Queen's Bench Division

*Wall *v* Mutuelle de Poitiers Assurances

[2013] EWHC 53 (QB)

2013 Jan 14, 15; 25 Tugendhat J

Conflict of laws — Tort — Assessment of damages — Claimant suffering severe injuries in vehicle collision in France — Claimant bringing proceedings in England against insurer of other driver — Judgment entered for claimant on liability with damages to be assessed — Issue arising in relation to instruction of experts — Whether instruction of expert being matter of "evidence and procedure" or "assessment of damage" — Whether English or French law applicable — CPR Pt 35 — Parliament and Council Regulation (EC) No 864/2007, arts 1, 4, 15

The claimant was severely injured in a collision with another vehicle whilst on holiday in France. Upon his return to the United Kingdom he commenced proceedings against the motor insurers of the other driver in the English courts. There having been no dispute as to liability, judgment was entered for the claimant with damages to be assessed. The claimant wished to rely upon a number of expert reports dealing with the various facets of his injuries and resulting needs. The defendant contended that a single expert ought to be instructed in line with the general practice and procedure in the French courts. The master ordered the trial, as a preliminary issue, of the question whether the issue of which expert evidence the court should order was (a) an issue of "evidence and procedure" within the meaning of article 1(3) of Parliament and Council Regulation (EC) No 864/2007[1] and so subject to CPR Pt 35[2] under English law because the Regulation did not apply to it, or (b) an issue relating to "the assessment of damage" within the meaning of article 15 of the Regulation to be determined under the applicable French law.

On the preliminary issue—

Held, that, while article 4(1) of Parliament and Council Regulation (EC) No 864/2007 required the court of the forum to apply the law of the member state in which the tortious damage occurred, there was no requirement for the court to put itself in the position of the foreign court nor to decide the case as the court in that jurisdiction would have done; that the question of what expert evidence the court should order and, in particular, the question whether there should be one single joint expert, or more than one expert pursuant to CPR Pt 35, was a matter of "evidence and procedure" within the meaning of article 1(3) of the Regulation; and that, therefore, the question of which expert evidence the court should order fell to be determined in accordance with English law by reference to CPR Pt 35 (post, paras 22, 43–45).

The following case is referred to in the judgment:

FBTO Schadeverzekeringen NV v Odenbreit (C-463/06) [2008] 2 All ER (Comm) 733; [2007] ECR I-11321, ECJ

No additional cases were cited in argument.

The following additional cases, although not cited, were referred to in the skeleton arguments:

CILFIT (Srl) v Ministry of Health (Case C-283/81) [1982] ECR 3415, ECJ

[1] Parliament and Council Regulation (EC) No 864/2007, arts 1(1)(3), 4(1), 15: see post, para 18.

[2] CPR rr 35.1, 35.3(1): see post, para 24.

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A *Harding v Wealands* [2004] EWCA Civ 1735; [2005] 1 WLR 1539; [2005] 1 All ER 415; [2006] UKHL 32; [2007] 2 AC 1; [2006] 3 WLR 83; [2006] 4 All ER 1, CA and HL(E)
Homawoo v GMF Assurances SA (Case C-412/10) [2012] ILPr 2
Kelly v Groupama [2012] IEHC 177
T & N Ltd (No 2), In re [2005] EWHC 2990 (Ch); [2006] 1 WLR 1792; [2006] 3 All ER 755

B

PRELIMINARY ISSUE

By a claim form dated 22 December 2011 the claimant, Steven John Kilfoy Wall, claimed damages for personal injuries which he had suffered in a road traffic accident whilst on holiday in France, from the defendant insurer, Mutuelle de Poitiers Assurances. Liability having been accepted by the defendant, a question arose in relation to the use of expert evidence in
C the quantum proceedings and whether the admissibility of such evidence was to be determined, pursuant to Parliament and Council Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (OJ 2007 L199, p 40), by reference to English law or French law. On 30 October 2012, Master Cook ordered a question, post, para 3, to be tried as a preliminary issue.

D The facts are stated in the judgment.

Robert Weir QC and *Matthew Chapman* (instructed by *Stewarts Law*) for the claimant.

Benjamin Browne QC and *Marie Louise Kinsler* (instructed by *Greenwoods Solicitors*) for the defendant.

E The court took time for consideration.

25 January 2013. **TUGENDHAT J** handed down the following judgment.

1 The claimant is English. In July 2010 he went to France for a holiday with his motorcycle. On 14 July 2010 a collision occurred between himself and a car driven by a Mr Clement. As a result the claimant sustained very severe personal injuries. After emergency treatment in a French hospital, he
F returned home to England. On 22 December 2011 he issued a claim form naming Mr Clement's motor insurers as defendant. There is no dispute that this is a course which he was entitled to adopt following Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I") (OJ 2001 L12, p 1) and *FBTO Schadeverzekeringen NV v Odenbreit* (Case C-463/06) [2008] 2 All ER (Comm) 733. In the past he would have been
G obliged to pursue any claim through the French courts.

2 There is no dispute that the collision occurred as a result of the negligence of Mr Clement. On 21 May 2012 judgment was entered for the claimant for damages to be assessed.

3 The issue which I have to decide is a technical issue which has arisen during the course of the case management being conducted by Master Cook.
H On 30 October 2012 he ordered the trial of the issue which is expressed in the following terms:

> "Does the issue of which expert evidence the court should order fall to be determined: (a) by reference to the law of the forum (English Law) on the basis that this is an issue of 'evidence and procedure' within

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article 1(3) of [Parliament and Council Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II') (OJ 2007 L199, p 40)]; or (b) by reference to the applicable law (French law) on the basis that this is an issue falling within article 15 of Rome II?"

4 In his preliminary schedule of special damages the claimant summarises the consequences of the accident as follows. He sustained: a spinal cord injury, a fracture at T12 necessitating internal surgical fixation, left sided rib fractures, left sided lung contusions together with a left haemothorax, a fractured pelvis, a fracture of the proximal fibular and distal tibia, a fracture of the right fibula and right tibial plateau, a fractured right wrist, a fractured left wrist, a fractured right humerus and other multiple intra abdominal injuries including bleeding to the left gastric artery, bleeding inferior mesenteric artery, haematoma right adrenal gland, haematoma pancreas, haemoperiotoneum and tears of the sigmoid colon managed by a left sub-costal defunctioning transverse colostomy.

5 In the same document he refers to a number of medical reports including: Mr Brian Gardner, consultant surgeon in spinal injuries 13 January 2012; Professor Paul Kennedy, consultant clinical psychologist, 7 January 2012. He also refers to non-medical reports from six separate experts on the following topics: care, rehabilitation costs, accommodation, assisted technology, neuro physiotherapy and transport.

6 At the time of the accident the claimant was self-employed as a highly skilled IT consultant. In his schedule of loss he also states that he will seek to rely on employment and/or accountancy expert evidence in support of his claim for past and future loss of earnings. These were at that stage quantified at over £1m. His claim for care is also quantified at substantially over £1m. A third very large element of the claim relates to accommodation.

7 Depending on how I decide the issue that has been argued before me, Master Cook will proceed with the case management in the usual way. I am not asked to give any specific case management directions, nor to give permission for any particular expert to give evidence.

The form of the claimant's medical experts' reports

8 Mr Gardner's report is in a familiar form. The substantive report covers 37 pages, the summary alone covering four pages. There are Appendices taking the total to 57 pages. For reasons which he states in his report, Mr Gardner expresses the opinion that there are six other expert reports required, namely on physiotherapy, housing, bowel management, urological care, an orthopaedic assessment and a care report. As a former consultant in spinal cord injury, he does not claim the expertise necessary to give an opinion on these other matters. All the expert reports prepared for the claimant that are now before the court are reasoned, and cover a total of 309 pages.

The background to Rome II

9 It is common ground that Regulation (EC) 864/2007 ("Rome II") applies to this case. That is the Regulation on the law applicable to non-contractual obligations made by the European Parliament and the Council of the European Union. Rome I is Regulation (EC) No 593/2008 of

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A the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ 2008 L177, p 6).

10 The legislative purpose of Rome II can be derived from the recitals, in particular recitals (6), (7), (14), (16), (33) and (38). It relates to cases which have a connection with more than one state, of which cross-border road traffic accidents such as the present case are a prime example. In the present case only two states are involved, France and England, but there could have been a third, if, for example, Mr Clement had been a Belgian who was also on holiday in France.

11 In summary the legislative purpose of Rome II is to improve the predictability of the outcome of litigation (or legal certainty), in part by achieving certainty as to the applicable law. Uniform rules applied in all states should help to ensure predictability and justice, in the form of a reasonable balance between the interests of the person claimed to be liable and the person who has sustained the damage.

12 It is not the purpose of Rome II to harmonise national laws. It is because national laws are known to differ, sometimes in important respects, that there is the need for certainty as to what is the applicable law, and fair rules for determining that. If all relevant laws were the same, it would not matter which was applicable.

13 The background against which this Regulation came to be made is that levels of compensation differ widely between different states, including between states which are members of the European Union.

14 The administration of justice differs widely between states. See for example the report on European Judicial System (2012 edition) on the efficiency and quality of justice, by The European Commission for the Efficiency of Justice ("CEPEJ"), which was set up by the committee of ministers of the Council of Europe in September 2002. One of the most important differences is that between states where the common law applies, such as England and Wales, Scotland, Northern Ireland and the Republic of Ireland, and most other European states, where civil law applies.

15 CPR Pt 35 (Experts and Assessors) was introduced on the basis of reports by Lord Woolf on Access to Justice: *Civil Procedure 2012*, para 35.0.2. Lord Woolf considered the differences between the ways in which courts in different countries received expert evidence. In his Final Report (1996) at chapter 13 he said:

> "8. The traditional English way of deciding contentious expert issues is for a judge to decide between two contrary views. This is not necessarily the best way of achieving a just result . . .
>
> "9. In continental jurisdictions where neutral, court-appointed experts are the norm, there is an underlying assumption that parties' experts will tell the court only what the parties want the court to know. For the judge in an inquisitorial system, the main problem is that it may be difficult for him to know whether or not to accept a single expert's view. There is no suggestion, however, that he is inevitably less likely to reach the right answer than his English counterpart."

16 Lord Woolf no doubt had in mind that some practices in the common law states are unknown in most civil law states. Rules of evidence also differ widely. Practices specific to common law states include an obligation on litigants to disclose documents which adversely affect their

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own case or support another party's case (CPR r 31.6(b)), the preparation and exchange of witness statements for use at trial (CPR r 32.4), and the cross-examination of witnesses, both witnesses of fact and expert witnesses.

17 The adversarial procedures in common law states are designed to assist the court to arrive at the truth. But they require more work to be done by litigants and their lawyers (often with correspondingly less work to be done by the judge) than is required under most civil law inquisitorial systems. The result is that the direct costs of litigation which have to be borne by the parties are much higher in the common law states. This is so, even when the comparison is between a civil law and a common law state where rates of remuneration charged by lawyers are at comparable levels. On the other hand, in the common law states fewer judges are required, and fewer cases are actually tried, instead of being settled. These facts may help to keep down the cost to the common law states of providing for the administration of justice. Having regard to the differences of procedure, it is not surprising that outcomes are different, even in those cases where there is no significant difference between the provisions of the substantive laws of the states in question.

The relevant provisions of Rome II

18 The provisions of Rome II relevant to the issue before the court include the following:

"*Article 1*

Scope

"1. This Regulation shall apply, in situations involving a conflict of laws, to non contractual obligations in civil . . . matters . . ."

"3. This Regulation shall not apply to evidence and procedure . . ."

"*Article 4*

General rule

"1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs . . . irrespective of the country or countries in which the indirect consequences of that event occur."

"*Article 15*

Scope of the law applicable

"The law applicable to non-contractual obligations under this Regulation shall govern in particular: (a) the basis and extent of liability . . . (c) the existence, the nature and the assessment of damage or the remedy claimed; (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation . . ."

19 There is no dispute that under article 4(1) Rome II the applicable law in the present case is French law. The main dispute between the parties before me is as to the scope of the words "applicable law" in article 4(1), in so far as

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A that relates to "the assessment of damage" referred to in article 15(c), and the corresponding scope of the words "evidence and procedure" in article 1(3).

Textbook commentaries

20 The editors of *Dicey, Morris & Collins on the Conflict of Laws*, 15th ed (2012) write:

B "7-022 . . . The lex causae [the applicable law] generally determines what are the facts in issue; and it may do so by providing that no evidence need, or may, be given as to certain matters . . . Such provisions are substantive. On the other hand as a general rule, the lex fori determines how the facts in issue must be proved. In the context of English proceedings, whether or not a document is privileged is to be determined C by English law; the fact that under a foreign law the document is not privileged . . . is irrelevant."

21 The editors write in relation to article 15(c) of Rome II:

"7-050 . . . Hence, the availability of particular heads of damage is to be treated as a substantive matter. The same is true of rules of remoteness . . . Rules imposing a statutory ceiling on the level of D damages affect the assessment of those damages and are to be treated as substantive, so that such rules of the lex causae would be applied in England. The application of the lex causae is not limited to compensatory damages. *More generally, it appears that the English courts should endeavour to consider the rules of the lex causae together with relevant judicial practices and guidelines as to their application,* E *so as to endeavour to apply the law of damages to reflect, as accurately as possible, the level of damages that would actually be awarded in the courts of the country whose law is applicable*." (Emphasis of Mr Browne QC.)

"34-036 . . . In order to secure the objectives of the Regulation in enhancing the predictability of litigation and the reasonable foreseeability of court decisions, it is suggested that the article 1(3) exclusion F should be interpreted narrowly as covering only matters, such as the constitution and powers of courts and the mode of trial, that are an integral and indispensable feature of the forum's legal framework for resolving disputes, such that they cannot satisfactorily be replaced by corresponding rules of the lex causae . . ."

"34-056 . . . [Article 15(c)] will include: the nature of the available G remedy; questions of remoteness of damage; the duty, if any, to mitigate damage; the available heads of damage; and matters of assessment (quantification) of damages. This provision departs from the pre-existing English law position . . . that the assessment of damages is a procedural questions governed by the law of the forum."

22 In *Andrew Dickinson, The Rome II Regulation: The Law Applicable* H *to Non-contractual Obligations*, (2008) the author wrote:

"3.39 . . . the direction to 'apply' the 'law' of a particular country must not be understood as requiring the member state court to put itself in the position of the court of that country and to decide the case as that court would have decided it."

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"14.19 [after a passage very similar to the words of *Dicey Morris & Collins*, para 7-050] . . . Thus, for example, the court seised should look to particular tariffs, guidelines, or formulae which are used in practice by foreign judges in the calculation of damages, as well as the approach in calculating awards in individual cases. The applicable law will also determine the extent to which specific facts (for example, social and economic conditions in a particular place) are relevant to the assessment of damages. Proof of the underlying facts will, however, remain a matter for the law of the forum, in accordance with article 1(3)."

"14.34 . . . Article 15(d) does not require member states to create new . . . procedures in order to accommodate those recognised by the law applicable under the Regulation. Instead it is submitted, the court seised of the dispute must adopt a 'best fit' approach, using the procedural . . . powers that are available to it to reflect the remedial framework of the applicable law as closely as possible."

"14.61 Without judicial guidance, the precise scope and effect of article 1(3) remains unclear . . . Rules falling within the category of 'evidence and procedure' . . . would include, for example, those concerning . . . (c) case management . . . (f) mode of proof of facts, and (g) costs."

Matters not in dispute

23 There is no dispute that CPR Pt 35 applies to this case, on the footing that the rules as to expert evidence which it contains are plainly a matter of procedure.

24 CPR Pt 35, in material part, provides:

"35.1 Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings."

"35.3(1) It is the duty of experts to help the court on matters within their expertise."

25 Guidance is given in the Protocol for the Instruction of Experts, para 6.1, in *Civil Procedure 2012*, para 35.21:

"6. *The need for experts*

"6.1 Those intending to instruct experts to give or prepare evidence for the purpose of civil proceedings should consider whether expert evidence is appropriate, taking account of the principles set out in CPR Pt 1 and 35, and in particular whether: (a) it is relevant to a matter which is in dispute between the parties. (b) it is reasonably required to resolve the proceedings (CPR r 35.1); (c) the expert has expertise relevant to the issue on which an opinion is sought; (d) the expert has the experience, expertise and training appropriate to the value, complexity and importance of the case; and whether (e) these objects can be achieved by the appointment of a single joint expert (see section 17 below)."

26 It is clear that the court should not give permission for an expert to be called to give evidence other than on an issue in the action or assessment. Thus it is necessary for the court to determine what the issues between the parties are. For present purposes I shall assume that the amounts of damages recoverable under each of the heads claimed by the claimant are in issue.

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A 27 French lawyers instructed by the parties have prepared a joint statement on the role in French law of medical experts in the assessment of damages for personal injuries.

28 There is provision in the French Code of Civil Procedure for the appointment of experts. It is common ground that the fact that these provisions are in a code entitled "Civil Procedure" is not, according to European Union law, determinative of whether it counts as part of the B applicable law for the purposes of articles 1(3) and 4 of Rome II.

29 The effect of the French Code of Civil Procedure is broadly as follows. Personal injury damages are assessed with the assistance of medical experts. There may be one or more experts. The expert may be appointed by agreement between the parties, or of the court's own motion. In practice a medical expert is always chosen from a list drawn up by the courts of C appeal or the Court of Cassation in accordance with provisions of French law. A single expert is appointed unless the judge considers it necessary to appoint more than one: article 264. A person who is appointed an expert may obtain the opinion of another expert, but only in a specialism which is different from his own: article 278. An expert whose opinion is sought under article 278 is known as a "sapiteur". In practice this makes it possible D for there to be one expert who directs the work and produces a single comprehensive report, which includes the opinions of the sapiteurs. For example, when the victim's accommodation requires adaptation, the medical expert will appoint an architect to give an opinion on the works in question. Another example given is where the victim has suffered serious brain damage and a specialist opinion is required on that.

30 Rules as to the conduct of the expert and related matters are set out E in articles 232 to 286. These include the following. The expert holds hearings, of which notice must be given to the parties. He receives documents and information from them, he conducts examinations, and he must disclose to the parties information and documents on which he may form his opinion, and give them an opportunity to make representations. The judge is not bound by the opinion of the expert: article 246. In practice F the judge assesses the losses suffered by the victim, item by item, on the basis of the report.

31 It is common ground that if there were in the present case a head of damage claimed by the claimant which was not recoverable under French law, then no expert evidence could be adduced in relation to that head of damage. However, it is also common ground that the heads of damage G claimed by the claimant are all heads of damage which are in principle recoverable under French law. French law applies the principle of restitutio in integrum which is also the principle underlying the English law of damages for tort.

The contentions of the parties

H 32 The claimant has asked the master to give permission for him to call a number of experts, as is customary in English litigation of this kind.

33 The defendant submits that permission should be given for only one (or perhaps one or two) expert witness to be called, and Mr Browne refers to that witness as being "a French medico-legal expert". By the word "French" he is not referring to the nationality of the witness, but to a single expert

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witness of a kind who is appointed in French personal injury litigation in accordance with French law.

34 Mr Browne submits that "law" within the meaning of article 15(c) includes the practices, conventions and guidelines regularly used by judges in assessing damages in the courts of the state whose law is the applicable law. The only way in which the legislative purposes of Rome II will be achieved is by rejecting the English "panoply of experts" and permitting only a single expert of the kind customarily appointed by French courts, so as to arrive at a figure that would actually be awarded in France. Any other interpretation would give an undue weight to the law of the claimant's domicile. This, he submits, is what is meant in the passage from *Dicey, Morris & Collins* cited in para 21 above.

35 Mr Browne referred me to an example of a report of a medical expert in French legal proceedings. It is anonymised by redaction. The victim in question was a young man who had suffered an accident which led to the amputation of the proximal quarter of his right arm and his right leg to the upper third of the thigh. The report is some 24 pages long, but in much smaller type than the claimant's medical expert reports in this case. It might be twice its actual length if produced in the same format as the claimant's reports.

36 Mr Browne submits that the sample French report is similar to an English medico-legal report in that it sets out the injuries suffered, treatments received and the impact of the injuries on the claimant. But he submits that there is a contrast in that the French report assesses the impact of the injuries in terms of a numerical assessment, on a scale of 0 to 7. For example, under the heading "Aesthetic impairment" the sample report reads (in translation): "(1) Elements: amputation scars persist on his right upper and lower limbs. (2) Evaluation: the definitive impairment must be considered as equivalent to 5 on a scale of 0 to 7."

37 He notes that the sample report addresses the need for care. For example, under the heading of care after the claimant's injuries stabilised (a stage referred to as "consolidation") it includes:

> "The consequences of the accident necessitate: (1) Psychological counselling, essential provision, twice a week for one year, i e 100 sessions a year altogether, then for two further years, one session a week, i e 50 sessions a year . . ."

38 The sample report also contains paragraphs on the employment status of the person, his needs for aids or equipment and transport and accommodation. It also, of course, addresses matters relevant to general damages, such as the gravity of the impairment.

39 Mr Weir QC submits that the form of the report is a matter of procedure. He questions how, under CPR Pt 35, an expert could include in his report opinions obtained from another expert of the kind referred to in France as a "sapiteur", that is an opinion which is not within the expert's expertise. CPR r 35.3 requires the expert "to help the court on matters within their expertise". Whether to give permission for the parties to adduce expert evidence, or whether to order a single joint expert, or to refuse permission for any expert evidence are, he submits, questions of case management. While it may be the case that French courts more commonly appoint a single expert than English courts, the French Code of Civil

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Procedure does not require there to be a single expert. It is the Code of Civil Procedure which, if anything, is the law, and not the practice of French courts to appoint a single expert in cases in which an English court would permit experts for each side.

40 Further, Mr Weir submits, Rome II does not require uniformity of outcome. Uniformity of outcome could not be assured unless the English court were to disapply its own rules on discovery, and cross-examination, which, he submits, are clearly matters of procedure or evidence.

Discussion

41 I have derived no assistance from the sample report. So far as I can understand, it contains no figures for past or future costs at all. No figure, for example, is given for the cost of the psychological counselling, care or accommodation. It is not clear to me how a French court would arrive at a figure for the costs of care, transport and accommodation on the basis of that report, if that was all that was before the court. I infer that there must have been other evidence before the court in that case, or some agreement between the parties.

42 It appears to me that a report similar to the sample report might well be produced under CPR Pt 35 in a case where the master ordered a single joint expert. But if it were, it would have to be supplemented by other reports.

43 CPR Pt 35 does not provide for the court to give permission to a single expert to convey to the court opinions of other experts whom s/he has consulted on matters which are not within the single expert's expertise. There is no evidence before this court as to what level of damages would actually be awarded by a French court if a French court were seised of the present case. Without such evidence there is no means by which this court, either today, or at any subsequent hearing, could endeavour to reflect that level of damages. I adopt the views of Mr Dickinson expressed in the passages cited in para 22 above. This court is not required to put itself in the position of a court in France and to decide the case as that court would have decided it. This court is not required to adopt new procedures. These views appear to me to be consistent with the views expressed by the editors of *Dicey, Morris & Collins on the Conflict of Laws* in para 21 above, when properly understood.

44 It is in my judgment clear that the questions of what expert evidence the court should order, and, in particular, whether or not there should be one (or more) single joint expert(s) pursuant to CPR Pt 35 are matters of procedure within article 1(3).

Conclusion

45 In my judgment the issue of which expert evidence the court should order falls to be determined by reference to the law of the forum (English Law), on the basis that this is an issue of "evidence and procedure" within article 1(3) of Rome II.

Order accordingly.

GIOVANNI D'AVOLA, Barrister

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