Neutral Citation Number: [2020] EWHC 2398 (QB)

Case No: QB-2019-001204

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/09/2020

Before :

MR JUSTICE CAVANAGH

- -

Between :

EUNICE RIX (widow and executrix of the Estate of Martin Rix (deceased))	**Claimant**
- and -	
PARAMOUNT SHOPFITTING COMPANY LIMITED	**Defendant**

- -
- -

Matthew Phillips QC (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Michael Kent QC (instructed by **DAC Beachcroft Claims Ltd**) for the **Defendant**

Hearing dates: 16 and 17 July 2020

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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.

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Mr Justice Cavanagh:

Introduction

1. This is a claim for damages arising from the death of the Claimant's ("Mrs Rix's) husband, Mr Martin Rix, on 20 April 2016, from an asbestos-related mesothelioma, at the age of 60. The mesothelioma had been contracted by Mr Rix, many years before, when he was exposed to asbestos whilst working for the Defendant company as an apprentice carpenter/shopfitter in the 1970s. Liability was admitted by the Defendant and judgment was entered in Mrs Rix's favour on 31 October 2019.

2. After leaving the Defendant's employment in the 1970, Mr Rix spent the rest of his working life building up a successful business. At the time of his death, he ran a profitable company, MRER Ltd, which had three main lines of business, construction/building, joinery, and the manufacture of granite worktops. Shortly before Mr Rix fell ill, in October/November 2015, the business had moved into purpose-built premises in Dunstable, Bedfordshire.

3. Mrs Rix's claims are brought under the Law Reform (Miscellaneous) Provisions Act 1934, and the Fatal Accidents Act 1976 ("FAA"). There are three main disputed issues between the parties (although there are other heads of claim). These are (1) whether Mrs Rix has a valid claim for financial dependency; (2) Mr Rix's likely life expectancy but for the mesothelioma; and (3) Mr Rix's likely date of retirement from MRER Ltd.

4. By consent, however, this judgment will deal only with issue (1), the financial dependency aspect of Mrs Rix's FAA claim. I am asked to decide whether Mrs Rix has a financial dependency claim and, if so, how it should be quantified. Mrs Rix's primary contention, as regards quantification, is that her financial dependency should be calculated by reference to Mrs Rix's share of the annual income that Mr and Mrs Rix would have received from the business if he had lived ("Basis 1"). Mrs Rix's secondary, alternative, contention is that her financial dependency should be quantified by reference to the annual value of Mr Rix's services to the business as managing director, calculated by reference to the cost of employing a replacement ("Basis 2"). Mr Matthew Phillips QC, leading counsel for Mrs Rix, did not contend that I am obliged to apply Basis 1. He submitted that I have a discretion to adopt whichever of Basis 1 or Basis 2 that I think fit, but he invites me to prefer Basis 1.

5. The Defendant denies that Mrs Rix has a financial dependency claim at all, because the family business has been more profitable since Mr Rix died than before his death, and submits, in addition, that each of the two methods of quantification relied upon on behalf of Mrs Rix is misconceived.

6. The parties have sensibly proposed that this stage of the quantum hearing be limited to the issues related to financial dependency, because they are hopeful that, once I have decided the financial dependency issues, they will be able to reach agreement on the other issues in the case without needing to come back to court. This would obviate the need for the court to deal with a great deal of contested medical evidence on the life expectancy and retirement date issues. I have agreed to this course of action.

7. It follows that, at the end of this judgment, I will not be making a final award of damages to Mrs Rix. Rather, I will give my decision on the following matters:

   (1) Whether Mrs Rix has a financial dependency claim at all;

   (2) If so, how, in principle, that claim should be quantified;

   (3) Again if so, the annual value of the financial dependency claim, for each year in which Mr Rix would have continued to work full-time in the business;

   (4) Whether Mr Rix would still have continued to draw an income from the business after he retired from full-time work, and if so, the level of that income; and

   (5) If Mrs Rix has a financial dependency claim which is to be calculated in accordance with Basis 2, is the appropriate deduction for Mr Rix's personal expenses the standard figure of 33%, or the lower figure of 17.5%, because he lived a relatively frugal life away from the business?

8. I have heard oral evidence from Mrs Rix, and also from her oldest son, Mr Jonathan Rix. To avoid the need to recall them on a later occasion, this evidence covered all of the outstanding disputed issues, including matters related to life expectancy and retirement date, but I will not, at this stage, set out any findings of fact on these other matters. Rather, I will make appropriate findings, if the need arises, on some future occasion, by which time I will have heard all of the relevant evidence on life expectancy and retirement date, including the medical evidence.

9. I have also been provided with four expert accountancy reports, two from Ms Julie Hardless on behalf of Mrs Rix, and two from Mr John Andrew on behalf of the Defendant. The experts also provided a joint statement dated 16 April 2020. There is little, if any, significant dispute between the experts on the detail of the financial figures relating to the business of MRER Ltd, but there is no agreement between them on the value of the financial dependency claim (if there is one), largely because they were each instructed to calculate the value of the financial dependency on a very different basis.

10. Mrs Rix has been represented before me by Mr Phillips QC, and the Defendant by Mr Michael Kent QC. I am grateful to both counsel for their very helpful submissions, both oral and in writing.

11. In this judgment, I will first set out the factual background. I will then consider whether there is a financial dependency claim at all, and I will then consider the appropriate valuation of any such financial dependency claim.

The factual background

12. Mr Rix was plainly a remarkably talented and dedicated businessman. From very small beginnings, and starting at the age of 21 in 1977, he built up a business that was originally concerned with installing and repairing kitchens and bathrooms in residential homes. The scale of the business gradually increased. The jobs that he took on gradually became bigger and he engaged sub-contractors to help him. He began to work on commercial/local authority projects as well as on residential home

projects. Mr Rix involved himself in all aspects of the job, including pricing and customer relations. Over the years, he built up a very good reputation in the local area, and expanded his business interests. He took over a firm, formerly a supplier, called Dunstable Laminates, which specialised in making worktops, and he also took over a joinery company in Dunstable.

13. In about 2008, Mr Rix decided to merge the three businesses into one company, and he founded MRER Ltd in order to do so.

14. The business continued to expand, and Mr Rix decided that he needed larger premises so that he did not have turn away some of the bigger jobs. To that end, he purchased a purpose-built property in Boscom Road, Dunstable. As I have said, he moved the business into this property in 2015, shortly before he fell ill. He took out a 15-year business mortgage, which would have continued until he was aged 74.

15. Much of the success of the business can be attributed to Mr Rix's skill and acumen. He had great business flair, but he was also highly competent, reliable, and charming, and he obtained a great deal of repeat business.

16. The success of the business is indicated by the size of the turnover and the profit margin. In the last two full years before Mr Rix fell ill, the years ending 30 June 2014 and 30 June 2015, turnover of the business was £1,468,536 and £1,415,362, and the gross profit was £380,173 and £335,593, respectively.

17. The business was the main focus of Mr Rix's life. He obviously enjoyed his work, and it was almost an all-consuming passion. He and his family would talk business at the dinner table. His work and his family, to which he was very close, were his life. He did not have any hobbies outside the business, apart from playing golf with his sons and occasionally going to football matches with them. He did not take long holidays. He and Mrs Rix would go on occasional short holidays in the Lake District or to visit friends in the Netherlands. Mr Rix did not like to fly and so the family did not go on other foreign holidays.

18. Mrs Rix was a major shareholder in the company, and drew a salary as a director, but she did not work in the business, and never has done. She had a shareholding, which produced dividends, and drew a salary. This was not to reflect her contribution to the business but was done on accountants' advice as it was a tax-efficient way of taking money out of the business. There is no suggestion that there was anything improper about this.

19. At the time of his death, Mr Rix owned 40% of the shares in the company. Mrs Rix owned 40%, and their sons, Jonathan and Adam, owned 10% each. After Mr Rix died, Mrs Rix inherited her husband's shareholding, so she currently owns 80% of the shares.

20. Mr and Mrs Rix did not take all of each year's profits out of the business. They left a substantial sum in the business to enhance its value. In the year ended 5 April 2015, the tax returns show that Mr Rix took a salary of £6,000 out of the business (plus a benefit in kind in the form of a company car) and received a net dividend of £25,252. Mrs Rix took a director's salary of £10,524 and received a net dividend of £5,000. In the year ended 5 April 2016, the last full year before Mr Rix died, he took a salary of

£8,060 and a net dividend of £18,999. Mrs Rix took a salary of £11,124 and a net dividend of £28,000.

21. In addition to his income from the business, Mr Rix had two small pensions. One was an annual pension of £3,668 with ReAssure and the other was a "drawdown" pension with Scottish Widows. The sum in the Scottish Widows pension fund was just over £27,000. This amount that was drawn from this latter pension from time to time was at Mr Rix's discretion. In 2016 he drew down £3,750.

22. Mr and Mrs Rix also enjoyed the rental income of commercial properties that they owned. In the year to 5 April 2015 they received £24,198 net income. In the following year the income dropped to £6,584. This was because the premises had been vacated by one or more parts of the business, which previously occupied them, as a result of the move to Boscomb Road. As a result, there was no rental income for a period, until a new tenant was found. In the year ending 5 April 2017, the rental income increased to £24,875. The commercial properties had always been in Mrs Rix's name, and she continues to receive the rental income from them. The income from these properties is not part of Mrs Rix's financial dependency claim.

23. Mr Rix wanted to build up a successful and stable business which he could pass on to his sons, Jonathan and Adam. Both of his sons worked, and continue to work, in the business, and have done since they left school. For the first few years Jonathan worked "on the tools", but he also obtained a NVQ in Construction, and he was being groomed eventually to take over from his father. Adam worked solely on the tools.

24. Prior to Mr Rix's death, it had been expected that he would carry on in the business for many more years and that he would gradually train his sons, and particularly Jonathan, in all aspects of the management of the business. As Mr Rix fell ill in October/November 2015, only a few months before his death, and he was seriously ill from the start, there was no time for him to arrange for an orderly transition. Nevertheless, Jonathan took over his father's role as managing director of the business (whether or not he uses the title) and the business has continued to thrive. Indeed, the turnover and profits have continued on an upward trajectory. Adam has remained working in the business, on the tools.

25. The continued success of the business is shown by the turnover and gross profit of the business in the years since Mr Rix died:

Year to	**Turnover**	**Gross profit**
30 June 2016	£1,386,961	£444,572
30 June 2017	£1,602,324	£640,365
30 June 2018	£1,662,941	£480,206
30 June 2019	£1,911,902	£556,292

26. Jonathan Rix has taken over from his father much sooner than he expected and he feels somewhat in his father's shadow, especially given the personal reputation his father enjoyed, his father's much greater experience, and the strong relationship that

his father had built up with customers. Some customers have been lost, though some new customers have also been gained. Jonathan has found the experience to be very stressful and it has had an adverse impact on his health. Nonetheless, it is a tribute to him that he has been so successful. Managers have been appointed in the joinery and laminates business to help carry out some of the work that was previously done by Mr Rix.

The legislation

27. Sections 1(1) and 1(2) of the FAA provide that:

> "1(1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."
>
> "(2) …[E]very such action shall be for the benefit of the dependants of the person, whose death has been so caused …"

28. Section 3(1) of the FAA provides that:

> "**3. Assessment of damages.**
>
> (1) In the action such damages, other than damages for bereavement, may be awarded as are proportional to the injury resulting from the death to the dependants respectively."

29. Section 4 provides that:

> "**4. Assessment of damages: disregard of benefits**.
>
> In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded."

(1) Is Mrs Rix entitled to a financial dependency award at all?

The issue

30. The principal battleground between the parties in the present case is section 3, not section 4, of the FAA. Pursuant to section 3, a dependant claimant can only recover damages if she or he has suffered financial injury resulting from the death. Mrs Rix says that she has suffered such an injury. The Defendant submits that no such injury has been suffered.

31. There is no doubt that, prior to her husband's death, Mrs Rix was financially dependent on her husband. He was the main breadwinner. However, the figures show that the business which was the source of his income has continued to thrive,

even after his death. It has become more profitable than before. Mrs Rix's shareholding in the business is greater now than it was before Mr Rix died. Mr Kent QC, on behalf of the Defendant, submitted that, in these circumstances, it would make no sense to conclude that Mrs Rix has suffered any financial injury as a result of her husband's death, for the purposes of section 3. She is better off, in purely financial terms, than she was when her husband was alive.

32. Mr Phillips QC, for Mrs Rix, on the other hand, submitted that Mrs Rix has indeed suffered financial loss as a result of her husband's death. He submitted that it would be odd indeed if a dependant were to lose her breadwinner, who was a successful businessman, and yet be regarded in law as having suffered no financial loss as a result.

The key authorities

33. Leaving all authority aside, for a moment, there is some logic in both parties' positions. Neither argument is self-evidently wrong. The answer is, however, to be found, in my view, in three leading Court of Appeal authorities, **Wood v Bentall Simplex Limited** [1992] PIQR 332 (CA); **Cape Distribution v O'Loughlin** [2001] EWCA Civ 178; and **Welsh Ambulance Services NHS Trust and another v Jennifer Mary Williams** [2008] EWCA Civ 81.

34. **Wood v Bentall Simplex** was a case concerning the dependants of a farmer, who farmed in partnership with his brother and parents. He had a one-third interest in the farm. He took only a small income from the farm each year. He was killed in an accident and his widow and children brought a dependants' claim under the FAA. The widow could not receive her husband's full interest in the farm unless it was sold, and so she accepted the house in which they lived in part satisfaction of her interest. 64 acres of grassland were transferred to trustees for the benefit of her children, and the remainder of the assets were left in the farm, in return for which the widow received 12.5% of the profits.

35. In **Wood v Bentall Simplex,** therefore, the assets which had given rise to the income by which the deceased had supported the dependants had passed to the dependants under the deceased's will.

36. The defendant in **Wood v Bentall Simplex** contended that the loss to the dependants should be reduced by taking into account the income from the assets that passed to them, on the basis that, since the dependants had inherited the assets, the income reduced the financial injury that they suffered for the purposes of section 3 of the FAA.

37. The trial judge rejected this argument, and the Court of Appeal dismissed the defendant's appeal.

38. At page 342 of the judgment, Beldam LJ (with whom Fox LJ agreed) said that:

> "No aspect of the law of damages has been found in practice to be more dependent upon the facts of each particular case than the assessment of loss of pecuniary benefit to dependants under the Fatal Accidents Acts. It is, I think, helpful to begin from

> certain underlying principles without regard to the current statutory provisions:
>
> (a) The foundation of the claim is the dependants' loss of expectation of future pecuniary benefit from the deceased;
>
> (b) Assets which the dependants were enjoying and of which they had the benefit during the deceased's lifetime and which they continue to enjoy after his death are not taken into account either as part of the dependency or as a deduction from it. See **Heatley v. Steel Company of Wales Ltd.** [1953] 1 W.L.R. 405;
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> ….”

39. At page 348 of the judgment, Staughton LJ similarly made clear that if a dependant inherited capital assets or investments which continue to produce an income, unaffected by the deceased’s death, there has been no loss of dependency. At page 349 of the judgment, Staughton LJ said:

> “…. I hold that, before one considers deductions under section 4 one first has to determine what loss the dependants have suffered; and if they have inherited the source of the income upon which they were dependant, they have not lost it.

40. To use what Staughton LJ described as “a familiar and homely metaphor”, the dependants cannot inherit the goose and still claim that they have been deprived of eggs.

41. However, Staughton LJ went on to make clear that the position is different where the income has been derived, even in part, from the deceased’s labour (page 349):

> “One then turns to the case where the income is in part derived from labour and in part from capital. Suppose that the husband owns a boarding-house, and that he and his wife run it together. If he should happen to be killed by a negligent wrongdoer, and his widow inherits the house and continues to run it, should she recover to the extent of her dependency on the whole of the profit of the boarding-house? That is not very different from the present case.
>
> My answer is that one must again determine what the dependants have lost; no question of deduction arises. The court has to ascertain how much loss has arisen because the deceased is no longer alive and able to work, and how much of the deceased's income was derived solely from capital which the dependants have inherited.”

42. In **Wood v Bentall Simplex,** Beldam LJ held that dependants were entitled to be compensated for the loss of a dependency, notwithstanding that they continued to own assets and continued to receive an income from them. He said, at pages 344-5, that

the dependants enjoyed not only the expectation of pecuniary benefit from the labour and work which the deceased was putting into the family farm, but were also able to rely on the increasing value of the family assets, albeit that they were tied up in the farming enterprise. These assets were substantially increasing as a result of the deceased's hard work.

43. McGregor on Damages, 20th Ed. (2017), summarised the reasoning in **Wood v Bentall Simplex** as follows:

> "Because the sums which the widow and sons were receiving before the death could be largely attributable to the deceased's work in the farm rather than from a return on the capital invested in the farm, to that extent a loss of dependency had been shown."

44. **Wood v Bentall Simplex** also made clear that the question whether there is a loss of financial dependency is a question of fact, and that awards are somewhat rough and ready, in the sense that damages awarded under the FAA may be greater than a strict view of the dependants' loss would justify (see Beldam LJ at 342 and Staughton LJ at 349).

45. In **O'Loughlin v Cape Distribution**, the deceased ran a property company, through which he received the income from a number of investment properties. His widow helped out in a secretarial capacity, but she never involved herself in the management or development of the properties. After his death, she attempted to take over the business, but found that she did not have the necessary skills. After her husband's death, she sold three of the properties and lived off the investment income of the proceeds of sale, plus the rental income of the remaining properties. The **O'Loughlin** case is different from the present case, therefore, in that the business had declined after Mr O'Loughlin's death.

46. The Defendant in **O'Loughlin** contended that the widow and other dependants had lost little if anything as a result of her husband's death, as the assets survived and continued to produce an income. The trial judge, Forbes J, rejected this argument, holding that the skills and energy which Mr O'Loughlin had brought to bear on the business, and the time and energy which he devoted to maintaining and building up the property portfolio, were clearly of economic or pecuniary benefit to the dependants, and so they had suffered a financial loss. The judge accepted the dependants' counsel's submission that the loss could best be measured by asking how much it would cost to replace Mr O'Loughlin's skills with those of another person, who was equally skilled in asset and property management. He awarded Mrs O'Loughlin damages calculated by reference to the annual value of his lost services, to which he applied a multiplier.

47. On appeal, the defendant argued that the judge should not have quantified the loss by reference to the value of lost services but should, rather, have compared the probable financial position of the family if Mr O'Loughlin had lived and continued to manage the business, with the probable financial consequences to his family of him no longer being in a position to do so. If this method of calculation had been used, the defendant submitted, the loss would have been reduced or even extinguished (as the

value of assets had largely survived Mr O'Loughlin's death, even though the business was not as successful as before).

48. At paragraph 10, Latham LJ, with whom Judge and Schiemann LJJ agreed, noted that the task for the court was to answer the difficult question of the extent to which the dependants have been deprived of a "reasonable expectation of pecuniary advantage from the continuance of the life of the deceased": see **Pym v The Great Northern Railway Company** (1863) 4 B&S 396. Latham LJ said that:

> "The task of the court, in answering this question was originally the province of the jury. Neither successive statutes nor, in my judgment, any decisions of the courts lay down any prescriptive method by which such damage is to be identified, or calculated apart from the principle that it requires that some damage capable of being quantified in money terms must be established." (paragraph 11)

and

> "…..the court's task in any case is to examine the particular facts of the case to determine whether or not any loss in money or in monies worth has been occasioned to the dependants and if it determines that it has, it must then use whatever material appears best to fit the facts of the particular case in order to determine the extent of that loss….." (paragraph 14)

49. As regards the quantification of the loss in **O'Loughlin,** Latham LJ said, at paragraphs 15 and 16:

> "15. In the present case, the judge came to the clear conclusion that the dependants had lost the flair and business acumen which would, by clear inference have resulted in a successful development of the property portfolio which represented the family's assets, with consequential increases in both the capital and the income value of that portfolio. In my view the judge was clearly correct in concluding that the dependants had thereby suffered a loss capable of being measured in money terms. He could, as submitted by Mr Alliott, have been asked to embark upon a complex evaluation of the extent to which the portfolio managed by Mr O'Loughlin would have been more valuable than the assets managed by the respondent. This would have involved a comparison of on the one hand, the likely increase in income and capital to be expected from prudent investment by somebody on the respondent's behalf of these assets, for she herself on the judge's findings, could not be expected to have managed them herself, and a projection of the increase in income and capital values of the portfolio based upon an extrapolation from Mr O'Loughlin's success between 1989 and 1995. It seems to me that such an exercise, although theoretically possible, would be so riddled with uncertainty and

> speculation as to make it difficult for a judge to find a secure basis for any conclusions that he might seek to reach.
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> 16. But one thing is certain, namely that the respondent would have to have professional advice in order to manage the family assets properly and effectively. The cost of such advice therefore represents the most secure basis from which to attempt to place a pecuniary value on the loss to the dependants arising from Mr O'Loughlin's death. Whether she chooses to have such an advisor or not is another matter. But the fact will always remain that she and the dependants will have lost the services of Mr O'Loughlin as the manager of the family assets, and that loss is capable of being valued in money terms. I have no doubt, in these circumstances, that the judge was entitled to take the course that he did."

50. The next case, **Williams**, is the closest on its facts to the present case. The claim under the FAA in **Williams** was brought by the wife and adult children of Mr Williams. Mr Williams was a man of unusual energy, flair, and drive, who had created and managed a successful builders' merchant business. Following his death, his wife and adult children took over the business, and, as in the present case, the profitability of the business increased. The dependants each received more money from the business than they did when their father was alive. It was not clear whether the increases in turnover and profit were due to the expansion of the business, improved financial management or external economic factors. In addition to the builders' merchant business, Mr Williams owned a number of properties and also a business (and hobby) in which he bought, restored, and traded steam engines and agricultural machinery.

51. The difference between **Williams** and the earlier case of **O'Loughlin**, as Smith LJ pointed out at paragraph 39, was that in **O'Loughlin** the widow had tried to continue running her husband's business but had failed at it, whereas Mrs Williams and her children had tried and succeeded.

52. The dependants argued that they had suffered a financial injury as a result of their father's death, even though the business had increased its profitability, and contended that they were entitled to damages calculated by reference to the cost of replacing Mr Williams as the manager of the builders' merchants, the property business and the steam engine business. The defendant contended that, as the businesses were more profitable than ever, there was no loss of dependency at all.

53. The trial judge, HHJ Hickinbottom (as he then was) accepted the dependants' arguments and awarded damages on the basis that they asked for.

54. On appeal, the defendant submitted that the judge had been wrong to find that there was any financial dependency at all. The judgment of the Court of Appeal was given by Smith LJ.

55. At paragraph 36 of her judgment, Smith LJ said that HHJ Hickinbottom had been plainly correct to state the general principle that where the widow inherits the assets which have produced the income from which the dependency derived, she cannot

have both the inherited assets and damages for loss of the income. **Williams** was a case in which the support provided to the dependants prior to death had derived partly from the capital that the deceased had amassed and partly from his work as manager of the business.

56. Before HHJ Hickinbottom, the defendant had argued that the Court should take into account what had actually happened since Mr Williams's death, namely that the business had thrived and become more profitable. The judge rejected this argument, saying:

> "However, generally dependants cannot by their actions affect, either to their advantage or to their disadvantage, the existence or value of a dependency. For example, as Mr Stevenson accepted (Closing submissions, Paragraph 22(f)), had Mrs Williams and the other dependants in the case before me decided to sell the builders' merchant business and live off the income of the capital produced, that would not have affected any dependency claim they might have had. It would have been no answer to such a claim that they ought to have attempted to carry on the business and tested out their ability to do so. The same would have applied if they had sold that business and purchased a business of a different type — a hairdresser's was the example used in debate — which was as financially successful as the builders' merchants had been under Mr Williams…..
>
> Neither, in my judgment, can the identification and valuation of a dependency depend upon the success or otherwise of dependants' efforts to run a business that they inherited. On policy grounds alone, this would be repugnant, as it would encourage failure and penalise success."

57. HHJ Hickinbottom went on to say that:

> "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.

> By Mr Williams' death, his dependants have lost his very considerable skills and services in relation to the builders' merchant business, and wealth creating property and steam engine activities. They can be valued in moneys worth: and, in the circumstances of this case, I consider their dependency can most appropriately be measured by asking how much it would cost to replace those skills with another person capable of bringing those skills to bear upon the various activities engaged upon by Mr Williams. That is the approach I propose to adopt."

58. The Court of Appeal approved the analysis set out by HHJ Hickinbottom and held that there had been a loss of financial dependency, notwithstanding that the business was more profitable than before. At paragraphs 45, 49 and 50 of the judgment, Smith LJ said:

> "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. With all due respect to his wife, who was plainly supportive of him as a wife and mother, she played no significant role in the wealth creation. It was agreed that her services to the business could have been purchased for about £3000 per annum at today's values. Yet, her benefits from her husband's efforts had been very substantial. She was already the joint owner of a number of properties and she enjoyed a share of the business profits far in excess of the value of her labour. 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.
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> ….
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> 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."

59. The Court of Appeal also approved the method of quantification adopted by HHJ Hickinbottom: see judgment, paragraph 51. Smith LJ said that the "value of loss of services" approach was the correct approach, because:

> "by focussing on the value of the deceased's services, it was possible to exclude any benefit which had come to the family by inheritance under the deceased's will. Any other method of assessment would have been difficult and complicated because of the need to separate out income which was derived from capital from that which was derived from labour. The method adopted by the judge went straight to the value of the deceased's labour."

60. In my judgment, these authorities demonstrate that:

(1) The question whether there has been a loss of financial dependency, and, if so, how much, is a question of fact;

(2) The courts will take a realistic and common-sense approach to these questions;

(3) There is no hard-and-fast or prescriptive approach to the determination, or quantification, of loss of financial dependency;

(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;

(5) The question whether a dependant has suffered a loss of financial dependency, for the purposes of the FAA, section 3, is fixed and determined at the date of death;

(6) It follows from the fact that the loss of financial dependency is fixed at death that, in a "work/skill" case, the existence of the right to claim loss of dependency, and the value of the loss, is not assessed by reference to how well the business has been doing since the deceased's death;

(7) Moreover, a dependant cannot by his or her own conduct after the death affect the value of the dependency at the time of the death; and

(8) Therefore, even if the business is now thriving and doing better than ever, the law will treat there as having been a financial injury and so a loss of financial dependency.

Discussion: application of the above principles to the present case

61. In my judgment, the case-law authorities referred to above show that Mr Phillips QC's submission is correct: 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" (**Pym**), because if he had lived his management of the business would have continued to produce an income for her. **O'Loughlin** and **Williams** make 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.

62. This makes sense, on policy grounds, as HHJ Hickinbottom pointed out. Otherwise there would be a perverse incentive to fail, because the damages recovered if the business fails would be greater than if the business succeeds.

63. On behalf of the Defendant, Mr Kent QC submitted that, even if I do not accept the argument that there can be no loss of financial dependency if the family business is more successful than before, the present case can be distinguished from **Wood, O'Loughlin** and **Williams,** on three grounds.

Mrs Rix's interest in the family business is akin to a capital or income-producing asset

64. First, Mr Kent QC said that the cases demonstrate that if a dependant has inherited an income-generating asset, s/he has not suffered any financial loss for loss of dependency purposes, but if the dependant has lost the benefit of earned income

generated by the deceased, then s/he will have suffered a financial loss. However, Mr Kent QC said that there is no clear dichotomy between an income-generating or capital asset, on the one hand, and earned income, on the other. In the present case, Mrs Rix's interest in the business is, and was at the time of her husband's death, akin to an income-generating or capital asset. She had a shareholding in the family business. Between her husband and herself, they owned 80% of the shares in the business and, as a result of her husband's death, her shareholding has increased from 40% to 80%, to match their joint ownership. He submitted that the family business was a mature one, which Mr Rix had already built up by the time of his death. The fact that the business continued to thrive after Mr Rix's death shows, he said, that, to a very large extent, the value of the business (and, therefore, the value of Mr and Mrs Rix's shareholding) was independent of her husband's continuing work and efforts. The business was mature and robust. A stage had been reached at which the business existed independently of the person who founded it and set it up. Mr Kent QC submitted that the financial dependency which Mrs Rix had enjoyed prior to her husband's death had come through his and her shareholding in the business. She had inherited his shareholding, which she held along with her own. This was akin to a capital asset, which she did not lose as a result of her husband's death. The position is similar to a case in which the family income came from rental income from properties.

65. Mr Kent QC further submitted that this argument does not fall into the trap of taking account of events that post-date Mr Rix's death. Rather, the argument is based on the state of the business before Mr Rix died.

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

67. In these circumstances, in my view, Mr Rix was in a very similar position to Mr Williams in the **Welsh Ambulance v Williams** case. In **Williams,** the fact that the business was mature, and that Mr Williams had a son and daughters who were working in the business (and who were sufficiently experienced to be able to take over when he unexpectedly died), did not mean that the business was treated like a capital asset. Rather, the Court of Appeal found that there was a financial dependency. Similarly, in **O'Loughlin,** the Court of Appeal held that there was a financial dependency, at least in part, notwithstanding that Mr O'Loughlin's business was primarily concerned with maximising the income from property assets, because the income from the business was increased by Mr O'Loughlin's own efforts. In the

present case, the reality was that the income that Mr and Mrs Rix earned, both from salary and from dividends, was the result of Mr Rix's hard work and flair. This is not a case in which the income at issue was the investment return on a passive holding in a business, which would continue to yield the same income irrespective of the deceased's capacity for work. If that had been the case, then the earnings would not have been part of Mrs Rix's financial dependency.

68. Mr and Mrs Rix also owned commercial properties from which they derived rental income and from which Mrs Rix continues to derive rental income after her husband's death. She does not claim any loss in relation to the rental from the commercial properties as part of her financial dependency claim, because she accepts that this is income from capital assets which was unaffected by her husband's death.

MRER was a company, and Mrs Rix's salary and dividends do not count towards her financial dependency, because they were her own income, as a shareholder and director

69. Secondly, Mr Kent QC pointed out that, unlike the family businesses in **Wood, O'Loughlin,** and **Williams,** Mr Rix conducted his business through a company, and Mrs Rix was both a director and shareholder in the business. Mr Kent QC submitted that the approach in those three cases should not apply where the dependant was a director and shareholder in a business. In such cases, the law should treat the dependant's director's fees or salary and dividends as their own income, not as something that they received as a result of their financial dependency on the deceased. It is clear that a dependant cannot claim under s3 of the FAA for loss of their own earnings: **Burgess v Florence Nightingale Hospital for Gentlewomen** [1955] 1 QB 349, and, he submitted, the income that Mrs Rix enjoyed as director and shareholder was her own income.

70. This issue is perhaps more directly relevant to the quantification of Mrs Rix's financial dependency claim, but it is convenient to deal with it at this stage.

71. I do not accept this submission. The authorities have made clear that courts should look at the practical reality in relation to financial dependence, not at the corporate, financial or tax structures that are used in family arrangements. If one looks at the practical realities, it is clear that the income that Mrs Rix received as director and shareholder was entirely the result of her husband's work for the business.

72. The importance of looking at the practical reality is made clear in three authorities.

73. The first authority is **Malyon v Plummer** [1964] 1 QB 330 (CA). This was a FAA case. The plaintiff widow and her husband, the deceased, were the only directors and shareholders of a private business. The husband did the vast majority of the work and was the driving force in the business. He owned all but one of the shares. The widow owned the other share and received a substantial salary, even though she only did some part-time work for the business, on a casual basis. Both of their salaries were paid into a family bank account, from which money was taken to pay for the family expenditure.

74. One of the questions in the appeal was whether the widow's salary qualified as part of the dependency for which damages could be recovered. The Court of Appeal held that it did.

75. Sellers LJ said:

> "In my opinion, the interposition of F. P. Malyon Ltd., if that is how it should be regarded, does not prevent the court assessing truly the loss which the wife has suffered. The husband's business, F. P. Malyon Ltd., has been destroyed by the loss of the husband and it is clear that its revenue was, in substance, derived from him. The decision in **Salomon v. Salomon & Co.** [1897] AC 22] need not blind one to the essential facts of dependency and require a finding of fact which is contrary to the true financial position as distinct from an artificial or fictitious one."

76. The Court of Appeal allowed the wife's salary to be treated as part of the loss of dependency, apart from the sum of £200, which reflected the true value of her work for the company.

77. In my view, the ruling in **Malyon v Plummer** provides the answer to this issue. The court should look at the practical reality. The reality, in the present case, is that the salary and dividends that Mrs Rix received were the result of her husband's work in the company. None of it represented her own earnings for work done. In those circumstances, the salary and dividends should be included in the loss of dependency. I should add that the position may well be different in cases where the arrangement was a fraud on the Revenue, but there was no suggestion that this was the position in the present case.

78. The next case is **Ward v Newalls Insulation Co Ltd** [1998] 1 WLR 1722 (CA). In this case, two partners ran a business together. The profits were paid into a partnership account. At first the partners drew out the profits on an equal, 50%, basis. However, they were subsequently advised by their tax advisers to make their wives equal partners. This was done, with the Inland Revenue's consent, and so each of the four partners drew out 25% of the profits. One of the partners fell ill as a result of exposure to asbestos and brought a personal injury (not a FAA) claim. The trial judge assessed his loss of earning capacity at 25%, on the basis that his wife's income should be disregarded.

79. The Court of Appeal allowed the plaintiff's appeal. The Court said that, in reality, the wife was a sleeping partner, whose contribution to the profitability of the partnership had been nil, and, accordingly, the plaintiff's real loss of earnings was 50% of the partnership profits. The partnership arrangement had been an informal arrangement, terminable at will. There was no public policy reason why the plaintiff's loss should be limited to 25% of the profits, when this did not reflect the reality.

80. Once again, therefore, the Court of Appeal looked at the true underlying reality, when deciding on loss of earnings by the claimant. This is consistent with the approach that has been taken in FAA cases.

81. The third case is **Head v Culver Heating Co** [2019] EWHC 1217 (QB). This was another mesothelioma case, but was not a FAA case, as Mr Head was still alive at the time of trial. Mr Head ran a family business, a company in which his wife was a director and 45% shareholder. Mrs Head received a salary and dividends. One of the issues was whether Mrs Head's dividend and/or salary from the company should be treated notionally as part of Mr Head's earnings. The judge, HHJ Melissa Clarke, sitting as a Deputy High Court Judge, said that it should. Mr Kent QC acted for the defendant in this case and disarmingly accepted that he had advanced, unsuccessfully, essentially the same argument as the one that he is advancing in the present case. In the **Head** case, Mr Kent QC said that the case was different from **Ward v Newalls,** because Mrs Head was a director with fiduciary responsibilities towards the company, and she owned 45% of the shares, which could only be transferred away from her with her consent. Mrs Rix was in a similar position. HHJ Clarke said that she had to look at the reality of the situation and that the reality was that the payments made to Mr Head's wife, both by way of salary and dividends, were tax-efficient ways of taking money out of the business that had been earned from Mr Head's efforts. On that basis, they fell to be taken into account as part of Mr Head's loss of earnings (save for a sum that represented remuneration for the work that she had actually undertaken). See judgment, paragraphs 79-96.

82. In my view, the approach in **Head v Culver Heating Co** is consistent with the approach that was taken in **Ward v Newalls,** and should be applied in the present case. Like Mrs Head, Mrs Rix was a director and shareholder. Her director's salary and dividends were, in reality, part of Mr Rix's remuneration. Unlike Mrs Head, Mrs Rix did not do any work in the business.

83. There is a further reason why I think that it is right to decline to treat Mrs Rix's continuing shareholding and director's salary as her own income, so that it is disregarded for the purposes of the quantification of the financial dependency claim. This is that, whilst Mrs Rix is currently an 80% shareholder in the business, there is no certainty that this will continue to be the position. At the moment, Jonathan and Adam, her sons, are each 10% shareholders, but they are the ones who are doing all of the work. I heard no specific evidence about this, but it is obvious that there may come a time when the sons will have greater family responsibilities of their own and may wish to take a shareholding, salary and dividends which more accurately reflects the extent to which the profitability of the business reflects their own efforts. Similarly, a time may come when Mrs Rix is willing to relinquish her majority shareholding for the benefit of her sons. It follows that I do not think that it would be appropriate to assume that the current position, in relation to directorship and majority shareholding, will continue indefinitely.

84. Mr Kent QC also made a related submission, to the effect that the court cannot ignore that Mr Rix decided to operate his business as a limited company. His services were provided for the benefit of the limited company, but a company cannot be an eligible dependant for the purposes of the FAA.

85. I do not think that the approach which I intend to adopt means that I am, in effect, treating the limited company as though it is a dependant for the purposes of a FAA claim. It is Mrs Rix who is the dependant. The point is that the fact that her husband's business was operated through a limited company, of which she was a director and shareholder, does not detract from the underlying reality that he was

generating income for himself and his wife, which was distributed though their salaries and dividends.

Mrs Rix was not the only shareholder in the business, apart from her husband

86. The third ground of distinction put forward by Mr Kent QC was that, in the other cases, the dependant, or dependants, consisted of all of the other partners or shareholders in the family business. In **Williams,** for example, the claimant dependants consisted of Mrs Williams and all of her children. Mr Kent QC said that the position is more complicated where, as here, the wife has claimed as a dependant, but the sons, who were each 10% shareholders, have not.

87. I do not think that this makes any difference to the question of principle as to whether or not Mrs Rix has a financial dependency claim. No doubt Jonathan and Adam Rix might have been joined to the claim as fellow dependants, as were the adult children in **Williams,** but in my judgment the sensible decision not to do this does not affect Mrs Rix's own claim under the FAA. It will be necessary to bear this point in mind when it comes to quantification, however, because it means that not all of the profits of the business were payable to Mr and Mrs Rix.

(2) <u>How should Mrs Rix's financial dependency claim be quantified?</u>

88. The objective is to determine the extent of the loss in money or in money's worth that has been occasioned to Mrs Rix, as her husband's dependant, by her husband's death.

89. In my judgment, there are three key principles which must be taken into account.

90. The first is that, as Latham LJ made clear in the passages in **O'Loughlin** that are set out at paragraph 50, above, there is no prescriptive rule about the way in which the value of the financial dependency should be quantified. The court is performing a function which used to be the function of a jury. The court must take a realistic and common-sense approach.

91. This means that the approach is not a purely arithmetical one. In **O'Loughlin,** at paragraph 27, Judge LJ cited the following observation made by Holroyd Pearce LJ in **Daniels v Jones** [1961] 1 WLR 1103:

> "Since the question is one of actual material loss, some arithmetical calculations are necessarily involved in an assessment of the injury. But they do not provide a substitute for common sense. Much of the calculation must be in the realms of hypothesis, and in that region arithmetic is a good servant, but a bad master."

92. The second principle is that it is necessary to separate out income which was derived from capital from that which was derived from labour. Income which was derived from capital is not part of the financial dependency, because it will be unaffected by the deceased's death, whereas income which was derived from labour is part of the dependency. Similarly, income produced from other income-producing assets, which is unaffected by the death, is not part of the dependency.

93. The third principle is that, as the Court of Appeal said in **Williams, t**he 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. This means, as I have said, that what happens after death is largely irrelevant to the quantification of the financial dependency. As Lady Smith said in **Williams,** at paragraph 50, "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."

94. The objective, therefore, in a family business case, is not to compare the income of the dependant from the family business before and then after the deceased's death, and to award the shortfall, if any. The income of the dependant from the business after the deceased's death is irrelevant. The inevitable consequence of this is that there will be cases, such as **Williams** itself, and in the present case, in which a substantial award for financial dependency will be appropriate, even though the deceased breadwinner's business has continued to thrive and provide an income for the dependant or dependants even after the deceased's death. In another case, raising a different issue, **Arnup v MW White Ltd** [2008] EWCA Civ 447; [2008] ICR 1064, Smith LJ recognised that, in loss of dependency cases, a dependant may recover more than she has actually lost. At paragraph 20 she said:

> "The Act [the FAA] new requires only the quantification of loss of dependency…. Once the loss of dependency has been calculated, there is nothing to be deducted. That is what Parliament has decided and the fact that the Claimant will in many cases receive more than she has lost is nothing to the point. See Buxton LJ in **McIntyre v Harland and Wolff Plc** [2006] 1 WLR 2577, at 2581A."

95. In the course of the parties' submissions before me, three different potential approaches to quantifying Mrs Rix's financial dependency have been mentioned.

96. On behalf of the Defendant, Mr Kent QC said that, if I did not accept his primary submission that there was no loss of financial dependency at all, one approach would be to quantify the loss by comparing the profitability of MRER Ltd in the period after Mr Rix died with an estimate of the profitability of the company if Mr Rix had survived. This would then form a basis for calculating how much better off Mrs Rix would have been, financially-speaking, if her husband had not died. Mr Kent QC made clear that he did not himself put forward this approach as the one to follow, saying that Mrs Rix had not presented a claim on this basis and it was not for the Defendant to put forward an alternative basis.

97. In my judgment, it is clear that this would not be the right approach. A comparison of profitability would mean that the court would be doing exactly that which the Court of Appeal in **Williams** said was not permissible, namely taking account of post-death events.

98. This leaves the two alternative approaches that Mr Phillips QC put forward, in his excellent submissions on behalf of Mrs Rix. I have referred to these as Basis 1 and Basis 2. Basis 1 provides for a calculation by reference to Mrs Rix's share of the annual income that Mr and Mrs Rix would have taken from the business if he had

lived. Basis 2 quantifies Mrs Rix's financial dependency by reference to the annual value of Mr Rix's services to the business as managing director, calculated by reference to the cost of employing a replacement.

99. As I said at the beginning of this judgment, Mr Phillips QC did not say that I am bound to adopt either Basis 1 or Basis 2. However, he invited me to conclude that Basis 1 is the most appropriate Basis to adopt in all the circumstances of the present case.

100. I accept Mr Phillips QC's submission. It is true that in **O'Loughlin** and **Williams,** the courts applied Basis 2. The same approach was taken by Martin Chamberlain QC, sitting as a Deputy High Court Judge in **Grant v Secretary of State for Transport** [2017] EWHC 1663 (QB). However, as Mr Phillips QC submitted, this was because of features of those cases which do not exist in the present case. In those cases, the claimed loss of dependency covered both income from capital assets and income from labour, and it was not easy to separate them. In **O'Loughlin,** the deceased was a property manager and developer, and so, to a substantial extent, the income enjoyed by the family before death came from rental and investment income, which would be largely unaffected by Mr O'Loughlin's death, but also from income generated by his labour, skill and flair, which represented the financial dependency. In those circumstances, it plainly made sense to calculate the dependency by reference to the cost of paying someone to perform the functions that Mr O'Loughlin previously carried out. This was a convenient way of placing a figure on the value of the income produced by Mr O'Loughlin's labour, skill and flair, whilst leaving out of account the income produced by the capital assets. As Latham LJ said, at paragraph 16 of the judgment, this was the most secure basis from which to attempt to place a pecuniary value on the loss to the dependants arising from Mr O'Loughlin's death. Similarly, in **Williams,** in addition to the income generated by Mr Williams's labour, he and his dependants had also been in receipt of an income generated from his capital assets, namely his properties, steam engines, and his agricultural machinery collection. If Basis 1 had been used in that case, it would have been difficult to separate out any financial benefit from the capital assets, which had come to the family by inheritance under Mr Williams's will, which continued to produce an income, unaffected by his death, and so which were not part of the financial dependency. For that reason, HHJ Hickinbottom and the Court of Appeal preferred Basis 2, which, as Smith LJ said at paragraph 51 of the Court of Appeal judgment, "went straight to the value of the deceased's labour." In **Grant,** the dependant widow inherited a development site from the deceased, which the deceased would have used his labour and skill to develop, if he had survived. The judge decided that the case was similar to **O'Loughlin,** and that the widow was entitled to compensation for the value of the work that Mr Grant would have done if he had lived (not for the value of the asset that she had inherited). This work consisted of the management and development of property and the most obvious way of assessing its value was by reference to the cost of replacing it. See judgment, paragraph 72.

101. I am not obliged to adopt the same approach as in **O'Loughlin, Williams** and **Grant.** The court must adopt the method of valuation of loss of dependency which best suits the facts of the particular case.

102. In the present case, in contrast to those cases, the financial dependency claim is concerned only with income produced by Mr Rix's labour, not with income produced

by his capital assets, or with income produced by a mixture of capital assets and labour. As I have said, Mr and Mrs Rix enjoyed the rental income of commercial properties, but this was entirely separate from the business operated by MRER Ltd, and Mrs Rix has deducted this from her financial dependency claim. What is left is the income from the business, which is all income that has been generated by Mr Rix's labour, skill, energy and flair. The difficult and complicated exercise of separating out income which was derived from capital from that which was derived from labour, which meant that Basis 1 was unsuitable in the **O'Loughlin, Williams** and **Grant** cases, does not arise in the present case.

103. It follows, in my judgment, that I should adopt Basis 1 in the circumstances of this case. As will be seen, it is possible to quantify the income that Mrs Rix has lost as a result of the fact that her husband's death has meant that he can no longer generate income as a result of his labour. Indeed, on the evidence before me, it is easier to do this than it would have been to quantify the loss of dependency on Basis 2, as there was only very limited evidence to assist me in calculating the cost of employing a replacement for Mr Rix in the business. In my judgment, Basis 1 is more likely to lead to a fair and accurate figure for loss of dependency than Basis 2. This is not a case in which it is easier to assess the salary of a replacement for Mr Rix than it is to assess the likely profitability of the business if Mr Rix had not died.

(3) <u>What is the annual value of the financial dependency claim, for each year in which Mr Rix would have continued to work full-time in the business?</u>

104. Figures for the annual loss on Basis 1 were set out in the expert reports of Ms Julie Hardless, Mrs Rix's expert. These were adjusted by Mr Phillips QC, by way of concession, to leave out of account the continuing rental income from the commercial property that had been owned by Mr and Mrs Rix. The final figures as claimed were helpfully set out in Mr Phillips's skeleton argument.

105. The Defendant's expert, Mr Andrew, was not asked to, and did not, set out his own figures for Basis 1. Mr Andrew was instructed to calculate loss on the different basis that Mrs Rix was only entitled to the difference between her actual income since her husband's death, and the income she would have received if he had survived. This is what he did in his Report, dated 3 December 2019. On this basis, he calculated the loss of dependency as nil. However, I have rejected this basis of assessment.

106. Mrs Hardless estimated the annual loss of dependency for Mrs Rix as being £75,108 for the period from 20 April 2016 to 30 June 2019, £64,616 for the period from 1 July 2019 until 20 May 2021, £67,460 pa from 21 May 2021 to 20 March 2022, and £64,612 thereafter.

107. These figures are based on the following stages in the calculation (using the figure for the period from 1 July 2019 until 20 May 2021 as an example):

(1) Annual income attributed to Mr and Mrs Rix's income from MRER Ltd, and his pensions: £108,678. This income is calculated as 70% of the estimated profit of the business. Mr Phillips QC explained that this figure has been used, rather than 80%, which would reflect the joint shareholding of Mr and Mrs Rix, partially to be cautious and partially because this reflects the dividend received by Mr and Mrs Rix in the year ended 30 June 2016. This figure is also based on the

assumption that all profits, after tax and capital repayment of the mortgage, would have been distributed as a dividend, even though, historically, Mr and Mrs Rix did not take all of the company's profits as dividends. Mr Kent QC said in oral argument that he did not object to that approach;

(2) The annual rental income from the commercial properties, received by Mrs Rix, and unaffected by Mr Rix's death: £23,509;

(3) Total joint income: £108,678 + £23,509 = £132,187;

(4) It was common ground that, if Basis 1 was the correct Basis to use, Mrs Rix's lost income was 2/3 of the joint income. This was in accordance with the conventional approach in **Harris v Empress Motors** [1984] 1 WLR 212 (CA) and **Coward v Comex Houlder Diving Ltd** (CA, unrep, 18 July 1988), and takes account of the standard estimate that 2/3 of a husband's neat earnings can properly be regarded as his wife's financial dependency upon him. (It was, correctly I think, not suggested before me that the conventional 2/3 figure should be adjusted because Mr Rix lived a frugal lifestyle). 2/3 of £132,187 = £88,125 pa;

(5) From this figure must be deducted the annual rental income from the commercial properties, which is £23,509. Mrs Rix continues to receive this income.

(6) This leaves an annual total for the value of lost dependency, in this period, of **£64,616**.

108. The change to the figures for the period from 21 May 2021 to 20 March 2022 is explained because Mr Rix would have qualified for his state pension on 21 May 2021. The further change, from 20 March 2022 results from the fact that this is the date when Mrs Rix will qualify for her state pension.

109. The explanation for the figures that were arrived at (prior to the concession relating to the rental income from the commercial property) was set out in the Expert's Report of Ms Julie Hardless dated 30 October 2018. With one exception that I will deal with below, the Defendant does not disagree with the figures set out in Ms Hardless's report. In particular, there is no challenge to the actual figures for profit, loss, dividends etc, both before and after Mr Rix's death which are set out in Ms Hardless's report. I find that they are accurate. There is no need to set them out in this judgment, beyond the extent to which I have already done so.

110. The only aspect of Ms Hardless's analysis that is challenged by Mr Kent QC is her view that the expected performance of the company if Mr Rix had survived and had continued to manage the business would have been somewhat better that its actual performance since his death. Ms Hardless's estimates of the value of Mrs Rix's loss of dependency, as set out above, are based on her estimate of the profitability of the company if Mr Rix had survived.

111. On behalf of the Defendant, Mr Kent QC submitted that there is no valid basis for proceeding on the footing that the company would have been even more profitable if Mr Rix had survived.

112. Ms Hardless explained at section 5 of her Expert's Report of 30 October 2018 why she had estimated profitability on the basis that if Mr Rix had survived, the business would have been even more profitable. She noted that Mr Rix had been taking steps to grow the business when he fell ill, and in particular had moved to new and bigger premise. Whilst Jonathan had tried hard to take his father's place when his father died, he did not have any experience in working in the building or joinery sides of the business, and was therefore at a disadvantage, as compared with his father, in organising work and pricing it for quotes, and in managing staff. He also did not have the relationship with regular clients that Mr Rix had built up over a working lifetime, and, in particular had lost jobs with Luton Borough Council and Bedfordshire Council which his father would probably have been able to secure. All of these were reasons why the business would probably have been even more profitable if Mr Rix had survived. The business also had to incur additional staff costs to replace some of the work that Mr Rix would have done, but Ms Hardless has not adjusted the estimated gross profit margin as a result, as the business would probably have had to increase staff numbers in any event.

113. In my judgment, Ms Hardless was right to work from the estimated figures for profit that she used. Mr Kent QC submitted that Mr Rix, if he had survived, would no longer significantly have enhanced the value of the business, because it was a mature business which was "up and running". I do not agree. The experience, flair and contacts of Mr Rix was of great value to the company. The evidence shows, therefore, that it is likely that the business would have done even better than it has done if Mr Rix had survived.

114. In any event, Mr Hardless's estimate of the likely profitability of the business if Mr Rix had survived is only slightly, if at all, higher than the actual figures for the years following Mr Rix's death. The figures she used for the profits in 2016, 2017, 2018 and 2019 were the actual figures achieved. The projections for future years are not excessive and, indeed, in respect of 2019, may be lower than the profit actually achieved. In my judgment, her figures represent the best available estimate.

115. For these reasons, I accept the figures put forward by Mr Phillips QC on behalf of Mrs Rix as the best estimate of the annual value of Mrs Rix's lost dependency.

(4) Would Mr Rix still have continued to draw an income from the business after he retired from full-time work? If so, what would have been the level of that income?

116. I reiterate that I have not been asked, at this stage, to make a finding about how long Mr Rix would have remained working full-time in the business, if he had survived, or to make a finding of his likely life expectancy, were it not for the mesothelioma. However, I have been asked to make a finding as to whether he would have carried on receiving an income from the business after his retirement and, if so, how much. In my judgment, it is highly likely that Mr Rix would have carried on working in the business, in a reduced capacity, even after his retirement, and I so find.

117. There are three reasons why I come to this conclusion. First, Mr Rix was, so to speak, under-pensioned. He would have had his state pension and his ReAssure pension, which would, together, have amounted to a little over £13,000 per annum. He also had a small "draw-down" pension with Scottish Widows. The fact that Mr Rix, who

was obviously a careful man, did not make additional pension provision indicates to me that he planned to continue receiving an income from the business for the rest of his life, even after he retired. Second, I think that it is almost inconceivable that Mr Rix would have had a clean break with the business. Mr Rix was what is colloquially called a workaholic. He would not have given up work altogether. He had built the business up over almost the whole of his working life, and he had many valuable contacts. He would have wanted to stay involved with the business in a lesser capacity, as a consultant, so that he could keep an eye on it and give support and guidance to his sons who were to take it over. Third, Mr Rix would, justifiably, have felt that he had added so much value to the business over many years that he was entitled to continue to receive an income from it even after he stopped full-time work in the business, and, indeed, even after he retired altogether.

118. So far as the level of the income that Mr Rix would have continued to draw from the business, I accept Mr Phillips QC's suggestion that he would have drawn 20% of income that he had previously drawn. On the one hand, this would be enough to enhance his pension and reflect the value that he had provided to the business and continued to provide. On the other, he would not be taking so much out of the business as to make it unfair upon his sons who were shouldering the main burden of running it.

(5) If Mrs Rix has a financial dependency claim which is to be calculated in accordance with Basis 2, is the appropriate deduction for Mr Rix's personal expenses the standard figure of 33%, or the lower figure of 17.5%, because he lived a relatively frugal life away from the business?

119. This issue does not arise, as I have concluded that Mrs Rix's financial dependency claim should be calculated in accordance with Basis 1, not Basis 2. If I had adopted Basis 2, then the starting-point is to work out a net multiplicand for the annual commercial value of Mr Rix's services. Then a figure must be deducted for Mr Rix's personal expenses. The typical figure is 33%, but in the **Williams** case, the judge deducted 17.5%, on the ground that Mr Williams did not spend much on himself.

120. If this issue had arisen, I would have found that the correct deduction in Mr Rix's case was also 17.5%. Like Mr Williams, Mr Rix devoted himself to his business and his family. He did not spend much money on himself, and took only short holidays. He had no expensive hobbies and his expenditure was much lower than the norm for a man of his means.

Conclusion

121. In summary, and taking the five questions set out at paragraph 7, above, my answers are:

(1) Mrs Rix has a financial dependency claim arising from the death of her husband;

(2) That claim is to be quantified by reference to the earnings that she would have continued to receive from the work done by her husband in the family company, MRER Ltd, if he had survived. This is my Basis 1. No discount should be made for the fact that the company has, in fact, thrived since Mr Rix died and Mrs Rix has continued to receive an income from the business;

(3) The annual value of the financial dependency claim, for each year in which Mr Rix would have continued to work full-time in the business is £75,108 for the period from 20 April 2016 to 30 June 2019, £64,616 for the period from 1 July 2019 until 20 May 2021, £67,460 pa from 21 May 2021 to 20 March 2022, and £64,612 thereafter;

(4) Mr Rix would have continued to draw an income from the business after retirement from full-time work. He would have drawn 20% of the income that he drew when in full-time work; and

(5) The question of an appropriate deduction for personal expenses under Basis 2 does not arise. If it had arisen, the appropriate deduction would have been 17.5%, not 33%, because of Mr Rix's relatively modest expenditure on himself.