

The applicable law in direct claims against insurers: an analysis of the decision in *Maier v Groupama Grand Est [2009] EWHC 38 (QB), 23rd*

January 2009

The recent decision of the European Court of Justice in *FBTO v Odenbreit (ECJ C-463/06)* renders it beyond doubt that an injured Claimant may bring proceedings directly against a road traffic insurer in the courts of his own domicile. However, in a number of cases currently proceeding in the High Court the applicable law in such cases is in dispute. In the first of these in which judgment has been given, *Maier v Groupama Grand Est [2009] EWHC 38 (QB)*, Mr Justice Blair decided two issues: the law governing (1) the assessment of damages, and (2) pre-judgment interest on those damages. As he observed, there is a body of well-known authorities on the answers to these questions as they arise in proceedings by an injured party against a tortfeasor, but there appears to be none as regards proceedings based on an injured party's direct claim against the insurer of the tortfeasor.

the facts

The facts in *Maier* were not in dispute. On 29th July 2005, Mr Maier was driving his Range Rover on the RN5 road in the area of Mont Sous Vaudrey, France. His wife was a passenger. M. Marc Kress was driving a van in the opposite direction. He lost control of the van, and it collided with the Maier's Range Rover. M. Kress was killed in the collision, and Mr and Mrs Maier suffered injuries for which they brought a claim for damages in the English court.

the issues

The Defendant was the French insurance company which insured M. Kress against third party claims arising out of the use of his vehicle under a contract of insurance, the applicable law of which was French law. Neither liability nor the jurisdiction of the English court was in dispute, and judgment on the issue of liability was entered on 24th September 2008. The Master ordered the following questions to be decided as preliminary issues:

- (1) Are damages to be assessed by reference to English Law or French Law?
- (2) Should the question of the award of pre-judgment interest on those damages be determined in accordance with English law or French law? (it was agreed that post-judgment interest should be determined in accordance with English law.)

There was, originally, a third question for preliminary determination, it being argued by the Defendant that the question of the recoverability of costs inter partes should also be determined according to French law, but that argument was abandoned.

the parties' submissions

The Claimants submitted that since the liability of the Defendant flowed from that of its insured, the assessment of damages should be treated as an issue in tort. Because under English conflicts rules it is well established that the assessment of damages in tort is a procedural matter, the issue would be governed by English law. So far as the second question was concerned, interest was claimed under section 35A of the Supreme Court Act 1981. This was a procedural provision, and English law therefore applied.

The Defendant submitted that the Claimants' direct claim against the insurer should be characterised as a contractual claim, because the insurer becomes involved only on the basis that it is contractually obliged to indemnify the policy holder against the claim which the injured parties have against him. For the same reason, the availability of interest was a

substantive rather than a procedural matter, and therefore governed by French law as the law applicable to the contract of insurance, and not English law as the law of the forum. The question for the court was the extent of the indemnity to which the tortfeasor was entitled under his policy. Only a French court had jurisdiction over any claim as between the tortfeasor and the insurer, and it was therefore the amount that the Claimants would be awarded by a French court that the English court had to value for the purposes of the direct claim against the insurer.

The Claimants disputed the proposition that an English court would have no jurisdiction in respect of a claim against the tortfeasor himself (or his estate), pointing to Article 11(3) of the Judgments Regulation. Article 11(3) says that if the law governing the direct action provides that the insured may be joined as a party to the action, the same court shall have jurisdiction over him. The Defendant countered that this provision only permits the courts of one Member State to exercise jurisdiction over an insured domiciled in another Member State when he is joined as a third party to a claim which has been brought against his insurer. It does not provide a basis on which to join him as an additional Defendant.

(1) assessment of damages

It is well established under English conflicts of law rules that the assessment of damages in tort is a procedural matter, and so governed by the law of the forum (cf the decision of the House of Lords in *Harding v Wealands* [2007] 2 A.C. 1). This position has altered as from 11th January 2009, in relation to events which give rise to damage which occur after 20th August 2007, as a result of Council Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations ('Rome II'). Since the accident happened on 29th July 2005, however, Rome II was not applicable.

If the claim had been brought against the tortfeasor or his estate, therefore, there was no doubt that damages would have been assessed by reference to English law. The question for the court was whether it made a difference that the claim was a direct one against the tortfeasor's insurer.

The Claimants submitted that to establish a direct action against an insurer, the Claimant would ordinarily have to prove (i) that the injury was caused by a breach of duty (usually in tort) on the part of a wrongdoer, and (ii) that the wrongdoer was entitled to be indemnified by the insurer against liability for such breach of duty. Ordinarily, the Claimants submitted, it would be appropriate to consider stage (i) issues as arising in tort, and stage (ii) issues as arising in contract. At stage (i), the insurer is in reality no more than a surrogate for the tortfeasor, and it would be artificial for such questions as the law governing the tortfeasor's liability to turn on the question of the law governing the contract of liability insurance which he took out. The question of the assessment of the damages in respect of which the indemnity is given arises at stage (i), and should be viewed as a matter arising in tort.

The judge found that 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, namely French law. Subject to that, he agreed with and adopted the Claimants' approach. In this case, liability had been admitted, and judgment had been entered by consent. As a result, the insurer had to meet directly the wrongdoer's liability, which in *Maher* was a tortious one. For the purposes of the assessment of damages, therefore, the insurer's liability should equally be seen as a liability arising in tort.

The judge went on to give a tentative 'preliminary view' that the Defendant might be right to suggest Article 11(3) of the Judgments Regulation envisaged the bringing of third party proceedings by the insurer against the insured, rather than providing an independent route by which the injured party can bring the wrongdoer before his own courts in circumstances not within the special jurisdiction provisions in the previous articles. However, this view was *obiter* and did not affect his conclusion that the assessment of the Claimants' damages resulting from the road accident is a matter of procedure to be determined by reference to English law, as the law of the forum, as arising in tort in accordance with *Harding v Wealands* and earlier authority.

(2) pre-judgment interest on damages

Blair J found that the claim for interest on damages should be characterised as an issue in tort, and any question as to whether there was a right to claim interest by way of damages would therefore depend upon the provisions of the applicable law under s. 11 of the Private International Law (Miscellaneous Provisions) Act 1995. In this case, the applicable law was that of France.

If interest is recoverable under the applicable law, the rate falls to be determined under English law as the *lex fori*; but this would not necessarily mean that the rate allowed would be the domestic English rate. The principles governing the court's discretion to award interest under s. 35A of the Supreme Court Act 1981 are sufficiently flexible to enable the court to arrive at an appropriate rate, whether English or French or some other rate entirely.

conclusion

For now, and pending any appeal, the position in respect of direct claims against insurers appears to be as follows:

- (1) Damages fall to be assessed by reference to the law of England and Wales;
- (2) Whether or not the Claimant is entitled to claim for pre-judgment interest falls to be assessed by reference to the applicable law;
- (3) If the Claimant is entitled to claim for pre-judgment interest, that claim falls to be assessed by reference to the law of England and Wales, but the court might well exercise its discretion to use the interest rate prevailing in the jurisdiction of the applicable law.

These conclusions, set out in a full and persuasive judgment, are of assistance to practitioners advising clients on the issues determined; however, it is likely that either the decision in *Maher* or in other similar

claims passing through the High Court at present will be appealed, so it is necessary to exercise some caution in relying upon them. Only time will tell if the judgment of Blair J will remain good law for long.

Sarah Prager

1 Chancery Lane