Neutral Citation Number: [2025] EWHC 170 (Ch)

Case No: BL-2022-001360

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

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 30 January 2025

**Before** :
**MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE**

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**Between :**

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|---|---|
| **(1) OFFICE PROPERTIES PL LIMITED (in liquidation)**<br>**(2) BRIAN JOHNSON**<br>**(3) PETER KUBIK**<br>**(as Joint Liquidators of Office Properties PL Limited)** | **Claimants** |
| **- and -** | |
| **(1) ADCAMP LLP**<br>**(2) RICHARD CHENERY** | **Defendants** |

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**Mr Patrick Lawrence KC** (instructed by **Penningtons Manches Cooper LLP**) for the **Claimants**
**Mr Michael Pooles KC** (instructed by **DAC Beachcroft LLP**) for the **First Defendant**
The **Second Defendant** did not appear and was not represented.

Hearing date: 21 January 2025
(Draft judgment circulated 24 January 2025)

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
This judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 10:30 am on 30 January 2025

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MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE

**Mr David Halpern KC :**

1. This is my judgment on the First Defendant's application, issued on 13 September 2024, to disallow an amendment to the Claim Form adding it as defendant and to strike out the Claim Form on the ground that the claim is statute-barred. The application raises an interesting and difficult issue of construction in relation to section 35(6)(b) of the Limitation Act 1980 and CPR rule 19.6(3)(b), on which there is no binding authority. (I shall refer to these two provisions together as "**Ground (b)**".)

## The facts

2. The claim arises out of a dividend paid by the First Claimant ("**the Company**") on 9 January 2017, which is said to have been unlawful, and a lease guarantee given by the Company on 20 January 2017. The basis of the claim is that these steps were taken by the Company in reliance on negligent legal advice. Accordingly the primary limitation period in respect of the claim expired in January 2023.

3. Pitmans LLP ("**Pitmans**") acted as solicitor to the Company in January 2017. In 2018 it was taken over by Bircham Dyson Bell LLP, which changed its name to BDB Pitmans LLP ("**BDB**"). Although BDB was apparently the "successor practice" for the purpose of professional indemnity insurance (meaning that BDB's insurer was liable to indemnify Pitmans against claims), there was no novation of liabilities as between Pitmans, BDB and the Company. In 2019 Pitmans changed its name to Adcamp LLP, but I shall continue to refer to it for convenience as Pitmans. In 2021 Pitmans was dissolved and in 2023 it was restored to the register.

4. The Claim Form was issued on 23 August 2022 against BDB, stating:

> "*The First Defendant is the successor practice to Pitmans LLP. Pitmans LLP were retained, and/or assumed responsibility, to advise the Company on various questions, including whether the Company could and should lawfully pay a dividend of up to £7 million and whether the Company should enter into a new lease guarantee. Pitmans LLP acted negligently, in breach of the contractual and/or tortious duties and/or fiduciary duties owed to the Company. The Company suffered loss and damage as a result of Pitmans LLP's negligence and/or breach of fiduciary duty, for which the First Defendant is liable to compensate the Company*."

5. The Claim Form includes a claim against the Second Defendant, the former director of the Company, for breach of director's duties. No application is made by him to strike out the Claim Form and he has taken no part in this hearing. I can therefore ignore him for the purpose of this judgment.

6. On 7 December 2022 Penningtons Manches Cooper LLP ("**PMC**"), on behalf of the Company, sent a preliminary notice of claim to BDB, stating that "*you*" were instructed to act as the Company's solicitors and that the Company had

suffered loss as a result of "*your*" negligent acts and omissions. A copy of the Claim Form was enclosed, but not by way of service.

7. The parties agreed, and the court approved, a number of extensions of time for service of the Claim Form. On 13 March 2023 PMC sent its formal letter of claim to BDB enclosing draft Particulars of Claim ("**POC**"), which stated at paragraph 2: "*The First Defendant is the successor practice to Pitmans LLP ("Pitmans"), which was at all material times a firm of solicitors advising the Company …. The liabilities of Pitmans have passed to the First Defendant, which bears responsibility for its acts and omissions.*" (I should make it clear that the counsel whose name is at the foot of the draft POC is not Mr Patrick Lawrence KC, who now appears for the Claimants.)

8. On 15 September 2023 DAC Beachcroft LLP wrote enclosing a draft Defence on behalf of BDB, in which they admitted that BDB was the successor practice to Pitmans for the purpose of indemnity insurance but denied that this constituted any assumption of responsibility by BDB for the acts or omissions of Pitmans.

9. This letter caused PMC to realise that the Claim Form had failed to name the correct party. Accordingly, on 10 October 2023 it was amended without permission to add Pitmans as First Defendant, renumbering BDB as Second Defendant. (CPR r 17.1 permitted this amendment to be made without permission because the Claim Form had not yet been served.) The Amended Claim Form states:

> "~~*The First Defendant is the successor practice to Pitmans LLP*~~. *The First Defendant (formerly Pitmans LLP) was* ~~*Pitmans LLP were*~~ *retained, and/or assumed responsibility, to advise the Company on various questions, including whether the Company could and should lawfully pay a dividend of up to £7 million and whether the Company should enter into a new lease guarantee. The First Defendant* ~~*Pitmans LLP*~~ *acted negligently, in breach of the contractual and/or tortious duties and/or fiduciary duties owed to the Company. The Second Defendant is the successor practice to the First Defendant. The Company suffered loss and damage as a result of the First Defendant's* ~~*Pitmans LLP's*~~ *negligence and/or breach of fiduciary duty, for which the First Defendant and/or the Second Defendant is liable to compensate the Company."*

10. On 22 December 2023 the Claim Form was re-amended without permission to delete BDB as Second Defendant. The Re-Amended Claim Form states:

> "~~*The First Defendant is the successor practice to Pitmans LLP*~~. *The First Defendant (formerly Pitmans LLP) was* ~~*Pitmans LLP were*~~ *retained, and/or assumed responsibility, to advise the Company on various questions, including whether the Company could and should lawfully pay a dividend of up to £7 million and whether the Company should enter into a new lease guarantee. The First Defendant* ~~*Pitmans LLP*~~ *acted negligently, in breach of the contractual and/or tortious duties and/or fiduciary duties owed to the Company.* ~~*The Second Defendant is the successor practice to the First*~~

> ~~*Defendant.*~~ *The Company suffered loss and damage as a result of* *the First Defendant's* ~~*Pitmans LLP's*~~ *negligence and/or breach of fiduciary duty, for which the First Defendant* ~~*and/or the Second Defendan*~~*t is liable to compensate the Company*."

(I have shown the re-amendments with double strike-throughs.)

11. The Re-Amended Claim Form was served on 29 August 2024, with the deemed date of service being 2 September 2024. It is common ground that Pitmans' application to disallow the amendment was duly made under CPR r. 17.2. Under this provision the court has to consider whether it would have granted permission to make the amendment, had permission been required: *Qatar Airways Group QCSC v. Middle East News FZ LLC* [2020] EHWC 2975 (QB) at [239], Saini J. (Mr Lawence KC's skeleton argument suggests that the date by reference to which the issues are considered might make a difference as regards the exercise of the discretion, but this has not been further explored by either counsel and it appears that nothing turns on it.)

## The law

12. S.35 of the Limitation Act 1980 deals with new claims. S.35(1) states (so far as relevant) that a new claim is deemed to have been made on the date of the original action: this is the doctrine of relation-back. S.35(2) provides that a "*new claim*" for the purpose of s.35(1) means a claim involving either the addition or substitution of a new cause of action or the addition or substitution of a new party. Strictly speaking I am concerned with the addition of a new party, which took place by virtue of the first amendment to the Claim Form. However, it is clear that BDB should never have been joined in the first place, as the Claimants belatedly recognised when they made the second amendment deleting BDB. Nevertheless, s.35(2)(b) applies to both substitutions and amendments, and neither counsel suggests that anything turns on the fact that the amendments were made in two stages and not one.

13. S.35(3) (so far as relevant) prevents a new claim from being made outside the limitation period unless permitted by rules of court. The reason for this was explained by the Court of Appeal in *Welsh Development Agency v Redpath Dorman Long* [1994] 1 WLR 1409 at 1425. The effect of the relation-back would be to deprive the defendant of a limitation defence, if the cause of action had become statute-barred between the date of the original action and the date of the amendment. Hence the test is whether it is arguable that the defendant would be deprived by the amendment of a limitation defence. In the present case the Claimants claim that time should be extended under s.14A of the Limitation Act 1980, but Mr Lawrence KC wisely accepts that the availability of that provision arguably depends on the doctrine of relation-back and hence that it should be ignored for the purpose of this application.

14. S.35(4) states that rules of court may permit new claims, but only if the conditions in s.35(5) are satisfied. In the case of a claim involving a new party,

s.35(5)(b) states that the condition is "*if the addition or substitution of the new party is necessary for the determination of the original action*".

15. S.35(6) contains the critical words which I am required to construe:

> "*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*."

16. CPR r.19.6 contains the rule which was contemplated by s.35 and provides (so far as material) as follows:

> "*19.6.—(1) This rule applies to a change of parties after the end of a period of limitation under—*
>
> *(a) the Limitation Act 1980 ….*
>
> *(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*."

17. Mr Lawrence KC accepts that the Claimants cannot rely on the "mistake" exception in s.35(6)(a) and r.19.6(3)(a), for the reason given by Leggatt J (as he then was) in *Insight Group Ltd v Kingston Smith* [2014] 1 WLR 1448 ("***Insight***") as follows:

> "*56. On the basis, however, that the distinction between mistakes as to identity and as to name is one which the law still requires to be drawn, I turn to consider the situation with which the present case is concerned, where a claim for damages for alleged professional negligence has been mistakenly brought against an LLP rather than the partnership whose business the LLP took over. Applying the Sardinia Sulcis test as discussed above, it seems to me that the relevant description of the defendant in a case of this kind is that of professional adviser. It is the fact that the defendant*

> *has provided professional services and has allegedly done so negligently which potentially gives rise to legal liability.*
>
> *57. In order to decide whether the claimant's mistake can be regarded as one of name rather than description, it is thus necessary to distinguish between the following two possible cases. (1) The claimant sues the LLP in the mistaken belief that the LLP provided the services which are said to have been performed negligently, failing to recognise that the services were provided by the former partnership and not the LLP. (2) The claimant knows that that the services were provided by the former partnership but mistakenly believes that the LLP is legally liable for the negligence of the earlier firm. The court has the power to grant relief in case (1) but not in case (2).*"

18. Leggatt J found, as a matter of fact, that the mistake in *Insight* was in Category (1). In the present case Mr Lawrence accepts that the mistake was in Category (2). In my judgment he is right to concede this. Although the position is not entirely clear from the preliminary letter of 7 December 2022 (paragraph 6 above), it is made clear both by the first sentence of the original Claim Form ("*The First Defendant is the successor practice to Pitmans LLP*") and by the draft POC (quoted at paragraph 7 above). Hence it is necessary for the Claimants to rely on Ground (b).

## The parties' submissions

19. The court has jurisdiction to permit the amendment under Ground (b) only where the claim sought to be made by or against the new party is the same claim as was made by or against the original party. The narrow, but important, point which divides the parties is whether the claim as amended is the same claim.

20. Mr Michael Pooles KC, who appears for Pitmans, submits that the original claim had two essential ingredients: (i) alleged negligence by Pitmans causing loss to the Company and (ii) BDB being liable for that loss. He says that Ground (b) applies only where the new claim is exactly the same as the old one, save for the substitution of a different party. He gives the examples of a body of trustees in a case where new trustees are appointed, and a claim by a company in liquidation where it is sought to substitute the liquidator as claimant.

21. By contrast, Mr Lawrence KC submits that the relevant ingredient is solely the alleged negligence of Pitmans which caused loss to the Company. The further allegation that BDB was liable for Pitmans' negligence should not be treated as part of the original claim for the purpose of Ground (b), since this is the very allegation that led to the decision to sue the wrong party.

## The authorities

22. I shall say more about these respective submissions by reference to the authorities. I start by reminding myself of the correct approach to the Act. In *Haward v Fawcetts* [2006] 1 WLR 682 at [32] Lord Scott said:

> "*It is important, in my opinion, to keep in mind that limitation defences are creatures of statute. The expression "statute-barred" makes the point. And, in prescribing the conditions for the barring of an action on account of the lapse of time before its commencement, Parliament has had to strike a balance between the interests of claimants and the interests of defendants. It is a hardship, and in a sense an injustice, to a claimant with a good cause of action for damages to which, let it be assumed, there is no defence on the merits to be barred from prosecuting the cause of action on account simply of the lapse of time since the occurrence of the injury for which redress is sought. But it is also a hardship to a defendant to have a cause of action hanging over him, like the sword of Damocles, for an indefinite period. Lapse of time may lead to the loss of vital evidence; it is very likely to lead to a blurring of the memories of witnesses and to the litigation becoming even more of a lottery than would anyway be the case; and uncertainty as to whether an action will or will not be prosecuted may make a sensible and rational arrangement by the defendant of his affairs very difficult and sometimes impossible. Each of the various statutes of limitation that over the years Parliament has enacted ... represents Parliament's attempt to strike a balance between these irreconcilable interests, both legitimate. It is the task of the judiciary to identify from the statutory language and the purpose of each amending enactment the balance that that enactment has endeavoured to strike and to apply the enactment accordingly. It is emphatically not the function of the judges to try to strike their own balance, whether as a response to the apparent merits of a particular case or otherwise.*"

I understand this to mean that I must not approach the construction of Ground (b) with any bias in either direction but must simply seek to give effect to the true meaning of the words in the Act and the Rules.

*Parkinson*

23. The earliest case to which I am referred on Ground (b) is the Court of Appeal decision in *Parkinson Engineering Services plc v Swan* [2009] EWCA Civ 1366 ("***Parkinson***"). In that case a company in liquidation brought proceedings against its former administrators. The defendants pleaded (inter alia) that the claim was barred by s.20 of the Insolvency Act 1986, which provided for a statutory release of the administrators upon discharge of the administration order. The liquidator sought to overcome this by applying to be substituted as claimant in place of the company and seeking an order under s.212 of the Insolvency Act 1986 permitting him to pursue the claim despite the release of the administrators. Lloyd LJ held as follows:

> "*13. There is no doubt that the claim which the liquidator seeks to assert under section 212 is identical to that which he put forward in the name of the company by the original proceedings. The proposed amendments include no change to the allegations of duty, breach or loss. References to the company are substituted for the word "Claimant", and reference to section 212 is added to the text as regards relief. Otherwise there is no change. ...*
>
> *26. The distinctive feature of the present case is that, on the one hand, the original proceedings cannot succeed but, on the other, subject to getting leave under section 212(4) the liquidator can assert exactly the same cause of action, on behalf of the company, and can thereby overcome the defence under section 20 to the company's own proceedings. It is therefore a case in which, if the court thinks it appropriate to give permission under the section, the cause of action of the company, which would otherwise be defeated, can be asserted against the same defendant relying on exactly the same facts. ...*
>
> *28. However, on the question of jurisdiction, whether it is open to the court to permit the substitution, it seems to me that this is a case in which the substitution is necessary in terms of section 35(5)(b) as well as of CPR rule 19.5(3)(b). The original action, asserting the company's claim against the former administrators, cannot be determined without the substitution of the liquidator whereas if brought by the liquidator under section 212 it can. ... It is the same claim, in every respect, despite the fact that it is asserted by the liquidator on behalf of the company, rather than in the name of the company itself.*" (I should add that the Rules have been amended, so that the relevant provision is now r.19.6(3)(b), but the wording has not changed materially.)

24. Mr Pooles KC relies on the fact that the only changes to the Claim Form in *Parkinson* were to substitute "company" for "claimant" and to include a reference to s.212, which is a purely procedural section creating no new cause of action. He also notes that *Parkinson* was a case of substitution of a claimant, not a defendant, and that this might make a difference. However, on being pressed to explain the difference, he accepted (rightly, in my judgment) that Ground (b) is drafted in the same terms in relation to both claimants and defendants and that it should make no difference to the construction of the section. He reserved his position in relation to the exercise of the court's discretion, but in the event did not develop this submission.

25. Mr Lawrence KC's response is that the only substantive amendment to the Claim Form in the current case was to delete the sentence which constituted the misidentification ("*The First Defendant is the successor practice to Pitmans LLP*") and hence this is not inconsistent with *Parkinson*.

*Roberts v Gill*

26. In *Roberts v Gill* the claimant as beneficiary under a will brought a claim for negligence against the solicitors who had advised the deceased's personal representatives. This claim was doomed to fail because the solicitors owed no duty to the beneficiary. He then sought to amend by adding a derivative claim on behalf of the estate. The Supreme Court unanimously held that there were no proper grounds for bringing a derivative claim. Lord Collins added a second ground for his decision, with which Lords Rodger and Walker agreed. He held that the proposed amendment involved the addition of a new party, in that the claimant would be acting in a new capacity in bringing a derivative claim. At [43] he said:

> "*But if the administrator has to be added at the same time as Mark Roberts changes the capacity in which he sues, Mark Roberts must satisfy the requirements of CPR 19.5(2)(b) and CPR 19.5(3)(b) (giving effect to section 35(5)(b) and 6(b)), namely that the addition of the administrator is necessary in the sense that "the claim cannot properly be carried on by …. the original party unless the new party is added". But if it were necessary to join the administrator in order for the representative action to be carried on, Mark Roberts would not be able to satisfy those requirements because he would not be able to show that the original claim could not properly be carried on by Mark Roberts in his personal capacity against the solicitors unless the administrator were added as a party. That is because there is no possible basis for any suggestion that the administrator would be a necessary or proper party to the personal claim*."

27. The amendment which Mr Roberts sought to make involved alleging a duty of care owed to the personal representatives, which was plainly a different claim from a duty of care owed to him as beneficiary.

*Irwin v Lynch*

28. The next case to which I was referred is *Irwin v Lynch* [2011] 1 WLR 1364, another decision of the Court of Appeal in which the leading judgment was given by Lloyd LJ. In that case the administrator of a company brought proceedings against the directors under s.212 of the Insolvency Act 1986. The directors applied to strike out the claim on the ground that s.212 does not permit an administrator to bring a claim under that section. The administrator sought to amend to substitute the company as claimant, so that the claim could continue under s.212. Lloyd LJ said:

> "*21 … I am not persuaded by the distinction which [counsel] 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 claimant 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.*
>
> *…*
>
> *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 directors 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.*
>
> *26. Sometimes the identity of the party might be, indeed often it might be, vital distinction, but here Mr Irwin plainly asserted the company's cause of action and asserted it on behalf of the company, just as the substituted liquidator did in the Parkinson Engineering case. So the cause of action is identical; it is already pursued for the benefit of the company, but it is doomed to failure because of the lack on Mr Irwin's part of the necessary locus standi. It seems to me that it is possible and appropriate for the court to exercise its discretion under rule 19.5 to allow the joinder of the company so as to assert the relevant claim.*"

29. Given that the reasoning in *Irwin v Lynch* is substantially the same as in *Parkinson*, it is unsurprising that the submissions of counsel in the present case were also substantially the same.

*Nemeti* (HHJ Cotter QC)

30. Next in time is *Nemeti v Sabre Insurance Co Ltd* ("***Nemeti***"). There was a first appeal from a Master to HHJ Cotter QC, as he then was ([2012] EWHC 3355 (QB)), and a second appeal to the Court of Appeal ([2013] EWCA Civ 1555). Mr Pooles KC places considerable reliance on the Court of Appeal's judgment, but at this point I must consider the judgment of HHJ Cotter QC, because it was given a week before the hearing in *Insight* and was referred to by Leggatt J.

31. It is necessary to look closely at the facts of *Nemeti* in order to see how the courts in that case approached the question whether the amendment amounted to a new claim. The case arose out of a road accident in Romania. The driver who caused (and died in) the accident was the uninsured son of the insured owner of the car. The claim form was issued against the father's insurer alone, alleging that the insurer had a duty to indemnify the insured under Reg.3 of the European Communities (Rights Against Insurers) Regulations 2002. Reg.3 permits the victim of an accident, who has a cause of action against an insured person in tort, to sue the insurer directly in certain circumstances. HHJ Cotter QC quoted the following extract from the Particulars of Claim:

> "*The Defendant was at all material times the insurer of the vehicle registration number AJ56WJM and consequently has a duty to indemnify their insured for negligent acts or omissions pursuant to section 3 of the European (Right against Insurers) Regulations 2002, and is directly liable to the Claimants for the negligence of their insured.*"

The judge noted that the claim contained two fatal flaws: one was that the Regulations apply only to accidents in the United Kingdom, not Romania; the second was that the negligent driver was not the insured. The claimant sought to amend by substituting the estate of the deceased driver as defendant, arguing that the claim was in essence a claim for personal injury arising out of a road accident and that it was the same claim against the insurer which was now sought to be maintained against the driver's estate. In effect, this is the argument which Mr Lawrence KC now advances, but in significantly different circumstances. The judge rejected this submission, saying:

> "*41. … [T]he sections within the 1980 Act in issue in this appeal allowing the addition or substitution of a party are necessarily restrictive as to the very limited circumstances in which it is permissible to deprive a Defendant of the accrued right of a limitation period. These sections are solely aimed at errors in the constitution or formality of the action, relating to the parties joined to it, or the capacity in which they sue or are sued, which made the extant action unsustainable. The addition or substitution of parties had to be necessary to cure some defect.*
>
> *42. As against this background the direct question to be addressed is whether the substitution is necessary for the determination of the original proceedings or, in other words, whether the original claim could not be maintained or properly carried on without the substitution. It must be necessary for the maintenance of the existing action, not for the assertion of a new action.*"

*Insight*

32. I now turn to *Insight*, on which Mr Lawrence KC relies. I have already noted (in paragraphs 17 and 18 above) that Leggatt J decided the case on the ground that there had been a mistake which could be cured under s.35(6)(a). Accordingly, his observations about Ground (b) were *obiter* but nevertheless detailed and valuable. At [90] he referred to *Nemeti* and said that he did not doubt the correctness of the conclusion on the facts of that case. However, at [91] he questioned HHJ Cotter QC's narrow conclusion that the section was "*solely aimed at errors in the constitution or formality of the action, relating to the parties joined to it, or the capacity in which they sue or are sued, which made the extant action unsustainable.*" He noted that *Nemeti* had been decided without reference to *Parkinson* and *Irwin v Lynch* and that HHJ Cotter QC appeared to base his narrow conclusion on the legislative history of s.35. He added that the court in *Irwin v Lynch* did not regard the history of the legislation as helpful, given that the court's task was simply to construe Ground (b). (I note

that neither counsel in the present case has referred me to the legislative history.) He then stated as follows:

> "*96 The principle which I derive from these two decisions of the Court of Appeal is that the court has power to order substitution under section 35(6)(b) and CPR r 19.5(3)(b) if: (1) a claim made in the original action is not sustainable by or against the existing party; and (2) it is the same claim which will be carried on by or against the new party.*
>
> *Application of the law to this case*
>
> *97 Applying this test to the facts of the present case, it is common ground that the claims made in this action were unsustainable against the LLP. The first requirement was therefore satisfied. However, the second requirement was not satisfied, as the claims which the claimants sought to carry on against the firm were not the same claims as were made against the LLP. I have concluded earlier that the claims originally made against the LLP alleged that the LLP had been negligent in auditing the accounts of the second claimant and providing administrative and fiduciary services during the relevant period. In contrast, the claims asserted against the firm after the claimants had realised their mistake alleged that the firm (and not the LLP) acted as auditor and provided the relevant services. The new claims, therefore, allege different facts and are not identical to the original claims.*
>
> *98 My conclusion on this issue would have been different if I had agreed with the master's view as to the nature of the mistake made by the claimants when they issued the proceedings against the LLP. As mentioned earlier, on the master's view the claims were originally brought against the LLP on the basis that the firm had provided the relevant services but in the mistaken belief that the LLP had taken over the liabilities of the firm. If I had accepted that analysis of the claims, then I would also have agreed with Master Fontaine that the requirements of CPR r 19.5(3)(b) were met in this case. That is because, if the original claims had asserted negligence in the provision of professional services by the firm, they would have been the same claims as those which are now pursued. The only difference would have been that the claimants were no longer contending that the LLP was liable in law for the acts alleged. Substituting the firm because that contention was abandoned would seem to me to be equivalent in its effect to the substitution of the liquidator for the company in the Parkinson Engineering case [2010] Bus LR 857 and of the company for the administrator in the Irwin case.*
>
> *99 It may be said that the result of this interpretation of CPR r 19.5(3)(b) means that it is likely to be available in cases, such as the International Bulk Shipping case [1996] 1 All ER 1017, where an error of law has been made as to the legal rights or liability of the person suing or being sued, which are just those cases where CPR r 19.5(3)(a) does not apply. I do not regard it as an objection but as an advantage of the interpretation that it*

> *has such a consequence and thus reduces the importance of what seems to me to be an essentially arbitrary distinction between mistakes of fact and law.*"

33. Mr Lawrence KC submits that I should follow the approach taken by Leggatt J, whilst recognising that I am not bound to do so. Mr Pooles KC accepts that Leggatt J's reasoning would result in Pitmans' application being dismissed, but urges that I should reject his reasoning as being inconsistent with *Nemeti* in the Court of Appeal (which I shall consider below). Mr Pooles KC also points out that Leggatt J at [99] candidly stated that he saw it as advantageous to give a wide interpretation to r.19.6(3)(b). I agree with Mr Pooles KC to this extent, that I am enjoined by Lord Scott to approach the construction of the section with no bias one way or the other (see paragraph 22 above), but that does not undermine the conclusions at [96] and [98], insofar as they remain valid on a neutral construction of the Act.

*Nemeti* (CA)

34. I now turn to *Nemeti* in the Court of Appeal, on which Mr Pooles KC relies. I have already referred to this case at paragraphs 30 and 31 above. Hallett LJ, with whom the rest of the court agreed, referred at [27-29] to *Insight*. She took issue with Leggatt J's dictum at [99], saying that she "*preferred to construe the unvarnished words of the section which, to my mind, are clear*". Save for this, she expressed no view on *Insight*.

35. She dismissed the appeal from HHJ Cotter QC for the following reason:

> "*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 [counsel] 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.*"

36. Mr Pooles KC relies on the fact that Hallett LJ regarded the amended claim against the driver's estate as being different from the original claim against the

insurer, and he submits by parity of reasoning that the amended claim against Pitmans is a different claim from the original claim against BDB because it no longer includes the material allegation that BDB has assumed the liabilities of Pitmans.

37. Mr Lawrence KC makes two submissions. Firstly he submits that the conclusion in *Nemeti* was inescapable on its facts (as Leggatt J accepted) because of the two fatal flaws (viz that the accident took place in Romania and that the driver was uninsured). He therefore submits that *Nemeti* is not inconsistent with his thesis that, in asking whether the amended claim is the same claim as the original one, the court should ignore the factor which led to the identification of the wrong party.

38. Secondly, he submits that the additional ingredient in the present case (i.e. the alleged transfer of liabilities to BDB) happened after the negligence, whereas the extra ingredients in *Nemeti* which the claimant wrongly thought provided the basis for the claim against the insurer were in place at the same time as the accident. I agree that this is a factual distinction between the two cases, and I suspect that it is likely to be a feature of most, if not all, cases that fall within Ground (b), but it is unnecessary for me to decide whether it is a prerequisite.

39. I confess that I am troubled by Hallett LJ's conclusion that that the original claim in *Nemeti* was not a claim in negligence but was a claim for a statutory indemnity. I would have thought that the driver's negligence was indeed a necessary ingredient in the Particulars of Claim against the insurer, albeit that there were additional ingredients which were bound to fail. However, I have quoted an extract from the Particulars in Claim in *Nemeti* in order to show just how muddled the pleading was. It may be that it was so badly pleaded that one could not properly extract any kernel that deserved to be saved by allowing an amendment. It is perhaps for this reason that Mr Pooles accepts that decisions in this area of the law are highly fact-sensitive and he expressly stops short of saying that *Nemeti* is determinative of the present case, albeit that he urges me to follow the very clear guidance given in that case.

*G4S plc*

40. I conclude this review of the authorities with a dictum of Mann J in *Various Claimants v G4S plc* [2021] 4 WLR 46. He reviewed a number of authorities, including *Insight*, and added:

> "*151 It strikes me that there is a curiosity about all this. If it operates … in line with the rationalisation suggested by Leggatt J, it would make the other provisions, and the need to analyse the type of mistake, redundant. The test of whether the same cause of action is advanced would provide a much easier test for a would-be claimant than a quasi-philosophical debate about the nature of the mistake. … I do not see why the presence or absence of a mistake should be a touchstone for the operation of rule 19.5(3)(b). It would also seem to provide a solution to the cases where an assignment was*

> *overlooked, or where the effect of a corporate merger on the whereabouts of a claim was not appreciated, resulting in the joinder of the wrong (sometimes non-existent) claimant. In all those cases it seems to me that it can be said that the same cause of action is being advanced, but it cannot be properly advanced without the joinder of the newly discovered "correct" claimant. It seems to me to be unlikely that this was the intention of this apparently more focused provision. Nor do I think, with respect, that knocking mistake cases out on the basis of discretion, as suggested by Lloyd LJ, is a satisfactory way of trying to reconcile the provisions.*
>
> *152 It seems to me that insufficient attention has been paid to the word "properly" in the provision. While it is not possible to define its precise effect, it seems to me that it is intended to correct errors of the kind in Irwin and Parkinson which are in the nature of locus standi errors. The word would be unnecessary if the provision were to have the broad effect which Leggatt J's analysis would give it. An interpretation along these lines is the interpretation which I would prefer, and it is not inconsistent with the Court of Appeal authorities which bind me*."

41. I make two observations on this. Firstly, Mann J appears to be suggesting that Leggatt J's approach would result in Ground (b) expanding to do all the work intended for s.35(6)(a). If so, this is an erroneous conclusion. Leggatt J made it clear that (a) and (b) are dealing with different situations. If the error made in *Insight* had been the kind of error which the Master thought it was, then Leggatt J would have held that it fell within (b) but not (a). Secondly, Mann J's reference to "*locus standi*" echoes HHJ Cotter QC's reference to constitutional or formal errors, but this was not approved by the Court of Appeal in *Nemeti*, who preferred to apply the unvarnished words of the section.

## Analysis

42. The key question in the present case is whether the new claim (a claim against Pitmans for loss caused by its negligence) is the same claim as the old claim (a claim against BDB for loss caused by Pitmans' negligence, in circumstances where BDB is alleged to have assumed liability for Pitmans' negligence), but pursued against a new party. It is clear from the foregoing discussion that those authorities which are binding on me do not identify where the line is to be drawn:

    i) *Parkinson* and *Irwin v Lynch* are both Court of Appeal authorities confirming that parties may be substituted where the same claim is being pursued against a different party. These are narrow decisions, because the amendments to the pleadings were very minor.

    ii) *Roberts v Gill* and *Nemeti* are decisions on the other side of the line. The amendments in each case went considerably beyond the addition or substitution of a new defendant and were held to involve asserting a

different claim entirely, albeit that the court did not find it necessary to define what constitutes a new claim for these purposes.

iii) *Insight* is directly in point, but is *obiter*.

43. I therefore go back to the wording of Ground (b). S.35(6)(b) requires the party seeking to amend to establish that the substitution or addition of the new party is necessary to enable "*any claim already made in the original action*" to be maintained. R.19.6(3)(b) requires the party seeking to amend to establish that "*the claim cannot properly be carried on by or against the original party unless the new party is added or substituted*". There is arguably an infelicity in the drafting of the Rule, insofar as it presupposes that the claim will continue to be carried on by or against the original party. In my judgment it cannot have been intended to require this, given that it expressly permits the substitution as well the addition of a new party. Hence the phrase "*by or against the original party*" must be read as if transposed, so that it reads: "*the claim by or against the original party cannot properly be carried on unless the new party is added or substituted*". On this basis I consider that, although the wording of the two provisions is different, the sense is substantially the same.

44. The classic definition of a claim is "*simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person*": *Letang v Cooper* [1965] 1 QB 232 at 242-3 *per* Diplock LJ. In my judgment Mr Lawrence KC is correct in saying that one cannot apply that definition literally to Ground (b), because the minimum facts which have to be pleaded in order to found a claim against one party will necessarily be different from the minimum facts which have to be pleaded to found a claim against a substituted party. The necessary difference is the inclusion of facts intended to show why the original party (or the substituted party, as the case may be) is the right party. The allegation in the original Claim Form that BDB was liable as the successor practice was not a necessary ingredient of the claim for loss caused by Pitman's negligence and was added solely in order to show why liability should attach to BDB. I gratefully adopt the reasoning of Leggatt J in *Insight* and I conclude that there is nothing in *Roberts v Gill* or *Nemeti* which prevents me from doing so.

## Discretion

45. R.19.6(2) says that the court "*may*" add or substitute a party but it provides no guidance as to how the discretion is to be exercised. Presumably it would be relevant if the applicant could show that it was misled by the respondent into joining the wrong party, or if the respondent could show that it relied to its detriment on the wrong party having been joined originally. However, although each side put in a brief witness statement, neither relied on any facts which materially assist in exercising the discretion.

46. Mr Pooles KC relies on two factors. One is that the Claimants would have a good claim against their legal advisers, if permission to amend were refused.

This argument was also advanced in *Insight* and rejected by Leggatt J at [107], on the ground that such a claim would be less satisfactory because it would be a claim for the loss of a chance. To this Mr Lawrence KC adds (i) that the Claimants would be additionally disadvantaged by having to waive privilege as against their legal advisers and (ii) that the question of waiver would be complicated by the existence of the claim against the Second Defendant. I agree, and would add a further point. In most cases where there is a need to amend under s.35, it is likely to have caused by carelessness on the part of the respondent's legal advisers. If Mr Pooles KC were correct, it would be very difficult ever to rely on s.35.

47. Mr Pooles KC also urged somewhat faintly that I should take delay into account. In the present case the Claim Form was issued more than four months before the end of the limitation period, and there was extensive correspondence between the parties during the lengthy period between issue of the original Claim Form and service of the Re-Amended Claim Form. I do not regard delay as a reason for refusing permission to amend on these facts.

48. Given that Ground (b) gives the court discretion to permit amendments where the requirements are fulfilled, I consider that I should exercise that discretion in favour of permitting the amendment unless there is a reason not do so. I am pleased to note that this accords with the view of Leggatt J at [106], 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 am not persuaded that there is any reason to refuse to exercise the discretion.

## Disposition

49. I therefore hold that the amendment to add Pitmans as defendant falls within Ground (b) and that such an amendment is permissible as a matter of discretion. It follows that Pitmans' application must be dismissed. I will hear the parties as to costs and consequential matters.