Neutral Citation Number: [2024] EWCA Civ 718

Case No: CA-2023-001083, CA-2023-001079 & CA-2022-002179

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
THE HONOURABLE MR JUSTICE MARTIN SPENCER
[2023] EWHC 1031 (KB)

AND ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
THE HONOURABLE MRS JUSTICE LAMBERT
[2022] EWHC 2704 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2024

Before :

LORD JUSTICE COULSON
LORD JUSTICE DINGEMANS
and
LORD JUSTICE STUART-SMITH

- -

Between :

(1) JANE NICHOLLS (2) AXA ASSISTANCE GROUP T/A AXA TRAVEL INSURANCE	**Claimants/ Respondents**
- and -	
MAPFRE ESPANA COMPANIA DE SEGUROS Y REASEGUROS SA	**Defendant/ Appellant**

And Between:

SONIA WOODWARD	**Claimants/ Respondents**
- and -	
MAPFRE ESPANA COMPANIA DE SEGUROS Y REASEGUROS SA	**Defendant/ Appellant**

And Between :

SUSAN SEDGWICK	**Claimant/ Respondent**
- and -	

MAPFRE ESPANA COMPANIA DE SEGUROS Y REASEGUROS SA	**Defendant/ Appellant**

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Mr Chapman KC and **Mr Archer** (instructed by **Blake Morgan LLP, Slater and Gordon UK Lawyers** and **Leigh Day**) for **Jane Nicholls, Axa Assistance Group, Sonia Woodward** and **Susan Sedgwick**
Mr Audland KC and **Mr Mead** (instructed by **Hextalls Law**) for the **Appellant**

Hearing date : 22 May 2024
- -

Approved Judgment

This judgment was handed down remotely at 14.30 hrs on 27/06/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Dingemans :

Introduction and issues

1. The respondents, who were the claimants in the original actions (Susan Sedgwick, Jane Nicholls and Sonia Woodward) each suffered accidents causing personal injuries in Spain. The appellant, Mapfre Espana Compania De Seguros Y Reaseguros SA (Mapfre), an insurance company, was liable to the respondents for their injuries.

2. The claimants brought claims for personal injuries against Mapfre in England and Wales. Liability was admitted and damages were assessed under Spanish law, pursuant to the provisions of Rome II (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007). These appeals raise the question whether interest, payable at the rates under article 20(4) of the Spanish Insurance Contract Act 50/1980 (Act 50/1980), should be ordered to be paid as part of the damages due to the claimants.

3. The judgments below which are the subject of this appeal have ordered that the interest under Act 50/1980 should be paid, but they have done so for different reasons. These reasons raise issues relating to the difference between matters of procedure on the one hand and substantive law (being "the law applicable to non-contractual obligations", to use the wording of Rome II) on the other hand, for the purposes of private international law and the interpretation of articles 1 and 15 of Rome II.

4. In *Susan Sedgwick v Mapfre Espana Compania De Seguros y Reaseguros SA* [2022] EWHC 2704 (KB) (*Sedgwick*) Lambert J, in a judgment dated 26 October 2022, held that the interest payable under Act 50/1980 was a matter of procedure and so governed by the law of England and Wales, and not a matter of substantive law, which would be governed by the laws of Spain. Nevertheless Lambert J awarded interest at the equivalent rate to the interest payable pursuant to Act 50/1980, as a matter of discretion under section 35A of the Senior Courts Act 1981.

5. In *Jane Nicholls and Axa Assistance Group v Mapfre Espana Compania De Seguros y Reaseguros SA and Sonia Woodward v Mapfre Espana Compania De Seguros y Reaseguros SA* [2023] EWHC 1031 (KB) (*Nicholls and Woodward*) Martin Spencer J, in a judgment dated 4 May 2023, heard appeals from two County Court decisions (Her Honour Judge Bloom in Luton County Court in *Nicholls* and Her Honour Judge Walden-Smith in Norwich County Court in *Woodward*) where both of the County Court Judges had found that the interest payable under Act 50/1980 was a matter of procedure, and so governed by the law of England and Wales, and both had exercised their discretion to award the equivalent to the interest rate payable pursuant to Act 50/1980, under section 69 of the County Courts Act 1984 (which effectively mirrors the provisions of section 35A of the Senior Courts Act 1981).

6. On the hearing of the appeals, Martin Spencer J decided that the recovery of interest under Act 50/1980 was not a matter of procedure but was a matter of substantive law, and so governed by Spanish law. This meant that the issue of exercising a discretion under section 69 of the County Courts Act did not arise. Martin Spencer J went on to hold that if payment of interest under Act 50/1980 had not been a matter of substantive law but had been a matter of procedure governed by the laws of England and Wales, it would not have been legitimate to exercise the court's discretions under section 69 of

the County Courts Act to award interest at the equivalent rate of interest under Act 50/1980.

7. In these appeals Mapfre contends that the interest payable under Act 50/1980 is penal in nature because it rises to 20 per cent per annum in the third year of application, is payable as a matter of Spanish procedural law to encourage early settlement of disputes by insurance companies, and is a matter of procedure which is not covered by Rome II. This means that the laws of England and Wales apply to the assessment and award of interest. Mapfre also contends that it is wrong to use the statutory discretion under either section 35A of the Senior Courts Act or section 69 of the County Courts Act to allow Spanish penal interest in by the back door when it relates to a different procedural environment to which different procedural rules apply, and where the laws of England and Wales contain within Part 36 of the Civil Procedure Rules procedural provisions to encourage the early settlement of disputes.

8. The respondents contend that the Act 50/1980 is a matter of substantive law because it is an integral part of the way in which damages and interest are assessed in proceedings in Spain for personal injuries in actions against insurers. Therefore it should be ordered to be paid as Spanish law governs the action. As an alternative, the respondents also contend that if Act 50/1980 is a matter of procedure for the purposes of Rome II, then all of the judges were right, and made no error in the exercise of their discretion, in ordering the payment of an equivalent rate of interest under Act 50/1980 as a matter of discretion under section 35A of the Senior Courts Act or section 69 of the County Courts Act.

9. There is a further issue raised on appeal which concerns medical costs and the costs of repatriation to England which had been incurred by Ms Sedgwick after her accident. These totalled £35,498.69 and had been paid by Ms Sedgwick's travel insurer, Insurefor.com. Those costs were included and formed part of the claim against Mapfre. It is common ground that under Spanish law if a claimant has been paid by an insurer then the claimant is considered not to have suffered any loss. Any claim for repayment of those costs must be brought by and in the name of the insurer. It is also common ground that under English law, Ms Sedgwick would be entitled to bring the claim for the repatriation and medical costs in her own name as a subrogated claim, and she would hold the sums recovered for and on behalf of Insurefor.com.

10. Mapfre contends that this issue of subrogation is governed by Spanish law, meaning that Ms Sedgwick cannot bring the claim for these costs, and point out that Insurefor.com is now out of time in which to bring such a claim under Spanish law. Ms Sedgwick contends that the issue is governed by the law of England and Wales, being the law governing the contract of insurance between Ms Sedgwick and her travel insurer. This aspect of the appeal raises issues about the proper interpretation of article 19 of Rome II, and the judgment of the Court of Justice of the European Union (CJEU) in *Fonds de Garantie des Victimes des Actes de Terrorisme et D'Autres Infractions v Victoria Seguros SA* (Case C-264-22) [2023] IL Pr. 24 at 597.

11. The issues were refined in Skeleton Arguments and excellent oral submissions before the Court. A pleading point had been raised by Mapfre in respect of the cases of *Nicholls* and *Woodward* to the effect that it had not been pleaded that Act 50/1980 was part of the substantive law. This point was disputed on behalf of Ms Nicholls and Ms Woodward, who submitted that the pleadings were adequate. In the event the parties

agreed that there was sufficient evidence about the laws of Spain and asked that the matter be determined on a substantive basis, leaving any issues on the pleadings to be considered when dealing with issues of costs. I am very grateful to Mr Chapman KC and Mr Archer, Mr Audland KC and Mr Mead, and their respective legal teams for their assistance.

12. The issues are now: (1) whether interest payable under Act 50/1980 is a matter of procedure for the purposes of article 1(3) of Rome II; (2) if so, whether the judges were wrong to award interest at the equivalent rate to the interest payable pursuant to Act 50/1980, as a matter of discretion under either section 35A of the Senior Courts Act 1981 or section 69 of the County Courts Act 1984; and (3) whether Ms Sedgwick was entitled to bring in her own name the subrogated claim for the repatriation and medical expenses.

The accidents

13. Ms Sedgwick, Ms Nicholls and Ms Woodward are domiciled in the United Kingdom. They each suffered accidents which caused personal injuries in Spain.

14. Ms Woodward was riding a motorised mobility scooter in Tenerife and when her brakes failed she crashed into a signpost on 13 October 2015. Ms Woodward sustained a significant injury to her leg.

15. Ms Nicholls was walking on a path in La Manga when she tripped on a small directions arrow on the path on 12 December 2015. Ms Nicholls sustained a twisted knee and a fracture of the tibial plateau.

16. Ms Sedgwick was in Tenerife walking down an external concrete staircase where the lights were not working, and she fell down 8-10 steps on 23 January 2016. Ms Sedgwick sustained severe fracture injuries to her left knee and right heel.

17. Mapfre were the insurers of the tortfeasors in all of the accidents. Persons domiciled in England and Wales who were injured in accidents abroad and who had the right to bring their claim in England and Wales, could bring an action directly against the relevant insurer pursuant to the Judgments Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000) and the decision of the CJEU in *Odenbreit v FBTO Schadeverzekeringen* (Case C-463/06) [2008] 2 All ER (Comm) 733. Under the laws of Spain persons injured in an accident have a right to bring an action against the relevant insurer.

Conflicts of law in England and Wales before Rome II

18. Claimants who have suffered an accident overseas may, in certain circumstances, bring a claim in England and Wales. Before the coming into force of Rome II, the relevant law of England and Wales was governed, in part, by the Foreign Limitation Periods Act 1984 and the Private International Law (Miscellaneous Provisions) Act 1985.

19. For the purpose of resolving issues about conflicts of law, there was a universal principle within private international law that recognised a distinction between matters of substantive law, which were governed by the law of the action or lex causae (literally the law of the cause), and matters of procedure, which were governed by the law of the

jurisdiction in which the action was being pursued or lex fori (literally the law of the forum), see generally *Harding v Wealands* [2006] UKHL 2; [2007] 2 AC 1 and *Maher v Groupama Grand Est* [2009] EWCA Civ 1191; [2010] 1 WLR 1564 (*Maher*) at paragraph 8. The substantive law in actions concerning tort is, under Rome II, referred to as the law applicable to non-contractual obligations.

20. The laws of England and Wales had, on occasions, taken what was sometimes considered by some private international lawyers to be a very broad view of what was a matter of procedure, and therefore subject to the laws of England and Wales. Under the laws of England and Wales before Rome II came into force, although the heads of recoverable damage were a matter for the substantive law, the assessment of the sums payable under those heads of damage together with awards of interest, were considered to be a matter of procedure, see *Maher* at paragraph 7. In paragraph 40 the Court in *Maher* recorded that, in exercising its discretion under section 35A of the Senior Courts Act "the factors to be taken into account in the exercise of the court's discretion may well include any relevant provisions of French law relating to the recovery of interest".

Rome II

21. Rome II then came into force, and as an EC Regulation it formed part of the laws of England and Wales at the time that it came into force. Rome II applies to claims for accidents which occurred after 11 January 2009, see the judgment of the Court of Justice of the European Union (CJEU) in *Homawoo v GMF Assurances SA* (C-412/20) [2012] IL Pr.2. Rome II deals with issues of allocation of the governing law applicable to non-contractual obligations. Rome II remains part of retained EU law in England and Wales after the United Kingdom's withdrawal from the EU.

22. Recital 6 of Rome II emphasised that in order to improve the predictability of the outcome of litigation and certainty as to the applicable law, conflict of law rules needed to designate the same national law irrespective of where the action was brought; recital 11 emphasised that "non-contractual obligation" was an autonomous concept; and recital 15 explained that the principle of lex delicti commissi was the basic solution in virtually all member states, but that the application varied and engendered uncertainty.

23. Some relevant provisions of Rome II are set out below. Article 1 is headed "*Scope*" and provides:

> *"1.1: This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters….*
>
> *…*
>
> *1.3: This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22."* (underlining added)

24. Article 15 is headed "*Scope of the law applicable"* and provides:

> *"The law applicable to non-contractual obligations under this Regulation shall govern in particular:*
>
> *(a) the basis and extent of liability…*

> *(b) the grounds for exemption from liability, any limitation of liability and any division 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;*
>
> *(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;*
>
> *(f) persons entitled to compensation for damage sustained personally;*
>
> *(g) liability for the acts of another person;*
>
> *(h) the manner in which an obligation may be extinguished…"* (underlining added)

25. Article 19 is headed "*Subrogation"* and provides:

> "*Where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship."* (underlining added).

The approach to the interpretation of Rome II

26. There was much common ground between the parties about the proper approach to the interpretation of Rome II. Terms used in European instruments such as Rome II should have a uniform, autonomous meaning and a uniform sphere of application. There was a dispute about whether the words "evidence and procedure" in article 1(3) of Rome II should be given a strict or narrow interpretation, as contended by Mr Chapman on behalf of the Respondents, who relied on extracts in textbooks in support of that proposition.

27. It is common ground that the recitals to Rome II are a relevant aid to the proper interpretation of Rome II. As appears above, recital 6 emphasised enhancing the predictability of litigation and recital 11 emphasised the autonomous concept of terms used in Rome II.

28. In *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138; [2014] 1 WLR 4263 the Court of Appeal held that issues of expert evidence were "evidence" for the purposes of Rome II, and fell to be ordered and permitted according to the laws of

England and Wales. In construing article 1(3) in that case the words of Rome II were given their natural meaning, see paragraph 42.

29. In *Lazar v Allianz SpA* (Case C-350/14) [2016] 1 WLR 835 the CJEU considered the proper interpretation of article 4 of Rome II. The CJEU emphasised at paragraph 21 that the need for a uniform application of EU law and the principle of equality meant that the terms of a provision of EU law which made no express reference to the law of the member states must normally be given an independent and uniform interpretation throughout the EU. It was necessary to consider not only the wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.

30. In *Actavis UK Ltd v Eli Lilly & Co* [2015] EWCA Civ 555; [2016] 4 All ER 666 the Court of Appeal considered actions for declarations of non-infringement of European patents and in that context considered whether conditions for the admissibility of such a declaration were a matter of substantive law or a matter of procedure for the purposes of Rome II. At paragraphs 130-145 the Court of Appeal held that conditions for the admissibility of such a declaration were a matter of procedure, and therefore governed by the laws of England and Wales, and not a matter of substantive law.

31. In paragraph 131 of *Actavis* Floyd LJ recorded that article 15 of Rome II was not directly concerned with clarifying the distinction between substance on the one hand and evidence and procedure on the other, but it simply contained "a list of matters which are `in particular' to fall under the designated law", therefore article 15 was not a safe guide to whether matters which did not fall within its scope were procedural or substantive. Floyd LJ referred to the need for an autonomous EU criterion for allocating rules into one or the other category. At paragraph 137 Floyd LJ held that the conditions for the admissibility of a declaration "were not so intertwined with matters of substance as to require them to be dealt with under the lex causae".

32. I should record that after the judgment in *Actavis* there was a trial of the substantive action and a further appeal to the Court of Appeal, and then an appeal to the Supreme Court. The judgment of the Supreme Court dealt with the issue of infringement of the patent, and did not engage the issue of the meaning of procedure under Rome II.

33. In my judgment the Court's task is to give Rome II an independent and uniform interpretation, having regard to the wording, the context in which it occurs, and the objectives pursued by the rules of which it is part. The objectives of Rome II were to ensure a uniformity of approach to determining the applicable substantive law. It is right that if the meaning of "evidence and procedure", which are excluded from Rome II, are given a very wide interpretation that might risk undermining the objectives of Rome II. On the other hand I do not accept Mr Chapman's submission that the words "evidence and procedure" in article 1(3) of Rome II should be given either a strict or narrow interpretation. This is because such an approach risks distorting the proper interpretation of the words "evidence and procedure". They are words which are to be given an autonomous meaning under Rome II and interpreted in their context and in the light of the objectives of Rome II.

34. In order to carry out the task of determining whether the interest payable under article 20.4 of Act 50/1980 is a matter of procedure, it is necessary to undertake a consideration of Act 50/1980. That is not to discover whether the provision is considered to be substantive law or a matter of procedure under either Spanish law or the laws of

England and Wales, because what is a matter of procedure for the purposes of article 1(3) of Rome II is an autonomous concept under Rome II. The purpose of undertaking a consideration of Act 50/1980 is to determine whether the issue of interest under that provision is so "intertwined" with the assessment of damages, which is a matter of substantive law under Rome II, that interest payable under Act 50/1980 should be considered a matter of substantive law and not a matter of procedure.

The assessment of damages for personal injuries under Spanish law and interest under Act 50/1980

35. It is necessary to set out some information about the assessment of damages for personal injury in Spanish law. Spanish law aims to provide full compensation for personal injuries. The assessment of personal injuries is carried out under the Baremo, which provides a form of tariff for payments depending on the injuries suffered. There are particular aspects of the assessment of damages for personal injuries in Spain which differ from the approach taken in England and Wales. At the hearing of the appeal, there was some discussion about the fact that, in general, the costs of future care are not recoverable in an assessment of damages under Spanish law. As is well known this can be a very significant head of damage under the laws of England and Wales.

36. Interest is paid in personal injury actions in Spain by reference to a legal interest rate set by the Spanish government pursuant to article 1108 of the Spanish Civil Code. That article applies specifically to road traffic accidents, but it was common ground from the expert evidence that the rate for road traffic accidents is used as the interest rate payable in other personal injury actions. The expert evidence showed that what has been referred to as the "Spanish legal interest rate" per annum in the relevant years was: 2015: 3.5%; 2016: 3%; 2017: 3% 2018: 3%; 2019: 3%; 2020: 3%; 2021: 3%; 2022: 3%.

37. The experts agreed that Spanish law provides for specific rules for the calculation of interest in claims against insurers, and that the relevant regulation for the calculation of interest in claims against insurers was article 20 of Act 50/1980.

38. The introduction to article 20 of Act 50/1980 provides that "If the insurer is in default of performance, the compensation for damages will follow these rules regardless of the validity of the contract clauses that are more beneficial to the insured". Article 20(3) records that "it will be understood that the insurer is in default when it has not fulfilled its obligations within three months of the claim or has not paid the minimum amount of what it may owe within forty days from receiving the claim". Article 20(4) provides that "compensation for default will be imposed ex officio by the court. It consists of the payment of annual interest equal to the legal interest rate in force when it accrues, increased by 50 per cent … However, after two years from the claim, the annual interest rate will not be less than 20 per cent." If applicable, interest under article 20 accrues on the full amount of the award for damages granted by the Court, including the non-pecuniary and the pecuniary loss.

39. The experts referred to a judgment dated 1 March 2007 by the Spanish Supreme Court which had set out the way in which interest under article 20 was calculated. The experts agreed that special interest under article 20 did not apply automatically, and was aimed at discouraging delay in litigation and in particular to discourage insurers from deliberately delaying payment where they are aware of their payment duties under the

insurance policy. Paragraph (8) of Article 20 provides that the penalty interest under Article 20 will not apply where there is a justified cause for the delay or the delay in payment is not attributable to the defendant. It was common ground that the failure to pay has been found to be justified where there was some doubt about whether there was an accident. In these circumstances it can be seen that, unless the failure of an insurer to make the required payment was "justified", the interest under article 20 of Act 50/1980 is payable.

40. It was also common ground that if interest under article 20 was not payable, under Spanish law (and it seems article 576 of Act 1/2000) the Spanish legal interest rate was increased. The experts had referred to this as an increase of the amounts payable to the claimants "in accordance with the increase of pensions in Spain". It is apparent that this increase would not be at the rate under Act 50/1980.

41. I note that: the experts had consistently referred to the interest under article 20 of the Act 50/1980 as being "penalty interest"; and that the introduction to article 20 refers to "the compensation for damages" following the rules set out in article 20. It seems that, under the laws of Spain, it is possible to have interest which was penal, paid as part of the compensation to the claimant. This does not answer the question whether, on an autonomous meaning of "procedure" under Rome II, article 50/1980 is a matter of procedure or a matter of substantive law.

Some previous authorities on whether interest is a matter of procedure for the purposes of Rome II and awards of interest to reflect foreign laws

42. In *AS Latvijas Krabjanka* [2016] EWHC 1679 (Comm) (*Krabjanka*), Leggatt J considered awards of interest, following the earlier handing down of a judgment dealing with liability and damages. Part of the claim was before Rome II came into force, and part was covered by Rome II. For the latter part of the claim, the court was required to decide whether interest was a matter of procedure for the purposes of article 1(3) of Rome II. Leggatt J referred to the distinction between matters of procedure and matters of substantive law, noting that this distinction was not drawn in the same way as the laws of England and Wales. Reference was made to the fifteenth edition of Dicey, Morris & Collins "The Conflict of Laws" and the tentative suggestion that the rate of interest recoverable on damages goes to or was intrinsically linked with the assessment of damages, meaning that interest would be a matter for substantive law. Leggatt J found that suggestion and argument persuasive, and said "it seems to me that the broad wording of Article 15 requires the court to exercise any power conferred by its procedural law to award interest as compensation to a claimant for being kept out of money as a result of the defendant's wrong only when and in the way that a remedy would be granted under the applicable foreign law to provide such compensation." This meant that in *Krabjanka*, for claims which fell within Rome II the right and remedy to interest was governed by Latvian law pursuant to Article 15 of Rome II. In relation to claims outside the scope of Rome II the Court used its discretionary remedy to award interest to compensate the Bank for being kept out of its money.

43. In *XP v Compensa* [2016] EWHC 1728; [2016] Med LR 570 Whipple J dealt with a claim for personal injuries arising out of a road traffic accident in Poland. At paragraph 67 of the judgment Whipple J did not decide whether an award of interest in that case was a procedural or substantive matter. This was because the Court would, even it was a matter of procedure, follow the suggestion in *Maher* that a domestic court might, in

exercising its discretion to award interest under section 35A of the Senior Courts Act 1981, take account of the relevant provisions of the foreign law, including the rates of interest payable under that law.

44. In *Scales v Motor Insurers' Bureau* [2020] EWHC 1747 (QB) Cavanagh J had regard to the specific rules of Spanish law governing the award of interest and held that it would be appropriate to apply the Spanish rules, stating "It does not matter in practice whether, in theory, I do so because these rules are part of the substantive law that I must apply, or because I exercise my discretion to do so in accordance with section 35A of the Supreme Court Act 1981. For the avoidance of doubt, however, if the award of interest is a discretionary matter under section 35A, I exercise my discretion in accordance with what I understand would have happened if these proceedings had taken place in Spain".

45. In *Troke & Anor v Amgen Seguros Generales Compania De Seguros Y Reaseguros SAU* [2020] EWHC 2976 (QB); [2020] 4 WLR 2976 (QB) Griffiths J considered an appeal from a judgment in the Plymouth County Court where interest had been awarded at English and not Spanish rates because the Recorder found that the rate of interest was a procedural decision. There was agreed expert evidence on Act 50/1980 to the effect that "Article 20 … contemplates a penalty interest where insurers have not made a relevant interim payment …". Griffiths J recorded that the wording of article 1(3) in Rome II mirrored the wording of article 1(3) of Rome I, and noted that the award of contractual interest in Rome I would be a matter of substantive law. Griffiths J then considered the discretionary nature of the award of interest under the laws of England and Wales, and rejected an argument to the effect that interest under Act 50/1980 was a substantive right, having regard to the wording of the joint experts' report and the use of the word "contemplates", which suggested a discretionary remedy. Griffiths J held that "the award of interest in this case was a procedural matter excluded from Rome II by article 1(3)". It is apparent that Griffiths J's conclusion was influenced by the expert evidence in the appeal before him on Act 50/1980. The Recorder had awarded interest at the usual rates in the Courts of England and Wales.

46. Griffiths J recorded that the Recorder might have applied the Spanish rates of interest under Act 50/1980 as a matter of discretion under section 69 of the County Courts Act, but as the Recorder had not been asked to do so, the Recorder was not bound to make such an award, see paragraph 58 of *Troke*.

47. In *Royalty Pharma Collection Trust v Boehringer Ingelheim Gmbh* [2021] EWHC 2692 (Pat) (*Royalty Pharma*) HHJ Hacon (sitting as a Judge of the High Court) held that interest provisions under German law were a matter of substantive law, and not a matter of procedure. This was because the rate of interest upon damages "goes to, or is intrinsically linked with, the assessment of the overall amount which the claimant can recover …", see paragraph 302.

The judgments below on interest under Act 50/1980

48. The next judgments which considered the issue of interest as a matter of procedure or substantive law were the judgments which are the subject of this appeal. As already mentioned Martin Spencer J and Lambert J came to different conclusions about whether interest payable under Act 50/1980 was a matter of procedure or substantive law.

49. Judgment was given in *Sedgwick* on 26 October 2022. Lambert J held that the recovery of interest provided for under the Spanish law was a matter of procedure and not a matter of substantive law. Lambert J followed the approach of Griffiths J in *Troke*, who had concluded that penalty interest provisions were 'procedural'. The nature of the interest was a penalty, procedural sanction or even an incentive designed to encourage prompt payment of an adjudicated compensatory sum. Lambert J agreed that the interest under Act 50/1980 was a matter of procedure for three reasons: (1) the right to claim interest by way of damages 'clearly falls within Article 15 of Rome II and hence to be determined by the law applicable to the non-contractual obligations'; (2) the 'purpose of penalty interest in Spanish law is to incentivise early interim payments and to discourage delay and procrastination on the part of the defendant'; and (3) `the imposition of an award of penalty interest by definition is not intended to achieve restitutio in integrum for the claimant but to penalise the defendant for having failed to comply with the requirement of making a conservative payment within 3 months of the claim'.

50. Lambert J found that Griffiths J's ruling in *Troke* had been based only 'in part' on the expert material before him and the wording of the joint report that the Spanish law 'contemplates a penalty interest'. Lambert J followed the approach in *Troke* because it recognised the procedural, penal nature of the interest rates as a sanction designed to incentivise early payments by an insurer.

51. As for the issue of whether the Judges below were entitled to award Spanish interest in exercise of their discretion under the Senior Courts Act, Lambert J recognised that applying the Spanish rates exposed the defendant to a double jeopardy of Spanish penalty interest and costs, and interest penalties under CPR Part 36.17, but did not consider that a good reason not to apply the Spanish rate of interest. There was therefore no good reason not to apply the discretionary power, which Lambert J chose to do 'in accordance with the penalty rate which would have been applied had this litigation been issued and pursued in Spain'.

52. Judgment was given in *Nicholls and Woodward* on 4 May 2023. Martin Spencer J was hearing appeals from judgments given in Luton County Court and Norwich County Court. Martin Spencer J held at paragraph 30 of his judgment that 'the recovery of interest provided for by Spanish law under Article 20 of the Spanish Insurance Act is … substantive, not procedural' for seven reasons. These were that: (1) it was Rome II's purpose to harmonise the laws of the EU countries, including the UK, and to ensure that the recovery from torts or delicts was 'identical irrespective of the forum in which the proceedings were brought', the Claimants in this case 'had the right to recover the same amounts as if they had sued in Spain' and this included the right to penal interest under the Spanish Insurance Act; (2) it was important and persuasive, although not conclusive, that the penalty interest provisions in the Spanish law were characterised as substantive legal provisions; (3) the views expressed in *Dicey, Morris & Collins* to the effect that the exclusion of evidence and procedure should be construed narrowly, at least insofar as it relates to damages, were persuasive; (4) the approach in *Latvijas* and *Royalty Pharma* was persuasive; (5) the ruling in *Troke* that the Spanish rates of interest, being penalties, were ultimately discretionary and not mandatory, had been affected by the use by the experts in that case of the word "contemplates". Martin Spencer J found that *Troke* was founded substantially on the basis of that linguistic parsing, rendering it wrong pursuant to Rome II; (6) there was a line of judges who had

all exercised a discretion to award interest in line with Spanish rates, regardless of their characterisation of interest as substantive or procedural which reinforced the conclusion that the interest should be characterised as weighty and substantive; (7) the result of applying Article 20 of the Spanish law brings 'such a dramatic effect upon the overall amounts awarded', that 'the awards of interest…are much more in the nature of substantive rights to damages than the kind of discretionary awards made in the English courts'.

53. Martin Spencer J therefore concluded that "the right to interest under Spanish law is a substantive right closely associated with the right to damages, and, as such, does not arise out of a matter of discretion through the award of interest under English procedure but arises as a right pursuant to the *lex causae*, applied as result of the application and interpretation of Rome II".

54. Martin Spencer J considered whether, if he was wrong, interest should nevertheless be awarded in accordance with Spanish law as a matter of discretion under section 35A of the Senior Courts Act or section 69 of the County Courts Act. Martin Spencer J considered that it was not legitimate for these judges to give effect to Spanish law provisions which, on the present basis, were intended to operate in a different procedural environment where different procedural rules and higher and penal rates apply. He said that it was wrong "to taint awards of interest under the English statutes and pursuant to the English civil procedural rules with elements of substantive foreign penal law, where the Claimant has chosen not to subject herself to those foreign procedural rules by suing in Spain but has elected to subject herself to the English rules of procedure, with its different rules and different legal consequences". The Judge held that he could interfere with the exercise of the judges' discretion on the bases they had misdirected themselves in law and that there had been a procedural unfairness or irregularity.

55. This court was, in the course of the written and oral submissions, referred to a number of interesting and helpful extracts from textbooks including: "Conflicts of Laws" Dicey, Morris & Collins from both the 15th and 16th editions; "The European Private International law of obligations" (6th edition) Plender & Wilderspin; "The Rome II Regulation: the law applicable to non-contractual obligations" Dickinson; "Accidents Abroad International Personal injury claims" (2nd edition) Doherty; "Substance and Procedure in Private International law" Garnett.

Whether interest payable under Act 50/1980 is a matter of procedure for the purposes of article 1(3) of Rome II – Issue one

56. Mr Audland on behalf of Mapfre emphasised the penal nature of the interest payable under Act 50/1980, and its procedural nature, which was to encourage insurers in Spain to comply with the procedural aim of an early resolution of disputes. Mr Audland accepted that the Spanish legal interest rate was part of the substantive law, but the interest payable under article 20(4) of Act 50/1980 was different because it was penal and procedural in effect.

57. Mr Chapman on behalf of the Respondents emphasised that Act 50/1980 was part of the assessment of damages for personal injuries in Spain, the assessment of damages was a matter of substantive law, and related to the payment of the Spanish legal interest rate, which was also a matter of substantive law. It did not matter that the interest under

Act 50/1980 was penal in effect, because it was an integral part of the assessment of damages under Spanish law where there were aspects of the award which might seem very low, or non-existent, when compared to an assessment under the laws of England and Wales, because it was part and parcel of the whole regime. In that respect Mr Chapman pointed out that article 20 expressly referred to the fact that "if the insurer is in default of performance, the compensation for damages will follow these rules …", emphasising the use of the word compensation. Although insurers could avoid payment of the interest, the circumstances in which that occurred were rare, and the fact that if it was not awarded, the interest payable under the Spanish legal interest rate was adjusted upwards showed that the interest under Act 50/1980 was intertwined with the assessment of damages.

58. In my judgment the interest payable under Act 50/1980 is not a matter of procedure for the purposes of article 1(3) of Rome II, and is governed by the law applicable to the non-contractual obligation, namely the law of Spain. This is for the following reasons.

59. First "the existence, the nature and the assessment of damage or the remedy claimed" are matters of substantive law, pursuant to the wording of article 15(c) of Rome II. I agree with the parties that the payment of interest under the Spanish legal interest rate is effectively part of the nature and the assessment of damage or the remedy claimed, because it is intertwined with the assessment of damages in Spain in the sense that it would be difficult to separate from the assessment of damages which is governed by the laws of Spain. This conclusion is consistent with the approach to the issue of interest under Rome II taken in *Krabjanka* and *Royalty Pharma*. I should say that, in common with the parties in their submissions, I did not derive much assistance from the wording of paragraph 15(d) of Rome II. This is because although "the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation" might have been read as applying to interest payable under Act 50/1980 (because Act 50/1980 provision was intended to encourage insurers to bring proceedings to an end and terminate the damage), the proviso "within the limits of powers conferred by its procedural law" might, on one view, have seemed to make the meaning circular. The explanatory memorandum of the EC in relation to article 15(d) emphasised that article 15(d) referred to forms of compensation "without obliging the court to order measures that are unknown in the procedural law of the forum", but this did not assist in determining what was a matter of procedure and what was a matter of substantive law.

60. Secondly the payment of interest under article 20 of Act 50/1980 is part of the process by which interest on damages is assessed under the laws of Spain. If article 20 applies, then the rate of interest is increased to the penal rate in Act 50/1980 from the Spanish legal interest rate, but if article 20 does not apply the Spanish legal interest rate is also increased from the Spanish legal interest rate "in accordance with the increase of pensions in Spain". This suggests that article 20 is so intertwined with matters governed by the substantive law, as to mean that Act 50/1980 is also part of the substantive law of the assessment of damages.

61. Thirdly the fact that the interest payable under article 20 of Act 50/1980 increases from a 50 per cent increase of the Spanish legal interest rate, to a rate of interest of 20 per cent per annum, which is a penal rate of interest to encourage prompt resolution of disputes by insurers, does not alter this conclusion. This is because the assessment of damages under the laws of Spain approaches the issue of compensation in a very

different way from the laws of England and Wales. The amounts awarded under the Baremo, for those heads of damages which are permitted under the Baremo, can be substantially increased by the payment of the penalty interest under article 20 of Act 50/1980, and this seems to be an integral part of the way in which damages are assessed in Spain. The fact that, from the point of view of a personal injury lawyer in England and Wales, some awards under the Baremo might seem to be very low, and the award of interest under article 20 of Act 50/1980 to be penal and very substantial, does not assist in deciding whether interest payable under article 20 of Act 50/1980 is a matter of procedure. The relevant point is that interest under article 20 of Act 50/1980 remains part of the approach of Spanish law to the assessment of the sums payable by the insurer to the injured party. This demonstrates the difficulty of disconnecting the assessment of damages under the Baremo and the payment of statutory interest on the one hand, from the interest payable under article 20 of Act 50/1980 on the other hand.

Whether the judges were wrong to award interest at the equivalent rate to the interest payable pursuant to Act 50/1980, as a matter of discretion under either section 35A of the Senior Courts Act 1981 or section 69 of the County Courts Act 1981 – issue two

62. Mr Audland on behalf of Mapfre submitted that it was wrong to exercise a judicial discretion to award penal rates of interest, which formed part of a different regime to govern the behaviour of insurers. In England and Wales insurers could be encouraged to settle by the use of Part 36 offers, and the Spanish insurer could receive (and in one case had received) a double penalty of penal interest and Part 36 interest. The Respondents had chosen to bring their claims in England and Wales, and they could not expect to take advantage of a procedural rule in Spain in the proceedings in England and Wales. In the case of *Woodward*, Mapfre had suffered an award of penalty interest under Act 50/1980 and a second award of penal interest under the procedural rules in Part 36.

63. Mr Chapman on behalf of the Respondents emphasised that the award of interest under Act 50/1980 was part and parcel of the award of compensation, and enabled the court to get closer to compensation for the respondents. The courts in England and Wales had applied foreign interest rates in many cases, and it was right to take that approach.

64. I note that ordering an award of interest equivalent to that payable under Act 50/1980 would accord with the decisions of those judges who decided that Act 50/1980 was a matter of procedure and not substantive law, but exercised their discretion to award the equivalent interest. The only case where a judge, having decided that the rate of interest was a matter of procedure, did not make an award of interest equivalent to that in Act 50/1980 was *Troke*. That was because in that case the claimant had not asked for an award of interest equivalent to that under Act 50/1980. Griffiths J had accepted that interest could have been awarded at a rate equivalent to Act 50/1980 but found that the Recorder had exercised his discretion in a permissible manner when not making that award, because he had not been asked for such a rate. The fact that all of the other judges had decided to exercise their discretion to make an award equivalent to Act 50/1980 does not mean that they are right to have done so, but it is a reason to reflect carefully before finding that they were wrong to do so.

65. In my judgment a court in England and Wales is entitled to exercise its discretion to make an award under either section 35A of the Senior Courts Act or section 69 of the

County Courts Act which has the effect of awarding interest at the rate of interest payable under Act 50/1980. First, this is because judges exercising their statutory discretion to award interest have long considered that a relevant factor to be taken into account may well include relevant provisions of the overseas law relating to the recovery of interest, see *Maher* at paragraph 40.

66. Secondly, although I accept that the rate of interest under Act 50/1980 after the second year is penal, and the award is often referred to as penalty interest, the payment of such interest is an integral part of the way in which damages for personal injuries paid by insurers are assessed in Spain. If, contrary to my earlier conclusion this fact is not enough to make it a matter of substantive law, it is sufficient to justify a judge exercising their discretion to award interest. In my judgment the passage at paragraph 132 of *Actavis* (where Floyd LJ said that a litigant resorting to a domestic court cannot expect to occupy a different procedural position from that of a domestic litigant) does not prevent the award of interest under Act 50/1980. This is because the Respondents are not gaining an advantage on other litigants in England and Wales who have their damages assessed according to the laws of England and Wales. The Respondents are obtaining what a claimant for damages for personal injuries against an insurer in Spain would obtain, albeit based on the evidence called before the Courts in England and Wales. Given the importance of interest paid under Act 50/1980 to the overall sums assessed to be due to an injured claimant from an insurer in Spain, it would, in my judgment, be an unusual case where such an important component of the overall award should be left out of the award as an exercise of discretion.

67. I should record that whether it is appropriate to award extra interest under Part 36, when an insurer has been ordered to pay interest under Act 50/1980, involves a separate exercise of discretion. Mapfre had relied on the existence of Part 36 interest payable in England and Wales in their submissions. The separate question of whether to award extra interest pursuant to Part 36, where interest has been awarded under Act 50/1980, was not an issue to be determined by this Court, and is likely to depend on various factors.

Whether Ms Sedgwick was entitled to bring in her own name the subrogated claim for the repatriation and medical expenses – issue three.

68. The next issue is whether Ms Sedgwick was entitled to bring in her own name the claim for the costs of her repatriation and medical expenses which had been paid by her travel insurer, Insurefor.com. Article 19 of Rome II, which is set out in paragraph 25 above, deals with subrogation.

69. Lambert J held that the key issue was whether the question of whether the insurer may bring a claim in the name of the insured was a question of "whether, and the extent to which" the insurer is entitled to exercise the rights of the insured against the third party, and held that it was. Lambert J permitted Ms Sedgwick to bring the claim for repatriation and medical costs in her own name.

70. The CJEU considered article 19 in *Ergo Insurance SE v If P&C Insurance* (Cases C-139/14; C-475/16) [2016] RTR 14. The CJEU explained that issue of any subrogation of the victim's rights is governed by the law applicable to the obligation of the third party, namely the civil liability insurer to compensate the victim, see paragraphs 57 and 58. However the CJEU confirmed that the law applicable to the determination of the

persons who may be held liable and the allocation of responsibility between them and their respective insurers remains in accordance with Article 19.

71. In *Fonds de Garantie* a French national was hit by the propeller of a motor boat, which was registered in Portugal. The French national was paid compensation by the Fonds de Garantie, which then started proceedings in Portugal to recover its outlay. The proceedings were statute barred under the laws of Portugal, which provide for a three year time limit. The Fonds de Garantie contended that the limitation period in France should apply. The matter was referred by the courts in Portugal to the CJEU. The CJEU held that the action was governed by the laws of the country in which the accident had taken place. Article 19 provided that the law applicable to an action by a third person subrogee against the person who caused the damage was the law applicable to the action.

72. Mr Audland on behalf of Mapfre submitted that article 19 was not easy to read, that the decision in *Ergo* did not seem to provide the answer, but that in the light of the judgment in *Fonds de Garantie*, the law governing the claim made by Ms Sedgwick was the law of Spain. This meant that Ms Sedgwick could not maintain a claim under the laws of Spain for the losses which had been paid by Insurefor.com, it was only Insurefor.com which could bring such a claim, and they were statute barred.

73. Mr Chapman on behalf of the Respondents submitted that article 19 of Rome II provided a clear answer to this issue. The matter was governed by the law of the insurance contract, which was England and Wales, and Ms Sedgwick was therefore entitled to maintain the claim. The decisions in *Ergo* and *Fonds de Garantie* upheld article 19 in that respect. It was clear that the French insurance contract in *Fonds de Garantie* could not affect the limitation period which in that case was governed by the laws of Portugal.

74. In my judgment Ms Sedgwick was entitled to bring the claim for repatriation and medical costs in her own name, even though she had been reimbursed for those costs by Insurefor.com, her travel insurer. Ms Sedgwick will hold the proceeds of any repayment of those sums for Insurefor.com, under the normal rules of subrogation which apply in England and Wales.

75. This follows from an application of article 19. "*Where a person (the creditor)*", which in this case is Ms Sedgwick, *"has a non-contractual claim upon another (the debtor)*" which in this case is Mapfre, "*and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty*", and the person with the duty of satisfying Ms Sedgwick was Insurefor.com "*the law which governs the third person's duty to satisfy the creditor"* and in this case it was the laws of England and Wales which governed Insurefor.com's duty to satisfy Ms Sedgwick "*shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship*."

76. This means that the laws of England and Wales determine "whether, and the extent to which, [Insurefor.com] is entitled to exercise against [Mapfre] the rights which [Ms Sedgwick] had against [Mapfre]". In my judgment, this means that the laws of England and Wales will determine whether Ms Sedgwick can bring that part of the claim which has been paid by Insurefor.com in her own name. Under the laws of England and Wales

Ms Sedgwick can bring the claim against Mapfre for the costs of repatriation and medical costs, subsequently paid to her by Insurerfor.com under her travel insurance. This does not seem to me to be a surprising conclusion. This is because it is the laws of England and Wales which will govern Ms Sedgwick's obligation to hold any recovery from Mapfre for the repatriation and medical costs for and on behalf of Insurefor.com.

Conclusion

77. For the detailed reasons set out above: (1) interest payable under Act 50/1980 is not a matter of procedure for the purposes of article 1(3) of Rome II. This means that interest under Act 50/1980 was properly awarded to the Respondents; (2) even if Act 50//1980 had been a matter of procedure, the judges were entitled to award interest at the equivalent rate to the interest payable pursuant to Act 50/1980, as a matter of statutory discretion under section 35A of the Senior Courts Act 1981 or section 69 of the County Courts Act 1981; and (3) Ms Sedgwick was entitled to bring in her own name the subrogated claim for the repatriation and medical expenses.

78. I would therefore dismiss Mapfre's appeals against the orders made by Martin Spencer J and Lambert J.

Lord Justice Stuart-Smith :

79. For a while I was taken with the idea that a rate of interest properly described as penal or penalty interest could not be regarded as an integral part of an award of compensation. However, I am persuaded that this was to see the question through an overly-Anglo/Welsh prism and that the better approach is as set out by Dingemans LJ. I therefore agree with his conclusions on issue one for the reasons that he gives. On issues two and three I agree and have nothing to add.

Lord Justice Coulson :

80. I also agree.