Neutral Citation Number: [2020] EWHC 2976 (QB)

Appeal ref: 10BS029C
Claim No: F39YJ825

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT PLYMOUTH
MR RECORDER McLOUGHLIN

Bristol Civil Justice Centre
Bristol BS1 6GR

Date: 06/11/2020

Before :

MR JUSTICE GRIFFITHS

- -

Between :

(1) RACHEL TROKE **(2) Master FINLEY ALLEN** **(a child by his mother and litigation friend RACHEL TROKE)**	**Claimants/ Appellants/ Respondents to Cross-Appeal**
- and -	
AMGEN SEGUROS GENERALES COMPANIA DE SEGUROS Y REASEGUROS SAU **(formerly RACC SEGUROS COMPANIA DE SEGUROS Y RESASEGUROS SA)**	**Defendant/ Respondent/ Respondent to Cross-Appellant**

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Conor Kennedy (instructed by **Trowers & Hamlins LLP**) for the Claimants
Lucinda Spearman (instructed by **Irwin Mitchell LLP**) for the Defendant

Hearing date: 29 October 2020

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Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 2 pm on 6 November 2020.

Approved Judgment

Mr Justice Griffiths :

1. This is an appeal against one element only of an order made by Mr Recorder McLoughlin ("the Judge") in the County Court at Plymouth on 3 March 2020. The appeal only concerns the rate of interest awarded on what were otherwise agreed awards of damages against the Defendant insurer ("the Defendant") to the Claimant victims of a road traffic accident in Spain ("the Claimants").

2. The appeal engages a potentially important and certainly difficult question about what law governs the award of interest in relation to a tort sued upon within this jurisdiction but committed in another jurisdiction.

3. I have had the benefit of thoughtful and sophisticated submissions from Counsel on both sides (Conor Kennedy for the Claimants and Lucinda Spearman for the Defendant) both orally and in writing. I am grateful to them. Both Counsel also appeared below.

Background and chronology

4. The road traffic accident occurred in Spain and the Claimants were most unfortunately injured. It is accepted by the Defendant that the Claimants were the victims of a tort and that they were entitled to damages as a result. It is accepted that the Claimants are entitled to sue the Defendant insurers directly in England and Wales in order to recover those damages. The amount of damages is also not in dispute.

5. The only dispute concerns the figure awarded by the Judge for interest, and whether the award of interest is governed by Spanish law (the *lex causae* – the law of the jurisdiction in which the cause of action arose) or by English law (the *lex fori* – the law of the forum in which the claim was being brought).

6. The Claimants appeal on the basis that Spanish law (the *lex causae*) governed both the award and the rate of interest and the Judge should, therefore (they argue), have awarded interest to the Claimants at the rates identified in the following passage from para 70 of the agreed joint expert report on Spanish law ("the Expert Report"):

> "**Interest**
>
> Article 20 of the Spanish 50/1980 Insurance Contract Act contemplates a penalty interest where insurers have not made a relevant interim payment within 3 months from the accident. The applicable statutory interest rate is:
>
> (i) From 28/12/2014 to 28/12/2016 interest will accrue at 6% (2014), 5.25% (2015) and 4.5% (2016).
>
> (ii) From 29/12/2016 until final payment, a flat variable rate of 20%."

7. These rates ("the Spanish rates") result in a substantially higher award of interest than the rates applied by the Judge. The Judge applied rates of 0.5% on special damages and 2% on general damages, which is accepted as having been appropriate if no regard was had to the Spanish rates.

8. In oral submissions, the Claimants' Counsel has developed a fall-back position, which is that, even if English law (the *lex fori*) governs the Court's assessment of the rate of interest, the Judge ought to have awarded the Spanish rates in the exercise of his discretion under section 69 of the County Courts Act 1984. This is not a point raised in the Grounds of Appeal.

9. The Defendant's cross appeal on the basis that, even if Spanish law did apply to the award of interest, and/or to the rate of interest, the Spanish rates did not apply to the facts of the present case, or should not be applied in the present case, because (i) the Expert Report did not say that they should and/or (ii) the burden of proof was on the Claimants and had not been discharged. In response to the Claimants' new fall-back argument, the Defendant says (iii) the Spanish rates should not be applied in the exercise of the Court's discretion under section 69 of the County Courts Act 1984.

10. I now turn to the Judge's decision.

The judgments

11. At the end of the one-day trial on 24 February 2020, the Judge immediately gave a full *ex tempore* judgment, of which I have a transcript settled and approved by the Judge ("J1"). It has all the appearance of a formal and final reasoned judgment (headed "Approved Judgment") and, over a number of paragraphs and pages, it considers the issues, the evidence, the law and the argument; and reaches reasoned findings and conclusions which were determinative of the issues in the trial – which were limited to issues about the law governing interest, and the rate to be awarded.

12. The Claimants (but not the Defendant) asked for permission to appeal. The Judge (it is agreed, although I have no transcript of this) said that J1 was only his provisional decision and he would prepare and hand down a more formal written judgment.

13. The next day, the Judge circulated a typed written judgment dated 25 February 2020 ("J2") which opens:-

> "This is a formal written judgment following on from my decision in court to award both Claimants, interest calculated under Section 69 of the County Courts Act 1984 as opposed to the rate of interest claimed by the Claimants under Spanish law."

14. J2 was written, as I have said, when the Judge was made aware that the Claimants wanted to appeal. The Claimants had been awarded interest, but at the lower rate usual in English courts, rather than at higher rates available under Spanish law as set out in the joint Expert Report on Spanish law. J2 concentrates on why the Claimants lost, whereas J1 referred to and considered the whole case.

15. Usually, when a judge gives a decision, and even reasons for a decision, followed by a written judgment, the later judgment may be taken as definitive, and to supersede whatever was said originally, especially when (as here) the earlier decision is expressly stated to be provisional. Judges have very broad powers to reconsider and even change their judgments, not only as to reasoning, but even as to outcome, at least before the order is drawn up and sealed (which in this case was not until 3 March 2020): see *In re*

L and another (Children) (Preliminary Finding: Power to Reverse) [2013] UKSC 8, [2013] 1 WLR 634.

16. However, in this case, because there are some gaps and obscurities in the reasoning of J2 which can be filled by the reasoning of J1, both sides ask me to consider them together, which I will.

17. For completeness, I will mention further reasons given by the Judge when permission to appeal was refused by him on 2 March 2020 (the day before the Order was drawn up on 3 March 2020). These were reasons given for refusing the Defendant permission to appeal, the possibility of an appeal by the Defendant probably not having occurred to him when he wrote J2, which (as I have said) followed the Claimants' request for permission to appeal. The Judge's written reasons for refusing the Defendant permission to appeal on 2 March 2020 cover 3 pages and 5 paragraphs ("J3"). Naturally, J3 is exclusively directed to the Judge's reasons for rejecting criticisms of his earlier judgments from the Defendant's side. J3 refused the Defendant's application for permission to appeal (which had been made in written submissions) on the basis that it would have no real prospect of success.

18. Both the Claimants and the Defendant then appealed to this Court. Since the outcome (that is, the Order appealed from) favoured the Defendant, the substantive appeal is brought by the Claimants, and the Defendant has a cross-appeal which is necessary only if the Claimants succeed in their appeal.

19. Permission to appeal was given both to the Claimants and to the Defendant by Murray J on 14 May 2020.

The reasoning of J1

20. The reasoning of the Judge on the points argued in this appeal appears from J1 (his initial, *ex tempore* judgment) as follows:

    i) He noted that:

    > "…it is decided case law that the assessment of damages, liability having been admitted, would be pursuant to Spanish law, that being the accident location…"

    There is no challenge to this. It is common ground that the law governing substantive claims was the *lex causae*, the law of Spain.

    ii) He said "The issue before this court is to what extent there is an entitlement to interest in this case".

    iii) He referred to the joint Expert Report, which stated in its first paragraph that the expert's instructions were:

    > "…to provide a report for the Court on the applicable Spanish laws that are relevant to the facts of this case and in particular in respect of quantification of the award for general damages and also about the Claimants' Schedule of Loss and the heads of Special Damages according to Spanish law."

iv) He referred to the schedules of loss on both sides which were dated subsequent to the joint Expert Report.

v) He referred to the passage in the Expert Report setting out the Spanish rates, which I have quoted already in full. He picked upon the expert's phrase "contemplates a penalty interest…" and said that this became "punitive" in the Defendant's counter-schedule.

vi) He said: "I am satisfied on the balance of probabilities, given this 19-page report, that interest would be payable under Spanish law to these two Claimants."

vii) The Expert Report said (within the passage on interest quoted in full in paragraph 6 above):-

> "Article 20 of the Spanish 50/1980 Insurance Contract Act contemplates a penalty interest where insurers have not made a relevant interim payment within 3 months from the accident."

The Judge noted that there was no evidence that the insurers had made "a relevant interim payment". He was right about that. There was no such evidence. Indeed, the Defendant insurers accept before me that no relevant interim payment was in fact made.

viii) The Judge emphasised that no follow-up questions had been asked of the expert by way of clarification of the passage in the joint Expert Report about Spanish rates of interest. He said:

> "It is a joint report. If interest were in dispute that could have been raised by the Defendants by way of clarification to discover the entitlement or not by asking a Part 35(8) question for clarification. I know there is an issue as to whether you can ask clarification questions under 35(8) with a single joint expert, but that could have been done."

I do not think there is anything in this point. If the Defendant was right that the state of the evidence was insufficient for the Claimants to prove their case on interest, including the recovering of interest at the Spanish rates, it was by no means incumbent on the Defendant to alter the position by asking questions for clarification. It might be said it would have been against their interests to do so. If, on the other hand, the Defendant was wrong, the evidence entitled the Claimants to the Spanish rates without further clarification. It was a matter for the Judge to decide between the two rival positions on the evidence.

ix) The Judge said: "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."

x) He then referred to various authorities and Dicey, Morris & Collins on *The Conflict of Laws* ("Dicey"). He accepted the Defendant's argument that:

> "…the rate of interest is a procedural decision and is governed by the *lex fori*. In other words, this court, should apply the rate of interest that is applicable in the law of England and Wales."

xi) He said:

> "…I am minded to follow that line of argument and award interest as per England and Wales law, because it should be determined by *lex fori* as opposed to *lex causae*."

xii) He justified his decision to reach that conclusion by referring to Dicey again, and to the decision of the Court of Appeal in *Lesotho Highlands Development Authority v Impregilo S.p.a.* [2003] 2 Lloyd's Rep 497 and of Bristow J in *Miliangos v George Frank (Textiles) Ltd (No 2)* [1977] 1 QB 489.

xiii) He then said:

> "It has been said, and I think conceded, that the two approaches contained in the skeleton argument of the defendant actually make no difference in terms of the award. It is just a differing approach. But the crux of the defendant's contentions that there is no entitlement to interest fails, as I have said, but the calculation of that interest is a procedural matter."

The reasoning of J2

21. The reasoning of the Judge in J2 (his reserved written judgment) was as follows:

i) He began by saying "It was agreed that Spanish law would apply to this claim and further that liability was not in issue".

ii) He said "Prior to the hearing of this matter all items of loss had been agreed save for the recoverability of interest… The Defendant challenged the applicability of the penalty interest that is awarded under Spanish law…"

iii) He said "The expert stated that interest under Article 20 of the Spanish 50/1980 Insurance Contract Act contemplates a penalty interest where insurers have not made any relevant interim payment within 3 months from the accident". He then set out the Spanish rates from the expert report.

iv) At para 12 he said:

> "It was agreed that the burden of proof lay on the Claimant to establish that under foreign law interest was payable, but that if it was then the rate of interest stated the Claimant should be determined by the lex causae i.e. under Spanish law, relying on Dicey that the preferred course would be to interpret Rome II as being the rate of interest on damages in respect of tortious obligations to be governed by the lex causae."

This is not easy to follow. It was certainly not agreed that the rate of interest should be determined by the *lex causae*. The Claimants said that it should (and therefore claimed the higher rates, which are the Spanish rates). The Defendant said that it should not. The Judge ultimately sided with the Defendant and awarded the lower rates of interest usual in England and Wales. The passage should, therefore, be read with the following punctuation and emphasis:

> "It was agreed that the burden of proof lay on the Claimant to establish that under foreign law interest was payable, but […] the rate of interest (stated the Claimant) should be determined by the lex causae i.e. under Spanish law, relying on Dicey [i.e. Dicey's suggestion] that the preferred course would be to interpret Rome II as being [i.e. as having the consequence that] the rate of interest on damages in respect of tortious obligations [is] to be governed by the lex causae."

v) The Judge referred specifically in this respect to "a tentative suggestion at paragraph 7-113 in Dicey". Para 7-113 of Dicey reads, in part, as follows:-

> "At least on the present state of the English authorities, however, rates of interest have been regarded as procedural even after the advent of the Rome Convention;
>
> > [footnote 455 here cites "*Lesotho Highlands Development Authority v Impregilo SpA* [2003] EWCA Civ 1159, [2003] 2 Lloyd's Rep. 497, at [50], expressly adopting the reasoning in this paragraph, reversed on other grounds, without reference to the point, [2005] UKHL 43, [2006] 1 A.C. 221. See also *Rogers v Markel Corp* [2004] EWHC 1375 (QB) (without express reference to the Rome Convention) and further proceedings: [2004] EWHC 2046 (QB)"]
>
> and there is no compelling reason to lead to a different conclusion in respect of substantially identical wording on the scope of the governing law in the Rome I Regulation. The ambit of the exclusion of evidence and procedure in both the Rome I and Rome II Regulations may well be subject to elaboration by the European Court in due course and it is to be hoped that rates of interest will be classified in the same manner for the purposes of both Regulations. Until then, it is tentatively suggested that the rate of interest on damages in respect of tortious obligations [footnote 456 adds: And other non-contractual obligations falling within the ambit of the Rome II Regulation] is governed by the *lex causae*. [footnote 457 adds: But that the matter cannot be regarded as settled.]

vi) It can be seen from this extract that the Judge's reference to "a tentative suggestion at paragraph 7-113 in Dicey" is a reference to Dicey's suggestion that the rate of interest on damages in tort "is governed by the *lex causae*".

The Judge must have rejected that suggestion in Dicey because he did not apply Spanish rates. Instead, he applied the lower rates usual in England and Wales. This confirms that in this part of J2 (specifically, para 12), the Judge was only setting out his understanding of the arguments being advanced by the Claimants, and not adopting them or indicating his own view. He went on to reject the Claimants' case, and to award the lower rates. In his summary of the Claimants' case in para 12 of J2, however, he also mentioned *Maher v Groupama Grand Est* [2010] 1 WLR 1564, and the proposition that (as the Judge put it)

> "…the power to make an award of costs was procedural but the section giving power to award interest created a substantive right".

However, he did not treat the power to award interest as a substantive right (which would have been governed by the *lex causae*, and therefore the Spanish rates) but, instead, treated his own power to award interest as a procedural matter, to which he applied the *lex fori*, ordering interest at the lower rates usual in England and Wales. This was what the Court of Appeal in *Maher* also did, in the result (paras 39-40 of *Maher*).

vii) After briefly summarising the Claimants' submissions in para 12 of J2, the Judge summarised the Defendant's submissions in paras 13-17 in the following way:

> "1. Procedure is governed by *lex fori* i.e. English law, whereas matters of substance governed by *lex causae*, that is Spanish law.
>
> 2. The availability of a right to interest is a substantive question governed by Spanish law, whilst the rate of interest being a procedural matter is governed by English law. Reliance was placed on the *Miliangos* and *Lesotho Highlands* cases, the latter dealing with a determination of the rate of interest for damages for breach of contract and the Rome I.
>
> 3. The primary argument is that interest is not recoverable under Spanish law as the expert report only "contemplates" penalty interest which is not an absolute right and only offers interest in principle.
>
> 4. Rome II Regulation does not expressly stipulate whether it applies to interest, but according to Dicey it would be unsatisfactory for the meaning and scope of the exclusions of evidence and procedure in the Rome I and II to differ.
>
> 5.Alternatively, interest is entirely a procedural matter and the English law applies to both the issue of availability of a right to interest and the rate of any available interest awarded – reliance was placed on cases of *Midland International Trade Services v Sudairy* and *Maher v Groupama*."

viii) J2 then set out Dicey paras 7-108 and 7-110 to 7-113 verbatim.

ix) Having thus referred to the submissions of the Claimants and the Defendant respectively, the Judge reached a section headed "Conclusions", in which he provided the reasoning for his own decision, in paras 19-26 of J2, as follows.

x) At paras 19-20 he said:

> "I am satisfied on the balance of probabilities that paragraph 70 of the expert's report sets out clearly under Spanish law that article 20 allows a remedy by way of an interest claim as set out above in relation to this case. The expert's report says as much. It was unclear whether this was a mandatory entitlement as it was "contemplated".
>
> There was no evidence before this court to suggest that the Defendant had made an interim payment within 3 months as outlined in Article 20 and therefore on the face of [the] Article, an award of interest could be "contemplated". The expert's report is very detailed, is a single joint expert's report, complies with CPR 35 and no questions were raised for clarification purposes by either party."

xi) In para 22 the Judge referred to the exclusion of evidence and procedure from Rome II by Article 1(3) and continued (in paras 23-24 of J2):

> "The case of *Maher* although not conclusive regarding Rome II is in my judgment a pertinent indicator as to how rates of interest should be awarded under tort which is governed by *lex fori*.
>
> There is no Court of Appeal authority to state that the approach in *Maher* does not apply to Rome II cases."

xii) The Judge then said (in paras 25-26 of J2):

> "This case is being litigated in England and Wales and interest under section 69 of the County Courts Act 1984 being considered procedural in nature, and by applying Article 1(3) of both Rome Regulations, then the rate of interest claimed for damages in tort falls to be decided by English and Welsh law.
>
> It is for those reasons that I determined that interest should be awarded on special damage at 0.5% and general damages at 2% from date of issue of the claim form."

22. The Judge said he was applying Article 1(3) "of both Rome Regulations" but, strictly speaking, he was applying Article 1(3) of Rome II only, although the wording of Article 1(3) Rome I is identical. This was a case to which Rome II applied, and Rome I did not apply.

i) Rome I is Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations. The Claimants' action was not a contract action.

ii) Rome II is Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations. The Claimants' tort action was, it is common ground before me as it was before the Judge, obviously a claim based upon non-contractual obligations.

23. If Rome II applied to the interest claim, it would apply Spanish law as the *lex causae*. This would have been the outcome in accordance with the "tentative suggestion" in Dicey para 7-113 cited by the Judge. It will be recalled that Dicey's suggestion extends, not only to a right to recover interest, but also to the rate of interest recoverable. Dicey's suggestion is that "the rate of interest on damages in respect of tortious obligations is governed by the *lex causae*".

24. However, Article 1(3) has identical wording in both Regulations (as the Judge indicated), and provides as follows:

> "This Regulation shall not apply to evidence and procedure…"

25. The Judge decided that the Claimants' interest claim was a procedural matter, excluded from Rome II by Article 1(3). Hence he applied the *lex fori*, refused to award interest at Spanish rates, and, instead, awarded interest at the lower rates usual in England and Wales.

26. I am not confident that the Judge appreciated that he was disagreeing with Dicey, whom he had cited at great length and with apparent approval in J2. There is also no indication in J2 that the Judge thought he was departing from his reasoning in J1 (although, as I have said, he would have been entitled to do that). He was not departing from his conclusion, which remained that lower rates rather than Spanish rates should be awarded. However, the reasoning in J1 also seemed to proceed on the basis that the Judge intended to follow Dicey. This is particularly clear from para 9 of J1, which said:

> "Having considered a number of authorities, and in particular the approach suggested in Dicey, which appears to have been adopted by Brooke LJ in the Court of Appeal decision in *Lesotho Highlands Development Authority*, I am minded to follow that line of argument and award interest as per England and Wales law, because it should be determined by *lex fori* as opposed to *lex causae*. Whilst it is clear that the Court of Appeal had in mind a decision from Ontario, a Canadian authority, it would appear that Brooke LJ stated in the *Lesotho* case: "So far as the rate of interest is concerned, in the absence of express agreement this is a matter for the arbitrators", it being an Arbitration Act claim, "as a matter of the *lex fori*." He quotes Dicey and Morris, 13th Ed, and he adopts the editor's "reasoning"."

27. It is also suggested by the conclusion of J1, at paras 11-12, which says:

> "It has been said, and I think conceded, that the two approaches contained in the skeleton argument of the defendant actually make no difference in terms of the award. It is just a differing approach. But the crux of the defendant's contentions that there is no entitlement to interest fails, as I have said, but the calculation of that interest is a procedural matter. Bearing in mind that Dicey 7-111 states that "Rome I regulation expressly states that the substantive scope of the provisions of the regulation should be consistent with those of Rome II regulation", I think it is accepted by both parties that this is a Rome II case. The footnote says that "Recital 7 of the Rome II Regulation contains no provision and predates the Rome I regulation and contains no similar provision." That is 449 in the footnote.
>
> So it is for those reasons that I make those findings."

28. This last passage – from J1 – needs qualification. It was not accepted by the Defendant that this was a Rome II case for the purposes of assessing interest. The Judge himself was assessing interest in accordance with the *lex fori* of England and Wales rather than the *lex causae* of Spain which would have been the appropriate law if Rome II applied to that exercise.

The reasoning of J3

29. When refusing the Defendant (as opposed to the Claimants) permission to appeal in J3, the Judge made the following additional observations which are helpful in throwing further light on his thinking:-

    i) He said "…para 19 [i.e. of J2 – quoted in para 21(x) above] clearly states where the burden of proof lay, transparently set out why the burden of proof had been satisfied by the claimant and why it was reasonable for the court to conclude that interest as "contemplated" by article 20 was recoverable in the instant case, albeit potentially discretionary."

    ii) He said "…it was reasonable for the court to conclude on the balance of probabilities from the evidence before it that no relevant interim payments had been made".

        (The Defendant accepts that and does not dispute this conclusion.)

    iii) Finally, he said:

        > "The expert's report was prepared for the purposes of this case as referenced in the judgment (see paragraph 7 of the judgment [i.e. J2]) and not as some generic treatise on Spanish law. The detailed report did not set out any bar or impediment for the recovery of interest in this case, other than to say it was contemplated and the court did not reverse the burden of proof in concluding accordingly that interest was on the face of Article 20 recoverable in respect of both Claimants. The

> defendant could have potentially bolstered its position significantly on this point, if it had asked appropriate questions to the expert prior to the hearing. It did not do so. It would not have affected the burden of proof."

Discussion and decision

30. The first question is whether the Judge was wrong to decide that the *lex fori* rather than the *lex causae* applied to his award of interest in this case.

31. On one view, this was a short question which turned simply on the proper application of Article 1(3) of Rome II to the facts of this case. If Rome II was not excluded, the Judge should have applied the *lex causae*, i.e. Spanish law. But, instead, he applied the *lex fori*, i.e. the law of England and Wales. He therefore awarded interest under section 69 of the County Courts Act 1984, which was the forum law.

32. This could only be correct if Article 1(3) meant that Rome II did not apply to the award of interest in this case.

33. Article 1(3) provides:

> "This Regulation shall not apply to evidence and procedure…"

34. The Defendant's argument was that this excluded Rome II. The Defendant argued that the award of interest was procedural. The Judge accepted that. The Claimants say he wrong to do so, and now appeal on that point.

35. Para (4) of the Preamble identifies the context of Rome II as "the harmonisation of conflict-of-law rules". Rome II came into force on 11 January 2009. Rome II has direct effect in Great Britain, without the need for any implementing legislation. It therefore came into force before the Claimants' accident in December 2014.

36. Article 1 of Rome II is entitled "Scope". Article 1(1) provides: "This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters."

37. Article 1(2) contains a number of specific exclusions which have no application to the present case. The Defendant relies (as did the Judge) on Article 1(3) to exclude the award of interest from the scope of Rome II.

38. Article 15 is entitled "Scope of the law applicable". Of potential relevance are Articles 15(a), (c) and (d) which provide:-

> "15. The law applicable to non-contractual obligations under this Regulation shall govern in particular:
>
> (a) the basis and extent of liability…
>
> (…)
>
> (c) the existence, the nature and the assessment of damage or the remedy claimed;

> (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;"

39. *KMG International NV v Chen* [2019] EWHC 2389 (Comm) conveniently summarises material relevant to the interpretation of Article 1(3). *KMG* quotes from the *travaux préparatoires* for Rome II, including the European Commission's original proposal (dated 22 July 2003) in relation to the specific exceptions in Article 1, which did not at that point include the exclusion of matters of evidence and procedure later incorporated into Article 1(3). This said:

> "These being exceptions, the exclusions will have to be interpreted strictly.
>
> The proposed Regulation does not take over the exclusion in Article 1(2)(h) of the Rome Convention, which concerns rules of evidence and procedure. It is clear from Article 11 [which eventually became Article 15] that, subject to the exceptions mentioned, these rules are matters for the *lex fori*. They would be out of place in a list of non-contractual obligations excluded from the scope of this Regulation."

40. Article 1(3) was introduced subsequently, when the draft came before the European Parliament, with the following explanation:

> "This amendment takes account of the universal principle of *lex fori* within private international law that the law applicable to procedural questions, including questions of evidence, is not the law governing the substantive legal relationship ("*lex causae*") but, rather, the procedural law of the forum."

41. Pausing there, it is an elementary and uncontroversial proposition that procedural questions (in this case) would be governed by English and not Spanish law. But that begs the harder question: is the award of interest procedural?

42. In *Actavis UK Ltd v Eli Lilly & Co* [2015] EWCA Civ 555 (a decision overturned by the Supreme Court on other grounds at [2017] UKSC 48) 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 paragraph 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 at 724-5.
>
> 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."

43. Is the payment of interest on damages one of the "non-contractual obligations" brought within Rome II by Article 15? Or is the award of interest to be characterised as a procedural matter, so that Rome II is disapplied by Article 1(3)? Might the award of interest be part of "the remedy claimed", so as to be specifically included within Rome II by the non-exhaustive list in Article 15, and, in particular, Article 15(c)? Might the award of interest be one of "the measures which a court may take … to ensure the provision of compensation", so as to be specifically included in Rome II by Article 15(d)? Might the award of interest even be part of the "extent of liability", so as to be specifically included by Article 15(a)?

44. Rome I and Rome II form part of a policy scheme for the harmonisation of private international law across the member states, which should be expected to be broadly consistent in its interpretation and application across the two Regulations. The fact that Article 1(3) of Rome II is identical to Article 1(3) of Rome I, coupled with the observation of Flaux LJ in *Actavis UK Ltd* at para 144 that "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", strongly suggests that the interpretation of Article 1(3) in Rome I and Rome II respectively should be the same.

45. Whether the award of interest is to be characterised as a procedural rather than a substantive right may depend on the basis upon which interest is claimed. If there is a contractual right to interest, as there sometimes is, that would be governed by Rome I and not Rome II, and it would be a claim of substantive right (under the contract) and would not, therefore, be excluded by Article 1(3) of Rome I.

46. But that is not this case. The Claimants' cause of action was in tort, and not in contract; it was a non-contractual claim under Rome II.

47. The Claimants argue that Spanish law gave them a right to interest, at fixed rates, and that this right should therefore be characterised as substantive rather than procedural. From this, they argue that it was not a right excluded from Rome II by Article 1(3).

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". They refer to para 37: "I remain of the view that Hobhouse J [in *Midland International Trade Services Ltd v Al Sudairy* (1990)] was right in holding that section 35A of the 1981 Act creates a remedy rather than a substantive right to interest". Finally, they rely on para 38 where Moore-Bick LJ says that *Lesotho Highlands Development Authority v Impregilo SpA* [20016] 1 AC 221 "…lends some support to the conclusion that section 35A creates a remedy rather than a substantive right".

49. The issue in *Maher* was whether, in an action brought against insurers in England for damages arising from a road traffic accident in France, the question of the award of interest should be determined under French law or English law (para 5). Moore-Bick LJ decided that the key to the determination of this issue was "the proper classification of the court's power to award interest" (para 25). He decided 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*" (para 33). In other words, if there is an absolute right to interest under the *lex causae*, that is part of the substantive claim under Rome II and would not be excluded by Article 1(3). But he emphasised that the English court's power to award interest under section 35A of the Senior Courts Act 1981 is discretionary, procedural and additional, and contrasted that with a substantive right (para 35).

50. In rejecting arguments that it was not truly discretionary, Moore-Bick LJ said, at para 35:

> "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."

51. It was his conclusion that interest under section 35A of the Senior Courts Act is a discretionary remedy rather than a substantive right claimed from the tortfeasor that led

him to decide that it was a procedural matter governed by the *lex fori* (which meant it was not excluded by the *lex causae*). He said (at para 40, emphasis the judge's own) as follows:-

> "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."

52. The conclusion in *Maher* that a procedural, discretionary power to award interest under English law could be applied "whether such a substantive right exists or not" in the foreign *lex causae* is contrary to a submission by the Defendant that, if the Claimants cannot show a right to recover interest under the *lex causae*, the claim for interest will fail entirely, citing Leggatt J in *AS Latvijas Krajbanka v Antonov* [2016] EWHC 1679 (Comm) at para 13. However, Leggatt J was aware of the judgment of Moore-Bick LJ in *Maher*; he cited it at para 7, saying:

> "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 might well include any relevant provisions of the applicable foreign law relating to the recovery of interest".

53. In para 13 of his judgment, Leggatt J was not deciding that, because (in his case) the foreign law did not recognise a right to interest, he had no power to award such interest under section 35A of the Senior Courts Act 1981 because Rome II applied. Rather, he was bearing the position in Latvian law in mind when deciding to exercise his discretion under the 1981 Act not, in that case, to award interest.

54. In *Abdel Hadi Abdallah Al Qahtani & Sons v Antliff* [2010] EWHC 1735 (Comm) interest was positively excluded by the Sharia law of Saudi Arabia, the *lex causae*. Nevertheless, the judge awarded simple interest pursuant to the discretionary power in section 35A of the Senior Courts Act 1981, on the basis (applying *Maher*) that this was a matter of procedure governed by the *lex fori* (per Jonathan Hirst QC at para 59).

55. In any event, in the present case an interest remedy was available under Spanish law, because this was stated in the joint Expert Report to be the case. The award of interest under the procedural law of England as the *lex fori* was not, therefore, inconsistent with or precluded by the substantive law of the *lex causae.*

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 Corporation* [2004] EWHC 1375 (QBD) at para 81, applying *Miliangos v George Frank (Textiles) Ltd (No 2)* [1977] 1 QB 489

at 497B-D and *Lesotho Highlands Development Authority v Impreglio SpA* [2003] EWCA Civ 1159.

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) at 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 3 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 paras 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)

67. In the present case, the chronology of accident, claim and judgment (before which no payment was made) was as follows:-

    i) The accident occurred in Spain on 28 December 2014.

    ii) No "penalty interest" was payable if payment was made within three months of the accident, i.e. by 28 March 2015. If payment was made on or before 28 March 2015, no "penalty interest" was payable.

    iii) If payment was not made by 28 March 2015, the first period of penalty interest under the Spanish rates (if applied) was from 28 December 2014 to 28 December 2016, when they were 6% (2014), 5.25% (2015) and 4.5% (2016).

    iv) A letter before claim was sent to the Defendant's claims management company in England on 25 February 2016, and acknowledged on 29 February 2016. Before this, the Defendant was not aware of the accident or the claim.

    v) The penalty interest rate under the Spanish rates (if applied) rose to a flat variable rate of 20% from 29 December 2016 until payment.

    vi) Proceedings were issued on 20 March 2019 and served on 25 March 2019.

    vii) Following exchange of pleadings and witness statements, and the preparation of a report on Spanish law from a jointly instructed single expert dated 24 January 2020, the trial took place on 24 February 2020.

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.

72. The Claimants' appeal must therefore be dismissed, and the Defendant's cross-appeal does not have to be decided.