<u>A Year in Fatal Accident Claims</u>

A talk by Charles Robertshaw & Achas Burin

1. This talk will be a deep dive into three cases concerning the Fatal Accidents Act 1976 ("the FAA") that have been reported over the last 12 months, namely:

    a. ***Hill v Witham*** [2021] EWCA Civ 1312;
    b. ***Rix v Paramount Shopfitting Company Co Ltd*** [2021] EWCA Civ 1172; and
    c. ***Chouza v Martins & Ors*** [2021] EWHC 1669 (QB).

2. Each case raises issues as to the correct interpretation of the FAA and the quantification of various types of claims thereunder. We will go through the facts and findings and high-light some practice takeaways from the decisions.

Hill v Witham [2021] EWCA Civ 1312

3. This Court of Appeal decision from July 2021 features 12KBW's very own Steven Snowdon QC and John-Paul Swoboda acting for the respondent (Mrs Witham).

<u>Brief Facts</u>

4. Mr Witham died of mesothelioma in January 2019 aged 55. He contracted mesothelioma as a result of asbestos exposure in the 1990s whilst working for D. He left a widow (C) but no biological children. However, from 2015, C and Mr Witham had fostered two children (a brother (A) and sister (B)). The children had significant care needs: A had autism spectrum disorder and ADHD; B had attachment disorder and ADHD.

5. The foster placement was made permanent in January 2018 and the terms of the foster care agreement with the council provided that:
    a. The council would pay the Withams a fostering allowance of £50k a year; and
    b. At least one parent must be available in respect of the fostering (i.e., only one parent could work while the other's time had to be devoted to parental care).

6. As a consequence, Mr Witham gave up work to stay at home with the children whilst C continued to work as paediatric diabetes nurse. When Mr Witham became seriously ill (and subsequently died), C gave up her work in order to care for the children.

<u>The Claim</u>

7. Foster children do not fall under the definition of 'dependants' in FAA s1(3) which states:

"(3) In this Act 'dependant' means –
(a) the wife or husband or former wife or husband of the deceased;
(aa) the civil partner or former civil partner of the deceased;
(b) any person who –
(i) was living with the deceased in the same household immediately before the date of the death; and
(ii) had been living with the deceased in the same household for at least two years before that date; and
(iii) was living during the whole of that period as the husband or wife or civil partner of the deceased;
(c) any parent or other ascendant of the deceased;
(d) any person who was treated by the deceased as his parent;
(e) any child or other descendant of the deceased;
(f) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to

12
King's Bench Walk

that marriage…"

8. Nevertheless, C claimed for the loss of dependency on Mr Witham staying at home to provide childcare whilst she worked.

9. The judge at first instance (Anthony Metzer QC sitting a Deputy High Court Judge) found that C was dependent on Mr Witham as the principal carer for A and B, which allowed her to pursue her career for the benefit of the whole family. Accordingly, he made a dependency award. However, he did not value the dependency based on C's loss of earnings. Instead, he valued the dependency based on the commercial cost of replacing Mr Witham's childcare (without any reduction to reflect the gratuitous nature of the care provided) and awarded £666k.

The Appeal

10. D appealed to the Court of Appeal on the following grounds:
    a. The judge was wrong to find that C had lost a dependency:
        i. It was A and B that had been dependent on Mr Witham, not C;
        ii. Foster children are not dependants as defined by s1(3) FAA;
        iii. Therefore, no loss of dependency can be awarded.

    b. Alternatively, the only loss to C was her inability to return to work but this was not recoverable under the FAA because it arose from a business relationship (being paid £50k a year to foster the children) and not from the relationship of husband and wife;

    c. In any event, C had suffered no loss because she continued to be paid £50k per year for the care of the children under the fostering agreement; and

    d. It was wrong to value the lost services by reference to the full commercial cost of childcare given that no such costs will ever be incurred by C (because she alone is required to care for the children now under the foster care agreement).

11. In relation to the argument that C's ability to work whilst Mr Witham cared for the children arose out of business relationship between C and Mr Witham, D relied upon ***Burgess v Florence Nightingale Hospital for Gentlewomen*** [1955] 1 QB 349. In that case, Mr Burgess and his wife were professional dance partners. Following his wife's death, Mr Burgess claimed for the loss of the fees and prize money he would have earned dancing with his wife. It was held that, in essence, the dance partnership of Mr Burgess and his wife was a business partnership and the services rendered by his wife could not be properly attributed to the relationship of husband and wife.

The Court of Appeal's Decision

12. The appeal was unsuccessful, and Nicola Davies LJ gave the lead judgment. In relation to whether C could make a dependency claim in respect of Mr Witham's childcare services case she stated:
    a. The assessment of the dependency is fact specific and in approaching such an as-

sessment, "*the court should identify and assess the loss which is truly suffered*";

b. "*The reality*" of the claim was that C had lost her career as a result of Mr Witham's death and subsequent loss of his services. She had been dependent on him to be able to pursue her career;

c. The decision to foster A and B was not a business decision:
   i. The Withams had a long and stable married relationship;
   ii. The decision to foster was a joint decision to have a family;
   iii. This was not 'incidental' to the husband-and-wife relationship, "*it was its core*".

d. In assessing the measure of the loss, the words of Latham LJ in ***Cape Distribution v O'Loughlin*** [2001] EWCA Civ 178 are relevant: "*there is no prescriptive method by which such damage is to be identified, or calculated…*";

e. What C lost was the benefit of her husband providing care for the children;

f. Consequently, she can claim the cost of securing those services to enable her to place herself in the same position as she was before her husband's death; and

g. The value of Mr Witham's services is not affected by the fact that C is now required to care for the children pursuant to the foster care agreement.

13. As to D's argument that C has suffered no loss because was being paid £50k by the council to look after the children, Nicola Davies LJ swiftly dismissed it on the basis that C had the benefit of the foster allowance both before and after the death, it had remained constant before and after the death, it does not affect C's loss of her husband's services.

14. As to the value of the lost childcare services, the general principles to be applied in valuing a dependency under the FAA can be summarised as follows:

a. There is no prescribed way of valuing a loss of services dependency (it used to be a question for the jury to determine);
b. If the court determines that a dependant has suffered a loss "*in money or money's worth*" then it must use "*whatever material appears best to fit the facts of the particular case in order to determine the extent of that loss*" – per Latham LJ in ***Cape Distribution;***
c. The usual starting point for valuing lost services is the commercial cost of replacing those services;
d. This is straightforward if a nanny or housekeeper already employed by the time of trial, the court can value the lost services by reference to the nanny or housekeeper's salary;
e. Where a parent or relative gives up work to care for children, the court can use the loss of earnings they incur as the measurement of loss, but it must be reasonable to give up work in the circumstances;
f. For example, it may not be reasonable where a parent gives up highly paid work when it would be cheaper to employ a full-time nanny;

g. But again, this is very fact sensitive. For example, in ***Mehmet v Perry*** [1977] 2 All ER 529 the claimant gave up his well-paid work to look after his 5 children. He was awarded his loss of earnings because it was thought to be in the best interest of the children by their family doctor, as two of the children had a rare blood disorder requiring constant care;

h. This somewhat offends the rule emphasised by Smith LJ in ***West Ambulance Services NHS Trust v Williams*** [2008] EWCA Civ 81: that a dependent cannot by their conduct after death of the deceased, affect the value of the dependency;

i. However, using lost earnings to value services dependency is now well established.

15. Turning back to Mrs Witham's claim, D argued that C had taken over care of the children herself and will not obtain commercial childcare assistance in future. Consequently, the court should look at the reality of the situation and award a gratuitous rate (with the usual 25% reduction) and not the full commercial care rate.

16. However, Nicola Davies LJ decided this issue as follows:

    a. *"It is the value of the services lost which requires assessment and compensation, not the value of how the dependent manages following the death"*;

    b. The judgment of O'Conner LJ in ***Housecroft v Burnett*** [1986] 1 ALL ER 332 is authority for the proposition that, where earnings have been lost, the commercial rate of care may still be appropriate. Whether it is appropriate is a fact-specific assessment for the court;

    c. Using the commercial rate of care was appropriate on these facts;

    d. Indeed, using C's loss of earnings to value the loss would have provided an even higher level of damages than the commercial care costs.

<u>Practice points</u>

17. As is emphasised in ***Hill***, it is a particular feature of FAA claims that the way the damages are calculated will be very fact specific. As Beldham LJ stated in ***Wood v Bentall Simplex Limited*** [1992] PIQR 332 (CA):

    "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 dependents under the Fatal Accidents Act."

18. It follows that caution should be employed when attempting to use a previously reported case as support for specific propositions in your cases. It is probably unlikely that any one reported authority will be a silver bullet for your case.

19. This is also an(other) example of an award in a FAA case that arguably does not 'feel right'. One's natural instinct is that a gratuitous care rate should be awarded given that Mrs Witham was destined to care for the children herself. However, the FAA is based on a statutory scheme not common law. Under the scheme it is "*the value of the services lost which requires*

assessment and compensation, not the value of how the dependent manages following the death".

20. Indeed, it is difficult to see facts on which a gratuitous rate would be used to value lost childcare services. We tentatively suggest that it might be awarded where:
    a. The children are a bit older;
    b. They only need minimal supervision before/after school when the surviving parent is at work;
    c. A relative is already established providing the necessary care to the children;
    d. It would be difficult to employ a nanny/housekeeper for just the short periods at beginning/end of each day; and
    e. The cost of employing a nanny/housekeeper all day would be unreasonable in the circumstances.

21. As to the argument that the foster care was part of a business relationship, that was always going to be difficult for D to succeed upon on the facts in ***Hill.*** But again, we tentatively suggest it may succeed on different facts e.g., where:
    a. A married couple have previously had their own children (especially when those children are now grown up);
    b. The couple have a prior history of foster care placements for number of years; and
    c. The prior and current foster children have limited care needs and/or are only placed with the foster parents for short periods at a time.

Paramount Shopfitting Co Ltd v Rix [2020] EWHC 2398 (QB)

Brief Facts

22. Mr Martin Rix ("MR") died in April 2016 from asbestos-related mesothelioma at the age of 60. He had contracted mesothelioma after being exposed to asbestos whilst working for D as a carpenter/shopfitter in the 1970s. The claim was brought by MR's wife Mrs Eunice Rix ("C") and liability was admitted by D.

23. After leaving his employment with D, MR built up a successful business called MRER Ltd which carried out construction work, joinery and the manufacture of granite worktops. The judge at first instance (Cavanagh J) found that much of the success of the business could be attributed to MR's skill and acumen and accepted that MR had wanted to build up a successful and stable business which he could pass on to his two sons.

24. C was a major shareholder in the company. The shareholding produced dividends. C also drew a salary as director but never worked in the business. Cavanagh J 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. MR was the "*the main breadwinner*" in the marriage and Cavanagh J found that prior to her husband's death C was financially dependent upon him.

25. At the time of MR's death, C had a 40% shareholding in the company and her sons each owned 10%. Following MR's death, C inherited his share of the business and accordingly her shareholding increased to 80%.

26. Following MR's death, his son took over as managing director and managers were ap-

pointed in the joinery and laminates parts of the business to carry out some work previously done by MR. The business continued to thrive with turnover and gross profit increasing each year. By 2019, the gross profit of the business was over £500k.

The Claim

27. C argued for a financial dependency claim valued on two alternative bases:

Basis 1 – her financial dependency should be calculated by reference to her share of the annual income which MR and C would have received from the business had he lived; or

Basis 2 – the financial dependency should be quantified by reference the annual value of MR's services to the business as managing director. The value should be calculated by reference to the annual cost of employing a replacement managing director.

The First Instance Decision

28. Cavanagh J made the following findings at first instance:
    a. C had suffered a loss of financial dependency notwithstanding that the business is now more profitable than it was when MR died:
        i. The business produced an income for the family;
        ii. This was as a result of MR's "*skill, energy, hard work, and business flair*";
        iii. Although C was a shareholder and director, the reality was that it was MR, not C, who was responsible for the success of the business;
    a. At the time of MR's death, C had a reasonable expectation of pecuniary advantage from the continuance of the life of MR because if he had lived his management of the business would have produced an income for C;
    b. The value of the dependency is fixed at death, the health of the business after the death is irrelevant;
    c. In particular, the value of a dependency is not affected by any increase in the profitability of the business; and
    d. C's interest in the business was not akin to a capital or income-producing asset. The business was not a 'money generating beast' that would generate money regardless of who was in charge of it.

29. Accordingly, in Cavanagh J's view, this was not a case in which the income was the investment return on a passive holding in a business which would continue to yield the same income irrespective of the deceased capacity to work. If it had been, then the earnings would not have been part of C's financial dependency.

30. Cavanagh J found that the correct approach to quantification of the dependency was as follows:
    a. The court must take a realistic and common-sense approach, separating out income which was derived from capital and income which was derived from labour;
    b. Only the income derived from labour forms part of the dependency;
    c. In a 'family business case' the objective is not to compare the income for the dependant from the business before and after the death and award any shortfall. The income from the business after the death is irrelevant;

d. Consequently, there can be substantial dependency awards even though the business has continued to thrive after the death;
e. 70% of the business' annual profit represented the income derived from MR's labour. Applying the usual *Harris v Empress Motors* percentage, C's annual dependency was two thirds of this figure. This gave an annual dependency of £64,616.

31. The only income that was disregarded by Cavanagh J for the calculation of the dependency was rental income from properties owned by MR that had passed to C on his death and income from C's two small pensions.

<u>Grounds of appeal</u>

32. D appealed on the following grounds:

Ground 1: The judge erred in treating all of the profits generated by the company as providing the basis for the calculation, without regard to whether those profits survived his death and continued to accrue to her. If there was any loss of dependency, it should have been valued using Basis 2.

Ground 2: The judge erred in law in treating the claimant's entitlement to a share of the profits of the company based on her own shareholding in the company as if it had belonged to MR.

Ground 3: The judge erred in law in confining the credit for surviving income to rental income and C's state pension and failing to take account of the claimant's surviving income in the form of a share of profits in the company and her director's salary.

<u>The Court of Appeal decision</u>

33. Lady Justice Nicola Davies, who again gave the lead judgment, started by reviewing the relevant case law and identifying the following principles as to the correct approach of the to the assessment of the damages to be awarded under section 3 FAA:

a. 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?"*;

b. The assessment is dependent upon the facts of the particular case;

c. 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;

d. 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;

e. 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; and

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

Ground 1 decision

34. Nicola Davies dismissed ground 1 on for the following reasons:

a. In cases where the inherited asset takes the form of a business 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.

b. 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.

c. 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.

d. Income is only derived from capital if it is identifiable as having been received without the labour and services of the deceased. In short, if it is passive.

e. On the facts of this case, there was no identifiable element of the profits which was not touched by the management of Mr Rix.

f. 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.

g. That being so, there can be no sound objection to Basis 1 which seeks to establish the income derived from the deceased's services.

h. There are other cases where Basis 2 will be an acceptable proxy. Each case has to turn on its own facts.

i. On the facts of this case, 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.

j. The value of the dependency is to be assessed at the date of death. 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.

k. There will be cases in which the valuation of the loss of dependency is greater than any financial loss sustained, but that is what Parliament decided.

Ground 2 decision

35. As to ground of appeal 2, Nicola Davies LJ confirmed:
    a. the correct approach for the courts was that they 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.

    b. the reality in the present case was that the salary and dividends which Mrs Rix received were the result of MR's work in the company, none of it represented her own earnings for work done.

    c. In those circumstances it was correct that the salary and dividends should be included in the loss of dependency.

    d. The approach of the trial judge was consistent with the authorities and reflected the reality of the case. There was nothing in this ground of appeal.

Ground 3 decision

36. As ground 3, Nicola Davies LJ confirmed:
    a. The judge at first instance found that the income of Mr and Mrs Rix, in the form of salary, dividends and profits from the business, was wholly attributable to Mr Rix's endeavours and earning capacity;

    b. Consequently, no portion or percentage of Mrs Rix's post-death income can be independent of the deceased and unaffected by his death.

    c. It follows that there can be no deduction of monies received from MRER by Mrs Rix post-death.

    d. 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.

Practice Points

37. As ever for FAA claims, the court placed a strong emphasis on each case turning on its own facts. However, this is another example of the FAA dependency claim that does not feel consistent with a normal interpretation of loss given that the business thrived following MR's death and C continued to reap the benefits. This difficulty was acknowledged by Nicola Davies LJ when she stated, "*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*".

38. As is apparent from the judgment, dependency claims following the death of a 'wealth creator' who ran a business will require very close analysis of the evidence of the deceased activities in the business and their consequences on the profit of the business. We suspect that in any such claim the parties are likely to require expert accountancy evidence to value the deceased's services and identify any income that is solely from capital rather than services rendered.

39. The same approach was applied in a 'lost years' case (see *Head* v *Culver Heating Co Ltd* [2021] EWCA Civ 34). Thus, if there are findings of fact to support such an award, the court will not differentiate between living mesothelioma claims and those post-death. In *Head*, the Court of Appeal allowed an appeal that was reopened under CPR 52.30, i.e. where there is a real injustice. *Head* confirmed the distinction between income-producing assets and labour. In family business cases, evidence going to this distinction will be crucial to the final award.

Chouza v Martins & Ors [2021] EWHC 1669

40. This is the first instance decision of Mr Justice Martin Spencer in the High Court which features John-Paul Swoboda representing the Claimant. It is an interesting and wide-ranging decision which is worth considering in detail. However, for the purpose of this talk, we will focus on three elements on the case:

    a. The PSLA award made in respect of fear and anguish very shortly before death;
    b. Whether it was appropriate to depart from the conventional percentages for financial dependency;
    c. Whether the deceased's sons had a dependency claim due to giving up work to run the family business.

<u>Brief facts</u>

41. In February 2015, Mr Rodriguez was a front seat passenger in a minibus when it was hit by an articulated goods vehicle, and he was killed aged 50. At the time of his death, he had been married to C for 20 years and they had 4 children (3 of whom were adults at the time of death, the other was 11 years old).

42. Mr Rodriguez had set up a business providing HGV vehicles and other plant for use in the construction industry. At the time of the death, the business was in significant debt and was insolvent.

43. But for his death, it was Mr Rodriquez's intention to wind up the company and pay off the debts in 2018 (when certain transport licences could be sold along with the vehicles making them more valuable). At the time of his death, he was providing his personal services as a plant operator on construction sites and putting the money he made through his business to keep it going.

<u>The PSLA claim</u>

44. At the time of the accident, the minibus was going around 65kph and the articulated lorry was approaching on the wrong side of the road. Spencer J found that Mr Rodriguez saw the lorry and shouted "*he is coming towards us*" whilst an expert in Emergency Medicine opined that:
    a. Mr Rodriguez would have been aware that a severe injury would have been inevitable 1-5 seconds before impact;
    b. He would have experienced intense fear during this period; and
    c. He either died instantly on collision or was conscious for only a split second following the collision (and died quickly thereafter).

45. Based on this evidence, C sought £2,500 for PSLA in respect of the intense fear experienced prior to impact. D argued that intense fear does not amount to pain or suffering or loss of amenity and therefore no award you be allowed.

46. Spencer J found that PSLA should include fear and anguish prior to physical injury and awarded £500.

47. This appears to directly contradict the House of Lords decision in ***Hicks v Chief Constable of South Yorkshire Police*** [1992] 2 All ER 65, in which the House of Lords found that no damages were recoverable where a deceased suffered for a matter of seconds before unconsciousness and death. No actionable loss could be proved because the period of suffering was part and parcel of the actual death.

48. ***Hicks*** was not referred to Spencer J during the rial and consequently appears that his PSLA award was made in error.

Departing from the usual financial dependency %

49. At trial, C made the usual claim for financial dependency on Mr Rodriguez's earnings. However, she sought to depart from the percentage ratios normally applied to such financial dependency claims which were set down in ***Harris v Empress Motors*** [1984] 1 WLR 212 and which limit a financial dependency to:
    a. 75% of a deceased partner's income if there are dependent children; and
    b. Two thirds of a deceased partner's income if there are no dependent children.

50. C asked for a financial dependency equivalent to 90% of Mr Rodriguez's pre-retirement income and 75% of his post-retirement income. C relied on five factors to support a finding that Mr Rodriguez did not spend much of his income on himself and therefore a greater percentage of his income than usual was used for the benefit of his dependents:
    a. Mr Rodriguez worked away from home for long periods. During that time his travel, accommodation and meals were all paid for by his contractors;
    b. He spent very little on himself in any event. C gave evidence to this effect herself stating that he had no hobbies, didn't buy new clothes etc.;
    c. He would have paid for the youngest child's education; and
    d. He had lavished expensive gifts on his children over the years (trips abroad, quad bike, car, motorcycles etc.).

51. D responded by arguing that:
    a. There was a complete lack of documentary evidence to support any change in the usual percentages including a lack of bank statements, phone bills, internet bills, and other household bills;
    b. Simply asserting Mr Rodriguez was frugal does not equate to justifying a 90% dependency; and
    c. He was actually more likely to spend money on himself whilst he was away from home (e.g., for post-work drinks etc.).

52. On deciding this point, Spencer J reminded himself of the judgment of O'Connor LJ in ***Harris*** which states:

> "*The percentages have become conventional in the sense that they are used unless there are striking evidence to make the conventional figure inappropriate because there is no departure from the principle that each case must be decided upon its own facts*"

53. However, he also noted Parker LJ's comments in ***Owen v Martin*** (1992) WL 895670:

> "*O'Connor LJ did not intend to lay down any rule that in the absence of striking evidence to the contrary two thirds of net income must be regarded as the value of the dependency I have no doubt. If he did he would clearly have been wrong. It is clear that the value of the dependency cannot be taken at such an arbitrary figure and must always depend on the facts.*"

54. Spencer J concluded that:
    a. If a court decides to use a percentage approach (rather than 'a tedious examination of the household expenses') it may adjust the percentages to reflect any general evidence about the lifestyles of the family;
    b. It is not necessary to "*descend to the nitty-gritty of the family finances*" to depart from the conventional percentages;
    c. The appropriate dependency percentages to use were 85% pre-retirement and 70% post-retirement.

<u>Practice points: The dependency %</u>

55. This appears to be a tough decision for D. The only documents with which to test C's evidence as to Mr Rodriguez's expenditure were in C's control and were not before the court. D made complaints about this at trial, but Spencer J stated that the disclosure issue should have been sorted out well before trial and, if dissatisfied with the disclosure, D should have sought the relevant orders from the Master.

56. It follows that, if C seeks to depart from usual financial dependency percentages and does not provide appropriate disclosure (bank statements, household bills etc.), defendants must make an application for specific disclosure for those documents as soon as possible and in any event in good time before trial (if the claimant does not agree to the disclosure promptly).

57. If a modest adjustment to the conventional percentages appears to be justified on the evidence, this could be agreed between the parties. Spencer J's indication is that the court will be unwilling to descend into the nitty-gritty of family finances.

Dependency when give up work to run the family business

58. Two of Mr Rodriguez's sons gave up work to assist with the family business following his death.

59. Firstly, David left a training contract with Deloitte to help with the business. Despite returning after 5 months to complete his training, there was no permanent position for him at the end of the contract. He left Deloitte and took up employment in the hotel industry earning a similar sum as he would have done if he had stayed at Deloitte. He claimed the cost of the disruption to career caused by Mr Rodriguez's death in the sum of €96k.

60. Secondly, Lucas gave up an internship as a heating engineer to help with the business. He claimed £49k of lost income as a heating engineer whilst working for the family business.

61. C argued that:
    a. All that is required to claim a dependency under FAA 3(1) is to identify the loss of "*a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased*" – per ***Pym v The Great Northern Railway Company*** [1863] 4 B&S 396;

    b. If the court determines that a dependent has suffered a loss "*in money or money's worth*" then it must use "*whatever material appears best to fit the facts of the particular case in order to determine the extent of that loss*" – per Latham LJ in ***Cape Distribution***

    c. The pecuniary advantage here was an ability to a pursue career whilst their father ensured family's financial stability by running the family business; and

    d. Their loss arose from a familial relationship and was not a business loss.

62. D argued that:
    a. These are claims for loss of earnings as a result of death and are not recoverable in law under the FAA;
    b. Neither David nor Lucas was financially dependent on the deceased at the time of death; and
    c. It was not reasonable for David and Lucas to give up their jobs to run a company that was insolvent (and whose debts were not covered by personal guarantees).

63. Spencer J found for D on the issue stating:
    a. In this case, Mr Rodriguez kept the business going by using the income generated from his personal services as a plant operator;
    b. It was the loss of this income that made the business unviable without David and Lucas intervening;
    c. David and Lucas' services to the business were a replacement of Mr Rodriguez's

income to the business;

d. That loss of income has already been awarded in the form of the financial dependency claim; and

e. This means David and Lucas' claims are double-recovery and no award should be made.

Conclusion

64. Thank you for taking the time to read this far. If you have any questions about the talk, or would like to discuss any related matters, please do not hesitate to contact us at the email addresses below.

Charles Robertshaw: robertshaw@12kbw.co.uk
Achas Burin: burin@12kbw.co.uk