OPINION OF LORD MENZIES : Outer House, Court of Session. 8th August 2001

1. In this action the pursuers are Stiell Facilities Limited, (formerly Stiell Limited), a company having their registered office at an address in Uddingston, Glasgow. The defenders are Sir Robert McAlpine Limited, a company having a place of business at an address in Newcastle-upon-Tyne. The action is an action for payment, in which the pursuers seek payment from the defenders of the sum of £2,421,426.37, being a sum which they aver is contractually owing to them in terms of a building sub-contract dated 17 June 1999 in respect of works which they carried at Law Hospital, Wishaw.

2. The matter came before me in the Vacation Court on 7 August 2001 (at which time the summons had not yet called), on the defenders' motion for *"recall of the arrestments granted on the dependence simpliciter, on the grounds that there is no colourable or stateable case and/or the continued use of arrestments is nimious and oppressive"*.

3. Counsel for the defenders advised me by way of background (which was accepted by counsel for the pursuers) that on 7 June 2001, the present pursuers raised an action in Glasgow Sheriff Court for rectification of a sub-contract between the present pursuers and the present defenders dated 17 June and 4 August 1999 by deleting the words *"E J Stiell Group Limited"* and substituting therefor "*Stiell Limited"* where they appear within the top left-hand section of the first page of the said sub-contract. This action, which is brought under the new commercial cause procedures, is defended and a proof before answer has been fixed to take place on 3 and 4 September 2001. I was provided with two copies of the record in that action, the most recent being dated 25 July 2001.

4. On 13 June 2001 the present pursuers raised another action against the present defenders, this time in Hamilton Sheriff Court, seeking payment of the same sum as concluded for in the present action, namely £2,421,426.37. I was provided with a copy of the summons in that action which contained averments identical in large part to the averments in the present action. I was told that the pursuers executed arrestments on the dependence of that action, which caught several hundred thousand pounds. On 20 July 2001 the defenders sought recall of the arrestments on the dependence on the ground that there was no colourable or stateable case. The Sheriff granted that motion and recalled the arrestments, whereupon the pursuers' agents moved for dismissal of the action, with the pursuers being found liable in expenses. The Sheriff granted this motion and dismissed the action that day, 20 July 2001. The present action was signetted on 24 July and served on 26 July 2001.

5. The first argument advanced by counsel for the defenders was that the arrestment was, in all the circumstances, nimious and oppressive. Under reference to *Maher & Cusine's Law and Practice of Diligence*, at paragraph 4.46, he submitted that the use of arrestments on the dependence was both unfair and prejudicial to the defenders. He referred me to ***Rintoul Alexander & Co v Bannatyne*** (1862) 1 M 137, *Levy* v *Gardiner* 1964 SLT (Notes) 68 and ***Hydraload Research & Developments Limited v Bone Connell & Baxters Limited*** 1996 SLT 219, and argued in light of these authorities, (1) that the present arrestments are unfair and prejudicial to the defenders, (2) that it is plain that this is a style of practice which the Court should not sanction, to use Lord President McNeill's words in *Rintoul*, and that the pursuers should not be allowed to do it, (3) that the use of arrestments in these circumstances was not consistent with fair play, (to use the language of Lord President Clyde quoted in *Levy*) and (4) that I should regard this action, and the use of arrestments on the dependence of it, as simply a riposte to the pursuers' failure in Hamilton Sheriff Court.

6. The second argument advanced by counsel for the defenders was, he said, the same as that which had persuaded the Sheriff at Hamilton. *Prima facie* looking at the sub-contract of 17 June 1999 (which is produced and referred to in the summons), the defenders did not contract with the pursuers but with E J Stiell Group Limited, having an address in Bothwell Road, Hamilton. He argued that the proper approach to a question of recalling an arrestment when a pursuer's title to sue was an issue was for the Court to look at the material before it and in particular, the contract which formed the basis of the action and consider whether *prima facie* the pursuer had a title to sue. On even a cursory inspection of the contract on which the action was founded, he submitted that the pursuers were not a party to the contract and that the entitled party was E J Stiell Group Limited. In support of this submission he referred me to ***Earl of Hopetoun's Trustees v Johnstone*** (1838) 1 D 138 (particularly to the Opinion of Lord Meadowbank at 140) and *Graham Stewart on Diligence* at page 200 which adopted the reasoning of this case. He also relied on ***Richards & Wallington (Earthmoving) Limited v Whatlings Limited*** 1982 SLT 66, to the extent that Lord Maxwell observed therein that "diligence, and particularly arrestment on the dependence, demands a high degree of precision and accuracy if it is to be valid and effective", and again "*We are here in the realm of strict law rather than equity. Companies and particularly companies operating in groups presumably use designations such as '(Earthmoving)' or '(Contracts)' deliberately for the purposes of identifying them and distinguishing them from other companies and no doubt they are entitled to and sometimes do rely on such words if for example they are sued in the wrong name. I do not think that when they or their advisors use the wrong identification words in brackets in a matter such as arrestment they can dismiss the error as a triviality"*.

7. In reply, counsel for the pursuers accepted (as I have already indicated) the narrative of the procedural background to this matter given by the defenders' counsel. He addressed his submissions first to the question of whether the arrestments were nimious and oppressive, on which he submitted that they were not. He stated that the decision to institute proceedings in this Court was taken only after the most careful deliberation, and that there was neither unfairness nor prejudice to the defenders. On this branch of his argument he focused on four expressions used by counsel for the defenders in his submissions:

(1) *That the pursuers attempted to get the better of the Sheriff*. In this regard he sought to distinguish the case of ***Rintoul*** from the present case, and observed that there was no decision from the Sheriff in Hamilton that the pursuers had contravened, nor was there any allegation of wrongful conduct.

(2) *That this was a style of practice which the Court should not sanction*. This was the language of the Lord President in ***Rintoul,*** where the Lord President was referring to the wrongous withholding of goods in defiance of the Court's order until a fresh action was signetted. His submission was that there was no style or practice in the present case which was analogous to what the pursuers did in *Rintoul*.

(3) *It was a legitimate inference for the Court to draw that the arrestments are not being deployed to promote the pursuers' interests*. Under reference to *Levy*, he submitted that there was no independent allegation by the defenders that these arrestments were not appropriate, and that *Levy* concerned duplication of actions, averments and remedies in contradistinction to the present case in which there is no duplication because the Sheriff Court action was dismissed before the present action was raised. Under reference to ***Hydraload,*** he submitted that there was no suggestion in the present case of a hastily compiled summons, the nuts and bolts of the present dispute having been before the parties for some time.

(4) *"Judge Shopping"*. Counsel for the pursuers could not say that it had not occurred to him that this argument might be made and might weigh with the Court. However, he said that it is misconceived - the pursuers are entitled to have their action in Hamilton Sheriff Court dismissed, and to start again. When I asked him why the pursuers chose to adopt this course of action, he replied that this was for several reasons, principally because an appeal to the Sheriff Principal or the Inner House would not be such a speedy remedy as the course adopted, and because the pursuers had had second thoughts about the desirability of maintaining an action for this amount of money and of this potential complexity in the Sheriff Court. He pointed out that there was nothing improper in the course of action adopted by the pursuers.

8. In summary on the question of whether these arrestments were nimious and oppressive, counsel for the pursuers submitted, (a) that there was no allegation of unfairness on the part of the pursuers, (b) that the defenders fell short of abuse of process, personal bar or bad faith, and (c) that there was no clear identification of any prejudice suffered by the defenders. On the contrary, all the disadvantages of the course of action adopted by the pursuers, fell to the pursuers themselves.

9. On the second of the defenders' submissions, namely that there was no colourable or stateable case, the pursuers' counsel had three points in answer:- (1) that the correct test was whether the pursuers' averments disclosed an intelligible and discernible cause of action; (2) applying that test he submitted that the pursuers' averments clearly do disclose an intelligible and discernible cause of action, and (3) there were certain misunderstandings in the defenders' approach.

10. On the question of the correct test he referred me to Lord Weir's decision on a motion heard in chambers in ***West Cumberland Farmers Limited v Ellen Hinengo Limited*** 1988 SLT 294, in which Lord Weir held that in a question concerning an arrestment of a ship:

i. "The Court in examining this form of diligence must be satisfied at the very least that the averments in the summons disclose some intelligible and discernible cause of action".

11. He also referred me to the decision of the Second Division in ***Rippin Group Limited v ITP Interpipe SA*** 1995 SC 302, which he submitted supported him because the Second Division had regard *ex hypothesi* of the pursuers' case, only to the pursuers' averments and not to anything else. He also relied on ***Stiell Limited v Riema Control Systems Limited*** 2000 SLT 1102 which (particularly at paragraph 16) supports the reasoning in ***Rippin.*** In light of these authorities the pursuers' counsel submitted that I could only look to the pursuers' averments and not to any extraneous material whatsoever, and that these averments do disclose an intelligible and discernible cause of action. The defenders were wrong to look to the contract, one must look to the pursuers' averments alone. The case of *Richards & Wallington* was distinguishable because it was concerned with error in drafting a summons and whether diligence can be maintained standing that error. The case is not relevant to the present situation in which there has been no lack of care in the way in which the pursuers have proceeded.

12. I turn to my decision now. First, on the question of whether the arrestments are nimious and oppressive in the circumstances relied on by counsel for the defenders, I am of the view that they are not. I do not consider that there has been any procedural or indeed other unfairness to the defenders, nor do I consider that there has been any prejudice to them. The case of ***Rintoul*** turned principally on the delay by the pledgee to obtemper the Sheriff's interlocutor to deliver the goods to the pledger and his use of that delay effectively to subvert the Sheriff's order. It was this wrongous withholding of the delivery order until the arrestments could be used, that Lord President McNeill referred to as a style of practice which cannot be sanctioned and rendered the party *in mala fides*. The present case has nothing to suggest that the pursuers have acted *in mala fides*, and there has been nothing of the nature of the trickery or deceitful action on the part of the pursuer in ***Rintoul.*** Similarly, I do not find the cases of ***Levy v Gardiner*** and ***Hydraload Research*** to be helpful. *Levy* was clearly one of a large number of similar actions for slander and slander of title, in which there was *inter alia* a duplication of actions, a duplication of heads of damage as between subsisting actions, and a lack of specification of quantification, which caused the Court to form the strong impression that the primary purpose of the arrestments was not to protect the legitimate interests of the pursuers, but to embarrass the defenders. None of these considerations seems to me to apply in the present case. Again, the combination of features which caused Lord Marnoch to draw the inference in

Hydraload that arrestments were an attack on suppliers financial credit or as a form of riposte to the Sheriff Court action, are not present in this case and I find it difficult to understand how the present action could be regarded as a riposte or *"revenge attack"* on the defenders.

13. In my opinion the pursuers were quite entitled to raise an action for payment in Hamilton Sheriff Court and then to seek dismissal of that action on payment of the defenders' expenses, and raise a similar or identical action in this Court. Not only is this competent, I do not perceive there to be any unfairness or prejudice to the defenders. The defenders said that the pursuers could have appealed the Sheriff's decision to recall the arrestments either to the Sheriff Principal or to the Inner House of the Court of Session. No doubt that is correct, but it does not follow that the pursuers are *in mala fides* or guilty of some kind of trickery by choosing to adopt the procedure which they have adopted. The defenders have not pointed to any impropriety in the present course of action and although they claim to have suffered prejudice, this is only because they are now subject to another arrestment on the dependence. If the pursuers had adopted the alternative procedure by way of appeal, it seems likely that the defenders would have been subject to an arrestment on the dependence throughout what may well have been a more protracted procedure.

14. In all the circumstances I am not persuaded by the first branch of the defenders' arguments, and I do not consider that the circumstances relied upon by them result in the arrestments being nimious and oppressive.

15. I found the second branch of the defenders' argument that the pursuers do not have a colourable or stateable case, more difficult to decide. However, I have concluded that this argument is well-founded and that for this reason the arrestments on the dependence of this action should be recalled. The dispute between the parties on this aspect of the debate was sharply focused. Counsel for the defenders relied on the clear terms of the contract itself, which was the foundation for the claim for payment and observed that the pursuers were not the party entitled in terms of the contract to payment. He submitted in reliance principally on the ***Earl of Hopetoun's Trustees*** that in a question of arrestment on the dependence, particularly where the pursuers' title to sue was an issue, the Court must proceed on a *prima facie* basis, looking at the material before it and not confining itself to reading the pursuers' averments *pro veritate*.

16. Counsel for the pursuers on the other hand, submitted that this approach was wrong and on the strength of ***West Cumberland Farmers, Rippin*** and ***Stiell,*** he submitted that the Court should only look to the pursuers' averments. I treat the *West Cumberland Farmers* case with some caution in the present case, as it was a hearing in chambers concerning an admiralty action *in personam* in which the Court was deciding whether to arrest a cargo vessel with all the consequences that such a decision may have. It does not appear to me that Lord Weir, particularly in the passage at page 294L-295B, was seeking in that case to lay down rules or even principles which could be applicable to all situations in which recall of an arrestment on the dependence of an action might be sought. I was referred to no other cases in which his decision has been followed in a more general context.

17. I do not read the ***Rippin*** or ***Stiell*** cases as relating to a dispute which is as fundamental to an action as the title to sue of the pursuers. Each of these cases was concerned, in different ways, with the effect of an arbitration clause or an adjudication procedure on a pursuer's right to seek payment through the Courts and therefore to obtain arrestment on the dependence of the action. In the circumstances of each of these cases the Inner House of the Court of Session held that there was no condition or contingency which required to be fulfilled before the sums became payable and the pursuers were entitled to seek payment through the Courts. In each of these cases the Court appears to have confined its consideration to the pursuers' averments, and to have concluded that *ex hypothesi* these averments the pursuers were entitled to maintain arrestments on the dependence.

18. I have little difficulty in understanding the reason for this approach in the cases referred to. However, I am doubtful as to whether this reasoning applies to a question of title to sue and also whether there is anything in principle or authority which would justify this approach to such a fundamental question. The case of *Earl of Hopetoun's Trustees*, although old, supports the defenders' contention that in a matter as fundamental as title to sue, the Court should look beyond the bare averments of the summons and should adopt a *prima facie* approach to the whole circumstances before it. The issue of title to sue goes beyond questions such as whether an arbitration clause renders a debt immediately payable or not. It goes to the root of the pursuers' entitlement to raise the action and therefore to insist on arrestment on the dependence. If the pursuers' title to sue is challenged, particularly at a stage of proceedings where the summons has not yet called and so parties' pleadings are not fully crystallised, I consider that the Court must go beyond the pursuers' pleadings in the summons and have regard to the facts and circumstances placed before it.

19. Having regard to the facts and circumstances placed before me, it is clear that the present pursuers are not the sub-contractors named in the sub-contract of 17 June 1999. Indeed, they accept this in their pleadings but aver that this is because of an error of which they are seeking rectification by means of the Glasgow Sheriff Court proceedings to which I have referred.

20. There is clearly a dispute between the parties as to whether or not there was such an error, which dispute should be resolved by the Glasgow Sheriff Court proceedings. I am clearly of the view, which was shared by both counsel who appeared before me, that it would not be proper for me to seek to resolve that dispute now. It should be resolved by the Sheriff within a matter of weeks from now. If it is resolved against the present pursuers, I understood the pursuers' counsel to accept that the pursuers would not have title to insist in the present action. That appears to me to be correct. If that is correct, I am of the view that the decision of the Sheriff is a

contingency or condition of a rather different nature from the conditions with which the Court was concerned in ***Rippin*** or ***Stiell***. The Court held in those cases that there was nothing in the contracts which rendered the debts contingent on an arbiter's determination. In the present case the pursuers' title to sue is indeed contingent on the Sheriff's determination. If the Sheriff is with the pursuers, they will have a title to sue. If the Sheriff is against the pursuers, they will have no title to sue.

21. In all the circumstances having regard to the terms of the sub-contract dated 17 June 1999, the fact that there is an unresolved dispute as to whether the pursuers have or have not contracted with the defenders, which will not be resolved for some weeks, and Lord Maxwell's observations in ***Richards & Wallington***, I am not persuaded that the pursuers have a colourable or stateable case. I therefore grant the defenders' motion and order recall of the arrestments on the dependence.

Pursuers: Smith; Macroberts
Defenders: Borland; McGrigor Donald