OUTER HOUSE, COURT OF SESSION

[2026] CSOH 9

CA57/25
CA58/25

OPINION OF LORD SANDISON

In the causes

THE SCOTTISH MINISTERS

Pursuers

against

DONALD LEGGAT

Defender

and

THE SCOTTISH MINISTERS

Pursuers

against

GABRIELLE GRIFFIN

Defender

Pursuers: Welsh; Harper MacLeod LLP
Defenders: Brown; Levy & McRae Solicitors LLP

6 February 2026

Introduction

[1] These commercial actions were transferred from the sheriff courts at Dundee and Stirling respectively as test cases from a much larger cohort of disputes in dependence

before various sheriff courts concerning the proper interpretation of a standard form contract entered into between students on undergraduate dentistry courses and the Scottish Ministers for the provision of a bursary of £4,000 per year as the course went on. The grant of the bursary was made conditional on the undergraduate undertaking to perform a certain amount of work in NHS dentistry for a period after graduating. The Ministers maintain that many dentists who entered into the bursary contracts did not fulfil the conditions, and seek repayment from those dentists of some of the sums which they received as bursaries. The particular bursary scheme under examination closed to new entrants in 2018, but its proper construction remains a matter of concern to approximately 1,300 dentists who participated in it.

Background

[2] Parties were agreed that the majority of general dental practitioners in Scotland are non-salaried independent contractors and are permitted to provide both NHS and private dental treatment to patients. In order to provide NHS dental care and treatment, they require to make arrangements with NHS boards by applying to be included on the dental list in an NHS board area. They can there be listed as either a principal dentist – an owner of, or a director or partner in a dental practice; or as an associate dentist – a self-employed dentist who enters into an arrangement with principal dentists that is neither partnership nor employment. Once they are registered to provide NHS dental treatment with the relevant NHS Board, they are able to carry out NHS dental treatments and services in respect of which they are remunerated by the NHS through "item of service" payments - ie payments linked to a clinical procedure undertaken, as well as receiving capitation payments and continuing care payments, all as set out in the published Statement

of Dental Remuneration in force at the time of performing the service, in terms of the National Health Service (General Dental Services) (Scotland) Regulations 2010.

[3] For NHS treatment, patients are required to pay a portion of the total NHS service fee payable to the dentist, again as set out in the terms of the relevant Statement of Dental Remuneration, with the balance of the allowable fee paid by the NHS on receipt of a claim from the dentist. Some categories of person are exempt from making any contribution towards their NHS treatment, including persons in receipt of certain benefits, pregnant women, nursing mothers and all children and young people aged under 25.

[4] Dentists carrying out private dental treatment – being clinical procedures and services not covered by the NHS, or clinical services and procedures carried out by a dentist not registered to provide NHS dental care and treatment in Scotland – are remunerated by payment at rates set by the dental practice and paid either directly from the patient or through dental insurance plans.

Relevant legislative provision

[5] At all material terms for the purposes of the present case, section 6(4) of the Prescription and Limitation (Scotland) Act 1973 was in the following terms:

> "(4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section—
>
> (a) any period during which by reason of—
>
> (i) fraud on the part of the debtor or any person acting on his behalf, or
>
> (ii) error induced by words or conduct of the debtor or any person acting on his behalf,
>
> the creditor was induced to refrain from making a relevant claim in relation to the obligation, and
>
> (b) any period during which the original creditor (while he is the creditor) was under legal disability,
>
> shall not be reckoned as, or as part of, the prescriptive period:

Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph."

Relevant contractual terms and background material

[6] The form for applying for a bursary which was completed by the undergraduate dentists contained a declaration and undertaking in the following terms:

"Declaration and undertaking (you must sign this)

- As far as I know, the details I have given on this form are complete and accurate.
- I agree to give you any further information you may ask for.
- I will tell you immediately if my circumstances change in any way that might affect any amount I have received, or had paid on my behalf.
- I agree to repay any amount I have received, or that has been paid on my behalf, which is more than the award due to me.
- I undertake to carry out [5 years (or part time equivalent)] of NHS dental work in Scotland, beginning within one year of graduation; and that my NHS earnings will represent at least 80% of my total earnings for each of these years.). If my bursary is claimed for 3 years, 2 years or 1 year my reckonable years of dental work in Scotland will be 4 years, 3 years and 2 years respectively, as defined above."

The Dental Undergraduate Bursary Contract signed by both defenders contained the following terms:

"1. The Scottish Ministers and the undergraduate hereby agree the following terms and conditions in respect of the undergraduate's application for a dental bursary.

2. The undergraduate accepts that the Scottish Ministers will make available a dental undergraduate bursary of £4000 per academic year for years 2, 3, 4 and 5, where eligible, of an approved dental undergraduate course at either the Glasgow or Dundee dental school. The bursary is payable annually on the basis that the undergraduate agrees to comply with the following eligibility criteria:
   (a) the undergraduate is registered for a qualifying dental course in a qualifying dental school; and
   (b) the undergraduate agrees to commit to a period of up to 5 years work in dentistry in the NHS in Scotland following graduation.

3. The undergraduate accepts that the bursary is provided by Scottish Ministers on the basis that they comply with the following:
   (a) the undergraduate agrees to carry out a total of 5 years dental work in Scotland (or the relevant agreed part time equivalent agreed in advance

with Scottish Ministers). The said period may include any relevant Dental Vocational Training (hereinafter called DVT) or Dental General Professional Training (hereinafter called GPT). The undergraduate agrees that if the bursary is only claimed for 3 years, 2 years or 1 year their reckonable years of dental work in Scotland will be 4 years, 3 years and 2 years respectively, as defined above;

(b) the period of employment must begin within one calendar year of graduation

(c) the undergraduate's NHS earnings will represent not less than 80% of their total earnings (hereinafter called the 'agreed commitment').

…

5. The undergraduate will not be restricted to working for any specific NHS Board upon graduation from dental school. The undergraduate agrees to practice NHS dentistry in Scotland by completing either one year's DVT or 2 year's GPT as defined in The National Health Service (Vocational Training for General Dental Practice) (Scotland) Regulations 2004 and thereafter completing the agreed commitment as referred to in clause 3 above and further explained below.
6. The DVT or GPT is training which is to be undertaken through NHS Education for Scotland (NES) (established on April 1, 2002, as a Special Health Board) and under the supervision of a principal dentist either in an independent practice or in the salaried service (defined as employment by the NHS in Scotland for the provision of 'general dental services', the service commonly known as 'community dental service' or any successor or successors to these), or in the case of GPT a combination of independent, salaried or hospital service.
7. While NES will try as far as possible to assist the undergraduate obtain a DVT or GPT job in the geographical region of their choice, this cannot be guaranteed. If a placement in the undergraduate's preferred geographical region is not possible the undergraduate will be required to work wherever placed. If the undergraduate turns down the VT or GPT place in Scotland then the bursary will be due to be repaid in full, unless on cause shown the Scottish Ministers decide that no repayment is required.
8. At the end of the VT or GPT year or years the undergraduate will complete the remainder of the agreed commitment in a dental practice providing 'general dental services' (GDS) under NHS arrangements, or in the 'salaried dental service' (SDS), or in the 'hospital dental service'.
9. 'General dental services' are as defined in the National Health Service (Scotland) Act 1978.
10. The undergraduate undertakes to provide as soon as reasonably practical to NES the name and address of their employer and any changes to their employer until the agreed commitment has been completed. When requested, the undergraduate agrees to provide confirmation in writing (and for this purpose writing includes electronic formats) from a qualified accountant of the percentage which the undergraduate's NHS earnings bears in any financial year to their total earnings.

…

12. If the undergraduate fails to graduate from dental school or fails to complete the course at any point then they will be required to repay the full amount of the dental bursary received by them for that year of the course.
13. If the undergraduate chooses to work part-time during the time period of the agreed commitment the undergraduate will serve the full time equivalent of five reckonable years in NHS Scotland and begin within one year of graduation in order to avoid becoming subject to repayment of the dental bursary. If the undergraduate works part time their NHS earnings must represent not less than 80% of their total earnings in Scotland.
14. If the undergraduate fails to complete the agreed commitment by their own volition the undergraduate will be required to repay the dental bursary."

At the time when Dr Leggat and Dr Griffin applied for their bursaries and signed the relevant contracts, the website of the Student Awards Agency Scotland (SAAS), the executive agency of the Ministers dealing with the administration of the bursaries, contained the following:

> "What happens to the bursary if I do not comply with the NHS Scotland tie-in period post graduation?
>
> You will be required to repay a proportion of your entire bursary if you do not meet the conditions of the tie-in period. The amount you repay will depend on how much of the tie-in period you actually complied with. If you did not comply with any of the tie-in period then you would have to repay the entire Dental Bursary you received throughout the degree. We will arrange repayment terms on an individual basis but we will not ask you to repay the whole amount in a lump sum."

Affidavit evidence

[7] David Notman, the Unit Head for Dentistry and Optometry for NHS Scotland, provided an affidavit in which he stated that his role concerned the strategy and delivery of government policy in Scotland to increase access to NHS dental services. His organisation was, in collaboration with National Education Scotland (NES) and SAAS, responsible for monitoring, administration and policy decisions in connection with the dental bursary. It had become apparent that individuals who had received substantial sums of money through the bursary as dental students were failing to ensure that 80% of their earnings were NHS

earnings for the appropriate number of years when they became professional dentists. Instead, many individuals were practising privately, or, alternatively, were operating a hybrid practice delivering both private and NHS dental services, but such was the amount of private work carried out that they fell well short of the relevant threshold. In both cases, they were receiving substantial remuneration but failing to repay sums received by way of the bursary from public funds. To deal with that issue, it was resolved that SAAS would require to take steps to recover sums due under the bursary, including the raising of court proceedings. Had Dr Leggat or Dr Griffin advised NES that they had failed to comply with their respective obligations under the bursary at an earlier date than they did, the Ministers would have taken steps to raise court action against them, as they did when such disclosures were in fact made.

[8] Once it was established by NES that any bursary recipient had not done what he or she ought to have done under the bursary contract, SAAS's practice was to write to that person and request repayment. If repayment was not made, then SAAS would take steps to ensure that court proceedings were raised. In the case of Dr Leggat, it did so around 13 months after NES was informed that he had not complied with his obligations. For Dr Griffin, it was around 10 months.

[9] NES would not have been able to determine through its own enquiries at any time whether either Dr Leggat or Dr Griffin had complied with the bursary conditions. That information was known only to the recipient of the bursary. Given the size of the bursaries, the number of the recipients, and the administrative burden that would be associated with a monitoring exercise carried out annually, that would have been a disproportionately burdensome manner in which to expect the scheme to be monitored. The dentists were

aware of their obligations and were aware of whether or not their earnings complied with those obligations.

Dr Leggat

[10] Dr Leggat provided two affidavits in which he stated that he had taken the dental bursary for three academic years only, thereby undertaking a commitment to NHS dentistry for 4 years. After graduating, he had done a 2-year vocational training programme and was a salaried employee for that period, which lasted until the summer of 2016. Thereafter, he worked at a dental practice and all the patients he treated were registered with the NHS. He was first asked to provide certification of his earnings to SAAS in March 2022, which he did. SAAS had asked for his total earnings to be divided between, on the one hand, the gross monthly sums the NHS had paid for treatments covered by it and carried out by him, and on the other, all other gross earnings received by him from his practice. This second category included gross sums which patients on his list had paid for dental hygiene services from the practice, even though he had had nothing to do with the provision of those services and had only actually received from the practice about one-third of the gross fee paid. The net sums he had received after deduction of costs and of the practice's share of the fees he generated were less than half of the gross amounts used in the Ministers' calculations.

Dr Griffin

[11] Dr Griffin provided an affidavit, the salient points of which for present purposes included an explanation that, after graduation, she completed a year of vocational training in a dental practice and then became a self-employed associate there. She generated fees for the treatments carried out, which were split on an agreed basis (in her case, roughly 50/50)

between her and the practice owners, reflecting the provision by the latter of premises, equipment and support staff. In a practice offering NHS dentistry, patients were registered with the practice, which generated a small recurring payment to it from the NHS. When such a patient received a check-up or a treatment offered by the NHS, the practice was paid a fee by the NHS in accordance with the payment regulations in force from time to time. Some categories of patient received their treatment free, but most had to make some financial contribution towards its cost, again as set out in regulations.

[12] Some common treatments were not available on the NHS, for example white composite fillings in some teeth. A patient wanting such a treatment could opt to have it on the basis that he or she would pay for it privately. The treating dentist had no proper way of controlling or influencing what choice a patient might make in this regard. He or she was obliged to discuss with the patient all of the possible treatments and give advice on their advantages and disadvantages. Until 2023, treatment on a single tooth had to be all on the NHS or else all done privately.

[13] In assessing her income for the purposes of the bursary contract, the Ministers had counted as NHS earnings payments actually made by the NHS and contributions made by patients for NHS treatments. It had counted as private earnings all payments received for treatment that the NHS did not fund, whether that treatment was provided to an NHS registered patient or a private patient. The split of earnings, so measured, between NHS and private would vary markedly from year to year and probably within annual periods too. The Ministers had assessed the total fees paid to her practice for work done by her, not the amounts she had actually received after costs and other deductions. It would be difficult to calculate her actual net earnings broken down between NHS and private earnings. That would, for example, require apportionment of lab charges.

[14] She had been on maternity leave from May to August 2018. None of the NHS maternity pay she had received for that period (amounting to more than £10,000) had been counted as NHS earnings for the purposes of the bursary contract. Her private patients tended to want treatments which were in progress to be completed by her before she went on maternity leave, resulting a short-term spike in private work just before that leave.

Submissions for the defenders

[15] On behalf of the defenders, counsel submitted that at the point when the bursary scheme was first introduced, in around 2006 - 2007, there was widespread public concern at an actual or at least perceived shortage of NHS dentistry provision. There were media reports of parents finding it impossible to get their children registered at an NHS dentist, and of long queues of new patients seeking to register every time a new practice offering NHS treatment opened. The policy objective to which the bursary scheme was directed was clear. It was to incentivise dentists to commit to providing NHS dentistry in the early years of their career. The incentive was a simple financial consideration, in the form of the bursary. It was paid in advance in exchange for acceptance by the dental student of the commitment, necessarily to be delivered at a future date, to provide a specified amount of NHS dentistry. Some of the obligations imposed on the student were obvious, such as the requirement to complete the relevant degree and to commence the period of vocational training within a year of doing so. The compulsitor imposed on the student – that in the event of failure to discharge the obligations undertaken the bursary might have to be repaid – was at the level of principle straightforward and obvious. The scheme envisaged that the dentist might complete some private dentistry. If the contract's objective was to be achieved it was obviously necessary to require that the dentists should make a meaningful

commitment to providing NHS dentistry, as distinct from, for example, being nominally registered to provide NHS treatment but seeing only a token number of patients on that basis while maintaining an overwhelmingly privately-funded patient list.

[16] Both the bursary application form and the contract were *pro forma* documents. There was no suggestion that the student dentists were told to take legal advice or that any of them did so. It was clear that no individual revisal to the proposed contract would have been entertained. This was a scheme made generally available to all members of a specified class. The contract which had come to be associated with Dr Griffin had been executed on behalf of the Ministers in July 2006, more than 3 years before she made her application for a bursary and before she even commenced her degree, while that which had come to be associated with Dr Leggat had been executed on behalf of the Ministers more than a year before he applied for his bursary. It was clear that the contracts had been executed on behalf of the Ministers in bulk with the name of the individual student left blank and the relevant officials being authorised to offer them for subsequent completion and execution by students.

"NHS Earnings"

[17] The contract might have sought to quantify the required commitment in a number of different ways. The mechanism selected was by reference to the dentist's earnings, and was to the effect that a specified percentage of earnings over the period of the commitment should be "NHS earnings". The fundamental defect in the drafting of the contract was the failure to engage with the practical operation of the process of measuring that. The use of such a shorthand term would normally indicate something that the contract defined, and it was clear that the matter could and perhaps should have been put beyond doubt by the

inclusion of a comprehensive definition, or at least of machinery sufficient to enable a clear assessment of whether 80% of the dentist's relevant earnings were "NHS earnings".

[18] The modern authorities on contractual construction had been recently reviewed in *Glenfiddich Wind Limited* v *Dorenell Windfarm Limited* [2025] CSOH 62 at [53] to [62], especially [59]. It was immediately apparent that a literal reading of the contract in the present cases would produce absurdity. The phrase "total earnings" in clauses 3(c) and 13 had a clear and obvious meaning if read in isolation. "Earnings" was a word with a clear ordinary meaning – "income from work" (Shorter Oxford English Dictionary), and was in that respect to be distinguished from "unearned" or investment income. The word "total" similarly had a single clear and obvious meaning when applied to a person's earnings. It connoted the whole of those earnings from all sources. However, it could not sensibly be thought that the intention of the parties to this contract was to require a dentist who happened to be a talented footballer or musician and who earned additional money by playing or performing on some weekends to bring such income into account in order to determine whether the commitment to NHS dentistry during the working week had been met. Accordingly, the words "from dentistry" or something similar had to be read into the phrase. The context made it clear that the parties must have intended that ostensibly wide and unrestricted phrase to have a narrower restricted meaning. Similarly, it could not have been intended that "NHS earnings" meant payments made to the dentist by the NHS, simply because many patients required to make payments themselves direct to the dentist and such payments were often the major element of the total payment received by the dentist. If only payments actually made by the NHS were to be counted, the 80% requirement would be impossible to achieve. It was therefore necessary to give the phrase some extended meaning derived from the context. Two competing constructions of the

phrase "NHS earnings" were offered. On behalf of the Ministers, it was contended that the definitional criterion which determined whether earnings were "NHS earnings" was whether the treatment which generated the payment was one that was offered on the NHS and was thus dealt with in the Statement of Dental Remuneration. If it was, then on the Ministers' construction all earnings derived from the treatment were NHS earnings regardless of whether payment came from the NHS or from the patient. That suggested construction produced arbitrary results and rendered the obligations placed on the dentists impossible to fulfil in many cases. It was therefore submitted that the only workable construction was one which took as the definitional criterion the status of the patient whom the dentist had treated as being NHS registered or not, as distinct from asking whether the specific treatment was NHS funded or not.

[19] A particular feature of the present case was that it seemed unlikely that the undisputed factual and regulatory context would have been fully known to the student at the point the contract was concluded, which was typically after the first year of undergraduate study when most would have been teenagers. Students at that stage could scarcely be expected to have understood the fine detail of dental practice including the technicalities of alternative treatments, the ethical and legal obligations applicable to the process of obtaining consent and the nuances of how particular treatments were paid for. It could however be said with a degree of confidence that the Ministers knew or should be taken to have known of that detail, and that their intention at inception of the bursary scheme could not have been to entice the students to commit to NHS dentistry by the promise of a bursary made on essentially false pretences, whereby they knew, but the students did not, that the bursary would very probably have to be repaid despite the student's best efforts to meet the conditions. So far as the students were concerned, their

intention was clear – to obtain the bursary and in exchange to agree to make the specified commitment to NHS dentistry, which they might reasonably have assumed would be objectively measured by fair and transparent criteria and in a way that would not produce arbitrary outcomes.

[20] The essential purpose of the contract was to increase the supply of dentists offering NHS treatment. Thus, the primary obligation imposed on the dentist post-graduation was in clause 2(b): "to commit for a period of up to 5 years work in dentistry in the NHS". It was therefore helpful to consider what might be meant by "work in dentistry in the NHS" as an aid to discerning the meaning of "NHS earnings". A dentist was clearly working in dentistry in the NHS if he was working full time at a dental practice where the patient list consisted only of patients registered to receive NHS treatment. He could not know in advance of seeing any particular patient whether the patient would require treatment, or if so what the options might be. He could not know the patient's choice until the patient made and communicated it. He did not cease to be working in dentistry in the NHS because an NHS registered patient, to whom he had given an NHS funded check-up and a series of NHS funded treatments decided, for example, not to have the amalgam filling available on the NHS and instead to pay £100 or so for a white composite filling which was clinically indicated but which the NHS did not fund. He did not cease to be working in dentistry in the NHS for the duration of the work on that tooth and return to NHS dentistry when he, perhaps, revised an existing amalgam filling on a different tooth belonging to the same patient. The General Dental Council's June 2014 guidance note, "Standards for the Dental Team", required that patients' interests should always be put before any financial, personal or other gain for the dentist.

[21] The phrase "by their own volition" in clause 14 clearly indicated the making of a conscious choice by the dentist as the qualifying criterion for the obligation to repay to be triggered. It was obvious that a dentist might choose to work at, for example, a city centre cosmetic dentistry clinic which did not offer NHS dentistry. That would clearly be a failure to complete the agreed commitment "by their own volition". The same might be said of a decision to take on a substantial cohort of patients not registered for NHS treatment and to treat them and receive payment privately, while at the same time continuing to treat NHS patients. The contract clearly envisaged this sort of "mixed" practice and permitted it up to a limit. It was nevertheless a matter of conscious choice on the part of the dentist. He need not take any privately paying patients, and a decision to do so during the period of contractual obligation imposed a responsibility to adhere to the 80/20% split. By contrast a decision by an NHS registered patient to decline available NHS treatment in favour of superior treatment for which he would have to pay privately, in turn imposing an obligation on the dentist to provide such treatment, could not sensibly be said to be a failure by the dentist's own volition.

[22] A helpful means of testing the competing constructions was to imagine a hypothetical scenario involving a modest variation of the contract. The Ministers might have stipulated for a complete commitment to NHS dentistry. They might have said that the conditions attached to receipt of the bursary were 5 years' work in dentistry in the NHS with 100% of the dentist's earnings having to be NHS earnings. On the Ministers' construction such a condition would be impossible to fulfil in practice, since it was inevitable that at least one patient would ask for a white filling which the dentist would be obliged to provide. The parties could not have intended that, and by the same logic they could not have seen an arbitrary margin of 20% which it was beyond the ability of the dentist to

control as a fair or reasonable criterion by which to judge compliance. No more violence was done to the words of the contract by the construction proposed by the defenders than by that proposed by the Ministers. The absurdities otherwise inherent in the contract were avoided. The commitment given by the dentist remained substantial and meaningful. It gave content to and was consistent with both clause 2(b) and clause 14. It was on any possible view the more commercially sensible of the two constructions contended for.

Continuous 5-year period?

[23] There were certain subsidiary questions which might arise for decision. The first was whether there was a fixed end point at which the assessment was to be made of whether the dentist had discharged the obligations undertaken. The beginning of the commitment period was clear – within 1 year of graduation. But the parties must have anticipated maternity or other legitimate career interruption, and they could not have intended that a dentist absent from work for such reasons would be precluded from fulfilling the obligation. There was no obvious reason why a dentist who had completed vocational training and 3 years of general practice, each of which met the 80% threshold, should be forced to repay the entire bursary if in the final year he fell short by less than 1%. Why should such a dentist not be able to make good the shortfall by completing further NHS work, given that the whole purpose of the contract was to incentivise work in dentistry in the NHS? There were no words which indicated that such a restriction was intended.

[24] How, in particular, was maternity pay to be dealt with? Dr Griffin was absent on maternity leave for about 2½ months at the end of the 5-year period. Was she required to make that time up? If not, how was the calculation to be done? It appeared that the methodology used by the Ministers disregarded maternity pay which was paid by the NHS.

Was such maternity pay "NHS earnings"? Maternity pay was paid as a matter of obligation by the NHS, and eligibility to receive such payment depended on prior service and earnings as an NHS dentist. That was on any sensible view earnings from NHS dentistry, and was covered by a separate Statement of Dental Remuneration.

Aggregate or year-by-year earnings?

[25] The application form bore to include an undertaking to meet the target in each year of the commitment period, but the contract itself was silent on that. As a matter of practice, the Ministers looked at earnings on a year-by-year basis, with each year running from 1 August to 31 July. Dr Griffin's case illustrated the absurdity of approaching matters on a year-by-year basis. The Ministers sued her on the basis of a narrow failure to meet the target in the third and fifth years. But when the figures were aggregated over the whole period, she exceeded 80% over that period even assuming the Ministers' construction of "NHS earnings" was otherwise correct, and before any adjustment to the figures for maternity pay. It was not obvious that the application imposed obligations which survived the parties entering into the contract. Both the Ministers and the student dentist knew at the time the application form was completed that they would (as it happened, instantly) be entering into a bilateral agreement dealing in detail with the conditions for the payment of the bursary, and that agreement contained no stipulation for assessment of compliance with the earnings commitment being on a year-by-year basis.

Turnover or net earnings basis?

[26] Regardless of the primary question as to construction of "NHS earnings", was there any warrant in the words of the contract or in the wider context for the approach which was

in practice taken by the Ministers to measurement of earnings, which was to quantify gross turnover generated by work done by the dentist rather than by reference to the dentist's actual earnings? Although turnover might provide a reasonable proxy by which to measure earnings if the assessment was indeed to be carried out on a year-by-year basis, on an aggregate basis it would skew the overall percentage split between NHS and private earnings because the amount earned in the initial training period after graduation, even though treated as NHS earnings, was proportionately much less than the amounts earned once the dentist was in full-time practice. "Earnings" could only sensibly mean earnings actually received by dentists for work done by them and could not reasonably also include substantial sums paid by a dentist to the practice owners in exchange for provision of premises and staff. This issue might be academic if the defenders' construction of "NHS earnings" was favoured, since in that event it would be relatively clear on either measure whether or not there had been compliance.

Repayment in whole or in part?

[27] It was common ground amongst the parties that, while clause 14 (unlike clauses 7 and 12) did not specifically state how much of the total bursary received would fall to be repaid in respect of a failure to comply with the NHS work requirement in a particular year, the relative explanation on the SAAS website at the time the contracts were entered into, which formed part of the material reasonably available to the contracting parties at the time, made it clear that only an amount proportional to how much of the tie-in period was actually complied with would be demanded. That meant that if, for example, in 2 years of a 5-year commitment period the dentist had not met the required percentage of NHS earnings, 40% of the total bursary would be repayable; if in 3 years of a 4-year commitment

period the requirement had not been met, then 75% would be repayable, and so on. Quite what effect that had in the circumstances of Dr Leggat and Dr Griffin depended on the answers to the other questions which had been raised.

Application of contra proferentem principle

[28] As a fallback position to the primary contention that the defenders' preferred construction could be arrived at by the application of conventional principles, counsel submitted that the contracts were of a type to which the *contra proferentem* principle of construction might properly be applied, in particular because much of the detail necessary to make sense of the contract could not reasonably have been expected to be known to the dental students but must be taken to have been known to the Ministers. It was clear that the drafting was done to the order of the Ministers and imposed on the students. It was on any view ambiguous. Reference was made to the general summary of the principle set out in MacBryde, *The Law of Contract in Scotland* (3rd edition), 8.38 – 8.43. It was acknowledged that this principle might be thought to be amongst the "old intellectual baggage" which Lord Hoffmann suggested had been discarded in *Investors Compensation Scheme Ltd* v *West Bromwich Building Society* [1998] 1 WLR 896 at 912G – H, but there was no decision of the appellate courts squarely to that effect. On the other hand, there was little if any authority decided since the turn of the century in which the principle had been applied. The better view was that it remained part of the law, but that in most cases it would be unnecessary to consider it separately because the correct construction would almost always become apparent by the application of ordinary principles of construction as explained in the authorities discussed in *Glenfiddich Wind*. Thus, although the principle remained available

and could be applied in the present case, the outcome for which the defenders contended could be reached without that being necessary.

Prescription

[29] It emerged in the course of the hearing that issues of prescription might arise on the accepted facts, and (given that these are test cases designed to facilitate the disposal of a much larger group of essentially similar disputes) I afforded parties the opportunity to amend their pleadings and address that issue, which they did. Counsel for the defenders submitted that the obligation to repay the bursary in whole or in part was an obligation imposed by the contract and that the Ministers sought implement of that obligation. It was one falling within paragraph 1(g) of Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 and the primary question was therefore that indicated by section 6(1) of that Act, namely whether the obligation in question had subsisted for more than 5 years. An obligation of this type began to subsist on the first day on which it could be enforced. The trigger event which enabled the Ministers to enforce the dentist's obligation to repay was that the dentist should have failed to complete the agreed commitment. On the construction of the contract advanced on behalf of the dentists, no question of prescription arose. If, properly construed, the obligation was to hit the 80% target in aggregate over the total period of the commitment, then it was impossible to measure that until conclusion of the period. Both test actions were respectively commenced within 5 years of that point. A question of prescription thus arose only on the hypothesis that the Ministers' construction of the contract was correct, and that the dentists' obligation was to hit the 80% target in each individual year.

[30] If the temporal period of measurement was a single accounting year, then a failure to hit the 80% target in any individual year was complete and irremediable at the end of that year. A dentist who missed the 80% target in his first year as a self-employed associate could not make good that failure even if he chose to do no private work whatsoever and to devote the entirety of his time to NHS dentistry for the remaining years of his commitment. On that hypothesis, the Ministers could enforce the repayment obligation immediately after the end of the accounting year, since performance in respect of that year would be (a) complete; (b) final, in the sense of being incapable of being altered by anything that happened subsequently; and (c) measurable. The Ministers had the right to require provision of information in certified form as to the proportion of NHS earnings. That right to information was expressed in clause 10 of the contract as being in respect of "any financial year". It was inescapable that the Ministers could, if they chose, enforce both the obligation to provide a certified breakdown of earnings and (assuming the correctness of their construction of the repayment obligation as being in respect of each individual year), the repayment obligation itself, immediately after the end of the year in which the failure occurred. It was not necessary that the Ministers should have had available to them all of the information necessary to litigate. Assembly of such information was what the prescriptive period was for: *Glasgow City Council* v *VFS Financial Services Ltd* [2022] CSIH 1, 2022 SC 133, 2022 SLT 181 at paras [52] - [53]. There was a clear conceptual distinction between, on the one hand, whether a state of affairs might be said definitively to exist as at a specified date (here, a failure to complete the agreed commitment in any particular year), and, on the other hand, whether a prospective litigant was aware of that state of affairs having come into existence. The failure here had either occurred or not by the end of the reference period. If the failure had occurred, the cause of action had arisen. It was nothing

to the point to ask whether the Ministers in fact knew that the cause of action had arisen. Lack of knowledge was irrelevant. The obligation to repay thus subsisted from the end of the reference period in which the failure arose.

[31] The entitlement of the Ministers to require the dentist to provide information certified by an accountant was nothing to the point. The certificate was not a condition precedent to the cause of action arising. The Ministers' reliance on *McPhail* v *Cunninghame District Council* 1983 SC 246, 1985 SLT 149 in this respect was misconceived. That decision was authority only for the uncontroversial proposition that in a construction contract which conferred rights to payment of sums certified by an architect, the issue of a certificate was a condition precedent to the enforceability of the claim. The question whether an obligation had or had not begun to subsist within the meaning of section 6(1) was answered by asking whether it would be possible for the creditor in the obligation to enforce it. Questions of whether it would be reasonable for the creditor to do so, or unduly burdensome for him to have to do so, were irrelevant to the identification of the date from which it would be possible for him to do so. An obligation which could be enforced was one which was subsisting whether or not it would be unreasonable or burdensome for the creditor actually to enforce it.

[32] Reliance on section 6(4) of the 1973 Act would also be misconceived. The contract imposed no positive obligation on the dentist to volunteer earnings information. The work involved in providing a calculation had no other use and was therefore not something that would be undertaken anyway for other accounting purposes. Clause 10 did impose a positive reporting obligation on the dentist in respect of any move to a new dental practice. The choice in the same clause to impose the obligation to provide earnings information only when requested to do so could only connote a conscious decision by the Ministers not to

require automatic reporting of income. It was understood that no requests were made prior to about 2022. In that state of affairs, the dentist could not reasonably be expected to have instructed preparation of the necessary breakdown, and could not reasonably be thought to have realised that the Ministers, who had not requested it, were nevertheless waiting with eager anticipation to receive it. The only reasonable conclusion the dentist could take from the terms of the contract was that the Ministers would determine what, if anything, they wanted to see, and would issue a request if so advised.

[33] The Ministers confined their argument under section 6(4) to the "fraud" limb of the sub-section. That required them to characterise a dentist's conduct in not volunteering a breakdown which they had not asked for and which the contract did not oblige the dentist to send in the absence of a request to do so, as "deliberate concealment" capable of amounting to fraud within the meaning of section 6(4). It was no doubt true that fraud had a broader meaning in this context than in others, but to characterise the entirely blameless conduct of the dentists as fraud deprived the term of all meaning. The essence of fraud was a machination or contrivance to deceive. Nothing of that sort was to be found in the present case. There might be some cases in which silence could amount to fraud, but they depended on the party who remained silent being under a legal duty to speak, or at least being subject to an expectation that they would speak, or, perhaps, where the conduct about which the party remained silent was itself dishonest and covert, as with the price fixing cartel in *Glasgow City Council*: *Heather Capital Ltd (in liquidation)* v *Levy & McRae* [2016] CSOH 107, 2017 SCLR 317 at [46]. The silence had to be an instrument of deception. *Heather Capital* [2017] CSIH 19, 2017 SLT 376 was authority only for the narrow proposition that on the extremely complicated facts of the two actions there being considered, the prescription issues could not be disposed of without inquiry. Separately, there was no relevant averment

of inducement to refrain from raising proceedings. The Ministers' argument appeared to be that even though they did not request the earnings information, they were nevertheless entitled to receive it, and because they did not receive it they somehow formed an erroneous impression that there had been complete compliance and they had no right to repayment, and were thus induced not to enforce their rights. That seemed somewhat difficult to square with the fact that they did subsequently issue a blanket request to the entire cohort of students to provide the information necessary to assess compliance. It remained necessary for the purposes of section 6(4) to identify inducement to refrain from raising proceedings.

[34] There was finally the question of reasonable diligence. In considering what was required in the exercise of reasonable diligence, the test was "what a prudent person carrying on business of the type operated by the pursuers would do": *Glasgow City Council* at [57] and the further authorities there cited. The question for the court was what was to be expected of a devolved government with a permanent staff of civil servants, ready access to legal advice and charged with the management of a substantial sum of public money. The Ministers said nothing at all on that, beyond asserting that it was unduly burdensome and thus not reasonable for them to require provision of information year by year. The Ministers might be able to submit with some element of force that even if the repayment obligation arose from year to year, it was reasonable for them to wait until the end of the commitment period before seeking verification of the earnings breakdown. If that was what they had done, then perhaps the court might be persuaded that inquiry was necessary. However, the Ministers had done nothing for a period of almost 4 years after the expiry of the commitment period, which expired in both cases on 31 July 2018. Dr Leggatt was first asked for an earnings breakdown on 21 March 2022. Dr Griffin was first asked for one on 28 June 2022. That was impossible to reconcile with any sensible conception of reasonable diligence

in the context of a governmental body. The court should therefore hold, first, that there was no relevant averment of fraud; secondly, that there was no relevant averment of inducement to refrain from raising proceedings; and, thirdly, that the Ministers could not make out reasonable diligence for any period sufficient to save the claim.

Submissions for the pursuers

[35] On behalf of the Ministers, counsel moved the court to grant decree against Dr Leggat for payment of the sum of £6,000 with interest and against Dr Griffin for payment of the sum of £9,600 with interest.

[36] The disputes concerned the interpretation of the contractual documents related to a bursary paid to each of the defenders during their dental studies, known as the Dental Student Support Grant. The bursary had been made available by the Ministers by way of their powers under section 1A(2) of the National Health Service (Scotland) Act 1978 and in furtherance of the statutory duty placed on them by section 1A(1) of the 1978 Act to promote the improvement of the physical and mental health of the people of Scotland. The purpose of the bursary was to encourage more people to train as dentists in Scotland and, thereafter, to work in the NHS in order to reduce the shortage of NHS dentists in Scotland. There were no particular policy documents available to cast further light on the exact aims of the provision of the bursary, but it could properly be assumed that the goal was the greater provision of NHS dentistry in practice, and not merely to secure in theory the greater availability of such dentistry. That was a slightly different assessment of the aims of the bursary scheme than that put forward by the defenders, who would regard the policy aims of the scheme as satisfied by the achievement of greater availability of NHS treatment as

opposed to its actual provision. That difference fed into at least some of the disagreements between the parties as to the true import of the contractual terms.

Status of bursary application form

[37] Each of the defenders had completed a dental bursary application form, in 2011 and 2009 respectively. On the same day as signing the application form, each defender had also signed the Dental Undergraduate Bursary Contract. The defenders claimed that the application form was not a source of legal obligation for them, and that their legal relationship with the Ministers was governed only by the contract. That was incorrect. Reference was made to the discussion of unilateral binding promises in *Regus (Maxim) Ltd* v *Bank of Scotland Plc* [2013] CSIH 12, 2013 SC 331, 2013 SLT 477 at [33], [34] and [37].

[38] However, the Ministers' position in these actions was simply that the application form, and in particular the clear unilateral promise on the part of the students contained in it, formed part of the relevant background that was available to both parties when the contract was formed, and that the documents fell to be read together. The application form was part of the background which informed what the parties understood the contractual terms to mean: *Arnold* v *Britton* [2015] UKSC 36, [2015] AC 1619, [2015] 2 WLR 1593 at [15] and [21]. That being the case, the defenders' attempt to suggest that clause 3(c) of the contract required 80% of earnings to be from NHS work in aggregate across the relevant years was self-evidently incorrect given the reference in the application form to that being a requirement in each relevant year. The obligation was that the defenders were required to have NHS earnings of 80% or more in each of the relevant number of years of work if they wished to avoid having to pay back the bursary in whole or in part.

General principles of contractual construction

[39] The approach to be taken by a court in the interpretation of a contract was now settled as a matter of law. The Ministers relied on the following propositions of law:

a. The exercise of interpreting a written contract required the court to concern itself with identifying the intentions of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The meaning should be assessed in light of (i) the natural and ordinary meaning of the language, (ii) any other relevant provisions of the agreement, (iii) the overall purpose of the clause and the agreement, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense: *Arnold* v *Britton* at [15].

b. A purposive approach should be taken to the construction of the contractual provisions in order to avoid adopting an overly strict or literal approach: *HOE International Ltd* v *Andersen* [2017] CSIH 9, [2017] SC 313 at [24] - [25].

c. The court's task was to ascertain the objective meaning of the language which the parties had chosen to express their agreement. This was not a literalist exercise focused solely on a parsing of the wording of the particular clause but required a consideration of the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, more or less weight fell to be given to elements of the wider context in reaching its view as to that objective meaning: *Wood* v *Capita Insurance Services Limited* [2017] UKSC 24, [2017] AC 1173, [2017] 2 WLR 1095 at [10].

d. Where there were rival meanings, the court could give weight to the implications of rival constructions by reaching a view as to which construction was more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions, the court had to consider the quality of drafting of the clause: *Wood* at [12].

e. The more unreasonable the result the more unlikely it was that the parties could have intended it, and if they did intend it, the more necessary it was that they should make that intention abundantly clear: *L Schuler AG* v *Wickman Machine Tool Sales Ltd* [1974] AC 235 at 251, [1973] 2 WLR 683 at 689.

"NHS Earnings"

[40] A key term in dispute amongst the parties was the meaning of "NHS earnings". The defenders argued that that phrase must mean earnings generated from providing treatment to NHS registered patients, whether or not those patients met some or all of the cost themselves. There was no basis in the contract for such an interpretation. The 80% requirement of the undertaking was to secure the carrying out of NHS dental work. The defenders' reading would undermine that purpose by permitting the obligation to carry out NHS work to be satisfied by them providing privately-funded non-NHS work to an NHS-registered patient. On the defenders' reading, provided that a patient was registered with an NHS dentist, all work carried out for that patient – even if the whole of that work was privately funded treatment – would fall to be treated as NHS earnings. There was no principle of interpretation which would result in that reading being what the parties to the contract objectively had in mind. When private dentistry work was performed on a patient,

the fact that that patient happened to be registered as an NHS patient did not convert what was plainly non-NHS work into NHS work. The Ministers' reading of the term "NHS earnings" was earnings derived from the provision of NHS services to patients. That was clear having regard to the contract as a whole and to its purpose. Interpreting "NHS earnings" in that manner was neither arbitrary nor capricious and was entirely in keeping with the purpose of the bursary. Objectively, it was clearly the correct interpretation of the phrase.

[41] That was borne out if one had regard to the provisions at clause 8 of the contract, from which it was clear that the "agreed commitment" (ie that 80% of the earnings of the dentist would be NHS earnings) included the initial post-graduation training (the VT or GPT training) to be followed by work (i) in a dental practice providing general dental services under NHS arrangements, (ii) in the salaried dental service (which was now part of the Public Dental Service), or (iii) in the hospital dental service. Option (ii) was a specialist form of provision of dental care to individuals with special needs who had difficulty accessing care from general dental practitioners, including those in long-stay care and those in areas with limited access to NHS dentists. Option (iii) was a form of dental service providing specialised care in a hospital setting and often involved complicated procedures requiring a general anaesthetic. Options (ii) and (iii) provided exclusively NHS treatments. By comparison, "general dental services" was defined in section 25(1) of National Health Service (Scotland) Act 1978 as the provision of dental treatment and appliances by dental practitioners or others entitled to carry on the business of dentistry, but was qualified in the contract by the words "under NHS arrangements". That, as with options (ii) and (iii), was clearly intended to mean only those general dental services that were provided by the NHS – ie not those provided under private dentistry. That was in accordance with the

Ministers' interpretation of NHS earnings and at odds with that argued for by the defenders. Objectively, the Ministers' interpretation was to be preferred.

[42] It was the contention of the Ministers that the supply of those services set out in the Statement of Dental Remuneration for which the dentist was remunerated at the rates there provided resulted in NHS earnings. That reading of the contract did not compromise the ability of dentists to make appropriate clinical decisions. The agreement required the defenders to undertake a certain number of years of work where their NHS earnings represented not less than 80% of their total earnings, or else they were required to repay the bursary. Both defenders were at liberty to undertake as much private work as they liked - indeed they could undertake only private work should they so desire - but they were required, in those circumstances, to repay the bursary as they had not complied with the obligations and undertakings that they gave in order to acquire it. Nothing in the contract restricted the professional decision-making of the defenders in any manner. They were free to choose whether or not to give private treatment when requested by a patient. If they did so, and thereby exceeded the permissible limit to private earnings, the clear and simple consequence was that the bursary was repayable.

[43] The adoption of the concept of earnings from the supply of services set out in the Statement of Dental Remuneration for which the dentist was remunerated at the rates there provided resulted in the conclusion that NHS maternity pay did not count as "NHS earnings". It also indicated that turnover, in the sense of the total earnings received from the provision of services set out in the Statement of Dental Remuneration, was the appropriate measure to be used to calculate NHS earnings and from that it followed that the proper comparison for ascertaining the percentage split as between NHS and private earnings was with the turnover generated by private work.

Continuous 5-year period?

[44] The contractual requirement to undertake "5 years' dental work in Scotland" meant a continuous period of employment with reasonable exceptions for breaks in work such as maternity leave, periods of certified sickness, and so on. There would always be scope to discuss and agree with SAAS how more unusual particular situations would be dealt with. At clause 3(a) of the contract, the defenders were required to carry out 5 years of dental work in Scotland. That period was then referred to in the clause as "the said period". At clause 3(b) the "period of employment" referred to had reasonably to mean the period of 5 years of dental work in Scotland in the preceding subparagraph. There was no other reasonable "period of employment" to which it could be said to refer. Therefore, there was reference to a single period of 5 years beginning within one calendar year of graduation. The defenders' suggestion that the obligation was to be interpreted as meaning any 5-year period throughout their entire career was absurd in light of the contract as a whole. Such an interpretation would mean that parties could only assess whether the defenders had complied with the contract, and therefore whether the bursary was to be repaid, as at the date of retirement. There was nothing in the contract which supported such a reading as being what the parties had in mind when the contract was executed. Nor was it objectively likely that the bursary would have been provided on that basis. The only reasonable reading of the phrase was that the commencement date requirement was included exactly so as to prevent the dentist saying "I may yet do it, but have not got around to it yet". That was exactly what the defenders sought to argue. The purpose of the bursary was to increase the number of NHS dentists. In return for several thousand pounds of public money, the defenders undertook to be NHS dentists for at least 5 years at the beginning of their careers.

Again, it was open to them to choose not to comply with that undertaking, but a failure to comply would result in the bursary being repayable.

[45] Clause 14 of the contract required repayment of the bursary if the defenders failed to complete the agreed commitment "by their own volition". Read with the obligation in clause 10 of the contract, it was clear that what was intended at clause 14 was that, if the provision of the information required under clause 10 demonstrated that the obligations in the contract had not been complied with, the defenders were expected to bring that to the attention of the Ministers and repay the bursary. Viewed reasonably, the phrase "by their own volition" must mean that the defenders were required to repay the bursary if they did not comply with the requirements of the contract, provided that they were not prevented by some matter outwith their own control from doing so. There was nothing in clause 14 which indicated that it was in any way intended to caveat the circumstances under which the bursary would need to be repaid. There was nothing to suggest that non-compliance with the contractual requirements, thus triggering the repayment obligation, required to be an active choice by the defenders. In any event, there was nothing to suggest that they did not have the ability to comply with the requirements if they had wanted to do so.

Aggregate or year-by-year earnings?

[46] This question was resolved by taking into account the background material known to the parties at the time of contracting, and in particular the undertaking given by the undergraduates when signing the application form for the bursary. That clearly indicated that the parties to the contract contemplated from the outset that the comparison of NHS and private earnings was to take place on a year-by-year basis.

Application of contra proferentem rule

[47] The current status of the *contra proferentem* rule had been correctly described (in the context of exclusion and indemnity clauses) by Andrew Burrows QC (as he then was) , sitting as a High Court judge, in *Nigeria* v *JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm), [2019] 1 CLC 207 at [34]:

> "[34] When Lord Hoffmann set out the modern approach to contractual interpretation in *Investment Compensation Scheme v West Bromwich*, he said, at [[1998] 1 WLR 912]: 'Almost all the old intellectual baggage of 'legal' interpretation has been discarded'. One question that arises, therefore, is whether the traditional rule of interpretation *contra proferentem* survives and in what form. In the context of exemption clauses that rule was to the effect that an exemption clause should be construed strictly against the person who drew up the exemption clause or was relying on it. But the recent authorities – see, especially, *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6 at [11], [58] – [67], [95], [116]; *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75; [2010] QB 27 at [23]; *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2015] EWCA Civ 1310; [2016] QB 835 at [10]; *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128 at [18] – [21] (and see generally Chitty on Contracts (ed Beale) (33rd edn, 2018) paras 15-012 – 15-020) – indicate that the law is as follows:
>
> (i) The ambiguity of who is the '*proferens*' (is it the person who drew up the exemption or the person relying on it?) means that reference to a *contra proferentem* rule is problematic.
>
> (ii) In any event, the modern objective and contextual approach to the meaning of the words, with business common sense and purpose also being relevant in some cases, renders it unnecessary to regard there as being a separate *contra proferentem* rule.
>
> (iii) Applying the modern approach, the force of what was the *contra proferentem* rule is embraced by recognising that a party is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words. And as Moore Bick LJ put it in the *Stocznia* case, at [23], 'The more valuable the right, the clearer the language will need to be'. So, for example, clear words will generally be needed before a court will conclude that the agreement excludes a party's liability for its own negligence. The well-known principles in *Canada Steamship Lines Ltd v The King* [1952] AC 192 (that general words, not explicitly mentioning negligence, will not exclude or indemnify against negligence unless that is the only possible liability) should be regarded as a flexible guide and not as a rigid code."

Repayment in whole or in part?

[48] The Ministers accepted that clause 14 of the contract fell to be construed against the background of the material available on the SAAS website at the relevant time, and that repayment could only be demanded in respect of some proportion of the total bursary, related to how much of the commitment as a whole had been discharged.

Prescription

[49] It was accepted that section 6 of the 1973 Act applied to the obligations which the Ministers sought to enforce. The agreed commitment undertaken by each dental student was set out at clause 3 of the contract. It had three separate elements: a period of 5 years (or such other period as was appropriate to the dentist in question); the commencement date; and the 80% threshold. The parties were unlikely to have agreed a contractual scheme that required a disproportionate level of supervision and expense to enforce it. The extent of any breach, and therefore the enforcement of any payment required to be made, could only be determined at the end of the 5-year period and once the Ministers had been provided with the relevant accountant-certified information to enable the assessment of compliance with the agreed commitment. The ascertainment of any liability on the part of the defenders to make payment to the Ministers was postponed until such time as the certified information from the accountant was provided: cf *McPhail* v *Cunninghame District Council* at 1983 SC 253. That was consistent with clause 10 of the contract, the second sentence of which could only sensibly be read as entitling the Ministers to require certification after the whole commitment period had ended, given that what was relevant was a pro-rated assessment of compliance within the whole period. The obligation to make repayment could, therefore, only become enforceable when either (i) the certified information was provided following a

request under clause 10, or (ii) the certified information was provided by the dentist to the Ministers without such a request being made. Applying that to the facts of these actions, Dr Leggat was asked to provide information as to his earnings by email on 21 March 2022 and provided the information by email on the following day. Service of the initial writ on him was effected on 19 July 2023. His obligation to make payment had not been extinguished by negative prescription. Dr Griffin was asked to provide the certified information on 28 June 2022. She provided it on 3 October 2022. The initial writ in her case was served on her on 20 July 2023. Her obligation to make payment had not been extinguished by negative prescription.

[50] If commencement of the prescriptive period was not postponed until the accountant-certified information was provided, the prescriptive period could not in any event reasonably commence any earlier than the end of the commitment period. It was not possible to know whether and to what extent payment was required from a dentist until the pro-rated assessment could be carried out by reference to the extent to which he or she had complied with the agreed commitment. That necessarily required consideration of how much of the 5-year period had been complied with, which could not be determined until that period was completed. On this hypothesis, Dr Leggat's commitment period ended on 31 July 2018 and service was effected on him on 19 July 2023, which was within 5 years of that date. Dr Griffin's commitment period also ended on 31 July 2018. Service was effected on her on 20 July 2023, which was within 5 years of that date.

[51] If the prescriptive period began from the end of the first year in which the dentist failed to satisfy the 80% NHS earnings requirement, separate prescriptive periods would operate for each year. If an obligation to repay one tranche of the bursary were to have prescribed, that would not of itself have any effect on the enforceability of the repayment of

a later tranche. A dentist would know, or should have known, that a threshold had not been achieved at or near the end of the relevant year. That information would not be available to the Ministers at that time. In that situation, section 6(4)(a)(i) of the 1973 Act would operate to postpone the commencement of the prescriptive period.

[52] The usual approach to section 6(4) remained that set out in *BP Exploration Operating Co Ltd* v *Chevron Shipping Co* [2001] UKHL 50, 2002 SC (HL) 19, 2001 SLT 1394. Fraud for these purposes was given a broad construction rather than a narrow, technical one: *Glasgow City Council*; *Dryburgh* v *Scotts Media Tax* [2014] CSIH 45, 2014 SC 651 at [30]. What was required was a deliberate acting on the part of the debtor that was intended to induce and did induce the creditor to refrain from asserting its rights. That deliberate acting might include concealing a relevant fact: *Glasgow City Council* at [52]. The dentists knew or must have known whether their earnings were at or above the 80% threshold each year. Their failure to inform the Ministers of that matter was concealment of a relevant fact. Had the Ministers been aware of the relevant facts, relevant proceedings would have been commenced. That they had not raised proceedings because of the dentists' deliberate concealment of facts qualified them for the benefit of section 6(4): *BP Exploration* at [67]. It was no answer to suggest that there was no positive obligation on the dentists in the contract to provide that information until it was requested. They knew or ought to have known that they were under an obligation with which they had not complied, and they knew that information was relevant information to the Ministers. Their failure to provide that information was sufficient to constitute "fraud" as defined in the authorities. It would be inequitable for the dentists to be able to fail to pass on relevant information in their possession and then seek to rely on that failure to avoid making repayment.

[53] The question then became one of reasonable diligence. That was not a simple matter; it involved asking whether it was reasonable for the Ministers not to ask for the information on a year-by-year basis, but to ask for it once the commitment period had expired: *Heather Capital* (IH) at [72] - [73]; *Glasgow City Council* at [37]; *Glasper* v *Rodger* 1996 SLT 44; Johnston, *Prescription and Limitation* (2nd edition) at [6.100] et seq. In the following circumstances, it was so reasonable. The dentists were under an obligation to notify changes of employer during the commitment period, so a change to their general employment would be flagged up by that. It would be disproportionate to ask dentists to pay an accountant to certify their earnings each year, given the sums involved, and it would be disproportionate for the Ministers to have to expend the funds required to administer a scheme requiring such levels of supervision for the same reason. Instead, it was reasonable for the Ministers to trust the professionals to bring relevant information to their attention. Had the dentists done so, that would have permitted the prescription period to commence. It was therefore reasonable for the Ministers to have a policy of requesting the certified information from the dentists only after the commitment period had come to an end.

[54] On any of the three available alternative analyses of the application of the law of prescription to the facts of these cases, the obligations to make payment had not prescribed prior to the commencement of these proceedings.

Relevant facts and figures as calculated by the pursuers

[55] Dr Leggat had received total bursary payments of £12,000. He graduated with the degree of Bachelor of Dental Surgery following completion of the 2013 - 2014 academic year. Having received bursary payments for only 3 years rather than 4, he was required to comply with the requirements of the contract for only 4 years, rather than 5. On or around 1 August

2014 he had commenced a 2-year period of vocational training, which was completed in part in a hospital setting and in part at a High Street dental practice. He was a salaried employee for that 2-year period. From 1 August 2016 onwards he worked as a self-employed dental associate at that practice. The splits of his earnings for the relevant years as between NHS and other earnings, calculated as the Ministers required, were: 2014-15 – 100%/0; 2015-16 – 100%/0; 2016-17 – 64%/36%; 2017-18 – 64%/36%. He had therefore failed to comply with the requirements of the contract during 2 years of the 4-year commitment period beginning 1 year after his graduation and was obliged to repay half of the total bursary, as sought.

[56] Dr Griffin had received total bursary payments of £16,000. She graduated with the degree of Bachelor of Dental Surgery following completion of the 2012-2013 academic year. Having received payments for 4 years, she was required to comply with the requirements of the contract for 5 years. On around 1 August 2013 she had commenced a period of 1 year in vocational training at a High Street practice. She was a salaried employee for that year. From 1 August 2014 onwards she worked as a self-employed dental associate at various practices in Scotland. The splits of her earnings for the relevant years as between NHS and other earnings, calculated as the pursuers required, were: 2013-14 – 100%/0; 2014-15 - 91.41%/8.59%; 2015-16 – 77.82%/22.18%; 2016-17 – 76.03%/29.97%; 2017-18 - 73.73%/26.27%. She had therefore failed to comply with the requirements of the contract during 3 years of the 5-year commitment period beginning 1 year after her graduation and was required to repay three fifths of the total bursary, as sought.

Decision

[57] The exercise in contractual construction which has to be undertaken in order to resolve the disputes in this case is a rather unusual one in some respects. Firstly, the contract under construction was not the product of the slightest negotiation, but was simply a document prepared on behalf of the Ministers and presented to student dentists on the basis that they must either take it (and the money it brought to aid them in the completion of their studies) or else leave it. Although the context in which the contract was entered into is thus clear enough, that context yields much less than might usually be expected by way of assistance in the exercise of construction. Similarly, the basic purpose of the contract (the provision of financial assistance in return for a commitment of some kind to NHS dentistry) may be discerned as a matter of generality, but is not sufficiently clear to assist in the provision of answers to many of the questions of construction which arise. There are, I was informed, no policy or similar documents in the possession of the pursuers which would cast further light on precisely what their aim in making available the financial assistance may have been (even assuming that their own aim and intention is, in the circumstances already adverted to, a permissible aid to the proper construction of the contract).

[58] Further, both the Ministers and the defenders rely heavily on non-contractual material as, effectively, determinative of elements of the true meaning of the contract terms themselves. The Ministers rely on the terms of the application form which, it seems, each student dentist signed more or less immediately before assenting in turn to the terms of the contract itself, as showing that the assessment of the ratio of NHS earnings to other earnings falls to be carried out on an annual basis. Both sides accept that the much more vaguely expressed content of the SAAS website, as already described, settles that, if a repayment becomes due from a dentist, its extent is limited to some proportion of the total bursary.

Despite the parties' views on these matters, it is necessary to bear in mind that this extraneous material only represents a source of information, of varying clarity and significance, as to the background reasonably available to the Ministers and the student dentists at the time of contracting, and does not in itself amount to further (let alone different) contractual terms.

[59] All of these factors do rather place a somewhat greater than usual premium in the exercise of determining the legal meaning to be ascribed the contract on the words actually contained in the contract itself, and on consideration of the practical results which the adoption of one or other of the parties' preferred constructions would produce (ie what would in construing a commercial contract be referred to as favouring a construction making good commercial sense), with a correspondingly lesser – but not immaterial - emphasis on the normally potent considerations of context and purpose in the particular circumstances surrounding these contractual arrangements.

"NHS Earnings"

[60] It is certainly unfortunate that the drafter of the contract did not see fit to define in it this central concept, and that the question of what was objectively intended by it is thus left to the inevitably approximate processes of construction when the matter could relatively simply have been put beyond doubt, but that is the situation that has to be dealt with. Beginning with the notion of "earnings", I accept that at its core the idea at which that word points is the monetary fruit of one's own labours, and that its use in contexts where what is meant is the financial yield of a position in which one has placed oneself, as by investment or other productive dealing, represents a secondary meaning that the circumstances of this case (which essentially concern how the dentist is to apply his own professional skills

during the commitment period) do not indicate as apt here. That resolves the minor question of whether a dentist's share of such monies as have been generated by work done not by him or her, but by practice hygienists or the like ancillary staff, qualifies as his or her "earnings" for the purposes of the calculation called for by the contract; it does not.

[61] I further accept that the minimum ratio described in the contract is to be struck as between "NHS earnings" (whatever that expression may comprehend) and other earnings from work done by the dentist as such – that is to say, in the application of the knowledge and skills gained from the dental education which the bursary facilitated. A distinction in liability as between dentists who choose to spend the time during which they are not engaged in dentistry in some other gainful activity and those who by contrast then prefer simple rest or recreation is not one justified by reference to the context and purpose of the contract. Part-time dentists are dealt with by clause 13 of the contract; in essence, they have to work for whatever would be the equivalent of their commitment period had they been working full-time, and the provision that at least 80% of their earnings have to be "NHS earnings" if they are not to become liable to repay the bursary to at least some extent must again, for the reasons already mentioned, refer to the ratio between such earnings and earnings from work done by the dentist as such.

[62] One reaches next the question of what "NHS earnings" actually are. The phrase cannot simply mean earnings actually received from the NHS. The general requirement for patient financial contributions to the dentist in respect of treatment otherwise carried out under the auspices of the NHS would probably render it very difficult, if not impossible, for the dentist to comply with the 80% commitment on the basis that only payments made by the NHS counted as relevant earnings, even if he or she did nothing but treat NHS patients with work authorised to be done in terms of the Statement of Dental Remuneration, to the

extent that that cannot objectively be supposed to have been the intention of the parties to the contract. That possibility excluded, only two competing constructions are advanced. The central difficulty with the defenders' proposed construction (ie all earnings from treating patients registered with the NHS) is that it entails that payments made entirely by a patient in respect of work which the NHS would not under any circumstances fund falls to be treated as "NHS earnings" simply because the patient in question is eligible and registered to receive some other kind of treatment for which the NHS would pay at least in part. It is not reasonably possible to see that the words "NHS earnings" naturally cover that sort of situation and neither the context nor the purpose of the contract suggest strongly enough that words inapt to describe what was being aimed at were chosen. It is true that dentists cannot properly direct whether a patient registered for NHS treatment in fact chooses to have that treatment as opposed to an alternative which would have to be privately funded, and therefore cannot at their own hand entirely control whether or not the contractual requirement will be met, but, by preponderantly treating patients eligible for NHS treatment, they can maximise the prospects of meeting the requirement. That a contracting party may find himself failing to meet a contractual requirement, and thus come under some liability despite his best efforts to avoid that situation, is not a particularly unusual outcome in contract law, and certainly does not furnish a ground weighty enough to displace the conclusion pointed at by consideration of the language of the contract and the highly anomalous results which adoption of the defenders' favoured construction would entail. No such difficulties attend the Ministers' construction, that "NHS earnings" means the earnings generated by the dentist by the treatment of NHS patients in accordance with the Statement of Dental Remuneration. That is, in my view, the proper construction of the phrase in the contract.

Year-by-year or in aggregate?

[63] The contract itself is silent on the question of whether the dentist's fulfilment of the 80% requirement falls to be assessed on an annual basis or in aggregate over the whole commitment period. Either possibility would be workable, and although various further consequences flow from the choice, reasonable arguments can be and were made in support of each competing construction. In this respect, however, the fact that each student dentist had, immediately before signing the contract, also signed an application form, the fifth bullet point of which was an undertaking that NHS earnings would represent at least 80% of his or her total earnings for each of the years of the commitment period, provides an effectively unassailable basis for concluding that the background against which the contract was executed shows that reasonable people in the position of the contracting parties would have understood the contractual obligation to be to meet the target percentage in each year of the commitment period, and not merely over the whole. The pursuers in practice calculate the year in question from 1 August in any relevant year to 31 July in the following year, apparently on the basis that, after graduation, nearly all dentists start training work on 1 August in the same year. The clear contractual obligation is, however, merely to start the commitment period within 1 year of graduation, and in the case of any dentists who do not start work on 1 August, the commitment period falls to be calculated, in the absence of any other stipulation in the contract, on a calendar year basis from their actual starting date.

Continuous commitment period?

[64] Again, the contract is silent on whether the commitment period being undertaken is a continuous one, or whether it could be met by a combination of shorter periods over a

longer stretch of time. The application form does not assist in this respect, and the question of construction must be answered by reference to the practical results which would flow from either of the possible constructions. The obvious difficulty with the defenders' suggestion that the period need not be a continuous one from the specified starting point within 1 year of graduation is, as the Ministers point out, that without a specified end point it becomes impossible to ascertain a point in time at which it can definitely be said that there has either been compliance with the commitment or not, meaning that requiring repayment of the bursary, whether in whole or in part, could almost always be met with the response that the commitment would be met in future. That cannot have been the intention of the contracting parties as reasonable actors. On the other hand, the defenders point out that such actors could not have intended that periods of absence for entirely reasonable causes, such as maternity, sickness or compassionate leave, should be regarded as amounting to a failure to meet the agreed commitment in the year or years during which they occur. However, that situation is catered for by the stipulation in clause 14 of the contract that repayment of the bursary will be required only where the dentist "fails to complete the agreed commitment by their own volition". Whether or not a failure to complete the agreed commitment is the result of the dentist's own volition cannot be something which the parties to the contract may be supposed to have intended to leave for unilateral determination by either the dentist or the Ministers, and is, perhaps understandably, not a matter which the contract attempts to define. In order to give it content recourse must be had to the common law's old familiar, the reasonable man. If such a person would conclude in any particular set of circumstances that a dentist's absence from work was not the direct result of his or her own free choice or, put another way, that there was a good reason for the absence, then that absence will not be by the dentist's own volition for the purposes of the contract.

[65] More difficult related questions are, firstly, whether a period of such justified absence in a particular year or years, while not amounting *per se* to a failure to meet the agreed commitment, has the effect of requiring the calculation of earnings for that year to be carried out on the basis of whatever period was in fact worked during that year, or whether resort to some other expedient is required and, secondly, whether payments received in respect of an unworked period, whether from the NHS or otherwise, such as maternity or sick pay, fall to be taken into account in calculating whether the required split between NHS and other qualifying earnings has or has not been attained in any year of the commitment period.

[66] Not without some hesitation (because the language of the contract itself provides no clue to the answers to these questions, and the contract's context and purpose do not in themselves enable the requisite choices to be made amongst the available possibilities), I conclude that the parties must be taken to have intended as reasonable actors that any period of justified absence in the sense discussed does not fall to be taken into account in computing compliance with the commitment to carry out dental work in Scotland. Thus, if a dentist was for example on justified sick leave for 4 months of one relevant year during the commitment period and 2 months of the following year, then the required commitment for each of those years would have been met by the 8 months worked in the first year and the 10 months worked in the second. It has already been observed that the commitment period must fall to be regarded as continuous in nature. Such continuity works both ways - just as a dentist cannot hold off performing continuously once the commitment period has begun, neither can the Ministers maintain that a period of justified absence interrupts that performance. If it were otherwise, the commitment period might be extended beyond the point contemplated on the face of the contract – perhaps well beyond that point – for reasons which could not sensibly be ascribed to the unwillingness of the dentist to try to discharge

the obligations which he or she had undertaken. I do not consider that such an outcome would have been that imagined by the parties acting reasonably at the time of contracting, had they indeed given the matter any positive thought.

[67] It flows, I think, from the conclusion that periods of justified absence are in effect to be left out of account for the purpose of determining whether or not the obligation to carry out dental work in Scotland for the commitment period has been discharged that payments made to the dentist in respect of such absences (the most obvious examples of which are maternity and sick pay) also fall to be left entirely out of account in determining whether, in respect of the commitment period, the 80% threshold has been reached. The types of payment received in respect of justified absences are often not easily classified as either being "earnings" at all, or as being properly ascribable in some relevant sense to the dentist having done NHS work or not. Fundamentally, the obligation undertaken by the dentists was to achieve the 80% NHS earnings threshold while engaged in dental practice. If the absence period is to be left out of account as part of a year within the relevant commitment period, any payments received in respect of that period must equally be neutral for the threshold determination question. It may be, as Dr Griffin's affidavit narrates, that when private patients become aware of a dentist's planned absence, some will wish to accelerate completion of their then-current treatments in a way which will increase a dentist's non-NHS earnings in the period of work leading up to that absence and thus skew any normal balance which he or she may until that point have sought to strike. However, it appears to me that if a decision is made by a dentist to accede to patient demands to increase private treatments in the lead up to a period of justified absence, it has to be recognised that, like most decisions, it may have consequences which will simply have to be accepted.

Gross or net earnings?

[68] Again, the contract is silent as to whether the concept of earnings which it deploys means the gross revenue generated by the carrying out of dental work by the dentist, or the net amount received by him or her after the costs of carrying it out have been deducted. If the threshold were to be assessed using the net earnings of the dentist from NHS treatments compared to the net earnings from non-NHS treatments, the nature of the arrangements which had been entered into in relation to revenue sharing within the particular practice, or indeed the financial efficiency of the running of the practice itself, would be at least capable of being brought to bear in the calculation, potentially with very unpredictable results. It is difficult to see why the parties to the contract would have contemplated the requisite calculation being affected by such factors, which bear no necessary relation to the split of the burden of the dentist's work as between NHS and non-NHS treatments. Further, as Dr Griffin frankly acknowledges, it would in practice be very difficult to split certain types of expenses, in particular, as between NHS and non-NHS treatments, resulting in the potential for much unproductive and inconclusive argument on the subject were net earnings to be used in the threshold calculation, and further supporting the conclusion that the parties to the contract properly fall to be taken as having agreed to that calculation being carried out on a gross earnings basis on both sides of the NHS/private equation.

Extent of repayment obligation

[69] Although the contract deals expressly with how much of the bursary has to be repaid in the event of certain events coming to pass (failing to take up a training place in Scotland - full repayment; failing the university course – full repayment of the amount received by point of failure), the general provision made by clause 14 for failing to complete

the agreed commitment by the dentist's own volition is simply that he or she will be required to repay "the dental bursary". Absent some other consideration, the natural reading of that provision would have been that the whole bursary would fall to be repaid in that circumstance also. However, the parties now agree that the statement on the contemporaneous SAAS website previously set out, and in particular that part of it which narrates that:

> "You will be required to repay a proportion of your entire bursary if you do not meet the conditions of the tie-in period. The amount you repay will depend on how much of the tie-in period you actually complied with"

forms part of the admissible background to the contract and has the effect of clarifying the (faint) ambiguity in the contractual wording, to the effect that only some element of the whole bursary will be repayable in the case of partial failure to meet the contractual commitment. Counsel for the Ministers, apparently with one eye on the prescription argument to come, made some attempt to argue that the proportion of the whole bursary which would be repayable would relate to the degree of compliance with all three elements of the contractual commitment (period, percentage and commencement date), but ultimately parties agreed that any repayment calculation which included a consideration of exactly how far a dentist's relevant earnings fell short of the 80% NHS threshold in any 1 year (or indeed how far they exceeded that threshold in other years) would be more complex than the parties could be taken to have intended, and that that matter should be left out of account. While I am not sure that I entirely agree with that proposition, I do not seek to disturb the parties' consensus. It did not appear that anyone had any strong views on the treatment of a dentist who failed to start dental work in Scotland within the year following his or her graduation, presumably because that is not an issue which has in practice arisen; it would appear to me such a failure would render the dentist in question liable to repay the

whole bursary, as having failed to comply entirely and *ab initio* with a mainstay of the agreed commitment. Given that I have already held that compliance with the required threshold falls to be assessed on an annual basis beginning with the first anniversary of the dentist's commencement of dental work in Scotland within the year following graduation, and that the SAAS website refers to the repayment liability depending "on how much of the tie-in period [the dentist] actually complied with", it follows in all the circumstances that a dentist is obliged to repay such proportion of the whole bursary received by him or her as corresponds to the number of years in the commitment period when the threshold was not met out of the whole. Put more simply, a dentist with a 5-year commitment period is bound to repay 20% of the whole bursary for each year within that period when the threshold was not met, and a dentist with a 4-year commitment period is bound to repay 25% for each such year.

[70] Parties were content that the final sentence of the relevant paragraph on the SAAS website, namely "We will arrange repayment terms on an individual basis but we will not ask you to repay the whole amount in a lump sum" should, at least in relation to these test cases, be ignored. I record that agreement and make no comment on it.

***Contra proferentem* principle**

[71] It has not been necessary, in resolving the various construction issues which have arisen in this case, to have recourse to the *contra proferentem* principle, even though there can be no doubt that the Ministers, who unilaterally composed the contract terms and presented them on a non-negotiable basis to the student dentists, would fall to be regarded as the *proferentes* for its purposes. I agree with what was said by Lord Burrows in the *Nigeria* case to the extent that it may well be that the modern mechanisms of contractual construction

will often, as here, indicate the meaning to be ascribed to potentially ambiguous terms without requiring the use of such an expedient of last resort as the principle represents.

[72] Nonetheless, if it is permissible to have regard in the construction exercise to what might be called "situational" circumstances surrounding the contract's execution (i.e. circumstances pertaining to how the contract was drawn up and executed), as it is – for example, *Wood* at [13] regarding whether the contract under examination was professionally drawn – then it is difficult to see as a matter of principle why the circumstance that that contract was entirely the product of one party and left simply for acceptance or rejection *in toto* by the other, should not be capable of being a relevant consideration in its construction, at the very least in cases where rights which that other would elsewise enjoy might or might not be excluded or circumscribed by an ambivalent provision. One might therefore say that reports of the *contra proferentem* principle's death have been at least somewhat exaggerated; it is simply living more quietly in a new landscape and working on rather less ambitious projects.

Prescription

[73] It is first necessary in the context of the application of the law of prescription to the present cases to determine when a dentist's obligation to repay something to the Ministers in respect of a failure to comply with the commitment which he or she undertook became enforceable. It has already been established, as the Ministers argued, that the obligation of the dentist was to work in NHS dentistry and achieve the stipulated percentage of NHS earnings in each year of the commitment period. Such an obligation is different in substance, and not merely in form, from an obligation to work for 5 years in NHS dentistry in Scotland and to meet the stipulated percentage of NHS earnings over the period as a

whole. As the defenders pointed out, Dr Griffin would have no repayment liability at all if the latter was truly the nature of the obligation undertaken. The consequences of the decision that has been made about the true nature of the obligation in question have to be accepted, be they rough or smooth, by all parties. It follows inexorably from that nature that a failure to meet the commitment in 1 year resulted in a prestable obligation on the part of the dentist to repay a known percentage (either 20% or 25%, depending on the overall length of the commitment period) of the total bursary received as soon as that failure occurred. That percentage was due by the dentist to the Ministers as soon as the failure had occurred. The obligation to pay it was not defeasible in the event of any later occurrence. In the case of a commitment year ending on 31 July, the repayment obligation in question would be prestable (at the latest, depending on the particular reason for failure) on 1 August of that same year. It may well be that the Ministers might have thought it convenient, economic, or in some other sense reasonable not to sue in respect of a single year, but rather to wait and see whether there were subsequent failure years, so as to be able eventually to sue once and for all for the whole repayment due. That, however, does not detract from the fact that, if so moved, they could entirely lawfully have sued for the repayment due in respect of a single failure year as soon as that year was completed, and sued in respect of any subsequent failure(s) as and when it or they occurred. The quinquennium begins to run when it is legally possible to sue in respect of a particular obligation, not when the creditor may find it convenient to sue.

[74] I reject the Ministers' suggestion that the obligation to repay was prestable only once the dentist had, voluntarily or in response to a request from the Ministers, furnished them with an accountant-certified confirmation of the relevant percentage split of the dentist's earnings. The obligation undertaken by the dentists was, as set out in clause 3 of the

contract, to start work as a dentist in Scotland within a year of graduation, to keep up such work for the relevant commitment period, and to achieve in each year of that period the requisite threshold of NHS earnings. This was not a case in which the parties had, as in *McPhail*, agreed that the nature and extent of any liability was dependent on the view or decision of a third party. It was entirely open to the Ministers to reject any such certification as was provided, and indeed I was informed that in some cases they had done just that. The certification process was merely a means by which the Ministers could inform themselves whether or not one element of the underlying obligation appeared to have been met; a certificate's terms were in no way constitutive or conclusive of anyone's rights or obligations.

[75] The obligation in question was one of payment under a contract, not to make reparation. In relation to such an obligation, there is no general principle (such as exists by dint of section 11(3) of the 1973 Act in relation to obligations of reparation) that time starts to run against a creditor only when he is or ought to have been aware of the facts giving rise to his right of action. In any event, the Ministers were plainly entitled in terms of clause 10 of the contract to require the provision of an accountant's certificate to inform them about a dentist's earnings split in any relevant year at any point once the year in question had ended. Again, if they chose for reasons appearing good to them not to do so until after the whole commitment period had ended, that choice and its consequences were for them. It certainly did not stop time running against them. No particular hardship flows from that conclusion; even if the Ministers chose not to request earnings certification until the whole commitment period had ended, no possible claim which they might have had could have prescribed for at least another year (or 2 years in the case of a 4-year commitment) after that end, and given that the dentists appear uniformly to have spent the first 2 years of the

commitment period in NHS training of one kind or another, thereby comfortably meeting the NHS earnings threshold during those years, in practical terms the Ministers had two or even three years after the end of the whole commitment period to raise proceedings before there was a material risk that any valid claim they had would prescribe; ample time during which to appreciate that the grass was growing under their feet.

[76] One turns to the argument that the prescriptive period was paused in terms of section 6(4) of the 1973 Act for such period during which the Ministers were induced by reason of fraud (that being the particular part of the subsection upon which they have chosen to rely) on the part of the dentists to refrain from making a claim. Section 6(4) has been tested to destruction and beyond in the authorities since the judicial enfeeblement of section 11(3) in its former terms. I adhere to the view that the actual words of section 6(4) represent the best guide to its proper application. The Ministers' argument entails that the dentists' conduct involved something properly to be regarded as fraud within the meaning of the subsection. Authority holds that such fraud may be constituted by "deliberate acting on the part of the debtor that was intended to induce and did induce the creditor to refrain from asserting its rights": *Dryburgh* at [30]. Counsel for the defenders accepted that suggestions made by me in *Batchelor* v *Opel Automobile GmbH* [2025] CSOH 93 at [161] and in *Mackie* v *Mercedes-Benz Group AG* [2025] CSOH 94 at [152], to the effect that the word "intended" in that passage might better be replaced with "calculated", were well-founded. In the present cases, however, the dentists are not said positively to have done anything, but rather simply not to have volunteered to the Ministers the information that they had not met the percentage threshold of NHS earnings in particular years. It is by no means obvious to me that the dentists would in fact have been aware of that information, since the calculation required for the purposes of the contract is not clearly required for any other purpose and

the dentists may well have given the matter no thought at all. Failing to disclose information of which one perhaps should have been aware but did not in fact know, short of a situation properly characterised as wilful blindness, is difficult to categorise as any sort of fraud, and so I would not have felt able to uphold the Ministers' position that their claims had not prescribed without proof of the dentists' actual state of knowledge. However, a prior question is whether the dentists' silence could, even if deliberate and calculated to induce the Ministers to refrain from asserting their rights, amount in the circumstances to "actings" or (to borrow the word used in section 6(4)(a)(ii) of the 1973 Act) "conduct" on their part. This issue was considered, in the context of that subsection, by Lord Doherty in one of the *Heather Capital* cases in the Outer House, [2016] CSOH 107, 2017 SCLR 317 at [46], as follows:

> "[46] Having heard fuller argument on the issue than I did in *Rex Proctor* [*Rex Proctor and Partners Retirement Benefit Scheme Trustees v Edwards* [2015] CSOH 83], and having reflected further upon it, I think there is a tenable argument that to construe 'conduct' as including only positive acts may be too restrictive an interpretation. The Oxford English Dictionary (2nd edn) defines 'conduct' as: 'Manner of conducting oneself or one's life; behaviour; usually with more or less reference to its moral quality (good or bad). (Now the leading sense)'. In my opinion, on a proper construction of s.6(4) the word 'conduct' has its ordinary meaning of behaviour. The expression is wide enough to include an omission to act in breach of an obligation or duty. It is very difficult to see why it should be given a more restrictive meaning, particularly since it is clear that a broad view is to be taken to the construction of s.6(4) (*BP Exploration Co Ltd v Chevron*, Lord Hope at para. 31, Lord Clyde at paras 66–67, Lord Millet at para.97; *Dryburgh v Scotts Media Tax Ltd*, opinion of the court at paras 18–20). Resort to the mischief rule points in the same direction. The mischief the error provision was intended to address is broad enough to encompass error induced by a failure of the debtor to act in breach of an obligation or duty. A construction of 'conduct' which confined it to positive acts would fail to address part of the mischief. It would be very odd indeed if innocent action inducing error fell within the purview of the provision but reprehensible inaction in breach of duty did not. The equitable case for the latter circumstance being included within the scope of the mischief, and within the meaning of 'conduct', is as strong as the case for reprehensible action being included and stronger than the case for innocent action being included."

[77] While acknowledging that that discussion was specifically about what could or could not amount to conduct inducing error for the purposes of section 6(4)(a)(ii), it is difficult to see how fraud within the meaning of section 6(4)(a)(i) could correspondingly be committed other than by the mechanism of words or conduct on the part of the debtor or a person acting on his behalf, or why a different view of what does and does not qualify as conduct should be taken as between section 6(4)(a)(i) and (ii). If that is so, it is noteworthy that conduct by way of omitting to do something requires in Lord Doherty's view that the omission must have been "in breach of an obligation or duty". In the very specific context of the contract currently under examination, unlike in many other cases where the issue might arise, the circumstance in which a dentist is under an obligation or duty to speak about the matter in question is made explicitly clear: when he or she is asked about it. Given that express stipulation, I do not consider that a claim that the dentists failed to speak despite not being asked can in that particular context amount to a relevant allegation of fraud, even in the attenuated version of that notion deployed for the purposes of section 6(4)(a)(i).

It follows that section 6(4) does not operate to suspend the operation of the prescriptive periods in these cases. The action against Dr Leggat was raised sufficiently promptly to avoid the operation of prescription in relation to his obligations to repay. That against Dr Griffin was raised too late to save from the operation of prescription what would otherwise have been her repayment obligations in respect of her claimed failures to meet the percentage threshold for NHS work in the years 2015/16 and 2016/17, but not too late in respect of the year 2017/18.

[78] Had it been necessary to consider the "reasonable diligence" proviso to section 6(4), I would have required to hear evidence on the subject of when the exercise of such diligence by the Ministers could have led to the discovery of the claimed fraud, and in particular

whether requests for accounting information ought to have been made before the end of the commitment periods. I also consider that the Ministers' position on having been induced to refrain from making a claim as a result of anything done or left undone by the dentists would have required proof before being accepted. In the event, however, recourse to these elements of section 6(4) is not required in order to identify that the subsection does not operate in the circumstances of these actions.

Disposal

[79] The cases will be put out by order so that parties, having considered the outcome of their various respective arguments, may make final submissions on their proper final disposal.