Neutral Citation Number: [2021] EWCA Civ 1172

Case No: B3/2020/1589

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE CAVANAGH
[2020] EWHC 2398 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2021

Before:

LORD JUSTICE UNDERHILL
Vice-President of the Court of Appeal (Civil Division)
LORD JUSTICE BAKER
and
LADY JUSTICE NICOLA DAVIES DBE

- -

Between:

PARAMOUNT SHOPFITTING COMPANY LTD — **Appellant**

- and -

MRS EUNICE RIX (WIDOW AND EXECUTRIX OF THE ESTATE OF MARTIN DONALD RIX, DECEASED) — **Respondent**

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- -

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

Hearing date: 24 June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10 am on Wednesday 28 July 2021.

Lady Justice Nicola Davies:

1. This is an appeal from the order of Cavanagh J dated 22 September 2020, whereby he ordered that the claimant/respondent, the widow of Martin Rix ("Mrs Rix"), had suffered a loss of financial dependency. The annual value of Mrs Rix's financial dependency, subject to issues relating to Mr Rix's life expectancy and ability to continue at work, was quantified by reference to her share of the annual income that she and her husband would have received from the work carried out by him in the family company had he survived.

2. Martin Rix died on 20 April 2016 from mesothelioma at the age of 60. The mesothelioma had been contracted by him in the 1970s due to exposure to asbestos when working for the appellant/defendant company as an apprentice carpenter/shopfitter. Liability was admitted by the company and judgment was entered on 31 October 2019.

3. Mr Rix left the appellant's employment in the 1970s. Thereafter, he spent his working life building up a successful business which he subsequently ran as a profitable company, MRER Ltd.

4. Mrs Rix's claims were brought under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976 ("FAA"). It was agreed before the judge that one issue would be determined, namely whether Mrs Rix had a valid claim for financial dependency and, if so, how it should be quantified. At trial Mrs Rix's primary contention as regards quantification was that her financial dependency, for the purpose of section 3 FAA, should be calculated by reference to her share of the annual income which Mr and Mrs Rix would have received from the business had he lived ("Basis 1"). An alternative contention was that Mrs Rix's 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").

5. It was the appellant's case that Mrs Rix had no financial dependency claim because the family business had been profitable since the death of Mr Rix.

Factual background

6. The judge described Mr Rix as a "remarkably talented and dedicated businessman". From small beginnings in 1977 he began installing and repairing kitchens and bathrooms in residential homes. As the scale of the business increased, the jobs became bigger and he engaged subcontractors to help him. The construction and building work expanded into commercial, local authority and residential projects. Mr Rix was involved in all aspects of the work and built up a good reputation in the local area. He also took over two businesses: one specialising in granite worktops; another in joinery. In around 2008, Mr Rix founded MRER Ltd in order to merge the three businesses. The business continued to expand. Mr Rix bought larger purpose-build premises in Dunstable in order to carry out bigger jobs. He took out a 15-year business mortgage, which would have continued until he was 74. In October/November 2015 the business moved into the Dunstable property shortly before he fell ill.

7. The judge found at [15] that much of the success of the business could be attributed to Mr Rix's skill and acumen. Mr Rix "had great business flair, but he was also highly competent, reliable, and charming, and he obtained a great deal of repeat business." The business was the main focus of Mr Rix's life, the judge described it as "almost an all-consuming passion". There came a time when the sons of Mr and Mrs Rix, Jonathan and Adam, joined the business. The judge accepted that Mr Rix had wanted to build up a successful and stable business which he could pass on to his sons.

8. Mrs Rix was a major shareholder in the company. The shareholding produced dividends. Mrs Rix also drew a salary as director but has never worked in the business. The judge found that the salary did not reflect her contribution to the business but was done on accountant's advice as a tax efficient way of taking money out of the business.

9. At [31] the judge described Mr Rix as being "the main breadwinner" and found that prior to her husband's death Mrs Rix was financially dependent upon him.

10. The success of the business was reflected in its turnover and profit margin. In the years ending 30 June 2014 and 30 June 2015 turnover was respectively £1,468,536 and £1,415,362. Gross profit was respectively £380,173 and £335,593.

11. The shareholdings at the date of Mr Rix's death were as follows: Mr Rix 40%; Mrs Rix 40%; Jonathan and Adam each owned 10%. Following her husband's death Mrs Rix inherited her husband's shareholding, thus she currently owns 80% of the shares.

12. Mr and Mrs Rix did not take all of the annual profits out of the business. They left a substantial sum in the business in order to enhance its value. Tax returns showed:

Year to	Mr Rix		Mrs Rix	
	Salary	Net dividend	Director salary	Net dividend
5 April 2015	£6,000 (plus company car)	£25,252	£10,524	£5,000
5 April 2016	£8,060	£28,000	£11,124	£28,000

Mr Rix also had two small private pensions.

13. Mr and Mrs Rix received the rental income from commercial properties which were in Mrs Rix's name. She has continued to receive rental income from them, which is no part of her financial dependency claim.

14. Following his father's death, Jonathan took over his role as managing director of the business. Adam has remained in his former role, namely on the tools. Having taken over the business much sooner than expected, Jonathan has found the experience to be stressful and it has adversely impacted upon his health. Some customers have been lost and others have been gained. Managers have been appointed in the joinery and laminates business to carry on some of the work previously done by Mr Rix.

15. Since Mr Rix's death the business has continued to thrive with turnover and gross profit increasing each year:

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

Grounds of appeal

16. Permission to appeal was granted by Bean LJ on the following grounds:

i) The judge erred in treating all of the profits generated by MRER Ltd which had accrued to the claimant and her husband (and would have been expected to do so had he lived) as providing the basis for the calculation of a loss of dependency suffered by the claimant without regard to whether those profits survived his death and continued to accrue to her;

ii) The judge erred in law in treating the claimant's entitlement to a share of the profits of MRER Ltd based on her own shareholding in the company as if it had belonged to the deceased;

iii) The judge erred in law in confining the credit for surviving income (as required by *Coward v Comex Houlder Diving Ltd*, 18 July 1988, CA) to rental income from commercial property owned by the claimant and, when received, her state pension and failing to take account of the claimant's surviving income in the form of a share of profits in MRER Ltd based on her own shareholding in that company and her director's salary.

The law

Fatal Accidents Act 1976 ("FAA")

17. The relevant provisions are:

> "1. Right of action for wrongful act causing death.
>
> (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) Subject to section 1A(2) below, every such action shall be for the benefit of the dependants of the person ('the deceased') whose death has been so caused.
>
> …

> 3. Assessment of damages.
>
> (1) In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.
>
> (3) In an action under this Act where there fall to be assessed damages payable to a widow in respect of the death of her husband there shall not be taken account the re-marriage of the widow or her prospects of re-marriage.
>
> …
>
> 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."

18. The issue of quantifying dependency pursuant to section 3 FAA has been considered in a number of authorities.

Wood v Bentall Simplex Limited [1992] PIQR 332 (CA)

19. The dependants of a farmer, who held a one-third interest in a family partnership in the farm, brought a claim under the FAA following his death. They were unable to receive the deceased's full interest in the farm unless it was sold. His widow accepted their house in part satisfaction of her interest. A transfer of land to trustees for the benefit of the children took place. The remainder of the assets were retained in the farm in return for which the widow received 12.5% of the profits. The assets which provided the income for the deceased's support of the dependants had passed to them under his will. At trial it was the defendant's case that the loss to the dependants should be reduced by taking into account the income from the assets passed to them after death and that such income reduced the financial injury for the purpose of section 3 FAA. This was rejected by the trial judge and the Court of Appeal. Beldam LJ stated (page 342):

> "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.

> (c) It is immaterial that after the deceased's death the family put the whole or part of the assets to a different use producing additional income. See *Buckley v. John Allen & Ford (Oxford) Ltd.* [1967] 2 Q.B. 637. …"

20. Beldam LJ held that the benefits which had accrued to the dependants from the estate of the deceased were to be disregarded. The dependants of the deceased enjoyed not only the expectation of pecuniary benefit from the labour and work which the deceased was putting into the family farm, they were also able to rely if necessary on the increasing value of the family assets, albeit tied up in the farming enterprise. The evidence showed that the assets were increasing in value as a result of the deceased's hard work.

21. Staughton LJ, in considering sections 3 and 4 FAA, posed the question (page 349) "… can the dependants inherit the goose and still claim that they have been deprived of eggs?". He stated:

> "There can be no doubt that the law does, to some extent, allow greater damages to be awarded under the Fatal Accidents Act than a strict view of the dependants' loss would justify … Nevertheless 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 dependent, they have not lost it.
>
> 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."

Cape Distribution v O'Loughlin [2001] EWCA Civ 178

22. The deceased and a partner had run a successful plant hire business which became a property development company. Thereafter, property formed the sole basis of his family's finances, all of which passed to Mrs O'Loughlin on his death. Mrs O'Loughlin had previously helped in the company but played no part in the management or development of the properties. Following Mr O'Loughlin's death, his widow attempted to do this work but did not possess the skills. She sold three of the properties and accepted the investment income. The judge found that the deceased had considerable flair and energy as a property developer, he had built up a property portfolio which

produced a significant income, with a high capital value. All the skills, time, effort and energy which the deceased devoted to maintaining and building the property portfolio were of economic and pecuniary benefit to his dependants and had been lost to them by his death. The judge accepted that the loss to the dependants could best be measured by the cost of replacing the deceased's skills with those of another person capable of bringing the same type of skills to the management of the property portfolio.

23. On appeal, Latham LJ, in addressing the section 3 FAA dependency valuation, identified the question to be answered as that articulated by Erle CJ in *Pym v Great Northern Railway Company* (1863) 4 B&S 396, namely 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". At [14] Latham LJ stated:

> "… it seems to me, that 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."

24. At [15] Latham LJ referred to the judge's 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." He stated that the judge was "clearly correct in concluding that the dependants had thereby suffered a loss capable of being measured in money terms." The judge's conclusion that Mrs O'Loughlin would require professional advice in order to manage the family assets properly and effectively and that it was the cost of such advice which represented the most secure basis from which to place a pecuniary value on the loss to the dependants arising from Mr O'Loughlin's death was upheld. Latham LJ determined that was a loss which was capable of being valued in money terms.

25. Mrs O'Loughlin's counsel accepted the principle set out by Beldam LJ in *Wood* above, namely that assets which the dependants were enjoying and which they had the benefit of during the deceased's lifetime, which they continued to enjoy after his death, are not taken into account either as part of the dependency or as a deduction from it.

Welsh Ambulance Services NHS Trust and another v Jennifer Mary Williams [2008] EWCA Civ 81

26. Following her husband's death in a road traffic accident, his widow sought damages for her own loss of dependency and on behalf of her three adult children. Mr Williams was described as a man of unusual energy, flair and drive who built up and expanded his builders merchant business. He also bought and redeveloped a number of properties and had an interest in acquiring and refurbishing old steam engines and agricultural machinery.

27. Mr and Mrs Williams were joint partners in the business. Mr Williams developed it and Mrs Williams helped when she could. Mr Williams worked long hours and was described as a "workaholic". The property portfolio and steam engine collection had been financed from the business and had grown in value as the result of Mr Williams'

keen eye for investment and his energy and skill in carrying out work of development and refurbishment. Smith LJ described Mr Williams as the driving force behind the family's economic success.

28. On his death, Mrs Williams inherited his share of the business. In accordance with family policy, the shares were equalised between the three children. Two of the children had taken over the management and direction of the business in place of their father. Mrs Williams increased her hours of work, and the third child became involved in office work. At trial the evidence was that since Mr Williams' death the business had thrived, turnover and profits had risen. It was not clear whether the increases were due to the expansion of the business, improved financial management or external economic factors, but in each year since Mr Williams' death each member of the family had received increased profits. Property acquisitions had continued, as had some transactions in respect of the steam engine collection. The defendants contended that there had been no loss of dependency as the family business and the other activities had continued to make profit and added to the value.

29. At the trial, HHJ Hickinbottom (as he then was), rejected the defendant's contentions and adopted the claimant's proposed method of assessing the costs of replacing the services rendered by Mr Williams. He determined that Mr Williams' personal expenditure accounted for 12.5% of the cost of his services as manager of the builders' merchants business. Everything else had been for the benefit of his family, all of which should represent their dependency. On appeal, the issue was whether the judge had erred in law in holding that there was a dependency, for the widow or the children. No alternative method for assessing the dependency, other than by reference to the cost of replacing Mr Williams' services, was proposed.

30. Smith LJ reviewed the authorities of *Wood* and *O'Loughlin* above. She endorsed 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. At [40] Smith LJ quoted from the judgment of HHJ Hickinbottom as follows:

> "65. … 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.
>
> …

> 67. 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."

31. In considering the factual position which gave rise to the dependency claim, Smith LJ at [45] stated:

> "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."

32. At [49] to [51] Smith LJ identified when the dependency has to be assessed and the relevance of post death events:

> "49. Thus it is plain, in my view, that Mrs Williams and the children were dependants of Mr Williams at the time of his death. The fact that each of them was as well off after the death as before, because David and Sarah 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.

> 51. Once it has been established that the surviving members of the family were indeed dependants of Mr Williams, the judge's task was to assess the value of the dependency. He was asked to do that on a global basis. It was apparent to the judge that the method of assessment which had been adopted in *Wood* and *O'Loughlin* was much the most convenient way of doing this. That was 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. The judge was right to choose this method of assessment."

Head v Culver Heating Co Ltd [2021] PIQR Q2

33. This was a claim in damages by the claimant, who subsequently died, for "lost years". It is not an FAA claim. On appeal it was held that the fact that the claimant was the major shareholder and driving force behind a company meant that the income from it should be considered as loss of the claimant's earning capacity rather than loss of a return from passive investment. Bean LJ at [33] referred to the judgment of Cavanagh J in this case and stated that he too considered that "at the time of Mr Head's death all the income which he and his wife received from the company (save for the small deduction in respect of Mrs Head's work) was the product of his hard work and flair, not a return on a passive investment." The lost years claim required an assessment of the value of the earnings or earnings capacity which the claimant personally had lost.

The findings of Cavanagh J

34. The approach of the judge to the law and to the facts of this case was careful, considered and clear. The judge found at [61] that Mrs Rix had suffered a loss of financial dependency, notwithstanding that the business is more profitable than it was at the time of her husband's death. He stated:

> "… 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."

35. The judge rejected the defence submission that Mrs Rix's interest in the family business is akin to a capital or income-producing asset and stated at [66]:

> "… Whilst there will no doubt be cases in which it is difficult to differentiate between capital or income-generating assets, which are unaffected by the deceased's death, and which continue to provide an income after death, and the income from the work and skill of the deceased, this is not such a case. In my judgment it would be wrong to regard Mr and Mrs Rix's shareholding in the family business at the time of his death as being an income-generating asset, independent of the work and labour of Mr Rix himself. It is clear that, until very shortly before his death, Mr Rix remained the prime mover in the business. He was primarily responsible for its health and prosperity, as a result of his flair, energy and hard work. The business was still expanding, having just moved into new premises. He was the person with the contacts and the know-how. Jonathan was being groomed to take over, but this plan was still at a very early stage. As Mr Phillips put it in his submissions, MRER was not a 'money-generating beast' that would generate money regardless of who was in charge of it."

36. The judge regarded Mr Rix as being in a similar position to Mr Williams. He concluded that 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."

37. The judge rejected the defendant's contention that as Mr Rix conducted his business through a company, and Mrs Rix was both a director and shareholder in the business, the law should treat the dependant's director fees or salary and dividends as their own income and not something they received as a result of their financial dependency on the deceased. The judge also took account of the fact that there is no certainty that Mrs Rix will continue to be an 80% shareholder in the business. Jonathan and Adam are doing all of the work, there may come a time when they may wish to take a shareholding, salary and dividends which more accurately reflect 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.

38. As to the quantification of Mrs Rix's financial dependency, the judge, following Latham LJ in *O'Loughlin*, stated that the court must take a realistic and common-sense approach, separating out income which was derived from capital from that which was derived from labour. The former was no part of the financial dependency because it was unaffected by the deceased's death. Income derived from labour is part of the dependency.

39. At [93] the judge, following *Williams*, stated that the dependency is fixed at the moment of death; it is what the dependants would probably have received as benefit from the deceased had he not died. The judge noted that the objective 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 ([94]). The income of the dependant from the business after the death is irrelevant. The inevitable consequence of this approach is that there will be cases in which a substantial award for financial dependency will be appropriate even though the deceased's business has continued to thrive and provide an income for the dependant/s after his death. In *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 [20] she stated:

> "The Act [the FAA] now 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."

40. As to the approach to quantification in *O'Loughlin* and *Williams*, in which each court had applied Basis 2 ([4] above), the judge observed that there were features of those cases which do not exist in the present case. In this case the financial dependency claim is concerned only with income produced by Mr Rix's labour, not with income produced by his capital assets, nor with income produced by a mixture of capital assets and labour. The rental income from commercial properties had been deducted by Mrs Rix

from her financial dependency claim. What was left was the income from the business, all of which had been generated by Mr Rix's labour, skill, energy and flair ([102]).

41. In quantifying the annual income, the judge at [107] calculated a figure of £108,678 as representing 70% of the estimated profit of the business and deducted from it the annual rental income of the commercial properties. It was common ground that if Basis 1 was used by the court, Mrs Rix's lost income was two-thirds of the joint income in accordance with the approach in *Harris v Empress Motors* [1984] 1 WLR 212 (CA) and *Coward v Comex Houlder Diving Ltd* (CA, unreported, 18 July 1988). This gave an annual total value for the lost dependency of £64,616 as at the date of trial. The figure was adjusted for later years.

The appellant's case

Ground 1

42. The appellant contends that it was a misdirection and an error of law at [94] of the judgment to rule as irrelevant the income which Mrs Rix has continued to enjoy from the company since her husband's death, as the business has continued to thrive and provide an income for her.

43. *Wood*, *O'Loughlin* and *Williams* do not support the Basis 1 approach adopted by the judge. In each of those cases the valuation of the lost dependency was calculated by reference to the notional cost of paying someone to perform the deceased's functions in relation to the business.

44. MRER Ltd had a substantial value and income producing capacity even without Mr Rix's continued involvement. Mr Rix's role was managerial and not operational which could have provided the justification for a claim based upon Mr Rix's death having a presumed impact upon the overall profitability of the company given his management skills, experience, contact and continued relationship with customers. It does not provide the basis for a conclusion that without him there was no business at all.

45. The identification and value of annual losses of financial dependency on Basis 1 was founded upon a material misdirection and error of law, namely that the whole of the element of financial dependency on her husband, which Mrs Rix was enjoying and would have enjoyed had he lived, was recoverable whether or not such was lost in whole or in part.

46. An assessment of lost dependency based upon an assumed future share of profits generated by MRER Ltd accruing to the deceased before income tax is contrary to principle. It includes the element of investment income generated by an established business reliant on employed labour and the return on capital including significant, tangible, fixed assets. If a dependency was properly found, the quantification of the loss should have been upon Basis 2.

Ground 2

47. If, contrary to ground 1, the evaluation of loss of financial dependency could be founded upon the profits of MRER Ltd, there was a misdirection in treating the profits derived from Mrs Rix's own 40% shareholding in the company and her director's salary as if

they were entirely her husband's income as she took no active part in the business, her shareholding and salary were the consequence of arrangements designed to minimise tax. It was not open to the judge to ignore the legal incidents attaching to Mrs Rix's shareholding and salary and treat the income therefrom as if they were beneficially owned by her husband. Reliance is placed on the authority of *Kent v British Railways Board* [1995] PIQR Q42 in support of the contention that to reallocate holdings to which a wife or widow was and remains legally and beneficially entitled is contrary to this authority.

Ground 3

48. It was necessary in assessing the net annual loss and applying the *Coward* methodology to deduct Mrs Rix's surviving income after tax. This would include her share of the profits of the company and her director's salary. As this is income from the company, which continues to accrue to her, it cannot be caught by section 4 FAA.

Respondent's submission

Ground 1

49. In order to succeed on this ground the appellant must establish that at least part of the income generated by MRER Ltd might properly be categorised as unearned income generated by a capital asset that has been unchanged by the deceased's death. The appellant is unable to establish this for a number of reasons, which include the judge's finding of fact that the income the deceased generated from MRER was as a result of his own labour, skill, energy and flair. This finding was logical given that the profitability of MRER depends upon business services/labour/activity that require active management on a day-to-day basis. Further, the authorities of *Wood*, *O'Loughlin* and *Williams* identify rental properties and investment/share portfolios as examples of "assets" that survive death and continue to provide an unchanged income stream.

50. It is logical to treat the whole of the profit available to Mr and Mrs Rix as "earned income" and therefore part of the financial dependency. The profit available for distribution is the direct product of Mr Rix's management of the company. The decision to retain profit within a company (as opposed to taking it out by way of dividends) is a personal decision on the part of the shareholder as to how best to utilise his/her entitlement to that money. A positive decision to save/invest profits within the company is nothing more than personal income management. The appellant's approach ignores the reality that decisions of shareholders on the extent to which they extract/retain profits in a company will depend upon many unpredictable factors, not least their personal need for the income from year to year and tax implications. It remains income available for their "disposal" from year to year.

Ground 2

51. This submission was expressly rejected by the judge at [71] who relied upon the authorities of *Malyon v Plummer* [1964] 1 QB 330 and *Ward v Newalls Insulation Co Ltd* [1998] 1 WLR 1722 (CA).

Ground 3

52. The methodology behind a loss of income dependency following the decision in *Coward* involves: identification of what the deceased and the dependant would have earned annually but for the death; combining the two incomes to produce a joint net annual income; taking two-thirds of the joint income (to reflect what the deceased would have spent on himself/herself) and deducting the deceased's personal income. The resulting figure represents the annual loss of dependency. This was the approach taken by the judge.

53. The judge's findings of fact as to the role of Mr Rix as the wealth creator in the family business fatally undermine this ground of appeal.

Discussion and conclusion

54. The following principles can be identified from the authorities as to the approach of the court to the assessment of the damages to be awarded under section 3 FAA:

    i) The question to be addressed is what is the extent of the dependants' loss based upon a reasonable expectation of pecuniary benefit from the continuance of the life of the deceased;

    ii) The assessment is dependent upon the facts of the particular case;

    iii) Capital assets which the dependants had the benefit of during the deceased's lifetime and continued to enjoy following the death are not taken into account either as part of the dependency or as a deduction from it;

    iv) The question for the court is 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;

    v) 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 lived. Post death events are irrelevant, save for those which affect the continuance of the dependency and the rise or fall in earnings to reflect the effects of inflation;

    vi) The damages awarded under the FAA can be greater than would be justified upon a strict view of the dependants' loss.

Ground 1

55. Since the 1970s, Martin Rix devoted his time, energy and ability to building up a successful business which encompassed construction/building, joinery and the manufacturing of granite worktops. He established a profitable company, MRER Ltd, and such was its success that in the latter part of 2015 the business moved into premises in Dunstable to enable it to accept larger contracts. Unchallenged were the judge's findings that much of the success of the business could be attributed to Mr Rix's skill and acumen. He possessed great business flair, he was highly competent, reliable and charming and was popular in the local area. The company's success was reflected in its turnover.

56. The business was described as the main focus of Mr Rix's life. Unsurprisingly, Mr Rix wished to build up a successful and stable business which he could in time pass on to his sons. He had been expected to carry on the business and gradually train his sons in all aspects of its management. Of note is the fact that Mr Rix took out a 15-year business mortgage on the Dunstable property, which was intended to run until he was 74. His death occurred when he was just 60. The judge found 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 and was the person with the contacts and the know-how.

57. Mrs Rix did not work in the business, her work and support was focused on her roles as a wife and mother. Her shareholding in and salary from the company reflected accountants' advice, there is no suggestion that there was anything improper in this arrangement.

58. The facts of this case are similar to those in *Wood, O'Loughlin* and *Williams* in which the inherited asset takes the form of a business in which the deceased had worked in order to generate or maximise income from the asset which his dependant has inherited. In such a case it is critical to distinguish between the loss of the income derived from the services of the deceased and the loss of income derived from the capital asset. If what was lost was a capital asset inherited by the dependant and it was an asset which was generating income for the dependant prior to the deceased's death, then no loss has resulted from his death following the inheritance. If, however, what the dependant has lost is not income derived from a capital asset but the contribution of the deceased as the manager of the business and family assets, the flair, skill, expertise and energy in the wealth-creating project upon which the deceased was engaged in his life and which, had he lived, he would be continued to be engaged upon, that is the real loss which can be valued in money's worth. The loss for the dependant relates to the contribution or services of the deceased in creating wealth.

59. The authorities of *Wood*, *O'Loughlin* and *Williams* do not establish a principle that a business such as MRER should be treated as a capital asset, which will continue to produce a flow of income regardless of the death of its prime mover and driving force. In *Williams* the builders' merchants business was not dissimilar in size to MRER and Mr Williams was also considered to be the driving force in the company. No aspect of the profitability of the company in Williams was treated by the court to be income attributable to capital assets. In *Williams* the family support prior to death was held to be derived partly from the capital Mr Williams had amassed and partly from his work as manager of the business. There was an identified separation. No such distinction was found by the judge on the facts of this case.

60. Income is only derived from capital if it is identifiable as having been received without the labour and services of the deceased. In short, it is passive. On the facts of this case, there was no identifiable element of the profits which was not touched by the management of Mr Rix. The judge concluded that MRER was not a "money generating beast" which would generate money regardless of who was in charge of it. It follows that the loss of Mrs Rix, for the purpose of the FAA, is the loss of the income generated by Mr Rix's services to the business, irrespective of the fact that the business employs or owns the capital assets. That being so, there can be no sound objection to Basis 1 which seeks to establish the income derived from the deceased's services. There are other cases where Basis 2 will be an acceptable proxy. Each case has to turn on its own

facts and there is nothing in *Williams* to suggest that an assessment on Basis 2 is wrong in principle or to be preferred to Basis 1.

61. Given such a finding, I accept the submission of the respondent at [50] above that it is logical to treat the whole of the profit available to Mr and Mrs Rix as earned income and therefore part of the financial dependency. The profit available for distribution is a direct product of Mr Rix's management of the company. The decision to retain profits within the company as opposed to taking it out by way of dividends was a personal decision by Mr and Mrs Rix.

62. The value of the dependency is to be assessed at the date of death: *Williams* [50]. The fact that the company has thrived since Mr Rix's death is irrelevant for the purpose of the calculation of Mrs Rix's dependency. As was observed in *Wood* and *Arnup*, there will be cases in which the valuation of the loss of dependency is greater than any financial loss sustained, that is what Parliament decided.

63. For the reasons given, and subject to the views of my Lords, I would dismiss this ground of appeal.

Ground 2

64. This ground was succinctly rejected by the judge at [71] when he stated that:

> "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."

65. In identifying the importance of looking at the practical reality the judge relied on the authority of *Malyon* above, an FAA case in which 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, owning all but one of the shares. His widow owned the remaining share and received a significant salary, albeit she did part-time work for the business on a casual basis. In addressing the issue of whether the widow's salary qualified as part of the dependency for which damages could be recovered, Sellers LJ stated that the court should address the true loss which the wife has suffered. The husband's business had been destroyed by his death and the revenue was, in substance, derived from him. The assessment of a dependency requires a finding of fact which reflects "the true financial position as distinct from an artificial or fictitious one". The court allowed the widow's salary to be treated as part of the loss of dependency apart from a sum which reflected the true value of her work for the company.

66. At [77] the judge identified the reality in the present case as being that the salary and dividends which 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 he correctly found that the salary and dividends should be included in the loss of dependency.

67. The appellant also relies upon the authority of *Ward* in which two partners ran a business together and the profits were paid into a partnership account. They were subsequently advised to make their wives equal partners. One of the partners fell ill and brought a personal injury claim. The trial judge assessed the partner's loss of earning capacity at 25% on the basis that his wife's income should be disregarded. The Court of Appeal overturned the finding and stated 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 as it did not reflect the reality of the situation.

68. In my judgment, the approach of the judge is consistent with the authorities and reflects the reality of this case. There is nothing in this ground of appeal.

Ground 3

69. Given the findings of the court, namely that the income of Mr and Mrs Rix, in the form of salary, dividends and profits generated by MRER, is wholly attributable to Mr Rix's endeavours and earning capacity, no portion or percentage of Mrs Rix's post death income can be independent of the deceased and unaffected by his death. It follows that there can be no deduction of monies received from MRER by Mrs Rix post death. Further, such deduction would contravene the principle that dependency is fixed at the date of death and nothing done by a dependant post death can affect the level of dependency from that source, save in limited circumstances which do not apply in this case.

70. For the reasons given, and subject to the views of my Lords, I would dismiss this appeal.

Lord Justice Baker:

71. I agree.

Lord Justice Underhill:

72. I agree that this appeal should be dismissed for the reasons given by Nicola Davies LJ, but in deference to the arguments before us I will add a short judgment on ground 1. I will for convenience refer to the dependant in a case of the kind we are concerned with as "the wife" and the deceased as "the husband", since this remains the most typical scenario (though no doubt decreasingly so).

73. Although Mr Kent floated an argument to the effect that the claimant was receiving damages for a loss which she had not in fact suffered, that point is squarely addressed by Smith LJ in the passage from her judgment in *Williams* quoted by Nicola Davies LJ at [32] above (see also *Arnup*, quoted at [39]), and it is clear how the law now stands. In truth, the real issue before us was not about whether she had suffered a loss but about whether in assessing that loss Cavanagh J should have adopted "Basis 2" rather than "Basis 1".

74. The starting-point must be that in a case where a wife has inherited from her deceased husband an asset which generates income without the need for any substantial work on

his part she cannot claim to have lost the income of which she previously enjoyed the benefit: as Staughton LJ said in *Wood* you cannot claim for loss of the eggs if you have inherited the goose.

75. That means that in cases like the present, where the inherited asset takes the form of a business in which at the time of his death the husband was himself actively working and thus contributing to the generation of the income of which she enjoyed the benefit, it is in principle necessary to distinguish between the loss of the income derived from those services and the loss of the income derived from the capital asset. That is clearly recognised in *Williams*. At [65] of his impressive judgment at first instance HHJ Hickinbottom emphasised that the widow's loss was not of "income derived from a capital asset" but was "the contribution of [the deceased]". At [44] of her judgment in this court Smith LJ approved that passage, and at [51] she expressed the distinction as being between "income which was derived from capital" and "[income] that was derived from labour". That is the same distinction as Bean LJ makes at [33] of his judgment in *Head* (albeit that that is not a FAA case), where he refers to the lost income being "the product of [the husband's] hard work and flair, not a return on a passive investment". (I would add that although in some of the cases the court places emphasis on the husband's special flair, that feature cannot be essential to establishing a loss, although it may be important in quantifying it: "special" or not, his services to the business have been lost.)

76. The real question is how that distinction works in the case of a small or medium-sized business with substantial assets, where the deceased (typically, but not necessarily, the founder) is not only the owner but the main person whose work and decisions generate the profits and thus the income which he takes out of the business and which the wife enjoys. Should some part of that income be treated as deriving from the assets – buildings, plant, goodwill, workforce – rather than from the services, however important, of the husband? On this the judgment of Staughton LJ in *Wood* is helpful. He says that in a case where a capital asset generates income by being used for the purposes of an "active" business, like a boarding-house or a farm, and where the deceased provided services for the purpose of that business,

> "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* [my emphasis] from capital which the dependants have inherited".

In the last paragraph of his judgment he says (in effect) that if the husband's income was no more than might be expected from doing the work without having any capital interest he would not regard it as incorporating an element of return on capital. I take that to mean that it is irrelevant that the capital has in one sense made the earning of the income possible. The income is only "derived from capital" if it is identifiable as having been received without the husband's services – in short, if it is passive.

77. It follows from that approach that Basis 1 is unobjectionable in principle. It simply seeks to establish what the income derived from the husband's services would have been. That will obviously sometimes be a very difficult exercise, depending on the circumstances of the case, and it is in such cases that Basis 2 will be a good proxy. A *leitmotiv* of the authorities is that the correct approach to the assessment of damages in this kind of case must depend on the particular facts (and, I would add, on what evidence

is available). Basis 2 was obviously appropriate in *Cape* because the claim was that the husband's flair and entrepreneurial skills would have *increased* the income from the existing property portfolio (see the opening lines of [15] of the judgment of Latham LJ): estimating the extent of any such increase would have been highly speculative. I am less clear why it was adopted in *Williams* (at [100] of his judgment in the present case Cavanagh J suggests a *prima facie* plausible explanation, but I am not entirely sure that it is reconcilable with the findings in that case): it may simply that it is the basis which the claimant advanced. However, all that matters is that nothing in *Williams* suggests that Basis 2 must in principle be preferred to Basis 1: Smith LJ's observations at [51] are directed to showing that Basis 2 was legitimate, and indeed right for the particular case, but not that its use is mandatory in all cases of this kind. Once that point is reached, I agree with Nicola Davies LJ that the judge in this case was perfectly entitled to adopt Basis 1.