



Neutral Citation Number: [2022] EWCA Civ 31

Case No: A1/2021/0011

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND
WALES TECHNOLOGY AND CONSTRUCTION COURT (QBD)

HHJ Kramer
HT-2020-00084

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/2022

Before :

LORD JUSTICE COULSON
LORD JUSTICE MALES
and
LADY JUSTICE WHIPPLE

Between :

(1) Cameron Taylor Consulting Limited
- and -
(2) Cameron Taylor One Limited
v
BDW Trading Limited

Appellants

Respondent

Fiona Parkin QC & Ronan Hanna (instructed by **CMS Cameron McKenna Nabarro**
Olswang LLP) for the **Appellants**
Simon Hargreaves QC & David Sheard (instructed by **Osborne Clarke LLP**) for the
Respondent

Hearing Dates : 8 & 9 December 2021

Approved Judgment

LORD JUSTICE COULSON:

1 INTRODUCTION

1. This appeal raises issues as to the application of CPR 17.4 and CPR 19.5 concerned, respectively, with amendments and the substitution of parties following the possible expiry of a relevant limitation period. The first part of the appeal concerns the approach which the court should take in circumstances where a claimant contends that the constraints to its pleaded claim which it proposes will allow for all the defendant's limitation arguments. The second part of the appeal concerns the nature and extent of the analysis that the court should undertake on an application to substitute one defendant company in the same group for another, where it is said that the original company was named by mistake.
2. I set out the factual background in Section 2. In Section 3, I summarise the judge's judgment. In Section 4, I identify the issues on appeal. In Section 5, I summarise the relevant law on amendments where a limitation point is raised, and in Section 6 I address the first part of the appeal. Then, in Section 7, I summarise the law on the substitution of parties and, in Section 8, I address the second part of the appeal. There is a short summary of my conclusions in Section 9. I am grateful to both leading counsel for their crisp written and oral submissions.

2 THE FACTUAL BACKGROUND

3. The claimant in the proceedings is BDW Trading Limited ("BDW"), part of the Barratt Group. They are the respondent to this appeal. The defendants are four different engineering companies, who are now all part of the AECOM group, but were not at the time of the relevant events. I note that the claim against AECOM Infrastructure & Environment UK Ltd ("AECOM"), the original defendant, has been abandoned. URS Corporation Ltd ("URS") was joined subsequently to these proceedings as the second defendant, and no objection is now taken to its joinder. Thus, the only defendants who are appellants for the purposes of this appeal are Cameron Taylor Consulting Limited ("CTC") and their sister company Cameron Taylor One Limited ("CT1").
4. In August 2019, Barratt contacted AECOM as a result of a structural problem that they had discovered on a residential tower block in Croydon, on which AECOM had been engineers. Thereafter, there were various meetings and exchanges which led Barratt and their consultants to undertake further investigations into other developments where the original engineering design had been carried out by companies now in the AECOM Group, such as URS, CTC and CT1. It appears that, during the last part of 2019 and into 2020, there was a good deal of communication between Barratt and AECOM and their respective lawyers. However, since privilege is now claimed for the written exchanges that these events engendered, it is inappropriate to refer to them further. It appears that the principal project that was the subject of the further investigation was the Capital East Development in East London.
5. On 6 March 2020, BDW issued a claim form against AECOM (as sole defendant) in respect of the Capital East development.
6. On 17 March 2020 the claim form was amended to:

- a) Add URS and CTC as additional defendants;
 - b) Add a claim against CTC in respect of two blocks at a development in Feltham, in West London;
 - c) Add a claim against URS in respect of a third development, Freemens Meadow.
7. The following day, 18 March 2020, the claim form was re-amended to add claims against CTC in respect of all the blocks in the Feltham development. So working back 15 years from that date (the period identified as the ‘longstop’ for limitation purposes in s.14B of the Limitation Act 1980, considered below), the relevant cut-off date for the purposes of the limitation arguments is 18 March 2005.
8. On 9 April 2020, the re-amended claim form was served on the three defendants.
9. On 23 April 2020, the defendants issued an application to disallow the amendments and re-amendments to the claim form pursuant to CPR 17.4 and/or CPR 19.5. As I have indicated, during the course of these applications, URS’ objections have fallen away. That means that there is no objection to the additional claim in respect of Freemens Meadow, because that only concerns URS, and not CTC. So the live objecting appellants are CTC/CT1, and the only project in issue is the development at Feltham.
10. On 18 May 2020, CTC provided BDW with a copy of their contract in respect of the original works at Feltham, because BDW had made it plain that they did not have it. That contract named CT1 as engineers, not CTC.
11. A further complication was that this contract contained an arbitration clause. On 19 May 2020, BDW served a notice of arbitration on CT1. There was a good deal of correspondence between the solicitors about the arbitration clause which was relevant to one aspect of BDW’s substitution application, going to discretion. However, that aspect of the debate, which the judge decided against CTC/CT1, is not resurrected as part of this appeal.
12. On 29 May 2020, BDW produced their Particulars of Claim (“PoC”). The PoC named only URS and CT1 as defendants, despite the fact that the substitution application had yet to be heard. Since what matters for the purposes of this appeal is the position of CTC/CT1 and the claims in respect of Feltham, I note the following relevant elements of the PoC:
- a) The pleaded claim in respect of Feltham runs from paragraphs 42 to 45.
 - b) The claims are in respect of inadequacies in the structural design. General allegations are made, in relation to Blocks G1, G2, I, Q and L, about the various elements of the slabs and/or supporting elements and/or walls which, so it is said, were not designed in compliance with the relevant British Standard and/or the Building Regulations.
 - c) Some of the allegations of negligence are made by reference to CT1 drawings, but no dates for those drawings are given. Other allegations are not made by reference to any drawings at all.

- d) The allegations of breach of duty at paragraph 47 are general. On their face they cover the entirety of structural designs carried out by CT1.
 - e) Similarly, the loss and damage in respect of Feltham, from paragraph 48.14 onwards, is also couched in generic terms. The loss claimed is the cost of investigation and remedial works at the Feltham site. It is not a claim made on a block-by-block basis.
13. Subsequently, BDW have indicated, in their reply to URS, and in the witness statement of their solicitor, Mr Adjetey, that they are prepared to limit their claim in respect of Feltham to CT1's structural drawings issued after 18 March 2005. That was referred to by Mr Hargreaves QC, on behalf of BDW, as "the constrained case". Mr Hargreaves properly accepted that, as things currently stand, BDW's PoC does not reflect the constrained case.
14. On 9 June 2020, BDW issued an application to substitute CT1 for CTC pursuant to CPR 19.5(2). As Ms Parkin pointed out, the making of the application under that rule presupposed that the relevant limitation period had expired.
15. On 29 June 2020, BDW issued what is referred to in the papers as a "back up" claim form against CT1 in respect of Feltham, and URS in respect of Capital East and Freemens Meadow. There is no explanation as to why that had not happened earlier.

3 THE JUDGE'S JUDGMENT

16. On 25 September 2020, His Honour Judge Kramer ("the judge") heard the first day of argument on the two applications, namely CTC's application to disallow the amendments of 17/18 March 2020, and BDW's application to substitute CT1 for CTC. The argument was not concluded on that day. The second day of argument took place on 16 October 2020.
17. At the end of that second day, the judge gave a lengthy *ex tempore* judgment. I am only too aware of the pressures on B&PC judges, and understand their laudable desire to deal summarily with as many cases as they can. But these were not straightforward applications (as evidenced by the fact that they had lasted two days, with both sides represented by leading counsel), and much might turn on the outcome. It may have been better if the judge had taken a little more time to consider his judgment.
18. The judge set out the facts and the relevant parts of the Limitation Act and the CPR. He made it plain at [35] that BDW's answer to CTC's limitation objection did not seek to raise the argument that the new claims were based on the same or substantially the same facts as the original claim. The judge said they clearly were *not* based on the same or substantially the same facts, and he was right to do so.
19. The first issue for the judge to decide, which was common to both applications, was whether it was arguable that the relevant limitation period had expired when the amendments and re-amendments were made on 17/18 March 2020: see [41]. The judge identified CTC's argument at [42] in the following terms:

"42 The defendants say it is. Their argument is that the drawings straggle [*sic*] the commencement of the 15-year longstop period and the claimant has

yet to prove that the damage, which it claims it suffered and which is necessary to perfect the cause of action in negligence, was due to something which happened after or before beginning of the 15-year period that makes the question as to whether the claim is statute-barred arguable. Therefore, the defendants should have their relief and the claimants should not have theirs.”

He summarised BDW’s response at [43]:

“43 The claimant’s case is that the claim has been made in a time-limited way so that it is not arguable that the claim is statute-barred. That has been achieved by confining the claim to acts and omissions, thus adopting the words of the Limitation Act, which refers to “acts or omissions, which are alleged to constitute negligence,” which occurred from 18 March 2005 onwards. Therefore, the only drawings and revisions upon which the claimant can rely for that is how the defendants acted or omitted to act, must relate to that 15-year period.”

20. Thereafter at [47]-[49], the judge accepted BDW’s submission that the pleaded claim was (or would be) restricted to drawings issued after 18 March 2005, so that it was impossible to say that any limitation difficulty arose at all. He accepted the argument that all BDW needed to do at this stage was to say that the only claims that they were making were in respect of acts or omissions which occurred in the 15 years to 18 March 2020 (i.e. after 18 March 2005). The judge expressly found that “by confining his claim to that period, he [Mr Hargreaves, on behalf of BDW] is ensuring that it is brought within the limitation period.”
21. That was the extent of the judge’s *ratio* in refusing CTC’s applications. There was no further explanation of why he accepted that critical argument. The judge did not address in any detail what the proposed constrained case would involve and how it fitted, either with the (different) claim set out in the PoC, or s.14B of the Limitation Act (addressed below).
22. The second issue for the judge concerned the substitution of CT1 for CTC, addressed from [50] onwards in the judgment. There is a much greater citation of authority in the second half of the judgment, and a fuller explanation for the judge’s conclusions. He found at [92] that it was quite apparent that the party which BDW intended to sue was the contractor providing civil engineering design services at Feltham, which was CT1. He found that the making of the claim against CTC was a mistake, made by Mr Adjetey, the solicitor instructed to issue the claim form. The judge said that he did not agree with Ms Parkin QC, who represented CTC/CT1, that it was necessary to track down precisely where and how the error originated or that such investigation could ultimately make any difference: see [93]-[94]. He found that the mistake was one as to nomenclature, not identity; that it was a genuine mistake; that there had been no intention to mislead; and that but for the mistake, CT1 would have been named as the defendant, not CTC.
23. The judge dealt with the question of discretion from [98] onwards. It was here that the issue of arbitration arose, because CT1 argued that the judge should not exercise his discretion in favour of BDW, given the existing arbitration agreement. The judge rejected that submission and, as I have indicated, that conclusion does not arise for consideration on this appeal.

4 THE ISSUES ON APPEAL

24. The first part of the appeal arises out of CTC’s unsuccessful application to disallow the amendments of 17/18 March 2020. Ms Parkin submits that it is reasonably arguable that the relevant limitation period had expired by the time the amendments were made. She contends that the judge applied the wrong test in law and that, if he had applied the right test, he would have been bound to hold that the 15 year limitation period identified in s.14B of the Limitation Act 1980 had, at least arguably, expired.
25. Mr Hargreaves’ response was a refined version of the argument which found favour with the judge. He said that, on a proper analysis of the applicable law, what he described as the “constrained case” proposed by BDW (in other words, making no allegations about drawings issued before 18 March 2005) provided a complete answer to Ms Parkin’s application.
26. The second part of the appeal arises out of BDW’s application to substitute CT1 for CTC. Ms Parkin said that, if she was right about the first part of the appeal, namely that her limitation defence was reasonably arguable, then that was also a complete answer to BDW’s claim for substitution. Mr Hargreaves accepted that. If, however, she was wrong on limitation, Ms Parkin contended that the substitution application should still have failed. She said that the judge was wrong to find that the mistake was one of nomenclature rather than identity, and that he was wrong to find that, if they had known the true position, BDW would have named CT1, rather than CTC, in the claim form. Mr Hargreaves contended that the judge was right on both counts because the judge’s findings were firmly based on Mr Adjetey’s evidence.
27. As indicated above, I propose to address the two aspects of the appeal separately, dealing first with the proposed amendments of 17/18 March 2020, and secondly with BDW’s application to substitute CT1 for CTC.

5 THE LAW RELATING TO POST-LIMITATION AMENDMENTS

5.1 The Limitation Act 1980

28. Section 2 of the Limitation Act 1980 (“the 1980 Act”) sets out the 6 year limitation period in tort, which is stated to arise when the cause of action accrued. In an ordinary tort case, that is when the damage occurred. However, Section 14A of the 1980 Act disapplies s.2, and provides a special time limit for negligence actions where the facts relevant to the cause of action were not known at the date of accrual. Instead, the relevant period stated in s.14A(4) is either:
 - “a) six years from the date on which the cause of action accrued; or
 - b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph a) above.”
29. Subsection (5) of s.14A provides:
 - “(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested

before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.”

30. The impetus for these particular amendments to the Limitation Act came from the decision of the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber and Partners* [1983] 2 AC 1, who found that the claim against the engineers in that case was statute-barred. The evidence showed that the physical damage caused by the negligent design (namely the cracking on the inside of the chimney) had occurred more than 6 years before the action was brought, even though that cracking was not reasonably discoverable by the claimant at that time. Accordingly, to alleviate the potential harshness of this result, s.14A was introduced as a way in which the claimant’s actual knowledge of the damage became potentially relevant to the accrual of the cause of action. The obvious problem with that was it had the potential to extend indefinitely limitation periods in cases of this sort. As a result, some sort of ‘longstop’ date was required.

31. That led to s.14B of the Limitation Act 1980 which provides:

“14B Overriding time limit for negligence actions not involving personal injuries.

(1) An action for damages for negligence, other than one to which section 11 of this Act applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission—

(a) which is alleged to constitute negligence; and

(b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).

(2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that—

(a) the cause of action has not yet accrued; or

(b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred;

before the end of the period of limitation prescribed by this section.”

32. Section 35 of the Limitation Act addresses the problem of introducing new claims, which may be statute-barred, into existing proceedings. That provides:

“35 New claims in pending actions: rules of court.

(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—

(a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and

(b) in the case of any other new claim, on the same date as the original action...

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

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

(5) The conditions referred to in subsection (4) above are the following—

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and

(b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.”

5.2 The CPR

33. CPR 17.4 was the successor to Order 20, rule 5 of the Rules of the Supreme Court, both as envisaged by s.35(4). It provides:

“17.4

(1) This rule applies where –

(a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and

(b) a period of limitation has expired under –

(i) the Limitation Act 1980;

(ii) the Foreign Limitation Periods Act 1984²; or

(iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.

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

5.3 The Relevant Authorities

34. Although it was not referred to by the judge, the starting point in considering the interplay between limitation arguments and amendments is *Welsh Development Agency v Redpath Dorman Long Limited* [1994] 1 WLR 1409, where the Court of Appeal upheld the earlier decision of the official referee refusing the proposed amendments concerned with negligent mis-statements. In an important passage, Glidewell LJ said at 1425G-H:

“We now wish to make it clear that, though the test applied in *Leicester Wholesale Fruit Market Ltd. v. Grundy* [1988] 1 W.L.R. 107 was the correct test in the circumstances of that case, in which section 35(1) gave the plaintiff no advantage, it was unnecessary for the decision in that case to disagree with what Purchas L.J. said in *Grimsby Cold Stores Ltd. v. Jenkins & Potter* (1985) 1 Const.L.J. 362, 370. Our view is that Judge Hicks was correct in concluding that where section 35(1) does, or may well, give the plaintiff an advantage a different test, namely that enunciated by Purchas L.J. in the *Grimsby Cold Stores* case, should be applied. In such a case, leave to amend by adding a new claim should not be given unless the plaintiff can show that the defendant does not have a reasonably arguable case on limitation which will be prejudiced by the new claim, or can bring himself within R.S.C. Ord. 20, r. 5. We should add that the court in *Holland v. Yates Building Co. Ltd.*, *The Times*, 5 December 1989, also relied on the judgment of Glidewell L.J. in the *Leicester Wholesale Fruit Market* case as being of general application and not limited to its own particular facts.”

35. *WDA* was decided under RSC Order 20 rule 5. But there was no substantive difference between the old rule and the CPR. As Jackson LJ pointed out in *Chandra v Brooke North (A Firm) and Anr* [2013] EWCA Civ 1559, the guidance in *WDA* is still directly applicable to the CPR. As he explained:

“66. If a claimant seeks to raise a new claim by amendment and the defendant objects that it is barred by limitation, the court must decide how to proceed. There are two options. First the court could deal with the matter as a conventional amendment application. Alternatively, the court could direct that the question of limitation be determined as a preliminary issue.

67. If, as is usually the case, the court adopts the first option, it will not descend into factual issues which are seriously in dispute. The court will limit itself to considering whether the defendant has a "reasonably arguable case on limitation": see *WDA* at 1425 H. If so, the court will refuse the claimant's application. If not, the court will have a discretion to allow the amendment if it sees fit in all the circumstances.

68. If the court refuses permission to amend, the claimant's remedy will be to issue separate proceedings in respect of the new claim. The defendant can plead its limitation defence. The limitation issue will then be determined at trial and the defendant will not be prejudiced by the operation of relation back under section 35 (1) of the 1980 Act.

69. This leads on to a separate and important point. If a claimant applies for permission to amend and the amendment arguably adds a new claim which is statute barred, then the claimant should take steps to protect itself. The obvious step is to issue separate proceedings in respect of the new claim. This will have the advantage of stopping the limitation clock on the date of the new claim form. If permission to amend is granted, then the second action can be allowed to lapse. If permission to amend is refused, the claimant can pursue his new claim in the second action. The two actions will probably be consolidated and the question of limitation can be determined at trial.”

36. There was an issue between the parties to this appeal as to the application of s.14B to cases of negligent design. When was the trigger for the 15 year period? The answer to that question is provided by *Pearson Education Limited v The Charter Partnership Ltd* [2007] EWCA Civ 130, where the issue also concerned defective drawings. The Lord Chief Justice, delivering the judgment of the Court, rejected the submission that, by reference to s.14B, the relevant act or omission on the part of the designers was the initial mistake in adopting an inadequate capacity for the drainage. The LCJ said:

“55. We do not accept Mr Dennys' submission that, for limitation purposes, the relevant act or omission on the part of CPL was their initial mistake in adopting an inadequate capacity for the drainage. Section 14(B) of the Limitation Act requires the court to identify the latest date when CPL were responsible for a negligent act or omission to which PEL's damage can be attributed. The gravity system designed by CPL was not incorporated in the warehouse. Whether or not CPL showed a failure to exercise reasonable skill and care in adopting a design capacity of 75 mm for that system, and on the evidence we believe that they did, is not relevant. *The relevant negligent act or omission was the act or omission that caused an inadequate drainage system to be incorporated in the building.* We consider that the most obvious negligent act that had this effect was specifying to Fullflow, who designed and installed the siphonic system, a design capacity that they, CPL, should have known was inadequate. That occurred in late January 1989, within the 15 year limitation period.” (Emphasis supplied)

6 PART 1 OF THE APPEAL: CTC'S APPLICATION TO DISALLOW THE AMENDMENTS UNDER CPR 17.4

6.1 Issue 1: What Is The Right Approach?

37. The first issue on the appeal against the judge's order refusing to disallow the relevant amendments is the approach to be adopted by the court when a defendant opposes the amendments on grounds of limitation.
38. I consider that the right approach is that explained in *WDA* and subsequently reiterated by Jackson LJ in *Chandra*. If a defendant can show that it is reasonably arguable that the new claim introduced by the amendments is statute barred, then leave to amend should not be given. Leave to amend will be given if the claimant can show that the defendant does not have a reasonably arguable limitation defence. In my view, precisely the same test applies in a situation, such as the present one, where s.14B is invoked.
39. Mr Hargreaves' helpful written formulation of the test under s.14B, handed up on the second morning of the appeal, omitted any reference to reasonable arguability. He accepted in his oral submissions that it must do so. Accordingly, with allowance for that important modification, Mr Hargreaves suggested that the question that the Court had to ask itself in the present case could be formulated as follows:

“Was it reasonably arguable that the date of the act or omission:

- i) alleged to constitute negligence; and
- ii) to which the damage is alleged to be attributable;

occurred outside the 15 year period.”

40. For myself, I am content to accept that formulation of the test arising under s.14B. This test was not articulated by the judge, who did not refer either to *WDA* or to *Chandra* in his judgment.

6.2 Issue 2: Is CTC’s Limitation Defence Reasonably Arguable?

41. There are two general points to be made at the outset. First, any claims in respect of the Feltham development were on the cusp of the expiry of the 15 year long stop period when these proceedings were started. There was no dispute about that¹. Ordinarily, therefore, it might be thought that, in such circumstances, CTC’s limitation defence was at the very least reasonably arguable, and that BDW needed to start separate proceedings (as envisaged in *Chandra*) just to be on the safe side. They have done so, but there is a gap of over three months between the dates of the amendments and the date of the ‘back up’ claim form. That delay was not in any way attributable to CTC/CT1.

42. Secondly, the limitation issue turns entirely on Mr Hargreaves’ submission, which found favour with the judge, that there could be no reasonably arguable limitation defence because the only drawings on which BDW will seek to rely in bringing their constrained case at trial are drawings issued after the 18 March 2005 cut-off date. That is *not* the case pleaded in the PoC. It is unfortunate that the judge accepted this rather vague reference to what BDW intended to do in the future without ordering this new case to be pleaded, and without any analysis of what it might involve and how it compared with what had been pleaded in the PoC. Although I am content to decide this appeal by reference to the constrained case as it was described by Mr Hargreaves, its uncertain nature has not assisted BDW’s arguments.

43. Assuming that they only advance the constrained case, BDW say that the answer to the amendment issue becomes simplicity itself: there can be no limitation defence (reasonably arguable or otherwise) because the only claims that will be made concern drawings issued after 18 March 2005, which are self-evidently within the limitation period. On the face of Mr Hargreaves’ typically beguiling submissions, that appears to be a neat and complete solution to the problem.

44. However, I have concluded that, neat and complete though it appears, the solution is fundamentally flawed. There are two principal reasons for that, deriving from the two constituent parts of s.14B.

a) “The Last Of The Dates On Which There Occurred Any Act Or Omission Which Is Alleged To Constitute Negligence...”

45. In my view, Mr Hargreaves’ solution only works because it avoids the question raised in the italicised passage in *Pearson Education*, set out at paragraph 36 above. What

¹ I have already noted at paragraph 14 that BDW’s substitution application in June pre-supposed that the relevant limitation period had expired.

matters is the last date or dates on which CTC were responsible for a negligent act or omission to which BDW's damage can be attributed. In a case about the design of defective buildings, *Pearson Education* holds that this happens when the relevant defective design was incorporated into the building. In practical terms, that will happen when a drawing containing the relevant defective design was issued to the contractor for construction purposes, and the contractor then builds in accordance with that drawing. That is why, as in the present case, a careful record is made of when and which version of the drawing is issued to the contractor for construction. Such drawings are commonly known as the "IFC drawings".

46. That basic point perhaps requires a little elaboration. In a negligent design case, an error on a drawing is only the start of the process. That drawing might be stored in a cupboard and never seen again; it might even be thrown away. It might be superseded the following day or the following week. It might be issued for a limited purpose which had nothing to do with the construction. It might be issued to record the as-built condition of the building. By itself, therefore, a defective drawing proves nothing; what matters is what happened to that drawing, and in particular whether and when that drawing was issued to the contractor with the instruction (express or implied) to build in accordance with it. It is in that way that the defective design is then incorporated into the building as built. There is usually no need to distinguish between the date of the IFC drawing and the date when the contractor actually incorporates the design shown on the drawing into the building: neither party suggested that it was necessary or possible to do so in the present case.
47. There used to be a suggestion that designers owed some sort of continuing duty to review their design, even after construction was complete. This so-called 'duty to warn' was almost always raised by claimants in order to try and avoid limitation difficulties. However the notion has fallen out of favour in recent years, and the duty has been said to arise only when something occurs to put the designer on notice that a review is required: see *New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd* [2001] B.L.R. 74 at 80. There is no continually accruing cause of action: see *Oxford Architects Partnership v Cheltenham Ladies College* [2007] B.L.R. 293. In any event, Mr Hargreaves confirmed that this was not how he put BDW's case on this appeal.
48. On the evidence available here, I conclude that it is reasonably arguable that the relevant drawings were issued to the contractor for construction purposes (and the defective design therefore incorporated into the building) before 18 March 2005. That is largely because of the information contained on the drawings themselves. Ms Parkin took the court through a number of the CT1 drawings, using the drawing for Block I as an illustration. A study of that drawing showed that it had been issued for construction on 26 November 2004 (ie well before the limitation cut-off date). Moreover, the areas in which it is alleged in the PoC that Block I were deficient, namely gridline 14-15-16 and gridline 6-7-8, were unaffected by any subsequent amendments to the drawing, and all but the last of those amendments was dated before the cut-off date in any event. Accordingly, taking Block I as an example, it is reasonably arguable that the latest date for the act or omission alleged to constitute negligence to which damage is attributable occurred outside the 15 year period. That position was confirmed by the schedule, produced by Ms Parkin as part of her

skeleton argument, which demonstrated that, for other blocks, the relevant drawings were also issued to the contractor for construction purposes before the cut-off date.

49. On this basis, therefore, BDW's constrained case cannot offer an answer to CTC's objection to the amendments. It is reasonably arguable that the last dates of the relevant acts or omissions – the issuing of allegedly defective drawings to the contractor for construction - occurred before 18 March 2005.

b) “...To Which The Damage Is Alleged To Be Attributable”

50. Mr Hargreaves complained that looking at the constrained case by reference to the dates when the drawings were issued for construction wrongly involved a consideration of the accrual of BDW's cause of action. He said that, because this case arose under s.14B, the question of the crystallisation of BDW's cause of action was irrelevant.

51. In my view, that submission missed the point. What matters under s.14B is the date of the act or omission alleged to constitute negligence “and to which the damage in respect of which damages are claimed is alleged to be attributable”. In this way, the causative consequences of the allegedly defective drawings are critical to s.14B. It is not just necessary to show when the relevant act or omission occurred; it is also necessary to show that that act or omission is one to which damage is attributable, as per *Pearson Education*. As we have seen, on CTC's case, that was when the drawings were issued for construction.

52. In my view, this gave rise to the second insurmountable difficulty facing BDW. Mr Hargreaves had to accept that the pleaded claim for loss and damage in respect of Feltham (currently unconstrained) seeks to recover all the costs of investigation and remedial works at the site. He maintained that, because of the proposed constraints to the pleaded case, BDW would inevitably reduce the number of CTC drawings on which they relied, but he said that that reduction in the scope of BDW's liability claim should not be regarded as having any effect on the damages sought. He submitted that this was again sufficient to satisfy the *WDA/Chandra* test.

53. I cannot accept that submission. It is not open to BDW to say that they will reduce the number of drawings on which they rely (to bring the claim within the 18 March 2005 cut-off date) but to assert, without more, that their overall claim for damages should be regarded as unaffected. In answer to questions from my Lord, Lord Justice Males, Mr Hargreaves agreed that BDW did not presently know whether the post-18 March 2005 revisions actually gave rise to any loss or damage at all. In this way, therefore, BDW are not in a position, even now, to sign a statement of truth to confirm that the, say, 20% of the total CTC drawings to which they intend to restrict themselves (i.e. the post-18 March 2005 revisions) gave rise to any damage, much less the damages claimed in the action.

54. So an acceptance that BDW intend to constrain their allegations of liability to drawings issued after 18 March 2005 does not ultimately help them. CTC have shown that it is reasonably arguable that any reduced number of drawings on which BDW propose to rely as part of their constrained case caused no damage at all, because the loss and damage claimed is attributable to the IFC drawings in respect of which any claim would be statute-barred. Although Mr Hargreaves said that this was a matter for

the trial, I do not agree. S.14B requires the relevant act or omission to have a causative effect and CTC have put that squarely in issue for the purposes of BDW's application to amend. It is therefore not a matter that can or should be put off to the trial.

55. For these reasons, therefore, it seems to me that it is reasonably arguable that the claims against CTC in relation to Feltham were new claims made after the limitation period identified in s.14B had expired. Applying the test in *WDA* and *Chandra*, I consider that the judge erred in concluding otherwise, and permission to make the amendments of 17/18 March 2020 should have been refused. If my Lord and my Lady agree with that conclusion, the result of the first part of the appeal is that, insofar as they affect CTC, the amendments of 17 and 18 March 2020 must be disallowed.
56. In those circumstances, the amendment joining CTC as a party to these proceedings must be disallowed, so the subsequent application to substitute them for CT1 does not arise. Moreover the substitution application must fail under CPR 19.5(2)(a) (set out below) for the same reasons of limitation. However, because Ms Parkin's submissions on the other aspects of the substitution application raise points of some practical importance as to the approach to be taken to such an application, I address that topic briefly in Sections 7 and 8 below.

7. THE LAW: SUBSTITUTION OF A PARTY

57. CPR 19.5 provides:

“19.5

(1) This rule applies to a change of parties after the end of a period of limitation under –

(a) the Limitation Act 1980;

(b) the Foreign Limitation Periods Act 1984; or

(c) any other enactment which allows such a change, or under which such a change is allowed.

(2) The court may add or substitute a party only if –

(a) the relevant limitation period was current when the proceedings were started; and

(b) the addition or substitution is necessary.

(3) The addition or substitution of a party is necessary only if the court is satisfied that –

(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party...”

58. As a result of my conclusion on the first part of the appeal, BDW do not get over the hurdle at r.19.5(2)(a): it is reasonably arguable that the limitation period had expired

when the application was made. The rest of this judgment is therefore concerned with the proper application of r.19.5(2)(b) and r.19.5(3)(a).

59. The leading case on this area of the law, *The Sardinia Sulcis* [1991] 1 Lloyd's LR 201, also arose under the old Rules of the Supreme Court. In that case it was held that the name of a party could be corrected if the court was satisfied that:

- a) there was a genuine mistake;
- b) the mistake was not misleading;
- c) the mistake was not such as to cause reasonable doubt as to the identity of the person intending to sue (or be sued);
- d) it would be just to allow the amendment.

60. The older authorities were reviewed by the Lord Chief Justice in *Adleson & Anr v The Associated Newspapers Limited* [2007] 4 All ER 330. He summarised the principles, and confirmed the relevance of the *Sardinia Sulcis* test:

“43. These authorities have led us to the following conclusions about the principles applicable to RSC Order 20 rule 5.

i) The mistake must be as to the name of the party in question and not as to the identity of that party. Such a mistake can be demonstrated where the pleading gives a description of the party that identifies the party, but gives the party the wrong name. In such circumstances a 'mistake as to name' is given a generous interpretation.

ii) The mistake will be made by the person who issues the process bearing the wrong name. The person intending to sue will be the person who, or whose agent, has authorised the person issuing the process to start proceedings on his behalf.

iii) The true identity of the person intending to sue and the person intended to be sued must be apparent to the latter although the wrong name has been used.

iv) Most if not all the cases seem to have proceeded on the basis that the effect of the amendment was to substitute a new party for the party named.”

61. Thereafter, having set out the subsequent authorities under r.19.5, Lord Phillips summarised the position under the CPR:

“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.”

62. In *Adelson* there was also an issue as to the corporate structure of the claimant group (because they were seeking to substitute one company within the group for another). The LCJ said:

“69. We have explained why *Morgan Est* should not be followed. If those responsible for the Particulars of Claim had knowledge of the corporate structure of the Las Vegas Sands Group and of the part played by each company in the group activities and deliberately decided to sue in the name of the Second Claimant alone, the fact that this decision may have been mistaken will not bring the case within CPR 19.5. To do this the Claimants must establish that those responsible for the Particulars of Claim were under a mistake as to the group structure or the roles played by the members of the group and, but for that mistake, would have included as claimants the Third and Fourth Claimants. This is the very minimum that they need to achieve if they are to have an arguable case that a mistake of name within the *Sardinia Sulcis* test occurred.

70. The Particulars of Claim were settled by junior counsel, who no longer represents the Claimants, and a declaration of truth was signed on behalf of the Claimants by a member of Salans. No evidence has been adduced to show that there was a mistake on the part of Salans or counsel as to the roles played by the claimant companies, but for which mistake the Third and Fourth Claimants would have been joined in the action.”

63. Reference was also made to *Insight Group Limited & Anr v Kingston Smith (A Firm)*[2012] EWHC 3644 (QB); [2013] 3ALL ER 518. In that case, again taking up

the point that X may deliberately have sued Y even though it knew that the relevant services had been provided by Z, Leggatt J (as he then was) said:

“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).”

8 ISSUE 3: IF CTC WERE A PROPER PARTY, WAS THEIR SUBSTITUTION BY CT1 APPROPRIATE?

8.1 Was There a Mistake?

64. In his first statement Mr Adjetey, BDW’s solicitor, explained that, in March 2020, design deficiencies were becoming apparent in the blocks at Feltham. That was the reason why some blocks were added to the claim form on 17 March and the remainder were added on 18 March. At paragraphs 3.20-3.29 of his statement, Mr Adjetey made it quite clear that, at the time of those amendments, he genuinely thought that the engineers for the Feltham development were CTC. He had been provided with information via a spreadsheet prepared by BDW which identified CTC as the relevant engineers. He said in terms that, if he had known that the relevant engineers were in fact CT1, he would have ensured that they were the named defendants instead (see paragraph 3.29).
65. It was only on 18 May 2020, when a copy of the relevant contract was provided by CTI, that it became apparent to Mr Adjetey that the relevant engineers were not CTC but CT1. That led to the application to substitute.
66. In the light of that evidence, the judge concluded that there was a mistake, which was categorizable as a mistake of nomenclature rather than identity. BDW wanted to sue the engineers who carried out the work at the Feltham development; they thought those engineers were CTC; in fact they were CT1. Nobody was or could have been misled. On that basis, therefore, he found that all the ingredients for allowing the substitution (as per *The Sardinia Sulcis* and *Adelson*) were in play.

8.2 Nomenclature or Identity?

67. Ms Parkin submitted that the judge should not have concluded that this was a genuine mistake as to nomenclature, because it was unclear where or how the mistake originated. She said that, in the absence of the spreadsheet to which Mr Adjetey referred, it was impossible to know precisely how and why the original mistake had

come about. It was therefore impossible for the court to say that it was a mistake of nomenclature rather than identity.

68. I reject that submission. In my view, it is seeking to overlay what is a straightforward and workable test with potentially labyrinthine complexities. It does not matter where precisely the mistake originated; as the judge said at [93], it could have originated with a very junior employee who was compiling information for a completely separate purpose. What matters is that, as a result of that incorrect information, the person responsible for commencing the proceedings, Mr Adjetey, made a mistake in naming the wrong engineering company in the Cameron Taylor group when making the amendments of 17/18 March 2020.
69. I should also say for completeness that, in my view, the judge was right to say that the evidence here satisfied the *Sardinia Sulcis/Adelson* test noted at paragraphs 59 - 61 above. Importantly, there was no evidence that CTC or CT1 were or could have been misled as to who BDW intended to sue; they knew that BDW intended to sue the engineering company responsible for the design of the blocks at Feltham.
70. Ms Parkin advanced two other arguments on this aspect of the appeal. First she suggested, by reference to [69] of *Adelson* and [57] of *Insight*, that BDW may have sued CTC in a mistaken belief that CTC were legally liable for the defaults of CT1. If so, that would have been a mistake as to identity, not nomenclature. That is right in principle but inapplicable on the facts: there may have been some evidence to support that suggestion in *Adelson* and *Insight*, but there was nothing in the evidence in the present case which even hinted at it.
71. Secondly, Ms Parkin submitted that a mistake as to identity could be inferred because many of the drawings referred to Cameron Taylor Bedford, which she said was the former name of CT1. Since any inquiries as to what Cameron Taylor Bradford now called themselves would therefore have bypassed CTC altogether, she suggested that there might have been another Machiavellian reason for BDW pursuing CTC, not CT1. Again I do not accept that submission. It runs counter to Mr Adjetey's evidence and, I would venture to suggest, offends against common sense. As Mr Hargreaves submitted, it is inherently unlikely in the circumstances of this case that BDW would deliberately have sued a company which they knew had not provided the relevant engineering services.
72. I should add this. The construction industry is bedevilled by the frequent changes of nomenclature of the myriad companies, with frustratingly similar names, that belong to the same group. Doubtless this is all done for tax purposes, to the benefit of the companies themselves. But it is not, in my view, something of which the companies themselves can seek to take advantage in circumstances like this, where it was quite apparent to them why a Cameron Taylor company had been named as a defendant in respect of the allegations about the engineering design at Feltham.

8.3 But For The Mistake, Would BDW Have Sued CT1?

73. Ms Parkin's related submission was that there was insufficient evidence to conclude that CT1 would have been named in the claim form but for Mr Adjetey's mistake. In this respect she relied on the passages in the judgment in *Adleson*, set out in paragraph

62 above, to suggest that BDW's evidence did not reach the required standard on this topic.

74. In my view, there are three complete answers to this submission. First, the Court of Appeal in *Adleson* was faced with a situation where the party seeking to substitute one company with another in the same group structure had provided no explanation or evidence at all. The judge at first instance had simply assumed that the mistake that had been made met the necessary test. As Lord Phillips said at [67] "no evidence was adduced as to how the error came to be made or what would have been done had the error not been made". In the absence of any relevant evidence, this court overturned the judge's decision. That result is far removed from this case. Mr Adjetey has given careful evidence about the mistake, how it came about, and what would have been done differently if the mistake had not been made.
75. Secondly, there is no dispute that BDW did not have a copy of the Feltham contract with CT1 at the time that they commenced proceedings and that, once they had seen it, they sought to substitute CT1 for CTC. That is entirely consistent with the conclusion that, but for the mistake, CT1 would have been named originally.
76. Thirdly, the judge expressly found as a fact that, but for the mistake, CT1 would have been the subject of the amendments of 17/18 March 2020, not CTC. He based that conclusion foursquare upon Mr Adjetey's evidence: that is what Mr Adjetey said in his statement. Accordingly, Ms Parkin's submission on this point amounted to an attack on the judge for accepting Mr Adjetey's evidence in the first place. In my view, such an attack is not open to CT1. There was nothing to suggest that Mr Adjetey's evidence on this issue should or could have been rejected. It was entirely plausible. The judge was quite entitled to accept it.
77. Accordingly, for these reasons, I would uphold the judge's conclusion on the second part of the substitution application, namely that the 'necessary' test under r.19.5(3)(a) was made out. I consider that CTC/CT1's arguments on these issues introduce unwarranted complexity, and were contrary to the evidence before the judge which he was quite entitled to accept. The issue under r.19.5 is designed to be resolved shortly at an interlocutory hearing. As I pointed out during argument, an application to substitute one party for another should not be turned into a state trial.
78. Of course, for the reasons previously given, BDW's substitution application itself must fail because of the position on limitation.

9 CONCLUSIONS

79. For the reasons that I have set out above, I would allow this appeal. I have some sympathy with BDW and their attempts to get the right claims issued against the right defendants before the 15 year long stop. However, for the reasons that I have given, they erred in seeking to do that by way of what were inevitably going to become hotly contested amendments introduced when, on any view, the limitation period had arguably expired.

LORD JUSTICE MALES:

80. I agree.

LADY JUSTICE WHIPPLE:

81. I also agree.