SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2020] EDIN 11

CA31/19

JUDGMENT OF SHERIFF WILLIAM HOLLIGAN

in the cause

ORMISTONS LAW PRACTICE LTD

Pursuer

against

THE SCOTTISH LEGAL AID BOARD

Defenders

Pursuer: Smith QC; Ormistons Law Practice Ltd
Defenders: Duncan QC; Solicitor to the Scottish legal Aid Board

Edinburgh, 6 January 2020

The sheriff, having resumed consideration of the cause, puts the matter out by order in order to determine further procedure and assigns 31 January 2020 at 9 30 am at the Sheriff Court, 27 Chambers Street, Edinburgh as a diet therefor.

Note

[1] The pursuer is a firm of solicitors. The defenders are the Scottish Legal Aid Board ("the Board"). In this commercial action the pursuer craves a declarator that the Board is liable to pay to the pursuer statutory interest on an account submitted by it to the defender; it also seeks decree for payment of the sum the pursuer says constitutes the interest exigible on the account. Although the particular sum craved is modest I was told this is but one of

many accounts to which payment of interest, if payable, would apply. The total sum is significant.

[2] During the case management hearings it was thought that a proof might be required to resolve all issues and a diet of proof was accordingly assigned. One of the issues on record is that of computation of any interest payable. The respective positions of the parties are as set out in article 7 and answer 7. In the hearing before me parties agreed that issue no longer requires the adjudication of the court. The remaining issue (whether interest is exigible on the relevant account) is a legal issue. In short, the defender seeks dismissal of the action. If successful on the main issue, the pursuer seeks further procedure. It was agreed that, for procedural reasons, the matter before me ought to proceed by way of debate rather than proof and that is how the hearing was conducted.

[3] The key issue in this case involves the interaction between two pieces of legislation: the Legal Aid (Scotland) Act 1986 ("the 1986 Act") and the Late Payment of Commercial Debts (Interest) Act 1998 ("the 1998 Act"). Interpretation of the 1998 Act involves consideration of Directive 2011/7/EU entitled "On Combating Late Payment in Commercial Transactions" (the Directive"). There is an earlier Directive (2000/35/EC) ("the 2000 Directive") which was superseded by the Directive and is not relevant to the present issue.

The Structure of the Legal Aid and Advice provisions

[4] The particular aspect of legal aid with which the matter is concerned is the provision of Legal Advice and Assistance ("LAA"). For the purposes of this action it is immaterial whether advice is provided by way of representation ("ABWOR") or otherwise. The current structure for LAA is to be found in Part II of the 1986 Act and the Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 2447/1996 ("the 1996 Regulations").

[5] "Advice and Assistance" is very broadly defined ("application of Scots Law to any particular circumstances which have arisen in relation to the person seeking the advice" – section 6(1)(a)). It includes, but is not limited to, advice as to the pursuit and settlement of a claim. Legal aid to pursue or defend legal proceedings is dealt with elsewhere within the 1986 Act. "Person" is defined in section 41 as not including a body corporate or un-incorporate except in particular, limited circumstances. An application for LAA requires to be in a form prescribed by the Board but it is the solicitor who determines eligibility (regulation 8). Although section 6(1)(a) refers to advice given to a person, in the majority of the other sections in Part II reference is made to the "client". Financial eligibility for LAA proceeds on a sliding scale, depending on the income and capital of the applicant. There are also specific measures for what may be described as certain passport benefits. Depending upon his or her income, a client may be required to pay a contribution which the solicitor collects. There is a financial limit in relation to fees payable to a solicitor on providing LAA but that is subject to increase and the prior approval of the Board. If the solicitor gives advice and assistance he requires to send the Board a copy of the client's application within 14 days of the application (regulation 11). A provision is made for a solicitor withdrawing from acting for the client (regulation 14) and for a change of solicitor (regulation 14A). A client in receipt of LAA requires to provide to the Board such information and documentation the Board may require for the purposes of performing its functions under the 1986 Act (regulation 15A).

[6] In relation to payment of the solicitor reference was made by counsel to sections 4 and 33 of the 1986 Act:

"**Section 4**

(1) The Board shall establish and maintain a Fund to be known as the Scottish Legal Aid Fund…

(2) There shall be paid out of the Fund:

(a) subject to section 4A(13) such sums as are by virtue of this or any regulations made thereunder due out of the Fund to any solicitor or counsel or registered organisation in respect of fees and outlays properly incurred or in respect of payments made in accordance with regulations made under section 33(3A) of this Act in connection with the provision, in accordance with this Act, of legal aid or advice and assistance.

Section 33 Fees and outlays of solicitors and counsel

(1) Subject to subsections (3A) and (3B) below, any solicitor or counsel who acts for any person by providing legal aid or advice and assistance under this Act shall be paid out of the Fund in accordance with section 4(2)(a) of this Act in respect of any fees or outlays properly incurred by him in so acting…

Section 12 of the 1986 Act provides as follows:

…

(3) Except in so far as regulations made under this section otherwise provide, fees or outlays to which this section apply shall be paid to the solicitor… as follows –

(a) *first* out of any amount payable by the client in accordance with section 11(2) or, as the case may be section 11A(2) of this Act;

(b) *secondly,* in priority to all other debts, out of any expenses which (by virtue of a judgment or order of a court or agreement or otherwise) are payable to the client by any other person in respect of the matter in connection with which the advice and assistance is provided;

(c) *thirdly,* in priority to all other debts, out of any property (of whatever nature and wherever situated) which is recovered or preserved for the client in connection with that matter, including his rights under any settlement arrived at or in connection with that matter in order to avoid or bring to an end any proceedings;

(d) *fourthly,* by the Board out of the Fund, following receipt of a claim submitted by the solicitor…".

[7] Read short, regulation 17 of the 1996 Regulations directs that fees and outlays shall only be for work actually, necessarily and reasonably done in connection with the matter. Regulation 18 provides:

> "(1) Where the solicitor considers that the fees and outlays properly chargeable for the advice or assistance exceed any contribution payable by the client under the provisions of section 11 of the Act together with any expenses or property recovered or preserved under the provisions of section 12 of the Act as read with regulation 16, he shall, within one year of the date when the giving of advice and assistance was completed, submit an account to the Board…
>
> (2) Where the Board receives an account in accordance with paragraph (1) above, it shall assess the fees and outlays liable to the solicitor for the advice and assistance in accordance with regulation 17 and shall determine accordingly any sum payable out of the Fund and pay it to the solicitor
>
> …
>
> (3) If the solicitor is dissatisfied with any assessment of fees and outlays by the Board under paragraph (3) above, he may require taxation of his account by the auditor; the auditor shall tax fees and outlays allowable to the solicitor for the advice and assistance in accordance with regulation 17, and such taxation shall be conclusive of the fees and outlays so allowed.".

The late payment structure

[8] The relevant parts of the 1998 Act are as follows:

> "Section 1 –
>
> It is an implied term in a contract to which this Act applies that any qualifying debt created by the contract carries simple interest subject to and in accordance with this Part.
>
> …
>
> Section 2 – Contracts to which Act applies
>
> > (1) This Act applies to a contract for the supply of goods or services where the purchaser and the supplier are each acting in the course of a business, other than an excepted contract.
> >
> > (2) In this Act 'contract for the supply of goods or services' means –

(a) a contract of sale of goods: or

(b) a contract (other than a contract of sale of goods) by which a person does any, or any combination, of the things mentioned in subsection (3) for consideration that is (or includes) a money consideration.

(3) Those things are

...

(c) agreeing to carrying out a service

…

(7) In this section –

'business' includes a profession and the activities of any government department or local or public authority;"

Section 2A - Application of the Act to Advocates

"The provisions of this Act apply to a transaction in respect of which fees are paid for professional services to a member of the Faculty of Advocates as they apply to a contract for the supply of services for the purpose of this Act".

Section 2A was inserted by Scottish Statutory Instrument (SSI 2002/335) in 2002.

[9] As both parties referred to the Directive in detail it is necessary that I should set out the relevant parts thereof. The aims and objectives of the Directive are set out in the recitals of which there are 39, not all of which it is necessary to record.

"(2) Most goods and services are supplied within the internal market by economic operators to other economic operators and to public authorities on a deferred payment basis whereby the supplier gives its client time to pay the invoice…

(3) Many payments in commercial transactions between economic operators or between economic operators and public authorities are made later than agreed in the contract or laid down in the general commercial conditions.

(4) Judicial claims related to late payment are already facilitated… However, in order to discourage late payment in commercial transactions it is necessary to lay down complimentary provisions.

…

(8) The scope of this Directive should be limited to payments made as remuneration for commercial transactions. This Directive should not regulate transactions with consumers, interest in connection with other payments, for instance payments under the laws on cheques and bills of exchange, or payments made as compensation for damages including payments from insurance companies…

(9) This Directive should regulate all commercial transactions irrespective of whether they are carried out between private or public undertakings or between undertakings and public authorities, given that public authorities handle a considerable volume of payments to undertakings. It should also therefore regulate all commercial transactions between main contractors and their suppliers and subcontractors.

(10) The fact that the liberal professions are covered by this Directive should not oblige member states to treat them as undertakings or merchants for purposes outside the scope of this Directive.

(11) The delivery of goods and the provision of services for remuneration to which this Directive applies should also include the design and execution of public works and building and civil engineering works.

…

(17) A debtor's payment should be regarded as late, for the purposes of entitlement to interest for late payment, when the creditor does not have the sum owed at his disposal on the due date provided that he has fulfilled his legal and contractual obligations.

…

(23) As a general rule public authorities benefit from more secure, predictable and continuous revenue streams than undertakings… Long payment periods and late payment by public authorities for goods and services lead to unjustified costs for undertakings.

Article 1 - Subject matter and scope

(1) The aim of this Directive is to combat late payment in commercial transactions, in order to ensure the proper functioning of the internal market, whereby fostering the competiveness of undertakings and in particular of SMEs.

(2) This Directive shall apply to all payments made as remuneration for commercial transactions.

Article 2 – Definitions

(1) 'commercial transactions' means transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration.

Article 3 – Transactions between Undertakings

(1) Member states shall ensure that, in commercial transactions between undertakings, the creditor is entitled to interest for late payment without the necessity of a reminder, where the following conditions are satisfied:

(a) the creditor has fulfilled its contractual and legal obligations…"

Submissions for the pursuer

[10] The argument of the Board is largely that there is no entitlement to interest in terms of the 1998 Act because there is no contract between the parties. The Board is a statutory authority and may only act within its powers but it must also fulfil its obligations under the Act. The structure of LAA gives rise to a tripartite arrangement involving the solicitor, the Board and the client. The funding arrangement in LAA is, in general terms, an unusual one in the sense that a third party (the Board) is funding the payment of the solicitor. "Contract" in the 1998 Act must be given a purposive construction (*Litster* v *Forth Dry Dock and Engineering Co Ltd* 1989 SC (HL) 96). The approach in *Litster* was referred to by the Lord Ordinary in the case of *Smith v SLAB* 2011 SLT 694 at paragraphs [14] and [32]. That case dealt with interest payable by the Board on fees due to counsel. The issue is not whether there was a contract but whether there was a "transaction", the latter being the wording of the Directive. Mr Smith QC referred to sections 2, 3 and 33 of the 1986 Act as to the powers of the Board. He pointed out that, at one point, the English Legal Aid Board was made the subject of a specific exception in the terms of the 1998 Act (Late Payment of Commercial Debts (Interest) (Legal Aid Exceptions) Order 1998/2482). The context in which that was done related to the power of the English Legal Aid Board to enter into contracts with firms

of solicitors. The power of ministers to make exceptions to the application of the 1998 Act was later removed. Mr Smith QC then went through various of the recitals and the provisions of the Directive. In *Smith*, the Inner House seemed to have concluded that the existence of a contract could be ignored (paragraph [14]). The effect of section 2A of the 1998 Act was to put advocates in the same position as solicitors who undoubtedly did have contracts. The court should concentrate on the transactional nature of the tripartite arrangement. The matter was not the conventional one of offer and acceptance. The Directive clearly had in mind the concern as to public authorities being slow in paying. The case of *Smith* is of assistance. The relationship between counsel and client is generally assumed not to be contractual nor is the relationship between counsel and solicitor. It is hard to see it could be argued that the relationship between counsel and the Board is contractual. The court in *Smith* referred to the Directive and pointed to the mischief it was designed to remedy, namely the pressure on small businesses, including individual professional practitioners, caused by the late payment of fees. The absence of a true contractual relationship is not an issue (paragraph [14]).

[11] The decision of the Lord Ordinary in *Smith* contains material which is helpful. The Lord Ordinary considered that delays in payment of fees by the Board are "anomalous"; the delays before payment which existed are considerable. The same comment can be made in the present case, a situation which would not be tolerated if the arrangement was between a solicitor and a private client. The Lord Ordinary held that the 1998 Act must be given a purposive construction. If that is done it inevitably leads to a conclusion that the Act applies to this situation. Reference was also made to the opinion of the Inner House at paragraph [9] in which it was stated that what is important is the "transaction" which leads to payment for services provided. In the present case the pursuer agreed to provide advice to the client;

it is registered to provide legal aid and advice and assistance; the defenders have the statutory obligation to make payment of the correct sum. That, it is submitted, is a "transaction" which engages not only the client, but also the Board. This court is bound by the decision in *Smith* in so far as it determines that the fact that the absence of a "contract" between these parties is irrelevant to whether the 1998 Act applies. The amendment making reference to advocates was only of importance to the court in order to remove any argument that there was no contract at all between counsel and the client. In this case, there has never been any doubt that such a contract existed.

Submissions for the defenders

[12] In his written submission, Mr Duncan QC began by setting out a number of the statutory provisions to which I have referred. Payments for LAA are made by the Board to solicitors in terms of the statutory framework. They do not arise under contract. The solicitor's contract is with his or her client. The solicitor has no contract with the Board. The Board's statutory role is to provide an indemnity for the pursuer's fees and outlays properly incurred under the regulations which indemnity becomes available if, or when, other potential payment avenues have been exhausted or are not available. In this case the contract for the supply of goods or services (the provision of LAA) was with a client who was not a commercial client and would not have been liable for interest under the 1998 Act. A commercial client would have been liable for interest. The second matter is the scope of the 1998 Act. Only in the case of advocates has Parliament extended the right to statutory interest to situations where there is, as a matter of domestic private law, no contract. Although the 1998 Act predated the 2000 Directive and the Directive it is not in dispute that the court requires to have in mind the wording and purpose of these Directives. The

interpretative obligation upon the court is set out in *Marleasing SA* v *La Comercial International De Alimentacion* SA [1993] BCC 421. That case provides that, in applying national law, whether the provisions were adopted before or after the Directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the Directive in order to achieve the result pursued by the latter. There are accordingly two questions in the current case: firstly, does the purpose of the Directive extend to an entitlement to interest in the present situation; and secondly, is it possible to construe the 1998 Act in a way that complies with this purpose? It is accepted that the Directive is not focussed narrowly upon contracts but more broadly upon commercial transactions. However these are defined in the Directive (paragraph 4). The Directive gives examples of transactions (where there might be said to be a commercial element) which are outwith the scope of the Directive such as insurance (recital 8). The *dicta* of the Inner House as to the Directive were within the narrow context of the exception in section 2A of the 1998 Act relating to advocates. It does not follow from what the court said that the machinery for the provision of payment for LAA creates a "commercial relationship" for the purposes of the Directive. *Esto* that is not correct, if the court is required to read the 1998 Act in a way that complies with the Directive it is not possible or appropriate in the present situation. This is not a contract or a commercial transaction for the supply of goods and services. Also, any obligation upon the court to take a purposive approach is not unlimited. The court cannot create a new domestic statutory scheme and it cannot alter fundamental features of the legislation. That is what the pursuer is asking the court to do in the present case. The pursuer is asking the court to go beyond its legitimate interpretative obligation. On the pursuer's approach to construction the amendment brought about by section 2A of the 1998 Act was not required.

[13] In his oral submissions, Mr Duncan QC went through a number of the recitals in order to illustrate that the paradigm case envisaged by the Directive relates to a contract that being a bilateral relationship between parties. Throughout the Directive there are many references to contracts, contractual obligations and mutual obligations. Mr Duncan had been unable to find any European decision specifically on point in this matter. He referred to three cases which he accepted provided limited assistance: *Pontina Ambiente SRL* v *Regione Lazio* [2010] 3C MLR 1, *IOS Finance EFC SA* v *Servicio Murciano* De Salud [2017] 3 CMLR 5;*Krol* v *Poland* (Unreported) 28 November 2019 -C772/18.

[14] In relation to *Smith*, the question of interest in that case was conceded by the Board. The issue was one of calculation. Accordingly, the question of the application of the Directive did not arise. Looking at paragraph [16] of the opinion of the Inner House the issue was the construction of section 2A. The ratio is found in paragraph [23], following the reasoning in paragraphs [16] and [19]. The paragraphs relied upon by the pursuer ([10] and [14]) were not part of the ratio. The absence of contract in that case needs to be viewed in the context of advocates. The ratio of the Lord Ordinary's opinion is much broader (see paragraph [42]). He expressly relied upon the Directive. The Inner House did not approve his reasoning. It is not clear from reading the opinion of the Lord Ordinary what the parties were relying on in the Outer House in relation to the Directive.

[15] Section 12 of the 1986 Act provides a hierarchy in relation to payment. It is not a voluntary aspect for the Board. If the client was a "consumer" the provision of legal services would not attract the application of the Act. If the pursuer is correct it will attract interest in relation to the Board. There is no reciprocity of any sort between the Board and the solicitor. The LAA scheme should be viewed more akin to the provision of social welfare than a commercial contract. The Directive does not cover the present situation. Mr Duncan

referred in detail to passages from *De Smith*, Judicial Review, 8th Edition paragraphs 14-061 – 14-066. The author there sets out the obligations and indeed limits of the interpretative function of a national court when applying and interpreting European legislation. Reference was made to *Litster* and also, in some detail, to the case of *Vidal-Hall* v *Google Inc* [2016] QB 1003, particularly at paragraph [90] (per Lord Dyson MR). In effect, the court in the present case is being asked to amend the legislation not to interpret it. The 1998 Act is structured upon the basis of contract. It would require a degree of violence to accommodate the LAA scheme within it.

Decision

[16] The starting point in this matter is whether there is any obligation on the part of the Board to make payment to the solicitor, for if there is no obligation to pay, it is difficult to see that there is any obligation to pay interest. In my opinion, there is such an obligation. I reach that conclusion for similar reasons to those set out in the *Smith* case. Sections 4, 12 and 33, together with regulation 18, combine to impose upon the Board a statutory obligation to pay to the solicitor fees and outlays which otherwise satisfy the requirements of the legislation. That the payment may arise pursuant to section 12(3)(d) is immaterial. It only applies when the preceding paragraphs do not. Put another way, once payment is due, the Board does not have discretion to withhold or refuse to make payment.

[17] It is important to consider the opinions in the case of *Smith* to which I was referred by both parties. The pursuer in that action was senior counsel. The claim was for interest on fees claimed by counsel relating to the pursuit of an action on behalf of a pursuer who was legally aided in terms of the legal aid scheme then in force. It did not concern LAA. It is not necessary to go into the detail of all of the regulations referred to. It is sufficient to say that

the scheme permitted counsel to make a claim for payment of 75% of fees in certain prescribed circumstances, one of which was that it was over two years since the grant of legal aid. The pursuer submitted a claim for payment of the sum of 75% of £7,500 on 31 January 2006. The sum of £260 was paid on 3 March 2006 (its calculation was described as "obscure" – paragraph [2] of the Inner House opinion). On 22 January 2008 the solicitors acting for the litigant submitted to the Board a claim for their fees and counsel's fees. That included the earlier fee note. Some money was paid on an unspecified date in February 2008 but the balance was not paid until 4 February 2011.

[18] From the opinion of the Lord Ordinary and the Inner House (the opinion of the court was given by Lord Hamilton) it is clear that the issue in the *Smith* case was not whether interest was payable but the date from which it was payable (see paragraph [1] of the opinion of the Lord Ordinary and paragraph [5] of the opinion of Lord Hamilton). The Board conceded that interest was payable on the fees in issue from 30 days after 23 January 2008 (the date of receipt by the Board of the solicitors' account – paragraph [19]). Lord Hamilton proceeded upon the basis that the concession made by the Board constituted an acknowledgement that interest may also run in respect of the earlier account (paragraph [19]). Before the Lord Ordinary the pursuer sought interest on the whole sum of £7,500 from the date of the claim (1 February 2006). The Lord Ordinary rejected that submission but upheld the pursuer's alternative submission that interest was payable from that date but on 75% of the fee. It was that issue which formed the basis of the reclaiming motion. With minor amendments, the Inner House adhered to the interlocutor of the Lord Ordinary

[19] The opinions dealt extensively with particular issues concerning the status of counsel and the absence of contractual relationships between counsel and both client and solicitor. Section 2A of the 1998 Act was inserted to give effect to the Directive (Lord Hamilton at

paragraph [8]). In my opinion, it is helpful to the resolution of this case to note Lord Hamilton found that the absence of a contractual relationship involving counsel to be no impediment to the application of the Directive and the 1998 Act (paragraph [14]) to counsel's claim for interest on his fees. At paragraphs [16] and [17] of his opinion Lord Hamilton stressed the obligation of the Board to make payment. He did so by reference to regulations 3(2) and 11(4) of the Civil Legal Aid (Scotland) Fees Regulations 1989 (SI 1989/1490) (as amended) then in force. The opinion of the Lord Ordinary was to similar effect (paragraphs [33] and [39]).

[20] In my opinion, the ratio of *Smith* is narrow. However, the dicta of the Inner House go further than the narrow issue itself. Firstly, as I have said, the Board conceded interest was due on the solicitors' account submitted on 22 January 2008 and received by the Board on 23 January 2008; the dispute was whether it was exigible on the earlier 2006 fee note and, if so, on what amount. That was the issue which had to be decided. As I read the opinion of Lord Hamilton, the Extra Division was concerned with the application of the Directive (paragraph [14]) to the pursuer's claim. Unlike the present case, it does not appear to have been argued that there was no contract between the solicitors and the Board. In so far as interest is concerned, I do not see that there is a fundamental difference in the relationship between solicitors and the Board depending upon whether the transaction is civil legal aid or LAA.

[21] Returning to the Directive, its basic architecture is aimed at "combatting late payment in commercial transactions" (recital 1). It seems to me that a "commercial transaction" is wider than a contract. Certain transactions are excluded (recital 8). The legal profession is expressly included (recital 10). Public authorities are also expressly included (recital 9 and article 2(1)).

[22] The 1998 Act preceded both the 2000 Directive and the Directive but it is common ground between parties that it requires to be interpreted in accordance with the Directive. The 1998 Act makes no express provision to deal with the present case (see paragraph [10] above). As I have said, section 2A was enacted to give effect to the Directive. It is noteworthy that the word used in section 2A is "transaction". As the passages in *de Smith* referred to by Mr Dunlop QC make clear, when it comes to interpreting domestic legislation in accordance with Directives of the European Union, there is a distinction between interpretation and amendment. I have considered carefully the judgment of Lord Dyson in *Vidal Hall* to which Mr Dunlop referred (particularly at paragraphs [86-90]). The issue in that case related to section 13(2) of the Data Protection Act 1998 which, in part at least, enacted into domestic law certain European legislation upon which I need not expand. Read short, the remedies conferred by the domestic legislation were significantly less expansive than those prescribed in the principal European legislation. The Court of Appeal was invited to interpret the domestic legislation compatibly with European legislation. The Court of Appeal concluded it was not open to it to do so. At paragraph [89] Lord Dyson quoted with approval the *dicta* of Lord Rodger in *Ghaidan v Godin-Mendoza* ([2004] 2 AC 557 at paragraph 121) when he said that implication must "go with the grain of the legislation". The interpretation urged upon the Court of Appeal went too far. Having said that, applying the distinction between interpretation and amendment is not always straightforward. Both parties referred me to the case of *Litster* which concerned interpretation of the Transfer of Undertakings (Protection of Employment) Regulations 1981, enacted in order to give effect to a European Directive. Without going into the facts of that case which, as the regulation suggests, dealt with unfair dismissal arising from the sale of a business, the House of Lords concluded that, in order to give effect to the relevant Directive, applying a purposive

construction to the domestic legislation, an entire phrase ought to be added into what was regulation 5(3) of the domestic legislation (page 287 per Lord Oliver). I have considered the European authorities referred to in paragraph [13] above. Other than highlighting the application of the Directive to public authorities I do not consider that they are particularly helpful in resolving the present issue.

[23] The LAA scheme, in its current form, dates back to the Legal Advice and Assistance Act 1972. The structure of LAA is to provide legal assistance to many who could not otherwise afford it. Sometimes LAA is employed to provide advice as to prospects of success in pursuing and defending litigation; sometimes it is for non-contentious matters. To an extent, Mr Dunlop QC is correct when he says that the scheme is, for the client at least, a social benefit. However, the professional obligations of the solicitor to the client remain the same. The amount of remuneration available to the solicitor is tightly controlled and not unlimited. One of the features of the legislation is that it prescribes that payment for the provision of legal services may be payable by a third party (the Board). The 1986 Act and regulations (and in particular section 12) set out a procedure by which a solicitor may seek payment from the Board. The pursuer is engaged in a business and for the purposes of LAA, where section 12(3)(d)applies, is dependent upon the Board for payment of its account (which may, in certain cases, include counsel's fees as an outlay therein). I accept that there is a hierarchy for payment set out in section 12 – I am only dealing with section 12(3)(d). Provided certain provisions are satisfied the Board has a statutory obligation to pay the solicitor. Read short, section 2(1) of the 1998 Act applies to a contract for the supply of services where both parties are either a business or one is a business and the other is a public authority (section 2(7)). The Directive uses the words "commercial transaction" throughout. In my opinion, the relationship in the present case between a solicitor and the

Board can properly be described as a "commercial transaction". The pursuer is in business, the Board is not but the Directive expressly applies to public authorities which are not in business. As the recitals make clear the actions of public authorities have commercial effects. If "contract" in the 1998 Act is interpreted to include a commercial transaction (see also section 2A) then the 1998 Act applies to the present case. In my opinion, such an approach is purposive and permissible as an exercise in interpretation and not amendment. Both the Lord Ordinary and Lord Hamilton made express reference to the Directive in their approach to the interpretation of the 1998 Act. The relationship between the parties to this action falls within the structure of the Directive and the mischief it was intended to address namely the late payment of monies owing. I was not informed by counsel as to the position of parties as to the date when interest would be chargeable. If, as I conclude, the Board has, at some identifiable point, an obligation to make payment then I see no violence done to the 1998 Act so as to impose an obligation upon it to pay statutory interest. It is important to recall that interest is only payable upon a debt which has become overdue for payment.

[24] It follows that I accept the conclusion urged upon me by the pursuer. As requested, I shall put the matter out by order to consider the terms of the interlocutor to follow and to deal with expenses.