

Diploma in Law

Lecture 4: Precautionary Acts & Precautionary Warrants

Lecturer: Dr. Emma Portelli Bonnici
Date: Tuesday 20th February 2024



**Diploma in Law
(Malta)**

Introduction

- A precautionary warrant or act may be broadly defined as a security whereby for example, party A as claimant, would issue a guarantee securing certain assets or funds, before his claim is decided. Party A would then be able to obtain satisfaction to his claim if the court decides in his favour.
- According to **Borg v. Borg** (First Hall Civil Court, 2007) the prerequisite for a precautionary warrant is that there must be a *prima facie* possibility that claimant's rights would be breached in absence of the warrant.



Article 829 COCP

- The above scenario is embodied in Article 829 COCP.
- It states that the “person suing out the act”, hence party A, may “secure his rights by one or more of the precautionary acts.”
- This article also points towards the measure as being one taken at the procedural stage. It may be raised when the matter at hand is not yet settled i.e. “without the necessity of any previous judgment...”



Judge's Sacco and Sciberras have correctly noted that the main aim of the precautionary warrant is not only to increase the efficiency of the judicial process, which was the main reason for the 2006 amendments. It is ultimately “biex il- kreditur iqieghed fiz-zgur il-jeddijiet tieghu u mhux biex igib l-allegat debitur gharkubbtejh”: Abdilla vs Auto Sales Limited (FH, 2011) and Mohnani vs Stivala (CoA, 2010). All recent judgments re-quote this same statement.



Executive Warrants v. Precautionary Warrants

- This precautionary warrant is mainly intended to prevent the dissipation or disappearance of the assets of the debtor in the claim, pending the outcome of proceedings. Hence, judgment is not a requirement for the issue of a precautionary warrant.
- Calamandrei states that precautionary warrants have various positive effects. These generally: (i) preserve a situation, (ii) provisionally regulate a situation, (iii) anticipate the effects of a final judgment and (iv) prevent the dissipation of property by the debtor.
- On the other hand, the executive measure allows the plaintiff or claimant to enforce and execute his claim.



The Precautionary Acts

- Article 830(1) lists the 8 precautionary acts: (a) warrant of description; (b) warrant of seizure; (c) warrant of seizure of a commercial going concern; (d) garnishee order; (e) warrant of impediment of departure; (f) warrant of arrest of sea vessels; (g) warrant of arrest of aircraft; (h) warrant of prohibitory injunction
- According to Article 829, “it shall be lawful for any person” to secure his rights by means of the previous judgment.
- If one had to compare this article to Article 273 that lists executive warrants one would realise that the (i) warrant of description and (ii) warrant of impediment of departure are not deemed to be executive warrants while they are precautionary acts. Moreover, Article 830 doesn't list (i) judicial sale, (ii) warrant of ejection/eviction, (iii) warrant in factum and (iv) warrant in procincto as precautionary acts.
- Such acts will be rescinded if the party against whom the act is issued makes such deposit or gives security as (i) in court's opinion and (ii) according to circumstances of case, may be sufficient to safeguard rights or claims stated in the act. It will also be rescinded if it is shown that a judicial act accepting liability has been filed in the proper registry.



Application for Issue of Warrant

- Made by application prepared by applicant & containing, under pain of nullity other details such as:
 1. Origin and nature of debt or claim sought to be secured
 2. When the right sought to be secured by the act is a debt, or a demand which may be satisfied by the payment of a sum of money, the amount of such demand
 3. If case has already been filed, it must specify and include judicial costs
- In **M.I.M.S. Supplies Limited vs Calleja** the court held that the applicant doesn't need to describe the debt in detail. Rather it would be enough that in a few words he would give a clear image of the right to be secured.
- The applicant must be confirmed on oath by applicant. Where there is more than one applicant, an oath taken by one is sufficient.
- The preparation and issue of executive warrants is the same as under executive warrants (see notes page 9 or Article 274). Article 831(3) adds the warrant of impediment of departure.



Filing of Precautionary Warrants with Judicial Letter (Article 833A)

When a judicial letter is filed and sworn according to Article 116A, the following three precautionary warrants may also be sworn and filed:

1. Warrant of description
2. Warrant of seizure
3. Garnishee order

When the letter is filed, the applicant may file a (i) sworn application, (ii) application or (iii) petition, as the case may be, within 20 days from the date of filing of a full or partial note of contestation or else within 60 days from the date of issuing of warrant. This is unless a note of contestation would have been filed according to which date occurs first.

In fact in *Cranston v. Donaldson* (Court of Magistrates, 2011), court noted that if such time periods lapse, the warrant would no longer remain in existence.

IMP: No sworn application, application or petition will be required if the precautionary warrant is converted to an executive warrant or is removed by a counter-warrant.

From this disposition it is evident that Article 833A like any other precautionary warrant “ghandu validita u hajja” unless and until the creditor has the opportunity of converting the debt into an executive title. This was highlighted in ***Aquilina v. Aquilina* (Court of Appeal, 1991)**



Service

- The court executing officer will serve the notice in writing to the applicant, lawyer or legal procurator and signature at the earliest date possible.



Counter-Warrants (Article 836)

- Without prejudicing the COCP or any other law, the person against whom the precautionary act has been issued, may ask for the precautionary warrant to be revoked, either totally or partially.
- This may be done through (i) an application to the court that has issued the precautionary warrant OR (ii) an application to the court hearing the case if it has already been instituted.



Counter Warrants - Grounds for Revocation

The grounds for revocation are six:

- Precautionary act ceased to be in force: ex the application on merits is not filed within the time imposed by law or the act was not within the relative period of time followed by the institution of a court action.
- Any condition requested by law for the issue of the precautionary act doesn't in fact subsist: this is wide ranging and mainly covers the substantive merits of the case, and even the formal pleas. It doesn't refer to a defect of substance but of form.
- Other security is available to satisfy the claim of the person either by the issue of some other precautionary act or if such other security can adequately secure the claim (to the satisfaction of the court): This ground may be utilised if other adequate security is available to satisfy the claim of the person at whose request a precautionary act was issued. The courts tend to be reluctant to revoke a precautionary act on the basis of this ground alone, unless some guarantee is simultaneously provided to secure the claim of the creditor, for instance a cash payment, bank guarantee or a hypothec.



- If it is shown that the amount claimed is not prima facie justified or is excessive: This ground may be utilised if the amount claimed by the creditor is prima facie not justified or is excessive. The court can reduce the amount claimed. It is important to note that the court will determine the matter on the basis of indications prima facie. No in-depth examination will therefore be carried out by the court.
- If security provided is deemed by the court to be sufficient: this ground complements Article 836(1)(c).
- If it is shown that in the circumstances it would be unreasonable to maintain the precautionary act in force, in whole or in part, or that the precautionary act in whole or in part is no longer necessary or justifiable: This is another wide-ranging ground and is intended to enable a party to show that there has been a change of circumstances such that there is reasonably no longer the need for the precautionary act, whether in whole or in part. Again, the court in question is likely to be reluctant to revoke a precautionary act on this ground alone, unless actual proof or security is provided.

- The applicant must file in writing all submissions to be made together with all documents in support of the demand being filed.
- The application, except for the warrant of description, shall be served on the opposite party who has 7 days from date of service to file a note containing all submissions and documents.
- Sub-article (4) states that the application will be dealt with urgently either in camera or after hearing the advocates of the parties, if it deems fit, provided that not more than 1 sitting may be fixed for such purpose.





Diploma in Law (Malta)

CAMILLERI PREZIOSI
ADVOCATES

Appeals

- Sub-article (5) notes that no appeal and no challenge shall lie from a decree acceding to an application for any precautionary warrant. Such decree is final and irrevocable.
- Except for the warrant of description, a similar precautionary act may not be issued in security of the claim against the person against whom the precautionary act so revoked was issued. This is unless in the application for a fresh precautionary act, the applicant states that new circumstances have arisen justifying the issue of a similar fresh precautionary act.



Security

- Notwithstanding that adequate security for the satisfaction of the claim of the person at whose request the precautionary act was issued is deposited in the registry of the court, the court which issued the counter-warrant under the provisions of this article may still, on a request made by application by any interested person, investigate the legality or otherwise of the relative precautionary act.
- The court may also order the reduction of the amount of security deposited or declare the precautionary act to be contrary to law, in which latter case it shall give such orders as it may deem appropriate, including, if the case so warrants, the giving of the security back to the debtor.



Penalties

- The applicant may be condemned to pay a penalty of not less than €1164.69 and not more than €6988.12 in favour of the person against whom the act was issued in the following 4 cases:
 1. If applicant, without valid reason, does not bring the action in respect of the claim within the time limit established by law.
 2. If, on demand of the defendant for the rescission of the precautionary act, the plaintiff fails to show that the act had to be issued or that within the 15 days previous to the application for the precautionary act, he had in any manner called upon the defendant to pay the debt, or, if the debt be not a liquidated debt, to provide sufficient security. This will not apply if there were reasons of urgency for the issue of the warrant.
 3. If applicant's claim is malicious, frivolous or vexatious
 4. If the circumstances of the debtor were such as not to give rise to any reasonable doubt as to his solvency and as to his financial ability to meet the claims of the applicant, and such state of the debtor were notorious.



- Article 838A adds that the party on whom the act is served may order the party suing to give sufficient security for the payment of the penalty that may be posed and of damages and interest. Furthermore, he may ask for rescission if in case of default.
- The court may, by means of an application at the request of the defendant against the precautionary act, condemn the applicant of the precautionary warrant to pay damages as may have been caused by the issue of the warrant. In such a case, the court will refer to and make use of the records of the proceedings of the precautionary act, and of any other proceedings arising therefrom or consequential thereto, and such records shall be admissible evidence for the purposes of this action.



Remain in Force

- Finally, it is essential to consider Article 838B, which states that, unless, rescinded by the court, or withdrawn by the party suing out the warrant, all precautionary warrants shall remain in force until the cause becomes a res judicata.
- Notwithstanding Article 830(1), precautionary warrants become executive warrants after that the cause becomes res judicata or when in accordance with Article 166B such judicial letter constitutes an executive title.
- However, in the case of a warrant of seizure, warrant of seizure of a commercial going concern, garnishee order and warrant of arrest of sea vessels, the creditor shall file a note within 15 days from the cause becoming res judicata in the acts of the same warrant and demand an extension or reduction of the effects of the warrant to an amount equivalent to the legal costs, interest and the difference in the principal amount due in terms of the judgment, and such note is to be served upon the debtor and such persons as may have any interest therein.
- Also, in the case of a warrant of description and a warrant of impediment of departure the creditor shall file an application under the provisions of article 388E (warrant in factum) within 15 days from the cause becoming res judicata.



The Warrant of Prohibitory Injunction (Mandate ta' Inibizzjoni)

- This is a precautionary act issued by the court which restrains a person from doing anything whatsoever which might be prejudicial to the person suing out the warrant
- Therefore, this cannot be used to restrain a person from not doing anything, nor can it be used in order to force a person to act
- The warrant of prohibitory injunction can only act as a precautionary warrant
- As has been stated by the court in various cases, one of which is **Falzon v. Zahra Ltd et (First Hall Civil Court, 2010)**, there are four types of warrants of prohibitory injunction, which are the following:



- (1) What is known as a 'general' warrant of prohibitory injunction (Article 873);
- (2) What is known as an 'alienatory' warrant of prohibitory injunction (Article 874);
- (3) When a married couple have done or are about to institute a case for personal separation (Article 876); and
- (4) When one prevents a person from taking a minor outside of Malta (Article 877)



Issuing of the Warrant

Two conditions must concur so that the warrant is issued:

- (1) It must be issued in order to preserve the rights of the applicant;
- (2) Prima facie, such person must appear to possess such right



Where the warrant is sought to be issued against the Government of Malta, or against an authority as established by the Constitution or against any person holding a public office in his official capacity, such warrant can only be issued if:

- (a) The entity in question confirms in open court that the thing sought to be restrained is in fact intended to be done;
- (b) The court is satisfied that, unless the warrant is issued, severe prejudice would be caused to the said applicant; prejudice which would be disproportionate when compared with the actual doing of the thing sought to be restrained



- If the person against whom the warrant is issued breaches the court's order directly or indirectly, the applicant, upon filing an application, may ask the court to condemn the person in question so as to remedy the breach
 - If the latter is still in default, then the applicant may be duly authorised to carry out remedial works at the expense of the person so restrained



Instances where the Warrant can be Demanded

Claims of the Creditor

A warrant of prohibitory injunction may be demanded by a creditor in order to secure a debt or any other claim not amounting to less than €11,647

The object of such warrant is to restrain the debtor from selling, alienating, transferring or disposing *inter vivos* such property by onerous or gratuitous title, or in any manner creating a burthen or real and/or personal rights



- In such cases pertinent to immovable property, the application for the warrant of prohibitory injunction shall contain the particulars relating to the person against whom it is directed that are required by law in respect of the registration of a transfer of immovable property
- The warrant shall, upon its issue and at the expense of the applicant, be served by a Notary Public, or any person indicated by the applicant, within twenty-four hours on the Director of Public Registry and the Land Registrar, and such warrant must be registered in the books kept for purpose



- **Papadopoulou et v. Director of Lands et (First Hall Civil Court, 2010)**
- The court here said that the a warrant of prohibitory injunction of this nature must be registered by the Director of Public Registry immediately after he is notified of the said warrant. (The judgement uses the word ‘minnufih’.) If the registration does not take place immediately, the consequences are that the said warrant of prohibitory injunction would not temporarily halt the act taking place.



- The effect of this all is that any future sale, alienation, transfer or disposal of immovable property to which the warrant refers shall be void and to no effect
- The warrant in question shall, unless previously revoked or otherwise ceasing to be in force, have effect for a period of one year from the date of final judgement in favour of the creditor in his action for the recovery of the debt or claim

Claims of the Spouse

- A warrant of prohibitory injunction may also be demanded by a spouse against the other spouse in cases of personal separation, either before or after the institution of a suit for personal separation (or, it is presumed, divorce too)
- The warrant aims to restrain the other spouse from selling, alienating, transferring or disposing *inter vivos* whether by onerous or gratuitous title any shareholding in any commercial partnership if this is part of the community of acquests
- The warrant may also be brought against the commercial partnership itself if the said spouse has a majority shareholding
- The warrant may also restrain the other spouse from contracting a debt or suretyship which is a charge on the community of acquests



- The aforementioned demand may be made at any time after the filing of the application before the Civil Court, and until final judgement has been given in any such action for separation
- The demand may also be made where it is the other spouse who has made the said application for personal separation
- The spouse against whom the warrant is issued, as well as any partnership referred to in the warrant and any interested party, may, by application, ask the court to revoke or vary the said warrant

Claims Against a Minor

A warrant of prohibitory injunction may also be issued to restrain any person from taking any minor outside Malta

The warrant shall also be served on the following persons:

- A. The person/s enjoying legal or actual custody over the said minor;
- B. The officer charged with the issue of passports;
- C. The Commissioner of Police;



- If, before the service of the warrant on the officer charged with the issue of passports, a passport in respect of the minor had already been include in the passport of another person, such officer shall take the steps necessary to withdraw the said passport in respect of the minor, and of any other passport which includes the name of the minor, and to delete the name of the minor from such passport
- However, with Malta being part of the Schengen Area, this provision is hard to enforce because there is no need to have a passport in order to travel to States within the said Schengen Area



Class Discussion:

What possible amendments could be made to this law?



A Possible Suggestion:

- Perhaps this notion can be extended to all forms of identification instead, so that the warrant can also be enforced on documents such as drivers licences and identification cards.
- This in turn would perhaps make it easier to enforce the said provision.



Execution of the Warrant

- The application shall be served on the party against whom it is issued, who shall file a reply thereto within ten days
- The court may, however, in urgent cases, reduce the said period of ten days; and furthermore, in default of opposition, the court may accede to the demand
- The court may initially issue provisionally a warrant for a short period, under the terms and conditions as it may deem necessary, and subsequently decide about the matter in a definitive manner
- The court shall decide on its merits within the shortest time possible, but not later than one month from the day when the warrant had been filed and confirmed on oath, and the parties have been duly notified



Conclusion

- As has been seen above, precautionary warrants are very powerful tools.
- The general practice is that upon the application of a person for the issue of a precautionary warrant, the Court will generally automatically issue the order, provided that he shall have complied with the aforementioned conditions as prescribed by the Code.



Class Exercise:

1. What is a precautionary warrant?
2. How is a precautionary warrant filed?
3. What is a warrant of prohibitory injunction?
4. In what instances may a Warrant of Prohibitory Injunction be demanded?
5. Find 2 judgements relating to precautionary warrants from the E-courts website - Summarise the facts of the case and the decision taken by the Maltese Court.



**Diploma in Law
(Malta)**