

# Litigation Protective Measures

What a general practitioner needs to know and look out for

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# Litigation Protective Measures

- Caveats
- Interim interdict and interdict
- Diligence on the dependence

# Caveats

- What is a caveat?
- What does a caveat do?
- What does a caveat cover?
- When should a client be advised to obtain a caveat?
- Advantages of a caveat.

# Interim Interdict/Interdict

- Sought to stop a wrong being done, or prevent a wrong that is going to be done
- Open in a variety of different situations, for a variety of legal wrongs
- Sought on it's own or as part of a wider court action
- Effect of interdict – *quasi* criminal
- Breadth of interdict – can be sought Scotland wide

# Interim Interdict

- The test – title and interest to sue, *prima facie* case and balance of convenience
- It is at the court's discretion whether it will be granted
- Consider the pleadings, any documents in support of the pleadings and submissions of the agent/agents

# *Prima facie* case

- *Sundolitt Limited v Paul Addison* [2017] CSIH 15

“A *prima facie* case is one which is sufficiently well founded in law and asserted fact that it might succeed, subject to any future comprehensive examination of its relevancy, the exigencies of proof and the strength or otherwise of any defence....”

# Balance of convenience

- What way causes least damage?
- Undue delay
- Discretion an important factor

# Examples of common cases of Interdict

- Restrictive Covenants
- Intellectual property
- Harassment – Power of arrest/non-harassment orders
- Heritable interdicts – nuisance, encroachment, trespass
- Defamation
  
- Introduction of the ability to seek interim orders *ad factum praestandum*



# Practicalities of seeking interim interdict

- Raise actions in sheriff court – keep costs down
- Commercial court in Edinburgh and Glasgow
- Hearings fixed same day
- Specialist commercial sheriffs

# Be wary...

- Court expects progress
- Damages for wrongful interdict

# Diligence on the dependence

- Part 1A of the Debtors (Scotland) Act 1987
- Arrestment
- Inhibition
- Can be sought anytime during the dependence of an action – commonly at the start (in terms of section 15E(1))

# Arrestment

- Arrest sums in the hands of third parties, pending the outcome of the action
- Action raised must contain crave for payment
- Court may limit sum that is to be attached by arrestment

# Inhibition

- Must be an action for payment

or

- an action for specific implement of an obligation to convey heritable property or to grant a real right in security, or some other right, over such property.
- Court shall limit inhibition to particular heritable property in second scenario, may limit it in first scenario

# Inhibition

- Inhibition is served and registered in the Registers of Inhibitions
- Provides for a block on the sale, further loans and change to the burdens of the property in question

# The test

- Section 15E (without hearing), Section 15F (with hearing):
- *Prima facie* case - *Gillespie v Toondale Ltd* 2006 S.C. 2004
- Real and substantial risk – *Hughes v Hughes* 2011 WL 2748598
  - Insolvent or verging on insolvency
  - Removing, disposing of.... otherwise dealing with all or some of assets
- Reasonable in all the circumstances – effect on third parties
- Onus on creditor

# Section 15F

- Subsections 6 and 7
- Such conditions as court thinks fit
- Consignment
- Caution or other security



# Section 15K

- Hearing to recall or restrict
- Invalidity or incompetent
- Satisfy same test as in section 15E/15F
- Onus on creditor to do so

# Be wary...

- Section 15G - If summons/writ not served on opponent within 21 days – diligence shall cease to have effect
- Section 15M – expenses if unsuccessful

Thank you for listening

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