OPINION OF LADY SMITH, Outer House, Court of Session. 5th August 2005.

Introduction:

[1] In 1981, the pursuers appointed the defenders as architects in connection with the designing and building of their new house in Livingston, West Lothian. Construction began in 1982 and the building of the house was completed in November 1983, the date on the certificate of practical completion being 17 November 1983. In about 1986, an arbitration took place between the pursuers and the building contractors in respect of payments that were being claimed for extensions of time. The building contractors attributed those extensions to having received late instructions from the defenders. Many documents were handed to the pursuers by the defenders at that time to assist them in the arbitration.

[2] On 15 November 1988, the summons in the present action was served on the defenders, alleging negligence. Problems and defects had, it was averred, arisen with the house as a result of faulty supervision and faulty design. Defences were not lodged.

[3] On 21 December 1988, on the pursuers' intimated but unopposed motion, the cause was sisted, the interlocutor of that date recording that the sist was "pending negotiations between the parties with a view to settlement". The action has remained sisted since then.

The present motions:

[4] 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 agents on 16 March 2005. That motion was opposed and the defenders enrolled their own motion for decree of absolvitor. The motions were not able to be heard before the Vacation Court, due to pressure of business and so were re-enrolled and came before me in a hearing that took place on 26th May, 27th May, and 5th and 6 July 2005. It is appropriate that I set out the full terms of the defenders' opposition to the pursuer's motion. They were:

"(i) the Court, in exercise of its inherent jurisdiction ought to grant Decree of Absolvitor, having regard to (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, (b) the serious prejudice to the Defenders which such delay has caused, and (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

(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 Defender's 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 .....".

[5] The source of the argument encapsulated in the first paragraph of that opposition appears to have been certain dicta of Sheriff Principal Macphail, as he then was, in the case of ***Newman Shopfitters Ltd* v *M J Gleeson Group*** *Plc* 2003 SLT (Sh Ct) 83.

At the hearing before me, Mr Thomson, on behalf of the defenders, accepted that the onus was on them and addressed me first.

Submissions for the defenders:

General:

[6] Mr Thomson's submission was clear and careful and he sought to deal with the challenges of some of the information in his instructions changing in the course of the hearing in as responsible a manner as possible. Delay was, it was said, at the heart of the defenders' argument. There had been no contact at all between parties' agents after the action was raised prior to March 1997 when the pursuers' previous agents had indicated that they would be enrolling to recall the sist. They did not, however, do so. The defenders made an offer to settle the action in April 1997, which was not accepted. In June 1998, the pursuers' agents had contacted the defenders' agents and proposed a further meeting but none took place. There was no further contact until the pursuers' present agents took over acting in February 2005. There was no known reason for the delay. It was inordinate and inexcusable. The defenders' counsel was invited to indicate what the point was at which, in his submission, the delay had become inordinate and inexcusable but he declined to do so, approaching matters on the basis that it had, on any view, now reached that point.

Inherent Jurisdiction:

[7] In these circumstances, the Court had, it was submitted, the power to grant absolvitor notwithstanding the fact that the Rules of Court made no provision enabling it to do so. It was a power which the Court could exercise by looking to its residual source of powers, whilst recognising that it was a power which required to be exercised with caution in exceptional cases only. In support of his submission that such a power existed, counsel for the defenders referred to ***Newman Shopfitters Ltd* v *M J Gleeson Plc, Wilson t/a TW Contractors* v *Drake and Scull Scotland Ltd*** 2005 SLT (Sh Ct) 35, ***Boyd Gilmour & Co* v *Glasgow & South Western Railway Co*** (1888) 16R 104, ***Hall* v *Associated Newspapers*** *Ltd* 1979 JC 1 and *Erskine Institutes I,ii,8*. Much reliance was placed on the case of ***Boyd Gilmour & Co* v *Glasgow & South Western Railway Co*;** it provided, it was submitted, eminent authority for the proposition that the power argued for by the defenders existed since the Court had felt able to make provision where the Rules of Court did not do so. He also referred to the approach that had developed in England, exemplified by the cases of ***Allen* v *Sir Alfred McAlpine & Sons Ltd*** [1968] 2 QB 229 and ***Birkett* v *James*** [1979] AC 297. Acknowledging that there were Scottish authorities to the effect that the residual power for which he was arguing did not exist, he also referred to the cases of ***Purdie* v *Kincaid & Co Ltd*** 1959 SLT (Sh Ct) 64, ***Esso Petroleum Co Ltd* v *Hall Russell & Co Ltd* (No 2)** 1995 SLT 127 and ***Catterson* v *Davidson*** 2000 SLT (Sh Ct) 51.

[8] Counsel for the defenders sought to distinguish *Purdie,* a case in which the Sheriff - Substitute had granted decree of absolvitor when the pursuer failed to enrol a motion to fix a diet of proof and it was held, on appeal, that he did not have power to do so, on the basis that it was not in point, that decision having been based on a misapprehension that there had been a failure to comply with an order of the Court. Similarly, he sought to distinguish ***Catterso****n,* a case in which an action was dismissed by the Sheriff when a pursuer failed to lodge a Minute of Amendment after having been given leave to lodge one and it was held that the Sheriff had no power to do so, again on the basis that it was not in point for the same reason as applied to *Purdie*.

[9] ***Esso Petroleum Co Ltd* v *Hall Russell & Co Ltd* (No2),** however, was a reasoned decision of Lord Johnston in which he had had to address the issue of whether or not the Court had an inherent jurisdiction to dismiss an action (or grant absolvitor) on grounds of delay and had found that no such power existed. Counsel for the defender submitted that Lord Johnston's conclusion was not justified because it was clear that the power existed, as was recognised in the case of ***Boyd Gilmour & Co* v *Glasgow & South Western Railway Co*.** The Rules of Court did not, it was submitted, diminish or take away from the inherent power. The English authorities showed how the power could be exercised appropriately and the test set out in ***Birkett* v *James*** was an example of how the discretionary power could properly be applied, recognising that the power should not be exercised in an arbitrary fashion.

[10] The power should, it was said, be exercised in this case. There would, it was stated, be real problems for the defenders if the action proceeded as they just did not have any records, which was a fundamental problem. John Spencely, a partner of the defenders, had been in charge of the project and he had destroyed such papers as he had. At the continued hearing, the details of Mr Spencely's position was elaborated by way of an affidavit (no. 8/12 of process) in which he states that he threw out his diaries for the relevant period long ago. He does not explain whether they were disposed of after the action was raised and if so, why. He states that he cannot remember what happened to the defenders' files regarding this project but explains that since their practice was to dispose of files after seven years, he suspects that that is what happened in this case. He does not explain why they would not have retained files when the action had not been disposed of, something of which he was aware, having asked the defenders' solicitors at one point whether anything should be done to reactivate the case. He was told by them to "let sleeping dogs lie". He retired from the defenders in 1999 and initially retained some papers including progress photographs taken during construction. Those were, however, thrown out by him, in 2004. He does not seem to have turned his mind to the question of whether they might still be required for the purposes of the litigation. Further, Mr Spencely states that although he had overall responsibility, the design was the responsibility of Stuart Renton, assisted by Neil Gillespie. Although Mr Gillespie still works in the defenders' firm and would be able to give evidence, Mr Renton is, it is said, very ill and would be physically unable to give evidence. The nature of his illness is not stated nor was any soul and conscience certificate produced. The question of whether or not he would be able to give evidence on commission did not appear to have been addressed by the defenders.

[11] At the continued hearing, the submissions for the defenders concentrated on difficulties with and for witnesses rather than lack of documentation no doubt because, by that stage, the pursuers had produced an Inventory containing details of the substantial quantity of documentation relating to the construction of their house which was held by them (nos. 6/40 - 44 of process). It was not simply a question of having the documents, it was said. Witnesses would need to explain them and explain why things were done, which was what the difficulty was, rather than the presence or absence of documents. It did though remain the position that the defenders had lost their papers. They could not, though, positively assert what was missing and there was no suggestion that they had identified any obvious gaps from the papers that the pursuers hold, although it was thought that there had been more files.

[12] It was also submitted on behalf of the defenders, with some force, that the defenders would be in an impossible position regarding the securing of expert evidence to assist them in refuting the allegations made, at this stage, so many years after the project. That proved to be an embarrassing submission for the defenders to have made, through, I hasten to add, no fault on the part of counsel. In the period between the first two days of the motion and the continued hearing, Mr Drummond made enquiries on behalf of the pursuers and found that there was an expert available, Mr David Pirie, who not only was able to give evidence regarding professional standards at the relevant time but had in fact provided a report in this case, on the instructions of the defenders. The front page of the report (see: no. 8/20 of process) was produced by the defenders at the continued hearing and it showed a date of January 1995. The explanation given for it having been misrepresented on behalf of the defenders at the earlier hearing that they did not yet have an expert witness and would be in difficulty in finding one was that their agents had forgotten that the report had been instructed.

[13] Finally, it was stated that there might be insurance problems. One of the professional indemnity insurers on the relevant panel had gone into liquidation and there might now be no insurance cover for part of the claim. Beyond these generalities, no details were, however, given. It was not, for instance, indicated when it was that the insurer in question had gone into liquidation.

[14] In anticipation of arguments that might be made against him, counsel for the defenders submitted that they were not to be criticised for having chosen to do nothing themselves to progress the action. Their choice was reasonable in the circumstances. Everything in the pursuers' conduct showed an absence of intention on their part to progress the action through the Courts. There was no basis for the defenders reasonably to think that this was an action that was going to be progressed. Nor could the Court ameliorate their position by adjusting the interest that would be due if damages were awarded: ***Boots the Chemists Ltd* v *GA Estates Ltd*** 1993 SLT 136. Reliance was also placed on the case of ***Shtun* v *Zalejska*** [1996] 1 WLR 1270.

Article 6:

[15] It was submitted that the Court, as a public authority, had to refrain from acting incompatibly with the European Convention on Human Rights ("the Convention"). In terms of section 8(1), the Court had a discretion when choosing remedy. Its own procedures required to comply with the Convention: ***Karl Construction Ltd* v *Palisade Properties Plc*** 2002 SC 270. Once a breach was identified, the only way forward was to stop the proceedings: *HMA* v *R* [2004] AC 462, an authority which should, it was said, be preferred to the approach adopted in ***Attorney General's Reference (No 1 of 2001)*** *[2004] 2 AC 72*. Whilst it was accepted that it would not make sense, in the context of civil litigation, to impose automatic termination of the litigation if the delay was the fault of the Court, if the Court had left matters in the hands of parties and delay had ensued, the Court could not wash its hands of it once an attempt was made to revive the proceedings. The state could not, it was stated, justify putting the defenders into the position of having to face proof in the action now, after such a long delay. The fact that parties were in control of the litigation did not remove the Court's obligations: ***Bucholz* v *Germany*** 1981 3 EHRR 597. Reference was also made to the case of ***Will* v *Argyll and Clyde NHS Trust*** 2004 SLT 368. Rule of Court 20.1 should, accordingly, be read so as to give the Court power to grant the order sought by the defenders.

Submissions for the pursuers:

General:

[16] On behalf of the pursuers, Mr Drummond, in an able and persuasive submission, indicated that his primary argument was that the defenders' motion was incompetent as the Court did not have any inherent

jurisdiction to dispose of an action for want of prosecution. If, however, the jurisdiction did exist and the Court had the discretionary power to do so, it was appropriate, when exercising that discretion to follow the test set out in the case of ***Birkett*** and that test had not been met in this case. Even if it had, the appropriate remedy would not be to grant decree of absolvitor. There were alternative remedies in the form of an award of expenses, an order for caution, treating the evidence in the pursuers' case at proof with caution, or dismissal. Further, he indicated that if it was decided that the defenders' motion was competent and that the discretion should be exercised, it should be limited to that part of the claim relating to the allegation of negligent supervision. Regarding the submissions under reference to Article 6 of the Convention, Mr Drummond submitted that there had been no breach but, in any event, breach should not result in dismissal or absolvitor.

Inherent Jurisdiction:

[17] Mr Drummond submitted that Lord Johnston's approach in ***Esso Petroleum Co Ltd* v *Hall Russell* (No.2)** was correct and should be followed. The case of *Boyd* ***Gilmour & Co* v *Glasgow & South Western Railway Co*,** founded on by the defenders, was not authority that the jurisdiction existed. Concerning, as it did, a decision to allow a reclaiming motion to be heard, in 1888, notwithstanding the fact that appeal prints were not lodged in time through oversight, it was superseded since Rule of Court 2.1 now provides for a remedy in such circumstances, as had its predecessor rules which had been included in the Rules of Court since 1934. Rather, the correct starting point was to consider the terms of Section 5 of the Court of Session Act 1988. Now, if a change in or addition to procedure is required, it is achieved by way of Act of Sederunt, as provided for by Parliament. It was not for an individual judge to innovate on the existing rules for the purposes of a particular case although it would always be open to him to make representations to the Rules Council should it seem that an alteration to the existing Rules was required. The current rules provided, in a number of instances, for sanctions in the event of failures by a party of various kinds but they did not provide for absolvitor or dismissal in the event of delay in prosecution of the action. The ***Newman Shopfitters*** case had been decided under reference to the provisions of different legislation, the Sheriff Courts (Scotland) Act 1907, which are in different terms.

[18] Mr Drummond asked and answered the question of what would be the consequences if the Court now, for the first time, took upon itself the power for which the defenders contended? It would mean that pursuers would, without warning, discover that actions which they had raised at a time when no such power had been exercised by the Court and its existence was unknown, would be at risk of finding themselves deprived of a remedy if there had been delay. When the present action was raised and sisted, the power had never been exercised nor said to exist. The pursuers would have no remedy against their former solicitors, who had delayed in the progression of the claim, as they would not be able to assert that any ordinarily competent solicitor would, at any earlier stage, have known of the risk of absolvitor or dismissal in the event of delay. To put pursuers into that position when, as in the present case, they had a triable case, would not be in the interests of justice. They would be left without any remedy in circumstances where, for many years, they had lived in a defective house which had never been wind and watertight. Mr Drummond submitted that a direct parallel could be found in the approach adopted by the Court in applications under Section 19A of the Prescription and Limitation (Scotland) Act 1973, namely that the availability of an alternative remedy was considered by the Court to be highly relevant when considering whether or not to exercise its discretion: ***Forsyth* v *A F Stoddard & Co Ltd*** 1985 SLT 51; ***McFarlane* v *Breen*** 1994 SLT 1320.

[19] In the event that, contrary to his submission, it was held that the power did exist, Mr Drummond submitted that it should only be exercised in exceptional circumstances, where the test set out in ***Birkett* v *James*** was met. He then turned to its constituent parts, the first of which was that the delay required to be inordinate and inexcusable. This was a case where, unlike the circumstances in ***Newman Shopfitters***, there had been no opposition to the sist and its purpose had been for parties to try and negotiate a settlement. Over the first nine and half years, that is what they did. He referred, in support of that submission to a number of documents relating to exchanges between parties' agents and between a Mr Smith, who was a claims consultant acting as agent for the pursuers, and the pursuers' solicitors. Those documents showed, he said, that there were discussions including a proposal that the dispute be referred for mediation all up to 1998, by which time any problems arising from the dimming of recollections of witnesses would, in any event, have occurred. Thereafter, it was accepted that there was inactivity but that was, put simply, the fault of the pursuers'

solicitors. The defenders had acquiesced in the delay. They had not written urging that matters be progressed, They had not enrolled a motion to recall the sist, as it would have been open to them to do. It was not appropriate that they choose to do nothing and then found on that.

[20] Regarding the second part of the ***Birkett*** test, Mr Drummond submitted that it had not been shown that the defenders would now be prejudiced in proceeding to proof. All the necessary documents were in the pursuers' possession and had been shown to the defenders. They included the contract between the parties, the building contract, the design drawings, the building specification, a collection of minutes of meetings, memoranda prepared by the defenders, the defects list prepared by the defenders at the end of the contract, copies of the defenders' correspondence and photographs of the defects. These were the documents that had been handed over to Mr Smith by the defenders, on 3 March 1986, to assist in the arbitration with the building contractor. The pursuers had also made available ten expert reports prepared for them, the dates of which ranged between 1984 and 2005, most of the reports having been prepared shortly after practical completion and prior to the raising of the action. The defenders had not shown how or why they would need any other records, particularly as regards the negligent design aspect of the claim. The case of ***Shtun* v *Zalejska***, founded on by the defenders, was not authority for the proposition that the action required to be stopped wherever there were going to be difficulties with the evidence.

[21] Regarding the appropriate remedy in the event that the discretion did fall to be exercised, it was submitted on behalf of the pursuers that it did not follow that absolvitor was necessarily the correct remedy. It applied only in exceptional circumstances and it was important to consider other options. In support of that submission, reference was made to *Clayton & Tomlinson*: ***The Law of Human Rights***, ***Biguzzi* v *Rank Leisure PLC*** [1999] 1W LR 1270 and ***Amodeus Ltd & ors* v *Gibson & ors***, *The Times Law Reports* 3.3.00.

Article 6:

[22] Mr Drummond submitted that, on a proper reading of the relevant authorities (***Zimmerman and Steiner* v *Switzerland*** *(A/66)* 1983 6EHRR 17; ***Bucholz* v *Germany*** 1981 3 EHRR 597) delay could not amount to a breach of Article 6 of the Convention unless it was shown to have been the fault of the state. The state was not at fault in this case. The Court had organised its systems so as to enable any party to enrol for a sist to be recalled at any time. It was not necessary for the Court to have any further system, such as one in which it took upon itself the responsibility of monitoring sists. Further, if the Court were to be seen as being at fault, there was no good reason to punish the pursuers for that fault by depriving them of a remedy, Article 6 being directed at the conduct of states not at inflicting penalties on parties. Rule of Court 20.1 could not be read in the manner suggested by the defenders as it applied only in specified cases of default. The approach of Lord Hope in ***Attorney General's Reference (No 2 of 2001)*** *[2004] 2AC 72* should be followed and it did not, contrary to what was suggested by the defenders, involve approval of the ***Newman Shopfitters*** case. Section 8 of the Human Rights Act 1988 conferred an unfettered discretion as regards remedy in the event of breach.

Discussion:

Inherent Jurisdiction:

[23] As a preliminary observation, if the defenders are correct in their contention that this Court already has (and for centuries has had) what was referred to as "an inherent jurisdiction" that includes a power which it can exercise so as to dispose of an action against the will of the pursuer on grounds of delay, then pursuers in actions presently lying sisted may be in a highly vulnerable position. Whilst such delay may well be attributable to dilatoriness on the part of their solicitors, it must be highly doubtful whether they would have a claim against them for negligence if the actions were to be dismissed or absolvitor granted on grounds of delay, given that standards of ordinary competence depend on what is accepted as being the current norm in terms of professional knowledge and practice. I do not see that it could, at least prior to the decision in ***Newman Shopfitters Ltd* v *M J Gleeson Group Plc,*** have been said that any ordinarily competent solicitor acting for a pursuer would have considered that to leave an action sisted for a lengthy period would entail a risk of his client's right of action being lost. The proposition advanced is, accordingly, an extreme one, and could result in hardship to pursuers who find themselves in such a position. The availability or otherwise of an alternative remedy to a pursuer whose ability to litigate a claim is under examination is something that the Court habitually takes into account when considering whether or not to exercise the discretion conferred on it by Section 19A of the Prescription and Limitation (Scotland) Act 1973 (***Forsyth* v *A.F Stoddard & Co Ltd*** 1985

SLT 51; ***McFarlane* v *Breen*** 1994 SLT 1320) and it would seem odd if the Court were to ignore it in the present context.

[24] Pursuers in such a situation would, no doubt, consider themselves victims of injustice. It is quite a different matter from decree of dismissal being pronounced in one of the sets of circumstances set out in Rule of Court 20.1 where, by virtue of the Rule itself and prior intimation of the diet in question a party has clear prior notice of the specific risk that he is running in the event of non - compliance. Indeed, it is noteworthy that whilst the Rules of Court provide for the termination of an action against the will of the pursuer they do so only in very clearly defined circumstances, no doubt because it is considered that fairness so requires. That the parties both relied on the test in ***Birkett* v *James*** , viz: *"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 an 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."* (per Lord Diplock at 318). is indicative of recognition that the draconian nature of this power is such that, if it exists, there would need to be fetters on, or, at least, guidelines regarding, its exercise. Since neither the power nor any fetters or guidelines as to its exercise are expressed in any existing Rule of Court or statute, it seems that the defenders are, simply put, challenging the court to declare its existence and extent by way of judicial pronouncement.

[25] The first and fundamental question that I have to address, accordingly, is that of whether or not a power exists which can be used in the way that the defenders propose. In doing so, it seems to me important to bear in mind that what is being argued for here is an extreme and draconian power to put a stop to a litigation that is ongoing. As such I do not consider that it can be categorised as a power that concerns management and regulation of the Court's ongoing business, support of its authority or enforcement of its orders.

[26] Considering the authorities chronologically, I begin with Erskine: *"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"*.

[27] That very general statement as to what was the position at that time cannot, in my view, be seen as indicating that the power for which the defenders contend exists as at the present time. Other than the case of ***Newman Shopfitters Ltd* v *M J Gleeson Group Plc***, no cases were cited in which Erskine's statement had been relied on as being authority to that effect.

[28] Turning then to the case of ***Boyd Gilmour & Co* v *Glasgow and South Western Railway Co***., this was the Inner House authority which the defenders relied on as the foundation of their argument. In that case, which was an appeal from the Sheriff Court, the appellants were almost a month late in lodging appeal prints and in boxing them on the first box - day thereafter, due to inadvertence. The relevant Rule of Court then in force was Section 3 of the Act of Sederunt of 10 March 1870 and it provided that in the event of an appellant failing to comply with the time scales for lodging and boxing appeal prints, he would be held to have abandoned his appeal. There was not then in force any Rule of Court conferring a discretion to excuse a failure to comply with a rule such as the present Rule of Court 2.1. Indeed, no such rule was introduced until 1934. The respondents in the appeal did not suggest that they had been prejudiced. Their challenge was one of competency, founding on the provisions of the Act of Sederunt. The Lord Justice Clerk, at p.107, said: *"At first sight, there is great force in this objection when the words of the Act of Sederunt are considered, which are very distinct"*. He then continued: *"Had it been clear that the Court are bound to regard a provision of an Act of Sederunt as being equivalent to a statutory enactment, I should have been unable to hold otherwise than that the defenders' appeal had fallen, and that it was not in the power of the Court to replace them in the position of being able to prosecute that appeal now"*.

[29] What follows in his opinion and that of Lord Young is an explanation that the court had, on previous occasions, determined that it was open to it to decide that it was not necessary to enforce the strict

provisions of the Act of Sederunt. The Lord Justice Clerk said (at p.107): *"The Court has invariably held that they were entitled to consider whether the circumstances of the case made it necessary to enforce the Act of Sederunt to the effect of precluding the party in default from proceeding with this appeal. They have thought themselves entitled to consider what was the intention in passing the Act of Sederunt, and having regard to that intention, whether there was in the particular case ground for enforcing its penal provisions".* and Lord Young, having referred to an earlier occasion on which the Court had granted similar relief to that sought by the appellants in the case before it said (at p.110): *"I read what I then said ..... 'It must always be in the power of the Court to do justice in any case of this kind, and relieve a party of so severe a penalty, following on so critical a construction of what, after all, is only a rule of Court laid down by the Court for its own guidance, with notice to parties and practitioners. We may advantageously and wholesomely make stern regulations, in order to check appeals taken merely for delay or other improper purpose, but it is a strong thing to say, that, by any words of ours in an Act of Sederunt, we preclude ourselves from doing what we think justice in any particular case ....."*

Now, I should be myself prepared to read into every Act of Sederunt by implication, that, notwithstanding any of its provisions, it should be in the power of the whole Court, or any Division of the Court, or even of any single Judge in a case, to grant any relief in any individual case, which was thought to be according to justice and equity, and without prejudice to the opposite party."

[30] In short, the Court determined that it had the power to refrain from enforcing a penal provision of the Act of Sederunt on the one hand because the view was taken that a dispensing power could be read into the existing rules and on the other hand because the view was taken that the Court had the power to refrain from enforcing a rule contained in an Act of Sederunt in the interests of justice. What it did not do was suggest that the Court had the power other than through the medium of an Act of Sederunt, to write and enforce a new rule regarding a matter upon which the existing rules were silent.

[31] I note that **Boyd Gilmour & Co v Glasgow & South Western Railway Co** was cited to the Court in the case of **Hutchison v Galloway Engineering Co** 1922 SC 497 where the Lord Justice Clerk said (at p.499): *"As is clear from the cases cited to us, an Act of Sederunt is not subjected to the same rigid construction as an Act of Parliament. But a Court can depart from the terms of an Act of Sederunt only where special cause is shown".* And Lord Salvesen said (at p.499): *"I also think with your Lordship that we do not need to construe an Act of Sederunt with the same rigidity as an Act of Parliament, but we cannot depart from the terms of an Act of Sederunt unless on special cause shown..."* . Again, the principle articulated appears to be that, in certain circumstances, the Court can decide to refrain from enforcing the terms of its own rules but nothing more than that.

[32] Turning next to the case of ***Purdie* v *Kincaid & Co. Ltd*** 1959 SLT (Sh Ct) 64, the facts are not in point. The Sheriff - Substitute had granted decree of absolvitor on the ground that there had been a failure to obtemper Rule 56 of the Rules of the Sheriff Court when in fact no such failure had occurred. The pursuer had delayed unreasonably in progressing the action. The passage relied on by the defenders appears at p. 6 and contains the *obiter* comment that: *"Unlike the Court of Session which has power to find a remedy in circumstances where none is prescribed by law the Sheriff Court has no jurisdiction ex nobile officium...".*

[33] It was, however, accepted on behalf of the defenders that the power for which they were contending was not one which would involve the exercise of the *nobile officium* and I do not, in any event, see that these comments can be relied upon as authority for the view that this Court has power to grant decree of absolvitor where there is delay.

[34] The case of ***Hall* v *Associated Newspapers Ltd*** falls to be considered next. A question arose as to the point at which the Court's jurisdiction with regard to contempt of Court arose, in the criminal sphere. That in turn involved the identification of the time at which it could be said that proceedings had begun and accused persons were entitled to the Court's protection. At p. 9, the Lord Justice General said: *"The law of contempt of Court covers many diverse forms of conduct one of which is conduct that is liable to prejudice the administration of justice generally, or in relation to the case of a particular individual. Its source is to be found in the indispensable power which is inherent in every Court to do whatever is necessary to discharge the whole of its responsibilities. As Erskine says in the Institutes, 1-2-8, 'every power is understood to be conferred without which the jurisdiction cannot be explicated'. One*

particular aspect of this power is the power to punish summarily conduct which impedes the Court in the exercise of its functions...".

[35] He goes on to refer to a passage in *Hume* which sets out the power of the Court to punish summarily any act which is to the prejudice of a fair and impartial trial and continues: *"From what we have said so far two conclusions may be drawn. In the first place it is of vital importance that the Court should guard jealously, in the interests of justice, its inherent jurisdiction to vindicate the fair and impartial administration of justice and, as a corollary, to protect persons charged with crime and liable to be tried .... from actions on the part of others which may prejudice their prospects of a fair and impartial trial. In the second place it is just as important that this indispensable and special jurisdiction which exposes offenders to summary punishment should be confined within proper and necessary limits".*

[36] The Court's power to determine and impose punishment for contempt has long been established, as indicated by the statement in *Hume*. Its existence was not in doubt in *Hall* v *Associated Newspapers* and, accordingly, the comments of the Lord Justice General ought, it seems, to be read against that background. I do not read anything said by him as authority for the proposition that it is open to the Court to do as the defenders seek. The power proposed by them cannot, in my view, properly be regarded as a matter of the Court discharging its responsibilities or taking action to prevent the impeding of its functions. In general terms the Court is *entitled*, in an ordinary action, to urge parties to progress the litigation and may do so by, for instance, limiting the time allowed for amendment, putting a case out By Order for a report on progress, or refusing a motion to discharge a diet where it is concerned about delay although not, interestingly, by fixing a diet of proof or jury trial if parties fail to enrol for the diet to be fixed or omit to specify a time estimate in the motion (Rule of Court 6.2). It is, though, not obliged to do so. I am not persuaded that the Court has responsibilities outwith those specified in the Rules of Court, to take action in respect of lack of progress, particularly where the action proposed is that the Court prevent the pursuer taking the action any further. Nor do I regard the power for which the defenders argue to be a matter of explication of the Court's existing jurisdiction, the ordinary sense of explication being a matter of detailed analysis of something that already exists. Further, the power sought is obviously not a matter of taking action to prevent the impediment of the Court's functions. In short, I am not persuaded that this case is authority for the proposition that the power exists.

[37] I turn then to the case of ***Esso Petroleum Co Ltd* v *Hall Russell & Co Ltd*** **(No. 2)** in which Lord Johnston held that the Court did not have the power to dismiss an action for want of prosecution. At p. 129 - 130 of his opinion, he said: *"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 of 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 is intended and that the ensuing silence is eloquent of an express intention not to confer the power demanded by the defenders".*

[38] Lord Johnston clearly approached the issue on the basis that the power sought was one which falls to be categorised as a power of the sort for which the Rules of Court would normally make provision, an approach with which I agree. Indeed, it is an approach which, in some respects the defenders seemed to accept, given their argument that Rule of Court 20.1 ought to be read as encompassing it.

[39] In ***Catterson* v *Davidson***, the facts of which were very similar to those in *Purdie* v *Kincaid & Co Ltd* 1959 SLT (Sh Ct) 64, Sheriff Principal Nicholson observed that the pursuer's agents had protracted the proceedings to an unacceptable extent that was: *"Inconsistent with the general public interest in having litigation dealt with in an expeditious manner which does not unfairly impinge on the time of the Courts to the prejudice of other court users"*. (at p.54) but then added some comments that read as covering his understanding not only of the Sheriff Court Rules but of those of this Court also: *".....notwithstanding the general thrust of the Ordinary Cause Rules , I do not consider that the Rules of Court in Scotland yet permit a judge to bring proceedings to an end simply on account of a failure on the part of one party to co-operate in the*

speedy despatch of litigation , unless of course that failure truly results in what can be characterised as default. It may be different in England in the circumstances which have recently been introduced there following on the reforms promoted by the Master of the Rolls, but I do not think we are quite in that situation yet in Scotland."

[40] However, in ***Newman Shopfitters Ltd* v *M J Gleeson Group Plc,*** Sheriff Principal Macphail was persuaded to the contrary. He found that the Sheriff Court had an inherent jurisdiction in reliance on the above passage from *Erskine,* the reference in ***Hall* v *Associated Newspapers Ltd*** to the inherent jurisdiction being described as the power in every Court *"to do whatever is necessary to discharge the whole of its responsibilities"*, Sir Jack Jacob's article in Halsbury's Laws of England, Vol 37 (4th ed, 1982) as to the English Court's inherent jurisdiction, the approval of what was said in that article by the Court of Appeal of Manitoba, and the terms of Section 5 of the Sheriff Courts (Scotland) Act 1907 which provide: *"Nothing herein contained shall derogate from any jurisdiction, powers, or authority presently possessed or in use to be exercised by the sheriffs of Scotland."* and which, he stated, showed that the powers of the sheriff were not limited to those confided to him by statute.

[41] The position in Scotland at present is, accordingly, that apart from the case of ***Newman Shopfitters Ltd* v *M J Gleeson Group Plc*** (which has, I understand, been followed in a number of Sheriff Court cases at first instance), there is no judicial pronouncement that the power argued for exists. There are statements to the effect that the Court's powers go beyond what is to be found in statute or the Rules of Court but only so as to enable it to fulfil its responsibilities, enforce its own orders and support its authority. It would seem to be inferred from the approach of the Sheriff Principal in the case of ***Newman Shopfitters Ltd* v *M J Gleeson Group Plc*** that he regarded the Court as having a responsibility to effect progress in an action and, furthermore, that that was a responsibility of such weight that it involved the power to deprive a party of a substantive right. Whatever the correct analysis of the position in the Sheriff Court, I do not agree that the Court of Session has such a responsibility.

[42] It is appropriate, at this point, that I refer to the two English cases to which I was referred on this matter. One is a decision of the Court of Appeal and one of the House of Lords. The first was the case of ***Allen* v *Sir Alfred McAlpine & Sons Ltd & Another***, which was heard along with two other cases. All were claims for personal injury. All had been the subject of considerable delay due to dilatoriness on the part of the plaintiffs' solicitors, something of which the court clearly took a dim view. Lord Denning clearly thought that the plaintiffs should sue their solicitors instead of the original defendants. Lord Justice Diplock was, in that case, inclined to be influenced against granting the order sought if the plaintiff would have no other remedy, although he later changed his mind. Lord Justice Salmon, in a passage which perhaps best encapsulates the extent of the Court's frustration, if not exasperation, at delays that were occurring in such cases, at p.267, said: *"Once it is generally recognised, as I have no doubt it now will be, that inordinate and inexcusable delay may and probably will result in the action being dismissed for want of prosecution and the liability to pay damages being transferred onto those responsible for the delay, there will, I am confident, be a remarkable improvement - an improvement which it has apparently been impossible to achieve by other means".*

[43] As to the applicable test for striking out, at p.259, Lord Diplock said: *"It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the Court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as result of the delay, the action would come to trial if it were allowed to continue".*

[44] Lord Justice Salmon added, at p. 268, that it was impossible to lay down a tariff as to what would amount to inordinate delay since it would vary from case to case.

[45] In ***Birkett* v *James*, *Allen* v *Sir Alfred McAlpine*** was approved by the House of Lords, their Lordships including Lord Diplock and Lord Salmon. At p.317, Lord Diplock referred to the dilatory conduct of plaintiffs' solicitors in the High Court having become a scandal and at p.318 , he observed: *"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 ....."*.

[46] He also, at p.324, retracted the opinion he expressed in *Allen* as to the relevance of the question of whether or not the plaintiff would have an action against his solicitor and said: *" .....on further consideration of the*

difficulties which would be involved if the court may take into account the prospects of the plaintiff having an effective remedy against his solicitors I think that I was wrong in saying that this was a relevant consideration".

[47] Accordingly, it would seem that post ***Birkett* v *James***, a procedure which appears to have found favour with the Court of Appeal in ***Allen* v *Sir Alfred McAlpine & Sons Ltd*** as one which would assist and protect plaintiffs who were being badly served by their solicitors, could be invoked in a way that might deprive them of all remedy.

[48] However, the English decisions do not inform as to the existence or otherwise of the power as an aspect of our law. It is, further, noteworthy that they were reached against a background of great frustration on the part of the Court, and very much as a last resort, which is not the position here. It should also be noted that matters have moved on in England, with the advent of the Civil Procedure Rules that were introduced in 1999. Hence comments such as are to be found in the case of ***Biguzzi* v *Rank Leisure Plc*** where, at p. 1932, Lord Woolf, Master of the Rolls as he then was, said:

"The Courts have learnt , in consequence of the periods of excessive delay which took place before April 1999, that the ability of the Courts to control delay was unduly restricted by such decisions as Birkett v James..... In more recent decisions the Courts sought to introduce a degree of flexibility into the situation because otherwise the approach which was being adopted by litigants generally of disregarding time limits for taking certain actions under the rules would continue.

Under the C.P.R. the position is fundamentally different.....

Under Rule 3.4(2) a judge has an unqualified discretion to strike out a case ....where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the C.P.R over the previous rules 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".

[49] One matter which gave rise to discussion in the earlier English authorities, which was touched on in ***Newman Shopfitters Ltd* v *M J Gleeson Group Plc*** and which was also raised in the course of the discussion before me was the relevance or otherwise of the ability of a defender to progress a sisted action by enrolling a motion to recall the sist. Sheriff Principal Macphail expressed the opinion that *"no sensible defenders"* would have done so since a defender: *"would usually be advised to let sleeping dogs lie"*. (see: paragraph 33). Lord Justice Diplock, in ***Allen* v *Sir Alfred McAlpine & Sons Ltd*** said, at p. 258: *".....in an adversary system which relies exclusively upon the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case , that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution.....".*

[50] In ***Birkett* v *James***, Lord Salmon, in commenting on the situation prior to 1967, said, at p.329*: "Defendants' solicitors might no doubt have taken out applications to dismiss for want of prosecution or for peremptory orders to compel the plaintiffs to get on with their actions. Not unnaturally they rarely did so, relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to believe that a dog which had remained unconscious for such long periods of time might well die a natural death at no expense to their clients; whereas, if they were to take the necessary steps to force the action to trial, they would merely be waking up a dog for the purpose of killing it at great expense to their clients which they would have no chance of recovering".*

[51] The latter comment was made in the context of such actions being at the instance of legally aided plaintiffs against whom awards of costs were not likely to be made even if their actions failed.

[52] In the present case, as I have noted, the pursuers sought to rely, in their favour, on the fact that the defenders had chosen to do nothing. It had always been open to them to enrol to recall the sist. It was simply not prudent of them to refrain from doing so. The defenders, on the other hand, sought to adopt the line to the contrary expressed in ***Newman, Allen*** *and* ***Birkett,*** as above.

[53] Whilst I can see that there may be room for both arguments, I am persuaded that a defender who refrains from enrolling to recall the sist on the basis that it is better to let sleeping dogs lie, takes a risk and that it is he who should bear the burden of that risk. It cannot be assumed that the sleeping dog will never wake. It may wake by itself or be woken by some third party. Even if the power for which the defenders contend in this case exists, the defender cannot safely assume that its application to the Court for the exercise of that power

will be successful. As argued for, it is a discretionary power and if, as parties seemed to agree, it should be subject to the same strictures as set out in ***Birkett* v *James***, it will only be used in an exceptional case in which all the criteria there stated, are met. On those criteria, even a defender who is able to show prejudice will not be assured of success since he may not be able to show that the delay is inexcusable. For example, in a case of incapacitating illness, the Court might be slow to accept that delay occasioned thereby should be branded inexcusable. It is, in my view, reasonable to expect defenders to keep track of their position in any litigation including one which is sisted, and if delay is a cause for concern, they should adopt the simple expedient of enrolling to recall the sist which failing, accept that it is at their risk if, not having done so, they find that they are in a worse position than otherwise they might have been, particularly if the original sist was one to which they were agreeable.

[54] However, as regards the question of whether or not the power argued for exists, it is sufficient to note that there are competing arguments as to the reasonableness or otherwise of expecting a defender to enrol for recall of a sist to prevent deleterious delay. The cases for and against are not determinative of the existence of the power but, to my mind, lend support to the view that it is not a discretion that the Court already has. Rather, if it is to be contemplated, it is one which ought to be fully considered and debated by the appropriate body, namely the Rules Council.

[55] Turning then to the present Rules of Court, they have been promulgated under the power conferred by Section 5 of the Court of Session Act 1988 which makes comprehensive provision whereby the Court can regulate its procedure through the medium of an Act of Sederunt. Further, Section 6 of that Act makes provision specifically for the purpose of enabling the Court to secure that cases are heard and determined without delay. It provides: *"With a view to securing that causes coming before the Court may be heard and determined with as little delay as is possible, and to the simplifying of procedure and the reduction of expense in causes before the Court, the Court shall, in the exercise of the powers conferred on it by section 5 of this Act, provide by Act of Sederunt....."*. and there then follows a list under seven subparagraphs, of ways in which the Court is to achieve that objective. There is no provision similar to that contained at the beginning of Section 5 of the Sheriff Courts (Scotland) Act 1907, as was founded on in the case of ***Newman Shopfitters Ltd* v *M J Gleeson Group Plc.***

[56] In certain cases, the Court has, by Act of Sederunt, made provision whereby the Court is empowered to grant decree of dismissal or of default in circumstances where there has been delay. Failures to lodge open and closed records may result in dismissal (Rules of Court 22.1(2) and 22.3(1)). Failures to appear when a case calls on the By Order Roll, the Procedure Roll, for a proof or for a jury trial, could result in decrees of default or dismissal (Rule of Court 20.1). Sanction for delay is also provided for where a party delays in enrolling for certification of witnesses until after the Court has awarded expenses in respect that whatever the outcome of the motion, the party enrolling the motion must bear the expenses of it in such circumstances (Rule of Court 42.13(4)). Further, the Court has made provision for the control of sists in actions for damages for personal injury covered by Chapter 43. The provisions of Rule of Court 43.8(1) and (2) include:
"(1) The action may be sisted or the timetable issued under Rule 43.6 may be varied by the court on an application by any party to the action by motion .....
.....
(3) Any sist of an action shall be for a specific period".

[57] The fact that it has *not* so provided as a general rule applicable in all types of action is indicative, in my opinion, of the Court's approach being that it is for parties, not the Court, to seek to limit any delay caused by a sist. It would have been a simple matter for such provision to have been made and that not having been done, like Lord Johnston in the case of ***Esso Petroleum Co Ltd* v *Hall Russell & Co Ltd* (No 2)**, I am of the view that the Court's silence on this matter is indicative of an intention not to confer the power sought.

[58] In all these circumstances, it is my opinion that the defenders' motion is incompetent.

[59] If I am wrong as regards the issue of competency, it is necessary to consider whether, on the facts of this case, it would be appropriate to exercise such discretionary power in favour of the defenders. Their position was that the delay had been inordinate and was, in the circumstances, wholly inexcusable. The pursuers sought to counter that by referring to the history of communications between parties' agents since 1988. The pursuers were, to an extent, hampered by the fact that they have not been able to access the whole of their solicitor's

files for that period. However, a number of letter and telephone notes produced by both parties were referred to which gave a fairly clear picture of what had been happening. It was as follows: In November 1989, the defenders' London solicitors wrote regarding the pursuers' proposal for remedial works to the house; in October 1992 , the pursuers' solicitors wrote to the defenders' London solicitors regarding remedial works to the house ; in May 1994 , the pursuers' claims consultant wrote to the defenders regarding problems with the chimney and regarding remedial works to the house; in October 1994 , the defenders' solicitors wrote asking for a copy of the Bill of Quantities so that they could take instructions as to whether or not to proceed to mediation; in December 1994, the pursuers' solicitor wrote to the pursuers' claims consultant regarding the cost risk if the case proceeded to proof and the desirability of trying to negotiate a settlement; in March 1997, the pursuers' solicitor wrote to the defenders' solicitors intimating his intention of enrolling to recall the sist; the defenders' solicitors wrote back when the motion was not enrolled on the intimated date asking when it would be enrolled; in April 1997, the pursuers' solicitor wrote again intimating their intention of enrolling to recall the sist on 8 April 1997; on 7 April 1997, the defenders' solicitors telephoned and offered to settle for the sum of £20,000, an offer which was rejected; on 25 June 1997, a meeting took place between agents and between then and June 1998, there were attempts to fix further meetings.

[60] It was frankly accepted on behalf of the pursuers that nothing further appeared to have happened after June 1998. Also, it was accepted that the solicitor responsible for handling the pursuers' case until this year, Mr Moffat of Paul Gebal & Co, had failed to act with any sense of urgency. Indeed, it seems reasonably clear from a reading of the documents that are available that the service provided by Mr Moffat to the pursuers was very poor indeed. However, it is not right to say, as the defenders sought to do, that there was no contact at all between agents apart from a three month period in 1997 and a brief episode of correspondence in 1998. Quite apart from anything else, the earlier contacts between parties' agents appear to have been sufficient to cause the defenders to consider the possibility of mediation and to instruct the expert report which they received in January 1995. Further, some weight ought to be given to the nature of the claim which was in respect of a house which, according to what is said on behalf of the pursuers, has had problems ongoing and emerging throughout the period since construction to the present time. In short, whilst the mere fact of a lapse of some sixteen and 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.

[61] I turn then to the question of prejudice. I have already indicated the extent to which the defenders' argument on this matter shifted as the information given to counsel altered with new facts such as the existence of the defenders' expert report, came to light. It seemed that, in the end of the day, what the defenders' complaint was that witnesses would have difficulty in giving evidence about events so far in the past, that the architect in charge of the design of the house was ill and that there could be difficulties with professional indemnity insurance.

[62] The case has two aspects to it, an allegation of negligent design and an allegation of negligent supervision. Many documents are available including, it seems, the key architectural documents covering the design and documents such as memos, notes of meetings including site meetings and letters that appear to be relevant to the matter of progression and supervision of the contract. Mr Spencely had overall responsibility for the contract, he is still available to give evidence and it is reasonably to be expected that any professional would be assisted in their recollection once the contemporaneous documentation had been considered, something which had not been done prior to the continued hearing despite the documents having been made available to the defenders. If Mr Spencely 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. As regards the design element, although there may be difficulties with Mr Renton's evidence, I cannot, given the very limited information put before me, rule out the possibility of his evidence at least being taken on commission and Mr Gillespie is available to give evidence. The case of *Shtun* v *Zalejska*, relied on by the defenders, is an example of a case in which the Court was persuaded that the impairment of witness'

recollections was liable to be such as to cause irreparable prejudice to the defenders but the present case is not, in my opinion, one which falls into that category.

[63] As regards the matter of insurance, it is not a matter which, in the absence of detailed information can, in my view, be given any weight.

[64] In all the circumstances, it does not seem to me that a fair trial is not possible nor that the defenders are liable to be unduly prejudiced. The onus of proof will remain on the pursuers and it is they who will have to bear the burden of any evidential difficulties that are attributable to delay which, in the circumstances of this case, judging the matter as best I can at this stage, will afford a fair balance to any problems that the defenders encounter in this regard. I would, accordingly, even if the defenders' motion had been competent, not have been prepared to grant it.

Article 6:

[65] The defenders' submission that the Court could not recall the sist because to do so would be a breach of Article 6, has, at first blush, an attractive simplicity to it: the defenders were entitled to a trial within a reasonable time and that cannot, on the defenders' hypothesis, now happen. I have, however, reached the conclusion that the argument is a flawed one. The Convention and the Human Rights Act 1998 provide protection against the failure by a contracting state to adhere to its obligations. The public authorities of such a state are required to act in accordance with those obligations and refrain from acting in breach of them. Certainly, the Court is a public authority and cannot act in breach of the Convention. However, the recall of the sist would not be the cause of any delay. Such delay is in the past and cannot be attributed to any act or omission of the Court. The question of whether or not a public authority has caused the delay is fundamental. As was said in ***Buchholz* v *Germany***, at p. 608:

" ..... only delays attributable to the State may justify [the Court] finding, in appropriate instances, a failure to comply with the requirements of 'reasonable time'."

And in *Zimmerman and Steiner* v *Switzerland* the Court, whilst declaring that the Convention places a duty on Contracting States to organise their legal systems so as to allow its Courts to comply with the requirements of Article 6(1), at p.23 pointed out:

"..... only delays attributable to the State may justify a finding of a failure to comply with the 'reasonable time' requirement".

[66] Nothing advanced on behalf of the defenders persuades me either that this Court has failed to organise itself so as to allow for compliance with Article 6(1) or that the delays in this litigation can properly be attributed to the Court. As far as the Court is concerned, the action was sisted on the unopposed motion of the pursuers and both parties have, at all times since then, had it in their power to utilise that aspect of the Court's systems which enables a party to enrol for recall of a sist at any time. I do not see that, in these circumstances, the Court can be said to have failed in its obligations or, moreover, to have caused any of the delay that has occurred.

[67] I should add that I have considered the views on the matter of whether the Court would be acting in breach of Article 6(1) by recalling the sist that were expressed by Sheriff Principal Macphail in ***Newman Shopfitters***. At p.28, he commented that the pursuers' reliance in that action on the case of ***Zimmerman* v *Switzerland*** was misconceived, citing in support of that view what was said by Lord Rodger of Earlsferry in ***HMA* v *R*** at para 146. In that paragraph he commented that it was not appropriate to consider the individual steps in the prosecution proceedings when considering the reasonable time guarantee; the proceedings as a whole required to be considered. However, Lord Rodger's views were expressed in the context of a criminal case where there was a period of delay of about five years for which the Crown, the public authority whose actions were under scrutiny, had no satisfactory explanation and for which it was being held responsible. Indeed, the Crown accepted that there had been an unreasonable delay due to a failure of the Lord Advocate. The context was, in short, that of a situation where the delay complained of had all been caused by the public authority in question, in that case, the Lord Advocate. It does not seem to me that the comments of Lord Rodger upon which Sheriff Principal Macphail relied would be apt in a case where the delay to date has not been caused by the relevant public authority.

[68] In all these circumstances, I am not persuaded that there has been or will be a breach by the Court of Article 6(1) of the Convention if the sist is now recalled.

[69] In any event, even if breach of the reasonable time guarantee arises, it does not follow that there should be automatic termination of the proceedings. As was commented by Lord Hope of Craighead in ***AG's Reference (No 2 of 2001),*** at p. 107, that is not something that can sensibly be applied in civil proceedings. He was aware of and referred to the case of ***Newman Shopfitters Ltd* v *M J Gleeson Group Plc,*** something which was relied on by the defenders, but what he said in fact lends little, if any, support to the defenders' case:

*"Of course , the prospect of an automatic termination for breach of the reasonable time requirement cannot sensibly be applied in civil proceedings. **Newman Shopfitters** .....provides an example of a case where a termination of the proceedings was thought to be appropriate. That was a case where the pursuer had delayed unreasonably in the conduct of proceedings for the giving of effect to an arbitration clause. But it has never been part of the argument in favour of the approach which I would adopt to the analysis of this Convention that this must happen ..... It would hardly ever be thought appropriate for civil proceedings to be terminated under our domestic system because of an unreasonable delay on the part of a public authority in the determination of the parties' civil rights and obligations. In practice an attempt by one party to have the proceedings terminated on this ground would almost always be rejected. The appropriate time to seek a remedy for the delay would be at the end, when the proceedings were all over: see, for example, **Porter v Magill** [2002] 2 AC 357.*

But there is no reason why the issue of delay should not be raised prior to the determination of the issue between the parties in a civil case. If that were to be done, the appropriate remedy under Section 8(1) would be to take steps to accelerate its determination".

[70] As I have noted, the parallel decision of the Privy Council in ***HMA* v *R*** was also referred to but it is of little assistance on this point, other than that, at p.485 - 6, Lord Hope commented on the importance , in the case of breach of a Convention right, in looking firstly at what might be thought to be the appropriate remedy for such breach according to domestic law. As he explained in the passage from the ***AG's Reference (No 2of 2001)*** referred to above, in his view, that would not, in the civil context, normally mean the cessation of the litigation.

Remedies:

[71] In the event, having determined that the defenders' motion is incompetent, the question of whether their remedy should be absolvitor or dismissal or some other remedy does not arise. However, had I had to determine it, I would have been persuaded to adopt the approach to the matter on the basis that if the discretion exists it must be a broad one where remedy is concerned and absolvitor need not result. In particular, it is difficult to see why, if a pursuer has a claim that has not prescribed or suffered limitation and so, if no action had previously been raised would be in a position to raise an action that is competent and relevant, dismissal would not be the appropriate remedy.

[72] As regards the appropriate remedy in the event that I am wrong and there has been a breach of Article 6(1), I would simply refer back to the views expressed by Lord Hope in ***HMA* v *R*** to the effect that cessation of the action will rarely be appropriate. Matters could, in that event, be properly attended by the Court taking steps to effect efficient progress in the action.

Disposal

[73] The defenders offered no opposition to the recall of the sist other than under reference to their own motion for absolvitor and I will, in the circumstances, grant the pursuers' motion and recall the sist. Defences have not yet been lodged and procedurally that would be the next step. However, it seems clear that matters have progressed since the action was raised and, in fairness to the defenders, they ought to be put in the position of knowing exactly what it is that the pursuers' present case against them involves. That being so, I would be prepared to allow the pursuers a short period to update their pleadings prior to defences being lodged and I will put the case out By Order for that matter and the matter of the expenses of the motion to be considered.

Pursuer: Drummond, Solicitor Advocate; Shepherd & Wedderburn

Defenders: Thomson, Advocate; DLA