[2016] UKSC 52
On appeal from: [2015] EWHC 1002 (QB)

JUDGMENT

Moreno (Respondent) *v* The Motor Insurers' Bureau (Appellant)

before

Lord Mance
Lord Clarke
Lord Sumption
Lord Toulson
Lord Hodge

JUDGMENT GIVEN ON

3 August 2016

Heard on 12 and 13 July 2016

Appellant	*Respondent*
Hugh Mercer QC Marie Louise Kinsler Alistair Mackenzie (Instructed by Weightmans (Liverpool))	Daniel Beard QC Sarah Crowther (Instructed by BL Claims)

LORD MANCE: (with whom Lord Clarke, Lord Sumption, Lord Toulson and Lord Hodge agree)

1. On 17 May 2011, the respondent, Ms Tiffany Moreno, a United Kingdom resident, was on holiday in Greece. Walking along the verge of a road, she was struck from behind by a vehicle registered in Greece driven by a Ms Kristina Beqiri. Ms Beqiri had neither a valid driving licence nor it appears any insurance and is admitted to have been responsible for the accident. Sadly, Ms Moreno suffered very serious injuries, which included loss of her right leg requiring her to use a wheelchair, continuing pain and psychological reaction, as well as loss of earnings. The preliminary issue the subject of this appeal is whether the scope of her claim to damages is to be determined in accordance with English or Greek law.

2. Ms Moreno's claim is against the Motor Insurers' Bureau of the United Kingdom (the "UK MIB"). That it can be pursued against the UK MIB is the result of a series of Council Directives of the European Economic Community (now Union) dating back to 1972 and culminating in a codified Sixth Directive 2009/103/EC of 16 September 2009. These Directives are in part transposed into English law by The Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 (SI 2003/37) ("the 2003 Regulations"). The 2003 Regulations were enacted prior to the codifying Sixth Directive and therefore refer to the earlier Directives. The expressed and obviously beneficial purpose of the arrangements introduced by the Directives and Regulations is to ensure that compensation is available for victims of motor accidents occurring anywhere in the Community (now the Union) and to facilitate their recovery of such compensation. With British exit from the Union, this will, no doubt, be one of the many current arrangements requiring thought.

3. In the present case, the effect of the arrangements is that Ms Moreno is entitled to pursue the UK MIB, rather than pursue Ms Beqiri or search for some (evidently non-existent) insurer of Ms Beqiri or pursue the Greek body responsible for providing compensation in respect of uninsured vehicles involved in Greek accidents. Under the Sixth Directive the UK MIB will, once it has compensated Ms Moreno, be able to claim reimbursement from the Greek compensation body, which will in turn be subrogated to Ms Moreno's rights against Ms Beqiri. The issue is, as stated, whether the scope of the UK MIB's liability to Ms Moreno is be measured according to English or Greek law. Ms Moreno's concern is that Greek law would yield a lesser measure of compensation than English law. It is accepted however that in other contexts the reverse might be the case. There is, for example, evidence that Irish personal injuries' damages can be significantly higher than English, and that

Italian law can in fatal accident cases award significantly more (and, if relevant, to a broader range of persons) than English law.

4. Ms Moreno's case, advanced on her behalf by Mr Daniel Beard QC, is that the Regulations provide for English law to govern the measure of recovery, and that there is nothing in the Sixth Directive to the contrary or precluding this. Submissions to like effect were accepted in 2010 by the Court of Appeal (Laws, Moore-Bick and Rimer LJJ), overruling Owen J, in *Jacobs v Motor Insurers' Bureau* [2010] EWCA Civ 1208; [2011] 1 WLR 2609. The Court of Appeal's decision in *Jacobs* was followed in *Bloy v Motor Insurers' Bureau* [2013] EWCA Civ 1543; [2014] 1 Lloyd's Rep IR 75. In the present case, Gilbart J on 17 April 2015 rightly also held himself bound by the decision in *Jacobs*, but saw very considerable force in a contrary conclusion. On 23 April 2015 he granted the UK MIB's application for a "leap-frog" certificate under section 12 of the Administration of Justice Act 1969, and the appeal comes before the Supreme Court accordingly, with its permission granted 28 July 2015.

5. Prior to the Directives, there was already in existence the Green Card System established by Internal Regulations and an Inter-Bureaux Agreement covering states both within and outside the then European Economic Community. Under this System, still effective in the form of Internal Regulations (as adopted by the UN General Assembly in Crete on 30 May 2002 and revised in Lisbon on 29 May 2008 and in Istanbul on 23 May 2013) and in force in substance since 1 July 2008, the insurers of vehicles in participating states issue Green Cards guaranteeing compensation to victims of motor accidents caused by the driving of such vehicles abroad, and bureaux set up in each such state guarantee "that the foreign insurer will abide by the law applicable in that country and compensate injured parties within its limits". Article 3(4) headed "Handling of Claims" further provides:

> "All claims shall be handled by the bureau with complete autonomy in conformity with legal and regulatory provisions applicable in the country of accident relating to liability, compensation of injured parties and compulsory insurance …"

Article 5(1) provides for the local bureau which has thus settled a claim arising out of an accident to be able to demand reimbursement of the sums paid as compensation, together with costs and a handling fee, from the member of the bureau (ie the relevant insurer) which issued the Green Card or policy of insurance or, if appropriate, from the foreign bureau itself, while under article 6(1) each bureau guarantees the reimbursement by its members (ie the insurers) of any amount so demanded.

6. The Directives start with the First Council Directive 72/166/EEC of 24 April 1972 requiring each member state under article 3(1) to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance, which must also under article 3(2) cover any loss or injury caused in the territory of another member state. Equivalent provision is now made in article 3 of the codifying Sixth Directive. Articles 2(2) and 7 of the Directive (now, articles 2 and 4 of the Sixth Directive) contemplated that the requirement for a vehicle based in one member state to produce a Green Card on entry into another member state would cease from a date to be fixed by the Commission once it ascertained that an agreement had been concluded between the national insurance bureaux established under the Green Card System in member states whereby each such bureau (elsewhere sometimes described as a "guarantee fund"):

> "guarantees the settlement, in accordance with the provisions of its own national law on compulsory insurance, of claims in respect of accidents occurring in its territory caused by vehicles normally based in the territory of another member state, whether or not such vehicles are insured."

The relevant *Convention complémentaire entre Bureaux nationaux* was entered into on 12 December 1973. Article 3(a) provides that it modifies pro tanto the Inter-Bureaux Agreement, the terms of which otherwise remain in force. Domestic effect is currently given to the requirement in article 1(4) of the Second Directive 84/5/EEC of 30 December 1983 for a guarantee by the Uninsured Drivers' Agreement dated 3 July 2015 made between the Secretary of State for the Environment, Transport and the Regions and the UK MIB.

7. The Second Directive specified in article 1(1) that the insurance referred to in article 3(1) of the First Directive should cover compulsorily both property damage and personal injuries, up to specified minimum amounts (article 1(2)). Equivalent provision is made in the Sixth Directive in articles 3 and 9. Further it was provided by article 1(4) of the Second Directive (or now article 10 of the Sixth Directive) that each member state should:

> "set up or authorize a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 *[or article 3 of the Sixth Directive]* has not been satisfied."

Article 1(4) of the Second Directive (now article 10(4) of the Sixth Directive) continued:

> "... [E]ach member state shall apply its laws, regulations and administrative provisions to the payment of compensation by this body, without prejudice to any other practice which is more favourable to the victim."

The intention of the legislature in passing the Second Directive was "to entitle victims of damage or injury caused by unidentified or insufficiently insured vehicles to protection equivalent to, and as effective as, that available to persons injured by identified and insured vehicles": *Evans v Secretary of State for the Environment, Transport and the Regions* (Case C-63/01) [2004] RTR 32, para 27.

8. The Fourth Directive 2000/26/EC of 16 May 2000 carried matters further, most notably by giving victims of foreign motor accidents various possibilities of recourse in their home states of residence. Article 1(1) stated that:

> "The objective of this Directive is to lay down special provisions applicable to injured parties entitled to compensation in respect of any loss or injury resulting from accidents occurring in a member state other than the member state of residence of the injured party which are caused by the use of vehicles insured and normally based in a member state."

"Injured party" was by article 2(d) defined as stated in article 1(2) of the First Directive, that is as "any person entitled to compensation in respect of any loss or injury caused by vehicles", a definition repeated in article 1(2) of the Sixth Directive.

9. The special provisions included:

(a) a provision that injured parties should enjoy a direct right of action against the insurer covering the responsible person against civil liability: article 3 (now article 18 of the Sixth Directive);

(b) a requirement on member states to ensure that motor liability insurers "appoint a claims representative in each member state" other than that in which they received their authorisation, to be responsible for handling and settling accident claims: article 4 (now article 21(1) of the Sixth Directive);

(c) a requirement that each member state establish or approve an information centre responsible for keeping a register containing information including the registration numbers of vehicles normally based in that state, the numbers of the insurance policy covering their use and their expiry date, if past: article 5(1) (now article 23(1) of the Sixth Directive);

(d) a requirement that each member state "establish or approve a compensation body responsible for providing compensation to injured parties in the cases referred to in article 1": article 6(1) (now article 24(1) of the Sixth Directive), coupled with a provision entitling such injured parties to present a claim to the compensation body in their member state of residence if within three months the insurer or its claims representative has not provided a reasoned reply to their claim, or the insurer has not appointed a claims representative in the injured party's state of residence (unless the injured party has taken legal action directly against the insurer);

(e) a provision entitling an injured party to apply for compensation to the compensation body in the member state if "it is impossible to identify the vehicle or if, within two months following the accident, it is impossible to identify the insurance undertaking": article 7 (now article 25(1) of the Sixth Directive). Article 7 goes on to provide that "The compensation shall be provided in accordance with the provisions of article 1" of the Second Directive (as to which see para 7 above). Article 25(1) says that it will be provided "in accordance with the provisions of articles 9 and 10" of the Sixth Directive, which relate respectively to the requirements on member states to ensure compulsory insurance in minimum amounts and to set up or authorise a compensation body to cover property damage or personal injuries caused by an unidentified or uninsured vehicle (see para 7 above).

10. The special provisions described in sub-paragraphs (d) and (e) of the previous paragraph mean that liability was in the first instance imposed on compensation bodies in the member state of the victim's residence which would otherwise have been expected to be borne by someone else, ie the person responsible for the accident, his or her insurer or an insurance bureau or guarantee fund in the state where the relevant vehicle was normally based. For that reason, both articles 6 and 7 of the Fourth Directive (now articles 24(10) and 25(1) of the Sixth Directive) contain provisions in articles 6(2) and 7 (now articles 24(2) and 25) regarding reimbursement, aimed at passing responsibility on to the insurer (where one can be identified) or guarantee fund described in this context in recital (31) to the Fourth Directive (recital (53) to the Sixth Directive) as the "ultimate debtor", coupled with further provision for subrogation rights against the person responsible for the accident.

11. Thus article 6(2) read:

> "The compensation body which has compensated the injured party in his member state of residence shall be entitled to claim reimbursement of the sum paid by way of compensation from the compensation body in the member state of the insurance undertaking's establishment which issued the policy.
>
> The latter body shall then be subrogated to the injured party in his rights against the person who caused the accident or his insurance undertaking in so far as the compensation body in the member state of residence of the injured party has provided compensation for the loss or injury suffered. Each member state is obliged to acknowledge this subrogation as provided for by any other member state."

Subject to very minor linguistic differences, article 24(2) of the Sixth Directive is identical.

12. Article 7 (now article 25(1)) read:

> "… The compensation body shall then have a claim, on the conditions laid down in article 6(2) of this Directive:
>
> > (a) where the insurance undertaking cannot be identified: against the guarantee fund provided for in article 1(4) of [the Second] Directive 84/5/EEC in the member state where the vehicle is normally based;
> >
> > (b) in the case of an unidentified vehicle: against the guarantee fund in the member state in which the accident took place;
> >
> > (c) in the case of third-country vehicles: against the guarantee fund of the member state in which the accident took place."

13. Under article 6(3) of the Fourth Directive (article 24(3) of the Sixth Directive), the operation of both articles 6 and 7 (now articles 24(1) and 25(1)) was also suspended until:

> "(a) after an agreement has been concluded between the compensation bodies established or approved by the member states relating to their functions and obligations and the procedures for reimbursement;
>
> (b) from the date fixed by the Commission upon its having ascertained in close cooperation with the member states that such an agreement has been concluded."

14. An agreement between compensation bodies and guarantee funds was reached on 29 April 2002. On that basis, the Commission by decision of 27 December 2002 determined that article 6 (and so also article 7) of the Fourth Directive should take effect as from 20 January 2003. In the United Kingdom, the UK MIB acts both as the bureau or guarantee fund contemplated by article 1(4) of the Second Directive (article 10 of the Sixth Directive) and, under regulation 10 of the 2003 Regulations, as the compensation body required under articles 6 and 7 (now articles 24(1) and 25(1) of the Sixth Directive). But in some states they are different bodies, a fact recognised in the agreement which deals separately with articles 6 and 7 accordingly. In relation to the two situations in which article 7 applies (an unidentified or uninsured vehicle), the agreement provides:

> "7.1. In either of the situations referred to …, the Compensation Body which has received a claim must immediately inform, depending on the circumstances, either the Guarantee Fund defined in article 1 of [the Second] Directive 84/5/EEC of the member state in which the accident took place or the Guarantee Fund of the member state in which the road traffic vehicle which caused the accident is normally based.
>
> 7.2. When it makes a compensation payment to an injured party, the Compensation Body shall:
>
> - reply to requests for information enabling the claim to be assessed, which it receives from the final paying body for reimbursement (Guarantee Fund),

> - apply, in evaluating liability and assessing compensation, the law of the country in which the accident occurred,
>
> - comply with the provisions of article 1 of Directive 84/5/EEC. …
>
> 8.1. When a Compensation Body has compensated upon request an injured party, it is entitled to receive, depending on the circumstances of the accident, either from the Guarantee Fund of the member state in which the accident took place or from the Guarantee Fund of the member state in which the road traffic vehicle which caused the accident is normally based, reimbursement containing, to the exclusion of everything else, the following:
>
> 8.1.1. the amount paid in compensation to the injured party or his/her beneficiaries; specifying the amounts paid as material damage and as bodily injury;
>
> 8.1.2. the sums paid for external services - such as, for example, experts', lawyers' or doctors' fees - inherent in the instruction and the in or out-of-court settlement of the claim;
>
> 8.1.3. the handling fees covering all other costs as defined by clause 8.3 hereof.
>
> 8.2. The amount to be reimbursed may only be disputed by the final paying Guarantee Fund if the Compensation Body which settled the injured party's claim has ignored objective material information given to it or has not observed the rules of applicable law."

15. Articles 6 and 7 of the Fourth Directive were transposed into English law by the 2003 Regulations using section 2(2) of the European Communities Act 1972. The Explanatory Note states simply that "These Regulations give effect to articles 5, 6 and 7 of the Fourth Motor Insurance Directive". There is no indication in the Lord Chancellor's Department's transposition note or elsewhere that anything was intended other than straightforward implementation of the United Kingdom's European obligations under the Directives.

16. Addressing the subject-matter of article 6 of the Fourth Directive, now article 24(1) of the Sixth Directive, (ie the situation where no reasoned reply has been received from an insurer or its claims representative within three months or where no claims representative has been appointed), regulation 12(3) and (4) provides:

> "If the injured party satisfies the compensation body as to the matters specified in paragraph (4), the compensation body shall indemnify the injured party in respect of the loss and damage described in paragraph (4)(b).
>
> The matters referred to in paragraph (3) are -
>
> > (a) that a person whose liability for the use of the vehicle is insured by the insurer referred to in regulation 11(1)(c) is liable to the injured party in respect of the accident which is the subject of the claim, and
> >
> > (b) the amount of loss and damage (including interest) that is properly recoverable in consequence of that accident by the injured party from that person under the laws applying in that part of the United Kingdom in which the injured party resided at the date of the accident."

17. Addressing the subject-matter of article 7 of the Fourth Directive, now article 25(1) of the Sixth Directive, (ie an unidentified or uninsured vehicle), regulation 13(2) provides:

> "(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."

18. Moore-Bick LJ, giving the sole reasoned judgment in *Jacobs*, expressed the view at para 21 that:

> "The scheme [of articles 6 and 7 of the Fourth Directive] appears to proceed on the assumption that the existence of the driver's liability and the determination of the amount of compensation payable to the injured party will be governed by the same principles at all stages of the process, but the Fourth Directive does not go so far as to provide that such questions are to be determined by reference to the law of the country in which the accident occurred."

He noted (para 22) that, at the date of the Fourth Directive, there was no universal rule governing the question what law should govern liability and damages in tort, and that at that date the position in English law was that:

> "issues of liability and heads of recoverable damages were normally determined by reference to the law of the place where the accident occurred, but the assessment of damages was determined by English law as the *lex fori*, as subsequently confirmed by the decision of the House of Lords in *Harding v Wealands* [2007] 2 AC 1."

He also noted (para 23) that, if a victim could recover from the compensation body in his or her own country more than he or she could have recovered from the driver responsible for the accident or the driver's insurer, that might be regarded as anomalous, but did not ultimately think (para 30) that "this anomaly, such as it is, provides sufficient grounds" for giving a domestic regulation "a meaning it does not naturally bear".

19. Turning to the 2003 Regulations, he said correctly (para 23) that it was from them that the domestic right of an injured person to make a claim against the compensation body derives. Examining regulation 12(4)(b), he found himself "driven to the conclusion that in the case of the insured driver the bureau is obliged to pay compensation assessed in accordance with English, Scots or Northern Irish law, as the case may be" (para 29). He noted that this might mean that the injured party was able to recover from the UK compensation body (the UK MIB) more or less than the compensation that he could have recovered in, for example, an action against the person responsible for the accident or his or her insurer (or, one could add, the bureau or fund of the state of the accident) (paras 29). But he said that, although this:

> "may at first sight appear to be inconsistent with the scheme of the Fourth Directive, the Directive itself does in fact contemplate the existence of such arrangements, since article 10(4) provides:
>
> > 'Member states may, in accordance with the Treaty, maintain or bring into force provisions which are more favourable to the injured party than the provisions necessary to comply with this Directive.'"

Article 10(4) is now article 28(1) of the Sixth Directive. A problem about Moore-Bick LJ's observation in this connection is that it overlooks the previously mentioned possibility that the level of compensation under English law can be less favourable than that provided under the law of the state of the accident.

20. Turning to regulation 13, directly in issue in *Jacobs* and now on the present appeal, Moore-Bick LJ concluded first that it must contemplate the victim being able to show the existence of liability on the part of the person responsible for the accident. The answer on this point lay, he considered, in the words "shall compensate the injured party in accordance with the provisions of article 1" of the Second Directive. He went on (para 32):

> "I think it is reasonably clear from the recitals to the Second Directive that its purpose was to assimilate the position of the victim of an unidentified or uninsured driver or vehicle to that of the victim of an identified and insured driver or vehicle; it is not its purpose to require the establishment of a system of no-fault compensation. It is, therefore, implicit in the scheme of the Second Directive that the victim must be able to establish that the driver is liable to him in respect of his injuries, but whether that requires proof of fault will depend on the law of the country in which the accident occurred. The reference in regulation 13(1)(c)(ii) to an insurance undertaking which insures the use of the vehicle assumes the existence of a liability on the part of the driver which ought to be, but is not, covered by insurance. It follows, in my view, that the obligation imposed on the bureau by regulation 13(2)(b) to compensate the injured party in accordance with the provisions of article 1 of the Second Directive carries with it the implicit proviso that the injured party must be able to show that the driver is liable to him. As in the case of a claim under regulation 12, that is a question to be determined by reference to the applicable law identified in accordance with the appropriate conflicts of laws rules. At the

> time the 2003 Regulations were made the applicable rules were those of the Private International Law (Miscellaneous Provisions) Act 1995, but since the introduction of Rome II, the rules set out in that Regulation will apply and will normally lead to the application of the law of the country in which the accident occurred."

21. There is no reason to differ from this analysis. Nor is there any reason to differ from Moore-Bick LJ's further analysis in paras 33-34 of the basic reasoning behind the expression in regulation 13(2) "as if it were the body authorised under paragraph 4 of that article and the accident had occurred in Great Britain". Moore-Bick LJ pointed out a difference between the Uninsured Drivers' Agreement (see para 6 above) and the Untraced Drivers' Agreement dated 7 February 2003 made between the Secretary of State for Transport and the UK MIB. The former Agreement covers the use in Great Britain or elsewhere in the European Union of British registered vehicles, which are, under article 3 of the First Directive (article 3 of the Sixth Directive) to which effect is given by sections 143-145 of the Road Traffic Act 1988, required to be insured in respect of such use throughout the European Union. The latter Agreement is limited in its scope to accidents occurring in Great Britain. Once the United Kingdom became obliged under article 7 of the Fourth Directive to have a compensation body to which victims of foreign motor accidents resident in the United Kingdom could apply for compensation, specific language was accordingly required to expand the UK MIB's liability to cover such victims when the vehicle responsible for the foreign accident was untraced. Hence, in Moore-Bick LJ's words, "the somewhat complicated language of regulation 13(2)(b) was designed to achieve that result" (para 34). The UK MIB, which acted as the guarantee fund for Great Britain pursuant to article 1(4) of the Second Directive, has also been designated as the United Kingdom's compensation body required by the Fourth Directive, and the language was "necessary to impose on the bureau in its capacity as compensation body an obligation of the kind that it already bore as guarantee fund, including a liability in respect of accidents occurring abroad" (para 33).

22. However, Moore-Bick LJ continued at the end of para 34 and in para 35:

> "34. … It does not necessarily follow, however, that it does not have the effect for which Mr Layton contended. A legal fiction may have consequences beyond its immediate purpose.
>
> 35. The mechanism by which the bureau's obligation to compensate persons injured in accidents occurring abroad involving uninsured or unidentified drivers is established is to treat the accident as having occurred in Great Britain, but in the

> absence of any provision limiting its scope it is difficult to see why it should not also affect the principles governing the assessment of damages, particularly in the absence at the time of complete harmonisation throughout the EEA of the conflicts of laws rules governing that issue."

23. Although Moore-Bick LJ went on immediately to say that the matter was nonetheless not free from difficulty and to return to the recitals to the Fourth Directive to see whether they pointed to a different conclusion, he regarded the recitals as showing concern as "primarily directed to the ability of injured parties to obtain compensation, not to the amount of that compensation", and found nothing there to support either party's case or to change his view (para 36). He also regarded his view as having "the incidental merit of ensuring that the measure of compensation recoverable under regulation 13 is likely to be broadly the same as that recoverable under regulation 12" (para 37).

24. Finally, Moore-Bick LJ regarded the provisions of Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in force from 11 January 2009, as irrelevant on the basis that regulation 13(2)(b) is defining the existence and extent of the UK MIB's obligation as a compensation body, rather than determining the liability of the wrongdoer (para 38).

25. Before the Supreme Court Mr Beard representing Ms Moreno supports the reasoning and conclusions of the Court of Appeal in *Jacobs*. He accepts, as did Moore-Bick LJ, that this may lead to some apparent anomalies, but submits that they are either capable of satisfactory resolution or insignificant and that the domestic legislator can be taken in the 2003 Regulations to have adopted a measure of recovery which reflected the basis of recovery under English law in respect of a foreign tort at the relevant times, and would have been seen as both convenient and favourable to the claimant.

26. In construing the 2003 Regulations, the starting point is that they should, so far as possible, be interpreted in a sense which is not in any way inconsistent with the Directives: *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135. It was however open to the domestic legislator, as Moore-Bick LJ noted (para 19 above), to introduce provisions "more favourable" to the injured party. But it is unlikely that it would do so by including a provision which could in some circumstances also prove less favourable to the injured party, and so put the United Kingdom in breach of the Directives.

27. A second point to be borne in mind is that the 2003 Regulations were made under section 2 of the European Communities Act 1972 (as amended subsequently

by sections 27 and 33 of the Legislative and Regulatory Reform Act 2006 and sections 3 and 8 of and Part I of the Schedule to the European Union (Amendment) Act 2008). Section 2(2) authorises regulations making provision (so far as relevant):

> "(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented …; or
>
> (b) for the purpose of dealing with matters arising out of or related to any such obligation …"

No question of vires has been raised in this case, and the 2003 Regulations must be approached on the basis that they implement or enable the implementation of the United Kingdom's EU obligations or deal with matters arising out of or related thereto. In so far as any of the Directives is:

> "in general terms leaving member states freedom to decide on the precise means for its implementation, provisions which the United Kingdom makes within the scope of such freedom will on the face of it fall within section 2(2)(a), as being for the purpose of implementing or enabling the implementation of the Directive."

See *United States of America v Nolan* [2015] UKSC 63; [2016] AC 463, para 63. But, in so far as the Directives prescribe a particular approach, the interpretive presumption, based on *Marleasing* (above), is that this was what the domestic legislator intended to be achieved.

28. Third, there is no suggestion in the 2003 Regulations or the Explanatory Note or elsewhere of any intention on the part of the domestic legislator to do anything other than faithfully implement and give effect to the Directives.

29. Fourth, on that basis, two questions are central to this appeal. One is whether the Directives prescribe any particular approach to the scope or measure of recovery applicable in a claim against a compensation body under article 7 of the Fourth Directive (article 25(1) of the Sixth Directive). The other is whether, if they do, the language of regulation 13(2)(b) reflects this approach, or mandates some different approach, whatever the Directives may have required.

30. Taking the first question, the Court of Appeal in *Jacobs* looked too narrowly, in my opinion, at the scheme created and represented by the Directives. Viewing its development holistically, it can be seen to be a scheme of which the constant aim has been to improve the prospects and ease with which injured parties can recover the compensation to which they are "entitled" in respect of any loss or damage caused by vehicles. This follows from the original definition of "injured party" in the First Directive. The first and Second Directives aim to ensure such compensation by providing for compulsory insurance, with the back-up of the guarantee (covering cases of non-insurance) provided by each national motor insurance bureau in accordance with article 1(4) of the Second Directive. The aim follows through into the "special provisions applicable to injured parties entitled to compensation", in respect of loss or injury in motor accidents occurring in a member state other than that of their residence, introduced by the Fourth Directive (see article 1(1)). These give injured parties, inter alia, a direct right of action against any insurer (article 3), a right to have a local claims representative of such insurers in their own state to handle and settle their claims (article 4) and a right to look to a compensation body in their own state if an insurer fails to provide a reasoned reply to the claim or to appoint a claims representative there (article 6) or if the accident is caused by an uninsured or unidentifiable vehicle (article 7). The injured parties, claims and compensation referred to throughout these articles are the injured parties who are entitled to and so claim the compensation in respect of loss or damage, to which article 1(1) of the Fourth Directive refers.

31. The inference is that, to whichever special provision of the Fourth Directive the victim of a motor accident may have to have recourse, the compensation to which he or she is entitled is and remains the same. It is the same compensation as that to which the victim is entitled as against the driver responsible, or his or her insurer, or, that failing, as against the guarantee fund of the state of the accident. The compensation remains the same if and when the victim has recourse instead to the compensation body established in his own state of residence under article 6 or 7. On the analysis accepted by the Court of Appeal in *Jacobs*, however, the measure of compensation could vary according to the happenchance of the route to recovery which the victim chose or was forced to pursue. If the victim chose or was led to pursue the responsible driver or a direct action against his or her insurer or a claim against the insurer's local claims representative, the measure would be that applicable in the state of the accident. If, on the other hand, the insurer did not respond appropriately or failed to appoint a claims representative, the victim could pursue the local compensation fund for whatever measure of compensation might be provided in this context by the local legislator or law - but would have (under article 6(1) of the Fourth Directive) to revert to looking to the insurer or its claims representative if even then one of these belatedly produced a reasoned reply. If, however, no insurer or vehicle could be identified, then the victim could without more recover whatever might be the measure of compensation provided in this context by his or her local legislator or law.

32. In the case of a claim against the driver responsible or his or her insurer or the guarantee fund of the state of the accident, such compensation would normally be measured in and under the law of the state of the accident. Under the predecessor international Green Card scheme, article 3(4), described in para 5 above, it was expressly provided that Green Card bureaux would handle claims in conformity with the legal provisions applicable in the country of accident relating to both liability and compensation. This is a provision which continued in force under article 3(a) of the *Convention complémentaire entre Bureaux nationaux* dated 12 December 1973, made pursuant to article 1(4) of the Second Directive. Under the First Directive, each national insurers' bureau was also to guarantee "the settlement, in accordance with the provisions of its own national law on compulsory insurance, of claims in respect of accidents occurring in its territory caused by [foreign based] vehicles" (article 2(2)). Under the Second Directive, article 1(4), each member state was to establish a guarantee fund to provide compensation in cases of unidentified or uninsured vehicles, applying its own laws to the payment of such compensation, without prejudice to any other practice more favourable to the victim. Counsel were agreed that this provision was solely directed to accidents in the territory of the member state in question, as it certainly must be in relation to unidentified vehicles. In essence, it was formalising and generalising at a Community (now Union) level the requirement for a local guarantee fund which up to that point only existed under the international Green Card scheme and the agreement between Community insurers' bureaux contemplated by article 2(2) of the First Directive. On this basis, the reference to applying the laws of the member state to the payment of compensation is further confirmation of an intention that that the law of the state of the accident should govern liability and the measure of compensation.

33. Next, as recorded in para 14 above, clauses 7.2 and 8.2 of the Agreement between Compensation Bodies and Guarantee Funds expressly provided that the compensation body established to give effect to those articles was to "apply, in evaluating liability and assessing compensation, the law of the country in which the accident occurred", and, further, indicated that the final paying guarantee fund might refuse reimbursement to the extent that the compensation body had "not observed the rules of applicable law". Gilbart J referred to this Agreement as a "private agreement" that "cannot be used to interpret the Directives or the Regulations", and Mr Beard pointed out that it post-dated the Fourth Directive. This is in my opinion to under-value the role of the Agreement and to view matters over-technically. Clauses 7.2 and 8.2 of the Agreement introduced in relation to compensation bodies provisions paralleling those applicable under the predecessor Green Card and motor insurance bureaux schemes. The making and approval by the European Commission of the Agreement containing such clauses were pre-conditions to the coming into force of articles 6 and 7 of the Fourth Directive. They can and in my opinion should be seen as part of a consistent scheme, to be viewed and construed as a whole.

34. A further indication of the way in which the scheme was intended to operate is provided by clause 7.3 of the agreement. According to clause 7.3:

> "The Guarantee Fund of the member state in which the accident took place, even though it is not responsible for the reimbursement described in Section III below, shall provide, upon request, to the Compensation Body to which a claim for compensation has been made, all necessary advice assistance and information - in particular on the content of the applicable law - and all documents it has available relating to the accident which this body wishes to obtain."

Section III deals with reimbursement procedures, from the Guarantee Fund either of the member state in which the accident took place or of the member state in which the road traffic vehicle which caused the accident is normally based. The rationale behind clause 7.3 is clearly that the Guarantee Fund of the member state of the accident will be able to provide the necessary information about the applicable law of that state to enable the Compensation Body in the victim's state to be able to settle the victim's claim in accordance with that law.

35. It would not be consistent with the scheme of the precursor Green Card System or with the scheme of the series of European Directives and associated agreements from 1972 onwards, for the compensation body established and acting under article 6 or 7 of the Fourth Directive to provide compensation other than in accordance with the law of the state of the accident.

36. Further confirmation of this intention is present in the express provisions of articles 6 and 7. First, the provision in article 7 for compensation to be provided in accordance with the provisions of the Second Directive requiring each member state to ensure compulsory insurance in minimum amounts and to set up or authorise a guarantee fund to cover property damage or personal injuries caused by unidentified or uninsured vehicles is a yet further pointer towards the intended link between the compensation available in the state of the accident and that available from the victim's local compensation body.

37. Second, the provisions of article 6 and 7 regarding reimbursement are significant. Under article 6(2) what is clearly envisaged is that the compensation body in the state of the victim's residence should be able to recover from the compensation body in the state of the insurer the whole sum that the former compensation body has paid out to the victim. The latter compensation body is then subrogated to the victim's rights against the responsible driver or his insurer "in so far as the compensation body in the member state of residence of the injured party

has provided compensation". But, on the analysis accepted by the Court of Appeal in *Jacobs* and supported on this appeal by Mr Beard, there is no necessary correlation between the amounts paid out by the compensation body of the state of the victim's residence and that recoverable from the compensation body of the state of the insurer or that to which that latter compensation body is subrogated. Clauses 7.2 and 8.2 of the Agreement between Compensation Bodies and Guarantee Funds would bar the compensation body which paid the victim from recovering more from the compensation body of the state of the insurer than was payable in respect of the claim under the law of the state of the accident. As to subrogation, even if that bar could be overcome, it is impossible to be subrogated to a victim's claim unless and except to the extent that the victim could him or herself pursue such a claim.

38. A similar point applies under article 7. On its face, it envisages that the compensation body meeting the victim's claim will be able to recover from the guarantee fund of either the state where the vehicle was normally based or, in case of an unidentified (or a third-country) vehicle, the state in which the accident took place. But the Court of Appeal's analysis in *Jacobs* would leave the compensation body without reimbursement to the extent that it had under (eg) English law to pay compensation on a basis more favourable than would be recovered under the law of the state of the accident. Conversely, as Mr Beard accepted, to the extent that English law was in some respect less favourable than the law of the state of the accident, the victim would suffer a shortfall in recovery. Mr Beard suggested that the victim's remedy then would be to make a further "top-up" claim direct against the guarantee fund established under article 1(4) of the Second Directive (now article 10(1) of the Sixth Directive) in the state where the vehicle was normally based in the case of an uninsured vehicle or the state of the accident in the case of an unidentified vehicle. But the need to avoid having to pursue proceedings in either of those states is the reason for articles 6 and 7.

39. I conclude, in these circumstances, that the scheme of the Directives is clear, and that they do not leave it to individual member states to provide for compensation in accordance with any law that such states may choose. On the contrary, they proceed on the basis that a victim's entitlement to compensation will be measured on a consistent basis, by reference to the law of the state of the accident, whichever of the routes to recovery provided by the Directives he or she invokes. In consequence, it also makes no difference to the measure of liability of the body or person ultimately responsible, which route is chosen. Since the position as a matter of European Union law is in all these respects clear, there is no need to contemplate a reference to the Court of Justice.

40. The next question is whether the 2003 Regulations give effect to this scheme, or have to be read as mandating a different approach, even if it is one which is potentially inconsistent with the Directives. The Court of Appeal in *Jacobs* started with regulation 12(4)(b), before moving to regulation 13(2)(b) and finding some

"incidental merit" in a conclusion that it provided a measure of compensation likely to be broadly the same as that recoverable under regulation 12. The wording of regulations 12(4)(b) and 13(2)(b) is however notably different, and even the Court of Appeal does not appear to have regarded the two as having, necessarily, the same effect. I prefer to start with regulation 13(2)(b) which is the one directly in issue on this appeal.

41. As I have already indicated (para 21 above), the Court of Appeal in *Jacobs* was in my opinion correct in its identification of the basic reasoning behind the expression in regulation 13(2)(b) "as if it were the body authorised under paragraph 4 of that article and the accident had occurred in Great Britain". Where it went wrong, in my opinion, was in concluding (paras 22-23 above) that this did not exhaust the rationale of that expression. Regulation 13(2)(b) can and should in my opinion be read as having a purely mechanical or functional operation. Once it is concluded that the scheme of the Directives is to provide a consistent measure of compensation, whatever the route to recovery taken by the victim, there is certainly no need to regard regulation 13(2)(b) as having any further purpose or effect. The Court of Appeal in *Jacobs* was right to conclude that regulation 13(2)(b) carried with it "the implicit proviso" that the injured party must be able to show that the driver is liable to him (para 32: see para 20 above). But it was wrong to draw on the old common law distinction - recognised (not uncontroversially) in *Harding v Wealands* and now removed from our law by Rome II (see eg *Cox v Ergo Versicherung AG* [2014] UKSC 22; [2014] AC 1379) - between liability and heads of damage on the one hand and measure of compensation on the other; and it was wrong to find this distinction reflected in regulation 13(2)(b).

42. Regulation 12(4)(b) is more specific and less easy to fit within the scheme of the Directives which I have identified. The loss and damage recoverable from the UK MIB in its role as compensation body is said to be that "properly recoverable in consequence of that accident by the injured party from [the insured] person under the laws applying in that part of the United Kingdom in which the injured party resided at the date of the accident". The most obvious purpose of this is to determine which of the United Kingdom's three legal systems should apply in proceedings which might, conceivably (subject to considerations of forum conveniens), be brought in any one of them. On this basis, the provision may well not have been aimed at prescribing the measure of recovery in such proceedings. This would and could then be left to and derived from the scheme of the Directives, as it is to be under regulation 13(2)(b). Again, I doubt whether the legislator, when drafting regulation 12(4)(b), was intending to draw a distinction between liability and heads of recovery (subject "implicitly" to the law of the state of the accident) and the measure of compensation. Even if the legislator had been, the distinction has with Rome II now been abolished. If regulation 12(4)(b) is dealing with the governing law at all, which I doubt, it could in my view also be read as embracing the conflicts of laws applying in that part of the United Kingdom in which the victim resided at

the date of the accident, which would, at least normally, yield a result consistent with the scheme of the Directives, by identifying the law of the State of the accident: see Rome II, article 4(1).

43. It follows from the above that it is unnecessary to address further submissions that were, briefly, addressed to the Supreme Court on the Rome II Regulation. The decisions in *Jacobs v Motor Insurers' Bureau* [2010] EWCA Civ 1208; [2011] 1 WLR 2609 and *Bloy v Motor Insurers' Bureau* [2013] EWCA Civ 1543; [2014] 1 Lloyd's Rep IR 75 should be overruled in relation to the meaning of regulation 13(2)(b). The UK MIB's present appeal should be allowed and the answer to the preliminary issue declared to be that the scope of the UK MIB's liability to Ms Moreno is to be determined in accordance with the law of Greece.