QUEEN'S BENCH DIVISION

1–2; 24 July 2009

KNIGHT
v
AXA ASSURANCES

[2009] EWHC 1900 (QB)

Before Mrs Justice SHARP

Insurance (motor) — Direct action against insurers — English victim injured in France by French tortfeasor — Policy governed by French law — Action brought against insurers in England — Whether damages to be assessed under English law or French law — Whether pre-judgment interest to be governed by English law or French law.

This was the trial of two preliminary issues on the measure of damages and interest in a claim for damages in England arising out of a road accident occurring in France.

Mr Knight, who was domiciled in England, was injured in a road accident in France on 18 March 2005. He was knocked down by a car driven by M Francis Poutot (FP), a French national, domiciled in France. FP was insured against liability for third party claims with the defendant, a French insurance company, under a policy governed by French law. Mr Knight commenced proceedings against the insurers in England and liability was admitted. The preliminary questions were: (1) was the assessment of damages to be governed by English law, as Mr Knight contended, or by French law, as the insurers contended; and (2) to what extent should the award of pre-judgment interest be governed by English law and/or French law? In *Maher v Groupama Grand Est* [2009] Lloyd's Rep IR 659 those questions were considered by Blair J. The learned judge held that that damages were to be assessed by reference to English law, and that both English and French law were potentially relevant to the assessment of pre-judgment interest on those damages.

In the present case expert evidence showed that under French law the insurer was required to tender an interim offer, nine months after the accident date; and a final offer, six months after the medical examination, failing which interest at twice the statutory rate was awarded. It was also common ground that the English court had jurisdiction under articles 9(1)(b) and 11(2) of Council Regulation (EC) No 44/2001, and that there was a direct right of action against an insurer in French law based on the tortious liability of the policyholder and the coverage of the policy.

————*Held*, by QBD (SHARP J) that the assessment of damages was to be governed by English law and that the award of pre-judgment interest was governed by both English law and French law.

(1) The issue in the present case was the quantification of the claim for damages. That was a tortious issue, not a contractual one and had nothing to do with the contractual relationship between the assured and insurer. Damages in tort were a procedural issue, to be assessed in accordance with English law (*see* paras 25 and 30);

————*Maher v Groupama Grand Est* [2009] Lloyd's Rep IR 659, followed; *Harding v Wealands* [2007] 2 AC 1, applied; *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387, applied;

(2) Pre-judgment interest was to be characterised as an issue in tort, and such a head of loss was a part of French substantive law. The assessment would be governed by English law (*see* paras 31, 35, 36 and 37);

————*Maher v Groupama Grand Est* [2009] Lloyd's Rep IR 659, followed.

The following cases were referred to in the judgment:

Bernaldez Case C-129/94 [1996] ECR I-1829;

FBTO Schadeverzekeringen NV v Odenbreit Case C-463/06 [2008] Lloyd's Rep IR 354;

Ferreira Case C-348/98 [2000] ECR I-6711;

Harding v Wealands (HL) [2007] 2 AC 1;

Jefford v Gee (CA) [1970] 1 Lloyd's Rep 107; [1970] 2 QB 130;

Kuwait Oil Tanker Co SAK v Al Bader, *The Independent*, 11 January 1999;

Macmillan Inc v Bishopsgate Investment Trust plc (No 3) (CA) [1996] 1 WLR 387;

Maher v Groupama Grand Est [2009] Lloyd's Rep IR 659;

Midland International Trade Services Ltd v Al Sudairy, *Financial Times*, 2 May 1990;

Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC (The Mount I) (CA) [2001] 1 Lloyd's Rep 597.

Robert Weir, instructed by Bond Pearce LLP, for the claimant; Philip Mead, instructed by Pierre Thomas & Partners, for the defendant.

Friday, 24 July 2009

JUDGMENT

Mrs Justice SHARP:

Introduction

1. This claim for personal injuries is brought by the claimant, Mr Knight, who is domiciled here, directly against the French insurers of a French citizen domiciled in France, who knocked Mr Knight down in a car accident which occurred in France. Liability is admitted, and I am asked to determine two preliminary issues of law: (i) is the assessment of damages to be governed by English law, as the claimant contends, or by French law, as the defendant contends; and (ii) to what extent should the award of pre-judgment interest be governed by English law and/or French law?

2. It is an unusual feature of this case that I am being asked to decide these questions shortly after essentially identical questions on materially identical facts were decided by Blair J in *Maher v Groupama Grand Est* [2009] Lloyd's Rep IR 659. His answer was that damages are to be assessed by reference to English law and that both English and French law are potentially relevant to the assessment of pre-judgment interest on those damages. I am told that he gave permission to appeal on both points, and that the appeal is due to be heard in October 2009.

3. Neither side has asked that this hearing await the outcome of the appeal however. While the claimant is content with Blair J's answer to the first question, he contends his answer to the second question was wrong (because it is said, pre-judgment interest should be assessed according to English law only). The defendant is content with Blair J's answer to the second question but seeks to argue his answer to the first question was wrong on grounds which were not, I am told, put forward in *Maher.*

4. The agreed facts in a little more detail are these. The claimant is English and as I have said is domiciled here. On 18 March 2005 he was on holiday in France in Alpe d'Huez. He was waiting to cross the road when he was knocked down by a car registered in France driven by M Francis Poutot (FP), a French national, domiciled in France. The defendant, a French insurance company, insured FP for third party claims arising out of the use of his car under a contract of insurance, which was in force at the material time. The contract of insurance is governed by French law.

5. On 12 March 2008 the claimant brought this action against the defendant for damages for personal injuries. Liability has been admitted, presumably because the French law applicable to the circumstances of the accident (the Loi Badinter) imposes a form of strict liability on the driver. The outstanding issues to be resolved therefore are quantum and costs. No issue has been raised at any stage by the defendant as to its indemnity obligations or coverage under the contract of insurance with FP.

6. At the hearing on 8 December 2008 when interim judgment on liability was entered, Master Foster ordered the trial of three preliminary issues:

> (i) To what extent are damages to be assessed by reference to English law and/or French law?
>
> (ii) To what extent should the question of the award of interest on damages be determined in accordance with English law and/or French law?
>
> (iii) To what extent should the question of recoverability of costs *inter partes* be determined according English law and/or French law?

7. I do not have to decide the third question since it has now been conceded by the defendant, in a letter dated 29 June 2009, that the recovery of costs is a procedural issue, and therefore falls to be determined by English law.

8. In *Maher*, there was no expert evidence before the court. In this case, expert evidence was obtained for this trial on relevant issues of French law from M Paris, for the claimant, and from M Segard for the defendant. Both are senior French lawyers. They have prepared a joint expert report dated 29 June 2009, from which it is apparent that there is no difference between them on the relevant principles of French law which they have been asked to consider. Neither expert gave evidence in person.

9. I should mention at this stage their joint conclusions on French law on the payment of interest. The agreed expert evidence is that French law provides for post-judgment interest from the date of the judgment, and does not generally provide for pre-judgment interest in tort. However, pre-judgment interest is awarded in the case of road traffic accidents, under certain conditions. The insurer should tender two offers: an interim offer, nine months after the accident date; and a final offer, six months after the medical examination that determined the consolidation date. Interest at twice the statutory rate is awarded against the insurer only when those steps either were not taken, or were not taken in due time. Pre-judgment interest is then awarded at twice the statutory rate on all heads of claim (pecuniary and non-pecuniary) including amounts paid to third parties for medical and hospital expenses. These rules appear in the Civil Code and the Insurance Code ("Codes des assurances") and are treated as rules of substantive law.

The jurisdictional basis for the claim: Brussels I

10. As in *Maher*, there is no dispute about jurisdiction. Articles 9(1)(b) and 11(2) of Brussels I Regulation (Council Regulation (EC) No 44/2001 on jurisdiction and the enforcement of judgments in civil and commercial matters) entitle an injured party to sue an insurer direct on matters relating to insurance, in the place where the injured party is domiciled, provided that direct action is permitted under national law. This was confirmed by the European Court of Justice (ECJ) in *FBTO Schadeverzekeringen NV v Odenbreit* Case C-463/06 [2008] Lloyd's Rep IR 354, ECJ. Mr Robert Weir who appears for the claimant suggests it is not clear whether the ECJ meant the national law where the accident occurred, or where the insurer is domiciled, or the law governing the contract of insurance. But in this case, it does not matter, because the answer to all three possibilities is French law.

11. It is common ground between the experts that there is a direct right of action against an insurer in French law, which is regulated by article L 124-3 of the Insurance Code. The evidence of both experts is that the direct right of action is a "dual" claim. It is based on the tortious liability of the policyholder but also requires a valid contract of insurance. If a direct claim against an insurer was brought by an injured party in France, the French court would assess the liability of the tortfeasor on ordinary tortious principles and then hold the insurer liable for such loss, subject to any issue of indemnity or coverage arising under the contract of insurance.

Question 1

The core reasoning in *Maher*

12. In paras 20 and 21 of *Maher* Blair J explained what had led him to the conclusion that English law applied to the assessment of damages in that case:

> 20. I take as the correct starting point the law as stated in *Dicey, Morris and Collins* (*ibid*) para 35-043, which is based on the majority view expressed in Australian decisions. Whether a claim can be brought by an injured party directly against the wrongdoer's insurers is a contractual question, governed by the law applicable to the insurance contract (and see para 35-065). It is not in dispute in this case that such a claim can be brought under French law. Subject to that, I agree generally with the claimants' approach. If for example, the insurers were in dispute liability under the policy, that question would fall to be determined under French law as the law governing the policy. But in the present case there is no such dispute. It is not suggested that the policy (a copy of which is not before court) limits the insurer's liability in any relevant way. [counsel for the defendant] does not argue with [Counsel for the claimant]'s assertion that the defendant's agreement was to indemnify the insured against liability in respect of claims wherever brought. Liability is admitted, and indeed judgment has been entered by consent. The result is that the insurer has to meet directly the wrongdoer's liability which in this case is a tortious one. For the purposes of the assessment of damages, the insurer's liability should equally be seen as a liability arising in tort. The conclusion is entirely consistent with the *Through Transport Mutual Insurance* case.

21. This approach receives some support from the Report of the Law Commission on Choice of Law in Tort and Delict (Law Com No 193 (1990)). It was this report which led in due course to the enactment of the Private International Law (Miscellaneous Provisions) Act 1995. The Commission's initial view was that a direct action against an insurer should be characterised as a matter in contract because of the connection to the contract of insurance. But after the consultation process, it suggested that if the underlying claim against the wrongdoer would be in tort (as it is here) then "an action against the insurer may be better seen as an extension of this tortious action". Paragraph 3.51 reads as follows:

> "In some jurisdictions it is possible for the injured party to bring a direct action against the wrongdoer's insurer rather than the wrongdoer himself. There are a number of ways in which the courts of other jurisdictions have characterised this issue. It has been seen as a tortious question, governed by the applicable law in tort; as a contractual question governed by the proper law of the insurance contract; and as a procedural question governed by the *lex fori.* The Consultation Paper tentatively concluded that the question whether the claimant can sue the wrongdoer's insurer rather than the wrongdoer himself was a matter for the proper law of the wrongdoer's insurance contract rather than a question to be decided by the applicable law in tort or delict, although it also said that there did not appear to be an unanswerable argument in favour of any approach. In the light of the views expressed by consultants, we are not convinced that the tentative conclusion adopted in the Consultation Paper is necessarily the ideal one. The direct action is not in any real sense contractual, since the claimant is not suing a party with whom he is in privity of contract. It is true that neither has a wrong been perpetrated by the insurer on the claimant. However, the action against the wrongdoer's insurer may be more akin to a claim in tort than contract, since

what would normally be the claimant's primary remedy would be a tortious action against the wrongdoer. If the claimant's action against the actual wrongdoer would be tortious, an action against the insurer may be better seen as an extension of this tortious action. Although the direct action cannot exist in the absence of the contract of insurance, neither would the direct action exist in the absence of any wrongdoing. While to apply a law other than the law of the insurance contract would expose the insurer to a liability greater than he contemplated, nevertheless, depending on where the insurer carries on his activities, his expectations might reasonably be expected to include not only the potential liability of the insured under the law of that jurisdiction to which cover extends, but also any potential direct liability. We have recommended that the matter should not be included in implementing legislation. The issue is of hardly any practical importance, there being no reported case in England or Scotland. We feel that the matter can be left to the courts to decide if called upon to do so."

The question whether the claimant can sue the wrongdoer's insurers is (as I have said) one for the law applicable to the insurance contract. But subject to that, this passage remains instructive when read as dealing with the stage (1) issues identified above.

The parties' principal submissions

13. The claimant's principal submission on question 1, in short, is that Blair J's conclusions in *Maher* were right for the reasons he gave. Since there is no material distinction between that case and this on the facts, this court should reach the same conclusion as he did, namely that for the purposes of the assessment of damages, the insurer's liability should be treated as arising in tort. This case, like *Maher* predates Rome II (Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations) and therefore the Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act") applies. Since, as Blair J said in *Maher* at para 13, "it is well established under English conflict of law rules that the assessment of damages in tort is a procedural matter and so governed by the law of the forum" (see for example, *Harding v Wealands* [2007] 2 AC 1), it follows that English law applies to the assessment of damages in this case.

14. Mr Weir submits the claimant is able to establish on the agreed expert evidence that French law recognises the various heads of loss claimed in this case. Accordingly the assessment of quantum should proceed according to English law rules.

15. The defendant's principal submission, in contrast, is that the court in this case should characterise the entire cause of action as contractual, and not characterise the underlying conduct which gives rise to the liability to pay damages. Mr Philip Mead who appears for the defendant (instructed by the same firm which represented the defendant in *Maher*) suggests the three-stage process which must be undertaken when identifying the appropriate law in a case such as this, including the process of characterisation "falls to be undertaken in a broad internationalist spirit in accordance with the principles of conflicts of laws of the forum, here England" (per Mance LJ in *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC (The Mount I)* [2001] 1 Lloyd's Rep 597 at para 26).

16. He says there are two matters which were not put before Blair J for his consideration in *Maher*: the relevant European legal context; and expert evidence as to the relevant French law, and he submits consideration of those matters should persuade this court to differ from the court's reasoning in *Maher.* Detailed consideration, he says, of the relevant directives and of the legislation implementing them in both France and England demonstrates their purpose is to ensure via the contractual route that the injured party can, for practical and pragmatic reasons, sue the insurer direct in the injured party's domicile.

17. More specifically Mr Mead submits that when one looks at the defendant's civil liability as the provider of insurance in accordance with article 3(1) of the First Motor Insurance Directive (72/166/EEC), civil liability must mean, in this context, both liability and quantum. He submits the case law of the European Court of Justice is consistent with this proposition: see *Bernaldez* Case C-129/94 [1996] ECR I-1829; and *Ferreira* Case C-348/98 [2000] ECR I-6711. The same concept of civil liability is referred to in the Fourth Motor Insurance Directive (2000/26/EC): article 3. He submits this analysis is supported by the expert evidence of the relevant French law in this case, from which it is apparent that the direct right of action against the insurer, as implemented in French law (where the entitlement to rely on the cause of action is not severable from the quantification of the loss), is not severable into separate issues of liability and quantum either.

18. If, as he submits, the substantive duty to pay damages arises out of or as a consequence of a cause of action characterised by English law as

contractual then it follows from Rome I (the Rome Convention on the Law Applicable to Contractual Obligations) and the provisions of the Contracts (Applicable Law) Act 1990 — which implements Rome I in this jurisdiction, that French law applies to the assessment and quantification of damages in this case.

19. Looking at the matter from another perspective, the purpose of the provision of compulsory motor insurance and the harmonising provisions between member states is not, Mr Mead submits, to enable the injured party to "cherry pick" as to which system of law should govern any particular issue (here the assessment of damages). Indeed he suggests it would be anomalous if the injured party could do so. The analysis in *Maher* depends upon characterisation of the underlying conduct which gives rise to the liability to pay damages. If this is correct, he submits, the characterisation of the claim against the insurer would depend on an analysis of the underlying cause of action against a non-party, and may lead to different answers depending on the facts and whether liability arose as a result of a tort, or a breach of contract, or arose as a result of no fault liability (as here) or act of God with resulting uncertainty for insurers.

The claimant's three "fall-back" submissions

The first "fall-back" submission

20. Mr Weir submits that even if the court considers it appropriate to characterise the entire cause of action, a direct right of action should more properly be characterised as tortious rather than contractual by analogy with the principles underlying vicarious liability. In this context he refers me to the commentary in *Dicey, Morris and Collins on the Conflict of Laws* (footnotes 18 and 19 at para 35-043); and to the analysis of the Law Commission (Law Com No 193 (1990)) as set out in *Maher* at para 21. See also Cheshire, North and Fawcett, *Private International Law*, 14th Edition, at page 678.

21. Mr Weir also suggests it would be an odd result if the rules governing contract which presuppose party autonomy (see Mance LJ at para 29 in *Raiffeisen*) are to be imposed on the action where the principal (indeed the only) issue will invariably be the liability — breach, causation and damages — of the policyholder to the injured person, who is not a party to the contract.

The second "fall-back" submission

22. Even if the court characterises the entire cause of action as contractual, Mr Weir submits an analysis of Rome I, the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, particularly regulations 4 and 7, and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 demonstrates that Rome I does not apply to it.

The third "fall-back" position

23. Finally, even if Rome I does apply, Mr Weir submits first, that the effect of article 1(2)(h) of Rome I is that in a case brought in England, the scope of Rome I does not extend to the assessment of damages; and second, that article 10(1)(c) of Rome I does nothing to alter the English common law substance/procedure divide anyway. See *Dicey, Morris and Collins* at para 32-201.

Discussion

24. In *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387 at page 418 in a passage also cited in *Maher* at para 18, Aldous LJ said as follows:

> I agree with the judge [Millett J] when he said: "In order to ascertain the applicable law under English conflict of laws, it is not sufficient to characterise the nature of the *claim*: it is necessary to identify *the question at issue*". (Millet J's emphasis.) Any claim, whether it be a claim that can be characterised as restitutionary or otherwise, may involve a number of issues which may have to be decided according to different issues of law. Thus it is necessary for the court to look at each issue and to decide the appropriate law to apply to the resolution of that dispute.

See also Auld LJ at page 407B; and Staughton LJ at pages 391H and 399C.

25. As Blair J went on to say in *Maher*: "Whether a particular issue is properly to be characterised as one in tort or one in contract depends therefore on what the issue is." The issue in this case is so it seems to me *the quantification of the claim for damages*. There is, as I have said, no issue between the parties as to the defendant's obligation to indemnify or coverage under the contract of insurance. The only question for the English court to resolve therefore is the amount to be awarded to the claimant for the injury caused to him by the tortfeasor's admitted wrongdoing. And that is a tortious issue, not a contractual one. The insurer's liability is for the policyholder's tort and has nothing to do with the contractual relationship between the insured and the insurer. I respectfully agree therefore both with Blair J's conclusions and the reasons given for them.

26. Considerations of the European legal context and the expert evidence in this case do not, in my view, lead to any different conclusion. The regulations and implementing legislation which I have been taken through in very great detail seem to me

merely to support an argument that Blair J accepted (at para 20) as the correct starting point, namely whether a claim can be brought by an injured party directly against the wrongdoer's insurers is a contractual question governed by the law applicable to the insurance contract. I see no inconsistency between the conclusion I have reached and the applicable French law, which itself analyses the direct right of action as a dual claim with two constituent parts.

27. In my view, it is also misconceived to regard this claimant as "cherry picking" in any pejorative sense. Brussels I permits an individual to bring a direct action against the insurer in the member state of his domicile; and it follows that the insurer will have to submit to the procedural rules of the member state in which it is sued. The claimant (as the weaker party) is merely making use of a remedy expressly provided for within the European framework, as he is perfectly entitled to do. The insurer can no more complain of the consequences as to how this particular procedural question is to be resolved than it could complain, for example, about English law rules of procedure on cross-examination.

28. I have mentioned the claimant's three "fall-back" submissions. But in view of the conclusion I have reached on question 1, it is not necessary for me to say anything further about them.

29. I should however deal with a discrete submission made by Mr Mead, that Blair J made an error of law in his judgment as to a jurisdictional issue, which so Mr Mead suggests fundamentally undermines his reasoning. At para 17 Blair J said as follows:

> . . . if this claim had been brought against the tortfeasor or his estate, there is therefore no doubt that damages would have been assessed by reference to English law . . .

30. Mr Mead submits that Blair J misunderstood the basic jurisdictional rule (in article 2 of Brussels I) that a defendant should be sued in the member state of his domicile. The point is a straightforward one in jurisdictional terms and it would be surprising if Blair J had made such an error. Be that as it may, I do not think that he did. It seems to me that when that sentence is read in the context of the rest of the judgment (see for example Blair J's discussion of the defendant's arguments on jurisdiction at paras 22 and 24) he was doing no more and no less than confirming that in a notional claim brought against a defendant in England governed by foreign tort law, damages are a procedural issue and so fall to be assessed according to the principles of English law — a starting point of Blair J's discussion at para 13 when he considered the most recent authority on this issue, *Harding v Wealands.*

Question 2

The core reasoning in *Maher*

31. In *Maher* Blair J concluded that the claim for pre-judgment interest was to be characterised as an issue in tort, and was not a matter of procedure. Any issue in that case as to whether there was a right to claim interest by way of damages therefore depended on French law. Assuming that interest was recoverable, the rate was to be determined under English law since that was a procedural issue. That did not mean however that the English rate would be applied, since section 35A of the Supreme Court Act 1981 gave the court a discretion to decide the appropriate rate. At para 29 and following he said this:

> 29. As regards the claimants' submissions, there is powerful support for the proposition that the Court's power to award interest under section 35A of the Supreme Court Act 1981 is procedural and thus applicable as part of the law of the forum. It was so held by Hobhouse J in *Midland International Trade Services Ltd v Al Sudairy*, *Financial Times*, 2 May 1990, and by Moore-Bick J in *Kuwait Oil Tanker Co SAK v Al Bader*, *The Independent*, 11 January 1999. On the other hand, these authorities are not supported by the editors of *Dicey, Morris and Collins* (*ibid*, paras 33-393 and 33-396), who say that:
>
> > "Despite the uncertainty of the outcome reached by the common law, the current position depends upon the proper interpretation of Pt III of the Private International Law (Miscellaneous Provisions) Act 1995, and in particular on whether the right to claim interest by way of damages is to be regarded as an issue in tort, for the purposes of that Act, which is governed by the choice of law rules for issues in tort which are contained in that Act. It is submitted that the right to claim interest by way of damages in a claim in tort is properly characterised as an issue of tort and is not, in any sense, a procedural question for the law of the forum. Accordingly, whether there is such a right depends on the law which is found to apply to the tort."
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> 30. The editors' view is: "essentially based on the premise that a claim for interest is in substance a claim for damages in the sense that it is awarded as compensation to the plaintiff for being kept out of money justly due to him, and that the question of whether or not such a claim or award is available to a claimant is (like the availability of heads of damage strictly so called) governed by the law applicable to the contract or tort sued upon": see *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 at para

205 (per Nourse LJ giving the judgment of the court)" . . .

32. Depending on rates, which will vary according to the currency of the claim, interest can of course be an important component, and these difficult questions will need to be resolved at a higher level at some point. But I have to answer the preliminary issue in this case, and (in the absence of clear appellate authority) propose to do so on the basis of the law as set out in *Dicey, Morris and Collins*. With the caveat that the factual position has only been touched on so far, my view is as follows. The claim for interest on damages should be characterised as an issue in tort (see para 33-396 that I have quoted above). Any question as to whether there is a right to claim interest by way of damages (such as the Defendant has obliquely raised in its skeleton argument), depends therefore on French law as the applicable law under section 11 of the Private International Law (Miscellaneous Provisions) Act 1995. I should add however that the result appears to be the same if section 35A of the Supreme Court Act 1981 is applied simply on the basis that it is a procedural provision and so applicable as part of the *lex fori*. This is because under section 35A(2), interest in personal injuries cases may be excluded where there are "special reasons" for doing so. A similar approach was adopted by Moore-Bick J when exercising his section 35A discretion in the *Kuwait Oil Tanker* case in dealing with the contention that since interest was (allegedly) irrecoverable under the law of Kuwait the same result should follow under section 35A also (see pages 155 and following of the judgment). I respectfully think that it is the right approach.

33. Assuming that interest is recoverable, the rate is to be determined under English law as the *lex fori*: see in this respect the views expressed in *Dicey, Morris and Collins*, *ibid*, at para 33-397. But this does not necessarily mean that the rate will be the domestic English rate. The principles governing the court's discretion under section 35A are sufficiently flexible to enable the court to arrive at an appropriate rate, whether English or French (*ibid*, at para 33-398).

The parties' submissions

32. Mr Weir submits as follows. No claim is made by the claimant in this case for interest as a head of damage, which it is accepted would be a substantive issue. Rather, the claim is made for pre-judgment interest on damages pursuant to section 35A of the Supreme Court Act 1981. Contrary to the views expressed in *Dicey, Morris and Collins* this is a procedural issue. Interest is claimed not as compensation for damage done, but for being kept out of money which ought to have been paid to the claimant: see per Lord Denning MR in *Jefford v Gee* [1970] 2 QB 130 at page 146A. Thus, in accordance with established English conflict principles, English law applies. Mr Weir relies on the decision of Hobhouse J in *Midland International Trade Services Ltd v Al Sudairy*, *Financial Times*, 2 May 1990, as adopted and applied by Moore-Bick J in *Kuwait Oil Tanker Co SAK v Al Bader*, 17 December 1998, unreported.

33. If however, contrary to the claimant's case, it is necessary to establish that there is a substantive right to interest under French law then Mr Weir relies on the joint experts' report which he submits confirms both that pre-judgment interest can be awarded in certain circumstances and, as the experts confirm in answer to question 8 in their report, that this is a rule of substantive law. It follows from their opinion, Mr Weir submits, that a head of loss known as pre-judgment interest is known to French substantive law, and this is sufficient to pass the substantive requirement. How such a head of loss is assessed is then a matter governed exclusively by English law.

34. Mr Mead submits that the analysis of Blair J is correct, as is the commentary by the editors of *Dicey, Morris and Collins* (at paras 33-393 and 33-396) which Blair J considered accurately set out the law. Thus, whether there is a right to claim pre-judgment interest is a matter to be determined by the *lex causae*, in this case, French law. Moreover, Mr Mead suggests it can be concluded from the joint experts' report in this case that there is no such right to interest in French law. He submits the award of interest in the circumstances described by the experts is a procedural matter, and cannot be characterised as substantive one. It is, he suggests, in reality, akin to the procedure which may be applied in this jurisdiction to offers made under Part 36 of the Civil Procedure Rules. Since there is no substantive entitlement to interest under the proper law, he submits the claimant's claim for such interest must fail.

Discussion

35. I agree with Blair J that there is powerful support for the proposition that the court's power to award interest under section 35A of the 1981 Act is procedural and thus applicable as part of the law of the forum. Nonetheless, Mr Weir has not persuaded me that Blair J was wrong in concluding that the right to claim pre-judgment interest is essentially "a claim for damages in the sense that it is awarded as compensation to the plaintiff for being kept out of money justly due to him", and, again, I respectfully agree both with Blair J's conclusions and the reasons given for them. No useful purpose is to be

served by my setting out in my own words what is said in his judgment, and I do not propose to do so.

36. The question then is whether a head of loss known as pre-judgment interest is known to French substantive law? The matter is dealt with fairly briefly in the joint experts' report (which itself was only available a day or so before the hearing) and was not really touched on in oral argument. Nor was it addressed in the parties' skeleton arguments, and [was] only briefly dealt with in written submissions from the parties received after the conclusion of the oral hearing. Nonetheless I am invited by the parties to determine the matter, and my conclusion is that such a head of loss is part of French substantive law. I understand why Mr Mead draws an analogy between the position under French law, and the court's jurisdiction here under Part 36 of the Civil Procedure Rules, but, by agreement, the experts were invited to answer this question: "8. Are these rules on interest [including pre-judgment interest] treated as rules of substantive law or procedural law in France?" Their unequivocal answer was as follows:

> French procedural rules are mostly codified in the "*Code of Civil Procedure*" and "*Code of Penal Procedure*". The above rules on interest appear in the Civil Code and in the Insurance Code (not in the Code of Civil Procedure) and are treated as rules of substantive law.

Conclusion

37. Accordingly, I would answer the preliminary issues in this case as did Blair J at para 35 in *Maher*, that is: "(1) Damages are to be assessed by reference to English law. (2) Both French and English law are potentially relevant to the award of pre-judgment interest on those damages, depending on the facts": see paras 32 and 33 of *Maher*. I additionally conclude that there is a head of loss for pre-judgment interest under French substantive law, and that its assessment in this case will be governed by English law.