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Neutral Citation Number: [2020] EWHC 1414 (TCC)

Claim No: HT-2018-000234

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date of judgment: 5 June 2020

Before :

THE HONOURABLE MR JUSTICE FRASER

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Between :

(1) TRW Pensions Trust Limited
(2) TP ICAP plc

Claimants

- and –

(1) Indesit Company Polska Sp. Z.o.o
(2) Whirlpool Company Polska Sp. Z.o.o
(3) Eichenauer Heizelemente GmbH & So. KG
(4) Askoll TRE S.r.l
(5) Whirlpool Emea Spa

Defendants

- -

Judgment

- -

Andrew Rigney QC and Caroline McColgan (instructed by **RPC LLP**) for the Claimants
Anneliese Day QC and Richard Liddell QC (instructed by **Taylor Wessing LLP**)

for the First, Second and Fifth Defendants
Antony White QC (instructed by **Reed Smith LLP**) for the Third Defendant
Ben Elkington QC (instructed by **Keoghs LLP**) for the Fourth Defendant

Hearing date: 20 May 2020
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Mr Justice Fraser:

Introduction

1. This is the judgment upon an application issued by the Second Claimant, TP ICAP plc, to amend its name to TP ICAP Group Services Ltd ("TP ICAP Group"), alternatively to be substituted by that latter company. Both TP ICAP plc and TP ICAP Group are members of the same group of companies. The application is put on two bases. The first is for the existing Second Claimant to amend its name to TP ICAP Group under CPR Part 17.4(3). The second, alternative, basis is to substitute TP ICAP Group for the existing Second Claimant pursuant to CPR Part 19.5(3)(a). This sub-paragraph of the CPR that was relied upon by the applicant was then amended, in an amended application notice, also to rely upon CPR Part 19.5(3)(b). I deal with this further below at [11]. The original application notice was issued on 5 March 2020, before the national lockdown due to the Covid-19 crisis, which was imposed on 23 March 2020. The hearing was originally set down for 3 April 2020, but that had to be vacated due to the crisis. It was subsequently conducted on 20 May 2020 remotely by the court using Skype for Business, somewhat later than would have been the case absent that crisis.

2. The substantive proceedings concern a fire which occurred on 24 August 2012 at Hanover Place, 8 Ravensbourne Road, Bromley, Kent BR1 1HP ("the Property"). That fire caused extensive property damage. It is the Claimants' case that the fire was caused by a defective dishwasher which was located on the second floor of the Property, and more particularly a defective pump heater assembly, or heater element within that assembly, within the dishwasher. The claim form states that the claim is in respect of "loss and damage which they (the Claimants) have suffered as a result of a fire (the "Fire") which occurred on or about 24 August 2012 situated at [the Property] in respect of which the First Claimant was the freehold owner and the Second Claimant was the leasehold owner and/or tenant and/or occupier" (emphasis added). The model of the dishwasher is said to have been a Hotpoint Aquarius.

3. The Particulars of Claim identify in paragraph 2 that the Second Claimant was formerly known as Tullett Prebon PLC, and was the leasehold owner and/or tenant and/or occupier of office space spanning the third floor of the Property, and that "the Second Claimant carries on business as a major international money broker and the Offices served as its disaster recovery suite", thereby and for that reason containing a very large quantity of specialist IT equipment. By way of proposed re-amendment, that paragraph is to be changed slightly, in that it is now proposed that paragraph 2 will state that the Second Claimant was formerly known as Tullett Prebon Group Ltd, and that "the Second Claimant is a service company to the subsidiary companies of TP ICAP plc which carry on business as a major international money broker and for which the Offices served as a disaster recovery suite" thereby containing the specialist IT equipment. The status of the First Claimant as being the freeholder of the Property remains unaffected by this application.

4. The First, Second and Fifth Defendants are all represented by the same solicitors, and I will refer to these parties as the Whirlpool Defendants. The Whirlpool group has undergone some corporate re-organisation, including a merger on 3 April 2018 between the First and Second Defendant. Taylor Wessing, the solicitors acting for all

the Whirlpool Defendants, has given the Claimants' solicitors various information about this, which is recited in paragraph 6 of the pleading. The Claimants aver that Whirlpool manufactured the Hotpoint dishwasher that caused the fire.

5. I shall refer to the Third Defendant as Eichenauer, which is a company incorporated in Germany which designs, manufactures and supplies electrical components for white goods, including dishwashers. The Claimants aver that Eichenauer manufactured the water heater used in the Hotpoint dishwasher, and that it was either the water heater, and/or the heating element within it, that caused the fire.

6. I shall refer to the Fourth Defendant as Askoll, an Italian company which also is responsible for the design, manufacture and supply of electrical components for white goods, including dishwashers. The Claimants' case is that Askoll manufactured the pump heater assembly within the Hotpoint dishwasher in question, using the water heater provided by Eichenauer. There are also contribution proceedings on foot between the different defendants, although those brought by Whirlpool were issued by way of separate proceedings with Whirlpool as the claimant, with case number HT-2018-000252.

7. The case of the First and Second Claimant against each of the defendants is explained in more detail in the Particulars of Claim. All that I have done in the preceding paragraphs is to provide sufficient outline detail relevant to this application. Essentially, the case against all of the defendants is that they were at the relevant times, for a variety of reasons, all involved in the design, manufacture and supply of the Hotpoint dishwasher in this case which caught fire and caused approximately £8.7 million of damage, such that each of them bear legal responsibility for those losses. Some of the losses are claimed by the Second Claimant, including a very sizeable head of loss relating to the IT equipment to which I have referred. Some of the losses are claimed by the First Claimant.

8. Before the fire, the dishwasher was actually sold to what was a well known firm, Comet Group Ltd, which in turn sold it to an English company called Networkers International (UK) Plc ("Networkers"). In February 2011 the dishwasher was installed in Networkers' office on the second floor of the office building which comprises the Property. The fire broke out in Networkers' office. The First Claimant is the freeholder of the Property, and the Second Claimant occupied the third floor, although the status of the Second Claimant and whether it should now become TP ICAP Group (rather than TP ICAP plc) lies at the heart of this application. The fire also caused substantial damage to Networkers' office, at the risk of stating the utterly obvious. However, none of Networkers' losses form part of these proceedings. Networkers brought separate proceedings of their own which were compromised by Whirlpool.

9. The final element to note, so far as all the general description of the proceedings is concerned, is that the Claimants had insurance. It is the insurers who bore the losses in the first instance, and these proceedings concern subrogated claims brought in the name of the Claimants by the insurers to recover those losses from those said to be legally responsible for the fire. The insurer for the First Claimant is Zurich PLC; for the Second Claimant, the insurance was provided by Allianz Global Corporate and Chubb Insurance Co of Europe SE ("Allianz" and "Chubb" respectively). This point only becomes relevant because Askoll, which opposes the application with the other

defendants, maintains that there will be no prejudice caused to the Second Claimant if the application is refused, as it is not that party that is bringing the claim, because the claim is brought by the insurers. I shall deal with that point first, as in my judgment it mis-states the nature of a subrogated claim. It is put in the following terms in Askoll's skeleton.

"123. It is apparent from the evidence that the action being brought in the name of C2 is a subrogated claim being pursued on behalf of C2's insurers, Allianz and Chubb. There is no evidence that either C2 or TPGSL will themselves suffer any loss or prejudice if these proceedings fail.

124. If Allianz or Chubb suffer any loss, then that is an issue that they can take up with their insured (C2) (which apparently gave misleading instructions to RPC) and/or with RPC (which failed to ensure proceedings were issued in the name of the correct claimant)."

10. I do not accept these submissions. They mis-state the nature of a subrogated claim. In a subrogated claim, the insurer stands wholly in the position of the insured. It is wholly circular to deal with potential prejudice to a party to litigation to state that because its insurer is standing in its stead (on a subrogated claim), that party would not suffer prejudice because it is the insurer who is the real party, not the actual insured. I will deal with prejudice more generally later, but there is no proper basis, in my judgment, for any distinction to be made between the insurers who bore the loss in the first instance, and the claimants in whose name those insurers bring their subrogated claims. Also, the evidence served in response by RPC makes it clear that Allianz and Chubb insured both TP ICAP plc (the existing Second Claimant) and TP ICAP Group (the party sought to be substituted). Group insurance arrangements are not unusual.

11. Another point necessary to deal with in this summary is the Second Claimant by its solicitors issued an application dated 15 May 2020 (a Friday), which was sealed on 18 May 2020 (the Monday immediately following) which amended the application in one respect. It sought to add "and/or CPR Part 19.5(3)(b)" to the application notice, immediately after the reference to CPR Part 19.5(3)(a) which was already expressly recited in the original application notice and draft order. This was supported by the third witness statement of Ms Percy of RPC, who are the Claimants' solicitors. The reason this was done is as follows. The applicant notified all the defendants that they would seek to argue additionally, or in the alternative, that CPR Part 19.5(3)(b) permitted the substitution. This was explained in correspondence as having arisen from the judgment of Mr ter Haar QC sitting as a Deputy Judge of the High Court in ***AIG Europe Ltd v McCormick Roofing Ltd*** [2020] EWHC 943 (TCC), a case which is said to share some features with this one. In that case he found that the correct rule on those particular facts which permitted a substitution of claimant was CPR Part 19.5(3)(b), rather than CPR Part 19.5(3)(a). That judgment was handed down on 21 April 2020. However, the defendants would not consent to this proceeding by way of argument and insisted that an application to amend the application notice was made. This was done.

12. That application to amend the application notice was opposed by the defendants for a variety of reasons, including (it was said) that further evidence would be required

from them in order to meet such an amended application. I allowed the application. No further evidence than that already submitted was required in order for the application to proceed seeking to argue a second sub-paragraph of CPR Part 19.5(3). The suggestion that because one sub-paragraph of one rule was specified in the application itself, rather than another sub-paragraph of the same rule, should mean the argument should properly be strictly confined only to CPR Part 19.5(3)(a) (and could not therefore touch upon or consider CPR Part 19.5(3)(b)) is not an argument which, in my judgment, is consistent with application of the over-riding objective. I consider proper application of the over-riding objective would have permitted the applicant to argue that the second limb of the rule be used, rather than the first limb, without amending the application notice. Notice was given to the defendants of the potential argument to come under sub-paragraph (b) by the applicant in a letter well in advance, and no prejudice could be caused by that approach. Nor would any further evidence of fact be necessary from the parties properly to deal with the application fairly. The excessively strict, if not unnaturally narrow, approach to the CPR adopted by the defendants to the application of 15 May 2020 is neither co-operative nor helpful. I do not consider that the application notice required amendment in order for me to consider the reasoning and findings that were made in the case of ***AIG v McCormick***. Reasoning in other first instance cases on either paragraph of the rule can be argued before the court, and can be persuasive, regardless of whether an amended application notice had been issued or not.

13. It is clear from the notes to the CPR Part 19.5(2) and (3) in the White Book Vol.1 that the rule requires two conditions to be satisfied. The first is that proceedings must have been started before the limitation period has expired. The second is that the substitution must be "necessary". The three sub-paragraphs at Part 19.5(3)(a) to (c) describe three ways in which the condition of necessity can be satisfied. That these are the only ways it can be satisfied is clear, in my judgment, from the use of the words "is necessary only if the court is satisfied that" (emphasis added) in the rule. This mirrors the approach in section 35(4) of the Limitation Act 1980 which states that the conditions in section 35(5) have to be satisfied in rules of court which allow a new claim to be brought after a relevant limitation period has expired.

14. In the case of a claim involving a new party, the relevant condition specified in section 35(5) is that the addition or substitution of the new party is "necessary for the determination of the original action".

15. Pursuant to section 35(6), that condition is not satisfied unless:

> "(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."

This essentially clarifies the requirement of "necessary" which is used in section 35(5).

16. These statutory provisions are reflected in CPR Part 19.5(3)(a) and (b). That this is the correct interpretation is also clear from ***Nemeti v Sabre Insurance Co Ltd*** [2013] EWCA Civ 1555 in which the judgment was given by Hallett VP. The specified circumstances in which addition or substitution of a party outside the limitation period

may be permitted are those identified in CPR Part 19.5(2) which uses the words "only if" as well. Whether the substitution is "necessary" is further defined in CPR Part 19.5(3)(a) to (c). One of these sub-paragraphs must be satisfied. However, they are alternatives. If the applicant persuades the court that there was a mistake such that the application falls within Part 19.5(3)(a), then that is the method (or gateway) that is engaged and sub-paragraph (b) will not arise.

17. In any event, I consider that the over-riding objective justified allowing the amendment of the application notice; no additional evidence is necessary in order to consider whether CPR Part 19.5(3)(b) is the correct sub-paragraph, rather than CPR Part 19.5(3)(a). It is the characterisation of what has occurred that is required, not a different factual analysis of what occurred, in another case. I will revisit this point further below. I appreciate that the defendants maintain that neither of these parts of the rule in Part 19.5(3) are available to the applicant, but I will deal with that substantive argument further below.

18. Further by way of introduction, the limitation period has expired. It is for that reason that the application has been necessary. Had it not done so, either fresh proceedings could have been started and then consolidated, or perhaps the amendment or substitution would have been consented to by the defendants. As it is, the application on all of the three alternative bases relied upon is opposed. The mistake that is said to have led to this situation was discovered in January 2020 by the Claimants' solicitors RPC, and the application was issued on 5 March 2020. There was to have been a mediation in March 2020 but that was abandoned in view of the contested application. Also, and simply for completeness, Networkers issued their own proceedings against Whirlpool and Comet in 2015, the latter by then being in liquidation. These proceedings were settled by Whirlpool. The claim form in the instant proceedings was served on 7 August 2018. That was at the very end of the 6 year limitation period in respect of the fire.

19. There has been a vast amount of material served by the parties for this application. A total of 10 witness statements and eight different skeleton arguments (each party lodged two) with an extraordinary number of exhibits might suggest that the parties had lost sight of the fact that this application would not determine the merits of the substantive disputes between them. A great deal of the material gives a vast amount of chronological history of the matter; given the age of the case, and the date when the fire occurred, this spans many years. Some of the evidence served by the parties is not, in my judgment, of central relevance to the application. This enormous quantity of material will have contributed to the very remarkable level of cost incurred on this application, which I was told was the grand total for all the parties of £435,000. I shall only deal with those parts of the evidence that I consider most germane, and I shall only deal with those arguments necessary to determine the application. I first identify how this situation has come about. Not all the defendants accept that it was a mistake by RPC that has led to the application being necessary.

20. The evidence as a whole makes the following clear, and to the extent that it may be argued by some parties to the application that it does not, I make these points as findings:
1. The Second Claimant was always intended to be the lessee of the third floor of the Property.

2. RPC, the solicitors acting for the claimants in the proceedings, believed that entity to be Tullett Prebon plc, which is now called TP ICAP plc. Some of the correspondence prior to issue of proceedings had used the term "Tullett Prebon" in any event.
3. In fact, the lessee was Tullett Prebon Group Ltd, now called TP ICAP Group Services Ltd, or as I have termed it in this judgment, TP ICAP Group.
4. Tullett Prebon plc, which prior to proceedings changed its name to TP ICAP plc, did not hold the lease, but as I have said RPC believed that it did. This was a mistake, and it was made by the particular solicitor who was responsible for issuing the claim form.
5. TP ICAP Group is a company within the same group as TP ICAP plc, and provides support services to the other companies within the group.
6. After the fire, Allianz and Chubb engaged loss adjusters who referred to the insured and the lessee of the third floor as Tullett Prebon plc, or simply as Tullett Prebon.
7. Allianz and Chubb insure both TP ICAP plc and TP ICAP Group.
8. The name Tullett Prebon plc was used in correspondence from RPC to the defendants, and also from and to the loss adjuster and to the insured, all of which used Tullett Prebon plc. The letter of claim, and indeed the whole pre-action protocol process, continued in the same vein using Tullett Prebon plc and also "Tullett Prebon". Other correspondence has simply used the term "Tullett".
9. RPC correctly ascertained that Tullett Prebon plc had changed its name to TP ICAP plc on 28 December 2016, and so the claim form was correctly issued (in so far as the name of that particular company was concerned) using the latter, current name, and not its former name. However, the name of the Second Claimant was not correct in this sense. That party was intended to be the lessee of the third floor of the Property, and the lessee was TP ICAP *Group*, and not TP ICAP plc.

21. This mistake came to light in late 2019 when a copy of the lease was provided to the defendants. The period from when it was discovered, up to and throughout February 2020, was spent in RPC providing further information to the defendants to encourage consent to the change of entity as Second Claimant. For example, in a letter of 24 January 2020 Taylor Wessing for the Whirlpool Defendants stated that they were not in a position to agree the issue and sought further information, including a draft pleading. After this was provided (which was on 4 February 2020) Taylor Wessing then asked for witness evidence in support of the application so that they could consider the matter further. The to-ing and fro-ing during this period make it clear that RPC were seeking to have the matter dealt with consensually, and although the defendants were being a little hesitant about it, they would not ultimately consent. They took some time to inform RPC about that, however, and in the meantime RPC was providing them with what they asked for. Ultimately, that approach did not bear fruit, and consent to the change was not given. Accordingly, an application was issued in very early March, as I have said. During the whole of this period, and indeed from 3 October 2019 onwards, the proceedings were subject to a stay of 6 months imposed by order of the court of that date, that order being made as a consent order. The stay was expressly stated to be for the purposes of ADR and was to run from 9 October 2019 to 9 April 2020.

22. The correct characterisation of the mistake, which is required in my judgment in order properly to consider what is an application on two alternative bases, is as follows. The intention on the part of the claimants, and RPC acting for them, and the claimants'

insurers, was for the claim form to be issued by the freeholder (as First Claimant) and the lessee of the third floor of the Property (as Second Claimant). This was clearly communicated to the defendants both before, and during, the pre-action protocol stage of the process, and indeed up to and after the issue of the claim form, including within the Particulars of Claim.

23. In reality, the company within the group who was the lessee of the third floor was mis-described in terms of name as it was not TP ICAP plc, the company identified both by name and actual company number in the claim form, but rather TP ICAP Group, which has a different name and a different company number, who held the lease. TP ICAP Group is a separate legal entity to TP ICAP plc. The mistake was therefore which of the group companies within the same group held the lease of the third floor of the Property. Both the companies are very closely connected; they are in the same group of companies; TP ICAP Group provides services to TP ICAP plc; and both companies are covered by the same insurers.

24. The origin of the mistake was the use by the loss adjusters of the name Tullett Prebon plc initially, and then simply Tullett Prebon, in a great deal of the correspondence and in the loss adjusters' reports. However, the operative mistake was made by RPC in terms of the name and number of the company used as the Second Claimant in the claim form. RPC have frankly admitted this. In my judgment there was never any doubt on the part of the defendants that it was the lessee of the third floor who was intended to be the Second Claimant. This is made crystal clear by the descriptive term within the claim form and the Particulars of Claim, which makes it clear that the Second Claimant is "the leasehold owner and/or tenant and/or occupier" of the third floor.

25. The defendants draw attention to the fact that the description adds "and/or occupier" to the description of the Second Claimant. I do not consider that this demonstrates sufficient, or any, doubt as to the intended status of the Second Claimant as the lessee of the third floor. In pleading terms, it could be described as a "belt and braces" approach, but it is the second alternative. The primary description is leasehold owner. The first alternative is tenant. Occupier comes very much at the tail end. Further, it is clear that the First Claimant is the freeholder of the Property; the Second Claimant is – or was intended to be - the entity that held the leasehold interest of the third floor.

26. Much criticism is directed by the defendants, in different measure, against RPC and how this situation could have come about, particularly when RPC had so long to ensure matters were entirely regular, and to prepare the claim fully. Reliance is also placed on the statement of truth, and all that connotes. However, obviously in a perfect world mistakes would never occur. Had the necessary checks been made, then this mistake would not have been made. The phrase used in one of the central authorities is "harmless error of its legal representatives". This appears at [106] in ***Insight Group Ltd and Insightsoftware.Com Ltd v Kingston Smith*** [2012] EWHC 3644 (QB), a judgment of Leggatt J (as he then was). That is, in my judgment, an apt description of what occurred here, although the word "harmless" is rather subjective. The fact that the error was compounded, in the sense that it was not discovered, when the statement of truth was signed is, in my judgment, neither here nor there. The statement of truth was signed in the belief that the Second Claimant was the lessee, because RPC understood that to be the case. That was the mistake. It can be described

in any one of a number of different ways, but all of them boil down to one essential. TP ICAP plc was thought to be the lessee of the third floor, and so was chosen as the Second Claimant. In fact, TP ICAP Group, a different company, held the lease.

27. It is correct to observe that this claim was issued near to the end of the limitation period, but in my judgment care over such matters is important well within a limitation period. But the degree of fault or culpability in making the mistake is not, so far as I can tell, of central relevance in applying the rules correctly. The solicitor at RPC checked the company name, noted the change of name and used the name of the company (and company number) of the entity within the group that he specifically, and RPC generally, believed held the lease. He had in any event inherited this mistake, in a sense, as when he joined the firm in 2014 the matter had been underway for some time. RPC had been instructed in late August 2012 and the mistake originated with how the loss adjusters described the insured. Had RPC checked the actual lease itself this would not have happened. It is, however, also correct to observe that hindsight is a wonderful thing. I consider this to be a simple mistake of fact in which company within the same group was the lessee of the third floor. Askoll relies on the fact that in its own pleading it stated the following:
"Paragraphs 3 and 4 [of the Particulars of Claim] are not admitted and the status of the Claimants and their entitlement to bring proceedings are for them to prove."

28. I consider that this reliance is misplaced, and this is the type of pleading which, whilst permissible under the Rules of the Supreme Court, was supposed to have come to an end with the advent of the Civil Procedure Rules. If Askoll were to have put status or title to sue of either claimant properly in issue, it should have done so expressly. Choosing to plead in its Defence that this was "not admitted" does not assist Askoll on this application. Had that point in the Particulars of Claim been denied, which it should have been (had Askoll wished to put it properly in issue), then the claimants would have known at that point in the proceedings that title to sue was in issue. RPC would have been aware of it specifically, and may well have discovered the mistake that had been made somewhat earlier. Askoll cannot, in my judgment, merely float in its defence the non-admission of something such as entitlement to bring proceedings as a potential issue in the future, and depend upon what turns up. I consider that this is a case of, in other words, Askoll hedging their litigation bets. Further, these pleadings came *after* there had been a stay of proceedings, agreed by all parties, to complete the pre-action protocol process. That process is supposed to assist the parties to narrow the issues with a view to reducing costs.

29. I have already referred to the defendants' collective criticisms of RPC in attesting to the accuracy of the Particulars of Claim by way of a statement of truth by the partner in charge of the case; the draft particulars were also approved by the Second Claimant. However, those different criticisms in essence all boil down to consequences of the same central mistake, which flowed through the case until it was discovered in late 2019. The mistake is that RPC believed that TP ICAP plc was the lessee of the third floor. Given that mistake, it made sense for RPC to provide the draft Particulars for approval to the insured on that basis, which is what happened, and it also made sense for that pleading to be supported by a Statement of Truth.

30. The defendants also submitted that not all of the losses claimed in the Particulars of Claim as having been suffered by the Second Claimant would arise as a function or

consequence of the Second Claimant being the lessee. As a single example, it is said that expensive IT equipment held in an office might not be the property of the lessee, it could belong to another company in the group. That is all very well so far as it goes, but it ignores that there are some heads of loss, for example fixtures and fittings, claimed directly as a result of the Second Claimant's status as lessee. It also ignores that the cost of renting out and fitting out temporary other premises is claimed, together with associated credits such as "less anticipated savings in rent, rates, service charges, utilities and repairs/maintenance". Taken both at face value from the description in the claim form, as well as the further detail in the Particulars of Claim, I conclude that there can have been no genuine doubt on the part of the defendants that the Second Claimant was intended to be the company within the group that was the lessee of the third floor.

31. Given the way that the application is put, the first step is to identify which is the appropriate rule to consider. Is it an amendment of name, such that CPR Part 17.4(3) is engaged, or is it a substitution, which means the applicant has to rely upon CPR Part 19.5(2)?

32. CPR Part 17.4(3) deals with correcting the name of a party. This is permissible "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." In my judgment, this application is not one that ought to be considered as though it were one to correct the name of a party. The claim form originally specified both name and company number of the Second Claimant. Both of these were correct, as in they both correctly identified the company called TP ICAP plc with its own specific company number. There was no mistake in the name of that specific company. The mistake was that this was not the legal entity that held the lease to the third floor of the Property. It is not a mistake as to the name of the party that was the Second Claimant.

33. I do not consider that CPR Part 17.4(3) avails the applicant on these facts, and I do not consider that the applicant can rely upon this rule.

34. In my judgment, the correct rule is CPR Part 19.5(2) which deals with substitution of a party. That is the correct description of what the applicant wishes to achieve. It does not want the existing Second Claimant to have its name corrected. It wishes to have the existing Second Claimant substituted by another company within the same group with a different legal identity. CPR Part 19.5(2) applies where an applicant seeks to add, or as here to substitute, a party after the expiry of a relevant limitation period. As stated in the heading to the rule, it is a special provision. The court may under Part 19.5(2) add or substitute a party if (a) the relevant limitation period was current when the proceedings were started, and (b) the addition or substitution is necessary. The relevant limitation period had not expired when the claim form was issued and so it is the requirement of necessity that is important. Part 19.5(3) states that such addition or substitution 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". Sub-paragraph (b) requires that the claim "cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant". There is also sub-paragraph (c) which deals with where death has

occurred or a bankruptcy order has been made. That latter sub-paragraph is of no relevance and need not be considered.

35. I consider that it is CPR Part 19.5 that is the correct limb of the application to consider in detail. If the Second Claimant fails under this rule, then the application in my judgment must fail, as CPR Part 17.4(3) does not provide it with an alternative route. I do not consider that this is a situation where CPR Rule 17.4(3) applies, as no correction, properly so-called, to the name of the Second Claimant is required.

36. Turning therefore to CPR Part 19.5(3), the first hurdle that has to be surmounted for the applicant here is one of jurisdiction. Secondly, if that hurdle is surmounted, the court has to be persuaded that, as a matter of discretion, the substitution ought to be made.

37. In ***Adelson and Las Vegas Sands Corp v Associated Newspapers Ltd*** [2007] EWCA Civ 701 the Court of Appeal reviewed and considered the case law in this respect and made it clear that the approach in an earlier case, known as the ***Sardinia Sulcis*** [1991] 1 Lloyds' Rep 201 was the correct one. The judgment of the Court in ***Adelson*** was delivered by the Lord Chief Justice. In that case the applicant was the second claimant, and sought to join two of its subsidiaries as claimants. The first claimant was the Chairman and Chief Executive of the second claimant, which was a casino business. It was a defamation action and the (shorter) limitation period had expired. The alleged defamation concerned the activities of the claimants.

38. It was common ground that the paragraph in the Particulars of Claim as originally drafted, describing the second claimant's activities, was not accurate and that the casino activities in question were carried out through the operating subsidiaries of the second claimant, the parent company, which was described at [2] in the judgment as "essentially a holding company".

39. Tugendhat J refused the application at first instance to add the two subsidiaries (although he did allow one limited amendment to the pleading itself, explained at [14]) and the Court of Appeal dismissed the appeal. The judgment stated that it would clarify "this difficult area of procedural law", in which there were conflicting decisions at the time. The Court of Appeal stated at [48] that there was good reason to believe that the new rules, namely CPR Parts 17.4 and 19.5, were intended to replicate RSC Ord 20. r5.

40. After an extensive review of both the pre-CPR regime, and also the two relevant rules under the CPR, the following is stated in the conclusions part of the judgment that deals with the principles that should be applied on applications such as this one:

> "[55] CPR 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 a 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 *Sardinia Sulcis.* The 'working test' suggested in *Weston v Gribben,* 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 *SmithKline,* 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."

41. In ***Insight Group Ltd and Insightsoftware.Com Ltd v Kingston Smith*** [2012] EWHC 3644 (QB), Leggatt J (as he then was) considered the inter-relationship between the rules in question and the Limitation Act, in the context of a firm of chartered accountants, Kingston Smith, becoming an LLP whereas at the time the cause of action arose, it had been a firm. The claim was mistakenly brought against the LLP, but should have been brought against the former partnership. Leggatt J reviewed the relevant authorities, and in particular the ***Sardinia Sulcis*** test, which the Court of Appeal had identified was the one to be applied.

42. He stated the following, which is of widespread application, which I can only repeat:

"[29] There is a considerable body of case law on the question of what type of mistake the court has power to relieve by substituting a new party for one named in mistake. In ***Adelson v Associated Newspapers Ltd*** [2008] 1 WLR 585, 598, at para 5, the Court of Appeal described this as a "difficult area of procedural law" and set out to clarify it. The Court of Appeal decided that, in order to fall within CPR r.19.5(3)(a), 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*** [1991] 1 Lloyd's Rep 201. In that case the proceedings were mistakenly brought in the name of the owners of the ship Sardinia Sulcis, when the owners had in fact assigned their claims to another party. The issue was whether that other party could be substituted as plaintiff after the limitation period had expired. Lloyd LJ (subsequently Lord Lloyd of Berwick) said at p.207:
"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*** [1967] 2 QB 703 the identity of the person intended to be sued was the plaintiff's employers. In ***Evans v Charrington*** [1983] QB 810 it was the current landlord. In ***Thistle Hotels v McAlpine*** (unreported) 6 April 1989 the identity of the person intending to sue was the proprietor of the hotel. In ***The Joanna Borchard*** [1988] 2 Lloyd's Rep 274 it was the cargo-owner or consignee. In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a

description which was more or less specific to the particular case. Thus if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise."

[30] In ***The Sardinia Sulcis*** Lloyd LJ was not considering CPR r.19.5(3)(a) but an earlier rule of court in different terms, RSC Order 20, r.5. That rule stated:
"(3) An amendment to correct the name of a party may be allowed [after any relevant period of limitation current at the date of issue of the writ has expired] 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."

[31] It was thus a requirement of RSC Order 20, r.5(3) that the mistake was "not misleading or such as to cause any reasonable doubt as to the identity of the person ... intended to be sued". Lloyd LJ was clearly addressing that requirement when he referred at the start and at the end of the passage I have quoted above to whether there could be any doubt as to the person intended to be sued.

[32] CPR r.19.5(3) does not contain such a requirement. (The requirement survives only in CPR r.17.4(3), which applies to an amendment made after the end of the limitation period to correct the name of a party where this does not involve the addition or substitution of a new party.) Not least for that reason, after the Civil Procedure Rules replaced the old Rules of the Supreme Court, there was uncertainty as to whether the ***Sardinia Sulcis*** test still applied. In ***Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd*** [2005] 1 WLR 2557 the Court of Appeal held that it did not. Jacob LJ (with whom Hooper LJ agreed), after reviewing the earlier cases, decided that under the new rule there was no longer any restriction on the kind of mistake required. Jacob LJ said (at para 37) that ***The Sardinia Sulcis*** should be allowed to sink back to the ocean bottom.

[33] Reports of the sinking, however, proved premature. In ***Adelson*** Lord Phillips of Worth Matravers CJ, giving the judgment of the court (which also included Jacob LJ), said that the ***Morgan Est*** case had been decided on the assumption that the Limitation Act 1980 (under which CPR r.19.5 but not RSC Order 20, r.5 was made) was intended to liberalise the law in this area. However, the legislative history of the 1980 Act showed that assumption to have been mistaken. The ***Morgan Est*** case should not be followed. The ***Sardinia Sulcis*** test still applies.

[34] The Court of Appeal in ***Adelson*** concluded (at paras 55-56) that, for CPR r.19.5(3)(a) to apply, three requirements must be met: (1) the person who has made the mistake must be the person responsible, directly or through an agent, for the issue of the claim form; (2) it must be shown that, had the mistake not been made, the new party would have been named; and (3) the mistake must be as to the name of the party, applying the ***Sardinia Sulcis*** test.

[35] This is confirmed by the decision of the Court of Appeal in ***Horne-Roberts v SmithKline Beecham plc*** [2002] 1 WLR 1662. In that case the claimant initially sued

Merck believing it to be the manufacturer of a vaccine which the claimant had received and which he claimed had caused him personal injury. In fact, the vaccine had been manufactured by SmithKline. After the expiry of the limitation period Bell J granted an application to substitute SmithKline as the defendant. The order was upheld by the Court of Appeal. Keene LJ said at para 45 that "the claimant always intended to sue the manufacturer of the identified vaccine and that is sufficient to give the court the power to substitute the true manufacturer."

43. I therefore apply the test as it is clearly set out at [34] of the judgment in the ***Insight*** judgment above, applying ***Adelson***. Here, it is clear to me on all the evidence that the three requirements necessary are all satisfied in favour of granting the application. The person who made the mistake was the person responsible at RPC for issuing the claim form. Had the mistake not been made, then TP ICAP Group would have been named as the Second Claimant, as the intention was for that party to the proceedings (the Second Claimant) to be the company within the group that held the lease of the third floor. It was the name of the party that was the mistake, applying what is referred to "as the generous test of this type of mistake laid down in ***Sardinia Sulcis"*** I would also add that there has never been any doubt as to which legal entity was intended to bring the proceedings as the Second Claimant. The First Claimant was intended to be the freeholder, and the Second Claimant was intended to be the leaseholder of the third floor, of the Property. Because of the mistake, RPC only achieved the first of those limbs. Absent the mistake, both would have been achieved.

44. I would go further in this case and say that the Particulars of Claim, in their form originally served, made this clear. The defendants all knew that the claims being brought against them were by the freeholder of the building, who was the First Claimant, and the lessee of the third floor, who was the Second Claimant. In the evidence served in opposition to the application, Ms Murphy for Askoll states that the Particulars of Claim were "deliberately drafted so at to be vague", because the pleading described the Second Claimant as the "leasehold owner and/or tenant and/or occupier". I do not accept that description of the drafting as being one of deliberate vagueness. It strikes me more as an attempt to be comprehensive as to the Second Claimant's interests. It is also consistent with the terminology used in pre-action correspondence which described the Second Claimant as the occupier of the third floor *pursuant to the lease*. A tenant is, usually, an occupier. It is notable that the part of the pleading which was, so far as Askoll is concerned, said to be "deliberately vague", was actually admitted by Eichenauer. I do not accept the other statements made by the defendants collectively in their evidence, which use terms such as "curious" for the fact that the mistake was not discovered sooner by RPC, as though there were something sinister in the way that the correct position has now emerged, or as though the solicitors providing witness statements in support of the application were hiding something, or trying to suit their evidence to the rules. The evidence submitted in support of the application makes it clear to me that this was a simple mistake, of the type that does occasionally occur. RPC thought that TP ICAP plc held the lease of the third floor of the Property. In fact, TP ICAP Group held the lease.

45. To adopt the parallel of the dicta of Keene LJ at [45] of ***Horne-Roberts v SmithKline Beecham plc*** [2002] 1 WLR 1662, where he said that "the claimant always intended to sue the manufacturer of the identified vaccine", the instant case could be described as "it was always intended that the second claimant be the lessee of the third floor". I

would just add this so far as this particular mistake is concerned. Infallibility is an extremely rare commodity. In legal careers spanning many years, almost all professionals will have made mistakes of one kind or another, from time to time. The case of ***Insight*** demonstrates one kind; this case demonstrates another.

46. I reject that any of the defendants were concerned about any lack of clarity about the Second Claimant prior to the events that led to the issue of this application. I consider that the legal entity intended to be the Second Claimant was the company that held the leasehold interest (an alternative way of putting it would be the entity that held the tenancy) of the third floor. This is clear from the pleading prior to amendment. Absent the mistake as to the name of that company within the group, this would have been achieved.

47. Given I am satisfied that there was a mistake, then the alternative way of satisfying the condition of necessity under CPR Part 19.5(3)(b) does not arise, and the decision on whether the application made on 15 May 2020 to amend the application form should be permitted, does not make any difference to the outcome of the application. Some argument was directed to the ratio of the learned deputy judge in ***AIG Europe Ltd v McCormick Roofing Ltd*** [2020] EWHC 943 (TCC) to which I have already referred. Although that case does have some similarities to this one, they are by no means on all fours with one another. CPR Part 19.5(3)(b) has more application to what are called company and liquidator/administrator cases such as ***Irwin v Lynch*** [2010] EWCA Civ 1153 and ***Parkinson Engineering v Swan*** [2009] EWCA Civ 1366, which is referred to within ***Irwin v Lynch*** by Lloyd LJ. It was Lloyd LJ who had in fact given the leading judgment in ***Parkinson Engineering*** in any event. In ***Irwin***, Mr Irwin was an administrator of a company seeking to pursue two directors for different matters, including that in respect of a building contract entered into between them and the company, the contract was a transaction at an undervalue.

48. Mr Irwin sought a declaration that it was a transaction at an undervalue and that the respondents were guilty of misfeasance and breach of trust in causing the company to enter into the contract, and therefore were liable to compensate the company. However, an administrator (unlike a liquidator) is not someone who, under section 212 of the Insolvency Act 1986, can bring a misfeasance claim. Such a claim is restricted to the Official Receiver, a liquidator, a creditor or a contributory. Mr Irwin was not one of those entitled to bring such a claim and he therefore sought to substitute the company as the claimant using CPR Part 19.5(3). His appeal against the refusal at first instance to allow him to do this was allowed. Lloyd LJ stated:

> "[20] Mr Morgan [for the directors, the respondents on the appeal] also submitted that the wider reading of rule 19.5(3)(b) would mean that it would rarely be necessary to resort to rule 17.4 or rule 19.5(3)(a) in a case of mistake. As to that, we do not have to decide the position, but it occurs to me that, if a party sought to use rule 19.5(3)(b) in what was really a case of mistake but in which rule 17.4 or rule 19.5(3)(a) could not for some reason be satisfied, the court, in considering the exercise of its discretion, might well take a dim view of an attempt to escape the limits imposed in the express provisions dealing with mistake cases by resort to this other, arguably more general, provision, even if the court found that the case fell within the language of rule 19.5(3)(b) as a matter of its natural reading.

[21] Considering the application to amend in the light of these considerations, I am not persuaded by the distinction which Mr Morgan seeks to draw between a case where the original claimant has a cause of action, even if one to which there is a cast iron defence on the basis of which the claim could be struck out, and another where there is a proper cause of action but the claim is not the right party to bring it because he does not have the necessary *locus standi*, and the claim could be struck out on that basis.

[22] Mr Morgan submitted that to allow a substitution on such a case would permit the possibility of a claim being brought by a complete stranger against the relevant defendant and then, outside the limitation period, that claim being sought to be adopted or validated by the substitution of the relevant company as claimant.

[23] Mr Irwin is not, of course, a complete stranger. His task is to collect in the assets of the company for the benefit of it and its creditors, and the claim which he asserted was avowedly brought on the part of the company. For my part, the idea of a complete stranger bringing such a case seems rather fanciful. If for some reason it were to prove real, it seems to me that the court would be likely to regard it as an unsuitable exercise of the court's discretion to substitute the company as claimant outside the limitation period for a complete stranger who had brought a case within the limitation period, which could no doubt have been struck out because he had no right to bring the claim. It seems somewhat unlikely that if this hypothetical complete stranger were to bring proceedings within the limitation period, it would in fact assert the same cause of action as that which the company could itself assert but had chosen not to.

[24] It seems to me that the present case is one in which the substitution is necessary for the determination of the original claim because the particular claim cannot be maintained unless the company is substituted as claimant. The original claim is a claim that the respondents were in breach of duty in causing the company to enter into the contract, thereby causing the company loss. The claim, as amended with the substituted claimant, is identical. The original claim cannot be maintained successfully; the new claim can be maintained successfully, subject obviously to proof of the facts. If it is so asserted, it is the identical claim but with a substituted and correct claimant."

49. I do not consider that the applicant in this case can rely upon CPR Part 19.5(3)(b). It is clear to me, both from the wording of the two different sub-paragraphs (a) and (b), that these two parts of the rule are intended to be exclusive, and that the former is the correct one in circumstances of mistake such as this one. Mistake is expressly identified within sub-paragraph (a). Mr White for Eichenauer submitted that the CPR should be construed using the *lex specialsis* canon of construction. I am not persuaded that such an approach is necessary, because what is essentially the same point is expressly dealt with by Lloyd LJ at [20] of the ***Irwin*** case above in any event. This explains that in a case of mistake, the court would be reluctant to allow what might be said to be the more generous regime of sub-paragraph (b) to be relied upon, in a case of mistake, if for some reason sub-paragraph (a) was not available. I accept and adopt that reasoning.

50. ***AIG Europe Ltd v McCormick Roofing Ltd*** [2020] EWHC 943 (TCC) was brought to my attention and in that case it is correct to observe that the route found to be

available was said to be both of sub-paragraphs (a) and (b). I do not consider that this case assists on the specific facts of the instant application, but in any event I consider these two alternatives to be precisely that, alternatives.

51. In any case, in ***AIG,*** whichever of the sub-paragraphs was applied, the outcome evidently depended upon the facts. Given CPR Part 19.5(3)(a) requires, expressly, a mistake to have been made, it will not apply in the same way in every case. That the essential cause of action remains the same can more readily be understood by considering the analysis used by Hallett VP in the case of ***Nemeti*** to which I have referred at [12] above. In that case, claimants (who had been injured in a car crash in Romania in which the driver had been killed) issued proceedings against his insurer. They sought, outside the limitation period, to bring the proceedings against his estate. In describing the nature of the two different cases, Hallett VP, who was sitting with the Chancellor and Sharp LJ (as she then was), stated the following.

"[41] However, at this stage of the process, this is not a matter of discretion. It is a matter of statutory construction. Absent section 35 and CPR 19 there is no power to substitute the deceased's Estate outside the limitation period. The Appellants must bring themselves within the section if their claim based on the driver's negligence is to proceed. In my view they cannot. There is a flaw in Mr Burton's analysis of the original cause of action. When he listed the essential ingredients of the original cause of action, he stopped at the negligence of the driver and the relief sought. He ignored the additional and vital element in the original claim for relief against the Respondents, namely the provisions of Regulation 3. The cause of action (the factual situation which entitles a person to obtain a remedy) against the Respondents may have been based on Mr Bura's negligence but it derived from statute. Had it not been for Regulation 3, there could be no claim against them.

[42] Regulation 3 required certain conditions to be fulfilled. Thus, in a properly constituted claim under Regulation 3 there would have been additional assertions in the Particulars to the effect that the accident occurred in the United Kingdom and the tortfeasor was insured by the Defendant. The claim for relief would have referred to the Regulation and presumably sought payment from the Defendant 'to the extent that (the Defendant) was liable to pay the insured tortfeasor' as per the Regulation. The original claim was not, therefore, a claim for damages for personal injury against the Respondents, as Mr Burton insisted. It was not a claim in negligence. It was effectively a claim for an indemnity under statute (as the Claim Form made clear) limited to the Respondents' liability to their insured.

[43] By contrast, the new claim is a claim in negligence against the alleged tortfeasor. The claim for relief is a claim for damages for personal injury allegedly caused by that negligence. Any judgment would be against the Estate. The fact that the Appellants, if successful, may be entitled to recover payment from the Respondents of "any sum" found due, under section 151 of the 1988 Act, is beside the point for these purposes.

[44] Thus, although the late Mr Bura's alleged negligence underlies both claims, the claims are not the same. It is not simply a matter of form. In substance these are two different causes of action.

[45] A deliberate decision was taken at the outset, no doubt for tactical and financial reasons, to sue one defendant, the Respondents, on a particular cause of action rather than sue another defendant, the Estate, on a different cause of action. After the expiry of the limitation period, the decision was taken to pursue the Estate because the first cause of action could not be maintained. It was properly constituted but doomed to fail for substantive reasons. No amount of amendment could save it. The proposed substitution of a new party is not designed to maintain the original claim; it is designed to launch a new claim against a new party. A mistake was made but not the kind of mistake the section was designed to remedy. The Judge was correct, in my view, to find that the amendment is not "necessary for the determination of the action".

(emphasis added)

52. Here, the substitution would not, in my judgment, affect the nature of the original cause, or causes, of action. The original claim brought by the Second Claimant against all of the defendants was one brought by the lessee of the third floor of the Property for breach of duty and/or breach of statutory duty and/or contraventions of the Electrical Equipment (Safety) Regulations 1994 and/or in negligence. Those causes of action would remain the same after the substitution, but with TP ICAP Group correctly identified and bringing the claim(s) as the lessee of the third floor, not TP ICAP plc (wrongly thought at the time to be that entity because of the mistake).

53. My attention was also drawn in the skeleton arguments to the requirements of CPR Part 19.4(4), which states that nobody can be added or substituted as a claimant unless their consent is given in writing and that has been filed with the court. However, the application was, at least by the time it was heard, supported by a witness statement from Sunni Doll, the Financial Controller of the whole group, including TP ICAP plc and TP ICAP Group itself (the entity in respect of which the substitution is sought) and I do not consider that there is any lack of consent in writing. That witness statement expressly states that “I make this witness statement in support of the Second Claimant’s application” and this clearly would lead to TP ICAP Group becoming the Second Claimant in the stead of TP ICAP plc. Even if I am wrong about that, Ms Percy for RPC is the partner at that firm representing the claimants and given the terms of her witness statements and the substance of the application, her authority must extend to consent on the part of TP ICAP Group to be substituted, and that is plainly in writing.

54. Yet further, even if I am wrong about both those points in the preceding paragraph, Richard Elmitt the General Counsel of TP ICAP Group sent a letter to the court dated 18 May 2020 which expressly stated that he has authority to provide the consent of TP ICAP Group to be substituted as the Second Claimant, and that such consent was expressly provided in that letter. Accordingly, there is nothing in this point that prevents the application succeeding. I cannot but observe that the letter to which I have just referred, came somewhat late for an application originally listed to be heard in March 2020, but it remains the case that consent to substitution was indicated formally by TP ICAP Group and in writing before the court heard the application. CPR Part 19.4(4) is therefore satisfied.

55. In my judgment therefore, the jurisdictional hurdle for the applicant to overcome is surmounted, and the correct route for the substitution is CPR Part 19.5(3)(a).

56. However, that is not the end of the matter because the court has a discretion whether to allow the substitution, which has to be considered once the jurisdictional hurdle is cleared. This is made clear, in my judgment, from the wording of CPR Part 19.5(2) which states "the court *may* add or substitute a party…." (emphasis added) and also from the dicta of Leggatt J in the ***Insight*** case when he stated:

> "[41] Where the requirements of section 35(6)(a) of the 1980 Act and CPR r.19.5(3)(a) are satisfied, the court has a discretion whether or not to allow substitution. The existence of this discretion might be thought sufficient to enable any potential injustice to be avoided, without the need to try to draw distinctions between different categories of mistake."
> (emphasis added)

57. I therefore turn, as a matter of discretion, to consider whether the substitution ought to be allowed. As part of this, I have read all of the cases listed in the bullet points in the Notes to this rule in Vol.1 of the White Book which follow the following text stating that the following cases are "examples" of the application of the ***Sardinia Sulcis*** test.

58. In those cases, although the intended party was mis-named, their identity was made clear by reference to a description which was specific to the particular case, as is made clear in the notes. I will not list all of those cases here, as to do so would simply lead to this judgment being unnecessarily lengthy, and they appear in the notes in any event to CPR 19.5.4. One is ***Sardinia Sulcis*** itself, another is ***Horne-Roberts*** which is referred to by Leggatt J in [35] of the ***Insight*** case, which I have reproduced at [33] above.

59. Here, it must be borne in mind that the different defendants' knowledge of this claim originate from before the limitation period expired. This is to be differentiated from a situation, say, where a defendant, unaware of a claim against it for years, is sought to be added or substituted after the limitation period has ended. Each case will also have fact-specific differences in any event.

60. As part of the exercise of considering discretion I have, for obvious reasons, considered delay. This claim was issued at the end of the limitation period and it was incumbent upon the claimants to progress it efficiently and timeously. However, in this case the pre-action protocol process had not been undergone when the claim form was issued – which was done for protective reasons - and the parties agreed that the protocol process should then take place between them. Indeed, on 2 October 2018 I myself made an order by consent of all the parties (except Eichenauer, who was in the process of being served outside the jurisdiction in Germany) that the proceedings should be stayed so that the pre-action protocol could be undertaken. The TCC Guide itself not only permits this consensual approach to the protocol, it could be said to encourage it, as the purpose of the protocol is to narrow issues and (hopefully) save costs. The different periods from that date onwards, over the next 14 months or so, saw different steps being taken by the different parties and attempts being made to do this, including service of pleadings after the pre-action protocol had been completed in 2019. It failed to assist the parties to resolve their differences, but to hold such

delay during this period against the claimants (or the applicant) would, in my judgment, not be fair. This stay of the whole proceedings was a consensual one.

61. There is only one particular period of delay which I would ordinarily consider required further explanation and that is from when the mistake was discovered in late 2019, until the issue of the application in early March 2020. However, that period is not large, and in any event it can be seen from all the correspondence that RPC was attempting to obtain agreement to the substitution during that period. Even then – and I use the Whirlpool Defendants as an example, not identifying them for particular opprobrium – the stance was one of "provide further information please" and was almost cautious and hesitant neutrality, or uncertainty, rather than opposition, to the substitution. This accounts for most, if not all, of the period of weeks up to 5 March 2020, rather than the claimants dragging their feet.

62. There is also, in my judgment, a point of principle that must be addressed in so far as any defendant seeks to rely upon delay from November 2019 onwards as justifying the court exercising its discretion against allowing the substitution. This point of principle is that there was another court-ordered stay in place from 9 October 2019 onwards. Again this was in a consent order submitted by the parties jointly, and approved by the court. This was for the express purpose of ADR. No party sought to have this lifted until the Second Claimant issued this application during that stay period in early March 2020. It would be contradictory to hold delay during the period of such a stay against one particular party to the litigation.

63. The defendants collectively raise a challenge to the evidence before the court of loss suffered by the party sought to be substituted, namely TP ICAP Group. It is said that this is not the company that suffered the loss, and/or that the status of lessee does not mean that the expensive IT equipment that was destroyed must necessarily have belonged to the company sought to be added by way of substitution. Whirlpool in particular contended strongly that the wrong entity would be the subject of the substitution, on the basis that it had not suffered the loss. I reject those challenges. There is, on the evidence before the court, ample evidence in my judgment for the purposes of an application of this nature. There might be some arguments available to the defendants at trial concerning some discrete elements of the loss claimed, for a range of reasons, but to suggest that the leaseholder of the third floor, forced to obtain alternative premises at additional cost following a fire, but giving credit for the rent it has saved, had not suffered any loss, is not a sound submission.

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.

65. I am supported in this, I consider, by the dicta at [106] in ***Insight*** where the following was stated:
" On the contrary, it seems to me that the court should generally be willing to "excuse such mistakes", in the sense of permitting substitution, even if there is no good explanation, where – as the Master found to be the case here – there is no prejudice to the party who is substituted. The court's discretion should not be exercised in a way that amounts, in effect, to punishing a party for the harmless error of its legal representatives."
I do not consider here there was "no good explanation" but the rationale holds good nonetheless.

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.

67. Ms Day for Whirlpool urged me not to "do away with limitation", as she put it, by depriving the defendants of limitation defences to which they were entitled. This is a circular approach to an application such as this. The relevant rules are certainly exceptions to routine application of limitation periods, but they derive from s.35 of the Limitation Act itself. I accept that if the applicant does not succeed in bringing itself within the special provision in CPR Part 19.5 then the claim by the Second Claimant would be time-barred. That does not however assist in deciding whether the special provision by way of an exception is available or not.

68. Finally, Mr Elkington sought to persuade me that the discretion could be exercised differently for different defendants. I do not consider that this is correct, at least in this case. Whether on entirely different facts and another case, this might be an argument available to a particular defendant amongst a group of defendants is perhaps a question for another day. However, and without hearing full argument on the point specifically, I would suggest it is doubtful. It would seem only possible on extraordinary facts. It appears to me that if it is available, it is more likely to arise under CPR 19.5(3)(b) rather than (a), the sub-paragraph I am applying in this case. Certainly there is no authority in favour of this proposition and none is relied upon. The claim form here names all five defendants, and it is the claim form that is sought to be amended by way of the substitution. I do not consider that there is anything in this case which would justify such an unusual result. I consider the exercise of my discretion properly leads to the same result in respect of all the defendants. Finally, the trial in this action is set down for 31 January 2022. I do not accept that there has been any material disruption; but if there has, its effects can be minimised between now and the trial.

69. In my judgment, and in the exercise of my discretion, I consider that the application ought to be permitted so that the company that in fact held the lease of the third floor, TP ICAP Group, is substituted for the company within the same group that RPC believed (at the time the claim form was issued) held the lease, namely TP ICAP plc. There is no potential injustice by doing so.

70. In all those circumstances, therefore, the application succeeds under the rule I have identified, CPR Part 19.5(3)(a), and I permit the substitution of the existing Second Claimant, TP ICAP plc, with TP ICAP Group, whose full name is TP ICAP Group Services Ltd. That latter entity will therefore become the Second Claimant in substitution for TP ICAP plc, which will play no further part in the proceedings. Because of the number of parties, and the high level of the costs to which I have already referred, I am going to give them the opportunity to agree the costs of the application without a further hearing. They have a period of seven days from the date of this judgment to do so. If this is not achieved, then a short further remote hearing with a time estimate of 45 minutes can be arranged in order for submissions to be made on costs and any other consequential applications.