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Valuing a 'lost years' claim

Head (Deceased) v The Culver Heating Co Limited (2021) EWCA Civ 34

The deceased was born on 11 August 1958 and as a young man in 1974-79 (and again briefly in 1980-81) was exposed to asbestos while working for the defendant company. Later he became the founder and managing director of his own heating and ventilation company, Essex Mechanical Services Ltd ("EMSL"). In December 2017 he began to experience symptoms of mesothelioma. Within a matter of weeks, it became apparent that the disease would take its inevitable and fatal course and he issued a claim for damages in the High Court. Liability was not in issue.

The issue in this appeal related to what damages should be awarded for the deceased's "lost years" claim. The claimant contended for an award of £4,421,683 but the trial judge accepted the defendant's submission that should be no award at all.

The deceased died after the trial and the judgment at first instance. His widow was appointed to carry on the appeal.

There were seven grounds of appeal on which the claimant argued the judge was wrong to find that the deceased had sustained no loss of income in the lost years: -

IN BRIEF

In allowing the claimant's appeal, the Court of Appeal held that the judge at first instance was wrong to treat the deceased's dividend income from his company as if it were the yield from a passive investment, such as a blue-chip stock with an annual dividend, rather than a means by which he distributed the fruits of his own labour in a tax efficient way.

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

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

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

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

(5) Accordingly, the judge did not include a substantial part of the deceased's income which, on her own findings, he would have derived from his efforts, and therefore failed properly to assess his loss of earning capacity. This was wrong in the light of *Pickett*.

(6) The judge erred in finding that there was no loss to the deceased because he could leave his shares in EMSL by testamentary disposition. The lost years claim should reflect the annihilation of his future earning capacity by the illness. He could not simply transfer that value to someone else since it relied on his future efforts, which would be extinguished by his death. He was poorer for this because he had been deprived of something which would otherwise have a present value. It was wrong to find that there was no loss simply because EMSL might be managed by others and might continue to make a profit for someone else. He could not make a testamentary disposition of his own future earning capacity.

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

Ground 1

It was unnecessary to resolve Ground 1, since the appellate court considered that on Grounds 2 to 7, which were essentially interlinked, the claimant was entitled to succeed.

Grounds 2-7

The distinction properly to be drawn was between loss of earnings from work and loss of income from investments. Most victims of mesothelioma did not earn enough to be able to live off investments. If a claimant had by the time of the mesothelioma diagnosis retired from work then

there would be no loss of future earnings, though there might be a claim for loss of pension. Suppose that the deceased had, before experiencing any symptoms from mesothelioma, decided to cease all active involvement in EMSL, put his feet up and enjoyed his retirement while retaining his shareholding in the company. If that is what the deceased had done, then the loss of earnings claim would indeed be zero. But that was not what happened: far from it. The deceased was, and would have remained for some time, the driving force within the company, as the judge accepted.

The company paid the deceased a very modest salary, the level of which the judge accepted was fixed for reasons of tax efficiency and did not reflect the value of his work. It made no sense at all to say that this was the full extent of his earnings from work, and that all the rest of his income from EMSL at the time of his death was, and would have continued to be, income from capital rather than earnings from work. At the time of the deceased's death all the income which he and his wife received from the company (save for the small deduction in respect of her work) was the product of his hard work and flair, not a return on a passive investment.

The deceased was free to dispose of that income in whatever way he chose. He could not make a testamentary disposition of his own future earning capacity. It was not necessary for him to be able to plead and prove what the cost of a replacement would be to EMSL: that would be to mischaracterise the nature of a lost years claim, which required assessment of the value of the earnings or earning capacity which the claimant personally had lost.

The deceased's evidence, accepted by the judge, was that he would have continued to work until the age of 65 full time; then until the age of 70 on an 80% basis; then reduced to a 50% basis. From the age of 70 he would no longer have drawn a salary, but would have continued to receive dividends. As he reduced his involvement, the responsibilities of his two sons would have increased, with one of them taking over as Managing Director. The later part of this period was understandably not explored in detail, but it seemed sensible to assume that he would have wound down his efforts in his mid-late 70s, reducing, say, to 25% at age 75. Once he no longer worked full time, his dividend income from EMSL could properly be treated pro rata as income from investments rather than earnings from work. When he ceased work altogether, his income from any shares he retained would have become entirely income from investments. It seemed sensible to assume also that as his sons would have taken over an increasing share of responsibility for the fortunes of the company, they would have received a greater share of its profits. That might be in the form of salary or shares, depending on tax efficiency, but in either event, the increase in the share of the company's profits attributable to the sons' labour during the handover period would mean a corresponding reduction in the deceased's own share.

The court therefore allowed the appeal, set aside that part of the judge's decision in which she assessed damages for the lost years claim at nil, and remitted the case (in default of any agreement between the parties) for an assessment of those damages.

Head v The Culver Heating Co Ltd [2021] EWCA Civ 34 (18 January 2021) (bailii.org)