

FACULTY OF ADVOCATES

RESPONSE

by

THE FACULTY OF ADVOCATES

to

**THE SCOTTISH GOVERNMENT
CONSULTATION PAPER**

on

INTEREST (SCOTLAND) BILL

Further to the meeting between members of the Faculty Sub-Committee and representatives of the Scottish Government to discuss the Interest (Scotland) Bill the responses given relate to the particular questions posed in the Government Consultation Paper on the draft Bill upon which the Faculty can give a substantive view.

Q1 Do you agree that utility debts should be exempt from the statutory interest regime?

It is a political decision whether or not to exempt particular categories of debt from the statutory interest regime. Clearly there is a balance between protecting vulnerable members of society in relation to essential services and not undermining provision of a service by commercial companies. Clause 11 of the Bill (which provides wide judicial discretion to either decide that interest is not payable, or payable at a lower amount, where that would be in the interests of justice) could be used to protect the vulnerable.

The consultation document highlights that the proposals regarding exempting certain categories of debt arise against a background that “It is not the intention to increase the level of indebtedness in these areas as the ultimate consequences of non-payment can be the loss of an essential service or possible eviction.” Clause 2 (a) of the Bill provides that statutory interest is not due on sums if “there is express or implied agreement between the creditor and debtor – (i) that interest is to be due...on a basis different from that provided for in this Act”. The majority of utility bills will make some provision for the payment of interest on arrears which would, in terms of this clause, be the basis upon which interest is payable. Whilst the Bill provides that the Scottish Ministers may, by order, provide for other types of payment to be specified as exempt from statutory interest (clause 2(e)) contractual interest would continue to run on such debts. It is unclear therefore that such an exempting provision would achieve the aim of limiting indebtedness in respect of these matter and it might have the unintended consequence of increasing the importance of contractual interest clauses for utility providers.

Q2 Do you agree that rent arrears due to public sector landlords should be exempt from the statutory interest regime?

Again, this is clearly a political decision. However the points made above regarding judicial discretion in these areas and the potential difficulty with an exemption from statutory interest pertain equally to debts under a lease. A further point is made regarding potential difficulties in defining the term “public sector landlord”. The phrase may include social landlords such as housing associations which are regarded as quasi-public in certain regards, for example, in relation to public procurement for the purposes of the application of European legislation.

It is considered that the drafting of clause 2(b) of the Bill may similarly be open to various interpretations regarding what constitutes “a fine, penalty or tax due” and what is a “public authority”.

Q 7 If you think that statutory interest should run on late payments under contracts of employment, do you think there are any particular circumstances when interest should not run on late payments? If so, then what would these be?

It is appreciated that on the current proposal interest would become payable on payments, even where these are only slightly late and where the amounts may not be significant. If there is concern that the provisions could place too much administrative strain upon employers then it would be open to legislators to include a *de minimis* provision.

Q8a Should the rate of statutory interest be simple interest?

The rate of interest should be simple interest. A linear calculation such as interest on one contractual debt might be relatively easily calculated using compound interest. However, any more complex calculation would be rendered very difficult if interest were to be calculated on a compound basis. As more fully detailed below, in certain actions such as actions for damages, there are multiple heads of claim upon which interest is calculated for different time periods, *or in respect of heads of damage which are to be regarded as accruing over time*. A requirement to calculate interest on such sums on a compound basis would make such calculation very difficult and would involve a great deal of time, both in carrying out the initial calculation and in explaining the same to the court.

Q8b Should the rate of statutory interest be compound interest?

No, for the reasons set out in the response above.

Q9a Should the draft Bill contain provisions for complete judicial discretion in awarding interest?

Yes. It is considered that given the wide compass of the proposed reform, and its uncertain effect, it is important to retain a wide judicial discretion in order to allow adaptation of the new law to varying circumstances.

Q9b Should the draft bill contain provisions for limited judicial discretion in awarding interest?

No, for the reasons set out in the response above.

Q10a Should the draft Bill allow for any retrospective effects?

No

Q11 Should there be a difference in transitional arrangements for contractual debts, non-contractual debts or damages?

No, there should be consistency in the implementation of the draft Bill to different kinds of debt to avoid confusion.

Q14 Do you think the draft Bill will have an effect on backdated pay?

It is appreciated that there is a potential difficulty where pay is “late” due to a protracted pay negotiation, and agreement is not made until some time after the expected settlement date. There may be a distinction between remuneration which is not paid when it is due (“late payments”) and remuneration which is not agreed until a later date, albeit the latter may be back dated. It may be argued that only late payments would be subject to the provisions of the Bill. Remuneration agreed as part of a negotiation only crystallises as an amount due from the point at which it is agreed. Even where back-dated, the relevant date of agreement remains the earliest point at which interest could be payable. There is no reason, however, why the Bill should not make explicit provision regarding this point for the avoidance of doubt.

Q15 Do you think the draft Bill should exempt backdated pay from the statutory interest regime?

Yes, for the avoidance of doubt (as discussed above) if the Government wish to avoid the provisions applying to backdated pay.

Q17 Do you think the draft Bill will alter behaviour and negotiating positions?

See comments above in response to Q1 and 2 regarding giving greater importance to contractual interest provisions.

Further Comment

The provisions of clause 7 of the draft Bill regarding the starting date for interest on damages do not make workable provision for calculation of interest on losses occurring over a period of time. In a Bill which seeks to codify the calculation of interest, it is unsatisfactory for the methodology to be left to the discretion of the Court, as clause 7(2) seeks to do. The method of treating certain heads of loss as spread out over time should be the norm, as it presently is in practice. Individual calculations for every single date on which, for example, wage loss has been sustained would be grossly wasteful of time.

Further, clause 7(2) and the Bill do not make it at all clear how the present practice of treating a loss as spread over time would be affected, if at all, by the other provisions of the Bill.

We understand that the present practice of applying interest at half of the judicial rate on the whole past damages for the whole time from the date of an accident, or onset of disease symptoms, to the present is arithmetically equivalent to applying the full rate to the damages relating to a specific past time period for the time from that period to the present, and summing the results for all past time periods. This produces the factor of one half by the process of integrating with respect to time, in mathematical terms, where past damages may be regarded, perhaps slightly artificially, as spread out smoothly over time.

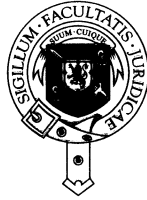
There is a calculus equation by which the factor of one half is achieved which can no doubt be checked with actuaries or accountants as appropriate.

The point of importance is that the current practice of applying interest at one half of the judicial rate for loss spread out over a period is based on as precise a calculation as is considered possible for such circumstances. If that is to be changed then the proposed change should be clearly set out. If that approach is not to be altered then that should be specified, not simply by reference to judicial discretion being exercised where necessary. The current formulation leaves the matter in some doubt.

The calculator on the Scottish Government Website only works for calculation of interest on a loss occurring at one date. It does not calculate interest on damages incurred over different periods of time, such as the simplified calculation shown above.

It should be noted that the calculation becomes substantially more complicated when, as is proposed, the interest rate varies over time.

The interest rates used for the calculator are not published on the website. It is not possible to check the calculation or exhibit to a court how a particular interest calculation has been reached.



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