Lord Abernethy; Lord Philip; Sir David Edward; Extra Division, Inner House, Court of Session. 12th June 2007

OPINION OF THE COURT delivered by LORD ABERNETHY

Introduction and background

[1] In 1982 the pursuers and respondents ("the pursuers") in this reclaiming motion contracted with the defenders and reclaimers ("the defenders"), a firm of architects, to design, administer, supervise and advise on the building of a dwellinghouse in Livingston. Construction began in 1982. The house was designed and built and on 17 November 1983 the defenders issued a certificate of completion.

[2] Thereafter disputes arose in relation to the building of the house. A dispute between the pursuers and the building contractors over payments which were claimed for extensions of time led to an arbitration in about 1986.

[3] On 15 November 1988 the summons in this action was served on the defenders, alleging negligence and breach of contract on their part. It was averred that problems and defects in the house were caused by the defenders' negligence in design and supervision.

[4] Defences were not lodged and on 21 December 1988, on the pursuers' intimated but unopposed motion, the cause was sisted. The interlocutor of that date recorded that the sist was "*pending negotiations between the parties with a view to settlement*". The action has remained sisted since then.

[5] Following the sist there was a desultory correspondence between the parties' solicitors which was broken off at various stages and led to no conclusion. In April 1997 the defenders made an offer in settlement of £20,000. The offer was refused and a number of attempts were made to arrange meetings, three of which were cancelled by the pursuers' solicitors. A meeting between solicitors did take place on 25 June 1997, but nothing came of it.

[6] A year later, in June 1998, an internal memo of the defenders' solicitors' records that the pursuers' solicitors sought to arrange a meeting with a partner in the defenders' solicitors' firm who knew nothing about the case. The partner who knew about the case sent a letter dated 12 June 1998 to the pursuers' solicitors explaining that, before a meeting could be arranged, he would have to obtain the authority of the defenders' London solicitors, requesting clarification of the purpose of the meeting and the proposed agenda, and asking for clarification of certain matters that had been discussed at the meeting a year earlier.

[7] The pursuer's solicitors did not reply to the letter of 12 June 1998, and no further communication between the parties or their solicitors occurred until early 2005.

[8] On 6 April 2005 the pursuers enrolled a motion to recall the sist. Warning of their intention to do so had been given in correspondence by their solicitors on 16 March 2005. The motion was opposed and the defenders enrolled their own motion for decree of absolvitor. The motions could not be heard before the Vacation Court due to pressure of business and they eventually came before the Lord Ordinary at a hearing that took place on 26 and 27 May and 5 and 6 July 2005. The full terms of the defenders' opposition to the pursuers' motion were as follows:

> "*(i) the Court, in exercise of its inherent jurisdiction ought to grant Decree of Absolvitor, having regard to*
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> *(a) the inordinate, unexplained and inexcusable delay on the part of the Pursuers in progressing this action subsequent to the sist pronounced on 21 December 1988,*
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> *(b) the serious prejudice to the Defenders which such delay has caused, and*
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> *(c) in any event, the substantial risk to a fair consideration of the issues of fact in the case which such delay has caused; or alternatively*
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> *(ii) the Court being prohibited, in terms of Section 6 of the Human Rights Act 1998 (the 'Act') from acting in a way which would be incompatible with the Defenders' Convention Rights (as defined in the Act), the allowance of further procedure in this case would be a breach of the Defenders' Article 6(1) right to have their civil rights and obligations determined at a fair and public hearing within a reasonable time by an independent and impartial tribunal.*
>
> *Accordingly, RCS 20.1 properly interpreted in the circumstances of this case requires that Decree of Absolvitor be granted ... ".*

[9] The Lord Ordinary held that the defenders' motion for absolvitor was not competent. She therefore refused it. Her interlocutor of 5 August 2005 gave effect to that decision. It is against that interlocutor that the defenders enrolled the present reclaiming motion. If the reclaiming motion is successful the subsequent interlocutor of the Lord Ordinary, dated 9 August 2005, which dealt with the expenses of the motion before her, would fall.

The Lord Ordinary's Opinion

[10] The principal contention on behalf of the defenders was that in appropriate, although exceptional, cases the Court had power to bring an action to an end by granting decree of absolvitor. No such power was provided by the Rules of Court but the power existed by reason of the inherent jurisdiction vested in the Court. In view of the inordinate and inexcusable delay that had taken place since the interlocutor of 21 December 1988 and the difficulties that the defenders would face if the case went ahead due to the passage of time and loss of evidence the Court should exercise the power in this case.

[11] The defenders also contended that to allow the case to proceed now would be a breach of the defenders' right in terms of Article 6(1) of the European Convention on Human Rights ("the Convention") to have their civil rights and obligations determined at a fair and public hearing within a reasonable time by an independent and impartial

tribunal. The Court, as a public authority, was prohibited in terms of section 6 of the Human Rights Act 1998 *("the Human Rights Act")* from acting incompatibly with the Convention. Its own procedures required to comply with the Convention and once the breach was identified in this case, the only course was for the Court to stop the proceedings.

[12] In the result the Lord Ordinary, accepting the pursuers' counter arguments, held that the defenders' motion was incompetent. She did so essentially on the basis that in terms of section 5 of the Court of Session Act 1988 the Court was given power to regulate its procedure by way of Act of Sederunt. By Act of Sederunt the Court had made Rules of Court to govern procedure. The silence in the Rules on this matter was in the circumstances indicative of an intention by the Court not to confer the power for which the defenders contended. The Lord Ordinary went on to hold that, even if the defenders' motion was competent, it would not have been appropriate in the circumstances to exercise her discretion to grant the motion. She held on the information before her that the delay, while inordinate, was not wholly inexcusable. She was not persuaded that in all the circumstances a fair trial was not still possible or that the defenders would be unduly prejudiced. In any event, the remedy favoured by the Lord Ordinary, if she had reached that stage, would have been dismissal of the action rather than decree of absolvitor.

[13] The Lord Ordinary also rejected the defenders' submissions based on Article 6(1) of the Convention. The Court had not been in any way responsible for the delay which had occurred. Nor would it be acting in breach of Article 6(1) by recalling the sist. In any event, termination of the proceedings was not the only, or even the usual, remedy available to deal with such a situation. The usual remedy, in terms of section 8(1) of the Human Rights Act, and the one the Lord Ordinary would have favoured if she had reached that stage, would be to take steps to accelerate determination of the case.

Submissions of counsel

[14] Mr. Thomson, junior counsel for the defenders, submitted that the nature of the Court's inherent jurisdiction was such that the Court had power to bring to an end litigation where there had been such delay on the part of a pursuer in prosecuting his claim as to put at risk the possibility of a fair trial of the issues between the parties or otherwise to prejudice the defenders so as to amount to an abuse of process on the part of the pursuer, unless such power was excluded or fettered by the Rules of Court.

[15] In advancing that proposition Mr. Thomson examined first the nature of the inherent jurisdiction of the Court. The Scottish authorities were scarce but he referred first to ***Hall v Associated Newspapers Ltd.*** 1979 JC 1. That case was concerned with contempt of Court. Giving the Opinion of a Court of five judges Lord Justice General Emslie stated (at page 9) that the power which the Court had to punish summarily conduct which impedes the Court in the exercise of its functions was part of *"the indispensable power which is inherent in every Court to do whatever is necessary to discharge the whole of its responsibilities"*. Support for that opinion was derived from *Erskine's Institute* 1.2.8 and *Hume on Crimes*, 3rd edition, chapter VI page 139. This was consistent with what is stated in *Halsbury's Laws of England*, 4th edition vol. 37, para. 12 under reference, *inter alia*, to Jacob's article *The Inherent Jurisdiction of the Court* (1970) 23 Current Legal Problems 23. Its inherent jurisdiction is a residual power of the Court to which it can resort in an appropriate case. In ***Shetland Sea Farms Ltd. v Assuranceforeningen Skuld*** 2004 SLT 30 Lord Gill under reference to the same article said that the Court of Session had an inherent power to dismiss a claim where the party pursuing it has been guilty of an abuse of process such as pursuing the claim by fraudulent means. Reference was also made to the decision of the House of Lords in ***Grobbelaar v News Group Newspapers Ltd.*** [2002] 1 WLR 3024 and to ***Montreal Trust Co. v Churchill Forest Industries (Manitoba) Ltd.*** (1971) 21 DLR (3d) 75. Lord Bingham of Cornhill in the former case and the Court in the latter case found support in Jacob's article mentioned above. The latter case also showed that the inherent jurisdiction stood apart from any Rule of Court. In ***Bremer Vulkan v South India Shipping*** [1981] AC 909 Lord Diplock said (at page 977) that the Court had as part of its inherent jurisdiction the power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done. This was not dependent on any specialty of English law or on any Rule of Court. It was difficult to suggest that what Lord Diplock had said did not apply equally to the Court of Session.

[16] Mr. Thomson went on to consider the relationship between the Court's inherent jurisdiction and the Rules of Court. He submitted that this was perhaps the key to the resolution of the reclaiming motion. The Rules should not be seen as a comprehensive code fettering or excluding the power of the Court under its inherent jurisdiction unless they did so either expressly or by necessary implication. Reference was made to Thomson and Middleton's *Manual of Court of Session Procedure*, pages vi-vii of the Preface and ***Brogan v O'Rourke Ltd.*** 2005 SLT 29. It was significant that the former was written in 1937, shortly after the 1934 Rules of Court were introduced following provision of the power to make Rules in sections 16 and 17 of the Administration of Justice Act 1933 (which is now contained in sections 5 and 6 of the Court of Session Act 1988). The inherent jurisdiction of the Court was more fundamental than, and went beyond, mere procedure. At the root of the decisions in ***Boyd, Gilmour and Co. v Glasgow and South Western Railway Co.*** (1888) 16 R 104 and ***Hutchison v Galloway Engineering Co.*** 1922 SC 497 must be the inherent jurisdiction of the Court. The Court had to retain the flexibility needed to deal with unusual situations unless it had clearly deprived itself of the power to do so. A Rule of Court was not to be interpreted as altering a settled rule of law unless that was expressly stated or followed by necessary implication. Otherwise the inherent jurisdiction of the Court would be emasculated. Construction of the Rules of Court in such a way as to have that effect would not serve the interests of justice.

[17] Mr. Thomson submitted that the power which the defenders moved the Court to exercise in this case to bring it to an end was within the inherent jurisdiction for which he contended. In support of that submission he referred to a considerable number of authorities. He started with the English authorities. The principles to be derived from those authorities were applicable in Scotland. In ***Allen v Sir Alfred McAlpine & Sons Ltd.*** [1968] 2 QB 229 the Court of Appeal held that it was within the inherent jurisdiction of the Court to exercise its discretion to dismiss a case for want of prosecution where there had been inordinate or inexcusable delay on the part of the plaintiff or his lawyers with the result that there was a substantial risk that it would not be possible to have a fair trial of the issues in the action or that it was likely to have caused serious prejudice to the defendants. This received the unanimous approval of the House of Lords in ***Birkett v James*** [1978] AC 297. The majority of their Lordships thought it irrelevant to consider whether the plaintiff might or might not have an alternative remedy against his solicitor. Lord Salmon considered that it was not a criticism of the defendant's solicitors that they had not themselves taken action to progress the case but had let sleeping dogs lie. The effect of these authorities was summarised in ***Trill v Sacher*** [1993] 1 WLR 1379, Neill L.J. at pages 1397-1400. Mr. Thomson submitted that the rationale of all this was that to bring an action in such circumstances was an abuse of process. The concept of abuse of process was well-known in Scotland. Reference had already been made to ***Shetland Sea Farms Ltd. v Assuranceforeningen Skuld.*** In ***Clarke v Fennoscandia Ltd. (No. 3)*** 2005 SLT 511 all three judges in the Second Division expressed the view *obiter* that the Court had an inherent power to control abuse of process. In both cases support was derived from ***Hunter v Chief Constable of the West Midlands Police*** [1982] AC 529. In ***Rodger v C & J Contracts Ltd.,*** unreported 30 March 2005 ([2005] CSOH 47) the view expressed *obiter* by Lord Emslie at paragraph [53] proceeded on the same basis. In ***Levison v The Jewish Chronicle Ltd.*** 1924 SLT 755 Lord Ashmore granted decree of absolvitor to deal with an abuse of process by the pursuer which seriously prejudiced the defenders in their conduct of the action. There were no Rules of Court to deal with abuse of process generally, although certain situations which might be regarded as an abuse of process, for example where there was no proper defence to an action, were provided for (RCS 21.1). It was not enough, however, to say that if such an abuse could be dealt with in terms of the Rules of Court the inherent power was thereby excluded, unless that was clearly so. On occasions it was necessary for a higher Court to make a judgment based more on legal policy than on legal precedent or previously acknowledged principle: see ***Wright v Paton Farrell*** 2006 SC 404, Lord President Hamilton at paragraph [5]. At paragraph [20], however, the Lord President, while acknowledging that there were indications that the law of Scotland may be developing a principle of "abuse of process", doubted whether it would be possible readily to identify, and under current procedural arrangements, to deal with cases in that category. Lord Osborne pointed out that while there were specific Rules of Court to deal with abuse of process in England, there was no counterpart in the Rules either of the Court of Session or the Sheriff Court. On the basis of Scottish authorities Lord Osborne acknowledged in principle the existence of an inherent power in any court to prevent abuse of its processes but found it impossible to reach a conclusion as to the scope of that power to dismiss an action where the pursuer had been guilty of an abuse of process. His view was that unless and until the power was crystallised in the form of Rules of Court which defined the criteria which were to be applied in connection with the exercise of the power, in practice it could not be exercised. Mr. Thomson submitted, however, that the Court should not be prevented from dealing with an abuse of process merely because there were no Rules of Court in place to govern the procedure. That would emasculate the Court's power to deal with an abuse of process. There were many situations in which the Court took steps to do justice even when there was no specific provision in the Rules of Court. Examples were an order of the Court for a pursuer to undergo a medical examination and the every day discretion exercised by the Court in the matter of expenses.

[18] Mr. Thomson recognised that in earlier times there could be considerable delay in proceeding with a case. A case could lie asleep for many years but could then be wakened: see ***Ross v Cleghorn*** 1758 M. 11996. But that situation was allowed for up to the then prescriptive period of 40 years by the procedures then extant: *Bankton's Institute* 4.23.12 and *Erskine's Institute* 4.1.8.

[19] Turning to more recent cases where there had been excessive delay on the part of a pursuer in proceeding with a case Mr. Thomson referred to ***Purdie v Kincaid & Co. Ltd.*** 1959 SLT (Sh. Ct.) 64 and ***Catterson v Davidson*** 2000 SLT (Sh. Ct.) 51. In each of those cases the Sheriff Principal had held that the Sheriff Court Rules did not give a Sheriff the power to bring an action to an end on the ground of mere delay on the part of the pursuer. In ***Esso Petroleum Co. Ltd. v Hall Russell & Co. Ltd. (No. 2)*** 1995 SLT 127 the defenders moved for dismissal of an action on the ground that there had been inordinate and inexcusable delay in pursuing the action. They contended that the Court had an inherent power to regulate its own procedure, which gave it authority to dismiss the action for want of prosecution. It was held by Lord Johnston that the motion was incompetent. It was accepted that the Court of Session had an inherent jurisdiction enshrined in the *nobile officium* to make good a *casus improvisus*. But since the procedure of the Court was regulated by Rules of Court and a number of Rules dealt with time limits or failure to comply with time limits but there was silence as to any power to dismiss an action for delay alone, it must be assumed that the draftsmen of the Rules had dealt with the problem of delay to the extent that was intended and had not intended to confer the power contended for by the defenders. Mr. Thomson submitted, however, that Lord Johnston's approach in that case was too narrow. It should not be followed and the Lord Ordinary in the present case was in error in doing so. The approach adopted by Sheriff Principal Macphail as he then was in *Newman* ***Shopfitters Ltd. v MJ Gleeson Group Plc*** 2003 SLT (Sh. Ct.) 83 should be followed. There it was held that in a case of inordinate delay the Sheriff was entitled to grant decree of absolvitor in the exercise of the inherent jurisdiction of the Court. That case was followed in ***Wilson t/a TW Contractors v Drake & Scull Scotland Ltd.*** 2005 SLT (Sh. Ct.) 35. Sheriff Principal Macphail's approach commended itself to Lord Glennie in ***McKie v MacRae***

2006 SLT 43. Lord Glennie considered that the existence of Rules of Court which allow for dismissal in certain situations did not preclude the Court from having and exercising an inherent jurisdiction, as part of its inherent power to control its processes to prevent abuse, to dismiss an action for delay. The purpose of the Rules of Court was not to provide a comprehensive summary of Court of Session procedure: see the Preface to the 1934 Rules of Court written by Lord President Clyde.

[20] Mr. Thomson further submitted that the allowance of further procedure in this case would constitute a breach of the defenders' rights under Article 6(1) of the European Convention on Human Rights to have their rights and obligations determined within a reasonable time. Those rights were given effect by section 1 of the Human Rights Act 1998. In terms of section 3(1) of the Act the Court had, so far as it was possible for it to do so, to read and give effect to both primary and subordinate legislation in a way which was compatible with Convention rights. It was unlawful if it acted (which included a failure to act) in a way which was incompatible with a Convention right (section 6). In relation to any act or proposed act which was or would be unlawful the Court was empowered to grant such relief or remedy as it considered just and appropriate (section 8(1)). It was therefore for the Court to determine the defenders' rights and obligations within a reasonable time. What was a reasonable time depended on the facts and circumstances of the case but if a reasonable time had already elapsed or would have elapsed by the time the case was determined the Court would require to grant such relief or remedy which it considered just and appropriate. The Court therefore had a duty to wake up sleeping dogs. Reference was made to ***Karl Construction Ltd. v Palisade Properties Plc*** 2002 SC 270, Lord Drummond Young at paragraphs 75 and 76. In this case there were two aspects to a possible breach of Article 6(1) of the Convention. The first was the delay which had already occurred. The second was the further delay that would be caused by allowing further procedure in the case. Between 1988 and 2005 no action had been taken by the Court. Thereafter any breach would be in the Court's compelling the defenders to remain under its jurisdiction in relation to this action. The fact that either party could have enrolled a motion at any time to recall the sist did not mean that there was no breach of Article 6(1). The Court had to accept its overriding responsibility under section 6(1) of the Human Rights Act to avoid a breach. The parties, however, could not use Court procedures in such a way as to result in there being a breach of Article 6(1). Reference was made to ***Buchholz v Federal Republic of Germany*** (1981) 3 EHRR 597. On the facts of this case it could not be said that the defenders' rights and obligations had been determined within a reasonable time. In that situation the appropriate remedy was the termination of these proceedings. Reference was made to ***R v HM Advocate*** 2003 SC (PC) 21 and ***Attorney General's Reference (No. 2 of 2001)*** [2004] 2 AC 72.

[21] Mr. Thomson then submitted that the effect of the delay in this case was that there was a real and substantial risk that a fair trial of the issues between the parties would not be possible. In any event, the defenders had been prejudiced by the delay. The proper approach to this point was set out in ***Shtun v Zalejska*** [1996] 1 WLR 1270. The Court had to consider the facts and circumstances of the case with care but it was not necessary for there to be evidence of the particular respects in which witnesses' recollections had been impaired by the delay and the prejudice suffered thereby. The Court was entitled to draw an inference that the defenders would be prejudiced as a result of the impairment of witnesses' recollections. The ways in which evidence could be affected and the broader policy considerations in the context of statutory limitation periods, which were addressed in ***B v Murray (No. 2)*** 2005 SLT 982, were equally applicable in the context of this case. Mr. Thomson then took us through a detailed history of what had happened in this case. There had been an inordinate delay which *prima facie* was inexcusable. It was for the pursuers to excuse it if they could. The correspondence between the parties' representatives had been at best fitful in the years up to 1998. There had been no good reason for that delay of 10 years. But there had then been no further correspondence at all between 1998 until towards the end of 2004. There was no credible excuse for that period of delay. In saying that the delay was not inexcusable the Lord Ordinary had overlooked the period after 1998. That was a failure in the exercise of her discretion which was enough to open the matter up for this Court. Mr. Thomson submitted that the defenders had been seriously prejudiced by the delay. Apart from general considerations of loss of recollection by the passage of time there were particular points of prejudice. Mr. Spencely, who had been in overall charge of the project, had disposed of his diaries after he retired from the defenders. Reference was made to two affidavits given by him. The second, dated 3 July 2006, was given after the Lord Ordinary's decision. The disposal of his diaries after he retired was not the defenders' fault. It was not the pursuers' either. There was therefore prejudice to both parties. Mr. Renton, who was part of the defenders' design team and who had been ill at the time of the hearing before the Lord Ordinary, had now died. In these circumstances there was a substantial risk that a fair trial of the issues between the parties was not now possible. Moreover, as the letter of 23 June 2005 from the defenders' London solicitors made clear, the defenders were not now fully insured. And in the event of an award of damages the Court could not do other than award interest on the damages going back very many years: see *Boots the Chemist Ltd.* v *GA Estates Ltd.* 1992 SC 485.

[22] In reply, Mr. Drummond, solicitor-advocate for the pursuers, moved the Court to refuse the reclaiming motion and adhere to the Lord Ordinary's interlocutor of 5 August 2005. Mr. Drummond submitted first that this Court had no inherent power to dispose of an action through want of prosecution. The defenders' motion to that effect was therefore incompetent. The Lord Ordinary had dealt with the matter correctly at paragraphs [55]-[58] of her Opinion. By making comprehensive provision for delay in the Court of Session Act 1988 and in the Rules of Court it must be taken that that provision was all that the legislators had intended. This was particularly so given that the problems of delay were not new either in England (as the recent cases showed) or in Scotland historically. In ***Newman Shopfitters Ltd. v MJ Gleeson Group Plc*** the Sheriff Principal had derived support from the terms of

section 5 of the Sheriff Court Act 1907 and also Rule 9.12(1) of the Ordinary Cause Rules 1993. There was no express reservation of jurisdiction in the 1988 Act as there had been in the Sheriff Court Act. There were numerous rules in the Rules of the Court of Session which dealt with delay and its consequences. There was also a streamlined procedure in respect of commercial and intellectual property actions. These provisions were made under a statutory section providing, *inter alia*, for steps to be taken to avoid delay. In this situation the Rules Council must be taken to have considered delay exhaustively and in so far as it made no provision in the Rules must be taken to have rejected any such provision. The proper way of dealing with a perceived gap in the Rules was for the Rules Council to consider the matter and, if so advised, provide new Rules. That would no doubt have prospective effect. If the defenders' motion were granted it would have retrospective effect, which was undesirable. The court should adopt the approach taken by Lord Johnston in ***Esso Petroleum Co. Ltd. v Hall Russell & Co. Ltd. (No. 2). Boyd, Gilmour & Co. v Glasgow South-Western Railway Co.*** was not authority for the proposition that the Court's powers were not restricted by Rules of Court or Act of Sederunt. There was no Rules Council at that time. *Boyd, Gilmour* was no more than a case of expediency. It should not be given the weight for which the defenders contended. The nature and scope of the Court's inherent jurisdiction in Scotland was different from that in England as described in Halsbury's *Laws of England* 4th edition, vol. 37 para. 12. The inherent power referred to by Erskine was a power which the Court had (1) to enforce its decrees and (2) to maintain its authority. The power sought by the defenders in this case did not fall into either of these categories. In ***McKie v MacRae*** Lord Glennie had characterised delay as an abuse of process. But, as was clear from Lord Diplock's speech in *Birkett* v *James*, abuse of process was in a separate category from delay. Erskine was authority for the Court's power in respect of the former, but not the latter. Lord Glennie was in error in characterising delay as an abuse of process. In the absence of acting in defiance of Court orders or the Rules it could not be said that the pursuers were abusing process. In paragraph [36] of her Opinion the Lord Ordinary had correctly put Lord Justice General Emslie's comments in ***Hall v Associated Newspapers Ltd.*** in context. Even if delay could be said to be a kind of abuse of process it was submitted (1) that abuse of process involved a direct challenge to the authority of the Court or a misuse of its procedures; (2) that there was doubt as to the existence and scope of the Court's power to regulate abuse of process; and (3) that if it did exist, it would appear to lead to dismissal rather than absolvitor. Reference was made to ***Shetland Sea Farms Ltd. v Assuranceforeningen Skuld, Clarke v Fennoscandia Ltd. (No. 3)*** and ***Wright v Paton Farrell.***

[23] Mr. Drummond then submitted that if the Court did have an inherent power to dispose of an action through want of prosecution, it should be subject to the test set out by Lord Diplock in ***Birkett v James.*** This was (1) that there should have been inordinate and inexcusable delay on the part of the pursuers or their lawyers; (2) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defenders; and (3) the power should be exercised only in exceptional circumstances. It was to be noted that the background against which the Courts in England had recourse to their inherent jurisdiction was the necessity to deal with their frustration at the delays which were occurring. The position was not the same in Scotland. It was also to be noted that the Courts in England had moved on since ***Birkett v James*** because the test set out there was considered unduly restrictive of the Court's ability to control delay: see ***Biguzzi v Rank Leisure Plc*** [1999] 1 WLR 1926. So while, if the inherent power existed, the test for its use should be as set out in ***Birkett v James,*** the English experience since that case was another reason why the power should not be exercised at all but should await crystallisation in the Rules of Court.

[24] Mr. Drummond then turned to the question whether, if the power contended for by the defenders existed, it was relevant, in deciding whether to exercise it, to consider whether the pursuers would have a remedy against their solicitors. He drew attention to the difference in view taken by the Lord Ordinary (who was of the view that it was relevant) and Lord Glennie in ***McKie v MacRae*** (who was of the view that it was not relevant). Lord Glennie's view was the same as the majority of the House of Lords in ***Birkett v James***. Lord Diplock was one of the majority and in that case he had taken a different view from the one he had earlier expressed in the Court of Appeal in *Allen* v *Sir Alfred McAlpine & Sons Ltd.*. He explained that his change of view was because it was too difficult to assess whether the plaintiff would have an effective remedy against his solicitors. But that was not the approach in Scotland: see the procedure in motions under section 19A of the Prescription and Limitation (Scotland) Act 1973 and in motions for summary decree. It was submitted, therefore, that whether the pursuers would have a remedy against their solicitors was a relevant factor to be taken into account. What weight it should be given was another matter. In this case it was unlikely that the pursuers would have a good claim against their solicitors. The test to establish professional negligence was a high one: see ***Hunter v Hanley*** 1955 SC 200. The question of foreseeability was perhaps an even stronger point. There was no precedent in the Court of Session for decree of absolvitor being pronounced for negligent want of prosecution.

[25] In relation to whether it was a relevant consideration that the defenders could have made progress in the action by enrolling a motion to recall the sist rather than letting sleeping dogs lie, Mr. Drummond said that he was not aware of any cases in court (as opposed to private arbitrations (***Bremer Vulkan v South India Shipping***)) in which it had been held that it was a relevant consideration but submitted that the Lord Ordinary was correct to hold that it was (paragraph [53])and Lord Glennie was wrong to hold in ***McKie v MacRae*** (paragraph [50](5)) that it was not. If there was to be a change of policy leading to the pursuers' case being struck out for want of prosecution, then such a change should affect the defenders' position also. It was incumbent on all parties to co-operate with the Court in avoiding unnecessary delay. Reference was made to ***Newman Shopfitters Ltd. v MJ Gleeson Group Plc.***

[26] In any event, Mr. Drummond submitted, the test for bringing the action to an end set out by Lord Diplock in ***Birkett v James*** was not met in the circumstances of this case. Whether it was so met was a matter for the Lord Ordinary in the exercise of her discretion. This Court could only come to a different conclusion if she either failed to exercise her discretion or exercised it in a way which was unreasonable or contrary to law. She found that the delay of some sixteen and a half years from 1988 to 2005 was inordinate, but looking at it as a whole did not find it wholly inexcusable. She was entitled to adopt that approach and this Court should not interfere. It was also a matter for the Lord Ordinary's discretion as to whether the defenders had been unduly prejudiced by the delay. On this matter also this Court should not interfere. As the Lord Ordinary noted, this was a case alleging negligent design and negligent supervision. The key documents covering the design of the building and other documents relevant to the supervision of the contract were available. The passage of time was not so important in that situation as it would have been where witnesses to matter of fact were trying to recall events many years ago. The onus of showing prejudice was on the defenders. Reference was made to ***Shtun v Zalejska*** and ***Trill v Sacher***. Mr. Drummond frankly stated, however, that if the action were to proceed, the pursuers would seek to plead further defects beyond those which had already been pled. In summary, those involved on the defenders' side with the design of the building and supervision of the contract, Mr. Spencely and Mr. Neil Gillespie, were still available to give evidence. Mr. Renton's death was not a hindrance to the defenders in presenting their case. The other witnesses would be the pursuers, Mr. David Smith (whom they had retained in 1986 to assist in the arbitration proceedings by the contractor against them) and independent experts on both sides. No doubt these would include Mr. David Pirie who had given the defenders a report on January 1995 (see the Lord Ordinary's Opinion paragraph [12]). Any dimming of witnesses' recollections as to events at the time would not be a hindrance because the key documents were available. In any event, if the period from 1998 to 2005 was critical, any dimming of recollections would have occurred by 1998 and therefore prejudice would have been suffered by then. Finally, with regard to the question of insurance, there was insufficient information, as the Lord Ordinary had found. In any event, this was part of the risk which went with the defenders not taking steps to progress the action but letting sleeping dogs lie.

[27] Mr. Drummond next submitted that the delay here did not result in a breach of the defenders' rights under Article 6(1) of the Convention. The Lord Ordinary at paragraphs [65]-[68] of her Opinion had correctly dealt with the point. Reference was made to *Buchholz* v *Federal Republic of Germany* and *Zimmerman and Steiner* v *Switzerland* (1983) 6 EHRR 17. In any event, even if there had been a breach of the defenders' rights under Article 6(1) it did not necessarily follow that the proceedings should be brought to an end. It was still possible to have a fair trial of the issues between the parties. If, contrary to his submission, the Court held that there had been a breach of the defenders' Article 6(1) rights it was not possible to read down RCS 20.1 (which was relied on by the defenders in their opposition to the pursuers' motion to recall the sist) so as to require the Court to grant decree of absolvitor. That Rule was to do with decree by default, which was not the situation here. Reference was made to Maclaren, *Court of Session Practice* page 1094 and Maxwell, *The Practice of the Court of Session* page 617.

[28] Finally, and in any event, Mr. Drummond submitted that the remedy of absolvitor sought by the defenders was inappropriate and disproportionate. Reference was made to ***Z v United Kingdom*** (2001) 34 EHRR 3. Section 8(1) of the Human Rights Act gave the Court a wide discretion as to remedy. There were a number of options, such as treating the evidence in the case with caution (***Esso Petroleum Co. Ltd. v Hall Russell & Co. Ltd.***; *Gloag on Contract*, second edition, page 543), taking steps to accelerate the action (***Attorney General's Reference (No. 2 of 2001)***), making orders as to expenses or caution, or variation in any award of interest (***Boots the Chemist Ltd. v GA Estates Ltd***.), or dismissal. Any default situations covered by the Rules of Court were dealt with by dismissal rather than absolvitor. Absolvitor was reserved for a situation where the merits of the case had been considered. Apart from ***Newman Shopfitters Ltd. v MJ Gleeson Group Plc***, where the point had not been argued, Mr. Drummond was not aware of any case where decree of absolvitor had been granted without a consideration of the merits. The reclaiming motion should be refused.

[29] Mr. Howie, senior counsel for the defenders, adopted his junior's submissions - except in one respect which is mentioned later - and focused on what he described as the major issues in the case and a number of points which had arisen in the course of the debate. He submitted that the Lord Ordinary was in error in holding that the defenders' argument based on the inherent jurisdiction of the Court was incompetent. It was not correct to say that the Court of Session Act 1988 took away the inherent jurisdiction of the Court and superseded it with the provisions of the Rules of Court. The inherent jurisdiction came from the original statutes setting up the Court. There had to be such jurisdiction in the Court to allow it to do what was necessary to perform its functions as a court of justice. That jurisdiction remained unless and until it was removed by Parliament. The 1988 Act did not remove it. It had been used since 1988 in cases which involved an abuse of process, a phrase which it was accepted might be better used more narrowly than it sometimes had been. Before 1988 ***Boyd, Gilmour & Co. v Glasgow and South-Western Railway Co***. and ***Levison v The Jewish Chronicle Ltd***. were examples of its use. Since 1988 ***Clarke v Fennoscandia Ltd. (No. 3)*** and ***Shetland Sea Farms Ltd. v Assuranceforeningen Skuld*** were cases in which it was said to be capable of being used. And it had been used in ***McKie v MacRae*** and, indeed, on a daily basis in the examples given by Lord Glennie in that case. Dismissal of actions for irrelevancy and lack of specification were further examples. The inherent jurisdiction of the Court is necessarily of wide compass. It had not been taken away either by Act of Parliament or by the Rules of Court. The Rules of Court were not comprehensive in the sense that they were exhaustive. Reference was made to the codifying Act of Sederunt 1913 and to the Preface to the 1934 Rules of Court written by Lord President Clyde. Section 6 of the 1988 Act did no more than provide that the Rules of Court must deal with the matters listed there. It had nothing to do with confining the Court's powers to

make Rules to that list. That would be inconsistent with the provisions of section 5. The predecessors of those sections were sections 16 and 17 of the Administration of Justice (Scotland) Act 1933. There was nothing in the 1988 Act either expressly or by necessary implication which removed the powers exercisable as part of the inherent jurisdiction of the Court or limited them to those expressly provided for either by the Act or the Rules of Court. Mr. Howie accepted that some test was necessary for the use of the inherent powers but it was not necessary to go the length of saying that they should not be used unless and until they were crystallised in Rules of Court, as Lord Osborne had said in ***Wright v Paton Farrell***. It would be remarkable if the powers could be used in the Sheriff Court, as in ***Newman Shopfitters Ltd. v MJ Gleeson Group Plc***, but not in the Court of Session. It followed that Lord Johnston had fallen into error in ***Esso Petroleum & Co. Ltd. v Hall Russell & Co. Ltd. (No. 2)***. The inherent jurisdiction of the Court was available to deal with the mischief of delay. If there was an appropriate test for its use, it should be used. Such a test was available: see ***Birkett v James*** as subsequently developed in *Department of Transport v Chris Smaller Ltd.* [1989] 1 AC 1197 and *Trill v Sacher*. Mr. Drummond had put forward a number of objections to the test and the way in which it should be operated. The objection on the ground of retrospectivity was not well taken. There was no reason why change should not be immediate. It had not been a problem which carried any weight in England: see ***Allen v Sir Alfred McAlpine & Sons Ltd.*** and ***Birkett v James***. Reference was also made to ***The "Boucraa"*** [1994] 1 Ll. LR 251. Whether or not there might be any future satellite litigation and, if so, its scope if the invocation of the inherent jurisdiction succeeded could not be a reason for not invoking it. That there was at present no set procedure in place was nothing to the point. Here the matter had been raised on the motion roll but, if it was thought necessary, it could be dealt with by way of Minute and Answers or in some other way. It was for the Court to provide an appropriate mechanism, not to deny use of the inherent jurisdiction because there was a query as to the appropriate mechanism. That the defenders had "let sleeping dogs lie" was not a relevant consideration. It had not been in England prior to recent radical procedural reforms, for the reasons given in ***Birkett v James*** and ***Bremer Vulkan v South India Shipping***. See also *Newman Shopfitters Ltd. v MJ Gleeson Group Plc* and ***McKie v MacRae***. It was accepted, however, that it might be a relevant consideration in the Human Rights aspect of the case.

[30] Dealing with a number of points which had arisen in the course of the debate, Mr. Howie accepted that it was difficult for him to draw an analogy between the delay in this case, after the action had been raised, and delay before an action is raised such as to support a plea of *mora*, taciturnity and acquiescence. Reference was made to ***Assets Co. Limited v Bain's Trustees*** (1904) 6 F 692; ***GA Estates Ltd. v Caviapen Trustees Ltd***. 1993 SLT 1051; and the galley proofs of Reid and Blackie on *Personal Bar*. A "substantial" risk that a fair trial would not be possible meant only a risk that was more than minimal, thereby providing a threshold for the exercise of discretion by the Court. Similarly, any prejudice caused by delay beyond that of issuing the writ, albeit within the prescription period, must be more than minimal: see *Trill v Sacher*. It was for the Court to determine, relying on its experience in these matters, whether in all the circumstances there was a substantial risk that a fair trial would not be possible, although it was for the defenders in this case to put forward sufficient material to enable such a determination to be made. The test in ***Birkett v James*** was that the delay gave rise to a risk that a fair trial would not be possible or was such as was likely to cause serious prejudice to the defenders. That was a disjunctive "or". See also ***Department of Transport v Chris Smaller Ltd.***. In this case there was a more than minimal risk that a fair trial would not be possible. Mr. Renton was dead and so his evidence would not be available. In his first affidavit Mr. Spencely said that Mr. Renton was responsible for the design of the building. In his second affidavit Mr. Spencely said that his diaries and progress photographs were not now available. Nor were the progress notes and sketches. These were important in order to see what was there at the material time and to determine what steps should have been taken to deal with it. Mr. Spencely's recollection had been dimmed by the passing of time and would not necessarily recover by looking at the documents again. So the contemporaneous discussions as to why the design was as it was might be beyond recall. Even if it could be said now that the design was wrong, it was not necessarily negligent. The missing information could be critical to that difference. Moreover, there was the question of supervision, which was a separate matter. Also it was not known what the pursuers' new claims would involve. Turning to the question of prejudice, Mr. Howie said that in the period when delay was culpable this was more than minimal. On this aspect of the matter he departed from his junior's submission relating to the question of interest and accepted he could not advance that as a point of prejudice. He did, however, rely on what he called the insurance gap. In the period of culpable delay the defenders had been fully insured. Now they were not, to the extent of about 26%. This was due to insurance company failures in 2001, 2004 and 2007. Some of this loss could be recovered under the Financial Services Compensation Scheme but there would still be a loss of some 10% of the 26%, which it was estimated could amount to about £25,000. It would fall on the partners of the defenders at the time or the estates of those who were deceased. This was more than minimal prejudice and satisfied the second part of the test in ***Birkett v James***. If there was a dispute about this, the Court might have to order the parties to set out their respective positions fully in a Minute and Answers, to be followed perhaps by a proof, before the matter could be determined. Once this stage was reached there was then the question of remedy. Mr. Howie said that the only issue at this stage was whether the Court should grant decree of dismissal or absolvitor. The other alternatives put forward by Mr. Drummond were either not serious or not realistic. The distinction between absolvitor and dismissal was a peculiarly Scottish one; it was not a problem which the Courts in England had had to face. It was true that both in ***Clarke v Fennoscandia Ltd. (No. 3)*** and in ***Shetland Sea Farms Ltd. v Assuranceforeningen Skuld*** only dismissal had been mentioned. But in those cases dismissal would have been enough to bring them to an end. The policy requirement was to do that but in this case that result would not be achieved by dismissal. Mr. Howie knew of no case where absolvitor had been granted before defences had been

lodged but in this case the defenders had now (very recently) lodged defences. Decree of absolvitor should be pronounced. If that was not possible, then the action should be dismissed.

[31] In reply Mr. Drummond made only one or two points of detail which we do not need to rehearse.

Discussion and Decision

[32] The issue for decision in this case is whether, and if so in what circumstances, a judge of the Court of Session has the "inherent" power to put an end to a pending action on grounds comparable to those on which, until the recent revision of the Civil Procedure Rules (implementing the Woolf Reforms), the High Court in England could strike out an action for want of prosecution.

[33] We begin by setting out our understanding of the English background, largely by quotation from decided cases.

The English background

[34] The *"inherent power"* or *"inherent jurisdiction"* of the court was defined in an article by the late Master of the High Court, Sir Jack Jacob, - *"a definition which has never perhaps been bettered"* (per Lord Bingham in ***Grobbelaar v News Group Newspapers Ltd***. [2002] 1 WLR 3024, at page 3037B) - as follows: *"[T]he inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."* (Jacob, *The Inherent Jurisdiction of the Court*, ((1970) 23 Current Legal Problems, 23).

[35] In ***Bremer Vulkan v South India Shipping*** [1981] AC 909 Lord Diplock said (at page 977 D-G):

"The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute.

The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an 'inherent power' the exercise of which is within the 'inherent jurisdiction' of the High Court."

[36] ***Bremer Vulkan*** was concerned with the power of the court in relation to delay in prosecuting an arbitration. The majority in the House of Lords held that the High Court had no inherent jurisdiction to supervise the conduct of arbitrators analogous to its power to control actions in court (although in certain circumstances it could restrain an arbitration by injunction). Lord Fraser of Tullybelton (the only Scottish member of the Committee), who dissented in the result, observed (page 991 C-D): *"If the arbitrator does not have power to dismiss for want of prosecution then, unless the court has power to restrain the arbitration by injunction, there is no means of preventing its proceeding even if the delay has been such as to preclude the possibility of a fair trail. If that were indeed the position I would agree with Roskill LJ [in the Court of Appeal] that it would reveal a lamentable gap in English jurisprudence."*

[37] In ***Birkett v James*** [1978] AC 297, Lord Diplock explained (at page 318) how the inherent jurisdiction of the court came to be invoked by the judges of the High Court in England as a basis for dismissing actions for want of prosecution:

"The modern practice as to dismissing actions for want of prosecution dates from 1967. By that time the dilatory conduct of proceedings in the High Court ... had become a scandal. ... Although the rules of the Supreme Court contain express provision for ordering actions to be dismissed for failure by the plaintiff to comply timeously with some of the more important steps in the preparation of an action for trial, ... dilatory tactics had been encouraged by the practice that had grown up for many years prior to 1967 of not applying to dismiss an action for want of prosecution, except upon disobedience to a previous peremptory order that the action should be dismissed unless the plaintiff took within a specified additional time the step on which he had defaulted.

To remedy this High Court judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible. ...

*... [In] **Allen v McAlpine** [1968] 2 QB 229, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to RSC, Ord. 25, r.1 in the current Supreme Court Practice (1976). The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."*

[38] In ***Allen v McAlpine*** Diplock LJ and Salmon LJ (as they then were) had held that, in deciding whether to strike out, it was relevant to consider whether the plaintiff had an alternative remedy against his solicitor. However, a consensus subsequently emerged in the Court of Appeal that this was not a relevant consideration. In ***Birkett v James*** Lord Diplock recanted (as he himself put it in ***Bremer Vulkan*** at page 985) and was supported by Lord Edmund-Davies and Lord Russell of Killowen (see [1978] AC at pages 324 and 335-336).

[39] Following the decision in ***Birkett v James***, the criteria for striking out were refined and developed. In *Trill* v *Sacher* [1993] 1 WLR 1379, at pages 1398-1400, Neill LJ, after considering the relevant authorities, set out a series of *"principles and guidelines*" to be applied *"where it is not suggested that the plaintiff has been guilty of intentional and contumelious default"*. We set them out in full here as we shall have occasion to refer to them later.

"(1) The basic rule is that an action may be struck out where the court is satisfied

(a) 'that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers,' and

*(b) 'that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party:' see **Birkett v James** [1978] A.C. 297, 318.*

(2) The general burden of proof on an application to strike out for want of prosecution is on the defendant.

*(3) Inordinate delay cannot be precisely defined. 'What is or is not inordinate delay must depend upon the facts of each particular case:' **Allen v Sir Alfred McAlpine & Sons Ltd**. [1968] 2 Q.B. 229, 268F. It is clear, however,*

(a) that for delay to be inordinate it must exceed, and probably by a substantial margin, the times prescribed by the rules of court for the taking of steps in the action; and

(b) that delay in issuing the writ cannot be classified as 'inordinate' provided the writ is issued within the relevant period of limitation.

(4) Delay which is inordinate is prima facie inexcusable: see Allen's case at p. 268F. It is for the plaintiff to make out a credible excuse. For example, difficulties with regard to obtaining legal aid may provide such an excuse.

(5) Where a plaintiff delays issuing proceedings until towards the end of the period of limitation he is then under an obligation to proceed with the case with reasonable diligence: Birkett v James [1978] A.C. 297, 323D. Accordingly, a court is likely to look strictly at any subsequent delay which is in excess of the period allowed by rules of court for taking the relevant step, and may regard such subsequent delay as inordinate even though a similar lapse of time might have been treated less strictly had the action been started earlier.

(6) A defendant cannot rely on a period of delay for which he has himself been responsible.

*(7) A defendant cannot rely on a period of delay if at the end of the period he 'so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay:' **Allen's case** [1968] 2 Q.B. 229, 260. It has been said that this rule is based on waiver or acquiescence, but the better view appears to be that the defendant is estopped: see County & District Properties Ltd. v Lyell (Note) [1991] 1 W.L.R. 683, 690F.*

*(8) Save in exceptional cases an action will not be struck out for want of prosecution before the expiry of the relevant limitation period: **Birkett v James** [1978] A.C. 297, 321D. It is not altogether clear how this rule is best explained. It may be that before the limitation period has expired the delay cannot properly be regarded as 'inordinate:' cf. **Birkett's case**, at p. 321D. Alternatively, it may be that, though the delay is both inordinate and inexcusable, the court would not in the ordinary case exercise its discretion to strike the action out if a fresh writ could be issued at once. To do so would only delay the trial.*

(9) Once the limitation period has expired the court is entitled to take account of all the earlier periods of inexcusable delay since the issue of the writ. These periods can include:

(a) periods of delay occurring before the expiry of the limitation period which at an earlier stage could not be treated as 'inordinate' (see (8) above), and

(b) periods of delay on which at an earlier stage the defendant could not

*rely because he was estopped from doing so by inducing the plaintiff to incur further costs in the reasonable belief that the action was going to proceed to trial, but which have been revived by subsequent inordinate and inexcusable delay. This proposition seems to follow from Diplock L.J.'s proviso in **Allen's case** [1968] 2 Q.B. 229, 260C: 'unless the plaintiff has thereafter been guilty of further unreasonable delay.' It is also supported by a later passage in his judgment, at p. 260: 'But it must be remembered that the evils of delay are cumulative, and even where there is active conduct by the defendant which would debar him from obtaining dismissal of the action for excessive delay by the plaintiff anterior to that conduct, the anterior delay will not be irrelevant if the plaintiff is subsequently guilty of further unreasonable delay.'*

*(10) A defendant cannot rely on any prejudice caused to him by the late issue of a writ. Thus such prejudice is not due to delay which can be characterised as inordinate or inexcusable. Some additional prejudice after the issue of the writ must be shown. The additional prejudice 'need not be great compared with that which may have been already caused by the time elapsed before the writ was issued,' but it 'must be more than minimal; and the delay in taking a step in the action if it is to qualify as inordinate as well as prejudicial must exceed the period allowed by rules of court for taking that step:' **Birkett v James** [1978] A.C. 297, 323.*

(11) Prejudice to the defendant may take different forms. In many cases the lapse of time will impair the memory of witnesses. In other cases witnesses may die or move away and become untraceable.

(12) The prejudicial effect of delay may depend in large measure on the nature of the issues in the case. Thus the evidence of an eyewitness or of a witness who will testify to the words used when an oral representation was made is likely to be much more seriously impaired by the lapse of time than the evidence of someone who can rely on contemporary documents. A defendant may also suffer some prejudice from prolonged delay in an action which involves imputations against his reputation, though this factor by itself is unlikely to provide a ground for striking out.

(13) When considering the question of prejudice and, if it is raised, the question whether there is a substantial risk that it will not be possible to have a fair trial of the issues in the action, the court will look at all the circumstances. It will look at the periods of inordinate and inexcusable delay for which the plaintiff or his advisers are responsible and will then seek to answer the questions: has this delay caused, or is it likely to cause, serious prejudice, or is there a substantial risk that because of this delay it is not possible to have a fair trial of the issues in the action? As Slade L.J. stressed in ***Rath v C. S. Lawrence & Partners*** *[1991] 1 W.L.R. 399, 410: 'a causal link must be proved between the delay and the inability to have a fair trial or other prejudice, as the case may be.'*

(14) An appellate court should regard its function as primarily a reviewing function and should recognise that the decision below involved a balancing of a variety of different considerations on which the opinions of individual judges may reasonably differ as to their relative weight. Accordingly, unless intervention is necessary or desirable in order to achieve consistency where there appear to be conflicting schools of judicial opinion, the appellate court should only interfere where the judge has erred in principle: ***Birkett v James*** *[1978] A.C. 297, 317."*

[40] Since the Woolf Reforms, the High Court now has very extensive powers of case management, the advantage of which, according to Lord Woolf himself (see ***Biguzzi v Rank Leisure Plc***, [1999] 1 WLR 1926, at page 1933B), is that *"the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."*

To judge by the reported cases, after 1967 a considerable number of actions were struck out for want of prosecution after delays falling very far short of the delay in the present case.

[41] Both before and since 1967, there have been rules of the English Supreme Court providing for striking out for failure to obtemper orders of the court and for failure to comply timeously with some of the more important steps in the preparation of an action for trial. But as far as we have been able to discover, there has never been any provision which deals expressly and in detail with the power of the court to strike out actions for want of prosecution.

The questions at issue in Scotland

[42] We address the points to be considered in the following sequence:

1. Do the Scottish courts - in particular the Court of Session - have an "inherent power", in the absence of express primary legislation, to put an end to a pending action on grounds comparable to those on which the English courts could strike out a pending action for want of prosecution?
2. If so, is it necessary, in order for the power to be exercised, that it first be "crystallised" in the Rules of Court by Act of Sederunt?
3. If not, what substantive conditions must be satisfied in order for a judge to exercise the power in a particular case?
4. Assuming the substantive conditions are met, by what procedure should the court be invited to exercise the power?
5. If the judge is satisfied that the power should be exercised, what is the appropriate order - dismissal (putting an end to the pending action while preserving the right of action) or absolvitor (extinguishing the right of action and the underlying rights and obligations)?
6. What are the consequences for disposal of this reclaiming motion?

Do the Scottish Courts - in particular the Court of Session - have an "inherent power", in the absence of express primary legislation, to put an end to a pending action on grounds comparable to those on which the English courts could strike out a pending action for want of prosecution?

[43] In the light of Lord Fraser's observation (quoted at paragraph [36] above) that the absence of a power to deal with delay in prosecution of an arbitration "would reveal a lamentable gap in English jurisprudence", and given the confidence with which the judges in England were prepared to invoke the inherent jurisdiction to deal with delay, there is a temptation to ask, with Lord Cranworth in ***Bartonshill Coal Co. v Reid*** (1858) 3 Macq. 266 (at page 285), "*If such be the law of England, on what ground can it be argued not to be the law of Scotland?"*

[44] However, as Lord Glennie observed in ***McKie v MacRae*** 2006 SLT 43 (at paragraph [34]): *"Before seeking to apply to Scots law principles developed in English and other foreign jurisprudence, care must always be taken to ensure that the issue in question is one where reference to such principles is likely to be instructive. In certain areas, such as the development of the common law of negligence or contract, there is little difficulty; and reference is frequently made to decisions of English and other common law courts. But where the problem before the court is one of its own practices and procedures, such a reference is less likely to be of assistance. The practice and procedures of the court are the product of historical development and of more recent, and precisely formulated Rules of Court. Any*

attempt to identify, by reference to English decisions, the existence in Scotland of a procedural power to put a stop to actions on grounds of delay, must attract criticism along these lines."

[45] In this case, the pursuers argued that, whatever may have been the situation in England, the Scottish courts have no power, in the absence of express statutory authority, to bring an action, competently raised within the prescriptive period, to an end on grounds of delay. The pursuers founded in particular on Sections 5 and 6 of the Court of Session Act 1988 as the measure of the Court's powers.

[46] There is ample authority for the proposition that, in the absence of express legislative exclusion or limitation, the courts of this country have *"the indispensable power which is inherent in every Court to do whatever is necessary to discharge the whole of its responsibilities"* (per Lord Justice General Emslie in ***Hall v Associated Newspapers Ltd.***1979 JC 1, at page 9). See also Erskine's *Institute* 1.2.8: *"In all grants of jurisdiction, whether civil or criminal, supreme or inferior, every power is understood to be conferred without which the jurisdiction cannot be explicated ... By the same rule, every judge, however limited his jurisdiction may be, is vested with all the powers necessary either for supporting his jurisdiction and maintaining the authority of the court, or for the execution of his decrees."*

[47] In his Preface to the Codifying Act of Sederunt of 1913 (*CAS 1913*, HMSO edition 1913, page xvi), Lord President Dunedin said: *"[T]he Acts of Sederunt of the Court of Session rest for their authority on bases of three kinds. First, there is the inherent power in the Court to make regulations as to its procedure - a power expressly conferred by the Statute establishing the Court - and long recognised as a Common Law power. Second, many Acts of Parliament contain clauses directing or allowing the Court to make Rules with a view to the carrying out of the provisions of the Act. Third, certain Acts provide, in addition, that if the powers thus given are exercised and the Rules so made are laid on the Table of Parliament, that then, if within a certain period neither House passes an Address to the Crown denying effect to the whole or part of the Rules so passed, then the Rules shall have the authority of an Act of Parliament."*

[48] Following the Administration of Justice (Scotland) Act 1933, new Rules of Court were enacted by Act of Sederunt in 1934. In his Preface to these new Rules, Lord President Clyde said:

"The purpose of these Rules is not to provide a comprehensive summary of Court of Session procedure, but to reform and extend the existing procedure so far as necessary to adapt it to the new conditions created by the Act ...

As regards matters of procedure, the Act restores to the Court of Session its ancient autonomy which modern legislation had almost smothered."

[49] In our opinion, these quotations provide the short answer to the pursuers' main submission on this point. When one compares the brevity of the 1988 Act with the Rules of Court which, with annotations, run to more than a thousand pages in Volume 2 of the Parliament House, it is self-evident that the 1988 Act cannot be the sole measure of the procedural powers of the Court.

[50] The 1988 Act is a consolidating statute and Sections 5 and 6 (subject to some amendments) have been part of the empowering statute since 1933 (see sections 16 and 17 of the 1933 Act). Section 5 states what the Court may do, but it does not follow that what is not expressly permitted is therefore forbidden. Section 6 prescribes certain steps that the Court must take to avoid delay but, again, it does not follow that the Court may not take other steps for that purpose. We cannot therefore accept that, if the power to strike out is not mentioned in the empowering statute, it cannot exist.

[51] A material point of difference between English and Scots law is, however, the distinction drawn in Scotland between prescription and limitation of actions. Prescription extinguishes the right, while limitation merely cuts off the right of action. Limitation of the right of action is the approach characteristic of the English common law. It was introduced to Scotland for the first time in 1954 in relation to actions for damages for personal injuries or death from personal injuries, and is limited to such actions and actions for reparation for damage caused by defective products under Section 2 of the Consumer Protection Act 1987. (The former Scottish triennial, quinquennial, sexennial and vicennial prescriptions limited the manner of proof rather than the right of action.)

[52] In Scotland, for centuries past, the decision whether, and if so when, a right - and the corresponding right of action - should be cut off by passage of time has been taken by the legislature rather than the courts. "*The history of prescription in Scots law is a history of statutes"* (Johnston, *Prescription and Limitation*, paragraph 1.24). The Scottish courts have therefore been unwilling to treat delay in itself as a ground for cutting off the right of action where the underlying right has not prescribed. In ***Mackenzie v Catton's Trustees*** (1877) 5 R 313 at page 317, Lord Deas said: *"**Mora** is not a good **nomen juris.** There must either be prescription or not. We are not to rear up new kinds of prescription under different names."*

While the Court has recognised the plea known as the plea of *mora* (delay), Maclaren (*Court of Session Practice*, page 403, approved in ***Halley v Watt*** 1956 SC 370, at page 374) explains that: *"Mora, or delay, is not of itself a defence, unless the delay has been for such a period, and the circumstances are such, that prescription applies. It is, therefore, not a proper separate plea in law, the proper expression of the plea being 'the action is barred by mora, taciturnity and acquiescence'. The latter must be supported by an averment of facts and circumstances inferring prejudice or acquiescence, and it is a plea to the merits and not a dilatory plea."*

[53] Under the Prescription and Limitation (Scotland) Act 1973, the raising of "*appropriate proceedings*" interrupts the running of prescription (Sections 1(1), 2(1)(a), 3(1)(a), (2) and (3), 4, 6(1)(a), 7(1)(a), 8(1) and 9). There is nothing

in the statute that provides or implies that "*appropriate proceedings*" brought within the prescriptive period can be cut off if not pursued with due diligence.

[54] Against that statutory background, it is not, in our opinion, open to this Court to put an end to an action, competently raised within the relevant prescriptive or limitation period, on the *sole* ground of delay or want of prosecution.

[55] However, as will be seen from Neill LJ's summary in ***Trill*** (quoted at paragraph [39] above), the power to strike out in England did not proceed on the basis of mere delay either. The existence of inordinate and inexcusable delay was the starting point, but more was required before an action would be struck out, and the decision to strike out depended on the facts and circumstances of the particular case. The list of considerations to be taken into account bears some resemblance to those that are taken into account in Scotland in relation to a plea of *mora* (see Johnston, *Prescription and Limitation*, Chapter 19).

[56] In our opinion, therefore, the issue to be addressed at this stage of the argument is not whether, in the absence of express statutory authority, the right to pursue a pending action can be cut off *on grounds of delay alone*. It is rather whether, because the 1973 Act makes no provision in relation to the fate of 'appropriate proceedings' once raised, the Court is precluded from considering whether, in a particular case after a certain lapse of time, the interests of justice require that the action be brought to an end. In our opinion, there are at least three reasons why this is not so.

[57] First, although there are relatively few reported cases where the plea of *mora* has been acceded to, the availability of the plea shows that, without express statutory authority and even where the prescriptive period has not expired, the Court has exercised the power - and is recognised as having the power - to bring an action to an end where there has been delay together with other facts and circumstances to justify that course.

[58] In our opinion, the correct way of understanding the relationship between statutory prescription and the "c*ommon law"* plea of *mora* is set out in Johnston, *Prescription and Limitation*, at paragraph 19.02: *"[T]he statutory provisions do not guarantee that a right or obligation will remain enforceable until the statutory period has run. All they postulate is that, once that period has run, it shall not be. It is therefore consistent with the statutory rules that there should be some common law doctrine of delay. But what is essential is that this should not undermine the statutory provisions. What this means is that it is not the mere passage of some period of time short of the prescriptive period which gives rise to a plea of delay. Instead it is the passage of time combined with other factors, namely taciturnity and acquiescence."*

[59] It is true that, so far as our researches and those of counsel have revealed, there has never been a case in which a plea of *mora* has been put forward, far less sustained, on the basis of events occurring (or not occurring) *after* the raising of an action. We can, however, see no reason in principle, logic or equity why it should be the case that, without express statutory authority, an action can be brought to an end because of delay occurring before the action is raised but may not, without such authority, be brought to end for like considerations after it has been raised.

[60] Second, the trend of legislation on prescription has been drastically to reduce the prescriptive periods. In the present case, the delay between the raising of the action and enrolment of the motion to recall the sist is more than three times the length of the relevant prescriptive period under Section 6 and Schedule 1 of the 1973 Act. In so far as the Act can be taken to represent the current policy of Parliament, the silence of Parliament as to the consequences of delay occurring after "*appropriate proceedings*" have been begun can be attributed, with at least equal probability, to the belief that the Court already has sufficient powers to deal with inordinate delay as to the intention of Parliament that such a power be excluded. The silence of the 1973 Act is, to put it no higher, neutral.

[61] Third, we do not think it can be the law that, in the absence of express authority, the Court is powerless to bring an action to an end if it is satisfied that a point has been reached at which justice cannot possibly be done. That would, in our opinion, be to deny the very reason for the existence of the "*inherent power*". (It is, of course, an entirely different question what conditions would have to be fulfilled before the Court could declare itself satisfied that justice could not be done and, *a fortiori,* whether such conditions are fulfilled in the present case.)

[62] For these reasons, we conclude that the Court has the inherent power, without express parliamentary authority, to put an end to a pending action, albeit competently raised within the prescriptive period, on grounds comparable to those on which the English courts were prepared to strike out a pending action for want of prosecution. The next question is whether that power can be exercised without being 'crystallised' in the Rules of Court.

Is it necessary, in order for the power to be exercised, that it first be 'crystallised' in the Rules of Court by Act of Sederunt?

[63] We will first set out the existing case law in some detail and then give our answer to this question.

The existing case law

[64] The question came before Lord Johnston in the Outer House in ***Esso Petroleum Co Ltd. v Hall Russell & Co Ltd.*** *(No2)*, 1995 SLT 127. In that case there had been a decision of the House of Lords in October 1988 confirming the allowance of proof before answer but no further procedure occurred until August 1994 when, on the unopposed motion of a third party, the case was remitted to the Outer House. The defenders and third parties then enrolled a motion seeking dismissal of the action on the ground of inordinate and inexcusable delay on the part of the pursuers in pursuing the action.

[65] Having considered the English authorities cited above (***Birkett v James, Allen v McAlpine*** and ***Trill v Sacher***), Lord Johnston held that the motion was incompetent for the following reasons (at pages129-130): *"In seeking to resolve this aspect of the matter, I confess to have been superficially attracted by the notion that the court should have a power to deal with inordinate delay, if necessary by the draconian steps of dismissing an action or granting absolvitor, in accordance with the fundamental role of the court to administer justice. However, on a closer examination of the issue, I do not think that the proposition stands up. The Court of Session obviously has an inherent power enshrined in the nobile officium and, putting aside whether a Lord Ordinary could exercise that power, a problem which could be avoided by reporting the case to the Inner House, the essential question is whether or not the necessary casus improvisus exists in the present context to enable such a power to be taken or created. Prima facie it does not. Fundamentally the procedure of the court is regulated by statutory instrument, namely Rules of Court, and I consider that one could only reach the point of even considering whether such a power existed if the Rules of Court were not only silent on a particular point, but plainly silent by reason of error or oversight. This I am quite unable to infer from a study of the rules and particularly those which deal with time limits or the failure to comply with procedural steps. It is plain to my mind that the draftsmen of the rules intended certain consequences to arise in the event of such circumstances occurring, but the very fact the rules are silent as to whether a power to dismiss an action for delay alone can be exercised would suggest the draftsmen might have had such in contemplation and deliberately eschewed it. I accordingly base my decision entirely upon a view of the rules that I am seeking to express, namely that because some aspects of delay or non-compliance are dealt with, one must assume that the draftsmen have dealt with the problem of delays to the extent that it is intended and that the ensuing silence is eloquent of an express intention not to confer the power demanded by the defenders."*

[66] The Lord Ordinary in the present case adopted the same approach, attaching importance also to the need for the matter to be "*fully considered and debated by the appropriate body, namely the Rules Council*" (paragraph [54] of her Opinion).

[67] The opposite point of view was taken first by Sheriff Principal Macphail (now Lord Macphail) in ***Newman Shopfitters Ltd. v M J Gleeson Group Plc*** 2003 SLT 83, and then by Lord Glennie in ***McKie v MacRae***.

[68] In *Newman* the action in the Sheriff Court had been sisted in 1995 for arbitration, but no arbitration took place. In 2002, the pursuer sought to recall the sist and re-enrol the cause for further procedure. The Sheriff recalled the sist and granted decree of absolvitor. On appeal, the Sheriff Principal held (1) that the Sheriff was entitled to grant absolvitor in the exercise of the court's inherent jurisdiction; and (2) that the Sheriff's decision was a proper exercise of the court's inherent jurisdiction and his conclusion that the litigation had to be brought to an end was not only justifiable but also unavoidable where the public interest in the administration of justice demanded that the action should not be allowed to proceed.

[69] On the question of inherent jurisdiction, the Sheriff Principal referred to Erskine, *Hall v Associated Newspapers Ltd.* and the article by Sir Jack Jacob (all quoted above, paragraphs [46] and [34]) and drew attention to Section 5 of the Sheriff Court (Scotland) Act 1907. He held (at paragraphs [25] and [27] as follows:

"[T]he powers of the sheriff are not limited to those confided to him by statute. His statutory powers only limit the exercise of the inherent jurisdiction to the extent that it cannot be exercised in a way which is inconsistent with statute law or statutory rules of court. A book on sheriff court practice would be unintelligible if it consisted only of the specific powers conferred by the relevant primary and secondary legislation. Many powers in daily use are not generally so conferred, such as the power to award expenses, the power to dismiss an action or to exclude averments from probation by sustaining a preliminary plea, the power to impose or recall a sist, the power to deal with contempt of court and the power to sit behind closed doors when the interests of justice so require. ...

I find ... that there is no authority which obliges me to hold that the sheriff has no power to dispose of an action without proof by pronouncing decree of absolvitor by virtue of the inherent jurisdiction on the court."

[70] The Sheriff Principal went on to apply the criteria approved by Lord Diplock in ***Birkett v James*** - what Neill LJ called "*the basic rule*" (see paragraphs [37] and [39] above).

[71] *McKie v MacRae* was a claim arising out of a motor accident in which the children of a woman killed in a car accident sued the widow of the driver of the car and the owner of the car. The accident occurred in 1986. The action was not raised until 1996 but this was within the limitation period because of the pursuers' non-age. The action was sisted in 1997 and the sist was recalled in 2003. In 2005 the pursuer amended to introduce new averments of fault against both defenders. The defenders took pleas to the relevancy, arguing first, that the action should be dismissed in exercise of the court's inherent jurisdiction where the pursuers had delayed unwarrantably in prosecuting the action resulting in a substantial risk that a fair trial would not be possible, *et separatim* both defenders had been prejudiced in their ability to defend the action, and secondly, that they should be assoilzied, failing which the action should be dismissed, where its continuation was incompatible with their Article 6 Convention rights.

[72] After full debate in Procedure Roll, including consideration of the Lord Ordinary's decision in the present case, Lord Glennie dismissed the action against both defenders. He first considered the arguments as to the existence of "*an inherent power to put a stop to proceedings in case of delay where that delay causes prejudice to the defenders or gives rise to a substantial risk that a fair trial will not be possible*" (paragraph [33]). Having considered the English authorities, he said (at paragraph [42]): *"To my mind, it is inconceivable that the Court of Session should not have an inherent power to control its processes to prevent abuse. ... To my mind, the relevant question is not 'why should such power exist?' but 'why should it not exist?'"*

[73] Having considered a number of Scottish authorities, he concluded (at paragraph [46]) that a general power to prevent abuse of the court's processes exists and went on to consider whether that general power can be applied in Scotland to enable the court to put a stop to cases in which delay has caused prejudice to a defender or has put in jeopardy the possibility of a fair trial. On this question, he said (at paragraphs [47]-[49]):

> *"[47] The principal argument against there being such a power is that it is not to be found in the Rules of Court, whereas those rules do contain specific powers to dismiss an action at various stages where the pursuer has not progressed it in accordance with the rules. It is to be inferred, so the argument goes, that the failure to confer such a power on the court in the rules is deliberate. [He cites Lord Johnston in Esso and the Lord Ordinary in the present case.] ... There are specific Rules of Court in terms of which the court is given the power to dismiss an action for failure to take certain steps within the prescribed time ...*
>
> *[48] However, I am not persuaded that the existence of such rules precludes the court from having and exercising an inherent jurisdiction to dismiss for delay. Much depends, to my mind, upon where one starts. I start from the assumption that the court has, and has always had, an inherent jurisdiction in its true sense, as explained by Lord Diplock in Bremer Vulkan. The Court of Session Act and the Rules of Court assume a relevance to that inherent jurisdiction only if they expressly or by implication (i) remove or restrict it, or (ii) fetter its exercise. ...*
>
> *[49] ... [T]he rules presently reflect a piecemeal approach to case management and sanctions for delay which cannot, in my opinion, be treated as exhaustive of the court's powers in this respect."*

[74] It is to be noted that Lord Glennie approached the power to strike out for delay as an aspect of the power to strike out for "*abuse of process*". The existence of such a wide general power has become a live issue in Scotland and there appears to be a division of judicial opinion on the matter. The relevant cases are ***Levison v The Jewish Chronicle Ltd.*** 1924 SLT *755*; *Shetland Sea Farms Ltd. v Assuranceforeningen Skuld* 2004 SLT 30; ***Clarke v Fennoscandia Ltd. (No 3***) 2005 SLT 511; and ***Wright v Paton Farrell*** 2006 SC 404.

[75] Until very recently, ***Levison*** was the only case in the books. It was an action of defamation against *The Jewish Chronicle* which had published an article suggesting that the pursuer, who styled himself Rabbi, was not a Rabbi. The pursuer lodged a number of documents in support of his claim to rabbinic status, including three which the defenders expressly averred were forgeries. Shortly after these averments were added by amendment, the documentary productions were borrowed by the pursuer's agents who then handed them on to the pursuer. The productions were subsequently returned to process, but the three impugned documents were found to be missing. Having ordered a Minute and Answers as to the circumstances surrounding the disappearance of the documents, Lord Ashmore held that the pursuer had deliberately abstracted the documents; that he had been guilty of conduct amounting to contempt of Court; and that the loss of the documents was calculated to prejudice materially the interests of the defenders. In granting absolvitor, Lord Ashmore said (at page 759, first column): *"In the circumstances of this case I doubt the competency, or at least the expediency, of using process caption, and also the appropriateness of the penalties of fine and imprisonment. On the whole, I have come to the conclusion that the granting of absolvitor with expenses to the defenders will not only be just to them, but will sufficiently penalise the pursuer for his unjustifiable and improper interference in this case with the ordinary course of justice to the serious prejudice of his opponents in the litigation."*

[76] ***Shetland Sea Farms*** was an action by salmon farmers for compensation in respect of the Braer oil tanker grounding. The Lord Ordinary (Lord Gill) held that two officers of the claimant company had presented false documents in support of the claim for compensation. The question then arose whether as a result the claim should be refused without further procedure. In deciding that it should not, Lord Gill said:

> *"[143] This court has an inherent power to dismiss a claim where the party pursuing it has been guilty of an abuse of process. In doing so it protects the integrity of its procedures by preventing one party from putting the other at an unfair disadvantage and compromising the just and proper conduct of the proceedings (cf Jacob, 'The Inherent Jurisdiction of the Court' [cit. sup.]). But this is a drastic power. The court should exercise the power sparingly, because it may involve the denial of a well-founded claim (cf J A Jolowicz, 'Abuse of the Process of the Court: Handle With Care' (1990) 43 CLP 77). In considering whether to exercise the power the court must keep in mind the general right of every litigant to pursue his case to judgment, however unpromising his case may appear to the court.*
>
> *[144] There are many diverse ways in which a litigant can abuse the process of the court; for example, by pursing a claim or presenting a defence in bad faith and with no genuine belief in its merits (eg **Lonrho plc v Al-Fayed (no 2)** [1992] 1 WLR 1); or by fraudulent means (**Levison v Jewish Chronicle Ltd.**, supra; **Arrow Nominees v Blackledge** [2000] 2 BCLC 167); or for an improper ulterior motive, such as that of publicly denouncing the other party (**Lonrho plc v Al-Fayed (no 2),** supra, Millett J at p.7G-H). **Hunter v Chief Constable of West Midlands** ([1982] AC 529) supports the existence of the court's inherent power in such cases, but the facts of that case are so far removed from those in the present case that I need not consider it further.*
>
> *[145] To found a claim on a false narrative of fact supported by fabricated documents is clearly an abuse of process. ...*
>
> *[146] The question therefore is whether this is a case in which the court's inherent power may properly be exercised. In order to decide the point, I need not attempt to formulate a comprehensive statement of principle. It is sufficient for me to consider only those cases where a litigant has been guilty of dishonesty in the prosecution of his case. In such cases, in my opinion, the court's disposal of the matter must depend on the question whether*

the dishonesty has made a fair trial of the issue impossible (Arrow Nominees Inc. v Blackledge, supra, Chadwick LJ at pp.193g-194h). If it has, the court has a duty to stop the proceedings in order to protect the innocent party from an injustice. But if the dishonesty is found out and desisted from and if, in consequence, a fair trial of the essential claim remains possible, the court ought not to stop the proceedings. To do so in such circumstances would simply be judicial retaliation for the affront to the court. ...

[149] In my view, the present case falls within the second category that I have described. ... ."

[77] In ***Clarke,*** which was one of a series of litigations, the Lord Ordinary held that, in the light of an undertaking given by the defenders, the action was no longer necessary, that the court had no jurisdiction to entertain the proceedings and that the action was incompetent. The pursuer reclaimed and the defenders argued, *inter alia*, that pursuit of the action constituted an abuse of process. The Second Division refused the reclaiming motion on other grounds, but each of the judges made observations on the defenders' argument as to abuse of process. The Lord Justice-Clerk (Lord Gill) said:

"[16] The present action is based on the allegations of conspiracy and fraud that the pursuer has failed to substantiate in any of the litigations to which I have referred. After a long and complex procedural history in which the pursuer has had no material success ... , the Lord Ordinary has dismissed the action in the interlocutor under review.

*[17] In the Outer House in **Shetland Sea Farms** ..., I expressed the view that this court possesses an inherent power similar to that of the High Court in England to strike out an action that amounts to an abuse of process. I discussed the matter in that case in the context of a claim based on false averments of fact supported by fabricated documents; but the concept of an abuse of process need not be confined to fraud. The essential question is whether the action compromises the integrity of the court's procedures. It might do so if it wastefully occupied the time and resources of the court in a claim that was obviously without merit.*

[18] If this court possesses the power to dismiss an action on the ground that it is an abuse of process, this case might have raised the question whether it should be exercised. However, since the point was not fully debated and since it is unnecessary for us to rest our decision on it, I shall not pursue the matter further."

Lord Clarke said:

*"[40] ... I consider that there was much force in what senior counsel for the defenders submitted as regards the pursuer's insistence on these proceedings amounting to an abuse of process, having regard to the history of matters. It seems to me, beyond doubt, that this court possesses the inherent power, referred to by Lord Diplock in the case of Hunter, in respect of ensuring the proper use of its procedures. I, furthermore, consider that that power might well appropriately be exercised in a case like the present, to prevent proliferation of litigation in relation to essentially the same dispute and the same issues, all as discussed by the Master of the Rolls in the case of **Barrow [Barrow v Bankside Agency Ltd.** [1996] 1 WLR 257]."*

Lord Menzies (at paragraph [44]) expressly agreed with both the Lord Justice-Clerk and Lord Clarke "*that the court possesses the inherent power to control abuse of process to which Lord Diplock referred in **Hunter** ...*".

[78] The First Division took a different view in ***Wright.*** That case concerned the immunity from suit of solicitors and advocates in connection with the conduct of court proceedings. The pursuer had been convicted after trial in the Sheriff Court, and the conviction was subsequently quashed by the High Court of Justiciary. The pursuer sued his solicitors on grounds of negligence in the conduct of his defence in the Sheriff Court.

[79] In that case reference was made to ***Arthur J.S. Hall & Co v Simons*** [2002] 1 AC 615, an English case in the House of Lords, in which the majority had held that, since a collateral challenge in civil proceedings to a criminal conviction was *prima facie* an abuse of process (*Hunter v Chief Constable of the West Midlands Police* [1982] AC 529) and ordinarily such an action would be struck out, an advocate's immunity from suit was not required to prevent collateral attacks on criminal decisions. In the course of his dissenting speech, Lord Hope of Craighead observed (at page 715): *"The power of the court to strike out a civil action on the ground that it is an abuse of process has not yet been recognised in Scotland."*

[80] In *Wright*, Lord President Hamilton said (paragraph [20]): *"**Hunter v Chief Constable of the West Midlands Police** has no direct application in Scotland; in any event, it appears to have proceeded on a view as to the underlying purpose of that litigation which in most cases might not be as readily capable of divination. While there are indications that the law of Scotland may be developing a principle of 'abuse of process', I doubt whether it would be possible readily to identify and, under current procedural arrangements, to deal with cases falling within any such category. As Lord Osborne observes, the views of the majority in Hall appear to have been strongly influenced by the existence of well developed procedural arrangements in England and Wales which have currently no equivalent in Scotland."*

[81] In his opinion, Lord Osborne, having considered ***Levison, Shetland Sea Farms Ltd.*** and ***Clarke***, said (at paragraph [164]): *"While I would not wish to differ from what was said in [Shetland Sea Farms and Clarke], and while I would acknowledge in principle the existence of an inherent power in any court to prevent abuse of the court processes, leaving aside **Levison v The Jewish Chronicle Ltd.**, I am not aware that the power has been exercised in any Scottish case. In my view, as matters currently stand, there would be insuperable difficulties in doing so. It appears to me that these derive from the absence of any counterpart of the rules of court in England, which were operated in **Hunter v Chief Constable of The West Midlands Police** and which now take the form of rules 3.4(2) and 24.2 of the Civil*

*Procedure Rules 1998 ... . In my opinion, unless and until the inherent power referred to in [**Shetland Sea Farms** and **Clarke**] is crystallised in the form of rules of court which define the criteria which are to be applied in connection with the exercise of that power, in practice, it could not be exercised. It may be that this consideration is what Lord Hope of Craighead had in mind when he said in Arthur J.S. Hall & Co v Simons at p.715 that "The power of the court to strike out a civil action on the ground that it is an abuse of process has not yet been recognised in Scotland".*

Lord Johnston (at paragraph [173]) agreed with Lord Osborne.

Decision on this aspect of the case

[82] We begin by consideration of the decisions on "*abuse of process*" which, in our opinion, can be distinguished from the present case. We then go on to consider the basis on which Lord Johnston in *Esso* and the Lord Ordinary in this case decided that, in the absence of a Rule of Court, they did not have power to bring the actions before them to an end.

[83] While ***Levison*** has been cited as a precedent for disposal of an action on grounds of abuse of process, the report in *Scots Law Times* classifies the case as "Contempt of Court". It seems clear from his opinion that Lord Ashmore (who "*went out of his way to help a lame dog*" - see Lord Sands' obituary in *The Scotsman,* reproduced in 1932 SLT (News) 149-50) intended termination of the pursuer's action by the grant of absolvitor to be a lighter penalty than fine and imprisonment for what was, by any standards, a flagrant interference with the course of justice. It can be assumed that, if there had been a precedent for the course he took, Lord Ashmore would have found it *("As a judge Lord Ashmore did not content himself with looking up the cases cited to him by counsel: he would set about to read up every case bearing in any way upon the matter before him from the eighteenth century downwards." - ibid*).

[84] In our opinion, *Levison* was a case decided on its own very special facts. In so far as it exemplifies the "inherent power" of the Court, the power in question is the undoubted power to deal with contempt of court, and perhaps also the power of the judge to fashion a remedy appropriate to the particular circumstances of the case. The case appears to us to have no bearing on the question whether, or in what circumstances, the Court has power to put an end to an action on grounds of delay.

[85] Similarly, while Lord Gill in *Shetland Sea Farms* used the expression *"abuse of process",* the circumstances under consideration - presentation of false documents in support of a claim for compensation - could equally well, in our opinion, have been categorised as a form of contempt of court or at any rate of what Lord Diplock in ***Birkett v James*** described as "*intentional and contumelious*" conduct (see paragraph [37] above). Lord Diplock carefully distinguished that, as a ground for striking out, from the case of *"inordinate and inexcusable delay".*

[86] *Clarke* and *Wright* were concerned with the question whether actions competently raised should be allowed to proceed, in *Clarke* because the action was unnecessary and in *Wright* because it sought to put in question in civil proceedings the conduct of a criminal trial. In both cases, the observations on "abuse of process" were *obiter* and the underlying fact situations and issues of law were, in any event, clearly distinguishable from those of the present case.

[87] Bearing in mind that Lord Osborne said in *Wright* that he did not wish to differ from what had been said in *Shetland Sea Farms* and *Clarke*, we do not regard his observations on the need for a Rule of Court as precluding us from considering whether, in the present context, a power such as the power to strike out for want of prosecution can be exercised without a prior Rule of Court. Having said that, we share the hesitations of the First Division in *Wright* about extensive use of "*abuse of process".*

[88] In particular, we do not agree with Lord Glennie in treating the power to strike out for want of prosecution as a sub-category of a power to deal with "abuse of process". As we have noted, Lord Diplock in *Birkett* v *James* distinguished between two possible situations: first, where "the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or *conduct amounting to abuse of the process of the court*" (emphasis added) and, second, where there has been inordinate and inexcusable delay. In our opinion, it is important to maintain this distinction lest the concept of abuse of process becomes so imprecise and all-embracing that the decision whether a particular course of conduct constitutes an abuse of process comes to depend, as it was put in the course of the debate, on the length of the Lord Ordinary's foot.

[89] It remains to consider the reasons given by Lord Johnston in ***Esso*** and the Lord Ordinary in the present case for holding that a power to strike out could not be exercised without a prior Rule of Court. In our opinion, their approach is unsound for the following reasons.

[90] First, we do not find it helpful to speculate as to the intentions of the "*draftsman*" of the Rules of Court. The "*draftsman*" of an Act of Sederunt, including the Rules of Court and any amendment or modification of them, is the Court itself.

[91] Second, as regards the role of the Rules Council, while the Court will normally proceed on a proposal of the Rules Council acting under Section 8 of the Court of Session Act 1988, the Court's power to make rules under Section 5 of the Act is not limited to rules proposed by the Council. Nor is the Court bound to make rules in the form proposed by the Council.

[92] Third, the Court cannot *"confer"* on itself a power which it does not otherwise have. The question whether the Court has inherent power to bring an action to an end on grounds of want of prosecution must be distinguished from the question whether, assuming such a power to exist in principle, it is a power that can or should be exercised without

first being crystallised by incorporation in the Rules of Court; and, in particular, whether it can or should be exercised by a judge sitting in the Outer House.

[93] Fourth, in our opinion, the issue here should not be approached on the basis that the absence of a specific rule in the Rules of Court is to be regarded as a "*casus improvisus*". In his Preface to the 1934 Rules (cited above, paragraph [48]), Lord President Clyde said that *"The purpose of [the] Rules is not to provide a comprehensive summary of Court of Session procedure"*, and perusal of the existing Rules of 1994 shows that this observation still holds good. On this point we prefer the approach of Lord Glennie.

[94] The Rules of Court (as opposed to the very extensive annotations in the Parliament House Book) are mainly, though not exclusively, concerned with prescribing what may, and in some cases must, be done at various stages in the procedure in different types of process, and when particular steps must be taken. In some, but not all, cases they prescribe the orders that the Court may pronounce. In a number of cases they provide for dismissal of an action where a party has failed to comply with a requirement of the Rules (e.g. failure to make up and lodge a Record - Rules 22.1 and 22.3) or to obtemper a peremptory order of the Court (e.g. failure to obtemper an order for production of a document - Rule 53.5(2) and (4)).

[95] On the whole, the Rules are not concerned with the substantive aspect of the various possible steps in procedure. Thus Chapter 23, "Motions", deals with the way in which motions are to be enrolled, intimated and so on, but does not deal with the substantive issues that motions may raise. Nor does it purport to deal comprehensively with the orders that the Court may pronounce to deal with those issues.

[96] Similarly, the Rules neither prescribe the pleas that may be advanced by a defender in order to secure dismissal of an action or absolvitor, nor the orders that the Court may pronounce on the basis of such pleas. The possible pleas that may be advanced by a defender are set out in some detail in the annotations to Rule 18(1) in the *Parliament House Book*. But there is no suggestion that what is set out there is either definitive or exhaustive of the rights of parties or of those of the Court. In particular, the right of a defender to plead *mora*, taciturnity and acquiescence, and the right of the Court to grant absolvitor if it finds that plea to be well-founded, appear only in paragraph (B)(3) of the annotations, and not in the body of the Rules.

[97] Chapter 28 ("Procedure Roll") is almost telegraphic in its brevity if it were taken to be a comprehensive statement of the law. After providing for four specific types of order that the court may make, Rule 28.1(3)(e) simply provides that the court "may make such other order as it thinks fit" without further specification. Chapter 37 ("Jury Trials") provides (Rule 37.10) for application of the jury's verdict after a civil jury trial, but Chapter 36 ("Proofs") says nothing at all about what the Court may do at the end of a proof, let alone what orders the Court may or may not pronounce. (If, however, a proof is split into parts, Rule 36.1(2) provides that the Court "shall pronounce such interlocutor as it thinks fit" at the conclusion of the first proof.)

[98] Most particularly, Chapter 24 ("Amendment of pleadings") contains no specific provision empowering the Court to refuse a Minute of Amendment, still less as to the grounds on which it may do so. It is an almost daily occurrence that the Court refuses amendment of pleadings on the ground that it comes too late, even where it is clear that, without amendment, the action is bound to fail.

[99] Thus, the *rules* of the Court of Session are not coextensive with the *practice* of the Court. The fact that a particular power is not mentioned in the Rules does not necessarily mean that the power is not available to be used in appropriate circumstances.

[100] There may be circumstances in which it would be undesirable that a power should be used for the first time without its being foreshadowed or "crystallised" in the Rules of Court. The pursuers submitted that parties should be aware of the potential consequences of their action or inaction. We cannot accept, however, as a general proposition, that the Court cannot take any course for which there is no precedent in the absence of a Rule of Court expressly empowering it to do so.

[101] First, if we assume for the purposes of argument that the Court is faced with a completely unprecedented situation in which the Court is satisfied that, because of the conduct of one of the parties, justice cannot be done if the case proceeds, it is surely unconscionable that the Court should wring its hands and declare itself unable to do justice on the ground that, in spite of the existence of an inherent power to cope with unprecedented situations, there is no Rule of Court that "crystallises" the power.

[102] Such a position is, in our opinion, even less tenable in the light of the overriding obligation imposed on the court by Article 6 of the European Convention on Human Rights. It is incumbent on the Court, as an organ of the state, under Article 6 of the Convention to ensure that civil rights and obligations be determined "within a reasonable time". The Court cannot regard itself as constrained, simply because there is no Rule of Court, to permit private parties to civil litigation to proceed with it in as leisurely a manner as they think fit.

[103] Second, precisely because the situations in which it is necessary to rely on the inherent power are likely to be rare and possibly unprecedented, it is not clear to us how a Rule of Court could be devised to deal with them, still less to lay down in advance the criteria for dealing with them.

[104] Third, we do not believe it is the function of Rules of Court, for the reasons already mentioned, to prescribe comprehensively the nature of the orders the Court may make, the particular fact situations in which it may make them or the criteria to be applied in making them.

[105] As to the question whether, in the absence of a Rule of Court, the Court can put an end to an action on grounds of delay, we repeat what we have said above (paragraph [62]) concerning the absence of legislative authority. We can see no reason in principle, logic or equity why it should be the case that, without express authority in statute or a Rule of Court, an action can be brought to an end because of delay occurring before the action is raised but may not, without such authority, be brought to end for like considerations after it has been raised.

[106] We therefore hold that the prior existence of a Rule of Court is not necessary for the Scottish courts to exercise a power comparable to that exercised in England to strike out for want of prosecution.

[107] Of course, as Lord Woolf said in ***Biguzzi*** *(supra)*, striking out is a draconian step and there may be measures short of striking out that will be appropriate and sufficient as a sanction for delay. It is therefore necessary to consider what substantive and procedural conditions must be satisfied in order for a judge to exercise the power to bring an action to an end on grounds of inordinate and inexcusable delay.

What substantive conditions must be satisfied in order for a judge to bring an action to an end on grounds of inordinate and inexcusable delay?

[108] As we have just said (paragraph [105]), we can see no reason in principle, logic or equity why it should be the case that an action can be brought to an end on grounds of *mora*, taciturnity and acquiescence because of delay occurring before the action is raised but may not be brought to an end for like considerations after it has been raised.

[109] The classic statement of the nature of the plea of *mora* is that given by the Lord President (Balfour) in ***Assets Co., Limited v Bain's Trustees*** (1904) 6F 692 at page 705: *"[I]t appears to me ... that the plea of mora cannot be successfully maintained merely on account of the lapse of time, but that the person stating it must also be able to shew that his position has been materially altered, or that he has been materially prejudiced, by the delay alleged. In other words, mere lapse of time will not, in my judgment, found an effective plea of mora. The law of Scotland provides for cases in which it is considered that lapse of time alone should form a sufficient answer to a claim, or lead to the mode of proof being restricted, in the various prescriptions and limitations ... I think we should be slow to add, by decision, a plea of bar or discharge resulting from mere lapse of time, which the Legislature has not thought fit to sanction by statute. At the same time, I do not doubt that where, coupled with lapse of time, there have been actings or conduct fitted to mislead, or to alter the position of the other party to the worse, the plea of mora may be sustained. But in order to lead to such a plea receiving effect, there must, in my judgment, have been excessive or unreasonable delay in asserting a known right, coupled with a material alteration of circumstances, to the detriment of the other party."*

[110] The criteria for sustaining the plea of *mora* as it has been developed are discussed in detail in Johnston *Prescription and Limitation* (Chapter 19), and Reid and Blackie, *Personal Bar* (Chapter 3). (We are grateful to the authors of Reid and Blackie, which was published soon after the hearing, for making the galley proofs available for consideration of the court at the time of the hearing). As we have noted (paragraph [55] above), there are echoes of these criteria in the list given by Neill LJ in ***Trill*** (paragraph [39] above) of the considerations to be taken into account on a motion to strike out for want of prosecution. The context is, however, different.

[111] The plea of *mora* is a plea to the merits (see Maclaren, cited at paragraph [52] above). Albeit the plea is directed to bringing the action to an end, the underlying reason for doing so is that the pursuer's substantive claim has been extinguished by his conduct (including, but not necessarily confined to, delay in asserting the claim) together with reliance by, or prejudice to, the defender. The issue is one of private right as between the parties.

[112] Such an issue of private right may very well arise in consequence of events occurring after the raising of an action, and the present case may provide an example of factual circumstances in which the plea of *mora* might be maintained. However, no such plea has been tabled by the defenders in this case and their argument did not proceed on that basis.

[113] It is therefore necessary to consider in what circumstances, independently of a possible plea of *mora*, the Court might bring a going action to an end on grounds comparable to those on which the English courts were prepared to strike out for want of prosecution.

[114] We note that a plea (referred to as a plea of *mora*) has been sustained in a number of recent cases where there has been undue delay (generally measured in months) in seeking judicial review - see Reid and Blackie, *Personal Bar*, paragraph 22-12 and following. There are sound reasons of public policy why this should be so in the field of public law. Nevertheless, it is important not to confuse the reasons of public policy for insisting on early prosecution of applications for judicial review with the issues of private right discussed above. (Use of the same expression, "plea of *mora*", may contribute to such confusion.) That does not mean, however, that considerations of public policy should be left out of account in determining how the Court should deal with a case of undue delay in proceeding with a civil action between private parties.

[115] As we have noted above (paragraph [102]), where private rights and obligations are concerned, it is incumbent on the Court, as an organ of the state, under Article 6 of the Convention to ensure that they be determined "within a reasonable time". We should add, however, that we were not persuaded by the defenders' argument that Article 6, of itself, requires the Court to bring the present action to an end.

[116] While Scottish (unlike English) civil procedure remains substantially "party-driven", so that the judges are not called upon (except in commercial causes) to engage in active case management, it does not follow that parties to

civil litigation have an unqualified right, once an action has been raised, to proceed with it in as leisurely a manner as they think fit. The old maxim *interest rei publicae ut sit finis litium* has lost none of its force.

[117] A concern to avoid the problems created by stale litigation is itself one of the reasons for the law of prescription (see Savigny cited by Johnston, *Prescription and Limitation,* paragraph 1.59, and the Report of the Scottish Law Commission on *Reform of the Law Relating to Prescription and Limitation of Actions*, 1970, paragraph 23). It would, in our opinion, be illogical to suppose that considerations that were relevant in the mind of the legislator for fixing, and in some cases reducing the periods of prescription, are irrelevant to the Court in determining whether litigation should be permitted to continue.

[118] The point was put succinctly by the Scottish Law Commission (*op. cit.* paragraph 34(2)) when dealing with the question whether the starting point for the long negative prescription of twenty years should be related to the aggrieved party's knowledge, actual or constructive, of the accrual of the right of action: *"The law should not give countenance to latent and antiquated claims which may affect even the successors of the person responsible and, if revived after many years, may disturb the basis on which they have arranged their lives."*

[119] The rationales for limitation periods were fully explained by McHugh J in the High Court of Australia (see ***Brisbane Regional Health Authority v Taylor*** [1996] 186 CLR 541 at pages 551-554, cited in the Opinion of Lord Drummond Young in ***B v Murray (No 2)*** 2005 SLT 982 (at paragraph [21]), which was recently affirmed by the First Division ([2007] CSIH 39). It is also apposite to quote Lord Brightman in ***Yew Bon Tew v Kenderaan Bas Maria*** [1982] 3 All ER 833 at page 839 (quoted by Johnston, *Prescription and Limitation*, at paragraph 1.62): *"[W]hen a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he has been retained, and order his affairs on the basis that his potential liability has gone."*

[120] Two aspects of life that have developed since 1982 add further reasons for early disposal of claims: first, the increasingly complex and costly problem of maintaining continuity of insurance against past liability and, second, electronic communication and archiving with the attendant danger of accidental disappearance of relevant material.

[121] From the point of view of the courts themselves, it is common experience in Scotland that litigation of stale claims tends to take significantly longer than litigation that proceeds when memories are reasonably fresh and relevant material is ready to hand. Unnecessarily lengthy litigation prevents the timely access of other litigants to the courts and, from the point of view of the judge, the task of reaching a just decision is less easy when bogged down in a morass of uncertainties.

[122] Moreover, there are many examples in Scottish practice of what Reid and Blackie (*Personal Bar*, paragraphs 19-13 and following) classify as "*procedural bar*", deriving from "*procedural rules and principles directed to promoting fair and appropriately expeditious procedure*". They include refusal to allow late introduction of "*dilatory*" pleas and defences; refusal of late amendments; refusal to allow the introduction of evidence for which there is no basis on record; refusal to entertain objections to evidence which was not objected to at the proper time; and refusal to allow the late introduction of additional defenders or third parties. Such procedural bars have the effect of cutting a litigant off from exercise of a right that he might otherwise have had.

[123] For all these reasons, we conclude that the Court has the power to bring an action to an end for want of prosecution and that, whatever may have been the position in more leisurely times, it is a power that the Court should be prepared in appropriate circumstances to exercise. It should, however, be regarded as the option of last resort.

[124] Before considering the criteria that must be satisfied for the power to be exercised, we must deal with two arguments that were urged upon us by the pursuers.

[125] The first concerned the relevance of any remedy the pursuers might have against their solicitors. Mr Drummond for the pursuers argued that it was relevant. He submitted that, in the present case, the pursuers would not have a claim against their solicitors and that, since they would therefore be deprived of a remedy, the action should, and indeed must, be allowed to proceed. Senior counsel for the defenders argued that this was an irrelevant consideration.

[126] In our opinion, the availability of a remedy against the pursuers' solicitors is not a relevant consideration in the present context, and we respectfully agree with the position that was adopted in England (see paragraph [38] above). If it is right that an action against a particular defender should be brought to an end, there is no reason of logic or justice why the action should nevertheless be allowed to proceed because the pursuer has no alternative remedy (see, to that effect, Lord Edmund-Davies in ***Birkett v James*** [1978] AC at page 336B-C).

[127] The second argument was that if there has been delay, defenders have as great a responsibility as pursuers. Mr. Drummond submitted that defenders cannot let sleeping dogs lie and then complain that they have been prejudiced by delay: there are ample procedural means that can be invoked by defenders to force pursuers to make progress. Senior counsel for the defenders submitted that this was also an irrelevant consideration.

[128] In our opinion, the primary answer to the pursuers' line of argument was put by Lord Diplock in ***Bremer Vulkan*** (cited above at paragraph [35]): *"Whether or not to avail himself of [his] right of access to the court lies exclusively*

within the plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory."

There is no justification for placing an obligation on a defender, who has been subjected unwillingly to court proceedings, to assume a positive responsibility for the expeditious dispatch of those proceedings. That responsibility should, in the normal case, be placed fairly and squarely on the pursuer. There may, of course, be circumstances where parties have agreed that, rather than submit their dispute to arbitration, they will have it decided by the court in order, perhaps, to have a binding determination for future cases. If so, they may share the responsibility for making progress. But that is not the normal case.

[129] As regards the criteria for exercise of the power to bring an action to an end, the English experience as disclosed in the decided cases suggests that it is not helpful to attempt too close a definition or to lay down in advance all the conditions that must be met. There is always the danger that judicial statements will be treated as if they were statutory formulae to be applied without reference to the underlying principle they are intended to express or explain.

[130] In our view, the most important principle is that the power must be exercised in each case in the light of its own facts and circumstances, and that, since it is a draconian power of last resort, the judge must set out the reasons for deciding to exercise it in sufficient detail to leave no doubt in the minds of the parties affected and, if necessary, to be reviewed by a higher court. Subject to that caveat, we suggest the following criteria.

[131] First, delay by itself is not enough but it must be the starting point. The nature of the delay that must have occurred has been expressed in more than one way: *"excessive or unreasonable*" (***Assets Co v Bain's Trustees***); *"inordinate and inexcusable*" (***Birkett v James,*** following Salmon LJ in ***Allen v McAlpine*** at [1968] 2QB page 268 E-G); "*gross and entirely unnecessary*" (***Inverclyde (Mearns) Housing Society Ltd. v Lawrence Construction Co Ltd***. 1989 SLT 815, per Lord McCluskey at page 821).

[132] For ourselves we prefer the formula "inordinate and inexcusable" since it emphasises that there are two aspects to be considered: on the one hand, the length of the delay and, on the other, the reasons for it. Both conditions (inordinate delay *and* inexcusable delay) must be satisfied.

[133] In considering whether the delay has been inordinate and inexcusable, account should be taken of the delay as a whole. Thus, first, where the action has been started at a late stage in the period of limitation or prescription, a more severe view may be taken of any further delay. Second, periods of excusable and inexcusable delay should not be regarded as totally independent. A period or periods of excusable delay, if followed by further, inexcusable delay, may be taken into account if, in the end, the delay as a whole has become inordinate and inexcusable. See points (5) and (9) of the list of criteria given by Neill LJ in *Trill* - paragraph [39] above. We would, however, caution against seeking to apply the *Trill* criteria too closely as they were developed in a different procedural context.

[134] Having established that there has been inordinate and inexcusable delay, it will be necessary for the court to consider what are the consequences of that delay. The *Birkett* v *James* formula proposes two possible criteria: first, that the delay "will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action" or, second, that the delay "is such as is likely to cause or to have caused serious prejudice to the defendants". In our view, the way in which these criteria are expressed should be treated with caution for three reasons.

[135] First, they are expressed in the alternative, which might imply that it is sufficient for to the judge to decide, in some discretionary fashion, that a "fair trial" is impossible. Second, the expression "fair trial", unless it is understood in a very broad sense, appears to us to place excessive emphasis on what will happen at the stage of trial or (in Scottish terms) proof. Third, the use of the expressions "substantial risk" and "likely to cause" may again suggest a discretionary assessment by the judge proceeding on individual impression rather than concrete reasons that would be open, if necessary, to review.

[136] In our opinion, the approach suggested by Reid and Blackie (*Personal Bar,* paragraph 3-07) is simple and comprehensive There must, in addition to delay, be "an added element of unfairness ... specific to the particular factual context".

[137] The relevant factual context will include the procedural context. Much may depend, in the particular case, on the stage that the action had reached before the delay occurred. At one end of the scale, there is the situation illustrated by the present case where an action has been raised in order to defeat prescription and no further procedure has taken place. If the action is allowed to proceed, extensive procedure may be necessary before the action can reach the stage of final disposal. At the other extreme, extensive procedure may have taken place leaving very little further to be done to resolve the case.

[138] Further, in our opinion, account should be taken of the procedural consequences of allowing the action to proceed, not only for the parties, but also for the work of the Court (see paragraph [121] above).

Assuming that the substantive conditions are met, by what procedure should the court be invited to exercise the power?

[139] There are two conflicting considerations as regards procedure. On the one hand, since the issue is whether the action should be allowed to proceed at all, we would regard it as counter-productive to require that it should be the subject of extensive pleadings or other time-consuming or costly procedural requirements. On the other hand, experience in this case shows that it is unsatisfactory (and to some extent time-wasting and therefore costly) for

the Lord Ordinary to proceed on the basis of factual statements made *ex parte* on the Motion Roll, of which the only written record is to be found in his or her Opinion and which may be added to, modified or departed from in the Inner House. (We note that Lord Glennie's decision in *McKie* was given after a full hearing on Procedure Roll.)

[140] In our opinion, the step of summary striking out is sufficiently drastic and, in Scotland, sufficiently unusual, to require at least a minimum of written or documentary material on which the Court can rely in reaching its decision, whether in the Outer House or the Inner House. Further, the pursuer is entitled to fair notice of the arguments that will be advanced and the facts that will be relied on by the defender.

[141] We suggest that the most appropriate written procedure would normally be by way of Minute and Answers focusing, without undue formality, the grounds on which the defender seeks to have the action brought to an end and the pursuer's grounds for resisting that motion. The precise way in which such Minute and Answers would be ordered would depend on the circumstances in which the matter arose. Where, as in the present case, the action has been sisted and the pursuer seeks to have the sist recalled so that the action can proceed, we envisage that the defender would enrol a counter-motion for dismissal or absolvitor and tender a Minute in support of that motion.

[142] Beyond that, we do not consider it necessary or wise to make further procedural suggestions in this case. This is a matter which the Rules Council would no doubt wish to consider and for which, if thought appropriate, recommend new rules.

If the judge is satisfied that the power should be exercised, what is the appropriate order - dismissal or absolvitor?

[143] Scots law makes an important distinction between an order that puts an end to a pending action while preserving the right of action (dismissal) and an order that extinguishes the right of action and the underlying rights and obligations (absolvitor). We understand that English law does not make this distinction. We note that the order pronounced by Lord Glennie in *McKie* was dismissal, whereas the order pronounced by the Sheriff in *Newman Shopfitters*, and sustained by the Sheriff Principal, was absolvitor. In neither case did the judge explain in detail his reason for adopting the one solution in preference to the other.

[144] It is certainly true, as the reclaimers urged upon us, that a decree of absolvitor is the only sure way of bringing litigation to an end once and for all. Since, *ex hypothesi*, the action has been raised within the prescriptive period and the running of prescription has been interrupted by the raising of the action, a decree of dismissal will leave it open to the pursuer to raise a fresh action.

[145] While we accept the inconvenience of that result, we do not think the Court can ignore the fact that decree of absolvitor is a decree on the merits. Such a decree would be appropriate if, as we think is possible, a defender were to enter a plea, with appropriate supporting averments, of personal bar by *mora*, taciturnity and acquiescence. Short of that, we are satisfied that the only form of decree open to the Court is dismissal.

What are the consequences for disposal of the present reclaiming motion?

[146] In this case, the Lord Ordinary concluded that the defenders' motion for absolvitor was incompetent, but went on to consider whether, if she were wrong on that point, it would be appropriate to exercise a discretionary power in favour of the defenders. She considered, first, the question of delay (paragraphs [59] and [60] of her Opinion) and second, the question of prejudice to the defenders (paragraphs [61] to [64]).

[147] On the question of delay, having narrated the history of contacts between the parties' solicitors following the raising of the action in 1988, she concluded: *"In short, whilst the mere fact of a lapse of some sixteen and a half years since the action was raised might seem to infer delay which is obviously inordinate and inexcusable, when the facts are properly considered, it is evident that it is not a matter of the parties' dispute being crystallised at the outset and lying dormant throughout that period. The delay can probably still be properly described as inordinate but it is not wholly unexplained and, in my view, not, in the circumstances, wholly inexcusable."*

[148] On the question of prejudice, the Lord Ordinary held that the key documents appeared still to be available and that the architect with overall responsibility for the contract was still available to give evidence. She said (at paragraph [62]): *"If [he] has difficulties due to the non-availability of his diaries or the other documents that he recently destroyed, that is not a prejudice which should count against the pursuers, in my opinion. He took a risk when disposing of those documents, knowing as he did that the action had not been disposed of."*

[149] We cannot agree with the Lord Ordinary's approach, essentially for reasons already discussed above.

[150] First, as regards delay, the test should not be whether the delay is "*wholly* unexplained" or "*wholly* inexcusable" but whether it is, considered as a whole, inordinate and inexcusable.

[151] The factual basis of the pursuers' case is that, during 1982, the defenders designed and supervised the construction of their dwelling-house, and on 17 November 1983 issued a certificate of completion. The Summons was signetted on 15 November 1988, two days before expiry of the prescriptive period. The action was sisted on 21 December 1988 and no step was taken in the process until the pursuers' motion to recall the sist was enrolled on 6 April 2005. As far as the documents reveal, the last communication between the parties' solicitors before 2005 was in June 1998.

[152] The situation is therefore as follows:

- The interval between the last communication and the motion to recall the sist was almost seven years - almost two years longer than the five-year period for prescription of obligations.
- The interval between the motion to sist and the motion to recall the sist was more than three times as long as that prescriptive period.
- The interval between the date when the reclaimers issued their certificate of practical completion and the motion to recall the sist was more than 21 years - a year longer than the period of long negative prescription which, unlike the five-year prescription, operates irrespective of whether liability was discoverable.

[153] In our opinion, even if one looks only at the first and shortest of these periods, for which the respondents could offer no explanation or justification, the delay was both inordinate and inexcusable. At the very best for the pursuers, the communings between the parties' solicitors in the period before that (1988-1998) were intermittent and desultory. The cumulative delay was, by any standards, totally unacceptable, and in our view, the Lord Ordinary misdirected herself on this issue.

[154] We consider further that the Lord Ordinary misdirected herself in her approach to the issue of prejudice in that she failed to take account of the inchoate state of the action in terms of procedure.

[155] The only step taken by the pursuers to stop the running of prescription many times over was the service of a summons of which the condescendence ran to no more than four pages. No defences had been lodged when the action was sisted (although we understand that defences were lodged after the Lord Ordinary issued her Opinion).

[156] Bearing in mind that this is an action of professional negligence against a firm of architects in respect of a building contract, it is impossible, in our opinion, on the basis of such a very brief summons, to make any assessment of what the issues would be likely to be at a proof if the action were to reach that stage. Moreover, Mr Drummond for the pursuers very fairly admitted that, if the action were allowed to proceed, he would wish to make extensive adjustments to his pleadings, increasing the sum sued for and introducing new averments of fact and new allegations of negligent design and supervision.

[157] Consequently, in our opinion, the Lord Ordinary was not in a position to assess the nature and extent of possible prejudice to the defenders in the way she did.

[158] In our opinion, the risk of prejudice to the defenders was not only serious but self-evident. Bearing in mind the observations of Lord Brightman in *Yew Bon Tew* (cited above at paragraph [119]), we cannot regard it as fair or reasonable to suggest that, after such a long delay and no activity for several years, the architect concerned, having retired in 1999, should still have held on to his notebooks and other papers on the off chance that the pursuers might wish to revive an action that had slumbered so long in the arms of Morpheus.

[159] For these reasons, we conclude that the reclaiming motion must succeed, and it only remains to consider what should be the fate of the action. Since we have held that the Lord Ordinary erred in the exercise of her discretion, the normal course would be to remit to her to reconsider the case in the light of this opinion, perhaps after inviting the parties to focus their respective positions in a Minute and Answers.

[160] In our opinion, that would not be the appropriate course to take in this case. We have already said that, in our view, the delay here was inordinate and inexcusable, and it therefore remains to consider whether it is necessary to remit to the Lord Ordinary to assess the element of unfairness.

[161] The defenders drew attention (see paragraphs [21] and [30] above) to various ways in which they were prejudiced, not all of which were before the Lord Ordinary. We do not find it necessary to consider these matters in detail since, in our opinion, the crucial consideration is this. After adjustment of the pleadings and amendment of the conclusions, the record would be likely to extend to many times the length of the existing summons, ventilating all manner of complaints. With incidental procedure, including the real possibility of lengthy debates on Procedure Roll, the action might well not be ready for proof until a date some 20 years after the summons was served and more than 25 years after the events giving rise to the action. If there were a reclaiming motion, that would, of course, lengthen the timescale still further.

[162] To allow such a situation to evolve would, in our opinion, be so manifestly unfair as to be a reproach to the law of Scotland. If there ever has been, in recent times, an action that should be stopped in its tracks now, this is it. We do not consider that any useful purpose would be served by a remit to the Lord Ordinary which would only waste court time and cause the parties to incur further expense.

Result

[163] In these circumstances and for all the reasons we have given we will recall the interlocutor of the Lord Ordinary and grant decree of dismissal.

[164] We would like to record our thanks to the parties' representatives for the thoroughness and care with which the reclaiming motion was prepared and presented.

Act: Drummond, Solicitor Advocate; Shepherd & Wedderburn (Pursuers and Respondents)
Alt: Howie, Q.C., Thomson; DLA Piper Rudnick Gray Cary Scotland (Defenders and Reclaimers)