Lord President; Lord Osborne; Lord Eassie FIRST DIVISION, INNER HOUSE, COURT OF SESSION : 10 January 2007

OPINION OF THE LORD PRESIDENT

[1] This is a reclaiming motion from an interlocutor dated 31 March 2006 by which the Lord Ordinary allowed the record to be opened up and amended in terms of a Minute of Amendment by the pursuers and Answers for each of the first, second, fourth and fifth defenders. By that amendment, among other changes, there was deleted in the Instance of the Summons the words "Link Housing Association Limited" and substituted therefor the words "Link Group Limited". The second, fourth and fifth defenders have reclaimed against that interlocutor. The first defenders have not. The third defenders were, in terms of an earlier interlocutor, assoilzied from the conclusions of the Summons.

[2] In May 1996 GAP Housing Association Limited, a body constituted under the Industrial and Provident Societies Act 1965 ("GAP"), entered into a contract with the first defenders for the construction of certain housing in Paisley. The contract was of a design and build nature. The first defenders employed a design team which included the second defenders, a corporate architectural practice. The second defenders entered into a collateral warranty with GAP. By that warranty they undertook certain obligations of reasonable care, skill and diligence to GAP. That warranty included the limitation provision hereinafter referred to. The fourth defenders were appointed by GAP as the Employers' Agent for the purposes of the development. The fifth defenders were appointed by GAP as Clerk of Works for that development. Neither of these appointments included any contractual limitation provision.

[3] By a special resolution dated 16 October 2000 (subsequently confirmed on 2 November 2000) the members of GAP resolved to transfer for a certain consideration the whole of the stock, property and other assets and all engagements of the association to Link Housing Association Limited, another body constituted under the 1965 Act and having the registration number 1481R(S). Link Housing Association by resolution dated 17 October 2000 accepted that transfer, which following consent thereto having been given by Scottish Homes became effective. On 8 May 2001 the members of Link Housing Association Limited resolved to change the name of that association to "Link Group Limited". That change of name was registered on 7 September 2001. On 29 November 2001 there was incorporated under the Companies Act 1985 a company styled "Link Housing Association Limited" with the registration number SC225807. Its registered office was at the same address as Link Group Limited.

[4] The limitation provision in the collateral warranty provided: *"No action or proceedings for any breach of this Agreement shall be commenced against the firm after the expiry of 5 years from the date of practical completion of the Premises under the Building Contract"*.

Practical completion occurred on or about 10 July 1997.

[5] The Minute of Amendment was lodged and intimated on 24 March 2005. Parties were agreed that that date, rather than the date of any amendment, was material for present purposes. As at 24 March 2005 both Link Group Limited (1481R(S)) and Link Housing Association Limited (SC225807) were in existence, as they both had been when the action was raised in July 2002.

[6] As at the same date Article 1 of the Condescendence included the averment: *"The pursuers are Link Housing Association Limited having its Registered Office at 45 Albany Street, Edinburgh, EH1 3QY."*

Article 2, after a narrative of GAP's arrangements with the other parties, included an averment - *"The pursuers have taken over the whole right, title and interest of GAP under the contracts, Collateral Warranty Agreements and appointments hereinbefore condescended on by virtue of transfer of engagements in their favour, following on a resolution by the members of GAP dated 2 November 2000 and the consent of Scottish Homes granted on 28 November 2000"*.

The clause "following on a resolution ... granted on 28 November 2000" was added to the Summons by adjustment on 11 February 2004.

[7] The Rules of the Court of Session confer wide powers of amendment. Rule of Court 24.1 provides:

"(1) In any cause the court may, at any time before final judgment, allow an amendment mentioned in paragraph (2).

(2) Paragraph (1) applies to the following amendments - ...

(b) an amendment which may be necessary -

(i) to correct or supplement the designation of a party to the cause; ...

(v) where the cause has been commenced or presented in the name of the wrong person, or it is doubtful whether it has been commenced or presented in the name of the right person, to allow any other person to be sisted in substitution for, or an addition to, the original person ... "

[8] Mr. Wolffe for the second defenders submitted that the material part of Rule 24.1 was paragraph (2)(b)(v). The proposed amendment involved the substitution of one person, Link Group Limited (1481R(S)) for another person, Link Housing Association Limited (SC225807). But the court's discretionary power to allow such an amendment was constrained by the rule that the court could not properly allow an amendment which would have the effect of defeating a limitation to which another party was entitled (***Hynd v West Fife Co-operative Limited*** 1980 SLT 41 at page 43). It was immaterial that there was some connection between the original person and the person sought to be substituted or added (***Mclean v British Railways Board*** 1966 SLT 39; ***Arif v Levy and Macrae***, Lord Coulsfield, 17 December 1991, unreported). The Lord Ordinary had further misinterpreted the facts in characterising the

change as a matter of form rather than of substance. The essential question was which corporate entity had raised the action; the answer to that question could only be Link Housing Association Limited (SC225807). The proposed amendment sought to substitute for the present pursuers a different entity, namely, Link Group Limited (1481R(S)). The provisions of the Companies Act 1985 emphasised the importance attached to a corporate name; reference was made to sections 2(1)(a), 26(1)(c), 28, 348 and 349. Similar provision was made in the Industrial and Provident Societies Act 1965 - section 1(1)(b), Schedule 1, para. 1 and section 5. Reference was also made to ***Richards & Wallington (Earthmoving) Limited v Whatlings Limited*** 1982 SLT 66, per Lord Maxwell at page 67. Rule of Court 13.2(1) (as read with form 13.2-A) required the name, designation and address of the pursuer to be inserted in the Instance. A person might sue under the name which he used in his contracts and transactions with the public (*Kinloch* v *Lourie* (1853) 16 D 197, per Lord Cowan at page 200). The name used by the pursuers in this summons was Link Housing Association Limited, the name of company SC225807; Link Group Limited would, at the relevant time, have been prohibited from using that name. The name used identified the particular body and distinguished it from everybody else (*Improved Edinburgh Property Investment Building Society* v *Whites* (1906) 8 F 903, per Lord Kinnear at pages 904-5). Reference was also made to *Modern Housing Limited* v *Love* 1998 SLT 1188. The circumstance that the pursuers made an inaccurate averment that they had succeeded to the engagements of GAP did not assist them. The name used in the Instance uniquely identified Link Housing Association Limited (company number SC225807). This was not a clerical error by way of misnomer (cf ***Riach v Wallace*** (1899) 1 F 718). Rule of Court 24(1)(b)(i) could not be applicable, "party" being defined in Rule of Court 1.3(1). What was sought to be done here was to introduce a new pursuer. It would be inappropriate to carry out an inquiry as to how this state of affairs had come about. In England a rule of court had been made to deal with situations of the present kind but it was in different terms and of little assistance; reference was made to ***Morgan Est (Scotland) Limited v Hanson Concrete Products Limited*** [2005] 1 WLR 2557, particularly per Jacob LJ at paras. 12-14, 19-22 and 41. The appropriate course was to recall the Lord Ordinary's interlocutor, refuse to allow the pleadings to be amended in terms of the Minute of Amendment and Answers and to dismiss the action in so far as directed against the second defenders.

[9] Mr. Howie, for the pursuers, responding to Mr. Wolffe's submission, acknowledged that, if the proposed amendment amounted to the substitution of one corporate body for another as pursuers, to allow it would involve an improper exercise of the court's discretion, the limitation period having expired. This was not, however, truly a substitution. It was a case of a misdescription, analogous to a clerical error - "Housing Association" had erroneously appeared in the description rather than "Group". No party could have been misled as to the person suing the action. It was clear from the averment in Article 2 that the pursuer was the person to whom the right, title and interest of GAP to pursue the proceedings had been transferred. That was the Industrial and Provident Society No. 1481R(S), now known as Link Group Limited. That company had existed at all material times. The company now known as Link Housing Association Limited (SC225807) had not existed at the date of transfer. Although in Article I the statute under which the pursuers were incorporated had not been referred to, each of the surviving defenders had been designed as a company incorporated under the Companies Acts. The absence of any such description with reference to the pursuers tended to confirm that they were incorporated otherwise. The relative documentation vouched that the transfer had been between Industrial and Provident Societies. Reliance was placed on ***Watson v Frame*** (1983) 28 JLS 421 and ***Orkney Islands Council v S. & J.D. Robertson & Co. Limited*** 2003 SLT 775, especially at paras. [5] - [8] and [11]. The defenders had taken no plea of limitation (or prescription) prior to the pursuers seeking to amend, although they must have been aware long before that of the error. There was no true prejudice to them as evidenced by the lateness of their taking the point. It was in the interests of justice that the amendment be allowed. Following an enquiry by a member of the court, Mr. Howie advised that the instruction to commence proceedings had been given to the solicitor on writing paper with the heading "Link Group Limited". The blunder had arisen from "a failure by the solicitor to appreciate the small print". Although there were errors in the Lord Ordinary's reasoning such that the pursuers could not rely on his exercise of discretion, this court could and should allow the proposed amendment. If the court was against him, Mr. Howie conceded that, subject to a submission consequential on the first defenders not having reclaimed (see below), the appropriate course would be to dismiss the action in so far as directed against the second defenders.

[10] No party sought an inquiry as to the precise circumstances in which this action came to be raised in the name of Link Housing Association Limited. Certain documentary materials were put before us by Mr. Howie vouching the history and basis of the transaction by which the engagements of GAP were transferred to the then styled Link Housing Association Limited, the latter's change of name to Link Group Limited and the incorporation of a distinct company under the style Link Housing Association Limited. None of Mr. Wolffe or either of the counsel appearing for the other reclaimers took any objection to the court having regard to that documentation, albeit that history had not formally been admitted or proved. I proceed upon the basis that that history is accurate and could readily have been ascertained by any interested party. I also take into consideration the account, so far as it went, given by Mr. Howie as to the instructions given for the raising of the action. It was not suggested that the second defenders would be prejudiced by the amendment, otherwise than in the obvious sense of their contractual limitation provision being in effect overridden.

[11] The power of the court to allow amendment is widely expressed. It is, however, well settled that there are restraints upon the exercise of that power. In *Pompa's Trustees v Edinburgh Magistrates* 1942 SC 119, Lord Justice-Clerk Cooper said, at page 125: *"Further, our reports contain many decisions showing that the Court will not in general allow a pursuer by amendment to substitute the right defender for the wrong defender, or to cure a radical*

incompetence in his action, or to change the basis of his case if he seeks to make such amendments only after the expiry of a time limit which would have prevented him at that stage from raising proceedings afresh".

The same restraint applies where an additional or substituted pursuer is sought to be introduced (***McLean v British Railways Board; Arif v Levy & Macrae***). There has been some debate as to whether that restraint arises by reason of the incompetence of such amendment or by reason of the impropriety of introducing a new party after expiry of the limitation period (***Hynd v West Fife Co-operative Limited; O'Hare's Exs. v Western Heritable Investment Co.*** 1965 SC 97). Before us counsel proceeded on the assumption that the latter basis was correct. This was the "better view" suggested by Lord President Emslie in ***Hynd*** and I am content to adopt it.

[12] In substance the issue before this court is a narrow one, namely, whether the amendment proposed corrects the designation of an existing party to the cause or substitutes another person for the original pursuer. The pursuers aver that they are "Link Housing Association Limited having its registered office at 45 Albany Street ... ". They do not identify the statutory basis for their incorporation but I am unable to accept that by reason of that omission, taken with the averments that the corporate defenders were each incorporated under the Companies Acts, it is implicitly to be understood that they were incorporated under the Industrial and Provident Societies Act 1965. They are simply silent as to the basis of their incorporation. Their averments in Article 2 that they have taken over the whole right, title and interest of GAP are clearly necessary to found the basis for relying on obligations originally owed to GAP. The circumstance that the pleader may readily be supposed to have intended that the action be brought in the name of the successor to GAP does not resolve the issue as to whether his error was of description or of attribution. If a person had made due enquiry of the Registrar of Friendly Societies and at the Companies Office he would have discovered that the right, title and interest formerly vested in GAP had not been transferred to the corporate body now styled Link Housing Association Limited (SC225807) but to Link Group Limited (1481R(S)). He would then have been alerted to the circumstance that the action was being brought in the name of a corporate body different from that in which that right, title and interest were vested. Standing knowledge of that state of affairs, the second defenders would have discovered that there had been *ex facie* a misattribution of rights and that they had a basis for contending that no obligations owed by them to GAP and to any transferee of it were the proper subject-matter of this action.

[13] The error which was made, and undoubtedly there was an error, cannot, in my view, be said to have been in the nature of a clerical error, that is, an error in the mechanical process of writing or transcribing. Although the names "Link Housing Association Limited" and "Link Group Limited" differ only in the second and third words of the first as against the second word in the second, there is no suggestion in the pleadings or otherwise that the person framing the Summons (or giving the instructions for its framing) mistranscribed the name of the pursuers (as in ***Riach v Wallace***). Nor is it the case where a single existing person has been misnamed (as in ***Watson v Fram***e and ***Orkney Islands Council v S. & J.D. Robertson & Co. Limited***). The error was, in my view, more profound than that. The plain inference from the circumstances as disclosed is that the solicitor or counsel concerned, although aware that GAP's rights had been transferred, did not appreciate that the original Link Housing Association Limited (the transferee) had changed its name and that another distinct body had been incorporated as Link Housing Association Limited. The action was, as a result, raised in the name of the latter body. That error was, in my view, a matter of substance going to the identity of the person suing. If that analysis is correct, then the proposal to change the name of the pursuers involves the substitution of a different person for the original pursuers (both being in existence at the time the action was raised) and is struck at by the line of authority referred to.

[14] It was not submitted that that line of authority should be overruled. Subject to the discussion which immediately follows, the second defenders' submission is, in my view, well-founded and effect should be given to it.

[15] Mr. Howie submitted that, even if he were wrong in his primary argument, it was not open to the court to open up the Lord Ordinary's interlocutor and thereafter refuse amendment. That was because the first defenders, who were also affected by the amendment, had not reclaimed. While in some circumstances it would be possible to allow amendment in part (where the amendment affected only certain parties discretely) that was not possible in respect of an amendment, such as the name of a party, which affected all parties equally and with which one party had not quarrelled. In my view this argument is unsound. Where a proposed change affects more than one party and one of these successfully opposes amendment then, albeit another party or parties consent or do not object to such amendment, the appropriate course is to refuse the amendment *simpliciter*. Where as here the consequence of allowing the amendment is to release the successful party from the action, it will be open thereafter for the pursuers to lodge a fresh Minute of Amendment proposing a change of name. That, if granted, will affect the position of the surviving defenders.

[16] Mr. Walker for the fourth defenders adopted Mr. Wolffe's submission in relation to the substance of the change sought to be made. He was unable, however, to point to any contractual or other limitation provision in his favour but contended separately that the operation of the quinquennial prescription under section 6 of the Prescription and Limitation (Scotland) Act 1973 was to a similar effect. If Mr. Wolffe's contention was correct, the date on which a claim was first made against the fourth defenders by the true successor to GAP was 24 March 2005, when the Minute of Amendment had been lodged. Any obligation of the fourth defenders to make reparation had subsisted for a continuous period in excess of 5 years prior to that date. The pursuers averred that in November 2000 the tenant of one of the flats in the development had reported that he was experiencing problems opening and closing windows in his flat. In that month the Engineers in respect of the development had on inspection noted that brickwork panels below the livingroom windows in that and in another flat had moved

horizontally outward to an unsafe extent. These events were within the quinquennium but letters, which were produced, from the maintenance officer and from the Housing Manager of GAP dated respectively 16 February 1999 and 12 April 1999 (with an appended list of defects) pointed to defects known to GAP prior to 24 March 2000. These letters were the subject of proposed averment by the fourth defenders in their Answers to the Minute of Amendment. The pursuers' Minute of Amendment did not answer these proposed averments otherwise than with a general denial. In any event, the pursuers' proposed averments involved a radical widening of their existing case against the fourth defenders. All that their existing pleadings contained was an averment that the fourth defenders had undertaken obligations in respect of supervision of the works and that they had failed in those obligations. Now additional duties were proposed to be averred - in particular that the standard of care which the fourth defenders had contracted to provide was that of a reasonably competent quantity surveyor, that they were contractually obliged to exercise such care in managing, controlling and supervising quality control procedures, inspections and reporting, that they were contractually obliged to exercise such care and skill to ensure consensus between GAP and the first defenders (the contractor) on contractual liabilities, including supervision of the second and third defenders and that they were contractually obliged to exercise such care to ensure that the standard of work was adequate to produce and provide a design building which was fit for its purpose. Cumulatively these additionally averred obligations would amount to a radically new case which should not be allowed to be introduced (***Pompa's Trustees v Edinburgh Corporation***).

[17] In my view Mr. Walker's separate submission cannot be given effect to at this stage. Unless it is apparent from a pursuer's averments that the obligation has been extinguished by prescription, it is generally for a party relying on a contention that it has been extinguished to establish the factual basis upon which the contention depends (***Strathclyde Regional Council v W.A. Fairhurst & Partners*** 1997 SLT 658). The letters referred to have neither been admitted nor proved nor the background against which they were sent explored. It cannot be said at this stage that by the date of these letters the obligation to make reparation on which the pursuers insist had arisen. Nor can it at this stage be said that the proposed averments constitute a change to the basis of the pursuers' case. *Prima facie* that case will remain one based upon the contractual obligation to supervise, that case being amplified by the identification of an objective standard against which that obligation falls to be measured, and by greater particularisation of the duties and of their breach. I would not have sustained the reclaiming motion on the separate basis urged by Mr. Walker.

[18] Mr. Erroll for the fifth defenders had no existing or proposed plea either of limitation or of prescription. His contention was that, having regard to the lateness with which the amendments were proposed and the extent of those averments in so far as they affected the fifth defenders, the Lord Ordinary had erred in the exercise of his discretion in allowing the amendment. The present averments in Article IX of the Condescendence were in general terms in respect of inspection and liaison. In describing the basis of the obligation relied on, the pursuers proposed to substitute "implied" for "contractual" and to specify that inspection should have been done on a daily basis. The premises had been demolished in February 2003. That circumstance could not otherwise than prejudice a party faced with a more detailed case of obligation and breach of obligation. It was, however, accepted that no contention of prejudice to the fifth defenders had been advanced before the Lord Ordinary. Reference was made to ***Thomson v Corporation of Glasgow*** 1962 SC (HL) 36, ***Watt v Phillips*** 1994 SLT 142, C*ork* ***v Greater Glasgow Health Board*** 1997 SLT 404 and ***Britton v Central Regional Council*** 1986 SLT 207.

[19] In my view Mr. Erroll's argument falls to be rejected. Delay will not of itself justify refusal of amendment. There must be prejudice or some other material disadvantage to the other party. In *Thomson* v *Glasgow Corporation* the amendment was sought after proof had been led. In *Wood*, C*ork* and *Britton* the allowance of amendment would have involved the discharge of an imminent proof. Nor am I satisfied that the proposed amendments involve a basic change in the pursuers' case against the fifth defenders; it involves merely a modification or particularisation of that case.

[20] In the foregoing circumstances I move your Lordships to allow the reclaiming motion at the instance of the second defenders, to recall the Lord Ordinary's interlocutor, to refuse to allow amendment in terms of the Minute of Amendment and Answers and to remit to the Lord Ordinary to proceed as accords.

OPINION OF LORD OSBORNE

[21] I have had the opportunity of reading the Opinion of your Lordship in the chair. I am in complete agreement with it and have nothing useful to add. I agree with the course of action which your Lordship proposes.

OPINION OF LORD EASSIE

[22] I have also had the opportunity of reading the Opinion of your Lordship in the chair. I am in complete agreement with its reasoning on all of the issues and with the disposal of the reclaiming motion which is proposed.

Act: Howie, Q.C., Richardson; Harper Macleod LLP (Pursuers and Respondents)
Alt: Wolffe; Simpson & Marwick (Second Defenders and Reclaimers): Walker; Bishops (4th Defenders and Reclaimers): Erroch; Drummond Miller (5th Defenders and Reclaimers)