The Currency of Suit in Actions for Damages

I. Introduction

In 1976, the House of Lords in *Miliangos* v. *George Frank (Textiles) Ltd*[1] decided that actions for the recovery of debts could be expressed in foreign currencies. According to Lord Denning, this decision "revolutionised" the law on this subject;[2] prior to the *Miliangos* case, English courts had steadfastly refused to recognise claims expressed in currencies other than sterling. Remarking on this change in a recent comment in this journal, Mr Brian Riordan made the following observation:

> To trace the juridical development of this new rule reveals a most enlightening example of two key tenets of the reform and modernization process of the common law: first, that the law should reflect the fundamental (commercial) realities of the day, and second, that the judge has a major role to play in keeping the law in step with those realities.[3]

The House of Lords has recently taken up the suggestion made by Lord Wilberforce in his speech in *Miliangos*[4] that the new principle of recognising claims expressed in foreign currencies be extended from cases of judgment debt to other areas, and in particular to actions for damages in cases of tort or breach of contract. In *The Despina R.* and *The Folias*[5] (decided of late), the House of Lords recognised that the increased volatility of foreign exchange rates has necessitated the protection of injured parties from any further losses that exchange rate changes may precipitate.

In contrast to the two earlier cases discussed in detail by Riordan,[6] *The Despina R.* and *The Folias* reveal more of the complexities that the new rule has created. This paper will examine the extent to which the law in this area is in fact capable of reflecting "commercial realities" and whether the judge is properly equipped to introduce the necessary reforms.

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1 [1976] A.C. 443 (H.L.).

2 *George Veflings Rederi A/S* v. *President of India* [1979] 1 W.L.R. 59, 62 (C.A.) *per* Lord Denning M.R.

3 Riordan, *The Currency of Suit in Actions for Foreign Debts* (1978) 24 McGill L.J. 422.

4 *Supra*, note 1, 464.

5 [1978] 3 W.L.R. 804 (H.L.).

6 *Miliangos*, *supra*, note 1; and *Federal Commerce & Navigation Co.* v. *Tradax Export S.A.* [1977] 2 W.L.R. 122 (C.A.). Riordan's submission, *supra*, note 3, was based primarily on these cases.

II. Choice of currency

In both *Miliangos* and *Federal Commerce,* there was only one non-sterling currency in which the plaintiff's loss could reasonably be expressed. However, in *The Despina R.* and *The Folias,* the House of Lords was faced with a choice between several eligible foreign currencies.

The *Despina R.* concerned a collision between two ships. The expenses of repair had been incurred primarily in three non-sterling currencies, one of which being the currency in which the plaintiffs conducted their trading operations. Lord Wilberforce suggested that in tort cases of this kind there were three possible currencies in which a plaintiff might be entitled to have his damage award expressed. The first is the expenditure currency — the currency or currencies in which the expense or loss was immediately sustained. The second is the plaintiff's currency, "the currency in which the loss was effectively felt or borne by the plaintiff, having regard to the currency in which he generally operates or with which he has the closest connection".[7] The third is the sterling equivalent, which is calculated at the time that the losses occurred or at some other date. In *Miliangos,* the House of Lords selected the plaintiff's currency as that which most truly expressed the plaintiff's loss, but it rejected a hard and fast rule and preferred not to indicate the circumstances in which the expenditure currency would be selected.

In *The Folias,* a cargo of onions was found to be damaged due to the failure of the refrigeration on a ship chartered by the respondents, a French company which operated shipping services. The consignees of the cargo successfully claimed against the respondents, and payment was made in Brazilian cruzeiros. The French company in turn claimed damages for breach of contract from the appellants, the Swedish owners of the vessel. The claim was brought to arbitration in London pursuant to the terms of the contract. In addition to the choice of currencies set forth in *The Despina R.,* the currency of the contract or charterparty presented a fourth possible solution. The House rejected the currency of the contract because even though the contract provided that payments in respect of the hire of the ship and other contractual payments were to be made in U.S. dollars, it made no provision for the payment of damages in U.S. dollars and hence was not susceptible of a "decisive

[7] *Supra,* note 5, 808.

interpretation".[8] A flexible rule was again adopted,[9] although the plaintiff's currency was again selected.

While the conclusions reached by the House were compatible with "the normal principles, which govern the assessment of damages",[10] and indeed, placed emphasis on the restoration of losses to the plaintiff, they do raise some difficulties relating to "fundamental (commercial) realities of the day".[11] Uncertainty as to which of several available currencies might be selected may affect the behaviour of the parties in the pre-arbitration bargaining process. The defendant, in addition to being able to exploit the plaintiff's aversion to any risk by making lower offers of settlement,[12] may have an incentive to delay settlement or to engage in speculative activity normally prohibited by Exchange Control Regulations.[13] Correspondingly, he will have to bear all of the losses arising out of fluctuations following exchange rate volatility.

III. Interest

A further problem arises from the likelihood that there will exist a relationship between the interest rates prevailing in different countries and the exchange rate between the currencies of those countries. This problem has been overlooked by the House of Lords, by Riordan,[14] and by judges in subsequent cases.[15] The potential importance of this relationship is great, as has been outlined by one of the current authors in case notes on *Miliangos*[16] and on *The Despina R.* and *The Folias.*[17]

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[8] *Ibid.*, 812.

[9] *Ibid.*, 814.

[10] *Ibid.*, 809 *per* Lord Wilberforce. The principles referred to are those of *restitutio in integrum* and of the reasonable forseeability of the damage sustained.

[11] *Supra*, note 3. These difficulties are considered in Bowles & Whelan, *Judgments in Foreign Currencies: Extension of the Miliangos Rule* (1979) 42 M.L.R. 452.

[12] The role of uncertainty in bargaining about the quantum of damages in personal injury cases has been investigated in Phillips & Hawkins, *Some Economic Aspects of the Settlement Process: A Study of Personal Injury Claims* (1976) 39 M.L.R. 497.

[13] See generally *The Exchange Control Act 1947*, 10-11 Geo. VI, c. 14 (U.K.).

[14] Riordan recognises that a damage award would include interest but fails to explain the method by which such interest should be calculated.

[15] See, *e.g.*, *Helmsing Schiffahrts G.M.B.H. & Co. K.G.* v. *Malta Drydocks Corp.* [1977] 2 Lloyd's Rep. 444 (Q.B.) *per* Kerr J.

[16] Bowles & Phillips, *Judgments in Foreign Currencies: an Economist's View* (1976) 39 M.L.R. 196.

[17] *Supra*, note 11.

The problem in question, whilst of intrinsic technical interest, also serves to highlight the unexpected complexities that legal reform may sometimes introduce. The relationship between the interest rate and the currency exchange rate of any given country was recognised in the *Miliangos* case by the lower court to which the case was referred for resolution of the final details of the judgment. In *Miliangos* v. *George Frank (Textiles) Ltd (No. 2)*,[18] Bristow J. expressly stipulated that in calculating the amount of the judgment debt, Swiss interest rates should be applied to the original debt, expressed as it was in Swiss francs:

> In my judgment the approach in English law should be: if you opt for a judgment in foreign currency, for better or for worse you commit yourself to whatever rate of interest obtains in the context of that currency.[19]

This procedure, which is essential if a consistent application of the *restitutio in integrum* principle is to be achieved,[20] does not seem to have been universally followed. In *Helmsing Schiffahrts G.M.B.H.* v. *Malta Drydocks Corp.*,[21] the plaintiffs were German shipowners who contracted through the second and third defendants for the building of two ships by Malta Drydocks Corporation. The price was expressed in Maltese pounds, which had been agreed upon as the currency of account. Pursuant to the terms of the contract, the plaintiffs were entitled to a return of approximately ten per cent of the purchase price because they had chosen not to order certain optional fittings. This sum, which amounted to 105,000 Maltese pounds, should have been paid to the plaintiffs in 1972 but was not paid until 1976. As a result of this delay, the plaintiffs had to borrow money in Germany at German commercial borrowing rates, which at that time were said to be approaching fifteen per cent *per annum*.

Kerr J. thought that the plaintiffs' claim for payment in Maltese pounds was justifiable,[22] but decided to differ from the rule which Bristow J. had adopted; he held instead that over the period in question the plaintiffs were entitled to interest payable in Maltese pounds, but calculated according to prevailing commercial borrowing rates in Germany. Certainly the case before him was more complicated than the *Miliangos* case in that the currency in which judgment would have been made, Maltese pounds, was not the

[18] [1976] 3 W.L.R. 477 (Q.B.).
[19] *Ibid.*, 479.
[20] See *infra*, text between fnn. 22 & 23.
[21] *Supra*, note 15.
[22] *Ibid.*, 448.

plaintiffs' currency. We respectfully submit, however, that Kerr J., in his attempts to fully compensate the plaintiffs, erred in the procedure that he followed in his calculations.

There are two logical ways in which the amount due to the plaintiffs may be calculated. The first entails the assumption that the plaintiffs, had they received the money that they were due when it became payable, would have held it in an account in Germany. Had they done so, or been treated as having done so, the appropriate procedure would have been to convert the sum payable in 1972 in Maltese pounds into German currency at the exchange rate ruling at the time, and to then apply German interest rates for the period of 1972 to 1976 over which the plaintiffs had been deprived of the use of the funds. The second possible line of argument is based upon the assumption that the funds would have been held in an account in Malta over the period in question. In this event the calculation would have proceeded by applying Maltese interest rates over the period to the basic sum expressed in Maltese pounds. The amount of principal and interest could then have been converted, if required, into German currency at the rate of exchange prevailing at the time of judgment. The method of calculation followed by Kerr J. conformed to neither of these two methods but represented a conceptually unsatisfactory hybrid. By continuing to express the basic sum in Maltese pounds while applying German interest rates, Kerr J. suppressed the influence of the change in the exchange rate between the currencies over the period.

The essence of the argument about the choice of interest rate is that the extent of the opportunities foregone by the plaintiffs as a result of being deprived of their money is best measured by reference to economic conditions in the plaintiffs' country or the country in which their business is conducted. In the *Miliangos* case, the Swiss plaintiff faced the prospect of considerable loss as a result of the decline in value of sterling relative to the Swiss franc. In compensating the plaintiff, it was clearly desirable to take account of the fact that he was expecting some specified number of Swiss francs, and also to ensure that the interest rate awarded was commensurate with the Swiss rate that would have been available to the plaintiff. In other words, the funds that the Swiss plaintiff would have had to borrow in order to finance (at least notionally) the cash shortfall he experienced as a result of the defendant's failure to pay the debt would have been available at the Swiss interest rate and not the rate prevailing in the United Kingdom or anywhere else.

The importance of ensuring consistency between the currency and the interest rate upon which calculations are to be based derives essentially from the existence of an inverse relationship between the interest rate in a country and the international strength of its currency. The rate of interest offered by a central bank reflects a number of factors, but in particular it reflects inflation and expectations about subsequent movements in exchange rates. For example, the Bank of England varies its minimum lending rate according to both the balance of payments position (which determines in part the extent of the Bank's eagerness to attract investment from overseas) and the expected rate of inflation (since the incentive to invest depends in part upon the difference between the nominal rate of return and the rate at which prices in the economy are rising). It is clear that the weaker the currency is expected to be, the higher the domestic interest rate will have to be if investment is to be protected. An important corollary is that the greater the fall in the international value of a currency, the greater the extent to which domestic interest rates will exceed those prevailing abroad. A cursory glance at the international financial statistics for the relevant countries and time period in the *Miliangos* case illustrates the point very clearly: the Swiss franc moved up considerably against sterling, but over the same period Swiss interest rates were correspondingly lower than those prevailing in the United Kingdom.[23]

In the *Helmsing* case, matters were slightly more complex. Over the period from 1972 to 1976, the Maltese pound declined in value against the Deutschemark. According to the rather sparse information available about interest rates in Malta, they were generally higher than those prevailing in Germany. This observation is based on a comparison of the discount rate offered by the central bank in each country. The interest rate figures quoted in the case, including the fifteen per cent to which German commercial rates were said to have risen, are confusing; by implication, German commercial rates (which like all commercial rates offered to risk-bearing firms exceed the minimum rate at which the central bank will lend) are being compared with the Maltese discount rate. Whilst there are good grounds for arguing that commercial rates (rather than the minimum lending rate) are the appropriate criteria to apply in compensating plaintiffs, it is important that comparable rates be used. It is meaningless to compare central bank rates in one country with a generically different interest rate in another country.

[23] For details, see Bowles & Phillips, *supra*, note 16.

Thus, whilst it appears from reading the *Helmsing* case in isolation that interest rates were higher in Germany than in Malta, the available statistics suggest the reverse. As is suggested above, the weakening of a currency is generally associated with high domestic interest rates. The consequence of this is that the German plaintiff is being overcompensated because too high an interest rate is being awarded, given that he is being protected from the effects of the weakening of the Maltese currency.

In general terms, it can be seen that where the interest rate corresponds to the currency in which the award is made, the plaintiff who loses as a result of currency volatility will suffer losses that are less spectacular than would appear at first glance. Even if there is substantial delay between the occurrence of harm and the date of judgment, the change in the value of the sum resulting from exchange rate changes will be offset to some extent by the lower rate of interest that it is appropriate to apply.

IV. Relevance to Canada

At the moment, Canadian courts have adopted the so-called "breach date" rule, in which a foreign sum will be converted into Canadian dollars at the rate of exchange prevailing when the payment was due.[24] Riordan is correct when he observes that this is based on "a now obsolete British rule".[25] He proposes that the guiding principle should be not only that the creditor should not suffer from the fluctuation in exchange rates but also that the debtor should not gain thereby. To allow a debtor to do so would be to sanction his unjust enrichment.[26] He argues that a plaintiff should be permitted to choose either the breach date or the date of payment as the date on which the exchange is to be calculated. English courts since *Miliangos* have held that the rate of exchange should be the rate prevailing at the date of payment,[27] but that a plaintiff who is shown to have brought about delays in legal proceedings in order to increase the amount claimed in damages may have his damages reduced on the grounds of failure to mitigate.[28] It is, however, difficult for a defendant to prove that the plaintiff has delayed, and to follow Riordan's proposal may be to place an inordinate burden on defendants.

[24] See Johnson, *Conflict of Laws* 2d ed. (1962), 721 *et seq.*

[25] *Supra,* note 3, 440.

[26] *Ibid.*

[27] See, *e.g., supra,* note 2.

[28] *Malhotra* v. *Choudhury* [1979] 1 All E.R. 186 (C.A.).

According to Riordan, the proposal discussed above would allow the judiciary to "effectively mitigate the unfair disadvantage that section 11 of the *Currency and Exchange Act* has on international plaintiffs, Canadian or otherwise".[29] Section 11 provides that:

> [A]ny statement as to money or money value in any indictment or legal proceedings shall be stated in the currency of Canada.[30]

We agree with Riordan's criticisms of this section, but his reliance on the judiciary in this matter appears somewhat optimistic, given the conceptual difficulties outlined above. Whilst many authors have concluded that the *Miliangos* case and the associated adjustments that have taken place represent an important step forward and reflect the adaptation of the law to the demands of modern commerce,[31] relatively little attention seems to have been paid to the difficulties that have arisen. Judges do not appear to have taken expert advice on how foreign exchange markets operate; their intentions to fully compensate plaintiffs for losses, while laudable, have led to overcompensation in the sense that an excessive interest rate has been awarded.[32] It is perhaps apposite to conclude by noting that in several areas of the law, judges are still inclined to react hysterically or derisively to the suggestion that actuaries, economists or other experts have much to offer to legal debate.[33] This attitude has been less prevalent in the area of contract law. Indeed, in his dissenting speech in the original *Miliangos* case, Lord Simon argued that a matter such as foreign money obligations demanded "the contribution of expertise from far outside the law — on monetary theory, public finance, international finance, commerce, industry, economics".[34] Perhaps he is right.

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[29] *Supra*, note 3, 440.

[30] R.S.C. 1970, c. C-39.

[31] See, *e.g.*, Riordan, *supra*, note 3; Mann, case note on *Miliangos* in (1976) 92 L.Q.R. 165, 167, referring to the "openly progressive and reforming spirit displayed in fields of international commerce".

[32] See, *e.g.*, *Helmsing Schiffahrts*, *supra*, note 15.

[33] See, *e.g.*, *Taylor* v. *O'Connor* [1971] A.C. 115 (H.L.); *Mitchell* v. *Mulholland (No. 2)* [1972] 1 Q.B. 65 (C.A.); *S.* v. *Distillers Co. (Biochemicals) Ltd* [1970] 1 W.L.R. 114 (Q.B.). On this problem generally, see Prevett, *Actuarial Assessment of Damages*: *The Thalidomide Case* (1972) 35 M.L.R. 140, 257.

[34] *Supra*, note 1, 481.

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