

COMMERCIAL
PRE-EMPTIVE REMEDIES

By:

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BIOGRAPHICAL INFORMATION

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Richard Aird was called to the English Bar in 1976 and to the Scots Bar in 1979 and is one of the very few Counsel jointly in practice at the English and Scots Bars where he practices predominantly in the **commercial** and **insolvency** fields. He has a broad commercial and insolvency practice which often calls for a consideration of English and Foreign remedies and other cross border issues. This work has involved two appearances in House of Lords and attendances in the Court of Session on numerous occasions, most Sheriff Courts in Scotland as well as Arbitrations.

He is the author of **The Scots Dimension to Cross Border Litigation**, the only textbook on cross border litigation within the United Kingdom, and has written a number of articles in professional journals. He is a Contributing Editor of **Commercial Litigation : Pre-Emptive Remedies (4th Ed)**, Sweet & Maxwell to which he writes both the Scottish and the International Sections.

INTRODUCTION

WHAT IS A COMMERCIAL PRE-EMPTIVE REMEDY ?

A measure intended to preserve a factual or legal situation until the courts normal procedures can be invoked.

This means they are usually obtained as a matter of urgency.

As a by-product pre-emptive measures can be a lethal tactical weapon which as experienced practitioners will attest frequently induces an early settlement. English Examples ?

Freezing injunctions, Search Orders and orders for custody, preservation and inspection;

Key Illustration:

A, an Italian National , proceeds in Paris with jurisdiction under the Judgment etc. Regulations against B , a German National .

B's assets whether moveable or immovable, tangible or intangible, in the form of debts owed by trade debtors or credits held by banks whether directly held or held by third parties have the potential to be seized in

ANY REGULATION JURISDICTION

To the extent provided by their internal law

A choice of Jurisdiction Clause ?

- i) Convening some Jurisdiction for Interim Protective Measures?**
- ii) Excluding some jurisdiction for Interim Protective Measures ?**
- iii) Excluding any Jurisdiction for Interim Protective Measures?**

Probably makes no difference

Recent ECJ cases

Gasser v Misat Srl [2005] QB 1

- An Austrian exclusive Choice of Jurisdiction Clause did not prevent the Italian Courts from considering whether they had jurisdiction to grant a negative declaration
And ten years later.....?

See also Turner v Grovit [2005] 1 AC 101 & Owusu v Jackson 2005 (C-281/02)

A. UK COMMERCIAL PRE-EMPTIVE MEASURES

- N.B.
- The English Common Law System has very different remedies to the civil law based Scottish System. Depending on the circumstances either may have the more effective remedy.

ANALYSIS OF INTERIM PROTECTIVE MEASURES

1). **THE CORE INTERIM PROTECTIVE MEASURE**

INJUNCTIVE RELIEF-
IN SCOTLAND THE INTERDICT

Interim Injunction

See generally CPR25.1 and Practice Direction.

The usual purpose of interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action. The injunction will almost always be negative in form to restrain the defendant from doing some act. Very exceptionally it may be mandatory, requiring an act to be done. A cross-undertaking from the plaintiff to be answerable in damages if the injunction proves to have been wrongly granted is almost always required.

Interim Interdict

Similar concepts - an order binding on individuals available on an interlocutory or permanent basis.

But important differences:

- i) No separate requirement in Scotland for an undertaking as to damages.
- ii) Differences in the concept of “Threatened Wrongs”?
- iii) Direct mandatory injunctions not competent in Scotland.

Both systems follow American Cyanamid Co. v. Ethicon (1975 A.C. 396) and other cases such as N.W.L. Ltd. v. Woods 1979 1 W.L.R. 1294 & Cambridge Nutrition Ltd. v. B.B.C. (1990) 3 All E.R. 523.

- i) “Good arguable case”

A serious question to be tried.

Not frivolous or vexatious but with a real prospect of success at trial.

And then

- ii) “The Balancing of the risks of doing injustice”.

But in Scotland the capacity to enter into meaningful and valuable undertakings is part of the Balancing Act.

i.e. Impecunious pursuer can obtain interim interdict where the balance is in his favour.

2). **PRE-EMPTIVE REMEDIES AGAINST PROPERTY**

England

“Relevant property or assets” (see CPR 25.1(c))

Property including land which is subject to a claim or as to which any question may arise

Wide powers for detention, custody or preservation - inspection ... samples ...
experiment ...

require information concerning the location of such property.

Scotland

Administration of Justice (Scotland) Act 1972

Section 1 ... documents and other property ... as to which a question may
relevantly arise ...

Wide powers ... inspection ... custody ...

Section 1(A) ... Require information concerning witnesses or defenders in any
type of action “likely to be brought”.

3). **REMEDIES IN SECURITY :**

The concepts are different.

The principal English remedy is the Freezing Injunction (Mareva Injunction)
(CPR25.1(i)g and Practice Direction)

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The Respondent is enjoined from parting with assets below a certain figure.
-excluded from the prohibition are usually normal business or living expenses and
legal costs.

The concept of Arrestment

- an order restraining a third party from making a payment or satisfying an
obligation to the opposing party
- an arrestment is made against a third party (i) who has an obligation to account
to the opposing party or who is in possession of property belonging to him.

WHAT TYPE OF CLAIM SUPPORTS AN ARRESTMENT?

Most claims may support an arrestment e.g. damages, due payment, vested rights
but not future or contingent claims.

In special circumstances i.e. insolvency of the debtor or an attempt to escape his
creditors will give rise to wider categories of arrestable claims.

THE MOST USUAL TARGETS FOR AN ARRESTMENT ARE:

- (a) a Scottish bank or building society account
- (b) a shareholding in a Scottish registered company
- (c) an assurance or investment policy with one of the many of the Scottish
assurance companies
- (d) trade or professional debtors of the target in Scotland
- (e) sums due under a contract (other than salary or wages) or

(f) possibly an English or foreign branch of a Scottish bank, insurance company or building society.

WHEN AN ARRESTMENT MAY BE SOUGHT?

Arrestments are obtained as an incident of raising the principal action. - the pleadings must set out an intelligible and discernible cause of action - a colourable case for the claim and the decision whether to grant the warrant must now be subject to Judicial Consideration.

A COMPARISION OF THE CONCEPTS OF FREEZING ORDERS AND ARRESTMENTS:

An arrestment on the dependence has no equivalent in English law. It has some resemblance to a Freezing Injunction, but it is much more like a garnishee order, except that it may be obtained at the outset of an action. A Freezing Injunction does not, of course, involve the seizure of goods. Some of the principal differences between arrestment and Freezing Injunctions are:

Freezing Injunction

1. Is available only where there is a real risk of dissipation or secretion of assets which would defeat judgment.
2. High Court Judges or duly authorised judges.
3. Requires a special application to the court, a "good arguable case" and real risk of dissipation or secretion.
4. Generally a requirement for undertakings.
5. Is directed at the defendant but binds third parties with notice.
6. Is ineffective upon the respondent's insolvency.

Arrestment on dependence

1. May be available against any defender excluding the Crown or upon dependence of a counterclaim in respect of due or actionable debts and in special circumstances.
2. Is available at all level of civil actions, including small claims in the sheriff court.
3. Require at least a prima facie case((Advocate General v Taylor (2003 SLT 1340) and judicial consideration to determine proportionality.
4. No caution or other security is normally required.
5. Is directed at selected third parties holding the defender's assets.
6. Creates a preference on respondent's insolvency.

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|--|---|
| 7. Applies to potential proceeds of action, and specific assets should be identified in advance. | 7. The warrant is general and permits the pursuer to seek to attach assets in the hands of third parties wherever they may lie. |
| But | |
| 8. Exceptionally can concern assets outside the jurisdiction. | 8. Can only attach Scots assets. If assets outside the jurisdiction interim interdict may be available. |
| 9. The defendant may be required to make disclosure of the whereabouts and extent of his assets. | 9. No powers to order disclosure. |

THE INHIBITION:- The Security Measure against LAND (Heritable Property)

An inhibition strikes at the opposing party's ability to dispose of heritable property. The effect of an inhibition is to restrain the party inhibited from burdening, alienating or otherwise affecting his heritable property (real property to the prejudice of the inhibitor). Unlike the Freezing Order a preference on insolvency is created.

The inhibition cannot affect the implementation of a transaction where a binding contract has already been reached.

Inhibitions are registered in the Register of Inhibitions and Adjudications.

OBTAINING AN INHIBITION

An inhibition may be obtained in similar circumstances to an arrestment. It is now necessary to demonstrate in advance at least a prima facie case (See Advocate General v Taylor (supra). Inhibitions are only granted by the Court of Session. In Sheriff Court actions letters of inhibition must be obtained from Court of Session.

4. PRE-EMPTIVE MEASURES TO PRESERVE EVIDENCE

- ALSO BIG DIFFERENCES

Background

The English and Scottish means to obtaining of documentary evidence differ at every stage.

1. in the hands of a party
2. in the hands of a third party
3. for use in and preparation for an action
4. prior to the raising of the action.

In Scotland there is no automatic discovery - the initiative is entirely on a party to seek evidence from an opponent. On the other hand documents may be recovered more easily than in England from a party and particularly a third party before the proof or even before the action is raised. This procedure involves an application to court (unless volunteered) with a Specification of Documents or Specification of Property seeking a Commission and Diligence for recovery against the “ haver.”

Administration of Justice (Scotland) Act 1972 Section 1:

The Scots courts have a discretion to order commission and diligence for:

Section 1: “...the inspection, photographing, preservation, custody and detention of documents and other property (including where appropriate, land) which appear to the court to be property as to which any question may relevantly arise in any existing civil proceedings before that court, or in civil proceedings which are likely to be brought, and to order the production and recovery of any such property, the taking of samples thereof and the carrying out of any experiment thereon or therewith.”

“Likely to be brought” - The ordinary meaning of the words:

Section 1(1A): where proceedings have been brought or are likely to be brought an order may be made against any person to disclose such information as he has to identify any person who appears to the court to be a possible witness or defender.

THE RECOVERY OF EVIDENCE AS A PRE-EMPTIVE REMEDY:

- Usually involving a “Dawn Raid”

The Dawn Raid: English Provisions.

The Search Order (Anton Piller Order)

Section 7 Civil Procedure Act 1997 & see generally CPR25.1(i)h and Practice Directions.

A special form of mandatory injunction. In order to secure advantage the application is invariably made *ex parte* often before the main contact is commenced.

- i) Evidence describing premises and relevant documents of property

- ii) Extremely strong *prima facie* case on the merits
- iii) Strong evidence of serious harm or serious injustice will suffer if order not made
- iv) Orders for disclosure of whereabouts of infringing articles and names and addresses of alleged wrongdoers.

The Dawn Raid in Scotland

Section 1(3) permits orders under the Administration of Justice (Scotland) Act 1972 to be granted on an *ex parte* basis in exceptional circumstances

- (a) are the documents or other material sought essential for the applicant's case?
- (b) if so, are they at a real risk of destruction or concealment?

A COMPARISON OF THE CONCEPTS :

The Scots regime extends further than English equivalents:

1. The Scots powers are easier to obtain. Provided the literal terms of the Act are made out an order in terms of Administration of Justice (Scotland) Act may be granted *ex parte* where the court is satisfied there is a real risk of concealment. The remedy does not take the form of an injunction so there is no necessary requirement for "usual undertakings" and no requirement for an exceptionally strong case on the merits. The Court will require to be satisfied the remedy sought is proportionate which of course take into account both these factors- but probably not to the same extent as in England.

2. There never has been the same concern about recovery from Third Party havens in Scotland as in England. The Scottish rules are rather unclear but certainly permit more widespread recovery from Third Parties.

2. Can a Search Order be carried out in Scotland? Competent yes but discretion not exercised in favour of the grant. Proctor Alarms Ltd v Maxim Alarms Ltd 1978 FSR 442.

3. The ground rules for conducting "dawn raids" are similar. The Scots proceedings are supervised by an independent commissioner. The "haver" has the opportunity to insist on measures being taken to preserve confidentiality and commercial secrets in any material removed, filmed or copied on site. In England the proceedings are supervised by the Supervising Solicitor.

4. In Scotland premises may be searched and items removed in the absence of the respondent or a responsible employee.

5. In both England and Scotland there are powers to order disclosure beyond what is recovered. These are less well tried in Scotland and were only introduced recently. It is unlikely that a Scottish Court could be persuaded to grant wide powers of disclosure.

5). HOW DOES HUMAN RIGHTS ACT VIEW PRE-EMPTIVE REMEDIES ?

Article 1 of Prot 1 European Convention on Human Rights:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the general conditions provided for by law and by the general principles of international law.”

Any restriction on peaceful enjoyment must strike a fair balance between the demands of the general interests of the Community and the requirement to protect an individual’s fundamental rights.

“A reasonable relationship of proportionality between the means employed and the aim pursued.”

(Sporrong and Lonnroth v. Sweden (A/52 1983 5 E.H.R.R.)).

In the case of English Injunctive Relief including the freezing and search orders the balancing of the risks of doing injustice is really applied proportionality. The object of the order is to protect the rights and freedoms of the applicant. (see Chappell v U.K. (1989 1FSR 617). The temporary nature of the freezing order with a return day helps proportionality as does the presence of the supervising solicitor in the case of the search order.

After a brief change (reform?) see eg Karl Construction v Pallisade Properties (2002 SLT 312) the Inner House has now decided that powers to arrest or inhibit are normally available as of right to those capable of demonstrating at least a prima facie case. (ie most litigants). Human Rights concerns are satisfied because before either remedy can be granted there must be judicial consideration—not necessarily a judicial hearing. (see Advocate General v Taylor (supra) to determine whether the remedy is proportionate . The compatibility of the Dawn Raid procedure is assisted because in England the Supervising Solicitor attends and in Scotland a court appointed Commissioner conducts the recovery.

B. WHAT REMEDIES ARE AVAILABLE IN OTHER CONVENTION COUNTRIES?

THE CIVIL LAW SYSTEMS

France:

Security: La Saisie Vente
La Saisie Attribution
La Saisie Conservatoire

Evidence: New Code of Civil Procedure
Article 9 - Each party must supply the facts necessary to prove their claim.
Article 10 - Judges may order any measure provided by law.

Germany:

Security: Arrest
Einstweilige Verfügung
Evidence: Selbständiges Beweisverfahren

C. FORUM DIPPING

“ The best Kept secret in commercial litigation”

The principal source of law on the subject of jurisdiction is the Civil Jurisdiction and Judgments Act 1982 which gives effect to the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, now in part succeeded by Council Regulation 44/2001 "The Judgements Regulations". This introduces the prospect of a choice of Jurisdiction –i.e. where and therefore in what form the commercial remedy may take.

This choice gives rise to a sea change in thinking which the professions have been slow to comprehend. Yet, tell the client that tactical advantage is possible and the interest is considerable. To take account of the possibilities litigates should now introduce tactical thinking to serve their clients' best interests which begins by an analysis of the available options. Remember just about every commercial company will have assets such as trade debtors in other jurisdictions.

The Conventions mean that forum shopping should no longer be regarded with disdain. Where the choice exists there is no bar to forum shopping which is a natural consequence of the availability of cross border litigation. "Choosing Forum is not a crime. It is a normal incident of multi-jurisdictional litigation." (Per Laddie J. Demel v C & H Jefferson (a firm) & Another 1999 SSR 204 p.212.& Boss Group v Boss France S.A.(1996) IRLR 403).But it would not be legitimate to add a defendant in the absence of a legitimate claim , solely provide jurisdiction against a party who could not otherwise be joined.(see Valerie Gannon v British& Irish Steam Packet Co Ltd.[1993]21R359 & Messier Dowty Ltd v Sabina [200]I Lloyds Rep 428)

ARTICLE 31

Applications may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.

NOTE: No substantive jurisdiction required.

Need for caution

It would not be a legitimate to use the provisions oppressively by multiplying the security obtained beyond the value of the claim.

Also practitioners must make sure they have personally assimilated and inquired into facts before making these applications particularly if in aid of foreign proceedings. (Lennox Lewis v Panos Eliades, Panix Promotions 2002 WL 45475.)

HOW PROVISIONAL AND PROTECTIVE MEASURES CAN BE USED

DEVELOPING THE PROFILE OF AN OPPONENT

Security:

i) Immoveable Property

Evidence:

i) Witnesses

- | | |
|--------------------------|-------------------------------------|
| ii) Moveable Property | ii) Business Records and Documents |
| iii) Banks and Creditors | iii) Intellectual Property Material |
| iv) Trade Debts | iv) Trade Secrets |

5. REQUESTS FOR INTERIM PROTECTIVE MEASURES FROM BEYOND THE JURISDICTIONS : THE DISCRETION

Union Carbide Corporation v. B.P. Chemicals 1995 SLT 972

“The court’s predominant concern with the ends of justice requires that account must be taken not only of injustice to the defendant if the plaintiff were to be allowed to pursue the foreign proceedings, but also of the injustice to the plaintiff if he were not allowed to do so. ... If it would be vexatious or oppressive for the order to be granted, especially in view of the nature and scope of the equivalent or similar remedies available in the other jurisdiction, the order should be refused.”

Credit Suisse Fides Trust SA v. Cuoghi 1997 3 WLR 871

“The English court had to recognise that its role was subordinate to and had to be supportive of the court seised with the substantive proceedings.”

Babenaft International Co v. Barrante 1989 2 WLR 232

Republic of Haiti v. Duvalier 1990 1 QB 202

Derby & Co v. Weldon & Ors 1990 CH 84

Omega Corporation v. Myrica (UK) Limited 1998 SCLR 475

Refco v Eastern Trading and Another (1991 1 Lloyds Rep 159)

Considered Credit Suisse case.

Motorola Credit Corporation v. Sem Cengiz Uzam 2003 WL 212 36565

Lauren Ryan & Others v Friction Dynamics Limited & Others (2000 WL 699 392 Mr Justice Neuberger).

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