

## Interim and precautionary measures - Scotland

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### 1 What are the different types of measures?

#### Diligence on the dependence

Diligence on the dependence is a protective measure which is used while a court action is ongoing, or shortly before it commences. It allows a pursuer (creditor) to preserve the defender's assets so that they will be available to satisfy any decree (judgment) granted in a court action in favour of the pursuer.

There are two types of diligence on the dependence. The first, arrestment on the dependence, is a method whereby a pursuer in an action for payment of money can effectively "freeze" any money or assets of the defender in the hands of third party. That third party is then prohibited from making payment of the money or transferring the asset. The second, inhibition on the dependence, prevents a defender from transferring or disposing of any heritable property in their ownership. It is used in relation to land or buildings, rather than money or moveable property, and prevents a defender from dealing with their property in a way which might prejudice the claim of a pursuer, for example; by selling the property then disposing of the proceeds.

Arrestment on the dependence and inhibition on the dependence can both be converted into a normal diligence in execution if decree is granted in favour of the pursuer in the court action.

#### Interim attachment

Interim attachment is a provisional diligence, similar to diligence on the dependence, which allows a pursuer to attach the defender's moveable property whilst a court action progresses. It effectively restricts a defender's ability to deal with attached moveable property in their possession pending the outcome of the action. However interim attachment cannot be used in a dwelling house, and certain items are exempt. Further once a decree is obtained it does not convert to attachment in execution; a charge for payment and further attachment is required before attached articles can be auctioned.

#### Interim interdict

Interdict is an order of the court which prevents a person from doing something, such as parting with property, so can be used to preserve a defender's existing state of affairs. Interim interdict has the same legal force as an interdict but is generally granted at an early stage of court proceedings once an application for interdict is made, and before enquiry into the facts. As a result, it is more susceptible to challenge or recall.

### **Preservation of documents and other property**

A court may make an order for the interim preservation of documents and other property (including land) which will enable a party to preserve real evidence or to procure evidence.

## **2 What are the conditions under which such measures may be issued?**

### **2.1 The procedure**

#### **Diligence on the dependence**

Diligence on the dependence can only proceed on an order of a court. Both the Court of Session and Sheriff Court can grant warrant for arrestment or inhibition on the dependence, or for interim attachment. Arrestment on the dependence and interim attachment are competent only where the action seeks payment of a sum of money, other than expenses. Warrant for inhibition on the dependence is competent where the action contains a similar conclusion, or is seeking a specific implement of an obligation to convey heritable property to the pursuer, or grant a real right in security over heritable property.

In a Sheriff Court action, the pursuer usually seeks a warrant for diligence on the dependence by applying for it in the initial writ. An initial writ embodies the pursuer's claim. Diligence on the dependence can apply at any time up to the issue of a final decree in the pursuer's favour. Service of the arrestment, inhibition or attachment is then usually executed by a sheriff officer (an officer of the court appointed to serve documents and enforce orders).

In the Court of Session (the supreme civil court in Scotland), warrants for diligence on the dependence are obtained by application. The Lord Ordinary (any judge in the Outer House of the Court of Session) may then grant an order for the diligence. The schedules of arrestment, inhibition or attachment are usually executed by a Messenger-at-Arms (an officer of the Court of Session appointed to serve documents and enforce court orders).

### **Preservation of documents and other property**

Before the court may grant an order where the proceedings to which the documents or property relate have not yet been commenced, it is necessary for the applicant to show that civil proceedings are likely to be brought and that in such proceedings questions may arise about the relevant documents or other property. In an action which has been commenced, the order will only be granted where the applicant shows that it is required to enable him to make specific that which is already averred (that is to prove what he has stated in his case). If the application is granted, the order will specify the manner in which compliance is required. Thereafter a certified copy of the order has to be served on the parties against whom it is made.

### **2.2 The main conditions**

#### **Diligence on the dependence**

Diligence on the dependence is discretionary and the courts will not grant warrant to do so unless satisfied by the provisions set out in the Debtors (Scotland) Act 1987, and that it is reasonable to do so in all the circumstances. The onus will be on the pursuer to satisfy the court that the order should be made.

#### **Interim interdict**

The Sheriff has to be satisfied about the urgency of the matter and the cogency of the case before granting interim interdict. It must be appropriate having regard to all the circumstances, and the Sheriff will need to be satisfied that more inconvenience will be caused to the pursuer if the interim interdict were not to be granted, than would be caused to the defender if it is granted.

### **Preservation of documents and other property**

Before the court may grant the order, it is necessary for the applicant to show that civil proceedings are likely to be brought and that, in such proceedings, questions may relevantly arise regarding the documents or other property. If civil proceedings have already been brought, the order will be granted only where the applicant shows that it is required (see 2.1 above).

## **3 Object and nature of such measures?**

### **3.1 What types of assets can be subject to such measures?**

## **Diligence on the dependence**

An arrestment in effect “freezes” goods or money owned by the defender, but which are in the hands of a third party. That third party is referred to as the arrestee. Arrested funds or goods cannot be taken into a creditor’s possession or sold prior to decree being granted. If a decree is granted in favour of the pursuer funds may be subject to automatic release, however an action of furthcoming must be raised for the release of goods.

Inhibition is a personal diligence which prevents a defender from disposing of, or granting security over, their interest in heritable property which they own, to the prejudice of creditors. Inhibitions are used against heritable property in the ownership of the defender rather than the property owed to him by a third party.

An interim attachment can attach corporeal moveable property, subject to certain exceptions. Included in the exceptions is any article kept within the defender’s dwelling house, items required for the defender’s trade or business, perishable goods, and, subject to a prescribed value; the defender’s vehicle.

## **Interim interdict**

An interim interdict prohibits a defender from carrying out a specific action with immediate effect. It can have the effect of preventing a defender or third party from taking steps in relation to any kind of asset.

## **Preservation of documents and other property**

The Court of Session and Sheriff Court have wide powers to order the preservation, custody and detention of documents and other property (including land) which may be relevant in any existing or future court proceedings. The court can order the production and recovery of any such property, as well as taking samples, and can carry out any experiment thereon.

### **3.2 What are the effects of such measures?**

## **Diligence on the dependence**

Arrestment on the dependence has the effect of “freezing” goods or funds owned by the defender and held by a third party. If the third party disposes of the assets that have been arrested, then they are liable to the pursuer for their value. If the pursuer is successful in their action, they have a preferable right over the property arrested. Arrestment on the dependence freezes but does not transfer ownership to the pursuer.

An inhibition on the dependence does not give the pursuer a real right over the property, and they cannot take action to take possession of the property or sell it. The effect of this diligence is to preserve the property as part of the defender’s estate and therefore prevent them from disposing of, or granting security over, their interest in property. Any voluntary legal act affecting the property after the effective date of the inhibition can be set aside by the pursuer to the extent that his interests are prejudiced.

## **Interim interdict**

Where a defender fails to comply with an interdict the pursuer may take proceedings against them for breach of interdict. Should the charge being admitted or proved, the penalties that the defender may face include a fine or potential imprisonment.

## **Preservation of documents and other property**

Failure to comply with the order could result in decree by default, in the main proceedings, being granted against a non-complying party. Additionally, it could result in proceedings for contempt of court being taken against anyone holding a document or property specified in the interdict.

### **3.3 What is the validity of such measures?**

## **Diligence on the dependence**

In the case of arrestment, if the defender is successful, then the arrestment on the dependence falls when the final decree is issued. If the pursuer wins the case, the arrestment is enforceable for up to three years from the date of decree.

An inhibition prevents a defender from disposing with or granting security over their heritable property. Inhibition on the dependence automatically converts into inhibition upon granting of the decree. The inhibitory effect lasts for five years but can be extended.

Where an interim attachment is executed this will have effect for six months or until it is recalled. If the action against the defender fails, then this will also cause the interim attachment to end.

## **Interim interdict**

An interim interdict continues until it is recalled or until the action is finally disposed of. If the interdict is time specific, then it will continue until the time limit specified expires.

### **Preservation of documents and other property**

The order falls on the final disposition of the action.

### **4 Is there a possibility of appeal against the measure?**

#### **Diligence on the dependence**

A defender may obtain interdict preventing the use of arrestment on the dependence in two situations. Firstly, where it can be instantly verified that the arrestment would be wrong, in the sense that it was executed without warrant, or irregularly, or maliciously and without probable cause. The second situation is where the defender has lodged in court the principal sum sued for.

Where warrant has been granted for diligence on the dependence the defender, or anyone else having an interest can seek its recall or restriction. A recall removes the warrant altogether and any diligence flowing from it. If an arrestment or inhibition on the dependence, or interim attachment, executed following the grant of the warrant is deemed incompetent, then the arrestment, inhibition or attachment must be recalled.

If the warrant was in fact valid, but the arrestment, inhibition or interim attachment was either ineffective or irregular, then diligence may be restricted.

When the defender is seeking to recall or restrict the diligence on the dependence, it is for the pursuer to satisfy the court that the diligence should not be recalled or restricted. The court may also request that the defender finds caution (security) that, on decree being pronounced against him, there will be made available to the pursuer the arrested fund or its value or, more commonly, the whole debt sued for.

#### **Interim interdict**

An order granting or refusing interim interdict made in the Sheriff Court may be appealed without leave to the Sheriff Principal (the senior Sheriff in the local area) or with leave to the Court of Session.

An order granting or refusing interim interdict made in the Court of Session may be appealed against within fourteen days of the order being granted.

### **Preservation of documents and other property**

An order granting an application for preservation of documents or property made in the Sheriff Court may be appealed within fourteen days of issuing of the order.

In the Court of Session, any person receiving the petition for preservation of the documents or property may appear and oppose the petition should they wish to do so. On executing the order, the Commissioner appointed by the court to do so will inform the recipient of his right to seek legal advice. Where the purpose of seeking this advice is to help him decide whether to ask the court to vary the order, the Commissioner will not begin to search for, take possession of or preserve the listed items.

#### **Related links**

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