

Interest (Scotland) Bill

Response to Consultation by Andersons Solicitors LLP, Glasgow and Edinburgh

1. Introduction

1.1 General

Andersons Solicitors LLP are a medium sized firm of solicitors operating from offices in both Glasgow and Edinburgh. It is considered that the most significant and relevant part of our practice so far as meriting scrutiny of the draft bill and the making of relevant responses, is insurance litigation. The firm acts for a number of major UK insurers who we consider have an interest in the provisions of the draft bill. After much reflection it is from that stand point only that we have decided to put forward the following comments. We believe that the draft bill is a worthy piece of legislation and that in many respects the provisions of the bill are to be commended even where they affect areas of practice in which we do not have a substantial involvement or in respect of which we have chosen not to respond. For example those areas may include the provisions relating to contracts of employment or to cautionary obligations. We shall leave it to our professional colleagues operating in those areas or with special interests in those areas to respond. We believe that our reputation in the field of insurance litigation (both in relation to disputes arising out of indemnification of policyholders by insurers and to the wide variety of litigations arising out of indemnity insurance, chief amongst which is of course personal injury) will commend our somewhat restricted remarks to the Scottish Government.

1.2 General Principles

We agree that there ought to be a single statutory source of authority for the calculation of interest on a general variety of obligations whether arising *ex contractu* or *ex lege*. We are generally in agreement with the view that in most instances it is comparatively easy to establish when sums due from either source fall due for payment. Thus in cases of the supply of goods and services it is or ought to be a simple proposition that interest should run from the date the goods or services are supplied and that in the absence of contractual provision this should be a deemed date. We have no disagreement with the proposed period of 30 days. Similarly in relation to obligations arising *ex lege* for example obligations to make reparation in respect of injury or damage to property or in respect of unjust enrichment it ought to be possible to ascertain with some precision the date from which the obligation to pay interest should run. The date upon which the loss in question is sustained is an obvious one. We are in general agreement with the provisions of Section 7 of the draft bill particularly those in Section 7 (2).

2. Particular Provisions

2.1 Contracts of Insurance

We are strongly of the view that contracts of insurance should be exempt from the provisions of the draft bill. Firstly, as is observed by the Scottish Government, insurance is not a devolved matter. Secondly there are particular features of the contract of insurance that in our opinion should preclude the accrual of interest on sums payable by an insurer to his insured.

In our opinion contracts of insurance are unique. It is trite to say that they are contracts of the utmost good faith. In almost all instances the policyholder will be in a unique position in that he

will have within his knowledge or at his disposal all of the information that the insurer needs to decide whether a claim falls to be admitted in principle and thereafter the measure of any indemnity that falls to be granted. We do not consider that it is a simple matter of producing “vouching”. In our respectful submission for an insurer to be under an obligation to pay interest from 30 days after the claim is vouched is overly simplistic. The “vouching” may in a complex business interruption case require the careful investigation by the insurer or by loss adjustors or even forensic accountants on its behalf, of the quantum of the policyholder’s claim. The policy may contain detailed provisions in relation to the period over which the interruption is to be measured and the manner of its calculation. It is within our own experiences that many claims presented by policyholders or those acting on their behalf are not “vouched” in accordance with the policy. We can see disputes arising as to whether or not an entitlement to interest has even arisen. It seems to us that a court having to adjudicate on this is essentially having to determine the date when the insurer was reasonably in a position to make payment under the policy. That seems to us to be tantamount to the “wrongful withholding” approach. We note that the Law Commission and the approach of the Scottish Government is to avoid indeed specifically avoid the court having to determine whether funds have been “wrongfully withheld”. In many cases however it would be comparatively easy for the court to determine when a sum, whether payable under contract or otherwise, fell due for payment. In the case of an insurance contract it would be a matter of evidence as to when an insurer having regard to all the terms and conditions of the contract and the conduct of the parties was in a position to admit the claim. We see no reason why interest could not run from that date.

We are not aware from our own extensive experience that many contracts of insurance make provision for the running of interest, contrary to what is stated at paragraph 42 of the Scottish Government’s consultation paper.

To specifically answer the questions posed in Section 4 of the paper we do consider that the provisions of the draft bill would have an effect on the provision of insurance for both individuals and businesses. It may lead to insurers requiring to redraft policies having regard to different legislative positions applying both south and north of the border. We do not believe it would ultimately be helpful in the resolution of disputes. As mentioned we believe it would create uncertainty and the scope for further litigation over when for example claims were adequately vouched. We believe that it would not be appropriate to apply the general interest provisions of the draft bill by default and that insurance, being a reserved matter in terms of the 1998 Act, the draft bill should specifically exempt contracts of insurance.

3. Damages

We are broadly in agreement with the provisions of the draft bill so far as they propose to review, modify and update the provisions of both the 1958 Act and 1971 Act. We do however advocate retaining a considerable degree of judicial discretion in the quantification and modification of the right to interest having regard to the conduct of the parties. There is already an established body of case law in relation to the conduct of parties as affecting the entitlement to expenses and we believe that this can adequately be dealt with within the context of Section 11 of the draft bill.

4. Fees & Outlays in Proceedings

We disagree with the views of the Scottish Law Commission. With respect to the Scottish Law Commission we believe that their proposal does not take account of the widespread practice whereby many actions are in reality fought on a speculative basis and therefore the fees element

at least of a judicial account will not have been paid by a client to his solicitor at any time prior to the date of any discerniture for expenses. We are of course not privy to the arrangements made by many practices for funding clients' outlays and there may be some justification for allowing a client who has funded outlays or has had those funded on his behalf, to recover interest from the date of payment. Nonetheless we can see significant difficulties in practice entitling a pursuer to recover interest on expenses which he may not have paid to his solicitor. However looking at the matter objectively we consider that there is some merit in allowing the recovery of interest in principle but that interest should in our view not run until at the earliest the date of discerniture. There remains some merit in the argument that interest should not run on any sum of expenses until the date of decree for the taxed amount or the date on which the account was agreed by the parties.

5. Calculation of Interest

We are in agreement with the proposal whereby the judicial rate of interest is fixed to the prevailing Bank of England lending rate save for an additional 1 or indeed 1.5 percentage points. This reflects the compensatory element to an award of interest. The current system whereby the rate is fixed by Act of Sederunt has proven in our view to be unjust particularly where the present rate has remained at 8% since 1993. Insurers or any other party who retains money, lawfully or otherwise have long since ceased to be able to obtain anything like those rates of return. We are also in agreement with the view that the interest calculation should be simple interest reflecting the normal commercial method of calculating interest.

6. Powers of Court to Waive or Reduce Interest

As briefly commented upon above we are generally in agreement that the court should retain a wide discretion to restrict or withhold the award of interest. There exists a developed body of case law particularly in relation to the courts general discretion to award expenses which in our view could be called upon. In this respect we are in agreement with the proposal made by the Faculty of Advocates and Citizen's Advice Scotland (paragraph 62).

7. Tenders

Again we are in agreement with this provision. A Tender should continue to be deemed to include interest to the date it is made. We pause to remark that so far as we are aware this is the only legislative recognition of the concept of a tender. It is perhaps for another forum but we are of the view that the law and practice of tenders ought to be made the subject either of legislation or of subordinate legislation in the form of rules of court.