Neutral Citation Number: [2019] EWHC 1217 (QB)

Case No: HQ18A03334

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
Strand, London

Date: 14 May 2019

Before:

HER HONOUR JUDGE MELISSA CLARKE
Sitting as a High Court Judge

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Between:

MICHAEL HEAD	**Claimant**
- and -	
THE CULVER HEATING CO LIMITED	**Defendant**

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Mr Harry Steinberg, QC and Kate Boakes (instructed by Fieldfisher) for the **Claimant**
Mr Michael Kent QC (instructed by BLM) for the **Defendant**

Trial dates: 11 and 12 April 2019

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Her Honour Judge Melissa Clarke:

I. Introduction and summary of decision

1. It is a tragedy for Mr Head and his close and loving family that he was diagnosed with mesothelioma in March 2018. The Defendant has accepted that Mr Head contracted it as a result of occupational exposure to asbestos, and that he was negligently exposed to asbestos during the course of his employment by the Defendant at the very start of his career, when he was an apprentice heating engineer from 1974 to 1979. Mr Head is now 60 years and 8 months old and is managing director of Essex Mechanical Services Limited ("EMSL"), a company which he founded and in which he, his wife Mrs Deborah Head, and their three adult children, Dale, Aaron and Tara, hold all the issued shares.

2. Mr Head obtained judgment for damages to be assessed by order of Master Gidden of 28 November 2018. By that order the Defendant was required to make an interim payment on account of damages of £200,000 and a sum on account of costs. I understand those payments have been made. The Defendant reserved the right to raise the issue of contributory negligence, but does not pursue that.

3. The parties have agreed the following heads of damages:

   i) Care and assistance: £15,000

   ii) Travel expenses: £3,497.10

   iii) Miscellaneous expenses: £1,000

   iv) Private Medical treatment: the Defendant has agreed to provide an indemnity in respect of future treatment Mr Head may receive on a private basis, including immunotherapy.

   v) Audiology costs: £5119

   vi) House adaptations: £52,822

   vii) Equipment: £3,250

4. That leaves just two heads of damages which are disputed: (i) general damages for pain, suffering and loss of amenity; and (ii) loss of income in the 'lost years'.

Damages for PSLA

5. The figures for general damages for pain, suffering and loss of amenity for which each party contends are not far apart. I am asked to determine the appropriate figure on conventional principles. For the reasons which I give in this judgment, I assess that at £95,000, which is the figure sought by Mr Head.

Damages for 'lost years'

6. The substantial dispute, and the real reason this has come before me for an expedited trial in the specialist mesothelioma list, relates to Mr Head's claim for loss of earnings

in the 'lost years'. He values this at just over £4,421,683. The Defendant values this at nil.

7. The underlying financial information relevant to the 'lost years' claim is addressed in the reports and joint statement of the expert forensic accountants: Mr Stanbury for Mr Head and Mr Forth for the Defendant. They have carried out financial analysis and have reached a measure of agreement. However they have identified a number of factual and legal issues that the court must determine before they can finalise their calculations. In particular, there is a dispute between the parties about the correct approach in law to the assessment of the lost years claim in the context of this case, which the expert forensic accountants acknowledge is not a matter for them but for the court.

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

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

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

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

    i) the principles of *Adsett v West* apply;

    ii) on the balance of probabilities, the profitability of EMSL is likely to continue after Mr Head's death, therefore the dividend income from the shares that he and Mrs Head hold in EMSL is likely to survive his death;

    iii) this dividend income is greater than the 'surplus' income he currently enjoys;

    iv) per *Adsett v West*, there is no loss in the 'lost years'.

12. Accordingly I assess that claim at nil.

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

14. Mr Steinberg Q.C. and Miss Kate Boakes represent Mr Head and Mr Michael Kent, Q.C. represents the Defendant. I am grateful to them for their succinct and helpful opening notes and skilful submissions.

II. Witnesses

15. Mr Head filed a witness statement dated 18 July 2018. In accordance with the directions order of Master Gidden, he gave evidence on commission at a deposition hearing on 12 December 2018. I have watched that evidence and read the transcript of the deposition.

16. Although not usual, I acceded to an oral application by Mr Steinberg to allow Mr Head to give evidence-in-chief and be cross-examined at trial. I also allowed Mr Head to rely on a late witness statement of his wife, Mrs Deborah Head. I gave my reasons for doing so at the time. That required Mr Kent, who appears for the Defendant, to cross-examine Mr Head on new evidence-in-chief. He did so with great skill and courtesy, for which I am grateful.

17. I found both Mr and Mrs Head to be credible and reliable witnesses. The manner in which they gave their witness evidence in these unimaginably difficult circumstances, with dignity, care and candour, was admirable and moving. Mr Kent in his closing submissions described Mr Head as conspicuously a man of integrity and honesty. I agree.

18. The parties were each permitted to rely on expert evidence from a forensic accountant. The report of Mr Head's expert, Mr Stanbury, is dated 14 September 2018 and is annexed to the Schedule of Loss. The report of the Defendant's expert, Mr Forth, is dated 30 January 2019. Mr Stanbury and Mr Forth met and produced a joint statement dated 21 February 2019. Both accountancy experts attended the trial and were cross-examined and Mr Forth was re-examined.

19. I am satisfied that Mr Stanbury and Mr Forth have the professional qualifications, expertise and experience to act as experts in this matter. I found each to be a careful and thoughtful witness who explained his opinions carefully, made appropriate concessions, and took care not to usurp the fact-finding functions of the court. It will be seen that in some areas of dispute I prefer Mr Stanbury's opinion and in others I prefer that of Mr Forth, for reasons which I give, but I am satisfied that they have each carried out their duties to the court diligently and have assisted the court to the best of their abilities.

20. The Claim was supported by two medical reports from Dr Rudd, a consultant physician with specialist accreditation in respiratory medicine and medical oncology, dated 3 August 2018 and 29 January 2019 respectively. Dr Rudd estimated Mr Head's life expectancy following his diagnosis of mesothelioma at 8 months from the date of the first report with a likely range of 4 to 12 months. The parties accept Dr Rudd's reports and the opinions contained within them save for his estimate of Mr Head's life expectancy but for his contraction of mesothelioma. Dr Rudd estimated this at 21.9 years from August 2018. This was based on his understanding of Mr Head's co-morbidities of hypertension and prostate cancer. Mr Head underwent a radical prostatectomy for that prostate cancer, which was found to be a tumour of Gleason grade 7, in November 2016.

21. The Defendant sought and was granted permission for the parties to obtain a further report from experts in the field of urology to address the prognosis for survival from that prostate cancer. Mr Head's expert is a Consultant Urological Surgeon, Mr Harriss, whose report is dated January 2019. The Defendant's expert is a Professor of Oncology, Professor Waxman, whose report is dated 3 January 2019. They produced a joint statement dated 12 March 2019 in which they reach an agreed position, although there is some dispute between the parties about what that agreed position means and how it assists the court, which I must resolve.

22. The medical experts were not called to give oral evidence.

III. Non-medical evidence

23. I will set out the medical evidence following the onset of Mr Head's symptoms when I come to consider life expectancy and general damages for pain, suffering and loss of amenity. The remainder of the relevant factual background for the purposes of the issues I need to determine is as follows.

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.

26. EMSL's business falls, broadly, in two parts. One part is the design and installation of heating, ventilating and air conditioning systems for the commercial sector ("Installation Business"). That includes: (i) direct contracts with customers including the NHS, local councils, governmental bodies and large retailers; and also (ii) sub-contracts with main contractors, in particular a contractor called Stroods. EMSL employees generally carry out the work of the Installation Business. EMSL currently has 15 employees.

27. The other part is provision of servicing and repair services for commercial customers' existing heating and ventilation systems ("Servicing Business"). This includes nationwide contracts for large retailers such as Clintons cards and Topps Tiles. This work is generally carried out by a network of local sub-contractors with whom EMSL has established relationships.

28. Until 30 April 2016 the Servicing Business was carried out through another related company, Set Fair Limited, but it is common ground that nothing turns on that and the forensic accountants have considered the income and expenditure of Set Fair Limited together with that of EMSL for the years before 2016.

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. Her evidence is that this involves booking service and repair appointments for the Clintons Cards contract, and allocating sub-contracted engineers to carry out that booked work, and also to carry out invoicing of the servicing work for Clintons Cards and Topps

Tiles. She says others employed in the office carry out all other administrative work for EMSL.

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.

31. Mr and Mrs Head also have a daughter, Tara Head, who is not a director and does not work for ESML.

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.

33. The shares of ESML are split into two classes. The A shares are held as to 45% each by Mr Head and Mrs Head and as to 5% each by Dale and Aaron. There are five allotted B shares, one being issued to each of Mr Head, Mrs Head, Dale, Aaron and Tara.

34. EMSL has historically paid dividends on the A shares in sums which Mr and Mrs Head say are determined by Mr Head, following advice from his accountant. It is not disputed that the amounts paid out by way of dividend and the split of earnings as between dividends and income in the form of salary are in large part driven by the wish to maximise tax efficiency.

35. EMSL has also historically paid dividends on the B shares. The expert accountants agree that but for the mesothelioma, each of the B shareholders would have continued to receive annual dividends of £2,000 each (£10,000 in total) based on the current dividend allowance level.

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 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.

40. Both he and Mrs Head in oral evidence confirmed that even though the timetable had been accelerated by his mesothelioma, that was still the intention. Both confirmed that there was no intention to put in place any other management over the heads of Dale and Aaron even on a temporary basis, and nor had Mr Head's illness given rise to any intention to sell the whole or part of the shares in EMSL to a third party, whether now or in the future. Mrs Head was clear that she intended EMSL should remain a family company providing a good living for her and her sons and an income for Tara.

41. Mr Kent asked Mr Head about his sons' capabilities in his deposition in December 2018 and in particular if Mr Head's sons were cut out for continuing the business, and Mr Head replied *"yes".*

42. In terms of the likely profitability of EMSL in the future, in his witness statement of July 2018, Mr Head said *"Business is very good. We are reliable and have a good reputation. Recently we picked up a contract for Merrill Barracks, Colchester. It is a £330000 contract over the next 18 weeks. We have been preferred contractors for Colchester Hospital for seven years. We are problem solvers. People are keen to get hold of us. In 2017/18 we had a contract at Colchester Hospital work £1M… We have recently been asked to do install air condition system for the Darwin Collection at the Royal Horticultural Society in Westminster. Business is good; we are full up until Christmas at least. There are no market issues at the moment".*

43. Mr Head provided updating information in his oral evidence at trial. He said that the large Colchester Hospital contract he had referred to had completed, increasing EMSL's turnover by £1m over 12 months, and that had contributed to an increased turnover for 2017/18 compared to the year before. However he didn't see that as exceptional. He told the court that three weeks ago EMSL received a similarly large order for the Mercury Rising theatre refurbishment, also worth £1m over 12 months. He said that in the 2018/19 financial year which had not quite finished (year end being 30 April), EMSL had obtained £2.5m of actual orders, to next May 2020. He said *"the forward work order book is brilliant"*.

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".*

IV. The law

Claim for the 'lost years'

45. The case of *Pickett v British Rail Engineering Ltd.* [1980] A.C. 136 established that a claimant whose life expectancy has been reduced by a tortious act may obtain damages referable to the loss of his earnings in the 'lost years', that is the years that he would have enjoyed had he lived his full life expectancy. Previously, damages could be awarded only for loss of earnings for the period of likely survival, but not beyond, per *Oliver v Ashman* [1962] 2 Q.B. 210. Instead a conventional award for loss of expectation of life was given. At the time of *Pickett*, this was £500. Lord Wilberforce at 150C of his judgment in *Pickett* set out the principle:

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

46. At 151A Lord Wilberforce set out what he called *"an important ingredient… namely 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 probably living expenses during those years. I think that this is right because the basis, in principle, for recovery lies in the interest which he has in making provision for dependants and others, and this he would do out of his surplus".*

47. Lord Salmon agreed with the principle of recovery for the 'lost years' at 152G:

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

48. Lord Salmon's view, expressed at 153F, was that those damages for lost years *"should be assessed justly and with moderation".* He agreed, at 154C, that the plaintiff's own living expenses should be deducted from any award *"because these clearly can never constitute any part of his estate"*.

49. Lord Edmund-Davies preferred not to consider the award of damages for lost years in terms of the impact upon dependents of the plaintiff as Lord Salmon had, saying at 162C:

> "For our present consideration relates solely to the personal entitlement of an injured party to recover damages for the "lost years", regardless both of whether he has dependants and of whether or not he would (if he has any) make provision for them out of any compensation awarded to him or his estate. With respect, 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. In the Australian case of *Skelton v Collins*, 115 C.L.R. 94, Taylor J referred to "the anomaly that would arise if *Oliver v Ashman* [1962] 2 Q.B. 210 is taken to have been correctly decided," adding, at p. 121:
>
> > "An incapacitated plaintiff whose life expectation has not been diminished would be entitled to the full measure of the economic loss arising from his lost or diminished capacity. But an incapacitated plaintiff whose life expectancy has been diminished would not.""

50. Lord Scarman took a similarly broad view at 170F:

> "The plaintiff has lost the earnings and the opportunity, which, while he was living, he valued, of employing them as he would have thought best. Whether a man's ambition be to build up a fortune, to provide for his family, or to spend his money upon good causes or merely a pleasurable existence, loss of the means to do so is a genuine financial loss. The logical and philosophical difficulties of compensating a man for a loss arising after his death emerge only if one treats the loss as a non-pecuniary loss – which to some extent it is. But it is also a pecuniary loss – the money would have been his to deal with as he chose, had he lived".

51. In *Gammell v Wilson; Furness v B & S Massey Ltd.* [1982] A.C. 27 the principles to be applied in the assessment of damages in lost years cases were considered in the House of Lords. Lord Scarman said at page 78:

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

> of probabilities which matters… in all cases it is a matter of evidence and a reasonable estimate based upon it."

Living expenses

52. It is common ground between the parties that the relevant principles for establishing the living expenses deduction for a 'lost years' claim can be found in the judgment of O'Connor LJ in *Harris v Empress Motors* [1984] 1 WLR 212 at 228G:

> "The sum to be deducted as living expenses is the proportion of the victim's net earnings that he spends to maintain himself at the standard of life appropriate to his case… Any sums expended to maintain or benefit others do not form part of the victim's living expenses and are not to be deducted from the net earnings… I think one can say in relation to a man's net earnings that any proportion thereof that he saves or spends exclusively for the maintenance or benefit of others does not form part of his living expenses. Any proportion that he spends exclusively upon himself does. In cases where there is a proportion of the earnings expended on what may conveniently be called shared living expenses, a pro rata part of that proportion should be allocated for deduction…".

53. It is also common ground that *Harris v Empress Motors* has given rise to a conventional 50% discount for living expenses. However, this can be displaced by evidence (*Phipps v Brooks Dry Cleaning Services Ltd* [1996] PIQR at Q100, Q105. See also *Shanks v Swan Hunter Group Plc* [2007] EWHC 1807 (QB)).

Notional reallocation of earnings between spouses

54. In *Kent v British Railways Board* [1995] P.I.Q.R. Q42 (CA) the plaintiff was injured in an accident for which the defendants were found to be 70% responsible. Before the accident, she had run a business in partnership with her husband, but afterwards its profits and profitability were reduced as a consequence of the accident. Despite the partnership, for taxation purposes it had been arranged with HMRC that she and her husband should be assessed on the basis that she received 40% of the profits business and her husband received 60%. On assessment of damages, the master accepted that no apportionment should be made of the profits as between the plaintiff and her husband. On appeal, it was held that to allow the plaintiff the full amount of the loss of takings of the business would effectively afford her husband a right of recovery, something to which he was not entitled as a matter of law. The presumption in s24 of the Partnership Act that partners shared equally in the profits of the business was not rebutted by the 40/60 split arranged with HMRC. The correct apportionment was 50/50.

55. A few years later *Ward v Newalls Insulation* [1998] 1 WLR 1722 came before the Court of Appeal. This was a mesothelioma case in which it was necessary to assess the plaintiff's loss of future earnings or earnings capacity. The plaintiff had been in a partnership with E, and together they set up a number of companies owned and controlled by the partnership. Those companies paid revenues to the partnership as directed by P and E from profits. Not all profits were paid to the partnership however – a portion was retained within the relevant company. On receipt of accountancy advice, and with the Revenue's approval, P and E declared that their wives were also

partners, although they contributed no capital and did no work for the partnership. No formal partnership deed was entered into, but for a number of years they declared four partners in the partnership accounts which were signed by all four, and they paid tax on the basis of four separate and approximately equal incomes from the partnership profits.

56. The defendant's argument, which was successful at first instance, was that this was a four-person partnership in law, albeit two partners (the wives) were dormant and sleeping. P's share was therefore 25%, not the 50% for which he contended. Per *Kent v British Rail Board*, if P was permitted to recover 50% of the partnership profits, that would wrongly afford his wife a right of recovery whereas as a matter of law she had none.

57. On appeal, Henry LJ giving the judgment of the court noted at 1725C (it did not appear to be disputed), that *"as partners, they [the wives] were no more than nominees of their husbands"*. At 1727G he summarised the issue before the court as being *"encapsulated in the question: "what was Mr. Ward's real loss of earnings and/or earnings capacity?""*

58. The court held that: the wives were partners in the partnership, albeit sleeping partners; since there was no partnership deed governing the partnership arrangement, it was an informal arrangement which existed from year to year and was terminable at will; the wives' contribution to the profitability of the partnership was nil; the fact of agreement re the apportionment of profits with the revenue did not affect the comparative values of each partner's contribution to the partnership; P and E together controlled all of the five companies that were passing on management fees to the partnership, which depended on them totally, and in practice they could have apportioned to themselves whatever percentage of the profits of the companies that they saw fit; and therefore P's real loss of earnings or earning capacity was 50% of the partnership profits.

59. Henry LJ went on to note that if P's wife had made a contribution to the profitability of the partnership, that would have been valued and deducted from his 50% share, but she had not, so the deduction was nil.

60. The court considered *Kent v British Railways Board* but held, at 1733C – E, that it did not consider that to be in conflict with the conclusion it had reached, because in that case, unlike *Ward v Newalls*, the partnership was one in which both the plaintiff and her husband had contributed, and:

> "in adopting the presumption of equality in default of agreement under section 24 of the [Partnership] Act of 1890, [Mays LJ] expressed himself as looking at the reality. We are sure that if the reality (of the plaintiff's loss measured by her contribution) had been 70 per cent, he would have found for that figure. There is no reason (and no power) for the judge to trump reality in a personal injury claim by any internal allocation of the division of profits in a partnership which does not reflect the true value of the partner's contribution."

61. Also relevant to the conclusion of the court was what Henry LJ described at 1733G as *"The reality... that Mr. Ward could and would have reorganised his affairs if it had*

been suggested to him that the legal effect of this arrangement was to halve the damages to which he was otherwise entitled. Thankfully, that is not the law".

Adsett v West

62. The Defendant relies on *Adsett v West*. This was a claim brought for the benefit of the estate of Richard Adsett, a single man of 26 years old killed in a road traffic accident by the negligence of the Defendant, under the Law Reform (Miscellaneous Provisions) Act 1934 ("LR(MP)A"). Such a claim can no longer be made because of section 1(2)(a)(ii) LR(MP)A, as inserted by the Administration of Justice Act 1982, but I accept Mr Kent's submission (which I do not understand to be disputed) that this does not affect McCullough J's analysis of the applicable principles.

63. Richard Adsett's father (the plaintiff and administrator of his estate) was a successful businessman with three well-established businesses, run as partnerships. From the age of 17, Richard Adsett had worked in one or other of these three business and over the years had been given a capital share in each of the partnerships. His income (described as *"not inconsiderable"*) derived in part from earnings from his work and in part from these investments. The court was told that had he lived, his father would have been likely to pass to him, either in his lifetime or on his own death, his own much larger share in the partnerships. There were a number of issues which McCullough J had to determine, but he described the one with which we are concerned in the following terms at 830E:

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

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

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

65. McCullough J noted the reliance that Mr Machin placed upon a number of passages from Lord Wilberforce's judgment in *Pickett*, including those I have already set out above at 150C and 151A, and Mr Machin's submission that although Lord Wilberforce confined himself to "earnings", those passages were as true of investment income as of earned income. McCullough J disagreed, and held at 842C-H:

> "To my mind there is a clear factual distinction, which the ordinary man would at once appreciate, between earned income and investment income. Immediately before he dies the deceased has lost his earning capacity, but his capital remains and with it its capacity (not his) to produce investment income. All that is common to the two is that he has lost the opportunity to use each *as and when they accrue* and he has lost the enjoyment of doing so.
>
> As I read Lord Wilberforce's remarks in the last of the passages that I cited [at 151A], what he thought significant was the victim's loss of opportunity to use his earnings. In his opinion "the basis, in principle, for recovery lies in the interest which he has in making provision for dependants and others". (p. 151).
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> By dying, a man loses the opportunity to provide for his dependants and others out of future earnings from work, but he does not lose the opportunity to provide for them out of income earned by capital of which he dies possessed. This he can achieve by suitable testamentary disposition, if this is required. The only opportunity which has gone is the opportunity to change his will – or to make one if he has not done so already.
>
> Lord Wilberforce, like Lord Salmon and Lord Edmund-Davies referred throughout to loss of earnings, never to loss of income or loss of financial expectation. In light of Lord Russell of Killowen's dissenting opinion which dealt with financial expectations other than earnings, and of which I assume they had advance intimation, it must follow that none of the three wished his opinion to be taken as extending beyond the loss of earnings.
>
> Lord Salmon said that it would be grossly unjust to the plaintiff and his defendants if the law were to deprive him from recovering for the loss of his earnings during the lost years. But there is no such injustice in excluding a claim of the type which Mr Machin makes here, for a man can, as I have said, provide for his dependants from the capital of which he dies possessed".

66. On my analysis of these paragraphs, the important distinction which McCullough J draws is not between income earned from work or earned from investments, because there are cases such as this one in which those may be fluid, or not easily distinguishable, but between earnings which are lost by the claimant's death, and those which survive the claimant's death.

67. Following further discussion and rejection of submissions made by Mr Machin on this point with reference to: the other judgments in *Pickett,* (including the dissenting judgment of Lord Russell of Killowen), which bear reading but I will not summarise here; *Gammell v Wilson*; and the first instance decision of Griffiths J in *Kandalla v British European Airways Corporation* [1981] Q.B. 158; McCullough J concludes at 846F:

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

> This decision leads to two consequential questions. The first is best explained by illustration. Suppose that during the lost years a deceased would have earned £5,000 per annum net from work and £5,000 per annum net from investments and would have had a surplus of £3,000 per annum. Does the £5,000 which survives extinguish the lost £3,000 per annum as Mr Ashworth submits? Or, as Mr Machin submits, is only half to be extinguished on the argument that his surplus would have derived (so far as one can tell) as much from his earned as from his unearned income?
>
> In my judgment, the answer is to be obtained not by asking which part of his income enabled him to save, but by considering the position of the deceased immediately before he died. He would then be deprived of his ability to earn £5,000 per annum from work. And he would be deprived of the need for £7,000 per annum to enable him to live and have his pleasures. Since £5,000 per annum would remain, and since this would more than provide for his surplus, his surplus would remain intact. The tort would not have taken it away. Therefore, I conclude the £5,000 should be deducted in full."

68. The Claimant submits that McCullough J's judgment is flawed because, having stated that *"I shall ignore the income which would have resulted from the capital"*, he did the opposite, by including the income from capital in his ultimate calculation by offsetting it against the surplus. Mr Steinberg argues that the effect of *Adsett v West* is that any income arising from capital investment should be disregarded entirely and should not be offset against the earnings income so as to reduce or even eliminate the award. With respect to Mr Steinberg, I consider that to be a misunderstanding of McCullough J's reasoning. Mr Steinberg truncates what McCullough J actually said at 846F, which is: *"in approaching the loss of income for the lost years I shall ignore the income which would have resulted from the capital which the deceased already owned at death".* In my judgment it is clear that McCullough J is ignoring income which survives death when approaching what he sets out as a two-stage process. The first step is calculating the surplus, i.e. the earnings or earning capacity which are lost on death less the living expenses which would have been spent in life but are 'saved' in death. However, he necessarily takes the income which survives death into account in the second stage of his reasoning, i.e. whether there is an overall loss in the lost years when the income which survives death is taken into account.

69. This can be properly understood by reading the whole of the discussion leading to the statement at 846F, which begins in 841A with McCullough J summarising the issue as *"what attention is to be paid to the fact that a proportion of he income which the deceased would have enjoyed in the lost years would have been earned by capital of which he died possessed",* and noting Mr Machin's submission that no distinction should be drawn. It continues through McCullough J's statement in 842C (restated in 842E and 842H) that there is a clear factual distinction between the two, namely that immediately before the deceased dies he has lost his earning capacity but the capital and the earning capacity of that capital remains. Upon reading the full discussion, there is a sharp focus on what he was seeking to achieve, namely to quantify actual loss in the lost years, which is in my judgment not flawed but both clear and rational.

70. Mr Steinberg at para 110 of his skeleton says that the Claimant's secondary or alternative case, which does not appear to arise on the facts of this case but will be developed further in closing submissions if necessary, is that the distinction made

between McCullough J in *Adsett v West* between earned income and income derived from capital was partly shaped by the peculiar facts of that case, wrong in the light of authority and should not, in any event, be followed. I agree that whether a focus on earned income and income derived from capital assists in a true assessment of losses in the 'lost years' will be fact specific, as this case demonstrates. As I have set out above, in my judgment the real distinction being drawn by McCullough J in *Adsett v West* is not between earned income and income from capital but from income which is lost on death and income which survives death.

III. Issues for determination

71. I am satisfied that in order to establish what, if any, damages for 'lost years' is due to Mr Head the court must:

i) **Establish the estimated annual expected net profit of EMSL before directors' salaries, tax and distribution of dividends;**

ii) **Determine the extent, if any, to which it is appropriate to notionally attribute part or all of the salary and dividend entitlements of Mrs Head to Mr Head's active involvement in EMSL, so as to treat that as part of Mr Head's notional gross income**;

iii) **Determine what basis of deduction of tax is appropriate, i.e. whether the double tax allowances of Mr and Mrs Head should be utilised despite any notional reallocation**;

iv) **Determine the appropriate rate of deduction for Mr Head's living expenses, and whether it should be applied to all or only part of Mr Head's notional gross earnings;**

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

72. In addition, the court must determine:

i) **Mr Head's life expectancy but for the mesothelioma**, which is relevant both to the 'lost years' claim and assessment of general damages; and

ii) **General damages for PSLA**.

IV. Determination of issues

Issue (i) - Estimated annual expected net profit of EMSL before directors' salaries, tax and distribution of dividends.

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.

74. The accountants only differ on the quantification of the future likely profitability of EMSL. Mr Stanbury's estimate is £580,000 per annum, Mr Forth's estimate is £545,000 per annum.

75. Mr Stanbury has based his calculation on the mid-point of (a) a simple average of the actual profit before directors' salaries, tax and distribution of dividends for years ending 30 April 2016, 2017 and 2018, being £569,023; and (b) a weighted average of those three years, on a weighting structure of 1:2:3, being £604,230. That gives a figure of £586,626 which he has rounded down to £580,000. He explains in the joint report that he has chosen this weighting structure to give the greatest weight to the most recent year (which he expressed as "primacy to recency"). His opinion is that this is appropriate because the figures show a rising trend in sales from February 2014. He points to the proximity of the simple average and the weighted average as reflecting the consistency of historical and projected profit of EMSL, and explains that is why he adopts a midpoint of those two figures as a robust estimate of future performance. He was unshaken in cross-examination and said that Mr Head's updated information in oral evidence about the healthy state of EMSL's order book through to 2020 only increased his confidence in his estimate.

76. Mr Forth has used a weighted average based on a weighting structure of 2:3:1 for the years ending 30 April 2016, 2017 and 2018 to reach his figure of £545,000. He has not included any consideration of the simple average in his calculation. In his report and the joint statement he says he has chosen this weighting structure as he considered 2018 to have been an exceptional year because of the very significant contract that EMSL entered with Stroods for work on the Gainsborough Wing of the Colchester Hospital, and 2017 and 2016 are more typical.

77. Mr Stanbury disagrees that 2018 is exceptional, as 2015 was almost as good. He has analysed the figures which show that Stroods has been EMSL's top customer from 2012 and 2018, and its most consistent customer from July 2015 onwards. I accept that is what the figures show. Accordingly, he submits, it is likely that this performance could occur again in the future and his weighting, which gives primacy to recency of performance, reflects that. Conversely, he says, Mr Forth's weighting, which gives least weight to the most recent figures does not reflect the consistent rising trend in sales from the change in strategy from 2014, is lower than the simple 3-year average and does not take that average into account. I accept those criticisms.

78. Since the joint statement was produced, Mr Forth was in court to hear Mr Head's further oral evidence about the very healthy order book currently enjoyed by EMSL. Mr Forth accepted in cross-examination that in light of this evidence, Mr Stanbury's estimate of £580,000 per annum looked like it was a better estimate than his. I agree, and accept Mr Stanbury's figure.

79. ***Issue (ii) - Whether and to what extent Mrs Head's dividend and/or salary from EMSL should be treated notionally as part of Mr Head's earnings, and whether part of her director's salary should in effect be added back to the company's net profits for the purposes of carrying out a 'lost years' calculation.***

80. The Claimant's case is that I should attribute to Mr Head all of Mr and Mrs Head's entitlement to the earnings of EMSL, save to provide Mrs Head with a notional salary which is commensurate to her contribution to the company (*Ward v Newalls*). This means that Mr Head's earnings would represent 90% of the profits of EMSL after payment of directors' salaries and corporation tax (i.e. Mr Head's 45% and Mrs 45%), and Mr Stanbury has assumed this 90% of profits figure for the purposes of his lost years calculation.

81. Mr Steinberg submits that this is would reflect the reality of the earnings which are the fruits of Mr Head's labour and reminds me that per Henry LJ in *Ward v Newalls* at 1730H-1731D, the court must consider the true position.

82. Mr Steinberg submits that there is no relevant distinction to be made, in law or in fact, between profits of EMSL which have been extracted from the business in the form of salary and dividend and those which have been retained in the business. It is just the case that Mr Head has chosen not to extract all of his earned income and has instead re-invested it into EMSL in a prudent fashion.

83. Mr Steinberg also submits that in relation to those earnings which have been extracted and not retained in EMSL, there is no valid distinction to be drawn between salary and profits distributed by way of dividend, as the use of share dividends is merely a tax efficient way to distribute profits and so any such distinction is artificial. Mr Head could have extracted those profits entirely as salary, or entirely as dividends, or in another salary/dividend split to that which was chosen. In each case they represent part of his earning capacity.

84. The Defendant's case is that the court should not ignore Mrs Head's legal entitlement to a salary or share of profits (*Kent v British Railways Board*; *Neal v Alison Jones T/A Jones Motors* [2002] EWCA Civ 1731). Mr Forth does not opine on the point but leaves the question to the court, carrying out his calculations on the two alternative bases ("Scenario 1" and "Scenario 2" in schedule 4 to the joint statement).

85. Mr Kent accepts that *Ward v Newalls* sets the principle that the courts will look to substance rather than form in assessing damages where otherwise an award would fail to reflect the reality of a claimant's situation. Hence, where a claimant has channelled some income which he has generated through his efforts to a family member for tax efficiency purposes, where it is appropriate to do so, he accepts that the courts will treat the reality that it is his income which is lost (so long as there is no fraud on the Revenue, which Mr Kent accepts is by no means suggested in this case). However, he submits, the starting point must be that element of income to which Mr Head himself was legally entitled. He submits that the burden is on Mr Head to show that in reality Mrs Head was never entitled to her shareholding and dividends or most of her salary from anything she contributed to the business, as assumed by Mr Stanbury.

86. Mr Kent submits that in fact Mrs Head is legally entitled to her 45% shareholding. This is not the case of a sleeping partner in a partnership subsisting from year to year

and terminable at will, like *Ward v Newalls*. For Mrs Head to lose her legal entitlement to those shares she would have to consent to their transfer. They could not be removed from her unilaterally. He submits that it is relevant that Mrs Head is not only an employee of EMSL but also a director with fiduciary duties and responsibilities and potential liabilities. He notes that Mr Head in his deposition confirmed that she had an important role in the company. Finally, Mr Kent submits that Mrs Head has no doubt also made a significant contribution to the success of the company by her activities in the domestic sphere, running the home and raising three children.

87. I am satisfied that I must look at the reality of the situation, applying *Ward v Newalls*. The reality is, in my judgment, that Mr Head is the driving force of EMSL. As Mrs Head says, it is his company, save for the 10% which he recently chose to share with his sons. I accept his evidence that the extraction of profits by way of salary and dividends was decided upon following advice from his accountant, and if the advice changed, he would follow it. He has a long association with his accountant and said he trusts him. Accordingly I have no doubt that if the tax regime changed materially so that a different split between salary and dividends would be more tax efficient, he would have implemented it. Mrs Head's evidence is that she would have agreed to that and there is no evidence before me that his sons would have taken a different view.

88. Similarly, I am satisfied on the evidence that the split in shareholding as between Mr and Mrs Head was also in order to maximise tax efficiencies. I do not accept Mr Kent's submission that the burden is on Mr Head to show that in reality Mrs Head was never entitled to her shareholding and dividends or most of her salary from anything she contributed to the business. I think that puts it a little high. Legal entitlement is one factor that I must look at, but not the only one, in my judgment.

89. I remind myself that in *Ward v Newalls*, Henry LJ noted at 1725C that *"as partners, they [the wives] were no more than nominees of their husbands"*. The decision of the court in that case accepted the legal entitlement of the wives as partners, albeit sleeping partners, but considered: whether that position could or would be likely to change (in that case, finding that any such partnership was from year to year and terminable at will); whether, if the parties had known that their arrangements would have halved the plaintiff's claim in damages, they would have been likely to have maintained it (finding they would not); and identifying the issue before the court as being *"encapsulated in the question: "what was Mr. Ward's real loss of earnings and/or earnings capacity?"*

90. Mr Steinberg did not submit in so many words that Mrs Head's ownership of her shares in EMSL was as a nominee of her husband, but in my judgment such a submission would be justified by Mrs Head's own evidence, which was that she only had a shareholding in the company because *"the accountant told us how to do it and I went along with it"*. She said of her husband *"the company is him"*. She confirmed that if Mr Head wanted to arrange the shareholdings or salaries differently she would agree to that. She said *"I rely on my husband for everything. I trust him 100%"*.

91. Therefore although Mrs Head is legally entitled to the dividends which are paid in respect of both the A shares and the B shares by virtue of the fact that they are registered in her name, in reality I am satisfied that Mrs Head considers herself to be

holding those shares to the direction of Mr Head. It seems likely that would have continued for so long as the marriage subsisted, and there is ample evidence before me that this is a long and happy marriage with no discernible likelihood of failure. I also have no doubt that, like in *Ward v Newalls*, if Mr and Mrs Head had been told that the fact that Mr Head's 90% shareholding in EMSL had been split between the two of them might cause a material difference to the award of damages in these proceedings, for example, they would have agreed to make alternative arrangements and Mrs Head's shareholding would have been returned to Mr Head.

92. I do not consider that the fact that Mrs Head is a director of EMSL affects my analysis, because whether or not she is a director is irrelevant to her shareholding, and vice versa. For the same reason, the fact that potential liabilities attach to that directorship is not a relevant consideration, in my judgment. Mrs Head's contribution in the domestic sphere, although undoubtedly a relevant consideration when considering financial remedies in divorce, for example, is not in my judgment a relevant consideration in establishing Mr Head's gross notional income for a 'lost years' claim.

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.

94. Mr Stanbury's opinion for Mr Head is that market rate for a part-time administrative support role in EMSL is £10 per hour, or £8320 per annum for her 2-day week. Mr Kent submits that this is far too low to reflect Mrs Head's current and future role as a director of a successful company.

95. Mr Forth for the Defendant characterised Mrs Head's role in his report as that of an office manager and estimated that the market would allow some £25,000 per annum. In cross-examination he agreed that, having heard Mrs Head's evidence, her role was more administrative than that of an office manager and that *"might be a reason to review his notional salary downwards"*. He acknowledged that £25,000 for two days' work was a full-time equivalent salary of £62,500 and agreed that was too high for the role she described. However he said he thought the correct figure was higher than the £8230 that Mr Stanbury put forward, as it underestimated the deep knowledge of the business that Mrs Head would have gained from her 16-year employment in EMSL and as the spouse of Mr Head. In his opinion, it undersells her value to the business. I agree.

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.

97. Mr Stanbury for Mr Head allocates the 'excess' portion of Mrs Head's salary directly to Mr Head. Mr Forth assumes it will be retained by EMSL so as to increase the net profits available for distribution (of which 90% make up Mr Head's earnings). Since Mrs Head's salary appears to have been set to maximise tax efficiencies, and since the split between salary and extracted dividend seems to have been determined for the same reason, I accept that Mr Forth's approach of returning the 'excess' salary to the dividend pool (whether extracted or retained) is the appropriate one.

Issue (iii) - The tax treatment of any notional reallocation of Mrs Head's dividends and/or salary

98. The Claimant's case is that the double tax allowances of both Mr and Mrs Head should be utilised in the calculation of loss of earnings, even though, as I have found, the dividends of Mrs Head should be notionally attributed to Mr Head, as the tax efficient arrangements put in place by that split in shareholding would have continued to be used as they are now. Once again, Mr Steinberg submits that this will reflect reality, as but for the mesothelioma, those arrangements would have continued.

99. The Defendant's case is that if Mr Head's notional earnings are increased, he should be deemed to be taxed on that enhanced notional gross earnings because, as Mr Forth opines in his report: *"to have the benefit of ignoring tax planning on one side of the equation but accepting it on the other seems incongruent."*

100. However Mr Forth accepts Mr Stanbury's expressed view that it is likely that the existing method of profit allocation would have continued, and thus so would the tax benefits. Mr Kent fairly accepted that he could see the the force of Mr Steinberg's submission, derived from the 'but for' logic.

101. In my judgment, despite the notional allocation of Mrs Head's dividends to Mr Head, in reality it is more likely than not that the actual allocation to Mrs Head would have continued in order to maximise tax efficiency. Accordingly I am satisfied that those double tax allowances should be factored into the calculation of loss.

Issue (iv) - What proportion of net income should be deducted to allow for 'living expenses' in approaching the lost years calculation, and whether the deduction for Mr Head's living expenses should be made on all or only part of Mr Head's notional gross earnings.

102. Mr Head's solicitors have produced a schedule analysing Mr Head's actual expenditure over 26 months in accordance with the principles in *Harris*. This schedule is supported with the documentation including bank statements, credit card receipts etc., that were used to produce it. The Claimant's case is that it shows that Mr Head's actual living expenses appear to be about 25% of his average monthly expenditure, i.e. the family income of Mr and Mrs Head arising from their salaries and their declared and paid dividends from the A and B shares. Mr Stanbury raises no issue with the accuracy of the schedule or calculation, which he did not prepare, and applies the 25% deduction to his lost years calculation.

103. In addition, although Mr Head's claim is for all earnings to which he and Mrs Head are entitled, namely: (a) earnings extracted by way of salary and dividends; and (b) their share of the profits which are not declared as dividends but retained within

EMSL; his case is that the deduction for living expenses has been calculated upon extracted earnings, not retained earnings, and this should be maintained for the lost years calculation. Accordingly, Mr Steinberg submits that since historically roughly half the dividends have been distributed and half retained, I should apply either a 25% deduction on Mr Head's extracted earnings of salary and paid dividends, or a deduction of 12.5% applied to the whole of Mr Head's notional gross income. Either, he submits, will get me to a similar place.

104. Mr Forth in his report opined that the 25% deduction utilised by Mr Stanbury was *"unsupported by evidence"*. He acknowledged that was incorrect in cross-examination, but I do not criticise Mr Forth because despite that schedule and supporting documentation being provided to the Defendant's solicitors, his evidence is that they were not provided to him and as a result he has not analysed them. Instead, Mr Forth applies a conventional 50% deduction in his lost years calculation (on instruction from the Defendant's solicitors), to all of Mr Head's income, including that element which is retained in EMSL. That approach is also maintained in the Defendant's Counter-Schedule of Loss. Mr Forth, understandably, did not feel able to analyse from the witness box a detailed financial schedule he had not previously seen, so Mr Head's schedule is unchallenged.

105. Mr Kent submits that the conventional rate of 50% has arisen in order to avoid the need for intrusive and often futile attempts to discover what claimants have actually spent over the years. He submits that Mr Head has expensive outside interests, including a cruising yacht, interests in motor racing, and paying the outgoings on a house in the South of France, which suggest that a 25% living expenses deduction is too low. The difficulty with those submissions in my judgment is that: (i) the work of analysing expenditure has already been carried out; and (ii) the schedule includes within it sums spent on those 'luxury' items.

106. Mr Kent submits that it is not right to say that because earnings have been retained by Mr Head in the business on the basis of prudential retention of profits, no living expenses deduction should be applied to them. I respectfully disagree, as O'Connor LJ in *Harris v Empress Motors* at 228G made clear that the living expenses deduction should not be applied to savings. It seems to me that retention of profits within EMSL is a method of saving them, which causes them to be capitalised into the net asset value of EMSL. Although that capital may be realised in due course, I consider that savings by a claimant who carries no personal debt like Mr Head are, almost by definition, surplus to requirements and accordingly no living expenses deduction should apply to the retained profits, in my judgment.

107. Mr Kent further submits that although slightly more than half of the dividends have, historically, been retained in EMSL (Mr Forth calculates this in his Schedule 2 attached to the joint statement as an average of 39% extracted and 61% retained in the three years to April 2018), it might have been the case in the future but for the mesothelioma that fewer profits were retained and more were extracted, to which a living expenses deduction should be made. The rate should be set with that in mind.

108. In all such assessments, the court is merely attempting to estimate what might have happened but for the mesothelioma, and it cannot see into the future. However given that I have found that EMSL is likely to show relatively stable future profitability, it

seems more likely than not that the three-year average proportion of extracted to retained dividends at 39:61 would have been maintained.

109. However in relation to Mr Head's numbers, it is clear from the schedule of outgoings that the 25% figure has been calculated on the basis of actual monthly expenditure of £14,000 of which £3584 is attributed to Mr Head's personal spend. That £14,000 must be made up of after-tax income, but it exceeds the sums against which I have to apply a living expenses deduction, namely Mr Head's salary and Mr and Mrs Head's extracted dividends, both net of tax.

110. 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 £7931 per month. Mr Head's personal living expenses of £3584 is 45% of that figure, which is much closer to the conventional sum.

111. Accordingly I assess the appropriate rate of deduction at 45%.

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

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

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

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

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

capacity died with him, but his capital lives on; it has been earning interest ever since, and will continue to do so just as if he had lived".

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

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

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

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

120. There are a number of potential claims which Mr Head could have, but has not pleaded, and for which he does not contend. I remind myself that Mr Steinberg stated clearly in his closing submissions that Mr Head's claim is maintained as pleaded. Those are potential claims for (i) loss of profitability of EMSL and/or loss of value in EMSL arising from Mr Head's illness and premature death; and (ii) the replacement costs of employing additional staff required for the same reason.

121. In relation to loss of profitability, Mr Kent made clear that the Defendant accepts that if the absence of Mr Head from the business due to his illness and premature death has an adverse impact on the value of his shareholding in EMSL, and/or its profitability and therefore the dividends that EMSL is able to pay in the future, then

that is something which the court may compensate in damages. I conclude that I cannot make such an award, because no such claim is pleaded and although it may appear obvious that the open market value of EMSL is diminished if the Managing Director responsible for the success of the company is no longer in position, in my judgment there is no evidence before the court to enable it to assess or even estimate the value of such a claim:

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

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

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

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

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

124. I return to the basic principle enunciated by Lord Scarman in *Gammell v Wilson* at page 78: *"The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime"* which must be *"at least capable of being estimated"* if *"sufficient facts are established to enable the court to avoid the fancies of speculation"*. Mr and Mrs Head have both stated in oral evidence that they are concerned about whether Dale and Aaron are ready to take on the challenges before them, although Mr Head did not express those concerns in his witness statement or deposition. I entirely accept that those are real fears, honestly expressed. However I have accepted on the balance of probabilities the experts' shared opinion that EMSL

can weather the handover without an adverse impact on its profitability. Of course nothing is certain about the future, and there is always a risk that they are wrong. However I have no basis at all for assessing either the probability of that risk, or what a fair compensation award for that risk would be, which puts this in the realms of speculation, in my judgment. Nor, importantly, does Mr Head through Mr Steinberg ask for such an award.

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

Issue (vi) - Life Expectancy

126. In his report, Dr Rudd stated his opinion that Mr Head's life expectancy would have been 21.9 years but for the mesothelioma. This was calculated from a life expectancy of a man of his age (25.5 years), adjusted upwards because he is a lifelong non-smoker (to 27.5 years), adjusted downwards because of his hypertension (to 25.3 years), to give the baseline figure from which to assess the effect of Mr Head's history of prostate cancer.

127. Dr Rudd then noted that the histological grade of Mr Head's prostate adenocarcinoma was Gleason 7. He relied upon a study which considered a large scale randomised trial comparing radical prostatectomy with conservative management of localised prostate cancer (Bill-Axelson et al 2011). That found that of patients who underwent radical prostatectomy, approximately 16% died of prostate cancer within 15 years. At that time, annual mortality from the prostate cancer was increasing at a rate of approximately 1% per year. Dr Rudd estimated, on the basis of the study, that:

    i) There would have been a 28% chance that Mr Head would have died of prostate cancer within his otherwise anticipated lifespan;

    ii) If this had happened, it would have occurred approximately half way though his otherwise anticipated lifespan, i.e. after approximately 13 years;

    iii) There would have been a 72% chance that Mr Head would have survived his otherwise anticipated lifespan of 25.3 years.

128. Putting together these possibilities on an actuarial basis causes Dr Rudd to reduce Mr Head's adjusted baseline life expectancy but for the mesothelioma from 25.3 years to 21.9 years from the date of the report (28% of 13 + 72% of 25.3).

129. The initial reports of Mr Harriss (consultant urologist) and Professor Waxman (consultant oncologist) analysed the likely risk in different ways, each relying on a different study to Dr Rudd and to each other, and each came to very different conclusions: Mr Harriss opining that Mr Head had a 98% chance of surviving 15 years (relying on the Memorial Sloan Kettering nomogram, designed to predict mortality weighted to the Gleason grade); and Professor Waxman opining that Mr Head's prostate cancer was associated with a 62% chance of 10-year survival (relying on a cohort of stage 3 prostate cancer patients within the Abdel-Rahman study).

130. However, once Mr Harriss and Professor Waxman met, Professor Waxman apparently accepted Mr Harriss's view that both the Bill-Axelson paper relied on by Dr Rudd and

the Abdel-Rahman study that he had relied on were too pessimistic because they both included cancers of all Gleason grades. Ultimately, Mr Harriss and Professor Waxman agreed that but for the mesothelioma, Mr Head had a greater than 90% chance of surviving 20 years from his prostate surgery.

131. Mr Kent for the Defendant submits that this is not helpful, as Mr Harriss and Professor Waxman have made no attempt to translate that into a revised life expectancy adjusted from UK mortality tables as has Dr Rudd, nor do they take account of hypertension as he did. He submits that I should accept Dr Rudd's fully adjusted life expectancy of 21.9 years as it is the best that I have before me.

132. Mr Steinberg for Mr Head submits that a greater than 90% chance of surviving 20 years from his surgery means that it is reasonable to assume that the prostate cancer would not have played a significant role or shortened Mr Head's life expectancy, and accordingly it is reasonable for the court to use Dr Rudd's baseline figure, adjusted for non-smoking and hypertension but not for prostate cancer, of 25.3 years.

133. In my judgment the agreed position of Mr Harriss and Professor Waxman is preferable to that of Dr Rudd, because it provides a more tailored analysis to the Gleason grade of Mr Head's tumour which those two experts agree is the most important prognostic indicator for prostate cancer. Although they have not translated that into a life expectancy, it is possible, in my judgment, to utilise in a rough and ready way the formula used by Dr Rudd to make an accurate-enough estimation. In my judgment, although rough and ready, this is more accurate than either assuming no effect on life expectancy as Mr Steinberg asks (which is not what Mr Harriss and Professor Waxman have agreed) or relying on Dr Rudd's calculation (which Mr Harriss and Professor Waxman agree, and I accept, is unduly pessimistic). By calculating from the 25.3-year baseline figure, this takes account of hypertension although Mr Harriss and Professor Waxman did not.

134. Dr Rudd found from his study that annual mortality from prostate cancer at the 15-year mark was increasing at a rate of approximately 1% per year. Although that is considering cancers of all grades, so it may be fair to assume that this rate of increase might be slightly lower in Mr Head's case, I have no evidence of that. A 1% annual mortality rate is also consistent with Mr Head having a 98% chance of surviving 15 years (from Mr Harriss's report), and a greater than 90% chance of surviving 20 years (from the joint statement). Applying that rate gives him an 88% chance of surviving 25.3 years.

135. Using Dr Rudd's calculation then, gives us an estimated life expectancy from August 2018 of 23.8 years (12% of 13 + 88% of 25.3). I think that is the best estimate I can reach on the expert evidence before me. I so find.

Issue (vii) - General Damages for Pain, Suffering and Loss of Amenity

136. Both counsel acknowledge the invidious task that a court has in endeavouring to place a value in compensation for the suffering caused by this appalling disease. In this case the task is more invidious than usual because it is unknowable for how long and how great will be Mr Head's suffering.

137. The Judicial College Guidelines (14th edition) provide a bracket of £55,830 to £100,350 for mesothelioma (adjusted for inflation to £58,434 to £105,030). They set out a non-exclusive number of factors which will affect the level of the award within the bracket, including the duration of pain and suffering, the extent and effects of invasive investigations, extent and effects of radical surgery, chemotherapy and radiotherapy, the extent to which the tumour has spread and other organs become involved causing additional pain and/or breathlessness, the level of the symptoms, domestic circumstances, age, level of activity and previous state of health, extent of life loss and concern for spouse and/or children following death.

138. Mr Steinberg reminds me that Mr Head's awareness that his life expectancy has been reduced is a relevant factor in the assessment of general damages, pursuant to section 1(b) of the Administration of Justice Act 1982. I agree, and it is an important one. However I note that in most, if not all, of the comparable mesothelioma cases this is a relevant factor, so I must be careful not to factor it in twice.

139. Mr Steinberg has helpfully summarised Dr Rudd's evidence in relation to Mr Head's illness, treatment and anticipated progression, which I gratefully adopt here with only minor changes:

i) The onset of the disease was in about December 2017, when Mr Head developed a persistent cough and subsequent shortness of breath;

ii) By 15 January 2018, a chest x-ray showed he had developed a massive pleural effusion almost completely filling the right hemithorax;

iii) He was admitted to the Emergency Department at Colchester Hospital by which time he was short of breath on walking 20 feet;

iv) His chest was drained, yielding blood-stained fluid;

v) He underwent thoracoscopy and pleural biopsy;

vi) The biopsies showed biphasic mesothelioma, predominantly of sarcomatoid type;

vii) Mr Head was informed of his diagnosis on 22 March 2018;

viii) On 10 April 2018, at an MDT meeting, it was agreed that his disease was not suitable for surgery and it was recommended that he be considered for a clinical trial;

ix) He was placed on a clinical trial called ATOMIC in which he received chemotherapy and arginine suppression therapy;

x) He underwent six cycles of chemotherapy treatment between 1 May 2018 and 13 April 2018, followed by weekly injections of the trial medication, followed by injections of the trial medication on days 1 and 8 of each 21 day cycle;

xi) He suffered from serious side effects including nausea, a severe itchy rash which extended from his shoulders to his legs, swelling of the eyes and lips and increased temperature;

xii) On 17 July 2018 he was found to have developed atrial fibrillation and rapid heart rate, for which he was prescribed bisoprolol and reviewed in the cardiology clinic;

xiii) On 21 August 2018, he was noted to be anxious and was referred for psychological support;

xiv) A CT scan on 28 August 2018 showed that the disease was stable;

xv) A CT scan on 18 December showed progressive disease with increased pleural thickness at various locations;

xvi) It is inevitable that his condition will deteriorate with worsening pain, increasing breathlessness, loss of appetite and weight, and progressive debility;

xvii) He is likely to become completely incapacitated;

xviii) Mr Head has outlived his initial estimated prognosis of 8 months on 3 August 2018. That estimate, and the range given by Dr Rudd at that time of 4 to 12 months, was maintained in Dr Rudd's report of 29 January 2019.

140. I accept Mr Steinberg's submission that Mr Head's: (i) relatively young age of 60; (ii) his commensurately great loss of life expectancy; and (iii) the long period of his illness, the intensity of his suffering to date and the extent of his treatment (all of which are continuing); are each aggravating factors.

141. Mr Steinberg has put before me a number of comparable cases, and produced a helpful table summarising the inflation-adjusted award, age of Claimant, period of illness and additional features of each as an appendix to his opening note. Of those, he submits that the cases of *Najib v John Laing* [2011] EWHC 1016 (QB) (aged 71 at trial, length of illness estimated at 2 years - £97,269); *Fleet v Fleet* [2009] EWHC 3166 (QB) (death at 58, length of illness 22 months, Dr Rudd assessed the level of pain as greater than average - £101,319) and *Beesley v New Century Group* [2008] EWHC 3033 (QB) (death at 62, length of illness 17 months, nearly 22 years loss of life expectancy - £96,383); are most comparable. I also find the facts of *Blake v Mad Max* [2018] EWHC 2134 (death at 61, 16 month illness, life expectancy reduced by 27 years - £90,253) comparable.

142. I put to one side the case of *Andreou v Booth Horrocks & Sons Ltd* [2017] EWHC 174 as the general damages in that case were agreed, and not judicially assessed. Other inflation-adjusted awards in the authorities relied on by Mr Head are as follows: *Grant v Secretary of State for Transport* [2017] EWHC 1663 (death at 70, 40 month illness - £96,814); *Davey v Shaw-Saville* Lawtel, unreported, Master Davison 30 March 2017 (death at 86, 3y 6m illness, life expectancy reduced by 4.4 years - £95,247); *Wolstenholm v Leach's of Shudehill* [2016] EWHC 588 (QB) (death at 70, 3y 8m illness, life expectancy reduced by 15.6 years, £98,238). These are longer illnesses (I presume) in older men with less reduced life expectancies and for those reasons I do not find them of as much assistance.

143. Mr Steinberg submits for Mr Head that the appropriate level of general damages is that contained in the Schedule of Loss - £95,000. The Defendant's Counter-schedule

of Loss puts the appropriate level at £80,000, below the mid-point of the range which is £82,000. Mr Steinberg submits that this cannot be right. Mr Kent in closing accepts that there is an argument for saying that the Defendant's figure is too low but submits that Mr Head's figure is too high. He submits that the correct figure is likely to be between those two numbers.

144. I agree that the Defendant's figure is too low and in my judgment would undercompensate Mr Head. Mr Head presents as a stoic and uncomplaining man and as well as those factors I have already highlighted, I pay particular attention (i) to the fact that he sought psychological help for anxiety; and (ii) to what I have heard from Mrs Head in written and oral evidence about the extent and intrusive nature of his treatment to date and the pain, suffering and loss of amenity he has endured, which I accept. In particular she said that he suffers from constant pain for which he takes tablets day and night, and takes sleeping tablets to enable him to sleep. This is in part because the tumour has caused his spine to twist. She said that although he tries to put a brave face on things, Mr Head has broken down a few times in private, and that it is a particular sadness him (and to the whole family) that he will not see his grandchildren grow up. Their first grandchild, George, was born just a month ago and Mr Head's joy at his birth was tempered with the anguish of that knowledge.

145. It is with a heavy heart that I remind myself that Mr Head is likely to have the worst of his pain, suffering and loss of amenity to come, and I also take this into account. I award him the £95,000 sought under this head of damages.

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