SHERIFF APPEAL COURT

[2026] SAC (Civ) 31
HAM-A130-19

Sheriff Principal Aisha Y Anwar

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR

in appeal by

ALAN CLARK

Pursuer and Appellant

against

SHAWBROOK BANK LIMITED

Defender and Respondent

Pursuer and Appellant: Tosh, advocate; Dallas McMillan
Defender and Respondent: R G Anderson, advocate; Wilson McKendrick Solicitors Ltd

19 April 2023

Introduction

[1] The appellant and his wife, Mrs Clark, entered into a contract with My Planet Ltd for the supply and installation of solar panels at their home. That contract is governed by Scots law. My Planet Ltd entered into liquidation in March 2016. The respondent is a lender. The respondent provided loans to customers purchasing solar panels from My Planet Ltd. The appellant and Mrs Clark also entered into a loan agreement with the defender. The loan agreement is governed by English law.

[2] In March 2019, the appellant raised proceedings against the respondent seeking payment of £10,623.01 with interest representing the sums paid under the loan agreement. The appellant avers that he was induced to enter into these contracts by misrepresentations made by a salesman for My Planet Ltd. He avers that the salesman represented that the solar panels would pay for themselves and would generate a profit for the appellant.

[3] The appellant asserts three heads of claim. First, that he is entitled to damages from the respondent arising from a breach of the implied terms of the contract with My Planet Ltd in terms of section 75 of the Consumer Credit Act 1974 ("the 1974 Act"). Second, that as the salesman for My Planet Ltd was also an agent for the respondent, he is entitled to damages under English law for misrepresentations made by the salesman in terms of the Misrepresentation Act 1967. Third, the relationship between himself and the respondent being unfair, within the meaning of section 140B of the 1974 Act, he is entitled to an order for repayment of the sums paid under the loan agreement.

[4] The appellant's pleadings averred that the contractual arrangements were between the appellant and the respondent. During an amendment procedure, upon the production of the contractual documentation by the appellant, it became apparent that Mrs Clark was a party to the loan agreement and the contract with My Planet Ltd. This prompted the respondent to introduce a plea of no title to sue. To address that plea, the appellant sought to amend his pleadings by adding Mrs Clark as an additional pursuer.

[5] The sheriff refused to allow Parts 2 and 3(i) of the appellant's minute of amendment which sought to add Mrs Clark as an additional pursuer. The appellant appeals against that decision.

The sheriff's decision

[6] Before the sheriff, the focus of the parties' submissions had been the issue of prescription. The sheriff concluded that the appellant did not, on his own, have title to sue. That being the case, she concluded that no relevant claim had been made to interrupt prescription. The proposed amendment would introduce a new party when, otherwise, proceedings could not be raised afresh. No challenge is taken to the sheriff's decision on the issue of prescription. For the purposes of the appeal, counsel for the appellant invited this court to proceed on the hypothesis that adding Mrs Clark as an additional pursuer would have the effect of allowing a claim to be brought outwith the prescriptive period.

[7] The sheriff went on to consider whether she should exercise her discretion in favour of allowing the amendment:

> "[17] The next question then is whether the court should allow the addition of a pursuer by amendment at this stage. Until the production of the loan agreement, the defender may well have been in error in the same way as the pursuer, however the onus is on the pursuer to establish their title to sue. It is the pursuer who seeks to correct their error and claim the correction is merely technical. However, the error was not of a technical nature. It arose from a misunderstanding as to who the parties were that had contracted. If allowed, the proposed amendment would amount to a distinct claim arising from an obligation to different obligees, that being Mr and Mrs Clark having a joint interest, as opposed to Mr Clark alone.
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> [18] The proposed amendment is a matter of substance, making a change of a fundamental nature if it were allowed. Having determined that this is an amendment of substance I am constrained by the dictum of the Lord President (Hamilton) in *Gray Aitken Partnership Ltd v Link Housing Association Ltd*, at paragraph 11, whereby restraint is to be applied to the exercise of the court's discretion by reason of the impropriety of introducing a new party after expiry of the period of prescription and, regrettably, I must refuse to allow amendment to add Mrs Clark as a pursuer."

Grounds of Appeal

[8] The appellant advances three grounds of appeal:

1. The sheriff erred in concluding that the proposed amendment would involve a fundamental change in the action and that restraint required to be applied to the exercise of her discretion;
2. The sheriff erred in concluding that the appellant did not have title to sue insofar as he sought orders under section 140B of the 1974 Act;
3. The sheriff erred in placing excessive weight on the nature of the amendment and in so doing failed to take account of, or placed insufficient weight upon, other factors.

Submissions

Submissions for appellant

[9] On behalf of the appellant it was submitted that the proposed amendment was competent in terms of OCR 18.2. The appellant referred to the dicta in *Gray Aitken Partnership Ltd* v *Link Housing Association Ltd* 2007 SC 294, *Perth & Kinross Council* v *Scottish Water* 2017 SC 164 and *Pompa's Trustees* v *Edinburgh Burgh Council* 1942 SC 119; the critical question was whether, on a proper analysis, the proposed amendment involved a fundamental change in the appellant's case. That analysis required to consider the substance of a proposed amendment not its mere form. While a change in the identity of a party to an action will generally be of a fundamental nature, an objective approach requires to be taken. The question in the present case was, how would a reasonable litigant or professional adviser construe the initial writ? Were the pursuers identified with sufficient clarity, objectively considered?

[10] Even where a change in the identify of a party is considered to be a fundamental change, the sheriff retains discretion to allow the amendment, where for example, circumstances arise due to the conduct of the respondent (*Sellars* v *IMI Yorkshire Imperial Ltd* 1986 SC 235). In the present case, the sheriff had erred in concluding that she required to apply restraint in the exercise of her discretion. As the proposed amendment did not involve any change to the essence of the case, the principle enunciated in *Pompa's Trs* was not engaged. The basic complaint remained the same. There was no change in the identity of the pursuer – there was an addition of a new pursuer without any separate craves, articles of condescendence or pleas-in-law (*cf Maclean* v *British Railways Board* 1966 SLT 39). The sheriff had erred in her description of the amendment as seeking to introduce a "distinct claim". A reasonable litigant would have construed the initial writ as advancing a claim by the counterparties to the respondents in the loan agreement, namely the appellant and his wife. The present situation was distinguishable from, and not akin to, that in *Link Housing*. Unlike in *Link Housing*, there was no obvious risk of ambiguity in the identity of the parties in the present case.

[11] In relation to the second ground of appeal, the appellant fell to be treated as having brought the action by or on behalf of both himself and his wife in terms of section 185(1)(b) of the 1974 Act. Had the sheriff considered section 185(1)(b) she would have concluded that the respondent's resistance to the amendment was truly an objection of form rather than substance. The sheriff had approached the issue on the basis that the issue of title to sue affected the whole claim; it did not. It affected the contractual and delictual claim only.

[12] In relation to the third ground of appeal, the sheriff had placed excessive weight upon the nature of the amendment. She had failed to take into account or failed to give sufficient weight to four factors. First, the respondent's averments and judicial admissions

that the appellant had been the sole counterparty to the loan agreement and the contract with My Planet Ltd. In Answers 5, the respondents had averred that a copy of the contract between the parties "will be produced". The pleader must have had sight of that contract. Second, the absence of any real and material risk of ambiguity about the true nature and substance of the claim. The copy contract had been produced in May 2021 when the amendment was on-going and no title to sue plea had been raised at that point. Third, the question of whether the solar panels were of satisfactory quality and conform to description and the question of whether the contracts had been induced by misrepresentation would still require to be determined in the context of the appellant's third ground of action, namely that the relationship between the parties was unfair; the same issues would be ventilated for all three claims. Fourth, the absence of any prejudice to the respondent other than the loss of the advantage conferred by prescription. The respondent had not advanced any prejudice. There is no new factual material for the respondent to investigate as a result of the proposed amendment.

Submissions for respondent

[13] On behalf of the respondent, it was submitted that the sheriff's decision was a discretionary one and the grounds of review of such a decision are limited. The question was whether, in the exercise of that discretion, the sheriff had misdirected herself in law or otherwise transgressed the limits of the discretion reposed in her to permit the appellate court to intervene (*A* v *Glasgow City Council* 2019 SC *295*).

[14] Any claim relating to the loan agreement and the contract with My Planet Ltd required to be brought by both parties who jointly entered into the agreements (*Detrick & Webster* v *Laing's Patent Overhead Handstitch Sewing Machine Co Ltd* (1885) 12 R 416 at 419 per

Lord President (Inglis) and followed in *Trustees of the Grange Trust* v *City of Edinburgh Council* [2017] CSOH 102 at para [15] by Lord Boyd of Duncansby). The appellant had no title to sue in respect of the contractual and alleged misrepresentation claims. The appellant had not pled that he had raised the proceedings in a representative capacity for his wife. If that was not necessary then the amendment was not necessary in relation to the third head of claim.

[15] The contract and loan agreement were concluded in January 2014. The loan agreement was terminated on 4 June 2014. The present action commenced on 23 April 2019. The appellant had no title to sue alone. An amendment to include Mrs Clark was not intimated until 19 January 2022. The action raised by the appellant who had no title to sue, did not interrupt prescription (Johnston KC, *Prescription and Limitation* (2nd Edition 2012)). Were fresh proceedings to be raised by the appellant and his wife, they would be out of time.

[16] It would be an improper exercise of the court's discretion to allow an amendment to introduce a new party after the expiry of the period of prescription (*Gray Aitken Partnership Ltd* v *Link Housing Association Ltd).*

[17] Unlike the situations in *Link Housing* and *Scottish Water,* the appellant should have been aware of the correct designation for the pursuers to this action. Unlike cases on misdescription of juristic persons, here, the appellant was a natural person who ought to have been aware of Mrs Clark's interest. The respondent cannot know, for example, if the parties are divorced. From an objective reading of the appellant's pleadings, it was plain that Mrs Clark was not a party to the proceedings.

[18] In relation to ground of appeal one, it was apparent from the opening words of paragraph 17 of her judgment that the sheriff did in fact go on to consider whether to

exercise her discretion to allow the amendment. The sheriff correctly identified that the amendment proposed was fundamental in nature.

[19] In relation to ground of appeal two, the appellant's proposed amendment did not distinguish between the common law and statutory claims. The sheriff had been correct to refuse the amendment.

[20] In relation to the question of prejudice, the submissions before the sheriff had been very brief. Answers 5 deal with the loan agreement. There was no prior judicial admission that the appellant was the sole counterparty to the loan agreement. The action was raised in May 2019. An incomplete version of the contract was produced in May 2021. A complete version was produced in October 2021. Minutes of amendment at the instance of the appellant were lodged in May and October 2021. In the course of the adjustment to the answers, the respondents took the title to sue point. The appellant did not aver that he had raised the proceedings in a representative capacity; if there was no ambiguity, then the amendment was not necessary. The scope of the proof was not relevant to consideration of the question of prejudice arising from allowing or refusing the amendment. The loss of the advantage conferred by prescription and limitation was however relevant.

[21] The sheriff has not transgressed the limits of her discretion. Standing the decision in *Dettrick* and *Link Housing*, it cannot be said that the sheriff has erred in law.

Decision

[22] The present difficulty has arisen as a result of the limited information before the pleader when the initial writ was drafted. Counsel for the appellant explained that this action was one of a larger number of actions in Scotland and England involving the respondent. The appellant's agents had received instructions from English agents in the

form of a spreadsheet or data file. Mrs Clark had not been mentioned on the spreadsheet. The initial writ had been drafted without sight of the loan agreement. The pursuer had simply averred "a copy of the contract will be produced." The terms of the contract with My Planet Ltd and the loan agreement formed the basis of the pursuer's claim. These ought to have been lodged when the initial writ was returned in 2019, in terms of OCR 21.1(1)(a). They were not. The appellant now seeks to remedy matters by way of amendment.

[23] The court has a wide discretion to allow amendment at any time before final judgment where it is necessary to add the name of an additional pursuer, in terms of OCR 18.2(2)(b)(iv). That discretion is not however unfettered. As explained by Lord President Cooper in *Pompa's Trs* (at p 125):

> "…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."

[24] The same restraint applies where an additional or substituted pursuer is sought to be introduced (*Gray Aitken Partnership Ltd* v *Link Housing Association Ltd; Maclean* v *British Railways Board; Arif* v *Levy and Macrae*).

The first ground of appeal

[25] For the purposes of this appeal, the appellant accepted that the amendment to introduce Mrs Clark as an additional pursuer would have the effect of allowing a joint claim by the appellant and Mrs Clark to proceed outwith the prescriptive period. Nevertheless, it was submitted that the sheriff had erred in law in her application of the general rule expressed by the court in *Pompa's Trs*.

[26] Notwithstanding that general rule, the court in *Pompa's Trs* allowed the amendment to substitute the correct defender, noting that the proposed amendment did not involve "a radical and fundamental incompetence, but a mistake in detail which, as it happens, now possesses no real significance". The pursuers had raised proceedings seeking compensation for damage by rioting under the Riotous Assemblies (Scotland) Act 1822 against the magistrates of Edinburgh; the statutory claim ought to have been raised against the town clerk. Commenting upon the outcome in *Pompa's Trs,* Lord Drummond Young, delivering the opinion of the court in *Perth and Kinross Council* v *Scottish Water* observed that:

> "It appears, therefore, that when an amendment is proposed after a time-limit has expired the court must consider the substance rather than the mere form of the amendment . . . on the facts of *Pompa's Trs*, it can been seen that a change in the identity of the defender will not matter provided that the substance of the action remains the same." (at para [11])

[27] In *Link Housing,* the First Division considered that an error in the description of the pursuer's designation was a matter of substance going to the identity of the person suing. The action had been brought in the name of a corporate body different from that in which right, title and interest to a claim had vested. Proceedings had been raised in the name "Link Housing Association Ltd". They ought to have been raised in the name "Link Group Ltd". The court concluded that the error in the description of the pursuer could not be said to have been in the nature of a clerical error.

[28] In *Perth and Kinross Council* v *Scottish Water,* the pursuers had raised proceedings against Scottish Water Ltd in relation to damage said to have arisen from flooding caused by a lack of sufficient capacity of a public sewer. Pre-litigation correspondence had been addressed to "Scottish Water", being the body with statutory responsibility for public sewers. Reminders had been issued to "Scottish Water Ltd" at the same address. The pursuers sought to amend the instance to substitute the correct defender, "Scottish Water",

after the expiry of the limitation period. Having considered the authorities, Lord Drummond Young, delivering the opinion of the Extra Division, concluded (at para [15]):

> "In applying the principles laid down in *Pompa's Trs v Edinburgh Burgh Council,* the critical question is whether on a proper analysis the proposed amendment involves a fundamental change in the pursuer's case, whether as to the identity of the parties or the ground of action or the general competence of the action. That analysis must in our opinion address the substance of what is proposed, not its mere form. This means that the case as originally pled and the amended case that is proposed must be considered as a whole; the identity of the parties, the remedy sought and the ground of action must be taken together in deciding whether there is a fundamental change."

[29] Noting that in *Perth and Kinross,* the change involved a change in the description of the defender, his Lordship went on to state at para [16]:

> "The significance of that change depends on whether that change should properly be categorised as a mere change in the name of the defender who has been sued, or a change in the identify of that defender. A change in identity will generally be of a fundamental nature; a change of name, if both names refer to the same legal person, will not be fundamental. The identify of a legal person is not the same as the name, but is more a fundamental concept".

[30] The subsequent discussion in paras [17] to [19] of his Lordship's analysis requires to be read in that context. In *Perth and Kinross*, the court was dealing with the designation of a legal person. It noted that "a legal person, although an abstraction, is more than a mere name" (para [16]). His Lordship made two observations. First, that court documents required to be interpreted on an objective basis; the critical question being who would a reasonable litigant or professional adviser in the position of the pursuer, defender or purported defender consider to be the correct defender? Second, the court required to consider whether the purported defender had been identified with sufficient clarity, objectively considered. The court noted that in *Link Housing,* it appeared that detailed consideration had not been given to the criteria for the identity of an artificial legal person; it had been assumed that the name defined the legal person. The court also considered it to

be a point of significant distinction that "the error was made by the pursuer as to its own designation, with an obvious risk of ambiguity or confusion as far as the defenders were concerned." (at para [14]).

[31] In the present case, on behalf of the appellant, it was submitted that the sheriff ought to have concluded that as the proposed amendment to add an additional pursuer was not fundamental in nature, the exercise of her discretion to allow it was not restrained by the dicta in *Pompa's Trs,* as applied in *Link Housing.* This court was invited to follow the approach in *Perth and Kinross Council.*

[32] Unlike the position in any of the authorities cited by the appellant, here, the proposed amendment seeks to add an additional party, rather than correct a designation or substitute a party to the existing action. There is no error in the designation of the appellant; his name is correct.

[33] However, the proposed amendment seeks to change the identity of the party pursuing the action from the appellant, to the appellant and his wife, jointly and severally. That is generally, a change of a fundamental nature; as recognised in each of the authorities this court was referred to. An error in correctly specifying the counterparties to the contractual arrangements with the respondents is a matter of substance, not merely of form, going to the identity of the person suing. It is not "a mistake in detail" of the type described in *Pompa's Trs.* The amendment seeks to change the definition of "pursuer" from one natural person to two natural persons. The proposed amendment is designed to defeat the respondent's plea that the appellant alone has no title to sue, which might otherwise lead to dismissal of the appellant's first and second heads of claim. Having examined the substance of the proposed amendment, the sheriff was correct to conclude that as it was of a fundamental nature and sought to introduce a new party after the expiry of the period of

prescription, she was constrained in the exercise of her discretion by the dictum of Lord President Hamilton in *Link Housing*.

[34] I am not persuaded that Lord Drummond Young's observations in *Perth and Kinross Council* set out in para [30] above are relevant to the present circumstances. These observations were made in the context of a discussion about the designation of legal persons. That is not the situation here. However, even if I am wrong about that, viewing matters objectively from the perspective of a reasonable litigant or professional adviser in the position of the respondents, does not assist the appellant in the present case. Unlike the situation in *Perth and Kinross Council*, there is no suggestion that the background to these proceedings, such as pre-litigation correspondence or discussions, would have informed the respondent or its advisers of the correct identity of the pursuers. Nor would a reasonable litigant or professional adviser have construed the initial writ as advancing a claim by the counterparties to the respondent in the loan agreement. There was no indication in the initial writ that the pursuer was not the sole counterparty; the indications were to the contrary. No contractual documentation had been lodged on behalf of the appellant (see OCR 21.1(1)(a)), until considerably later in the proceedings. As currently pled, the appellant is designated as the pursuer without qualification. The craves seek payment to him alone without mention of any other party. In relation to Lord Drummond Young's second observation, again, that does not assist the appellant. The appellant had been identified with sufficient clarity, objectively considered. There was no ambiguity or uncertainty; his designation was correct. The appellant's pleadings were silent on the possibility of an additional pursuer.

[35] It was submitted on behalf of the appellant that a reasonable litigant or professional adviser in the position of the respondent would have been aware that the pursuer had

intended to raise proceedings on behalf of himself and his wife. That submission is predicated upon an outdated general assumption that one spouse must be presumed to be acting in a representative capacity for both in relation to their financial affairs.

[36] The first ground of appeal is refused.

The second ground of appeal

[37] In relation to the second ground of appeal, it was submitted that the sheriff erred in holding that the appellant had no title to sue in so far as he sought orders under section 140B of the 1974 Act; as the loan agreement had two debtors, the appellant fell to be treated as having brought the claim by himself and his wife in terms of section 185(1)(b) of the 1974 Act. This submission is ill-founded. The sheriff made no such decision.

[38] It would appear that there was very limited discussion, if any, of the provisions of the 1974 Act before the sheriff. The appellant's minute of amendment did not seek to distinguish the appellant's various heads of claim. It was submitted that had the sheriff understood that the appellant had title to sue in respect of the orders sought under section 140B of the 1974 Act, it is likely that the sheriff would have considered the respondent's resistance to the amendment was truly an objection as to form rather than one of substance.

[39] It is inappropriate to invite this court to speculate on what the sheriff might have done in a situation where it would appear that an argument was not properly before her. In any event, in terms of OCR 18.2(2)(b)(iv), the sheriff may allow an amendment which is "necessary" to add an additional pursuer. Standing the terms of section 185(1)(b) of the 1974 Act, the appellant's proposed amendment was not necessary. The second ground of appeal is refused.

The third ground of appeal

[40] In relation to the third ground of appeal, it would appear that the focus of the submissions before the sheriff had been the issue of prescription. The appellant submitted that the sheriff had placed excessive weight on the nature of the amendment and had failed to give sufficient weight to other factors.

[41] Contrary to the appellant's submissions, I am satisfied that the sheriff did not regard the nature of the amendment as determinative. That is evident from the sheriff's comments in para [17] of her decision. This court does not have the benefit of a full discussion by the sheriff on the 'other factors' which ought to have informed the exercise of her discretion as it would appear these were not fully ventilated before her.

[42] Insofar as the respondent had made averments that the appellant was the sole counterparty to the contract with My Planet Ltd and the loan agreement, the respondent was of course responding to the averments made by the appellant. The sheriff correctly noted that the onus lay upon the appellant to correctly set out the parties to the action. She noted that the respondent may well have been in error in the same way as the appellant. In the absence of the contractual documentation, which it fell upon the appellant to lodge and produce, little weight falls to be attached to this factor in the discussion on whether to allow the appellant's amendment. Similarly, little weight falls to be attached to the stage at which the respondent advanced a plea of no title to sue.

[43] While the question of whether the solar panels were of satisfactory quality and conformed to their description and the question of any contractual misrepresentation will still be relevant to the appellant's statutory claim, the fact that the same evidence will require to be led to establish the appellant's third head of claim as would require to be led

for his first and second heads of claim, is not a material factor in the exercise of the court's discretion. The question for the court is not the effect of the amendment on the scope of the proof, but rather whether the proposed amendment is "necessary". It is not necessary in relation to the appellant's third head of claim for the reasons already explained.

[44] Finally, the appellant pointed to the absence of any prejudice to the respondent other than the loss of any advantage conferred by prescription. It was submitted that the fundamental policy of the law to protect defenders from stale claims which after the passage of time would be difficult to investigate, would not be undermined, if the amendment were allowed. I accept that the respondent would not require to make further investigations or to be faced with a fresh set of facts, as a result of the addition of Mrs Clark as a party to the action. That is a relevant factor in the exercise of the court's discretion. However, the loss of the advantage conferred by prescription and the ability to seek dismissal of the craves related to the first and second heads of claim on the basis that the appellant has no title to sue, is also a relevant consideration and does constitute a prejudice to the respondent. The appellant, on the other hand, may still pursue his third head of claim.

[45] It is important too, to take account of the nature of the error in the designation of the appellant as the sole pursuer. The error in the present case could not be described as a "clerical error" as that term was explained by the court in *Perth and Kinross Council*. The error was not one which arose as a result of the mis-transcribing of information or the copying and pasting of material. A deliberate choice had been made to refer only to the appellant in a spreadsheet or data file of potential litigants who may raise proceedings against the respondents in Scotland, presumably by someone who had considered the relevant contractual material. A deliberate choice had been made by the drafter of the initial writ to rely upon the content of that spreadsheet rather than examine and timeously lodge

the founding contractual documents. The appellant had made an error in relation to the designation of the pursuers. The identity and designation of the pursuers was a matter which was, or ought to have been, within his knowledge and the knowledge of those representing him.

[46] I am not persuaded that the sheriff placed excessive weight on the nature of the amendment or failed to take account of the limited discussion before her of other factors which may be relevant to the exercise of her discretion. Even if I am wrong in that assessment, having regard to the submissions now made before this court, I am not persuaded that it would be in the interests of justice to allow the appellant's proposed amendment. The third ground of appeal is refused.

[47] Accordingly, the appeal is refused. Parties were agreed that expenses should follow success and that sanction be granted for the employment of junior counsel. I shall award the expenses of the appeal in favour of the respondent with sanction for the employment of junior counsel.