Neutral Citation Number: [2020] EWHC 943 (TCC)

Case No: HT-2019-000303

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

The Rolls Building
Fetter Lane, London, EC4A 1NL

Date: Tuesday 21st April 2020

Before :

MR ROGER TER HAAR QC

Sitting as a Deputy High Court Judge

- -

Between:

AIG EUROPE LIMITED

Claimant

- and –

(1) McCORMICK ROOFING LIMITED
(2) McCORMICK FLAT ROOFING LIMITED

Defendants

-and-

ROYAL & SUN ALLIANCE INSURANCE PLC

Third Party

- -
- -

Carlo Taczalski (instructed by **Clyde & Co**) for **AIG Europe SA**
James Davison (instructed by **Clarkslegal**) for the **Defendants**

James Watthey (instructed by **DAC Beachcroft**) for the **Third Party**

Hearing date: 12 March 2020

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment will handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Tuesday 21st April 2020.

Mr Roger ter Haar QC :

1. AIG Europe SA applies to be substituted as the Claimant in this action. The application is opposed both by the Defendants and the Third Party.

2. On 31 August 2013 a fire broke out at 58 Fenchurch Street, London EC3M 4AB. AIG Europe Limited was then the leaseholder of that property.

3. The Particulars of Claim in these proceedings allege that the fire started in the course of works to convert a flat roof to a roof terrace. There is no dispute that the First and/or Second Defendants were involved in that work. It is the Defendants' case that their involvement was minimal.

4. The case against the Defendants is that the fire was caused by the negligence of one or other or both of the Defendants.

5. The Third Party was joined to these proceedings by an order made on 19 February 2020. The Third Party is the First and/or Second Defendant's liability insurer. As set out in the order, it was joined to this litigation with permission to:

    1.1 Oppose, and be heard in, the Claimant's Application dated 20 December 2019 (that is the application upon which I am ruling in this judgment);

    1.2 Seek a declaration that it is not liable to indemnify the First Defendant and/or the Second Defendant against any liability which they may have for the matters and sums claimed in this action;

    1.3 Contest whether the First Defendant and/or the Second Defendant are liable as alleged or at all.

6. The proceedings were started by a Claim Form issued on 27 August 2019. It named the Claimant as "AIG Europe Ltd". The brief details of the claim were stated as follows:

> "In May 2012, the Claimant entered into a contract with Overbury Plc to convert the flat roof on level 13 of the property at 58 Fenchurch Street, London, EC3M 4AB ("the Property") into a roof terrace.
>
> "The Defendant(s) were sub-contracted by Overbury Plc to design and install the roofing system which included installing a vapour control layer, insulation and single ply membrane on the roof terrace of the Property.
>
> "On 31st August 2013 at approximately 17.43hrs, following completion of roofing works (which included hot work processes) by the Defendant(s) there was a fire at the Property which caused extensive loss and damage to the Claimant.
>
> "It is the Claimant's case that the Defendant(s) owed the Claimant a duty of care to:
>
> "i. carry out the roofing works without causing damage to the Property;
>
> "ii. adopt a safe system of work during the roofing and hot work processes; and
>
> "iii. take adequate care and precautions following completion of the hot works/roofing works to prevent/minimise the risk of fire.
>
> "The Claimant alleges that the Defendant(s) is liable for the loss and damage sustained by the Claimant."

7. The Claim Form was served on 20 December 2019. It was accompanied by Particulars of Claim which pleaded the following in paragraphs 2 to 5:

> "2. The Claimant is the successor company to AIG Europe Limited ("AIG"). Before its merger with the Claimant and dissolution, AIG held a long leasehold interest in, and operated an insurance business from, The AIG Building, 58 Fenchurch Street, London, EC3M 4AB (the "Property"); the Defendants (or one of them) owed AIG a duty of care and breached it causing damage to the Property. Following the merger, they are liable for the damage caused to that Property (and other

losses) pursuant to an assignment of AIG's cause of action to the Claimant.

"3. Unfortunately, the Claimant has been incorrectly named on the Claim Form.

"3.1 The Claim Form states that the name of the Claimant is AIG. It is not. AIG was a company registered in England and Wales under company number 1486260 which held the leasehold interest in the Property from 21 May 2013 until December 2018.

"3.2 However, on 1 December 2018, it transferred part of its business to an English company ("AIG UK Ltd"), and then merged its remaining business with AIG Europe SA which is a company registered in Luxembourg under number B218806; AIG's assets and liabilities (which assets included the cause of action sued upon in these proceedings) were transferred to AIG Europe SA.

"3.2 Accordingly, the Claimant should have been named as AIG Europe SA.

"An application to amend the Claim Form by substituting AIG Europe SA for AIG Europe Limited is made at the same time as serving the Claim Form and these Particulars.

"4. The Defendants are two companies within the same group of companies. At all material times, they have both specialised in and held themselves out as specialising in construction operations relating to roofing including flat roofing. ….

"5. Both Defendants are sued because although the Claimant understands that the company engaged by the main contractor to complete the relevant works was the First Defendant, there has been no proper response to the letter of claim which was directed to the First Defendant, and the Second Defendant's name appears on various documents."

8. As the Particulars of Claim indicated would be done, the service of the Claim Form and the Particulars of Claim was accompanied by an Application Notice attaching a draft order that:

"AIG Europe SA be substituted in place of AIG Europe Ltd pursuant to rules 17.4 and 19.5 of the Civil Procedure Rules."

9. Accompanying AIG's skeleton argument for the hearing before me was a draft Amended Claim Form. As was necessary, the amendments to the brief details of claim went further than a simple substitution of name:

> "In May 2012, ~~the Claimant~~ *AIG Europe Limited* entered into a contract with Overbury Plc to convert the flat roof on level 13 of the property at 58 Fenchurch Street, London, EC3M 4AB ("the Property") into a roof terrace.
>
> "The Defendant(s) were sub-contracted by Overbury Plc to design and install the roofing system which included installing a vapour control layer, insulation and single ply membrane on the roof terrace of the Property.
>
> "On 31st August 2013 at approximately 17.43hrs, following completion of roofing works (which included hot work processes) by the Defendant(s) there was a fire at the Property which caused extensive loss and damage to the Claimant.
>
> "It is the Claimant's case that the Defendant(s) owed ~~the Claimant~~ *AIG Europe Limited* a duty of care to:
>
> "i. carry out the roofing works without causing damage to the Property;
>
> "ii. adopt a safe system of work during the roofing and hot work processes; and
>
> "iii. take adequate care and precautions following completion of the hot works/roofing works to prevent/minimise the risk of fire.
>
> "The Claimant alleges that the Defendant(s) is liable *to it* for the loss and damage sustained by ~~the Claimant~~.*AIG Europe Limited*"

10. Supporting the application was a witness statement from Mr. Viran Ram, a partner in the firm of Clyde & Co., the Claimant's solicitors. The details at paragraphs 11 to 22 below come from that witness statement.

Transfer of the cause of action

11. AIG Building Limited and AIG Europe Limited were subsidiaries of American International Group Inc.

12. The Property was the subject of a lease between The Mayor and Commonalty and Citizens of the City of London and AIG Building Ltd dated 15 July 2003.

13. On 22 March 2013, as part of a corporate re-structure that led to the dissolution of AIG Building Ltd, the lease was assigned to AIG Europe Ltd and AIG Europe Ltd was the entity which primarily carried on business at the Property.

14. I was told by Mr. Taczalski that when he was drafting the Particulars of Claim that he identified that American International Group Inc's European business had gone through a Brexit driven restructure in 2018.

15. AIG Europe carried on a range of insurance related business in the UK which included business written in the UK, and business which relied upon passporting rights into the EU. As part of the restructure, the UK business was transferred to a new insurer AIG UK Ltd before the remaining business of AIG Europe Ltd was merged into AIG Europe SA.

16. On 1 December 2018, AIG Europe Limited and AIG Europe SA entered into a Merger Agreement. Article 3 of the Merger Agreement provided:

> "3.1.1 In accordance with the sequence of events set out in article 1.2.3, on Merger Completion, all property, rights and powers of any description) of AEL shall be transferred to AESA as they are on Merger Completion (i.e. on Merger Completion, AEL shall transfer to AESA the entire business of AEL which remains following the UK Transfer, being the

> European Business including the business of the European Branches).
>
> "AESA shall constitute the universal legal successor to AEL (including for each European Branch) and shall continue, after the Merger, to exist under the form of a public limited company (societe anonyme)."

17. This (together with the balance of the Merger Agreement) gave effect to the intention of a specific carve-out in respect of the UK business (specifically defined), with the subsequent transfer of the entire remainder of AIG Europe Ltd to AIG Europe SA.

18. The Scheme by which the UK business was to be carved out from AIG Europe Ltd was appended to the Merger Agreement as Schedule 6. Section 3 of the Scheme sets out the assets and liabilities that were to be transferred to AIG UK Ltd. The lease for the property fell within the definition of "Transferring UK Properties" which were transferred to AIG UK Limited. However, such accrued cause of action (if any) in respect of the damage caused by the fire in 2013 was not caught by the transfer to AIG UK Limited.

19. In consequence, any such cause of action remained with AIG Europe Limited after the UK Transfer at the point of merger with AIG Europe SA. The effect of Article 3 of the Merger Agreement was that any cause of action then passed to AIG Europe SA.

20. AIG Europe Limited ceased to exist on 5 December 2018.

21. The long and short of these corporate manoeuvres is that the Claim Form should have named AIG Europe SA, not AIG Europe Limited.

22. The explanation given by Mr. Ram for this mistake is as follows:

> "By way of explanation as to how this error has occurred, I should also clarify that ACE provided a Multinational Master Insurance Policy ("the Policy") to American International Group Inc and all of American International Group Inc's subsidiary companies. The Policy responded to the damage to the Property, and this Firm is instructed by both ACE and AIG and as I set out above, before that AIG Building Limited. In drafting the Claim Form, my firm named AIG Europe Ltd instead of AIG Europe SA. It was our mistake in not identifying and transposing the correct entity onto the Claim Form, and we apologise for it."

The Relevant Rules

23. The application is made under CPR rules 17.4 and 19.5.

24. CPR rule 19.5 provides:

> "Special provisions about adding or substituting
>
> parties after the end of a relevant limitation period
>
> ***"19.5***
>
> "(1) This rule applies to a change of parties after the end of a period of limitation under –
>
> (a) the Limitation Act 1980;
>
> (b) the Foreign Limitation Periods Act 1984; or
>
> (c) any other enactment which allows such a change, or under which such a change is allowed.
>
> "(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; or
>
> (c) the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party."

25. CPR rule 17.4 provides:

> "(3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question."

26. In his written submissions, Mr. Taczalski for AIG said that CPR rule 17.4 is unlikely to add a great deal in this case in that it is unlikely to be satisfied if neither of the limbs relied upon under CPR 19.5 is satisfied. He repeated this in his oral submissions. I agree, and therefore treat this application as being made under CPR rule 19.5 (3)(a) and/or 19.5(3)(b).

CPR rule 19.5(3)(b)

27. Both CPR rule 19.5(3)(a) and (b) are gateway provisions. Unless AIG can bring itself within one or other of these provisions, the application will fail. Even if they do so, then they must persuade me that I should exercise my discretion to allow the substitution. I consider first whether AIG can bring themselves within one or other of those provisions.

28. The gateway provision in CPR rule 19.5(3)(b), as set out above, requires the Court to be satisfied that:

> "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."

29. I was referred to relevant authority.

30. First, *Parkinson Engineering Services plc v Swan* [2009] EWCA Civ 1366; [2010] Bus LR 857. In that case, the claimant company was the subject of an administration order made in May 2003 and the defendants were appointed the joint administrators. In November 2003 the administration order was discharged and the company ordered to be wound up. Under that order the defendant administrators were released from liability under section 20 of the Insolvency Act 1986 with effect from February 2004. By a Part 7 claim form issued in April 2009 in the Chancery Division the liquidator caused the company to commence proceedings against the defendants claiming damages for negligence in the performance of their duties as administrators. The defendants pleaded that the claim was barred by the effect of the statutory release under section 20. To defeat that plea the liquidator applied in June 2009 for an order permitting the amendment of the existing proceedings by substituting himself as claimant and adding a claim for compensation under section 212(3) of the Insolvency Act 1986, a claim which could proceed, notwithstanding the release, provided the court gave permission pursuant to section 212(4). The judge at first instance allowed the application.

31. On appeal, that decision was upheld. Lloyd L.J. said at paragraph [28]:

> "…. on the question of jurisdiction, whether it is open to the court to permit the substitution, it seems to me that this is a case in which the substitution is necessary in terms of section 35(5)(b) as well as of CPR r 19.5(3)(b). The original action, asserting the company's claim against the former administrators, cannot be determined without the substitution of

> the liquidator whereas if brought by the liquidator under section 212 it can. Without that substitution it could only, and would be bound to, be determined in favour of the defendants because of the section 20 defence. The claim would be struck out, because of that defence, and it could not be decided on its merits, either way, as the proceedings stand. In terms of the rule, it cannot properly be carried on by the original party, the company, whereas it can be maintained and carried on if the liquidator is substituted. No more than minimal change is necessary to the statement of case: substitution of references to the liquidator as claimant and references to the company in the third rather than the first party, so to speak, together with consequential changes as regards the relief sought. It is the same claim, in every respect, despite the fact that it is asserted by the liquidator on behalf of the company, rather than in the name of the company itself."

32. In *Roberts v Gill & Co.* [2010] UKSC 22; [2011] 1 A.C. 240 the claimant, in his personal capacity as a beneficiary of his late grandmother's estate, commenced proceedings for damages in negligence against two firms of solicitors who had advised the estate's former personal representatives. After the relevant limitation period had expired, the claimant applied to amend the proceedings in order to continue them both in his personal capacity and on behalf of the estate as a derivative action. The Supreme Court considered the application of both CPR rules 17.4 and rule19.5(3)(b). The Supreme Court held that an amendment to treat the claimant's claim as a representative action rather than a personal claim would be an amendment to alter the capacity in which he sued (paragraph [40]) and that the representative claim is a claim involving a new cause of action since the capacity in which the claimant made the claim was an essential part of the claim (paragraph [41]).

33. On the facts of that case, the Supreme Court upheld refusals by the judge at first instance and the Court of Appeal to amend as requested.

34. However, it is significant to note that in the judgment of Lord Walker of Gestingthorpe JSC at paragraph [104] he said:

> "In the ordinary case of a simple assignment or transmission of a cause of action after proceedings have been commenced, no question of limitation arises."

35. *Roberts v Gill* is a somewhat special case because of the law as to who can pursue a derivative action. However, it seems to me distinguishable from *Parkinson Engineering* in that what the claimant was attempting to do was to introduce a new cause of action rather than to regularise the pursuit of an already pleaded cause of action which had been pursued by the wrong person.

36. In *Irwin v Lynch* [2010] EWCA Civ 1153; [2011] 1 WLR 1364 the directors of a company entered into a contract with that company under which the company would carry out work to a property belonging to the directors. The company subsequently went into administration and the directors appointed an administrator. The administrator applied for, inter alia, a declaration that the contract was a transaction at an undervalue and that the directors were guilty of misfeasance and breach of trust in causing the company to enter into the contract and were therefore liable to compensate the company. The directors applied to strike out the claim against them personally on the ground, inter alia, that the administrator was not entitled to make such a claim by reason of section 212 of the Insolvency Act 1986. In response the administrator applied for leave to add or substitute the company as claimant under CPR rules 17.4(4) and 19.5. The judge refused the application, but the Court of Appeal allowed the administrator's appeal.

37. The Court of Appeal (whose judgment was again given by Lloyd L.J.) followed *Parkinson Engineering*. Lloyd L.J. said at paragraph [26]:

> "Here the original claim was liable to be struck out, as it has indeed been, because of lack of standing, but I see no good reason to regard the reason for the striking out as being a critical distinction between [*Parkinson Engineering*] and this [case]. I would also reject the contention that the cause of action is not the same because of the identity of the claimant. Sometimes the identity of the party might be, indeed often it might be, a vital distinction, but here Mr Irwin plainly asserted the company's cause of action and asserted it on behalf of the company, just as the substituted liquidator did in the *Parkinson Engineering* case. So the cause of action is identical; it is already pursued for the benefit of the company, but it is doomed to failure because of the lack on Mr Irwin's part of the necessary locus standi. It seems to me that it is possible and appropriate for the court to exercise its discretion under rule 19.5 to allow the joinder of the company so as to assert the relevant claims."

38. In *Insight Group Ltd v Kingston Smith* [2012] EWHC 3644 (QB); [2014] 1 WLR 1448, Leggatt J. referred to *Parkinson Engineering* and *Irwin v Lynch* and said at paragraph [96]:

> "The principle which I derive from these two decisions of the Court of Appeal is that the court has power to order substitution under section 35(6)(b) and CPR r 19.5(3)(b) if: (1) a claim made in the original action is not sustainable by or against the existing party; and (2) it is the same claim which will be carried on by or against the new party."

39. In his submissions before me, Mr. Taczalski put his submissions first in respect of CRP rule 19.5(3)(a), to which I turn below. However, applying the guidance in the authorities that I have referred to above, it seems to me that rule 19.5(3)(b) is the more natural place to start: the problem is that the original claim cannot be maintained against the existing defendants unless AIG Europe SA is substituted for AIG Europe Limited.

40. The opposition to this came principally from Mr. Watthey for RSA. Mr. Davison for the Defendants primarily directed his fire at the exercise of my discretion, although naturally adopting Mr. Watthey's submissions. The one point as to the gateway provisions which Mr. Davison made separately was to argue that because AIG Europe Ltd had ceased to exist at the time that proceedings were commenced, the proceedings were a nullity.

41. In my judgment that argument should be rejected: a situation where the proceedings would otherwise be a nullity is well within the situation in respect of which CPR rule 19.5(3)(b) is intended to provide a remedy.

42. For the Third Party, RSA, Mr Watthey submitted:

> "CPR 19.5(3)(b) is not applicable and reliance on it is misconceived. "
>
> "39.1 It states in terms that substitution can only be given thereunder if adding or substituting is necessary to continue the claim brought by the "original party". There is a fundamental difference between that and a substitution so that a claim can be brought against (or by) a *new* party.
>
> "39.2 So, for example, leave might be given to add a liquidator where that is necessary for the company as the original party to continue its claim (Parkinson Engineering Services Plc v Swan [2009] EWCA Civ 1366; [2010] P.N.L.R. 17).
>
> "39.3 In the present case there is no suggestion that the original party (i.e. the Claimant, AIG Europe Limited) itself has any claim which could be carried on by substituting AIG Europe SA.
>
> "39.4 Indeed, the whole basis of the application is that the Claimant in fact has no claim because it has been assigned."

43. As to the arguments in paragraph 39.1 to 39.3, it seems to me that they misread CPR rule 19.5(3)(b). That rule envisages substitution where

> "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;"

44. RSA's argument assumes that there cannot be a substitution of a new claimant for the original "party". This is contrary to the terms of the rule.

45. I may be unfair to the subtlety of RSA's argument, but perhaps the most important submission on its behalf is that in paragraph 39.4, namely that "the whole basis of the application is that the Claimant in fact has no claim because it has been assigned". It is, of course, true that the basis of the application is that the Claimant in fact has no claim because it has been assigned, as that paragraph asserts. However, as the Supreme Court recognised in *Roberts v Gill* (see paragraphs 32 to 35 above) an assignment is very much the situation where rule 19.5(3)(b) will apply.

46. In my judgment, the application made to substitute AIG Europe SA for AIG Europe Limited passes the gateway provision on CPR rule 19.5(3)(b).

CPR rule 19.5(3)(a)

47. AIG also makes its application also under CPR rule 19.5(3)(a). As set out above, that permits the Court to permit substitution of a party where the court is satisfied that:

> "the new party is to be substituted for a party who was named in the claim form in mistake for the new party"

48. There is a substantial body of authority on this rule and its predecessor, Order 20 rule 5. There was an important review of the authorities and statement of principle in the Court of Appeal decision in *Adelson v Associated Newspapers Limited* [2007] EWCA Civ 701; [2008] 1 WLR 585. At paragraphs [29] to

[33] of the judgment of the Court, Lord Phillips of Worth Matravers CJ, said this:

> "29. …. we would make some general observations, using the current descriptions of claimant and defendant to describe the parties to an action. Most of the problems in this area arise out of the difference, sometimes elusive, between an error of identification and an error of nomenclature. An error of identification will occur where a claimant identifies an individual as the person who has caused him an injury, intends to sue that person, describes him in the pleadings by the correct name, but then discovers that he has identified the wrong person as the person who injured him. An error of nomenclature occurs where the claimant identifies the correct person as having caused him the injury, but describes him in the pleadings by the wrong name.
>
> "30. A problem arises in distinguishing between the two types of error where the claimant knows the attributes of the person he wishes to sue, for example the manufacturer of an object, but has no personal information of the identity of that person. If on inquiry he is incorrectly informed that a named third party as defendant but describing in the pleading the attributes of the person intended to be sued, is the case one of misnomer of the person intended to be sued or error of identification? A similar problem can arise when attempting to identify the parties to an alleged contractual offer and acceptance: see for example *Ingram v Little* [1961] 1 QB 31.
>
> "31. The rule presupposes that there is a person intending to sue. The mistake envisaged in relation to the name of the claimant is one under which the name used for the claimant is not the name of the person wishing to sue. Such a mistake is likely to be made by an agent of the person intending to sue. Where the claimant is a company the mistake will always be that of an agent, but identifying the person intending to sue may create difficulties.
>
> "32. The rule also envisages that there will be a person intended to be sued. The mistake envisaged in relation to the defendant will be one under which the name used for defendant is not the appropriate name to describe the person that the claimant intends to sue. Thus the rule envisages a defendant identified by the claimant but described by a name which is not correct..
>
> "33. In either case the mistake that the rule envisages is one of nomenclature, not of identification. This conclusion receives support from the authorities …."

49. An important case under the pre CPR rules considered by the Court of Appeal was *The Sardinia Sulcis* [1991] 1 Lloyd's Rep. 201. At paragraph [37] Lord Phillips commented that that case was particularly important for two reasons:

> "The first is that it involved a mistake in relation to the name of the plaintiff. The second is because it laid down a test that has been applied in a number of subsequent cases."

50. At paragraph [38] he referred to a passage in the judgment of Lloyd L.J. in that case which has become known as "the test in *The Sardinia Sulcis"*:

> "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. In *Mitchell v Harris Engineering* [1967] 2 QB 703 the identity of the person intended to be sued was the plaintiff's employers. In *Evans v Charrington* [1983] QB 810 it was the current landlord. In *Thistle Hotels v McAlpine* (unreported) 6 April 1989 the identity of the person intending to sue was the proprietor of the hotel. In *The Joanna Borchard* [1988] 2 Lloyd's Rep 274 it was the cargo-owner or consignee. In all these cases it was possible to identify the intending 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."

51. The Court then considered the extent to which "the test in *The Sardinia Sulcis"* applies to CPR rule 19.5(3)(a) and concluded at paragraphs [55] to [57]:

> "55. CPR r 19.5(3)(a) makes it a precondition of substituting a party on the ground of mistake: "the new party is to be substituted for a party who was named in the claim form in mistake for the new party." It is clear from this language that the person who has made the mistake must be the person responsible, directly or through an agent, for the issue of the claim form. It is also clear that he must be in a position to demonstrate that, had the mistake not been made, the new party would have been named in the pleading.

> "56. The nature of the mistake required by the rule is not spelt out. This court has held that the mistake must be as to the name of the party rather than as to the identity of the party, applying the generous test of this this type of mistake laid down in *The Sardinia Sulcis*……
>
> "57. Almost all the cases involve circumstances in which (i) there was a connection between the party whose name was used in the claim form and the party intending to sue, or intended to be sued and (ii) where the party intended to be sued, or his agent, was aware of the proceedings and of the mistake so that no injustice was caused by the amendment. In the *SmithKline* case [2002] 1 WLR 1662, however, Keene LJ accepted that the *Sardinia Sulcis* test could be satisfied where the correct defendant was unaware of the claim until the limitation period had expired. We agree with Keene LJ's comment that, in such a case, the court will be likely to exercise its discretion against giving permission to make the amendment."

52. Applying the general principles discussed to the facts of the case before it, the Court said at paragraph [69]:

> "If those responsible for the particulars of claim had knowledge of the corporate structure of the Las Vegas Sands Group and of the part played by each company in the group activities and deliberately decided to sue in the name of the second claimant alone, the fact that this decision may have been mistaken will not bring the case within CPR r 19.5. To do this the claimants must establish that those responsible for the particulars of claim were under a mistake as to the group structure or the roles played by the members of the group and, but for that mistake, would have included as claimants the third and fourth claimants. This is the very minimum that they need to achieve if they are to have an arguable case that a mistake of name within the *Sardinia Sulcis* test occurred."

53. I have referred above in the context of CPR rule 19.5(3)(b) to the decision of Leggatt J. in *Insight Group Ltd v Kingston Smith*. In that case Leggatt J was primarily concerned not with limb (b) but with limb (a) of rule 19.5(3).

54. At paragraphs [34] and [35] he said:

> "34. The Court of Appeal in the *Adelson* case concluded, at paras 55-56, that for CPR r 19.5(3)(a) to apply, three requirements must be met: (1) the person who has made the

> mistake must be the person responsible, directly or through an agent, for the issue of the claim form; (2) it must be shown that, had the mistake not been made, the new party would have been named; and (3) the mistake must be as to the name of the party, applying the *Sardinia Sulcis* test.
>
> "35. There is a footnote which should be added to the *Adelson* case. In holding that the *Sardinia Sulcis* test still applies, the Court of Appeal cannot have intended to suggest that it remains necessary to show that the mistake was not misleading or such as to cause any reasonable doubt as to the identity of the person intended to be sued. As already mentioned, and as was noted in the *Adelson* case at para 44, that was a requirement of the old RSC Ord 20, r 5 but it is not a requirement of CPR r 19.5(3)."

55. After an extensive review of the authorities, he said at paragraph [55]:

> "In his concurring judgment in *The Sardinia Sulcis* … Stocker LJ said, at p 209:
>
> > "I agree with Lloyd LJ that the distinction between the identity of a party and the name of that party may present great difficulties. If a solution to the problem is to be stated in terms of general application I do not feel I can improve on the test suggested by Lloyd LJ – can the intending plaintiff or defendant be identified by reference to a description which is specific to the particular case – e g landlord, employer, owners or shipowners? … The nature of the claim will usually provide the answer to this problem."
>
> "I respectfully agree that, if it is necessary to draw this distinction, it may be impossible to improve on the *Sardinia Sulcis* test, seen as a method for distinguishing in effect between errors of fact and law. The difficulties in drawing the distinction, however, seem to me to be at least three. The first is that the distinction between what counts as an error of fact and one of law can itself be elusive. Second, even where the distinction can in principle be drawn with reasonable clarity, there may be considerable practical and evidential difficulty in identifying the precise nature of the mistake made by the person responsible for preparing the claim form – not least because the mistake may often have arisen as a result of the failure of that person to give the matter any proper thought. The third difficulty is that it is not clear why it should matter which type of mistake was made. There is no obvious rationality in drawing a distinction between mistakes of fact and mistakes of law in this context any more than there is in other contexts, such as the recovery of money paid under a mistake of fact, where a similar distinction has been abolished or questioned in recent years."

56. Applying those general principles to the case before him, Leggatt J. said at paragraphs [56] and [57]:

> "56. On the basis, however, that the distinction between mistakes as to identity and as to name is one which the law still requires to be drawn, I turn to consider the situation with which the present case is concerned, where a claim for damages for alleged professional negligence has been mistakenly brought against an LLP rather than the partnership whose business the LLP took over. Applying the *Sardinia Sulcis* test as discussed above, it seems to me that the relevant description of the defendant in a case of this kind is that of professional adviser. It is the fact that the defendant has provided professional services and has allegedly done so negligently which potentially give rise to legal liability.
>
> "57. In order to decide whether the claimant's mistake can be regarded as one of name rather than description, it is thus necessary to distinguish between the two following cases. (1) The claimant sues the LLP in the mistaken belief that the LLP provided the services which are said to have been performed negligently, failing to recognise that the services were provided by the former partnership and not the LLP. (2) The claimant knows that that the services were provided by the former partnership but mistakenly believes that the LLP is legally liable for the negligence of the earlier firm. The court has the power to grant relief in case (1) but not in case (2)."

57. The final authority on CPR rule 19.3(5)(a) to which I need to refer is the decision of Mr. Andrew Henshaw Q.C. in *Rosgosstrakh Ltd v Yapi Kredi Finansal Kiralama A.O. and another* [2017] EWHC 3377 (Comm). In that case the claimant, Rosgosstrakh Ltd, was, or should have been, a protection and indemnity policy underwriter. As a result of a corporate reorganisation, Rosgosstrakh Ltd was subsumed into another legal entity, Public Joint Stock Company Rosgosstrakh which was the full legal successor of Rosgosstrakh Limited.

58. At paragraph [73] Mr Henshaw commented as follows:

> "The criticisms of *Sardinia Sulcis* in observations in later cases may be explicable on the basis that the solicitor in *Sardinia Sulcis* was apparently aware of the merger but made a mistaken assumption about its legal effect. Had he not been so aware, then it seems to me that any criticism would be misplaced. Where proceedings are intended to be brought by or against an entity identifiable by description, such as employer, landlord, shipowner or insurer, but the person preparing the proceedings is unaware that the entity has meanwhile been subsumed into another corporate body and ceased to exist in its original form, then that person has in my view misnamed the entity and the case falls within the *Sardinia Sulcis* test and CPR rule 19.5. It would be entirely artificial to classify such a case as involving no mistake as to the party's name but only as to its rights. In reality, there has been a mistake of facts – ignorance of the fact of the reorganisation by adjunction – which has led to the wrong entity being named as fitting the identifiable description."

And at paragraph [75(viii)]:

> "For completeness, I would observe even in a case of simple assignment it is not at all obvious why a mistaken selection of a party arising from ignorance of the assignment should not be regarded as a mistake falling within CPR 19.5 …."

59. Unsurprisingly, AIG relies heavily upon this decision.

60. In response, as to the applicability of CPR rule 19.5(3)(a), as in respect of CPR rule 19.5(3)(b), Mr. Davison contends that the claim should be dismissed on the basis that, as AIG Europe Ltd had ceased to exist at the time that proceedings were commenced, the proceedings are a nullity. The problem with that submission is that the self same argument was put forward in the *Sardinia Sulcis* and rejected. The decision of Mr. Henshaw in *Rosgrosstrakh* is also directly contrary to that submission, and I reject it.

61. For the Third Party, Mr. Watthey did not support Mr. Davison's nullity submission. He took the lead in oral argument in arguing that the case does

not fall within CPR rule 19.5(3)(a). He submitted that AIG had to satisfy a three stage test asking the following questions:

(1) Was the mistake genuine?

(2) Was it a mistake which would not have caused reasonable doubt as to the identity of the claimant? And

(3) If those questions were answered in favour of the applicant, should the court exercise its discretion in favour of the applicant, the discretion being explicit from the use of the word "may"?

62. There was no dispute between the parties as to the first of these questions, both as to it being a relevant question, and that the answer to that question is "yes".

63. There was no dispute between the parties as to the materiality of the third question, which I address below.

64. There was a disagreement between the parties as to whether the second question is a relevant question, other than in respect of the exercise of discretion.

65. There was no dispute between the parties that that question is a relevant element of CPR rule 17.4 (see in this context *Best Friends Group v Barclays Bank Plc* [2018] EWCA Civ 601 at paragraph [3]). It was also an element of the old Ord 20 r. 5. However, I agree with Leggatt J. at paragraph [40] of *Insight Group* that it is not a part of CPR rule 19.5(3) and to that extent there has been a liberalisation of the law.

66. Mr. Watthey's principal argument was that the mistake was not a mistake as to name, but as to identity. In his submission:

(1) Although the names are obviously similar, AIG Europe Ltd and AIG Europe SA are two entirely distinct corporate entities, and a considered decision was taken to sue in the name of the former;

(2) When one looks at the way the Claimant is spoken of, it can be seen that a deliberate decision was taken to sue in the name of the party that contracted for the works to be done and suffered loss as a result of the fire, i.e. the leaseholder at the time.

67. As he developed his argument, Mr. Watthey pointed out that the proposed amendments to the Claim Form (see paragraph 9 above) go further than a simple change of name. This is necessary because AIG Europe SA was not the party who entered into the original contract nor the party who suffered the loss, but is the party in whom any cause of action is now vested.

68. In paragraph 25 of his skeleton argument he set out his arguments as follows:

> "is it possible to identify that in truth the claimant was always intended to be AIG Europe SA by reference to a description on the Claim Form?[1]
>
> "25.1 Only if the answer is in the affirmative can substitution be permitted.
>
> "25.2 On these facts, the answer is in the negative.

[1] In a footnote Mr Watthey said "The Particulars of Claim which have been served in this case must be disregarded; it is a document which came into existence after the expiry of the limitation period and after the mistake had come to light (see GE Money Home Lending Limited v H C Wolton & Sons Limited t/a Wolton Chartered Surveyors [2010] EWHC 1011; [2010] PNLR 28 at [71] on precisely this point)."

> "25.3 Indeed, the Applicant falls *well* short: there is *only* a name given (the wrong name: the Claimant) and there is no description whatsoever of the party bringing the claim.
>
> "25.4 On a charitable reading, one could conceivably "read-in" some descriptions, in that the Claim Form says that:
>
> > "*the Claimant contracted with Overbury Plc … there was a fire at the Property which caused extensive loss and damage to the Claimant … the Defendant(s) owed the Claimant a duty of care*".
>
> "25.5 However, none of the above "descriptions" are apposite properly to describe AIG Europe SA:
>
> > "25.5.1 AIG Europe SA did not contract with Overbury Plc;
> >
> > "25.5.2 AIG Europe SA did not suffer any loss and damage by reason of the fire; and
> >
> > "25.5.3 the Defendants cannot have owed AIG Europe SA (as a future assignee) any duty of care.
>
> "25.6 The above is all in sharp contrast to The Sardinia Sulcis in which the true claimants (i.e. the assignees, whose name was sought to be substituted in) were always properly described on the writ as "the owners of the Sardinia Sulcis".
>
> "25.7 The Applicant may argue that it was intended that the claim should be brought in "the name of the entity which had the cause of action"; but as Lloyd LJ said in The Sardinia Sulcis, and as the White Book editors now summarise the position: the test cannot be as wide as that as otherwise leave to amend would always be given.
>
> "25.8 Rather, the evidence is that there was a deliberate decision to sue in the name of the Claimant as the leaseholder of the property, the contracting party, and a separate entity to AIG Europe SA.
>
> "25.9 That turned out to have been erroneous, but it is not the sort of error that can allow the Applicant to rely upon CPR 17.4(3) or 19.5(3)(a)."

69. I do not accept the submission that there was a deliberate decision to sue in the name of the Claimant in any relevant sense: of course, a decision was made to sue in the name of AIG Europe Ltd, but that was a genuine mistake, as conceded.

70. The footnote to paragraph 25 raises the question as to whether the Court can look at the Particulars of Claim in deciding whether or not there was a mistake made. In support of its position that I should not have regard to the full pleading, Mr. Watthey refers to paragraph [71] of the judgment of Behrens J. in *G E Money Home Lending Ltd v H C Wolton & Sons (t/a Wolton Chartered Surveyors)* [2010] EWHC 1011 (Ch); [2010] P N L R 28 at paragraph [71]:

> "Miss Linklater drew my attention to various passages in the authorities where the courts had relied on the pleadings to justify the substitution of a party. For my part I have some doubt as to whether reliance on the Particulars of Claim adds anything in the circumstances of this case. It is a document which came into existence after the expiry of the Limitation period and after the mistake had come to light and which was served in draft form during the course of the application for substitution. Plainly by the time the application was heard the defendant was aware of the mistake. However it seems to me that the Court of Appeal in *Adelson* was contemplating a period before that."

71. Obviously, insofar as the court is considering what was the state of mind of the person who drafted the Claim Form, a document produced at a later date once the mistake is known may be of limited assistance in deciding what was the mistake and why the original mistake was made. However, I do not accept that the Particulars of Claim is a document to which reference cannot be made. Certainly, in deciding the effect of the contents of the Claim Form upon its recipient a document served at the same time as the Claim Form is relevant: see *Mitchell v Harris Engineering Co. Ltd* [1967] 2 QB 703 at p. 709, cited at paragraph [34] of the judgment in *Adelson*, paragraph [26] of the judgment of Toulson LJ in *Evans v Cig Mon Cymru* [2008] EWCA Civ 390; [2008] 1 WLR 2675 and paragraph [58] of the judgment of Leggatt J. in *Insight Group*

(referring to considering "subsequent correspondence in so far as it sheds light on what the reason was for naming the LLP as the defendant").

72. However, in my judgment, reference to the Particulars of Claim is of limited assistance in this case in deciding whether the case falls within CPR rule 19.5(3)(a), but is relevant in deciding whether I should exercise my discretion in so far as the Particulars of Claim were served with the Claim Form.

73. Subject to those points, there seems to me to be some strength in the points made by Mr. Watthey, which is why I have first considered CPR rule 19.5(3)(b), which appears to me to be the more natural provision to deal with the situation before the court.

74. However, it also seems to me on the authorities that a mistaken decision to sue in the name of the original party entitled to sue rather than in the name of an assignee is a mistake as to name rather than as to identity. In that respect I refer to paragraph [48] of the judgment of Leggatt J. in *Insight Group* and paragraph [75(viii)] of the judgment of Mr. Henshaw in *Rosgrosstakh*.

75. If a failure to sue in the name of an assignee is a mistake of name, as those authorities decide, then it is inevitable that changes of the sort necessitated in the amendments to the "brief details of claim" will have to be made, but will not change the nature of the mistake made.

76. For his part, Mr. Davison argued in his skeleton argument:

> "35. The Applicant was neither named nor described in the claim form in mistake for the dissolved Claimant. Only the dissolved claimant was named and described in the Claim Form. Further the applicant assignee does not match someone of the description actually used in the Claim Form and never

did. In **Smith Kline Beecham PLC v Horne Roberts**[2] Lord Justice Keene the President of the Court of the Appeal at Paragraph said:

> "Stocker L.J. while acknowledging the difficulty in distinguishing between the identity of a party and the name of that party, added at page 209:
>
> > "*If a solution to the problem is to be stated in terms of general application I do not feel I can improve on the test suggested by Lord Justice Lloyd – can the intending plaintiff or defendant be identified by reference to a description which is specific to the particular case e.g. landlord, employer, owners or shipowners?*"

"a) It is by this test that the distinction between the entities can be starkly drawn:

"b) The Claimant was the Employer, also occupier of the Premises, an English limited company. Whilst neither the Applicant nor the Claimant entered into a contract with the Defendants only the Claimant entered into the contract with the Main Contractor.

"c) Whereas the Applicant has never been any of those things it is simply on the Applicant's own case "the Assignee" of part of the Claimant's interests, a Societe Anonyme that never employed the Main Contractor, the Defendants and never suffered any loss from any alleged tort.

"d) The Assignee does not even occupy the building where the fire took place - that is a different AIG company. Even after the attempts to patch the property rights with the 20 December 2019 transactions are taken into account the result is that there is both confusion and separation of identity - were that not the case those steps would not have been necessary.

"e) Clearly there is a difference and any lay person (from the point of view of mergers) is likely to be confused by the prospect that the claim is brought by the Post-Brexit EU Passporting business based in Luxembourg and not the person the work was done for or the person who occupied that building."

77. In my judgment, these points are no more than explaining the circumstances in which an assignment happened, and the different characteristics between the

[2] *Horne-Roberts v SmithKline Beecham plc* [2001] EWCA Civ 2006; [2002] 1 WLR 1662

assignor and assignee. However, as with Mr. Watthey's submissions, these submissions reinforce my view that this case, whilst falling within limb (a) as interpreted by the authorities, falls more naturally within limb (b) of CPR rule 19.5(3).

78. For these reasons, if I am wrong as to the application of CPR rule 19.5(3)(b), I hold that CPR rule 19.5(3)(a) applies.

Discretion

79. Having decided that this application passes the gateway provisions of CPR rule 19.5(3)(b) and/or (a), I must now consider whether to exercise my discretion in AIG's favour.

80. It was to the exercise of my discretion that Mr. Davison for the Defendants devoted the greater part of his oral submissions, and understandably so.

81. To my mind, the most important point made by Mr. Davison concerns the effect of this claim upon the Defendants and those behind the Defendants. There were placed before me two witness statements from Judith McCormick and one from Ronald McCormick. These emphasise that the Defendants are small family owned companies already in a precarious state of financial health, a state which can only have been made considerably worse by the national emergency which has required dramatic government interventions in the period between the hearing before me and the delivery of this judgment.

82. Mr. Davison emphasises that the amount of work carried out by the Defendants was minimal, particularly compared to the scale of the claim made.

83. The Defendants' position is made worse and more worrying by the insurance position: the cover under the RSA policy is only £1 million, and even that is quite possibly not available given that RSA has belatedly refused to indemnify under their policy.

84. The strain of this litigation is having a direct effect on the mental well being of the McCormicks, particularly Mr. McCormick.

85. In addition to those points, Mr Davison points to the following:

(1) The Defendants were not in any way responsible for the mistake;

(2) Greater care should have been taken when preparing the Claim Form;

(3) There is a lack of transparency as to what happened between the date of issue and the date of service of the Claim Form;

(4) There are serious and legitimate concerns about both liability and quantum of the claim itself, but the Defendants are unable to be able to afford legal assistance to defend the claim, which may well be uninsured, but is undoubtedly underinsured if proved in full.

86. Mr Davison graphically expresses the conclusion of his submissions as follows:

> "This is a case where protective proceedings were issued to attempt to access the resources of the insurers of the Defendants. In the meantime this case is likely to drive both Defendants out of business and their directors and staff out of their minds and out of work *even if the matter does not end up reaching trial* which would be at some innominate far off and costly point in the future. The Defendants ask that the court ends this part of the action now and release the Defendants. It is

> submitted that justice is served if the court dismisses this application and award costs to the Defendants."

87. For the Third Party, Mr. Watthey makes the following points:

(1) This is not a case where the true identity of the person intending to sue was apparent to the Defendants prior to the expiry of the limitation period despite the wrong name being used;

(2) There has been serious delay on the part of the Claimant in pursuing this claim;

(3) There was no pre action correspondence at all with the Second Defendant (although a letter of claim was sent to the First Defendant on 17 June 2019);

(4) This is not a matter where information as to the identity of the correct party was in the hands of the Defendants rather than the Claimant;

(5) The exercise of discretion in favour of the Applicant would deprive the Defendants of the Limitation defence which they would otherwise enjoy against any fresh proceedings issued in the name of AIG Europe SA;

(6) The Third Party also relies upon the matters relied upon by the Defendants.

88. As to the first of these six points, Mr Watthey submits in his skeleton argument as follows:

> "30. In Adelson Lord Phillips CJ stated, at [57], that:

> *"In SmithKline*[3] *... Keene LJ accepted that the Sardinia Sulcis test could be satisfied where the correct defendant was unaware of the claim until the limitation period had expired. We agree with Keene LJ's comment that, in such a case, the Court will be likely to exercise its discretion against giving permission to make the amendment"*

"31. The comment above was given in the context of substituting a defendant after expiry of the limitation period. But it applies equally to substitution of a claimant.

"32. GE Money Home Lending was a professional negligence action by a lender against a valuation surveyor.

> "32.1 Like the present case, the claim had been issued in the name of the wrong group company; the claim was issued in the name of "Money Home Lending" when it should have been issued in the name of "Money Mortgages". And like the present case, the problem was noticed only shortly before expiry of the Claim Form / the time for service of Particulars of Claim.
>
> "32.2 HHJ Behrens sitting as a Judge of the High Court said, at [68] to [73]:
>
> > *"... the pre-action correspondence would not have assisted the Defendant to identify Money Mortgages as the lender. As already noted both of the pre-action letters described Money Home Lending as the lender.*
> >
> > *"The first time that the Defendant would have been aware of the mistake and the true identity of the Claimant would have been when it received the application and the letter from Optima Legal dated 14th January 2010.*
> >
> > *"...*
> >
> > *"In my judgment the Defendant did not know the true identity of the person intending to sue at any relevant time. Equally (to adapt paragraph 57(ii) of the judgment) it is not a case where the Defendant, or his agent, was aware of the proceedings and of the mistake so that no injustice was caused by the amendment.*
> >
> > *"If, however, I am wrong about this it is plain that the Defendant did not know the identity of the correct Claimant until well after the Limitation period had*

[3] Horne-Roberts v SmithKline Beecham [2001] EWCA Civ 2006

> *expired. In those circumstances it seems to me that it is covered by Keene LJ's comment approved by the Court in Adelson that the Court would be likely to exercise its discretion against giving permission to make the amendment. There are no special factors here leading to a different course."*

> "33. HHJ Behrens' comments are on all fours with the present case:
>
> "33.1 There was nothing in the pre action correspondence which could have assisted the Defendants to identify that the true claimant was AIG Europe SA and not AIG Europe Limited. In fact, the only pre-action correspondence seems to have been the Letter of Claim dated 17 June 2019, which was sent in the name of AIG Europe Limited[4].
>
> "33.2 The first time that the Defendants would have been aware of the mistake would have been when they received the letter from the Claimant's solicitors dated 20 December 2019 (receipt of which the Defendants in fact deny) which served both the proceedings and the application for substitution.
>
> "33.3 The Defendants would not and could not have known the true identity of the person intending to sue at any relevant stage. In particular, the Defendants will obviously have had no reason to be acquainted with the various re-organisations of the Claimant's group companies.[5]
>
> "33.4 In any event, it is plain that the Defendants did not know the identity of the correct Claimant until well after the Limitation Period had expired; it expired on 31 August 2019 whereas the Defendants would have been unaware of the identity of the correct claimant until receipt of the application under cover of a letter dated 20 December 2019. This case is therefore covered by Keene LJ's *dictum* (approved in Adelson) that the Court would be likely to exercise its discretion against giving permission."

89. For AIG Mr Taczalski submits in his skeleton argument:

> "55. It is submitted that that discretion should be exercised in AIGE SA's favour.
>
> "56. There are a number of factors that point in this direction, and the evidence which has been relied upon by the Defendants

[4] Mr Davison's witness statement sets this out and appends the correspondence (p217, pp219 – 228). There is no suggestion in the witness statements of Mr Ram or Ms Poonia that there was any earlier correspondence.
[5] See the witness statement of Mr McCormick at paragraph 19 (p360).

and RSA does little to change the position. More detailed oral submissions will likely be necessary once the basis of the Defendants' and RSA's objections are known in more detail. At present and in summary:

"56.1 The same allegations of fault and the same alleged loss will be advanced as in the claim originally pleaded; the difference is the party suing.

"56.2 Refusing to grant permission would deprive AIGE SA of a proper, bona fide and valuable claim against the Defendants.

"56.3 Refusing to grant permission would give the Defendants and likely RSA a windfall. They should be made to respond to the claim on the merits.

"56.4 There is no prejudice to the Defendants that has been identified between being sued in the name of AIGE SA in August 2019, and now.

"56.5 The Defendants' liability was also investigated back in 2013, such that there is witness evidence available from that time.

"56.6 The error was identified by AIGE SA's side, and a proper evidenced application made at once. This is not a case where the claimant's hand had to be forced by a strike out application, for example. It was not even raised by the Defendants / RSA. This is in contradistinction to many of the cases such as ***Parkinson*** and ***Irwin***, where relief was nevertheless granted.

"56.7 There has been no delay between the identification of the issue and the making of the application.

"56.8 The Defendants were aware of the potential claim pre-action.

> "56.8.1 This was both at the outset, and in the months leading up to the end of the limitation period.
>
> "58.8.2 Insofar as it is said that there was no correspondence with the Second Defendant, the reason for this has been explained by Ms Poonia, and the fact that the Defendants say that they are effectively one and the same, removes any substance that the argument ever had.
>
> "56.8.3 Notwithstanding the Defendants' awareness of the claim by their directors, their directors (whether on the advice of their brokers or not) chose to do nothing to respond to the claim.

> "56.9 The financial position of the Defendants is not material, and neither is RSA's protestation that it does not intend to indemnify the Defendants.
>
> "56.9.1 This is so as a matter of principle.
>
> "56.9.2 It is also so as a matter of practicality including because: (1) whatever RSA's present position on indemnity, it appears from the Defendants' evidence to have confirmed indemnity previously / waived any breaches – RSA's position therefore appears to be very unattractive; and (2) there are clearly other assets about which nothing is said.
>
> "56.9.3 The impression one might get from Mr Davison's [of DACB, RSA's solicitor] statement for RSA is that RSA knew nothing of this until after proceedings were served. This is wrong – as explained by Ms Poonia, she was in contact with Mr Davison in August 2019 in relation to this matter."

90. I have found the exercise of my discretion in this case a matter of considerable difficulty. In the event, I have decided that the application should be granted.

91. Firstly, I recognise that doing so will deprive the Defendants of an accrued limitation defence, but that is so in the overwhelming majority, if not all, the cases where there is a contested application under CPR rule 19.5.

92. Secondly, I fully accept that these proceedings will place considerable strain upon the McCormicks personally, but that would have been so even if the mistake had not been made. In my judgment this case is primarily a dispute between the insurers standing behind AIG, and RSA who may or may not be require to indemnify the Defendants. It seems highly improbable that any recovery will be made against the Defendants except to the extent that the monies come from RSA. As a matter of humanity, it may well be that AIG and their insurers might wish to confirm what appears to me to be the reality, namely that no attempt will be made to make a recovery except to the extent

that insurance monies are available: I cannot make any such order, but would suggest that urgent consideration be given to this.

93. Thirdly, this is a case in which, perhaps unusually, investigations involving the Defendants' workmen were made very soon after the incident. Although the extent of pre-action correspondence was very limited, these early investigations are, in my view, a relevant factor.

94. Fourthly, at no time were the Defendants misled by the mistake, since the Claim Form when served was accompanied by the Particulars of Claim which fully explained the mistake which had been made.

95. Fifthly, this was an unfortunate, but innocent, mistake.

96. For these reasons the application will be allowed.

97.