

JUDGMENT : The Sheriff of Dunfermline. 22nd March 2002

The Sheriff, having resumed consideration of the Cause, Grants the Motion; Orders the arrestment served on the dependence of the action to be recalled. Sanctions the employment of Junior Counsel. Appoints parties to be heard on the question of expenses on Wednesday 27 March 2002 at 9.45 am.

Note : This is an action of payment arising from a building contract between the parties whereby the pursuers were instructed by the defenders to manufacture and install equipment at a leisure development in Edinburgh.

1. During the dependence of the action, the pursuers obtained warrant and served arrestments which the defenders now seek to have recalled.
2. Counsel for the defenders, in his submissions before me, relied to a material extent upon the judgement of Lord Drummond Young in the case of **Karl Construction Limited v Palisade Properties plc** 2002 SLT 312.
3. He submitted that firstly, the automatic right to arrest on the dependence is incompatible with the defenders' rights under article 1 of the European Convention of Human Rights (hereinafter called the ECHR) especially when that automatic right was taken together with the absence of a general right to compensation for the use of the diligence if the action were ill-founded.
4. Secondly, he said that having such a specifically automatic right with limited compensation, did not strike a fair balance between the interests of a litigant having assets available to meet his claim and the right of a defender recognised in article 1 of the ECHR to dispose of his property as he wished.
5. Thirdly, he submitted that the court is a public authority and must act compatibly with the ECHR and so could not grant an arrestment on the dependence in a manner that was incompatible with the defenders' property rights.
6. Fourthly, he submitted that it followed that an arrestment on the dependence could not be granted until there was some justification of it, taking the form of a pursuer showing that the defenders were insolvent or were likely to conceal or dissipate or remove their assets.
7. In the fifth place, he submitted that there was no such justification put forward by the pursuers in this case and accordingly the arrestments used amounted to a wrongful diligence and should be recalled.
8. In the sixth place, he submitted that in any event, if he were wrong in respect of his fifth argument and even if the arrestments were lawfully granted, in the event of a motion for a recall of the arrestment, the court must still act compatibly with article 1 of the first protocol requiring the pursuers to justify the necessity of arrestments.
9. In spite of what Lord Drummond Young said at paragraph 81 of his judgement, viz "*I should emphasise that my opinion in this case is concerned solely with inhibition on the dependence of an action with pecuniary conclusions. It is has no application whatsoever to inhibition in execution; nor does it apply to the rare cases where inhibition is used in an action relating to heritable property. Nor does this opinion have any direct bearing on arrestment on the dependence. Arrestment is a very different remedy from inhibition and is subject to legislation that does not apply to inhibition.*" Counsel submitted that much of what was said in that opinion applied to the case of arrestments on the dependence.
10. He went on to submit that arrestments on the dependence were largely based on the common law and the Judge was free to exercise his discretion and order recall of the arrestments.
11. Counsel submitted that there would be four main headings in his speech.
 1. he would deal with the nature of arrestments on the dependence;
 2. article 1 protocol 1 of the ECHR;
 3. section 6 of the Human Rights Act 1998 and
 4. the provisions of the Ordinary Cause Rules.
12. Dealing with the nature of the arrestments on the dependence, he adopted the comments of the Law Commission at paragraph 2.3 in their "Report on Diligence on the Dependence etc (Scottish Law

Commission No 164)". An arrestment on the dependence prohibited the third party from alienating the arrested subjects and imposed a preferable right over the subjects which the law will recognise and enforce in insolvency proceedings. He referred to Stair at volume 8 of the Encyclopaedia dealing with the sources of this diligence. He then referred to paragraph 251 which sets out the extent of the arrestment. It was worth noting that the arrestment caught all that is in the arrestee's hands owing to the defender.

13. In his submission, arrestment on the dependence was a) too easily obtained and b) too difficult to recall. He referred to the Scottish Law Commission Report at paragraph 2.17 to the effect that "*As a general rule, warrants for diligence on the dependence in respect of debts alleged to be presently due are generally granted automatically without judicial enquiry in consonance with the theory that the diligence is a legal remedy to which the creditor is entitled as of right*".
14. He also referred to Lord Drummond Young's Opinion in **Karl Construction Ltd**. Therein speaking of inhibition on the dependence, he explains that it is available as of right in all actions containing a pecuniary conclusion, that is a conclusion for payment or damages unless the action is for payment of a future or contingent debt or for a pecuniary claim in consistorial proceedings.
15. Before such a warrant could be granted, there required to be justification for it, especially considering that there was no compensation for the wrongful use of the diligence unless it could be proved by the defender that the pursuer acted maliciously, or that there was an irregularity in procedure. He referred to the cases of **Wolthekker v Northern Agricultural Company** 1862 1M.211 and **Grant v The Magistrates of Airdrie** 1939 SC 738.
16. These cases, which are discussed in paragraph 40 of Lord Drummond Young's judgement, illustrate quite clearly the principle that there is really no distinction to be drawn between inhibition and arrestment on the dependence and, since there is very limited compensation available to defenders in the event of wrongful diligence, this raises the question of the unfairness of the diligence. In the circumstances, Counsel argued that it was unfair that the pursuer should be entitled to a warrant to arrest on the dependence without justification.
17. He went on to submit that the remedy was too difficult to recall and in that connection, referred to Lord Drummond Young's judgement in **Karl Construction** (supra) at paragraphs 35 to 39 inclusive.
18. He then went on to deal with the second head of his argument under article 1 protocol 1 of the ECHR. He proposed to adopt what was said by Lord Drummond Young in **Karl Construction** (supra) at paragraph 41. There, the Judge referred to the defender's argument in that case, referring to the pursuer's absolute and automatic right to use inhibition in an action of payment together with the drastic effects of inhibition on the defender and the relative lack of re-dress for wrongful use of the diligence. That, it was said, was incompatible with article 1 of the first protocol to the ECHR. That article protected the individual's property.
19. According to Mr Smith, the diligence of arrestment on the dependence which prevented the disposal of funds belonging to the defender, was more damaging than inhibition where the individual can at least continue to inhabit his property. According to him, the onus should not be on the defender to disturb the diligence which had been effected since that was an unfair burden.
20. Counsel referred to Lord Drummond Young's Opinion again in **Karl Construction Ltd** at paragraph 42 agreeing that there must be a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the defenders' fundamental rights.
21. Counsel accepted that arrestment on the dependence could be pursued for a legitimate aim and could be justified as obtaining security for the pursuer in event of the defender being unable to meet his liability under a decree of payment. The question which arose was whether the means adopted was proportionate to the aim in question.
22. In other words, there required to be proportionality between the competing rights of the creditor and the debtor. In this connection, he adopted what Lord Drummond Young said in paragraph 43 of the

judgement in **Karl Construction Ltd** (supra). In this connection, he also adopted paragraphs 44, 46, 47, 48 and 49 of Lord Drummond Young's judgement.

23. He also referred with approval, to what was said in the Scottish Law Commission Report at paragraphs 2.42, 2.43 and 2.44.
24. Pre-judgement remedies were discussed in Lord Drummond Young's Opinion, and Counsel submitted that there was really no distinction between arrestments on the dependence and inhibition on the dependence, but that arrestment was a personal injunction on the defender himself, and if there was a breach, contempt of court proceedings would result, unlike inhibition procedure. He asked me to follow the reasoning of Lord Drummond Young in paragraphs 50 to 54 of his Opinion, and to hold that there must be some enquiry by the Judge before a right of protected attachment is granted during litigation. He referred to paragraph 56 and agreed that "Protective attachment should be seen as an extraordinary remedy requiring a pursuer to demonstrate special circumstances".
25. He asked me to approve paragraph 60 of Lord Drummond Young's Opinion and to accept that "*Protective attachment is seen as part of the law of pre-judgement remedies and the law attempts to work from a coherent set of principles applying to all such remedies*". According to Counsel, the same principles should apply as between arrestments on the dependence and inhibitions on the dependence.
26. In Scots law, the main interim remedy open to a pursuer was interim interdict and it was clear that such a remedy could only be granted after a Judge had considered the balance of convenience. This showed that the other procedures allowing diligence on the dependence were significantly out of step with it.
27. He asked me to concur with Lord Drummond Young in relation to the present law of inhibition on the dependence. In his opinion it failed to meet all four of the requirements that 1) the pursuer must establish a prima facie case on the merits of the action; 2) that he must establish that there is a specific need for the interim remedy; viz that there is a significant risk of the defender's insolvency or that he is taking steps to conceal or dissipate his assets; 3) that the hearing must take place before a Judge at which the last two matters are considered and 4) if a protective attachment is used without an objective justification and if the pursuer is unsuccessful in the action, the defender should be entitled to damages for any loss that he has suffered in consequence of the attachment.
28. Arrestment on the dependence was a disproportionate remedy for a variety of reasons, including the fact that the scope of any arrestment was not restricted to the value of the sum sued for. The automatic nature of the right and the limited compensation available in the event of a claim being ill-founded rendered the procedure unfair. There were also the factors requiring consignation of a sum of money in court by the defender to facilitate the withdrawal of the arrestment and the consequent sterilisation of the defender's assets which made it an unfair procedure.
29. Counsel then went on to deal with the margin of appreciation and its national equivalent, a subject also dealt with by Lord Drummond Young at paragraph 67 in his judgement.
30. In his submission, Counsel argued that whilst Scots Law may not strike the fairest balance between the parties, it did not even strike a fair balance.
31. In this connection, Counsel founded upon paragraph 70 of Lord Drummond Young's Opinion to the effect that "*Similarly, where a principle or procedure of the common law has been clearly established, I am of opinion that the court should exercise restraint in holding that the principle or practice contravenes the Convention. That is in accordance with the basic principle that the national authorities are given a margin of appreciation because they are in the best position to know how to respond to local conditions*".
32. In particular, Counsel founded upon paragraph 72 of the same Opinion viz "*More significant however, is the fact that, in nearly every legal system to which I have been referred except Scots Law, such a judicial security is subject to the four requirements described above, namely a prima facie case on the merits, special reasons for an interim remedy, a judicial hearing, and a right to compensation if a judicial security is obtained without objective justification. In the face of this degree of unanimity, it is difficult to argue that the margin of*

appreciation accorded to the State permits the granting of judicial security automatically on the raising of an action, with minimal regard to the merits of the pursuer's case or to the existence of circumstances that justify a judicial security. That is especially so in view of the relative lack in Scots Law of any right to compensation to a judicial security used without objective justification. Ultimately I am of the opinion that inhibition on the dependence simply goes too far to fall within the principle of the margin of appreciation or its equivalent in national law." Counsel asked me to hold that the same finding required to be made in respect of arrestments on the dependence.

33. Counsel then embarked upon the third head of his submissions, namely that in terms of section 6(1) of the Human Rights Act 1998 it was unlawful for a public authority to act in a way which was incompatible with a Convention right. The court was a public authority and required to ensure that the remedies available to litigants complied with the convention.
34. In this connection, Counsel adopted Lord Drummond Young's views which he asked me to share, set out in paragraphs 73 - 77 inclusive. He asked me to hold that since the pursuers in the present action had not attempted to justify the arrestments on the dependence, they amounted to a wrongful diligence and the arrestments should be recalled.
35. He then analysed the legality of the warrant to arrest on the dependence based upon the Ordinary Cause Rules of the Sheriff Court.
36. He submitted that the Ordinary Cause Rules relating to the granting of these warrants were not peremptory in their terms, but were merely permissive. He referred to the terms of rule 3.5(1) which reads that "A copy of an initial writ with warrant to cite which includes a warrant to arrest on the dependence, certified as a true copy by the pursuer or the defenders as the case may be, or his solicitor, shall be sufficient warrant to arrest on the dependence if it is otherwise competent to do so".
37. He submitted that if a hearing were fixed to justify the granting of the warrant, such a procedure would be compatible with this rule. In his opinion, the reference to "..... if it is otherwise competent to do so" allowed the court to infer that a hearing could be permitted to allow the pursuer to justify obtaining such a warrant.
38. Ordinary Cause Rule 5.1(1) authorised the Sheriff Clerk to sign a warrant for arrestment on the dependence inter alia. In terms of sub-section 3 "*Where the Sheriff Clerk refuses to sign a warrant which he may sign, the party presenting the initial writ may apply to the Sheriff for the warrant*". In other words he said there is nothing in the rule of court which is incompatible with what article 1 protocol 1 requires from the pursuer viz submitting to the court that there is a substantial risk of the defender not paying his debt.
39. In the present action, the pursuers could have asked for a hearing to justify the warrant for arrestment which they obtained automatically.
40. Such a motion would have required intimation and the defender would be alerted of the action and might take steps to dispose of his assets. The rules however are clearly flexible, and this problem could be obviated by dispensing with the necessity for intimation of the motion. The court would have to be satisfied that it was either unnecessary or undesirable to intimate the motion to the defenders.
41. In his submission, his arguments were supported by the Scottish Law Commission recommendations set out in their report at 3.27 paragraph (2) viz an ex parte application should be competent for warrant to execute diligence on the dependence before commencement of the action by service of the summons or initial writ; (3) an application for warrant for diligence on the dependence should be intimated to the defender unless the applicant in an ex parte application satisfies the court that warrant should be granted without such prior application.
42. At this point he closed his submissions on his main four arguments. He then went on to submit that in the event of the court rejecting his arguments on the motion to recall the arrestments, the consequence would be that the warrant was lawful and the defenders would then be entitled to proceed to court and enrol a motion for recall of it on other grounds. The question of onus would require to be looked

at anew in view of the terms of section 6 of the Human Rights Act 1998. According to him, it would follow that the application for recall would require to be addressed by the pursuer who would require to justify the granting of the warrant. In other words the onus would be not on the defenders as in the previous law to justify the propriety of the warrant, but fairly and squarely upon the pursuers.

43. In conclusion, he summarised his argument thus; an arrestment on the dependence was an interference with the defender's rights and enjoyment in his property. Whilst an arrestment on the dependence was a legitimate public aim, a fair balance was not being struck between the two opposing aims of creditor and debtor in our law.
44. An arrestment upon the dependence was too easy to obtain and compensation to a defender was very limited. There was at present no justification required from a pursuer as to why arrestment was necessary. An arrestment upon the dependence was incompatible with the defender's convention rights. In these circumstances, the court should 1) recall the unlawful arrestments and secondly, even if I were against him in that regard, I should hold that the onus was upon the pursuers to justify taking such a warrant.
45. In reply, Mr Miller, the pursuers' solicitor submitted that I should refuse the motion.
46. He maintained that there were important differences between arrestments on the dependence and inhibition on the dependence. These differences were of importance when considering the principle of proportionality.
47. Inhibition was a more severe remedy than arrestment and it applied to future heritable property acquired by the defender also. Inhibition was all encompassing since it attached to all the defender's heritage, whereas arrestment only attached to one particular asset or debt due by one of the defender's to him. There was nothing to prevent an arrestee incurring more liability to the defender and paying off that later liability. There was accordingly more flexibility attached to arrestment on the dependence.
48. Arrestment only applied to sums of money in respect of which there was a liability to account at the point of arrestment. In the case of an individual bank account in which a salary was lodged, only one lodgement would be subject to an arrestment.
49. A further distinction was that it was difficult to limit an inhibition to a particular property since the value of the property was difficult to assess, whereas in the case of arrestment it was always a known sum which was being attached.
50. In the case of arrestments, the defender's situation was different in that he was not placed in a situation where he was locked in as a result of the arrestment. He could continue to trade and his other debtors could pay him. He could lodge and draw sums from his bank account. The only thing which was attached was one sum to cover the claim of the pursuer once this was established.
51. He accepted that as a result of the arrestment, the defender was deprived of the use of his money and this interfered with his right of property in terms of article 1 protocol 1 of the ECHR. The practical effect of an arrestment however, was limited in that it could be restricted by agreement and focused upon one asset only. It was an important tool for a creditor to protect his interest.
52. The situation which arose in **Karl Construction Ltd** was different from the one facing the court now. In **Karl Construction Ltd** the situation faced by the defender was an extreme one where there had been inhibition on the dependence and all his assets were frozen. If there had been an arrestment on the other hand only a fraction of the defender's assets would have been frozen.
53. From the practical point of view in the case of companies, it would be possible for the pursuers to see the accounts, but so often the pursuer was "blind" as to the overall financial health of the defender.
54. If the pursuer were to justify the granting of diligence and demonstrate that the defender was "*hard up*", he would frequently have little information to establish that. Accordingly, there should be no onus on the pursuer because of the limited effect in law of an arrestment as compared with an inhibition. It would be more difficult in the case of an individual or partnership to establish the

financial health where there was a lack of information. In these circumstances, it was appropriate that a pursuer should have an interim remedy available to him which could allow him to secure his position in the event of establishing his claim.

55. Another distinction which was apparent as between arrestments and inhibition was that in the event of an inhibition, if there should be success in the action, the pursuer was not left with a remedy which was readily enforceable. He would require to proceed to an action of adjudication which would result in his being under pressure to make the defender insolvent so as to secure a cash settlement. If the debtor only had heritable assets then he was locked into the possession of them for years. The remedy available to an inhibiting creditor was more severe than that open to an arresting creditor where an arrestment on the dependence becomes an arrestment in execution on the grant of a decree. This was a swifter remedy than adjudication, although the pursuer in the case of an arrestment in execution still would require to raise an action of furthcoming to make cash available to pay the decree. In addition, after a decree had been obtained following upon an action of adjudication after inhibition the creditor could not obtain a good title until after a period of ten years had elapsed. For these reasons, Mr Miller submitted that I should not be bound by the decision in **Karl Construction Ltd**.
56. At the same time he was prepared to accept that there were certain aspects of the law relating to pre-judgement remedies set out by Lord Drummond Young in his judgement which were of some merit. He could see that protective attachment had to be seen as part of the law of pre-judgement remedies and accepted that the law had to work from a coherent set of principles applying to all such remedies. He sought to draw a distinction however, between inhibitions and arrestments. He did not think that it was appropriate to draw an analogy between interim interdict and other forms of pre-judgement remedies. According to him, an interim interdict imposed limits on an individual's freedom and a breach of an interim interdict was potentially penal, whereas in the case of an arrestment on the dependence, the defender was unable on his own to breach an arrestment and would require collusion on the part of the arrestee before that could be done.
57. He then went on to deal with Counsel's submissions in relation to the application of the margin of appreciation to be accorded to the national authorities and how it should be exercised. I understood him to agree with Lord Drummond Young at paragraph 70 of his judgement that "*Where a principle or procedure of the common law has been clearly established, I am of opinion that a court should exercise restraint in holding that that principle or practice contravenes the Convention.*" He submitted to me that the courts should be reluctant to interfere with established principles of common law, since it was to be assumed that acceptance of the common law was the same as acceptance of domestic legislation. He asked me to hold that the long established practice of granting warrants to arrest on the dependence should be regarded as a legitimate way of achieving the aims of the Convention.
58. He accepted that Scots Law in this regard was out of step with most other jurisdictions. He disagreed however, with Counsel's submission that arrestments should be regarded in the same light as inhibitions and should be subject to the same rules as them. He repeated his submission that inhibition is quite different from arrestment as it is so wide ranging and compared with inhibitions, arrestments can readily be restricted in their effect.
59. He then turned to deal with his interpretation of the Rule of Court in relation to warrants for arrestment and warrants for inhibition.
60. In the case of warrants to inhibit, these were based upon section 5 of the Court of Session Act 1988 and rule of court 13.6 of these Rules at (c)(1) enacts that when signetted a summons shall be authority for inhibition on the dependence of the action subject to the provisions of any other enactment or rule of law. This provision arose from a delegated power under section 5 of the 1988 Act which provides for the court to regulate procedure in diligence in such causes. Accordingly, this rule of court was secondary legislation.
61. In the Sheriff Court however, the Ordinary Cause Rules are primary legislation since they are based upon a schedule of the Sheriff Court (Scotland) Act 1907. In the Sheriff Court in the Ordinary Cause

Rules 3.3(1) the warrant of citation shall be in Form 01. That form of warrant of citation grants warrant to cite the defender and grants warrant to arrest on the dependence.

62. In relation to Rule 3.5 of the Ordinary Cause Rules at (1)(a) an Initial Writ with warrant to cite which includes a warrant to arrest on the dependence shall be sufficient warrant to arrest on the dependence if it is otherwise competent to do so. According to Mr Miller the step of granting warrant to arrest on the dependence, is unclear.
63. It is however clarified by rule 5.1. That reads "1. Subject to paragraph (2) a warrant or arrestment on the dependence may be signed by the Sheriff or Sheriff Clerk. Rule of Court 5.1(3) reads "Where the Sheriff Clerk refuses to sign a warrant which he may sign, the party presenting the initial writ may apply to the Sheriff for the warrant".
64. According to Mr Miller, taking the three Rules of Court together, the right of the pursuer to arrest on the dependence arises from these rules.
65. Section 6 of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. But section 6(1) does not apply if section 6(2)(a) or (b) is in point. (a) reads "*As the result of one or more provisions of primary legislation, the authority could not have acted differently;* or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce these provisions.
66. Mr Miller submitted that he was focusing upon the effect of section 6(2)(a).
67. Counsel had said that the practical effect of section 6 was that the Ordinary Cause Rules 3.3 and 3.5 were to be read as permissive in that they permitted the court to grant warrant on the dependence, and that accordingly the court could decline warrant where no cause had been shown for granting it.
68. Mr Miller took a different view. In his opinion when the three ordinary cause rules were read together, the legislation granted a right to the pursuer to obtain a warrant to arrest on the dependence and so in the present case, a warrant to arrest was not granted in unlawful circumstances since the court could not have acted in any different manner. In other words he was submitting that section 6(2)(a) of the 1998 Act applied and that accordingly section 6(1) was not applicable.
69. Mr Miller went on to submit that the warrant to arrest on the dependence did not fall foul of article 1 of the Convention and an arrestment on the dependence could not be struck at by Lord Drummond Young's judgement and for these reasons was a valid form of diligence.
70. Accordingly, looking at the question of proportionality, whilst inhibition might not strike a proper balance between the defender and the general interest in securing money due after a decree, arrestment on the dependence did strike a proper balance between the defender and such a general interest.
71. He submitted that in the sheriff court where the warrant was granted on the basis of primary legislation, the granting of a warrant to arrest on the dependence by the Sheriff was a lawful act in terms of section 6(2)(a) of the 1998 Act.
72. In conclusion, he submitted that even if granting a warrant to arrest on the dependence was a lawful act of the court, the court is empowered to recall the arrestment on a motion to that effect, but that it should not be a matter for the pursuer to prove anything, in other words there should be no onus upon the pursuer, because to require him to prove the true extent of the solvency of the defender would be to put him in an impossible situation.
73. In reply, Counsel for the defenders submitted that the pursuer's solicitor clearly accepted that arrestment upon the dependence was an interference under Article 1 of Protocol 1 of the ECHR. It followed, accordingly, that it was incompatible with a Convention right. The pursuers, in effect, were not in a position to explain why it should not be recalled.

74. In relation to the distinction between arrestments and inhibition on the dependence, it would, in fact be possible for arrestments to be wider in effect than an inhibition where there was little or no heritage in the possession of a defender. In the end of the day it would be a matter of degree whether an arrestment or an inhibition was the more catastrophic for a defender. The question which the pursuers' solicitor cannot answer is why our system of law does not provide for a hearing before a warrant to arrest on the dependence is granted. Such a devastating interim remedy should not be granted automatically without some enquiry by the court.
75. According to Counsel it was also significant that Mr Miller had made no attempt to address the defender's problem of the lack of compensation in the event of a pursuer who had arrested a sum of money and who subsequently failed in his action. The absence of a remedy for the defender who was out of pocket through his cash flow being interrupted or for some other reason was ignored by Mr Miller.
76. It had been submitted on behalf of the pursuer that the Ordinary Cause Rules established an automatic right in a pursuer to arrest on the dependence.
77. Counsel for the defenders disagreed with this and reiterated his submission that the three Rules of Court were not mandatory but were clearly permissive, since they clearly provided that the court may grant such a warrant and if it is otherwise competent to do so. In that situation it was open to the court to take the view that the granting of the warrant should be subject to compliance with the provisions of the Human Rights Act 1998.
78. In relation to the applicability of section 6(2)(a) to section 6(1) of the Human Rights Act 1998, while Counsel accepted that the Ordinary Cause Rules were primary legislation, the question was could the court not have acted differently from granting a warrant automatically. In his submission, the Rules of Court were permissive and the court could clearly have acted differently.
79. In reaching a decision on this motion, I am influenced by the fact that neither Counsel for the defenders, nor the solicitor for the pursuers disagreed to any extent with the reasoning of Lord Drummond Young in **Karl Construction Ltd**. In seeking to follow the decision of Lord Drummond Young in that judgement, I have to bear in mind his caveat in paragraph 81 in relation to arrestments on the dependence. There he says "*Nor does this opinion have any direct bearing on arrestment on the dependence. Arrestment is a very different remedy from inhibition, and is subject to legislation that does not apply to inhibition*".
80. Counsel for the defenders addressed me on the basis that what was said in the Judge's opinion in relation to inhibition largely applied to arrestments on the dependence. I did not understand that Mr Miller, on behalf of the pursuers, disagreed with the conclusions reached by Lord Drummond Young.
81. Mr Miller did argue that there were important differences between inhibitions and arrestments and to that extent he attempted to argue that what had been said about inhibitions in **Karl Construction Ltd** did not apply to the same extent to arrestments on the dependence. He argued that inhibitions as a form of protective attachment were all encompassing and more severe in their effect than arrestments. An inhibition attached to all of a defender's heritage whereas an arrestment would probably only apply to one particular debt due to a defender. It was very difficult to limit an inhibition to a particular property, since it was difficult to assess the value of a property. An inhibition might restrain the sale or disposal of heritage whose value was far in excess of the sum sued for.
82. The defender, whose asset has been arrested, can continue to trade and can lodge and draw sums from his bank account and continue to receive payment from debtors other than the one in whose hands the arrestment has been effected.
83. It followed then, according to Mr Miller, that there was in reality a difference between the two forms of diligence and accepting that there was a legitimate aim in arresting on the dependence, when considering the principle of proportionality with arrestments on the dependence, the court was not only entitled but under an obligation to take a less serious view of the outcome of the procedure. The

court should conclude that a hearing before a Judge before granting a warrant, was an unnecessary precaution, despite the limited compensation available to defenders in the event of the action resulting in absolvitor.

84. In his speech in reply, Counsel argued that it was possible for arrestment to be wider in effect than an inhibition in situations where there was no heritable property. He concluded that in the end of the day it was a matter of degree. He concluded by asking the question why our system, unlike any other in the world, allowed an automatic right to a warrant to arrest without any enquiry by the court beforehand.
85. I was not prepared to accept Mr Miller's conclusions that the arrestments on the dependence can be granted quite properly on the basis of the Ordinary Cause Rules 3.3, 3.5, 5.1.1 and 5.1.3.
86. I did not agree with his interpretation of the effect of Section 6(1) of the 1998 Act upon this remedy. According to him sub-section (2)(a) applied since the Ordinary Cause Rules were expressed in a mandatory form and so the authority (Sheriff Clerk) could not have acted differently. It followed then according to him that Section 6(1) had not been breached.
87. I disagree with this opinion. I prefer counsel's interpretation that the relevant Ordinary Cause Rules are permissive and the wording founded upon by him means that I could decline warrant where no cause had been shown for granting it. I prefer the view that sub-section 2(a) does not apply since the Ordinary Cause Rules are permissive and the Court could have acted differently - viz: by hearing the pursuer's justification for obtaining an arrestment on the dependence thus complying with Section 6(1) of the 1998 Act.
88. All these factors have driven me to the inescapable conclusion that the same criteria which were relied upon by the judge in **Karl Construction Limited** in relation to inhibitions are equally compelling in relation to arrestments on the dependence.
89. I consider that the defender's argument is a powerful one and that it is appropriate accordingly that I should recall the arrestments on the dependence complained of.
90. In conclusion I must say that even if counsel had failed in his motion I would have been in agreement with him that any fresh motion by the defenders for recall of the arrestments on the dependence (say on the grounds that they were nimious and oppressive) would have to be considered in the light of Section 6(1) of the 1998 Act and that it is likely that I would conclude that the onus was on the pursuers to justify the propriety of the warrant.