Adding insult to injury? The nature of the statutory obligations of the Motor Insurers' Bureau; the untraced driver and road accidents in the EEA

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Introduction

The first instance decision in *Howe v Motor Insurers' Bureau*[1] has potentially major ramifications for a UK resident having the misfortune to sustain injury in a road traffic accident occurring elsewhere in Europe. It highlights real practical problems with the current UK regime with regard to road traffic accidents occurring in an EEA state other than the UK.

Mr Howe sustained serious life-changing injuries in a road accident occurring in 2007 in France when his vehicle was struck by a wheel as it fell from a heavy goods vehicle. The heavy goods vehicle had never been identified and so Mr Howe had been unable to claim against any insured or any insurer. So far so bad. He had, however, engaged solicitors who in turn had notified the MIB of the claim, and significantly this had occurred within a few months of the accident. In short, the solicitors had sought to follow the broad thrust of the Motor Insurers' Bureau Untraced Drivers' Agreement 2003 notwithstanding that the accident had occurred in France rather than Great Britain; they did so on the basis of an entitlement arising under the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003[2] (the "2003 Regulations").

In the context of an accident caused by an untraced driver these regulations provide that in certain circumstances a UK resident will be able to claim compensation from the MIB where the accident occurs in an EEA or Green Card state. As Mr Howe's claim met the basic conditions his solicitors pursued the claim to compensation communicating directly with the MIB. The MIB conducted protracted negotiations with its French counter-part compensation body (the *Fonds de Garantie*, "FDG") which negotiations resulted in payment to Mr Howe of a series of interim sums. However, following the expiry of the five year limitation period apparently applicable under French law for claims there made the FDG notified the MIB/Mr Howe's solicitors that the claim had become barred under French law by reason of foreclosure of claim, a concept broadly equivalent to domestic limitation periods.

Preliminary issues in the claim then made no the MIB arose, namely:

(i) Whether the liability of the MIB under the 2003 Regulations is dependent upon liability of, in this case, the French compensation body, the FDG;
(ii) If so, whether the limitation period under French law had expired;
(iii) If not, whether the limitation period against the MIB had expired;
(iv) If so, whether the MIB was precluded from relying on a limitation defence by reason of estoppel by convention/representation.

It was accepted that the issue of liability was subject to French law; it was not necessary to consider whether that body of law also governed the question of damages, an appeal to the Supreme Court on such issue being listed for hearing in July 2016.[3]

The MIB contended that when a road traffic accident occurs in a member state other than that of the place of residence of the claimant any responsibility of the MIB, as the home state compensation body, under the 2003 Regulations is an intermediary one, ultimate liability being passed back, in this case, to the compensation body for the place of accident, the FDG. Relying in part on the *Travaux Préparatoires*[4] the MIB contended that the

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[1] [2016] EWHC 640 (QB: Stewart J). Permission to appeal has been given which is due to be heard in March 2017.

[2] SI 2003/37.

[3] *Moreno v Motor Insurers' Bureau* [2015] EWHC 1142 (QB); [2015] Lloyds Rep 535 (QB).

[4] In particular the Resolution of the EU Parliament 308/108/2011/95; the EU Commission's proposal and amended proposal OJ C 20.11.95 P108, 97/0264 COD; and the report of the EU Parliament A4-0267/98.

Motor Insurance Directives, now consolidated in the Motor Insurance Directive of 2009 ("the 2009 Directive"),[5] do not require that the home state compensation body is to be made liable when the foreign guarantee fund or insurer is not itself liable, and that the 2003 Regulations are to be understood in the same fashion. The MIB further contended that Mr Howe's claim was barred by the applicable limitation period under French law as applicable to any liability of FDG and that there was no real likelihood under French law of any extension or disapplication of the limitation period. Alternatively, under English law any claim as might be made on the MIB was itself statute barred as no proceedings had been issued within six years of the accident, assuming the claim to be formulated as a statutory civil debt.

As to the first issue the meaning and effect of the 2003 Regulations were relevant, in particular regulation 13 which reads:

> "Entitlement to compensation where a vehicle or insurer is not identified
> 13(1) This regulation applies where – (a) an accident, caused by or arising out of the use of a vehicle which is normally placed in an EEA State, occurs on the territory of –
> (i) an EEA State other than the United Kingdom, or
> (ii) a subscribing State,[6]
> and an injured party resides in the United Kingdom,
> (b) that injured party has made a request for information under regulation 9(2), and
> (c) it has proved impossible –
> (i) to identify the vehicle the use of which is alleged to have been responsible for the accident, or
> (ii) within a period of two months after the date of the request, to identify an insurance undertaking which insures the use of the vehicle.
> (2) Where this regulation applies –
> (a) the injured party may make a claim for compensation from the compensation body, and
> (b) the compensation body shall compensate the injured party in accordance with the provisions of Article 1 of the second motor insurance directive ***as if it were the body authorised under paragraph 4 of that Article and the accident had occurred in Great Britain***."
> (emphasis added).

The words of regulation 13(2)(b) were accordingly relevant to Mr Howe's claim, particularly those here highlighted. The wording of regulation 13 has been considered by the Court of Appeal on two prior occasions in the context of deciding whether the regulations stipulate that assessment of damages is to be on the assumption that the accident has occurred in Great Britain: *Jacobs v Motor Insurers' Bureau*[7], and in *Bloy v Motor Insurers' Bureau.*[8] The regulation has also been considered at first instance in *Marshall v Motor Insurers' Bureau,*[9] a case in which the court had decided that the MIB is not liable in circumstances when the compensation body in the state of accident is itself not liable.

The decision

The judge decided that Mr Howe's claim was statute barred with the result that, at least in principle, all interim payments previously paid by the MIB/FDG were recoverable; as further discussed here, Mr Howe also became liable to costs awarded in favour of the MIB. The judge held as follows:

(1) Central to the reasoning of the Court of Appeal in both *Jacobs*[10] and *Bloy*[11] was the conclusion that the 2003 Regulations deem the accident to have occurred for all purposes in Great Britain. Those cases did not, however, decide *when* the MIB is liable but it was an essential step in the legal reasoning in reaching the *ratio* in each case that the 2003 Regulations impose legal liability on the MIB. Pending the Supreme Court review of this issue the outcome is that the MIB is not only liable if the FDG is liable.

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[5] Directive 2009/103/EC, OJ No L 263, 07.10.2009, P11.
[6] Broadly speaking, a Green Card state.
[7] [2010] EWCA Civ 1208; [2011] 1 WLR 2609; [2011] 1 All ER (Comm) 445; [2011] 1 All ER 844; [2011] RTR 2.
[8] [2013] EWCA Civ 1543; [2014] 1 Lloyd's Rep IR 75.
[9] [2015] EWHC 3421 (QB).
[10] [2010] EWCA Civ 1208; [2011] 1 WLR 2609; [2011] 1 All ER (Comm) 445; [2011] 1 All ER 844; [2011] RTR 2, paras 33-35.
[11] [2015] EWHC 3421 (QB), para 44.

(2) Given the conclusion made as to the first issue, the second issue as to the French limitation period falls away. However, on an *obiter* basis, time limits are fixed under French law by Article R421-12 of the Insurance Code, under which "foreclosure" extinguishes the right to claim. The claimant accepted that his claim would be barred under French law subject to his arguments as to (i) *impossibilité d'agir* (inability to act) (ii) estoppel (iii) waiver. As to inability to act this is apparently not available under French law where the claimant is assisted by a lawyer and in this case appears to be a claim which is unlikely to succeed. As to estoppel, the concept is of recent development under French law and is apparently based on the principle that no party is to be permitted to contradict itself to the detriment of another. So far as waiver is concerned it is unclear whether a party is able to waive foreclosure periods as stipulated by Article R421-12. Accordingly, were the second issue to be live the claimant would likely be barred by the five year French limitation period.

(3) Under the 2003 Regulations no claim in court is made but the claimant has a three year period from the date of accident in which to submit his claim to the MIB. Mr Howe made a claim within three years and had his accident occurred in Great Britain he would have been in time; there would have been no defence to his claim. All the correspondence between the claimant's solicitors and the MIB was predicated on the basis that the MIB was acting as agent for the FDG and the correspondence was not a claim under the Untraced Drivers' Agreement of 2003 as such. If there had been a rejection of the claim there would have been a six year limitation period but on the facts that too is now barred. Alternatively, if it is possible to construe the claim as a statutory claim under section 9 of the Limitation Act 1980 the necessary ingredients for that claim arose as at the date of accident and were not delayed, as the claimant contended, until request for insurance information had been made because no such request is a pre-condition of a claim in relation to an untraced driver. No submissions had been made on the basis of sections 11 and 33 of the Limitation Act 1980 and so no conclusions could be made thereon.

(4) The evidence did not support the claim as to estoppel, whether estoppel by convention or promissory estoppel. Estoppel by convention requires the exchange or manifestation of an agreement or assumption; the correspondence between the MIB and the claimant's solicitors reveal nothing as to the limitation period and that the MIB would not take any defence. As to promissory estoppel there was no clear and unequivocal promise to the same effect; the fact that negotiations on quantum continued throughout with a number of interim payments being made were insufficient to establish an unequivocal promise.

Comment

This decision would seem to be in error in a number of respects and unless reversed by the Court of Appeal has major ramifications not previously envisaged. It arguably compounds the questionable interpretation to the 2003 Regulations already made by the Court of Appeal.

The 2003 Regulations and compliance with Community law

The difficulty stems from the opacity of the 2003 Regulations which has led to the Janus-faced interpretation given to regulation 13 by the Court of Appeal in *Jacobs* and in *Bloy*: that liability of any driver at fault, and thus of any insurer will, in most cases, be determined in accordance with Rome II[12] by the governing law of the place of accident but that the assessment of damages is a matter to be determined by English law. This is an unhappy outcome and arguably not the intention of the Motor Insurance Directives, now consolidated in the 2009 Directive, nor indeed it is here submitted that of the 2003 Regulations themselves. In this context the 2009 Directive has the broad aim of alleviating procedural difficulties to the claimant who sustains injury outside his country of residence, primarily by enabling such claimant to make claim on a compensation body for the state of the claimant's place of residence and thus to afford the claimant the procedural benefit of claiming in his own state of residence; there is no intention to affect the governing law as to liability nor as to quantum; indeed there is no need to do so because provision is made elsewhere.[13] Giving the appropriate purposive interpretation

[12] EC Regulation No 864/2007, OJ No L 199, 31.07.2007, P40.

[13] See in particular recitals 22-23, 35 and 47-48; articles 10, 20 and 25 of the 2009 Directive, and in their original format in the 4th Motor Insurance Directive, 2000/26/EC, OJ L No 181/65, 16.5.2000 at recitals 25, 26 and 31 and articles 1, 6 and 7. The CJEU has repeatedly confirmed that Community law in this context does not directly impact on the content of law determining liability and compensation: Case C-348/98 *Mendes Ferriera v Companhia de Seguros Mundial Confiança SA* ECLI:EU:C:2000:442; [2000] ECR 1-06711; Case C-537/03 *Candolin v Vahinkovakuutusosakeyhtio Pohjola* ECLI:EU:C:2005:417; [2005] ECR 1-05745; [2006] Lloyd's Rep IR 209; Case C-484/09 *Carvalho Ferriera Santos v Companhia Europeia de Seguros SA* ECLI:EU:C:2011:158; [2011] ECR 1-01821; Case C-409/09 *Ambrósio Lavrador v Companhia de Seguros*

appropriate to statutory material[14] the aim in the context of the 2003 Regulations as understood against the background of the 2009 Directive is arguably as straightforward as it is modest: to enlarge in a geographical sense the scope of the MIB's responsibility beyond domestic accidents (explicitly stated in the Untraced Drivers' Agreement 2003 as "Great Britain") and to extend the procedural mechanisms to claims involving untraced drivers in circumstances when UK residents sustain damage in accidents occurring in other EEA states. This responsibility, like that of the domestic version, is predicated upon a claimant being able to satisfy the compensation body on a balance of probabilities that liability is not in issue, that is, in the context of the claim here considered that the liability of the untraced driver is proven (and thus sufficient to engage any responsibility of the compensation body of the place of accident).[15]

The 2009 Directive permits the claimant to make an election, albeit one only relevant in a procedural sense (in this context the 2009 Directive uses the permissive description to the effect that the claimant "may" apply). This is so because of the inter-play between articles 10 and 25 of the 2009 Directive. Article 25 requires compensation in cross-border claims, such as that of Mr Howe, to be made in accordance with articles 9 and 10. Article 9 refers to the specified minimum sums. Article 10 refers to the obligation on member states with regard to each national compensation body; it contains express reference to the rules by which each national body is to operate. Article 10.4 with its somewhat Delphic wording might suggest that member states are authorised to apply domestic law as to liability and quantum. Article 10.4 reads "each member state shall apply its laws, regulations and administrative provisions to the payment of compensation by the body, without prejudice to any other practice which is more favourable to the victim." This provision appears to be the outcome of the Opinion of the Economic and Social Committee which commented on the draft proposal with the following view "The Committee thinks that the proposal for a Directive should make it clear that the body referred to in Article 1 [a reference to the Second Motor Insurance Directive 84/5/EEC] should make it clear that the body referred to in Article 1, which in certain member states is a subsidiary body, will make payments only in so far as the victim has not obtained compensation through other channels, without calling into question the existing rules in the various member states." [16] This, it is submitted, is directed not to the matter of the body of law to determine liability and quantum but rather gives authority to member states to make deductions to the compensation in accordance with their own domestic rules, most notably in the case of the UK in respect of tax, national insurance, and recoverable state benefits; and to permit allowance for sums received by the claimant from first party insurance and thus to permit the body to have a subsidiary status. The existence of such a provision arguably serves to underline the proposition that as a matter of first principle issues of liability and as to the compensation fall to be determined in accordance with the governing applicable law for the place of accident.

Article 25 makes explicit that the compensation in cross-border claims is to be made in precisely the same fashion as that under article 10. There is no suggestion in the 2009 Directive to the effect that article 25 is intended to displace article 10 in those instances where both might otherwise be applicable. If that had been the intention one would have expected a very different approach to the cross-referencing in these provisions. Indeed, the general thrust of the evolution of the Motor Insurance Directives has been to systematically enlarge the procedural rights and thus options of the claimant rather than to trim or refine existing rights.

Thus, one concludes that the claimant has an election. In accordance with article 10 he may apply for compensation to the compensation body for the state of accident; in such case the claimant will be obliged to meet the procedural requirements, to include any time constraint for his claim such as was applicable in the case here discussed to the FDG. Alternatively, he may, as arguably the claimant did in this case, apply to the MIB in accordance with article 25, meeting as he must any procedural requirements applicable to domestic claims, to include any time constraints applicable.[17] In either case it is irrelevant to the claimant that the ultimate debtor is

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Fidelidade-Mundial SA ECLI:EU:C:2011:371;[2011] ECR 1-04955; [2012] Lloyd's Rep IR 236; Case C-442/10 *Churchill v Wilkinson* ECLI:EU:C:2011:799; [2011] ECR 1-12657.

[14] *Per* Lord Steyn in *Attorney General's Reference (No 5 of 2002)* [2004] UKHL 40; [2005] 1 AC 167 at para 31.

[15] The case of *Marshall v MIB* [2015] EWHC 3421 (QB) does not decide the point because that concerned the allocation of responsibility for the claim as between the identified drivers/their insurers and the compensation body for the country of accident.

[16] [1981] OJ C 138/15. The proposition appears to have been the source of article 10.4, these words being added to the Commission's original proposal [1980] OJ C 214/9.

[17] Had the claim been rejected by the MIB (presumably on information provided by the FDG or other authorities and having considered the evidence submitted by the claimant) the claimant would have been entitled to proceed to arbitration following the procedure envisaged by the Untraced Drivers' Agreement 2003. This was not

a foreign compensation body; such matters are between the compensation bodies, and as the 2009 Directive puts it "This system can be made to function by means of an agreement between the compensation bodies established or approved by Member States, defining their functions and obligations and the procedures for reimbursement" (recital 52).[18] The decision in this case would seem thus to be in error as to the finding that the claim is statute barred under French law since that body of law is irrelevant to a claim made on the MIB in these circumstances.

Estoppel

If, contrary to the contentions here put forward, claims such as those of Mr Howe in relation to an untraced driver are governed by the limitation period for the state of accident any submissions as to estoppel by convention would still fall to be decided in accordance with English law, as the law of the jurisdiction. This is because the weight of judicial authority is to the effect that this particular form of estoppel is a matter of evidence; accordingly it is governed by the place of jurisdiction rather than a matter of substantive law, generally governed by the law of the place of accident.[19] Were it otherwise we would have the counter-intuitive

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relevant on the facts of Mr Howe's claim since it was clear that there was no live issue as to the liability (under French law) of the untraced driver.

[18] As a matter of historical development unsurprisingly article 10 predates article 25, that is to say the attention was first directed to ensuring the existence of compensation bodies operating on a national basis, that is to say on an entirely domestic manner within each member state, only later did attention focus on cross-border issues and those claimants injured outside their own states of residence: article 10 originated in the Second Motor Insurance Directive 84/5/EEC; OJ L 8/17; 11.01.1984; article 25 originated in the Fourth Motor Insurance Directive 2000/26/EC; OJ L181/65; 20/07/2000.

[19] Rome II, ibid, article 1.3 scope. That some at least of the variants or species of estoppel are matters of evidence is supported by a number of the older authorities, most notably *Heane v Rogers* (1829) 9 B & C 577 at 586, 109 ER 215 in the context of admissions where Bayley J stated "…there is no doubt but that the express admissions of a party to the suit or admissions implied from his conduct, are evidence, and strong evidence…"; similarly in *Graves v Key* (1832) 3 B & Ad 318; 110 ER 117 there is reference to admissions being evidence against the person, this not being conclusive except to the person who may have been induced to alter his condition; and in *Pickard v Sears* (1837) 6 Ad & E 469 at 474 where Lord Denman CJ stated in the context of what would now be viewed as estoppel by representation that "the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded (sic, meaning in more modern language that he is prevented) from averring against the latter a different state of things as existing at the same time; and the plaintiff, in this case, without any of those formalities that throw technical obstacles in the way of legal evidence…". See too Lord Haldane's comments to the effect that estoppel by representation is a rule of evidence in *London Joint Stock Bank v MacMillan* [1918] AC 777 at 818. Estoppel by convention appears to have developed from estoppel by agreement, which in turn developed from estoppel by recital of fact in a deed, on which see *Shelley v Wright* (1737) Willes 9; 125 ER 1029; *Hill v Proprietors of the Manchester Water Works* (1831) 2 B & Ad 544; 109 ER 1245; *Horton v Westminster Improvement Commissioners* (1852) 155 ER 1165. That trail leads to the case of *Ashpitel v Bryan* (1863) 122 ER 179; 3 B & S 474 in which Crompton J treats the facts arising as a form of estoppel by the evidence, in stating *"…*when two parties agree that a commercial instrument shall be taken as founded upon a certain fact, and the position of one, by acting on that agreement, is altered, the other ought not to be admitted to deny it, and in this class of estoppels deceit, in which is involved the question whether the party knew the real state of facts, is not necessary…". This was also the approach taken in *Stroughill v Buck* (1850) 117 ER 301 approved by the House of Lords in *Greer v Kettle* [1938] AC 156 in which estoppel by deed is treated as a rule of evidence, per Lord Maugham at p170. More generally in *Young v Raincock* (1849) 137 ER 124, another early case of estoppel by recital, reference is made to Lord Coke, Co Litt 352a, for a general definition of estoppel "Estoppe cometh of the French word *estoupe*, from whence the English word stopped: and it is called an estoppel because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." This has more recently been expressed: in *Low v Bouverie* [1891] 3 Ch 82, where Bowen LJ concluded "…estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said…" (at p105) in referring to it as filling up the gap in the evidence; see too comments in the same case to the same effect *per* Lindley LJ at p101. This decision was approved by the House of Lords in *Woodhouse AC Israel Cocoa v Nigerian Produce Marketing Co Ltd* [1972] AC 741. This was also the view taken by Latham CJ and Dixon J in influential *dicta* in the Australian High Court in the case of *Grundt v Great Boulder Pty Gold Mines Ltd* [1937] HCA 58; [1937] 59 CLR 641. The point is not free of all doubt, the learned editors of Halsbury's Laws of England (Butterworths, 2014) vol 47, at para 301 take the view that estoppel is better viewed as a matter of substantive law, referring to *Canada and*

situation of conduct of parties taking place within one EU member state being judged for any legal effect by reference to a body of substantive law applicable in another member state.

The decision, rejecting the claim based on estoppel by convention also appears to be in error. Authoritative guidance on the concept of estoppel by convention[20] was given by Lord Steyn in *Republic of India v India Steamship Co (No 2) ("The Indian Grace"):* "It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust[21] to allow him to go back on the assumption … It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted … that a concluded agreement is not a requirement for an estoppel by convention."[22] This test has more recently been applied by the Privy Council.[23] It is also supplemented by the guidance emerging from the discussion by Bingham LJ, as he then was, in *Norwegian American Cruises A/S v Paul*

Dominion Sugar Company v Canadian National (West Indies) Steamships Ltd [1947] AC 46 at 56 per Lord Wright "Estoppel is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly viewed as a substantive rule of law". It may be that the position differs as between the distinct forms of estoppel, and that most obviously proprietary estoppel is more naturally seen in substantive law terms albeit a doctrine which is arguably a sub-species of promissory estoppel: *Cobbe v Yeoman's Row* [2008] 1 WLR 1752 (HL). It may not be possible nor arguably desirable to categorise all forms of estoppel as being of the same juridical base just as they do not share identical characteristics; on this see *Steria v Hutchinson* [2006] EWCA Civ 1551 Neuberger LJ, as he then was, at para 87, was content to assume that there may be different species of estoppel and stressing that what unites these is unconscionability and the need for specific principles in order to resolve the inherent tension between the positions of the respective parties, *ibid* at para 92, and in referring to *dicta* of Robert Walker LJ in *Gillett v Holt* [2000] Ch 198 at 225, 232.

[20] This form of estoppel, originally referred to as estoppel by agreement, appears to be an evolutionary step in the development of estoppel by recital in a deed rather than as a development from estoppel by representation; it is not dependent upon any mistake or misleading: *Aspitel v Bryan* (1863) 122 ER 179 and on appeal (1864) 122 ER 999 referring also to *Shelley v Wright* (1737) Willes 9; 125 ER 1029; *Hill v Manchester Water Works* (1831) B & Ad 544; 109 ER 1245; reference was made to this form of estoppel and that arising in cases of estoppel by representation, primarily *Pickard v Sears* (1837) 6 Ad & El 469; 112 ER 179; *Freeman v Cooke* 2 Exch 654; 154 ER 652. Estoppel by representation as a doctrine can trace its roots back to at least 1687: see the decision in Chancery in the case of *Gale v Lindo* 1 Vern 475; 23 ER 601; a similar approach was taken some years later by Lord Mansfield in 1762 in the Kings Bench decision in *Montefiori v Montefiori* 1 B & W 363; 96 ER 203.

[21] Given that estoppel by convention did not emerge from estoppel by representation and that it is based on a mutual assumption which arguably without more binds the parties there is no imperative for there to be detriment to one party assuming, which is not clear, that detriment is required for other forms of estoppel; that issue was left open in *Bremer Handelsgesellschaft v Vanden Anenne* [1978] 2 Lloyd's Rep 109, 127 per Lord Salmon; but see *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd The Post Chaser* [1981] 2 Lloyd's Rep 695; [1982] 1 All ER 19 where in a case argued on the basis of equitable estoppel (promissory estoppel) Goff J held that detriment is not a necessary element in such a claim, merely that the party concerned has conducted his affairs on the basis of the assurance; also *Alan & Co v El Nasr Export & Import* [1972] 1 Lloyd's Rep 313; [1972] 2 QB 189 *per* Denning MR. Such hurdle would naturally be met in most if not all cases of mutual assumptions. Detrimental reliance appears not to have been treated in the early case law as an explicit factor but was referred to in *Carr v London & NW Railway* [1875] LR 10 CP in the context of estoppel by representation. The case of *Stroughill v Buck* (1850) 14 QB 781; 117 ER 301, approved by their Lordships in *Greer v Kettle* [1938] AC 156, decided that whether there is estoppel by recital in a deed capable of binding both parties is a question of evidence, decided as a matter of construction; it will depend upon whether the statement was made by one only or was truly mutually agreed, as such detriment to one or other party was not explicitly noted. In any event detriment, where required, is not a narrow or technical concept and is judged at the moment when the party seeks to rely on inconsistent rights: *Gillett v Holt* [2001] Ch 210; [2000] 3 WLR 815 referring to *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) HCA 58; (1937) 59 CLR 641.

[22] [1998] AC 878 at 913.

[23] *Townsend v Persistence Holdings Limited* [2013] UKPC 12 at para 33 *per* Lord Neuberger. In another Privy Council decision in the same year estoppel by convention was referred to as having its basis in the parties express or implied agreement that for the purposes of their transaction a certain state of fact or law is to be treated as true such that it would be unfair for one party to seek to resile from that agreement: *Prime Sight Ltd v Lavarello* [2013] UKPC 22; [2014] AC 436 at para 29.

Mundy Limited, The Vistafjiord[24] to the effect that estoppel by convention is not confined to agreed assumptions of fact but may extend to matters of law; that the court will give effect to the agreed assumption only if it would be unconscionable not to do so and that once the common assumption is revealed to be erroneous the estoppel will not apply to future dealings. The essential feature is that each party was aware of the assumption made by the other (it is one shared and thus held in common) which is not satisfied in cases where the parties were at cross-purposes or unaware of the assumption made by the other. In this context "agreement" signifies only that the assumption is held in common and that the parties are aware that each other is proceeding on the same basis; agreement in a contractual sense is not a requirement. A simple two-fold test was adopted by the Court of Appeal in *ING Bank NV v Ros Roca SA*:[25] (i) was there a relevant assumption of fact or law either shared by the two parties or made by one and acquiesced in by the other and (ii) would it be unconscionable or unjust to allow the one party to go back on the assumption. In the *India Steamships* case estoppel by convention failed because there was no manifestation by exchanges between the parties of a common assumption, a requirement that has been underlined by the Court of Appeal in *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The August Leonhardt),*[26] and often referred to as "something done across the line between the parties".[27]

Thus, in *Mears Ltd v Shoreline Housing Partnership Ltd*[28] Akenhead J summarized the current state of English law in the following terms:

> "From the cases, one can conclude that the relevant law on estoppel by convention is: (a) An estoppel by convention can arise when parties to a contract act on an assumed state of facts or law. A concluded agreement is not required but a concluded agreement can be a "convention". (b) The assumption must be shared by them or at least it must be an assumption made by one party and acquiesced in by the other. The assumption must be communicated between the parties in question. (c) At least the party claiming the benefit of the convention must have relied upon the common assumption, albeit it will almost invariably be the case that both parties will have relied upon it. There is nothing prescriptive in the use of "reliance" in this context: acting upon or being influenced by would do equally well. (d) A key element of an effective estoppel by convention will be unconscionability or unjustness on the part of the person said to be estopped to assert the true legal or factual position. I am not convinced that "detrimental reliance" represents an exhaustive or limiting requirement of estoppel by convention although it will almost invariably be the case that where there is detrimental reliance by the party claiming the benefit of the convention it will be unconscionable and unjust on the other party to seek to go behind the convention. In my view, it is enough that the party claiming benefit of the convention has been materially influenced by the convention; in that context, Goff J at first instance in the *Texas Bank* case[29] described that this is

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[24] [1988] 2 Lloyd's Rep 343 referring to the *dicta* of Peter Gibson J, as he then was, in the unreported case of *Hamel-Smith v Pyecroft & Jetsave Ltd* to the effect that the agreed assumption is not restricted to matters of fact and may be as to a matter of law, that no contract between the parties is a necessary requirement but that the requirement of unconscionability is an essential prerequisite to any estoppel, and that the estoppel operating only to the extent necessary in the interests of justice; reference was also made to the *dicta* of Kerr LJ in *'The August Leonhardt'* [1985] 2 Lloyd's Rep 28 at p34 to the effect that "…in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption. The alleged representor's participation in this conduct can then be relied upon by the representee as a basis for this form of estoppel." This approach appears to have been endorsed by the House of Lords in observations made in *Johnson v Gore Wood & Co (No 1)* [2002] 1 AC 562; [1991] 3 WLR 297. See too more recently the Court of Appeal decision in *Dixon v Blindley Health Investments Ltd* [2015] EWCA Civ 1023 which confirms that estoppel by convention is not confined to mistaken assumptions, but that the basis of the doctrine is consensual. There must be an unambiguous and clear assumption shared whether as a matter of fact or law and on the faith of which both parties proceed. The expression of accord may be inferred from conduct or even silence but something must be shown to have "crossed the line" sufficient to manifest an assent to the assumption, such matters being a question of fact.

[25] [2011] EWCA Civ 353; [2012] 1 WLR 472 per Carnwath LJ at para 66.

[26] [1985] 2 Lloyd's Rep 28 per Kerr LJ.

[27] As, for example, in *ING Bank NV v Ros Roca* [2011] EWCA Civ 353; [2012] 1 WLR 472; see too *Revenue and Customs Commissioners v Benchdollar Ltd* [2010] EWHC 1310 (Ch) endorsed by the Court of Appeal in *Dixon v Blindley Health Investments Ltd* [2015] EWCA Civ 1023.

[28] [2015] EWHC 1396 (TCC) at para 51.

[29] This being a reference to the decision at first instance by Goff J in *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 2 WLR 554; [1981] 1 All ER 923.

> what is needed and Lord Denning talks in these terms. (e) Whilst estoppel cannot be used as a sword as opposed to a shield, analysis is required to ascertain whether it is being used as a sword. In this context, the position of the party claiming the benefit of the estoppel as claimant or indeed as defendant is not determinative or does not even raise some sort of presumption one way or the other. While a party cannot in terms found a cause of action on an estoppel, it may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on the estoppel, it would necessarily have failed. (f) The estoppel by convention can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous."

In *Gillett v Holt*[30] (a case of proprietary estoppel) the Court of Appeal considered the necessary element of detriment and held that this is not a narrow or technical concept but connotes something substantial, approached as part of a broad enquiry as to unconscionability, and judged as at the date on which the party seeks to go back on an assurance or assumption. The Court of Appeal then referred with approval to the explanation given by the High Court of Australia in *Grundt v Great Boulder Pty Gold Mines*[31], and to *dicta* to like effect in *Thompson v Palmer*[32] that the detriment is that which would flow from the change of position if the assumption were abandoned; the act or omission becomes detrimental if the other party is permitted to go back on the common assumption.

The claim of estoppel in the case here discussed was made on the basis of both estoppel by convention and promissory estoppel. The judge, it is submitted, correctly rejected the latter, there being no clear assurance as to any defence of limitation was to be waived.[33] This was so simply because of the parties' assumption that the claimant had already complied with the time restriction on his claim; on the facts there was no limitation defence susceptible to waiver. Arguably, however, the court fell into error in relation to the claim as to estoppel by convention by referring to the alleged estoppel being concerned with agreement by the MIB not to take any limitation defence. This, it is submitted, is not the correct way in which to analyse the dealings between the parties and the necessary mutual assumption at the core of the estoppel claim: the assumption clearly made and shared between the MIB and the claimant's solicitors could only be that there was no limitation defence available because the claimant had made his claim within the standard three year period expressed by the Untraced Drivers' Agreement 2003; the tenor of the communications was that there was a common assumption that the Untraced Drivers' Agreement 2003 applied, albeit with necessary modifications given that Mr Howe's accident had occurred in France rather than in Great Britain. On this point it might have been telling to have introduced evidence as to the guidance offered by the MIB itself through its website; current guidance suggests that claimants need to apply within a three year period whether or not the accident occurs within the UK; there is no standard form for application where the accident has occurred abroad; claimants are simply instructed to write a letter to the MIB. These kinds of evidence would be highly relevant to show the manifestation of an assumption or a "crossing the line" between the parties sufficient to justify estoppel by convention.[34]

Limitation

As to the limitation period arising under the 2003 Regulations Stewart J rejected the claimant's contentions that service of a request for insurance information under regulation 13 has any effect on the running of time, being at most only a procedural step; such reasoning appears, it is submitted, entirely sound. However, the reasoning proceeded further to conclude that a six year limitation period, by virtue of regulation 16 of the 2003 Regulations (sums due and owing to be recoverable as a civil debt) and section 9 of the Limitation Act (sums recoverable by statute), would run from the cause of action; the cause of action was held to arise as at the date of accident rather than the date at which any debt is quantified.

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[30] [2001] Ch 210; [2000] 3 WLR 815.
[31] (1937) HCA 58; (1937) 59 CLR 641.
[32] (1933) 49 CLR 507.
[33] The case may be distinguished from that of *Ace Insurance SA-NV v Seechurn* [2002] EWCA Civ 67, being a claim as to promissory estoppel rather than estoppel by convention and where the claim was made under first-party insurance (personal accident policy) in which the *bona fides* of the claimant were doubted by the insurer and thus in respect of which the insurer's liability for any sum in excess of that already paid over was clearly in dispute.
[34] In this it is relevant to note that the MIB stands in a different position from that of an insurer in that the MIB holds itself out as a body that provides advice and support in making motor insurance claims: MIB website accessed 20th May 2016. An adversarial role is not therefore suggested nor arguably appropriate given the obligations under the 2009 Directive.

That may be in doubt. Section 9 is not limited to claims by way of debt, as distinct from those, as in this case, for unliquidated damages: the wording of section 9(1) is broad referring to "an action to recover any sum…". Regulation 16 of the 2003 Regulations, however, arguably postpones the accrual of the cause of action against the MIB until the sum becomes "due and owing pursuant to these Regulations". In the context of insolvency law a debt "due" connotes one that has become payable, that is, a sum of money to which the creditor may go at once and demand payment.[35] Not all claims made under the 2003 Regulations will result in a sum becoming due and owing simply because the claimant has to satisfy the MIB that liability of the untraced driver is established (generally, as we have seen, in accordance with the law of the place of accident) and that the precise sum by way of compensation has been established. Accordingly, the date of the claimant's accident is arguably not the accrual of the cause of action under the 2003 Regulations; it is either the date on which liability is accepted by the MIB or, and arguably more likely, the date on which quantum is established. In this way there is the prospect of a limitation period and one that will operate in a manner analogous to an action on a judgment even though in most if not all cases the claimant will have no need to pursue the MIB in this fashion.

Costs – Qualified One-Way Costs-Shifting

In a further unhappy sequel[36] to this decision Stewart J concluded that the claimant who had failed in his action against the MIB was liable to pay costs; he enjoyed no costs shield by way of One-Way Costs-Shifting under the Civil Procedure Rules ("CPR") CPR Part 44, an innovation with effect from April 2013. In broad terms, these rules are designed to protect the unsuccessful personal injury claimant from an adverse costs order in the event of the total failure of his claim. The costs shield although not exhaustive nor guaranteed in all cases[37] nevertheless generally applies when a claimant seeks damages for personal injury but fails in his claim. As the judge acknowledged a claim such as that made on the MIB pursuant to the 2003 Regulations (to which one might also add a claim made direct against an insurer pursuant to the European Communities (Rights against Insurers) Regulations 2002)[38] lie within the rationale of the costs shield created by the rules on Qualified One-Way Costs-Shifting for the benefit of personal injury claimants. But this was not enough: the claim was not one for "personal injuries" as is required by the language adopted in CPR Part 44; rather it was a claim for a declaration as to a sum due pursuant to statute (a statutory debt) by reference to regulation 16 of the 2003 Regulations. This conclusion was made on the basis of a somewhat narrow interpretation of CPR Part 44, r.44.13, seemingly heavily influenced by the fact that the claim on the MIB is not predicated upon any breach of duty or any other wrong (at least by the MIB itself). Accordingly, an order of costs was made against Mr Howe, which order may be enforced in the normal way. Although obviously further complicated by a probable claim by Mr Howe against one or more legal advisor that approach also appears to be questionable.

As Stewart J accepted the statutory context of the CPR Part 44 requires a purposive interpretation given to the wording defining its scope; "damages" at least in the civil context typically connotes an award of money for a civil wrong. As Sir Wilfred Greene MR expressed it in *Hall Brothers SS Co Ltd v Young*[39] "…the word "damages" is one which to an English lawyer conveys a sufficiently precise meaning…"Damages" to an English lawyer imports this idea, that the sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract, by the general law, or by legislation." True it is that the MIB is not itself guilty of any civil wrong (unless and until it is in breach of its

[35] *Re European Life Assurance Society (No 1)* (1869) LR 9 Eq 122 at 127 per James VC, referring to s80 Companies Act 1862, mentioned by *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc* [2013] UKSC 28; [2013] 1 WLR 1408 and considered in *Re Cheyne Finance Plc* [2007] EWHC 2402 (Ch); [2008] Bus LR 1562; [2008] BCC 182 in relation to the common phrase of "due and payable" implicitly connotes a sum immediately to be paid rather than a sum that will become payable at some future date. See too s123 Insolvency Act 1986: one way of showing that a company is insolvent is to prove that the company "is unable to pay its debts as they fall due" (s123(1)(e)).

[36] [2016] EWHC 884 (QB).

[37] Notable exceptions are cases where the claimant is guilty of abuse of process or where his claim has been found to be fundamentally dishonest. Instances where there is no fault on the part of the claimant include the possibility of set-off costs against any sums awarded in the claimant's favour and also where the claim includes heads of loss not falling within the scope of the rules, most commonly (although not as yet fully tested by the courts) a reference to claims for the cost of hire and damage to property: CPR r.44.15-16.

[38] SI 2002/3061. In the case of the 2002 Regulations there is a cause of action which exists against an identified defendant, and the claim on the insurer is necessarily parasitic upon the existence of a breach of duty by an insured driver.

[39] [1939] 1 KB 748 at 756-757 quoted with approval by Longmore LJ in *Bedfordshire Police Authority v Constable* [2009] EWCA Civ 64; [2009] 2 All ER (Comm) 200; [2009] Lloyd's Rep IR 607 at paras 21-23.

obligations under the 2003 Regulations) but the claim upon it is predicated upon proof of a civil wrong, albeit in this context that of the untraced driver, and it is this civil wrong which gives rise to a remedy which is in the nature of damages for personal injury. The MIB has no responsibility under the 2009 Directive nor therefore under the 2003 Regulations unless and until the claimant is able to prove the existence of civil liability as a matter of law and fact. As such it may be thought to be analogous to a *Monk v Warbey* claim[40] which envisages a cause of action on the basis of a statutory duty on the keeper of a vehicle not to cause or permit its uninsured use; in both the defendant has not caused the claimant's injury in any legal or factual sense but both are made legally responsible by statute for the damage caused. It is the concept of "responsibility" which is indicative of a liability for damages in a similar fashion to the way in which tort law may impose strict liability. This was the approach in fact recently taken by Longmore LJ in *Bedfordshire Police Authority v Constable*.[41] For his lordship the distinction between "damages" and "compensation" was illusory.

Longmore LJ's comments were in a different context to the CPR, the 2002 and the 2003 Regulations. But the argument here made is only strengthened when the focus of attention of the rules on Qualified One-Way Costs-Shifting is considered; this is directed to the nature of the remedy sought, that is to say what the claimant seeks in practical terms, rather than to the nature of the defendant's alleged liability. It is thus arguably inappropriate to attempt to make a technical distinction between "damages" and "compensation" or between "damages" and "a civil debt". Seen in context there is no difficulty in viewing a claim such as that of Mr Howe made upon the MIB that is designed to test the perimeter of the MIB's responsibility under the 2003 Regulations as truly being in the nature of a claim which seeks damages for personal injury. It is only regulation 16 of the 2003 Regulations which has given rise to doubt. The purpose of regulation 16 of the 2003 Regulations is arguably directed to an entirely different matter: the creation of a cause of action predicated upon breach by the MIB in its obligations to pay compensation under the 2003 Regulations, that is once the claim is accepted as sound and quantum is ascertained.

The decision at first instance, if it is upheld by the Court of Appeal, has significant practical implications extending to the scope of costs' orders against claimants who seek compensation from the MIB under the 2003 Regulations. The scope of the costs shield has been considered by the Court of Appeal in *Wagenaar v Weekend Travel Ltd*[42] but that was only in relation to a claim for indemnity or contribution as between defendants, where it was held that Qualified One-Way Costs-Shifting does not apply in that context. That decision is entirely sound because the nature of the claim by one defendant against another when seeking indemnity or contribution is not in substance a claim for personal injuries but rather for financial loss. Such a claim is not, however, analogous to the situation of the claimant who has sustained personal injury and the defendant MIB pursued as the compensation body.

If the narrow interpretation of CPR Part 44 is correct, and if Part 44 is not amended, there remains an arguable point as to compliance with the expectations of EU law, specifically as to the principles of equivalence and effectiveness considered in *Evans v Secretary of State for the Environment, Transport and the Regions*.[43] Equivalence may be in doubt when, as is required, one compares the position of the personal injury claimant who is able to identify the insured driver alleged to be at fault with that of the victim of an untraced driver. The MIB as a company limited by guarantee and financially supported by the motor insurance industry is of course right to defend all unjustified claims made upon it and in appropriate circumstances to participate in legal proceedings in order to test the perimeter of its statutory obligations. Balanced against this is the social and public interest in personal injury claimants not being deterred by the risk of adverse costs orders from taking

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[40] [1935] 1 KB 75.

[41] [2009] EWCA Civ 64; [2009] 2 All ER (Comm) 200; [2009] Lloyd's Rep IR 607, a decision noted without criticism by the Supreme Court in *Mitsui Sumitomo Insurance Co (Europe) Ltd v Mayor's Office for Policing and Crime* [2016] UKSC 18; [2016] 2 WLR 1148.

[42] [2014] EWCA Civ 105; [2015] 1 WLR 1968 per Vos LJ at para 36: "I should start by referring briefly to the Jackson Report, pursuant to which QOCS was introduced. I shall not repeat here the careful discussion in Chapters 9 and 19 of the Jackson Report. Suffice it to say that the rationale for QOCS that Jackson LJ expressed in those sections came through loud and clear. It was that QOCS was a way of protecting those who had suffered injuries from the risk of facing adverse costs orders obtained by insured or self-insured parties or well-funded defendants. It was, Jackson LJ thought, far preferable to the previous regime of recoverable success fees under CFAs and recoverable ATE premiums…". That case concerned a claim for contribution and or indemnity, made between defendants, the Court of Appeal concluded a claim which fell outside the scope of Qualified One-Way Costs-Shifting, as not one in respect of personal injuries.

[43] [2003] EUECJ Case C-63/01; [2004] RTR 32; [2005] All ER (EC) 763; [2004] RTR 534; [2003] ECR I-14447; [2004] Lloyd's Rep IR 391; [2004] 1 CMLR 47, in particular at paras 27-28, 45, 76.

legal proceedings against the MIB where properly advised so to do, a matter at the heart of the concept of access to justice.[44] As things stand such a claimant will need to give serious consideration as to the advisability of taking out legal expense insurance. The irony would be that the costs of such claims would then become shifted from the motor insurance sector to the legal expense insurance sector, a fiscally wasteful outcome and contrary to one of the aims of the Jackson reforms. These matters have broader scope than the 2003 Regulations.

A possible argument might be made by motor insurers that Qualified One-Way Costs-Shifting does not also apply to a claim made pursuant to the European Communities (Rights against Insurers) Regulations 2002 ("the 2002 Regulations")[45] which in broad terms permit a direct right of action against a motor insurer. The argument might be put on the basis that the 2002 Regulations enable the third party claimant to stand in the shoes of the insured (the effect of regulation 3) and thus the claim is one for "indemnity" under an insurance policy rather than a claim for "personal injuries". It is submitted that such an interpretation of the regulations would be misplaced. The effect of regulation 3 is to extend the third party's right of action to the insurer rather than to change the inherent nature of that cause of action or to create a distinct cause of action different in substance to that possessed against the insured: the claimant's success or failure against the insurer is dependent upon success or failure against the insured; the recovery is for personal injuries sustained, and there may be no double recovery. The reference in that regulation to the liability of the insurer ("…the insurer shall be directly liable to the entitled party to the extent that he is liable to the insured person.") intends only to make explicit the limitations of this right of action in terms of available defences as between insurer and insured. The approach of the Court of Appeal in *Nemeti v Sabre Insurance Co Ltd*,[46] that the cause of action is in the nature of a claim for indemnity by virtue of statute, was *obiter* on the point and the court was not asked to consider the context of the rules as to costs' liability since the point was not a live issue on the facts. In any event to conclude that the nature of the liability is that of indemnity or a statutory debt does not in this context exclude the possibility that the claim is also one that seeks damages for personal injuries; the concepts are not mutually exclusive in this context. Particular weight of course needs to be given to the fact that the 2002 Regulations, as with the 2003 Regulations, were implemented to comply with Community law and as such require a purposive interpretation.[47]

Moreover, were both insured driver and insurer to be joined in the civil proceedings the odd result might be that the costs shield is applied to the failed claim made against the insured but not with regard to the failed claim made against the insurer co-defendant. The outcome could be that the insurer co-defendant would be liable to meet the defence costs of his insured whilst being able to enforce his own defence against the unsuccessful claimant insofar as those costs are severable from those of the insured. It is doubtful that these kinds of complexities were contemplated by the draftsman in formulating the costs rules particularly as these matters were not canvassed by Lord Justice Jackson in his review of costs.[48] Indeed it is of note that Lord Justice Jackson adopted the phrase "personal injuries litigation" and expressly stated that he treated this as a broad concept.[49] The focus was upon the individual who had sustained personal injury. This is arguably so regardless of the legal basis of the claim.

The guidance by the Supreme Court, forthcoming in *Moreno*, will provide much needed clarity in relation to the 2003 Regulations. It is to be hoped that the guidance will extend to some at least of the problems here highlighted. It is also to be hoped that the Court of Appeal will address the injustice currently meted out to Mr Howe and his solicitors, and that the CPR Rules Committee will give further thought to the wording of CPR Part 44 to make explicit reference to claims brought pursuant to the 2002 and the 2003 Regulations.

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[44] A recent example of this is the case of *Wigley-Foster v MIB* [2016] EWCA Civ 454 where the Court of Appeal reversed a first instance decision and thereby confirmed that supervening insurer insolvency does not divest the claimant of his claim on the MIB as a result of failure by the insurer to respond to the claim within the time period prescribed by regulation 11 of the 2003 Regulations. The judgment suggests that the claimant's right of claim arises in an inchoate form as at the date of accident.

[45] SI 2002/3061.

[46] [2013] EWCA Civ 1555.

[47] There are other problems with the 2002 Regulations not least the fact that they are restricted to accidents within the UK although Community law requires an EEA scope. For further commentary on the 2002 and 2003 Regulations See the discussion in Merkin and Hemsworth, *The Law of Motor Insurance, 2nd edn* (Sweet & Maxwell) 2015, chapter 8.

[48] *Review of Civil Litigation Costs: Final Report by Lord Justice Jackson*, December 2009.

[49] Ibid, chapter 19, p184 at para 1.1.