

Penal Interest Awarded in Accordance with Spanish Law by English Court

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Introduction

In [Nicholls v Mapfre \[2024\] EWCA Civ 718](#) (“*Nicholls*”), the Court of Appeal grappled with an important question for cross-border disputes: whether a penalty interest rate that is payable under Spanish law should be awarded by the English courts.

The case concerned individuals who had each suffered personal injuries in Spain and sought compensation against a Spanish insurer, Mapfre, in the English courts. Liability was admitted, and damages were assessed under Spanish law in accordance with the provisions of 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 (“*Rome II*”). One of the key issues on appeal was whether a Spanish penal interest rate provision which applies to insurers should be interpreted as a matter of procedure for the purposes of *Rome II* (and as such would not be payable in proceedings brought in the courts of England and Wales) or whether the penal interest rate provision is a matter of substantive law such that it could be awarded by the English courts applying Spanish law. Mapfre argued that English procedural rules already contain mechanisms to encourage early settlement of claims (*i.e.*, the Part 36 regime under the Civil Procedure Rules (the “*CPR*”)), and so English courts should not also apply penalty interest provisions that arise under a different procedural regime.

On the facts, the Court was not persuaded by Mapfre’s argument and concluded that (i) the Spanish penal interest provision (Article 20 of Act 50/1980) directed towards insurers was a substantive as opposed to procedural matter under *Rome II*, and so Spanish law applied; and (ii) even if interest payable under Article 20 of Act 50/1980 should be considered a procedural matter under *Rome II*, the English courts could nonetheless exercise their discretion to award the claimants an equivalent rate of penal interest. The Court’s reasoning is discussed further below. The Court also addressed the applicable law to a subrogation issue in the case, but as that was a relatively straightforward issue it will not be covered in this case update.

Spanish Penal Interest Payable in English Court Proceedings

The Court concluded that the interest payable under Article 20 of Act 50/1980 is not a matter of “procedure” under Article 1(3) of Rome II. In other words, it is a matter of substantive law under Rome II (i.e., Spanish law), and so penal interest under Article 20 of Act 50/1980 was payable by Mapfre to the claimant insureds. This was for three separate but interrelated reasons:

- The wording of Article 15(c) of Rome II, which provided that “the existence, the nature and the assessment of damage or remedy claimed” fell within the scope of the applicable law under Rome II, supported the view that the payment of interest under the Spanish legal interest rate is effectively part of the nature and assessment of damage or the remedy claimed, because it is intertwined with the assessment of damages in Spain.
- The payment of interest under Article 20 of Act 50/1980 is part of the process by which interest on damages is assessed under the laws of Spain, given that it has an effect on the interest rate whether it applied or not. If Article 20 applies on the facts of the case, then the Spanish legal rate of interest is increased to the penal rate in Article 20 of Act 50/1980. However, even if it does not apply, the basic Spanish legal interest rate is also increased in accordance with the “increase of pensions in Spain”.
- The fact that the interest payable for a personal injury claim can be substantially increased to a penal rate under Article 20 of Act 50/1980 to encourage prompt resolution of disputes by insurers, did not alter the conclusion above. The Court observed that this was an integral way in which damages are assessed in Spain. Notably, it had earlier taken note of the discussions of experts who indicated that, under the laws of Spain, it is possible to have interest which was penal, paid as part of the *compensation* to the claimant.

In reaching this decision, the Court of Appeal departed from the High Court’s decision [in *Susan Sedgwick v Mapfre Espana Compania De Seguros y Reaseguros SA* \[2022\] EWHC 2704 \(KB\)](#). In that case, Lambert J had concluded that the interest payable under Article 20 of Act 50/1980 was a matter of procedure and so governed by the law of England and Wales. Lambert J stated that the purpose of the Spanish penal interest rate regime was aimed at penalising the defendant and ensuring the early disposal of cases as opposed to

providing reparation for the claimant and so was not a substantive right. In contrast, the Court of Appeal's decision did not regard this as conclusive—it undertook a broader exercise in examining the purpose, wording and content of Act 50/1980 before concluding that it was intertwined with the substantive Spanish law of the assessment of damages and was not simply a matter of procedural discretion. The Court of Appeal's conclusion affirms one of the findings of the High Court in [*Jane Nicholls and Axa Assistance Group v Mapfre Espana Compania De Seguros y Reaseguros SA and Sonia Woodward v Mapfre Espana Compania De Seguros y Reaseguros SA* \[2023\] EWHC 1031 \(KB\)](#) (“Woodward”) in which Martin Spencer J was also persuaded that the penalty interest provisions in the Spanish law were characterised as substantive legal provisions.

English Court's Discretion to Award an Equivalent Interest Rate

The Court of Appeal also found that even if the Spanish interest rate was a procedural matter, a court in England and Wales is entitled to exercise its discretion to make an equivalent interest award either under section 35A of the Senior Courts Act 1981 or section 69 of the County Courts Act 1984. In doing so, it reached a different conclusion on this issue to the High Court in *Woodward*. The Court of Appeal reasoned that (i) judges exercising their statutory discretion to award interest have long considered that relevant factors to be taken into account may include relevant provisions of overseas law relating to the recovery of interest; (ii) such a result would place the claimants in the same position they would have been in had they been a claimant for damages for personal injuries against the insurer in Spain; and (iii) given the importance of interest paid under the Act 50/1980 to the overall sums assessed to be due to an injured claimant from an insurer in Spain, it would be an unusual case where such an important component of the overall award should be left out of the award as an exercise of discretion.

The Court also considered the issue that had been raised by Mapfre's counsel that English procedural rules already contain provisions to encourage the early settlement of disputes within Part 36 of the CPR, and as such, allowing the award of the Spanish penal interest could lead to a double penalty (i.e., of Spanish penal interest and Part 36 interest). Although this issue didn't arise in the case, the Court of Appeal recorded that whether it is appropriate to award extra interest under Part 36 when an insurer had been ordered to pay penal interest under Article 50/1980 involves a separate exercise of discretion. Foreign insurers should thus be wary that there is a possibility that they might be subject to penal interest twice, both under English law and the relevant foreign law. For example, in cases where a Part 36 offer had been made by the claimant and the judgment is at least as advantageous in money terms as that offer, CPR r. 36.17(4)(a) requires the court, unless it would be unjust to do so, to award the claimant an enhanced

interest on all or part of the damages at up to 10% above the base rate. A foreign insurer defendant would not be assisted by judicial pronouncements that there is “no injustice” to an insurer who is made to pay interest under both Article 20 of Act 50/1980 and Part 36 ([Scales v Motor Insurers’ Bureau \[2020\] EWHC 1749 \(QB\)](#)). This makes England and Wales an attractive forum for claimants who may benefit from both regimes. Nonetheless, the Court of Appeal has made clear that the application of Part 36 interest in these circumstances is discretionary and may not be awarded in all cases. A future court may be influenced by the fact that imposing a double penalty would undermine the objective of Rome II, which seeks to harmonize the laws of the EU countries, including the UK, to ensure that the recovery from torts or delicts is “identical irrespective of the forum in which the proceedings were brought”.

Key Takeaways

The case is of interest to parties involved in cross-border disputes who are considering bringing a tort claim in the courts of England and Wales. It is particularly noteworthy for foreign insurers who are considering settlements of disputes brought in the English courts. The Court of Appeal’s finding creates a potentially advantageous environment for claimants who may be entitled to recover damages, foreign penalty interest, Part 36 enhanced interest and legal costs.

The Court of Appeal’s finding should not be read as accepting that all foreign interest provisions are applicable in proceedings brought in the English courts. We consider that there may be scope to distinguish *Nicholls* in similar future cases on the basis that interest provisions in another country might be very different from the Spanish penal interest provisions under Act 50/1980. Whether foreign interest provisions are applicable will require a fresh, fact-sensitive analysis as to whether those provisions are intrinsically linked to the assessment of damages which the claimant can recover.

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