OPINION OF LORD WHEATLEY : OUTER HOUSE, COURT OF SESSION : 31st March 2006

[1] Link Housing Association Limited is an industrial and provident company with its registered office in Edinburgh. It seeks reparation from the various defenders following a contract for the construction of thirty flatted dwelling houses in Ferguslie Park, Paisley. The contract was entered into between a company called GAP Housing Association and the first defenders, who are a construction company, in May 1996. The first defenders thereafter appointed the second defenders as architects and the third defenders, who are no longer concerned in this action, as engineers. The fourth defenders were appointed by GAP Housing Association as the Employer's Agent in April 1996 and the fifth defenders were appointed as Clerk of Works also in April 1996.

[2] The first defenders' contract with GAP Housing Association incorporated the conditions of the Scottish Building Contract with Contractors' Design 1981 (revised September 1995). The second defenders entered into a Collateral Warranty Agreement with GAP in respect of the professional services to be provided by them in May and June 1997. Among other conditions, this agreement contained a provision in the following terms:

"9. No action or proceedings for any breach of the agreement shall be commenced against the Firm after the expiry of the 5 years from the date of practical completion of the premises under the building contract."

[3] The fourth and fifth defenders had no such prescriptive agreement with GAP Housing Association, nor had the first defenders in terms of their contract.

[4] The building works in terms of the contract were done in 1996 and 1997, and it is agreed that the practical completion date on the contract was 10 July 1997. Accordingly, in terms of clause 9 of the second defenders' agreement with GAP Housing Association, the prescriptive period of five years ended on 10 July 2002. Defects were said to have been found in the buildings and an action was signetted against the present defenders on 8 July 2002 and served on the following day. The defects alleged were substantial, and the building subsequently appear to have been demolished.

[5] In the meantime GAP Housing Association Limited transferred the whole of its stock, property and other assets and all its engagements to Link Housing Association Limited by a transfer document dated 14 November 2000. Link Housing Association Limited are the company whose title appears as the pursuers in the present instance. Both GAP Housing Association and the Link Housing Association Limited were industrial and provident societies and the registration of the transfer under the Industrial and Provident Societies Act 1965 was completed on 6 December 2000. Then, on 7 September 2001, again in terms of the Act, Link Housing Association Limited changed its name to Link Group Limited, and this new title was duly registered with the registrar of companies on 29 March 2001. I understood from submissions that Link Housing Association Limited nonetheless continued to retain some form of corporate identity.

[6] The present action was therefore signetted on 8 July 2002 in the name of Link Housing Association Limited, although as indicated, by that time the company had changed its name to Link Group Limited. Following the lodging of the summons, the Record was then closed in February 2004. It is fair to say that the closed record contained averments for the pursuer which gave merely a brief outline of the factual history of the contract, and then a series of general averments of duties of care against each of the defenders.

[7] In April 2004 the second defenders lodged their note of arguments, and I understand that the other defenders did the same. Thereafter, a procedure roll hearing was fixed for February 2005. Just before that hearing, the pursuers indicated that they wished to lodge a minute of amendment in response to these notes of argument, and the procedure roll was discharged. The minute of amendment at the instance of the pursuers was subsequently lodged, answered and adjusted. The minute of amendment on the pursuers' part expanded significantly on the averments of fact and added a number of detailed averments of duties of care against each of the defenders. In addition, the minute of amendment sought to change the pursuers' name from Link Housing Association Limited to Link Group Limited; as indicated earlier, the change of name had taken place in November 2001, before the present action had been raised in July 2002.

[8] In these circumstances, Mr Wolffe, Q.C., who appeared for the second defenders, argued firstly that the detailed averments contained in the minute of amendment came far too late and should be refused, and secondly that in terms of the contractual time bar contained in clause 9 of the Collateral Warranty Agreement between the pursuers and his clients, the introduction of a new company as the pursuers in the action was out of time; it was too late for the pursuer to seek to amend its own designation once the time bar had expired. In respect of his second argument, which he took first, counsel for the second defenders submitted that this was not an attempt to correct an error in terms of Rule of Court 24.1(2)(b)(v), but rather a deliberate attempt to replace one company, with another. Link Housing Association Limited, as a separate company had still been in existence at the time the action was raised. It appeared that they had earlier transferred the operations part of their business to Link Group Limited. Accordingly, the purpose of the minute of amendment was to exchange one company as pursuer in the action for another. The statutory provisions which related to the industrial and provident societies made it clear that the precise description of the identity of the company was important. The same was true in general terms of companies in terms of the Companies Acts. It was therefore a matter of some substance; the pursuers must have been aware of their corporate identity at the time they raised the action. They must be held to have acted deliberately in raising the action in the name of Link Housing Association Limited. Accuracy, Mr Wolffe maintained, is the foundation of procedure, as Lord Justice Clerk Thomson observed in ***The Overseas League* v *Taylor*** 1951 SC 105.

[9] Counsel submitted that because of what therefore amounted to a statutory requirement for accuracy in these matters, there should be a presumption that the Link Housing Association Limited must have known that they had received the transfer of assets and engagements from the GAP Housing Association Limited in 2001. They must also have known that they had transferred their rights and obligations to another company before the action was raised. Accordingly, the pursuers would have to produce some very compelling explanation to persuade the court to allow the identity of the pursuers to be changed at this stage. Counsel also submitted that the minute of amendment should not be allowed because it contains a large amount of new material at a point now distant in time from when the building work was started.

[10] For the first defenders, Mr Borland indicated that as his Collateral Warranty Agreement did not contain a prescriptive clause such as was found in clause 9 of the second defenders' Agreement, he could not put forward an argument on time bar or title to sue, but he supported the second defenders' submissions that the substantial alterations to the pursuer's case contained in the minute of amendment now came far too late. For the fourth defender, Mr Walker, who also did not have the benefit of the prescriptive clause available to the second defenders, nonetheless indicated that he wished to argue that the substantive claim made against the fourth defenders had prescribed. He submitted that the complaints about the defects found in the building had first of all been made to the fourth defenders in 1999, and so had plainly been known about at that time. It was therefore too late to introduce these complaints into the action in 2005; they were excluded by the operation of prescription in terms of the Prescriptions and Limitation (Scotland) Act 1973. Mr Walker also argued that the new averments in the Minute of Amendment came too late. For the fifth defenders Mr Errogh also found that no prescriptive agreement was available to him but offered his support to the submissions made by the other defenders that the detailed amendment came at a point in time where they it should no longer be allowed.

[11] For the pursuers, Mr Howie, Q.C. maintained that the substitution of the pursuer's title which he now sought was competent, and whether it should be allowed lay within the discretion of the court. There could be no prejudice to the defenders should this part of the proposed amendment be allowed, and none was suggested by any of the defenders. The change in the name from Link Housing Association Limited to Link Group Limited was an internal company arrangement, and the only real mistake in the original description of the pursuers' name in the instance of the summons was that the words "Housing Association" were introduced instead of the single word "Group". While it was important that companies properly identified themselves at all times, this did not mean that the court could not grant leave to correct a party's title in misdescription cases. The defenders should have known about the pursuers' name change from an early stage and they had not raised any objection in the pleadings

as they originally stood to the pursuers' title. The defenders could never have been in any doubt about who was trying to get money from them, or why. In groups of companies, clear distinctions about the exact company title under which a particular operation is carried out within the group are not always in the minds of those employed. The present situation was simply a case of mistaken identity. What was clear was that the pursuers were the party in whose interest and for whose benefit the transfer of assets took place. At the time when the action was raised, Group Housing Limited did not exist. The instance of the summons therefore contained a misdescription; it could not be anything else. This was precisely the sort of error that the Rules of Court contemplated when considering the question of the court's discretion to allow amendment in the interests of justice. There would be substantial prejudice to the pursuers if they were to lose at this time their rights to prosecute their claim against the defenders.

[12] Mr Howie also submitted that, in terms of the fourth defenders' submissions, again no complaints of prejudice were made. The pursuers did not accept that their complaints about the fourth defenders' failures in respect of the contract were affected by any prescriptive period which ended with the lodging of the minute of amendment. In these circumstances the fourth defenders' arguments on time bar could not be disposed of at this stage.

[13] As far as the general objections to the late introduction of the material contained in the Minute of Amendment was concerned, Mr Howie submitted that this was a case which was raised timeously but from its nature there were bound to be delays in the character of the complaints becoming clear. The delay was far from one-sided; the defenders had also contributed to the lack of progress in the case thus far.

[14] The law on the question of prescription as it applies in this case is well settled, at least in principle, as Mr Wolffe demonstrated in a lucid and brief explanation. It appears to be accepted that either in terms of the statutory provisions of Section 19A of the Prescription and Limitation (Scotland) Act 1973 for actions to which that statute refers, or at common law where there is a contractual agreement on time bar, the court has a discretionary power to override these statutory or contractual provisions where they apply to the out of time introduction of a new party or cause of action. Broadly speaking, this discretion may be exercised if the alteration sought is one of form rather than substance. In other words, when a time limit, however constituted, operates against the raising of an action at the instance of, or against, a new party, or the introduction of a new cause of action, the court has a discretion to relieve the pursuers of the consequences of the prescriptive provisions if the introduction of the new party is simply a formal correction of the description of the party who has properly raised the action before the time limit has expired, or the new cause of action is sufficiently related or connected to any cause of action timeously intimated. So long as no real prejudice is caused to the other side by the introduction of such new material the court will normally encourage the accurate description of the real issues between the true parties.

[15] As Mr Wolffe suggested, the normal starting point in cases of this kind is ***Pompa's Trustees* v *Edinburgh Magistrates*** 1942 SC 119. In that case the pursuers brought in error an action against the Magistrates of Edinburgh instead of the town clerk and tried to bring the latter official into the action after the expiry of the relevant statutory time limit. In allowing the pursuers so to amend, the Lord Justice Clerk (Cooper) said at page 125: *"It is well recognised that, where a statute prescribes a special method for enforcing a statutory right or liability, the general rule is that no other method of enforcement can be resorted to (Maxwell on Statutes, pp.339-40 and cases there cited). 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. But I consider that in the special circumstances of this case the appellants are entitled to claim that they are not truly infringing any rule of general application in seeking our authority to make the amendment which they propose. So far from resorting to a remedy different from the prescribed statutory remedy, they have expressly invoked the proper section, although they have failed to comply with its exact requirements. So far from seeking to substitute the right defender for the wrong defender, all they ask is that one*

representative of the right defender should be replaced by a different representative of the right defender. The admitted error in their action as originally raised does not involve a radical and fundamental incompetence, but a mistake in detail which, as it happens, now possesses no real significance. The basis of their case, if the amendment is allowed, will remain the same as before."

[16] This entirely sensible and pragmatic decision determined from an early stage that the principle to be applied in any attempt to alter the identity of a party to an action after the time bar has expired is that the court will refuse such applications where they seek to introduce an entirely different party in place of the one originally designed; but if the alteration seeks simply to describe accurately the true party, then such an amendment will be allowed. The emphasis is placed on allowing the true identification of the party to the action to be settled, and not to allow the substitution of a wholly different and unconnected party or cause of action outwith the prescribed time limits. In that way, the requirement of accuracy as an essential part of procedure on the one hand, and the need to provide protection from the prosecution of litigation outwith the prescriptive period on the other, are both preserved. In terms of what was said by the Lord Justice Clerk in ***Pompa's Trustees*** as applied to the present case, all that the pursuer seeks to do is to substitute the correct title of the company within the defender's group of companies, rather than the incorrect one, as opposed to substituting the right defender for the wrong one. This is not a mistake of fundamental incompetence, but an error in detail which was not shown to have any real significance and the basis of the action remains as before.

[17] None of the subsequent cases cited really advanced the matter much further. In ***McCulloch* v *Norwest Socea Ltd*** 1981 SLT 201 the pursuers were advised in advance of service of the summons of the true title of their opponents but still served the action on the wrong defenders. Nonetheless, the court allowed an amendment to describe the defenders in the proper way on the basis that although the proposed change was more than a formality, the discretion of the court should be exercised in favour of allowing the amendment in the interests of justice and because no significant delay or prejudice would be caused. In ***Richards & Wallington (Earthmovings) Ltd* v *Watlings Ltd*** 1982 SLT (N) 66 the court refused an amendment to cure a problem raised by an action raised in the wrong name of a company, but I consider this case to be of little assistance here as it was exclusively concerned with the question of arrestments. In *Watson* v *Frame* 1983 JLS 421, an amendment was allowed to design correctly the name of the defenders outwith the prescriptive period on the grounds that the proposed change was one of form rather than substance, and the correction of a misdescription rather than the substitution of a new defender. In ***Orkney Islands Council* v *S and J D Robertson & Co Ltd*** 2003 SLT 775, much the same view was formed. In all these circumstances, it appears from these various authorities that the present minute of amendment could only be refused if a different and unconnected entity was sought to be introduced as a party to the action, or an entirely new cause of action were to be substituted from that originally pled. In the present case, neither of those situations obtain.

[18] In practical terms, it should in my view be a matter of complete indifference to the defenders that the pursuers have so misdescribed themselves; so long as the proper design is in place before the matter becomes critical, and no substantial prejudice appears to be involved, there is no reason why the court should not allow parties to focus correctly on who is involved in the dispute. No doubt it is regrettable that companies should change their title without informing those who should know that they have done so; but wherever arcane reason prompts this apparently common practice, I have no doubt that the net result is, as Mr Howie submitted, that everybody knows who the real parties are. The fact that the Link Housing Association Limited continued to exist after it had transferred its assets and engagements to Link Group Limited seems to me to be of little moment. What happened in the present case was clearly a blunder, and a matter of form rather than substance. No prejudice of any kind was suggested by the defenders; not even that to allow the amendment would deprive them of an opportunity to take advantage of the blunder and escape liability for any misdoings that might be proved against them. On the question of the correct designation of the pursuers I therefore can find no reason to refuse the Minute of Amendment.

[19] Also, I have no doubt that in a complex matter of this kind, any defects will inevitably take some time to emerge. That they did not all become obvious in a complete and true sense prior to the lodging of the summons is understandable. The suggestion that the pursuers knew something of the existence of the defects more than five years before describing them more fully in the pleadings is not, in my view, a convincing reason for excluding all reference to such problems after the prescriptive period has been completed. It would be surprising if the pursuers had been able to describe completely all of the problems which this contract has caused them at any particular point prior to the expiry of the prescriptive period. They have indicated within the appropriate time limits the general nature of the complaints which they make against the defenders. It would, in my view, be unrealistic to require them to provide full details of those complaints in a matter of this sort from the outset, or to prevent them from expanding on the detail of these general averments as such detail becomes apparent and the action progresses beyond the expiry of the prescriptive period. In these circumstances I propose to allow the minute of amendment for the pursuers as answered by the defenders and thereafter adjusted. The action will then be put out by order in order to determine further procedure.

Pursuer: Howie, QC; Harper MacLeod
First Defenders: Borland; MacRoberts
Second Defenders: Wolffe; Simpson & Marwick, WS
Fourth Defenders: Walker; Bishops
Fifth Defenders: Erroch; Drummond Miller, WS