



Diligence on the dependence: the new rules

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Good old days, Practical Debt recovery, poinding at Christmas and warrant sales as a cure to excessive consumerism.

Free availability of diligence on the dependence. Getting your client up the queue, the delights of the rule in Claytons case and Bell's Canons of ranking.

Bankruptcy and speeding tickets.

The Bankruptcy and Diligence (S) etc Act 2007 ("the BAD Act") largely came into force on 1st April 2008 but it is really on in more recent times that the rules have begun to become clear.

First question: why bother.

Section 146 allowed for the first time inhibition to be granted in the Sheriff Court.

Unfortunately s154 (1) provides:

(1) An inhibition does not confer any preference in any—

(a) sequestration;

(b) insolvency proceedings; or

(c) other process in which there is ranking.

This has important consequences as to whether or not a creditor wishes an inhibition and also whether or not the Court is minded to grant it.

The effect of the new rule is substantial. It means, for example, that a lender who already has a standard security or floating charge is not affected by the inhibition and new monies advanced will not rank behind the inhibitor. In *Beaghmor Property Ltd-v-Station Properties Ltd* [2009] CSOH 133 the issue before Lord Hodge was whether or not it was reasonable in the circumstances to keep the inhibition in place. He commented:

“In some cases the prospect of insolvency may be such that it militates against the grant of warrant for diligence on the dependence because it is clear that the diligence cannot protect the enforcement of a decree in future. This may arise particularly in relation to the diligence of inhibition which is merely a prohibitory diligence and does not attach the land. At common law it ranked after debts which have already been secured and gave no preference in relation to prior unsecured debts. On insolvency it secured more than a *pari passu* ranking at the expense only of posterior creditors: see Bell's Canons of Ranking in “Commentaries” (McLaren's ed.) Vol II, p.413 and Baird and Brown v Stirrat's Trustee (1872) 10 M 414. An inhibition registered after 22 April 2009, when section 154 of the Bankruptcy and Diligence Etc (Scotland) Act 2007 came into force, does not confer any preference in ranking. Thus in many cases the imminent prospect of the debtor's insolvency may make it unreasonable to grant warrant for such diligence or maintain it in effect. In this case, however, there is a prospect of an advantageous sale of the site at a sum which significantly exceeds Station's current liabilities. There appears therefore to be something to secure.”

On a more practical level I would suggest that the impact of s154 is that a creditor needs to give consideration as to whether or not it will in fact apply pressure on the debtor to address the debt. If their banker is not concerned and they have no imminent intention of selling heritage the effect of the inhibition may be negligible.

It appears to me that the effect of s154 has been rather underrated. What has happened is that one of the few effective tools in the locker of an aggrieved creditor in Scotland has been turned into a shadow of its former self. In my experience inhibitions on the dependence are now a concern for development companies and house builders but for comparatively few others.

S169 inserted a series of sections into the Debtors (S) Act 1987 number 15A to 15 N copies of which are annexed.

s15D (2) provides that applications were to be made in the form provided for by “the Act of Sederunt”.

At the time the Act came into force there was no Act of Sederunt.

For the Court of Session this is the Act of Sederunt (Rules of the Court of Session Amendment No. 3) (Bankruptcy and Diligence etc. (Scotland) Act 2007) 2008/122 (Scottish SI).

For the Sheriff Court the equivalent provision is the Act of Sederunt (Sheriff Court Rules Amendment) (Diligence) 2008/121.

Both of these statutory Instruments supposedly came into effect on 1st April 2008 but only for those of psychic ability as they were not available for some time after the Act came into force despite supposedly both being dated 13th March 2008.

Key points of the new provisions

It is still possible to obtain diligence on the dependence before the defender knows you are coming. This is permitted by an application under s15E which allows the Court to grant diligence without notice. When these rules first came into force I made a series of applications like this. Most of them did not even require me to appear before a Judge and were granted automatically on the basis of the averments in the summons. These averments of course have to be drafted with an eye on the provisions of the section itself to ensure that the tests are met.

In more recent times, certainly in the Commercial Court in the Court of Session and increasingly in the Outer House, Judges are not minded to grant diligence without a hearing at which the other side has the opportunity to be represented. This is an s15F hearing. In my experience these hearings are expensive *and* protracted involving a mini-debate of the pleadings, a consideration of the defences that are to be made and a careful consideration of the consequences of granting the diligence.

The tests to be applied

Under both s15F and s15K which regulates the procedure when diligence has been granted ex parte and an application for recall has been made the Court applies certain key tests.

The Initial Writ or summons must disclose a prima facie case. In the leading authority of *Gillespie-v-Toondale Ltd* 2006 SC 304 the Inner House adopted Lord Drummond Young's test of "a good arguable cause" which was said to be a "substantial hurdle" which is

more than a colourable case. The earlier case was *Barry D Trentham Ltd-v-Lawfield Investments Ltd* 2002 SC 401 where Lord Drummond Young said:

"The expression 'good arguable case', used in English law in relation to Mareva injunctions, may give a good idea of what is intended. If, at the stage of a motion for recall, an apparently substantial defence is put forward to the pursuer's claim, it is in my opinion appropriate for the court to scrutinise the claim and the defence and to determine whether in all the circumstances inhibition is appropriate, or whether it should be recalled, either absolutely or subject to conditions. This is in my view an aspect of the requirement of a *prima facie* case, in the sense of a good arguable case; if there is an apparently substantial defence to the pursuer's claim it is difficult to say, on the basis of the whole of the material before the court, that that claim amounts to a good arguable case. If no substantial defence is put forward, of course, all that the court requires to consider is whether the pursuer has set out a good *prima facie* case."

I attempted to rely upon this in the case of *MRK 1 Ltd-v-Sakur* [2008] CSOH 176 by lodging detailed defences which explained why the documents relied upon were fraudulent. Lord Pentland concluded that these defences did not have a plea in law seeking the setting aside of these documents *ope exceptionis* and were therefore irrelevant.

My practice since that time has been not to lodge defences *per se* but to give a detailed outline of the defence. I have to say that in general I have found Judges reluctant to undertake the kind of weighing exercise contemplated by Lord Drummond Young.

In my experience it is very difficult for a defender to successfully argue that there is not a *prima facie* case at the commencement of the action. Unless readily demonstrated to be false by documents of the pursuers themselves the averments in the writ will be taken *pro veritate*. Judges and Sheriffs will generally not submit the pleadings to the sort of critical analysis as one might achieve at debate. In my experience the court is willing to consider even obvious defects in the context that they may well be capable of rectification during the process of the action. In a recent example where I was successful my client was being sued for £1.5M on a construction contract. They were suing on an interim application for payment and had since lodged a final account. This showed discrepancies of nearly £500,000 on some of the items claimed and, I thought, gave the pursuers problems in seeking to make a *prima facie* case for the interim certificate which was the basis of the conclusion. Although with me overall Lord Glennie

disagreed commenting: "No doubt these are the sort of issues that will be addressed during the adjustment period."

This does not mean that it is not worth trying. Even if you fail the existence of "a good going defence" or obvious flaws will make the Court far more sympathetic to a debtor when getting to the later stages where the court has a wide discretion.

The likelihood that decree will be defeated by insolvency or the hiding of assets

In the good old days a debtor who was alleged to be *vergens ad inopiam* or in *meditatione fugae* (*which always sounded so much more evil in Latin and worthy of condemnation*) was fair game for any form of diligence that you wished to apply for. The consequence of an inhibition not granting any preference did not have any immediate effect but is now starting to have an effect in the Court of Session. Debtors in particular are being protected from the damaging effect inhibitions can have on their business. The fact the debtor is poor is now unlikely to be telling unless you can bring the suspicion of evasion into play. It is therefore essential if seeking diligence on the dependence to make averments about bounced cheques, promises to pay not fulfilled, suspicions that favourites are being played amongst creditors as well as any concern that assets may be going walk about. It is clear that in considering such matters it is appropriate to look not only at the current position but also the future: *Barry D Trentham Ltd v Lawfield Investments Ltd* 2002 SC 401. This approach was approved in *McCormack v Hamilton Academical Football Club Ltd* 2009 SC 313 which also decided that the section was focussed not so much on practical insolvency (which the club wasn't) but absolute insolvency (which the club were). The case is also interesting because they decided that although £90K was being sued for a more realistic assessment of the claim was £40K and the arrestment was restricted to that. This is another obvious potential benefit from fighting the prima facie case point.

There is an interesting tension between the approach of the Extra Division in *McCormack* and the observations of Lord Hodge in *Beahmor*. In *McCormack* the court was dealing with an arrestment which had had an effect as it had attached the gate money after a quarter final match in the Cup. The absolute insolvency of the club was held to justify that diligence on the dependence and the Division did not give a lot of time to considering whether this was going to kill the goose that laid the golden egg as referred to by Lord Hodge.

The Opinion of the Court said:

"The Lord Ordinary was in error in apparently confining his consideration to whether the defenders were practically insolvent. They may not be, since they continue to pay their debts as they fall due. But there is no doubt, on the other hand, that the defenders are absolutely insolvent, in the sense that their liabilities well exceed their assets. Their continued existence must depend, as the docquet on the accounts states, on the goodwill of their creditors. Whatever the state of that goodwill may be at present, it is difficult to argue that there is no 'risk' that the pursuer's decree, were he to secure one, will be not be prejudiced or defeated in the future by what is admittedly absolute insolvency. Again, in that regard, the Lord Ordinary was in error in apparently confining his consideration to the 'imminent' position, rather than to both that position and the state of affairs at the point in the future when a decree might be secured. In order properly to assess risk, the court has to consider when the pursuer might secure a decree and what the defenders' position at that time might be."

I would suggest that such speculative exercises are likely to assist the creditor. It will be very difficult for a court approaching the matter in the manner indicated in this case to conclude that a debtor who is already in trouble might not be in worse trouble by the time the case comes to proof a year later. This is therefore one of the few really useful decisions for creditors.

"Reasonable in all the circumstances"

S15F (3) and s15K (9) (c) both require the Court to consider whether it is reasonable in all the circumstances that the diligence be granted. This is an almost unfettered discretion making appeals difficult although, as the *McCormack* case shows, not impossible. The observations quoted from Lord Hodge above were made in this context. It should not be difficult for a defender to point to some adverse consequences of diligence, even if it is only upsetting the Bank. It is not easy for the creditor to show a consequential gain unless an arrestment has attached a sum of money. It is open to the pursuers or the defenders to suggest alternatives. In the same recent case before Lord Glennie which I was involved in the pursuers wanted a mandate of free proceeds of sale for houses as they were sold. We offered adjudication which we knew the pursuers would not want and their reluctance to have an early resolution of the dispute told against them. I also ran an argument about a contingent debt in that case. Before the 2007 Act diligence on the dependence on a contingent debt such as a claim that had not been certified as due under a building contract was incompetent: *Costain Building and Civil Engineering Group Ltd-v-SRU* 1993 SC 650. That is no longer the case as a result of

s15D but that does not mean the fact that the debt was contingent is not a relevant circumstance for the Court to taken into account.

The onus on the creditor

S15F (4) and s15K (10) both expressly provide that the onus of demonstrating the need for the diligence either being granted or staying in place is on the creditor. In my experience this means very little, usually no more than that the pursuer leads in the submissions. A consequence of the reluctance of the Courts to find that there is not a prima facie case in there somewhere is that this onus is usually then discharged and carries little weight. I must say that I can see no reason why these provisions should be restricted to this prima facie case but that is the current position.

Conclusions

It is undoubtedly much harder and less rewarding to obtain diligence on the dependence of an action than it used to be. Serious consideration needs to be given as to whether or not the pursuer wants to take the risk of getting tied up into expensive hearings (the loser in the last 3 I have been involved in would have had no change out of £5,000) where the deck has undoubtedly been stacked against him. Where the defender is "at it" there may be no choice but it is no longer the "no brainer" it once was. The key used to be pressure. I think the key is now fraud or dissipation of assets. Despite the decision in *McCormack* the current tide is not flowing in the creditor's favour.

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PART 1A DILIGENCE ON THE DEPENDENCE

Availability of diligence on the dependence

15A Diligence on the dependence of action

(1) Subject to subsection (2) below and to sections 15C to 15F of this Act, the Court of Session or the sheriff may grant warrant for diligence by—

- (a) arrestment; or
 - (b) inhibition,
- on the dependence of an action.

(2) Warrant for—

- (a) arrestment on the dependence of an action is competent only where the action contains a conclusion for payment of a sum other than by way of expenses; and
- (b) inhibition on the dependence is competent only where the action contains—
 - (i) such a conclusion; or
 - (ii) a conclusion for specific implement of an obligation to convey heritable property to the creditor or to grant in the creditor's favour a real right in security, or some other right, over such property.

(3) In this Part of this Act, "action" includes, in the sheriff court—

- (a) a summary cause;
 - (b) a small claim; and
 - (c) a summary application,
- and references to "summons", "conclusion" and to cognate expressions shall be construed accordingly.

15B Diligence on the dependence of petition

(1) Subject to subsection (2) below and to sections 15C to 15F of this Act, the Court of Session may grant warrant for diligence by—

- (a) arrestment; or
 - (b) inhibition,
- on the dependence of a petition.

(2) Warrant for—

- (a) arrestment on the dependence of a petition is competent only where the petition contains a prayer for payment of a sum other than by way of expenses; and
- (b) inhibition on the dependence is competent only where the petition contains—
 - (i) such a prayer; or
 - (ii) a prayer for specific implement of an obligation to convey heritable property to the creditor or to grant in the creditor's favour a real right in security, or some other right, over such property.

(3) The provisions of this Act (other than section 15A), of any other enactment and of any rule of law relating to diligence on the dependence of actions shall, in so far as is practicable and unless the contrary intention appears, apply to petitions in relation to which it is competent to grant warrant for such diligence and to the parties to them as they apply to actions and to parties to them.

15C Diligence on the dependence to secure future or contingent debts

(1) It shall be competent for the court to grant warrant for diligence on the dependence where the sum concluded for is a future or contingent debt.

(2) In this section and in sections 15D to 15M of this Act, the "court" means the court before which the action is depending.

“Application for diligence on the dependence

15D Application for diligence on the dependence

(1) A creditor may, at any time during which an action is in dependence, apply to the court for warrant for diligence by—

- (a) arrestment; or
 - (b) inhibition,
- on the dependence of the action.

(2) An application under subsection (1) above shall—

- (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt;
- (b) subject to subsection (3) below, be intimated to and provide details of—
 - (i) the debtor; and
 - (ii) any other person having an interest;
- (c) state whether the creditor is seeking the grant, under section 15E (1) of this Act, of warrant for diligence on the dependence in advance of a hearing on the application under section 15F of this Act; and
- (d) contain such other information as the Scottish Ministers may by regulations prescribe.

(3) An application under subsection (1) above need not be intimated where the creditor is seeking the grant, under section 15E (1) of this Act, of warrant in advance of a hearing on the application under section 15F of this Act.

(4) The court, on receiving an application under subsection (1) above, shall—

- (a) subject to section 15E of this Act, fix a date for a hearing on the application under section 15F of this Act; and
- (b) order the creditor to intimate that date to—
 - (i) the debtor; and
 - (ii) any other person appearing to the court to have an interest.

15E Grant of warrant without a hearing

(1) The court may, if satisfied as to the matters mentioned in subsection (2) below, make an order granting warrant for diligence on the dependence without a hearing on the application under section 15F of this Act.

(2) The matters referred to in subsection (1) above are—

- (a) that the creditor has a *prima facie* case on the merits of the action;
- (b) that there is a real and substantial risk enforcement of any decree in the action in favour of the creditor would be defeated or prejudiced by reason of—
 - (i) the debtor being insolvent or verging on insolvency; or
 - (ii) the likelihood of the debtor removing, disposing of, burdening, concealing or otherwise dealing with all or some of the debtor's assets,
 were warrant for diligence on the dependence not granted in advance of such a hearing; and
- (c) that it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to do so.

(3) The onus shall be on the creditor to satisfy the court that the order granting warrant should be made.

(4) Where the court makes an order granting warrant for diligence on the dependence without a hearing on the application under section 15F of this Act, the court shall—

- (a) fix a date for a hearing under section 15K of this Act; and
- (b) order the creditor to intimate that date to—
 - (i) the debtor; and
 - (ii) any other person appearing to the court to have an interest.

(5) Where a hearing is fixed under subsection (4) (a) above, section 15K of this Act shall apply as if an application had been made to the court for an order under that section.

- (6) Where the court refuses to make an order granting a warrant without a hearing under section 15F of this Act and the creditor insists in the application, the court shall—
- (a) fix a date for such a hearing on the application; and
 - (b) order the creditor to intimate that date to—
 - (i) the debtor; and
 - (ii) any other person appearing to the court to have an interest.

15F Hearing on application

- (1) At the hearing on an application for warrant for diligence on the dependence, the court shall not make any order without first giving—
- (a) any person to whom intimation of the date of the hearing was made; and
 - (b) any other person the court is satisfied has an interest, an opportunity to be heard.
- (2) The court may, if satisfied as to the matters mentioned in subsection (3) below, make an order granting warrant for diligence on the dependence.
- (3) The matters referred to in subsection (2) above are—
- (a) that the creditor has a *prima facie* case on the merits of the action;
 - (b) that there is a real and substantial risk enforcement of any decree in the action in favour of the creditor would be defeated or prejudiced by reason of—
 - (i) the debtor being insolvent or verging on insolvency; or
 - (ii) the likelihood of the debtor removing, disposing of, burdening, concealing or otherwise dealing with all or some of the debtor's assets, were warrant for diligence on the dependence not granted; and
 - (c) that it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to do so.
- (4) The onus shall be on the creditor to satisfy the court that the order granting warrant should be made.
- (5) Where the court makes an order granting or, as the case may be, refusing warrant for diligence on the dependence, the court shall order the creditor to intimate that order to—
- (a) the debtor; and
 - (b) any other person appearing to the court to have an interest.
- (6) Where the court makes an order refusing warrant for diligence on the dependence, the court may impose such conditions (if any) as it thinks fit.
- (7) Without prejudice to the generality of subsection (6) above, those conditions may require the debtor—
- (a) to consign into court such sum; or
 - (b) to find caution or to give such other security, as the court thinks fit.

Execution before service

15G Execution of diligence before service of summons

- (1) This section applies where diligence by—
- (a) arrestment; or
 - (b) inhibition,
- on the dependence of an action is executed before service of the summons on the debtor.
- (2) Subject to subsection (3) below, if the summons is not served on the debtor before the end of the period of 21 days beginning with the day on which the diligence is executed, the diligence shall cease to have effect.
- (3) The court may, on the application of the creditor, make an order extending the period referred to in subsection (2) above.
- (4) In determining whether to make such an order the court shall have regard to—
- (a) the efforts of the creditor to serve the summons within the period of 21 days; and

(b) any special circumstances preventing or obstructing service within that period.

Restriction on property attached

15H Sum attached by arrestment on dependence

(1) The court may, subject to subsection (2) below, when granting warrant for arrestment on the dependence, limit the sum which may be attached to funds not exceeding such amount as the court may specify.

(2) The maximum amount which the court may specify under subsection (1) above shall be the aggregate of—

- (a) the principal sum concluded for;
- (b) a sum equal to 20 per cent of that sum or such other percentage as the Scottish Ministers may, by regulations, prescribe;
- (c) a sum equal to 1 year's interest on the principal sum at the judicial rate; and
- (d) any sum prescribed under subsection (3) below.

(3) The Scottish Ministers may, by regulations, prescribe a sum which appears to them to be reasonable having regard to the expenses likely to be—

- (a) incurred by a creditor; and
 - (b) chargeable against a debtor,
- in executing an arrestment on the dependence.

(4) For the avoidance of doubt, section 73F of this Act applies to any sum attached under this section.

15J Property affected by inhibition on dependence

Where the court grants warrant for diligence by inhibition on the dependence—

- (a) in a case where the action is brought for specific implement of an obligation—
 - (i) to convey heritable property to the creditor;
 - (ii) to grant in the creditor's favour a real right in security over such property; or
 - (iii) to grant some other right over such property,
 the court shall limit the property inhibited to that particular property; and
- (b) in any other case, the court may limit the property inhibited to such property as the court may specify.

Recall etc. of diligence on the dependence.

15K Recall or restriction of diligence on dependence

(1) This section applies where warrant is granted for diligence on the dependence.

(2) The debtor and any person having an interest may apply to the court for an order—

- (a) recalling the warrant;
- (b) restricting the warrant;
- (c) if an arrestment or inhibition has been executed in pursuance of the warrant—
 - (i) recalling; or
 - (ii) restricting,
 that arrestment or inhibition;
- (d) determining any question relating to the validity, effect or operation of the warrant; or
- (e) ancillary to any order mentioned in paragraphs (a) to (d) above.

(3) An application under subsection (2) above shall—

- (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
- (b) be intimated to—
 - (i) the creditor; and
 - (ii) any other person having an interest.

(4) At the hearing on the application under subsection (2) above, the court shall not make any order without first giving—

- (a) any person to whom intimation of the application was made; and

- (b) any other person the court is satisfied has an interest, an opportunity to be heard.
- (5) Where the court is satisfied that the warrant is invalid it—
- (a) shall make an order—
 - (i) recalling the warrant; and
 - (ii) if an arrestment or inhibition has been executed in pursuance of the warrant, recalling that arrestment or inhibition; and
 - (b) may make an order ancillary to any order mentioned in paragraph (a) above.
- (6) Where the court is satisfied that an arrestment or inhibition executed in pursuance of the warrant is incompetent, it—
- (a) shall make an order recalling that arrestment or inhibition; and
 - (b) may make an order ancillary to any such order.
- (7) Subject to subsection (8) below, where the court is satisfied that the warrant is valid but that—
- (a) an arrestment or inhibition executed in pursuance of it is irregular or ineffective; or
 - (b) it is reasonable in all the circumstances, including the effect granting warrant may have had on any person having an interest, to do so,
- the court may make any order such as is mentioned in subsection (2) above.
- (8) If no longer satisfied as to the matters mentioned in subsection (9) below, the court—
- (a) shall make an order such as is mentioned in subsection (5) (a) above; and
 - (b) may make an order such as is mentioned in subsection (5) (b) above.
- (9) The matters referred to in subsection (8) above are—
- (a) that the creditor has a *prima facie* case on the merits of the action;
 - (b) that there is a real and substantial risk enforcement of any decree in the action in favour of the creditor would be defeated or prejudiced by reason of—
 - (i) the debtor being insolvent or verging on insolvency; or
 - (ii) the likelihood of the debtor removing, disposing of, burdening, concealing or otherwise dealing with all or some of the debtor's assets; and
 - (c) that it is reasonable in all the circumstances, including the effect granting warrant may have had on any person having an interest, for the warrant or, as the case may be, any arrestment or inhibition executed in pursuance of it to continue to have effect.
- (10) The onus shall be on the creditor to satisfy the court that no order under subsection (5), (6), (7) or (8) above should be made.
- (11) In granting an application under subsection (2) above, the court may impose such conditions (if any) as it thinks fit.
- (12) Without prejudice to the generality of subsection (11) above, the court may impose conditions which require the debtor—
- (a) to consign into court such sum; or
 - (b) to find such caution or to give such other security,
- as the court thinks fit.
- (13) Where the court makes an order under this section, the court shall order the debtor to intimate that order to—
- (a) the creditor; and
 - (b) any other person appearing to the court to have an interest.
- (14) This section applies irrespective of whether warrant for diligence on the dependence is obtained, or executed, before this section comes into force.

15L Variation of orders and variation or recall of conditions

- (1) Where—
- (a) an order restricting warrant for diligence on the dependence is made under section 15K (7); or
 - (b) a condition is imposed by virtue of—
 - (i) section 15F (6); or
 - (ii) section 15K (11),

of this Act, the debtor may apply to the court for variation of the order or, as the case may be, variation or removal of the condition.

(2) An application under subsection (1) above shall—

(a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt; and

(b) be intimated to—

(i) the creditor; and

(ii) any other person having an interest.

(3) At the hearing on the application under subsection (1) above, the court shall not make any order without first giving—

(a) any person to whom intimation of the application was made; and

(b) any other person the court is satisfied has an interest,

an opportunity to be heard.

(4) On an application under subsection (1) above, the court may if it thinks fit—

(a) vary the order; or

(b) vary or remove the condition.

(5) Where the court makes an order varying the order or, as the case may be, varying or removing the condition, the court shall order the debtor to intimate that order to—

(a) the creditor; and

(b) any other person appearing to the court to have an interest.

General and miscellaneous

15M Expenses of diligence on the dependence

(1) Subject to subsection (3) (a) below, a creditor shall be entitled to such expenses as the creditor incurs—

(a) in obtaining warrant for diligence on the dependence; and

(b) where an arrestment or inhibition is executed in pursuance of the warrant, in so executing the arrestment or inhibition.

(2) Subject to subsection (3) (b) below, a debtor shall be entitled, where—

(a) warrant for diligence on the dependence is granted; and

(b) the court is satisfied that the creditor was acting unreasonably in applying for it, to the expenses incurred in opposing that warrant.

(3) The court may modify or refuse—

(a) such expenses as are mentioned in subsection (1) above if it is satisfied that—

(i) the creditor was acting unreasonably in applying for the warrant; or

(ii) such modification or refusal is reasonable in all the circumstances and having regard to the outcome of the action; and

(b) such expenses as are mentioned in subsection (2) above if it is satisfied as to the matter mentioned in paragraph (a) (ii) above.

(4) Subject to subsections (1) to (3) above, the court may make such finding as it thinks fit in relation to such expenses as are mentioned in subsections (1) and (2) above.

(5) Expenses incurred as mentioned in subsection (1) and (2) above in obtaining or, as the case may be, opposing an application for warrant shall be expenses of process.

(6) Subsections (1) to (5) above are without prejudice to any enactment or rule of law as to the recovery of expenses chargeable against a debtor as are incurred in executing an arrestment or inhibition on the dependence of an action.

15N Application of this Part to admiralty actions

This Part of this Act (other than sections 15H, 15J and 15M) shall apply, in so far as not inconsistent with the provisions of Part V of the Administration of Justice Act 1956 (c.46) (admiralty jurisdiction and arrestment of ships), to an arrestment on the dependence of an admiralty action as it applies to any other arrestment on the dependence.”.