



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 52

CA94/23

OPINION OF LORD SANDISON

In the cause

MEX GROUP WORLDWIDE LIMITED

Pursuer

against

(FIRST) STEWART OWEN FORD; (SECOND) BRIAN ROBERT CORMACK;  
(THIRD) COLM DENIS SMITH; (FOURTH) MICHAEL GOLLITS; (FIFTH) MELVILLE  
CONSULTING PARTNERS LIMITED; (SIXTH) MELVILLE CONSULTANCY LIMITED;  
(SEVENTH) REGAL CONSULTANCY INTERNATIONAL LIMITED;  
(EIGHTH) CSM SECURITIES SARL; (NINTH) VON DER HEYDT & CO AG;  
(TENTH) VON DER HEYDT INVEST SA; (ELEVENTH) MEX SECURITIES SARL;  
and (TWELFTH) VIACHESLAV (known as 'SLAVA') VOLOTOVSKIY

Defenders

**Pursuer: Moynihan KC et J Brown; Clyde & Co (Scotland) LLP  
First, Second, Fifth, Sixth and Seventh Defenders: McBrearty KC et E Campbell;  
BTO Solicitors LLP**

17 May 2024

**Introduction**

[1] The summons in this commercial action passed the Signet on 19 October 2023 and on the same day I granted warrant to arrest on the dependence under section 15E of the Debtors (Scotland) Act 1987 on the *ex parte* application of the pursuer. In April 2024 the first, second, fifth, sixth and seventh defenders sought recall of the warrant to arrest in terms of

section 15K(5)(a)(i) of that Act. 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, eg, *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].

## **Background**

[2] The extensive and complex background to this litigation is set out in my opinion of even date to this in a petition by the pursuer for an order under section 1 of the Administration of Justice (Scotland) Act 1972 - [2024 CSOH 51]. That opinion explains why I refused the motion of the respondents for recall of a section 1 order made on 18 October 2023. The same background facts apply to the motion for recall of the warrant to arrest in the present case, and indeed both motions were argued together over 3 days. I record separately here only the submissions of the parties which were specifically directed to the question of recall of the warrant to arrest.

### **Pursuer's submissions**

[3] On behalf of the pursuer, senior counsel added to his general submissions that there was no challenge to the averments in the summons justifying the necessity for warrant to arrest. The fact that a defence had been put forward did not necessarily preclude the grant of diligence. The existence of a positive defence required the court to scrutinise the pursuer's case with extra care, but the question remained whether a good arguable case had been made out by the pursuer: *F G Hawkes (Western) Ltd v Szipt Ltd* (Lord Emslie, unreported, 21 March 2007), at [25]. It followed that diligence could be granted where each party had a *prima facie* case. The case put forward by the pursuer met the standard required to justify the grant of diligence.

### **Defenders' submissions**

[4] On behalf of the relevant defenders, senior counsel submitted in particular that the pursuer had no sufficient *prima facie* case and that the warrant to arrest should be recalled for that reason. The *prima facie* test was a substantial hurdle for the pursuer to surmount: *Gillespie* at [13], approving Lord Drummond Young in *Barry D Trentham Ltd v Lawfield Investments Ltd* 2002 SC 401, 2002 SLT 1094, at [6] on the meaning of "*prima facie*", ie a good arguable case. The pursuer's case did not meet the requisite standard.

### **Decision**

[5] Although the factual background to the motion for recall of the warrant to arrest is the same as that set out in the petition process, the background law is very materially different. For reasons which are well-understood and canvassed clearly in *Gillespie*, the pursuer requires to surmount the "substantial hurdle" of setting forth a "good arguable

case” and not merely a colourable one. The court requires to consider the pleadings as a whole and the submissions made by both counsel to determine whether, in all the circumstances, arrestment is appropriate on the basis of the existence of a *prima facie* case.

[6] I set out the parties’ contentions on the existence or otherwise of a *prima facie* case in my opinion in the petition process. For the reasons set out in that opinion, in particular the identification of the salient points of the pursuer’s case at [49], and taking fully into account the nature of the defence stated, I conclude that a *prima facie* case of the requisite standard has been stated by the pursuer. It is a good arguable case, notwithstanding that it will face the same challenges and hurdles described in my opinion in the petition procedure. For the reasons there explained, I do not consider it appropriate at this stage to canvass in any further detail at this stage the apparent merits and weaknesses of the case of any party.

### **Conclusion**

[7] I refused the defenders’ motion for recall of the warrant to arrest.