Neutral Citation Number: [2023] EWHC 1031 (KB)

Case No: QA-2022-000142
KA-2022-000225

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4th May 2023

Before :

THE HONOURABLE MR JUSTICE MARTIN SPENCER

- -

Between:

QA-2022-000142	**(1) JANE NICHOLLS** **(2) AXA ASSISTANCE GROUP T/A AXA TRAVEL INSURANCE**	**Claimant/ Respondents**
	- and –	
	MAPFRE ESPANA COMPANIA DE SEGUROS Y REASEGUROS SA	**Defendant/ Appellant**

Between:

KA-2022-000225	**(1) SONIA WOODWARD**	**Claimant/ Respondent**
	-and-	
	MAPFRE ESPANA COMPANIA DE SEGUROS Y REASEGUROS SA	**Defendant/ Appellant**

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Mr Archer (instructed by **Blake Morgan**) for **Jane Nicholls and other**
Mr Chapman KC (instructed by **Slater & Gordon**) for **Sonia Woodward**
Mr Audland KC (instructed by **Hextalls Law**) for the **Defendant/Appellant**

Hearing date: 19th April 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday, 4th May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE MARTIN SPENCER

Mr Justice Martin Spencer :

Introduction

1. In this conjoined appeal, the defendant, Mapfre Espana Compania de Seguros y Reaseguros SA ("Mapfre") appeals against decisions reached in the courts below, whereby the respective judges exercised their discretion to award interest on damages in accordance with Spanish law and in particular Article 20 of the Spanish 50/1980 Insurance Contract Act ("the Spanish Insurance Act"). It is contended on behalf of the defendant that, the award of interest being a procedural matter governed by section 69 of the County Courts Act 1984, there is no room for the introduction of Spanish law relating to awards of interest, even as a matter of discretion.

Nicholls

2. In the first case, Nicholls -v- Mapfre, the claimant, who was born on 8 May 1960, sustained injury on 12 December 2015 when she tripped on a path at La Manga golf course, Spain and twisted her knee, sustaining a fracture to the tibial plateau.

3. Proceedings were issued on 13 April 2019 and on 7 January 2020, the defendant admitted liability and made an offer of £25,000 which was not accepted: judgment was entered for damages to be assessed.

4. The trial came before Her Honour Judge Bloom in the Luton County Court who gave judgment for the claimant in the sum of €83,654.28 comprising damages of €42,458.28 and interest of €41,196.71. There is no appeal against the award of damages, which were calculated in accordance with Spanish law, and in particular the "Baremo rules" (an annex to Royal Decree 8/2004 as updated by Act 35/2015).

5. In relation to the award of interest, the learned judge had a joint statement from experts on Spanish law, which stated:

> "MATTERS OF AGREEMENT AND DISAGREEMENT IN RESPECT OF INTEREST
>
> **100.** We are agreed that article 20.4 of the Spanish Insurance Contract Act 50/1980 of 8 October contemplates specific rules for the calculation of interest in claims against insurers.
>
> **101.** The interest is calculated as follows:
>
> For the first two years from the date of the accident (or date of knowledge), interest will accrue by reference to the Spanish

> legal interest increased by 50%, that is an annual 3.5% in the period April 2015 to April 2017.
>
> Two years after the accident (or date of knowledge) interest will accrue at the rate of 20% (annual interest)."

To this, Ms Astigarraga, the Defendant's expert, added the following:

> "**104.** Ms Astigarraga would also say that pursuant to Article 20.8 of the Insurance Contract Act such Default Interest will not apply where there is a justified cause for the insurer not to make early payments.
>
> **105.** Such justified reason would be accepted by the court in cases where the reality of the accident is disputed or so is the existence of a valid cover under the policy as established by the Spanish Supreme Court in its judgment of 29 November 2005. In this sense, I would refer to the Judgment of the Supreme Court of 19 December 2017 where the penalty interest was not imposed upon the insurer until the court proceedings had concluded and the reality of the accident had been established. In this sense, the court referred "There is, without a doubt, a situation of uncertainty or reasonable doubt about the way the events occurred and the consequent obligation to compensate, while the criminal proceedings were active, which disappears when they conclude and the responsibility of the driver of the vehicle is declared. In the same way, the Spanish Supreme Court decided in its judgment of 24 September 2018."

6. For the claimant, it was argued that the court should apply the rates of interest under Spanish law referred to in the joint statement pursuant to s69 County Court Act 1984. For the defendant, it was argued that the court should apply United Kingdom interest rates. Counsel for the claimant referred the court to the judgment of Cavanagh J in *Scales -v- Motor Insurer's Bureau* [2020] EWHC 1747 (QB) from paragraphs 271-280.

7. Giving her judgment, the learned Judge said.

> "**59.** The starting point in consideration is that Article 20 provides for a penalty, and as is made clear in the *Scales* case at paragraph 264, it is "agreed that penalty interest under Article 20 is aimed at discouraging delays in litigation and, in particular, at discouraging insurers from deliberately delaying payment where they are aware of their payment duties under the insurance policy. Article 20(8) provides that the penalty interest will not apply where there is a justified delay or the delay in payment is not attributable to the defendant."
>
> **60.** I have not been referred to any authorities or seen any Supreme Court decisions in Spain where it is suggested that the fact that there have been some sort of offers or something of the like is a reason to justify delay in payment. This is a case where liability has been admitted from the outset, and yet no payments have been made. There is no reason under Article 20(8) that the delay of payment is due to issues around liability, or whether or not the policy was applicable. There is nothing about this case,

> which, in my view, makes it exceptional. The fact that it was raised by the expert in evidence that it might lead to double recovery was not a matter that was ever put to Ms Carbonell or was raised in joint reports, and it seems to me that the court should not start, on the basis of something that was said in cross-examination that was never put to the other expert or in the joint reports.
>
> **61.** The view that this court takes is that the court has proceeded under the Spanish law and the Spanish law has specific provisions in relation to interest whereby there is a penalty of 3.5% for the first two years and thereafter 20%. In exercising my discretion, my view is that I should follow that same principle, the Article 20 interest principles and adopt them and apply them in this case. I've been given no reason why Article 20 (8) would apply in this case. I have looked at the authorities and none of them are applicable. I can see that there are cases where the court has refused to impose the penalty rate, but the court has made it very clear. It is restricted in the way it should approach those sort of arguments and it will be in cases where there is a good reason and there is no good reason that I can see in this case, and in my discretion I therefore apply the interest rate that would apply under Article 20."

Woodward

8. In Woodward -v- Mapfre, the claimant was injured on 13 October 2015 in Tenerife when she crashed into a signpost whilst riding a motorised mobility scooter. Proceedings were issued on 22 January 2020. Again, liability was admitted and judgment was entered on 11 May 2021 for damages to be assessed. The assessment came before Her Honour Judge Walden-Smith sitting in the Norwich County Court. On 21 October 2022 the learned judge gave judgment in the sum of £112,620 comprising damages of £54,205.63 and interest of £58,414.37. An additional sum of £11,260 was ordered to be paid pursuant to CPR 36.17 (4) (d). These orders were made pursuant to the learned judge's written judgments dated 12 October 2022 and 21 October 2022. Again, there is no appeal against the award of substantive damages, made in accordance with Spanish law and the Baremo rules, only against the award of interest.

9. As with Judge Bloom, so too Judge Walden-Smith had a joint statement from experts in Spanish law which provided, among other things, as follows:

> "**73.** We are agreed that Spanish law provides for specific rules for the calculation of interest in claims against insurers. We are agreed that the relevant regulation for the calculation of interest in claims against insurers is Article 20 of the Spanish 50/1980 Insurance Contract Act of 8 October ("Article 20").
>
> **74.** We are agreed that a judgment of 1 March 2007 [RJ 2007/798] the Spanish Supreme Court laid down the general principle that interest under Article 20 is calculated as follows:

> i) For the first two years from the date of the accident (or date of knowledge), interest will accrue by reference to the Spanish legal interest increased by 50%, that is, an annual 5.25% in 2015, 4.5% in 2016, 4.5% in 2017, 4.5% in 2018, 4.5% in 2019, 4.5% in 2020, 4.5% in 2021 and 4.5% in 2022.
>
> ii) Two years after the accident (or date of knowledge) interest will accrue at a rate of 20% (annual interest).

75. We are agreed that special interest under Article 20 does not apply automatically.

76. We are agreed that such penalty interest under Article 20 is aimed at discouraging delay in litigation and in particular to discourage insurers to deliberately protract payment where they are aware of their payment duties under the insurance policy.

77. We are agreed that 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.

78. We agreed that, if applicable, interest under Article 20 will accrue on the full amount of the award for damages granted by the court, including the non-pecuniary and the pecuniary loss.

79. We are agreed that Article 20.6 sets out for the general rule applicable to the initial day of accrual of interest "dies a quo" by which is considered the date of the accident.

80. We are further agreed that Article 20.6 contemplates an exemption to the general rule in the event the insured has not complied with the obligation to report the accident, in which case the initial day of accrual of interest "dies a quo" will be the date of its communication.

81. We are agreed that, in case the insured or policy holder has not reported the accident, the Court will have discretion to determine the start date (dies a quo) for the calculation of the "legal interest rate". For this purpose, the Court will take into consideration at which point in time the insurer became aware of the claim. If the Court is satisfied that the insurer was perfectly aware of the claim before proceedings were brought (e.g. because the insurer received a formal letter of claim from the claimant or his solicitors) the dies a quo will be the date when the insurer became formally aware of the claim. If the Court is not satisfied with this, it will take into consideration as dies a quo the date of issue. "

10. Addressing the question of interest, Judge Walden-Smith, having considered the submissions on behalf of the parties, ruled as follows:

"**72.** In my judgment, the right to penalty interest is not a substantive right. It is acknowledged that it will not always apply, albeit that is in restricted circumstances, and as such is a matter of procedure to be determined by the lex fori (the law of England and Wales). What the court does have is a discretion to award interest pursuant to the provisions of section 69 of the County Courts Act 1984. In my judgment, it is appropriate to award interest, as a matter of lex fori, at the same rate as the penalty rate of the Spanish law. This was suggested in *Maher* and encouraged by Whipple J in *XP v Compensa*.

73. The facts of this case are that the accident occurred on 13 October 2015. The insured party knew about the accident immediately. No penalty interest would have been payable had payment been made by 13 January 2016, but the claim itself was not issued until 26 March 2020. Liability was disputed in full and was not accepted until approximately May 2021 when judgment on liability was entered by the court.

74. While the defendant has submitted that the penalty rate should not apply as a consequence of the time that has passed since the accident, the claim being issued some five years after the accident (in contrast to Spain where there is a limitation period of 1 year) and the time it has taken for the claim to be heard, almost 7 years after the accident, I do not accept that the circumstances are such that penalty interest is not appropriately applied as a matter of discretion. I am satisfied that whilst this penalty interest is not automatic and is therefore a matter of procedure rather than substance, I am not satisfied that the defendant's situation in this case is exceptional. The defendant is to be taken to know of the accident through its insured from the date it occurred and did not take any steps to resolve the case or make any interim payment even after the claim had been issued in 2020. The defendant, in my judgment, through its officers made a decision not to resolve this issue at an early-stage and, while it is clear that accidents of this nature are designed to be resolved at a much earlier time in the courts of Spain than in the courts of England and Wales, that does not mean that the defendant could not have brought this to an end at an earlier stage.

75. Consequently, it is my conclusion that while the lex fori rather than the lex causae applies to the interest to be added to the final judgment on both general and special damages, I determine that the interest to be applied is in accordance with the penalty interest to be applied in the Spanish court pursuant to the discretion under section 69 of the County Courts Act 1984. As I understand the evidence from the experts, the interest rate to be applied is therefore 5.25% per annum for 2015 and 4.5% in 2016 and 2017, and that the interest after two years from the date of

> the accident, or date of knowledge of the accident accrues at 20% per annum."

11. Pursuant to permission granted by Yip J on 14 October 2022 in the Nicholls case and permission granted by Sir Stephen Stewart on 13 February 2023 in the Woodward case, Mapfre now appeals against the award of interest in both cases, contending that both judges erred in the exercise of their discretion in awarding interest by reference to the provisions of Spanish law.

The Appellant's Submissions

12. Mr Audland KC, representing the defendants on this appeal (but not below), submits that these cases (and those which have preceded them) raise a fundamental point of principle, namely whether, in relation to a procedural matter subject to the lex fori, it can ever be right to apply or, indeed, take into account, a foreign procedural sanction since the implementation of Council Regulation 864/2007 on 11 January 2009 ("Rome II"). Mr Audland submits, firstly, that it is well established that the award of interest on damages is procedural, not substantive: see *Maher -v- Groupama* [2009] EWCA Civ 1191. Secondly, he submits that once it is determined that English procedural rules apply, although the award of interest on damages is discretionary, the scope of that discretion does not extend to include foreign punitive rules on the award of interest because that is, effectively, to promote such rules into a substantive right and thus derogates from the principle that the award of interest is procedural and not substantive. Thirdly, Mr Audland submits that his contention is fair and just for a claimant who chooses to litigate in this jurisdiction: the award of interest under English law is closely aligned to English procedural rules and it is within those rules that the discretion is to be exercised, not least so that all litigants in this country are treated equally. He relied on the decision of the Court of Appeal in *Wall -v- Mutuelle de Poiters Assurances* [2014] EWCA Civ 138 which, although addressing a different procedural point of law, namely the number of experts who may be called, illustrates how the provisions of Rome II are intended to work. Fourthly, Mr Audland submitted that the line of cases which have held that a court can take into account foreign laws on the award of interest in exercising discretion under either section 69 of the County Courts Act 1984 or Section 35A of the Senior Courts Act 1991 were wrongly decided because they placed inappropriate reliance on the decision of the Court of Appeal in *Maher* when *Maher* was decided before the implementation of Rome II and Rome II has fundamentally changed the position since its implementation. Mr Audland submitted that the position taken by the claimants in the instant cases, and the position taken by the judges at first instance and in the other cases where foreign rules on awards of interest have been taken into account, renders the interaction of the rival systems of law chaotic when these systems are intended to operate entirely separately. Thus, the Spanish rules operate in such a way as to provide an obligation on the claimant to give early notification and an obligation on the defendant to make early interim payments which can be accepted by the claimant not in full and final satisfaction, but on account of damages, such payments being made through the court. In contrast, the law of England and Wales has its own separate system of encouraging efficient litigation including the making of Part 36 offers and the sanctions applicable where such offers are bettered or not bettered. He submits that to superimpose one system upon the other, even pursuant to a purported exercise of discretion under sections 69 or 35A, is a recipe for chaos and is a tainting of the integrity of the procedural system of law being applied.

The Respondents' Submissions

13. For the claimant in the Woodward case, Mr Chapman KC adopted as his primary submission that, whilst agreeing with Mr Audland that the award of interest is procedural and therefore a matter for the lex fori, the discretion in relation to the award of interest is a wide one and sufficiently flexible for the English court to have regard to foreign rules, where appropriate. He commended the approach of Her Honour Judge Walden-Smith, submitting that the learned judge exercised her discretion "judicially" and with due regard to previous authority. He described it as "an English discretion but with Spanish characteristics". Although Mr Chapman acknowledged that *Maher* was decided before the implementation of Rome II, he submitted that the cases decided after 11 January 2009, had rightly held that *Maher* remained good law, not merely for the proposition that the award of interest is procedural rather than substantive but also where the court said, at paragraph 40, that the factors to be taken into account in the exercise of the court's discretion may well include any relevant provisions of foreign law relating to the recovery of interest, the reference in that particular case being to French law.

14. In the alternative, Mr Chapman submitted, as he did below and as he has done in the previous cases in which he has appeared (albeit without success) that the award of interest is so intrinsically linked to the assessment of financial compensation that it is in fact appropriate to treat it as a substantive matter, not procedural. He submitted that it is clear that interest is treated as a substantive right by Spanish law and although that does not govern the answer, which is in fact a question of European Law, retained into English law since the exit of the United Kingdom from the European Union, by reference to the interpretation of the provisions of Rome II. In support of his secondary case, Mr Chapman drew support and comfort from the view expressed by the authors of Dicey, Morris and Collins at paragraphs 4-111 to 4-116. He also drew support from the decision of Leggatt J (as he then was) in *Latvijas -v- Antonov* [2016] EWHC 1679 (comm) and the decision of Judge Hacon in *Royalty Pharma Collection Trust -v- Boehringer Ingelheim GmbH* [2021] EWHC 2692 (Pat).

15. On behalf of the claimant in Nicholls' case, Mr Archer adopted and supported the submissions made by Mr Chapman KC. He pointed to paragraph 35 of the decision in *Maher* (see paragraph 33 below) as illustrating the sheer breadth of the discretion open to judges at first instance making awards of interest: he also referred to paragraph 36 of the judgment. He refuted the suggestion made by Mr Audland that Her Honour Judge Bloom had used a wrong starting point: he submitted that it was plain that Judge Bloom's starting point was, and remained, section 69 of the County Courts Act 1984 and he disputed that she effectively ousted English law by disapplying the provisions of Part 36 (as she did): he described what she did as using a "safety valve" in order to do justice between the parties.

16. In their submissions, all counsel made extensive reference to the various authorities appearing in the joint authorities bundle, and those submissions are considered and dealt with as those authorities come to be addressed in the next section of this judgment.

Discussion

Substance or Procedure?

17. In my judgment, the logical starting point is to consider whether the recovery of interest on damages under Spanish law is a substantive right, subject to the law of the lex causae, or a procedural matter subject to the lex fori. This must, in my view, be the starting point because if recovery of interest is a substantive right, effectively recoverable as part of the damages, then it would follow that it would be wrong for a judge to increase its award of interest under English procedural rules to take account of the foreign law in relation to such recovery. Indeed, the recovery of such interest as a substantive right would be a factor to be taken into account by the judge in reducing the award of interest under English procedural rules (assuming that the recoverability or non-recoverability of such damages may be taken into account at all, contrary to Mr Audland's principal submissions on behalf of the defendant).

18. In her Respondent's Notice, Ms Woodward seeks to uphold the order of the court below on the grounds that:

> "By reason of article 15(a) and/or article 15(c) and/or article 15(d) of regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 ("the Rome II Regulation"), the Spanish law rules as to the award of interest on damages (including the rules as to the rate of such interest) form part of the substantive law of Spain which the English court is required, by article 4.1 of the Rome II Regulation, to apply to the tort/delict."

19. The foundation for this ground of upholding the orders of the judge below is the Rome II Regulation. The relevant provisions of Rome II are:

> "Article 1
>
> *Scope*
>
> 1. This regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).
>
> 3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.
>
> Article 4
>
> *General Rule*
>
> 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
>
> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.
>
> Article 15
>
> *Scope of the law applicable*
>
> The law applicable to non-contractual obligations under this Regulation shall govern in particular:
>
> a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
>
> 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 damages 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."

20. In support of this submission, Mr Chapman argues that the Rome II Regulation identifies (as falling within the scope of the law applicable) "the basis and extent of liability" (article 15(a)), "the existence, the nature and the assessment of damage or the remedy claimed" (article 15(c)) and "the measures which a court may take to prevent or terminate injury or damage, or to ensure the provision of compensation" (article 15(d)). Mr Chapman submits that the Spanish penalty interest provisions contained within the Spanish Insurance Act are clearly to be characterised as substantive legal provisions as a matter of Spanish law. Although, having considered article 20 of the Spanish Insurance Act and the joint statement of the experts on Spanish law, I tend to agree with that submission, regardless of such characterisation as a matter of Spanish law, the Rome II Regulation requires an autonomous interpretation which does not depend on the manner in which characterisation is dealt with in any particular EU member state. In other words, whether the recovery of interest is a substantive right for the lex causae or a procedural remedy for the lex fori is a matter of EU law, interpreting the Rome II Regulation in accordance with such law.

21. In view of the above, Mr Chapman submits that the relevant foreign law rate of interest is a matter of clear relevance to the remedy (financial compensation) to which the

claimant is entitled, being intrinsically connected or linked to the award of financial compensation.

22. Furthermore, he made this important submission:

> "However, and regardless of such characterisation as a matter of Spanish law, the Rome II Regulation is the starting (and ending) point of enquiries into the scope of the applicable foreign law. Rome II requires an autonomous interpretation (which does not depend on the manner in which characterisation is dealt with in one EU Member State). Moreover, Rome II broadly directs the matters which fall within the scope of the law applicable and narrowly directs matters of procedure and evidence (which are reserved to the law of the forum). In these circumstances, the relevant foreign law rate of interest is a matter of clear (post-Rome II) relevance to the remedy (financial compensation) to which the Claimant is entitled (to use the language found in some of the case law, it is intrinsically connected/linked to the award of financial compensation). As such, this matter of remedy falls within the scope of the (foreign/Spanish) law applicable."

23. In support of these submissions, Mr Chapman referred to the following authorities:

i) Latvijas -v- Antonov, where, in a previous judgment, Leggatt J (as he then was) had found that, in eight transactions, the defendant, Mr Antonov, had acted dishonestly and in breach of duties owed to the claimant bank under Latvian law causing the bank to suffer losses in excess of €90m. The bank claimed interest on those damages pursuant to Article 195 of the Latvian civil procedure code, alternatively under Section 35A of the Senior Courts Act 1981 at the rate of 6% per annum. In his judgment, Leggatt J observed that English rules of private international law distinguish between questions of substance, which are governed by the law applicable to the cause of action, and questions of procedure which are governed by the law of the forum. He then stated,

> "**7.** The proper approach to applying this distinction has been considered by the House of Lords in *Harding -v- Wealands* [2007] 2 AC1 and by the Supreme Court in *Cox -v- Ergo* [2014] AC 1379. Those cases decide that the question whether a particular head of loss is recoverable is a question of substance governed by the law applicable to the obligation. On the other hand, whether there is a remedy available for any particular item of loss is a procedural question governed by English law as the law of the forum. Applying that distinction to a claim for interest, the Court of Appeal held in *Maher -v- Groupama* that the existence of a right to recover interest as a head of damage is a matter of substance governed by the applicable law, but that Section 35A of the 1981 Act is a procedural provision which creates a remedy exercised at the court's discretion. The Court of Appeal considered that this discretionary remedy is available whether a substantive right to recover interest exists or not, although the factors to be taken into account in exercising the

court's discretion may well include any relevant provisions of the applicable foreign law relating to the recovery of interest."

Having referred to the provisions of article 1(3) of Rome II which states that the regulation "shall not apply to evidence and procedure", Leggatt J referred to Dicey and Morris' view that it might be argued that the rate of interest recoverable on damages goes to, or is intrinsically linked with, the assessment of the overall amount which the claimant can recover in respect of a damages claim and thus falls within the scope of Article 15 of Rome II saying, at paragraph 10:

"It is their tentative suggestion that the rate of interest on damages is governed by the law applicable to the non-contractual obligation. I find this suggestion and the argument on which it is based persuasive. Indeed, 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 wrongdoing only when and in the way that a remedy would be granted under the applicable foreign law to provide such compensation."

Having made these observations, Leggatt J considered the exercise of the court's discretion at paragraph 13, stating:

"In the circumstances I consider that I shall exercise the discretionary power conferred by Section 35A of the Senior Courts Act 1981 as follows. In relation to the Bank's claims which fall within the scope of Rome II, for which the remedy as well as the right to recover interest is therefore governed by Latvian law pursuant to Article 15 of the Regulation, no interest should be awarded for the period prior to the entry of judgment because such a remedy is not available in Latvian law. On the other hand, in relation to those claims outside the scope of Rome II, where the discretionary remedy provided by Section 35A is available to be used, the court should exercise its discretion by awarding interest to compensate the Bank for being kept out of its money. In agreement with Teare J in *JSC Bank -v- Ablyazov* [2013] EWHC 867 (Comm) at paragraph 26, I do not think it would be just to deprive the Bank of such compensation merely because a similar procedural remedy would not be available to a Latvian court. I consider that interest should be awarded at a suitable commercial rate from the time when each relevant sum was paid out."

ii) The second authority relied on by Mr Chapman is *Royalty Pharma Collection Trust -v-Boehringer Ingelheim GmbH* [2021] EWHC 2692 (Pat), a decision of His Honour Judge Hacon sitting in the Patents Court where, in an action for breach of patent, the claimant relied on a provision of German law, namely section 288 BGB, which provides:

> "(1) Any money debt must bear interest during the time of default, the default rate of interest per year is five percentage points above the basic rate of interest.
>
> (2) In the case of legal transactions to which a consumer is not a party the rate of interest for claims for payment is nine percentage points above the basic rate of interest."

The claimant submitted that the right conferred by section 288 was substantive, not procedural: it was part of the claimant's cause of action and governed by the lex causae, namely German law. In so arguing, the claimant relied, by analogy, on the judgment of Griffiths J in *Troke -v- Amgen* [2020] EWHC 2976 (QB). Having considered and analysed the judgment of Griffiths J in *Troke*, Judge Hacon proceeded to consider the decision in *Latvijas* (above) and then stated that, in agreement with Leggatt J he too found the reasoning set out in Dicey persuasive. Judge Hacon then said this:

> "**302. A**s I have discussed, despite the similarity in wording between the respective Articles 1(3) of Rome I and Rome II, they must each be applied consistently with the remainder of the Regulation of which each forms part. The observation by Griffiths J in *Troke* of a strong suggestion that the interpretation of Article 1(3) in Rome I and Rome II respectively should be the same form no part of the *ratio* of his judgment. Probably the better view – and the view I will adopt – is that the rate of interest upon damages goes to, or is intrinsically linked with, the assessment of the overall amount which the claimant can recover in respect of a damages claim under Article 15(c) of Rome II.
>
> **303.** Therefore, the lex causae must be applied to the rate of interest in Boehringer's counterclaim, making redundant any discretion this court may have under English law in relation to interest. The lex causae is German law."

24. Consistently with the above, Mr Chapman also, of course, relied on the view expressed in Dicey, Morris and Collins at paragraphs 4-111 to 4-116, and in particular at 4-115 where they state:

> "It is notable that the wording of Article 15 of the Rome II Regulation on the scope of the lex causae is in somewhat broader terms than Article 12(1)(c) of the Rome I Regulation. Article 15(c) applies to "the existence, the nature and the assessment of damage or the remedy claimed." The intention for issues relating to the assessment of damages to be determined by the lex causae is clear. It might be argued that the rate of interest upon damages goes to, or is intrinsically linked with, the assessment of the overall amount which the claimant can recover in respect of a damages claim. The exclusion of evidence and procedure should be construed narrowly, at least insofar as it relates to damages. Given the language of Article 15 of the Rome II Regulation, it is

> tentatively suggested that the rate of interest on damages in respect of tortious obligations is governed by the lex causae."

In further support, Mr Chapman relied on the view of the authors of "Accidents Abroad" (2017) at paragraph 8-034 where they state:

> "There are a number of factors which point towards a pre-judgment interest being part of the remedy claimed, and thus to be decided according to the applicable law chosen by Rome II. If it is right that the primary role of an award of interest is compensatory, that is the foremost factor. The applicable law is to be given a broad scope and to be treated as including practices, conventions and guidelines used by the courts in the country whose law is being applied [citing *Wall -v- Mutuelle de Poiters Assurances*]. There is a strong argument, therefore, that the starting point when considering interest is the applicable law, not the law of the forum and that factors strong enough to lead to Section 35A being treated as procedural at common law may not be enough for it to be treated the same way under Rome II."

25. On behalf of the defendant, Mr Audland relied principally upon *Maher* which, although decided before Rome II came into force, has been relied on in cases which have considered the law after Rome II came into force determining that the recovery of interest is procedural rather than substantive. The decision of the court in *Maher* was given by Moore-Bick LJ, who considered awards of interest from paragraph 25 of the judgment. He stated:

> "Interest
>
> **25.** The proper classification of the court's power to award interest is also, in my view, the key to the determination of the second issue. The question is whether an award of interest under Section 35A of the Senior Courts Act 1981, is to be classified as a substantive right or a remedy. Questions of substantive rights are governed by the lex causae and it is common ground that in this case, the law applicable to the tort is French law. Accordingly, Section 35A has no application if it creates a substantive right. If, on the other hand, it is remedial in nature, it is a power that the court has as its disposal, since matters of remedy are regarded as procedural in nature and governed by the lex fori.
>
> **26.** The juridical nature of section 35 has been considered on several occasions without being authoritatively resolved. In *Midland International Trade Services Limited -v- Al Sudairy*, Hobhouse J held that it should not be characterised as creating a substantive right for three reasons: (1) because in English law there was no right to recover interest by way of damages for the late payment of money and Section 35A was enacted as an

> alternative to a substantive right; (2) because the court's power to award interest under Section 35A arises only in connection with legal proceedings; and (3) because the power to award interest is discretionary and is not of such character as to create a legal right.
>
> …
>
> **33.** I accept that the existence of a legal right to claim interest is properly to be classified as a substantive matter to be determined by reference to the lex causae, but the question that arises for determination in this case is whether Section 35A of the 1981 Act creates a substantive right or merely a remedy. Although in *Kuwait Oil Tanker SAK -v- Al Bader* [2000] this court suggested that Section 35A creates a right to claim interest, that is not how it has hitherto generally been regarded. In *Jefford -v- Gee* [1970] 2 QB 130, Lord Denning, giving the judgment of the court, commented on section 3 of the Law Reform (Miscellaneous Provisions) Act 1934, the precursor to Section 35A at page 149F saying:
>
> "seeing that a claim for interest under the act of 1934 need not be pleaded, it is plain that it is itself not a cause of action. It is no part of the debt or damages claimed, but something apart on its own. It is more like the award of costs than anything else. It is an added benefit awarded to the plaintiff when he wins the case."
>
> …
>
> **40.** In these circumstances, I agree with the judge that the existence of a right to recover interest as a head of damage is a matter of French law, being the law applicable to the tort, but whether such a substantive right exists or not, the court has available to it the remedy created by Section 35A of the 1981 Act. Having said that, 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. To that extent I agree with the judge that both English and French law are relevant to the award of interest."

Although, of course, Mr Audland departed from the final sentence of paragraph 40 above, he relied on the substance of the judgment of the court that the recovery of interest is a matter for English procedural law, subject to the judge's discretion.

26. In *XP -v- Compensa* [2016] EWHC 1728, Whipple J (as she then was) considered (at paragraph 67) that she did not need to analyse or decide the issue of whether an award of interest in that case (which concerned Polish law) was a substantive or a procedural matter because if interest on the award against *Compensa* is a procedural matter, to be resolved under English law, she determined that she would follow the suggestion made in *Maher* to the effect that:

> "the domestic court might, in exercising its discretion under Section 35A of the Senior Courts Act 1981, wish to take into account the relevant provisions of foreign law relating to the recovery of interest, including the rate of interest which would have been payable in that other country. It is appropriate in this case that interest on the award should be calculated under Polish law."

Thus, the learned judge did not consider that she needed to decide the question whether the award of interest is substantive or procedural because, through the exercise of her discretion, she reached the same result in any event.

27. In *Troke -v- Amgen* [2020] 4 WLR 159 (QB), Griffiths J considered an appeal from a judgment of Mr Recorder McLoughlin sitting in the County Court at Plymouth who, in respect of a road traffic accident which occurred in Spain, awarded interest on the basis of the usual rates of interest applied in the English courts pursuant to section 69 of the County Courts Act 1984. It had not been argued before the learned Recorder that he should exercise his discretion to apply higher rates by reference to Spanish law as had been done by Whipple J in *XP*. From paragraph 40 of his judgment, Griffiths J considered Rome II and its interpretation as follows:

> "**42.** In *Actavis UK Ltd v Eli Lilly & Co* [2015] EWCA Civ 555; [2015] Bus LR 1068 (a decision overturned by the Supreme Court on other grounds at [2017] UKSC 48; [2017] Bus LR 1731) Floyd LJ (with whom Kitchin and Longmore LJJ agreed) said at paras 130–133:
>
> "**130.** Article 1(3) of Rome II is a rule about what is sometimes called the 'vertical scope' of the Regulation. Evidence and procedure are excluded from the scope of the Regulation. Although it does not automatically follow that these issues will be subject to the lex fori, the private international law principle that such matters are for the law of the forum is well recognised. It is enough to quote Dicey at para 7.002: 'The principle that procedure is governed by the lex fori is universally admitted."
>
> "**131**. Article 15 of Rome II is not itself directly concerned with clarifying the distinction between substance on the one hand and evidence and procedure on the other. It simply contains a list of matters which are 'in particular' to fall under the designated law. Included in the list are matters, such as limitation periods, which were traditionally the subject of some debate as to whether they were substance or procedure. Article 15 does not answer that question, but merely declares that they will be subject to the law which governs non-contractual obligations under Rome II. I therefore do not regard article 15 as a safe guide to whether matters which do not fall within its scope are procedural or substantive."
>
> "**132.** The distinction between substance and procedure is a fundamental one. The principle underlying it is said to be that a

litigant resorting to a domestic court cannot expect to occupy a different procedural position from that of a domestic litigant. Thus, that litigant cannot expect to take advantage of some procedural rule of his own country to enjoy greater advantage than other litigants here. Equally he should not be deprived of some procedural advantage enjoyed by domestic litigants merely because such an advantage is not available to him at home. Thus, at common law, every remedy was regarded as procedure: see for example *Don v Lippmann* (1837) 2 Sh & MacL 682, 724–725."

"**133.** Whether a rule is to be classified as one of substance or one of procedure or evidence under Rome II is a matter of EU law: the fact that a rule is classified as one or the other under domestic law is of no relevance."

48. In support of this proposition they cite the observation of Moore-Bick LJ in *Maher v Groupama Grand Est* [2010] 1 WLR 1564 at para 35 that Section 35A of the Senior Courts Act 1981 "does not create a substantive right to interest but a remedy at the court's discretion". They argue that this is contrasted with his statement at para 36 that

"Whether Parliament intended to create a legal right to recover interest or merely to give the courts a power to award interest in appropriate cases turns on the language of the statute properly understood in its context … There is no necessary inconsistency between the existence of a substantive right to interest and the existence of a statutory discretion".

56. I conclude, therefore, that the Judge was correct in thinking that his power to award interest under section 69 of the County Courts Act 1984 as the lex fori (the counterpart of the High Court power under Section 35A of the Senior Courts Act 1981) was not inconsistent with Rome II, and was permitted by article 1(3).

57. That being so, the Judge was entitled to apply the rate of interest prevailing in the forum, since he was ordering interest pursuant to the forum law (the County Courts Act 1984). This is what Treacy J did in *Rogers v Markel Corpn* [2004] EWHC 1375 (QB) at [81], applying *Miliangos v George Frank (Textiles) Ltd (No 2)* p 497B–D and *Lesotho Highlands Development Authority v Impreglio SpA.*

58. The Judge might equally have applied the Spanish rates, not as a matter of lex causae, but using the discretion given to him by the lex fori: that is what Whipple J thought should happen in *XP v Compensa Towarzystwo SA* [2016] EWHC 1728 (QB); [2016] Med LR 570, para 67, based on the suggestion in *Maher*. However, he was not asked to do that and, it being in his

discretion, I do not think it can be said that he was bound to do that.

59. But that does not entirely resolve the question. The Claimants argue that the right to interest proved in the Joint Expert Report was a substantive right in this particular case, and that it was therefore part of the lex causae which fell to be applied to their tort claim under Rome II. To that argument I will now turn.

60. The Claimants are able to point to the Judge's decision in their favour "that interest would be payable under Spanish law to these two Claimants" (J1 para 4); that the condition precedent for the Spanish rates had been satisfied, in that no interim payment had been paid (J1 para 5; J2 para 20 and J3 para 3); and the Judge's finding that "I am satisfied on the balance of probabilities that interest is recoverable under Spanish law in this particular instance… So that is finding No 1" (J1 para 6).

61. On the other hand, against them is the wording in the Expert Report, which says that the relevant Spanish law "contemplates a penalty interest", and makes it clear that the Spanish rates then set out as the "applicable statutory interest rate" are only those "contemplated" as such.

62. This is a point picked up in the Judge's later, more considered, judgment at J2, which says (at para 19): "It was unclear whether this was a mandatory entitlement as it was 'contemplated'". Having raised the uncertainty, the Judge does not resolve it in the Claimants' favour. He does not find that it is, in fact, a mandatory entitlement.

63. The use of the word "contemplated" was striking, because the language used by the expert when setting out the Claimants' substantive rights to damages was not qualified in this way. It seems to me that the word "contemplated" suggested on its face that the entitlement was not mandatory, but discretionary. It was not, therefore, properly classified as a substantive right. It was a procedural right, in the discretion of the forum, and procedural rights are excluded by article 1(3) of Rome II and will be governed by the lex fori not the lex causae.

64. This was also suggested by the characterisation of the Spanish rates as "a penalty interest", which arose "where insurers have not made a relevant interim payment within three months from the accident". Interim payments on account of a substantive award or settlement to be determined later seem to me to have the quality of procedural matters. A penalty, also, is to be distinguished from a substantive right. A penalty is a procedural sanction (or incentive). It is not a fundamental right. It is also to be expected that a penalty award will ultimately be in the discretion of the court (and so procedural) rather than

> being claimed as an absolute right (and so part of the substantive as opposed to procedural law). This is reinforced by the expert saying that the "penalty interest" is something which the Spanish law "contemplates" rather than Spanish courts awarding it automatically and as of right.
>
> **65.** Consequently, on the materials before the Judge, and consistently with his findings in J2, I reject the argument that the Expert Report was describing a substantive as opposed to a procedural right to interest. It follows that the Judge was right not to apply the Spanish rates as a matter of substantive right to be governed by the lex causae.
>
> **66.** Since the decision of the Judge in this case, the provision for interest under Spanish law, as set out in the Joint Expert Report, has been set out in more detail and with more context in another case (it being a question of fact, to be proved by evidence in every case, like all matters of foreign law, insofar as they differ from English law). This confirms that the recovery of the Spanish rates is discretionary, and not mandatory: see *Scales v Motor Insurers' Bureau* [2020] EWHC 1747 (QB) at [258]–[280]. For example, "article 20(8) provides that article 20 penalty interest will not apply where there is a justified delay or the delay in payment is not attributable to the Defendant" (para 265)."

Having set out the chronology of the claim, Griffiths J continued:

> "**68.** It is striking to note from the above chronology that the date on which Spanish rates of penalty interest would begin, three months after the accident, was before the defendant was even made aware of the claims.
>
> **69.** That would seem capable of justifying the Defendant's failure to make an interim payment before that date: cf *Scales* para 264. However, I do not have to decide that, and it was not a point argued before the Judge. The point is that the Spanish rates, being penalties, were ultimately discretionary and not mandatory, as a matter of law, even if the cases in which the Spanish rates are not awarded are restricted (*Scales* paras 271–272; in para 275 the word "exceptional" is used).
>
> **70.** Although this was a matter of foreign law, and therefore had to be proved at the hearing before the Judge, it was proved by the expert's use of the word "contemplates", and it is no more than reassurance that *Scales* confirms it to be correct that this was a power exercisable in the discretion of the court, and not a substantive right or mandatory entitlement.
>
> **71.** It follows that I agree with the Judge that the award of interest in this case was a procedural matter excluded from Rome II by article 1(3); that there was no substantive right to interest at

> Spanish rates to be awarded to the Claimants under the lex causae; that interest could be awarded under section 69 of the County Courts Act 1984 as a procedural matter in accordance with the law of England and Wales as the lex fori; and that he was entitled to award interest at English and not Spanish rates accordingly"

28. In *Sedgwick -v- Mapfre* [2022] EWHC 2704 (KB), the claimant sought damages for personal injury arising from an accident sustained on the Spanish island of Tenerife when she fell, descending an inadequately lit concrete staircase sustaining severe fracture injuries to her left knee and her right heel. Lambert J considered the question of interest from paragraph 78 of her judgment. She considered Article 20 of the Spanish Insurance Act from paragraph 78 of her judgment. At paragraph 81, she observed that the experts in that case agreed that:

> "the purpose of the imposition of a penalty rate of interest under Article 20 is to discourage delay in litigation and in particular to discourage insurers from protracting payment where they are aware of their payment duties under the insurance policy."

Mr Chapman, who also represented the Claimant in that case, submitted, as here, that the penalty interest rule in Article 20 is a substantive rather than a procedural provision. He relied on the same arguments as he relies on in the present case. Lambert J rejected the argument stating as follows:

> **"96.** In considering the question posed, that is, whether the penalty interest provisions are procedural or substantive, I have taken into account the following matters.
>
> **97.** Whether binding or not, the judgment of Griffiths J in *Troke* is a powerful authority in this context. The central issue which confronted him was whether the right to penalty interest was a substantive right and therefore fell to be determined by the lex causae to be applied under Rome II. Griffiths J reached the conclusion that the penalty interest provisions were procedural and that the judge below had therefore been right not to apply the Spanish rates of interest but award interest under s69 County Courts Act 1984.
>
> **98.** Griffiths J's reasoning was based in part upon the expert material before him and the observation in the Joint Expert Report of the relevant Spanish law "contemplates a penalty interest." To his mind, this suggested a discretionary entitlement not a mandatory one. However he said that the expert report referring to the law "contemplating a penalty interest" simply reinforced his view that penalty interest was a procedural rather than substantive right. At [64] he said:
>
> *"Interim payments on account of a substantive award or settlement to be determined later seem to me to have the quality of procedural matters. A penalty also is to be*

> *distinguished from a substantive right. A penalty is a procedural sanction (or incentive). It is not a fundamental right, it is also to be expected that a penalty award will ultimately be in the discretion of the court (and so procedural) rather than being claimed as an absolute right (and so part of the substantive as opposed to procedural law).”*

99. He noted that the exclusionary jurisdiction under Article 20(8) was highly restrictive but as he set out at [69] “*the point is that the Spanish rates, being penalties were ultimately discretionary and not mandatory as a matter of law, even if the cases in which the Spanish rates are not awarded are restricted (Scales paras 271-272; in para 275 the word “exceptional” is used)*”

100. As I have already observed, Mr Chapman urges me to treat *Troke* with a degree of caution. It is “at odds” with the decision in *AS*. However he does not submit that it is wrong, let alone “plainly wrong.” Nor does he convincingly argue that the case can be satisfactorily distinguished. I find it difficult to see how the case can be distinguished. The issue before Griffiths J is the same as that before me. Its ratio is clear. Although in part based upon expert evidence that is not before me (the reference to the Spanish law “contemplating” the imposition of penalty interest”) Griffiths J’s conclusion that the penalty interest provisions were procedural was based centrally upon their discretionary character as demonstrated by the Article 20(8) exclusion and his understanding that they constituted a discretionary procedural sanction for failing to make a timely interim payment.

101. Whether the decision in *Troke* is binding upon me or not, I agree with its conclusion and the underlying reasoning which I endorse and follow. I make the following observations and findings:

i) 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 obligation. Article 15(d) applies the law of the non-contractual obligation to the measures which the court may take to ensure the provision of compensation. *“The right to claim interest by way of damages in a claim in tort is within the ambit of Article 15 and is not, in any sense, a procedural question for the law of the forum*.” See *Maher v Groupama* (supra) and Dicey 16th edition at [4.113].

ii) 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. I agree with Mr Mead (and Griffiths J) that penalty interest is a procedural

> sanction to give teeth to a procedural regime aimed at early disposal of cases and as such it is not a substantive right.
>
> iii) The purpose of an award of damages for personal injury is to restore the victim of an accident to the position he/she would have been in but for the accident. Full reparation is the objective. The substantive right to an award of interest to compensate the victim for being kept out of his or her award and the loss of use of the money is therefore consistent with this objective. But 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. The observations in Dicey which were picked up and endorsed in *AS*, that penalty interest might be seen as a remedy in the form of compensation for the claimant being kept out of his or her money, must in my view be considered in this context.
>
> **102.** I note with interest the observations of the authors of Dicey that, unlike under Rome I, the rate of interest may be a matter of substantive law of the lex causae. This is, as the authors acknowledge, a tentative suggestion only. It was a tentative suggestion that was brought to the attention of Griffiths J. It was based upon the breadth of the wording of Article 15 of Rome II as to the scope of the lex causae (which is broader than the equivalent provision in Rome I) and the premise that the exclusion of evidence and procedure should be construed narrowly. However, to my mind, the penalty interest provisions are discretionary; they may be excluded if there is a good reason to do so and they are procedural in character.
>
> **103.** I therefore reject the claimant's submission that the Spanish law provisions concerning penalty interest are substantive and that I am bound to apply them in this case. I find that they are procedural and therefore the interest rates are those of the lex fori, that is under s. 35A Senior Courts Act 1981."

29. Thus, Lambert J considered that the penalty interest provisions are discretionary because they may be excluded if there is good reason to do so and, for that reason, they are procedural in character, thus following, and persuaded by, the judgment and reasoning of Griffiths J in *Troke*.

30. With the greatest possible respect to them, I find myself differing from the views and conclusions of Griffiths J and Lambert J. In my judgment, the recovery of interest provided for by Spanish law under Article 20 of the Spanish Insurance Act is, pursuant to Rome II and as a matter of European law, substantive, not procedural. I say this for the following reasons:

i) I consider that Mr Chapman is correct in his submission (see paragraph 22 above) that the broad scheme of Rome II is, as a matter of EU law, to direct the matters which fall within the scope of the applicable law broadly and to direct matters of procedure and evidence (which are reserved to the law of the forum) narrowly: this may mean, and in my judgment does mean, that the effect of the implementation of Rome II within our domestic law was to recalibrate the distinction between matters of substance and procedure from the previous position as represented by *Maher*. The purpose of Rome II was to harmonise the laws of the EU countries (then including the UK) and ensure that, where a tort or delict was committed in an EU country, the recovery was identical irrespective of the forum in which the proceedings were brought. The Claimants in each of the cases before me had the right to recover the same amounts as if they had sued in Spain rather than England, and in my judgment, that should be deemed to include the right to penal interest under the Spanish Insurance Act, particularly if, as I decide below (see paragraphs 31 onwards), that cannot legitimately be done by exercising discretion under sections 35A or 69. It was the intention of each of the judges below, as well as Whipple J in *XP* and Lambert J in *Sedgwick* that the Claimants should recover the same amounts as they would have recovered in Spain, and, in my judgment, that could only be done by characterising the recovery of penal interest under the Spanish Insurance Act as substantive, not procedural.

ii) Second, I consider that Mr Chapman is right when he submits that, under Spanish law, the penalty interest provisions contained within the Spanish Insurance Act are characterised as substantive legal provisions (see paragraph 20 above). Whilst, as acknowledged, this is not conclusive, I consider it to be an important, and persuasive, matter which would influence the European Court of Justice were it seised of this case.

iii) Third, I find myself persuaded by the views expressed in Dicey, Morris & Collins: see paragraph 24 above.

iv) Fourth, I associate myself with the views of Leggatt J in *Latvijas* (see paragraph 23 i) above and His Honour Judge Hacon in *Royalty Pharma* (see paragraph 23 ii) above).

v) Fifth, I am not convinced by the reasoning of Griffiths J in *Troke*, that the Spanish rates of interest, being penalties, were ultimately discretionary and not mandatory, by reference to the use by the experts in that case of the word "contemplates" whereby the award of interest was a "power exercisable in the discretion of the court and not a substantive right or mandatory entitlement." In that case, the expert report stated that the relevant Spanish law "contemplates a penalty interest" and made it clear that the Spanish rates then set out as the "applicable statutory interest rate" are only those "contemplated" as such. Griffiths J found the use of the word "contemplated" as striking because the language used by the expert when setting out the claimants' substantive rights to damages was not qualified in this way. He said:

> "it seems to me that the word "contemplated" suggested on its face, that the entitlement was not mandatory, but discretionary. It was not, therefore, properly classified as a substantive right. It

was a procedural right, in the discretion of the forum and procedural rights are excluded by Article 1(3) of Rome II and will be governed by the lex fori not the lex causae."

This was also suggested by the characterisation of the Spanish rates as "a penalty interest" which arose "where insurers have not made a relevant interim payment within three months from the accident". See paragraph 64 of his judgment, cited at paragraph 27 above.

In the instant case of Woodward, the experts, in their joint report, did not similarly use the word "contemplates" in relation to the award of interest, but only in relation to the application of the exemption under Article 20(6). Rather, they agreed that Spanish law "provides for specific rules for the calculation of interest in claims against insurers". They agreed 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" and they agreed that Article 20.6 "contemplates an exemption to the general rule in the event the insured has not complied with the obligation to report the accident, in which case the initial day of accrual of interest "dies a quo" will be the date of its communication." This seems to me to be more of an exception to the right to penalty interest rather than a discretion not to award it. To my mind, the agreed expert evidence in the present case (and, in fact, my interpretation of the evidence which was before Griffiths J) is to the effect that the claimant has a right to penal interest as laid down by the statute so long as the claim has been duly notified to the insurer and the insurer has failed to make the appropriate payments. I do not read Article 20, nor its interpretation by the experts, as truly providing the Spanish court with a discretion but rather a set of rules as set down which provides the claimant with a right to such interest, which is much more akin to a substantive right than the discretionary right provided by Section 35A of the Senior Courts Act 1981 or section 69 of the County Courts Act 1984.

It would, of course, be unfortunate if the answer to the question whether the right to penal interest under Spanish law is or is not substantive rather than procedural depended on the language used in the experts' reports in any particular case. This was recognised by Lambert J in *Sedgwick* where she referred to the decision in *Troke* being "in part based upon expert evidence that is not before me". Lambert J suggested that Griffiths J's conclusion was in fact based centrally upon the discretionary character of the penal interest provisions and his understanding that they constituted a discretionary procedural sanction for failing to make a timely interim payment, a conclusion with which she agreed. I have the misfortune to disagree with his (and her) conclusion, but I agree that whether or not the right to interest under the Spanish Insurance Act should be based upon a perception of the true nature of such payments rather than the language used by the experts in any particular case, whose command of English may not fully reflect the nuances associated with the use of a particular word such as "contemplate".

vi) Sixth, as alluded to in sub-paragraph i) above, it could perhaps be said that the "proof of the pudding is in the eating": in both the cases on appeal before me as well as in *XP* (per Whipple J) and *Sedgwick* (per Lambert, J.) the so-called "discretion" was exercised by all judges so as to provide the claimants with the

full amount of interest as provided for by Article 20. In *Sedgwick*, considering whether to exercise her discretion, Lambert J said, at paragraph 106, that, in considering that question,

> "I take into account that, had this case been issued and tried in Spain, then the penalty rates of interest would have been applied. There is no good reason why they would have been excluded under Article 20(8)."

I consider it to be of significance that she uses the expression "would have been applied" rather than "could have been applied," thereby suggesting that there would have been no scope for the exercise of any discretion. In no case cited to me did a judge, in the exercise of his or her "discretion", decline to order such interest at all or order it in some lesser amount. The only case where it was not awarded was *Troke*, and that was because the learned Recorder in the court below had not been asked to exercise his discretion to award such interest. It is difficult to see in what respect even lip-service was paid to any discretionary nature of the remedy: indeed, the way that the Spanish statute and rules were applied seems to me to prove, in practice, that what was being granted was, in reality, a substantive right, only expressed through the "back door" of exercise of discretion under section 69 of the 1984 Act. If, as in due course I find, Mr Audland's submissions are correct that this was an illegitimate use of so-called judicial discretion when, if the award of interest is discretionary and procedural, the two systems are wholly separate and applied by reference to the rules of procedure peculiar to English law, then there is no place for the imposition of Spanish rules (or French rules or Polish rules or the rules of any other EU country) through this back door route. However, all the judges considered it to be just for the Claimant to have such interest. If the only legitimate route for such interest to be awarded is by characterising it as a substantive right subject to the lex causae, that reinforces the conclusion that such characterisation is correct.

vii) Seventh, I consider it to be relevant that the result of the application of Article 20 of the Spanish Insurance Act is to have such a dramatic effect upon the overall amounts awarded. In both cases before me, the effect was more or less to double the award, and I assume there were similar effects in *XP* and *Sedgwick*. In Nicholls, the amount of interest was €41,196.08. According to the appellant's skeleton argument, interest awarded at the conventional rates for personal injury claims (2% on general damages and half the special account rate on special damages) would have resulted in an award of €2,447.03. A similar discrepancy between the sum awarded and the sum that would have been awarded had conventional rates been applied pertains in the Woodward case. This significant difference indicates clearly, to my mind, that the awards of interest in both cases are much more in the nature of substantive rights to damages than the kind of discretionary awards made in the English courts.

31. As I have observed, the interpretation of articles 1(3) and 15 of Rome II is a matter of EU law. Had the United Kingdom been a member of the European Union, this court could have referred the question of interpretation of Rome II to the European Court of

Justice and that court would have had the advantage of the opinion of the Advocate-General who could have carried out a survey of a selection of domestic jurisdictions to ascertain whether, in general, awards of interest are to be regarded as substantive rather than procedural, which might have assisted the European Court of Justice in its interpretation of Rome II so far as whether awards of interest are generally to be regarded as substantive or procedural. In the absence of such a power, the English domestic courts must do their best to interpret the provisions of retained EU law, such as Rome II. There is, unfortunately, no guidance (at least so far as Counsel have been able to discover) from existing EU case law to guide me. Doing the best I can, and for the reasons set out in paragraph 30 above, I take the view 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.

Discretion under sections 35A Senior Courts Act 1981 or section 69 County Courts Act 1984

32. If I am wrong that the award of interest on damages does not fall to be awarded as a substantive right under Spanish law, but as a discretionary remedy under section 69 of the 1984 Act, I must go on to consider whether it was right or wrong for the judges below to have regard to Spanish law in exercising their discretion to award interest at what would have been the Spanish rates. As I have observed, the exercise of their discretion in this way has had a dramatic effect upon the sums awarded, approximately doubling them in both cases.

33. The foundation for the award of interest by reference to the rules of foreign law relating to the award of interest in the cases decided post-Rome II was the decision of the Court of Appeal in *Maher -v- Groupama* [2009] EWCA Civ 1191 and in particular what was said at paragraphs 35 and 40 as follows:

> "**35**. It is accepted that although the court has a discretion in the matter of awarding interest, the discretion must be exercised judicially and in accordance with established principles. The ordinary rule is that a successful party is awarded interest at such rates, and for such periods as the court considers will fairly compensate him for being kept out of his money. However, the discretionary nature of the power is underlined by the fact that in some circumstances the court will depart from the ordinary rule. In *Jefford -v- Gee* at page 151 E-F, Lord Denning gave as an example the case where one party or the other has been guilty of gross delay. Another is to be found in Part thirty-six of the civil procedurals. Rule 36.14(3)(a) provides that the court may award a claimant who has obtained a judgment at least as advantageous to him as an offer he has previously made to settle the claim interest on the whole or part of any sum of money awarded as damages at a rate not exceeding 10% above base rate. Such an award is not intended to be compensatory but is intended to encourage defendants to accept sensible offers of settlement. These are but two examples of how the discretion may be exercised, having regard to the particular circumstances of the

> case and the conduct of the parties to the litigation. They proceed on the footing that Section 35A does not create a substantive right to interest but a remedy at the court's discretion, albeit one that must be exercised judicially.
>
> …
>
> **"40.** In these circumstances I agree with the judge that the existence of a right to recover interest as a head of damage as a matter of French law, being the law applicable to the tort, but whether such a substantive right exists or not, the court has available to it the remedy created by Section 35A of the 1981 Act. Having said that, 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. To that extent I agree with the judge that both English and French law, are relevant to the award of interest."

34. It is appropriate to look at the subsequent decisions. In *XP* [2016] EWHC 1728 Whipple J dealt with the question of the differing regimes as to interest under English law and Polish law as follows:

> "**67.** Mr Doherty for *Compensa* invited me to award interest under English law in preference to Polish law. He argued that this was open to me on the basis that interest was a procedural matter and so I have a choice as to my approach, citing *Maher -v- Groupama*. I do not need to analyse (or decide) the issue of whether the award of interest in this case is a substantive or a procedural matter. I can simply say that if interest on the award against *Compensa* is a procedural matter, to be resolved under English law, then I would follow the suggestion made in *Maher*… To the effect that the domestic court might, in exercising its discretion under Section 35A of the Senior Courts Act 1981, wish to take into account the relevant provisions of foreign law relating to the recovery of interest, including the rate of interest which would have been payable in that other country. It is appropriate in this case that interest on the award should be calculated under Polish law. That would be consistent with this court's role in hearing the claimant's case against *Compensa* under Rome II, namely, to arrive at a figure for damages which equates to that which would have been awarded by a Polish court if this case had been heard in Poland. Any different approach would be inconsistent with that role. I reject Mr Doherty's invitation."

With respect to the Whipple J, I agree with the submission of Mr Audland KC that this was to confuse and obfuscate the boundaries under Rome II between substantive law, which is for the lex causae, and procedural matters, which is for the lex fori. What she did was to introduce matters of substantive Polish law through the "back door" of English procedural law by reverting to "exercise of discretion". In my judgment, the learned judge did in fact need to analyse and decide whether the award of interest in

that case was substantive or a procedural matter, and, if it was procedural, consider how a matter of substantive Polish law could be superimposed upon English procedural rules and how that was consistent with the role of the court under Rome II.

35. Similarly, in *Scales -v- Motor Insurer's Bureau* [202] EWHC 1747 (QB) Cavanagh J proceeded upon an assumption that he could exercise his discretion under Section 35A of the Supreme Court Act 1981 to award interest by reference to Spanish law principles: the contrary was not argued. Thus, having referred to *Maher* and to the fact that "it is common ground that Spanish law provides a substantive right to interest," he stated:

> "**256.** In any event, whether or not such a substantive right exists, the English court has a discretionary power, under Section 35A of the Senior Courts Act 1981, to decide whether to award interest and to determine the amount of interest: *Maher*, paragraph 35 and 40. This power must of course be exercised judicially. In exercising the course discretion, the Court of Appeal said in *Maher* that the English court might well take into account any relevant provisions of the foreign law relating to the recovery of interest (see judgment, paragraph 40).
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> **257.** There are, as I will explain, specific rules of Spanish law which govern the award of interest in cases such as these. In my judgment it is appropriate to apply these rules to the present case. 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 this, the Senior Courts 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. That is in keeping with the way in which I have determined the other issues in the case. Neither of the parties invited me to take any other course of action: all of their submissions on interest were made by reference to Spanish law principles."

36. Thus, the points taken by Mr Audland in the present case and his arguments by reference to Rome II were not considered. Cavanagh J went on to award the full amounts of interest which would have been awarded under Spanish law in a Spanish court.

37. *Troke* was a case where interest at Spanish rates was not awarded but that is because the learned Recorder in the court below was not invited to do so. This arises from paragraph 58 of the judgment of Griffiths, J where he said:

> "**58.** the judge might equally have applied the Spanish rates, not as a matter of lex causae but using the discretion given to him by the lex fori: that is what Whipple J thought should happen in *XP*, based on the suggestion in *Maher*. However, he was not asked to do that and, it being in his discretion, I do not think it can be said that he was bound to do that."

Thus, the higher rates of interest recoverable under Spanish law could only be secured in that case, if counsel for the claimant had been able to persuade the judge that such interest was recoverable as a matter of substantive Spanish law and the application of the lex causae rather than through the so-called "back door" of discretion under section 69. Griffiths J decided that it could not be so recovered, in my judgment wrongly (see paragraph 30 above).

38. Finally, there is the decision of Lambert J in *Sedgwick*. Having followed the decision of Griffiths J in *Troke* and rejected Mr Chapman's submission that interest pursuant to the provisions of Spanish law is recoverable as a substantive right, she proceeded to consider whether she should award a rate of interest consistent with the Spanish law penalty rates pursuant to her discretion under Section 35A of the Senior Courts Act 1981. She said:

> "**108.** I accept that the imposition of the Spanish penalty interest rate upon the damages award made, as Mr Mead outlined, exposed the defendant to a double jeopardy of Spanish penalty interest and costs and interest penalties under CPR part 36.17. This does not seem to me to be a good reason not to apply the Spanish rate of interest. Of course, the sanctions set out in CPR 36.17 are themselves discretionary and may be displaced in the presence of a good reason to do so.
>
> **109.** For all of these reasons therefore I exercise my discretionary power under Section 35A Senior Courts Act 1981 to award interest on general and special damages in accordance with the penalty rate, which would have been applied had this litigation been issued and pursued in Spain."

Again, as with the previous cases, the line of argument adduced by Mr Audland in the present case was not advanced.

39. As already observed, the judges below, in the two cases before me, adopted exactly the same approach as Whipple J and Lambert J and applied the Spanish rates of interest in full. In Woodward's case, Her Honour Judge Walden-Smith additionally made an award of £11,389.25 pursuant to CPR 36.17 (4), rejecting the argument on behalf of the defendant that it would be unjust to do so in circumstances where the punitive interest rate provided for by Spanish law had been allowed. She stated:

> "**11.** In this matter, I do not consider that there is anything which is unjust in the Part 36 consequences applying. The offer to settle in the sum of £55,050 on 22 June 2022 was made by the claimant at a time when the parties were both aware of the potential quantum and were advised with respect to the Spanish law, the joint statement having been finalised on 8 April 2022. The offer to settle at that sum was well pitched.
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> **12.** The offers made by the defendant were simply not sufficiently high to meet the damages awarded. Liability was denied at the outset part thirty-six offers were made by the defendant to resolve the matter in the sum of €7,000 on 13 May

> 2021, €12,000 on 9 September 2021, €35,000 on 13 June 2022, together with Calderbank letters on 29 March 2022 in the sum of €35,000 and €38,000 on 2 August 2022."

40. In my judgment, for the reasons put forward by Mr Audland, it was not legitimate for these judges to give effect to Spanish law provisions which, on the present basis, are intended to operate in a different procedural environment where different procedural rules apply, to award interest at those significantly higher, penal rates as part of the discretion under either Section 35A of the Senior Courts Act 1981 or section 69 of the County Courts Act 1984. As Mr Audland observed, we have our own system of rules and sanctions to encourage early notification and to encourage early offers. We also have a different limitation period. The system in England also operates differently to enable defendants to make final offers of settlement, which have the effect of concluding the proceedings if accepted, which is in contradistinction to the Spanish system whereby payments made into court by the defendant operate as interim payments but which have the potential effect of satisfying the provisions of article 20 of the Spanish Insurance Law Act. In my judgment, a clear line was intended to be drawn by Rome II between the award of substantive sums in accordance with the lex causae and the application of procedural rules in accordance with the lex fori. This clear distinction means that, pursuant to Rome II, it is illegitimate to taint awards of interest under the English statutes and pursuant to the English civil procedure 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, including the way in which discretion is exercised by the courts when deciding whether to award interest and, if so, in what sums.

41. I am aware, in so deciding, that I am interfering with the purported exercise by both judges in the courts below of their discretion. In *Azam -v- University Hospitals Birmingham NHS Foundation Trust* [2020] EWHC 3384 (QB), Saini J set out, at paragraphs 50 and 51 the circumstances in which an appellate court will interfere with a discretionary evaluation:

> "**50.** an appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the following errors:
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> (i) a misdirection in law;
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> (ii) some procedural unfairness or irregularity;
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> (iii) that the judge took into account irrelevant matters;
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> (iv) that the judge failed to take account of relevant matters; or
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> (v) that the judge made a decision which was "plainly wrong".

> **51.** Error type (5) requires some elaboration. This means a decision which has exceeded the generous ambit within which reasonable disagreement is possible."

I agree with and accept Mr Audland's submission that the awards of interest in accordance with Spanish law, insofar as they were made in purported exercise of discretion under section 69 of the County Courts Act 1984, involved a misdirection of law because it was wrong in principle to apply Spanish rules as, on the basis being discussed, these are a procedural sanction and would apply only to cases proceeding in Spain, under Spanish procedural rules, as opposed to England, where the English courts have their own procedures to sanction or penalise delay. Alternatively, the imposition of Spanish penalty interest through exercise of discretion involved "procedural unfairness or irregularity" because the defendant in each case was penalised excessively, as shown by the exorbitant amounts awarded by way of interest (by comparison to the amounts that would have been awarded applying the usual English rates of interest) and by reference to the fact that, in Woodward, the defendant was effectively penalised twice by the additional imposition of a sum pursuant to CPR 36.17 (4). I accordingly consider that this is a rare case where, as an appellate court, I can interfere with what purported to be an exercise of discretion in each case. The intention was a laudable one, namely to counter-balance a perceived injustice to the claimants in relation to the interest they would have received had they sued in Spain as opposed to the "normal" interest receivable pursuant to English procedural rules. In my judgment, though, the method adopted was wrong and illegitimate: the correct approach would have been to recognise that the award of such interest arises as a matter of substantive law and application of the lex causae pursuant to the provisions of Rome II. When viewed that way, the making of an additional award pursuant to the provisions of CPR 36.17 by Her Honour Judge Walden-Smith was absolutely correct as the making of the two awards - penalty interest under Spanish law, and an additional award under CPR 35 – would have been regarded as different "animals", imposed under two different sets of rules and in respect of which there was no overlap.

42. In the circumstances, in my judgment, the awards made in the courts below were the right awards but were made for the wrong reasons. The appeals of the defendants in each case are therefore rejected.