MR JUSTICE DAVID STEEL:

This action arises out of the loss of a part of the cargo of parts for a pyrolytic furnace. The cargo was being carried on the defendants' vessel, "Mosconici" from Venice to Kuwait in July 1996. The relevant part of the cargo was stowed on deck. In particular, there were eight large convection modules, which would appear to an outsider to be similar to large containers. While on passage in the Gulf of Aden, the vessel encountered heavy weather and three of the modules were lost overboard. The other five suffered from sea water wetting. The main focus of the claim was the three modules that had been lost and which in due course were replaced by new ones that had been manufactured in Italy and then sent out to Kuwait.

The primary issues in the action were the three defences which had been raised: first, that, as the defendants contended, they were not liable for any of the damage because of express contractual provisions on the face and reverse of the bill of lading relating to deck cargo; alternatively, that the loss and damage was caused by an excepted peril, namely perils of the seas; and, thirdly, in any event, they were entitled to limit their liability by virtue of article 4 or 5(a) of the HagueVisby Rules. Those principal issues were in fact compromised or settled on the eve of the trial. In the event, the claimants abandoned their claim for wetting of the five modules, but the defendants conceded liability for the loss of the three modules but, by the same token, it was accepted that the defendants were entitled to limit their liability. The claimants also conceded that they were liable in respect of a small item of surveyor's fees, I think totalling some 800 Kuwaiti dinars, which, at least for the moment, I can disregard.

The limit of liability as measured in Special Drawing Rights was not in issue. The figure was 414,000 SDRs. But what was in issue and what in due course came before me for decision were four further outstanding issues relating to the quantum of the claim. First, what was the appropriate currency into which the limit should be converted? Secondly, what was the gross rate of interest appropriately attributable to that currency? Thirdly, what, if any, adjustment ought to be made to that gross rate of interest to reflect the fact that the fund constituted a conversion from special drawing rights? Fourthly and lastly, from what date should the interest run?

The claimants' answer to these four issues was as follows. They submitted that the appropriate currency was United States dollars; that the appropriate rate of interest was the U.S. prime rate, which they put forward, taking an aggregate average over the relevant period since the casualty, as 8.49 per cent; that no adjustment should be made merely because *there* was a conversion of special drawing rights; and that the interest should be calculated as from the date of the casualty or at least - and for this purpose it does not matter which - from the date when the vessel arrived at her port of refuge and the failure to deliver occurred.

The defendants challenged all those propositions and it was their case that the relevant or appropriate currency was the Italian lira; that the appropriate rate of interest - whether expressed as a base rate plus one per cent increment or the Italian prime rate - was in the region of 7.9 per cent; thirdly, that that figure should be discounted to reflect the protection against inflation, which they contended was contained within the special drawing right base for the limit of liability; and, fourthly, that the date from which interest should run was not the date of the casualty, but the mean date of payment *for the* substitute modules that were manufactured. Even then the difference, as I understand it, between the extreme cases (if I may call them that) only amounted to a few thousand dollars, and thus it might be thought that it was not worth expending further cost in a case which has really absorbed more than its fair share, but that of course is just the problem. It is a problem further highlighted by this fact, that in August 2000 - some five months before the trial - the defendants made a Part 36 offer by way of a payment into court in a sum said to reflect the defendants' entitlement to limit their liability under the Hague-Visby Rules. As I understand it, if, but only if, the claimants' primary case on all four issues that are before me is correct, they will have recovered as a result of the action a little bit more than the offer and of course, if such be the case, the allocation of costs for the trial of the action would be in the discretion of the court. Per contra, if - and again I understand this not to be controversial - the claimants were wrong for any one or more of the issues, the claimants would not have recovered more than the Part 36 offer and in those circumstances the court would be bound - because it is

not suggested it would be unjust so to do - to award the defendants their costs as from the date of the payment pursuant to Part 35. I should add that it is not suggested by the defendants that in those circumstances it would be appropriate for the court to make an order of indemnity costs or any incremental rates of interest as are available under Part 36.

So with that introduction I turn to the four issues: first of course, the question of what is the appropriate currency. Here there is, as may not be surprising, no issue as to the appropriate legal principles. I was referred to the decision of the House of Lords in **The "Texaco Melbourne"** [1994] 1 Lloyd's Rep. 473 and to the passage in Lord Goff's speech at page 477, which reads as follows:

> *"First, it is necessary to ascertain whether there is an intention, to be derived from the terms of the contract, that damages for breach of contract should be awarded in any particular currency or currencies. In the absence of any such intention" - and it is common ground that this is such a case - "'the damage should be calculated in the currency in which the loss was felt by the plaintiff or' (adopting the words of Lord Denning, M.R. in the Court of Appeal . . .} 'which most truly expresses his loss'".*

The focus of the defendants' submissions against the background of that relevant legal approach was that the claimants had been paid in full for the lost modules; that the claim for damages was pleaded by reference to the cost of manufacture and despatch of the replacements; and that, since the replacements were manufactured in Italy and were paid for in lira, the currency which most justly expressed the loss sustained by the claimants must be Italian lira.

In my judgment, this is too narrow a perspective. Damages in a cargo claim of this kind ought in principle to be assessed by reference to the arrived sound value: see **The Sanix Ace case** [1987] 1 Lloyd's Rep. Evidence of that value - which would be the measure of the proprietary interest in the goods which the claimants had - may be obtained from a range of sources. It may be reflected in the invoice price. It may be reflected in the local market price or value. It may be reflected in the replacement cost.

Against that broader perspective, what are the considerations which seem material to evaluating the appropriate currency that best reflects the proprietary value in the modules? Mr Rainey, in his submissions, identified the following as being particularly material, and I agree with him. First, the claimants, albeit an Italian company, was at the relevant time part of a substantial United States group of companies, and the involvement of the Italian company arose as a result of an agreement entered into for the construction of an ethylene plant in Kuwait between Equate Petrochemical Company and the well-known U.S. construction company Brown & Root. In pursuance of that construction contract, Brown & Root entered into a sub-contract as buyer with the American corporation of which the claimants are a part. That contract was for the purchase of a furnace system with an invoice value of some US$49 million. But in order to take advantage of national export credit financing, that total purchase order was apparently split three ways between the United States, Italy and Germany. Thus the claimants' interest arose by virtue of the spin off of one of those three purchase orders, and the Italian contract (if I may call it that), which the claimants were a party to, was also a United States dollar transaction, with Brown & Root paying the claimants in United States dollars. Payment was duly made in United States dollars and, from the evidence, was maintained in the corporate accounts of KTISPA in United States dollars. On top of that, the contract itself made provision for damages for non-delivery in United States dollars, as indeed there were express contractual penalties expressed in dollars in that contract for late delivery and so on.

It seems to me that those considerations wholly overwhelm and subsume the fact that replacement modules were manufactured in Italy and paid for in Italian lira. Indeed it is notable that there is nothing in the pleadings to suggest that the claimants were pursuing their claim in an inappropriate currency. I have come to the clear, conclusion that the currency which most justly expresses the loss that has been sustained by the claimants is United States dollars.

The second issue is the gross rate of interest. I have been reminded of the decision of Mr Justice Langley in **Kuwait Airways v Kuwait Insurance** [2000] 1 AER (Commercial), in which he helpfully sets out the numerous authorities, both of this court and other courts, relating to the appropriate rates of interest. He concluded - and I agree with him - that it is the well-established practice in the Commercial Court to award interest at base rate plus one per cent and, in the context of United States dollars, that was equivalent to or analogous with the United States prime rate. That may not in fact be a statement of any controversy. What is perhaps surprising in the present context is that the dispute is about what the prime rate was, or perhaps more particularly what the prime rate means. This all arises from the defendants' reliance upon a fax from the Royal Bank of Scotland, received shortly before the hearing in which *these* matters were aired, which reads as follows: "*Comments*", it says.

> *"United States interest rates re the "Mosconici'" Kuwait, July 1996. The prime rate is the rate of interest charged by commercial banks to first class risk corporate borrowers for short-term loans. The prime rate is the basis of the whole structure of commercial interest rates in the United States. The US dollar prime rate of interest is 300 basis points. This is 3 per cent, e.g. 100 basis points is equivalent to 1 per cent, and so on. The Fed rate is the US base rate, and the prime rate is made up of the Fed rate plus basis points, which is currently 3 per cent. The US dollar prime rate is always 300 basis points above the Fed rate, and the Fed rate is currently 5.5 per cent".*

What was submitted on behalf of the defendants is that that evidence from the Royal Bank of Scotland makes it plain that the prime *rate is in fact* the Fed rate. In my judgment, that reading of the letter *is misconceived.* The letter is making it plain - and this is in fact entirely common ground with the claimants' own *position - that the prime* rate is the Federal rate plus the basis points, that is to say, as at the time the letter was written 5.5 per cent plus 3 per cent. Accordingly I am quite unable to accept the proposition that, in applying the United States prime rate to the appropriate currency, the gross rate of applicable interest is anything other than, as the claimants contend, taken overall from the period since July 1996, 8.49 per cent.

So we move on to the third issue, the novel proposition that a discount must be made to the gross rate of interest. The argument seems to be this, that interest reflects both the value of money and the cast of it, and that since the Fund, as expressed in special drawing rights, affords protection against loss of value, the rate of interest must be discounted so that it only protects the claimants against the cost of the money and not the value of it as well. A close analogy is said to lie, in respect of this submission, with the decision of the House of Lords in **Wright v. British Railways Board** [1983] 2 AC 773. It is sufficient for present purposes to refer to the headnote, which accurately reflects the decision of the House, which reads,

> *"'the interest to be awarded on damages for non-economic loss, like the assessment of compensation for that loss, could only be a conventional figure for which the Court of Appeal was generally the best qualified to lay down guidelines; that the House of Lords should hesitate long before departing from those guidelines and, since judges were required to assess damages for non-economic loss in the money of the day at the date of trial, 2 per cent from the date of service of the writ to the date of judgment represented an appropriate rate of interest; that although the rate of 2 per cent had been recommended at a time when the rate of inflation was high and the anxiety of investors to preserve the real value of their money made them willing to accept a much lower "real" rate of interest as a reward for foregoing the use of their money, that guideline, which like other guidelines served the purpose of promoting predictability and thus facilitating settlements, should not be varied until the long term trend of future inflation became predictable and expert evidence showed that 2 per cent was no longer the appropriate rate of interest'".*

I confess I see no relevant or helpful analogy with **Wright v. British Railways Board** in the context of the present claim, which is a claim for economic loss assessed as at the time of loss and then in due course subjected to a cap. I see no justification for depriving the claimants of interest on the fund which was due to be paid as from the autumn of 1996 at the very latest. Any different conclusion would, in my judgment, in fact be inconsistent with the decision of the Court of Appeal **in Polish Steam Ship Co. v Atlantic Maritime [1985]** 1 QB 41.

Lastly, the date. The defendants contend, as I have already indicated, that the payment should run from the date of the payment for the replacement modules. To some extent this proposition stands or falls with the parallel submission on the appropriate currency. Again I accept the

conventional approach as identified and spelt out in **Kuwait Airways** by Mr Justice Langley at page 586, that prime facie the interest should run from the date of loss.

It follows from the conclusions that I have already reached that there are no good reasons for departing from that date - which is either July or August 1996 - in the present case.

So what is the outcome? The outcome, as I understand it, is that the claimants have, as one might say, beaten the offer, but only just. It seems to me nonetheless -for reasons which I will try and spell out in a moment - that the actual event on which costs should perhaps depend is the likelihood or otherwise of the claimant being able to break the limit. Assuming for the purposes of argument that there was no prospect of breaking the limit, it is difficult to see any real justification for pursuing the action after the payment in, even allowing for the fact that on the findings that I have made the claimants have recovered slightly more than the offer.

One of the more bizarre features of the case is that the claimants kept pressing - and I have seen the correspondence relating to it - for a detailed analysis of the manner in which the payment in had been calculated. Indeed elaborate submissions were first made to Mr Justice Moore-nick for an order that the provisions of CPR required the claimants to give more detail as to how they had calculated the claim and, following an intimation from Mr Justice Moore-Rick that sometimes it may be appropriate for more detail to be given, application was made and heard before Mr Justice Morrison, in which the claimants pressed the defendants to spell out in some considerable detail how they had calculated their payment in. I have not seen the judgment of Mr Justice Morrison - which is not, at least presently, available - but he rejected the claimants' application. As I say, I am not very surprised he did so, and I suspect that one of the primary reasons he rejected it was the content of the defendants` skeleton argument, paragraph 6, which reads as follows: "The short answer to the claimant may be to look at the notice of payment into court. Where the payment is for the whole of the claim, the form does not require any details. Where it is for part of the claim only, the form does require the defendant to give details. In the second case, he must identify ***what items*** he is seeking to settle so the claimant can appraise whether he should accept the offer or whether he would do better by going on. The form does not contemplate or encourage any further disclosure when an all-in offer is made. It is submitted that the clear ambit of Part 36.9 is for clarification only in cases where it is not clear what the payment into court is intended to cover. Once it is clear that payment is all inclusive, there is no need for any clarification. Indeed even in cases where the payment is for part of a claim submitted, one overall figure can be given for all the individual parts and no further particularisation can be or should be ordered".

It seems to me that in fact this scuffle was very much at the edge of the field of play. As I have already indicated, the only real justification for seeking to press on, after August 2000, was to try and break the limit. Indeed that is perfectly apparent from the fact that the claimants themselves made a Part 36 offer in December, in which ironically they give no detail but asserted that they were willing to accept US$1.2 million - a figure which may or may not represent the cost of manufacture of replacements of the modules without any further additional expenditure as part of the legitimate claim. But however it is calculated - and it matters not - it is only conceivable that that figure could be put forward on the basis of a lack of entitlement on the part of the defendant to limit its liability. But in my judgment that was a hopeless prospect wholly lacking in realism.

It is rather striking that *the pleaded case on* this issue - namely limitation of liability - is restricted to one paragraph of four lines in the reply, which says:

"*The plaintiffs will contend the stowage and lashing of the cargo was effected so negligently and carelessly as to amount to recklessness on the part of the defendants, their servants or agents, within the meaning of Article 4 rule 5(4). In the premises it is denied the defendants are entitled to limit their liability*". That, I have to say, is a wholly inadequate plea, and it is rather surprising it survived. It is misconceived in two respects: firstly, because it equates negligence and carelessness - whether gross or not - as something akin to recklessness. That, in my judgment, would have been demurrable. But even more unsatisfactory is the suggestion "*In the premises*" that the defendants were not entitled to limit their liability. There is no plea of knowledge, let alone actual knowledge, that loss would probably result as a result *of the reckless* conduct. Accordingly the plea is inadequate, and I presume on the facts not only is the plea inadequate but the case is hopeless, bearing in

mind the decisions in **Goldman v Thai Airways** and the more recent decision of the Court of Appeal in **Nugent v Michael Doss.**

It follows that, in my judgment, the only justification for pressing on, after the payment in, in order to affect any substantial recovery over that which was offered was based on a complete misconception and lack of realism as to the plea of limitation.

What then should be the appropriate order of costs? It is common ground that this is entirely at the discretion of the court. The court is directed in this context to have regard - and I quote from CPR 44.3(4) –

> *"In deciding what order (if any to make about costs, the court must have regard to all the circumstances, including (a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment into court or admissible offer to settle . . . (whether or not made in accordance with Part 36) . . . The conduct of the parties includes (a) the conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim".*

It seems to me that the relevant considerations for the purposes of exercising my discretion with regard to costs in the present circumstances are as follows. So far as conduct is concerned, I have already expressed my views about the lack of realism with regard to the entitlement of the defendants to limit. There was a parallel lack of realism in the defendants' refusal to concede that, certainly in respect of the modules that were lost overboard, there was in principle liability. I do not put that in anything like the same degree of lack of realism as seems to have descended on the claimants but it has some materiality as to the costs that were incurred in preparing for the action: an inability to keep the eye on the ball in that respect.

So far as the outcome is concerned, I have to bear in mind that the claimants have in fact recovered a little bit more than was offered primarily because they have recovered a small sum in respect of survey fees, but, as I indicated, by and large the claimants have not succeeded in the event - the event effectively being the decision as to whether there was an entitlement to limit or not. Accordingly I regard this as a case in which, despite the fact that they have recovered marginally more than the Part 36 payment, an order of costs must be made to reflect the reality of the situation. I order that the claimants should pay 66 per cent of the defendants' costs as from the date of the payment into court. I assume that the appropriate order, before that, is that the claimants should have their costs prior to that date.

