JUDGMENT : Judge Richard Havery Q.C. : TCC. 22nd July 2004.

1. This is an application on the part of the claimant to amend the claim by the addition of two new claimants. There is also a proposed amendment to the text of the particulars of claim. It is common ground that that amendment stands or falls with the amendments the subject of the application.

2. The claim is a claim for damages for breach of contract. The application has proceeded on the basis that the limitation period had not expired when the claim was brought on 10th November 2003. The defendant, however, reserves its position on that point. It is common ground that the limitation period had expired before the application was made.

3. The claimant is a company known as Morgan Est (Scotland) Limited. It was formerly known as Miller Civil Engineering Services Limited. It is common ground that the contracting party was another company, Miller Civil Engineering Limited. On 13th October 2000 pursuant to the terms of a hive down agreement Miller Civil Engineering Limited transferred, among other things, the benefit of the contract to Miller Civil Engineering Services Limited. By a sale and purchase agreement, the shares in Miller Civil Engineering Services Limited were transferred from Miller Group Limited to Morgan Sindall PLC on 10th May 2001. On 1st October 2001 Miller Civil Engineering Services Limited transferred all its assets to Morgan Est PLC, which is also a wholly-owned subsidiary of Morgan Sindall PLC. Miller Civil Engineering Services Limited changed its name to Morgan Est (Scotland) Limited on 24th October 2001.

4. In the particulars of claim it is stated that the claimant was the contracting party. As indicated above, it was not the contracting party. From 13th October 2000 until 1st October 2001 it was the assignee of the contracting party. When the proceedings were issued, the claim had been assigned to Morgan Est PLC.

5. The application is an application to add Miller Civil Engineering Limited as first claimant and assignor to the existing claimant, which is sought to be made the second claimant, and to add Morgan Est PLC as third claimant and existing assignee of the claim. It is sought to amend the text of the particulars of claim by pleading the relevant assignments.

6. The reason for seeking to join Miller Civil Engineering Limited to the claim was to comply with procedural requirements in the event that the defendant took objection to its non-joinder.

7. The relevant part of the Civil Procedure Rules is part 19.5, which applies to a change of parties after the end of a period of limitation. Part 19.5 reads, so far as material, as follows:

   (2) The court may add or substitute a party only if—

   (a) the relevant limitation period was current when the proceedings were started; and

   (b) the addition or substitution is necessary.

   (3) The addition or substitution of a party is necessary only if the court is satisfied that—

   (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;

   (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant;…

8. Mr. Reed submitted that paragraph (3)(b) applied to the addition of the proposed first claimant. He submitted that paragraph (3)(a) applied to the proposed addition, by way of substitution, of the third claimant. It was to the addition of the third claimant that Mr. Pilling principally objected. He was content to let the application to join the proposed first claimant stand or fall with the application to join the proposed third claimant.

9. Mr. Reed submitted that Morgan Est (Scotland) Limited was named in the claim form in mistake for Morgan Est PLC. The principal evidence on this point appears in a witness statement of Mr. Shane Sayers, a partner in the firm of Kennedys, the solicitors acting for the claimant. His evidence was that a company search was made in the name of Miller Civil Engineering Services Limited. The search indicated that that company had changed its name to Morgan Est (Scotland) Limited. That is why the claim form identified the claimant as Morgan Est (Scotland) Limited (formerly Miller Civil Engineering Services Limited). The company search indicated to Mr. Sayers that it was appreciated that there had been a transfer of assets from Miller Civil Engineering Limited to Miller Civil Engineering Services Limited. The company search did not reveal that the claim had been transferred to Morgan Est PLC. Accordingly, said Mr. Sayers, it appeared that the mistake as to the identity of the claimant occurred because it was not appreciated that there had been a further transfer of assets. It was the intention throughout to bring the claim in the name of the party holding the right to bring the claim. Morgan Est (Scotland) Limited and Morgan Est PLC were, at the date the claim form was issued, and remain, members of the same group of companies. At the date the proceedings were issued it was believed that the correct claimant was Morgan Est (Scotland) Limited. Mr. Sayers went on to say that the reason why the mistake was not brought to the attention of Kennedys was probably because Kennedys dealt with the individuals involved in the works and at a higher level with the parent company Morgan Sindall PLC.

10. The most recent authority on this subject is the decision of the Court of Appeal in ***Parsons v. George*** [2004] EWCA (Civ) 912. In that case Dyson L.J., with whom Morritt V-C. and Clarke L.J. agreed, reviewed the history of the subject via the Rules of the Supreme Court, Order 20, rule 5. He referred in paragraph 13 of his judgment to ***Evans v. Charrington & Co Ltd*** [1983] 1 QB 810, a decision on the application of Order 20, rule 5. In that case, a tenant made an application to the county court for a new tenancy, erroneously naming C as the landlord and respondent to the application. The lease had been made between C as landlord and E as tenant. But C had

assigned the reversion to B. The judge allowed E to add B as an additional respondent to the application. That decision was upheld by a majority of the Court of Appeal.

11. In paragraph 25 of his judgment, Dyson L.J. expressed the view that it would be surprising if the effect of the Civil Procedure Rules were to deny to the court jurisdiction to allow the addition or substitution of parties after the expiry of a relevant limitation period in circumstances where the court had previously enjoyed such jurisdiction. In paragraph 41 he cited with approval, as indicating the proper construction of CPR 19.5(3)(a), the test suggested by Lloyd L.J. (with whom Stocker L.J. and Sir George Waller agreed) in ***The Sardinia Sulcis and Al Tawwab*** [1991] 1 Lloyd's LR 201, 207. Lloyd L.J. said this:

*It is thus established by three or more decisions of the Court of Appeal that a name may be "corrected" within the meaning of O.20, r.5(3), even though it involves substituting a different name altogether, and the name of a separate legal entity, and even though it is objected (see per Lord Justice Donaldson in **Evans v. Charrington & Co.** at p. 822) that the effect of substituting a new name will be to substitute a new party. But the amendment will not be allowed where there is reasonable doubt as to the identity of the person intending to sue or intended to be sued.*

The "identity of the person intending to sue" is a concept which is not all that easy to grasp, and can be difficult to apply to the circumstances of a particular case, as is shown by the fact that in two of the cases to which I have referred there has been a dissenting judgment.

*In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would always be given. So there must be some narrower test. In **Mitchell v. Harris Engineering** the identity of the person intended to be sued was the plaintiff's employers. In **Evans v. Charrington** it was the current landlord. In **Thistle Hotels v. McAlpine** the identity of the person intending to sue was the proprietor of the hotel. In **The Joanna Borchard** it was the cargo-owner or consignee. In all these cases it was possible to identify the intended plaintiff or intended defendant by reference to a description which was more or less specific to the particular case. Thus if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise. The point can be illustrated by the facts of **Rodriguez v. R. J. Parker**. In that case the identity of the intended defendant was the driver of a particular car. It was held that there was a mistake as to name. But if the plaintiffs had sued the driver of a different car, there would have been a mistake as to identity. He would have got the wrong description.*

12. In ***Parsons v. George*** the court allowed the claimants to amend their claim to sue the persons who answered the description of competent landlord, where they had sued the original defendants because they mistakenly believed that they answered that description (ib., paragraph 42). The competent landlord was the assignee of the reversion from the original landlords (ib., paragraphs 2 to 4).

13. In this case, Morgan Est PLC can be described, to use the words of Lloyd L.J. quoted above, by reference to a description which is more or less specific to the particular case, viz. the assignee of the right to sue the defendant under the contract, or the person holding the right to sue the defendant under the contract.

14. Mr. Pilling submitted that the mistake in this case was not a mistake of the kind contemplated by CPR 19.5(3): it was not a mistake as to the name or the identity of a party. The claimant had made a mistake as to its rights. There was no mention of any assignment in the particulars of claim.

15. The essence of Mr. Pilling's argument was that the mistake was in thinking that the claimant (formerly known as Miller Civil Engineering Services Limited) was the contracting party Miller Civil Engineering Limited. He submitted that the onus was on the claimant to adduce clear evidence of the nature of the mistake, and that Mr. Sayers's evidence was inadequate. It was indeed largely hearsay and deductive. Mr. Sayers's conclusion from the fact of the company search in the name of Miller Civil Engineering Services Limited that it was appreciated that there had been a transfer of assets from Miller Civil Engineering Limited was not, submitted Mr. Pilling, justified. There was another explanation: that Miller Civil Engineering Services Limited was a member of his client group, Morgan Sindall PLC, whereas Miller Civil Engineering Limited was not.

16. There is a witness statement from Mr. William Raymond Johnston. He has been company secretary of Morgan Sindall PLC since January 1990, and is company secretary and alternate director of Morgan Est (Scotland) Limited and of Morgan Est PLC. He refers to the business transfer agreement dated 13th October 2000 whereby the business of Miller Civil Engineering Limited was transferred to Miller Civil Engineering Services Limited. He confirms that it was signed by the parties and dated 13th October 2000. He recalled seeing the original signed agreement in about March 2001. He exhibited an unsigned and undated copy of the agreement to his witness statement. The original cannot now be found.

17. It is clear that the claimant was perfectly well aware of the assignment to itself. Otherwise, it would not have instructed Kennedys to bring these proceedings. Why the assignment was not mentioned in the particulars of claim does not appear. The mistake may have been that the claimant was the contracting party, as submitted by Mr. Pilling. For example, it may be that the person instructed by the claimant was not told of the assignment and did not notice that Miller Civil Engineering Services Limited was not the same company as the contracting party Miller Civil Engineering Limited. That is speculation, but is not ruled out by Mr. Sayers's evidence, and is consistent with his credible assertion that it was the intention throughout to bring the claim in the name of the party holding the right to bring the claim. The claimant would be burdened with the mistake of its agent. If the mistake was of the

kind submitted by Mr. Pilling, then there were two mistakes: first, that the claimant was the contracting party; and second, that the contracting party was the party entitled to sue the defendant under the contract. The first of those mistakes is of a kind which would fall within rule 19.5, but is not relevant to the application to join Morgan Est PLC. The second mistake is not of a kind which would fall within rule 19.5. But in any case the mistake would be a mistake as to the person holding the right to sue the defendant under the contract. There can be no doubt that the claimant and Kennedys intended that the claimant should be that person. One can describe that person in three ways: as the contracting party (an erroneous description), as the assignee of the contracting party, or as the person holding the right to sue the defendant under the contract. In ***Evans v. Charrington & Co. Ltd***. and ***Parsons v. George***, tenants were allowed to amend who had intended to sue particular persons who had been the relevant landlords in the erroneous belief that they still were the relevant landlords. In my judgment, those actual decisions justify adopting the wider description of the intending claimant as the person holding the right to sue the defendant under the contract, as opposed to the narrower description as the contracting party or the assignee of the contracting party.

18. Accordingly, I reject Mr. Pilling's submission that the mistake was not of a kind falling within CPR 19.5(3)(a). Mr. Pilling's second point was that CPR 19.5(3)(a) was confined to the substitution, and did not extend to the addition, of a party. He referred me to section 35(6) of the Limitation Act 1980, defining the maximum permissible scope of the rule that is CPR 19.5. He submitted, and I accept, that CPR 19.5 must be interpreted in the light of section 35(6). I also accept that section 35(6) draws a distinction between the addition and the substitution of a new party. Mr. Reed submitted that his application to join Morgan Est PLC was in essence an application to substitute a new claimant. I accept that submission. Morgan Est (Scotland) Limited, having assigned away its rights under the contract to Morgan Est PLC, cannot successfully claim in this action. It is retained only for the same reason as that for which it is sought to join Miller Civil Engineering Limited, namely the procedural requirement to join an assignor. If it were removed as a claimant, it could doubtless be added back under CPR19.5(3)(b).

19. Mr. Pilling further submitted that if the proposed third claimant would not be allowed to amend the particulars of claim to plead the assignments, that would be an independent reason not to allow joinder of the proposed third claimant. The relevant rule is CPR 17.4(2), which provides as follows: *The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.*

Mr. Pilling raised two points. First, would the effect of an amendment to plead the assignments be to add or substitute a new claim, and if so, would such claim arise from the same facts or substantially the same facts as those already pleaded? And second, if it is the third claimant who has to apply to make the amendment, can it bring itself within rule 17.4(2) as having already claimed a remedy in the proceedings?

20. Mr Pilling submitted that the claim amended to plead the assignments would involve a new cause of action. He relied on the observation of Brett J. in ***Cooke v. Gill*** (1873) LR 8 CP 107, 116 that *"Cause of action has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, -- every fact which the defendant would have to traverse."* Mr. Pilling submitted that the assignments were essential new facts and would make the cause of action a different cause of action from the existing cause of action.

21. CPR 17.4(2) refers to a new claim whereas its predecessor, RSC O.20, r. 5(5), referred to a new cause of action. Section 35(5) of the Limitation Act 1980 draws the distinction between a claim involving a new cause of action and a claim involving a new party. In ***Chatsworth Investments Limited v. Cussins (Contractors) Limited*** [1969] 1 WLR 1, the Court of Appeal allowed an amendment under RSC O.20, r.5(1) notwithstanding that the new claim arose out of the same facts as the existing claim, plus a novation. Although the decision was made under rule 5(1), that rule was expressed to be subject to the *"following provisions"* of the rule, which included rule 5(5). Lord Denning MR said (at p.2) *"The new cause of action arises out of the same facts, plus the novation. That may well be covered by subrule (5), but I prefer to allow the amendment on the wider ground [sc., justice] I have stated under rule 5(1)."*

22. In my judgment, pleading the assignments would not involve pleading a new claim within the meaning of CPR 17.4(2). The claim is the same; pleading the assignments simply shows how the claim comes to be vested in Morgan Est PLC. The same point must have arisen, if only implicitly, in the cases where a claimant was allowed to amend to join a party who had become landlord by assignment.

23. Mr. Pilling's other point was that an amendment to plead the assignments would not fall within CPR 17.4(2) since the hypothetical applicant, Morgan Est PLC, is not a party which has already claimed a remedy in the proceedings. Since I have held that such an amendment does not involve a new claim, this question does not arise.

24. I conclude that I have jurisdiction to allow the amendment sought in the application. I have a discretion whether to allow that amendment. Dyson L.J. in ***Parsons v. George*** made some comments relevant to the exercise of discretion. He said in paragraphs 8 and 9 of his judgment:

"…..On the one hand, it may be unjust to a defendant to add a person as a party to proceedings if this would deny him an accrued limitation defence…..

On the other hand, there are circumstances in which it would be manifestly unjust to a claimant to refuse an amendment to add or substitute a defendant even after the expiry of the relevant limitation period. A common example of such a case is where the claimant has made a genuine mistake and named the wrong defendant, and

where the correct defendants have not been misled, and they have suffered no prejudice in relation to the proceedings (except for the loss of their limitation defence)."

The second of those paragraphs obviously applies also where it is sought to add or substitute a claimant.

25. Mr. Pilling submitted that I should exercise my discretion in favour of the defendant, on two grounds. The first ground was that the explanation given by the claimant as to the source of the mistake was not satisfactory. In paragraph 14 of his witness statement Mr. Sayers said that from his consideration of the file and discussions with those more directly involved in the day-to-day conduct of this matter than himself, it was clear that an investigation was undertaken to clarify who the claimant should be. He then went on to refer to the company search that I have mentioned in paragraph 9 above. It is true that Mr. Sayers's statement is not informative about the source of the mistake, and gives no explanation why the assignment to Miller Civil Engineering Services Limited was not pleaded. Nevertheless it is not suggested, nor is there any reason to think, that the failure on the part of the claimant was caused by anything other than a genuine mistake.

26. Mr. Pilling's other ground was that the claimant's difficulties were of its own making. It had left it until the eleventh hour to bring proceedings, and without giving sufficient consideration to whether it had a claim. Had the claimant acted promptly in prosecuting the action, the proposed third claimant's interest in the claim would have emerged much earlier, and the claimant could have made the necessary applications within the limitation period. The claimant chose to leave this claim until late 2003. In such circumstances, the court should not grant the claimant the indulgence of allowing this application when the result would be to allow the proposed third claimant to bring a claim to which the defendant would otherwise have a valid accrued limitation defence.

27. There was no suggestion that the defendant had been misled. Indeed, it was the defendant in the defence that first raised the point that the existing claimant was not the contracting party.

28. The defence was dated 28th May 2004, and this application was made on 4th June 2004. In my judgment, there was no inordinate delay in prosecuting the action after it was started or in making this application after the mistake was discovered.

29. CPR 19.5(3)(a) itself envisages that the application will be made long after the cause of action arose, that the application will have been rendered necessary by a mistake on the part of the applicant, and that if the jurisdiction is exercised the defendant will suffer the prejudice of losing an accrued limitation defence. It is true that this is not a case where the mistake has been caused by the defendant. But in my judgment it would be just to exercise the jurisdiction conferred by CPR 19.5(3) and to give the claimant leave to add Morgan Est PLC as third claimant, Miller Civil Engineering Limited as first claimant, to amend the proceedings to show Morgan Est (Scotland) Limited as second claimant, and to amend the text of the particulars of claim in the form of the draft annexed to the application.

Mr. Paul Reed (instructed by Kennedys) for the Claimant
Mr. Benjamin Pilling (instructed by Vizards Wyeth) for the Defendant