

Sheriffdom of South Strathclyde Dumfries and Galloway at Hamilton

Taxation of Advice & Assistance Account

LARN: 5383875515 [REDACTED]

H

The diet of taxation was held on 15 April 2016. Mr Lunny appeared on behalf of Lunny & Co. Solicitors, Motherwell. There was no appearance on behalf of the Scottish Legal Aid Board (SLAB).

On 13 April 2016 (at 14.17), [REDACTED] Solicitor for SLAB, e-mailed Mr Lunny and myself to advise that payment of the 2 issues in dispute, namely 30 January 2015 and 16 February 2015, would now be made. A copy of that e-mail can be found at APPENDIX 1.

Later that same day (at 14.30), Mr Lunny e-mailed [REDACTED] and myself to advise "..... There also remains the issue of interest and late payment charge in terms of the Late Payment of Commercial debts regulations that I have previously raised with you. Furthermore as you are aware from the terms of your e-mail I have a large number of files where time on line fees are being docked on the basis that work carried out by unqualified staff is "administrative". If you are now willing to pay the fees in this account can you confirm the position in relation to all other outstanding accounts? I suspect that the only way I can resolve this issue will be to see a taxation in all these accounts ultimately to the cost of SLAB." A copy of that e-mail can be found at APPENDIX 2

[REDACTED] replied by e-mail on 14 April (at 16.44) to indicate that in his view SLAB was not due to pay interest. A copy of that e-mail can be found at APPENDIX 3.

Mr Lunny responded by e-mail later that same (at 17.02) to advise "..... Given that there is no position being put forward on the repeated failure by SLAB to pay for unqualified time I see no option but to continue with this taxation tomorrow." A copy of that e-mail can be found at APPENDIX 4.

[REDACTED] responded by e-mail later that same day at (19.04) to advise ".....Having allowed both fees in dispute, how exactly are you dissatisfied with the assessment. The Auditor's function is to assess the fees before him in the circumstances in which they were incurred. Clearly the Auditor cannot pronounce on some general issue, even if capable of being defined, on fees that are *not* before him. In the circumstances, and of course without any disrespect to Mr Hamilton, my presence at the diet tomorrow would serve no useful purpose. I agreed with you as regards the first entry, and I was prepared to allow the second entry. The Auditor cannot allow you more than you have claimed and been allowed in this account." A copy of that e-mail can be found at APPENDIX 5.

On the morning of the taxation diet 15 April (at 11.23), [REDACTED] emailed me to expand on his view that interest on late payment could not be made and attached copies of (a) Late Payment of Commercial Debts (Interest) Act 1998 and the Judgement dated 16 December 2011 by the Senior Costs Judge Sitting as a Judicial Taxing Officer of the Supreme Court and the Registrar of the Supreme Court in relation to the proceedings between [REDACTED] +3 (Petitioners) and Her Majesty's Advocate (Respondent). This was referred to by me at the taxation diet and I subsequently e-mailed a copy of that e-mail and attachments to Mr Lunny later that afternoon.

Copies of the aforementioned e-mail, the 1998 Act and Judgement can be found at APPENDICES 6, 7 and 8 respectively.

The diet of taxation duly commenced and Mr Lunny advised that he was disputing the position of SLAB whereby they had now accepted the 2 entries of 30 January and 16 February 2015, initially disputed by them. [REDACTED] in his e-mail of 13 April (APPENDIX 1) had indicated that both of these fees would be now paid.

Mr Lunny submitted that it was necessary that he receive a decision on these 2 matters by the auditor as to whether he was correct in bringing them to taxation. He contended that if such matters were continually brought to taxation and SLAB then accepted that payment should be made prior to a taxation diet then such an approach might be construed as an abuse of process.

I advised Mr Lunny that I was in agreement with [REDACTED] position that since the aforementioned disputed entries had now been accepted by SLAB and payment of same along with the taxation fees would be settled by them, there was nothing for the auditor to consider. Accordingly, I advised that I would not make a decision on these matters.

Mr Lunny then turned to the question of interest and late payment charge in terms of the Late Payment of Commercial Debts (Interest) Act 1998.

Mr Lunny referred to Section 2 of the 1998 Act – Contracts to which Act applies. He submitted there were several strands which required to be established:

- (1) Section 2(7) referred to "government department" includes any part of the Scottish Administration - Mr Lunny submitted that SLAB was part of the Scottish Administration.
- (2) Section 2(2) and (3) - Contract for supply of goods and services. Mr Lunny submitted this was a contract with SLAB. This related to the provision of legal services and payments by SLAB fell into this definition.

MA

(3) Mr Lunny advised that Lunny & Co. applied to be registered with SLAB in November 2012 which was subsequently accepted and they were duly registered. Each application for legal aid by the client required to be signed by the solicitor and each was individually granted or otherwise. Mr Lunny further submitted this was a contractual relationship between Lunny & Co. and SLAB based on the original contract of November 2012. In Mr Lunny's view that was a contract on a continuing basis. There was also a contractual relationship between the solicitor and client which in effect constituted a tripartite relationship between SLAB, solicitor and the client.

Mr Lunny further advised that if I was not with him on that point, then each individual application should be considered as a contract.

Mr Lunny rejected the submissions put forward by [REDACTED] in his e-mail correspondence.

Mr Lunny undertook to lodge written submissions following the taxation diet. This was duly done on 2 December 2016 and these are attached at APPENDIX 9.

Auditor's decision

I have considered Mr Lunny's oral and written submissions along with the e-mail correspondence from both parties referred to earlier.

I am of the view that the question of statutory interest is not a matter for the auditor to decide upon.

As [REDACTED] stated in his e-mail at APPENDIX 6, ".....Statutory interest, if due in any particular circumstances, is due as a matter of law and a claim shall be made direct to the paying party, subject to a decision of the Court by way of an action for payment in the event of a dispute."

[REDACTED] submission was also supported by the Judgement dated 16 December 2011, referred to earlier, (APPENDIX 8) by the Senior Costs Judge Sitting as a Judicial Taxing Officer of the Supreme Court and the Registrar of the Supreme Court, paragraph 24 stated "..... SLAB accepts that counsels' fees are subject to the payment of statutory interest in terms of the Late Payment of Commercial Debts (Interest) Act 1988, but it is pointed out that arguments may arise as to the period during which interest should run, and whether there should be remission of interest in respect of various matters. The parties were in agreement that the issue of interest having been conceded, the actual amount of interest payable should, if agreement cannot be reached, form the basis of a separate application before the Scottish Courts.

MA

Therefore, apart from recording that counsel are entitled to the appropriate interest on their fees, we make no further ruling in respect of interest."

██████████ also mentioned in that e-mail there was no precedent for an auditor to allow statutory interest. I did not hear from Mr Lunny on that matter.

It is regrettable that it has taken this time to write my decision and I apologise to both parties for the delay. To confirm my decision, I do not believe that it is within the power of the auditor to make an award of statutory interest.



J Hamilton

Depute Auditor of Court at Hamilton

9 January 2017





James Hamilton <jhamilton.auditor@gmail.com>

TAXATION AT HAMILTON: 15 APRIL 2016 @11.30 RE HUGHES LARN 5383875515 TAX-59

1 message

APPENDIX 1

at 14:17

Dear Mr Lunny,

I refer to the diet of taxation set down for Hamilton on **Friday 15 April 2016 @ 11.30.**

I have now had the opportunity of considering the entries in dispute, namely 30 January (£6.35) and 16 February (£2.90). Having done so, I would be prepared to allow the first entry, on balance, although I do have misgivings regarding the second entry. However, given my position on the first entry It would be inappropriate not to pay the second in the circumstances. I have discussed this with colleagues in the Accounts Department. These entries shall be passed for payment.

This being the case, I shall also arrange for the Auditor's lodging fee of £5 to be paid.

I should say that I am having discussions (both internally and with our law accountants) on the wider issue as to where the line is drawn, as it were, on what is referred to as administrative work, in effect work that is 1) actually advice under A&A and 2) is chargeable to a client and, by extension from the Fund, or not.

Regards,

Head of Legal Services (Technical and Criminal),
Scottish Legal Aid Board,
Thistle House,
91 Haymarket Terrace,
EDINBURGH EH12 5HE
(Direct Dial: 0131 240 2089)

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From: Mark Lunny [mailto:mark@lunny.co.uk]

Sent: 13 April 2016 14:30

APPENDIX 2

Subject: RE: TAXATION AT HAMILTON: 15 APRIL 2016 @11.30 RE HUGHES LARN 5383875515 TAX-59

I note your position in relation to this taxation. I should advise that the lodging fee for the taxation is £42 plus the £5 fee. There also remains the issue of interest and late payment charge in terms of the Late Payment of Commercial debts regulations that I have previously raised with you.

Furthermore as you are aware from the terms of your e-mail I have a large number of files where time on line fees are being docked on the basis that work carried out by unqualified staff is "administrative". If you are now willing to pay the fees in relation to this account can you confirm the position in relation to all other outstanding accounts? I suspect that the only way I can resolve this issue will be to see a taxation in all these accounts ultimately to the cost of SLAB.

Mark Lunny

Solicitor



Lunny & Co
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James Hamilton <jhamilton.auditor@gmail.com>

**RE: TAXATION AT HAMILTON: 15 APRIL 2016 @11.30 RE HUGHES LARN
5383875515 TAX-59**

1 message

APPENDIX 3

016 at 16:44

Thank you for your email.

Apologies for the delay in responding. I had a doctor's appointment today.

Sorry if I got that figure wrong. I shall, of course, arrange to have the correct fee paid to the Auditor.

As I indicated at the taxation diet at which you raised the point of statutory interest, SLAB is not due you interest on this sum. The Late Payment of Commercial Debts (Interest) Act 1998, as amended by the Late Payment of Commercial Debts (Scotland) Regulations 2002 (adding a new section 2A relating to Members of the Faculty of Advocates), does not apply to solicitors. Indeed, the purpose of this section, which equiperates a "transaction" with a "contract" was not to enable advocates, as such, to be paid interest by the Board under legal aid but rather, after representations in the Scottish Parliament, to bring advocates within the ambit of the Act given that there is no contract between an instructing solicitor and counsel. Only indirectly has it had implications for the Fund given that there is, of course, no "contract" in its unadulterated sense between the Board and solicitors and counsel.

Further and in any event, whilst the Act may have been engaged in the context of legal aid as far as Members of Faculty are concerned, there is not even a "transaction" for the provision of legal services under advice and assistance or ABWOR, where it is the solicitor who admits a client to A&A, gives advice and deducts the fees etc. from any property recovered or preserved. There may well be a transaction for payment (by default, but not a transaction for the provision of legal services, as required by the 1998 Act.

I am aware that there have been a number of abatements to your accounts under this head. You mentioned this at the last taxation. Indeed, I have looked at some of them. My view on the first entry does not extend to all such entries, the ones that I have seen being clearly subject to abatement. That is why I am currently looking at this issue with a view to determining more clearly where the line, and there is a line, be drawn. So reversion to taxation is not your only option.

I shall revert to you once this is done.

Regards,

entry is not to be allowed, it is abated.

There is no standard of taxation under which the paying party is liable to pay for a typist typing a letter, a receptionist answering the phone or accepting deliveries at the counter, the work of the cashier or office junior, being part of the overheads met by fee-earners, or by persons who may be a fee-earner in certain situations but not when undertaking such work. Certainly not under A&A defined in section 6 of the 1986 Act as advice to a client on a matter of Scots law. Nor is it enough to say that you "delegate" such work to such persons. Of course you do; that is why you employ them.

That is why I say that I am attempting more clearly to identify the point at which a line is drawn in my discussions both internally and with our external law accountants, which may assist all of us in this necessary function of the Board.

Regards,

From: Mark Lunny [mailto:mark@lunny.co.uk]

Sent: 14 April 2016 17:02

To: [REDACTED]

Subject: RE: TAXATION AT HAMILTON: 15 APRIL 2016 @11.30 RE HUGHES LARN 5383875515 TAX-59

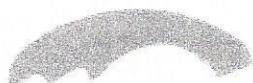
APPENDIX 4

Thank you for your e-mail setting out the position of SLAB re the implementation of European Law. I assume you will have no difficulty in my copying that to my MEP suggesting that she raises this matter with the appropriate European body on the issue of compliance with the EU directive?

Given that there is no position being put forward on the repeated failure of SLAB to pay for unqualified time I see no option but to continue with this taxation tomorrow.

Mark Lunny

Solicitor



Lunny & Co
Solicitors

www.lunny.co.uk



James Hamilton <jhamilton.auditor@gmail.com>

**RE: TAXATION AT HAMILTON: 15 APRIL 2016 @11.30 RE HUGHES LARN
5383875515 TAX-59**

1 message

APPENDIX 5.

Dear Mr Lunny,

Thank you for this.

I have indeed no difficulty in you copying my email to your MEP. I cannot imagine that the Commission would have any concerns regarding non-compliance given that 1) the Directive was aimed at commercial transactions (arising from a fear that sub-contractors were not being paid promptly by contractors, to their economic disadvantage), properly referred to as "contracts" in the 1998 Act giving effect to the Directive (indeed preceding the Directive), and 2) that the contract in this case is between you and Mr Hughes, the Board being third-party funders. I have set out how this founding concept has been extended in the case of Members of Faculty in my earlier email.

May I remind you as to the basis on which you are entitled to proceed to taxation, in the terms of the relevant regulation making such provision:

"(4) 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 the 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 allowable."

Having allowed both fees in dispute, how exactly are you dissatisfied with the assessment? The Auditor's function is to assess the fees before him in the circumstances in which they were incurred. Clearly the Auditor cannot pronounce on some general issue, even if capable of being defined, on fees that are *not* before him. In the circumstances, and of course without any disrespect to Mr Hamilton, my presence at the diet tomorrow would serve no useful purpose. I agreed with you as regards the first entry, and I was prepared to allow the second entry. The Auditor cannot allow you more than you have claimed and been allowed in this account.

In any event, you overstate the issue itself, with respect. You refer to "the repeated failure of SLAB to pay for unqualified time". We pay for work properly undertaken by unqualified persons all the time. There is no issue arising there. Nor is it appropriate, nor even accurate, to term the exercise of our statutory functions in applying the (high) agent and client, third party (Fund) paying taxation standard set by Parliament as a "failure". Our staff's job description, as it were, is described thus in our regulations:

"(3) Where the Board receives an account in accordance with paragraph (1) above, it shall assess the fees and outlays allowable 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."

Where an entry is not to be allowed, it is abated.

There is no standard of taxation under which the paying party is liable to pay for a typist typing a letter, a receptionist answering the phone or accepting deliveries at the counter, the work of the cashier or office junior, being part of the overheads met by fee-earners, or by persons who may be a fee-earner in certain situations but not when undertaking such work. Certainly not under A&A defined in section 6 of the 1986 Act as advice to a client on a matter of Scots law. Nor is it enough to say that you "delegate" such work to such persons. Of course you do; that is why you employ them.

That is why I say that I am attempting more clearly to identify the point at which a line is drawn in my discussions both internally and with our external law accountants, which may assist all of us in this necessary function of the Board.

Regards,

From: Mark Lunny [mailto:mark@lunny.co.uk]

Sent: 14 April 2016 17:02

To: [REDACTED]

Subject: RE: TAXATION AT HAMILTON: 15 APRIL 2016 @11.30 RE HUGHES LARN 5383875515 TAX-59

[REDACTED]

Thank you for your e-mail setting out the position of SLAB re the implementation of European Law. I assume you will have no difficulty in my copying that to my MEP suggesting that she raises this matter with the appropriate European body on the issue of compliance with the EU directive?

Given that there is no position being put forward on the repeated failure of SLAB to pay for unqualified time I see no option but to continue with this taxation tomorrow.

Mark Lunny

Solicitor



www.lunny.co.uk



James Hamilton <jhamilton.auditor@gmail.com>

STATUTORY INTEREST

1 message

15 April 2016 at 11:23

APPENDIX 6

You should read the legal disclaimer at the end of this e-mail about the terms and conditions that apply to it.

Jim,

I attach a copy of the relevant statutory provision for statutory interest. Section 2A, as you can see, applies the provisions of the Act to a member of the Faculty of Advocates 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 the Act. Clearly a solicitor is not an advocate. This I believe is the "regulations" to which the solicitor is referring in his communications. I have set out in a recent email how the use of the term "transaction" has brought advocates within the ambit of legal aid, where the Board has granted legal aid.

In the case before you, not only is the solicitor not an advocate but it is the solicitor who grants A&A to a client, so there are two reasons why a solicitor providing A&A is not due statutory interest.

In any event, it is not your concern. Statutory interest, if due in any particular circumstances, is due as a matter of law and a claim shall be made direct to the paying party, subject to a decision of the Court by way of an action for payment in the event of a dispute.

The first time a claim was made by counsel for statutory interest, the Registrar in England stated that it was not a matter for him to determine interest and a hearing was set down for what was then the Judicial Committee of the Privy Council (now the Supreme Court). I attach a decision of the Senior Costs Judge, in a case involving an advocate, which reflects this position at paragraph 24.

If The solicitor believes that he is due statutory interest then he should seek to claim it from the Board. We have responded in appropriate terms to other solicitors.

There is no precedent for an auditor allowing statutory interest.

Hope this assists.

Regards,



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2 attachments



Late payment of statutory interest provisions.pdf

206K



hoekstra judgment.doc

318K



Late Payment of Commercial Debts (Interest) Act 1998

1998 CHAPTER 20

PART I

STATUTORY INTEREST ON QUALIFYING DEBTS

1 Statutory interest.

- (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.
- (2) Interest carried under that implied term (in this Act referred to as “statutory interest”) shall be treated, for the purposes of any rule of law or enactment (other than this Act) relating to interest on debts, in the same way as interest carried under an express contract term.
- (3) This Part has effect subject to Part II (which in certain circumstances permits contract terms to oust or vary the right to statutory interest that would otherwise be conferred by virtue of the term implied by subsection (1)).

Annotations:

Commencement Information

- I1** S. 1 wholly in force; s. 1 not in force at Royal Assent see s. 17(2); s. 1 in force for specified purposes: at 1.11.1998 by S.I. 1998/2479, art. 3; at 1.7.1999 by S.I. 1999/1816, art. 3; at 1.9.2000 by S.I. 2000/2225, art. 3(1), Sch.; at 1.11.2000 by S.I. 2000/2740, art. 3(1); S. 1 in force (E. W. N.I.) in so far as not already in force at 7.8.2002 by S.I. 2002/1673, art. 2: s. 1 in force (S.) in so far as not already in force at 7.8.2002 by S.S.I. 2002/337, art. 2

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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 a consideration that is (or includes) a money consideration.
- (3) Those things are—
 - (a) transferring or agreeing to transfer to another the property in goods;
 - (b) bailing or agreeing to bail goods to another by way of hire or, in Scotland, hiring or agreeing to hire goods to another; and
 - (c) agreeing to carry out a service.
- (4) For the avoidance of doubt a contract of service or apprenticeship is not a contract for the supply of goods or services.
- (5) The following are excepted contracts—
 - (a) a consumer credit agreement;
 - (b) a contract intended to operate by way of mortgage, pledge, charge or other security; and
 - ^{F1}(c)
- ^{F2}(6)
- (7) In this section—

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

“consumer credit agreement” has the same meaning as in the ^{M1}Consumer Credit Act 1974;

“contract of sale of goods” and “goods” have the same meaning as in the ^{M2}Sale of Goods Act 1979;

[^{F3}“government department” includes any part of the Scottish Administration;]

“property in goods” means the general property in them and not merely a special property.

Annotations:

Amendments (Textual)

- F1** S. 2(5)(c) repealed (7.8.2002) by S.S.I. 2002/335, reg. 2(2) (with reg. 4)
 S. 2(5)(c),(6) repealed (7.8.2002) by S.I. 2002/1674, reg. 2(2)
- F2** S. 6 repealed (7.8.2002) by S.S.I. 2002/335, reg. 2(2) (with reg. 4)
- F3** Definition in s. 2(7) inserted (1.7.1999) by S.I. 1999/1820, art. 4, Sch. 2 Pt. I para. 132

Commencement Information

- I2** S. 2 fully in force; s. 2 not in force at Royal Assent see s. 17(2); s. 2 in force for specified purposes: at 1.11.1998 by S.I. 1998/2479, art. 3; at 1.7.1999 by S.I. 1999/1816, art. 3; at 1.9.2000 by S.I. 2000/2225, art. 3(1), Sch.; at 1.11.2000 by S.I. 2000/2740, art. 3(1); S. 2 in force (E. W. NI.) in so far

Changes to legislation: There are outstanding changes not yet made by the legislation.gov.uk editorial team to Late Payment of Commercial Debts (Interest) Act 1998. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details)

as not already in force at 7.8.2002 by S.I. 2002/1673, art. 2; S. 2 in force (S.) in so far as not already in force at 7.8.2002 by S.S.I. 2002/337, art. 2

Marginal Citations

M1 1974 c. 39.

M2 1979 c. 54.

[^{F4}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.]

Annotations:

Amendments (Textual)

F4 S. 2A inserted (S.) (7.8.2002) by S.S.I. 2002/335, reg. 2(3) (with reg. 4)

3 Qualifying debts.

- (1) A debt created by virtue of an obligation under a contract to which this Act applies to pay the whole or any part of the contract price is a “qualifying debt” for the purposes of this Act, unless (when created) the whole of the debt is prevented from carrying statutory interest by this section.
- (2) A debt does not carry statutory interest if or to the extent that it consists of a sum to which a right to interest or to charge interest applies by virtue of any enactment (other than section 1 of this Act).

This subsection does not prevent a sum from carrying statutory interest by reason of the fact that a court, arbitrator or arbiter would, apart from this Act, have power to award interest on it.

- (3) A debt does not carry (and shall be treated as never having carried) statutory interest if or to the extent that a right to demand interest on it, which exists by virtue of any rule of law, is exercised.

^{F5}(4)

(5)

Annotations:

Amendments (Textual)

F5 S. 3(4)(5) repealed (E. W. NI.) (7.8.2002) by S.I. 2002/1674, reg. 2(3)

S. 3(4)(5) repealed (S.) (7.8.2002) by S.S.I. 2002/335, reg. 2(4) (with reg. 4)

Commencement Information

I3 S. 3 fully in force; s. 3 not in force at Royal Assent see s. 17(2); s. 3 in force for specified purposes: at 1.11.1998 by S.I. 1998/2479, art. 3; at 1.7.1999 by S.I. 1999/1816, art. 3; at 1.9.2000 by S.I. 2000/2225, art. 3(1), Sch.; at 1.11.2000 by S.I. 2000/2740, art. 3(1); S. 3 in force (E. W. NI.) in so far

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as not already in force at 7.8.2002 by S.I. 2002/1673, art. 2; S. 3 in force (S.) in so far as not already in force at 7.8.2002 by S.S.I. 2002/337, art. 2

4 Period for which statutory interest runs.

- (1) Statutory interest runs in relation to a qualifying debt in accordance with this section (unless section 5 applies).
- (2) Statutory interest starts to run on the day after the relevant day for the debt, at the rate prevailing under section 6 at the end of the relevant day.
- (3) Where the supplier and the purchaser agree a date for payment of the debt (that is, the day on which the debt is to be created by the contract), that is the relevant day unless the debt relates to an obligation to make an advance payment.

A date so agreed may be a fixed one or may depend on the happening of an event or the failure of an event to happen.
- (4) Where the debt relates to an obligation to make an advance payment, the relevant day is the day on which the debt is treated by section 11 as having been created.
- (5) In any other case, the relevant day is the last day of the period of 30 days beginning with—
 - (a) the day on which the obligation of the supplier to which the debt relates is performed; or
 - (b) the day on which the purchaser has notice of the amount of the debt or (where that amount is unascertained) the sum which the supplier claims is the amount of the debt,
 whichever is the later.
- (6) Where the debt is created by virtue of an obligation to pay a sum due in respect of a period of hire of goods, subsection (5)(a) has effect as if it referred to the last day of that period.
- (7) Statutory interest ceases to run when the interest would cease to run if it were carried under an express contract term.
- (8) In this section “advance payment” has the same meaning as in section 11.

Annotations:

Commencement Information

- I4** S. 4 fully in force; s. 4 not in force at Royal Assent see s. 17(2); s. 4 in force for specified purposes: at 1.11.1998 by S.I. 1998/2479, art. 3; at 1.7.1999 by S.I. 1999/1816, art. 3; at 1.9.2000 by S.I. 2000/2225, art. 3(1), Sch.; at 1.11.2000 by S.I. 2000/2740, art. 3(1); S. 4 in force (E. W. NI.) in so far as not already in force at 7.8.2002 by S.I. 2002/1673, art. 2; S. 4 in force (S.) in so far as not already in force at 7.8.2002 by S.S.I. 2002/337, art. 2

5 Remission of statutory interest.

- (1) This section applies where, by reason of any conduct of the supplier, the interests of justice require that statutory interest should be remitted in whole or part in respect of a period for which it would otherwise run in relation to a qualifying debt.

Changes to legislation: There are outstanding changes not yet made by the legislation.gov.uk editorial team to Late Payment of Commercial Debts (Interest) Act 1998. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details)

- (2) If the interests of justice require that the supplier should receive no statutory interest for a period, statutory interest shall not run for that period.
- (3) If the interests of justice require that the supplier should receive statutory interest at a reduced rate for a period, statutory interest shall run at such rate as meets the justice of the case for that period.
- (4) Remission of statutory interest under this section may be required—
 - (a) by reason of conduct at any time (whether before or after the time at which the debt is created); and
 - (b) for the whole period for which statutory interest would otherwise run or for one or more parts of that period.
- (5) In this section “conduct” includes any act or omission.

Annotations:

Commencement Information

- I5** S. 5 fully in force; S. 5 not in force at Royal Assent see s. 17(2); s. 5 in force for specified purposes: at 1.11.1998 by S.I. 1998/2479, art. 3; at 1.7.1999 by S.I. 1999/1816, art. 3; at 1.9.2000 by S.I. 2000/2225, art. 3(1), Sch.; at 1.11.2000 by S.I. 2000/2740, art. 3(1); S. 5 in force (E. W. NI.) in so far as not already in force at 7.8.2002 by S.I. 2002/1673, art. 2; S. 5 in force (S.) in so far as not already in force at 7.8.2002 by S.S.I. 2002/337, art. 2

[^{F6}5A Compensation arising out of late payment

- (1) Once statutory interest begins to run in relation to a qualifying debt, the supplier shall be entitled to a fixed sum (in addition to the statutory interest on the debt).
- (2) That sum shall be—
 - (a) for a debt less than £1000, the sum of £40;
 - (b) for a debt of £1000 or more, but less than £10,000, the sum of £70;
 - (c) for a debt of £10,000 or more, the sum of £100.
- (3) The obligation to pay an additional fixed sum under this section in respect of a qualifying debt shall be treated as part of the term implied by section 1(1) in the contract creating the debt.]

Annotations:

Amendments (Textual)

- F6** S. 5A inserted (7.8.2002) by S.S.I. 2002/335, reg. 2(5) (with reg. 4)
S. 5A inserted (7.8.2002) by S.I. 2002/1674, reg. 2(5)

6 Rate of statutory interest.

- (1) The Secretary of State shall by order made with the consent of the Treasury set the rate of statutory interest by prescribing—
 - (a) a formula for calculating the rate of statutory interest; or
 - (b) the rate of statutory interest.

Changes to legislation: There are outstanding changes not yet made by the legislation.gov.uk editorial team to Late Payment of Commercial Debts (Interest) Act 1998. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details)

- (2) Before making such an order the Secretary of State shall, among other things, consider the extent to which it may be desirable to set the rate so as to—
- (a) protect suppliers whose financial position makes them particularly vulnerable if their qualifying debts are paid late; and
 - (b) deter generally the late payment of qualifying debts.

Annotations:**Commencement Information**

- I6** S. 6 fully in force; s.6 not in force at Royal Assent see s. 17(2); s.6 in force for specified purposes: at 1.11.1998 by S.I. 1998/2479, art. 3; at 1.7.1999 by S.I. 1999/1816, art. 3; at 1.9.2000 by S.I. 2000/2225, art. 3(1), Sch.; at 1.11.2000 by S.I. 2000/2740, art. 3(1); S. 6 in force (E. W. NI.) in so far as not already in force at 7.8.2002 by S.I. 2002/1673, art. 2; S. 6 in force (S.) in so far as not already in force at 7.8.2002 by S.S.I. 2002/337, art. 2

Changes to legislation:

There are outstanding changes not yet made by the legislation.gov.uk editorial team to Late Payment of Commercial Debts (Interest) Act 1998. Any changes that have already been made by the team appear in the content and are referenced with annotations.

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

- Act applied (with modifications) by S.R. 2010/170 reg. 14(10)



APPENDIX 8

IN THE SUPREME COURT OF THE UNITED KINGDOM

Parliament Square
London,

Date: 16 December 2011

Before :

THE SENIOR COSTS JUDGE SITTING AS A JUDICIAL TAXING OFFICER
OF THE SUPREME COURT
AND
THE REGISTRAR OF THE SUPREME COURT

Between :

(1) LIEUWE HOESKTRA
(2) JAN VAN RIJS
(3) RONNY VAN RIJS
(4) HENDRICK VAN RIJS

Petitioners

- and -

HER MAJESTY'S ADVOCATE

Respondent

Mr Andrew Smith QC instructed by **The Appellant Counsel**
Mr Haggerty instructed by **The Scottish Legal Aid Board**

Hearing date: 17 November 2011

Approved Judgment

I.

.....

Senior Costs Judge Hurst:

1. The four Petitioners, who are Dutch nationals, were convicted of major drug offences (the importation of several tonnes of cannabis resin) and received lengthy sentences of imprisonment. The accused were represented not only by counsel in Scotland, but also by advocates of the Netherlands Bar. The issues in all of the cases raised significant points regarding the rights of the accused under the European Convention of Human Rights. The Petitioners, having been convicted, appealed to the Scottish Court of Criminal Appeal for various reasons, including dissatisfaction with those representing them. In a reserved judgment the appeals were dismissed on 28 January 2000. Leave to appeal to the Privy Council on devolution issues was refused on 31 January 2000.
2. On 23 February 2000 the Petitioners presented the first of two petitions to the Judicial Committee of the Privy Council for special leave to appeal. The devolution issues raised were all alleged breaches of the European Convention of Human Rights. Briefly they were these:
 - i) Mr Graham Bell of counsel, who had previously acted for the Second Petitioner, Jan Van Rijs, appeared for the Crown at a hearing in the Court of Appeal on 7 July 1999, having been appointed an advocate depute on 1 January 1998;
 - ii) that because the Lord Advocate would have had a right, under Schedule 6 to the Scotland Act 1998 to require the High Court of Justiciary to refer a devolution issue to the Privy Council, the High Court was in breach of the "Equality of Arms" principle under the European Convention in refusing leave, and, by the same principle, the Privy Council was required to grant the petition as special leave to appeal;
 - iii) that a tracking device, allegedly fitted to one of the vessels used to move the cannabis, was a breach of the Petitioners' privacy, contrary to Article 8 of the Convention, and effectively enabled Scottish law enforcement officials to operate in the territorial waters of other countries;
 - iv) Lord McCluskey, who presided in the Court of Appeal, expressed strong disapproval of the European Convention in an article which appeared in a journal on 6 February 2000, less than a week after the Appeal Court refused the Petitioners leave to appeal to the Privy Council.
3. By its Order of 28 January 2000, the Justiciary Appeal Court directed that the hearing of the remaining grounds of appeal should take place on 6 March 2000, but on 3 March, before the petitions for special leave had been considered by the Privy Council, the Appellants/Petitioners lodged minutes in the Justiciary Appeal Court moving that the Bench should disqualify itself from hearing the appeal further. They relied on ground (iv) above. The motion came before a different court of the Justiciary Appeal Court, presided over by the Lord Justice General on 9 March 2000. That court held that, on an objective basis, the judgment could not be regarded as impartial, and accordingly the judgment of 28 January 2000 was pronounced by a

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9. The counsel concerned are Mr George Gebbie, Mr John McLaughlin, Mr Derrick Nelson (all of whom are advocates) and Mr John Gildea, who is a solicitor advocate. We refer to them collectively as "counsel". All counsel were, at that time, junior counsel, although Mr Gebbie and Mr McLaughlin were rather more senior than the other two.
10. The four Petitioners had all had the benefit of legal aid in respect of their appeal to the Scottish Court of Criminal Appeal.
11. Legal aid in Scotland is regulated by the Legal Aid (Scotland) Act 1986, and Regulations made under it. The SLAB administers the scheme according to the relevant legislation.
12. As we have said, counsel and SLAB have been unable to resolve the appropriate level of fees for the work done in the Privy Council. We were assured during the hearing before us that negotiation and delays of this sort no longer occur. Each counsel claimed separate brief fees for each petition. The total fees sought were as follows: Mr Gebbie, £40,250; Mr McLaughlin, £40,250.50; Mr Nelson and Mr Gildea, £30,750 each. These fees appear to have been claimed at 2010 levels. A provisional taxation was carried out by the Registrar and the Costs Clerk of the Supreme Court on 22 March 2011, who made the following allowances: Mr Gebbie, £10,500; Mr McLaughlin, £9,000; Mr Nelson and Mr Gildea, £6,000 each. It later came to light that a previous version of Mr McLaughlin's claim had been assessed and so his claim in respect of the first petition had not been dealt with provisionally.
13. The relevant Regulations governing legal aid are, the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, which state:

"10(1) Counsel shall be allowed such fee as appears to the Board, or at taxation the Auditor, to represent reasonable remuneration, calculated in accordance with Schedule 2 [or 3], for work actually and reasonably done, due regard being had to economy."
14. In earlier written submissions, Mr Haggerty referred to a previous case in the Privy Council, *Alvin Lee Sinclair v Her Majesty's Advocate*. In that case the fees of counsel were remitted to the Registrar for taxation.
15. Mr Andrew Smith QC appeared for the Petitioners, and Mr Paul Cullen QC was instructed by SLAB. It was I who heard the matter. According to Mr Haggerty:

"the taxation of counsel's fees by the Registrar in the *Sinclair* case (and also in associated *Holland*) created a benchmark which allowed the Board to revert to counsel who had not formally accepted the payments an offer made by the Board in other Judicial Committee cases. It should be noted however that the *Sinclair* case included not only the fees in respect of the substantive hearing, but also quite separately a range of further fees in respect of the extended procedure culminating in the hearing on 6 December 2005. Both the *Sinclair* and *Holland* cases were appeals and this process, initiated by the Board,

related to appeals and not petitions for leave to appeal. Counsel's clerks in the instant cases who enquired as to whether these cases would now be adjusted in the light of the new benchmark were advised of the Board's position."

16. Mr Smith argues that it is wrong for SLAB to treat the present cases as applications for special leave alone, since (as we have now accepted) counsel had had to prepare fully to argue the substantive appeal.
17. Mr Smith points out that the European Convention on Human Rights was given statutory force in Scotland before England and Wales. The Petitioners therefore had to grapple with the substantive issues, as well as the new procedure. This was a very early application, and was certainly the first oral hearing of a petition for special leave. The case was widely reported in Scotland, and also in Appeal Cases and the Weekly Law Reports. The application itself lasted one day, and the Board's decision was, in his submission, both complicated and detailed. He submits that Mr Gebbie was arguing issues of immense complexity, compared with the issues which had been raised in the case of *Sinclair*.
18. In support of his argument that fees should be assessed as at today's rates, rather than at the time when the work was done, and that interest should also be allowed, Mr Smith submits:

"Interest is compensation for failure to make payment; adjustment of fees to reflect current prices is a different principle. Accordingly, both adjustments for the difference in the value of money (ie, to allow current day rates) and interest should be allowed. This matter has been commented on judicially in both Scotland (in the First Division of the Inner House) and in England. [In *JM v Fife Council*]:

33. In deciding what disposal in respect of interest is in the circumstances fair to both parties, it is important to bear in mind two things – first, that the quantum of the principal sum of past solatium is assessed in money's worth as at the time of the interlocutor, not as at the time or times when the injury was sustained and, second, that two elements may be said to be included in the giving of interest on damages. In *Wright v British Railways Board* [1983] 2 AC 733 (referred to in *McGregor on Damages* (17th Ed) at paragraph 15-109) Lord Diplock at page 781F identified these elements as: "one, a reward for taking a risk of loss or reduction of capital; the other, a reward for foregoing the use of the capital sum for the time being." The former element in effect protects against inflationary effects on the value of money; the latter is concerned with the obligant having had, over the intervening period, the benefit of the use of the capital sum. These elements, it may reasonably be supposed, are both intended to be reflected in the rates of interest on

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decrees which have been fixed from time to time – and which historically have been set at the same rates in Scotland as in England.”

19. Mr Haggerty relied on the documents already lodged, which set out in some detail the position of SLAB. We do not need to set those submissions out in detail. In assessing the fees payable to counsel SLAB had regard to:

- the Standard Faculty Services fee notes;
- information provided by counsel in support of their fees;
- the Judicial Committee (Devolution Issues) Rules Order 1999;
- House of Lords Practice Directions (March 2000);
- advice from the Registrar's office.

20. The submission continues:

“On the basis of these references the Board attempted to perform its functions, in a very novel area at the time, in good faith and subject to the unfortunate circumstances at the time where no provision had been made for a referral to either the Auditor of the Court of Session or the Registrar on any “question or dispute.” (Using the terminology in the Criminal Fees Regulations)

21. Mr Haggerty pointed out that originally there had been a table of fees for counsel, published in 1992, but it had never been updated, and it was not until 2005 that a new table of fees was published. It is for this reason that the decision in *Sinclair* came to be used as a benchmark. The legislation gives power to SLAB to increase fees in respect of difficulty and complexity.
22. Mr Haggerty agrees that the Scotland Act 1998 made provision for devolution issues to be dealt with by the Judicial Committee of the Privy Council. Unfortunately, however, the Regulations were not amended, and no fees were prescribed. SLAB made the appropriate payment to counsel based on earlier experience in the House of Lords. He submits there should be no difference in respect of fees in the Privy Council. Section 32 of the 1998 Act provides that counsel may receive payment only from SLAB. SLAB had assessed the reasonable fee on the basis that the application was for special leave to appeal and no more. The suggested fees were £2,000. Mr Haggerty argues that the issue in the Judicial Committee was not extremely complex, all counsel were junior counsel, and the award of fees should be as at the time when the work was done.

Conclusion

23. Mr Smith initially argued that the fees allowed should be at a level appropriate to 2011, but also argued that counsel were entitled to interest on those fees. His suggestion was that the figures allowed in *Sinclair* should be increased by the

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appropriate figure for inflation, up to November 2010, together with a further 5% increase to reflect what he said was the increased complexity in the instant case.

24. Mr Haggerty resisted this method of calculation, and submitted that the appropriate level of fee was that applicable when the work was done. SLAB accepts that counsels' fees are subject to the payment of statutory interest in the terms of The Late Payment of Commercial Debts (Interest) Act 1988, but it is pointed out that arguments may arise as to the period during which interest should run, and whether there should be remission of interest in respect of various matters. The parties were in agreement that the issue of interest having been conceded, the actual amount of interest payable should, if agreement cannot be reached, form the basis of a separate application before the Scottish Courts. Therefore, apart from recording that counsel are entitled to the appropriate interest on their fees, we make no further ruling in respect of interest.
25. Mr Smith also accepted that this approach was possible, and suggested that the correct approach was to take the fees in *Sinclair*, and deduct an appropriate element for inflation (which he suggested would reduce those fees to approximately 80% in 2001) and to add 5% for the increase in complexity.
26. The difficulty which SLAB has encountered in arriving at appropriate fees for counsel has been caused in part by the absence of any guideline fees for work in the Privy Council in 2000. The adoption of the decision in *Sinclair* as a "benchmark" is understandable, in the absence of any other guidance, but that decision was never intended to stand as a benchmark, and, like any case where costs are being assessed, was, inevitably, fact sensitive. Accordingly, we do not accept that the correct approach is either to add to the fees in *Sinclair* an inflation element, and an element for complexity, to bring the fees up to today's levels. As we have stated we do accept that it is appropriate to allow fees at the level appropriate to 2000, but we reject the suggestion that that figure should be arrived at by deducting from the *Sinclair* figures an element for inflation, and then adding 5% for complexity.
27. In arriving at our figures for counsel's fees, we have taken into account all the circumstances, and considered the representations, both of counsel and of SLAB, oral and written. We have also borne in mind the recommendations of the Report of the Appeal Committee of the House of Lords, dated 14 October 1998 (Report Session 1997-98, HL Paper 145). In our judgment the recommendations in that Report apply equally to assessments in the Supreme Court and in the Privy Council.
28. The provisional taxation carried out by the Registrar and the Costs Clerk was on the basis that, although novel, these were primarily petitions for special leave only, and did not require the inclusion of full sums for preparation to argue the full appeal. On that basis we find that the fees allowed were appropriate. Having now accepted that in fact counsel had been told that they should be ready to argue the full appeal, we accept that the fees allowed are insufficient.
29. Taking into account the submissions and factors which we have highlighted, we allow the following fees: Mr Gebbie, £15,000; Mr McLaughlin, £15,000; Mr Nelson £8,500, Mr Gildea, £8,500.

Late Payments and SLAB

The Late Payment of Commercial Debts (Interest) Act 1998 should be applied to payments due by SLAB to a solicitor.

Types of contract

The purpose of the act is to imply a term of interest in a commercial contract and s2 of the act states it "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".

There are 3 parts to the definition which require to be fulfilled.

1. Are the parties acting in the course of a business?

The Acts definitions under s2(7) states that business including a government department and government department includes the Scottish Administration. SLAB is part of the Scottish Administration. A solicitor is a business enterprise and as such the relationship between SLAB and a solicitor is within the "course of a business" definition.

2. Is it the supply of goods or services?

We are looking at the provision of legal services. Service between s2(2) and (3) is a contract by which a person agrees to carry out a service for a monetary consideration. Again payments by SLAB fall into this category.

3. Is there a contract?

The position of SLAB appears to be that there is no contractual relationship for the provision of the payment of the sums due. They point to the requirement for Scottish advocates to have a provision applying the act to their fees. No provision applies the act to Scottish solicitors therefore the act does not apply in those circumstances.

However, the status of an advocates fee is separate to the position on a solicitors fee. An advocate's fee cannot be sued for and is *honorarium*. Therefore the fees of an advocate are never debts and the act could not be applied to such a fee. Specific provision for the act to apply to an advocates fee was therefore necessary. No such specific provision is necessary for solicitors fees.

With whom is there a contract?

The relationship between the different parties in legal aid results in contracts and obligations between the different parties. There is a standing relationship between the solicitor and SLAB. The solicitor requires to complete and submit paperwork and have their application to undertake legal aid work in general accepted. There is a contractual relationship between the client and solicitor, the client instructing the work to be undertaken. There is also a contractual relationship between SLAB and the client. The client requires to sign and submit their application for legal aid via their solicitor. The solicitor and the client sign and submit the

application to slab which then accepts the legal aid application. There is in effect a 3 way relationship between the client, slab and the solicitor.

So what is a contract? At its most basic a contract is an agreement where an offer meets an unqualified acceptance. Given the different types of legal aid and the different relationships that exist the question is to what extent is there any offer and acceptance? In Advice and Assistance the solicitor is authorised to grant AA to a limited level of funding. To that extent the solicitor is acting under the authority of SLAB and is authorised to enter into the relationship between SLAB and the client on SLAB's behalf. However, the necessary paperwork requires to be submitted via the legal aid online system, a system with its own terms and conditions to which the solicitor is subject. Thereafter the application is submitted by the solicitor and the application is then "granted". This amounts to an offer and acceptance resulting in a contractual relationship between all the parties. Without the signed paperwork and the grant of legal aid there would be no relationship or interest on the part of SLAB. Similarly SLAB will grant a civil legal aid application. There is therefore a voluntary agreement between SLAB and the Solicitor in the provision of legal service where by the solicitor has agreed to undertake the work for the client under the regulations of SLAB and the relevant statutory law. All contracts are subject to the law and regulated by law. A consumer credit agreement is subject to Acts of Parliament. That does not make any agreement any less of a contract. Therefore the existence of any statutory regulation of the relationship between SLAB and the solicitor does not make the relationship any less contractual. Put simply the solicitor is agreeing to undertake the work subject to SLAB regulations and SLAB agrees to pay the solicitor at legal aid rates for that work. SLAB have rights under the contract and under each grant of legal aid. These include the right to peer review files and inspect files and accounts. Therefore rights and obligations are created between the solicitor and SLAB. The parties are in a contractual relationship. The term purchaser is defined in the act as applying to "the person who contracts with the supplier". There is no requirement in the act that the purchaser is in receipt of the goods or services.

What Debts qualify under the Late Payment of Commercial Debts (Interest) Act?

A qualifying debt is defined in s3 as a debt created by virtue of an obligation under a contract to pay all or part of the contract price. As indicated above the contract between SLAB and the solicitor includes the obligation that SLAB will pay the solicitor subject to the regulations. These regulations include the provision of payment at certain rates which are defined in the table of fees. Therefore the contract price is such sums that are judged payable by SLAB but and are qualifying debts if they have not been paid after 30 days. These sums are payable from the submission of the account and interest should run from 30 days after the account is submitted to SLAB. Similarly if a supplier requires to sue for a debt interest runs from when

the debt was incurred not from when the court establishes the sums payable. As such the interest is due from the submission of the account with the work item not from the date it is audited as payable.

Therefore, failure to pay a debt if it is denied runs the risk that if the debt is adjudged to be payable and interest will have been running on that sum from the relevant date. Payments by SLAB are subject to the terms of the Late Payments of Commercial Debts (Interest) Act. The test for the necessary relationship between SLAB and the solicitor is met and sums unpaid after 30 days are qualifying debts as defined by the Act. Interest is due to be paid on any sums not paid within the 30 day period and compensation under s5A also falls due.



Late Payment of Commercial Debts (Interest) Act 1998

1998 CHAPTER 20

PART I

STATUTORY INTEREST ON QUALIFYING DEBTS

1 Statutory interest.

- (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.
- (2) Interest carried under that implied term (in this Act referred to as “statutory interest”) shall be treated, for the purposes of any rule of law or enactment (other than this Act) relating to interest on debts, in the same way as interest carried under an express contract term.
- (3) This Part has effect subject to Part II (which in certain circumstances permits contract terms to oust or vary the right to statutory interest that would otherwise be conferred by virtue of the term implied by subsection (1)).

Annotations:

Commencement Information

- II S. 1 wholly in force; s. 1 not in force at Royal Assent see s. 17(2); s. 1 in force for specified purposes: at 1.11.1998 by S.I. 1998/2479, art. 3; at 1.7.1999 by S.I. 1999/1816, art. 3; at 1.9.2000 by S.I. 2000/2225, art. 3(1), Sch.; at 1.11.2000 by S.I. 2000/2740, art. 3(1); S. 1 in force (E. W. N.I.) in so far as not already in force at 7.8.2002 by S.I. 2002/1673, art. 2: s. 1 in force (S.) in so far as not already in force at 7.8.2002 by S.I. 2002/337, art. 2

Changes to legislation: There are currently no known outstanding effects for the Late Payment of Commercial Debts (Interest) Act 1998, Part I. (See end of Document for details)

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 a consideration that is (or includes) a money consideration.

(3) Those things are—

- (a) transferring or agreeing to transfer to another the property in goods;
- (b) bailing or agreeing to bail goods to another by way of hire or, in Scotland, hiring or agreeing to hire goods to another; and
- (c) agreeing to carry out a service.

(4) For the avoidance of doubt a contract of service or apprenticeship is not a contract for the supply of goods or services.

(5) The following are excepted contracts—

- (a) a consumer credit agreement;
- (b) a contract intended to operate by way of mortgage, pledge, charge or other security; and
- ^{F1}(c)

^{F2}(6)

(7) In this section—

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

“consumer credit agreement” has the same meaning as in the ^{M1}Consumer Credit Act 1974;

“contract of sale of goods” and “goods” have the same meaning as in the ^{M2}Sale of Goods Act 1979;

[^{F3}“government department” includes any part of the Scottish Administration;]

“property in goods” means the general property in them and not merely a special property.

Annotations:

Amendments (Textual)

- F1** S. 2(5)(c) repealed (7.8.2002) by S.S.I. 2002/335, reg. 2(2) (with reg. 4)
 S. 2(5)(c),(6) repealed (7.8.2002) by S.I. 2002/1674, reg. 2(2)
- F2** S. 6 repealed (7.8.2002) by S.S.I. 2002/335, reg. 2(2) (with reg. 4)
- F3** Definition in s. 2(7) inserted (1.7.1999) by S.I. 1999/1820, art. 4, Sch. 2 Pt. I para. 132

Commencement Information

- I2** S. 2 fully in force; s. 2 not in force at Royal Assent see s. 17(2); s. 2 in force for specified purposes: at 1.11.1998 by S.I. 1998/2479, art. 3; at 1.7.1999 by S.I. 1999/1816, art. 3; at 1.9.2000 by S.I. 2000/2225, art. 3(1), Sch.; at 1.11.2000 by S.I. 2000/2740, art. 3(1); S. 2 in force (E. W. NI.) in so far

Changes to legislation: There are currently no known outstanding effects for the Late Payment of Commercial Debts (Interest) Act 1998, Part 1. (See end of Document for details)

as not already in force at 7.8.2002 by S.I. 2002/1673, art. 2; S. 2 in force (S.) in so far as not already in force at 7.8.2002 by S.S.I. 2002/337, art. 2

Marginal Citations

- M1 1974 c. 39.
M2 1979 c. 54.

[^{F4}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.]

Annotations:

Amendments (Textual)

- F4 S. 2A inserted (S.) (7.8.2002) by S.S.I. 2002/335, reg. 2(3) (with reg. 4)

3 Qualifying debts.

- (1) A debt created by virtue of an obligation under a contract to which this Act applies to pay the whole or any part of the contract price is a “qualifying debt” for the purposes of this Act, unless (when created) the whole of the debt is prevented from carrying statutory interest by this section.
- (2) A debt does not carry statutory interest if or to the extent that it consists of a sum to which a right to interest or to charge interest applies by virtue of any enactment (other than section 1 of this Act).

This subsection does not prevent a sum from carrying statutory interest by reason of the fact that a court, arbitrator or arbiter would, apart from this Act, have power to award interest on it.

- (3) A debt does not carry (and shall be treated as never having carried) statutory interest if or to the extent that a right to demand interest on it, which exists by virtue of any rule of law, is exercised.

^{F5}(4)

(5)

Annotations:

Amendments (Textual)

- F5 S. 3(4)(5) repealed (E. W. NI.) (7.8.2002) by S.I. 2002/1674, reg. 2(3)
S. 3(4)(5) repealed (S.) (7.8.2002) by S.S.I. 2002/335, reg. 2(4) (with reg. 4)

Commencement Information

- I3 S. 3 fully in force; s. 3 not in force at Royal Assent see s. 17(2); s. 3 in force for specified purposes: at 1.11.1998 by S.I. 1998/2479, art. 3; at 1.7.1999 by S.I. 1999/1816, art. 3; at 1.9.2000 by S.I. 2000/2225, art. 3(1), Sch.; at 1.11.2000 by S.I. 2000/2740, art. 3(1); S. 3 in force (E. W. NI.) in so far

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as not already in force at 7.8.2002 by S.I. 2002/1673, art. 2; S. 3 in force (S.) in so far as not already in force at 7.8.2002 by S.S.I. 2002/337, art. 2

4 Period for which statutory interest runs.

- (1) Statutory interest runs in relation to a qualifying debt in accordance with this section (unless section 5 applies).
- (2) Statutory interest starts to run on the day after the relevant day for the debt, at the rate prevailing under section 6 at the end of the relevant day.

[^{F6}(2A) The relevant day for a debt is—

- (a) where there is an agreed payment day, that day, unless a different day is given by subsection (2D), (2E) or (2G);
- (b) where there is not an agreed payment day, the last day of the relevant 30-day period.

(2B) An “agreed payment day” is a date agreed between the supplier and the purchaser for payment of the debt (that is, the day on which the debt is to be created by the contract).

(2C) A date agreed for payment of a debt may be a fixed date or may depend on the happening of an event or the failure of an event to happen.

(2D) Where—

- (a) the purchaser is a public authority, and
- (b) the last day of the relevant 30-day period falls earlier than the agreed payment day,

the relevant day is the last day of the relevant 30-day period, unless subsection (2G) applies.

(2E) Where—

- (a) the purchaser is not a public authority, and
- (b) the last day of the relevant 60-day period falls earlier than the agreed payment day,

the relevant day is the last day of the relevant 60-day period, unless subsection (2G) applies.

(2F) But subsection (2E) does not apply (and so the relevant day is the agreed payment day, unless subsection (2G) applies) if the agreed payment day is not grossly unfair to the supplier (see subsection (7A)).

(2G) Where the debt relates to an obligation to make an advance payment, the relevant day is the day on which the debt is treated by section 11 as having been created (instead of the agreed payment day or the day given by subsection (2D) or (2E)).

(2H) “The relevant 30-day period” is the period of 30 days beginning with the later or latest of—

- (a) the day on which the obligation of the supplier to which the debt relates is performed;
- (b) the day on which the purchaser has notice of the amount of the debt or (where that amount is unascertained) the sum which the supplier claims is the amount of the debt;
- (c) where subsection (5A) applies, the day determined under subsection (5B).

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(2I) “The relevant 60-day period” is the period of 60 days beginning with the later or latest of—

- (a) the day on which the obligation of the supplier to which the debt relates is performed;
- (b) the day on which the purchaser has notice of the amount of the debt or (where that amount is unascertained) the sum which the supplier claims is the amount of the debt;
- (c) where subsection (5A) applies, the day determined under subsection (5B).]

^{F7}(3)

[^{F8}(3A)

(3B)

(3C)]

(4)

(5)

[^{F9}(5A) This subsection applies where—

- (a) there is a procedure of acceptance or verification (whether provided for by an enactment or by the contract), under which the conforming of goods or services with the contract is to be ascertained; and
- (b) the purchaser has notice of the amount of the debt on or before the day on which the procedure is completed.

(5B) For the purposes of [^{F10} subsections (2H)(c) and (2I)(c)], the day in question is the day ^{F11} ... after the day on which the procedure is completed.

(5C) Where, in a case where subsection (5A) applies, the procedure in question is completed after the end of the period of 30 days beginning with the day on which the obligation of the supplier to which the debt relates is performed, the procedure is to be treated for the purposes of subsection (5B) as being completed immediately after the end of that period.

(5D) Subsection (5C) does not apply if—

- (a) the supplier and the purchaser expressly agree in the contract a period for completing the procedure in question that is longer than the period mentioned in that subsection; and
- (b) that longer period is not grossly unfair to the supplier (see subsection (7A)).]

(6) Where the debt is created by virtue of an obligation to pay a sum due in respect of a period of hire of goods, [^{F12}subsections (2H)(a) and (2I)(a) have effect as if they] referred to the last day of that period.

(7) Statutory interest ceases to run when the interest would cease to run if it were carried under an express contract term.

[^{F13}(7A) In determining for the purposes of subsection [^{F14}(2F)] or (5D) whether something is grossly unfair, all circumstances of the case shall be considered; and for that purpose, the circumstances of the case include in particular—

- (a) anything that is a gross deviation from good commercial practice and contrary to good faith and fair dealing;

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- (b) the nature of the goods or services in question; and
 - (c) whether the purchaser has any objective reason to deviate from the result which is provided for by subsection [^{F15}2(E)] or (5C).]
- (8) [^{F16}In this section—
- “advance payment” has the same meaning as in section 11;
 - “enactment” has the same meaning as in section 126(1) of the Scotland Act 1998;
 - “public authority” means a contracting authority (within the meaning of [^{F17}regulation 2(1) of the Public Contracts (Scotland) Regulations 2015].]
- [^{F18}In this section—
- “advance payment” has the same meaning as in section 11;
 - “enactment” includes an enactment contained in subordinate legislation (within the meaning of the Interpretation Act 1978);
 - “public authority” means a contracting authority (within the meaning of [^{F19}regulation 2(1) of the Public Contracts Regulations 2015].]

Annotations:

Amendments (Textual)

- F6** S. 4(2A)-(2I) inserted (21.6.2015 for E.W. N.I. and 27.6.2015 for S.) by The Late Payment of Commercial Debts (Amendment) Regulations 2015 (S.I. 2015/1336), regs. 1(1), 2(2) (with reg. 1(3)); The Late Payment of Commercial Debts (Scotland) Regulations 2015 (S.S.I. 2015/226), regs. 1(1), 2(2) (with reg. 1(3))
- F7** S. 4(3)-(5) omitted (21.6.2015 for E.W. N.I. and 27.6.2015 for S.) by virtue of The Late Payment of Commercial Debts (Amendment) Regulations 2015 (S.I. 2015/1336), regs. 1(1), 2(3) (with reg. 1(3)); The Late Payment of Commercial Debts (Scotland) Regulations 2015 (S.S.I. 2015/226), regs. 1(1), 2(3) (with reg. 1(3))
- F8** S. 4(3A)-(3C) inserted (16.3.2013 for E.W. N.I. and 29.3.2013 for S.) by The Late Payment of Commercial Debts Regulations 2013 (S.I. 2013/395), regs. 1(1), 2(2) (with reg. 1(3)); The Late Payment of Commercial Debts (Scotland) Regulations 2013 (S.S.I. 2013/77), regs. 1(1), 2(2) (with reg. 1(3))
- F9** S. 4(5A)-(5D) inserted (16.3.2013 for E.W. N.I. and 29.3.2013 for S.) by The Late Payment of Commercial Debts Regulations 2013 (S.I. 2013/395), regs. 1(1), 2(4) (with reg. 1(3)); The Late Payment of Commercial Debts (Scotland) Regulations 2013 (S.S.I. 2013/77), regs. 1(1), 2(4) (with reg. 1(3))
- F10** Words in s. 4(5B) substituted (21.6.2015 for E.W. N.I. and 27.6.2015 for S.) by The Late Payment of Commercial Debts (Amendment) Regulations 2015 (S.I. 2015/1336), regs. 1(1), 2(4) (with reg. 1(3)); The Late Payment of Commercial Debts (Scotland) Regulations 2015 (S.S.I. 2015/226), regs. 1(1), 2(4) (with reg. 1(3))
- F11** Words in s. 4(5B) omitted (3.5.2013 for S. and 14.5.2013 for E.W. N.I.) by virtue of The Late Payment of Commercial Debts (Scotland) (No. 2) Regulations 2013 (S.S.I. 2013/131), regs. 1(1), 2 (with reg. 1(3)); The Late Payment of Commercial Debts (No.2) Regulations 2013 (S.I. 2013/908), regs. 1(1), 2 (with s. 1(3))
- F12** Words in s. 4(6) substituted (21.6.2015 for E.W. N.I. and 27.6.2015 for S.) by The Late Payment of Commercial Debts (Amendment) Regulations 2015 (S.I. 2015/1336), regs. 1(1), 2(5) (with reg. 1(3)); The Late Payment of Commercial Debts (Scotland) Regulations 2015 (S.S.I. 2015/226), regs. 1(1), 2(5) (with reg. 1(3))
- F13** S. 4(7A) inserted (16.3.2013 for E.W. N.I. and 29.3.2013 for S.) by The Late Payment of Commercial Debts Regulations 2013 (S.I. 2013/395), regs. 1(1), 2(5) (with reg. 1(3)); The Late Payment of Commercial Debts (Scotland) Regulations 2013 (S.S.I. 2013/77), regs. 1(1), 2(5) (with reg. 1(3))

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- F14** Word in s. 4(7A) substituted (21.6.2015 for E.W. N.I and 27.6.2015 for S.) by The Late Payment of Commercial Debts (Amendment) Regulations 2015 (S.I. 2015/1336), regs. 1(1), 2(6)(a) (with reg. 1(3)); The Late Payment of Commercial Debts (Scotland) Regulations 2015 (S.S.I. 2015/226), regs. 1(1), 2(6)(a) (with reg. 1(3))
- F15** Word in s. 4(7A) substituted (21.6.2015 for E.W. N.I and 27.6.2015 for S.) by The Late Payment of Commercial Debts (Amendment) Regulations 2015 (S.I. 2015/1336), regs. 1(1), 2(6)(b) (with reg. 1(3)); The Late Payment of Commercial Debts (Scotland) Regulations 2015 (S.S.I. 2015/226), regs. 1(1), 2(6)(b) (with reg. 1(3))
- F16** S. 4(8) substituted (S.) (29.3.2013) by The Late Payment of Commercial Debts (Scotland) Regulations 2013 (S.S.I. 2013/77), regs. 1(1), 2(6) (with reg. 1(3))
- F17** Words in s. 4(8) substituted (S.) (18.4.2016) by The Public Contracts (Scotland) Regulations 2015 (S.S.I. 2015/446), reg. 1(2), sch. 6 para. 1(2) (with regs. 3-18, 99-101)
- F18** S. 4(8) substituted (E.W. N.I.) (16.3.2013) by The Late Payment of Commercial Debts Regulations 2013 (S.I. 2013/395), regs. 1(1), 2(6) (with reg. 1(3))
- F19** Words in s. 4(8) substituted (E.W. N.I.) (26.2.2015) by The Public Contracts Regulations 2015 (S.I. 2015/102), reg. 1(2), Sch. 6 para. 1

Commencement Information

- I4** S. 4 fully in force; s. 4 not in force at Royal Assent see s. 17(2); s. 4 in force for specified purposes: at 1.11.1998 by S.I. 1998/2479, art. 3; at 1.7.1999 by S.I. 1999/1816, art. 3; at 1.9.2000 by S.I. 2000/2225, art. 3(1), Sch.; at 1.11.2000 by S.I. 2000/2740, art. 3(1); S. 4 in force (E. W. NI.) in so far as not already in force at 7.8.2002 by S.I. 2002/1673, art. 2; S. 4 in force (S.) in so far as not already in force at 7.8.2002 by S.S.I. 2002/337, art. 2

5 Remission of statutory interest.

- (1) This section applies where, by reason of any conduct of the supplier, the interests of justice require that statutory interest should be remitted in whole or part in respect of a period for which it would otherwise run in relation to a qualifying debt.
- (2) If the interests of justice require that the supplier should receive no statutory interest for a period, statutory interest shall not run for that period.
- (3) If the interests of justice require that the supplier should receive statutory interest at a reduced rate for a period, statutory interest shall run at such rate as meets the justice of the case for that period.
- (4) Remission of statutory interest under this section may be required—
 - (a) by reason of conduct at any time (whether before or after the time at which the debt is created); and
 - (b) for the whole period for which statutory interest would otherwise run or for one or more parts of that period.
- (5) In this section “conduct” includes any act or omission.

Annotations:

Commencement Information

- I5** S. 5 fully in force; S. 5 not in force at Royal Assent see s. 17(2); s. 5 in force for specified purposes: at 1.11.1998 by S.I. 1998/2479, art. 3; at 1.7.1999 by S.I. 1999/1816, art. 3; at 1.9.2000 by S.I. 2000/2225, art. 3(1), Sch.; at 1.11.2000 by S.I. 2000/2740, art. 3(1); S. 5 in force (E. W. NI.) in so far

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as not already in force at 7.8.2002 by S.I. 2002/1673, art. 2; S. 5 in force (S.) in so far as not already in force at 7.8.2002 by S.S.I. 2002/337, art. 2

[^{F20}5A Compensation arising out of late payment

(1) Once statutory interest begins to run in relation to a qualifying debt, the supplier shall be entitled to a fixed sum (in addition to the statutory interest on the debt).

(2) That sum shall be—

- (a) for a debt less than £1000, the sum of £40;
- (b) for a debt of £1000 or more, but less than £10,000, the sum of £70;
- (c) for a debt of £10,000 or more, the sum of £100.

[^{F21}(2A) If the reasonable costs of the supplier in recovering the debt are not met by the fixed sum, the supplier shall also be entitled to a sum equivalent to the difference between the fixed sum and those costs.]

(3) The obligation to pay [^{F22}a sum] under this section in respect of a qualifying debt shall be treated as part of the term implied by section 1(1) in the contract creating the debt.]

[^{F23}(4) Section 3(2)(b) of the Unfair Contract Terms Act 1977 (no reliance to be placed on certain contract terms) shall apply in cases where a contract term is not contained in written standard terms of the purchaser as well as in cases where the term is contained in such standard terms.

(5) In this section “contract term” means a term of the contract relating to a sum due to the supplier under this section.]

[^{F24}(4) Section 17(1)(b) of the Unfair Contract Terms Act 1977 (no reliance to be placed on certain contract terms) shall apply in cases where a contract term is not contained in written standard terms of the purchaser as well as in cases where the term is contained in such standard terms.

(5) In this section “contract term” means a term of the contract relating to a sum due to the supplier under this section.]

Annotations:

Amendments (Textual)

F20 S. 5A inserted (7.8.2002) by S.S.I. 2002/335, reg. 2(5) (with reg. 4)

S. 5A inserted (7.8.2002) by S.I. 2002/1674, reg. 2(5)

F21 S. 5A(2A) inserted (16.3.2013 for E.W. N.I. and 29.3.2013 for S.) by The Late Payment of Commercial Debts Regulations 2013 (S.I. 2013/395), regs. 1(1), 3(2) (with reg. 1(3)); The Late Payment of Commercial Debts (Scotland) Regulations 2013 (S.S.I. 2013/77), regs. 1(1), 3(2) (with reg. 1(3))

F22 Words in s. 5A(3) substituted (16.3.2013 for E.W. N.I. and 29.3.2013 for S.) by The Late Payment of Commercial Debts Regulations 2013 (S.I. 2013/395), regs. 1(1), 3(3) (with reg. 1(3)); The Late Payment of Commercial Debts (Scotland) Regulations 2013 (S.S.I. 2013/77), regs. 1(1), 3(3) (with reg. 1(3))

F23 S. 5A(4)(5) inserted (E.W. N.I.) (16.3.2013) by The Late Payment of Commercial Debts Regulations 2013 (S.I. 2013/395), regs. 1(1), 3(4) (with reg. 1(3))

F24 S. 5A(4)(5) inserted (S.) (29.3.2013) by The Late Payment of Commercial Debts (Scotland) Regulations 2013 (S.S.I. 2013/77), regs. 1(1), 3(4) (with reg. 1(3))

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6 Rate of statutory interest.

- (1) The Secretary of State shall by order made with the consent of the Treasury set the rate of statutory interest by prescribing—
 - (a) a formula for calculating the rate of statutory interest; or
 - (b) the rate of statutory interest.
- (2) Before making such an order the Secretary of State shall, among other things, consider the extent to which it may be desirable to set the rate so as to—
 - (a) protect suppliers whose financial position makes them particularly vulnerable if their qualifying debts are paid late; and
 - (b) deter generally the late payment of qualifying debts.

Annotations:

Commencement Information

- I6** S. 6 fully in force; s.6 not in force at Royal Assent see s. 17(2); s.6 in force for specified purposes: at 1.11.1998 by S.I. 1998/2479, art. 3; at 1.7.1999 by S.I. 1999/1816, art. 3; at 1.9.2000 by S.I. 2000/2225, art. 3(1), Sch.; at 1.11.2000 by S.I. 2000/2740, art. 3(1); S. 6 in force (E. W. NI.) in so far as not already in force at 7.8.2002 by S.I. 2002/1673, art. 2; S. 6 in force (S.) in so far as not already in force at 7.8.2002 by S.S.I. 2002/337, art. 2

Changes to legislation:

There are currently no known outstanding effects for the Late Payment of Commercial Debts (Interest) Act 1998, Part I.