THE OPINION OF Lord Drummond Young : Outer House, Court of Session : 14th January 2002

[1] The pursuers, who are building contractors, have raised an action against the defenders in which they conclude for payment of the sum of £533,947.35. The pursuers aver that by contract dated 27th October and 26th November 1999 Karl Construction (Scotland) Limited, acting as agent for the pursuers, who at that stage were an undisclosed principal, entered into a contract with the defenders for the construction of four retail units and eighteen residential flats at 330 Byres Road, Glasgow. The form of contract used was the Scottish Building Contract Contractor's Designed Portion Sectional Completion Edition with Quantities (August 1998 revision). That contract incorporated the 1980 edition of the JCT Standard Form of Building Contract, Private Edition with Quantities, subject to a number of important amendments. The pursuers further aver that the contract works were carried out on site and that practical completion was certified as having occurred on 16th June 2000. The pursuers' claim against the defenders is said to arise on two bases. First, it is said that the pursuers are entitled to payment of further monies due under the contract. The final contract sum requires to be adjusted, to take account of variations and the like, and in addition the pursuers are entitled to reimbursement of loss and expense incurred by them as a result of certain matters affecting the regular progress of the works, in terms of condition 26 of the JCT Standard Form of Building Contract. Second, it is said that the pursuers are entitled to claim damages for breach of contract by the defenders. That breach of contract is said to have occurred in two ways. First, it is averred that the defenders' agents, the contract architect and quantity surveyor, have failed to fulfil the obligations contained in condition 30.6 of the JCT Standard Form, and that the defenders are liable for that failure. Second, it is averred that it was an implied term of the contract between the parties that the defenders would take such steps as were reasonably necessary to see to fulfilment of the architect and quantity surveyor's functions and obligations under the contract, and that the defenders were in breach of that term. Although the two grounds of action, payment and damages, are not expressly stated in the alternative, Mr Smith, who appeared for the pursuers, stated that the claims were made on an alternative basis. This is in any event clear from the fact that a single conclusion covers both grounds of action.

[2] The summons contained the usual warrant for inhibition and arrestment on the dependence of the action, and the pursuers in due course inhibited the defenders, having registered an inhibition on the dependence on 19th October 2001. The defenders moved for recall of that inhibition.

[3] Mr Wolffe, who appeared on behalf of the defenders, advanced three grounds for recall. First, he submitted that the pursuers had no title to sue on the terms of the contract between the parties. They accordingly had no colourable case, which was a ground for recalling diligence on the dependence. Second, the defenders submitted that the pursuers' claim was essentially contingent, with the result that diligence on the dependence was incompetent unless special circumstances were averred. Third, in the circumstances of the present case, the automatic grant of inhibition when no particular justification was advanced for such a remedy involves an infringement of the defenders' rights under article 1 of the First Protocol to the European Convention on Human Rights; on that basis the diligence was wrongful and should be recalled.

Title to sue

[4] Mr Wolffe's first argument was that on the face of the parties' contract the pursuers had no title to sue; on that basis the pursuers did not have a colourable case, and the diligence should be recalled. The contract had on its face been concluded between the defenders and Karl Construction (Scotland) Limited, not the pursuers. The defenders now averred, however, that Karl Construction (Scotland) Limited had been acting as agent for an undisclosed principal, namely the present pursuers. Mr Wolffe submitted that the contract was one that could not be performed vicariously, and consequently could not be enforced by an undisclosed principal. Such a category of contracts was well recognised; reference was made to ***Siu Yin Kwang* v *Eastern Insurance Company Limited***, [1994] 2 AC 199, Keating on Building Contracts (7th ed, London, 2001) at paragraphs 12-04 and 12-06, ***Asphaltic Limestone Company Limited* v *Glasgow Corporation***, 1907 S.C. 463, ***Cole* v *C.H. Handasyde & Co***, 1910 S.C. 68, ***Scottish Homes* v *Inverclyde District Council***, 1997 SLT 829 and ***Linden Gardens Trust Limited* v *Lenesta Sludge Disposals Limited,*** [1994] AC 85. He referred in particular to three features of the contract. First, it was a sophisticated building contract, involving more than mere manual work in particular, the main contractor was expected to exercise considerable administrative and management skills. Second, the

contract incorporated the Contractor's Design Portion. This involved the design of substantial parts of the building by the main contractor. Third, the contract contained prohibitions on assignation and subcontracting. Clause 19.1.1 of the JCT Standard Form provides that neither the Employer nor the Contractor shall, without the written consent of the other, assign the contract. Clause 19.2.2 provides that the Contractor shall not without the written consent of the Architect (which consent is not to the unreasonably withheld) sub-let any portion of the Works. On the foregoing basis, Mr Wolffe asked me to hold that only Karl Construction (Scotland) Limited could perform the contract, and consequently that only that company could have title to sue on the contract.

[5] Mr Smith, who appeared on behalf of the pursuers, submitted that it could not be said that the pursuers had no colourable case on title to sue. While there are classes of contract which are personal as between the contracting parties, it was not clear that this was such a case, and it was likely that a preliminary proof would be required to establish the facts. A number of reasons existed for this view. First, the prohibitions on assignation and sub-letting contained in the contract were not absolute; in particular, sub letting was only prohibited without the consent of the Architect, and that consent was not to be unreasonably withheld. Second, the Contractor's Design Portion was not significant, because the actual design was normally provided not by the contractor himself but by a design team of outside professionals. In fact it became clear that the contractor's direct input to design in the present case was restricted to the timber kit portion of the building. While this was fairly significant, it was less than the total work notionally attributed in the contract to contractor's design. Third, while reliance was undoubtedly placed by the employer on management and administrative skills, the skills in question were those of the pursuers, rather than Karl Construction (Scotland) Limited. The two companies were closely associated with each other. Karl Construction (Scotland) Limited was not a trading company, and had no skills of its own as a contractor. It had no employees beyond the board of directors. In all contracts that it had entered into, the necessary management skills, and the input of the main contractor, had been provided by the pursuers.

[6] In my opinion the defenders' arguments are to be preferred on this matter. It is clear that the law recognises a category of contracts which are personal to the contracting parties. In such cases it is not possible for the ostensible party to a contract to conclude it as agent for an undisclosed principal; that follows from the nature of such a contract. This was recognised by Lord Lloyd of Berwick, delivering the opinion of the Privy Council in ***Siu Yin Kwang* v *Eastern Insurance Company Limited***, *supra*, when he stated (at [1994] 2 AC 207D-E): *"The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal".*

In that case which concerned a contract of insurance, it was argued on behalf of the insurer that such a contract is personal in nature, with the result that an undisclosed principal cannot intervene. This argument was rejected on the basis of a finding by the trial judge that the actual identity of the insured was a matter of indifference to the insurer.

[7] A similar point is made **in *Cole* v *C.H. Handasyde & Co***, *supra,* where Lord President Dunedin indicated (at 1910 S.C. 73-74) that it was essentially a matter of construction in the light of all the circumstances whether a contract involved *delectus personae* and hence was not capable of being performed by anyone other than the ostensible contracting party. In the same case Lord Kinnear pointed out, at 75, that: *"The principle which we call delectus personae ... applies when a person is employed to do work or to perform services requiring some degree of skill or experience. And it is therefore to be inferred that he is selected for the employment in consequence of his own personal qualifications. Such a contract is not assignable by him to a third person who may or may not be competent for the work".*

In the context of a building contract, Lord Penrose applied this principle in *Scottish Homes* v *Inverclyde District Council, supra.*. The contract in question was for the repair and maintenance of a local authority's housing stock. The work was generally of a skilled nature. It was to be carried out in such a way as to minimise inconvenience to the occupiers of the houses, and to provide for the safety of occupiers and visitors. In these circumstances it was held that the contract was not assignable by the contractor.

[8] In general, it is clear that a building contract involving complex work will be personal to the contracting parties. That applies particularly if detailed administrative or management work is called for, or if elements of design are involved. In the present case, if the proposal had been to assign the contract to a contractor unconnected with Karl Construction (Scotland) Limited, I would have had little hesitation in concluding that such assignation was incompetent. The same would be true if it were alleged that Karl Construction (Scotland) Limited had concluded the contract on behalf of an undisclosed principal unconnected with that company. The contract was a complex construction contract, with significant elements of design, even if the amount of design actually carried out by the contractor was less than the contract itself indicates. In the present case, however, Karl Construction (Scotland) Limited was closely connected with the present pursuers; the two companies had the same shareholders. Moreover, it was maintained by the pursuers that they performed all management and administrative services for Karl Construction (Scotland) Limited. In view of the close connection between the two companies, I consider it possible that it may be a matter of indifference to an employer such as the defenders whether the contract is carried out by Karl Construction (Scotland) Limited or the pursuers, or indeed another company in the same group. It is to be expected that the skills of all of those companies will be available to the group as a whole. Moreover, the general attitude to business of the companies within the group may well be similar.

[9] The test that the defenders require to satisfy in order to obtain recall on this ground is that the pursuers have no colourable case; that was accepted by Mr Wolffe. That is a difficult test to satisfy. In the present case, for the reasons discussed in the last paragraph, I am not persuaded that it has been satisfied. Consequently I would refuse recall of the inhibition on this ground.

Whether claim contingent

[10] Mr Wolffe's second argument was that the sum claimed by way of payment was in essence a contingent liability, with the result that special circumstances must be averred if inhibition were to be used on the dependence. He referred to the provisions of the parties' contract, in particular those dealing with certification and payment, and pointed out that the pursuers did not found on any certificate issued by the architect. He submitted that the contract contained detailed provisions for certification and payment of monies on certification, and that in those circumstances the defenders' obligation to pay was contingent. He founded on the decision of a court of five judges in ***Costain Building & Civil Engineering Limited* v *Scottish Rugby Union PLC***, 1993 S.C. 650, which overruled the earlier decision in ***Taylor Woodrow Construction (Scotland) Limited* v *Sears Investment Trust Limited,*** 1991 S.C. 140, and on the earlier decisions in ***Lubenham Fidelities and Investments Company Limited* v *South Pembrokeshire District Council***, (1986) 33 BLR 39 and ***Stanley Miller Limited* v *Ladhope Developments Limited,*** 1988 SLT 534. He further referred to the more recent decision in the House of Lords in the Northern Irish case of ***Beaufort Developments (N.I.) Limited* v *Gilbert-Ash N.I. Limited***, [1999] 1 AC 266, where it was held that a court had power to review architects' certificates issued under the JCT Standard Form of Building Contract. He submitted that, to the extent that that case was inconsistent with ***Costain,*** the latter case should be followed, as reflecting the approach that the Scottish courts have always taken to contractual arrangements of this nature. He then dealt with the pursuers' damages claim. This was based on a failure to operate the contractual mechanism for certification, in particular condition 30.6 of the JCT Conditions. He referred to passages in Keating on Building Contracts at paragraphs 5-21 and 5-22 and Hudson's Building and Engineering Contracts at pages 820-827, and to *Bernhard's* ***Rugby Landscapes Limited* v *Stockley Park Consortium Limited***, (1998) 14 Const L. J. 329. He submitted that the pursuers' claim amounted at most to a breach of clause 30.6 of the JCT Conditions, which required adjustment of the contract sum by the architect or quantity surveyor. Any such adjustment should bring out a figure that was identical to the sum claimed by way of payment. Thus the pursuers could not suffer any loss by virtue of the alleged breach of contract apart from the possible late payment of the adjusted sum that should have been certified by the architect. That loss, however, would be dealt with by the provisions in the contract for the payment of interest.

[11] For the pursuers, Mr Smith submitted that it was unclear following the decision in ***Beaufort Developments*** how the present claim should be analysed. It was possible that a contractor would have a right of action for the sums that were due but not certified; an alternative was that the contractor was

entitled to raise an action for damages in the event of a failure to certify. Either of those remedies could be justified on the basis of *Beaufort*. On either remedy, the claim was not for a contingent sum. That was clearly true of an action for damages; the decision in *Costain* only related to an action for payment of a sum due under a contract. The present damages claim proceeded on two alternative bases. First, the architect was the employer's agent, and the defenders as employer were accordingly liable for their agent's failures. Second, a term should be implied into the contract that the employer must take such steps as are reasonably necessary to secure fulfilment of the architect's functions under the contract. On either basis, the claim was an ordinary claim for damages, which was not a claim for a contingent debt.

[12] The pursuers' claim is alternatively for payment under the parties' contract and for breach of that contract. The two parts of the claim raise somewhat different issues, and I consider them separately.

Payment

[13] The leading authority in this area of law is ***Costain Building & Civil Engineering Limited* v *Scottish Rugby Union PLC,*** *supra*. That case involved arrestments on the dependence of an action, but it was not suggested that any different principle would apply to an inhibition on the dependence. The contract between the parties was subject to the ICE Conditions of Contract (5th ed, June 1973) (revised January 1979), as amended by the tender document. The pursuers sued for two sums. The first consisted of a claim for varied and additional works which had not been certified by the engineer, together with a claim for loss and expense to which the pursuers said that they were entitled under a provision of the contract. The second consisted of interest and finance charges, which were said to be due under the contract because the engineer had failed to certify sums timeously.

[14] The Lord President began his analysis of the law by stating (at 653A) that it was necessary to examine the contract in order to see whether the debt sued for was one for which arrestment on the dependence was competent. He continued: *"Graham Stewart on Diligence at p. 201 states that where the debt is future or contingent and arises ex contractu the arrestment, unless the defender is vergens ad inopiam or in meditatione fugae, will be recalled without caution. The explanation which he gives for this is that arrestment for a future or contingent debt is really an arrestment in security and that some circumstances must have taken place since the obligation or contract creating the debt was made, if the arrestments used thereon are to be effectual. If the creditor desires to obtain security for such a debt he must stipulate for it when the contract is entered into".*

The Lord President went on to discuss the distinction between debts that are pure and debts that are future or contingent. He stated (at 654E) *"An obligation is pure when it can be enforced immediately because it is not subject to any condition. An obligation is future... when, although not presently exigible, it is dependent on no other condition than the arrival of the day which has been fixed for its performance. It exists from the date when the obligation was entered into, but there is no entitlement to enforce performance of it until the day for performance has arrived. An obligation is conditional or contingent if its enforceability depends upon an event which may or may not happen, or if it is subject to a resolutive condition by which it may cease to the exigible on the occurrence of some uncertain event. Erskine states that a conditional obligation has no obligatory force until the condition is purified, because it is in that event only that the party declares his intention to be bound and consequently no proper debt arises against him until it actually exists. On his analysis the condition of an uncertain event suspends not only the execution of the obligation but the obligation itself".*

The Lord President then went on (at 654H) to consider the particular contract governing the parties' relationship. The significant features of that contract were as follows: (1) the engineer had wide powers to give instructions and directions to the contractor, including matters that might result in loss and expense to the contractor; (2) the engineer had power to order variations in the works; (3) the value of the variations was to be taken into account in ascertaining the amount of the contract price payable by the employer; (4) payment of the contract price was to be made on a system of interim and final certificates issued by the engineer; and (5) certificates issued by the engineer were subject to an arbitration clause, whereby the arbiter was authorised to open up, review and revise certificates. Founding on those features, the Lord President expressed the ratio of the case in the following terms (at 663C): *"It seems to me that the correct distinction in the present context is between claims which are contingent because they are conditional and claims which are future. And in either case claims, while they remain of that character, although arrestable by a creditor of the common debtor, cannot competently provide the basis for an*

arrestment in security of another debt in an action to enforce the claim. Furthermore, while each contract must be examined according to its own terms, there is now a substantial body of authority... to the effect that, where the contract provides for payment for work done on the issuing of a certificate by an engineer or architect, the issue of the certificate is a condition precedent to the contractor's right to demand payment. A claim which is of that kind is a contingent claim because the debt is not due until the certificate has been issued".

[15] In the present case the parties' contract is a version of the standard Scottish Building Contract, namely the Contractor's Designed Portion Sectional Completion Edition with Quantities. It incorporates the 1980 JCT Standard Form of Building Contract. Clause 2 of the Scottish Building Contract provides that the amount payable by the Employer to the Contractor is either the Contract Sum defined in the preamble to the contract or such other sum as shall become payable at the times and in the manner specified in the Conditions; the "Conditions" are defined in condition 1.3 of the JCT Standard Form as meaning the provisions of that form of contract. The JCT Standard Form contains a number of provisions which may, and typically will, have an important impact on the contract sum. Clause 13.2.1 of the JCT Standard Form provides that the Architect may issue instructions requiring a variation. Clause 13.2.3 provides that any such variation is to be valued in accordance with clause 13.4.1, subject to certain exceptional cases. Clause 13.4.1 requires that variations should be valued by the Quantity Surveyor in accordance with principles stated in clause 13.5. Clause 13.7 provides that effect is to be given to a valuation under clause 13.5 by addition to or deduction from the Contract Sum. Clause 26 deals with loss and expense caused to the Contractor by matters materially affecting the regular progress of the works; this covers matters such as late or defective instructions or drawings issued by the Architect to the Contractor, or the consequences of variations instructed by the Architect. In such cases, if the Contractor makes written application to the Architect stating that he has incurred or is likely to incur direct loss and expense in consequence of such matters, the Architect is obliged to ascertain, or have the Quantity Surveyor ascertain, the amount of such loss and expense. Clause 26.5 provides that any amount from time to time ascertained under clause 26 is to be added to the Contract Sum.

[16] Clause 30, as amended by Amendment 18, deals with certificates and payments. Clause 30.1.1.1 provides as follows: *"The Architect shall from time to time as provided in clause 30 issue Interim Certificates stating the amount due to the Contractor from the Employer specifying to what the amount relates and the basis on which that amount was calculated; and the final date for payment pursuant to an Interim Certificate shall be 45 days from the date of issue of each Interim Certificate".*

If payment is made late, interest is also due. Clause 30.1.3 states that not later than five days after the issue of an interim certificate the Employer must give written notice to the Contractor specifying the amount of the payment proposed to be made in respect of the certificate, to what the payment relates and the basis on which the amount is calculated. Clause 30.6 provides for the final adjustment of the Contract Sum following practical completion of the works. The various matters to be taken into account in adjusting the contract sum are specified in clause 30.6.2; these include the amount of the valuation of any variation under clause 13 and any amount ascertained as loss and expense under clause 26.1. Clause 30.8 deals with the issue of a final certificate by the Architect. That certificate is to state the sum of the amounts already stated as due in interim certificates and the Contract Sum adjusted as necessary in accordance with clause 30.6, and the difference between those amounts is to be a balance due by one party to the other. Clause 30.9 provides that the final certificate is to have conclusive effect as to a number of matters, and in particular is to the conclusive evidence that any necessary effect has been given to all the terms of the contract that require an amount to be added to or deducted from the Contract Sum or an adjustment made to the Contract Sum.

[17] Finally, clauses 41A and 41B deal respectively with adjudication and arbitration. Clause 41B.1 provides as follows:

"In the event of any dispute or difference between the Employer of the Contractor arising during the progress of the Works or after completion or abandonment thereof in regard to any matter or thing whatsoever arising out of this contract or in connection therewith including

...

the withholding by the Architect of any certificate to which the Contractor may claim to be entitled, or

the adjustment of the Contract Sum under Clause 30.6.2;

...

then the said dispute or difference shall be and is hereby referred to the arbitration of such person as the parties may agree to appoint as Arbiter [with provision for appointment in default of agreement]".

Clause 41B.3 states that the Arbiter is to have a number of specific powers, including directing that measurements and valuations should be taken, ascertaining and awarding any sum which ought to have been included in any certificate, and opening up, reviewing and revising any certificate. That clause is expressly made subject clause 30.9, however, and consequently the arbiter has no power to open up, review and revise a final certificate of the Architect. Finally, clause 41B.6 empowers the Arbiter to award interest.

[18] In my opinion the provisions of the parties' contract quoted above display all of the essential features relied on by the court in *Costain*. In particular, the provisions of clause 30 of the JCT Standard Form, dealing with certification and payment, make it clear that payment for work done is to follow the issuing of a certificate by the Architect. Such a certificate must, if appropriate, take account of any variations that have been instructed under clause 13 and the amount of any direct loss and expense sustained by the contractor in consequence of any matter specified in clause 26. In those circumstances, in accordance with the ratio of *Costain*, there is no debt due until a certificate has been issued, and the issue of a certificate is a condition precedent to the Contractor's right to demand payment. On that basis, inhibition on the dependence will only be competent if special circumstances are averred by the pursuers. The pursuers make no such averments, and accordingly on this ground I conclude that their inhibition on the dependence is incompetent so far as the action is for payment.

[19] Mr Smith submitted that the status of the decision in ***Costain*** was unclear following the relatively recent decision of the House of Lords in ***Beaufort Developments (N.I.) Limited* v *Gilbert-Ash N.I. Limited.*** In my opinion the principle laid down in *Costain* has not been affected by the decision in *Beaufort*. In the first place, there is the obvious point that *Beaufort*, although a decision of the House of Lords, is a Northern Irish case, and is therefore not binding on a Scottish court, especially in the face of a decision of five judges in the Inner House. Apart from that consideration, however, I am of opinion that the ratio of *Beaufort* is essentially consistent with the ratio of ***Costain***, although some of the dicta in *Costain* do appear inconsistent with *Beaufort*, and certain qualifications must in my view be added to *Costain* in the light of *Beaufort*. That dicta in the two cases are inconsistent is perhaps not surprising, as the issues under consideration in each case were quite different.

[20] ***Beaufort*** was a decision on the JCT Standard Form. The contract contained an arbitration clause, clause 41, which gave the arbitrator power to open up, review and revise any certificate. It had previously been held by the English Court of Appeal, in ***Northern Regional Health Authority* v *Derek Crouch Construction Company Limited,*** [1984] QB 644, that the court had no power to review any architect's certificate if the contract contained an arbitration clause in those terms. The House of Lords held that *Crouch* was wrongly decided, and that the court's powers to review certificates, using its normal forms of remedy, were not excluded by such an arbitration clause. Lord Hope stated (at 285D) that clauses conferring a power to open up, review and revise certificates are designed to define the powers to be given to the arbitrator, since the arbitrator has no jurisdiction except that which the parties choose to confer upon him by the agreement to go to arbitration. Thus all of the arbitrator's powers must be set out in the contract. By conferring such powers, however, the parties should not be taken to limit the ordinary powers of the court to determine their rights and obligations under the contract. Lord Hope went on to point out that no express contractual provision gave finality to the decisions and opinions of the architect, apart from the final certificate (see 285H-286A and Lord Hoffman at 275H-276F). The result was stated as follows (at 286B-D): *"On this approach, if there is no stay [of arbitration], the court will be able to exercise all its ordinary powers to decide the issues of facts and law which may be brought before it and to give effect to the rights and obligations of the parties in the usual way. It will have all the powers which it needs to determine the extent to which, if at all, either party was in breach of the contract and to determine what sums, in any, are due to be paid by one party to the other whether by way of set-off or in addition to those sums which have been certified by the architect. It will not be necessary for it to exercise the powers which the parties have conferred upon the*

architect in order to provide the machinery for working out the contract. Nor will it be necessary for it to exercise the power which clause 41.4 confers on the arbitrator to revise certificates. This is because the court does not need to make use of the machinery under the contract to provide the parties with the appropriate remedies. The ordinary powers of the court in regard to the examination of the facts and the awarding of sums found due to or by either party are all that is required. There would be no risk of any injustice to the contractor".

(See also Lord Hoffman at 273F-G). Lord Hope refers to the awarding of sums found due by one party to the other. It seems likely, however, that at least in Scotland the court might also have power to reduce certificates and to grant declarator of the parties' rights; those are ordinary powers of the court in Scotland.

[21] It should be noted that the dispute in *Beaufort* arose because the employers had raised court proceedings against the contractors, and the contractors responded by an application for an order staying all further proceedings pending arbitration. The ultimate question before the courts was whether the court proceedings should be stayed. It is unlikely that that question could arise in Scotland. In Scotland, unlike England or Northern Ireland, if a contract contains an arbitration clause arbitration is mandatory if either party insists on it; the court has no discretion to allow the court action to continue in spite of an arbitration clause: ***Hamlyn & Company* v *Talisker Distillery***, 1894, 21 R. (HL) 21; ***Sanderson & Son* v *Armour & Co,*** 1922 S.C. (HL) 117. On the facts of *Beaufort*, therefore, if the contractor applied in Scotland for a sist pending arbitration, that application would inevitably have been granted, at least if the motion was made timeously. Thus the fundamental problem in *Beaufort*, whether the court has power to review certificates despite the existence of an arbitration clause, could only arise if both parties agreed that the court should hear the matter.

[22] The decision in ***Beaufort*** that the court has power to review certificates despite the existence of an arbitration clause does not in my opinion have any bearing on the fundamental question in *Costain*: whether the employer's obligation to make payment in a contract containing a certification mechanism is a pure obligation or a contingent obligation. I nevertheless consider that the contingency on which payment is due is more complex than was assumed in *Costain* (where it was not necessary for the court to consider any contingency other than certification). In my opinion, under the JCT and ICE Standard Forms payment is due by an employer conditionally on the issue of a certificate by the architect or engineer, or on a decree of an arbiter, or on a decree of the court. The decrees of the arbiter or the court are, for this purpose, equivalent to the certificate of the architect or engineer. In the case of the JCT Standard Form, it is clear from clause 41B.3.3 that an arbiter can reconsider certificates, opening them up and revising them as necessary. It is likewise clear from ***Beaufort*** that the court can review certificates, by reducing them and granting decrees for declarator, if appropriate, and payment. If the powers of the arbiter or court are exercised in this way, the relevant decree supersedes the architect's certificate, and is obvious that it must entitle the contractor to payment in the same way as an architect's certificate does. The equivalence of an arbiter's decree to an architect or engineer's certificate is probably implicit in ***Costain,*** although not mentioned expressly, no doubt because the arguments were not concerned with the question of arbitration. The equivalence of a court decree to an architect or engineer's certificate follows from *Beaufort*, on the basis that a decree of the court can achieve the same result as a decree of an arbiter. In every case, however, until an appropriate certificate or decree has been obtained, the debt due by the employer to the contractor is contingent, and will accordingly not form a basis for inhibition on the dependence unless special circumstances are averred.

Damages

[23] These further qualifications on the contingency on which payment is due are also important in cases where the architect or engineer fails, for whatever reason, to perform his duty under the contract to issue a certificate. In the present case, the pursuers' claim for damages is based on the failure of the architect to fulfil his functions under the contract; in short, the pursuers claim that the architect ought to have issued certificates certifying sums as due to them but failed to do so. The situation where an architect fails to issue a certificate has been the subject of considerable discussion in the leading textbooks in the field of building contracts, Keating on Building Contracts (7th ed, London, 2001) at paragraph 5-22 and Hudson's Building and Engineering Contracts (11th ed, London, 1995) at paragraph 6-148. The

authorities on the matter, however, are relatively sparse; I was referred to two cases, *Panamena* ***Europea Navigacion*** **v** ***Frederick Leyland & Co***, (1943) 76 Lloyds Rep 113; [1947] AC 428 and ***Lubenham Fidelities and Investments Company Limited*** **v** ***South Pembrokeshire District Council,*** *supra*.

[24] In my opinion, it is a general principle of building contract law that, if there is any failure in the certification mechanism, for example because the architect refuses to act and the employer does not compel him to do so, the party adversely affected can resort to arbitration, if the matter falls within the terms of an arbitration clause, and failing that litigation, in order to have the amount that should have been certified determined. If the contract says nothing about failure to issue certificates, the legal basis for that principle is an implied term, based on business efficacy; support for that approach is found in ***Panamena Europea Navigacion*** **v** ***Frederick Leyland & Co,*** *supra,* in the opinions in the Court of Appeal of Scott and Goddard LJJ at 76 Lloyds Rep 124 and 127 respectively, and in the speech in the House of Lords of Lord Thankerton at [1947] AC 436. The parties' arrangements for payment of the contractor are dependent upon the issue of certificates, and thus assume that certificates will be issued as necessary. Consequently, if the certification mechanism fails for any reason, it is obvious that a substitute or equivalent mechanism must be found. If the contract contains an arbitration clause, the substitute mechanism will usually be a decree of the arbiter, performing the functions that should have been performed by the architect or engineer. If there is no arbitration clause, or parties do not make use of the arbitration clause, it is clear from *Beaufort* that the court can perform the same function. Keating and, seemingly, Hudson suggest that the concurrence of the employer in the certifier's inaction may be a necessary feature if the contractor is to have a remedy. In my opinion such concurrence is not essential in itself, but if the contract contains an arbitration clause which refers to disputes or differences arising between the parties, the employer's concurrence is probably necessary to give rise to such a dispute or difference.

[25] In the present case, clause 41B.1 refers to arbitration, among other things, *"the withholding by the Architect of any certificate to which the Contractor may claim to be entitled"*. That provision clearly contemplates that the architect's failure to issue a certificate will of itself be sufficient to entitle the contractor to resort to arbitration in order to have the amount that ought to have been certified determined by the arbiter. In ***Lubenham Fidelities****, supra,* May LJ delivering the opinion of the Court Appeal, suggested (at 33 BLR 58) that the existence of a sufficiently wide arbitration clause permitting arbitration upon interim certificates during the currency of the contract meant that there was no need or scope for the implication of any further term to permit a party to resort to arbitration; *Panamena* was distinguished on the ground that in that case there was no arbitration clause in the contract. On that basis, I am of opinion that in the present case clause 41B.1 is clearly wide enough to permit the arbiter to issue the necessary certificate if the certification mechanism has broken down. The crucial point, however, is that the function of the arbiter is to determine the amount that should have been certified by the architect, that is to say, the amount that is due for payment by the employer to the contractor in terms of the contract.

[26] On this analysis, the contractor's remedy before the arbiter is essentially enforcement of the contract. The arbiter is asked to perform functions equivalent to those that should have been carried out by the architect. That may involve valuing variations in terms of clause 13, or ascertaining the loss and expense caused to the contractor by matters falling within clause 26. It may also involve opening up and revising certificates that have already been issued by the architect. Ultimately the arbiter must determine how much, if anything, is due by the employer to the contractor, and must pronounce decree for payment of that sum. If the court undertakes that task, it must go through similar procedures, and ultimately will pronounce a similar decree for payment. That decree, whether of the arbiter or the court, is equivalent to a certificate, and payment will be due by the employer once it has been pronounced in the same way as it would have been had the architect issued a certificate. On this basis an award of damages will not be necessary; the contractor will be found entitled to payment of what is due under the contract, which will be precisely the same amount as should have been certified. That amount may include interest. It follows that, if the contract is enforced in this way, there can be no breach of contract causing loss to the contractor; the provisions of the contract can always be enforced, using the mechanism of arbitration. That means that the pursuers will never have to resort to their damages claim. Moreover, and perhaps more fundamentally, the remedy of damages is a substitutionary remedy, which is only necessary if the

primary remedy, enforcement of the contract, is not available. Enforcement is possible in this case. The contractor's rights under provisions such as clauses 13 and 26 can be enforced by the arbiter or the court; in this way the arbiter or court can perform a process akin to certification, and can ascertain and grant decree for the sum that should have been certified. Thus the question of damages will never arise.

[27] In my opinion the foregoing analysis provides a complete answer to the pursuers' argument that, even if their claim for payment under the contract is contingent, the inhibition is valid because of the claim for damages. On a proper analysis of the parties' contract, the claim for damages will never arise; indeed, at best, the damages claim could only be a substitute for the payment claim. Such a claim cannot put the pursuers into a more favourable position as regards diligence on the dependence than the claim for payment. The availability of diligence must be dependent on the nature of the primary claim, and in my view that is a contingent claim in this case.

The European Convention on Human Rights

[28] Mr Wolffe's third argument for the defenders was that there was no valid warrant for diligence because the use of inhibition on the dependence in present circumstances was contrary to article 1 of the First Protocol to the European Convention on Human Rights. He submitted that inhibition on the dependence involved a restriction on the use of property, and he referred to the principal cases on the construction of article 1 in this area. These established that a court must consider the aim that was being pursued by a restriction on the use of property, and consider whether a fair balance was struck between that aim and the property owner's rights. Mr Wolffe accepted that it was legitimate for the state to make available to a creditor pursuing a well-founded claim a mechanism whereby the debtor may be prevented from seeking to avoid payment of a just debt by illegitimate means. Nevertheless, he submitted that any such mechanism must strike a fair balance between that end and the right of the proprietor to the use and enjoyment of his property. In considering whether such a fair balance was struck, he submitted that the availability of compensation for unjustified use of the restriction was relevant. The Scots law of inhibition failed to achieve such a balance, in that inhibition was available automatically on the signeting of a summons, regardless of whether circumstances existed to suggest that the remedy was necessary. Moreover, compensation was only available for unjustified use of the diligence in very limited circumstances. Mr Wolffe referred to the history of inhibition in Scots law, and quoted at length from the Report on Diligence on the Dependence and Admiralty Arrestments, published by the Scottish Law Commission in March 1998. This report contained lengthy criticisms of the remedy. He then referred me to material dealing with a substantial number of other jurisdictions; I discuss this below. In conclusion, he submitted that Rule of Court 13.6, which provides that a signeted summons may be warrant for inhibition on the dependence, should be construed in such a way that the signet should not be affixed unless special justification for the use of inhibition on the dependence was put before the court; he relied on section 3 of the Human Rights Act 1988 for this purpose.

[29] Mr Smith, for the pursuers, submitted that it is not possible to construe Rule of Court 13.6 in the way suggested if effect were to be given to the Rules of Court generally, or to the common law rules applying to inhibition on the dependence. He submitted that the present law of inhibition on the dependence struck a fair balance between the pursuer's interest in having assets available to satisfy a decree and the defender's right to make use of his property. He stressed in particular the margin of appreciation that is accorded to signatory states under the Convention, and its equivalent in national law; restraint should be shown in any interference with existing legislation and rules of law. Consequently, provided that a reasonable relationship could be shown between means and ends, that was sufficient to satisfy the Convention.

[30] It is obvious that this issue can only arise if I am wrong in holding that, under the existing law, special reasons must be advanced for the use of inhibition on the dependence in the present case. On that hypothesis, however, I am of opinion that the defenders' argument is correct. An automatic right to inhibition on the raising of an action containing pecuniary conclusions is in my view incompatible with the defenders' rights under article 1 of the First Protocol to the Convention, especially when that automatic right is taken together with the absence of any general right to compensation for the use of the diligence in an action that turns out to be ill-founded.

[31] On this subject, five major issues require to be considered. These are the nature of inhibition on the dependence in Scots law, the meaning of article 1 of the First Protocol, the proportionality of the remedy accorded by inhibition on the dependence to the aim of that remedy, the margin of appreciation accorded to each state under the Convention and its equivalent in national law, and the consequences under the Human Rights Act of a contravention of a Convention right.

Nature of inhibition on the dependence

[32] The history of inhibition is discussed in Graham Stewart on Diligence at pages 525-526, and in somewhat greater detail in Ross's Lectures on Conveyancing at pages 459 et seq. Inhibition appears to have entered Scots law from France in about the middle of the fifteenth century, and to have been in general use from 1469 onwards. Originally it was an ecclesiastical remedy, but eventually the civil courts adopted it, and came to make it generally available in all cases were one person claimed payment or damages from another. Various statutory provisions have been enacted dealing with the diligence, but its origins clearly lie in the common law. The most important of the statutory provisions is now contained in Rule of Court 13.6(c)(i), which provides as follows:

"When signeted, a summons shall be authority for --

...

(c) subject to any other provision in these Rules and the provisions of any other enactment or rule of law, diligence by --

(i) inhibition on the dependence of the action

...

when a warrant in the appropriate form... has been inserted in the summons".

The substance of this provision can be traced back to section 18 of the Court of Session Act 1868, a section which has now been repealed. The effect of these provisions is that, when an action is raised in the Court of Session, it is no longer necessary for the pursuer to obtain letters of inhibition; instead, the summons itself will be sufficient warrant for the diligence. Rule of Court 13.6(c) is expressly made subject to the provisions of any other enactment or rule of law. Consequently it will only operate if a pursuer is entitled to inhibition on the dependence at common law, and if the common law is modified by any Act of Parliament, including the Human Rights Act 1998, the Rule will not apply.

[33] The present law governing inhibition on the dependence is reasonably clear in its basic features. Inhibition on the dependence is available as of right in all actions containing a petitory 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. In cases of the latter sort, special circumstances must be demonstrated to a Lord Ordinary before diligence on the dependence is available. The traditional grounds for diligence in those circumstances are allegations that the defender is *vergens ad inopiam* or *in meditatione fugae*, that is, at significant risk of insolvency or contemplating flight from the country. In addition, in the modern law it is clear that steps by a defender to conceal or dissipate his assets will justify the diligence: ***Wilson v. Wilson***, 1981 SLT 101. The reference to the contemplation of flight was no doubt appropriate in an age when imprisonment was a standard remedy for the payment of debt and a small fortune in gold coins could be carried in a saddlebag; at the present day, however a similar approach should be taken to any procedure whatsoever whereby assets can be dissipated or concealed. Apart from the cases where special circumstances must exist, inhibition is available automatically when an action containing a pecuniary conclusion is raised. If the action is in the Court of Session and the summons contains an appropriate form of warrant, the signeted summons is warrant for the diligence on the dependence, in accordance with Rule of Court 13.6(c)(i); in other cases, letters of inhibition must be used, but the diligence is still available automatically unless the letters relate to an action for a future or contingent debt or to a consistorial action in dependence in the Sheriff Court.

[34] The effect of inhibition is to freeze the whole heritable property of the defender. In Graham Stewart on Diligence, inhibition is described (at 526) as "a preventive diligence whereby a debtor is prohibited from burdening, alienating directly or indirectly, or otherwise affecting, his lands or other heritable property to the prejudice of the creditor inhibiting". In its Report on Diligence on the Dependence and Admiralty Arrestments, published in March 1998, the Scottish Law Commission summarises the effect of inhibition

as follows (paragraph 2.6): *"The inhibition has two main effects. First, it renders reducible, at the instance of the inhibiting creditor, deeds burdening or alienating the debtor's heritable property voluntarily granted after the date of registration of the inhibition. Second, in any insolvency proceedings or other processes of ranking on the debtor's heritable property, the inhibiting creditor is given a preference for his debt over any debts contracted by the debtor after the date of registration of the inhibition. An inhibition thus strikes at the debtor's future voluntary deeds and debts. An inhibition creates litigiosity but does not impose a nexus or create a real right in the nature of a security right. Rather it gives the inhibitor a right to reduce deeds violating the inhibition and a right in any process of ranking to draw such a dividend as he would have drawn if post-inhibition debts had not been contracted and post-inhibition voluntary deeds had not been granted".*

Although in theory alienation is possible, any alienation, whether outright or in security, can be reduced at the instance of the inhibiting creditor, and consequently in practice alienation is prevented; normally no purchaser would accept title unless any inhibition against the seller is discharged. In order that the inhibitor may acquire a real right in the heritable property of the person inhibited, he must use the diligence of adjudication, but that is only available in execution, not on the dependence. Nevertheless, the practical effect of an inhibition is to prevent the party inhibited from alienating his heritable property.

[35] Inhibition on the dependence can be recalled, but the grounds of recall are limited, and have generally been interpreted restrictively. The modern practice is set out in the Report by the Scottish Law Commission, at paragraphs 2.27-2.37. A number of the grounds of recall are of little practical significance, but three are of particular importance for present purposes.

[36] So far as the merits of the pursuer's case are concerned, diligence may be recalled if the pursuer has no "colourable case" or no "intelligible and discernible cause of action". The standard of a "colourable case" is very easy to satisfy, and it is clear that it is not necessary for the pursuer to satisfy the standard of a *prima facie* case. The standard is likewise much lower than that applied in a procedure roll discussion to satisfy the test of relevancy: see ***West Cumberland Farmers Limited* v *Ellon Hinengo Limited*,** 1988 SLT 294, and ***Interconnection Systems Limited* v *Holland***, 1994 SLT 777.

[37] So far as the use of inhibition on the dependence is concerned, the diligence may be recalled if it is nimious and oppressive. This applies if the diligence is excessive, in the sense that the property attached is worth more than the pursuer's claim, or alternatively if the sums sued for in the action appear extravagant. This can be a valuable limitation, as the Scottish Law Commission points out, but it is of limited utility for two reasons. First, at an early stage of a court action, when inhibition is first used, it may be difficult to estimate the true value of the pursuer's claim with any degree of accuracy. This is especially significant in actions for damages for breach of contract or for delict, and it may also be significant in cases where the pursuer's claim is for payment of a debt that is incapable for the present of precise ascertainment. Second, inhibition freezes the defender's heritable property, but the value of that property may not be clear; an obvious example is property which may obtain planning permission for a valuable development. Moreover, as the Scottish Law Commission comments (paragraph 2.29) "The power of restriction has to be seen against the background of a system in which it 'is open to anybody to state a claim of damages against another person, and to lay his damages at a ridiculous figure, and then to proceed to plant [diligence] all around'. Again in the wonder is that such excessive diligence is allowed in the first place".

[38] In addition, the diligence may in theory he recalled because the defender's financial position is sufficiently strong. The modern practice, discussed by the Scottish Law Commission at paragraph 2.31 of their Report, is that, however good the defender's financial position may appear to be, caution or consignation is required. The traditional test, which was applied by the Inner House in *Taylor* ***Woodrow Construction (Scotland) Limited* v *Sears Investment Trust Limited***, *supra*, is that there should be "no prospect of the pursuer's claim being defeated". In that case the test was applied strictly in the context of a defender which was a member of a group of companies. It was held that the test was not satisfied because the defender's assets could readily be transferred to other companies within the group. If the test is that there is "no prospect" of the claim being defeated, it is clearly one that is extremely difficult to satisfy.

[39] In summary, recall of inhibition is not common in practice unless the defender finds security for the pursuer's claim, through either caution or consignation. Moreover, the defender is generally compelled to find such security without regard to how well founded the pursuer's claim is; it is only in exceptional circumstances that an inhibition will be recalled because of the weakness of the claim against the defender.

[40] If the pursuer's claim turns out to be ill-founded, there is no right to compensation for the wrongful use of diligence unless it can be proved by the defender that the pursuer acted maliciously, or that there was an irregularity in procedure. The fact that the claim was ill founded, even if very clearly so, gives no right to compensation. In ***Wolthekker* v *Northern Agricultural Company***, 1862, 1 M. 211, Lord Justice Clerk Inglis stated (at 212-213): *"A litigant using any legal right or remedy, to which he was absolutely entitled, and which he required to apply for no special warrant to enable him to use, could never be made liable for the consequences of its use, unless he was shewn to have resorted to it maliciously and without probable cause.... It would then be most unreasonable and inconsistent, to give the pursuer of an action the right to use inhibition and arrestment on the dependence, and, at the same time, to make him answerable in damages, merely because he fails in obtaining a judgment against the defender, if he use his legal right moderately and in good faith".*

In ***Grant v. Magistrates of Airdrie***, 1939 S.C. 738, Lord President Normand stated (at 758-759): *"When diligence is an unquestionable right to which a party is absolutely entitled, he is liable in damages at common law for injury done if he acts without legal warrant, or if there is irregularity in execution, or if the execution is wholly unjustifiable though formally regular, as, for example, when the sum due has been paid before execution, or if malice and want of probable cause are established. But if the warrant for diligence can only be obtained from the Court upon a statement or representation of made to the Court by the applicant, he is liable absolutely for damage caused by the diligence".*

In that case, the principle stated in the last sentence was relevant. The defenders had used against the pursuer a form of statutory diligence available under the Burgh Police (Scotland) Act 1892 to recover rates in respect of a shop. The rates were in fact due not by the pursuer but by his brother. It was held that the pursuer had a right of action against the defenders for wrongful use of diligence even if he did not establish that they had used the diligence maliciously and without probable cause.

Article 1

[41] The defenders argue that the absolute and automatic right of a pursuer to use inhibition in an action with a conclusion for payment of a present debt or for damages, when taken together with the drastic effects of inhibition on the defender and the relative lack of redress for wrongful use of the diligence, is incompatible with article 1 of the First Protocol to the European Convention on Human Rights. Article 1, which is headed "Protection of property", is in the following terms:

"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".

That article has been regarded as establishing three distinct rights. These were stated by the European Court of Human Rights in ***Sporrong and Lonnroth* v *Sweden***, 1982, 5 EHRR 35, as follows (at paragraph 61): *"[Article 1] comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph".*

The effect of an in inhibition is to prevent the disposal or alienation of property. In ***Marckx* v *Belgium*,** 1979, 2 EHRR 330, the European Court of Human Rights held, at paragraph 63, that *"the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property".* In that case, it was held

that a restriction in Belgian law on an unmarried mother's right to make gifts or legacies in favour of her child contravened the second paragraph of article 1. It is in my opinion clear from that decision that a restraint on disposal or alienation of property falls *prima facie* within the second paragraph of article 1.

[42] The second paragraph is, however, limited by an important qualification: the State may control the use of property to further the general interest or to secure the payment of taxes or other contributions or penalties. It is the general interest that is of significance in the present case. Consequently the second paragraph of article 1 involves a balancing exercise; the court must consider whether the restriction placed on the use, including disposal, of property is justified by the general interest. This matter was considered by the European Court of Human Rights in ***Fredin* v *Sweden***, 1991, 13 EHRR 784, where the relevant principle was stated as follows (at paragraph 51): *"It is well-established case law that the second paragraph of Article 1 of Protocol No 1 must be construed in the light of the principle laid down in the first sentence of the Article. Consequently, an interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is reflected in the structure of Article 1 as a whole, and therefore also in the second paragraph thereof: there must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question".*

Two points call for discussion, the proportionality between the means employed and the aim pursued, and the margin of appreciation accorded to the State and its equivalent in domestic law.

Proportionality

[43] The aim of inhibition on the dependence is to ensure that assets are available to meet a possible decree in favour of a pursuer. That is, as the defenders accepted, obviously a legitimate public aim. The means used to achieve the aim involve an automatic freezing of the whole of the defender's heritable assets, in such a way that alienation of any sort is in practice rendered impossible, with limited grounds of recall, and with no right to compensation for wrongful use of the diligence except in very limited circumstances. The critical question is whether a fair balance is struck between the aim and the means.

[44] In the course of the debate I was referred to a wide range of materials originating both in Scotland and in other systems of law. The earliest of the Scottish materials was Ross's Lectures, published in 1822. Ross states (at pages 467-468): *"The great abuse of this diligence arose from this, that, by frequency, it passed unnoticed, and came, at last, to be granted to all creditors, real and pretended, for all liquid debts, depending actions, and, in short, for every claim that one man could muster up against another. In this view, it is the most cruel and impolitic diligence that was ever introduced into the law of any country. Because one man pretends or imagines that another is indebted to him, and the experience of every day shows us upon what slight grounds these claims are reared up; is it reasonable that another of landed property should, by a judicial writ taken out in the common routine of court, receive a blow upon his credit, be recorded not only as an actual, but a kind of insolvent debtor, and, in effect, have the amount of that pretended claim made pro tempore a debt upon his lands?"*

The Scottish Law Commission's Report on Diligence on the Dependence and Admiralty Arrestments, published in March 1998, summarises subsequent criticism of the existing Scots law of diligence on the dependence at paragraphs 2.42-2.44. The views of Sheriff Dobie are quoted at some length. He pointed out that in many cases the defender may be placed in a real difficulty by diligence on the dependence. He can obtain recall on caution, but the companies that provide such caution, today generally banks and insurance companies, require a premium together with the transfer of securities sufficient to cover their liability. Sheriff Dobie further refers to the length of court proceedings, and suggests that funds pledged for caution are for all practical purposes *extra commercium* during that period.

[45] The same result follows if sums are consigned to obtain recall. In either event, the result is to sterilise assets that may well be of great importance to the defenders' business, to provide cash flow and consequent working capital. In ***Interconnection Systems Limited* v *Holland***, *supra*, a case dealing with the recall of arrestments, Lord Penrose remarked (at 780 F): *"Maintaining positive cash flow is essential in any well managed business. Interruption of cash flow would necessarily affect the business's budgetary strategy*

and may well affect short-term liquidity and the efficiency of financial management. Claims may be compromised in the face of effective arrestments which would otherwise be contested.... It is reasonable to assume generally that effective arrestments will affect the cash position of a defender, even in circumstances in which the arresting creditor was motivated solely by the purpose of protecting his own interests".

In the present case, the defenders are property developers. In such a case their heritable property is their stock in trade. Consequently an inhibition has the effect of stopping their sales entirely, and its recall becomes of paramount importance. In practice, that means that either caution must be found or consignation offered. In either event, there is a serious effect on their working capital.

[46] I was referred to materials dealing with a substantial number of other legal systems. In all of these systems a remedy is available to entitle a pursuer to obtain protective security for the sum sued for in a depending action. In no instance, however, is such security available automatically on the raising of an action; in nearly every case, the pursuer is required to establish two matters: first, that he has he has a *prima facie* case against the defender, or at least a claim that is capable of precise evaluation; and, second, that there are special reasons to suppose that the defender may not be able to satisfy his claim. Because the foregoing matters must be positively demonstrated, an appearance before a court is necessary in every jurisdiction. In addition, in every jurisdiction compensation is available whenever the use of protective security is not justified.

[47] In relation to continental Europe, I was provided with information on the law in Belgium, Denmark, France, Germany, Italy, Luxembourg and the Netherlands; this was derived from European Civil Practice, by O'Malley and Leighton, (London,1989). In France, for example, protective attachment of a defender's land is available by a procedure known as *saisie immobiliere*. An application is made to a judge. The application must set out the grounds for seizure of the defender's assets. It must show a *prima facie* case on the merits and some urgent threat to the satisfaction of the claim. If the attachment turns out to be unjustified, compensation is payable to the defender for any loss that he may suffer. The position in Belgium is similar. In the Netherlands, provisional attachment (*conservatoir beslag*) is available if there are good grounds for supposing that a debtor may attempt to dispose of his assets before judgment. An application to the court is required, and the court must be satisfied that there are sufficient grounds to grant leave for provisional attachment; the evidence required, however, is described as "minimal". In Germany, a corresponding remedy (*Arrest*) is available in an action in which the claim is for a specific sum of money or is capable of precise evaluation. In such cases, the pursuer must show that there is a risk that the defender will so deal with his assets as to obstruct or defeat the enforcement of any judgment. Evidence to that effect is usually given by way of formal written declaration. It is not sufficient to show merely that the defender is likely to become insolvent. If protective attachment is subsequently shown to have been unjustified, the pursuer is liable in damages to the defender for any loss suffered in consequence. In Italy, an applicant for protective attachment (*sequestro conservativo*) must demonstrate that he has a *prima facie* case on the merits and that delay in granting the remedy could cause prejudice. If it is found that the attachment should not have been granted, the applicant may be liable to compensate the defender for any losses that he has suffered.

[48] The remedies available in continental Europe are summarised by Professor Maher in a valuable article, Diligence on the Dependence: Principles for Reform, found at 1996 JR 188. He states (p. 199):
"Of the systems [in continental Europe] looked at by the Commission, five features recur. These are: (1) a pursuer must establish cause shown for the remedy in terms of the merits of the action; (2) the pursuer must also establish the need for an interim remedy; (3) a pursuer must lodge security in respect of the defender's loss where the pursuer's claim fails; (4) damages automatically ensue either if the pursuer loses on the merits or where the provisional remedy is unnecessary; and, (5) applications for a remedy are made to a judge. Another feature common to most European systems is that: (6) application may be made ex parte, usually on cause shown for this step, but the resulting remedy is temporary only, and calls for the pursuer to validate it at a subsequent contested hearing.

"As far as I can tell all the legal systems of mainland Europe States in the European Union (and possibly beyond) conform to all or all but one of these general principles".

In England and Wales, the corresponding procedure is the ***Mareva*** injunction. This is a relatively recent procedure, dating from the decision of the Court of Appeal in ***Mareva Compañia Naviera S.A.* v**

International Bulkcarriers S.A., [1975] 2 Lloyds Rep. 509. The principles governing *Mareva* injunctions are summarised by Professor Maher in his article on diligence on the dependence as follows (at p. 200):

"(1) An application for a Mareva injunction may be made only to a judge of the High Court, not the County Court;

(2) the plaintiff must show that he has a good arguable case;

(3) the plaintiff must show that there is a real risk that the defendant may remove or conceal his assets or deal with them so as to defeat the plaintiff's claim;

(4) the plaintiff must make a full and frank disclosure of all material facts known to him (including those unfavourable to his case), and failure to do so will result in the injunction being discharged;

(5) the plaintiff must give an undertaking in damages in case either he fails on the merits of the action or the injunction turns out to be unjustified".

[49] Authority for the second of these propositions is found in ***Rasu Maritima S.A.*** **v** ***Perusahaan Pertambangan Miniyak Dan Gas Bumi Negara (The Pertamina),*** [1978] QB 644; and authority for the third and fifth is found in ***Third Chandris Shipping Corporation*** **v** ***Unimarine S.A.***, [1979] QB 645. In the latter case Lord Denning MR stated guidelines applicable to *Mareva* injunctions in the following terms (at 668F-669E):

"(i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know....

(ii) The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant.

(iii) The plaintiff should give some grounds for believing that the defendant has assets here....

(iv) The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied.

(v) The plaintiff must, of course, give an undertaking in damages -- in case he fails in his claim or the injunction turns out to be unjustified in a suitable case this should be supported by a bond or security: and the injunction only granted on it being given, or undertaken to be given".

It is thus clear that the English procedure corresponding to inhibition of the dependence is very much more limited; critical features are that the plaintiff must show that he has a good arguable case, stating fairly any points made against it by the defendant, and that the plaintiff must show that there is a real risk that assets will be dealt with in such a way as to defeat the plaintiff's claim. As in nearly all systems in continental Europe, the defendant has a remedy in damages if an injunction is obtained without good cause. Ireland has followed English law on this matter.

[50] Professor Maher's article also considers protective attachment in the United States and Canada. He summarises the principles that have generally been applied in American and Canadian jurisdictions as follows (at pp. 198-199):

"(1) The remedies which are equivalent to diligence on the dependence in Scots law are classified as part of the general law on prejudgment remedies, and should be coherent with the underlying principles of that branch of the law.

(2) As such, these remedies are extraordinary in nature.

(3) Accordingly, there must exist meaningful substantive grounds to justify the granting of these remedies.

(4) The substantive grounds relate both to the plaintiff's chances of success in the action, and a shown need for the remedy.

(5) In addition procedural due process requires that these substantive grounds are considered by a judge before a remedy can be granted.

(6) Procedural due process also raises a presumption that the defendant is given an advance notice of the application and hearing prior to any grant of the remedy.

(7) This presumption may be rebutted but only if the plaintiff can show good cause for so doing and subject to safeguards to protect the defendant's position.

(8) These safeguards include the provisional nature of a remedy granted on an ex parte application, with a resulting need for a validation hearing where the onus is with the plaintiff; undertakings by the plaintiff where the remedy proves unjustified, i.e. where the plaintiff does not succeed in the action or the plaintiff cannot establish that special circumstances exist to justify its need".

I was referred to one of the leading decisions of the United States Supreme Court in this area, ***Connecticut v. Doehr***, 501 US 1 (1991). That case concerned a Connecticut statute which authorised a judge to allow the prejudgment attachment of real estate without prior notice or hearing on the plaintiff's verification that there was probable cause to sustain the validity of his claim. In the case under consideration, one DiGiovanni applied to the Superior Court of Connecticut for such an attachment against Doehr's home in conjunction with a civil action for assault and battery that he was seeking to institute against Doehr in the same court. The application was supported by an affidavit in which DiGiovanni stated that the facts set forth in his complaint were true, declared that the assault had resulted in particular injuries requiring expenditure for medical care, and stated his "opinion" that those facts were sufficient to establish probable cause. On the basis of these submissions, the judge of the Superior Court found probable cause and ordered the attachment. Doehr challenged the procedure on the ground that it violated the due process clause of the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment, so far as material, states *"nor shall any State deprive any person of life, liberty, or property, without due process of law"*. The Supreme Court upheld the challenge. White J, who delivered the majority opinion, explained the relevant principles as follows (at pages 11-17):

"We agree with the Court of Appeals that the property interests that attachment affects are significant. For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause....

"We also agree with the Court of Appeals that the risk of erroneous deprivation that the State permits here is substantial. By definition, attachment statutes premise a deprivation of property on one ultimate factual contingency -- the award of damages to the plaintiff which the defendant may not be able to satisfy.... [The] statute presents too great a risk of erroneous deprivation.... Permitting a court to authorise attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute, or, in the case of a mere good faith standard, even when the complainant failed to state a claim upon which relief could be granted. The potential for unwarranted attachment in these situations is self-evident, and too great to satisfy the requirements of due process absent any countervailing consideration....

"Finally, we conclude that the interests in favour of an ex parte attachment, particularly the interests of the plaintiff, are too minimal to supply such a consideration here. Plaintiff had no existing interest in Doehr's real estate when he sought the attachment. His only interest in attaching the property was to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action. Yet there was no allegation that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment. Our cases have recognised such a properly supported claim would be an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected.... Absent such allegations, however, the plaintiff's interest in attaching the property does not justify the burdening of Doehr's ownership rights without a hearing to determine the likelihood of recovery".

[51] White J went on to review the law in other states, and found that only three, including Connecticut, authorised attachments without a prior hearing in situations that did not involve any special threat to the plaintiff's interests.

[52] Finally, I was referred to a document produced by the International Law Association, The Helsinki Principles on Provisional and Protective Measures in International Litigation, adopted in 1996. This report sets out principles which the Association thought should apply to all provisional and protective measures used in international litigation. Two of these principles appear relevant. The fourth is as follows: *"The grant of such relief should be discretionary. It should be available:*

(a) on a showing of a case on the merits on a standard of proof which is less than that required for the merits under the applicable law; and

(b) on a showing that the potential injury to the plaintiff outweighs the potential injury to the defendant".

The eighth principle is as follows:

"The court should have authority to require security or other conditions from the plaintiff for the injury to the defendant or to third parties which may result from the granting of the order. In determining whether to order security, the court should consider the availability of the plaintiff to respond to a claim for damages for such injury".

[53] Against the foregoing background, it is necessary to consider the critical question whether the aim of inhibition on the dependence, ensuring that assets are available to meet a possible decree in favour of a pursuer, is proportionate to the means employed. In my opinion article 1 of the First Protocol starts with a presumption that the owner of property is free to use it, and in particular to dispose of it, as he wants. This is clear from the second paragraph of the article, which permits any State that is party to the Convention "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest" or to secure payment of taxes or other contributions or penalties. In my view the reference to necessity in that provision indicates that there must be a valid reason for any interference with the right to use, including the right to dispose of, property. Against that, the paragraph permits such laws as the State "deems necessary", and it has been recognised by the European Court of Human Rights, in *Fredin v. Sweden, supra,* that that wording permits the State a wide margin of appreciation both in choosing the means of enforcement and in ascertaining whether the consequences of enforcement are justified in the general interest. Nevertheless, the presumption seems to be in favour of freedom of use and disposal, and an objectively valid need must be shown to take away that freedom.

[54] If that is so, it follows that any legal provision that interferes with the freedom to dispose of property should not be significantly wider than is necessary to achieve the aim of such interference. That is in essence what the test of proportionality, referred to in *Fredin v. Sweden, supra,* means. On that basis, I am of opinion that four requirements must be satisfied if a right of protective attachment of immoveable property during litigation is to conform to article 1 of the First Protocol. These are as follows:

1. The pursuer must establish a *prima facie* case on the merits of the action.
2. The pursuer must establish that there is a specific need for an interim remedy; this will generally involve demonstrating either that there is a significant risk of the defender's insolvency or that the defender is taking steps to conceal or dissipate his assets or that there is a significant risk that the defender will remove his assets from the jurisdiction.
3. A hearing must take place before a judge at which the last two matters are considered.
4. If protective attachment is used without an objective justification, and in particular 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.

[55] My reasons for so holding are as follows. First, it is difficult to see why the law should consider a protective attachment necessary unless the pursuer can at least satisfy the test of a *prima facie* case. This is not as stringent a test as the test of relevancy in a procedure roll discussion. It is, however, recognised as an essential standard for the grant of the other main protective remedy in Scots law, interim interdict. Furthermore, nearly all of the other systems to which I was referred insist that a test of broadly this nature should be satisfied.

[56] Second, the aim of protective attachment is to ensure that assets are available to satisfy a possible decree in favour of a pursuer. That aim is clearly reasonable, and important. In the majority of cases, however, a defender who is found liable to a pursuer meets his liability following decree, without reference to any diligence that has been done on the dependence of the action. If a defender is unwilling to meet his liability to the pursuer, various enforcement procedures are available; in Scots law these include diligence in execution and the threat of insolvency proceedings. These are generally effective if the defender is solvent. If the defender is not solvent, of course, insolvency proceedings must be carried into effect, and in that event the general policy of Scots law is to distribute assets *pro rata* among creditors. It is not obvious why protective attachment should be necessary, or even appropriate, until the stage when the defender appears to be in financial difficulties, or is taking steps to conceal or dissipate his assets, or there is a significant risk that he will remove his assets from the jurisdiction. Before that stage, it is in my view unreasonable to proceed on the assumption that a defender will not meet his liabilities in due course. In other words, protective attachment should be seen as an extraordinary remedy, requiring a

pursuer to demonstrate special circumstances. Once again, nearly all the other systems to which I was referred restrict protective attachment in this way. If financial difficulties are relied on as the reason for protective attachment, I am of opinion that the appropriate test is that there is a significant risk of the defender's insolvency. This would cover either absolute insolvency, in the sense of an excess of liabilities over assets, or practical insolvency, in the sense of inability to pay debts as they fall due; either of these involves a risk that the pursuer will not recover any sum to which he is found entitled. It should clearly not be necessary to establish actual insolvency, as that would justify insolvency proceedings; instead, it should be sufficient to show that there is a significant risk of insolvency. That is obviously an actual, and not merely a theoretical, risk, and there must be a factual basis for drawing the conclusion that such a risk exists. I return to this point later in this opinion.

[57] Third, if a pursuer must pass the test of a prima facie case and demonstrate special reasons for protective attachment, it is obvious that a hearing must take place at which the pursuer must satisfy a judge of those matters.

[58] Fourth, even with the foregoing safeguards, it may frequently turn out that protective attachment is not objectively justified. In such a case there is a real risk of significant detriment to the defender. In my opinion, if protective attachment is recognised as a remedy only available if special circumstances are shown, but the remedy turns out not to the objectively justified, the defender should be entitled to compensation if he suffers loss in consequence. This is in fact recognised by Scots law in cases where special reasons must be shown for protective measures during litigation: see ***Grant* v *Magistrates of Airdrie,*** *supra*; the same is generally true of interim interdict, which is granted *periculo petentis*.

[59] On all of the foregoing requirements, I am particularly impressed by the near unanimity of approach found in the European and North American legal systems discussed above. This is the clearest possible indication that Scots law is seriously out of step with general trends of contemporary legal thought in this area. It is also significant that the drastic nature of inhibition on the dependence has been the subject of repeated criticism by writers of Scots law since at least 1822.

[60] I am also impressed by the comparison with the rules on Scots law dealing with interim interdict. In North America, as indicated in the passage quoted above (at paragraph [50]) from Professor Maher 's article on Diligence on the Dependence, protective attachment is seen as part of the law of prejudgment remedies, and the law attempts to work from a coherent set of principles applying to all such remedies. In my opinion there is much to be said for such an approach. All interim remedies are designed to preserve matters while litigation proceeds; all are provisional in nature, granted without any definitive hearing on the merits of the case; and all may have serious consequences for the parties while the litigation proceeds, and sometimes even thereafter. These similarities seem to call for consistency in the underlying principles applicable to such remedies. In the case of interim interdict, Scots law requires a pursuer to demonstrate a *prima facie* case, and requires him to establish that special circumstances exist for the grant of the remedy; this involves showing that the balance of convenience favours the remedy. In considering the balance of convenience, of course, the court may consider a large number of matters, including the practical consequences of an order and the relative strengths of the pursuer's and defender's cases. Finally, as I have already mentioned, interim interdict is granted *periculo petentis*. Thus the principles of Scots law dealing with diligence on the dependence are significantly out of step with the principles that govern the other main interim remedy.

[61] In my opinion it is clear that the present law of inhibition on the dependence fails to meet all four of the foregoing requirements.

[62] On the first, it is assumed that the pursuer's claim is good, without any serious examination of the merits beyond the question of whether there is a "*colourable case*". That standard is clearly less than a prima facie case.

[63] On the second, inhibition on the dependence involves the automatic freezing of the whole of the defender's heritable assets, in such a way that alienation of any sort is in practice rendered impossible. Releasing any part of those assets from that restriction on alienation generally requires that the defender should find caution for the full sum sued for, plus expenses, or consign an equivalent sum. Consignation

has the effect of tying up the funds concerned for the duration of the action, which can be several years. Finding caution involves substantial expense, and, as explained above, in order to obtain caution a defender will frequently require to grant security over equivalent assets in favour of the cautioner. That again has the effect of sterilising assets. The remarks of Lord Penrose in ***Interconnection Systems v. Holland***, *supra*, are in point. The effect of inhibition is especially serious in cases such as the present, where land is the defender's stock in trade. In such a case, the defender cannot carry on business without recall of the inhibition. Thus the consequences of an inhibition are serious for a defender, and except in the case of future and contingent debts and consistorial claims they arise without any requirement that the pursuer show special reasons for the remedy.

[64] It is clear that Scots law does not require a hearing before a judge before inhibition on the dependence is granted, apart from exceptional cases such as future and contingent debts, consistorial claims and cases where inhibition is granted at a time after signeting of the summons. Because it is granted automatically in other cases, there is no need for a hearing.

[65] On the fourth of the foregoing requirements, if the pursuer's claim turns out to be ill-founded, the defender has no redress for the use of the diligence unless he can show malice, or certain types of procedural defect. Thus there is no right to compensation for use of diligence that is not objectively justified.

[66] For these reasons I am of opinion that the automatic right to an inhibition conferred by Scots law, with very limited right to compensation for use of the diligence without objective justification, does not strike a fair balance between the interest of the pursuer in having assets available to satisfy his claim and the right of the defender, recognised in article 1 of the First Protocol, to dispose of his property as he wants. The requirement of proportionality is accordingly not satisfied. For the reasons discussed above, however, I would not reach that conclusion in any case where it could be shown by the pursuer that the defender was taking steps to dissipate or conceal his assets, or that there was a substantial risk of the defender's insolvency, or that there was a significant risk that he would remove his assets from the jurisdiction, provided that a *prima facie* case exists. These three sets of circumstances are the obvious cases when the court is justified in intervening to secure assets to satisfy a pursuer's claim.

Margin of appreciation and its national equivalent

[67] The European Court of Human Rights has repeatedly acknowledged that in the states which recognise its jurisdiction the national authorities enjoy a margin of appreciation in the implementation of the Convention, largely on the ground that the national authorities are better placed to take account of local conditions. The margin of appreciation has an equivalent in national law, namely the principle that the courts should show respect for decisions of the legislature and, to some extent, the executive: see ***R.* v *DPP, ex parte Kebilene***, [2000] 2 AC 326, at 380E-381E per Lord Hope of Craighead; ***Brown* v *Stott,*** 2001 SC (PC) 43, at 66B-H, per Lord Steyn.

[68] Mr Smith argued that I should have regard to this principle, and should show restraint in interfering with well established rules of Scots law.

[69] The margin of appreciation and the equivalent principle in national law are in large measure based on the idea that the aims of the articles of the Convention can usually be achieved in a number of different ways. It is accordingly open to the national authorities of the individual states to decide which method of achieving those aims is to be used. An obvious example is the right to fair trial under article 6; this is achieved by widely differing procedures in different European states. Nevertheless, provided that the totality of legal proceedings results in fairness to the parties, the requirements of the article will be held to be satisfied.

[70] Within a single national system of law, it will frequently be the legislature or the executive that is in the best position to determine how the margin of appreciation accorded to the national authorities should be exercised. In cases where the legislature has chosen to act, it is obvious that the courts must exercise great restraint in interfering with the decisions made by it; the legislature is the democratically elected organ of government . The same is true to some extent of decisions of the executive, although for somewhat different reasons. The function of the executive is to govern in an effective manner, and the

courts must allow it to do so; in particular, they should be slow to take over functions involving the exercise of administrative discretion, or to foreclose major budgetary decisions. Similarly, 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. 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; the common law can be regarded as just such a response. Consequently, in every case where a common law principle or practice is challenged under the Convention, the court must consider whether the principle or practice in question can be regarded as a legitimate way of achieving the aims of the Convention, having regard to the national equivalent of the margin of appreciation.

[71] The present case concerns a particular interim remedy, namely judicial security over the defender's immovable property prior to the court's ultimate determination of an action. It seems clear, both in principle and by reference to the various systems of law discussed above, that such a security can only be achieved in one way, namely by a form of provisional attachment of the defender's immoveable property, in such a way as to prevent him from alienating or granting securities over that property. All of the national legal systems to which I was referred recognise a security of that nature. Thus a single, narrowly defined, form of remedy is under consideration. In that situation, there is in my opinion inherently less scope for application of the margin of appreciation, or its national equivalent.

[72] 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 for a judicial security used without objective justification. Ultimately, I am of 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.

Consequences under the Human Rights Act of contravention of article 1 of the First Protocol

[73] For the reasons discussed in the last two sections of this opinion, I reach the conclusion that, if the pursuers have a right to inhibition on the dependence in the present case without establishing special circumstances, there has been a contravention of the defenders' Convention rights by the grant of inhibition on the dependence. The next question is the remedy available for that contravention.

[74] Counsel 's submissions centred around section 3 of the Human Rights Act and Rule of Court 13.6; I was invited to construe that rule in a way that was consistent with article 1 of the First protocol. I am nevertheless of opinion that the defenders' fundamental complaint is not about that rule; all that the rule does is to make inhibition available through a warrant in the summons in cases where the common law procedure of letters of inhibition would be available. The rule is, in any event, subject to the provisions of the common law and any other statutory provision, which obviously includes the Human Rights Act 1998. Moreover, inhibition itself is a common law remedy. Consequently the defenders' complaint is not in reality about any statutory provision but about provisions of the common law; in particular, the automatic availability of the remedy, with minimal regard to either the merits of the action or the defender's financial position, and the absence of any right to compensation for the wrongful use of the diligence are both features of the common law.

[75] The Human Rights Act is not particularly helpful in determining the relationship of the Convention to the common law. Section 6(3)(a) states that a court is a "public authority" for the purposes of section 6, and section 6(1) states that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. It is therefore clear that a court is bound by the Convention to some extent. It has been suggested by at least one writer, Professor Sir William Wade (in a contribution to "Constitutional Reform in the United Kingdom: Practice and Principles", edited by Beatson, Forsyth and Hair (Oxford, 1998), and an article, "Horizons of Horizontality", (2000) 116 L.Q.R. 217) that the result is that a court

must follow the Convention in any case where that there is a conflict between the common law and a Convention right. In my opinion that view is too extreme. In particular, it seems fundamentally at odds with the structure of the Human Rights Act, which does not make the Convention directly effective except in relation to public authorities. That limitation on direct effectiveness would not have been necessary if the Convention were intended to prevail over the common law in all cases; indeed, a wholly different structure would be expected if that were the intention of Parliament.

[76] The question thus arises as to how far the courts are bound by the Convention in common law matters. In my opinion the applicability of the Convention must extend at least to what may be described as the "internal" processes of the court, as against the rights that individuals and other private legal persons have against one another as a matter of substantive law. Those "internal" processes include the procedures that the court follows and, crucially, the remedies that the court makes available. I reach this conclusion because those are matters that involve the court's own processes. The statement in section 6(3)(a) that a court is a public authority must have some content, and the minimum content that can be given is in my opinion the subjection of the court's procedures and remedies to the Convention. The proposition that a national court's remedies are subject to the Convention is supported by Strasbourg case law, notably the decision in *Tolstoy* v *United Kingdom*, 1995, 20 EHRR 442, where the level of damages awarded in an English libel action was held to the incompatible with article 10 of the Convention. Such decisions are obviously not conclusive in relation to the meaning of section 6 of the Human Rights Act; nevertheless, they indicate that the courts are organs of the state for the purposes of the Convention, and that it is expected that a court's remedies and procedures will accord with the Convention. The view that the Convention is directly applicable to remedies and procedures seems to be supported by textbooks on The Human Rights Act: see Clayton and Tomlinson, The Law of Human Rights (Oxford, 2000), paragraphs 5.81-5.83; and also Mulcahy (ed), Human Rights and Civil Practice (London, 2001), paragraphs 5.31 and 5.47.

[77] In my opinion inhibition on the dependence is properly categorised as a remedy granted by the court. It is essentially a form of judicial security pending the resolution of litigation, and judicial securities of that nature are almost universally regarded as a form of interim remedy. If that is so, the court cannot grant an inhibition on the dependence in a manner that is incompatible with a defender's Convention rights. That means that a court cannot grant inhibition on the dependence automatically, whether on the signeting of a summons or by letters of inhibition. Instead, inhibition on the dependence can only be granted if a specific justification is put forward for the grant. In addition, for the reasons discussed previously, I am of opinion that the court must be satisfied that the pursuer has a *prima facie* case.

Conclusion

[78] In the present case no specific justification has been put forward by the pursuers for inhibition on the dependence of the action. It is not said, for example, that there is any substantial risk of the defenders' insolvency, in the sense of either absolute or practical insolvency. Nor is it said that the defenders are taking steps to conceal or dissipate their assets, or are even suspected of taking such steps. Consequently I must conclude that, if the pursuers have a right to inhibition on the dependence without establishing special circumstances, the present inhibition is incompatible with the defenders' Convention rights, and that section 6(1) and (3)(a) of the Human Rights Act requires that the court should give effect to those rights. On that basis the present inhibition on the dependence is wrongful, and must be recalled.

[79] I should conclude by stating that, even on the foregoing view of the law, inhibition on the dependence would continue to be widely available. I have suggested (at paragraph [56]) that it would be a sufficient justification for use of inhibition on the dependence 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. In cases where a pursuer sues for a liquid debt which has been the subject of a demand for payment, and either there is no obvious defence to the claim or the pursuer is able to aver that he is not aware of any possible basis for a defence, I am of opinion that the court would be justified in drawing the inference that there is a substantial risk of practical insolvency from the defender's failure to pay. In such a case, accordingly, inhibition on the dependence would normally be available. That would apply, for example, to an action for repayment of a loan repayable on demand, such as a bank overdraft, or to

an action for the price of goods where the pursuer was able to aver that there was no dispute about the quality or fitness for purpose of the goods, or to an action for duly assessed taxes that had not been paid. If the justification put forward by a pursuer for inhibition on the dependence turns out to be false, on the existing authorities it is likely that he will be liable to compensate the defender for wrongful use of diligence; that follows from the principle stated in *Grant* v *Magistrates of Airdrie, supra*. Thus, for example, if a pursuer sues for the price of goods and avers that he does not know of any basis on which the defender could refuse payment for the goods supplied, and the defender has in fact made a complaint about the quality of the goods, the pursuer would be liable for the wrongful use of diligence.

[80] For the reasons discussed previously, I am of opinion that inhibition on the dependence will not be automatically available, even in cases where it seems possible to draw a clear inference of practical insolvency; the motion for inhibition would still have to go before a judge, who would require to the satisfied that the pursuer had a *prima facie* case and that there was a specific justification for inhibition on the dependence. I do not think that that should cause any great practical difficulty. At present, in cases where inhibition on the dependence is sought in an action for a future or contingent debt, the application must be made to a judge, who must be satisfied that special circumstances are available. The same is true of inhibition in consistorial actions. While the number of such applications will obviously increase, the time taken to consider most applications should not be great, and it is likely that applications will simply not be made in cases were there is not a specific justification for diligence. There is no evidence that in countries such as England, where a specific justification must be put forward for the equivalent remedy, the need for a hearing has made undue demands on judicial time.

[81] I should emphasise that my opinion in this case is concerned solely with inhibition on the dependence of an action with pecuniary conclusions. It 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.

[82] In the foregoing circumstances, I conclude that the present action is in substance to recover a contingent debt, and that no special circumstances have been put forward to justify the use of inhibition on the dependence; and further that in any event the use of inhibition on the dependence is in the present case contrary to article 1 of the First Protocol to the European Convention on Human Rights. For these reasons, I have recalled the inhibition used by the pursuers against the defenders. In conclusion, I should thank both counsel for their excellent arguments; these dealt with difficult and complex issues in a manner that was both clear and concise.

Pursers: S.C. Smith; MacRoberts
Defenders: Wolffe; Paull & Williamsons