OUTER HOUSE, COURT OF SESSION

[2025] CSOH 68

P609/25

OPINION OF LORD CUBIE

in the Petition of

MERMAID SUBSEA SERVICES (UK) LIMITED

Petitioner

against

JAMES FISHER OFFSHORE LIMITED

Respondent

Petitioner: Dean of Faculty; DLA Piper Scotland LLP
Respondent: Howie KC; Burness Paull LLP

29 July 2025

[1] The petitioner has invoked the power of the Court of Session to grant warrant for diligence in dependence of an action raised in England. The warrant was sought under section 27 of the Civil Jurisdiction and Judgements Act 1982 ("the 1982 Act"), which so far as relevant to these proceedings provides as follows:

> Provisional and protective measures in Scotland in the absence of substantive proceedings
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> (1) The Court of Session may, in any case to which this subsection applies
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> (a) subject to subsection (2)(c), grant a warrant for the arrestment of any assets situated in Scotland;
>
> (b) subject to subsection (2)(c), grant a warrant of inhibition over any property situated in Scotland…

> (2) Subsection (1) applies to any case in which
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> (a) proceedings have been commenced but not concluded....in…England and Wales; and
>
> …
>
> (b) In relation to [paragraph (a)]...of subsection (1), such a warrant could competently have been granted in equivalent proceedings before a Scottish court.

[2] On 19 June 2025, on an *ex parte* motion, the Lord Ordinary granted warrant to do diligence on the dependence, based on the averments in the petition. Diligence on the dependence was effected. The petitioner is part of a group of companies, (the Group), the parent company of which is James Fisher and Sons Limited.

[3] On 10 July 2025 the respondent moved the Court to: (i) recall the warrant for diligence on the dependence of the action by arrestment and inhibition in terms of the Court's interlocutor of 19 June 2025; (ii) recall any arrestment or inhibition executed in pursuance of that warrant; and (iii) grant the respondent its expenses of the petition process.

[4] The test for recall is helpfully encapsulated in *Mex Group Worldwide Ltd* v *Ford (No 2)* [2024] CSOH 52 by Lord Sandison who said:

> "The onus in the recall motion is the same as it was at the hearing for the initial grant: it is incumbent on the pursuer as creditor to satisfy the court that the arrestment should not be recalled: see respectively sections 15E(3) and 15K(10) and, e.g., *Glasgow City Council* v *The Board of Managers of Springboig St John's School* [2014] CSOH 76 at [9]. Recall is, in terms of section 15K(8) , to be granted if the court is no longer satisfied as to the matters specified in subsection (9), *viz* : (i) the existence of a *prima facie* case on the merits; (ii) a real and substantial risk that enforcement of any decree would otherwise be defeated or prejudiced; and (iii) that it is reasonable in all the circumstances for warrant to arrest to be granted. In considering recall, the court must take into account the terms of the defences and the submissions made by the defenders: *Gillespie* v *Toondale* [2005] CSIH 92, 2006 SC 304, at [12]-[13]."

Parties agreed that although this matter proceeded as a petition under section 27 of the 1982 Act, this represented the test.

[5] The petitioner was represented by the Dean of Faculty and the respondent by Mr Howie KC.

Submissions for petitioner

[6] The Dean submitted that the warrant should remain in place subject to the removal of the purported warrant against moveable items which had not been sought and had been granted *per incuriam.*

[7] The Dean submitted that although some of the concerns expressed in the petition about the solvency of the respondent had been addressed, there was still a real and substantial risk of insolvency defeating any claim by the petitioner in the proceedings in England justifying the continuation of the warrant.

[8] The respondent company is a subsidiary part of the group. The Dean submitted that the issue was the solvency and stability of the respondent, not the parent company – any enforcement would be against the respondent. The Dean made reference to the accounts lodged; the initial motion had been prompted by the 2023 accounts showing a balance sheet deficit of £21 million, and concerns about the parent company; on that basis the Lord Ordinary had granted the right to take interim diligence steps.

[9] The 2024 accounts were now available. On the face of the accounts since 2023, turnover was up, gross profit was up and operating losses down; but the apparent improvement in the financial position was qualified by the large amounts of debtors being £37.3 million. There was still a substantial and worrying deficit. The respondent continued to trade on the faith and support of the parent company. The parent company was a

substantial entity; they said that they will support the respondent, but that support fell short of what the petitioner sought given the financial position of the respondent. The petitioner had asked for a parent company guarantee but none had been forthcoming.

[10] The initial application had drawn on what were said to be uncertainties about the viability of the parent company including an onerous borrowing facility and what were reasonably seen by the petitioner to be defensive sales by the parent company to release funds. Although the parent company had explained the current position which appeared improved, the petitioner was entitled to still be concerned about the financial structure. The parent company could decide to cut the respondent company off. That was an option in the structure of a limited liability company and why company structures existed, so that discrete decision could be made about particular companies in the group. The Dean submitted that it was not reasonable, given the potential insolvency of the respondent, to proceed on the basis that there would be support and faith shown by the parent company. The updated accounts did not ameliorate the petitioner's concerns.

[11] The Dean referred to remarks of Lord Drummond Young in *Gaelic Seafoods (Ireland) Ltd* v *Ewos Ltd* 2009 SCLR 417 (making reference to *Fallimento La Pantofola D'Oro SpA* v *Blane Leisure Ltd (No 2)* 2000 SLT 1264) as follows:

> [In *La Pantofola*] Lord Hamilton reviewed the law in detail. He stated (at pp 1267-1268):
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> "[7] The courts in Scotland have long exercised a common law jurisdiction in respect of the finding of security for expenses by litigants who are individuals.... It would, however, be inappropriate, in my view, to seek to apply without qualification the principles applicable to an individual in the circumstances of a limited company. As Millett J said in DSQ Property Co Ltd v Lotus Cars Ltd at [1987] BCLC 60, at p 64e–f:
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> > 'A limited company is not like an individual. It is a commercial concern with exclusively commercial debts and liabilities. Unlike an individual it can charge its whole undertaking to a secured creditor and leave nothing at all for unsecured creditors, even those having priority in a winding up. It is obvious

> that in some circumstances justice may require such a plaintiff to be required to give security for costs, and this is recognised in the legislation of both Great Britain and Northern Ireland.'
>
> 'These observations were made in the context of an application under [the English Rules of Court], but I agree with them and regard them as equally relevant to the exercise in Scotland of the court's common law jurisdiction in respect of limited companies.
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> Lord Hamilton went on to consider the various factors that were relevant in that case… The fourth factor was the extent to which those who had a financial interest in the pursuers and their claim, whether creditors, shareholders or others, might be able or willing to provide security. No information was available on this matter, and it was accordingly not taken into account. Nevertheless, Lord Hamilton expressed regret that there was no information available."

[12] Lord Drummond Young continued

> "[15] The defenders' application for caution is made at common law, and it seems to be accepted that the test for caution at common law is relatively strict. Nevertheless, it seems to me that the fact that the pursuers are a limited company is a factor of some importance. In this respect I agree with the view expressed by Lord Hamilton in *La Pantofola*, at pp 1267–1268, paragraphs [7] and [8] (quoted above at paragraph [5]): a limited company is a commercial concern with exclusively commercial debts and liabilities, and it can deal with its assets in such a way that there is nothing left for its creditors. In these circumstances it is important that the court should ensure that a limited company is not used as a device to enable those who have the underlying financial interest in the litigation to conduct it without fear of an adverse finding in expenses. That consideration becomes particularly important when a company is admittedly insolvent; in such a case it seems to me that a defender should normally be entitled to obtain security for expenses, even at common law, in the absence of any countervailing consideration."

[13] Accepting that this case dealt with a different issue (whether a limited company should have to provide caution for expenses) the Dean submitted there was a clear read-across in relation to how the courts should consider apparently vulnerable, even if not insolvent, companies. In this case, although there was some information about an apparent commitment to support the respondent, as presently advised, the parent company were declining to make the support formal by way of the parent company guarantee sought. An indication of support was not, in his submission, sufficient to displace the real and

substantial risk arising from an informed reading of the accounts. It did not provide the necessary assurance given the apparent vulnerability of the respondent. The sum required was, as a proportion of the assets of the parent company, minimal; the absence of a commitment to the formal guarantee was of considerable significance.

[14] The Dean referred briefly to a decision in *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd)* v *John Holt & Company (Liverpool) Limited* [2013] EWCA Civ 779. In that case Tomlinson LJ was dealing with an application for security for costs against a company and observed

> "18. It is clear to me, in fact it is well-known and Mr Hollander has reminded me of the passages in the authorities such as Hammond Suddard Solicitors v Agrichem International Holdings Limited [2001] EWCA Civ 2065 and Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534 , that it is legitimate for the court to have regard to the reality that there stands behind this company directors and possibly other backers, persons who have a financial interest in the company, who would be likely to find it in their interests to put the company in funds in order to enable it to bring the appeal which it wishes to bring."

[15] The Dean submitted that it was authority for the same proposition, that a look beyond the respondent to the wider financial interest or stakes was legitimate in assessing the question of risk. The motion should be refused.

Submissions for respondent

[16] The respondent submitted that the petition was unreasonable and unwarranted. Mr Howie argued that there was no basis for the Petitioner's assertion that, as at June 2025, the preconditions for the grant of a warrant to carry out diligence on the dependence of the English proceedings had been satisfied.

[17] It was recognised that the accounts of late December 2023 showed a deficit of £21 million; however, the notes to the accounts confirmed an ability to continue, albeit

reliant on financial support. The uncertainly in the group financing had been addressed and remedied; the revolving credit facility had been replaced by a more stable and cheaper means of financing; concerns were recognised. Reference had been made to the parent company accounts, showing they had considerable assets.

[18] A superficial look at the respondent's accounts which focused solely on the Profit & Loss Account and Balance Sheet might cause concern, but any such concern would be allayed by the support provided by the parent company and the information about their own position; the parent company had restructured the debts due to it by the respondent, taking financial pressure off the respondents company. Costs were being addressed, and historic, less core, aspects of the business were being concluded; the company was solvent standing the allowances made by the parent company – note 15 to the accounts explained the restructuring. Even accepting that the viability proceeded on the basis that the parent company will continue to offer support, the situation did not present a real or substantial risk.

[19] The support has its origin well before the action arose, being manifest in the earlier accounts. The parent company will provide support to any extent to which it may be needed. As a proportion of the overall value of the company, the financial exposure in this case was relatively minor; for that reason not needing to be formalised.

[20] It was, Mr Howie submitted, wholly unreasonable to consider that a publicly listed company accountable to the stock exchange would renege on the commitment made, which appears in its published accounts; although hypothetically possible, the reputational damage suffered would be disproportionate in relation to any apparent saving caused by failing to provide the necessary support. Any such steps would attract significant reputational damage and would be an act of corporate self-harm having ripples well beyond

this petitioner in relation to dealing with other companies. That hypothetical risk cannot amount to a real and substantial risk. The group would not endanger its reputation and itself on that account.

[21] He distinguished the authorities as looking at caution or security for costs. There was no material that would justify the conclusion that the parent company would cut the respondent loose. The Dean must show that there was a real and substantial risk; such a conclusion was not justified by the material before the court. The warrant should be recalled. Even if not recalled, it should be restricted.

Response by petitioner

[22] In a brief response the Dean accepted the arrestment should be restricted pro tanto re movables. The money element was a matter of expression but not material. The Dean accepted that there had been a change in the financial landscape since the petition, but it was not, in his submission, material enough to remove the real and substantial risk. The respondent was still subject to financial pressure. If there was support it could be made concrete by the provision of a parent company guarantee. The position of the parent company was of no consequence or consolation to the petitioner. In the absence of some actionable commitment to support, there remained a real risk. Subsidiaries failed all the time. It was a function of the corporate structure and limited liability that such things happen. The directors of a public limited company owe a duty to the plc; they might factor in reputational risk but that need not be determinative. The respondent's parent company were painting themselves as a benevolent actor, but have failed to explain what was objectionable about a parent company guarantee.

Basis for decision

[23] The parties were essentially agreed on the financial condition of the respondent; the petitioner argues that it is precarious and that the purported support of the parent company is meaningless unless it is crystallised into a guarantee. Given the relatively modest sum sought in the context of a publicly listed company, the failure to provide such guarantee was material.

[24] In contrast the respondent says that it is the relative insignificance of the sums in dispute against the total asset value of the company which means that both petitioner and the court can be re-assured that the parent company would not allow the respondent to fail with the reputational and wider damage that would cause for such a small amount.

[25] It was conceded that there was a *prima facie* case, given the existence of the English proceedings; the issue for the court was whether there was a real and substantial risk and if so whether it was reasonable to grant the order sought.

[26] The position was different from that which faced the Lord Ordinary on 19 June; more up to date information was available about the position of the respondent in the context of the most recent accounts. I accordingly consider whether as at the time of hearing there is a real and substantial risk posed to enforcement of any decree obtained in the proceedings in England.

[27] I accept, in accordance with the authorities cited, that in considering the matter, account can be taken of surrounding circumstances. The respondent in this case is in a stronger position than the parties considered in these two cases.

[28] The petition was granted on the basis of the petitioner's submissions on 19 June informed by the 2023 accounts; the respondent's ability to continue as a going concern depended upon financial support from other companies within the Group, which itself faced

material uncertainty over its ability to continue as a going concern. The more up to date accounts were now available and form the basis for this decision. In March 2025, the annual accounts of the group for the year to 31 December 2024 were published. I observe that this was before the motion for diligence was made. Those accounts disclose an improvement in the financial condition of the group as compared to that shown in the accounts to 31 December 2023.

[29] The revolving credit facility with its mandatory payments on which the petitioner relies to seek to establish "heightened concern" about the viability of the group was replaced, the requisite re-financing having been achieved by September 2024. Further financing in the shape of an export facility has since been obtained. The high financing charges of the previous funding arrangements of the group reflected in the 2023 accounts, as well as administrative expenses attending those arrangements have been reduced as a result of the improved lending terms of the replacement funding arrangements.

[30] The 2024 accounts of the respondent reflect an increase in turnover and in gross profit. There has been a restructuring of the cost base and the loss for the year before tax had reduced from £9.9 million to £7.3 million. The accounts asserted that historic proof performing contacts were being completed. The directors foresee a return to profitability within the 2-5 year period. They conclude that there are sufficient financial resources to continue to trade for the 12 month period. That assertion is qualified by reference to the notes to the accounts indicating that the respondent is party to the group's banking arrangements, being a named party on the banking documents and providing a cross-guarantee for certain Group facilities. It is acknowledged, in the accounts for the respondent, that the going concern basis is dependent on the ongoing ability of the Group to

continue trading and provide any financial support required by the Company, to the extent it is necessary.

[31] On 19 September 2024, the Group completed the refinancing of its revolving credit facility (RCF), replacing it with a single three-year RCF and a five-year bilateral facility; the accounts say that the terms of the new facilities are less restrictive and less onerous compared to the previous arrangement (confirmed in the Regulatory News Service announcement number 7/2 of process).

[32] Accordingly, the group have indicated their intention to make available such funds as are needed by the respondent and that it does not intend to seek repayment of the amounts due by the respondent at the balance sheet date, for a period of at least 12 months from the date of approval of the financial statements.

[33] There was a further qualification to the effect that as with any company placing reliance on other group entities for financial support, the directors of the respondent acknowledged that there can be no certainty that this support will continue although, at the date of approval of the financial statements, they had no reason to believe that it will not do so.

[34] The annual report and accounts for 2024 for the parent company and group were produced at number 7-5 of process (pdf pages 70-291) and merit attention. *In gremio* of that report the parent company narrate that they operate on behalf of the group a "minimum internal liquidity target" of £20 million, to enable the settlement of any liabilities as they become due - although as at 31 December 2024 it was said in fact to stand at £25 million.

[35] The group has net assets of £190.3 million, an increase from the previous year. The report states that the primary drive of the increase in net assets was the reduction in borrowing following the refinance and the proceeds of the disposal of assets.

[36] In considering the material provided, the court has to guard against reading too much into the "strategic report" part of the accounts which for obvious reasons will tend to stress the positive aspects of the company's performance. But even allowing for that and the qualifications contained in the accounts, the position seems more stable than in the previous account; the concerns expressed by the petitioner in the original petition have been met.

[37] I take into account the cases cited and the general ability of the court to factor in to this decision the overall financial picture; I observe that in *Gaelic Fisheries* the pursuer was insolvent and the liquidator proposed to continue with the action for the benefit of creditors who were otherwise protected from exposure to expenses. In *Caterpillar,* counsel advised the judge expressly that the directors were unwilling to put up any funds or further funds with a view to assisting the company; as it happens the judge declined to take that at face value because they were arguing against an order for security of costs. The wider picture in each of these cases was a cause for concern. The circumstances in this case do not give rise to the same concern.

[38] I take a number of factors drawn from the material presented and the submissions into account:

- The 2024 accounts for the respondent show an upturn
- The respondent is not relying on support of conventional creditors or HMRC (cf. *McCormack* v *Hamilton Academical Football Club Ltd* [2009] CSIH 16) or their bank or some prospective sale of assets (cf. *Beaghmor Property Ltd* v *Station Properties Ltd* [2009] CSOH 133)
- The respondent has instead the support of the parent company, support which was not triggered by these proceedings
- The parent company is of significant size and asset value

- The potential sum to which the parent company is exposed is relatively modest in the context of the overall value of the parent company
- The parent company have earmarked funds specifically to support subsidiaries. There are £20 million reserves, currently at £25 million, a facility available well in advance of these proceedings
- There is reputational damage risk to a publicly limited company in failing to fulfil a commitment to support subsidiaries publicly made

[39] The petitioner has to demonstrate a real and substantial risk. While recognising the uncertainties which were clearly expressed by the Dean, there is not, as presently advised, the kind of real and substantial risk which would justify the warrant to arrest.

[40] I will grant the respondent's motion and recall the orders made on 19 June 2025.

[41] The respondent moves for the expenses of the petition procedure. Given that I find that there is no real and substantial risk and that the 2024 accounts were available from March 2025, (that is in advance of the hearing on 19 June 2025 where the Lord Ordinary granted the interim measure sought), I find the petitioner liable to the respondent in the expenses occasioned by the petition procedure.