Case No. QBCM1 96/1382/B

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(MISS B DOHMANN QC sitting as a High Court Judge)

Royal Courts of Justice
Strand
London WC2

Wednesday 12 March 1997

B e f o r e:

LORD JUSTICE EVANS
LORD JUSTICE HOBHOUSE
LORD JUSTICE MUMMERY

- - - - - -

CREDIT LYONNAIS
Plaintiffs/Respondents

- v -

NEW HAMPSHIRE INSURANCE COMPANY
Defendants/Appellants

- - - - - -

(Transcript of the Handed-down judgment of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)

- - - - - -

MR M BRINDLE QC and MR G PHILLIPS (Instructed by Berwin Leighton, London, EC4R 9HA) appeared on behalf of the Appellants.

MR M HUMPHRIES (Instructed by Linklaters & Paines, London, EC2V 7JA) appeared on behalf of the Respondents.

- - - - - -

J U D G M E N T (As approved by the Court)

LORD JUSTICE HOBHOUSE: This is an appeal with the leave of the Judge from the Judgment of Miss Barbara Dohmann QC sitting as a Deputy Judge of the High Court on 16th September 1996. The issue which she had to decide was whether two policies of insurance were governed by English or French law. She held that the applicable law was English law. The relevance of the point is apparently that there are time-bar defences which are available to the insurers under French law but not under English law.

The Plaintiffs are Credit Lyonnais, the well known bank incorporated under the laws of France and having its Head Office in France. Although its main banking business is carried on in France, it also carries on business in some 70 other countries either through subsidiaries or branches established in those countries. In the United Kingdom its "Head Office" is at 84-94 Queen Victoria Street London EC4P 4LX. In the United Kingdom it operates through branches not through a separately incorporated subsidiary.

In 1988, the Head Office of Credit Lyonnais in France decided to reorganise its insurance arrangements as part of a "world wide insurance programme". They stated that: "the target of Credit Lyonnais parent company is to obtain on a group level a better coverage of its units at the cheapest price, while protecting as much as possible the independence of each unit." The 'units' referred to are the subsidiaries or branches operating in various countries outside France. The independence of each unit was to be protected as far as possible, by using local policies issued by a local insurer and maintaining the local relationship between each local unit and a local insurance broker. The other objectives were to be achieved through a structure of insurance and terms of cover negotiated in France between the Head Office acting through their French insurance broker Gras Savoye (apparently also known as "Unison") with 'UNAT' a French subsidiary of a United States insurance group called American International Group. These negotiations agreed the scope of the cover to be provided and a

definition of the risks. They agreed that the scheme should consist of four layers: a first layer Ff5m to Ff20m, the second layer Ff20m to Ff50m, the third and fourth layers covered losses in excess of Ff50m. The first and second layers were to be covered by local policies placed by the local unit through the local correspondent broker of Gras Savoye with the locally operating member of the American International Group. The local units were also to be at liberty to take out cover for the deductible of Ff5m should they think it prudent to do so having regard to the nature of their business. The local unit would pay the premiums on the policies placed locally.

The third and fourth layers were to be covered in France by policies taken out by the French Head Office with UNAT France, the premiums being paid by the French Head Office. There was to be a further 'DIC' policy taken out by the French Head Office and paid for by them to cover the risk of the local first and second layer policies not in fact covering the full risks which it had been agreed with UNAT should be covered. Part of the stated purpose of the programme was to achieve "homogeneity of coverages" which is understood to mean that the risks and occurrences covered in each country should be equivalent. Insofar as they were not, the 'DIC' policy would fill in the gaps.

The layers of cover and the premiums were all expressed in French francs. The terms of the cover were negotiated and agreed in France and set out in documents in the French language.

The policies the subject matter of this action were the first and second layer local policies for the United Kingdom 'unit'. The two policies were issued by the Defendants in the action, the New Hampshire Insurance Company which is incorporated in the United States having its Head Office in New York but registered under the Companies Act 1985 as an overseas company. Its insurance business in the United Kingdom was conducted through an English underwriting agency, American International Underwriters (UK) Limited, part of the same group. The insurance was placed by the

United Kingdom Head Office of Credit Lyonnais through the firm of London brokers Willis Faber Dumas who were also the London correspondents of Gras Savoye. The relevant policies are dated July 1989 and were renewed by renewal endorsements issued in London by AIU in July 1990. The claims in the action relate to frauds which the Plaintiffs say were perpetrated in the policy year 1990/1.

The two policies came into existence as a result of Willis Faber and the Plaintiffs' London office being informed of the programme which had been decided upon in France. The two local policies were in the English language and contained "Special Conditions" which were effectively the totality of the policy. No schedules were attached. There was no identification of the "policyholder" and it is accepted that it must be taken to have been simply Credit Lyonnais that is to say the entity incorporated in France as the London Head Office/branch was not a separate legal entity. The persons insured included the policyholder's clients so far as interested. The Special Conditions were stated to be a free translation of those contained in the French document; in case of dispute of the terms and conditions of the French master policy were to prevail. It is accepted that this was confined to points of translation. It is also accepted that General Conditions negotiated in France and to which the policies issued in France were subject were not incorporated into the relevant local policies and are not relevant to the question of ascertaining the applicable law of the local policies.

The policies the subject of this action contained a "Territoriality" clause which expressly confined the cover to the United Kingdom. The premiums although expressed in French francs (as were the limits of cover) were to be paid in London through the London brokers. Although there was no provision to this effect, it would be contemplated that claims would, in accordance with the ordinary practice, be paid in London through AIU and the London brokers. Both policies included a clause for the agreed adjustment of claims. This would in the ordinary course be done locally but the policies

provided that in the event of the failure of the parties to agree upon a third adjuster to resolve any difference of opinion between the other two, the third adjuster should be appointed by "the president of the legal competent body having jurisdiction in the Policyholder's head office". The risks covered included a definition of what was meant by the word "fraud". In the first layer policy the definition included "any act provided and punished by [various articles] of the French Penal Code or any other similar legal provisions outside France". In the second layer policy the equivalent wording did not make express reference to the French penal code but included such expressions as "swindle" and "any abuse of payer signed in blank" which were translations of French words which had a more exact meaning than is apparent from these translated words. Neither policy directly or indirectly included any arbitration or jurisdiction clause nor did they include any choice of law clause.

The question which the Judge had to decide was what law was applicable to these policies. The criteria which she had to apply are laid down in the Insurance Companies Act 1982 as amended to give effect to the Second Council Directive dated 22 June 1988 (OJ 1988 No.L172). So far as relates to policies of the present type, the Act provides:

> "94B
> (1) The law applicable to a contract of insurance the effecting of which constitutes general business, and which covers risks situated in the United Kingdom or another Member State, shall be determined in accordance with the provisions of Part I of Schedule 3A to this Act.
>
> 96 .....
>
> 'policyholder' means the person who for the time being is the legal holder of the policy for securing the contract with the insurance company.

96A

(3) References in this Act to the Member State where the risk is situated are-

(a) where the insurance relates to buildings and their contents (in so far as the contents are covered by the same policy), to the Member State in which the property is situated;

(b) where the insurance relates to vehicles of any type, to the Member State of registration;

(c) in the case of policies of a duration of four months or less covering travel or holiday risks (whatever the class concerned), to the Member State where the policyholder took out the policy;

(d) in a case not covered by paragraphs (a) to (c) -

(i) where the policyholder is an individual to the member State where he has his habitual residence at the date when the contract is entered into;

(ii) otherwise, to the member State where the establishment of the policyholder to which the policy relates is situated at that date."

SCHEDULE 3A
LAW APPLICABLE TO CERTAIN CONTRACTS OF INSURANCE
PART I
GENERAL BUSINESS

General Rules as to Applicable Law

1 (1) Where the policyholder has his habitual residence or central administration within the territory of the Member State where the risk is situated, the law applicable to the contract is the law of that Member State.

However, where the law of that Member State so allows, the parties may choose the law of another country.

(2) Where the policyholder does not have his habitual residence or central administration, within the territory of the Member State where the risk is situated, the parties to the contract may choose to apply either-

(a) the law of the Member State where the risk is situated, or

(b) the law of the country in which the policyholder has his habitual residence or central administration.

.....

Applicable law in the absence of choice

2 (1) The choice referred to in paragraph 1 must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.

(2) If that is not so, or if no choice has been made, the contract shall be governed by the law of the country (from amongst those considered in the relevant sub-paragraphs) with which it is most closely connected.

(3) Nevertheless, a severable part of the contract which has a closer connection with another country (from amongst those considered in the relevant sub-paragraphs) may by way of exception be governed by the law of that other country.

(4) A contract is rebuttably presumed to be most closely connected with the member State where the risk is situated.

.....

Supplementary Provisions

4 (1) Where a Member State includes several territorial units each of which has its own rules of law concerning contractual obligations, each unit shall be considered as a country for the purposes of identifying the applicable law.

(2) The provisions of this Part of this Schedule apply to conflicts between the laws of the different parts of the United Kingdom.

....."

Section 96A and Schedule 3A are designed to give effect to the Second Directive and discharge the obligation of the United Kingdom under Article 32 of the Directive to amend its national law to comply. The Schedule follows closely the wording of Article 7 of the Directive. The recitals of the Directive refer to the need to develop the internal insurance market, to facilitate competition and,

where necessary, to have regard to the requirement to protect some policyholders. In relation to applicable law the Second Directive recites:

> "Whereas the provisions in force in the Member States regarding insurance contract law continue to differ; whereas freedom to choose as the law applicable to the contract a law other than that of the state in which the risk is situated may be granted in certain cases in accordance with rules taking into account specific circumstances."

The expressions "where the risk is situated" and "establishment" are used in other parts of the Directive as well as in Article 7. There was large measure of common ground between the parties in relation to the application of these provisions. It was agreed that no distinction need be made between English law and the law of any other part of the United Kingdom. It was agreed that the policies did not include any choice of applicable law "expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case". It was also agreed that the risk was situated in England being the 'State' where the establishment of the policyholder to which the policies relate was situated. It is similarly agreed that the central administration of the policyholder was in France and that paragraph 1(2) would have been the sub-paragraph which delimited the freedom of choice had the parties made a choice of applicable law and which was therefore the relevant sub-paragraph for the purpose of paragraph 2(2).

It is thus agreed that the relevant provisions are those to be found in paragraph 2 - "the contract shall be governed by the law of the country (France or England) with which it is most closely connected" and the contracts are rebuttably presumed to be "most closely connected" with England, being "the Member State where the risk is situated".

The special provision made by the Second Directive regarding the law applicable to insurance contracts fills an exception which had been deliberately left in the Rome Convention on the Law Applicable to Contractual Obligations. Article 1.3 of the Rome Convention states that it does not apply to contracts of insurance which cover risks situated in the territories of Member States of the European Economic Community. There are many similarities between the drafting of the Rome Convention and the Second Directive and it is unrealistic not to take into account that the former influenced the latter. It is therefore helpful and appropriate to approach the consideration of Article 7 of the Second Directive having informed oneself of the scheme of the Rome Convention and the commentary of Giuliano and Lagarde, OJ 1980 C282.

The scheme of the Rome Convention is to treat the applicable law as something to be chosen by the parties to the contract and to recognise the right of contracting parties to choose the applicable law. Article 3 opens with the words: "A contract shall be governed by the law chosen by the parties." It also requires (like the Second Directive) that the choice must be express or demonstrated with reasonable certainty. Article 4 deals with the applicable law in the absence of choice and lays down the general rule that, to the extent that the law applicable has not been chosen according to Article 3, "the contract shall be governed by the law of the country with which it is most closely connected". Paragraphs 2 to 4 of Article 4 lay down certain presumptions. For example paragraph 2 states:

> "It shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has at the time of conclusion of the contract his habitual residence or, in the case of a body corporate or unincorporate, its central administration."

The test in this paragraph is a test which identifies the closest connection of the contract with a country by identifying the country in which the primary performing party is located. Thus, the test looks first at what is involved in the performance of the contract, then identifies the party who is to provide that performance and then connects that party to a country. Paragraphs 3 and 4 similarly refer to the location of the subject matter of the contract or of a performing party.

It is therefore a test which consistently with the logic of the drafting does not look for some inferred or imputed intention but rather applies a criterion which takes into account the performance of the contract and a geographical location. As the commentators point out, this criterion gets away from the concept of simply having regard to where the contract is made nor is it, as such, a criterion of place of performance. It is a criterion which seeks to identify the country in which the *party* providing the significant performance is located. It is also to be observed that just as it is not a test directed to ascertaining intention so it is not directed to identifying a legal system with respect to which the intention to enter into contractual relations must be taken to refer. The test fundamentally departs from the logic of the approach of the conflicts of laws rules of English private international law for ascertaining the proper law of a contract.

The word used in Article 4 of the Rome Convention is "presumption". The commentators refer to it as a "rebuttable" presumption. But Paragraph 5 of the Article goes further: it provides that where the "characteristic performance" cannot be determined the presumption in paragraph 2 is not to be made and, in any case, the presumptions in paragraphs 2 to 4 "shall be disregarded if it appears from

the circumstances as a whole that the contract is more closely connected with another country". The presumption is therefore displaced if the Court concludes that it is not appropriate in the circumstances of any given case. This, formally, makes the presumption very weak but it does not detract from the guidance that paragraph 2 gives as to what is meant by "the country with which it is most closely connected" and does not detract from the need to look for a geographical connection. This reading of Article 4 is also supported by the commentators.

Returning now to the 1982 Act and the Second Directive, it is clear from the recitals to the Directive that one of its purposes is to protect the interests of policyholders. It therefore has a similar character to those Articles of the Rome and Brussels Conventions which make special provision for classes of contract where it is considered that the parties are not or may not be in an equal bargaining position and considerations of policy are to be applied. There is, of course, no suggestion that the two parties to the present contracts were themselves other than equal. But such concerns underlie and inform the understanding of the drafting of provisions such as these. Similarly it is always important to have in mind that they are intended to have a uniform international application. Their provisions and the Acts by which they are incorporated into English law should not be given a construction deriving from specifically English concepts which are not within the scheme of the relevant international convention.

Unlike the Rome Convention, the 1982 Act and the Second Directive contain no statement that the applicable law is to be the law chosen by the parties. Rather, there are provisions which state what law shall be the applicable law subject to limited rights of the parties to agree that a different law shall apply. Thus it subordinates and restricts the power of the parties to choose. Paragraph 2 of the

Schedule, which corresponds to sub-paragraph (h) of Article 7.1, follows a similar scheme and uses some of the same wording as Article 4 of the Rome Convention. But there are two important differences. The first is that the presumption of closest connection is with the country of the insured party not the insurer as would, in the (assuredly correct) view of the commentators, be the position under Article 4.2 of the Rome Convention. Whilst following the similar approach of considering the performance of the contract and relating it to one of the parties and that party's geographical location, the Second Directive states that the significant location is the location of the insured. The second difference is in the drafting of the presumptive provision. The only qualification is the word "rebuttable". There are no words such as those included in Article 4.5 of the Rome Convention which displace the presumption if it appears from the circumstances as a whole that there is a closer connection with another country. It is understandable why the Directive should have been more tightly drafted since a more general qualification of the presumption would effectively displace the policy of the Directive that the location of the insured should be the primary consideration. This said, the overall scheme is similar in that the "closest connection" test is only to be applied in the absence of a permitted choice and that the underlying criterion is still that of identifying the *country* with which the contract is most closely connected.

The definition of the phrase "the risk is situated" further underlines these conclusions. Inserting the relevant part of the definition, paragraph 2(4) of the Schedule reads: "a contract is rebuttably presumed to be most closely connected with the Member State where the establishment of the policyholder to which the policy relates is situated."

Returning to the facts of the present case, it is accepted that the establishment of the policyholder is the London office of Credit Lyonnais. This identifies the significant geographical location for the purposes of the Directive and the 1982 Act. The presumption that English law is the applicable law therefore follows. By what other factor is that presumption to be rebutted? Consistent with the policy of the Directive (reproduced in the Act) one must look for links with the subject matter and performance of the contract and their connection with a particular country. In the present case such factors are exclusively English. The subject matter of the contract is risks which relate to property and activities in the United Kingdom. This is clearly stated in the "territoriality" clause. The performance of the contract by the payment of premiums and the payment of claims is again either expressly or by the contemplation of the parties to take place in England. Both parties are for the purposes of the First and Second Directives established in England. All these factors reinforce the presumption and go no way towards rebutting it. There are no factors which consistently with the intent of the Second Directive can be put into the opposite side of the scale.

There is no element of performance that is geographically connected with France. There is no performing party which is relevantly located in France. The only party with any connection with France is Credit Lyonnais and it is accepted that for the purposes of the Directive and the 1982 Act the place where it is established as the policyholder is in the United Kingdom.

The factors relied upon by the Defendants in argument before us and before the Judge are largely irrelevant to the statutory criteria. Thus, references to French francs and provisions of the French penal code do not themselves relate to the location of the performance of the contract nor to the location of either of the performing parties. Similarly the genesis of the contract and its emanation

from a world-wide programme negotiated in France is not relevant. This too has nothing to do with the performance of the contract and the location of the performing parties. The arguments of the Defendants are not directed to matters relevant to any rebuttal of the presumption nor to the criteria stated in the Directive and the Act.

The Defendants criticised the considerations emphasised by the Judge in her judgment. There is some force in these criticisms but they do not assist the Defendants. Like the Defendants, she seems to have been strongly influenced by considerations which would be relevant to the traditional approach of English law when deciding what is the *proper* law of a contract under English conflict of laws rules independently of any convention or statutory provision. She appears to have been asking herself whether there was material from which an intention to contract by reference to the French legal system could be inferred. She said:

> "The policyholder here had the choice, and is unlikely to have been in a weak bargaining position, yet it did not when the terms of the contract were drawn up (and does not now) contend that French law should apply so as to ensure the homogeneity of the worldwide scheme. General Conditions, expressly governed by the French Insurance Code, making numerous references to that Code, and providing for any disputes between the contracting parties to be submitted to the jurisdiction of the French courts, were not attached to the present Policies. .... The General Conditions were not supplied to Credit Lyonnais in London.
>
> It is the contract (not a worldwide scheme) which, if the presumption is to be rebutted, must be shown to be more closely connected to (in this case) France. I have no doubt that had the Policies included the General Conditions, such rebuttal should succeed. But, contrary to Mr Brindle's submission, the position of the Policies is not such a simple "classic" case. We have policies issued in England by an English Underwriting Agency to the UK business enterprise of a French multi-national company, entirely and expressly with reference to that UK business. It does not follow from the fact that a multi-national company may dictate the precise terms of local supply contracts that such contracts are governed by the law of the headquarters of that multi-national. In

> this case, it appears clearly from Mme Suchanecki's affidavit that local laws do or may apply to the scheme policies issued in various parts of the world. I am not left with the impression that "legal homogeneity", upon which Mr Brindle sought to rely so much, was achieved, achievable or even attempted, given the omission of the General Conditions in the present case and in other instances, and given the omission in the carefully negotiated Special Conditions of any choice of law or jurisdiction clause."

I accept the Defendants' submission that once it is seen that there is no choice of applicable law satisfying paragraph 2(1) of the Schedule, the question of choice and absence of choice becomes irrelevant to the question of ascertaining with what State the contract is most closely connected. Similarly to refer to the contemplation by one party or another that certain local laws may or may not be relevant is to be influenced by considerations of inferred choice and connection with legal systems and not with questions of performance and the location of performing parties.

However, the Judge was right to conclude that the presumption had not been rebutted. Nothing turns in the present case upon any nice assessment of the weight of the material with which it is sought to rebut the presumption. In the present case there is no such material. But it must be pointed out that under the Directive and the 1982 Act there is no scope for displacing the presumption in the sense of treating it as inapplicable or holding that one can disregard it. In my judgment, as I have stated earlier, the drafting of the corresponding provisions of the Rome Convention and of the Second Directive are in this respect different and disclose a different policy.

In my judgment the appeal should be dismissed. The applicable law in relation to each of these policies is English law.

LORD JUSTICE MUMMERY: I agree that the appeal should be dismissed for the reasons given by Hobhouse LJ.

LORD JUSTICE EVANS: I also agree that the appeal should be dismissed for the reasons given by Hobhouse L.J. His close analysis of the provisions of the Insurance Companies Act 1982 which give effect to the Second Directive shows that "the applicable law in the absence of choice" has to be ascertained by reference to the factors referred to in paragraph 2 sub-paragraphs (2) to (4). This is something different from the common law approach of determining the parties' implied, if not express, choice of proper law. But first it is necessary to establish that no such choice, within the permitted limits, has been made expressly or at least "demonstrated with reasonable certainty", in accordance with paragraph 2(1). The learned judge therefore was correct to approach the issue in this way, and she was led to the correct conclusion also.

At the conclusion of the hearing we invited Mr Brindle Q.C. and Mr Humphries to confirm that there are no European authorities which are relevant to our decision, and this they have done. We are grateful to them for their further assistance. They have both drawn attention to the different terms of the presumption stated in Article 4 of the Rome Convention. For the reasons given by Hobhouse L.J. it is unnecessary in the present case to consider the precise operation of the presumption in circumstances where opposing factors may be finely balanced.

Order: Appeal dismissed with costs. Leave to appeal to House of Lords refused.