

Response FROM Douglas McGregor to SLC Discussion Paper on Prescription

One issue which has not been raised in the Discussion Paper on Prescription is the question of the effect of raising court proceedings on the running of prescription. Chapter 5 of David Johnston's book, *Prescription & Limitation* 2nd Ed (at paras 5.33 to 5.44), looks at the arguments for and against treating the raising of proceedings as a continuing event/process as opposed to viewing it as a single event. At para 5.42 it is suggested that clarification of the law is required.

The difference between the two approaches is perhaps most starkly apparent in cases in which decree of dismissal is sought on the basis of inordinate and inexcusable delay in terms of rule 21A.1 of the Rules of the Court of Session or rule 15.7 of the sheriff court Ordinary Cause Rules. In such cases the court action is likely to have been dormant for an extended period of time. See, for example, *Abram v British International Helicopters Ltd* [2014] CSIH 53 and the recently issued sheriff court decision, *Sultana v General Accident Fire & Life Assurance Corporation plc* [2016] SC EDIN 40. Not all cases involve such lengthy delays though – see the decision of Sheriff Principal Scott QC in *Fox v United Biscuits (UK) Ltd* 17 June 2014 Sheriffdom of Glasgow & Strathkelvin 2014 SC GLA 20 where the period of delay was much shorter.

The pursuer in *Sultana* was seeking payment from insurers after a fire destroyed shop premises. A proof diet had been assigned for 22 October 2001 but was discharged after agents withdrew from acting. A further proof was allowed to be assigned on a date to be afterwards fixed.

No steps were taken to fix a diet and the case did not call again until 2016 when it was put out by order. The pursuer appeared in person. The defenders were represented and confirmed to the court that they had taken an informed decision not to take steps to fix a diet.

Sheriff Mackie exercised her discretion and dismissed the action under rule 15.7 after being satisfied that there had been inordinate and inexcusable delay resulting in unfairness.

As in previous cases, the sheriff in *Sultana* puts considerable store by the undoubted difficulties that the lengthy period of delay would cause at proof. In particular, evidence would be likely to be vague and uncertain. She concluded that justice could not be done.

It seems to me that the question of whether prescription runs during the course of proceedings may be of considerable importance to parties in cases decided under rules 21A.1 and 15.7. (The issue of imprescriptible obligations in the context of rule 15.7 was looked at by the Sheriff Principal in *Hardie v Morrison & Anr* 10 July 2012 but otherwise prescription does not appear to have featured in the case law on inexcusable and inordinate delay)

In cases like *Sultana*, if the pursuer's claim has prescribed during the course of proceedings then dismissal of the action is an end to the matter. If it has not prescribed then there would seem to be nothing to prevent a pursuer from raising fresh proceedings the following day and heading to proof despite any evidential difficulties. In such cases the court might question the benefit of dismissal as opposed to simply relying on an award of expenses of process to mark disapproval.

At present, decisions in *Hood v Dumbarton District Council 1983 SLT 238* and *GA Estates Ltd v Caviapen Trs Ltd 1993 SLT 1045 & 1051* seem to indicate that prescription does not run while proceedings are ongoing but in *GA Estates* there is a particular emphasis on the need for the pursuer to take a step in process as a positive assertion or re-assertion of his claim. That would tend to suggest that prescription may have been running in the *Sultana* case since no steps were taken to fix a proof. *Hood* on the other hand seems to place greater store on the initial raising and continued existence of the action rather than the taking of any procedural steps during the course of proceedings.

Given modern case management procedures and the keenness of courts themselves to insist on progress being made with actions, cases involving delay of the type seen in *Sultana* are likely to be rare in future. The vast majority of cases are likely to be disposed of in a relatively short timescale. In the circumstances, it might be more straightforward if the raising of an action were sufficient to interrupt and suspend prescription with a fresh prescriptive period commencing only on disposal of proceedings. If the position is clear then all parties to the action (except perhaps party litigants) will be aware of the consequences of failing to make progress. As an alternative, consideration might be given to allowing a limited period after dismissal in which fresh proceedings could be raised. Issues surrounding amendment of pleadings as occurred in *GA Estates* may also have to be addressed.

Other approaches may be preferred but, in any event, it seems to me that the current consultation represents an ideal opportunity to clarify the law in this area.

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