OPINION OF T.G.COUTTS Q.C., (Sitting as a temporary judge.) Outer House, Court of Session. 10th December 2003.

[1] In this action the pursuers seek reduction both of a disposition granted by the first defender to the second defender and of a standard security granted by the first defender to the third defenders. Only the second defender entered appearance. The pursuers sought decree *de plano*, the second defender sought dismissal of the action. Both compearing parties agreed that the matters raised in the action could be determined at debate.

[2] The procedure roll was heard in three instalments. Important relevant decisions of the House of Lords and of the Inner House of the Court of Session were issued after the date of the first instalment of the debate.

Facts and relevant chronology of events

[3] In September 2000 the pursuers raised an ordinary cause action in the Sheriff Court against the first defender for payment of £76,123.50. On 6 September 2000 letters of inhibition were signetted on the dependence of the action and a Notice of Inhibition was recorded in the Register of Inhibitions and Adjudications on 7 September. The letters of inhibition were served on the first defender on 8 September 2000. The letters of inhibition and execution thereof were recorded in the Register of Inhibitions and Adjudications on 22 September 2000.

[4] The Human Rights Act 1998 came into force on 2 October 2000. On 20 September 2001 the first defender granted a disposition of a property subject to the inhibition by the said letters. On the same date the second defender granted a standard security to the third defenders, the Bank of Scotland. On 23 October 2001 decree for the said sum of £76,123.50 was granted against the first defender in the Sheriff Court action together with interest and expenses and on 20 February 2002 decree for the expenses of the action was granted in the sum of £1,669.11.

[5] No application was made at any time on behalf of any of the defenders to have the inhibition on the dependence recalled or reduced. Accordingly the disposition, and the standard security were granted in the face of a *prima facie* regular inhibition properly recorded in the appropriate register. Those letters of inhibition were obtained in the normal way regarded as usual and appropriate for such for many years.

[6] The various provisions of the Human Rights Act 1998 which were canvassed in argument, here confined to those appropriate to the present circumstances - a case not concerned with legislation or its interpretation, were as follows:

1. the convention rights set out in Article 1 of the First Protocol, i.e.

Protection of Property

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 conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

2. Section 2 of the Act;

2(i) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any-

(a) judgement, decision, declaration or advisory opinion of the European Court of Human Rights.

3. Section 6 of the Act;

Acts of public authorities

***6.** (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

(3) In this section "public authority" includes -

(a) a court or tribunal

4. Section 7 of the Act;

7. *(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may -*

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

5. Section 9 of the Act

9. *(1) Proceedings under section 7(1)(a) in respect of a judicial act may be brought only -*

(a) by exercising a right of appeal;

(b) on an application (in Scotland a petition) for judicial review; or

(c) in such other forum as may be prescribed by rules.

The second defender's argument

[7] It was stated that the second defender did not dispute that if the inhibition granted was valid the pursuers would be entitled to decree of reduction. Accordingly the question for the Court was restricted to determining whether the inhibition was valid. The second defender argued that the situation in which the first defender was placed after 2 October 2000 meant that his rights as well as those of the second defender, his disponee, were protected by Article 1 of the First Protocol to the Human Rights Act. Pronouncing the decree sought would be contrary to section 6 in that the Court would be acting in an incompatible way in granting it.

[8] Initially (following the position adopted by the Court of Appeal in England in ***Wilson* v *First County Limited (No.2)*** 2002) it was argued that the Human Rights Act operated retroactively and in addition that the question for the Court was whether, at the time when the order for reduction was sought in Court the second defender had acquired Convention Rights which required to be applied. The argument presented by counsel and which was said to prevent the Court granting such an order was to follow the Court of Appeal and adopt the statement of Sir Andrew Morritt V.C. at para.18 : *"To put the point in another way, the relevant question, in the present case, is not whether some Convention right of First County Trust was infringed when it made a loan to Mrs Wilson upon the terms of the agreement dated 22 January 1999; nor whether, before 2 October 2000, there was any domestic remedy in respect of any such infringement. The relevant question is whether in allowing an appeal from the order made by Judge Hull QC - or more precisely, in making an order after 2 October 2000 which gives effect to a decision to allow the appeal - this Court would be acting in a way which is incompatible with an existing Convention right. That is a question which has to be answered on the basis of the facts as they are at the time when the order is made in this court".*

After the first stage of the procedure roll the House of Lords (at 2003 3 WLR 568) allowed an appeal and expressly stated, per Lord Hobhouse at para.134, that the Court of Appeal was mistaken in regarding the time at which the Court made a pronouncement as determinative of the application of any rights which arose in terms of the Human Rights Act. Lord Rodger of Earlsferry at para 212 while dealing with the argument about retroactivity stated: *"Subject to one exception, there is nothing in the language of any of the sections in the Act to suggest that they are meant to be retroactive. The exception is section 22(4) which, expressly, gives retroactive effect to section 7(1)(b) in one particular situation. The proper inference is that none of the other provisions is intended to apply retroactively. This inference is corroborated by the obvious, and potentially far-reaching, unfairness of unsettling the law relating to past events and transactions in different areas of law. In these circumstances, applying the powerful presumption against retroactivity, I readily conclude that, subject to section 22(4), none of the operative provisions of the Act, including section 3, is retroactive".*

In light of that decision much of the argument before me was superseded and the state of the law was in my view properly summarised by counsel for the pursuer when he stated that there was no authority left to assist the defender in support of a proposition that the relevant event was not the act of obtaining the inhibition but the granting of a Court order which flowed from the inhibition like the

one presently sought. The defender he said, did not have any Convention rights when the inhibition was obtained and even if that inhibition had been automatically obtained it could not be characterised as an unlawful or invalid act. The second defender's Convention rights, he argued, had never been engaged and so he was not entitled to pray-in-aid section 7(1)(b) of the Human Rights Act 1988.

[9] The second defender's argument thus came to be that at the time when the disposition was registered there was no valid inhibition in place because, he said, it fell foul of Protocol 1 following the reasoning in the decision in ***Karl Construction Ltd* v *Palisade Properties plc*** 2002 S.C.270. The effect of that decision it was argued, was to make invalid and accordingly unenforceable an inhibition like the present obtained with the then procedure. If enforced, section 6 of the Act would be infringed.

The pursuer's argument

[10] The pursuer, in addition to contending simply that there was nothing wrong with the inhibition when obtained, pointed out that it had not been challenged in any proper way at any time. He also drew attention to various decisions of the European Court of Human Rights which, he said, showed that if there was a "***victim***" as defined by section 7 by the Act and that victim was able to foresee and thus know about the relevant state action, that knowledge or imputed knowledge would prejudice any claim that the interference with his property was disproportionate. He referred to ***James & Others* v *The United Kingdom*** (1986) A98; ***Jacobsen* v *Sweden*** (1989) 12 EHRR 56; ***Olbertz* v *Germany*** 1999 - V427; ***Antoniades* v *United Kingdom*** 64 ER 232 and ***Katte Klitsche de la Grange* v *Italy*** (1994) 19 EHRR 368. In the present case each defender knew or ought to have known that he was affected by the restrictive inhibition, and therefore his property rights had been or might be interfered with. Accordingly neither defender has a remedy under the Convention.

Decision

[11] I do not consider that the decision in ***Karl Construction*** *per se* can make invalid an inhibition on the dependence, however obtained. That decision being concerned with the procedure for obtaining an inhibition and the manner in which an inhibition may be imposed, and not whether inhibition was an invalid or improper act, could in my view only apply prospectively and not retroactively. An inhibition which has been regularly obtained in the way in which these matters were regulated prior to ***Karl Construction*** subsists and is valid until either recalled or reduced. Neither step was taken by the defenders. An inhibitee is not entitled to ignore an inhibition on the Register. He must in the first instance get rid of it. He may in future and in appropriate cases be able to do so in relation to inhibitions granted subsequent to 2 October 2000 but in my view cannot do so for an inhibition granted and subsisting prior to that date simply on the basis that it had been obtained in a way which was subsequently disapproved in ***Karl Construction***. Recall of such an inhibition has, in any event, in practice been refused when the circumstances warrant refusal.

[12] Further, in the argument about the rights of parties the pursuers in this matter also have rights, regularly obtained, to which attention requires to be paid. They, like all other persons affected by inhibitions granted before 2 October 2000, are entitled to rely upon them unless and until recalled. Persons like the defenders in this case are not entitled simply to ignore an inhibition properly on the Register and act *brevi manu*.

[13] Further I agree with pursuer's counsel that the defenders are not '***victims***' of an unlawful act in the present situation. They are not being deprived of any property to which they were entitled.

[14] It requires further to be noticed that in the action ***Advocate General* v *Taylor*** designed to bring the matter of inhibition on the dependence before the Inner House by way of a Report made to them and argued in August 2000, the decision in which was released on 5th November 2003, the Court expressly stated that the procedure for obtaining inhibition which had been adopted did not infringe Article 6.1 of the Human Rights Act. Although stating that they agreed that the then procedure did contravene Article 1 of the First Protocol, they drew back from the position suggested by ***Karl Construction*** by indicating that it was not necessary in every case that there be a hearing in Court before a judge. What was required was only that an application be judicially considered before it was granted. All that was required, said the Inner House, was that the applicant demonstrate that the diligence sought was proportionate to the claim. The necessity for diligence was not required to be demonstrated. Neither

party in the debate before me thought that their respective arguments obtained any assistance from ***Advocate General* v *Taylor***.

[15] In my opinion the diligence granted in the present case was not invalid when granted nor was it rendered so by the passage of the Human Rights Act 1988 into force nor by the decision in **Karl Construction.** It would subsist until recalled. It was not said to have been disproportionate. There is no authority to support the proposition that the act of this Court in granting decree of reduction in this case can fall foul of the Human Rights Act. The Court granting reduction is not acting in a way incompatible with the human rights of any of the parties. The defenders chose to act in the face of an inhibition on the Register. They cannot be allowed so to act at their own hand, so as to affect the rights of the pursuers legitimately acquired when they obtained security for the debt due to them. The defenders knew that they were inhibited.

[16] By the time the present action was raised the issue was not whether the inhibition obtained could be recalled, but whether the defenders having acted in the face of an inhibition on the Register, could at this late stage assert that the inhibition is invalid and so avoid its consequences.

[17] On the whole matter therefore I repel the pleas-in-law for the second defender, sustain the pursuers' first and second pleas-in-law and grant decree *de plano*.

Pursuers: Gardiner, Archibald Campbell & Harley, W.S.
Defenders: McCall, Simpson & Marwick, W.S.