



Neutral Citation Number: [2023] EWHC 2015 (Ch)

FL-2020-000051

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**FINANCIAL LIST (CH D)**

**2 August 2023**

**Before:**

**MR JUSTICE LEECH**

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**B E T W E E N:**

**ALLIANZ FUNDS MULTI-STRATEGY TRUST  
(on behalf of ALLIANZGI BEST STYLES  
GLOBAL EQUITY FUND) AND OTHERS**

**Claimants**

**- and -**

**BARCLAYS BANK PLC**

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**Defendant**

**MR JONATHAN NASH KC and MR ALEX BARDEN** (instructed by **Signature Litigation LLP**) appeared on behalf of the Claimants.

**MR MICHAEL WATKINS and MR TOM FOXTON** (instructed by **Latham & Watkins (London) LLP**) appeared on behalf of the Defendant.

**Hearing dates: 11-13 July 2023**

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**APPROVED JUDGMENT**

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**This judgment was handed down remotely at 2 pm on 2 August 2023 by circulation to the parties or their representatives by email and by release to the National Archives.**

**Mr Justice Leech:**

**I. The Applications**

1. By Application Notice dated 15 February 2023 (the “**First Application**”) the Claimants apply for permission to amend the Claim Form and Particulars of Claim to amend the names of a number of individual Claimants and, in a number of cases, to substitute new parties for existing Claimants under either CPR Part 17.4 or CPR Part 19.6. By a second Application Notice dated 9 June 2023 (the “**Second Application**”) the Claimants apply for permission to amend the Claim Form and Particulars of Claim to amend or substitute a number of additional Claimants.
2. The factual background to the applications can be briefly stated as follows. The Claimants’ case is that they are investors who acquired, continued to hold or disposed of ordinary shares in the Defendant, Barclays Bank plc (the “**Bank**”), which is listed on the London Stock Exchange. Some of them also claim to have acquired those shares in a rights issue in September 2013 in which the Bank raised approximately £5.8 billion as additional share capital (and they rely on a prospectus issued on 16 September 2013).
3. On 26 June 2014 the Bank issued an RNS stating that the Attorney General of the State of New York had filed a complaint in the New York State Courts relating to his investigation of “LX Liquidity Cross” which was the Bank’s alternative trading system (the “**Complaint**”). On 31 January 2016 the Bank and Barclays Capital Inc (“**Barclays Capital**”), one of its subsidiaries, entered into a settlement agreement with the Attorney General of New York and submitted to an order (the “**SEC Order**”) made by the Securities and Exchange Commission (the “**SEC**”).
4. On 28 May 2020 Financial Recovery Technologies LLC (“**FRT**”), which described itself as a “Leader in Securities Litigation”, published a circular on its website headed “Case Spotlight: Barclays Plc”. It identified the Bank and stated that it was organising claims relating to “Misleading or untrue statements in published information and violation of disclosure requirements”. It then stated that the limitation period expired on 25 June 2020 and that the deadline for participation in the claims was 1 June 2020 before providing the following background:

“Organizers are currently investigating a potential recovery effort for investors against Barclays plc (Barclays) claiming the firm grew market share for its dark pool securities trading facilities, called LX Liquidity Cross (LX), through misrepresentations about how, and for whose protection and benefit, they were operated. On June 25, 2014, the New York State Attorney General (AG) issued a press release about its lawsuit against Barclays and Barclays Capital Inc. (Barclays Capital), the entity through which Barclays operates in the US. In its suit, the AG claimed that contrary to Barclay’s public statements about safeguards to protect clients from predatory high frequency traders, it actually operated the dark pools for its own benefit. The press release caused the price of Barclay’s London exchange listed shares to fall £0.13 per share, wiping out more than £2.08 billion in market capital.”

5. Under the heading “Eligibility & Costs” FRT continued that in order to participate in the action, investors had to have held shares at market close on 25 June 2014 or to have purchased them during the September 2013 rights issue and held some of them until 25 June 2014. FRT then set out the terms on which a funder called Woodsford was prepared to fund the litigation and then answered the question “Why is there a tight deadline?” as follows:

“Brown Rudnick only recently brought this matter to Woodsford. The deadline is a hard one due to an expiring limitations period – the legal time limit for filing claims. UK law requires certain claims to be filed within 6 years after investors knew or reasonably should have known of the wrongdoing. The Organizers are starting the six years from the June 25, 2014 press release by the AG.”

6. Finally, the circular stated that the organisers were preparing a two phase strategy which required investors to provide the following information:

“**Phase 1:** This first stage will focus on preserving claims – i.e. preventing them from expiring on June 25, 2020 – by attempting to negotiate an early, out-of-court settlement. This may involve entering into a standstill or tolling agreement with Barclays, suspending the limitations clock, or filing

claims in court to ‘perfect’ them (stopping the clock) but delaying serving the complaint on Barclays.

**Phase 2:** If the first stage fails to produce a settlement, the Organizers will file claims in court – if they have not already done so during Stage 1 – and serve the complaint on the Barclays and litigate to resolution.

In Phase 1, you will need to provide trade records and proof of your legal

or beneficial ownership of them. Proof of reliance may also be required for settlement negotiations. Woodsford has not set a participation on threshold for Phase 1. However, it will only proceed to Phase 2 if certain conditions are met including a group participation rate by claimants totalling 650 million eligible shares.”

7. On 6 June 2020 Brown Rudnick LLP (“**Brown Rudnick**”) served a letter of claim (the “**Letter of Claim**”) on the Bank addressed to its board of directors and also its Head of Investor Relations. Brown Rudnick stated that they represented the clients set out in Appendix 1 and summarised the nature of the claim as follows:

“Our clients dealt in Barclays Shares in reasonable reliance on information published by Barclays and suffered loss as a result of untrue and/or misleading statements and/or omissions in such information between 1 January 2011 and 1 February 2016 (the “**Relevant Period**”), and/or have suffered loss as a result of Barclays’ dishonest delay in publishing such information. Accordingly, those clients have claims against Barclays pursuant to inter alia section 90A of the Financial Services and Markets Act 2000 (“**FSMA**”), in respect of the matters more particularly described below.”

8. The Letter of Claim provided detailed particulars of the claims under section 90 and section 90A of FSMA based primarily upon the Complaint, the settlements between the Bank, Barclays Capital, the New York Attorney General and the SEC. In Appendix 1 Brown Rudnick identified 88 potential Claimants for whom they acted and they also invited the Bank to enter into a standstill agreement (and enclosed a draft).
9. By an agreement dated 25 June 2020 (the “**Standstill Agreement**”) and made between the parties referred to in the Schedule (who were defined as the “**Proposed Claimants**”) (1) and the Bank (2) the parties agreed to stop time running for limitation purposes. In clause 2 (which was headed “Agreement to suspend time”) the parties agreed as follows:

“2.1 In consideration of the Proposed Claimants agreeing not to issue or serve proceedings in respect of the claims identified in the Letter Before Action against any current or former Barclays director, the Parties hereby agree that: (a) as regards the Proposed Claimants, for all purposes of any Limitation Defence, time will be suspended during the Period; and (b) Barclays will not raise any Limitation Defence against the Proposed Claimants or any of the Proposed Claimants that relies on time running during the Period.

2.2 The suspension of time under this agreement shall continue in force

until the earlier of: (a) Four (4) weeks after service of notice by either the Proposed Claimants or Barclays, stating that the running of time is to recommence; (b) the service of legal proceedings on Barclays in connection with the Dispute (whether by way of issuing new proceedings, joinder to existing proceedings, amendments to statements of case incorporating the addition or substitution of a new cause of action or new party and/or parties, third party proceedings or otherwise); or (c) 29 January 2021.”

10. The schedule to the Standstill Agreement now identified 122 Proposed Claimants. But in Clause 1.9 the parties also agreed that any party with the right to bring the claims set out in the Letter of Claim for, or on behalf of or in the place of the Proposed Claimants, would be entitled to the benefit of the Standstill Agreement. Mr Nash and Mr Watkins both used the term the “**Claimant Universe**” to describe all of these potential Claimants and I adopt that term myself. Clause 1.9 provided as follows:

“This agreement shall be binding on, and enure to the benefit of, the Parties to this agreement, their respective personal representatives, successors and permitted assigns, and any party with the right to bring any of the claims set out in the Letter Before Action for, on behalf of or in place of the Proposed Claimants. References to any Party shall include that Party's personal representatives, successors or permitted assigns, and references to the Proposed Claimants shall include any party with the right to bring any of the claims set out in the Letter Before Action for, on behalf of or in

place of a Proposed Claimant. Additional Proposed Claimants may become parties to this Agreement by being added to the Schedule hereto and being notified to Barclays up to and including 11:59 p.m. on 25 June 2020 (notwithstanding for this purpose the provisions in the final sentence of Clause 8.1).”

11. On 30 October 2020 Latham & Watkins served a letter of response on behalf of the Bank (the “**Letter of Response**”). They stated that the claim was fundamentally flawed and set out their detailed response to the allegations in the Letter of Claim. In section 8 (which was headed “Proof of Title”) they stated as follows:

“We note that your clients include a mix of entities, including funds, trusts and nominees. Indeed, some of your clients do not appear to be legal entities at all. The basis on which they claim to be entitled to pursue the proposed proceedings is therefore unclear – as is the basis on which they say that they acquired, held or disposed of Barclays shares. Like the issues relating to reliance set out in section 4 above, this will be the subject of extensive disclosure from your clients if they decide to press ahead with the proposed claim, including as to the precise basis on which

shares were acquired, held or sold; by whom; and whether as legal or beneficial owner, or both.”

12. On 26 November 2020 Brown Rudnick issued the Claim Form and Schedule 1 now identified 310 Claimants. On 25 March 2021 they amended and re-issued it. No amendments had been made to the brief details of the claim set out in the body of the form but a substantial number of amendments had been made to Schedule 1 and, in particular, a large number of Claimants had been deleted. In this judgment I use the term “**Claim Form**” to refer to the Amended Claim Form dated 25 March 2021 and the term “**Claimants**” to refer to the remaining Claimants named in Schedule 1 (whether their names are accurately stated or not). I also use it to refer to all of the intended Claimants who were applying to be substituted for existing Claimants named in Schedule 1. Finally, I use the term “**Proposed Claimants**” to refer to the Claimants identified in the Standstill Agreement (as it is used in the agreement itself).
13. Where I refer to individual Claimants I do so by using the prefix “**C**” and the number in Schedule 1 (in its proposed amended form). Thus, **C1** refers to Allianz Funds Multi-Strategy Trust. Where necessary, I also refer to the description of the claim given in Schedule 1 or the capacity in which the individual Claimant is stated to have brought the claim. Thus, **C1** is described as bringing the claim “on behalf of AllianzGI Best Styles Global Equity Fund” and **C58** names CI Investments Inc in its capacity as trustee of a number of different funds (and amendments to three of those funds are among the first amendments which the Court has been asked to consider).
14. The Claimants were all represented at the hearing of the Applications by Mr Jonathan Nash KC and Mr Alex Barden instructed by Signature Litigation LLP (“**Signature**”). The First Application was issued by Brown Rudnick but by the time of the Second Application they had withdrawn because of a conflict of interest and had been replaced by Signature, who issued the Second Application. The Bank was represented by Mr Michael Watkins and Mr Tom Foxtan instructed by Latham & Watkins. I am grateful to all counsel and their respective teams for their lucid and thoughtful submissions and the quality of the argument which was presented before me.
15. Before I move on to the procedural history of the action, I should deal with the numbers upon which both sides relied. It will be apparent from the detailed amendments which I summarise in Section IV (below) that it is possible to calculate the number of

Claimants in different ways. In opening the Applications Mr Nash told me that there are 120 claims remaining after the amendment to the Claim Form and that their value is £225 million. He also told me that 59 were the subject matter of the Applications and that their value is £99 million. Finally, he told me that 44 claims were contested and that their value was £70 million. Mr Watkins told me that the names of 189 Claimants had been deleted from the Claim Form, 123 claims remained and that 57 were the subject matter of the Applications (of which 43 were in dispute). There were, therefore, minor differences between the parties but they were not material.

16. By the end of the hearing it was common ground that 40 claims were in dispute. Shortly after the hearing Mr Barden submitted an agreed table which set out the remaining amendments in dispute and I have identified the various categories and taken examples of each one from that table in Section IV (below). In his covering email Mr Barden stated that the 40 amendments included a handful of entries where two Claimants were treated together or a single Claimant divided in two. It also included two entries for **C58** (above) because it fell into two different categories. He also pointed out that Mr Watkins accepted that the Claimants' table was a correct summary of the disputed amendments but that their characterisation was not agreed in all cases and that Mr Watkins had asked me to review the specific amendments by reference to the witness statements (as I have done).

## **II. Procedural History**

17. On 10 March 2021 Mann J handed down judgment in *Various Claimants v G4S plc* [2021] EWHC 524 (Ch) (later reported at [2021] 4 WLR 46) ("**G4S**"). I consider the decision in greater detail (below) but because the parties referred to the decision in correspondence and it framed their approach in correspondence to the issues which I must now decide I mention it here in the context of the procedural history.
18. By letter dated 30 April 2021 Latham & Watkins wrote to Brown Rudnick responding to the re-issue and service of the Claim Form. They stated that there appeared to be material differences between the Claimants identified in Schedule 1 (as amended) and the Proposed Claimants identified in the schedule to the Standstill Agreement. In schedule 1 to their own letter Latham & Watkins listed those Claimants who had not been identified in the schedule to the Standstill Agreement. Under the heading

“Unidentified Claimants” they stated as follows:

“5. Furthermore, it appears that a significant number of the Claimants identified in the Amended Claim Form have been improperly or inadequately identified, and may fall into the categories of “unidentified claimants” articulated by Mr Justice Mann in G4S, including various funds and sub-funds, trusts, and foreign entities. Without further information from you, our client is unable to verify the status of these entities, including whether they have legal personality and/or have the capacity to bring proceedings in their own name.

6. These difficulties are compounded by what appear to be several incorrectly named Claimants, references to the old names of entities whose names have since changed, references to entities which appear from our searches not to exist or to be incorrectly named, and by the use of naming conventions such as “-” which appears to be an attempt to signify some unspecified relationship between two or more entities.

7. We have listed in Schedule 2 to this letter the Claimants in respect of which these concerns apply. Separately in relation to each Claimant, please provide (a) its full legal name (b) its place of incorporation or establishment, and (c) whether you contend that it has separate legal personality and if so the nature thereof. Pending your response, Barclays reserves the right to apply to strike out the claims of the Claimants listed in Schedule 2.”

19. On 5 May 2021 Brown Rudnick served the Particulars of Claim. Appendix A contained details of the Claimants. By letter dated 14 June 2021 Brown Rudnick replied to Latham & Watkins letter dated 30 April 2021 dealing with the Claimants in their first schedule. By letter dated 12 July 2021 they sent a further letter addressing the Claimants in their second schedule. They sent two of their own schedules the first of which was intended to capture “those alternative formulations of certain claimant names which at the outset were included out of an abundance of caution but that we now believe can be removed from the relevant schedules of claimants”. They also included some Claimants for whom further investigation was required. The second schedule was intended to provide particulars of “the nature of the relevant legal personality, and the relevant place of incorporation”. In the final paragraph Brown Rudnick stated:

“Finally, as to the outstanding points that remain, we confirm we are working to resolve these matters as soon as possible, but this inevitably requires liaison with clients and their representatives in various jurisdictions which does introduce unavoidable delays. Finalising this exercise will also then enable us to revert in respect of any specific matters that may need to be addressed in respect of the full legal names



of some of the claimants pursuing claims against your client.”

20. By letter dated 20 July 2021 Latham & Watkins replied. They summarised the correspondence to date, set out their preliminary analysis of the extent to which the Claimants so far identified held shares in the Bank and complained about the number of duplicate Claimants. They then continued:

“11. The situation described above was obviously a hopeless basis on which to bring these proceedings. Apart from raising serious questions about the basis on which your firm signed the statements of truth in the Amended Claim Form and the Particulars of Claim, it has real practical consequences. Amongst other things, it directly affects the directions that the Court will be asked to make in due course, in relation to disclosure amongst other things; if, as appears likely, it turns out that many of the “claimants” not only lack title to sue, but do not in fact exist as legal entities, our client risks being left without a costs remedy against them when their “claims” are, inevitably, discontinued or struck out; and without knowing which of the claimants is actually entitled to join in these proceedings it is impossible for our client even to begin to guess at the potential quantum of the claim and for the parties therefore to engage with their on-going obligation to consider alternatives to litigation.

12. Our client obviously awaits your response to the outstanding issues identified in your letter dated 12 July 2021 and the further issues identified above with considerable interest. Absent satisfactory answers and/or proposals for dealing with those “claimants” in whose name these proceedings should never have been brought, including (without limitation) those “claimants” who (a) were never shareholders in the Relevant Period, (b) have been included wrongly “out of an abundance of caution”, (c) have been wrongly identified in the List of Claimants, (d) lack legal personality, and/or (e) were not included in the List of Proposed Claimants in the Standstill Agreement and do not fall within the scope of that Agreement, our client intends to apply to strike out all those “claimants” who appear to have no proper basis for joining in these proceedings and who should therefore never have been included in the List of Claimants. That application self-evidently needs to be determined ahead of any case management conference so that the parties and the Court can make decisions about the future conduct of the proceedings on a sensible and proportionate basis.”

21. On 28 July 2021 the Bank served its Defence. By letter dated 12 August 2021 Brown Rudnick replied. In the first paragraph they stated that they were not addressing “your now somewhat laboured efforts at criticism” and complained that Latham & Watkins’ approach was “unhelpful” and their narrative self-serving and inaccurate. In the second and third paragraphs they continued as follows:

“2. At the risk of falling into the same trap of repetition, as should by now be well known to you and in any event has been made clear by us in correspondence, our recent effort to clarify the identification of the various claimants pursuing the Claim against your client was not the product of any deficiencies in the initial approach. It is instead a consequence of the inherent complexities of (a) the various domestic and international investment structures involved in the holdings of our various clients; and (b) the still developing area of FSMA securities litigation, including those issues recently examined, at some length, in the respective judgments of Mr. Justice Hildyard in *Tesco* and Mr. Justice Mann in *G4S*.

3. To this end, we now enclose an updated version of Schedule 2 to our letter dated 12 July 2021, which addresses most of the previously outstanding matters. While there remain a handful of matters still marked in the attached as “outstanding”, these are very much the minority and represent only one part of the overall quantum of the claimants’ claims. We hope to be able to finalise the outstanding matters shortly.”

22. By letter dated 16 September 2021 Latham & Watkins wrote back setting out their substantive objections to the identification of the Claimants by Brown Rudnick. Their first objection was that most of the Claimants did not have an interest in the Bank’s shares during the Relevant Period. They stated that they had established that only two Claimants had been registered as shareholders and that only 27 of the remaining Claimants were beneficial owners. They asked Brown Rudnick to identify those Claimants who had an interest in the Bank’s shares in the Relevant Period and to provide full details. Their second objection was that many of the Claimants lacked legal personality or capacity. In particular, they stated as follows:

“23. We note the purported clarification of the remaining Claimants’ legal personality and capacity to pursue their claims in these proceedings in the updated Schedule 2 to your 12 August 2021 letter, under the heading “*Nature of Legal Personality/Other*”. This topic has been explored at length in correspondence and has still not been properly addressed.

24. Schedule 2 to this letter is a list of those remaining Claimants that our enquiries to date suggest lack legal personality and/or capacity to bring proceedings in their own name. For the avoidance of doubt, this is not a comprehensive list. Given the large number of jurisdictions concerned, our client has necessarily focused on clusters of Claimants from particular jurisdictions and has not investigated the nature or capacity of all the remaining Claimants. Our client reserves the right to apply to strike out other Claimants on this ground in due course.

23. Latham & Watkins gave an example and requested Brown Rudnick to confirm the

precise basis on which each of the Claimants had legal personality and was entitled to pursue a claim in their own name (and to provide details). Latham & Watkins' third objection in paragraph 26 of their letter was that a number of Claimants had been improperly identified and they asked for confirmation that the Claimants in Schedule 3 existed and, if so, for full details. (They also took a number of other objections which are not directly relevant to these Applications.)

24. By letter dated 11 October 2021 Brown Rudnick sent a detailed letter in which they attempted to address Latham & Watkins' objections and requests. In this letter they suggested that they intended to amend the names of certain Claimants. Under the heading "Claimant naming conventions" they dealt with the second and third objections (above) as follows:

"Barclays' Schedule 2 (para 25 of your letter – standing of various trusts)

11. In respect of those Claimants you have identified here as having the status of either Massachusetts Business Trusts or more general trusts, we intend to amend their names as currently set out in the list of claimants to the Amended Claim Form. The proposed formulations of these specific amendments are set out in Schedule 1 hereto.

12. The same conclusion has been reached in respect of claimant #63, which is also a trust. We refer you again to our Schedule 1 for the proposed amendment.

13. As to those claimants you have specifically highlighted here in respect of Retirement Systems in the United States, as already noted above with specific reference to the contradictions in your own correspondence, identifying the correct formulation of a claimant that is both compliant with the local applicable law and English law and procedure is far from a simplistic matter. We are therefore finalising our approach in this regard and will supply you with our proposals very shortly.

Barclays' Schedule 3 (para 26 of your letter – claimant names)

14. In respect of the specific queries identified at paragraph 26 and Schedule 3 of your letter: a. #13 - Amundi Funds II – Multi Asset Conservative. The position of the entities identified at claimants #13 and #14 are again one of the more complex to unravel. It is now apparent that these claimants in fact comprise three distinct groups: (i) funds most properly described as 'fonds commun de placement' and therefore without legal personality. Thus Amundi Luxembourg S.A. is the legal party named as responsible; (ii) Amundi Funds SICAV, a standalone legal fund with separate legal personality; and (iii) Amundi Investment Funds SICAV, another standalone legal fund with separate personality. We are presently finalising the naming conventions of these parties and will provide our proposed amendments to you shortly which will clarify

the position.”

25. On 29 October 2021 Brown Rudnick served the Claimants’ Reply. By letter dated 12 November 2021 Latham & Watkins wrote to them identifying a number of concerns about the amendments to the proposed list of Claimants including the failure to delete duplicate Claimants, the failure to name individual trustees and the failure to formulate the legal personality of retirement systems and funds correctly. By letter dated 19 November 2021 Brown Rudnick replied stating that if the parties could not reach agreement, it would be necessary for the Claimants to make an application to Court. In the final paragraph of that letter they stated as follows:

“We therefore shortly will provide you, in some cases again, with lists of the withdrawals, amendments, or substitutions we propose in this matter, together with an explanation as to the reasons such matters are deemed necessary. We will then invite your client, once again, to confirm its position on such matters i.e. whether it is willing to consent to the various matters being proposed or not. In the event consent is not forthcoming on some or all of our proposals then of course it will be for our client to make the necessary application to the court.”

26. By letter dated 30 November 2021 Latham & Watkins noted what Brown Rudnick had stated about withdrawals, amendments and substitutions (above). They also pointed out that the Claimants were required by paragraph D3.2(a) of the Admiralty and Commercial Court Guide to take steps to fix a date for the first CMC by 11 August 2021 but had failed to do so. By letter dated 1 December 2021 Brown Rudnick wrote back accepting that it was “highly desirable” to fix a CMC. By letter dated 16 December 2021 Latham & Watkins chased for the amendments and by email dated 23 December 2021 Brown Rudnick stated that they proposed to address them in correspondence by 14 January 2022.
27. In the event Brown Rudnick did not comply with this deadline. However, under cover of a letter dated 11 February 2022 they sent Latham & Watkins a series of schedules. They stated that the purpose of the letter was as follows:

“In light of how the parties’ correspondence has developed, the purpose of this letter (and its enclosures) is to set out in a consolidated fashion those amendments that our clients have proposed and do propose be made, together with sufficient background detail that should enable your client now to provide its view on, and hopefully to provide its consent to, each such proposed amendment.”

28. Brown Rudnick identified two categories of Claimant. The first category consisted of proposed withdrawals and deletions which were the subject matter of the first four schedules (including alternative formulations of the same claimant). The second category consisted of proposed amendments to the remaining Claimants in Schedule 1:

“14. We set out in Schedule 5 hereto, details of those amendments that the Claimants propose be made to the existing names set out in the List of Claimants. 15. For the avoidance of doubt, and to assist with clarity around the Claimants’ proposals, this Schedule 5 is set out in a form which (i) assumes the requested withdrawals addressed above have all been effected; and (ii) identifies all of the other amendments being proposed. 16. We invite your client’s consent to amend the List of Claimants in line with the proposals set out in Schedule 5.”

29. Schedule 5 to this letter contained a series of very detailed amendments. The example to which I was taken was **C5**. In column 1 the Claimant was identified as “Allianz Global Investors GmbH”. Column 2 contained a description of the claim: “German Limited Liability Company acting in the capacity as management company.” The third column then set out a detailed explanation for the amendment:

“This amendment is sought to remove mention of these specific funds from the name of this claimant party. At the outset the claimant parties were invited to provide details of their holdings of shares in Barclays on the relevant dates, and to provide details of which entity held such shares. In response this claimant's representatives provided the claimant name that appeared in the schedule to the Claim Form dated November 2020. Subsequently we have been liaising with the claimant's representatives to seek assistance with, amongst other matters, obtaining trade data to help fully identify the extent and nature of the relevant funds' holdings in Barclays Plc shares, gaining a fuller understanding of the relevant investment structures that may be (or may have been) in place, and confirming the nature of the legal entity with the requisite standing to bring proceedings in respect of losses that arise in respect of relevant holdings in Barclays Plc shares. Following these discussions we have clarified that BR's initial understanding of the position of these funds i.e. that claimant No.5 had the requisite standing in respect of a list of funds that included these four subfunds, was incorrect, and that these four funds are in fact subfunds of Allianz Global Investors Fund (Claimant #10 below). The position was still being investigated at the point of issue of the Claim Form (and Amended Claim Form) and thus the course taken then was to include in the Claim Forms reasonable alternative formulations of the parties which it was reasonably suspected had the necessary legal standing to bring action in respect of the losses incurred in the identified subfunds. This approach was adopted to seek to preserve the claim arising in respect of the holdings in the identified subfunds while investigations around specific legal standing remained

ongoing. The position has since been clarified and these four funds are now sought to be removed from this claimant name to avoid any confusion.”

30. The final column then set out the proposed amendment. It took some time for Latham & Watkins to consider all of the proposed amendments and the individual rationale for each one. On 22 March 2022 Brown Rudnick also served the Claimants’ Amended Reply and on 11 April 2022 they wrote to Latham & Watkins again about fixing a CMC. They enclosed a draft list of issues and proposed a number of directions (including a direction for a split trial). By letter dated 22 April 2022 Latham & Watkins responded to these letters stating that the Bank was prepared to consent to some individual amendments but not to the balance of them. They explained the reasons for this position as follows:

“Our client is otherwise not prepared to consent to your clients’ proposed amendments. If your clients wish to pursue them, in whole or in part, they will need to apply for permission to amend and serve supporting evidence explaining the basis on which each amendment is sought to be made. Having regard to the limited information provided to date concerning how the alleged mistakes apparently necessitating the proposed amendments occurred, including (a) the nature of the proposed mistake/amendment; (b) who made the mistake, why and when; (c) how the mistakes were identified and why they were not identified sooner; and (d) an explanation of the general delays caused by the apparent failure on your part properly to identify the entities on whose behalf claims were being brought, our client’s position is that the proposed amendments either do not fall within the scope of CPR 17.4 or CPR 19.5 and/or that the Court should not exercise its discretion to allow them.”

31. Latham & Watkins gave as a particular example **C13** which I consider in more detail below. But their criticism of the proposed amendment was that it was unclear what fund had been originally intended and what the correct name of the fund was or should be. They pointed to a number of name changes and the different approach which Brown Rudnick had taken in their letter dated 29 October 2021. In relation to the CMC they adopted the following position:

“17.3 However much they may wish things were otherwise, your clients cannot simply ignore the numerous outstanding issues set out above and pretend that the parties and the Court are in a position to list a CMC and consider case management directions up to and including a trial of these proceedings. The correct order of events is as follows:

17.3.1. Your clients must (a) issue, serve and list their application for

permission to amend and (b) provide the missing trade data and custody statements/letters to enable our client to identify all those Claimants whose claims are time-barred and, if so advised, apply to strike out the claims concerned. Those applications should, as you accept in relation to your clients' application, be dealt with before the first CMC.

17.3.2. Separately, your clients should (a) provide their long overdue final response to our client's 16 September 2021 Part 18 Request and (b) engage with our client's outstanding 18 January 2022 draft Part 18 Request, the answers to which bear directly on the proposals in your 11 April 2022 letter. Our client cannot begin to consider those proposals in the meantime."

32. In the meantime, on 28 January 2022 Brown Rudnick had issued a second Claim Form annexing a schedule of 65 Claimants. By letter dated 4 February 2022 Latham & Watkins wrote to them asking whether there was any link between the two sets of proceedings and on 24 February 2022 they chased for a response. Under cover of a letter dated 4 March 2022 Brown Rudnick sent a copy of the second Claim Form (as amended) (the "**Second Claim Form**") and in the covering letter they stated that it did not relate to any separate or standalone claim but that its subject matter was the same as the subject matter of the present proceedings. By letter dated 27 June 2022 Brown Rudnick wrote to Latham & Watkins as follows:

"In finalising the evidence for the Claimants' application to amend the List of Claimants in the First Claim (the "Claimants' Application"), we have noticed some minor issues relating to the List of Claimants in the Second Claim. The proposed amendments relating to the List of Claimants in the Second Claim are set out in Schedule 1 to this letter (the "Second Claim

Amendments"). In respect of all claimant names that are sought to be amended in the Second Claim Amendments, we are also seeking to amend the corresponding claimant in the First Claim. As such, the Second Claim Amendments will be dealt with most efficiently by including them in the Claimants' Application.

Our clients therefore remain willing to agree to stay the Second Claim pending the outcome of the Claimants' Application, provided that such stay is effective for all purposes other than the Second Claim Amendments. We enclose a revised draft of the consent order which incorporates your amendments from 14 June 2022 and shows our further amendments in Tracked Changes."

33. By October 2022 Brown Rudnick had not issued the application referred to in this letter and on 14 October 2022 Latham & Watkins served an Application Notice on Brown Rudnick in which they sought an order under CPR Part 3.1 and CPR Part 18 requiring

Brown Rudnick to serve the application within two weeks of the date of the order, to answer a Request for Further Information and to provide trade data and custody statements or letters which they had promised in correspondence. By letter dated 31 October 2022 Brown Rudnick objected that this was unnecessary and proposed that the Claimants should issue the application to amend by 16 December 2022. Latham & Watkins invited them to enter into a consent order but by letter dated 9 November 2022 Brown Rudnick declined to do so on the following basis:

“Our clients do not agree to the consent order proposed. Your client’s proposed order is drafted in stricter terms than the order sought in the Defendant’s Application. Furthermore, in our letter dated 31 October 2022 and in previous correspondence, we explained the reasons why it is difficult for the claimants to commit to a specific timetable for the completion of the steps sought in the Defendant’s Application. We proposed 16 December 2022 as the timetable which the claimants are currently working towards as they progress the relevant matters.”

34. Brown Rudnick did not issue the First Application by 16 December 2022. However, on that date they wrote to Latham & Watkins enclosing a link to letters from custodians and intermediaries for 77 Claimants verifying the accounts in which they held the Bank’s shares. They stated that they were planning to provide the reply to the Request for Further Information and trading data by 20 December 2022 and to issue the amendment application in early January 2023. They also attached a Schedule setting out custodian statements designed to demonstrate the chain of custody of the Bank’s shares. The schedule also contained further detailed amendments, some of which were ultimately reflected in the First Application and a further commentary on the position of each Claimant.
35. On 21 December 2022 Brown Rudnick served their response to the Request for Further Information and on the same day they provided comprehensive trading data records for all but two of the Claimants. One of those two Claimants was **C13** which was the subject matter of one of the two contested applications in relation to the jurisdiction to grant permission.
36. The Bank’s application for directions was listed for hearing between 7 and 9 February 2023 and on 30 January 2023 Brown Rudnick wrote to Latham & Watkins providing a draft witness statement. In the covering letter they stated as follows:



“The evidence which our clients intend to serve in support of their application is enclosed in final draft form. As you may be aware, in both the RSA and Serco litigation, issues relating to name amendment were dealt with by consent between the parties. The Claimants are confident that their application will be successful but, given the potential scope of the application, we consider that it is appropriate to provide you with the evidence in draft before issuing the application in a further attempt to narrow the issues between us, whether as to matters of principle or as to the detail of individual proposed amendments. As you will be aware, we have previously sought to do this through various rounds of information provided to you as to the amendments sought but you have been unwilling to engage with that process. Now that you can see the evidence on which the Claimants will rely we hope that your client will now engage constructively with the proposed amendments. We anticipate being in a position to issue the application within 2 weeks of your client confirming its position that it intends to contest any or all of the application.”

37. Latham & Watkins insisted again that the Claimants submit to a consent order and this time Brown Rudnick agreed. By Order dated 6 February 2023 Miles J ordered the Claimants to issue and serve their amendment application by 4 pm on 15 February 2023 and to provide “Further Particulars of Standing” by 28 April 2023. By Order dated 3 March 2023 Trower J gave directions for the service of evidence and for the First Application to be listed for hearing.
38. On 15 February 2023 Brown Rudnick issued the First Application. The First Application was supported by a witness statement dated 15 February 2023 (“**Shrimpton 1**”) and made by Mr Neill Shrimpton, a partner in Brown Rudnick. He explained the background to the changes between the Claim Form and the Particulars of Claim in the following terms:

“Alongside the PoC a further amended version of the List of Claimants was served which identified some further existing Claimants which, since service of the Amended Claim Form on Barclays, had also given instructions to the effect that they no longer intended to pursue the Claim against the Defendant. As these proposed amendments to the List of Claimants were now being sought in a post-service context, in the covering letter serving the PoC [NS1/pages 75-76] my firm sought the Defendant’s consent to the making of such amendments to the Amended Claim Form and its List of Claimants. This consent was provided by the Defendant’s lawyers L&W in their reply correspondence dated 12 May 2021 [NS1/pages 133-134].”

39. He also explained that from April 2020 onwards Brown Rudnick began to receive

instructions from the Claimants. He described this as the “**Registration Phase**” and he explained that between July 2020 and March 2021 his team continued to contact a number of the Claimants asking them to provide information and documents to verify their name and ownership of the Bank’s shares. He also explained that throughout the remainder of 2021 Brown Rudnick undertook a checking exercise (which he called the “**Constitutional Document Review**”) and that following that review they asked further questions and obtained letters from custodians confirming that individual Claimants were the beneficial owners of the relevant shares. He described this as the “**Full Verification Exercise**”.

40. By letter dated 20 February 2023 Latham & Watkins wrote to Brown Rudnick enclosing another schedule of Claimants and this time stating as follows:

“In light of the statements made by Mr Shrimpton in his witness statement, and the significant length of time your clients have had to put together the Application, we presume that it contains all amendments to the names of claimants which you and your clients consider are necessary. It is not clear on what basis each of the 25 Claimants listed in Schedule 1 consider they can proceed with their claim in light of your previous notifications that they require amendments. Please confirm the Claimants’ position as soon as possible. Our client reserves its right to apply to strike out the claim of any Claimant which lacks standing to sue.”

41. By letter dated 31 March 2023 Latham & Watkins wrote to Brown Rudnick again drawing their attention to CPR Part 19.4(4) (which provides that nobody may be added or substituted as a Claimant unless they have given their consent in writing and the consent has been filed with the Court) and asking for copies of the relevant consents. By letter dated 6 April 2023 Brown Rudnick replied stating that there was no requirement that the consents be filed before any order was made adding or substituting individual Claimants and that the consents would be filed at the appropriate time. Latham & Watkins accepted that position and it was common ground before me that if I granted permission to amend, then the Claimants would file the relevant consents under CPR Part 19.4(4) when the order was made. I do not, therefore, consider compliance with this provision any further.
42. In a witness statement dated 17 April 2023 (“**Middleton 2**”) Mr Oliver Middleton, a partner in Latham & Watkins, answered Shrimpton 1. Under cover of a letter dated 26

May 2023 Signature served notice of change on Latham & Watkins and the Further Particulars of Standing. During the course of the hearing I asked for a copy of the Further Particulars of Standing and I was provided with a copy. It consists of a spreadsheet containing a significant amount of information.

43. In the covering letter Signature stated that they had now been instructed by the Claimants. They also stated that further amendments had been made in respect of **C63**, **C79** and **C80**. By a witness statement dated 2 June 2023 (“**Hogan 1**”) Ms Rebecca Hogan, a partner in Signature, replied to Middleton 2. On 9 June 2023 Signature issued the Second Application and served it on Latham & Watkins together with the second witness statement of Ms Hogan (“**Hogan 2**”) in support of the application. In paragraph 6 she stated as follows:

“Evidence in respect of the First Amendment Application has been exchanged, with evidence from the Defendant having been filed on 17 April 2023, and responsive evidence filed from the Claimants on 2 June 2023. As foreshadowed in that responsive evidence (see paragraphs 27 to 28 of my first witness statement dated 2 June 2023 (“**Hogan 1**”)), further amendments are sought in connection with additional Claimants, many of which were not able to be included within the First Amendment Application due to a conflict of interests on the part of the Claimants’ former solicitors, Brown Rudnick LLP.”

44. By a witness statement dated 28 June 2023 Mr Middleton (“**Middleton 3**”) answered Hogan 2 and by a witness statement dated 4 July 2023 (“**Hogan 3**”) Ms Hogan replied to his evidence. Ms Hogan gave the following additional evidence about Brown Rudnick’s conflict of interest in paragraph 21:

“Middleton 3 seeks to interrogate the change of legal representation. Without prejudice to whether the Defendant is entitled to such information which is of course subject to legal professional privilege, having only recently been instructed, I am not in a position to provide the level of detail

sought in any event. I can say that the reason for the change of legal representation arises from a conflict of interest identified by Brown Rudnick which meant that it was not able to continue acting for certain claimants within the group. That conflict did not arise from Brown Rudnick’s relationship with the claimants in these proceedings, or its conduct of this proceedings, but rather to other matters unrelated to these proceedings. As regards paragraph 28 of Middleton 3, of the 29 claimants within the Second Application, 10 claimants could not be included within the First Amendment Application due to conflict issues, a further 14 were

anticipated to be capable of agreement without the need to be included within the application (see my firm's letter of 7 June 2023 at B1206 – B1210), but in light of Barclays' position in this respect they did require to be included, and the remaining 4 arose in the course of preparing the application."

### **III. The Law**

#### *(1) Section 35*

45. Section 35 of the Limitation Act 1980 ("**Section 35**") is headed "New claims in pending actions: rules of court". Section 35(1)(b) provides that a new claim made in the course of any action other than third party proceedings shall be deemed to be a separate action and to have been commenced on the same date as the original action. This is the statutory basis for the principle of "relation back" and the effect of the section is to deprive a defendant of a limitation defence if a claimant is permitted to amend to bring a new claim after the expiry of the limitation period. Section 35(3) to section 35(7) regulate the circumstances in which such an amendment may be permitted:

"(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim...

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following—  
(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and (b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

(6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as necessary for the determination of the original action unless either— (a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or (b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.

(7) Subject to subsection (4) above, rules of court may provide for allowing a party to any action to claim relief in a new capacity in respect of a new cause of action notwithstanding that he had no title to make that claim at the date of the commencement of the action. This subsection shall not be taken as prejudicing the power of rules of court to provide for allowing a party to claim relief in a new capacity without adding or substituting a new cause of action.”

(2) *CPR Part 17.4*

46. CPR Part 17.1 provides that a party may amend their statement of case (including by removing, adding or substituting a party) at any time before it is served on any other party. There is no dispute that the original amendments made by Brown Rudnick to the Claim Form before it was amended and served on 25 March 2023 were validly made under this provision. CPR Part 17.3(1) provides that the Court may give permission to a party to amend their statement of case. But CPR Part 17.2 provides that this power is subject to the special provisions of CPR Part 19.6 and CPR Part 17.4 which provides as follows:

“(1) This rule applies where— (a) a party applies to amend their statement of case in one of the ways mentioned in this rule; and (b) a period of limitation has expired under— (i) the Limitation Act 1980; (ii) the Foreign Limitation Periods Act 1984; (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

(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.

(4) The court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings started or has since acquired. (Rule 19.6 specifies the circumstances in which the court may allow a new party to be added or substituted after the end of a relevant limitation period.)”

(3) *CPR Part 19.6*

47. CPR Part 19 was amended by the Civil Procedure (Amendment) Rules 2023 (SI

2023/105) to insert a new CPR Part 19.5 dealing with Human Rights and the existing CPR Part 19.5 was renumbered as CPR Part 19.6. Minor amendments were also made to the text of the rule. CPR Part 19.6 now contains the special provisions which were formerly in CPR Part 19.5 about adding or substituting parties after the end of a relevant limitation period (as CPR Part 17.4(4) records above). The text of the rule is now as follows:

“(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 change, or under which 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 them and their interest or liability has passed to the new party.

(4) In addition, in a claim for personal injuries the court may add or substitute a party where it directs that— (a) (i) section 11 (special time limit for claims for personal injuries); or (ii) section 12 (special time limit for claims under fatal accidents legislation), of the Limitation Act 1980 shall not apply to the claim by or against the new party; or (b) the issue of whether those sections apply shall be determined at trial.”

(4) *The Sardinia Sulcis Test*

48. In *The Sardinia Sulcis* [1991] 1 Lloyd’s Rep 201, proceedings were brought in the name of the Italian owners of the Sardinia Sulcis who had ceased to exist as a result of a merger with another Italian company. They applied to amend under RSC Order 20 Rule 5(3) which provided as follows:

“An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.”

49. The Court of Appeal upheld the decision of Sheen J to give leave to amend. The test

which they applied was whether it was possible to identify the claimant by reference to a description which was specific to the facts of the relevant case. Lloyd LJ (with whom Stocker LJ and Sir George Waller agreed) set out this test at 207:

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

The “identity of the person intending to sue” is a concept which is not all that easy to grasp, and can be difficult to apply to the circumstances of a particular case, as is shown by the fact that in two of the cases to which I have referred there has been a dissenting judgment. In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would always be given. So there must be some narrower test. In *Mitchell v. Harris Engineering* the identity of the person intended to be sued was the plaintiff's employers. In *Evans v. Charrington* it was the current landlord. In *Thistle Hotels v. McAlpine* the identity of the person intending to sue was the proprietor of the hotel. In *The Joanna Borchard* it was the cargo owner or consignee. In all these cases it was possible to identify the 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. The point can be illustrated by the facts of *Rodriguez v. R.J. Parker*. In that case the identity of the intended defendant was the driver of a particular car. It was held that there was a mistake as to name. But if the plaintiffs had sued the driver of a different car, there would have been a mistake as to identity. He would have got the wrong description.”

50. Stocker LJ gave a concurring judgment in which he stated that he could not improve on this test. He also provided the following commentary at 209 col 1:

“The difficult question in any given case is to decide whether the application to amend involves the identity of the party suing or only the name of such party. In the instant case, for the reasons I have given, no real problem arises since the identity of the party suing appears on the front of the writ. I agree with Lloyd L.J. that the distinction between the identity of a party and the name of that party may present great difficulties – the dissenting judgments in the cases cited indicate the

problem. 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 L.J. – 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? If the identification of the person intending to sue or be sued appears from such specific description any amendment is one of name, where it does not it will in many if not all cases involve the description of another party rather than simply the name. The nature of the claim will usually provide the answer to this problem.”

51. RSC Order 20 Rule 5 did the work of both CPR Part 17.4 and CPR 19.6 before the introduction of the Civil Procedure Rules. But the *Sardinia Sulcis* test continued to be applied despite the change from one to two rules and the different language employed. In *Horne-Roberts v SmithKline Beecham plc* [2002] 1 WLR 1662 the claimant applied for permission to substitute one pharmaceutical company for another as the defendant in a claim for damages for personal injury after the limitation period had expired. The claimant’s advisers had identified the right batch of the rubella and measles vaccine but not the correct manufacturer. Bell J granted permission to amend at first instance: see [2002] PIQR P3. He identified the most cogent factor in his decision at [39] and [40]:

“39. The most cogent factor, in my view, is that for some time before this application SK had been aware of a number of very similar claims against it, and it had been preparing to defend them. It will suffer no prejudice if the order for substitution is made, beyond the susceptibility to recompense under the provisions of the 1987 Act, which would not otherwise be there, but which is a feature of all cases where a new defendant is substituted outside a limitation period. 40. On the other hand, if the application is refused the young claimant, with allegedly serious disability, will be deprived of any remedy under the 1987 Act. For the purpose of this application I must assume that he has an arguable claim under the Act, although it promises to be hotly contested. A claim for negligence or common law breach of duty, which the claimant has in any event, will be harder to pursue successfully for a variety of reasons. At the very least he will have the burden of having to take separate proceedings against his solicitors in respect of their mistake.”

52. The Court of Appeal followed the *Sardinia Sulcis* and upheld the decision: see [2002] 1 WLR 1662 at [39] to [43]. There was no appeal against the judge’s exercise of the discretion but Keene LJ (with whom Hale LJ and Dame Elizabeth Butler-Sloss P agreed) briefly considered the exercise of discretion at [44] and [45]:

“44. Instinctively one is reluctant to accept an interpretation of section



35(6) of the 1980 Act which might allow the substitution of a new defendant unconnected with the original defendant and unaware of the claim until after the expiry of the limitation period. Such a reaction initially led me to doubt the conclusion reached by Bell J. But on further consideration it seems to me that any potential injustice can be successfully avoided by the exercise of the court's discretion under section 35. It is perhaps not without significance that there is no appeal in the present case against the exercise by Bell J of his discretion against SK.

45. I conclude therefore that the claimant always intended to sue the manufacturer of the identified vaccine and that that is sufficient to give the court the power to substitute the true manufacturer under section 35 of the 1980 Act and CPR r 19.5. On this second issue also Bell J was, in my view, correct in the conclusion which he reached. It follows that I would dismiss this appeal.”

53. In *Adelson v Associated Newspapers Ltd* [2008] 1 WLR 585 an individual and the company of which he was chairman brought libel proceedings against a newspaper. They applied to amend to add third and fourth claimants which were alleged to be the company's operating subsidiaries. Lord Phillips CJ reviewed all of the authorities under RSC Order 20 Rule 5 including the *Sardinia Sulcis* and summarised the test at [43]:

“These authorities have led us to the following conclusions about the principles applicable to Ord 20, r 5. (i) The mistake must be as to the name of the party in question and not as to the identity of that party. Such a mistake can be demonstrated where the pleading gives a description of the party that identifies the party, but gives the party the wrong name. In such circumstances a “mistake as to name” is given a generous interpretation. (ii) The mistake will be made by the person who issues the process bearing the wrong name. The person intending to sue will be the person who, or whose agent, has authorised the person issuing the process to start proceedings on his behalf. (iii) The true identity of the person intending to sue and the person intended to be sued must be apparent to the latter although the wrong name has been used. (iv) Most if not all the cases seem to have proceeded on the basis that the effect of the amendment was to substitute a new party for the party named.”

54. Lord Phillips then considered the authorities on CPR Part 17.4 and CPR Part 19.5 (as it then was) including the *SmithKline* case (above) before setting out his conclusions at [55] to [57]:

“55. CPR r 19.5(3)(a) makes it a precondition of substituting a party on the ground of mistake that: “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 type of mistake laid down in *The Sardinia Sulcis*. The “working test” suggested in *Weston v Gribben* [2007] CP Rep 10 in as much as it extends wider than the *Sardinia Sulcis* test, should not be relied upon.

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.”

55. The application failed because the claimants failed to prove how the mistake had come to be made. Lord Phillips recorded that counsel had conceded that it was not thought to be a useful use of costs or proportionate to obtain an explanation from the claimants' former solicitors: see [71]. He continued at [72] and [73] (in a passage upon which Mr Watkins relied):

“72. There is no reason to believe that Salans were under any misapprehension as to the true position in relation to the corporate structure of the Las Vegas Sands Group or as to the roles of the companies in the group. We have no information as to the instructions given by Salans to counsel. Only one thing is clear. Those responsible for the particulars of claim thought it appropriate to plead that the second claimant “trades and operates” without adding the words “through its operating subsidiaries”. We find it impossible to deduce from that fact that those responsible for the particulars of claim were under a misapprehension of the material facts but for which they would have added as claimants the third and fourth claimants.

73. Mr Price has not conceded that on the facts of this case the second claimant cannot bring a claim for any damage done to the group's reputation. It is at least possible that, rightly or wrongly, an informed decision was taken that the second claimant was the appropriate corporate claimant. The attempt to add the third and fourth claimants may reflect no more than a belated decision to attempt to avoid lengthy argument as to the nature of the cause of action of the second claimant.

Indeed in the course of argument Mr Price said that it had been hoped to achieve this.”

(5) *Insight*

56. Mr Nash placed particular reliance upon the decision of Leggatt J (as he then was) in *Insight Group Ltd v Kingston Smith* [2014] 1 WLR 1448 (“*Insight*”). In that case the claimant brought a claim for professional negligence against a limited liability partnership of accountants. Most of the relevant acts or omissions upon which it relied had been committed before the partnership had become an LLP and it applied for permission to amend to substitute the partnership as the defendant. The Master dismissed the application but Leggatt J allowed the appeal. He confirmed that it was not an element of the test that the mistake was not misleading or caused no doubt. He stated this at [37]:

“It could not be said, and was not suggested in the *SmithKline* case, that the claimant's mistake in naming Merck as defendant instead of SmithKline was not misleading or such as to cause doubt as to the identity of the party intended to be sued. It obviously was. Indeed, SmithKline did not even become aware of the claim until after the limitation period had expired. Nevertheless, as was noted in the *Adelson* case [2008] 1 WLR 585, para 57, the Court of Appeal still held in the *SmithKline* case that the *Sardinia Sulcis* test could be, and was, satisfied. It cannot therefore be an element of the test, at any rate as it now applies, that the mistake was not misleading or such as to cause doubt as to the identity of the person intending to sue or intended to be sued.”

57. Leggatt J then went on to consider the limits of the *Sardinia Sulcis* test. He expressed the view that it was not an easy test to apply and gave as an example the range of possible descriptions which might have been applied in the *SmithKline* case: see [43]. He also considered cases which fell the wrong side of the line: see [45] to [49]. He then gave the following guidance about the relevant description at [47] (upon which Mr Nash relied by analogy) at [52] and [58]:

“52. It is not easy to derive from these authorities any clear guidance as to where and how the line is to be drawn between those mistakes which on the *Sardinia Sulcis* test the court has power to correct by substitution and those which it does not. It seems to me, however, that the only way in which the *Sardinia Sulcis* test is workable at all is to identify the relevant description of the intended claimant or defendant by reference to what description is material from a legal point of view to the claim made. For example, in the *SmithKline* case [2002] 1 WLR 1662 the claim was

founded on the Consumer Protection Act 1987 which gives a right to a person injured by a defective product to recover compensation from the producer of the product. It was thus material to allege that the party sued was the producer of such a product. On the other hand, the fact that the product was a vaccine and identity of the batch from which it came were not material to the existence of the cause of action and are therefore not essential facets of the description of the party whom the claimant intended to sue.”

“58. To determine into which category a particular case falls, it is necessary to consider the whole of the evidence which may serve to explain why the LLP, and not the firm, was named as the defendant in the claim form. Such evidence will of course include any explanation given by the person who was responsible for preparing the claim form. But any such explanation may well not be conclusive, not least because the person responsible for the mistake may have given no proper thought to the decision to name the LLP as the defendant and may not consciously have followed either of the possible thought processes distinguished above. Any explanation given of the nature of the mistake may thus be an attempt to rationalise what was done in hindsight. For that reason other, objective evidence is likely to be just as, if not more, important. If particulars of claim were prepared when the claim was issued or at any rate before the mistake was recognised, they may be the best source for inferring what the claimant intended. It is also potentially relevant to consider what was said in any correspondence which preceded the issue of the claim form and in subsequent correspondence in so far as it sheds light on what the reason was for naming the LLP as the defendant.”

58. The judge reviewed the Master’s exercise of discretion at [104] to [111] and considered that none of the factors which she had identified justified the Court’s refusal to permit substitution of the firm for the LLP. Four of those factors are directly relevant to both Applications before me. Those factors and the judge’s conclusions were as follows:

- (1) *Legal Representatives*: It was wrong in principle to approach the exercise of discretion on the basis that the Court should generally be unwilling to excuse mistakes by a party’s legal representatives unless there is a very good explanation. It should not be exercised in a way which punished a party for their harmless errors: see [106].
- (2) *The Mistake*: It was also wrong in principle to regard the lack of evidence as to when and in what circumstances the claimant acquired knowledge of the existence of the firm as relevant to the exercise of discretion. This was only relevant to the question whether there was any culpable delay in making the

application for substitution: see [108].

(3) *Delay in bringing the claim*: This undoubtedly contributed to the need to make the application for substitution after the end of the limitation period but did not affect the justice of whether or not to allow substitution: see [110].

(4) *Delay in making the application*: The Master was right to consider that this was a minor, if not negligible, factor in the overall balance of considerations: see [111].

59. Her Honour Judge Walden-Smith (sitting as a judge of the High Court) applied *Insight* in *American Leisure Group Ltd v Olswang LLP* [2015] PNLR 456. In that case Master Bragge had also refused to permit the substitution of the claimant after the expiry of the limitation period in the exercise of his discretion. Although the judge agreed with Leggatt J in *Insight* that it was not for the Court to punish a party for the harmless error of its legal representatives, she declined to interfere with the exercise of discretion. However, she also distinguished *Insight* on the following basis at [64]:

“A significant difference between the facts in *Insight* and in this case is that neither OLLP nor Olswang had any idea of the potential claim until months after the limitation period had expired. ALG decided, for whatever reason, not to take any steps in prosecuting a claim against their legal advisors until the very last minute: both with the issue of the claim form and the particulars of claim. That was the decision of ALG over which Olswang had no control. While a party will always lose the benefit of a limitation defence where the discretion is exercised in favour of the claimant under the provisions of CPR r.19.5 to substitute a party after expiry of the limitation period, in this case the manner in which ALG has conducted itself means that there was no intimation of a claim until four months after the expiry of the limitation period. That, as I have said, creates particular prejudice to a party who is entitled to consider that potential exposure to an action has come to an end by reason of the expiry of the limitation period.”

60. In both *American Leisure* (above) and *Rosgosstrakh Ltd v Yapi Kredi Finansal Kiralama AO* [2017] EWHC 3377 (Comm) the Court adopted the same evidential approach as Leggatt J had done in *Insight* in determining the appropriate description of the claimant. In *Rosgosstrakh* Mr Andrew Henshaw QC (as he then was) granted permission to substitute Rosgosstrakh Insurance Company PJSC as the claimant for Rosgosstrakh Ltd on the basis that the *Sardinia Sulcis* test was satisfied and that the intended claimant was (or included) the current insurer under a P&I policy at the time

of issue: see [75] and [76]. He exercised his discretion to permit the amendment for a number of reasons. For present purposes, it is enough to note that he rejected the contention that there was no attempt by the claimant to engage in pre-action correspondence: see [87](i). He also attached little or no weight to the fact that substitution would deprive the defendant of a limitation defence. He stated this at [87] (v):

“I do not consider the fact that the substitution will deprive the First Defendant of a time bar defence to be a relevant, alternatively a weighty, factor in this context. That factor will by definition always exist in applications of this nature, yet the Limitation Act and Civil Procedure Rules make express provision for the substitution of parties after the expiry of a limitation period in cases falling within the rules.”

61. In *Best Friends Group v Barclays Bank PLC* [2018] EWCA Civ the Court of Appeal agreed with Leggatt J in *Insight* that it is not for the Court to exercise its discretion to punish a party. In that case, the application to amend was only made under CPR Part 17.4(3) and not under CPR Part 19.5. Phillips J dismissed the application because he was not satisfied that there was a genuine mistake and that, even if there was, it caused reasonable doubt as to the identity of the party in question. The Court of Appeal dismissed the appeal but also commented briefly on the judge’s exercise of discretion. Simon LJ stated this at [42]:

“Mr Penny submitted that the Judge's conclusion involved a penal approach to the exercise of discretion which led to a disproportionate result. He referred in this context to the decisions in *Insight Group Ltd v. Kingston Smith (A Firm)* [2014] 1 WLR 585; and *American Leisure Group Ltd v. Olswang LLP* [2105] EWHC 629 (Ch). I would accept at once that it is not for the court to exercise its discretion so as to punish a party for a harmless error by its legal representative. However, I do not consider that this is what occurred. The Judge was rightly concerned by the delay in making the application. The Claim Form has been issued at the end of (and in relation to the 2006 swap, after the expiry of) the limitation period. The claim was conducted without any of the urgency that it should have had. Even when the issue of the proper identification of the claimant was specifically raised in the Defence on 15 July 2015, nothing was done to put the matter right. Instead of a prompt application to amend the Claim Form an unwarranted allegation of deliberate concealment was made. Although there has been no waiver of privilege which might have enabled the Judge to assess it, previous counsel's characterisation of what occurred as 'sheer incompetence' was neither a sufficient explanation nor such as to come near to a justifiable excuse to what were repeated failures in the conduct of the litigation in what is a

specialist court, where high standards of efficiency and expertise are expected of practitioners.”

62. It is clear from the report that the conduct of the claimants (and their legal advisers) in that case was fairly extreme. Stuart-Smith J (as he then was) was equally critical of the claimants in *Jalla v Royal Dutch Shell* [2020] EWHC 459 (TCC). In that case the Claimants had amended the Claim Form without permission to change the name of one of the Defendants: see [5]. The Claimants subsequently applied to amend under both CPR Part 17.4 and CPR Part 19.5 and the judge commented on the peculiarity of this application at [11] to [19]. In the event he rejected the evidence of the Claimants’ solicitor that a mistake had been made and dismissed the application: see [141] to [149]. However, he also dealt with the exercise of discretion at [151]:

“Had I found that I had a discretion I would not have exercised it in favour of the Claimants. Since the question is hypothetical I can give my reasons shortly. First, the Claimants have not explained why they amended the Claim Form without reference to the Court in April 2018 when they must have known that there were significant limitation issues that required them to use the procedures under CPR r. 17.4 or r. 19.5: they knew they had limitation difficulties because they had issued protective proceedings and the amendment was being made well over six years after the December 2011 Spill. Second, the effect of the amendment was that STASCO was first notified of its alleged involvement well over six years after the December 2011 Spill. Neither STASCO nor SIL, RDS or SNEPCO had any reason to investigate the facts of the Northia's involvement until the claim was in fact statute barred for many, if not all, of the Claimants. This constitutes substantial prejudice which is not eliminated if it were subsequently to be shown that some Claimants first suffered actionable damage after April 2012. Third, the mistake (if such it was) led to the naming of SIL which was misleading and such as to cause reasonable doubt as to an intention to sue STASCO. Although the Claimants purported to correct this mistake before service of proceedings, this remains a matter that may be taken into consideration when exercising the Court's discretion: see the reference to *Best* at [121] above. Fourth, the Claimants then delayed until June 2019 to issue the STASCO Application. Although it is true that the Defendants had not raised the issue with them, the primary responsibility for regularising the position rested with the Claimants who had inappropriately relied upon the CPR r. 17.1 procedure in the first place. Fifth, in an attempt to stave off inevitable findings to the effect that the Defendants had an accrued limitation defence for many (and possibly all) of the individual claims being brought, the Claimants raised an unwarranted deliberate concealment argument that was unjustified both on the facts and the appropriate legal principles. It may be said that this is to "double-count" because the existence of a discretion might have arisen

if the deliberate concealment argument had succeeded. I therefore make clear that I would have declined to exercise my discretion in favour of the Claimants even if giving this point no weight.”

63. The final decision which I must consider before I turn to *G4S* is *TRW Pensions Trust Ltd v Indesit Company Polska Sp Z.o.o.* [2020] EWHC 1414 (TCC) in which Fraser J gave permission to one of the claimants to amend its name from “TP ICAP plc” to “TP ICAP Group Services Ltd” or to substitute the one company for the other. The claim related to a fire at business premises in Kent and the judge found that the second claimant was always intended to be the lessee of those premises. He applied *Insight* in deciding whether the *Sardinia Sulcis* test was satisfied: see [43]; he did not consider a delay of weeks to be fatal to the exercise of discretion: see [61]; and he held that there was no prejudice in being deprived of a limitation defence (relying again on *Insight*). He stated as follows at [64]:

“I have also, as part of this exercise, considered prejudice to the defendants, although that is only one element of considering discretion. I can deal with this simply. In my judgment there is none to the defendants if the substitution is permitted. There is no doubt that the defendants would be in a far better position forensically were this application to fail, but that is not the correct test for prejudice. The defendants always knew, from receipt of the claim form, that the Second Claimant was intended to be the lessee of the third floor. The fact that the mistake that was made by the solicitors acting for the claimants was that they believed that the lessee was TP ICAP plc, when in fact it was TP ICAP Group, has caused the defendants no prejudice whatsoever. Failing to achieve a technical knockout cannot, in my judgment, sensibly be characterised as prejudice.”

64. Fraser J also held that the prejudice to the defendants in relation to the conduct of the trial was not a determinative factor either because they would face the same case on liability whether the application for substitution succeeded or not. Mr Nash placed strong reliance on the following passage at [66]:

“Various matters were prayed in aid by the defendants in terms of how hard it would be for them to conduct the trial, so long after the event, if substitution were permitted. Although in some cases on other facts such a consideration might be valid, here it is not, because as the applicant points out, all of the different defendants, from the First through to the Fifth, will face the same case on liability from the First Claimant, the freeholder, in any event, whether this application were to succeed or not. Therefore the defendants will have to grapple with their evidential difficulties, real or imaginary, in any event. The freeholder's case will



continue. This is undoubtedly a feature of this particular case; I do not weigh it in the balance as a determinative factor, but it certainly cannot be ignored. The fact that the First Claimant has its own separate and freestanding claim in relation to which no mistake was made, arising out of exactly the same facts, which will proceed entirely unaffected by whether the substitution is permitted or not, is of some relevance to the application.”

(6) *G4S*

65. The facts of *G4S* bear a strong resemblance to the facts of the present case. It was also a group action under section 90A of FSMA although not the subject of a GLO. On 10 July 2019 a Claim Form was issued against *G4S plc* claiming that investors had bought and held shares in the company which had lost value as a result of a public announcement that the company had been the subject matter of a fraud. Mann J recorded that the original number of claimants was 43 but rose to 182 before reducing to 93. He also recorded that the limitation period ran (or arguably ran) from the date of an announcement on 11 July 2013 and that the claim was not preceded by any Letter of Claim or any pre-action correspondence. Finally, he recorded that if the claimants who had joined the group after 11 July 2019 (i.e. after the limitation period had arguably expired) could not be added or substituted, the value of the claim would be reduced from £102 million by £92 million to £10 million: see [3] to [6]. Those claimants numbered 52: see [14].

66. *G4S* differs from the present case, however, because in many cases the defendant disputed the claimants’ entitlement to rely on either CPR Part 17.4 or CPR Part 19.6. In particular, it disputed whether the threshold gateways (as I will refer to them) in CPR Part 17.4(3) and CPR Part 19.6(3)(a) or (b) were satisfied. Mann J analysed the authorities in detail (as I have attempted to do) before summarising the law at [140] and considering the kind of mistake which would satisfy the *Sardinia Sulcis* test at [141] to [144]:

“From these authorities I derive the following conclusions for the purposes of the points I have to decide:

(i) Under both rules 17.4 and 19.5, the mistake must be as to name and not identity.

(ii) Rule 19.5 refers in terms to a substitution. However, in reality rule 17.4(3) has also been interpreted so as to allow what is, in fact (and law) a substitution.

(iii) That is because the concept of a mistake as to name is interpreted generously.

(iv) Generosity is achieved by looking to the description of the legal requirements for qualification as the claimant or defendant (as the case may be)— Insight at para 52—usually as described in the claim form (and perhaps Particulars of Claim if served with it).

(v) If a description is to be relied on as saving a misdescribed party it must be sufficiently specific to allow identification in the circumstances —“more or less specific to the particular case”, in the words of *Sardinia Sulcis*. A successful amendment will very often be a case where there is an intention to sue in a certain capacity (landlord, tenant, shipowner).

(vi) The true identity must be apparent to the litigation counterparty, at least under rule 17.4(3) (*Adelson* para 43). It is not clear to me why this would be a requirement under CPR r 19.5(3)(a) when it seems to omit the reasonable doubt criterion.

(vii) Under CPR r 17.4(3) it is a requirement that the mistake would not have caused reasonable doubt as to the identity of the party intending to sue. That is not a requirement under CPR r 19.5, but the point may be relevant to the court's discretion, and may be a significant factor. Mr Onslow accepted that it was capable of being relevant to discretion. I confess that it is not wholly clear to me how it is likely to play into discretion, but I suppose it is relevant to consider it as a test for whether the counterparty in reality knew in substance who the proper claimant/defendant was supposed to be. If they did then there might be more of a case for allowing the amendment, though I confess I do not find this wholly logical.

141. The level of generosity is demonstrated by a large number of the reported cases, but I can just confine myself to just one. In the *TRW* case (above) there was a claim by what was intended to be the tenant under a lease to one of a group of companies. After proceedings were issued, and after the limitation period had expired, the claimants discovered that the actual leaseholder was a different company from that which had originally sued. The wrong entity had been listed on the claim form because of a mistaken belief by the claimants' solicitors as to the identity of the lessee, and the mistaken belief came from a description given by loss adjusters. Fraser J allowed substitution under CPR r 19.5 on the basis that there had been a relevant mistake. The company which was joined as claimant was the company that the mistake maker (the solicitor) intended to be joined. There was no mistake as to the identity of that company. There was no mistake as to the name of that company. His mistake was in thinking that it was the tenant company. Nonetheless this was treated as a mistake as to name within the generous test.

142. That decision, and other more historical ones which follow the *Sardinia Sulcis* test, are a helpful background in my considering the mistakes in this case.

*Unidentified claimants — the person making the mistake*

143. According to *Adelson*, the person whose mistake is relevant has to

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" (para 55).

144. One might have thought that that would mean the individual within the client who authorised the proceedings. However, that would be too narrow a view. In *TRW* it was, on the facts, the solicitor who was responsible for the litigation. There is no indication in that case that anyone in the client companies made a mistake at all. The source of the mistake was in the casual use of names by the loss adjuster, and a misinterpretation by the solicitor. That was sufficient for Fraser J. I would respectfully agree with that approach of allowing that mistake to count. It does not seem to me that too nice an inquiry into who made the mistake is going to matter much, because at the end of the day if there is a mistakenly joined party that will be down to the solicitor who will be mistaken as to the party who should be joined. He may have made the mistake himself without a contribution from anyone else; or he may have made it because of something he was told (as in *TRW*, and as in *BDW Trading Ltd v AECOM Infrastructure and Environment UK Ltd* (unreported) 16 October 2020. I do not see why the rule requires a particularly strict approach to this inquiry. In my view it is more important to identify the nature of the mistake, though that will of course involve identifying who made it, and obviously the mistake must have been causative of the error in question."

67. Mann J noted that it was a requirement of CPR Part 17.4 that there should be no reasonable doubt as to the identity of the party but not of CPR Part 19.6 and held that this issue falls to be determined at the date of the mistake (which will usually be the date of the Claim Form or the application to amend): see [153] to [159]. More generally, he expressed the view that the question whether there was an operative mistake which fell within either CPR Part 17.4 or CPR Part 19.6 should be tested at the same time. He stated this at [158]:

"The reasonable doubt element is a measure of the quality of the mistake and closely associated with it. The linguistic connection is close, and is reinforced by the likely purpose of the test. It is intended to be a test of the mistake, in its context. It does not make much sense to me that its inherent quality as a mistake can be altered by an explanation given to the defendant (or other counterparty) after the event of the mistake. Mr Onslow's submissions can be tested by taking two scenarios in relation to a mistaken claimant. First, a scenario in which the test is not fulfilled at the time of the issue of the claim form and is still not immediately before service. Immediately before service the claimant explains the mistake and says it is going to serve and make an application to amend to correct it. Second, a scenario in which the requirement is not fulfilled at the date of issue, the claimant then serves, and immediately afterwards it points

out the mistake and says it is going to amend. If Mr Onslow is correct then the requirement is fulfilled in the first case but not the second. But in my view the difference between those scenarios is immaterial. There is no good reason why the clarification given by the claimant (which makes the mistake apparent and removes confusion from that point) should assist the claimant in the first case but not the second. It is more rational to test the matter as at the date of the mistake and its operation (the issue of proceedings in the wrong name), after which point the clarification by the claimant can make no difference.”

(i) Wrong entity

68. Mann J then addressed a number of sample amendments which (like this case) could be grouped into a number of different categories. The sample case in Category 2 involved an amendment to add the words “Invesco Fixed Interest Investment Series for and on behalf of” a number of OEICs. As the judge explained, these are FCA authorised collective investment schemes called “Open Ended Investment Companies” and have no capacity to sue in their own names but must sue in the name of an umbrella company. The judge described the mistake at [197] and [198]:

“197. The mistake is said to be as to the corporate nature of the funds in question. The originally named claimant is a sub-fund within an OEIC of the nature described in the previous section of this judgment dealing with such entities. These were not sub-funds with separate legal personality. They were ring-fenced funds under an umbrella company, with the ring-fencing consequences referred to in that section. The evidence is that “the Claimants” (no particular individual identified) thought that it was unnecessary and inappropriate for the umbrella companies to be parties to the claim because each of the Investment Manager and the Investment Advisor to each of the sub-funds (unidentified to me) were party to the claim, the former body “having the authority to bring proceedings in relation to losses suffered by any of the above-funds”. I confess I do not understand this reasoning.

198. It appears that this mistake as to legal personality persisted into this application because in his first witness statement Mr Warren-Smith for the claimants averred that this fund was an ICVC (Investment Company with Variable Capital) which had separate legal personality. However, by the time of his second witness statement he seems to have appreciated the error and proposed the amendment which is currently under consideration. It thus seems that the error extended from the claimant group to the solicitors. No individuals within the group are named. Mr Warren-Smith contents himself with saying that his information came from individuals in the legal team at Invesco Asset Management Ltd, to whom all management of sub-funds is delegated.”

69. The judge held that the mistake made did not satisfy the threshold gateway in CPR Part 17.4(3) because the case before him was not a case where the correct entity was identified but the wrong name applied, but a case where the correct entity was not identified at all. He also held that if this was incorrect then the application fell at the hurdle of reasonable doubt. I set out part of his reasoning from [200] and [202]:

“200. The next question is therefore whether it was a mistake as to name within the meaning of rule 17.4(3). I do not consider that there was. This rule applies where a party wishes “to correct a mistake as to the name of a party”. It is not apparent from the authorities that the same generosity should apply to this concept as applies to rule 19.5(3)(b). This was not a case where the correct entity was identified and the wrong name applied. It was a case where the correct entity was not identified at all. A non-existent entity was identified and named. The correction sought is not to correct the name of the intended party. It is to substitute a completely different name, the name of something that actually exists. It may be that the concept of correcting the name can become a matter of fact and degree, but if that is so then the present falls well on the wrong side of the line.”

“202. If I am wrong about that then I consider that the rule 17.4 case falls at the hurdle of reasonable doubt. The best evidence of total uncertainty (not just reasonable doubt) is that the claimants themselves continued to labour under misapprehensions as to which entity owned the shares in question even after doubts were raised as to other entities—see Mr Warren-Smith's first witness statement. It is not apparent why an objective observer should have no reasonable doubt as to the correct identity of the party in question when the Invesco organisation, and its solicitors, themselves remained confused.”

70. Mann J then went on to consider whether in the alternative the threshold gateway in CPR Part 19.6 was satisfied. He pointed out that the substitution of a claimant may be made under the rule even if the existing claimant does not exist (citing *Rosgosstrakh* (above)). He cited both *The Sardinia Sulcis* and *Insight* and directed himself that it was necessary to identify the essential description of the intended claimant before reaching the following conclusions at [205] to [208]:

“205. The essential description “the owner of shares held by the [Invesco fund]”, which is an acceptable paraphrase which does not beg the questions which arise under this head, is a description which is sufficient to fall within *Sardinia Sulcis* as elaborated by *Adelson*.

206. I have not overlooked the fact that one of the apparent requirements of the old Ord 20 r 5, set out in para 43 of *Adelson*, is: “(iii) The true identity of the person intending to sue and the person intended to be sued must be apparent to the latter although the wrong name has been used.”

207. That would probably not be fulfilled in the present case. For the reasons appearing above in relation to the reasonable doubt element of the rule 17.4(3) test, the true identity of the legal owner of the Fund's shares would not have been apparent to G4S. However, I do not regard that requirement as necessarily carried over into CPR r 19.5(3)(a). The Court of Appeal did not say that it was, and I do not detect it in the later authorities. If it had been carried over it would have involved the introduction into rule 19.5(3)(a) of a requirement which would be stricter than the reasonable doubt test, which has been held not to be applicable to this provision as a matter of rule. Accordingly, I do not consider that absence of this factor stands in the way of the conclusion that I have reached.

208. I therefore consider that the mistake made in this instance was a mistake as to name and not as to identity, being appropriately generous to the claimants for these purposes. For what it is worth, I consider that the position in relation to this particular exemplar falls naturally within the wording of CPR r 19.5(3)(a), though I accept that there is little that is natural in the approach which the authorities require to be taken to this provision.”

71. Because of this finding it was unnecessary for Mann J to go on and consider the alternative threshold gateway in CPR Part 19.6(3)(b). However, he did make one particular observation about the amendments at [210] which was relevant to the amendments in the present case:

“I add one further point about the form of the amendment, though it is not one taken by Mr Rabinowitz (though he does make a similar point in relation to the next category). I find the new formulation curious. The expression “for and on behalf of” suggests one entity doing something for another entity. One cannot do an act “on behalf of” a non-entity. I have wondered whether that formulation was adopted as a presentational one so as to suggest that the proper claimant and the wrongly named claimant were more or less the same thing, in order to improve the argument. Whether or not that is right, it does not seem to me appropriate. If it is desired to indicate that Invesco Fixed Interest Investment Series (the legal owner of the shares) was bringing its claim in respect of the particular shares held in the Fund, then that could be more aptly phrased, though in my view it is strictly unnecessary in the heading to a claim form (though obviously it would have to be properly pleaded). However, this point is not taken as a bar to the amendment so I shall not take any action on it, other than to draw the attention of the parties (and particularly the claimant) to it in this paragraph.”

(ii) Name changes

72. Mann J dealt with name changes at [245] to [257] which he grouped together as

Category 6. One sample proposed amendment involved changes to both the name of the claimant and the fund on whose behalf the claim was made. The judge considered the evidence and concluded that a “triple mistake” had been made. He also refused permission to amend for the following reasons:

“253. There is therefore a triple mistake here. There is a wrongly pleaded former description of the fund; that description no longer applies because of a name change of the fund; and the “entity” pleaded does not hold the shares anyway because they are held by a trustee.

254. I accept that it might just be possible to describe all this as a mistake of name for the purposes of rule 17.4(3). However, even if that is done then this exemplar fails the reasonable doubt case. Even if the claimant itself is satisfied as to the correct entity now, looking at the matter as at the date of issue of the proceedings, or even as at the date of service, the chain of mistakes would give rise to reasonable doubt as to the identity of the person in question. It is all too puzzling. Mr Onslow pleaded for some understanding since this was a “vast and complex” organisation which does not resemble a human and in which mistakes would be made. I do not doubt that the Invesco group is a complex organisation, in which some mistakes will be made, but these mistakes, taken with the others that have been made, are serious and extensive and, frankly, they ought not to have been made. One would expect the organisation to be able to keep records of changes of names of funds, and transmit names to solicitors accurately—indeed, the names of its funds must be important for all sorts of reasons beyond these proceedings. I am afraid I am unable to extend the sympathy sought.

255. Turning to rule 19.5(3)(a), the position might be thought to be analogous to the Category 2 cases where it is in fact an umbrella company holding the assets (though Invesco Pensions Ltd is not said to be an umbrella company). However, I do not think that that works for the claimant in this particular case. In Category 2 one can take the description of the fund, and the pleading of a shareholding, and treat the failure to plead the legal owner as a mistake as to name within the generosity of the test. The present case is different because of the first pleading, which was of a fund which did not own the shares in question. One therefore starts from a different point. I do not consider that the generosity of the test extends as far as this case.

256. Rule 19.5(3)(b) fails for reasons which will by now be apparent. That provision cannot be taken to be intended to extend to the chain of mistakes in this case. If it did it would really amount to a provision which always allows a substitution no matter what has gone before if that is what is necessary to save the action, and that cannot be right.”

(iii) Discretion

73. Finally, Mann J dealt with discretion. He briefly summarised the submissions of

parties: the claimants relied on the prejudice of losing the ability to bring claims valued at £90 million in time. The defendants relied on a number of aspects of the claimants' conduct (and their solicitors): see [272] to [274]. The judge cited Stuart-Smith J's judgment in *Jalla, Adelson and Best Friends Group* before summarising the effect of the authorities at [281]:

“On the authorities, therefore, the following material points can be extracted:

(a) The quality of the mistake can be relevant. An accidental slip that is easily made may be more remediable than other more serious forms of mistake.

(b) The speed with which corrective action is taken is relevant. A speedy application will be looked on more favourably than a tardy one.

(c) Prejudice to each party is relevant.

(d) The fact that a claim will be extended to a claimant who would otherwise be time-barred is not, by itself, sufficient prejudice to justify a refusal of the exercise of discretion. That is logical—the ability to pursue a claim which could otherwise not be pursued is built into the legislation and the rules.

(e) The state of knowledge of the claim on the part of the defendant is relevant. If the defendant knows of a number of similar claims already, and the amending claimant just adds one, then the prejudice to the defendant is not that great (*Horne-Roberts*). By contrast, if a whole batch of “new” claimants seek to come in, then that may well be different.

(f) It is of assistance to a claimant that the defendant knows of the claim and of the mistake in advance of the proceedings. By contrast, it is relevant the other way if the defendant does not have that knowledge.

(g) The jurisdiction is not intended to be punitive of the maker of the mistake. The court understands that honest mistakes can be made (see also *Insight* at para 106 and *TRW*).

(h) It is said that a defendant who is notified of the claim after the expiry of the limitation period is in a better position than one who knows about it before the limitation period has expired. This is justifiable on the basis that in cases like *Horne-Roberts* and *TRW* the amended-against defendant is only being put in the same position as he thought he was in before the limitation period expired. The position is otherwise if the defendant knew nothing of the claimants or the claims made until after the period had expired.”

74. The judge then stated that applying those factors and the other factors arising out of the facts of this case, he would exercise his discretion against the claimants to refuse permission to amend. He set out his reasons in detail and because they are all relevant



in the present case, I must set out the relevant passage at [283] to [292] in full:

“283. This is nothing like the case of an understandable error in relation to known pre-limitation period litigation being corrected, on a one-off basis, after the limitation period. The defendant was not notified of the claim until after the expiry of the limitation period. That presents immediate difficulties to the claimants on the basis of the above factors, and is one of the indicators of the great (and unnecessary) rush in which the claimants apparently were.

284. Assuming the sample instances placed before me were typical (which was the purpose of the sampling) it is clear enough what is likely to have happened. At an extraordinarily late stage someone in the Invesco group, or perhaps an intermediary, realised there was or might be a claim. They did not realise early enough, or action it early enough, to enable an orderly marshalling of the various claims and the orderly identification of claimants, followed by a letter before action and a pre-action protocol. There was therefore a rush to get some claims issued, and then a continuing exercise in identifying claimants. Those responsible for the exercise did not carry out enough researches to understand who the claimants should be. That would, I accept, be a tiresome exercise, but it needed to be done. Instead, the identity of claimants was passed to the solicitors who themselves probably rushed through the exercise of adding batches of claimants. I say nothing about the culpability of the solicitors in failing to check (if they did—Mr Warren-Smith said they raised queries when they had any), but the fact that batches of amendments were carried out on one particular day speaks to the haste of the exercise. That haste should have been unnecessary. The source of the error may have been the lack of understanding of intermediaries, or the lack of understanding of Invesco of its own corporate structures, but either way it is not a meritorious position when it occurred on such a grand scale.

285. A large part of this exercise went on after the limitation period had (at least arguably) expired but before the claim was intimated to G4S. It was in this period that most of the mistaken identities are pleaded. It is said that the exercise was difficult because of the need to go back into a lot of records going back a number of years, and that contributed to the mistakes. That may be the case, but it ought not to have been happening when it was. If it was complex it ought to \*44 have started earlier. If it had been, and mistakes had been made, there would not have been a limitation problem.

286. In practically all mistake cases within this amending jurisdiction the amending party is, of course, the author of its own misfortune, so that is not a reason for disallowing the amendments. However, in this particular instance the authorship went not merely to who made the mistakes, but also to when and in what circumstances they were made. They were made close to or (in most cases) after the end of a limitation period of which the claimants were aware—Mr Warren-Smith in substance refers to the fact that the activities were taking place close to a perceived

limitation end date. That is apparently because the decision to sue was taken very late. Where that is the case, and the source of the error is a failure to carry out sufficient investigation to understand who should be a claimant, that is a strong factor against the exercise of the discretion.

287. A further factor pointing the same way is the late stage at which G4S was told of the claim—three months after the issue of proceedings and a similar period after the end of the limitation period. When it was told of the claim there were a significant number of misidentified claimants. At that point the claim can be described as being in something of a mess, with a lot of misdescribed claimants and a large number of claimants who were subsequently removed (about 90). Group claimants have a certain obligation to make their claim clear, not confused, and to do so before the claim is issued.

288. So far as the speed of correction is concerned, some mistaken references were corrected by purported amendments; others were not done until after the defendant pointed out the problem, and even then only with a degree of reluctance. In its defence, served on 13 July 2020, G4S took the unidentified claimants point, and it issued an application seeking to strike out the claims of 64 defendants as being improperly identified. It was not until 14 September that the claimants said they would, absent consent to amendment, apply to amend to correct names, and then did not make an application until 23 October. This is not a particularly prompt response to the point being taken, and if it be said that the scale of the exercise is the cause of any delay, then the riposte is that that scale was caused by the scale of the errors in the first place, and is not a particularly good justification.

289. Mr Onslow's main point, as I have said, is lack of prejudice to the defendant. Mr Rabinowitz did not particularly rely on prejudice to his client and it is true that if the amendments are not allowed then a large number of claimants owning a large part of the claim will fall away. That is prejudice. However, on the facts of this case it is less compelling than might be the case in other litigation. All applications of a limitation period cause prejudice. It is so significant in this case because of the scale of the errors that occurred. It arises not because what happened is of the kind of accident that will happen (to use a cliché), but because of a failure to address important points, and doing everything very late. I do not ignore the prejudice but it has to be weighed with the other relevant matters and is nothing like determinative.

290. So far as rule 19.5(3)(a) is concerned, there is also the factor of reasonable doubt, of lack of knowledge of the intended identity on the part of the defendant, which is capable of coming back in at this stage. There is no way the defendant can realistically have understood what was intended in relation to all these claimants. This factor weighs against the claimants when it comes to discretion.

291. Taking all the above factors into account in this case, and taking the discretion point globally, as did the parties, I consider that the correct course is to exercise my discretion against the claimants. These were multiple mistakes borne of haste, casualness and a failure to understand a

group's own structures and/or entities. They were done in the course of activities conducted in full knowledge of an approaching limitation period. If the litigation (which is complex, and required proper attention) had been put in train earlier, either there would not have been so many mistakes, or there would have been time to correct them. As it is the lateness has led to the mistakes and the expiry of a limitation period. Such disorderly litigation is not to be encouraged, and is certainly not to be assisted by the exercise of the court's discretion as to the amendments sought. There is prejudice to the claimants in this conclusion, but that is what happens when the Limitation Act applies.

292. I would allow one limited exception to this. In the Allianz exemplar in category 6 I would exercise my discretion in favour of the amendment. A straight historic change of name of a corporate entity which has not been properly recorded is a straightforward matter and where there is no scope for reasonable doubt I would allow the claim to continue in the new name. The same is not the case in relation to the other exemplar, which is rather more than just an historic change of name of the entity.”

75. The Divisional Court (Dingemans LJ and Picken LJ) disagreed with Mann J's construction of CPR Part 19.4(4) in *Rawet v Daimler AG* [2022] 1 WLR 5105. However, this point has no bearing upon the issues which I have to decide and the Court did not suggest that Mann J's decision was wrong in any other way. As I will explain when I deal with discretion, Mr Nash invited me not to follow *G4S* and, if necessary, submitted that it was wrong. But he did not place significant weight on *Rawet v Daimler AG* (and neither do I).

#### **IV. The Proposed Amendments**

(1) *Category A: Name Changes*

76. **C58:** The Claimant is named as “CI Investments Inc” in the Claim Form and in the capacity as the trustee of various investment funds. The Claimants apply to amend Schedule 1 to change the names of two funds from “CI International Fund” to “CI International Value Fund” and from “Skylon Growth & Income Trust” to “CI Global Asset Allocation Private Pool”. Mr Shrimpton's evidence is that these changes were necessary because the two funds had changed their names as a result of mergers with other funds although the mergers took place in 2017 and 2019 respectively. Nevertheless, the Claimant with capacity to sue remains CI Investments Inc. Mr Middleton accepts that the threshold gateway in CPR Part 17.4(3) has been met in this case. The value of the claim is stated to be £60,000.

77. **C194:** The Claimant was named as “OFI Asset Management SA” in the Claim Form and it brought the claims “in respect of” certain French investment funds each of which is a French “fond commun de placement” (“FCP”). The Claimants apply to amend Schedule 1 to change the name of one fund from “OFI Actions Monde” to “OFI RS ACT4 GREEN FUTURE”. Mr Shrimpton’s evidence is that this involved a change of name of the relevant FCP and not a change of legal personality and that it took effect on 8 July 2022. Again, the Claimant with the capacity to sue remains OFI Asset Management SA. Mr Middleton also accepts that the threshold gateway in CPR Part 17.4(3) has been met in this case. The value of the claim is stated to be £10,000.

(2) *Category B: Typographical or Clerical Mistakes*

78. **C58:** The Claimants also apply for permission to amend Schedule 1 to change the name of a third fund listed under **C58** from “CI Signature Canadian Balanced Fund” to “CI Canadian Balanced Fund”. Mr Shrimpton’s evidence is that the original name involved a typographical error which was not picked up (the inclusion of “CI” in the name) but that on 29 July 2021 the fund also changed its name (to remove the word “Signature”). Again, the Claimant remains CI Investments Inc. Mr Middleton accepts that the threshold gateway in CPR Part 17.4(2) has been met in this case.<sup>1</sup> The value of the claim is stated to be £520,000.

79. **C82:** The Claimant is named as “Equity Trustees Limited” in the Claim Form and in the capacity as the trustee of an investment fund. The Claimants apply to amend Schedule 1 to change the name of the fund from “CMLA Indexed Global Share Fund” to “CMLA International Share Fund”. Mr Shrimpton’s evidence is that the fund was wrongly named in the Claim Form and Mr Middleton accepts that the threshold gateway in CPR Part 17.4(3) has been met in this case. The value of the claim is stated to be £90,000.

80. **C213:** The Claimant is named in the Claim Form as “Partners Healthcare Pooled Investment Accounts, LLC” and the Claimants apply for permission to amend Schedule 1 to change its name to “MGB Pooled Investments, LLC”. Mr Shrimpton’s evidence is that the Claimant was incorrectly named in the Claim Form (because the word “System” was accidentally omitted) but that in any event it changed its name with

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<sup>1</sup> See Middleton 2, ¶139. Mr Middleton may have meant CPR Part 17.4(3) although CPR Part 17.4(2) may apply to the proposed amendment because it is made just to the description of the fund itself.

effect from 1 April 2022. Mr Middleton also accepts that the threshold gateway in CPR Part 17.4(3) has been met in this case. The value of the claim is stated to be £230,000.

81. **C220:** The Claimant is named in the Claim Form as “QIC Limited” as trustee of two funds “QIC Queensland Investment Trust No. 2” and “QIC International Equities Fund”. The Claimant applies to change the name of the first fund to “Queensland Investment Trust No. 2”. Mr Shrimpton’s evidence is that the Claimant was incorrectly named in the Claim Form (because the letters “QIC” were accidentally included in its name). Mr Middleton also accepts that the threshold under CPR Part 17.4(3) has been met in this case. The value of the claim is stated to be £1,410,000.
82. **C294:** The Claimant is named in the Claim Form as “Victorian Funds Management Corporation” and the claim is stated to be made “on behalf of VICTORIAN FUNDS MANAGEMENT CORPORATION ATF VFMC INTERNATIONAL EQUITY TRUST 1”. The Claimant applies to amend Schedule 1 by deleting the words “VICTORIAN FUNDS MANAGEMENT CORPORATION ATF”. Mr Shrimpton’s evidence is that the letters “ATF” stand for “as trustee for” and that by mistake the name of the corporate entity in whose name the claim is brought was duplicated. Mr Middleton also accepts that the threshold gateway in CPR Part 17.4(3) has been met in this case. The value of the claim is stated to be £1,220,000.

(3) *Category C: Massachusetts Business Trusts*

83. **C2:** The Claimant named in the Claim Form is “Allianz Funds Multi-Strategy Trust”. The Claimants apply to amend Schedule 1 to change the name of the trust to “Virtus Strategy Trust” and to add the names of the individual trustees in their capacity as trustees of the Virtus Business Trust. It is Mr Shrimpton’s evidence that the relevant trust is a Massachusetts Business Trust (“**MBT**”), that during the Registration Phase the client confirmed that it had separate legal personality and was able to sue in its own name but that during the Full Verification Exercise, Brown Rudnick became aware that the title to the assets vests in the trustees themselves and that the trust had changed its name with effect from 1 February 2021 as a result of a change in management. Mr Middleton confirms that the threshold in CPR Part 19.6(3)(a) has been met in this case. The value of the claim is stated to be £20,000.
84. **C4:** The Claimant is named in the Claim Form as “Allianz Funds” and the Claimants

apply to amend Schedule 1 to change its name to “Virtus Investment Trust” and to add the names of the individual trustees. Mr Shrimpton’s evidence for C4 is very similar to his evidence for C2. He states that the relevant fund is also an MBT, that during the Registration Phase the client confirmed that it had separate legal personality, that during the Full Verification Exercise Brown Rudnick became aware that the title to the assets vested in the trustees themselves and that the trust had changed its name with effect from 1 February 2021 as a result of a change in management. Mr Middleton confirms that the threshold gateway in CPR Part 19.6(3)(a) has been met in this case. The value of the claim is stated to be £10,000.

85. **C72 C120 C149 C234:** In each of these cases the Claimants apply to amend Schedule 1 to add the names of the trustees to the name of the fund on the basis that each fund is an MBT (and in the case of C234 to correct a small typo from “Fund” to “Funds” in the name of the trust). Mr Middleton confirms that the threshold in CPR Part 19.6(3)(a) has been met in each of these cases. The value of the claims are stated to be £110,000, £6,430,000, £540,000 and £840,000 respectively. The amendment in relation to C72 was first put forward in the Second Application.

(4) *Category D: Delaware Statutory Trusts*

86. **C170:** The Claimant named in the Claim Form is “New York Life Investment Management LLC” and is stated to be bringing the claim “on behalf of MAINSTAY MARKETFIELD FUND and MS VP MARKETFIELD PORTFOLIO”. The Claimants now apply to amend Schedule 1 to bring two separate claims. The first application is to amend the name of **C170** so that the Claimant is identified as “Total Fund Solution” and the nature of the claim is expressed to be “in respect of the Cromwell Marketfield L/S Fund (formerly the MAINSTAY MARKETFIELD FUND)”. This amendment was first put forward in the Second Application and in Hogan 2, Ms Hogan explained the basis of the amendment.

87. It is Ms Hogan’s evidence that during the Registration Phase New York Life Investment Management LLC (which is currently named as the Claimant) was identified as the owner of the relevant shares when it was in fact the fund manager. In about July 2021, however, Brown Rudnick became aware that the two funds identified in the Claim Form had changed their names and that they were sub-funds of trusts

established under the Delaware Statutory Trust Act and I will refer to each one as a Delaware Statutory Trust or “DST”. As Mr Shrimpton explains, the Act expressly provides that a DST is a legal entity and may (but not must) sue or be sued in its own name. In October 2021 Brown Rudnick obtained copies of the trust deed and confirmed that the trust deed of the first fund required the claim to be brought in the name of the trustees. But in November 2022 Brown Rudnick discovered that the sub-fund had been renamed again (this time as the “Cromwell Marketfield L/S Fund”) and organised into a separate DST called “Total Fund Solution”. The Claimants therefore apply to bring the claim in the name of the DST and also to amend the nature of the claim to reflect the re-organisation of the fund. The value of the claim is stated to be £24,000,000.

88. **C170A:** The second application is to add a new Claimant “Mainstay VP Funds Trust” and the nature of the claim is expressed to be “in respect of The MainStay VP IQ Hedge Multi-Strategy Portfolio (formerly the MS VP MARKETFIELD PORTFOLIO)”. It is Ms Hogan’s evidence that in July 2021 Brown Rudnick discovered that the Mainstay VP Marketfield Portfolio had changed its name and in October 2021 Brown Rudnick also confirmed that its assets were vested in a DST called “Mainstay VP Funds Trust”. The Claimants therefore apply to bring a separate claim in the name of the DST (which may sue in its own name) and to amend the nature of the claim to reflect the change of name of the sub-fund. In Middleton 3, Mr Middleton accepts that the threshold gateway in CPR Part 19.6(3)(a) is met in relation to both **C170** and **C170A**. The value of the combined claim is stated to be £24,370,000.
89. **C277:** The Claimant named in the Claim Form is “TIAA-CREF Funds” and the nature of the claim is stated to be in respect of a number of different funds or sub-funds. The Claimants now apply to amend Schedule 1 to change the name to “TIAA-CREF Life Funds” and to delete the names of the funds or sub-funds. Mr Shrimpton’s evidence is that two alternatives of the claim by TIAA-CREF Funds were included in the Claim Form as both **C277** and **C278** (one identifying the funds and the other not). However, as part of the Full Verification Exercise, Brown Rudnick became aware that the assets of one of the sub-funds were vested in a different DST called “TIAA-CREF Life Funds”. The Claimants therefore apply to substitute this DST as **C277**. Mr Middleton originally opposed this amendment in Middleton 2. But at the hearing Mr Watkins accepted that the threshold gateways in either CPR Part 17.4 or CPR Part 19.6 had been

met in relation to all of the Claimants apart from **C221** and **C13B**. The value of the claim is stated to be £110,000.

90. **C297 C297A:** The Claimant named in the Claim Form is “Virtus Investment Advisers Inc” and the claim is stated to be made in respect of three investment funds. The Claimants now apply to amend to substitute “Virtus Asset Trust” in respect of two of the funds and to bring a new claim in the name of “Virtus Alternative Solutions Trust” in respect of the other fund. Mr Shrimpton’s evidence is that between December 2020 and March 2021 Brown Rudnick discovered that the funds were related to two DSTs and that on 1 June 2022 it obtained the trust deeds and verified this information. Again, Mr Middleton originally opposed this amendment in Middleton 2. But at the hearing Mr Watkins accepted that the threshold gateways in either CPR Part 17.4 or CPR Part 19.6 had been met in relation to all of the Claimants apart from **C221** and **C13B**. The value of the claim is stated to be £40,000.

(5) *Category E: Other Trusts*

91. **C63:** The Claimant named in the Claim Form is the “Colleges of Applied Arts and Technology Pension Plan”. The Claimants apply to amend Schedule 1 to add the names of twelve individual trustees in their capacity as trustees of this plan. Mr Shrimpton’s evidence is that on 22 June 2020 the client confirmed that the pension plan itself was the owner of the relevant shares but that the trust deed (when supplied) showed that the pension plan was a trust established under the laws of Ontario and that it had no legal personality. It is also his evidence that a list of current trustees was supplied in November 2022. Mr Middleton accepts that the threshold gateway in CPR Part 19.6(3) (a) is met in this case and the value of the claim is stated to be £140,000.
92. **C65 C79 C80 C98 C99 C101:** In each of these cases the Claimants apply to amend Schedule 1 to add the names of the trustees to the name of a trust on the basis that each trust does not have separate corporate personality and that the claim must be brought by the trustees themselves. Mr Middleton confirms that the threshold in CPR Part 19.6(3) (a) has been met in each of these cases and the value of the claims are stated to be £2,000, £1,140,000 (**C79** and **C80**), £11,840,000 (**C98** and **C99**) and £140,000 respectively. The amendments in relation to **C65**, **C98**, **C99** and **C101** were first put forward in the Second Application.



(6) *Category F: Retirement Systems/Pension Trusts*

93. **C168:** The Claimant is named in the Claim Form as the “New York City Teachers Retirement System”. The Claimants apply to amend Schedule 1 to add the name of the “Teacher’s Retirement Board” in its capacity as trustee of the relevant funds and to add the word “Funds” to the end of the description of the claim. Mr Shrimpton’s evidence is that the system was set up under statute and that the members of the retirement board hold the funds generated under the system. It is also his evidence that this information was confirmed in an affidavit sworn on 18 February 2022. Mr Middleton accepts that the threshold gateway in CPR Part 19.6(3)(a) is met in this case and the value of the claim is stated to be £3,350,000.
94. **C221:** The Claimant is named in the Claim Form as “QSuper Limited”. The Claimants apply to amend Schedule 1 to substitute “Australian Retirement Trust Pty Ltd” as the Claimant in its capacity as the “Trustee for Australian Retirement Trust”. Mr Shrimpton’s evidence is that Brown Rudnick originally assumed that QSuper Ltd was the correct Claimant because it held a power of attorney and entered into the retainer with the firm. However, it is also his evidence that during the Full Verification Exercise they discovered that the “QSuper Board” held the relevant shares in its capacity as the trustee of the “QSuper Fund” which was constituted by the Superannuation (State Public Sector) Deed 1990. He also stated that the Superannuation (State Public Sector) Act 1990 provided that the board was a “body corporate” and expressly empowered it to sue and be sued in its corporate name. In October 2021 Brown Rudnick proposed that Schedule 1 should be amended to state that **C221** was “QSuper Board of Trustees for the QSuper Fund” and in February 2022 they refined the amendment to state that the Claimant was “QSuper Board as trustee for QSuper”.
95. However, it is also Mr Shrimpton’s evidence that on 4 March 2022 Brown Rudnick were informed that the QSuper Fund and the SunSuper Superannuation Fund had merged with effect from 28 February 2022 to become the Australian Retirement Trust and that its new trustee was the Australian Retirement Trust Pty Ltd. For this reason, therefore, the Claimants now apply to make a different amendment. Mr Watkins opposed that amendment on the basis that the threshold gateway in CPR Part 19.6(3) was not satisfied in this case because it failed the *Sardinia Sulcis* test and it was not possible to identify **C221** by reference to an essential description.

96. **C208 C217 C226 C231 C254 C272 C279 C280 C281 C285:** In each of these cases the Claimants apply to amend Schedule 1 to add the names of a trustee or individual trustees to the names of institutional pension funds in a number of different jurisdictions in the USA and Quebec. It is the evidence of Mr Shrimpton and Ms Hogan that the pension funds themselves either do not have legal personality or cannot bring claims in their own names and that it is necessary for the claims to be brought by the trustees. Mr Middleton confirms that the threshold gateway in CPR Part 19.6(3)(a) has been met in each of these cases and the value of the claims are stated to be £3,640,000, £1,140,000, £3,000, £1,100,000, £2,900,000, £10,000, £380,000 (**C279** and **C280**), £100,000 and £720,000 respectively. The amendments in relation to **C208**, **C217**, **C226**, **C272** and **C285** were first put forward in the Second Application.

(7) *Category G: Other Naming Issues*

97. **C152:** The Claimant is named in the Claim Form as “Mediolanum International Funds Limited” and the nature of the claim is described as “on behalf of MEDIOLANUM SPECIALITIES SICAV – SIF Equity Income Fund. The Claimants apply to amend Schedule 1 to strike through both the name of the Claimant itself and part of the description to leave the Claimant as “MEDIOLANUM SPECIALITIES SICAV – SIF”. Mr Shrimpton’s evidence is that during the Registration Phase Brown Rudnick became aware that this was a “Société d’Investissement à Capital Variable” (“**SICAV**”) registered in Luxembourg but that the client gave instructions to make the claim in the name of a custodian. It is also his evidence that in July 2021 the client confirmed that the SICAV was a separate legal entity and had standing to pursue the claim in its own name. The Claimants applied to amend under CPR Part 19.6(3)(b) and Mr Middleton originally opposed this amendment in Middleton 2. But Mr Watkins did not do so at the hearing. The value of the claim is stated to be £180,000.

98. **C154:** The Claimant is named in the Claim Form as “Mercer Global Investments Europe Ltd” and the nature of the claim is described as made on behalf of “Mercer Global Investments Management Ltd” on behalf of eleven different funds. The Claimants apply to amend Schedule 1 to delete both the name of the Claimant and most of the description of the claim to leave the Claimant and description as “Mercer Global Investments Management Ltd on behalf of Mercer QIF CCF”. It is Mr Shrimpton’s evidence that during the Full Verification Exercise Brown Rudnick established that ten

of the eleven funds related to other Claimants and that the eleventh was an Irish “Common Contractual Fund” and that its constitution provided for the new proposed **C154** to bring the claim on its behalf. The Claimants also applied to amend under CPR Part 19.6(3)(b) and Mr Middleton originally opposed this amendment in Middleton 2. But Mr Watkins did not do so at the hearing. The value of the claim is stated to be £530,000.

99. **C163:** The Claimant is named in the Claim Form as “National Australia Bank Limited” and the nature of the claim is described as “custodian of Ausbil Investment Management Limited as responsible entity for the Candriam Sustainable Global Investment Trust and the Candriam Sustainable Global Equity Fund”. The Claimants apply to amend Schedule 1 to delete both the name of the Claimant and most of the description of the claim to leave the Claimant and description as “Ausbil Investment Management Limited as responsible entity for the the Candriam Sustainable Global Equity Fund”. Ms Hogan’s evidence is that it is now understood that the new proposed **C163** is both custodian and trustee of the second fund (which has no separate legal personality) and that it was an error to include the first fund in the description of the claim. Mr Middleton accepts that the threshold gateway in CPR Part 19.6(3)(a) is met in this case and the value of the claim is stated to be £130,000. The amendment in relation to **C163** was first put forward in the Second Application.

(8) *Category H: Trusts Incorrectly Named*

100. **C151:** The Claimant is named in the Claim Form as “Mediolanum International Funds Limited” and the nature of the claim is described as made on behalf of three funds with “Challenge” in the name. The Claimants apply to amend Schedule 1 to strike through the names of the three funds and replace the description with “in respect of Challenge Funds”. They do not apply to amend the name of the Claimant itself. Ms Hogan’s evidence is that at some stage it came to Brown Rudnick’s attention that the three named funds were sub-funds of “Challenge Funds” an Irish unit trust created by a trust deed dated 24 February 1998. Mr Middleton accepts that the threshold gateway in CPR Part 17.4(4) is met in this case although the value of the claim is not stated. The amendment in relation to **C163** was first put forward in the Second Application.
101. **C175 C241:** In both of these cases the Claimant is named in the Claim Form as the

trustee of a particular fund and the Claimants apply to amend Schedule 1 to change the name of the fund or funds. In both cases Brown Rudnick discovered during the Full Verification Exercise that sub-funds of an Irish unit trust had been named rather than the trust itself and, in both cases, they apply to substitute the name of the trust. Again, they do not apply to amend the name of the Claimant itself. Mr Middleton accepts that the threshold gateway in CPR Part 17.4(4) is met in both cases and the value of the two claims are stated to be £110,000 and £1,720,000 respectively.

(9) *Category I: Wrong Capacity*

102. **C13:** The Claimant is named in the Claim Form as “Amundi Luxembourg SA” and the nature of the claim is described as made in respect of nine funds most of which have “Amundi” in their titles. The Claimants now apply to amend Schedule 1 to amend the description of the claim so that it is only brought in respect of one of the nine funds, “Amundi SF”, which is an FCP under Luxembourg Law and has no legal personality of its own. Mr Middleton accepts in Middleton 3 that the threshold gateway is met in relation to this amendment. However, the Claimants also apply to name two new Claimants and to advance two new claims as I now explain.
103. **C13A:** The Claimants also apply to amend Schedule 1 to add a new Claimant “Amundi Investment Funds”. It is Ms Hogan’s evidence that during the Full Verification Exercise Brown Rudnick established that the remaining eight funds identified in the Claim Form had originally formed part of a number of FCPs but have now been merged or transferred into two SICAVs which have their own legal personality. They also established that a number of the funds had undergone other name changes and mergers or (in the case of C13A) that the claim had been brought in the wrong name in the first place. The first fund named in the Claim Form was “PI Investment Funds – European Equity” which had formed part of a SICAV called “PI Investment Funds” and had changed its name to “Amundi Investment Funds” on 21 February 2020. They, therefore, apply to amend to add a new claim **C13A** in the name of Amundi Investment Funds. Mr Middleton accepts in Middleton 3 that the threshold gateway in CPR Part 19.6(3)(a) is met in relation to this amendment.
104. **C13B:** The Claimants also apply to amend Schedule 1 to add a new Claimant “Amundi Funds” and a new description of the claim as “in respect of” the remaining funds or

sub-funds. Ms Hogan's evidence is that all of those funds had undergone name changes, two had merged and that all seven had been transferred into a SICAV called "Amundi Funds" between 2018 and 2021. The Claimants therefore apply to amend to add Amundi Funds as **C13B** and to amend the names of the six remaining funds or sub-funds in the description of the claim. Ms Hogan also accepted in Hogan 3 that there had been a typographical error in the name of one of the funds (because it had been taken from trading data). The value of all three claims is stated to be £3,700,000 and all three of the amendments were advanced for the first time in the Second Application. Mr Watkins opposed these amendments on the basis that it is not possible to identify the Claimant by reference to an essential description of the claim.

105. **C145:** The Claimant is named in the Claim Form as "Marathon Asset Management LP" and the nature of the claim is described as being on behalf of eleven different funds most of which have "Marathon" in their name. The Claimants apply to amend Schedule 1 by substituting nine of the funds themselves, the general partner of the tenth fund and the trustee of the eleventh fund as Claimants **C145A** to **C145J**. Ms Hogan's evidence is that during the Full Verification Exercise Brown Rudnick discovered or appreciated that the eleven funds were Delaware limited partnerships, Cayman exempted companies, a Cayman exempted limited partnership and a Cayman exempted trust. In all cases, therefore, the claims should have been brought by the funds themselves or by the general partner or trustee. Mr Middleton accepts in Middleton 3 that the threshold gateway in CPR Part 19.6(3)(a) is met in relation to this amendment and the total value of the eleven claims is stated to be £12,980,000. These amendments were first advanced in the Second Application.

## **V. Jurisdiction**

### *(1) C221*

106. Mr Watkins submitted that **C221** was named in the Claim Form as "QSuper Limited" without any description of the claim and that there was no jurisdiction to substitute a different legal entity, the "QSuper Board of Trustees" or to add a new description of the claim "as trustees of the QSuper Fund". He submitted that CPR Part 17.4(3) did not apply because this was not a case where the correct entity was identified and the wrong name applied but a case where the correct entity was not identified at all: see *G4S* at

[200] (above). He also submitted that since no essential description of the claim was given in Schedule 1 CPR Part 19.6 did not apply. He placed particular reliance on *G4S* at [204] where Mann J appeared to accept that a description of the relevant fund for which the claimant held the shares was necessary.

107. Mr Nash submitted that the essential description of **C221** was to be found in the Claim Form and Particulars of Claim rather than in Schedule 1 and that it was only material to identify **C221** as the owner of shares in the Bank during the Relevant Period. He relied on the fact that paragraph 3 of the Claim Form identified the Claimants as “holders of interest in securities” issued by the Bank at all material times. He relied on *Insight* at [52] (above) and Leggatt J’s analysis of the *SmithKline* case. For present purposes, so he submitted, it was only material for legal purposes to plead that **C221** was the owner of shares and not to identify the relevant fund or the capacity in which the Claimant held them.
108. If there had been only one claimant making a claim for the diminution in value of its shares in a company, I would be prepared to accept that the essential description of the claimant would be the owner of relevant shares. But I am not satisfied that that is a sufficient description where the Claim Form is issued in the name of 310 different claimants. The only way in which the Bank and its legal advisers could establish the identity of the individual Claimants was by reference to Schedule 1 (or then by reference to Appendix A to the Particulars of Claim).
109. But in any event, Schedule 1 (and Appendix A) formed part of the identity of the Claimants pleaded by Brown Rudnick when they issued (and then amended and re-issued) the Claim Form and served the Particulars of Claim. Brown Rudnick specifically pleaded the identity of the Claimants as follows in paragraph 1 of the Claim Form:
- “The Claimants identified in Schedule 1 claim compensation from the Defendant a. pursuant to s. 90A (and Schedule 10A) of the Financial Services and Markets Act 2000 (‘FSMA’). And/or b. under s.90 of FSMA.”
110. In my judgment, therefore, Schedule 1 formed part of the identification of the Claimants in the Claim Form. In the Particulars of Claim (where further changes had been made to the names and descriptions of the Claimants) Brown Rudnick also

pleaded as follows:

“3. The Claimants are investors who acquired, continued to hold and/or disposed of ordinary shares issued by Barclays Plc and admitted to trading on the London Stock Exchange during the Relevant Period, and/or interests therein. For the purposes of these Particulars, references to such shares include references to interests therein. The details of the Claimants are set out in Appendix A.

4. Some of the Claimants acquired shares pursuant to a rights issue carried out in September 2013 by which Barclays Plc raised approximately £5.8 billion by way of additional share capital (“the Rights Issue”). The Rights Issue proceeded by way of prospectus dated 16 September 2013 (“the Prospectus”).

5. The Relevant Period is from 1 January 2011 to 1 February 2016. The Claimants reserve the right, pending consideration of Barclays’ disclosure and further relevant information to be obtained from third parties, to assert claims against Barclays arising earlier in time.”

111. Moreover, I am satisfied that it is not a sufficient description of an individual Claimant simply to plead that they held shares in the Bank. As Mr Watkins submitted, to succeed in a claim under section 90A a claimant has to prove reliance and loss. Schedule 10A, paragraph 3(4) provides as follows:

“(4) A loss is not regarded as suffered as a result of the statement or omission unless the person suffering it acquired, continued to hold or disposed of the relevant securities— (a) in reliance on the information in question, and (b) at a time when, and in circumstances in which, it was reasonable for him to rely on it.”

112. Finally, on 6 February 2023 Miles J ordered the Claimants to provide Further Particulars of Standing setting out the basis on which they assert standing and title to sue. I accept that those particulars do not form part of the essential description of the Claimants for the purpose of CPR Part 19.6. But in my judgment the Claimants had to provide sufficient information about their beneficial ownership of shares in the Bank at the relevant time to enable the Bank to understand the basis on which the claim was made and to undertake its own investigation. I, therefore, agree with Mann J in *G4S* at [205] that the essential description of **C221** required Brown Rudnick to state the fund, pension plan or retirement system on whose behalf the claim was made.

113. For these reasons, therefore, I accept Mr Watkins’ submission that the amendment from “QSuper Limited” to “QSuper Board of Trustees as trustees for the QSuper Fund” does

not satisfy the *Sardinia Sulcis* test. Brown Rudnick were seeking to substitute a body corporate created or incorporated by statute for a limited company and, in the absence of an essential description of the function or capacity of the Claimant, it is not possible in my judgment to treat the amendment as a change of name rather than as a change of identity and the threshold gateway in CPR Part 19.6 is not met.

114. I hold, therefore, that the threshold gateway in CPR Part 19.6(3)(a) is not satisfied for **C221** and I dismiss the application for permission to make this amendment. Mr Watkins conceded that if I had found that the first proposed amendment met the threshold test, then the second substantive amendment also met that test. I agree and for the reason which he gave. The first proposed amendment was intended to introduce an essential description of the capacity in which the Claimant was intending to make the claim, namely, as the trustee for the QSuper Fund. The second amendment (ignoring a minor amendment to drop the word “Fund”) involved a change in both the name of the trustee and the name of the retirement fund. But because the first amendment fails to satisfy the threshold test, I need not consider the subsequent amendments further.

(2) *C13B*

115. **C13** was named in the Claim Form as “Amundi Luxembourg SA” and the amendment to “Amundi Funds” involves the substitution of a different legal entity as Claimant (a SICAV for a société anonyme) with a different name. The essential description of the claim has also changed. Indeed, the claim is now brought in respect of six funds all of whom have changed their names either as a result of mergers or name changes. Mr Watkins submitted, therefore, that this was an example of the kind of triple mistake identified by Mann J in his Category 6 change of name cases at [253]. The essential description of the six funds was wrongly pleaded to begin with. The description no longer applies because of name changes and mergers. Finally, the entity pleaded as the Claimant does not (or did not) hold the shares because they are now held by a SICAV which is entitled to bring a claim in its own name.

116. Mann J accepted that the threshold gateway would be satisfied if the relevant amendment had involved a wrong entity: see [205] to [208]. If, therefore, the amendment had involved no more than the addition or substitution of Amundi Funds as **C13B** I would have held that CPR Part 19.6(3)(a) was satisfied in the present case.



However, Mann J distinguished his Category 2 cases because the essential description involved the wrong fund which did not own the shares: see [255]. It is possible, in my judgment, to distinguish *G4S* in the present case because Ms Hogan's evidence was that the original funds owned the shares but have gone through a series of name changes as a result of mergers, name changes and then transfers to a single SICAV.

117. However, Mr Watkins submitted that the mere similarity between the names of the individual funds is insufficient to satisfy CPR Part 19.6(3) and that **C13B** named the wrong fund in circumstances where there were many similarly named funds which could potentially have been relevant. After some hesitation, I accept that submission. In my judgment, "six Amundi Funds" is not a sufficient description of the claim to save the amendment. If there had been a typographical error in the name of a single fund or a change of name in one or two funds after the Claim Form had been issued, that might have been different. But in the present case, all of the relevant changes of name, mergers and transfers to Amundi Funds had taken place well before the Claim Form was issued. I hold, therefore, that the threshold gateway in CPR Part 19.6(3)(a) is not satisfied for **C13B** and I dismiss the application for permission to make this amendment.

## **VI. Discretion**

118. Mr Watkins submitted that the Court should refuse to exercise its discretion to permit the remaining amendments for reasons similar to those which Mann J gave for refusing to permit the amendments in *G4S*. He submitted that the description of the claims handling which Mann J gave in [291] (above) applied equally well to the present case for the following reasons:

- (1) *The scale of the errors*: Mr Watkins relied on the fact that the claim was issued in the name of 310 Claimants, 189 had abandoned their claims, errors had been made in 57 of the remaining claims and 43 remained in dispute at the commencement of the hearing. He also reminded me that in many cases the Claimants have put forward a number of different variations and are still applying to make multiple amendments.
- (2) *No good reason for the errors*: Mr Shrimpton gave three principal reasons for the errors which were made: there was limited time available, mistakes were made by

the clients and there was a change in the law. Mr Watkins submitted that there was no merit in any of these reasons. He directed his fire principally at the first reason and submitted that it was not a good reason for making mistakes that the claims group was assembled so late and immediately before the limitation period expired.

- (3) *Delay*: Mr Watkins submitted that there had been a very significant delay in making both Applications. On 26 November 2020 the Claim Form was originally issued. However, the First Application was not issued until 15 February 2023 and even then, it was not comprehensive because the Second Application was issued on 9 June 2023.
- (4) *Quality of the errors*: Mr Watkins described the various mistakes which were made. He submitted that in many cases an English lawyer drafting a Claim Form would have asked questions (e.g. about the legal personality of the Claimant). He also submitted that a full explanation of the errors has not been given and that the mistakes were such as to cause reasonable doubt.
- (5) *Prejudice*: Mr Watkins submitted that the Bank has suffered significant prejudice because the claims are stale and because there has been a significant delay to the action as a whole. He submitted that the Bank has incurred very significant costs in relation to the Applications and verifying the amendments before they were issued. He also submitted that the Bank would lose a limitation defence and that a significant reduction in the claims group would reduce the scope of the action and the financial exposure of the Bank.
- (6) *The Second Application*: Finally, Mr Watkins submitted that these factors applied with greater force to the Second Application. He submitted that no proper explanation for Brown Rudnick's conflict has been provided, it does not explain the delay of four months and it does not explain some of the amendments.

119. Mr Nash did not really try to defend Brown Rudnick's conduct of the claims or of the First Application although he submitted that it was nothing like as bad as the conduct of the claims in *G4S*. He placed significant reliance upon the fact that Brown Rudnick had served the Letter of Claim and given notice of the claims before the limitation period had expired (or arguably expired) and he distinguished *G4S* on that basis. But his

principal argument was that the Claimants would suffer prejudice if the Court refused permission which would far outweigh any unsatisfactory conduct on the part of Brown Rudnick and the other factors upon which Mr Watkins relied and, in particular, that the Bank could be compensated in costs for any prejudice which it had suffered.

120. In answer to Mr Nash's submissions Mr Watkins submitted that the same argument was advanced in *G4S* and even though the defendant did not rely on any prejudice, Mann J did not exercise his discretion to grant permission but described it as "less compelling than might be the case in other litigation": see [289] (above). Mr Nash submitted that I should not follow *G4S* on this point and that, if necessary, the decision was wrong. He submitted that in substance Mann J's decision was punitive and that I should follow *Insight* (which has been consistently followed in other cases) and grant permission. In the light of those submissions, I now turn to consider the relevant factors in the present case.

(1) *Notification*

121. There is no dispute that the Claimants gave notice of their claims to the Bank before the limitation had expired (or arguably expired). The present case is therefore distinguishable from *G4S* where the defendant was not notified of the claim until three months after the limitation period had expired: see [287]. It is fair to say that the Letter of Claim was served only on 5 June 2020 and very shortly before the limitation period expired. But the letter itself was sufficiently detailed to put the Bank on notice of the specific allegations which it had to meet.

122. There is no doubt that the notification before the limitation period has expired is regarded as an important factor in the exercise of discretion: see, in particular, the *SmithKline* case at [44] and *Adelson* at [57](ii). In *American Leisure* Her Honour Judge Walden-Smith considered this to be a significant reason for distinguishing *Insight*: see [64]. In *Jalla* Stuart-Smith also considered it important that the defendant had not been notified until after the expiry of the limitation period: see [151].

123. There are two principal reasons why the Court attaches significance to notification before the end of the limitation period. First, it gives the defendant an opportunity to prepare for the claim (e.g. by taking advice and preserving evidence). Secondly, if the *Sardinia Sulcis* test is satisfied, a defendant can hardly complain that it has been

deprived of a limitation defence if it is given adequate notice before the limitation period has expired that the claim will be brought together with an essential description of the claimant and the claim. If there remains a reasonable doubt about the identity of the claimants, this is a factor which the Court can take into account and reduces the weight to be attached to the notification.

124. It might be said that I should attach little or no weight to the Letter of Claim because it did not identify the individual Claimants sufficiently clearly and wholesale amendments have been made on a rolling basis to the list of Claimants ever since. In my judgment, the answer to this point is provided by the Standstill Agreement and the identification of the Claimant Universe in clause 1.9. The Bank was prepared to agree to suspend the limitation period for any party with the right to bring any of the claims set out in the Letter of Claim “for, or on behalf of or in place of the Proposed Claimants”. As Mr Nash submitted, this was a commercial decision for the Bank and it considered it in its interests to agree to suspend time for the entire Claimant Universe to prepare to meet the claims. It also shows that at the commencement of the claim, the Bank was less concerned to identify every member of the claims group with certainty before the limitation period expired.
125. There was some debate before me about the effect of the Standstill Agreement and the significance which I should attach to it given that the Bank later terminated it and it would provide no answer to a limitation defence except for the standstill period itself. The significance which I attach to it is that it provides evidence of the way in which the Bank and its advisers approached the notification of the claims before the end of the limitation period. The Bank treated the Letter of Claim as a notification by the entire Claimant Universe and agreed to suspend time accordingly.
126. For all of these reasons, therefore, I attribute significant weight to the Letter of Claim and the notification of the claims before the limitation period expired although this is not, in my judgment, a sufficient reason by itself for distinguishing *G4S* or for exercising the Court’s discretion to permit the remaining amendments by itself. I therefore move to consider the quality and justification for the errors made in identifying the individual Claimants.

(2) *The Errors*

127. Both Mr Nash and Mr Watkins submitted that I should deal with the exercise of discretion on a global level. Mr Watkins submitted that the evidence relating to individual mistakes was “thin” in a number of cases. But given that he accepted that the threshold gateway was met for all of the relevant Claimants (apart from **C221** and **C13B**) and the general findings which I make in this section, I do not consider that it would have affected my overall conclusions to examine the detailed explanations in each case.
128. Mr Shrimpton gave a number of explanations for the mistakes made by Brown Rudnick in Shrimpton 1. He explained that the Claim Form was issued between Hildyard J’s judgment in October 2019 in the *Tesco* litigation (later reported at [2020] Bus LR 250) and Mann J’s judgment in *G4S*. He stated that Brown Rudnick had taken a “pragmatic approach” to the question whether individual Claimants fell within section 90A and he then continued:

“25. It was between the issue of the Claim Form and the Amended Claim Form, and the ongoing process of engaging with the Claimants and their representatives in the course of seeking to clarify remaining uncertainties around the name and standing of certain Claimants for which alternative formulations had been included, that the mistakes in respect of the Applicants also started to be discovered, as I explain further below. Moreover, the 10 March 2021 judgment of Mr. Justice Mann in *G4S*, and the guidance set out therein, provided further impetus for the by then ongoing review of the approach to the naming of claimants that had been taken in the List of Claimants.

26. I consider the causes of the mistakes to be primarily:

- (a) That in practice, certain Claimants have recorded their interest in shares and/or otherwise dealt with their shareholdings using names that do not correspond to the correct name for the legal entity that in law holds that interest, leading to errors being made in the information provided to my firm as a result;
- (b) That, as explained further in paragraph 27, certain Claimants had typically conducted securities litigation in foreign jurisdictions in a particular name which would not be the correct name under English law;
- (c) Certain transcription errors made by my firm when entering the names on the claim forms under the pressure of time;
- (d) That my firm relied on claimants’ representatives, who in many cases are experienced corporate professionals and in some cases also lawyers, to have a proper understanding of the particular legal structures used by their clients in their home jurisdictions and that the concepts of ‘legal personality’ and ‘beneficial ownership’ had the same meaning in their home jurisdictions as in English law; and

(e) The limited time available to my firm and to claimants to complete the process of identifying potential claimants and to carry out verification of the names provided to us by claimants.”

129. I accept Mr Watkins’ submissions that the number of errors was very large. I also accept his submission that Mr Shrimpton did not provide a fully satisfactory explanation for such a large number of errors. In particular, I am not satisfied that the limited time available to complete the process of identifying potential claimants, the time pressure under which Brown Rudnick were clearly operating and the mistakes which their clients themselves made provide a reasonable justification for the failure to identify the name of each Claimant correctly and to provide an essential description of the nature of each claim. I say this for the following reasons.
130. In *Manning and Napier Fund Inc v Tesco plc* [2017] EWHC 3296 (Ch), [29] (cited by Miles J in *Allianz Global Investors GmbH v RSA Insurance Group Ltd* [2021] EWHC 3091 (Ch) at [7] and [8]) Hildyard J stated this in the context of a claim under section 90A of FSMA:
- “Joinder of claimants to Group actions, whether or not subject to a GLO, should not be a matter of subscription but of orderly and careful assessment in respect of each claimant that the statutory requirements to establish liability are appreciated and satisfied. I would note parenthetically, without in any way suggesting that this applies in the particular case, that there is a danger in the case of group actions that people do subscribe to the action in the expectation, or at least hope, of settlement, without at that stage giving sufficient focus to the need for its case to be tested with the same degree of particularity as would be the case if they were fewer in number.”
131. It is clear that Brown Rudnick did not take any steps to assemble the claims group until April 2020 which was only two months before the limitation period was about to expire (and FRT only began to advertise for Claimants at the end of May). Moreover, it is clear from the deletion of 189 Claimants that many of the original subscribers had second thoughts about bringing a claim before the Claim Form came to be issued. Most of the errors which Brown Rudnick made in Schedule 1 can therefore be explained by the failure to carry out the “orderly and careful assessment” which Hildyard J described (above) in relation to each Claimant before the limitation period expired.
132. I accept that the failure to carry out such an assessment in relation to each Claimant was

due to the extreme time pressure under which Brown Rudnick were operating at the time. But in my judgment, that is not a reasonable justification. I was given no explanation for the background to the FRT circular, whether it was Brown Rudnick themselves who saw the commercial opportunity and organised the claims group and, if so, and why they took no preparatory steps before April 2020. I therefore accept Mr Watkins' submission that Mann J's comments in *G4S* at [286] apply equally to the present case.

133. I also accept Mr Watkins' submission that *G4S* did not represent a change in the law or a change in practice. It is not entirely clear to me what Mr Shrimpton meant by adopting a "pragmatic approach" before *G4S*. But if he meant by this that Brown Rudnick failed to establish a chain of custody, to check with clients who held each relevant parcel of shares (and in what capacity) and to establish whether they had corporate personality and the right to sue, then that is not a reasonable explanation either. As Mr Watkins submitted, an English lawyer drafting a claim form would have asked some pretty basic questions about the information which they had been given when preparing the Claim Form. Such a solicitor would have asked at the very least whether the entity identified as the Claimant had corporate personality and, if so, in what capacity it held the legal or beneficial ownership of the relevant shares.
134. Indeed, I would go further. As I pointed out in argument, it is necessary for a solicitor to ask questions of this nature in order to be satisfied that they have authority to issue the Claim Form and can properly sign a statement of truth. The decision which I had in mind when I made that observation was *Adams v Ford* [2012] 1 WLR 3211 which was concerned with the issue of a Claim Form on behalf of claims group of 273 claimants and in which the Court of Appeal set out guidance for exactly this sort of case and well before the *Tesco* litigation. It is sufficient for present purposes to cite the headnote:

"While it is in general a misuse of the court process for a legal representative to issue proceedings in the name of a person who has not given authority to do so, it is not the policy of the law always to prevent that happening provided that it is openly done, and so there is no rule that the issue of proceedings without valid authority must necessarily amount to an abuse of the process of the court. Determining whether there has been an abuse of process requires sensitivity to the facts of the particular case."

135. There was no challenge to Brown Rudnick's authority to issue the Claim Form on

behalf of any of the Claimants or submission that there was an abuse of process and it was not necessary for me to consider that issue. But *Adams v Ford* provides strong support for Mr Watkins' submissions (which I accept) that a solicitor should have carried out sufficient checks to establish the identity of each individual Claimant and that they had authority to issue on its behalf before doing so. It also provides support for Mr Watkins' submission that Brown Rudnick should have known this and acted accordingly well before Mann J's decision in *G4S*.

136. Where I part company with Mr Watkins is that the errors made by Brown Rudnick in Schedule 1 were such as to cause reasonable doubt in the minds of the Bank's officers and their advisers as to the true identity of the Claimants. Mr Watkins submitted that the mistake in relation to **C13B** generated real doubt about the identity of that Claimant. I accept that submission and I would have exercised my discretion to refuse to permit the amendment to **C13B** even if I had been satisfied that the Claimant had passed through the threshold gateway. I would also have exercised my discretion to refuse to permit the amendment in relation to **C221** for the same reason.
137. However, I am not satisfied that those two examples are truly representative of the remaining Claimants. The Bank accepts that the threshold gateway under CPR Part 17.4(3) is satisfied in relation to Categories A and B. It follows, therefore, that it accepts that in those cases the mistake was not one which would cause reasonable doubt as to the identity of the Claimant. The Bank also accepts that the threshold gateway under CPR Part 17.4(4) is satisfied in relation to Category H which involves a change of capacity rather than a change of name or a change of party. Again, I can see no real doubt about the identity of the Claimant in those cases.
138. The Bank accepts that the threshold gateway under CPR Part 19.6(3)(a) is satisfied for Categories C to E and in those categories the only real doubt was whether the trust, fund or retirement system has corporate personality and, if so, whether it can bring the claim in its own name or whether it is necessary to join the trustee or trustees. I am not satisfied that there was any real doubt caused in relation to the identity of most of the relevant funds themselves or the substance of the claim. The Bank would have known in commercial terms what investment fund was bringing the claim. I am prepared to accept that some of the amendments in Category G and Category I might have led to a reasonable doubt but I am not satisfied that the uncertainty was so great that I should



exercise my discretion to refuse to permit those amendments for that reason.

(3) *Prejudice*

(i) The Claimants

139. I am satisfied that the Claimants will suffer significant prejudice if the Court refuses permission to amend. In particular, they will lose the opportunity to bring their claims within the limitation period (or arguably so) and will face a limitation defence which they would otherwise have avoided. There was no argument that this is legitimate prejudice which the Court is entitled to take into account: see, e.g., Bell J's judgment in the *SmithKline* case at first instance at [40].

(ii) The Defendant

140. By contrast, I am satisfied that there is no prejudice to the Bank in being deprived of a limitation defence. This is because section 35(6) and the Civil Procedure Rules provide for the Court to permit amendments to correct the name of the Claimant or add or substitute a Claimant after the expiry of the limitation period which relate back the issue of the Claim Form. Mr Andrew Henshaw QC did not consider the loss of the potential limitation defence to be a relevant or weighty factor: see *Rosgosstrakh* (above) at [87](v). Leggatt J considered it to be a windfall in *Insight*: see [112]. Finally, Fraser J attached little weight to this "technical knockout" in *TRW*: see [61].

141. In his Skeleton Argument Mr Watkins submitted that the loss of a limitation defence was prejudicial to the Bank. He also submitted that there was a real value in reducing the number of Claimants whom the Bank had to face and the total value of the claims and that the Bank would lose that advantage if the Court granted permission. I reject those submissions. I attach little weight to the fact that the Bank will be deprived of a limitation defence and will have to face the additional claims.

142. I accept, however, that the Bank has suffered prejudice as a consequence of the delay in fixing the claims group and narrowing the Claimant Universe. I also accept that this prejudice cannot be measured solely in terms of costs but also in terms of stress and management time. Both the Bank itself and its witnesses (especially those individually named in the Particulars of Claim) have had, and will have, substantial claims hanging

over them for longer than they should have done. Moreover, the effect of the delay whilst the Claimant group has been properly identified is to delay longer the trial of stale claims. In my judgment, this is prejudice which I should take into account.

(iii) The balance

143. Although I accept that the Bank has suffered prejudice to which I should give weight, I am also satisfied that the balance of prejudice comes down strongly in favour of the Claimants. As Mr Nash submitted, the action will continue whether or not the Court permits the amendments and the Bank will have to face the remaining claims in any event. It will continue to have the same evidential difficulties, it will encounter the same stress and it will have to devote the same management time to these claims. Moreover, the extent to which the Claimants are able to establish wrongdoing under section 90A will largely turn on the documents and the Bank should have taken adequate steps to preserve them long before now. I accept those submissions. In *TRW Fraser J* adopted the same reasoning: see [66] (above).

(4) *Delay*

144. On 25 March 2021 Brown Rudnick re-issued and amended the Claim Form. It was then served on the Defendants. In their letter dated 30 April 2021 Latham & Watkins first raised their concerns about material differences between the Proposed Claimants named in the Standstill Agreement and the Claimants listed in Schedule 1 and on 19 November 2021 Brown Rudnick accepted that if the parties could not reach agreement, it would be necessary to issue an amendment application.
145. In my judgment, Latham & Watkins' letter dated 30 April 2021 was a red flag which ought to have alerted Brown Rudnick to the need to make both Applications. If they had acted reasonably promptly, then I see no reason why they could not have issued both Applications and had them heard by the end of 2021. Moreover, they themselves had recognised the need for the Applications by November 2021. Again, if they had issued the Applications by the end of that year, they could have been heard by Easter 2022 or, at the latest, by July 2022. However, the First Application was not listed until 15 February 2023 and the Second Application on 9 June 2023 and they were not heard and determined until the end of July 2023. Taking a rough and ready approach, I consider that there was a delay of between 12 and 18 months for which the Claimants

must account.

146. Mr Watkins submitted that this delay was fatal. He pointed out that Mann J did not consider a delay of three months to be prompt in *G4S*: see [288]. He also relied on *Jalla* where a delay in issuing the amendment application between April 2018 and June 2019 was one of the reasons why Stuart-Smith J would have refused permission: see [151]. Finally, he relied on *Best Friends Group* where a delay in issuing the amendment application between July 2015 and July 2016 was the principal reason why the Court of Appeal upheld the decision to refuse permission to amend.
147. I am satisfied that there is no reasonable justification for this delay of between 12 and 18 months in the present case. Once Latham & Watkins had raised concerns about the Claimant group on 30 April 2021, a short period of delay can be excused whilst the parties sought to limit the issues and the number of Claimants for whom an amendment application was required to be made. Nevertheless, by the end of February 2022 the battle lines had been clearly drawn and there is no reasonable justification for the delay after that date. The Claimants ought to have issued the Applications by that date (at the latest). However, they dragged their feet and the Bank had to force them to issue. It is unnecessary for me to decide whether they would have issued the First Application by 15 February 2023 if the Bank had not issued its own application for directions and forced the Claimants to agree to a hard deadline. But at the very least this demonstrates their overall reluctance to apply to court.
148. I am satisfied, therefore, that there is no reasonable justification for a large part of the delay of between 12 months and 18 months in this case and that this unjustified delay is a strong factor against the exercise of the discretion in the Claimants' favour. On the other hand I am not satisfied that the delay is fatal to the Applications or that I should refuse to exercise my discretion to grant permission to amend because of this delay alone. I have reached this conclusion for the following reasons:
- (1) Mr Nash submitted that the delay has to be seen in the context of group securities litigation where the Claimant Universe is a large one and cannot properly be compared with cases like the *Best Friends Group* where there were two Claimants. I accept that submission.
  - (2) This is not a case in which Brown Rudnick can be criticised for the failure to

engage with Latham & Watkins altogether or for adopting questionable tactics or for misconduct. In both *Jalla* and *Best Friends Group* the Court was highly critical of the conduct of the Claimants' solicitors. Although Brown Rudnick dragged their feet, I am not otherwise critical of their conduct. They (and later Signature) engaged with Latham & Watkins and produced a rolling series of amendments and for which a significant amount of work was required.

- (3) In particular, on 11 February 2022 Brown Rudnick served detailed amendments and the schedule which accompanied them obviously took a significant amount of time to prepare. On 16 December 2022 they produced a link to 77 custodian letters and on 22 December 2022 they produced the trading data and answered the Bank's Request for Further Information. Again, the schedule which Brown Rudnick served to prove the chain of custody also took a significant amount of time to prepare. Finally, on 26 May 2023 Signature served the Further Particulars of Standing and I am satisfied that this was also a substantial exercise.
- (4) Finally, Mr Nash submitted that the Bank had not suffered substantial prejudice as a consequence of the delay. He argued that the true comparison is not to look at the overall delay to the claims as a whole but to compare the position as it now is with the position as it would have been if all of the Claimants had been named correctly in the Claim Form when it was issued or when it was re-amended and re-issued. I also accept that submission. I accept that an order for costs cannot compensate the Bank for the additional management time, work and stress required to address the claims group and I do not downplay its significance. But I am satisfied that the Bank will not be prejudiced in the future conduct of the action and that it can be compensated for most of the additional time and costs which it has incurred during the unjustified period of delay of 12 to 18 months by an appropriate order for costs.

(5) *The Balance*

149. Balancing these factors against each other, I have reached the conclusion that I should exercise the discretion to grant permission to amend. In my judgment, the fact that the Claimants notified the Bank before the expiry of the limitation period coupled with the prejudice which they will suffer if I refuse permission outweigh the absence of a

reasonable excuse for the errors in Schedule 1 and the delay in issuing the First Application. Although the Applications have taken a very long time to resolve, I give weight to the fact that the Defendant will not be prejudiced in the future conduct of the action and to the fact that there has been no real doubt about the identity of most of the Claimants.

150. I add the following observations because I am conscious that I have reached a different decision from that made by Mann J in *G4S*. I have made it very clear that I am critical of the way in which the claims group in this action was formed by subscription and the dangers associated with a solicitor issuing a Claim Form on behalf of multiple claimants without authority. Solicitors who are forming claims groups for securities litigation would do well to remind themselves of Hildyard J's comment in *Manning and Napier Fund Inc v Tesco plc* (above). Moreover, a solicitor cannot be criticised for refusing to issue a Claim Form during the limitation period where the client has failed to give adequate information or authority to enable the solicitor to sign the statement of truth. Nevertheless, given the other factors which I have considered and applying *Insight*, I take the view that it would be punitive to refuse permission to amend because I may disapprove of the way in which the claims group was formed shortly before the limitation period expired.
151. Mann J reached a different conclusion in *G4S* at [289]. He stated that he had not ignored the prejudice to the Claimants but that it had to be weighed up against the other relevant matters and should not be regarded as determinative. It is not possible to draw direct comparisons between the amendments which the Claimants applied to make in that case or their conduct more generally. Moreover, I am not bound by the exercise of discretion in *G4S*. Nevertheless, I consider that it is appropriate to give much greater weight in the present case to the prejudice to the Claimants if they are refused permission to amend than Mann J was prepared to do so in that case. I consider that this is appropriate in the present case partly because of the nature of the amendments (above) and partly because (for the most part) the Bank can be compensated for the delay in the meantime by an appropriate order for costs.

(6) *The Second Application*

152. The Second Application was issued four months after the First Application. Ms

Hogan's evidence was that this was because of a conflict of interest. In his oral submissions Mr Nash told me that the conflict was unrelated to the claims in this action. I agree with Mr Watkins that the very limited evidence about the conflict was unsatisfactory and did not justify the additional delay. But I am not satisfied that a further delay of four months affects decisively the balance between the individual factors which I have considered in relation to the First Application. Accordingly, I will grant permission to amend in relation to the Second Application apart from **C13B**.

## **VII. Disposal**

153. I grant permission to the Claimants to amend Schedule 1 to the Claim Form to make the amendments which I have set out in section IV (above) apart from the amendments to **C221** and **C13B**. In relation to those amendments, I refuse permission to amend because the threshold gateways in CPR 17.4 and CPR Part 19.6 are not satisfied and because I would have exercised the Court's discretion to refuse permission in any event. I also add that even if I had been minded to exercise the Court's discretion to refuse permission for the remaining amendments on the basis that the present case is on all fours with *G4S*, I would have granted permission for the amendments in Category A, Category B and Category H. In my judgment, those amendments fall squarely within Mann J's Category 6: see [292].
154. I propose to hand down judgment remotely and to adjourn the hearing of any consequential matters to a date to be fixed (including the consideration of any appropriate order for costs to compensate the Bank for the additional time and costs which it has incurred in relation to the issue of establishing the identity of the Claimants and the amendments to the Claim Form). I also invite the parties to consider whether it is appropriate to deal with the form of order for this hearing separately or whether it can be combined with the first hearing of the CMC.