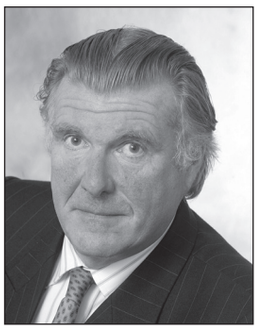
The best-kept secret in commercial litigation

Richard Aird investigates the benefits of forum dipping into Scotland



Richard Aird is an advocate and barrister at Murray Stable

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European regulation, in the form of the Brussels and Lugano Conventions (now largely succeeded by Council Regulation 44/2001 (the Jurisdiction Regulation)), often presents important choices for those bringing proceedings. At the highest level, good litigation practice now involves a comparison of legal regimes and the remedies of candidate jurisdictions to determine which suits the situation best. Article 31, which introduces cross-border security measures, is an important part of this, and was introduced into UK law by Part IV of the Civil Jurisdiction and Judgments Act (CJJA) 1982. In an exercise of gold plating, Part IV now extends beyond the member states to litigants from any jurisdiction in most types of case (see SI 1997/3020, 1997/2780, 2001/3929).

Paradoxically, for nearly three decades, one by-product of this movement has largely gone unnoticed by UK practitioners. Part IV also introduces, within the constituent parts of the UK, the possibility of 'forum dipping', a manoeuvre which is well understood in cross-border litigation.

One reason why the opportunities within Part IV have remained largely unused by the profession is that little analysis has so far been published on the comparative criteria and effectiveness of the respective interim or security measures of the two principal UK jurisdictions – England and Scotland. An understanding of what remedies lie on the other side of Hadrian's wall is the obvious first stage, and when gained it is likely that a change in litigation tactics will occur.

Interim relief and forum dipping

Forum dipping is based on Article 31 of the Jurisdiction Regulation and ss24-28 CJJA 1982. These provisions enable assistance, in the form of protective measures, to be given to litigants from other jurisdictions in cases that are proceeding (or about to proceed) elsewhere. So a litigant in England can obtain a security measure from Scottish courts even when the case has no other link with Scotland. The same is true of a litigant in Scotland who can seek interim relief in the English jurisdiction.

To forum dipping applicants, the English courts may make all forms of their domestic interim relief available subject to two exceptions in s25(7)(b): a warrant to arrest property (other than ships) and provisions for obtaining evidence. The most versatile of English forms of interim relief is, of course, the freezing order.

The Scottish cross-border provisions are contained in s27 CJJA 1982, which permits four types of security measure: arrestment, inhibition, interim attachment and interim interdict. See the box, opposite, for more details.

Interim measures of the type provided by Part IV are usually requested as a matter of urgency, and as every experienced practitioner knows, even when obtained entirely properly, can make even the most resolute of opponents willing to consider early settlement.

Ethics of forum dipping

Prior to being enshrined in international treaty, forum shopping was regarded as a reprehensible practice. The Brussels and Lugano Conventions mean that forum shopping and forum dipping based on Article 31 should no longer be regarded with disdain. Where the choice exists, forum shopping is simply a natural consequence of the availability of legitimate options in cross-border litigation. Judicial acceptance can be found in *Demel v C&H Jefferson (a firm) & anor* [1999] and in *Boss Group v Boss France SA* [1996]. Nevertheless, there are important ground rules.

First, the remedies are discretionary. Section 25(2) CJJA 1982 states that the remedy may be refused if:

> ... the fact that the court has no jurisdiction apart from this section... makes it inexpedient for the court to grant it.

Curiously, this proviso does not appear in the Scottish provisions, but it may be assumed that the Scottish courts will not be tempted to grant an inappropriate remedy despite the absence of these cautionary words.

The role of the court in granting orders of this sort is, according to *Credit Suisse Fides Trust SA v Cuoghi* [1997]:

> ... subordinate to and had to be supportive of the court seized with the substantive proceedings.

Few cases on Part IV have arisen in Scotland, but the existence in England of interim security orders and powers to recover evidence may assist the grant of Scottish Part IV orders to English litigants (*Union Carbide Corporation v BP Chemicals Ltd* [1995]).

There are other proscriptions. It would not be legitimate to add a defendant in the absence of a legitimate claim, solely to enable jurisdiction (*Messier Dowty Ltd v Sabina SA* [2000]). Nor would it be legitimate to use the remedy oppressively by multiplying the security obtained beyond the value of the claim.

There are special professional duties that necessarily arise from the nature of cross-border litigation. Where unfamiliar legal concepts may arise, practitioners must make sure they have personally studied and inquired into the background, before making applications in aid of foreign proceedings (*Lewis v Eliades & ors* [2002]).

The exclusive choice of jurisdiction clause

In commercial litigation a particular jurisdiction is often selected by the adoption of an exclusive choice of jurisdiction clause. The law that governs CJJA 1982 is to be determined by principles laid down by the European Court of Justice. One reason why the potential of Part IV has been overlooked may be that, until recent ECJ cases such as *Gasser v Misat Srl* [2005], *Turner v Grovit* [2005]and *Owusu v Jackson* [2005], it looked possible that an exclusive choice of the English jurisdiction would exclude an application in terms of Part IV to other courts. The burden of authority is now that these applications may be made irrespective of an exclusive choice of jurisdiction.

Comparison of English interim measures and Scottish security measures

Injunctions and interdicts

The core English protective measure is the injunction, which preserves the status quo until the rights of the parties have been determined in the action. The injunction will often be negative in form, restraining the defendant from doing something. More rarely it may be mandatory, requiring a certain action. A cross-undertaking to be answerable in damages if the injunction proves to have been wrongly granted is almost always required.

The Scottish equivalent is the 'interim interdict', which involves similar concepts to the interim injunction. Although the differences between the remedies are subtle they could nevertheless make a considerable difference in certain cases. The strength of case required in England is 'a serious issue to be tried', as against the lower Scottish requirement of

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Four types of Scottish security measure

As contained in s27 of the Civil Jurisdiction and Judgments Act 1982, the four types of Scottish security measure are:

- Arrestment, a type of garnishee order.
- Inhibition, a type of caution or charge (immoveable property).
- Interim attachment, a type of charging order (moveable property and money).
- Interim interdict, a type of interim injunction.

Few member jurisdictions possess a security measure which, like the arrestment and interim attachment, secures rights against a subsequent insolvency. Section 28 extends powers to recover evidence. These are generally regarded as the most readily obtainable and effective measures available in any EU member jurisdiction. But perhaps the main advantage is that the Scottish remedies are in general far simpler in concept, and cost perhaps a tenth of their English equivalent.

a *prima facie* case. In Scotland there is no separate requirement for the applicant to have capacity to enter into meaningful and valuable undertakings. However, the capacity to indemnify the party interdicted is still relevant when determining the balance of convenience. Each case will depend on its own particular facts, but it is easier for an impecunious pursuer with a weaker case to obtain a remedy in Scotland than in England. Conversely, were a mandatory injunction required it would be more difficult, if not impossible, to obtain a positive order in Scotland under s27 CJJA 1982.

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Freezing orders and arrestments, interim attachments and inhibitions

The main English form of interim protection is the freezing order, under which the respondent is enjoined from parting with defined assets. Normal business or living expenses and legal costs are usually excluded from the prohibition. Where the order affects a bank, all of the respondents' accounts may be frozen. There may be hundreds of these, and each one must be specified in the order.

To obtain a freezing order the applicant must demonstrate 'a good arguable case' on the merits, and a real risk of dissipation of the respondent's assets. The requirement to enter into the usual undertakings to meet any losses and expenses has been raised above.

The Scottish order of arrestment has little resemblance to a freezing order, and is more like a garnishee order, except that it may be obtained at the outset of an action. The security is achieved by attaching, in the hands of a third party, an obligation to account for a debt owed to the respondent. This may arise, for example, where a bank account is in credit, or where a third party owes a trade debt to the respondent or holds their property.

To secure claims against heritable (real) property, Part IV extends the inhibition. This remedy strikes at the opposing party's ability to dispose heritable property by restraining, burdening, alienating or otherwise affecting the property to the prejudice of the inhibitor. The consequences are similar to a caution placed on the Land Registry against a particular entry. The interim attachment is used to fill the gaps in the other Scottish remedies and attaches to corporeal moveable property (but not money) in the debtor's possession which is owned either by the debtor or in common with a third party.

Forum dipping in Scotland

- Litigants or intending litigants in England should consider the possibilities of forum dipping in Scotland.
- Despite the attractions of this tactical step, the profession has been slow to invoke cross-border powers within the UK.
- Forum dipping in Scotland is possible even if the case has no connection with Scotland. The procedure is ancillary to the English action, which can continue as before.
- The Scottish measures may be considered where there is a real and substantial risk that a claim may be defeated by the defendant's insolvency, concealment or removal.
- The Scottish remedies may be less onerous to obtain, more effective and significantly cheaper than their English equivalents.

The Scottish advantage

The collective criteria for security measures have been codified by the Bankruptcy and Diligence etc (Scotland) Act 2007 (the 2007 Act). The core requirement for interim relief is a real and substantial risk that a claim may be defeated by the respondent's insolvency, concealment or removal. Other requirements, such as reasonableness and proportionality, are common to both jurisdictions. The most significant difference is that the Scottish remedies require only a *prima facie* case on the merits to obtain the relief sought.

In practice, Scottish remedies are much easier to obtain and enforce. The freezing order is a major forensic and organisational step, with implications for both parties and third parties. Even when granted, discussions and further hearings incurring considerable expense may be required to clarify or regulate the position of banks and third parties.

The Scottish domestic measures are usually obtained in the Sheriff Court and, even with judicial consideration and *inter partes* hearings, the administrative and legal costs will usually be relatively low. The cross-border remedies that are the subject of this article can only be obtained in the Court of Session. Although greater than the Sheriff Court, the costs of obtaining a cross-border security measure in Scotland are considerably less than their English equivalents.

Although the effectiveness of the inhibition on insolvency has been reduced by the 2007 Act, both the arrestment and interim attachment secure a preference for the creditor in the defendant's insolvency. This makes for one of the most effective protective measures in any jurisdiction. This compares with a freezing order, which will not be granted to circumvent the insolvency of the respondent.

In increasingly circumscribed circumstances, extra-jurisdictional consequences may be achieved by an English freezing order. As a remedy *in personam* it is, in theory, portable. Much attention has been given in recent Court of Appeal cases to the extent this may be permitted. The Scottish measures, however, are generally confined to warrants effected on property in Scotland. There are limited possibilities of an arrestment with cross-border effects, such as on a Scottish bank or insurance company which has a branch elsewhere.

Although the interim interdict is also an order *in personam*, it is difficult to envisage a Scottish court making an order of the complexity of a freezing order or granting security over assets outside its jurisdiction. The English freezing order may, and usually does, have ancillary orders attached which are intended to make the remedy more effective, including the disclosure of the whereabouts of the assets, which the Scottish equivalent lacks.

Search orders and s1 of the Administration of Justice (Scotland) 1972

In Scotland there is no automatic discovery. A party must usually seek their own evidence. When the Scottish procedure is invoked, recovery or inspection is more readily permitted from a party, or more particularly, from a third party. Where foreign proceedings are brought or are likely to be brought, the Court of Session has wide powers to require disclosure on behalf of applicants outside its jurisdiction, pursuant to s28 CJJA 1982. In both jurisdictions there are powers to order disclosure beyond what is recovered, but in Scotland these are recent innovations and remain to be judicially defined.

How does the Scottish remedy compare with the English search and seizure order? The search and seizure order is a special form of mandatory injunction, with exacting requirements. These include the identification of property, premises and relevant documents. There must be a strong *prima facie* case on the merits, and strong evidence of serious harm or serious injustice that will be suffered if the order is not made. Although the criteria that must be demonstrated to obtain the Scottish equivalent (including dawn raids) remain stringent, they are generally less demanding. Orders under the Administration of Justice (Scotland) Act 1972 may be granted on the significantly lower standard of a cogent *prima facie* case on the merits, that the documents or other material are essential for the applicant's case and that there is a real risk of destruction or concealment.

The courts of both jurisdictions will need to be satisfied that the remedy sought is proportionate, but the Scottish remedy does not take the form of an injunction, so there is no requirement for the applicant to give the 'usual undertakings'. Any inability to meet potential damages resulting from a misapplication of the measure would weigh against granting the application.

Once obtained, the ground rules for conducting the search are similar. In Scotland premises may be searched and items removed in the presence of the respondent or a responsible employee. The role of the supervising solicitor is akin to the commissioner who is appointed by Court of Session. An opportunity is given to the 'haver' (the respondent) to insist on measures being taken to preserve confidentiality and commercial secrets in any material removed, filmed or copied on-site.

Practical steps

The key to a successful forum dipping strategy is the identification of the best target assets. This is a careful and probably painstaking process. The global economy means that corporate defenders of any size may often have assets of various types in a number of different countries. Many small- to medium-sized enterprises operating in the UK have 'arrestable' or 'attachable' assets in Scotland. Despite this, when the English client is asked whether the defendant has anything attachable in Scotland, the normal reaction is a blank look. So this article aims to provide an introduction to the extent of the possibilities.

A combination of informed client instructions, internet searches and local commercial knowledge usually provide the answer. A classic application of the arrestment is to trade debts – inevitable if the defenders have a branch in Scotland or even do business with Scottish companies. At a more rarefied level, a shareholding in a Scottish registered company may be arrested. Scotland retains a substantial manufacturing base. The North Sea oil industry contains a wealth of opportunity for arrestment or attachment. Lorries and aircraft may themselves be the subjects of attachment, and their contents can often be the subject of arrestment. Although diminished by the credit crunch, the Scottish financial sector remains significant.

Beyond the border (as the Romans found to their cost), the Scots remain determined to preserve their own: the achievement of latter-day European unifiers has been to require them to preserve the assets of other litigants as well. ■

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Boss Group v Boss France SA
[1996] IRLR 403

Credit Suisse Fides Trust SA v Cuoghi
[1997] EWCA Civ 1831

Demel v C&H Jefferson (a firm) & anor
[1999] FSR 204

Gasser v Misat Srl
[2005] EUECJ C-116/02

Lewis v Eliades & ors
[2003] EWCA Civ 1758

Messier Dowty Ltd v Sabina SA
[2000] 1 Lloyds Rep 428

Owusu v Jackson
[2005] EUECJ C-281/02

Turner v Grovit
[2005] EUECJ C-159/02

Union Carbide Corporation v BP Chemicals Ltd
[1995] SLT 972