JUDGMENT OF SHERIFF PRINCIPAL IAIN MACPHAIL QC. EDINBURGH, 4 March 2003.

The Sheriff Principal, having resumed consideration of the cause, refuses the appeal and adheres to the interlocutors of 6 and 19 September 2002; finds the pursuers and appellants liable to the defenders and respondents in the expenses of the appeal; allows an account thereof to be given in and remits the same, when lodged, to the Auditor of Court to tax and to report; certifies the appeal as suitable for the employment of counsel, including senior counsel.

Introduction

[1] This is an action for declarator and payment. It was raised in March 1995 and was sisted for arbitration in August of the same year. No arbitration took place. In July 2002 the pursuers lodged a motion to recall the sist and re-enrol the cause for further procedure. The Sheriff recalled the sist but decided that the litigation should be brought to an end. On 6 September 2002 he pronounced an interlocutor granting decree of absolvitor; and on 19 September 2002 he pronounced a further interlocutor finding the pursuers liable to the defenders in the expenses of the action. Against those two interlocutors the pursuers now appeal.

The facts

[2] The action arises from the construction of an extension to the Parliament House in Edinburgh. The defenders were the main contractors in a contract with the Secretary of State for the Environment, Property Services Agency. On 2 November 1990 they sub-contracted with the pursuers for joinery works. The work was to be done in 1991 and 1992. The pursuers aver that the defenders failed in a number of their contractual obligations to them and thereby caused delay and disruption to the sub-contract works. The pursuers' work appears to have been completed by a date prior to March 1994. In any event the pursuers say that as a result of the delay and disruption they needed an additional period of 40.5 weeks, beyond the period specified in the sub-contract, to complete the sub-contract works. They intimated a claim to the defenders for extension of time and for payment of sums due in respect of the delay and disruption the defenders had caused. That claim amounts to £279,208.07. They also claim payment of their final account of £43,087.00 and a payment of £138,937.49 for what are described as ***'head office overheads/profits and/or finance charges'***. They further aver that they are entitled to payment of a sum of £54,488.00 which the defenders have wrongfully withheld.

[3] The pursuers crave a declarator that they are entitled to extensions of time for completion of the sub-contract works; or, alternatively, a declarator that they are bound to complete these works within a reasonable time and that they have done so. They also crave payment of £530,417.78 with interest and VAT.

[4] The defenders, for their part, deny the pursuers' claims but rely in their defences on an arbitration clause. Their first plea-in-law is in these terms:

'(1) Ante omnia, the disputes between the parties as disclosed in the pleadings being such as fall within the terms of the arbitration clause in the contract between the parties referred to in Answer 4 the action should be sisted to allow the said disputes to be referred to arbitration.'

[5] The action was raised on 31 March 1995. A continued options hearing took place before Sheriff N E D Thomson on 2 August 1995. Before that hearing the defenders lodged a note in support of their preliminary pleas (no 9 of process) giving notice that they would insist on their first plea-in-law. The Sheriff's interlocutor of 2 August 1995 reads as follows: *'The Sheriff, having heard the pursuers' procurator and counsel for the defenders on defenders' motion sists the cause for arbitration.'*

[6] The pursuers marked an appeal to the Sheriff Principal and asked the Sheriff to write a note. Sheriff Thomson's note records, in part: *'At the hearing before me on the options roll the defenders moved that effect be given to their first plea-in-law, and that the disputes should accordingly be referred to arbitration. The pursuers opposed this on the ground that at least the question of the disposal of the £54,488 could not be regarded as being in dispute.'*

The Sheriff rejected the pursuers' contention and concluded: *'I accordingly sisted the cause to allow the whole matters in dispute to be determined by arbitration.'*

Arbitration, Building & Construction Law Reports. Typeset by NADR. Crown Copyright reserved.

[7] The appeal did not proceed because the parties lodged a joint minute (no 12 of process) craving the Court to allow the appeal to be abandoned with no expenses due to or by either party. On 27 February 1996 Sheriff Principal Nicholson QC interponed authority to the joint minute and thus allowed the appeal to be abandoned. The cause accordingly remained sisted for arbitration in terms of Sheriff Thomson's interlocutor of 2 August 1995.

[8] The history of events after 2 August 1995 appears from the correspondence lodged as nos 6/1/3 to 6/1/13 of process. The parties agreed that Mr George F Robertson FRICS, FCIArb, should be appointed as arbiter. The solicitors who then represented the pursuers wrote to him on 1 September 1995 asking him on what terms and conditions he would be prepared to act. On 6 September Mr Robertson replied, setting these out. On 29 September the same solicitors wrote him a letter intimating that the terms and conditions were acceptable to the pursuers, and that they had forwarded a draft joint deed of appointment to the defenders' solicitors. On 1 December the defenders' solicitors intimated to the pursuers' solicitors their proposed revisals to the draft. It seems that the latter did not respond, because the defenders' solicitors wrote reminders on 8 December 1995 and 24 January 1996, apparently without effect.

[9] The next letter is dated 31 March 1999 and is from Jarvis plc, who appear to be the successors of the pursuers, to the defenders' commercial director. It states in part: *'We are now activating the legal process and you will be hearing from our solicitor, Alistair Morrison of Masons, shortly.'*

The next letter, however, is dated 25 February 2002, and is from Jarvis Newman Ltd to the defenders. It attaches a claim for £479,208.73 and states: *'While we do not resort to such measures lightly, we consider that the commencement of formal arbitration proceedings is the most expedient way in which we can recover the monies due to us. Accordingly, we have instructed Masons to write to you separately to agree an arbiter and expedite proceedings forthwith.'*

On 21 May 2002 the pursuers' present solicitors wrote to Mr Robertson referring to 'your appointment as arbiter in the above matter' and advising, *'We are now instructed by the claimants who wish to progress the arbitration.'* On 29 May Mr Robertson wrote to both parties explaining that he was now retired and stating that he had no record or recollection of ever having been appointed as arbiter. Mr Robertson's memory was correct. He had not been appointed as arbiter, and there was no arbitration to 'progress' since no arbitration had commenced in any practical sense.

[10] The litigation in this Court remained dormant until the pursuers lodged a motion to recall the sist. Both at the hearing of the motion before Sheriff Stoddart, and at the hearing of the appeal, the pursuers' representative was invited to explain why the pursuers had taken no steps to initiate the arbitration since 1995. In the note appended to his interlocutor of 6 August 2002 Sheriff Stoddart writes: *'I pressed Mr Macfarlane [the pursuers' solicitor] on the steps which the pursuers had taken to progress the arbitration after the sist was granted in 1995. He told me that his firm had not acted for the pursuers at that time and he was unable to assist me, beyond accepting in very general terms that the matter appeared not to have been dealt with by the pursuers and that there had been various corporate "goings-on". He was unable to specify what these were, or why they prevented any progress being made in the arbitration.'*

At the hearing of the appeal counsel for the pursuers and appellants did not volunteer any explanation in the course of his speech. When I invited him to do so at the conclusion of his submissions he candidly told me that there was no proper reason he could advance. There had been a company reconstruction, and the matter had been overlooked.

[11] The pursuers' motion to recall the sist (no 7/1 of process) was lodged on 4 July 2002 and is in these terms: *'The pursuers move the Court to recall the sist granted on 2 August 1995 and to re-enrol the cause for further procedure.'*

The defenders gave notice of opposition and on 18 July 2002 Sheriff Stoddart heard parties on the motion and made avizandum. He decided that the sist should be recalled, but that a final order should be pronounced bringing the litigation to an end. In order that parties might address him on how that might be done, on 6 August 2002 he pronounced an interlocutor appointing a further hearing on 15 August 'in respect of (1) final procedure in the cause; and (2) all questions of expenses.' On 15 August

he granted the motion, recalled the sist, closed the record and found the pursuers liable to the defenders in the expenses of the motion. He then heard parties' submissions on further procedure, and again made avizandum. On 6 September 2002 he pronounced an interlocutor granting decree of absolvitor and appointing parties to be heard on expenses on 19 September. On the latter date he found the pursuers liable to the defenders in the expenses of the action insofar as not already dealt with and certified the cause as suitable for the employment of counsel.

[12] This appeal is now taken against the interlocutors of 6 and 19 September 2002. It should be noted, however, that Sheriff Stoddart has explained his thinking both in the note to his interlocutor of 6 August and in the note to his interlocutor of 6 September. The latter note refers to the former, and the Sheriff intended them to be read together. It is clear that the Sheriff considered that it was within his discretion to assoilzie the defenders in the exercise of the inherent jurisdiction of the court. He also considered that it was incumbent on him to read rule 16.2(1) of the Ordinary Cause Rules 1993 in a way which was compatible with article 6(1) of the European Convention on Human Rights.

[13] I heard the appeal on 17 December 2002. While I was considering the case at avizandum I decided to put it out by order for the purpose of giving the defenders an opportunity to provide further information relative to the prejudice which, in their view, they would suffer in the event of a proof. I issued an interlocutor with an explanatory note on 28 January 2003, and the hearing took place on 18 February 2003 when both parties' counsel were available. Productions to which counsel had referred at that hearing were supplied to me on 3 March 2003.

[14] I conclude this review of the facts with a note of some of the information which the defenders provided at the by order hearing. The defenders no longer have in their possession the following documents relative to their contract with the pursuers: the site diaries, which were written up daily by their site agent; and the defenders' weekly and monthly internal reports. All these documents have been lost or destroyed. The defenders are also unaware of the whereabouts of three of their former employees who were of importance in the Parliament House project: their site agent, their sub-contract co-ordinator and their project manager. I shall consider later the significance of the loss of those documents and witnesses.

The submissions at the appeal

The submissions for the pursuers

[15] Counsel for the pursuers argued that the Sheriff had proceeded on two bases, each of which was unsound: the supposed inherent jurisdiction of the court; and the effect of article 6(1) of the European Convention on Human Rights.

[16] Counsel submitted that the Sheriff had erred in thinking that the court had an inherent jurisdiction to grant decree of absolvitor where there had been inordinate and unexplained delay. He had had no jurisdiction to assoilzie the defenders in the absence of a specific statutory right to do so. Counsel founded on ***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. He also referred to Macphail on *Sheriff Court Practice* (2nd edn) paras 2.05 and 5.95 *et seq*. Even if the Sheriff did have such jurisdiction, the basis on which he exercised it had been flawed. It could not be said at this stage that it would be unjust to proceed with the action: various provisions of the Prescription and Limitation (Scotland) Act 1973 allowed cases to go to proof many years after the events which gave rise to them, as in ***McCabe v McLellan*** 1994 SLT 346. In any event the present case might not get to proof and might be substantially determined at debate. The Sheriff had failed to have proper regard to three matters. (i) Any delay would be prima facie to the prejudice of the pursuers, on whom the onus of proof primarily lay. (ii) Any prejudice to the pursuers might be lessened by an order for caution for expenses: ***G v H*** (1899) 1 F 701. (iii) It had been open to the defenders to progress matters by applying to the court for the appointment of an arbiter and proceeding with the arbitration even without the co-operation of the pursuers; or by moving for the recall of the sist.

[17] As to the Human Rights Act 1988, counsel criticised the Sheriff's view that he was obliged by section 3 of the Act to read rule 16.2(1) of the Ordinary Cause Rules 1993 as including among the matters constituting a 'default' the actings of the pursuers in failing to progress the arbitration to a conclusion

(page 10 of the Sheriff's note of 6 September 2002). That was incorrect. First, it was difficult to see how rule 16.2(1) could be so read. Secondly and more fundamentally, the provision in article 6(1) entitling everyone to a hearing within a reasonable time was directed towards the obligation of the State to prevent procedural delays in civil cases. The State was not responsible for delays attributable to a party: ***Zimmerman and Steiner v Switzerland*** (1983) 6 EHHR 17 at page 23, paragraph 24. Here, there had been no delay at all by the court. Even if the Sheriff had been correct in holding that the defenders' rights under article 6(1) had been breached, he had erred in holding that the remedy must be absolvitor: ***Council of the Law Society of Scotland v Hall*** 2002 SLT 989; ***Attorney General's Reference (No 2 of 2001)*** [2001] EWCA Crim 1568, [2001] 1 WLR 1869; the decision of the High Court of Justiciary in ***H M Advocate v R*** 2002 SLT 834; and the judgment of the Privy Council in ***Mills v H M Advocate (No 2)*** [2002] UKPC D2, 2002 SLT 939. The Sheriff had failed to carry out a balancing exercise. He should have considered that absolvitor would mean that the pursuers' right to recover the sums due to them would be irretrievably lost. There had been no material before him from which it could be inferred that a fair hearing was impossible. He should have taken account of the conduct of the defenders and the fact that it had been open to them to proceed with the arbitration or to move for the recall of the sist. He should have considered whether any prejudice to the defenders might be lessened by making an order for caution for expenses, by subjecting the evidence to particularly careful scrutiny in the event of a proof, and by refusing to award interest for the period of delay in the event that the pursuers were successful. The appeal should be allowed and the case remitted to the Sheriff to proceed as accords.

The submissions for the defenders

[18] Counsel for the defenders argued that at common law the Sheriff had been entitled to take the course he did. There was no authority binding on this Court to the effect that in an extreme case it was beyond the power of the Sheriff to grant decree of absolvitor. ***Purdie, Esso Petroleum Co Ltd*** and ***Catterson*** did not support that conclusion and should be distinguished. The Ordinary Cause Rules 1993 were not a comprehensive code: see section 5 of the Sheriff Courts (Scotland) Act 1907; Macphail on *Sheriff Court Practice* (2nd edn) paras 2.05, 2.06. Rule 16.2 was not exhaustive of the court's power to deal with default. In other cases of default the court had power to bring the action to an end under its inherent jurisdiction. If not, the purpose of the 1993 Rules would be set at nought in a case such as the present, which was extreme and exceptional. It was clear from his two notes that the Sheriff had conducted a balancing exercise and reached the correct result. An order for caution for expenses would not meet the fact that evidence had been lost. The court would not be entitled to withhold an award of interest: ***Boots the Chemist Ltd v G A Estates Ltd*** 1993 SLT 136. The defenders could not have done anything to progress the arbitration.

[19] As to the Human Rights Act, the Court should construe the Ordinary Cause Rules 1993 in a way consistent with the Convention: ***Karl Construction Ltd v Palisade Properties plc*** 2002 SLT 312. To allow the case to proceed would be incompatible with article 6(1). Prejudice was to be presumed from the length of the delay, which could not be explained by any complexity of the case or any conduct by the defenders. To allow the case to proceed would be a breach of the requirements of a fair hearing and of a hearing within a reasonable time. The Court could not act incompatibly with the Convention. Counsel referred to the judgment of the Privy Council in ***H M Advocate v R*** [2002] UKPC D3, 2003 SLT 4. Here also, the Sheriff's balancing exercise had led to the correct conclusion. The appeal should be refused.

Decision

Recalling the sist

[20] Before I state my views on the parties' arguments, I think I should notice that no comment was made on the recall of the sist by the Sheriff's interlocutor of 15 August 2002, which is not the subject of any appeal. Both parties appeared to assume that the Sheriff had been entitled to recall the sist. I need not, therefore, consider that issue. I shall only note that in 1996 the pursuers ultimately acquiesced in the granting of the sist. As I have recorded in paragraphs [6] and [7] above, they opposed the defenders' motion to sist the cause for arbitration and appealed against Sheriff Thomson's interlocutor granting that motion, but they abandoned their appeal and did not otherwise challenge the correctness of the

Arbitration, Building & Construction Law Reports. Typeset by NADR. Crown Copyright reserved.

Sheriff's decision to sist. If, then, as must be assumed, the sist was rightly granted, it may be difficult to understand why it should not continue to bar the progress of the action. In ***Sanderson & Son v Armour & Co*** 1922 SC (HL) 117 Lord Dunedin said at page 126: *'The English common law doctrine, - eventually swept away by the Arbitration Act of 1889 - that a contract to oust the jurisdiction of the Courts was against public policy and invalid, never obtained in Scotland. In the same way, the right which in England pertains to the Court under that Act [see now the Arbitration Act 1996, sections 9, 86] to apply or not to apply the arbitration clause in its discretion never was the right of the Court in Scotland. If the parties have contracted to arbitrate, to arbitration they must go.'*

Similarly, Lord Stewart said in ***Roxburgh v Dinardo*** 1981 SLT 291 at page 292: *'It is clear that the court in Scotland does not have any discretion to permit an action to proceed because it considers that course to be more appropriate than arbitration.'*

[21] It appears, accordingly, that if one party to a litigation invokes an arbitration agreement, the court has no discretion to refuse to sist the cause for arbitration if the agreement is valid, if it applies to the issue being litigated and if it is capable of being performed. If, then, the sist is not discretionary but mandatory, and the three conditions subject to which it was made continue to apply, it may be supposed that the court has no power to recall it against the wishes of a party who is opposed to that course. To recall the sist and revive the litigation in these circumstances would involve the court not only in reversing its previous decision but also in nullifying the agreement to arbitrate. Prima facie it would seem that the court has a duty not only to act upon an agreement to arbitrate by sisting the action, but also a continuing duty to respect the agreement by maintaining the sist until the arbitration, once commenced, has broken down or has come to an end, or until both parties move for the recall of the sist. Absent such a joint motion, the court by sisting the action requires the claimant to proceed by way of arbitration or lose his claim altogether, if the three conditions continue to obtain. If they do, a motion to recall the sist and enrol the cause for further procedure might be thought to be incompetent. If the claimant has failed to play his part in the initiation of the arbitration proceedings and the time for arbitration has run out, that should be nothing to the purpose. It should mean only that the claimant has elected not to pursue the only method of dispute resolution which he had obliged himself exclusively to employ. At the very least one might expect that a claimant who rued his agreement to arbitrate and sought the recall of the sist might be required to show some good reason why he should not be obliged to abide by the agreement. In the present case, the fact that the pursuers had for more than six years unaccountably overlooked a claim for over £500,000 would seem to have little prospect of being regarded as a good reason. Whether the time for arbitration had expired was not discussed. Thus, even if the court had a discretion to recall the sist, it appears that no grounds for exercising such a discretion could have been established.

[22] Sheriff Stoddart has expressed the view that to have left the cause sisted would have been 'the worst of all worlds' for the reasons he gives in his note of 6 August 2002 at page 8. It may be that in the present case the refusal of the motion for recall would have had the effect of bringing this dispute to an end, if the time for arbitration had expired. If, as the learned Sheriff envisages, the pursuers would have been left without alternative means of redress, that would have been the consequence of their own inaction, which was their own responsibility. On the other hand, the learned Sheriff's decision to recall the sist and dispose of the action by decree of absolvitor has the merit of achieving closure by an authoritative and unambiguous declaration that the litigation is at an end both in fact and in law. I do not pursue this matter, however, but give my decision on the basis of the arguments presented, which did not raise any question as to the competency of the motion to recall the sist and re-enrol the cause for further procedure. In the following paragraphs, accordingly, I assume that the Sheriff had a discretion to grant the motion and that his decision to do so is not open to challenge.

Inherent jurisdiction

[23] In my opinion the Sheriff was entitled to grant decree of absolvitor in the exercise of the inherent jurisdiction of the court. I shall explain my view by stating and answering three questions. (1) Does the sheriff court possess an inherent jurisdiction? If so: (2) what is its nature? And (3): was the Sheriff entitled to exercise it as he did in the circumstances of this case?

[24] I answer the first two questions together. There is no doubt about the existence and nature of the inherent jurisdiction of the court. It is derived not from any statute or rule of court, but from the very nature of the court itself. The primary authority is Erskine, I, ii, 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.'*

In ***Hall v Associated Newspapers Ltd*** 1979 JC 1 at page 9, the inherent jurisdiction was described as: *'. . . the indispensable power which is inherent in every Court to do whatever is necessary to discharge the whole of its responsibilities.'*

Since the power is inherent in every court, it is also possessed by courts in other jurisdictions. It has been described in the following words, which are entirely consistent with the foregoing authorities: *'In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been 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, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.'*

That definition is given in Sir Jack Jacob's article on Practice and Procedure in *Halsbury's Laws of England* vol 37 (4th edn, 1982) para 14 and is repeated in the reissue of that volume (2001) at para 12. It was approved and applied by the Court of Appeal of Manitoba in ***Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd*** (1971) 21 DLR (3d) 75 at 81 per Freedman CJM.

[25] It follows that the jurisdiction of the court, in the sense of its capacity to act in the cases before it, is not limited to its express statutory powers. That was recognised by Parliament in section 5 of the Sheriff Courts (Scotland) Act 1907 which provides: *'Nothing herein contained shall derogate from any jurisdiction, powers, or authority presently possessed or in use to be exercised by the sheriffs of Scotland . . .'*

Thus the 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 an exposition 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. Other examples are given in Macphail, *Sheriff Court Practice* (2nd edn) para 2.07, page 28. Other ways in which the inherent jurisdiction may be exercised are mentioned in that work at paras 2.05-2.25. In this case it will be relevant to notice later that the court has an inherent jurisdiction to control its own process, and in particular to prevent any abuse of that process. Examples of that aspect of the exercise of the inherent jurisdiction are cited in Macphail, para 2.19, page 34.

[26] Rule 16.2 of the Ordinary Cause Rules 1993, which specifies circumstances in which the sheriff may grant decree by default, is not exhaustive. It cannot be read as forbidding the court to grant decree by default in other circumstances. Thus it does not necessarily define the limits of the sheriff's power to dispose of an action without proof in the event of a party's failure to act. The inactivity of the pursuers in the present case is not in my view a default of the kind described in rule 16.2(1). But is the sheriff powerless, on that account, to dispose of the action at this stage? In my opinion none of the cases relied on by the pursuers compels that conclusion. While none of them is binding on me, I have studied them with respect and care.

1. In ***Purdie v Kincaid & Co Ltd*** 1959 SLT (Sh Ct) 64 the Sheriff-substitute had granted decree of absolvitor after the pursuer had failed to enrol a motion to fix a diet of proof. The Sheriff held that in the absence of any statutory provision or rule of court authorising him so to act, the Sheriff-substitute had had no power to do so. The question whether he had had any such power in the exercise of the inherent jurisdiction was not discussed.

2. ***Esso Petroleum Co Ltd v Hall Russell & Co Ltd (No 2)*** 1995 SLT 127 is an Outer House decision relative to the Rules of the Court of Session. The Lord Ordinary, Lord Johnston, decided upon a study of these Rules that it had been expressly intended that that Court should not have power to dismiss an action on the ground of such inordinate and inexcusable delay that there was a substantial risk that a fair trial was impossible or that the defenders would be seriously prejudiced.
3. In ***Catterson v Davidson*** 2000 SLT (Sh Ct) 51 Sheriff Principal Nicholson QC held that the failure by the pursuer to lodge a minute of amendment after being allowed to do so by the Sheriff could not be said to amount to a default. His Lordship went on to express obiter dicta to the effect that the rules of court in Scotland did not 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 dispatch of litigation, unless that failure truly resulted in what could be characterised as a default. It is to be noted that his Lordship did not have the advantage of hearing argument on the use of the inherent jurisdiction and in these obiter dicta did not consider whether a sheriff might have a discretion to bring proceedings to an end in the exercise of that jurisdiction.

[27] I find, therefore, 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 of the court. The next question is whether the circumstances of this case were such as to entitle the Sheriff to exercise his discretion so to dispose of the action. It is therefore necessary to establish the conditions which must be satisfied before that discretion may be exercised in a case such as this. Here I would refer to the conditions which Lord Johnston would have considered in ***Esso Petroleum Co Ltd*** if he had held the motion before him to be competent (pages 128I-K, 130C-G). These conditions appear to have been derived from the speech of Lord Diplock in ***Birkett v James*** [1978] AC 297 at page 318. First, there must have been inordinate and unexplained delay on the part of the pursuers. Secondly, such delay either (a) will give rise to a substantial risk that a fair consideration of the issues of fact, or a fair trial, would not be possible; or (b) has caused or is likely to cause serious prejudice to the defenders. If these conditions are satisfied, the sheriff no doubt has to take into account all the relevant circumstances of the case including the conduct and position of each party and decide whether to exercise his discretion in favour of disposing of the action. I shall assume in favour of the pursuers that the discretion should be exercised only in exceptional cases, and that it is for the defenders to satisfy the court that it should be exercised.

[28] In this case it must be beyond dispute that the delay on the part of the pursuers was inordinate. The action was sisted on 2 August 1995. The pursuers did not take the steps necessary for the appointment of an arbiter, although twice reminded to do so by the defenders. They did not take any positive steps until they lodged their motion to recall the sist on 4 July 2002, nearly seven years after the sist had been granted. The delay was also inexcusable: no satisfactory excuse has been tendered either to the Sheriff or at the hearing of the appeal. The first condition is accordingly, in my opinion, satisfied.

[29] The second condition is that the delay either has given rise to a substantial risk that a fair trial will not be possible or has caused or is likely to cause serious prejudice to the defenders. Here, it is necessary to examine all the relevant circumstances. These must include the issues in the case; the nature of the evidence, oral or documentary, which is likely to be available; and the nature and degree of any prejudice to the defenders which has been or is likely to be caused by the delay.

[30] As I have already noted in paragraph [2] above, the pursuers say that as a result of various failures by the defenders the pursuers needed an additional 40.5 weeks, beyond the period specified in the contract, to complete the contract works (article 13 of the condescendence). The delay and disruption caused them to incur loss, expense, damage and costs, for which they are entitled to payment from the defenders (articles 18 and 19). They refer to a three-volume document ('the Claim') which is said to quantify and itemise fully their loss and expense (article 20). It is dated 'March 1994' - some nine years ago. At volume 2, page 123 (not volume 3, page 125, as stated in article 21) it shows as outstanding at its date a sum of £279,208.07. They also claim payment of £43,087.00 which is said to be the outstanding balance of their final account (article 21) and a payment of £138,937.49 for 'head office overheads/profits and/or finance charges' (article 22).

[31] The defenders' counsel characterised the pursuers' claim as a 'global claim' which did not attribute any particular loss to any particular failure by the defenders. They sued for the difference between their actual expenditure and that for which they had allowed in their tender. That claim depended on a number of 'heroic' assumptions: that there had been no inefficiency in their work, that they had made the allowance in the tender correctly, and that there had been no snagging or remedial works for which the pursuers were responsible. The defenders, in order to reduce the amount of what they considered to be an overstated claim, would have to prove such inefficiency and snagging and remedial works. The figure for head office overheads and profit was based on a percentage of 18 per cent (volume 2, page 126), but its true measure was to be found by proving the loss of contracts which the pursuers could not undertake because their resources continued to be tied up at the Parliament House; and that also turned on the reasons for the period of delay. Since the pursuers' claim was founded on the period of delay, it was necessary to establish the history or chronology of what had actually happened on site, and for that it was necessary to have some information in the shape of contemporary documents and the oral evidence of witnesses. It was necessary to establish the 'critical path delay', which might be described as a series of bottlenecks on the way to completion. The defenders had to prove that the pursuers' losses based on delay had been overstated, by pointing to causes of delay which were not the defenders' fault, such as inefficiency, snagging or remedial works which were the responsibility of the pursuers, and any matters that were nobody's fault, such as extremely severe weather.

[32] I have already noted in paragraph [14] above the nature of the evidence that has been lost to the defenders. They no longer have their site diaries or their weekly and monthly internal reports. They have lost touch with their site agent, their sub-contract co-ordinator and their project manager. It is reasonable to assume that those witnesses, even if they were to be found, and any other witnesses who might be available, would be very likely to have had their recollections impaired by the passage of time. The pursuers' counsel referred to a claim which they had submitted to the defenders in 2002 and which had been varied or restricted in certain respects, but I can only proceed on the basis of the averments the pursuers offer to prove on record. The pursuers' counsel also said that the pursuers would have difficulties similar to the defenders' at proof; but if so, that consideration only emphasises the problems that the court would have in achieving a fair consideration of the issues of fact: there is likely to be extreme difficulty in deciding which version of the facts is to be preferred, and thus a serious risk of reaching an unjust result, or producing an unfair trial. I have no doubt that in view of the importance of establishing the course of events on site and the difficulty in doing so in the absence of the contemporary records and the witnesses to whom I have referred, the defenders have been and would be seriously prejudiced by the pursuers' inordinate and unexplained delay. I have therefore concluded that the second condition is satisfied in each of its alternative branches.

[33] The two conditions having been in my view satisfied, I now examine all the other relevant circumstances. I begin by considering the circumstances urged as relevant by the pursuers.

1. The first was that proofs might lawfully take place many years after the event by virtue of the Prescription and Limitation (Scotland) Act 1973. That is not, in my view, a relevant consideration because it fails to distinguish between cases where there has been inevitable or excusable delay by a pursuer for which Parliament has made special provision, and inexcusable delay such as that for which the present pursuers are responsible.
2. The second was that the present case might not reach the stage of proof and might be substantially disposed of at debate. But speculation as to the procedural course of the case also appears to me to be irrelevant: consideration of whether to exercise the discretion is necessarily based on the assumption that if the action is allowed to proceed, a proof will take place.
3. It was said that any delay would be prima facie to the prejudice of the pursuers, on whom the onus of proof primarily lay. There would also, however, be prejudice to the defenders; and the question is whether that is a risk which they should be required to accept, in circumstances where that risk has been created by the inactivity of the pursuers.
4. It was suggested that any prejudice to the defenders might be lessened by an order for caution for expenses. Such an order, however, would not mitigate the loss of evidence.

5. It was submitted that in the event of the pursuers' being successful, the Court could refuse to award interest for the period of delay. That, however, would not be legitimate: ***Boots the Chemist Ltd v G A Estates Ltd*** 1993 SLT 136.
6. Finally, it was said that the defenders had not been powerless to act if they had wished to progress matters. They could have moved for the recall of the sist, or they could have gone to arbitration even without the co-operation of the pursuers. They could have applied to the Court for the appointment of an arbiter under the Arbitration (Scotland) Act 1894. If the pursuers had failed to co-operate, the defenders would have succeeded. In my opinion no sensible defenders would have taken either course. As to the recall of the sist: it is seldom in a defender's interests to revive an action which has become dormant action owing to the inactivity of the pursuer. A defender would usually be advised to let sleeping dogs lie. As to pressing on with the arbitration: it is not obvious that the defenders could competently have applied to the Court for the appointment of an arbiter. The arbitration clause in the parties' contract provides for the appointment of an arbiter, failing agreement, by the President or Vice-President for the time being of the Royal Institution of Chartered Surveyors (no 6/1/2 of process, article 3(1)). Further, the powers of the arbiter had not been agreed. In any event, however, this chapter of the pursuers' submissions appears to me to be lacking in realism.

[34] I now consider the conduct and position of each party. The pursuers bear the responsibility for the fact that the two conditions are satisfied. There is no suggestion that blame is to be attributed to their solicitors or to anyone else. On the other hand a decree of absolvitor would deprive them of their right of access to the courts. No distinction may be drawn between their claim for £54,000 and the remainder of their claim: it is clear from the defenders' Answers 4 and 24 that the claim for £54,000 is disputed. The defenders, for their part, have not caused or contributed to the present situation in any way. It has not been suggested that their inaction after their fruitless reminders to the pursuers amounted to acquiescence in the delay which ensued, and in my view they cannot be said to have acted unreasonably. They have now been very materially prejudiced by the effects of the passage of time. In these circumstances, in my opinion, there can be no injustice in the pursuers' bearing the consequences of their own fault.

[35] It is clear from a reading of his two notes that the learned Sheriff took account of all the relevant circumstances. I refer to pages 6 to 8 of his note of 6 August 2002 and to pages 7 to 8 of his note of 6 September 2002. It appears to me that his conclusion that the litigation must be brought to an end was not only justifiable but also unavoidable. In my opinion, in the highly exceptional circumstances of this case the public interest in the administration of justice demands that the action should not be allowed to proceed. There was no suggestion that in that event the appropriate decree should be dismissal rather than absolvitor. I accordingly find that the granting of decree of absolvitor was a proper exercise of the inherent jurisdiction of the court. For that reason I have refused the appeal.

[36] I offer a few observations. I am aware that the decision in this case is without any reported precedent. There may be two reasons for that. The first is that the circumstances of the case are, as I have said, highly exceptional. Secondly, the decision has been made against the background of the Ordinary Cause Rules 1993. As is well known, one object of these Rules is to avoid delay caused by inactivity of the kind illustrated in the history of this case by requiring the Sheriff to seek to secure the expeditious progress of litigation (see for example rule 9.12(1)). It may therefore be expected that Sheriffs will now bear down more heavily than they may have done in the past upon inordinate and unexplained delay. When the Rules are silent, their spirit may be observed by the invocation of the inherent jurisdiction of the court *'to do justice between the parties and to secure a fair trial between them'* (Jacob, *cit* para [24] above).

[37] I would also observe that the inherent jurisdiction of the court may be invoked to prevent any abuse of process: I refer to my comment at the end of paragraph [25] above. Whether further procedure in the present action, as was sought by the pursuers, would have been an abuse of process is a matter which was not discussed at the hearing of the appeal. I note that it has been observed south of the Border that if a claimant were to abandon his contractual right to arbitrate and seek to pursue an

Arbitration, Building & Construction Law Reports. Typeset by NADR. Crown Copyright reserved.

action, the court would grant a stay under its inherent jurisdiction to stay abusive proceedings (Mustill and Boyd, *Commercial Arbitration* (2nd edn, 1989) page 158, footnote 2).

[38] It is also interesting to notice that in England and Wales the inherent jurisdiction of the court was invoked in a way comparable to its exercise in this case in ***Allen v Sir Alfred McAlpine & Sons Ltd*** [1968] 2 QB 229. *Allen* was approved in ***Birkett v James*** [1978] AC 297. The law as it stood before the introduction of the Civil Procedure Rules 1998 is explained in *Halsbury's Laws of England* (4th edn) vol 37 (1982) paras 448-450. That is a reference to Sir Jack Jacob's article in the original volume 37 of the fourth edition, not to the article in the re-issued volume 37 which was published in 2001.

Human Rights Act 1998

[39] Upon the view I have taken, it is unnecessary to consider the parties' submissions relative to the Human Rights Act 1998. I shall, however, briefly state my opinion.

[40] This Court is clearly a 'public authority' for the purposes of section 6 of the Act: see section 6(3)(a). It is therefore unlawful for it to act in a way which is incompatible with a Convention right: section 6(1). Its remedies and procedures should accord with the Convention: ***Karl Construction Ltd v Palisade Properties plc*** 2002 SLT 312 at page 330, para 76. Article 6(1) of the Convention declares that in the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. For the reasons already given, if the present action were to proceed this court would provide the defenders with a hearing which neither would be fair nor would be held within a reasonable time. The inactivity of the pursuers cannot be assigned to any of the categories of default in rule 16.2(1) of the Ordinary Cause Rules. Let it be assumed that, contrary to the opinion expressed in paragraph [26] above, these Rules read according to their ordinary meaning give the Court no alternative but to continue to entertain the action and provide in due course such a hearing. Such a hearing would not be Convention-compliant. Thus, if the Court is entitled to proceed only in accordance with those Rules, they 'must be read and given effect in a way which is compatible with the Convention rights': section 3(1).

[41] The part of the Rules which could most appropriately be so read and given effect is Chapter 16, which deals with decrees by default. 'Default' means, amongst other things, 'failure to perform some legal requirement or obligation' (*Shorter Oxford English Dictionary*). The law now requires a pursuer to co-operate with the court in securing the expeditious progress of his case (rule 9.12(1), (2)). If he is guilty of such delay that the defender cannot have a fair trial, or a trial within a reasonable time, he must be in breach of that duty, and thus in default. Rule 16.2(2) entitles the sheriff to grant decree of absolvitor or dismissal when a pursuer is in default, but only (according to the assumption made above) if the default is among those specified in rule 16.2(1). Rule 16.2(1) must therefore be read as if it also applied to a pursuer who was guilty of such delay. If it is so read, the sheriff in such a case would be entitled to grant decree of absolvitor by default. Accordingly I would have been prepared to refuse the appeal on the ground that the Sheriff had been entitled so to read rule 16.2(1) as to make it Convention-compliant and, upon applying the rule read in that way, to assoilzie the defenders. I consider that the pursuers' reliance on ***Zimmerman and Steiner v Switzerland*** (1983) 6 EHHR 17 was misconceived. If the Court allowed this action to proceed, it would be in breach of article 6(1): cf ***H M Advocate v R*** [2002] UKPC D3, 2003 SLT 4 at para 146 per Lord Rodger of Earlsferry. The breach would be irremediable.

Result

[42] In the result, however, I have refused the appeal on the ground that the learned Sheriff's disposal of the case was a justifiable and wholly appropriate exercise of the inherent jurisdiction of the Court. The parties were agreed, and I also agree, that expenses should follow success and that the appeal should be certified as suitable for the employment of counsel.

Act: Skinner, Advocate; Semple Fraser WS
Alt:Howie, QC; MacRoberts