FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 26
A68/13

Lord President
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

CAROLINE COWAN

Pursuer and Reclaimer

against

LANARKSHIRE HOUSING ASSOCIATION LTD

Defenders and Respondents

_____

Pursuer and Reclaimer: Sutherland; Allan McDougall
Defenders: Johnston QC, O'Rourke QC; Brodies LLP

21 May 2020

Introduction

[1] In this reclaiming motion, the pursuer seeks a review of the interlocutor of the Lord Ordinary, dated 15 May 2019, which refused the pursuer's motion to amend her pleadings in her action for damages against the defenders. The defenders are her landlords under a secure tenancy. The amendment relates to the pursuer's averments of a breach of duty

under schedule 4 to the Housing (Scotland) Act 2001. The duty is said to arise from the pursuer's home having been built on contaminated land. The issues are, first, whether the amendment amounts to a fundamental change in the case such as would deprive the defenders of the protection of the time bar provision in section 17(2) of the Prescription and Limitation (Scotland) Act 1973. Secondly, a question arises as to whether the Lord Ordinary erred in requiring the pursuer to proceed by way of amendment when the record had not yet closed. Thirdly, a challenge is made to the Lord Ordinary's exercise of discretion.

The Summons and the Statutory Duties

[2] The action was raised in 26 September 2012 under RCS Chapter 43; that is the procedure dedicated to personal injuries cases. It is important to observe *in limine* that this procedure dispenses with adjustment and the lodging of open and closed records (RCS 43.1.(3)). It requires the pursuer to lodge a "brief statement" which contains only those facts which are necessary to establish the claim (RCS 43.2.(1)). The relevant form (43.2-A) repeats this requirement and adds that the pursuer is to "*State whether claim based on fault at common law or breach of statutory duty. If breach of statutory duty, state provision of enactment*". One purpose of Chapter 43 procedure, as set out in the report (1998) and supplementary report (2002) of the working group chaired by Lord Coulsfield, was to avoid the perceived necessity under ordinary procedure to elaborate upon the nature of the common law and statutory duties founded upon.

[3] The pursuer lives at Tiber Avenue, which is within the Watling Street development site in Motherwell. Her averments of fact were as follows:

> "4b. The former uses of the site resulted in various types of contaminated waste being left on and under the ground at the site. This contaminated waste included solvents. The solvents were chemicals in the form of volatile organic compounds

(VOCs) and semi-organic volatile compounds (SVOCs)... The solvents included the chlorinated solvents trichloroethylene … and tetrachloroethylene ... These … chlorinated solvents are each capable of being harmful to human health.

4c. Solvents present below the ground surface were not removed from the site prior to the commencement of housing construction. Solvents present under the ground surface throughout the site gave off vapours. The vapours … permeated the houses … The vapours … contained levels of VOCs contaminants which are harmful to human health. The occupants of the houses, including the Pursuer, were exposed to those vapours ... … the Pursuer found out about the potential contamination of land which could be harmful to her health on or about 1 March 2010.

4d. The pursuer became the tenant of the Defender… on or about January 2005. The tenancy… was a secure tenancy under the Housing (Scotland) Act 2001. As a consequence of the exposure to, and inhalation of, the VOCs and SVOCs in the air within said property the Pursuer suffered loss, injury and damage."

[4] The pursuer sought damages based on two breaches of duty:

"6a. The Defender was in breach of the following contractual duty: It was an implied contractual term at common law that the Defender provided a house that was in a tenantable and habitable condition at the beginning of the tenancy"; and

"6b. The Defender was in breach of its statutory duty in terms of Section 27 and Schedule 4 of the Housing (Scotland) Act 2001."

Section 27, which is headed "Repairs", provides that Schedule 4 has effect. Schedule 4, which is headed "Landlord's Repairing Obligations" provides that:

"1. The landlord in a Scottish secure tenancy must—

(a) ensure that the house is, at the commencement of the tenancy, wind and watertight and in all other respects reasonably fit for human habitation, and

(b) keep the house in such condition throughout the tenancy.

2. The landlord must, before the commencement of the tenancy—

(a) inspect the house and identify any work necessary to comply with the duty in paragraph 1(a), ...".

The Schedule goes on to deal with the requirement to carry out any necessary work within a reasonable time and the landlord's right to enter the house to carry out any necessary works.

[5] Defences were lodged timeously. On 21 January 2013, on joint motion, the action was withdrawn from the Chapter 43 procedure, appointed to proceed as an ordinary cause, and immediately sisted for a period of six months. In any event, on 26 February 2013, the Lord President (Gill) directed (Direction No. 1 of 2013: *Personal Injury Actions relating to alleged ground contamination at the Watling Street Development in Motherwell*) that Chapter 43 should not apply to actions for damages relating to contaminants at the site. The Direction provided (para 5) that, subject to "any specific orders of the court, actions shall proceed as ordinary actions and be subject to the rules which apply to such actions". A nominated judge was given the power (para 10) to set or vary timetables and to make such order as was thought fit "for the speedy determination of the actions". Speed has not been a characteristic of the progress of the actions. A further five sists of the pursuer's action were granted, pending the resolution of the "lead case" of *McManus* v *City Link Development Co* (*infra*).

McManus v City Link Development Co

[6] *McManus* was an action by two other inhabitants of the site against: City Link Development Co Ltd, who had been the developers; Scott Wilson Scotland Ltd, who had been the environmental consultants; and the defenders as landlords. The written pleadings for and against the three defenders were extensive. They extended to some 92 pages. They involved an interweaving of common law and statutory cases, including duties alleged to have existed under the Environmental Protection Act 1990.

[7] On 22 December 2015, in an Opinion ([2015] CSOH 178) subsequently described as "lengthy and detailed", the common law case against City Link was dismissed on the basis that they owed no non-delegable duty of care to the pursuers and they had complied with

any duty of care having become satisfied that Scott Wilson had assessed the site as suitable for residential development. There was a relevant case against Scott Wilson, although there were issues of time bar pending. The *McManus* case against the defenders was, first, that there had been breaches of the implied term of habitability in the pursuers' tenancy agreement. The implied term was the same as that averred (*supra*) in this action. The Lord Ordinary held that it had not been breached because a house could not become uninhabitable either because of its location or its construction on contaminated land. This conclusion was not challenged in the subsequent reclaiming motion ([2017] CSIH 12).

[8] The statutory case against the defenders was that they had a duty under Schedule 4 of the 2001 Act "to ensure that the house (was), at the commencement of the tenancy, wind and watertight and in all other respects reasonably fit for human habitation". The defenders had to "inspect the house and identify any work necessary to comply with" the duty (para [186]). This case failed because of the absence of averments about the condition of the property at the beginning of the tenancy. The Lord Ordinary observed that:

> "[190] There is no averment that, before [the commencement of the relevant tenancy, the defenders had] failed to ensure that the house was reasonably fit for human habitation. There is no averment that they failed to inspect the properties before either of these dates or that they failed to identify any work necessary to comply with the duty to ensure fitness for habitation."

The pursuers had relied on the same averments on which they based the breach of the implied term of the tenancy; that the relevant house was not fit for human habitation "as a result of being built on contaminated land and the construction of the house permitted contaminated vapours to permeate the said house." That was not a relevant case of breach of the statutory duty. The house was, again, not uninhabitable either because of its location or its construction. This part of the Lord Ordinary's Opinion was challenged in the *McManus* reclaiming motion.

[9] On 14 February 2017, an Extra Division ([2017] CSIH 12; 2017 Hous LR 84) refused the reclaiming motion by the pursuers against, *inter alia*, the Lord Ordinary's dismissal of the case against the defenders. The court observed that:

> "[36] In his opening submissions, junior counsel advised the court that he had not accepted the invitation by the court to set out in writing reference to the averments concerning [the defenders] on which he relied. He adopted his written submission. The court insisted that, in the course of oral submissions, he clearly identified the foundation in the pursuers' pleadings on which he relied to set out a relevant case. Thereafter he identified Articles 2 and 18 and, later in his submission, relied also on part of Article 13."

Although the court considered (para [48]) that "Fumes or vapours permeating a house causing ill health may, depending on the facts averred, be capable of amounting to a breach of the statutory provision", it accepted the defenders' submission that:

> "[42] … the pursuers must aver and offer to prove that at the commencement of a particular tenancy (i.e. on one specific date) the house let is … not wind and watertight and in all other respects reasonably fit for human habitation (2001 Act Sch 4). Although there are averments about the condition of the site and problems from time to time, including the averments in Article 13, these averments are insufficient to found a case under the statutory provisions relied on by the pursuers against the … defenders".

[10] Similar to the Lord Ordinary's reasoning (at para [190]), the court noted:

> "[46] … There are no averments that contaminated vapours permeated … the … property at the commencement of the tenancy. …".

Accordingly:

> [47] … The case pled [in Article 13] is not a case to the effect that on a specified date of commencement of the tenancy, vapours harmful to health permeated the house to the extent that the house was not … at the commencement of the tenancy, wind and watertight and in all other respects reasonably fit for human habitation (the 2001 Act). … [T]hat is the minimum requirement of relevant pleadings … and we do not consider that the pleadings meet that minimum requirement. Indeed, in his oral submissions we understood counsel to explain that there was nothing wrong with the properties but the problem was that as a result of the contaminated land, as averred in Article 18, vapours at some point were likely to occur in the properties and did so in this case causing injury to health.

> [48] … the Lord Ordinary was correct to focus on the averments the pursuers offered to prove in relation to the date of commencement. It is not enough… to aver that problems might arise in the future during the tenancy or that problems did arise, for example, some fumes or vapours penetrated the house. It is essential to offer to prove that at the date of the commencement of the particular tenancy, the condition of the house was such (and we accept that might be because of the penetration of vapours or fumes) that it was uninhabitable by reference to the relevant statutory test which applied.
>
> [49] In the absence of averments which we consider to be essential, the appeal by the pursuers in relation to the statutory case against the third defenders is unsuccessful and accordingly the reclaiming motion is refused. …"

It is clear from the Opinion that the court was somewhat frustrated by the manner in which the case had been inadequately pled by the pursuers, despite invitations by the court to remedy what were perceived to be obvious defects in the pleadings which had been highlighted by the Lord Ordinary.

[11] On 26 January 2018, the United Kingdom Supreme Court refused permission to appeal (UKSC 2017/0120). This brought the *McManus* proceedings, in so far as relating to the present defenders, to an end. The case against Scott Wilson continued.

The Minute of Amendment

[12] Meantime, on 7 April 2017, the pursuer's case was sisted again until 7 July. The sist was not renewed. It is not disputed that neither party was aware that the sist had expired despite the existence of an interlocutor which made that plain. Had this been observed by the pursuer, she could have proceeded to lodge an Open Record in accordance with ordinary procedure (RCS 22.1(1)). That having been done, a date for the commencement of an adjustment period would have been provided along with a date upon which the record would close (RCS 22.2(1)). Had that been done, for reasons which will become apparent, the

present problem would not have arisen. What happened was rather different. The actions had fallen asleep and required what was formerly called awakening (see now RCS 23.3(4)).

[13] On 5 April 2018, at a By Order hearing in *McManus*, the pursuers intimated that further investigations were being carried out to see whether this action, and the other 35 similar actions against the defenders, could continue. In due course, an expert report, dated 31 October 2018, was obtained by the pursuer in support of her position that there had been vapour in her house at the beginning of her tenancy. On that date, the agents for all of the pursuers wrote to the defenders' agents as follows:

> "As you are aware, the case of *McManus* which is currently the subject of taxation was not a test case. We have a further 37 (*sic*) claims issued against your client which we are currently obtaining expert evidence in relation to so that we can waken them under the relevant Court procedure".

[14] There was no procedure in the pursuer's case until 27 February 2019, when the defenders, apparently prompted by the pursuer's motion to renew the (expired) sist, enrolled a motion to dismiss all the actions on the basis that the lead action, namely *McManus*, had been dismissed. On 18 March, the Lord Ordinary refused the pursuer's motion to sist and, *in hoc statu*, the defenders' motion to dismiss all the actions. He appointed the pursuer, if so advised, to lodge a minute of amendment and move to have it received. Leave was granted to the defender to reclaim that interlocutor but no reclaiming motion was marked.

[15] The pursuer's minute of amendment seeks to replace all of the averments in the original statement of claim with new articles of condescendence, including the following:

> "2. … The house is one of a number of similar properties owned by the defender which were built on part of a former brownfield site at Watling Street, Motherwell … From 1947 or thereby the site was occupied by Metropolitan Vickers Limited until the 1970's (*sic*) or thereby. From the mid 1970's (*sic*) or thereby the site was occupied by Satchwell Sunvic Limited. While occupied by Metropolitan Vickers Limited and

thereafter Satchwell Sunvic Limited the site was used as an engineering works. Activities carried out at the engineering works included electroplating, which used solvents in the electroplating process. The solvents used at the site were chemicals in the form of volatile organic compounds ('VOCs') and semi-organic volatile compounds ('SVOCs'). Some of the solvents used were in pure chemical form. Other solvents used were complex compounds made up of a number of chemicals. The engineering works were vacated in the late 1970's (*sic*) and were demolished by or about 1984. The former uses of the site resulted in waste material being left in the ground at the site, and contamination of the ground at the site. This contamination included waste ash, slag, brick, asbestos, scrap metal, concrete, petroleum products and solvents. …

3. Between 1990 and 1995 the site was investigated, and work was undertaken to remediate the site with the intention of making it suitable for residential development. The remediation work … failed to remove all the solvents which were in the ground at the site. Between 1998 and 2000 houses were built on that part of the site which is now owned by the defender. Solvents present below the surface of the ground had not been removed from that part of the site prior to the commencement of housing construction. The ground and groundwater in that part of the site where ... Tiber Avenue was built was contaminated by solvents present below the surface of the ground. ... The solvents which were present below the surface of the ground gave off vapours. The vapours … permeated ... Tiber Avenue … On or about January 2005 the pursuer became the tenant of the house. The pursuer's landlord was the defender. *At the commencement of the pursuer's tenancy TCE (trichloroethylene) vapours were permeating the house. The TCE vapours permeating the house at the commencement of the tenancy were harmful to the health of the pursuer. At the commencement of the tenancy TCE vapours were present in the house at a concentration which was harmful to health. TCE vapours continued to permeate the house during the course of the tenancy* (emphasis added).

4. The pursuer's tenancy of the house was a Scottish secure tenancy under the Housing (Scotland) Act 2001. In terms of Section 27 and Schedule 4 paragraph 1 of the 2001 Act the defender had a statutory obligation to (a) ensure that the house was, at the commencement of the tenancy, wind and watertight and in all other respects reasonably fit for human habitation, and (b) keep the house in such condition throughout the tenancy. *The house was not in all respects reasonably fit for human habitation at the commencement of the tenancy by reason of the TCE vapours permeating the house at the commencement of the tenancy. The house was not in all respects reasonably fit for human habitation at the commencement of the tenancy by reason of the TCE vapours present in the house at the commencement of the tenancy.* As a consequence, the defender was in breach of its statutory obligation to the pursuer under the tenancy. …" (emphasis added).

Lord Ordinary's Reasoning

[16] The Lord Ordinary refused to allow the pursuer's minute of amendment to be

received. He granted the defenders' motion to dismiss all 36 actions. He explained that he had required a minute of amendment "in order to consider how to progress matters". The proposed changes to the pleadings were being proffered after more than two years had elapsed since *McManus*. More than 18 months had passed since the expiry of the sist. The pursuer had not lodged an open record or taken steps to secure an adjustment period. The proposed changes were to be based on the investigations that had resulted in the report of 31 October 2018. The amendment proceeded on the basis that the injury had first been suffered when the tenancy had commenced. The averment in the last sentence of paragraph 4c of the original summons regarding the point at which the pursuer first became aware that she had suffered harm from potential contamination (on or about 1 March 2010) was not included in the new pleadings.

[17] RCS 43.2(1) and Form 43.2-A required the original summons to state the provision of any enactment said to be breached. The pursuer's summons failed to specify adequately the part of schedule 4 to the 2001 Act on which the pursuer was founding. Even if it was taken to be referring to paragraph 1(a), there had been no evidential basis for such an averment when the action was raised. The problem with the averments had been identified in *McManus*. It had been the catalyst for the instruction of the expert report.

[18] The pursuer's claim as amended would have prescribed under section 17(2) of the Prescription and Limitation (Scotland) Act 1973. She had sought, 14 years after the commencement of the tenancy and some 6½ years after the action was raised, to amend a case based upon an unspecified statutory ground to one averring a specific provision. The Lord Ordinary exercised his discretion to refuse to allow the minute of amendment to be received, following *Sellars* v *IMI Yorkshire Imperial* 1986 SC 235. No claim with a proper evidential foundation had been made within three years of the occurrence of the injury or

within three years of the date when the matters described in section 17(2) of the 1973 Act became known to the pursuer.

Submissions

Pursuer

[19] The pursuer first compared the averments in the original summons with those in the Minute of Amendment with a view to arguing that the minute of amendment only made the pleadings under chapter 43 (*Hamilton* v *Seamark Systems* 2004 SC 543; *Higgins* v *DHL International UK* 2003 SLT 1301; *Dillon* v *Greater Glasgow Health Board* 2011 Rep LR 122) more specific for the purposes of an ordinary action. Two breaches of duty were founded on: that of the implied term to provide a house in a tenantable and habitable condition at the beginning of the tenancy; and that of a statutory duty in terms of section 27 of and schedule 4 to the 2001 Act. The claim in the Minute of Amendment had been specified in the summons which had been brought within the triennium. The pursuers were only giving further specification of the statutory provision which had previously been identified as relevant. The cause of action pled in the minute of amendment was the same type as averred in the original summons. It was considered unnecessary, in light of *McManus*, to repeat the common law case. The original summons, in any event, gave sufficient specification of the facts and the provisions relied upon (*Hamilton* v *Seamark Systems Limited* (*supra*)).

[20] Secondly, the pursuer argued that the Lord Ordinary's decision resulted in procedural injustice. No period of adjustment was ever appointed. After the period of sist had expired, both parties mistakenly believed that this action, and the 35 related actions, continued to be sisted. The action "fell asleep" (*American Mortgage Co of Scotland Ltd* v

Sidway (Sisted Cause: Wakening) (1906) 14 SLT 521). It was re-woken by the pursuer's motion to re-sist. That motion was refused on 18 March 2019. The requirement to have the pursuer's pleadings updated following a remit of the action from Chapter 43 procedure to the ordinary roll was a matter within the discretion of the Lord Ordinary in terms of the Lord President's Direction. The minute of amendment was in substance an adjustment of the pursuer's pleadings in the absence of any procedure for adjustment or the closure of the record. *Sellars* v *IMI Yorkshire Imperial Ltd* (*supra*) was not relevant.

[21] Thirdly, the Lord Ordinary erred in the exercise of his discretion. The pursuers would lose the right to proceed following a period in which the action had been sisted of consent. The defenders would not be prejudiced. They had been aware throughout of the basis for the actions. The pursuer had been unable to adjust in accordance with the RCS. The pursuer had not been alerted to the loss of the period of adjustment. The Lord Ordinary failed to take into consideration the consequences for the pursuer of dismissal of her action at such an early procedural stage. The defenders ought to have investigated the background circumstances giving rise to that action, so they would not be materially prejudiced in their investigations.

Defenders

[22] The defenders contended that the summons had not complied with the requirements of RCS 43.2(1). The averments of fact were deficient. They did not state when the exposure to the vapour had occurred. There were a number of different obligations under Schedule 4 to the 2001 Act, some at one time and some at another. In terms of the Lord Ordinary's opinion in *McManus* v *City Link Development Co* (*supra* at para [190]; affirmed by the Extra

Division (*supra*) at para [47]), the pursuer had failed to identify the particular duty alleged to have been breached relative to the timing of the exposure.

[23] The pursuer had not sought to reclaim the Lord Ordinary's decision to require a Minute of Amendment. The pursuer had been afforded several opportunities to plead a relevant case, but had failed to do so. On 11 March 2016, and again on 7 April 2017, the cause had been sisted pending the resolution of *McManus*. In view of the Lord Ordinary's decision in *McManus*, the pursuer had been on notice that the relevancy of the pleadings was in issue. The pursuers in *McManus* had made no attempt to amend in order to address the absence of a relevant statutory case. The pursuer had not taken steps to lodge an open record in terms of RCS 22.1 or sought an opportunity to adjust in order to meet the problems which had been identified in *McManus*.

[24] The pursuer has finally chosen to amend her pleadings. The Lord Ordinary refused receipt of the minute of amendment on the basis that its averments were time-barred and that the defender was entitled to the protection in section 17(2) of the 1973 Act. The Lord Ordinary was entitled to do so as an exercise of his discretion (*Sellars* v *IMI Yorkshire Imperial* (*supra*) and *Clark* v *Greater Glasgow Health Board* 2017 SC 297 at para [47]). The pursuer did not rely on section 19A of the 1973 Act.

Decision

[25] The Lord Ordinary approached the Minute of Amendment on the basis that it involved a fundamental change in the pursuer's case by introducing a new ground of fault based upon the condition of the tenancy at its inception. This amounted to an averment of a breach of paragraph (1)(a) of Schedule 4 to the Housing (Scotland) Act 2001 when no such case had existed before. On that understanding, and applying *Sellars* v *IMI Yorkshire Imperial*

1986 SC 235, the Lord Ordinary refused to receive the Minute as a matter within his discretion; taking into account the prejudice which he considered would thereby accrue to the defenders in having to investigate a stale claim. The court is unable to agree with this analysis.

[26] The summons was drafted in a manner which accorded with the provisions of RCS 43.2(1)) and Form 43.2-A. It did so by stating only those facts which were necessary to establish the claim. These facts included an averment that the pursuer had become a tenant in January 2005 and had subsequently been exposed to the offending vapours. She averred a breach of an implied contractual term of her lease; *viz*. to provide a house that was in a tenantable and habitable condition "at the beginning of the tenancy". Although in the Minute of Amendment the pursuer has elected to delete her common law case, apparently on the basis of her understanding of *McManus* v *City Link Development Co* [2017] CSIH 12, the two averments, when combined, set out a case, in the context of a summons proceeding under chapter 43, of a failure to provide a habitable abode at the commencement of the tenancy by reason of the ingress of vapours at that time and continuing thereafter.

[27] In the summons, the pursuer avers that the claim is based at common law and under statute. In terms of the Form (43.2-A), she correctly does not set out *ad longum*, as might be necessary in an ordinary action, the specific individual duties within the statutory provision which she says were breached. Rather, as directed by the Form, she stipulates only the "provision of the enactment" upon which she intends to found; that is Schedule 4 of the Housing (Scotland) Act 2001. Although there may be questions to be asked in due course about which particular duty the pursuer is relying upon, for the purposes of abbreviated pleadings the averment encompasses the Schedule 4 duty, or duties, to ensure that the house was, at the commencement of the tenancy, reasonably fit for human habitation and to keep

the house in such a condition throughout the tenancy. It also, *quantum valeat*, encompasses the duty to inspect the house and identify any work necessary to comply with the duty.

[28] There is no material difference (other than the deletion of the common law case) between the case averred in the chapter 43 summons and the expanded case sought to be substituted by way of amendment. There is therefore no issue of limitation of actions under section 17 of the Prescription and Limitation (Scotland) Act 1973 and, in particular, no protection to be afforded to the defenders under section 17(2). The cases are fundamentally the same.

[29] The Lord Ordinary having proceeded upon a misunderstanding of this aspect of the case, it falls upon this court to re-examine the issue anew. It must do so in the context of a proposed amendment which does not alter the case but expands upon it in the manner which would always have been required if the case were to proceed under the ordinary procedure. The joint motion that the case should proceed in this way, and in any event the Lord President's Direction (No 1 of 2013: *Personal Injury Actions relating to alleged ground contamination at the Watling Street Development in Motherwell*) made it inevitable that the pursuer's averments would require to be expanded to meet the requirements of written pleadings in an ordinary cause.

[30] An important starting point is to recognise that, whatever the history of *McManus* v *City Link Development Co* (*supra*) and the lapse of time since this action was raised, this case is procedurally at a very early stage. Defences have been lodged but no further procedure (other than repeated sists and the cause ultimately falling asleep) has occurred. Apart from the progress of *McManus*, which was a lead case which appears to have settled some generic issues, the court is not aware of why it has taken 8 years to reach this early point in the procedure. Some of the delay, at least since the decision in *McManus*, must be laid firmly at

the pursuer's door. Even if it was remiss of the pursuer to fail, for almost two years, to notice that the sist imposed in April 2017 was to expire in July of that year, the defenders do not dispute that they too thought that the cases all remained sisted. Wherever the faults may lie, for the purposes of considering an amendment procedure, the cases must be regarded as being at a relatively embryonic stage (cf *Clark* v *Greater Glasgow Health Board* 2017 SC 297).

[31] The normal step which ought to follow the lodging of defences is a period of adjustment. The Lord Ordinary was no doubt entitled, in terms of the Lord President's Direction, to order that it proceed by amendment rather than adjustment. Nevertheless, in so doing, he was bound to recognise the problems which that deviation from the norm would bring in an action for personal injuries. The difficulties are highlighted by *Sellars* v *IMI Yorkshire Imperial* (*supra*), in which the Lord Justice Clerk (Ross) set out in definitive terms the effect of section 17 of the 1973 Act in relation to actions which have been brought against defenders within the *triennium* but in which a radical alteration in the pleadings is proposed after its expiry. *Sellars* brought an end to the many arguments, which were prevalent at the time in personal injuries litigation, when, as was far from uncommon, such an alteration was proposed.

[32] The Lord Justice Clerk said (at 243):

> "… Section 17 is dealing with the bringing of actions, and does not in terms make it incompetent to make radical alterations by adjustment or amendment in an action brought within the *triennium*. It has, however, been held in a number of cases where an action has been raised timeously that the Act will not permit a pursuer by amendment outwith the *triennium* to make a fundamental change in his case since this would deprive the defenders of the protection which they are entitled to enjoy under sec. 17 of the Act. Whether this is treated as a matter of competency or merely as a matter of wide discretion which the court has to allow an amendment, is open to question. …

The Lord Justice Clerk went on (at 244) to answer the question by categorising the matter as one of discretion and not competency. He continued:

> "In the present case, however, no question of amendment arises. The averments which radically alter the pursuer's case were added after the expiry of the *triennium* by adjustment and not by amendment. … [T]hat makes a material difference. With the possible exception of scandalous averments which may be deleted at the open record stage…, the court has no control or discretion over what averments may be added by adjustment. The court can control adjustment by limiting the adjustment period and ultimately by closing the record, but the court does not require to grant leave to add particular adjustments in the way in which leave is required for a minute of amendment. There is no express reference in the Limitation Acts to adjustment and…[in accordance with the RCS] a pursuer may adjust his pleadings without restriction and without obtaining express leave to do so."

[33] The Lord President's Direction gave the Lord Ordinary a *carte blanche* to regulate procedure in a manner which differed from the ordinary cause rules. In requiring a Minute of Amendment instead of a normal adjustment period, the Lord Ordinary withdrew from the pursuer the customary period in which she could adjust her pleadings at will. Although that was within his discretion, he was bound to have in mind, when deciding whether or not to receive the Minute, the fact that in the normal course of things the pursuer would have been free to alter her case, in the manner proposed in the Minute, by adjustment and thus without any leave of the court. That is an important consideration to be balanced alongside the time which has elapsed since *McManus* and during which parties appear to have been blissfully unaware of the dormant nature of the process.

[34] Balancing all of these factors, the court considers that the Lord Ordinary erred in summarily dismissing some 36 actions at a point before the record had closed and before adjustment had been permitted. In deciding whether to permit amendment the court must look to the interests of justice (*Dryburgh* v *National Coal Board* 1962 SC 485 Lord Guthrie at 492). At this stage of a cause, a court would seldom be able to justify the refusal of

amendment in the absence of substantial prejudice being caused to the opposing party. If a defender were able to persuade the court that he was prejudiced, because of the late introduction of new matters which required to be investigated for the first time some years after the event, that could merit refusal. However, the defenders had notice of the pursuer's case that the house was not habitable at the start of the tenancy in terms of the Chapter 43 statement of claim. In the somewhat unlikely event that they did not carry out appropriate investigations at or about that time (or when claims were initially intimated to them in advance of proceedings), the fault must be attributable to their own inaction. The court is not satisfied that the proposed amendment causes the defenders any substantial prejudice.

[35] The court will allow the reclaiming motion and recall the Lord Ordinary's interlocutors of 15 May 2019 (including that part relating to the other actions). It will allow the Minute of Amendment to be received and for answers within 28 days. This will permit adjustment to follow thereafter in terms of RCS 24.2(3)(a). It is to be hoped that, as was the express intention of the Lord President's Direction in 2013, these actions will now proceed to a "speedy determination".