



## BRIEFING NOTE:

### Inhibitions and Arrestments - the future

A new decision may have a profound effect on how creditors can obtain security for payment of an outstanding debt

#### Practical Implications of Karl Construction Limited -v- Palisade Properties plc

#### INTRODUCTION

For centuries in the Court of Session, applications for authority to Inhibit and Arrest on the dependence of Court actions were granted automatically if requested to do so by pursuers in monetary claims - provided that it could be shown that a debt was due.

In practical terms, the effect of an Inhibition is to prevent the debtor from selling heritable property (e.g houses or land) and the granting of warrant to Arrest on the dependence allows the Pursuer Creditor to freeze money which is owed to the debtor by a third party - the most common example being funds held in the debtors bank account. Over the years, both these mechanisms have proved to be powerful weapons in the Pursuer Creditor's armoury.

#### The effect of Karl Construction Limited v Palisade Properties plc

The opinion of Lord Drummond Young in the above case, issued recently could potentially change all this. Founding on Article 1 of the First protocol of the European Convention on Human Rights (now fully incorporated into Scots Law), Lord Drummond Young held that certain types of inhibition involved depriving a party of his or her property. As such it would be unlawful to grant such an order unless the Court was satisfied that it was necessary. While Lord Drummond Young did state that his opinion did not have "any direct bearing on arrestment on the dependence"

Sheriffs throughout Scotland have decided that they will no longer automatically grant authority to arrest on the dependence of a court action.

As a result, in all Sheriff Court payment actions where arrestment on the dependence is sought the case must call before a Sheriff so that he can be addressed on why this remedy is considered to be necessary.

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Somewhat ironically, the Court of Session remains unaffected at present, and, in Sheriff Court actions, application can still be made to the Court of Session for inhibitions in the normal way even in the absence of a warrant to arrest.

Criteria for the granting of warrants to arrest in the Sheriff Court Formal guidance is yet to be issued by the Scottish Court Service, but it would appear that Sheriffs require to be satisfied that:

- (a) There is a prima facie case; and
- (b) That the Pursuer can demonstrate a substantial risk of the defender's practical insolvency, in the sense that the Defender appears to be unable to pay debts as they fall due or, alternatively, that there is a material risk of the debtor absconding. It should of course be noted that where Decree has already been granted, arrestments can be readily obtained in the usual way.

### Practical implications

1. Cost: It is clearly more expensive to have a Solicitor argue these points in front of a Sheriff than it was to have the Sheriff Clerk sign the warrant automatically. The ruling also applies to Summary Cause and Small Claim actions so, accordingly, careful thought should be given whether arrestment is required or, indeed, can be justified.
2. Uncertainty: Like all such hearings, the outcome will be a matter for the individual Sheriff's discretion. In our experience to date, some Sheriffs readily grant warrants to arrest while others take more convincing. This inevitably leads to uncertainty at least in the short term.
3. Refusal: If a pursuer application for warrant to arrest is not granted then the Pursuer will be unable to freeze the debtors bank account - although it is however open to the Pursuer to do so at a later date, for example, once Decree has been granted, or perhaps in the event of further information coming to light to make a further application to the Court which the Sheriff may be persuaded to grant in light of the new information.

### Conclusion

#### - Court of Session

Given the embryonic nature of this ruling it is far from easy to predict how matters will develop. The Court of Session may continue with the present system in respect of Inhibitions indefinitely, with other Judges simply disagreeing with Lord Drummond Young's opinion, or there may yet be a change in the rules instituted in an attempt to overcome Human Rights arguments.

#### - The Sheriff Court

The Sheriff Court position in respect of warrants to arrest is highly unsatisfactory. Firstly no proper guidance has been issued as to the criteria by which Sheriffs grant or refuse applications for warrants to arrest and, secondly the current situation imposes the significant extra cost of a solicitor appearing in front of a Sheriff. Fortunately, in Sheriff Court actions, Creditors can still apply to The Court of Session for an Inhibition as long as they have proof firstly of warrant to serve, and secondly, of service itself.



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