SHERIFF APPEAL COURT

[2021] SAC (Civ) 22
EDI-CA31-19

Sheriff Principal M M Stephen QC
Sheriff Principal D L Murray
Sheriff Principal C D Turnbull

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL MHAIRI M STEPHEN QC

in appeal by

THE SCOTTISH LEGAL AID BOARD

Pursuer and Respondent

in the cause

ORMISTONS LAW PRACTICE LIMITED

Defender and Appellant

Appellant: Duncan QC; Scottish Legal Aid Board; Brodies LLP
Respondent: Smith QC; Ormistons Law Practice Limited

11 June 2021

[1] The first issue in this appeal involves the scope of EU Directive 2011/7 "On Combating Late Payment in Commercial Transactions" ("the Directive") (which supersedes Directive 2000/35 EC) and the interaction between the "Directive" and the Late Payment of Commercial Debts (Interest) Act 1998 ("the 1998 Act") which falls to be construed against the terms of the "Directive". The second and operative issue is whether the terms of the 1998 Act require the appellant to make payment to the respondent of statutory interest on an account submitted to them in terms of the Legal Aid (Scotland) Act 1986 ("1986 Act").

[2] The respondent, a firm of solicitors, raised a commercial action against the appellant, The Scottish Legal Aid Board ("the Board"), seeking declarator that the Board is liable to pay statutory interest to the respondent on part of their account submitted to the Board and remaining unpaid more than 30 days after that account had been taxed. The action relates to a particular case involving a client of the firm CM. On 3 August 2016 the appellant made payment of the sum of £1,796 within 30 days of the account being submitted. However, this was less than the total of remuneration and outlays claimed. On 29 March 2017 the respondent submitted the account for taxation and on 8 June 2018 the auditor determined that £131.70 remained due to the respondent. That balance was ultimately paid by the Board on 14 September 2018. The interest claimed amounts to £23.59. However the issue relating to payment of interest on overdue accounts is said to affect many thousands of legal aid accounts and is therefore of wider importance. Only the crave for declarator was debated before the sheriff. For the purpose of these proceedings the Board did not resist the respondent's computation of interest in Crave 2. Crave 3 seeks payment of £40 being the fixed sum of compensation due in terms of section 5A of the 1998 Act. Following debate, the sheriff, on 31 January 2020, granted decree of declarator that the appellant is obliged to make payment to the respondent of the sum due by way of statutory interest in terms of the 1998 Act and granted decree in terms of Craves 2 and 3. The sheriff in a concise yet comprehensive judgment observes at paragraph [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))." The sheriff concludes at paragraph [23] "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…. 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."

Appeal

[3] In the note of appeal the appellant firstly contends that the sheriff erred in concluding that the statutory arrangements for payments to solicitors by the Board in respect of Legal Advice and Assistance ("LAA") and advice by way of representation (ABWOR) fell within the scheme of the Directive.

[4] Secondly, it being a matter of agreement that the 1998 Act requires to be construed in a way that gives effect to the scheme of the Directive, *esto* the sheriff is correct that the

scheme of the Directive would be broad enough to cover the arrangements for payment of LAA, the sheriff erred in concluding that the 1998 Act could be construed in a manner that gave effect to the intention of the Directive. In particular, the sheriff overlooked the limits placed upon a court when construing legislation in a way that complies with EU Directives. It is the domestic legislation that matters. It is not open to the court to create a new and different scheme or to change the principles of the domestic legislation. The sheriff fails to explain how the provisions of the 1998 Act fall to be construed in such a way that imposes upon the Board an obligation to pay interest. The 1998 Act is concerned with contracts. Section 2 makes it clear that the 1998 Act is concerned with contracts where the debtor is a purchaser of goods or services. Section 4(2D), as relied upon by the respondent, applies only where a public authority is the purchaser of the goods or services in question. Section 2A was enacted by Scottish Ministers to bring advocates within the scope of the Act (See *Smith* v *SLAB* 2012 SLT 694). The appellant has no contract with the respondent and is not a purchaser of the pursuer's goods or services. For these reasons the sheriff erred.

Statutory Framework

> **"Directive 2011/7/EU "on Combating Late Payment in Commercial Transactions" Recitals:**
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> (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, as agreed between parties, as set out in the supplier's invoice or as laid down by law.
>
> (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. Furthermore, Member States should

be able to exclude debts that are subject to insolvency proceedings, including proceedings aimed at debt restructuring.

(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 therefore also regulate all commercial transactions between main contractors and their suppliers and subcontractors.

(17) A debtor's payment should be regarded as late, for the purposes of entitlement to interest for late payment, where 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. In addition, many public authorities can obtain financing at more attractive conditions than undertakings. At the same time, public authorities depend less than undertakings on building stable commercial relationships for the achievement of their aims. Long payment periods and late payment by public authorities for goods and services lead to unjustified costs for undertakings. It is therefore appropriate to introduce specific rules as regards commercial transactions for the supply of goods or services by undertakings to public authorities, which should provide in particular for payment periods normally not exceeding 30 calendar days, unless otherwise expressly agreed in the contract and provided it is objectively justified in the light of the particular nature or features of the contract, and in any event not exceeding 60 calendar days.

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, thereby fostering the competitiveness of undertakings and in particular of SMEs.

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

Article 2 - Definitions

For the purposes of this Directive, the following definitions shall apply:

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;

Article 4

Transactions between undertakings and public authorities

1. Member States shall ensure that, in commercial transactions where the debtor is a public authority, the creditor is entitled upon expiry of the period defined in paragraphs 3, 4, or 6 to statutory 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; and

(b) the creditor has not received the amount due on time, unless the debtor is not responsible for the delay.

3. Member states shall ensure that in commercial transactions where the debtor is a public authority:

(a) the period for payment does not exceed any of the following time limits:

(i) 30 calendar days following the date of receipt by the debtor of the invoice or an equivalent request for payment

(ii) where the date of receipt of the invoice or the equivalent request for payment is uncertain, 30 calendar days after the date of the receipt of the goods or services;

(iii) where the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 calendar days after the date of the receipt of the goods or services;

(iv) where a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, is provided for by statute or in the contract and if the debtor receives the invoice or the equivalent request

for payment earlier or on the date on which such acceptance or verification takes place, 30 calendar days after that date;

5. Member States shall ensure that the maximum duration of a procedure of acceptance or verification referred to in point (iv) of point (a) of paragraph 3 does not exceed 30 calendar days from the date of receipt of the goods or services, unless otherwise expressly agreed in the contract and any tender documents and provided it is not grossly unfair to the creditor within the meaning of Article 7.

The Late Payment of Commercial Debts (Interest) Act 1998

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.— 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—

(c) agreeing to carry out a service.

(7) In this section— "business" includes a profession and the activities of any government department or local or public authority;

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.

Legal Aid (Scotland) Act 1986

4.— Scottish Legal Aid Fund.

(1) The Board shall establish and maintain a fund to be known as the Scottish Legal Aid Fund (in this Act referred to as "the Fund").

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

(a) subject to section 4A(13), such sums as are, by virtue of this Act 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;

12.— Payment of fees or outlays otherwise than through clients' contributions.

(2) This section applies to any fees or outlays properly chargeable (in accordance with section 33 of this Act), in respect of advice and assistance given to a client in pursuance of this Part of this Act; but does not apply to the salary payable to a solicitor employed by the Board under sections 26 and 27 of this Act or to the salary payable to a solicitor employed by the Board by virtue of section 28A of this Act.

(3) Except in so far as regulations made under this section otherwise provide, fees or outlays to which this section applies shall be paid to the solicitor or, as the case may be, the registered organisation, 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 an 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 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 by it of a claim submitted by the solicitor or the registered organisation.

> (4) In subsection (3), the reference to an amount payable by the client does not include an amount which it is for the Board to collect (whether under section 11A(3) or any regulations made under section 33ZA(1)).
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> 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."

Preliminary Matter

[5] At the appeal hearing there was a discussion whether a reference might be made to the Court of Justice of the European Union (CJEU) or "European Court" either on the application of one or both of the parties to the appeal or by the court itself. Counsel for both parties indicated that they did not consider it necessary that a reference be made to the CJEU. That reflected the position adopted by parties before the sheriff. The 1998 Act fell to be construed in a manner which gives effect to the Directive currently in force which superseded the 2000 Directive. That being the case and although it was open to make a reference until the end of 2020 (by virtue of section 6 of the European Union (Withdrawal) Act 2018) the court was not minded to make a reference in terms of the Act of Sederunt (Sheriff Appeal Court Rules) 2015, (Chapter 21 Rule 21.2(2)) being satisfied that the issues were capable of determination by applying conventional rules of statutory interpretation and in particular having due regard to the rules and limits placed on courts when interpreting domestic legislation in a manner which complies with EU Directives.

Submissions on behalf of the Board

[6] Senior counsel for the appellant adopted his written note of argument and then invited us to consider two specific issues of interpretation:

(1) The first issue concerns the scope of the EU Directive 2011 against which (it is accepted) the 1998 Act falls to be construed.

(2) The second issue is concerned with the scope of the 1998 Act and whether that domestic legislation can be construed in a way that gives effect to what the respondent contends to be the purpose of the Directive.

Proper consideration of these issues of interpretation leads to the conclusion that the LAA Scheme falls outwith both the Directive and the provisions of the domestic legislation. The appeal should be allowed; the sheriff's interlocutor of 31 January 2020 recalled with expenses in favour of the appellant. The cause is suitable for sanction of senior counsel due to its complexity and novelty.

[7] Counsel directed his submissions on the first issue by reference to six propositions which can be summarised as follows:

1. The Directive is concerned with remuneration for commercial transactions and should be construed as a contract for the supply of services or goods, between a supplier and purchaser.

2. Where the Directive refers to remuneration it is referring to the transaction described above.

3. In the present case the transaction between the solicitor and client is a consumer contract and the Directive does not apply to that situation at all (Recital 8).

4. The respondent suggests that the transaction is the payment due to the solicitor by the Board. However, the respondent distorts the distinction which must be made between the transaction and the remuneration. These are two separate concepts.

5. The obligations of the Board sit outside any transaction and therefore outwith the Directive.

6. The statutory scheme for LAA contains none of the ingredients required to be compliant with the Directive.

[8] The approach which the courts should adopt in construing EU legislation differs from construction of domestic law. Firstly, legal concepts do not necessarily have the same meaning in each member state. As a result, the terminology used in EU legislation should be construed as having an autonomous and uniform EU meaning that might differ from the meaning that would be given under the domestic law in a particular member state. Secondly, EU Directives differ from UK legislation in both form and expression. EU Directives contain recitals or preambles which set out the legislative objective. In construing a Directive, the domestic court must have regard to these stated objectives. The sheriff was referred to the key recitals and articles of the Directive in particular recitals 2, 8, 9, 17, 23 and 26. The Directive refers to commercial transactions rather than a contract which having regard to the principles of interpretation is understandable. However, the Directive is concerned with what we know as a contract or contractual obligations. Recital 2 makes clear that the concern of the Directive is to ensure that the recipient of goods or services, including a public authority, pays the provider promptly. LAA provided in terms of the 1986 Act and associated Regulations cannot be placed within this bi-lateral framework. It is necessary to look at Articles 1, 2, 3 and 4 to understand its scope. The focus of the articles, as with the recitals, is upon obligations arising under contractual obligations between the supplier and the recipient of the goods or services. Article 4 makes clear that the Directive applies to public authorities where the public authority is the recipient of the goods or services. Counsel referred to a recent judgment of the CJEU in *Techbau SpA* v *Azienda*

Sanitaria Locale AL C-299/19 which considered the scope of the predecessor Directive (2000/35) in the context of a public works contract. That authority was of limited assistance to the court. At paragraph 38 the CJEU provide guidance on the construction of Article 2(1) which, "must normally be given an independent and uniform interpretation". The entitlement to interest arises when two conditions have been met. These conditions are part of the legal arrangements between the supplier and the recipient of the services. The first condition is that the supplier had fulfilled its contractual and legal obligations. The second condition is that the particular point in time when interest arises under the contract had been reached (see Article 4(3)(a)(i)-(iv).

[9] Having regard to this analysis of the Directive the sheriff erred in concluding that LAA did not fall outside the bi-lateral supply or purchaser structure envisaged by the Directive. LAA is in the nature of a statutory indemnity. The Board have an obligation to pay the solicitor when other means of payment are not available (see section 4(1) and (2); section 12 and section 33(1) of the 1986 Act).

[10] The second condition precedent to the entitlement of interest arises within Article 4 which provides for the four possible trigger points from which interest may run under the contract. The possible trigger points stipulated in Article 4 are to a significant extent replicated in section 4 of the 1998 Act. Article 4, properly analysed, is further evidence that the Directive is concerned with contractual obligations. None of these four situations fall within the relationship between the parties to this appeal. The Board are unable to ascertain when any entitlement to interest arises. The fulfilment of contractual and legal obligations in the current case relates to a consumer contract namely providing legal services to the client. The scheme of LAA sits outside any transaction and outwith the contractual obligation of the solicitor to the client or between the solicitor and the Board. The scheme

does not require the fulfilment of legal obligations. Article 4 simply cannot be applied to the relationship between the solicitor and the Board. No issue is taken with the sheriff's analysis of LAA, however, the error arises in attempting to make LAA fit into the Directive. The LAA scheme exists as a framework for payment to which solicitors may have access when other means of payment are unavailable. The system in place for the payment of LAA operates for the benefit of society; for clients who lack the means to pay for legal services; and for solicitors acting for such clients. The scheme imposes few if any obligations upon solicitors. The statutory scheme for LAA bears no relation to a contract or to a transaction between a purchaser or supplier. Instead, it sits outside the intended scope of the Directive.

[11] The second issue relates to the scope of the 1998 Act. Can the domestic legislation be construed in a way that gives effect to what the respondent contends to be the purpose of the Directive?

[12] Senior counsel cited authorities which have considered the duties of a national court when interpreting domestic law enacted for the purpose of transposing an EU Directive. The "*Marleasing* principle" requires the court to interpret domestic law, so far as possible, to achieve the purpose of the Directive. However, the principle is subject to constraint (see Lady Smith in *Barton* v *Secretary of State for Scotland* 2016 SC 258; Lord Dyson in *Vidal-Hall* v *Google Inc* [2016] QB 1003 and *Litster v Forth Drydock and Engineering Company Limited* 1989 SC (HL) 96). Analysis of the authorities leads to four propositions which will assist in interpreting the 1998 Act.

1. What provision(s) of the domestic legislation would require to be altered to encompass LAA?

2. Do these provisions represent important or fundamental features of the 1998 Act?

3. Would such changes alter or distort the legislation?

4. Can the provisions of the 1998 Act be taken to be the will of the UK Parliament?

Senior counsel submitted that the latter three questions should be answered in the affirmative. The approach to the 1998 Act can be made firstly at a higher level and then at a lower or operational level. With regard to the first question, the sheriff said that all that was required is to change the word contract to "commercial transaction" (see paragraphs 25 and 26 of his judgment). However, after consideration of sections 1 and 2 of the Act changing contract to commercial transaction does not achieve the stated purpose on the part of the respondent. The Board do not purchase the services of the solicitor. There is no contract between the parties. The provisions relating to contract and interest are fundamental to the legislation. The proposed interpretation advanced by the respondent would alter the fundamental purpose and feature of the 1998 Act. It would extend the benefit of statutory interest from that for which there is provision to that for which there is no provision. With regard to the fourth question, Lord Dyson in *Vidal-Hall* did not consider that it mattered whether or not the court was aware of why Westminster legislated in the manner it did (restricted or otherwise).

[13] The lower level analysis of the 1998 Act required careful consideration of section 4 which is a complex provision for determining the relevant day for statutory interest to run. There are formidable obstacles presented by these provisions if LAA is to be shoe horned into the 1998 Act. The question as to how the date from which interest runs is to be calculated is addressed by sections 4(2A), (5A), (5B) and (5C). In this case, however, it is unanswerable and simply serves to underline the fact that the statutory scheme of LAA cannot be fitted into the 1998 Act without altering the fundamental features of the Act,

namely, that the Act is concerned with bi-lateral contracts and not the statutory scheme of LAA.

[14] We were addressed on section 2A of the 1998 Act which was inserted in 2002 to bring members of the Faculty of Advocates within the scope of the 1998 Act. Advocates have a non-contractual arrangement with solicitors and individual clients and accordingly members of Faculty required to be brought within the scope of the 1998 Act by way of specific amending legislation in respect of fees and remuneration. *Smith* v *SLAB* 2012 SLT 694 was cited to the sheriff who takes some time to analyse that case. In *Smith* there had been a concession by the Board with regard to the issue of interest which was to apply. *Smith* was concerned with section 2A and the date from which interest should run. *Smith* does not assist the court in this case as it was decided on this very narrow issue.

Submissions for the respondent

[15] Senior counsel for the respondent invited us to refuse the appeal and adhere to the sheriff's interlocutor of 31 January 2020. The appeal focuses on the issue of principle which the sheriff determined, namely, that the 1998 Act applied to the LAA scheme and the parties' relationship. The sheriff correctly identified the provisions which established the relationship between a solicitor engaged in LAA and the Board and that that relationship is a "commercial transaction" which fits within the scope of both the Directive and also the 1998 Act.

[16] Parties are agreed that in considering the scope and application of domestic legislation which is designed to implement a Directive it is legitimate to look at the Directive to answer the question at issue (*Litster* v *Forth Dry Dock and Engineering Company Limited supra*). The Directive must be given a purposive construction. It was also a matter of

agreement that there is no authority from this or any other jurisdiction which assisted in answering the point at issue and the court required to interpret both the Directive and the 1998 Act from first principles. It is submitted that the sheriff's interpretation of the Directive and of the application of the 1998 Act violates no principle of interpretation. It does not exceed what is reasonable standing the purpose of the Directive which is to discourage delayed payment to small or medium businesses by the imposition of a penalty in the form of interest. We were referred to De Smith: Judicial Review 8th Edition at 14-066.

[17] The sheriff has correctly identified the statutory provisions which establish the relationship between the solicitor and the Board and the LAA scheme. The scheme poses obligations on the Board to make payment in the circumstances set out by the sheriff and in terms of the 1986 Act.

[18] The respondent contends that the matter is relatively straightforward and that the Directive applies to the relationship between the parties. The appellant on the other hand looks for reasons to dis-apply the Directive. The appellant, wrongly, interprets the Directive to mean that it is confined to circumstances where the services are provided to a public authority and not where the public authority is obliged to make payment for services supplied to another party; indeed where there are indications of a contract in existence. The appellant fails to address the purpose of the Directive and to identify any provision which supports the proposition that a commercial transaction is simply a contract. The more nuanced relationship between the parties relative to LAA is still an arrangement between parties that is capable of falling within the scope of the Directive. The Board have legal obligations namely to comply with the 1986 Act and associated regulations and to remunerate a solicitor who provides LAA to a client.

[19] In approaching the scope of the Directive it is important to consider Article 2(1) which states that "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. Having regard to the terms of Article 2 it is not necessary that there is a direct contractual relationship between the parties but that the commercial transaction has led to the provision of services to the client, which the Board are obliged to fund. The respondent is an "undertaking" and the appellant is a "public authority". They have entered into a transaction whereby the appellant is bound by a statutory scheme whereby the carrying out of work by an authorised solicitor; submitting the relevant forms to the appellant and performing the obligation to provide advice and assistance to the client then entitles them to payment. This has all the hallmarks of a commercial transaction.

[20] Senior counsel referred to Article 1(2) of the Directive which is to the effect "This Directive shall apply to all payments made as remuneration for commercial transactions." It is therefore submitted that as soon as the payee is entitled to payment for a commercial transaction (as defined) the provisions of the Directive and the Act apply. There is no provision within the Directive which would exclude this type of commercial transaction. Senior counsel departed from the contention that the relationship could be characterised as a tripartite relationship between the solicitor, the client and Board but rather that there were coexisting relationships.

[21] We were addressed on *Smith* v *SLAB* (*supra*). The point at issue in that case is somewhat different but nevertheless the *dicta* of the Lord President at paragraph [14] is of assistance in determining this issue. The sheriff was entitled to have regard to that and

correctly recognised that the *dicta* of the Inner House went further than the narrow issue itself. In particular at paragraph [19] the sheriff observes:

> "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."

The sheriff was correct to take the view that there was no fundamental difference in the relationship between solicitors and the Board if the transaction involved full civil legal aid or LAA. It would lead to inconsistency if members of the Faculty of Advocates are entitled to interest on fees in legal aid cases and solicitors are not. It is important to consider the mischief which the Directive seeks to address.

[22] Further assistance with the interpretation of the Directive may be found in *Techbau (supra)* at paragraph 38. It is necessary to interpret and understand the Directive before construing the domestic legislation. The 1998 Act should not be interpreted literally but should be interpreted to give effect to the Directive. It is possible to do this by adopting a purposive construction. The LAA scheme is capable of falling within the terms of both the Directive and the 1998 Act. The LAA scheme imposes certain obligations on the solicitor who requires to follow the rules. If the solicitor does not comply with the requirements of the scheme the solicitor will not be entitled to payment. Although the relationship leading to payment could be regarded as complicated it is nevertheless fundamental to both the Directive and the 1998 Act that there is no requirement that the services are provided to the debtor. The question Lord Rodger posed (in *Ghaidan* v *Godin-Mendoza* [2004] 2 AC 557) "does it go with the grain?" can be answered in the affirmative. It is very much with the grain to read the 1998 Act in a manner which addresses the purpose of the directive and

only if it is impossible to read the 1998 Act in terms of the Directive can the appeal succeed. The legislation does not restrict the provision of services to the debtor alone and accordingly the Directive and the legislation is capable of being interpreted as including the LAA scheme. The legal obligation on the part of the solicitor is to supply advice and assistance to the client. The relationship between the parties is the commercial transaction "which leads to" the separate transaction with a client for the provision of advice and assistance. The appeal should be refused with expenses in favour of the respondent.

Decision

[23] The issues raised in this appeal involve the interpretation of the 1998 Act and whether its provisions as to statutory interest apply to a legal aid account submitted to the Board and remaining unpaid, in whole or in part, after the relevant day had passed. Before we consider the 1998 Act which requires to be read against the terms of the Directive, it is necessary to look at the structure and context in which the parties operate. This involves consideration of the legal aid provisions in particular those relating to the grant of legal advice and assistance (LAA) and the statutory framework for both the grant of LAA and for payment by the Board to the solicitor providing legal services to a client.

[24] The sheriff sets this out succinctly under the heading "The Structure of the Legal Aid and Advice provisions" at paragraphs [4] to [7] of his judgment. Sections 4, 12 and 33 of the 1986 Act, together with Regulations 17 and 18 of the Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 2447/1996 ("the 1996 Regulations") are of particular importance in understanding how LAA operates. These provisions are set out in the sheriff's judgment and also in this opinion. Parties are agreed that the sheriff's narration correctly encapsulates the statutory scheme which governs the relationship between a

solicitor and the Board. We too adopt the sheriff's analysis of LAA. We also accept that the relationship between a solicitor and the Board is essentially the same whether the solicitor is acting on a "full" civil legal aid certificate or under the LAA provisions (see paragraph [20] on page 29 of the sheriff's judgment).

[25] It is important to notice that the scheme for the grant of legal aid (including LAA) is a statutory one which also controls the remuneration payable to solicitors (by regulation) and also by whom payment of that remuneration is made. The Board's obligation to pay a solicitor who acts for a person by providing LAA may be found at section 33(1) of the 1986 Act. Any solicitor (or counsel) is to be paid out of the Fund which the Board require to maintain in terms of section 4(1) and (2) of the 1986 Act. The combined effect of sections 4 and 33 is tempered by section 12 described in its heading as "Payment of Fees or Outlays otherwise than through Clients' Contributions". Eligibility for LAA is determined by the solicitor. Financial eligibility and liability to pay a contribution depends on the income and capital of the client. If the client is due to make a financial contribution towards LAA it is the responsibility of the solicitor to collect that. Client contributions form the first source of funding of the fees and outlays of the solicitor in terms of section 12(3)(a) of the 1986 Act. The sheriff refers to the "hierarchy for payment" of the solicitors' fees and outlays as provided in section 12. This case proceeds on payment of the solicitors' fees by the Board out of the Fund following receipt of a claim (or account) submitted by the solicitor in terms of section 12(3)(d), the first, second and third sources of payment having either been exhausted or inapplicable.

[26] The scheme for LAA could be regarded as providing "statutory indemnity" to the solicitor in respect of fees and outlays incurred, as counsel for the appellant had suggested, with the Board being the funder of last resort. However, that may over-simplify the scheme

which is strictly regulated. The solicitor requires to use a particular form as prescribed by the Board. There is a financial limit to the fees which the solicitor may incur on behalf of the client. That limit may be increased with the prior approval of the Board. The nature of the advice and assistance which may be given is wide ranging including advice by way of ABWOR. LAA may not necessarily lead to an application for full civil legal aid but could do. LAA may include "pure advice" with no prospect of a claim for recovery of money or property from another party. The solicitor requires to notify the Board when LAA commences and provide the Board with any information required by it for the purpose of performing its statutory functions under the 1986 Act. The Board may well not know whether the solicitor's fees and outlays are met by the other party or from property including money recovered for the client. The solicitor may not require to make any claim to the Board at all in respect of fees and outlays if the solicitor has been remunerated in the circumstances set out in section 12(3)(a)(b) or (c) of the 1986 Act. On the other hand, in terms of regulation 18 where the solicitor considers that fees and outlays incurred exceed any contribution payable by the client, together with, any expenses or property recovered or preserved the solicitor must within one year of the date when the giving of advice and assistance was completed submit an account to the Board. Provision is made in regulation 18 for the Board to assess the fees and outlays due to a solicitor; determine any sums payable and pay it. If the solicitor is dissatisfied by any such assessment made by the Board (as here) provision is made for taxation by the auditor which shall be conclusive as to the fees and outlays to be allowed.

[27] This broadly encapsulates the statutory scheme of LAA. However, does the relationship between the parties under the LAA scheme fall within the scope of the Directive and meet the definition of a commercial transaction between an undertaking (solicitor) and a

public authority (the Board) which leads to the supply of services for remuneration? The sheriff at paragraph [23] of his judgment states "In my opinion, the relationship in the present case between a solicitor and the Board can properly be described as a 'commercial transaction'." and "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".

[28] The purpose of the directive is plainly to address the scourge of late or delayed payments for goods or services by imposing a penalty in the form of interest. It aims to discourage late payment especially to small and medium size businesses. Recital 23 and Article 1 of the Directive are of particular importance in interpreting its scope. Article 1(1) informs the aim of the Directive namely to combat late payment in "commercial transactions". It goes on to explain that this is "in order to ensure the proper functioning of the internal market, thereby fostering the competitiveness of undertakings and in particular of SMEs." Article 1(2) makes clear that the Directive applies to <u>all</u> payments made as remuneration for commercial transactions which are defined in Article 2(1) as meaning "transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration." Articles 3 and 4 require member states to ensure that the creditor in such transactions is entitled to interest for late payment (without the necessity of a reminder) when certain conditions are satisfied. Condition (a) is critical, and perhaps obvious, namely that the creditor must have fulfilled its contractual and legal obligations. Article 4 deals with transactions between undertakings and public authorities which is the territory this appeal inhabits. Both articles stipulate the date when the creditor is entitled to interest for late payment. The period for payment should not exceed 30 calendar days following the date of receipt by the debtor of the invoice

or an equivalent request for payment. Alternative time limits apply where the date of receipt of the request for payment is uncertain or is received earlier than the goods or the services or where there is a procedure of acceptance or verification by which the conformity of the goods or services with the contract is to be ascertained.

[29] The language of the Directive is redolent of contract but the Directive is concerned with "commercial transactions" (including commercial transactions between undertakings and public authorities). We agree with the sheriff's conclusion that a commercial transaction is a broader concept than a contract, however, Articles 3 and 4 stipulate fulfilment by the creditor of its contractual and legal obligations as a pre-condition of entitlement to interest. We also accept that the Directive applies across member states of the EU with different legal systems and different domestic legal definitions of contracts. This in itself may call for a broader approach to what may be regarded as contractual obligations or what we recognise as a contract. The aim of the Directive is clear and can be seen to best effect in Article 1(1) of the Directive, that is combating late payments in commercial transactions. That is well understood. However, the issue is the nature of the relationship between the respondent and the Board, is it a commercial transaction within the meaning of the Directive? A commercial transaction looks and feels very much like a contract. The appellant directed us to the terms of Article 13 which deals with the repeal of the previous Directive (2000/35/SC) but goes on to state that the earlier Directive remains applicable to contracts concluded before the date of repeal.

[30] Clearly, solicitors fall within the scope of the Directive given the terms of Recital 10 which refers to the "liberal professions". The Board is a public authority. However, it is necessary to analyse the relationship between the parties under LAA especially as the Directive regulates all commercial transactions but not transactions with consumers

(Recital 8). The solicitor/client contractual relationship lies at the heart of LAA. The obligation on the part of the Board to pay fees and outlays to the solicitor in terms of section 33 depends on that contract which is a consumer contract for services.

[31] Section 12 of 1986 Act makes provision for the "hierarchy" of funding the solicitor's fees and outlays. The Board are obliged to indemnify in terms of regulation 12(3)(d). After that the Board require to assess and determine the sum payable out of the fund and then to pay it, unless the solicitor is dissatisfied by the assessment in which case provision is made for taxation by the auditor which shall be conclusive as to the fees and outlays to be allowed. If, as it appears to be, the scope of the Directive is limited to payments made as remuneration for commercial transactions then, it is doubtful whether payments made by a public authority as remuneration for services provided by solicitors to a client as part of a consumer contract fall within its scope. The LAA scheme is a statutory scheme by which the Board is obliged to make payments from the fund in terms of sections 4, 33 and 12 together with Regulations 17 and 18 of the 1996 Regulations if called upon to do so by virtue of the solicitor submitting a claim for fees and outlays properly incurred in acting for a client in receipt of LAA.

[32] Senior counsel for the respondent, in his note of argument, advances the proposition that the Directive is designed precisely to fit the arrangement between the Board and the respondent and that there is nothing in the Directive to suggest that that relationship is other than a commercial transaction entitling the respondent to interest. Likewise, the respondent accepted that the solicitor could not charge interest to his client as that was a consumer contract. However, counsel for the respondent, accepting that the relationship between the solicitor and his or her client under LAA is not a commercial transaction, did not consider that made any difference. Services had to be provided but not necessarily between the

parties to the relevant commercial transaction. Departing from his position before the sheriff that the relationship between the parties and the client was a tripartite arrangement he, instead, argued that there were two separate relationships firstly, between solicitor and client and secondly between solicitor and the Board. Although the relationship with the Board was separate it was a commercial transaction leading to the provision of services to the client. The solicitor was only entitled to payment from the Board if he fulfilled certain criteria, namely, being approved by the Board to provide LAA on a subject relating to Scots Law; following the requirements for LAA; and charging only for work necessarily and reasonably done. That relationship with the Board is the commercial transaction leading to payment. These are co-existing relationships. However, in our view, as no goods or services are being provided by the respondent to the Board the relationship between the parties is not in the nature of a commercial transaction as defined and envisaged by the Directive. The statutory scheme of LAA involves a process for payment of the solicitor's fees and outlays rather than the provision of services to the Board. Instead, the relationship is one of regulated indemnity for payment of fees and outlays reasonably and necessarily incurred on behalf of the client. The statutory scheme is designed to facilitate the provision of legal services to people who cannot afford the cost of engaging a solicitor privately. The LAA scheme facilitates solicitor client relationships which are consumer contracts. The solicitor may have no requirement to call upon the Board to meet his fees and outlays, for example, in circumstances where the subject matter of the advice relates to a claim for damages against a negligent party and the solicitor's costs are met as part of a settlement. The relationship between the solicitor and the Board is not therefore of the nature of a commercial transaction or contract envisaged by the Directive. The Directive is concerned with commercial transactions involving obligations on both sides. The obligations

incumbent upon both the solicitor and the Board in LAA do not relate directly to the provision of services but rather their funding and are more akin to indemnity.

[33] The judgment of the CJEU in the case of *Techbau (supra)* was issued just prior to the hearing of the present appeal. It is concerned with a public works contract. The District Court in Turin made a reference for a preliminary ruling on the interpretation of Article 2(1) of the 2000 Directive. The contract related to the delivery and fitting out of an operating block for a hospital in Italy. A ruling was required whether the concept of a "commercial transaction" covered the contract in issue. The court appears to have had no difficulty in finding that a public works contract constituted a commercial transaction and fell within the material scope of the Directive. The court was concerned with promoting an independent and uniform European interpretation of the Directive and what constitutes a commercial transaction. Senior counsel for the respondent relied on paragraphs 38, 39, 41 and 44 of *Techbau* in support of his proposition that the LAA scheme was the commercial transaction between the parties which leads to the solicitor/client contract. However, we do not consider that the LAA scheme can be characterised as a transaction or transactions between undertakings or between undertakings and public authorities. Any services provided are by the solicitor to the client that being a consumer transaction which is excluded from the Directive.

[34] We have come to the conclusion that the scope of the Directive, limited as it is to payments made as remuneration for commercial transactions, does not apply to the LAA scheme and the relationship between the parties arising from that scheme. Any payment made in respect of remuneration relates not to a commercial transaction between the parties but to the solicitor's services in fulfilling an obligation to provide advice and/or representation in the contract with the client. Further, the Board's obligations to the solicitor

under LAA arise not as a result of a commercial transaction between the parties to this appeal but in terms of the statutory framework of the 1986 Act and associated regulations. In our opinion, that framework sits outwith the scope of the Directive. The LAA scheme obliges the Board to pay remuneration to the solicitor who has provided LAA to a client if certain conditions are met. In terms of the Directive the entitlement to interest is not absolute. The creditor in the commercial transaction must have fulfilled his contractual and legal obligations (Article 4(1)(a)). There being no contract between the parties in this case the question remains to whom the contractual and legal obligations are owed? Certain basic rules must be followed in terms of the LAA scheme – completion of the form; determination of the client's eligibility; collection of contributions and submission of an account to the Board within one year of the date when the solicitor completed giving advice and assistance. These are requirements of the LAA scheme and may be considered legal obligations on the part of the solicitor. There are no contractual obligations. However, the solicitor has both contractual and legal obligations to the client. Whether these obligations have been fulfilled is primarily a matter between the solicitor and client. The board may well not be aware of whether these contractual obligations have been fulfilled. The scheme for payment of fees and remuneration properly incurred in terms of sections 4, 12 and 33 of the 1986 Act is not equivalent to a commercial transaction. There must first be a commercial transaction in terms of which remuneration is paid provided the other party fulfils his obligations to provide goods or services. (See Articles 2(1) and (4) of the Directive). The solicitor/Board relationship is based on payment of fees or remuneration only in circumstances where the client contribution is insufficient to meet those fees and no other property or expenses have been recovered to satisfy the solicitor's fees. This arrangement which we have described as one of regulated indemnity for payment of fees and outlays is not of the nature of a

commercial transaction. It appears to us to be part of a statutory scheme in which the Board is the disburser of last resort.

[35] The second ground of appeal proceeds on the hypothesis that the sheriff was entitled to conclude that the scope of the Directive was sufficiently broad to encompass the payment arrangements between a solicitor and the Board in respect of LAA. That being so, and there being agreement that the 1998 Act requires to be construed, where possible, in a way that gives effect to the Scheme of the Directive, did the sheriff err in his approach to the construction of the 1998 Act by concluding that it could give effect to the Directive?

[36] This ground is concerned with sections 1, 2, 3 and 4 of the 1998 Act. The provisions relating to the calculation of interest are not of immediate concern. Section 2A applies these provisions "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 purposes of this Act". The 1998 Act was amended by SSI (SSI 2002/335) to insert section 2A (see *Smith* v *SLAB supra*).

[37] The 1998 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. This case is not concerned with an excepted contract which by virtue of section 2(5) is a consumer credit agreement, mortgage or similar security. Section 2(3) extends the definition of a contract for the supply of goods or services to "agreeing to carry out a service for consideration that is or includes money consideration." Section 1 introduces the implied term to any such contract that any qualifying debt created by the contract carry simple interest. Qualifying debt is defined in section 3. Accordingly, it can be recognised that in enacting the 1998 Act Parliament wished to apply statutory interest to contracts for the supply of goods and services as set out in section 2: that is contracts

between purchaser and supplier where each are acting in the course of business. Consumer credit agreements are excepted so also must be consumer contracts as in the Directive. We were referred to cases which discussed the principles which the domestic court requires to apply when interpreting domestic law which has been enacted to give effect to an EU Directive. The "*Marleasing*" principle (as set out in the judgment of the European Court in *Marleasing SA* v *La Comercial Internacional de Alimentation SA* (C-106/89) [1990] ECR I-4135) is usually cited as the basic principle to be followed when a domestic court is called upon to interpret national law. That court is required, as far as possible, to interpret national law in light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter. However, as Lady Smith observed in *Barton* (*supra*) at paragraph [21] "As with the application of section 3(3) of the Human Rights Act 1998 (Cap 42), there is no obligation to import a meaning which is inconsistent with a fundamental feature of the legislation or is incompatible with the 'underlying thrust' of the legislation being construed or requires the reading in of words which are inconsistent with the scheme of the legislation (*Ghaidan* v *Godin-Mendoza (supra)* per Lord Nicholls of Birkenhead, para 33, Lord Rodger of Earlsferry, para 121). …The power and duty to interpret national law so as to conform with a European Directive does not enable the court to trespass into the field of lawmaking, that being the province of Parliament (*HM Revenue & Customs* v *IDT Card Services Ireland Ltd*, para 82; *O'Brien* v *Ministry of Justice* (No 2), para 48)." Thus there are limitations and constraints on the application of the *Marleasing* principle.

[38] The *dicta* of Lord Rodger of Earlsferry in *Ghaidan* v *Godin-Mendoza* was also quoted with approval by Lord Dyson in *Vidal-Hall* (*supra*) which was concerned with section 13 of the Data Protection Act 1998 (which gave effect to the Parliament and Council Directive 95/46/EU). The Data Protection Act is an instance of the UK Parliament giving less than full

effect to an EU Directive. For example, the Data Protection Act provides for compensation for pecuniary loss rather than non-pecuniary loss despite the terms of the Directive which appear to encompass both. It therefore appears to be acknowledged that a domestic Parliament can give less than full effect to a Directive. This, of course, emphasises that there is a limit to the manner in which a court can interpret domestic legislation to give effect to a Directive. The court cannot amend or change or alter the settled will of Parliament. The claimants in *Vidal-Hall* had no allegations of pecuniary or material loss and in these circumstances their claim for distress and anxiety did not fall within the definition of "damage" for the purpose of section 13 which the UK Parliament had limited, in effect, to pecuniary loss unless special conditions existed which did not in that case. The court held that section 13(2) of the Data Protection Act 1998 was a fundamental feature of that Act and could not be dis-applied by invoking the *Marleasing* principle. After quoting with approval Lord Rodger's dicta from *Ghaidan* v *Godin-Mendoza* Lord Dyson considered the various interpretive techniques which could be deployed to eliminate an incompatibility. However,

> "The relevant question in each case is whether the change brought about by the interpretation alters a fundamental feature of the legislation or is inconsistent with its essential principles or goes against its grain, to use Lord Rodger's memorable phrase. In our view, there is no significance in the interpretative tool that is used. Reading in to a provision or reading it down may change a fundamental element of it. That is not permissible. But we do not see why, as a matter of principle, it is impermissible to disapply or strike down, say, a relatively minor incompatible provision in order to make the measure compatible. The question must always be whether the change that would result from the proposed interpretation (whichever interpretative technique is adopted) would alter a fundamental feature of the legislation. It will not be "possible" to interpret domestic legislation, whether by reading in, reading down or disapplying a provision, if to do so would distort or undermine some important feature of the legislation.".

[39] At paragraph 121 in *Ghaidan* v *Godin-Mendoza* (*supra)* Lord Rodger of Earlsferry observes:

> "For present purposes, it is sufficient to notice that cases such as Pickstone v Freemans plc [1989] AC 66 and Litster v Forth Dry Dock & Engineering Co. Ltd [1990] 1 AC 546 suggest that, in terms of section 3(1) of the 1998 Act, it is possible for the courts to supply by implication words that are appropriate to ensure that legislation is read in a way which is compatible with Convention rights. When the court spells out the words that are to be implied, it may look as if it is 'amending' the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute."

Litster, of course, was concerned with the Transfer of Undertakings (Protection of Employment) Regulations 1981 ("TUPE"). In that case the House of Lords applied a purposive construction to the Directive and to Regulations issued for the purpose of complying with the Directive. In *Litster* the court was able to supply by implication words appropriate to comply not only with the obligations in terms of the Directive but also the purpose of the regulations as laid by Parliament to ensure that a dismissal by reason of a transfer from one employer or undertaking to another should be treated as an unfair dismissal being simply a different way of expressing the terms of the Directive which said that a transfer is not to constitute a ground for dismissal. Accordingly, as Lord Rodger explains, the court was not amending the legislation but ensuring it was read in a way which was compatible not only with convention rights but also with the will of Parliament whose intention had not been to limit the operation of crucial regulations designed to protect persons in employment immediately before the transfer. Thus, the court when construing legislation to give effect to the terms of the Directive must take care to respect the

intention of Parliament and cannot invoke *Marleasing* to adopt a meaning which is inconsistent with a fundamental feature of the legislation.

[40] The question remains, in this case, whether the sheriff was entitled to interpret the 1998 Act in a way which is compatible with the Directive so as to permit the statutory scheme of LAA to fall within the ambit of sections 1 and 2 of the Act? A literal approach to these important provisions points to the conclusion that Parliament intended that statutory interest be applied only to contracts between purchaser and supplier. In enacting the 1998 Act Parliament did not use the term "commercial transaction". Recognising that the 1998 Act predated the Directive and its predecessor the 2000 Directive we must interpret the 1998 Act in light of the purpose of the directive and its wording. We do not know why Parliament legislated by restricting statutory interest to contractual obligations. In *Vidal-Hall*, Lord Dyson addressed this question and concluded that it made no difference in interpreting domestic legislation whether or not the court knows why Parliament legislated in a restrictive way when transposing a Directive into domestic law (see paragraph 93). As we mention earlier the legal terminology or nomenclature in the EU may not necessarily accord with that used in domestic law. Lord Dyson refers to the autonomy of EU legal terms at paragraph 72 in *Vidal-Hall*.

[41] In this case the sheriff (at paragraph [23]) considers, firstly that the relationship between the parties can properly be described as a "commercial transaction" and secondly, "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." Is it possible to interpret the 1998 Act in a manner that reads commercial transaction for contract and brings the LAA statutory scheme within the scope of the Directive? Sections 1 and 2 of the Act represent the core provisions. They limit the scope of

statutory interest to contracts in terms of section 2. The implied term as to interest does not extend to all contracts. We take the view that to read commercial transaction for contract in sections 1 and 2 of the Act would add little to the respondent's case. Section 2(2)(b) requires there to be a contract by which one party agrees to carry out a service for a monetary consideration. There is no contract between the parties in the sense that the Board purchases the services of the respondent. That does not appear to be in dispute. The fundamental difficulty for the respondent lies not in substituting commercial transaction for contract but in interpreting the 1998 Act in a matter which encompasses the LAA scheme which is a statutory scheme. To read into sections 1 and 2 a statutory scheme for the provision of legal aid would be to alter the fundamental wording and purpose of the legislation. "It goes against the grain" of the 1998 Act to interpret the legislation in the manner contended for by the respondent. It does, however, go with the grain of equity to contend that interest ought to be paid on late payments arising either as a result of a legal obligation under a contract or under a statutory scheme such as LAA. However, that is not the issue we require to decide but nevertheless exposes an inconsistency especially when we turn to consider section 2A of the 1998 Act. The amendment of the 1998 Act to apply sections 1 and 2 to transactions in respect of fees for professional services due to an advocate was considered necessary as members of the Faculty of Advocates do not enter into a contract either with solicitors who instruct them or individuals for whom they act or advise. But for the section 2A exception they could not benefit from statutory interest. As the Lord President pointed out in *Smith* (*supra* at paragraph [14]) when considering the application of the 1998 Act to the professional services rendered by an advocate "it is vain to search for a contractual obligation – indeed, perhaps, for any obligation". In our opinion this serves to emphasise that the enactment of section 2A recognised that the 1998 Act was concerned solely with

contractual obligations, meaning that the 1998 Act and its provisions as to statutory interest as originally enacted could never apply to a member of the Faculty of Advocates. There required specific provision to bring them under the umbrella of contractual statutory interest. But for section 2A the lack of contractual relationship with either an instructing solicitor or client meant that the 1998 Act could not apply due to its focus on contractual relationships.

[42] The appellant made further submissions in support of this ground of appeal focussing on what may be described as the operative provisions of the 1998 Act, in particular, section 4 which involves somewhat labyrinthine rules for determining the period for which statutory interest is to run. Section 4 is subject to section 5 which provides for remission of interest. This will depend on the conduct of the supplier and where the interests of justice lie. Section 4 requires attention to be focussed on the "relevant day". There are fairly complex rules for determining the relevant day which may be the agreed payment date. However, the relevant day may also depend on the happening of some other event or, indeed, a failure of an event to happen (section 4(2C)); where the purchaser is a public authority the last day of a relevant 30 day period may be the relevant day (section 4(2D)). Where the relevant 30 day period applies, as argued for here, it is necessary to ascertain the day on which the obligation of the supplier is performed and the day on which the purchaser has notice of the sum claimed to be the debt. Where that amount is unascertained it may be necessary to ascertain the date by reference to a verification or acceptance procedure under which conformity of the services is to be ascertained.

[43] The respondent, on the other hand, advances the simple proposition that the practical difficulties advanced on behalf of the appellant are misplaced. The application of that section does not raise an issue which should concern the court. A solicitor has a year to

submit the account to the Board. If the solicitor delays the remission provisions of section 5 may apply by limiting interest to a reduced rate or for all or part of the period for which statutory interest would normally run, if the solicitor's conduct and/or the interests of justice require.

[44] We agree with the respondent's observations on the effect and purpose of the remission provisions, however, we doubt that section 5 provides a complete answer to the appellant's submissions on the relevant day or in particular "the last day of the relevant 30 day period" in terms of sub-sections 4(2A) and 4(2H). Section 5 would appear to envisage judicial determination which failing extra-judicial agreement on issues relating to conduct and where the interests of justice lie. These are normally discretionary matters depending on the facts and circumstances of each case. The interest craved in the specific case to which this appeal relates is modest - £23.59. The disputed or additional sum due to the respondents was £131.70. An additional sum of £40 is craved in respect of statutory compensation. It is difficult to accept that section 5 provides a practical, pragmatic or proportionate remedy when the sums are relatively small and the potential number of accounts large.

[45] Of course, the appellant's submissions on this point represent the micro or practical approach to the main issue in this appeal – whether LAA can properly fall within the terms of the 1998 Act. It is clear from the pleadings that the payment day or relevant day on which the respondent relies is in terms of section 4(2A)(b), namely, the last day of the relevant 30 day period which is defined in section 4(2H) as follows:

> "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.

(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.

(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 the 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).

(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."

[46] There is no agreed payment day in terms of the LAA arrangement. We have to consider instead whether the definition of the "relevant 30 day period" in section 4(2H) is compatible with the transactional arrangements for LAA. It is contended on the part of the appellant that each of the options require to be analysed, however, it is sufficient for current purposes to demonstrate that LAA presents an irreconcilable barrier to the application of any one of these provisions. The appellant contends that none of these options or possible dates could be applied to LAA. Sub-section 4(2H)(a) refers specifically to the day on which the obligation of the supplier to which the debt relates is performed. It appears to us that the use of the words "to which the debt relates" is a reference to the obligations between the solicitor and client rather than any obligations between the parties. Once the provision of

LAA has commenced the only further requirement imposed on the solicitor is to render an account in terms of regulation 18 of the 1996 Regulations which is to submit an account with the Board within one year of the date when the giving of advice and assistance is completed. That can hardly be regarded as a legal obligation as it only arises in circumstances where the fees and outlays cannot be recovered from client contributions or from expenses or property recovered. The requirement to lodge an account may never arise. It is true that the solicitor may forfeit payment should he delay in submitting an account without good cause. This sub-section implies and sub-section 4(2H)(b) explicitly refers to "the purchaser" of services. Purchaser is defined in section 16 as follows:

> "Purchaser" means (subject to section 13(2)) the buyer in a contract of sale or the person who contracts with the supplier in any other contract for the supply of goods or services."

[47] We have already examined the difficulty in identifying the Board as the person who contracts with the solicitor for the supply of services to the client. There appeared to be common ground that there was no actual contract between the Board and the solicitor. It would strain the language of sub-section 4(2H)(a) and (b) to accommodate the arrangements for payment under LAA. Sub-section 4(2H)(c) applies where there is a procedure of acceptance or verification under which the conforming of the services with the contract is to be ascertained. Again, the conformity to a contract poses difficulty but, leaving that to one side, regulation 18 provides for a type of verification procedure but restricted in nature to the assessment of the account which failing taxation. The procedure for verification envisaged in section 4(5C) is strict providing "Where…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….as being completed immediately after the end of that period". It is important to

note that the verification period does not begin with the submission of the account of expenses but rather it begins with the day on which the obligation of the supplier to which the debt relates is performed. Again, with reference to sub-section 4(2H)(a) this does not sit easily with LAA when the debt relates to the performance of obligations in a solicitor / client relationship and the statutory requirement is to submit an account within one year of the completion of the advice and assistance. Accordingly, our analysis of "the relevant day" provisions in terms of sub-section 4(2A) provides further support for the appellant's contention that the LAA scheme cannot be made to fit within the scheme of the 1998 Act or the Directive. It follows that there is substantial force in the appellant's argument that the relevant payment day provisions in section 4 provide further cogent support for the proposition that the LAA scheme and the applicable payment arrangements between the parties do not fall within the scope of the 1998 Act.

[48] In effect the appellant had an *esto* argument based on the respondent's contention that the LAA scheme imposed contractual obligations on each party sufficient to bring them within the scope of the Directive and the Act. Then the sub-section 4(2H)(c) acceptance or the verification arrangements would operate to defeat the respondent's argument on entitlement to interest as the 30 day period would not run until the process of assessment of the LAA account was complete as only at that point would the precise amount of the debt be ascertained. It certainly appears that section 4(2H)(c) read together with sub-sections (5A), (5B) and (5C) mean that where there is a procedure for assessment (verification) or taxation as arises under regulation 18 the purchaser (the Board) must also have notice of the precise amount of debt on or before the day on which the verification or taxation procedure is completed. If we proceed on the hypothesis that the Board is the purchaser and the respondent is the supplier of services, then, sub-section 4(5C) operates to

delay the relevant day which crystallises on the day after the day on which the procedure is completed which, in turn, means that the 30 day period begins at that stage, postponing the date from which statutory interest runs.

[49] It follows from what we say that the appeal must be allowed. We will recall the sheriff's interlocutor of 31 January 2020; sustain pleas in law 2 and 3 for the defender and appellant, repel the pleas in law for the pursuer and respondent and grant decree of absolvitor in favour of the defender and appellant. The pursuer and respondent will be found liable to the defender and appellant in the expenses of the cause at first instance and in respect of the appeal. We shall certify the appeal as suitable for the employment of senior counsel.

[50] However, the matter does not end there. The sheriff was referred to the case of *Smith* v *SLAB*. The point at issue in *Smith* was a narrow one, namely, the date from which interest on counsel's claim for payment of fees would run, liability to pay interest having been conceded by the Board (see paragraph [19] of the Lord President's opinion). The Lord President considers the 1998 Act read against the 2000 Directive (being the predecessor to the Directive with which this appeal is concerned) concluding at paragraph [14]:

> "The Directive envisages that all professional persons should, in their commercial relationships, have the benefit of the Directive. Accordingly, the 1998 Act was, within the period for transposition of the Directive, amended by the insertion of section 2A. That section applies the provisions of the Act 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. Thus, it is vain, when considering the application of the Act to the professional services rendered by an advocate, to search for a contractual obligation – indeed, perhaps, for any legal obligation."

The court had already observed at paragraph [10] that: "the relationship between an advocate and his client is not at common law contractual". Clearly, amending legislation was required to dis-apply the common law character of the advocate's professional

relationship with solicitors and clients "to ensure that advocates had the benefit of the Directive". However, *Smith* serves to emphasise the anomalous position of solicitors compared with counsel in their remuneration arrangements with the Board. The Board's position in this case sits rather awkwardly with the concession made in *Smith*. The concession appears to have resulted in the Lord Ordinary and the Inner House not addressing the question whether the 2000 Directive applied to the relationship between the Board and counsel. At least it appears to us that the application of the Directive was not seen as controversial in the context where a public authority is making payment of fees incurred by counsel. It undoubtedly creates an unattractive and surprising anomaly that the Board accepts that they are liable to pay interest on counsel's fees but should not be liable for interest on the fees and outlays paid to solicitors as a result of our analysis in this case. The anomaly cannot be explained solely by reference to section 2A of the 1998 Act. Whereas, the relationship between solicitor and client is based on contract the relationship between a solicitor and the Board is somewhat different. The regulations governing payments as remuneration for the supply of services to a client in receipt of legal aid or LAA involves the Board fulfilling its obligations under a statutory scheme.

[51] Consumer contracts which include contracts for services between solicitors and their individual clients do not fall within the scope of the Directive and the question of interest on late payment of an account or fee note will not normally arise. Nevertheless, where the client is eligible for LAA or civil legal aid it is anomalous that the solicitor may have to wait upon the pleasure of the Board to receive settlement of fees and outlays without there being any interest penalty for late payment. Although we were assured by counsel for the appellant that the well understood position is that the Board should make payments timeously we were also told (by senior counsel for the respondent) that the Board, as a

public authority, persistently failed to make payment to solicitors within a reasonable time and hitherto have escaped the penalty of interest. We also note the Lord President's observations in *Smith* that the Board's approach to their obligation to make payment of counsel's (interim) fee note and its calculation of a figure of £260 plus VAT to be paid against an interim fee charged of £5,620 was "obscure". *Smith* was concerned solely with payment of counsel's fees and the date from which interest should run on unpaid fees. The Lord President considered "it is plain that 'undertaking' in the Directive was so defined so to include persons carrying on the profession of advocate in Scotland" (paragraph [10]). As we have already observed the definition of 'undertaking' extends to the legal profession. Considerations of consistency and, indeed, fairness would lead to the expectation that the solicitor branch of the legal profession should also have the benefit of the Directive in respect of remuneration for fees and outlays from the Fund overdue for payment. In our view, that is a matter that requires to be addressed by Parliament.