, Lord Salmon and Lord Edmund-Davies. He explained that it naturally followed (and was not objectionable) that there could be recovery for other financial benefits that may have accrued during the lost years, giving as examples "a life interest or an inheritance". In doing so he made reference to paragraph 90 of the Law Commission Report on Personal Injury Litigation Assessment of Damages (1973) (Law Com No 56). Paragraphs 90-91 of that report state:

> "90. We are also of the opinion that, in line with the reasoning of the Australian High Court in *Skelton v Collins,* the plaintiff should be entitled to compensation for other kinds of economic loss referable to the lost period. A person entitled by will to receive an annuity for his life would, if his life were shortened by the defendant's fault, lose the capacity to receive the annuity during the lost period, no less than he would lose his earning capacity. There seems to be no justification in principle for discrimination between deprivation of earning capacity and deprivation of the capacity otherwise to receive economic benefits.
>
> The loss must be regarded as a loss of the plaintiff; and it is a loss caused by the tort even though it relates to moneys which the injured person will not receive because of his premature death. No question of the remoteness of damage arises other than the application of the ordinary foreseeability test.
>
> 91. A plaintiff's income may, however, come from dividends paid on capital assets and, as these assets will themselves, subject to death duties, be able to pass, on his death, to his dependants, we consider the court must have a discretion to ignore such lost income in the lost period in its assessment of damages…"

17. Thus, the Law Commission's view was that economic losses other than salary are, in principle, recoverable, but that capital assets and dividends derived from such assets are not recoverable (because they are not lost). The approach that should be taken where there is a possible mixture of earning capacity and investment income has been considered at first instance in two cases – *Adsett v West* [1983] 1 QB 826 and *Rix v Paramount Shopfitting Company Limited* [2020] EWHC 2398 (QB) [2020] 4 WLR 123.

18. In *Adsett* the deceased was killed at the age of 26. He was the son of a rich businessman. He held shares in three family businesses from which he derived an income. He also worked in two of the businesses. He lived with his parents and did not contribute to his keep. He spent most of his income. His father had intended to transfer his interest in the businesses to him at some stage in the future. The issue was the extent to which the lost years claim could encompass not just earning capacity but also the loss of enjoyment of income from invested capital. The claimant argued that no distinction should be drawn been earnings and investment income: the deceased's death prevented him from

enjoying the fruits of both. The defendant responded that the investment income would continue to be paid for the benefit of the estate, that the deceased and the estate "are one and the same" and that, accordingly, there had been no loss in respect of the investment income. McCullough J said at 842C and E:

> "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.
> …
> 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."

19. McCullough J drew attention to the focus in *Skelton* and *Pickett* on earning capacity as opposed to the capacity of a capital investment to produce an income. The latter can be the subject of testamentary disposition, so the victim has not lost the opportunity of being able to deploy the funds. By contrast, earning capacity is lost at the point the victim dies. Thus, at 843A McCullough J said:

> "Lord Salmon's conclusion was reinforced by the judgments in *Skelton* …, and he selected for citation that part of the judgment of Windeyer J. which said that a man should be compensated for the destruction or diminution in his capacity to earn money… The same passage appealed to and was cited by Lord Edmund-Davies (p. 162F-G). I can detect nothing in the speeches of either Lord Salmon or Lord Edmund-Davies to suggest that they would not have regarded the capacity of a man's capital to earn money after his death, particularly when allied with his testamentary capacity, as constituting an important distinction."

20. McCullough J therefore drew a distinction between loss of earning capacity and loss of investment income. The former is recoverable, the latter is not.

21. McCullough J then addressed two arithmetical questions that arise where both earnings and investment income are lost. The first concerns whether saved living expenses should be deducted from investment income, or earnings, or both:

> "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 per annum should be deducted in full."

22. In other words, where the deceased's earning capacity is less than the deceased's living expenses, McCullough J considered that there is no loss, even if the deficit is (more than) made up by investment income.

23. The second question concerns whether the losses should be assessed year by year (so that a loss in one year is not offset by a gain in a subsequent year), or whether a global approach should be taken in respect of the entire period of the lost years (so that the total living expenses are deducted from the total earning capacity):

> "when comparing the surplus with the investment income which remains, does one strike a balance year by year or once overall, so that any excess in one year may be offset by a deficiency in another?
>
> I have come to the conclusion that, since an award of damages is an award of one sum, the balance should be struck once. I see no logical reason why a gain on one year should not be used to offset a loss in another."

24. HHJ Melissa Clarke applied the judgment of McCullough J in *Adsett*. She summarised her conclusions at [11]:

> "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'."

25. The detail of the calculation is set out in the judgment at [118]:

> "the net dividends which Mr Head's shareholding will continue to earn after his death will be no less £172,465 per annum… 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'…"

26. This calculation was reproduced in tabular form by counsel for the Claimant, and incorporated by Bean LJ in his judgment at [12]:

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) ie (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 (ie the estate is £14,917 better off)

27. It can be seen that the entire profit of EMSL was described by the parties as "dividend", part of which was "extracted" (ie distributed to the shareholders) and part of which was "retained".

28. The decision in *Rix* post-dates the judgment of HHJ Melissa Clarke but pre-dates that of the Court of Appeal. The claim was brought under the Fatal Accidents Act 1976, but the facts are otherwise similar to the present case. Mr Rix was exposed to asbestos in the course of his employment in the 1970s. After leaving that employment, he built up a successful business. Like Mr Head, Mr Rix was "a remarkably talented and dedicated businessman." He died from mesothelioma in 2016 at the age of 60. The issue was whether Mr Rix's wife had a financial dependency claim and, if so, how it should be quantified. The defendant contended that the family business had become more profitable since Mr Rix died, and that there was therefore no loss of dependency claim. Cavanagh J referred to the first-instance judgment of HHJ Hickinbottom in *Welsh Ambulance Services NHS Trust v Williams* [2008] EWCA Civ 81. In that case too, the deceased was a person "of unusual energy, flair, and drive, who had created and managed a successful… business." The success of the business continued after his death. HHJ Hickinbottom rejected the submission that there was no loss:

> "What the dependants have lost is not income derived from a capital asset, but the contribution of Mr Williams as the manager of the business and family assets (including property and steam engines); his flair, skill, expertise and energy in the various wealth creating projects on which he engaged in his life and which, had he lived, he would have continued to engage upon. That is a real loss, which can be valued in moneys worth. Given that that is their loss in my judgment, just as it was irrelevant whether Mrs O'Loughlin hired expert assistance or not, it is irrelevant whether the Williams' dependants hired someone to replace Mr Williams' skills and services, or sold the business and reinvested the proceeds in capital assets or another business, or indeed (as they did) replaced those skills and services with their own. None of these can affect or diminish the true loss to the dependants as dependants."

29. The Court of Appeal upheld this analysis – see *per* Smith LJ at [45]-[50]:

> "45. The position was that, during his lifetime, Mr Williams was a wealth creator. He worked hard physically and he had entrepreneurial skills which he put to good use. It is instructive to note that, between the ages of 20 and 50, his efforts resulted in the accumulation of over £6 million. …If Mr Williams had lived, he would have gone on generating wealth in the way that he had done before and, as the judge found, would have continued to do so for another 30 years, although with some reduction in rate after the age of 70. Mrs Williams would plainly have continued to benefit from his efforts as she had benefited before. Nothing could be more obvious than that Mrs Williams lost a very valuable dependency upon her husband's death.
> ….
> 49. …. The fact that each of them was as well off after the death as before, because David and Sarah [two of the children] took over responsibility for managing the business and did so successfully is nothing to the point. As the judge observed, a dependant cannot by his or her own conduct after the death affect the value of the dependency at the time of the death. To take Mrs O'Loughlin as an example, her dependency was the same whether she tried to run the property business but failed, or tried to run it and succeeded or refused to try at all. In refusing to try, she might have decided to sell all the properties, or she might have employed someone to run it as a manager or she might simply have done nothing and let it run downhill. Whatever she did and with whatever result, good or bad, she could not affect the value of her dependency on her husband at the date of his death.
>
> 50. Accordingly, in my judgment, Judge Hickinbottom was right when he held that it was irrelevant that David and Sarah had made a success of the business. That was not because the

> financial benefit which they had brought to the family was a 'benefit accruing as a result of the death' which had to be ignored under section 4. It was because that financial benefit was irrelevant to the assessment of the dependency under section 3. He was correct when he said that nothing that a dependant (or for that matter anyone else) could do after the death could either increase or decrease the dependency. The dependency is fixed at the moment of death; it is what the dependants would probably have received as benefit from the deceased, had the deceased not died. What decisions people make afterwards is irrelevant. The only post death events which are relevant are those which affect the continuance of the dependency (such as the death of a dependant before trial) and the rise (or fall) in earnings to reflect the effects of inflation."

30. Cavanagh J distilled a number of principles from this, and other, authorities, including (at [60(4)]):

> "There is a difference between an income-producing asset, such as a rental property or an investment, on the one hand, and a business which was benefiting from the labour, work, and skill of the deceased, on the other. Where the value of an income-producing asset is unaffected by the deceased's death, there is no financial loss or injury as a result of the death, and so there is no claim for loss of financial dependency in relation to it under section 3. Where, however, the deceased worked in a business that benefited from his or her hard work, the dependants will have lost the value of that hard work as a result of the deceased's death and so will have a financial dependency claim."

31. Accordingly, Cavanagh J held (at [61]):

> "Mrs Rix has suffered a loss of financial dependency, notwithstanding that the business is more profitable than it was at the time of her husband's death. There is no dispute that Mrs Rix was her husband's dependant. As in the *Williams* case, her husband's business produced an income for the family which was the result of her husband's skill, energy, hard work, and business flair.
>
> Although she was a director and shareholder, the reality was that it was her husband, not her, who was responsible for the success of the business. At the time of her husband's death, she had a "reasonable expectation of pecuniary advantage from the continuance of the life of the deceased" …, because if he had lived his management of the business would have continued to produce an income for her. …[*Williams* makes] clear that, as the value of the dependency is fixed at death, the health of the business after the deceased's death is irrelevant. In particular, *Williams* shows that the existence of, and value of, a dependant's

> financial dependency is not affected by any increase in profitability in the business."

32. The defendant submitted that the business was "mature and robust" and that its value was "independent of [Mr Rix's] continuing work and efforts" – the stage had been reached at which it "existed independently of the person who founded it and set it up." Income derived from the profitability of the business was therefore properly to be regarded as the proceeds of an investment rather than of Mr Rix's earning capacity. Cavanagh J rejected that submission, at [66]:

> "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. Jonathan was being groomed to take over, but this plan was still at a very early stage. As Mr Phillips put it in his submissions, MRER was not a "money-generating beast" that would generate money regardless of who was in charge of it."

33. This analysis shows that the profitability of a business (whether or not distributed in the payment of dividends) is not, for these purposes, necessarily to be regarded simply as a return on a capital investment. Where that profitability is generated by the work of an individual person then it may properly be regarded as reflective of (a component of) that individual's earning capacity.

34. The appeal in the present case was advanced on the following grounds (leaving aside the first ground of appeal which the Court of Appeal did not think it necessary to address):

> "(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*."

35. Bean LJ observed that these six grounds "are essentially interlinked". The Court concluded that the Claimant was entitled to succeed on these grounds (see *per* Bean LJ at [29]).

36. Bean LJ identified the key passages from the decisions in *Pickett* and *Adsett*. In doing so, he emphasised the distinction that was drawn as between earnings and investment income (see eg *Adsett* at 842C, at paragraph 18 above). With one exception, Bean LJ did not consider that the judgment in *Adsett* was "particularly controversial". The exception was that he considered McCullough J's analysis of the arithmetical approach to the combination of earnings, investment income and living expenses (see paragraph 21 above) as "[m]ore problematic". This, he held, "led Judge Clarke to her critical conclusion that "the real distinction… is not between earned income and income from capital but from income which is lost on death and income which survives death."" Bean LJ explained that this is not the correct distinction, rather "the distinction properly to be drawn is between loss of earnings from work and loss of income from investments."

37. Having identified the distinction that is properly to be drawn, Bean LJ then said:

> "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…"

38. For the Claimant, Mr Steinberg QC argues that during the period when Mr Head would have worked at full capacity, the starting point for the lost years claim should be his director's salary and 90% of the company profits, less his living expenses and a deduction to reflect the value of Mrs Head's work for the business (paragraph 93 of the judgment of HHJ Melissa Clarke which was cited and emphasised by Bean LJ – see paragraph 9 above). This starting point should then be reduced in the way indicated by Bean LJ at [35] in respect of the periods when Mr Head would not have worked at full capacity.

39. For the Defendant, Mr Kent QC draws attention to the words "income" and "dividends" and "earnings" in the Court of Appeal judgment. This, he says, shows that the Court of Appeal intended that the claim should be limited to sums actually paid to Mr Head as salary or distributed dividends. The profitability of EMSL, insofar as it was retained within the company and not paid as dividends distributed to shareholders, should, he argued, be left out of account.

40. At one point Mr Steinberg QC suggested that a request could be made to the Court of Appeal to pronounce on how its judgment should be applied in the light of this new dispute that has arisen between the parties. It was not clear to me what form such a request should take. I do not, in any event, consider that there is any jurisdiction to take such a step. Once the Court of Appeal made an order, its judgment is for future courts to interpret in accordance with well-established principles. There is no scope for a form of dialogue. Those principles of interpretation include the contextual importance of the argument that the Court had been asked to resolve. Lord Sumption JSC described the process of interpreting court orders in *Sans Souci Limited v VRL Services Limited* [2012] UKPC 6 at [13]:

> "…the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment

> are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve."

41. These underlying principles equally apply to court judgments. Applying these principles, the effect of the Court of Appeal's judgment is clear. It is that:

(1) artificial distinctions should not be drawn between salary, dividends and undistributed profit. What is important is the element of the funds generated by the business that reflects Mr Head's earning capacity as opposed to any element that reflects investment income;

(2) Mr Head's earning capacity, at the time he contracted mesothelioma, is best reflected by a combination of his salary and 90% of EMSL's profits, less a deduction in respect of the work done by Mrs Head;

(3) Once he no longer worked full-time his earning capacity could properly be reduced pro rata.

42. As to (1) this reflects the existing authorities (see paragraphs 13 - 32 above), particularly *Adsett* at 842C and *Rix* at [66], both of which were cited by Bean LJ. It is clear that Bean LJ considered that both these passages accurately stated the law. Bean LJ regarded the critical distinction (consistent with the earlier authorities) as being between the capacity to generate money through work and through investment. In using the language of "loss of earnings" (see eg at [30]) Bean LJ was not seeking to exclude earning capacity that was reflected in the accumulation of funds otherwise than by payment of salary. Rather, he was simply adopting the language that had been used by McCullough J in *Adsett*. Bean LJ was not thereby excluding income that derived from dividends (when the dividends reflected work rather than investment). On the contrary, it is plain that Bean LJ contemplated that dividend income generated by Mr Head's work was to be treated in the same way as his salary (see eg at [35]). The words "earnings" and "earning capacity" were used interchangeably by HHJ Melissa Clarke (see at [93] of her judgment) because it was not necessary (given the way in which the parties presented their cases), to draw any sharp distinction. So too, in the Court of Appeal, it was not necessary (in the light of the issues that were raised) to draw any sharp distinction between dividend income and the undistributed profits of the company – the word "dividend" was used to cover both (see paragraph 27 above). What was in issue was whether the claim is limited to salary. The Court held that it is not. Bean LJ explains that it is important to assess Mr Head's earning capacity rather than the amount he chose to draw out of the business by way of salary and/or dividends. Just as it makes "no sense at all" (see at [33]) to define Mr Head's earning capacity solely by reference to the salary that he happened to choose to draw, there is no reason to define his earning capacity by reference to the dividend payments. He was the driving force behind the business and (on the findings of the Judge) 90% of the profitability of the business was attributable to his hard work.

43. The point can be illustrated by consideration of the position if Mr Head had not chosen to deploy his earning capacity through the vehicle of EMSL but had instead been self-

employed, working on his own account. In that event, the starting point for assessing his earning capacity would naturally be the net profit that he generated. The fact that he chose to incorporate EMSL does not, as a matter of principle, make any difference to the level of his earning capacity.

44. As to (2), the baseline assessment of Mr Head's earning capacity was undertaken by HHJ Melissa Clarke in her judgment at [93]. That extract from her judgment was cited (and the relevant sentence emphasised in italics) by Bean LJ (see paragraph 9 above). Nothing in the judgment of the Court of Appeal suggests that Judge Clarke's assessment of earning capacity was in any way flawed. It is to be taken as the starting point for the assessment of Mr Head's loss of earning capacity during the lost years. All that is then required is, (3), to adjust the figure to reflect the periods when Mr Head would not have worked at full capacity, and then to deduct living expenses.

45. Mr Kent QC argued that even if the earning capacity of a person in the position of Mr Head is not necessarily defined by reference to the aggregate of his salary and dividend income, nonetheless, on the particular facts of this case, the Court of Appeal found that Mr Head had arranged the affairs of the EMSL so as to draw a sum from the business that reflected the value of his work for the business. That finding, if not explicit, is, he argued, at least implicit in the language of "income" and "earnings" and "dividends", and the lack of reference to the retained profit of the business. I do not agree. There is no evidential platform to support such a finding. The evidence is that Mr Head had made decisions as to the salaries and dividends to be paid in order to maximise tax efficiency, rather than to reflect his personal contribution to the business. The Court of Appeal does not at any point suggest otherwise. There was no reason for the Court separately to address the retained profits of the business because HHJ Melissa Clarke had already made a finding as to Mr Head's earning capacity, and the nature of the arguments that were advanced by the parties meant that it was unnecessary to distinguish between retained profits and distributed dividends.

46. Further, the grounds of appeal which the Court of Appeal upheld, included (ground 3 – see paragraph 34 above) a complaint that the Judge had not included the dividends and retained profits in the calculation of the lost years claim. In upholding this ground of appeal, the Court did not suggest that it should only succeed so far as the dividends were concerned – the ground of appeal was allowed in full.

47. Accordingly, I find that Mrs Head is entitled to recover a sum for the lost years claim that is assessed on the basis identified by HHJ Melissa Clarke at [93], but subject to an adjustment to reflect Mr Head's likely subsequent work pattern, and a deduction for living expenses. These further factors are each the subject of dispute between the parties.

(2) If Mr Head had not contracted mesothelioma, to what extent would he have worked less and/or handed over ownership of the company as he approached old age?

48. The Claimant's case is that Mr Head would never have stopped working. Mr Steinberg QC argues that Judge Clarke found that Mr Head would never have fully retired, and it is not open to the Defendant now to re-open that finding. The Claimant seeks to rely on new evidence, comprising a witness statement from herself, a statement from her son, Aaron Head, and a statement from Petra Humphrey who was Mr Head's personal assistant. Mr Kent QC says that this evidence should have been available at the trial

before Judge Clarke, but he helpfully did not object to the evidence being adduced. He cross-examined Mrs Head and Aaron Head. The statement of Ms Humphrey was adduced as written evidence.

49. The Defendant's case is that "it is appropriate to conclude on the balance of probabilities that [Mr Head's] 80th birthday would have represented a likely date for retirement: it may have been earlier it may be later."

50. The Claimant relies on paragraph 39 of Judge Clarke's judgment (see paragraph 9 above) for the finding that Mr Head would never have retired. I do not read paragraph 39 as such a finding. That paragraph accurately records Mr Head's evidence that his intention was to continue working, but at a reduced level, after the age of 65, and that after the age of 70 he would work "at about 50%." It accurately records that this evidence was not disputed. There is, however, no finding in terms that Mr Head would have continued working at a 50% level for the rest of his life. In the light of the way the case was presented by each of the parties it was not necessary for a finding to be made as to whether or when Mr Head would have retired. As Bean LJ observed, the latter part of Mr Head's likely working life was not explored in detail.

51. Bean LJ, at [35], proceeded on the basis that there would come a time when Mr Head would have "ceased work altogether". That does not amount to a positive finding that Mr Head would have retired at any particular age. My attention was drawn to changes that were made to an embargoed draft of the Court of Appeal judgment following representations from counsel. I do not, however, consider that that is a useful aid to determining the factual issue that now arises.

52. For these reasons, it is necessary to make a finding, on the evidence, as to whether, and if so when, Mr Head would have retired. The evidence that was before HHJ Melissa Clarke is fully summarised in her judgment (see paragraph 9 above). The Claimant continues to rely on that evidence. In her additional statement, the Claimant disputes the contention that Mr Head would have retired at the age of 80 years old and retained a majority stake in the company. She says that she is "absolutely sure" that he would not have taken an income or value from the business if he was not working in it – which she characterised as "taking the money from his boys whilst not working."

53. She says:

> "Mike had a different make up to most people in his attitude to work. He had the make up of a self-made man. He had built up the business from scratch. He enjoyed working. He was always on the phone working even during weekends and on holiday. Indeed when he became ill through his mesothelioma he carried on working. When you have built up a business on your own and there is nobody else to answer to there is a different frame of mind."

It is for those reasons that she did not think that he would have retired.

54. Mr Aaron Head said they had never discussed the date of his father's retirement, and he, Aaron Head, had "just assumed he would go on and on." He agreed with his mother that if his father had stepped back from the business and done less work then "he would

have taken a decrease and reduced share of the income… He would not have sat at home taking all the profit when Dale and myself were doing a lot of the work. He was not that sort of man."

55. Ms Humphrey provided a witness statement to similar effect. She was not cross-examined and in the light of the view I have taken of the balance of the evidence it is not necessary to decide what, if any, weight it would be appropriate to accord her evidence.

56. As to the evidence that was before HHJ Melissa Clarke, and the additional evidence of Mr Aaron Head and Mrs Head, I unhesitatingly accept that Mr Head would not have drawn more money from the business (whether as salary or dividends) than that which reflected the work he put in. As he stepped back from the business so he would have reduced his drawings and, one way or another, reallocated the shareholdings. There is no evidence that he could not have afforded to do so. The mortgage was paid, he had a private pension on top of his state pension, and it is likely that he would have built up a substantial cash surplus in the period, up until the age of 70, when it is common ground that he would have been working full time. I accept that Mr Head would have found it difficult to give up a majority shareholding in the business. He candidly gave evidence before Judge Clarke to that effect. That, however, was evidence given by a 60 year old man who had been the alter ego of the business for more than 30 years, whose sons had only been made directors 3 years earlier, and who had not begun to contemplate retirement or even slowing down. As the years went on, and as his sons gained greater experience and undertook a greater share of the running of the business, it is likely that Mr Head would have reallocated proportions of his shareholding (and that of Mrs Head) to reflect his proportionately reduced involvement. He would, I think, have reconciled himself to losing his control of the business (or, more accurately, handing over control of the business), in favour of allowing his sons greater autonomy and control to reflect their increasing experience and responsibilities.

57. I draw some limited support for that conclusion from the clear evidence that Mr Head took account of tax implications when making these types of decision, taken together with the evidence of the Defendant's expert accountant, Mr Forth, that (1) distribution of profits by dividend rather than salary is more tax efficient, and (2) reallocation of shares is what one would ordinarily expect in a family business to reflect the changed involvement of different members of the family over time.

58. As to the question of retirement, I do not doubt the honesty of either Mrs Head or Mr Aaron Head (or, for that matter, Mr Head). I am sure that they were each doing their best to give accurate responses to the questions that they were asked. The question of retirement had never been discussed before Mr Head became unwell. They could therefore only speculate – and their difficulty doing so was palpable when they were each giving oral evidence. They had only ever known Mr Head as a man who was highly driven by his business and who worked flat out. They found it difficult to contemplate that that would change, just as Mr Head had himself found it difficult to contemplate giving up a majority interest in the business. It is, however, common ground (and is reflected in the approach of Judge Clarke and the Court of Appeal) that by the age of 70 he would have reduced his input by 50%. By that point, his sons would have gained the experience and skills necessary to run the business. They would have developed their own relationships with the customer base, and their own ideas as to how the business should develop. Mr Head would be an invaluable guiding hand in the

early years, but it is likely that his influence and importance to the business would diminish as his sons became more and more established. Retirement was not in contemplation when Mr Head was in his 50s and working at a prodigious rate. That would, I think, have been likely to change as time went on and his work rate diminished. Just as his work rate would have diminished to 80% by the age of 65, and to 50% by the age of 70, so I think it would have diminished by a further 50% (so to 25% of the position before age 65) when Mr Head reached the age of 75, and that he would have retired altogether at the age of 80. Of course, as the Defendant recognises, it is possible that it may have been earlier or later than that. However, I think that progression (100% up to age 65, 80% from age 65, 50% from age 70, 25% at age 75, and retirement at age 80) fairly balances out the differing possibilities. It is also entirely consistent with the approach of the Court of Appeal. Even if, as Mr Steinberg QC argued, the Court of Appeal were merely providing a "suggestion" rather than a binding finding, it is the finding as to work pattern that I would make.

(3) Should the calculation of the lost years claim take into account rental income?

59. Mr and Mrs Head received income from an investment property that they jointly owned. The Defendant argues that this rental income should be taken into account when calculating the lost years claim (on the assumption that this would have continued to represent an income stream for Mr Head if it had not been for his untimely death, and that it has now been inherited by the estate).

60. The Claimant argues that neither party at trial suggested that this rental income should be factored into the lost years calculation, that it was not a point raised by either party in the Court of Appeal, and it is not now open to the Defendant to argue that it should be included in the calculations so as to offset any loss that may have been sustained.

61. In the light of the approach to be taken to the lost years claim (which is simply a question of calculating Mr Head's earning capacity and deducting his living expenses, leaving investment income out of account) it is not easy to see why rental income should have any significant role to play. I appreciate that it might, at the margins, impact on the incidence of taxation and therefore have an impact on the precise calculation of the loss. However, as Mr Steinberg QC points out, this issue was simply not explored at the original trial. It is possible that if the Defendant had relied on the rental income then the Claimant may have sought to argue that a part of the rental income should be included in Mr Head's earning capacity, thereby increasing the extent of the claim (eg if Mr Head had spent time and effort in the maintenance of the property). It is simply not possible to know how the evidence would have played out. On this aspect, which appears only to have a modest, if any, impact on the overall value of the claim, I therefore agree with Mr Steinberg's submission that it is not now open to the Defendant to introduce an additional factor to the calculation which has not been explored in the evidence.

(4) What deduction should be made for living expenses?

62. It is common ground that Mr Head's notional living expenses during the lost years should be deducted from his earning capacity. There is disagreement as to the amount that should be deducted.

63. In the case of a married person, the conventional proportion to be applied is 50%, in accordance with the principles identified in *Harris v Empress Motors* [1984] 1 WLR 212 *per* O'Connor LJ at 228G-H. Applying a conventional approach avoids the necessity to undertake a calculation of the amount in fact spent on the living expenses of each spouse. It can, however, work injustice in individual cases (eg where one spouse's living expenses are significantly more or less than the other, or where significant savings are generated out of income).

64. In the present case, HHJ Melissa Clarke found that Mr Head's monthly expenditure on living expenses was £3,584. This was not challenged on appeal, and there is no challenge by either party to it now. On this basis, a deduction of 45% was applied – see at [110]-[111]:

> "Assuming 39% of the future dividends will be extracted, that is some £67,261 per annum net of tax. Adding that to Mr Head's net salary of £27,911 per annum and dividing by 12 gives available monthly post-tax earnings of £7,931 per month. Mr Head's personal living expenses of £3,584 is 45% of that figure, which is much closer to the conventional sum.
>
> Accordingly I assess the appropriate rate of deduction at 45%."

65. The Claimant says that there is a typing error in this paragraph, with an erroneous arithmetical consequence, because the 45% deduction was derived by dividing £3,584 by £7,931. However, the denominator of £7,931 was based on the projection of the Defendant's accountancy expert, whereas the Judge had preferred the projection given by the Claimant's expert. If that figure had been used in the calculation then the rate of deduction should have been 38%, not 45%.

66. Mr Kent QC says that it is not open to the Court now to change the assessment applied by the Judge which was not challenged in the Court of Appeal. In any event, he says, the reduction was entirely appropriate. It was less than the conventional deduction and courts do not usually condescend to a detailed analysis of spending habits.

67. I agree that it is not now open to the parties to seek to re-open the finding of HHJ Melissa Clarke as to the amount that was spent on Mr Head's living expenses (and neither party seeks to do so). It seems to me that that finding provides the best basis for the assessment of damages. Part of the rationale of applying a percentage deduction is to avoid the need for a detailed enquiry as to the amounts actually incurred in respect of living expenses. Here, however, as Judge Clarke pointed out, that enquiry had already been undertaken. Having determined the amount actually spent in respect of living expenses I do not consider it is necessary to derive a percentage reduction to then be applied. Instead, the assessed amount of the living expenses can directly be deducted. I appreciate that this means that the living expenses are treated as being fixed, rather than increasing or decreasing in line with income. I do not, however, see any reason why in the particular circumstances of this case the living expenses should have significantly changed in line with income. Mr Head's income and available assets were not such that his expenses were artificially constrained by the earnings and dividends that he drew month by month. As he reduced the amount of work he put into the business, and commensurately reduced his drawings from the business, I do not see any reason why that should have impacted on his living expenses. He is likely to have had

ample resources available, and to have wished to continue to enjoy his interests and activities (eg his cruising yacht, and his house in the south of France) so as to live life to the full in retirement, as he had before. Nothing in the evidence suggests otherwise.

68. Moreover, the basis on which the assessment of damages falls to be undertaken has changed in the light of the Court of Appeal decision. For the reasons that I have given, Mr Head's earning capacity falls to be assessed by reference not just to his salary and the dividends drawn, but also the undistributed profits that his work generated within EMSL. That in itself provides a sufficient basis for reviewing the calculation to be applied in respect of the deduction of living expenses, and makes it more appropriate to use the actual figures derived by the judge, and less appropriate to apply a percentage reduction. Ultimately, I did not detect any significant disagreement from either party to this course.

69. Accordingly, the deduction to be applied for living expenses should be £3,584 per month.

70. This then leads to a consequential issue as to whether the deduction should be applied year by year (so that any surplus in a given year is treated as a crystallised loss and is not offset by a deficit in a subsequent year) or whether the assessment should be made "once overall" so that the lost years claim amounts to the total lost earning capacity less the total saved living expenses. This is the second of the two consequential questions that is addressed by McCullough J in *Adsett* (see paragraph 23 above). He considered that the assessment should be made once overall. I agree, for the reasons that McCullough J gives: the nature of the award is a single sum to represent the overall loss that was sustained by Mr Head as a result of his foreshortened life expectancy. That loss amounts to his overall earning capacity in the lost years, less his overall living expenses in the lost years.

(5) Would Mrs Head have retired when Mr Head reached the age of 70?

71. There has been no finding as to the date on which Mrs Head would have retired, and no evidence was advanced explicitly on the point. It makes a small difference to the calculation of the loss. The Claimant's case is that she would have retired on her 70th birthday. The Defendant's case is that she would have retired a year later, when Mr Head reached the age of 70 and would have substantially reduced his involvement in the business. In the course of argument Mr Steinberg helpfully and realistically conceded the point. Accordingly, the calculation of the lost years claim should assume that Mrs Head would have retired from the business when Mr Head reached the age of 70.

(6) Would there have been a cost incurred in respect of administrative work performed by someone other than Mrs Head and, if so, what cost?

72. It follows from the resolution of issue (1) that the lost years claim is calculated by reference to Mr Head's earning capacity. In respect of the period when Mr Head was working at full capacity his earning capacity is calculated by taking his salary, adding 90% of the profits of EMSL after salaries (but for this purpose treating Mrs Head's salary as £12,000). Judge Clarke (at [96]) assessed the notional cost of Mrs Head's contribution to the business at £12,000. There is nothing to suggest that Mrs Head's work was in any way unnecessary or that it would not have continued to be needed

(whether undertaken by Mrs Head or a replacement). It is inherent in Judge Clarke's valuation of Mrs Head's contribution to the business that this work was necessary. Mr Steinberg suggested that there is no evidence that this cost would have continued to have been incurred, and that the work undertaken by Mrs Head might have simply been absorbed by existing employees without any additional net cost to the business. There is, however, equally no evidence to support this alternative forecast. I do not consider that the Defendant should be shut out from arguing that the £12,000 annual cost to the business would have continued to have been incurred, and that is the natural and logical consequence of Judge Clarke's findings. The lost years claim should therefore be calculated on the basis that this would be a recurring annual cost.

(7) Should Mrs Head's salary of £45,000, and her state pension, be taken into account for assessing the tax liabilities?

73. Mrs Head's salary was £45,000 per year. It was set at that level for tax efficiency reasons. The issue that has arisen is whether that would have continued to be the case during the lost years (up until the point of Mrs Head's retirement). Mr Steinberg argues that it is not open to Mr Kent to advance a submission that Mrs Head would continue to have been paid at £45,000 per year during the lost years because no evidence has been adduced, and, at this stage, the calculation of the claim should be a matter of simple arithmetic. Both parties have, however, substantially changed the cases that they advanced before Judge Clarke. On the basis of the Court of Appeal's ruling as to the correct method of calculating the lost years claim it is inevitable that changes are required both to the calculation and the assumptions or findings that underpin the calculation. The calculation that is required is a matter of arithmetic subject to (in respect of this issue) a finding one way or the other as to whether Mrs Head would have continued to be paid a salary of £45,000. Mrs Head's salary had been well established and there was no reason for it to change. If Mrs Head's case is that she would not have continued to be paid a salary at the same rate then it is for her to prove that case, and she has not done so.

74. A subsidiary issue arises as to whether (for the purposes of tax calculations) Mrs Head's state pension should be taken into account. Again, Mr Steinberg says that it is too late for this to be raised. Again, however, I consider that it should be taken into account. It does not require any new evidence and there is no justification for ignoring it.

(8) What figures should be taken for the salaries of Dale Head and Aaron Head in the 2018/19 tax year?

75. Previous calculations by both parties as to the value of the lost years claim have been based on the latest company accounts that were then available. They were for the tax year ending April 2018. The figures for the salaries of Dale Head and Aaron Head were taken from those accounts. The accounts for the tax year ending April 2019 are now available. Mr Kent says that represents the most up to date information and should be the basis for the assessment and that, now that the April 2019 accounts are available, those figures should be used. Mr Steinberg says that it is now too late for the defence to change the basis upon which the assessment is conducted.

76. In principle, I would have accepted Mr Kent's submission on this point: I am conducting a fresh assessment of the lost years claim, and it is natural to use the most up to date figures. There is, however, a difficulty in doing so. By the time of the 2018-

2019 tax year Mr Head had made adjustments to the business in the light of his greatly foreshortened life expectancy. He had given his sons additional responsibilities at an earlier stage than he would otherwise have planned. It is likely that any increase in their salaries in 2018-2019 are a result of that, rather than an accurate reflection of the salaries that would have been paid in any event. Mr Kent repaid Mr Steinberg's concession (see paragraph 71 above) with one of his own. He did not pursue the point. It follows that the figures from the tax year ending in April 2018 should continue to be used.

(9) What rate of interest should be applied, and in respect of which components of the award?

The arguments

77. The Claimant seeks interest at the judgment rate of 8% on the entire lost years claim. The argument is that the loss had accrued at the time of the hearing before HHJ Clarke. If the approach mandated by the Court of Appeal had been applied then judgment would have been given for (broadly) the sum that I now award. The Claimant would then have been entitled to interest at that judgment rate – see section 17 Judgments Act 1838. Further, the Claimant has been kept out of the money to which she is entitled for 2 years.

78. There is a discretion as to the rate of interest to be applied – see section 35A Senior Courts Act 1981. Mr Steinberg argues that the discretion should be exercised in the particular circumstances of this case by adopting the judgment rate. He relies on the decisions in *Pinnock v Wilkins & Sons* [1990] 1 WLUK 651 and *Perry v Raleys Solicitors* [2017] EWCA Civ 314. In both of these cases the Court of Appeal upheld the award of interest at the judgment rate (see, in respect of *Perry*, the judgment of Gloster LJ at [59]-[68]). In the alternative, Mr Steinberg suggested a rate of 4%, half the judgment rate, on the basis that this splits the difference between the rate for which the Claimant was contending, and (half of) the special account rate which the Defendant submitted was appropriate.

79. Mr Kent argues that this is a straightforward case of awarding interest for pecuniary loss in a personal injury claim. No award of interest should be made in respect of future losses (ie that part of Mr Head's lost earning capacity that relates to the period after this judgment). Interest on past losses (ie that part of Mr Head's lost earning capacity that relates to the period up to today) should be awarded at half the special account rate in accordance with the convention established by *Jefford v Gee* [1970] 2 QB 130.

Discussion

80. Allowing for the impact of The Judgment Debts (Rate of Interest) Order 1993, section 17 of the Judgments Act 1838 provides that judgment debts carry interest at the rate of 8% per year until the date of payment. The point at which interest starts to run is the date of judgment, unless the court orders otherwise – see section 17 read with CPR 40.8. Here, the date of judgment is today. It is not the date of Judge Clarke's judgment. It was not suggested that I could or should exercise the power under CPR 40.8 to set the date from which interest should start to run as the date of Judge Clarke's judgment. Rather, the Claimant seeks to achieve the same end by application of the discretion under section 35A of the 1981 Act. There does not, however, seem to me to be any good reason to do so.

81. The fact that interest would have been awarded at 8% from the date of Judge Clarke's judgment if she had applied the approach that was later set out in the Court of Appeal judgment is nothing to the point. The fact is she did not do so. If she had done so then the Defendant would no doubt have paid the judgment sum at that point rather than allow its liability to accumulate at an annual rate of 8%. So, even in that event, the Claimant would not have recovered what she now seeks to claim. The Claimant would be in a better financial position, if the judgment rate were applied, than would be the case if this judgment had been given in 2019.

82. The rate of interest under section 17 of the 1838 Act is far above that which is ordinarily required to compensate a claimant for being kept out of her money (see *ACLBDD Holdings Ltd v Staechelin* [2018] EWHC 428 (Ch) *per* Morgan J at [8]). The judgment rate (as it currently stands) is significantly higher than available guaranteed investment rates, and 80 times higher than the Bank of England's base rate. It contains a significant salutary element to encourage early settlement of judgment debts and to provide a sanction for delayed payment.

83. The Claimant is right that in both *Pinnock* and *Perry* interest was awarded at the judgment rate in respect of the period before judgment had been given. I do not, however, consider that either case supports the award of interest at the judgment rate in the particular circumstances of the present claim. Both *Pinnock* and *Perry* were professional negligence claims, where the claimants' solicitors' negligence had deprived the claimants of a chance of securing judgment.

84. In *Pinnock* Ralph Gibson LJ (dissenting) rejected an argument that the claimant had lost a real prospect of recovering interest at the judgment rate. He considered that it was likely that the defendant would have paid the judgment debt before substantial interest had accrued. He would therefore have awarded interest at the special account rate, rather than the judgment rate. Nicholls LJ (with whom Fox LJ agreed) took the view that the judgment rate should be applied. He emphasised that *Pinnock* was a claim for professional negligence rather than a personal injuries claim. He considered that there was "much force" in taking the judgment rate as a convenient starting point for the award of interest under section 35A of the 1981 Act. He distinguished *Jefford v Gee* because at the time it was decided the judgment rate was not "realistic", whereas at the time of *Pinnock* it was "realistic." That distinction now, however, works in reverse so as to distinguish *Pinnock* itself. *Pinnock* was decided in 1990 when the judgment rate (15%) was broadly in line with Bank of England base rate (14.88%). It did not contain the additional element that is now present. The rationale that underpins the approach of Nicholls LJ in *Pinnock* does not (in the light of the current judgment rate) support using the judgment rate as the starting point when awarding interest under section 35A of the 1981 Act.

85. In *Perry* the claimant had been kept out of his money for 10 years. An award of simple (as opposed to compound) interest at the special account rate over that period of time would not have compensated the claimant for the loss of use of his money because of the erosion of the value of the fund due to inflation (see *per* Gloster LJ at [63]). Gloster LJ considered that the observations of Nicholls LJ in *Pinnock* applied. Moreover, the conduct of the defendant in that case deserved "appropriate sanction". Again, the rationale for the award of the judgment rate in *Perry* does not apply to the facts of the present case.

86. If the Claimant's argument is well founded then it follows that every time a first instance assessment of damages is overturned on appeal and remitted for re-assessment, interest on the re-assessed sum should be awarded at the judgment rate from the date of the first assessment of damages. There is no authority to support that approach. It would ordinarily result in a significant windfall above and beyond the true loss to a claimant that accrues from being kept out of funds, or the benefit to a defendant of delayed payment. It would apply the salutary element that is inherent in the judgment rate where the policy reasons for that component do not apply. It would also potentially cause confusion and satellite litigation: if the judgment rate is to be applied in a remitted assessment, why not where a final hearing has been delayed or adjourned? This is an area where there is good reason to apply, within reasonable limits, bright lines, simplicity and convention.

87. The conventional approach to the award of interest for damages in a personal injury claims is that set out by Lord Denning MR in *Jefford v Gee* [1970] 2 QB 130 at 146B, 146G and 147B-C:

> "Special damages mean the *actual pecuniary loss* suffered by the plaintiff, up to the date of trial, owing to the wrongful act of the defendant. In principle, the plaintiff should be awarded interest on the sum which represents the loss as from the date it was incurred.
>
> …
>
> *Loss of wages*: This occurred week by week. In principle, the interest should be calculated on each week's loss from that week to the date of trial. But that would mean too much detail. Alternatively, it would be possible to add up the loss every six months and allow interest on the total every six months until trial. That would seem fair, especially as the loss for the initial weeks might be for total incapacity, and afterwards only for partial incapacity when he could do light work. More rough and ready, the total loss could be taken from accident to trial: and interest allowed only on half of it, or for half the time, or at half the rate.
>
> …
>
> *Overall result:* Taking all these things into account, we think that the special damages should be dealt with on broad lines. The amounts of interest at stake are not large enough to warrant minute attention to detail. Losses, expenditure and receipts should all go into one pool. In all ordinary cases we should have thought it would be fair to award interest on the total sum of special damages from the date of the accident until the date of trial at half the rate allowed on the other damages.
>
> …
>
> Where the loss or damage to the plaintiff is *future pecuniary loss*, e.g. loss of future earnings, there should in principle be no interest. The judges always give the present value at the date of trial, i.e., the sum which, invested C at interest, would be sufficient to compensate the plaintiff for his future loss, having regard to all contingencies. There should be no interest awarded

> on this: because the plaintiff will not have been kept out of any money. On the contrary, he will have received it in advance." [*original italicisation*]

88. There is no good reason in the present case to depart from that conventional approach. Interest should be awarded at half the special account rate, not the judgment rate.

89. That leaves the question of whether interest should be applied to all, or only part, of the award. That depends on whether it is a past or a future loss. The lost years claim had accrued by the point of Mr Head's death. That does not, however, mean that it is a claim in respect of past losses. The claim can be attributed to identifiable periods of time. Part of the claim (that relating to Mr Head's earnings capacity from the date of his death until today) represents a past loss. The balance of the claim represents a future loss. It is no different in principle from a claim for loss of earnings where the future claim crystallises and is capitalised at the point of judgment. Accordingly, the award of interest should be applied only to past losses, namely that part of the lost years claim that relates to the period before today.

(10) What, if any, orders should be made under CPR 36.17(4)?

90. The Claimant made a Part 36 offer on 13 November 2020 to accept £2,249,705.80 as the gross damages award (to include all heads of loss). It is common ground that the Claimant will (in the light of the resolution of points (1)-(4)) recover more than that sum. It is therefore common ground that the outcome of the litigation is more advantageous to the Claimant than if the offer had been accepted.

91. The Claimant seeks consequential orders under CPR 36.17(4). Leaving aside the effect of CPR 36.17(7) (which has no application here), CPR 36.17(4) states:

> "the court must, unless it considers it unjust to do so, order that the claimant is entitled to—
>
> (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
>
> (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
>
> (c) interest on those costs at a rate not exceeding 10% above base rate; and
>
> (d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—
>
> (i) the sum awarded to the claimant by the court; or

> (ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—
>
> | Amount awarded by the court | Prescribed percentage |
> |---|---|
> | … | |
> | Above £500,000 | 10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure." |

92. The Claimant therefore seeks:

(a) interest at the rate of 10% above base rate for the entirety of the period since 21 days after the part 36 offer was made;

(b) costs on the indemnity basis since that date;

(c) interest on costs at the rate of 10% above base rate;

(d) an additional amount of £75,000.

93. The starting point is that the Claimant is entitled to orders under each of these heads (albeit, in respect of the interest rates at (a) and (c), not necessarily at the rates claimed by the Claimant which are the maximum rates that may be applied rather than tariff rates or starting points).

94. Orders under CPR 36.17(4) should only be refused where the court considers it "unjust" to make such orders. In considering whether it would be unjust, CPR 36.17(5) requires that the court must take into account all the circumstances of the case, including:

> "(a) the terms of any Part 36 offer;
>
> (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
>
> (c) the information available to the parties at the time when the Part 36 offer was made;
>
> (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
>
> (e) whether the offer was a genuine attempt to settle the proceedings."

Is it unjust to make the orders referred to in CPR 36.17(4)?

95. The fact that orders under CPR 36.17(4) might result in the Defendant paying (and the Claimant receiving) considerably more than the amount required to compensate for the losses sustained does not render such orders unjust. That consequence is inherent in a scheme which provides a system of sanctions and rewards so as to encourage dispute

resolution. It is necessary to recognise that is the intended purpose of the scheme, and to assess in that context whether the making of part 36 orders would be unjust having regard to all the circumstances, including the factors identified in CPR 36.17(5). It is a "formidable obstacle" to show that the imposition of part 36 orders would be unjust – see *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch) *per* Briggs J at [13(d)].

96. CPR 36.17(5)(a): The terms of the part 36 offer were that the Defendant should pay a sum of just under £2.25M. Those terms were clear. The Claimant has achieved a more advantageous result. The terms of the offer are not such that it would be unjust to make the orders referred to in CPR 36.17(4).

97. CPR 36.17(5)(b): The offer was made at a late stage in the proceedings, after the initial assessment of damages and a month before the Court of Appeal hearing. The parties had taken entrenched litigation positions. The approach taken by both parties meant that the prospects for compromise at this late stage were, realistically, limited. Nonetheless, the timing of the offer does not in itself make it unjust to impose part 36 orders. It was made sufficiently in advance of the Court of Appeal hearing (and, more so, sufficiently in advance of the remitted hearing to assess the value of the lost years claim) to enable substantial costs to be saved.

98. CPR 36.17(5)(c): At the time the offer was made, the parties had set out their respective cases on the value of the claim, disclosure had taken place, witness statements had been exchanged, the parties had the benefit of expert accountancy reports, and permission to appeal had been granted. There was ample information available to enable the claim to be valued. The Defendant did not respond to the part 36 offer by making any request for further information or by indicating that it was not in a position to make a decision on the offer because of any lack of information. Considering the position at the time the offer was made, it cannot be said that it would be unjust to make part 36 orders because of any lack of information available to the Defendant. The issue, however, falls to be separately considered by reference to the information that subsequently became available (as to which see below).

99. CPR 36.17(5)(d): Each of the parties advances a litany of complaints about the conduct of the other. Subject to the late admission of evidence (as to which see below) I do not consider that these points show that it would be unjust for part 36(4) orders to be made.

100. CPR 36.17(5)(e): There is no basis for finding that the Claimant's part 36 offer was anything other than a genuine attempt to settle the proceedings. It represented a very substantial discount from the Claimant's (overblown) open litigation position and (as events have shown) represented a realistic valuation of the claim.

101. Other factors: The assessment of whether it would be unjust to make part 36 orders requires account to be taken of all relevant circumstances, not just those identified in CPR 36.17(5). The Defendant relies on the fact that the Claimant introduced very late evidence (see paragraphs 48-55 above). At the time the evidence was introduced, the Defendant argued that it did not make any significant difference to the value of the claim. It was said that there was no good reason for the failure to have provided the evidence much earlier, and well before the hearing before HHJ Melissa Clarke, but the Defendant did not ultimately object to the evidence being introduced (see paragraph 48 above). There is no reason why that constructive approach should deprive the Defendant from now arguing (with the knowledge of how the claim has played out) that

it would be unjust to make part 36(4) orders having regard to the impact of the late evidence.

102. The Claimant relies on the Defendant's earlier argument that the late evidence did not have an impact on the value of the claim. Her case is that it was entirely consistent with all of the earlier evidence that had been advanced by the Claimant and with the way in which the case had been pleaded, valued by the Claimant's expert accountant and presented to Judge Clarke. It did not therefore make any material difference, and it would not therefore be unjust to impose part 36(4) orders.

103. It is not difficult to assess the broad impact of the late evidence. As paragraphs 48 – 56 above show, it resulted in a finding that Mr Head would have reduced his shareholding in the business to reflect the gradual reduction in his involvement. That finding is to the Claimant's considerable benefit. It means that the value of the claim is assessed on the basis that Mr Head would not have received dividend income from the business beyond that which derived from work he carried out for the business. There would therefore be no element of investment income which might otherwise be offset against lost earning capacity. In the light of the way in which both parties presented their cases, this was capable of making a significant difference. That is no doubt why the Claimant was anxious to adduce additional evidence to establish the point.

104. The earlier evidence relied on by the Claimant would not, in itself, have resulted in that finding. Nowhere in that earlier evidence is it said in terms that Mr Head would have given up his shareholding in the business. On the contrary, Mr Head's evidence was that he would have found it difficult to give up his controlling interest. The Claimant is on stronger ground when she says that her case was pleaded, and valued by her accountant, on the assumption that Mr Head's share in the business would have reduced to reflect his reduced involvement. However, when the Defendant came to decide whether to accept the part 36 offer, it would have been natural to assess whether the evidence supported that offer, as opposed to whether the offer was less than the amount of the pleaded case.

105. The Defendant presented figures to show that without the fresh evidence the Claimant would not have recovered more than the part 36 offer and so would not have been entitled to part 36 orders. Those figures were disputed by the Claimant. It is not necessary to make a finding as to the precise monetary difference that the new evidence makes. It is sufficient to observe that the Claimant has "beaten" her part 36 offer by a relatively small proportion of the overall value of the claim and so any significant increase in the value of the claim is likely to have made all the difference.

106. It would have been open to the Defendant to seek to accept the Claimant's part 36 offer at the time that the late evidence was served. That was at a very late stage, only shortly before the hearing. By then, almost all of the costs of the claim had been incurred. Moreover, the starting point, at the time the Claimant sought to introduce the late evidence, is that it had not been served until shortly before the hearing, and there was no order permitting the Claimant to rely on fresh evidence. If the Defendant had objected to the admission of the evidence then it would have been necessary to determine whether the Claimant should be given permission to rely on the evidence. Although the Claimant was not, strictly, in breach of any directions (because there had been no direction for the exchange of witness statements), it was incumbent on the Claimant to place all of the evidence on which she wished to rely before HHJ Clarke

and (in the event that she wished to rely on further evidence) to seek a direction to permit her to do so well before the hearing. Having not done either of those things, the Claimant would have required relief from sanctions. In deciding whether to grant relief it would have been necessary to apply the test in *Denton v TH White Ltd* [2014] EWCA Civ 906 [2014] 1 WLR 3926. The breach of the court's directions was significant, so the Claimant would not have succeeded at the first stage of the test. There was no good reason for the breach of the court's directions, so the Claimant would not have succeeded at the second stage of the test. An application for relief from sanctions would therefore have required an assessment of all the circumstances of the case. If it had been known, at that point, that the Defendant would be prejudiced by the late introduction of the evidence, then the nature and extent of that prejudice would have been considered, along with ways in which it could be mitigated. Of course, the potential for part 36 consequences could not have been taken into account, because of the effect of CPR 36.16(2). It is, however, now known that the Defendant has been prejudiced by the late introduction of the evidence because of the potential part 36 consequences. It would be unjust to the Defendant to allow the Claimant to benefit from part 36(4) orders that are only available because she was permitted to rely on evidence which was served late without good reason.

107. Accordingly, the Defendant has discharged the burden of demonstrating that the making of part 36(4) orders would, in all the circumstances of this case, be unjust. I therefore refuse the Claimant's application for part 36(4) orders.

Outcome

108. Mrs Head is entitled to recover damages in respect of the lost years claim calculated by:

(1) Taking the salary of Mr and Mrs Head, together with 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, and treating that as Mr Head's loss of earning capacity up until the age of 65;

(2) Reducing that figure by:

(a) 20% in respect of the period when Mr Head would have been aged between 65 and 70 (during which period Mr Head would have worked "on an 80% basis");

(b) 50% in respect of the period when Mr Head would have been aged between 70 and 75 (during which period Mr Head would have worked on "a 50% basis");

(c) 75% in respect of the period when Mr Head would have been aged between 75 and 80 (during which period Mr Head would have "wound down his efforts… to 25%");

(d) 100% (so allowing no loss of earning capacity) in respect of the period after Mr Head would have reached the age of 80, when he would have retired;

(3) allocating the multiplier for future loss to the net sums attributable to each of these separate periods;

(4) deducting monthly living expenses of £3,584 in respect of the entire period of the lost years, including the period after Mr Head would have reached the age of 80;

(5) calculating the claim on the basis that Mrs Head would have retired when Mr Head reached the age of 70;

(6) continuing to deduct the value of the work done by Mrs Head even after her retirement, on the basis that the cost would continue to have been incurred by employing a replacement;

(7) calculating the claim on the basis that, before her retirement, Mrs Head would have continued to draw a salary of £45,000 and would be in receipt of her state pension;

(8) calculating the salaries of Aaron and Dale Head by reference to the accounts for the year end April 2018 (not April 2019);

(9) awarding interest on the lost years claim for the period up until today at half the special account rate from 19 April 2019 until today, with no award of interest on that part of the award which relates to the lost years after today;

(10) Making no order under CPR 36.17(4).

109. The parties agree that the application of these principles results in damages for the lost years in the sum of £2,444,310 and interest of £1,195. Allowing for the other heads of loss that were assessed by HHJ Clarke, and further interest on those sums which is agreed by the parties, I give judgment for the Claimant in the total sum of £2,621,786.10 inclusive of interest.