



Neutral Citation Number: [2024] EWHC 370 (Ch)

Case No: PE-2021-000009

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

Rolls Building
Fetter Lane
London, EC4A 1NL

21 February 2024

Before :

MRS JUSTICE BACON

Between :

(1) THE TINTOMETER LIMITED
(2) WINTERBOURNE TRUSTEE SERVICES LIMITED

Claimants

- and -

(1) PITMANS (A FIRM)
(2) ADCAMP LLP

Defendants

Patrick Lawrence KC (instructed by **Blake Morgan LLP**) for the **Claimants**
Benjamin Wood (instructed by **Reynolds Porter Chamberlain**) for the **Defendants**

Hearing date: 30 January 2024

Approved Judgment

This judgment was handed down remotely at 10 am on 21 February 2024 by circulation to the parties or their representatives by email and by release to the National Archives.

Mrs Justice Bacon:

Introduction

1. This is an application to strike out a claim which is now only pursued against the first defendant, **Pitmans**. Pitmans was not originally named on the claim form when it was issued, but was substituted as a defendant before service of the claim form following various orders extending time for service. The defendants contend that the claim should



be struck out on the grounds either that the orders extending time for service should be set aside, or in the alternative that the amendment of the claim form to substitute Pitmans as a defendant should be disallowed.

2. Following exchange of skeleton arguments for this hearing, a point arose as to whether, if the defendants pursued their application to set aside the orders extending time for service, they should have expressly made an application contesting jurisdiction under CPR r. 11, and should also have disputed jurisdiction in their acknowledgement of service. In response the defendants issued an application seeking to correct any error of procedure in that regard, as well as seeking permission to rely on further evidence regarding the position of the individual partners of Pitmans.
3. At the hearing Mr Lawrence KC appeared for the claimants and Mr Wood appeared for the defendants. Following the hearing I received further written submissions from both parties on whether Pitmans does in fact have standing to seek to set aside the extension of time orders. I have taken account of those further submissions in this judgment.

Background

Overview of the claim and the parties

4. The dispute has arisen in the context of proceedings brought by the claimants alleging negligent advice by solicitors in relation to a pension scheme. The first claimant is the employer who funds the scheme and the second claimant is the scheme trustee. For the purposes of this hearing it is not necessary to distinguish between the claimants, and I will therefore refer to them collectively in this judgment.
5. The claim alleges that the solicitors failed to advise that an amendment to the scheme made by way of a 2009 deed, which was intended to limit the scheme liabilities, was ineffective. The relevant advice is said to have been given in 2008 and 2009.
6. It is now known that the solicitors who were instructed by the claimants in 2008 and 2009 carried on business, at the time, as a traditional unincorporated partnership known as Pitmans or Pitmans Solicitors. That entity is the first defendant as substituted by the claimants. The partnership continued until 1 May 2011. In 2008 an LLP called Pitmans (UK) LLP was incorporated, but remained at that stage a dormant company. It changed its name first to Pitmans LLP, and then to Adcamp LLP (**Adcamp**). That entity is now the second defendant (albeit that the claim is no longer pursued against Adcamp). On 1 May 2011 Adcamp acquired the business of the Pitmans partnership. It was therefore from that point that the business was carried on by the LLP rather than the partnership. In around December 2018 the business was acquired by another LLP, Bircham Dyson Bell LLP, which then changed the name of the merged entity to BDB Pitmans LLP (**BDBP**).
7. The present application arises because the claim form which was originally issued in April 2021 named Adcamp and BDBP as the first and second defendants, respectively, and did not refer to the former partnership, Pitmans. The claim form was not, however, served until September 2023, following a succession of extensions of time. By the time it was eventually served, the claim form had been amended pursuant to CPR rr. 17.1



and 19.6 so as to substitute Pitmans as the first defendant and Adcamp as the second. The strike out application disputes both the extensions of time and the substitution of Pitmans as a defendant.

Chronology of events between issue and service of the claim form

8. The chronology of events between issue and service of the claim form is central to the arguments on both sides. At the outset, there is no dispute that the claim was brought long after the expiry of six years from the date on which the cause of action accrued. The claimants therefore have to rely on s. 14A(4)(b) of the Limitation Act 1980, which provides a limitation period of three years from the earliest date on which the claimants had the knowledge required to bring an action for damages. The claimants say that the earliest date on which they had the relevant knowledge should be taken as being September 2018. That date is disputed by the defendants, but nothing turns on that issue for the purposes of the present application.
9. On the basis of the claimants' contention that they acquired the relevant knowledge no earlier than September 2018, the limitation period expired no earlier than September 2021. The claim form was issued within that period on 22 April 2021, naming Adcamp and BDBP as the defendants. Adcamp was sued as the entity alleged to have provided the negligent advice in 2008/9. BDBP was sued as the "successor practice" to Adcamp.
10. The claim form was issued at that point, without pre-action correspondence, in order to bring it within the s. 14A limitation period. Having issued the claim form the claimants then sought to comply with the professional negligence pre-action protocol before serving the claim on the defendants. To that end, on 24 June 2021 their solicitors (then as now Blake Morgan) sent a preliminary notice to BDBP setting out the allegations of negligence and asking for the relevant client files to be produced. The claimants also proposed a six-month extension of time to serve proceedings, from 22 August 2021 (the four-month period prescribed by CPR r. 7.5) to 22 February 2022, to allow the parties to engage with the pre-action protocol.
11. That extension of time was agreed in writing by BDBP's solicitors (then as now Reynolds Porter Chamberlain, or **RPC**) on behalf of both BDBP and Adcamp. It is common ground that this was a compliant agreement, pursuant to CPR r. 2.11, to vary the time limit specified by CPR r. 7.5.
12. Unfortunately, there were repeated delays in producing the client files which the claimants had requested (and which, it is undisputed, they were entitled to obtain from BDBP). A further difficulty also arose when Adcamp was dissolved on 7 September 2021 by means of a voluntary strike-off. In a letter dated 4 February 2022, RPC informed the claimants of the dissolution, and confirmed that the former owners of Adcamp were taking steps to restore the company to the register. RPC said that once the restoration had taken place it was likely that it would be instructed by Adcamp in relation to this matter.
13. BDBP agreed to a further extension of time for service of the claim form. The dissolution of Adcamp meant, however, that Adcamp could not agree to such an extension, and it would therefore be necessary for the extension of time to be made by



way of court order for it to be effective as against both defendants. Accordingly the claimants applied for an order extending time for service of the claim form to 22 August 2022. That order was made on 22 February 2022, recording in the recitals that BDBP had consented to the extension but that Adcamp had been dissolved (the **February 2022 order**).

14. By June 2022 the files had still not been received from BDBP, more than a year after the claimants' request. The claimants decided, however, to proceed to serve their letter of claim pursuant to the professional negligence pre-action protocol, without waiting further for the client files. The letter of claim was served on 30 June 2022. It referred to Adcamp as the entity which had given the advice in dispute, and outlined the basis of the claimants' claim against Adcamp and BDBP. The letter repeated the claimants' request for the relevant files to be provided forthwith.
15. Given that the client files had still not been provided to the claimants, and Adcamp had still not been restored to the register, BDBP agreed to a further extension of time for service of the claim form. That extension was granted by order of the court on 19 August 2022, extending time to 22 February 2023 (the **August 2022 order**).
16. The files relating to the advice given in 2008/9 were finally provided to the claimants on 13 October 2022. BDBP's full response to the letter of claim was due on 20 October 2022, but was not in the event served until 22 February 2023, following repeated chasing by the claimants. No explanation was (or has subsequently been) provided for the four-month delay in providing that response.
17. By that stage, since Adcamp had still not been restored to the register, RPC was still instructed only by BDBP, but the letter of response acknowledged that there was "some common ownership" between BDBP and Adcamp, and confirmed (as in previous correspondence) that RPC anticipated being instructed by Adcamp when restored. Accordingly, RPC explained that the letter of response outlined Adcamp's anticipated response to the claim against it. The letter went on to refer to Adcamp as the entity which had been asked to advise on the matter in dispute (albeit that any negligence by Adcamp was denied). There was no suggestion in the letter that it had in fact been Pitmans and not Adcamp which had been engaged to advise in 2008/9. On the contrary, the letter positively asserted that:

"Adcamp LLP was asked for its assistance during 2009 in relation to implementing the amendment to the Scheme Rules by preparing a Deed of Amendment reflecting your clients' decision in relation to freezing benefits and members' additional voluntary contribution arrangements."
18. Two days before the letter of response was received the claimants had sent another chasing letter, which also asked BDBP to agree a further extension of time for service of the claim form. RPC confirmed BDBP's agreement the following day (i.e. on 21 February 2023). A court order was obtained the same day, extending time to 22 May 2023 (the **February 2023 order**), albeit that BDBP's consent to the order does not appear to have come in time for it to be put before the court when the order was sought and granted.



19. Adcamp was eventually restored to the Companies House register on 5 April 2023. This was apparently not communicated to Blake Morgan, who sent an email to RPC on 19 May 2023 asking for an update on the position regarding Adcamp. On the same day, the claimants filed an application for a further extension of time giving as the reason the fact that the parties were awaiting the restoration of Adcamp to the register, in order to serve the claim on it. BDBP had (again) consented to the extension. The order was approved by the court that day, extending time to 22 August 2023 (the **May 2023 order**).
20. On 8 June 2023 RPC informed the claimants that Adcamp had been restored to the Companies House register, and on 27 July 2023 RPC sent the claimants the 5 April 2023 order confirming restoration.
21. The manner in which the claimants became aware that the wrong defendants had been named on the claim form was explained in a witness statement provided by Mr Michael Colledge, the partner at Blake Morgan with conduct of the case for the claimants. He explained his initial investigations which had led him (erroneously, as it turned out) to the conclusion that Adcamp had been the legal entity which gave the advice to the claimants in 2008/9. He also explained the circumstances in which, at some point in the summer of 2023, he had re-reviewed the documents that he had received from BDBP as part of preparing his instructions to counsel to prepare the particulars of claim. That review apparently led him to realise (for the first time) that the entity which had given the disputed advice in 2008/9 may not have been as stated on the claim form. Mr Colledge then carried out further investigations described in his witness statement.
22. On 7 August 2023 Blake Morgan wrote to RPC noting that its further investigations had established that the entity giving the advice in 2009 was Pitmans, and that Adcamp did not in fact trade until May 2011. On that basis Blake Morgan said that it intended to amend the claim form before service to add Pitmans as a defendant and remove BDBP. The letter asked whether RPC now had instructions to act for Pitmans and Adcamp, and if so sought confirmation from RPC as to the defendants' position on whether the relevant advice had been provided by Adcamp or Pitmans. The letter also asked for confirmation of the correct name of the traditional partnership, and requested a copy of the partnership membership statement.
23. Blake Morgan then emailed RPC on 9 August 2023 asking again whether RPC was now instructed by Adcamp, and whether both defendants (i.e. BDBP and Adcamp, as they were at the time) would agree to a further extension of time for service to 22 September 2023. Blake Morgan also asked for RPC to provide the business transfer terms between Pitmans and Adcamp.
24. RPC replied on 11 August 2023 saying that it anticipated having instructions to act on behalf of Adcamp the following week. As regards a claim against Pitmans, RPC said that this would be out of time, but indicated that if a claim was brought RPC would attempt to contact the members of the old partnership. RPC also queried the reason for the request for the business transfer agreement. There was no reply regarding the request for an extension of time.



25. The claimants explained their request for the business transfer terms in an email from Blake Morgan to RPC on 16 August 2023. In the same email, Blake Morgan asked again whether RPC had instructions from BDBP and Adcamp regarding a further extension of time for service of the claim form.
26. No reply being forthcoming on that point, on 17 August 2023 the claimants applied to the court for a further short extension of time to serve their claim form. Their application was supported by a witness statement from Mr Colledge, which referred to outstanding points of procedure which needed to be resolved, as set out in the exhibited correspondence from 7–16 August. The application indicated that it was made on notice to both Adcamp and BDBP, and it was served on RPC by email at 11:56 a.m. on 17 August 2023.
27. It seems, however, that the court may have dealt with the order before the application was sent to RPC, because at 12:06 pm the court emailed its sealed order to Blake Morgan, extending time for service of the claim form to 22 September 2022. Blake Morgan forwarded this to RPC at 12:51 pm (the **August 2023 order**).
28. On 7 September 2023 RPC emailed Blake Morgan noting (without any objection in that regard) the extension of time, and confirming that RPC was now instructed to accept service on behalf of Adcamp. The letter maintained the position that any claim against the former partnership would be statute barred, but again offered to seek instructions from one or more of the former partners if the claim was pursued against them.
29. On 13 September 2023 the claimants amended the claim form as foreshadowed in their 7 August 2023 letter, adding Pitmans as a defendant and removing BDBP, pursuant to CPR r. 17.1(1). A further amendment (immaterial for present purposes) was made on 15 September 2023. The re-amended claim form and particulars of claim were then served by email on RPC on behalf of Adcamp on 21 September 2023.
30. In relation to Pitmans, the re-amended claim form and particulars were served by post on 13 individuals said to be former partners of Pitmans, by letters dated 20 September 2023. On 22 September 2023 the claimants sent each of those addressees a password-protected USB memory stick containing the claimants' initial disclosure, which included the five orders extending time for service of the claim form made from February 2022 to August 2023.

Issues

31. On 3 October 2023 the defendants brought their application to strike out the claim. The application specifically sought the strike out of the claim in relation to the first defendant (Pitmans), the second defendant (Adcamp) and Mr Andrew Davies, one of the former partners of Pitmans, who was made bankrupt in 2020. Ancillary to the application for a strike out on the grounds that the extension of time orders between February 2022 and August 2023 should be set aside, the defendants applied for the time for that set aside application to be extended to 3 October 2023. The alternative ground for strike out of the claim against Pitmans was that the court should disallow its substitution as a defendant.



32. Separate acknowledgements of service were then filed for each of the defendants on 5 October 2023. In Pitmans' acknowledgement of service, three of the individuals served as having been partners at the dates of the alleged negligent advice either denied or did not admit being partners at that time. The remaining ten individuals admitted that they were partners at the relevant time, but Mr Davies said that he could not be pursued by reason of his bankruptcy.
33. Neither of the acknowledgements of service indicated that the defendants intended to contest the jurisdiction of the court. That gave rise to the further application filed by the defendants on the morning of the hearing (30 January 2023) seeking relief from and the correction of any error in procedure in not contesting jurisdiction.
34. Two aspects of the defendants' applications are not opposed by the claimants. First, the claimants no longer pursue their claim against Adcamp; the application to strike out the claim in relation to that defendant is not opposed. Secondly, the claimants accept that they cannot pursue a claim against Mr Davies.
35. The following remaining issues arise for determination:
 - i) Whether the defendants should have expressly contested jurisdiction in their acknowledgement of service and strike out application, and if so whether the court should grant any relief necessary to enable that error to be corrected.
 - ii) Whether Pitmans has standing to apply to set aside one or more of the orders extending time for service of the claim form, and if so whether an extension of time should be given to permit Pitmans to do so.
 - iii) Whether one or more of the orders extending time for service of the claim form should be set aside, such that the claim form should be regarded as having been served out of time on Pitmans.
 - iv) Whether, if the court does not set aside the orders extending time, it should nevertheless disallow the substitution of Pitmans as a defendant.
36. I will address the issues in that order. First, however, it is necessary to set out the main relevant rules of the CPR.

Relevant CPR rules

Extension of time for service of a claim form

37. CPR r. 7.5(1) provides that where the claim form is served within the jurisdiction, the claimant must complete the specified step in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form.
38. CPR r. 7.6 permits the claimant to apply for an order extending that period, as follows:

“(1) The claimant may apply for an order extending the period for compliance with rule 7.5.



- (2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made –
 - (a) within the period specified by rule 7.5; or
 - (b) where an order has been made under this rule, within the period for service specified by that order.
- (3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if –
 - (a) the court has failed to serve the claim form; or
 - (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
 - (c) in either case, the claimant has acted promptly in making the application.
- (4) An application for an order extending the time for compliance with rule 7.5 –
 - (a) must be supported by evidence; and
 - (b) may be made without notice.”

39. PD 7A sets out the evidence required for an application under r. 7.6:

“11.1 An application under rule 7.6 (for an extension of time for serving a claim form under rule 7.6(1)) must be made in accordance with Part 23 and supported by evidence.

11.2 The evidence should state –

- (1) all the circumstances relied on,
- (2) the date of issue of the claim,
- (3) the expiry date of any rule 7.6 extension, and
- (4) a full explanation as to why the claim has not been served.”

Setting aside an order made without a hearing

40. The claimants’ applications for extension of time orders were made pursuant to r. 7.6, and were dealt with by the court without hearings pursuant to CPR r. 23.8. That provides:

“The court may deal with an application without a hearing if –

- (a) the parties agree as to the terms of the order sought;
- (b) the parties agree that the court should dispose of the application without a hearing, or
- (c) the court does not consider that a hearing would be appropriate.”

41. Under PD 23A §11.2, where r. 23.8(c) applies the court will treat the application as if it were proposing to make an order of its own initiative.

42. The consequence is that in such a case the provisions of CPR r. 3.3(4)–(6) are engaged:



- “(4) The court may make an order of its own initiative, without hearing the parties or giving them an opportunity to make representations.
- (5) Where the court has made an order under paragraph (4) –
- (a) a party affected by the order may apply to have it set aside, varied or stayed; and
 - (b) the order must contain a statement of the right to make such an application.
- (6) An application under paragraph (5)(a) must be made –
- (a) within such period as may be specified by the court; or
 - (b) if the court does not specify a period, not more than 7 days after the date on which the order was served on the party making the application.”

43. Accordingly, where an application is dealt with by the court without a hearing on the basis that the court does not consider that a hearing would be appropriate (r. 23.8(c)), the safeguard set out in r. 3.3(5) applies and a party affected by the order may apply to have it set aside, varied or stayed, within either seven days or such other period as the court specifies in the order. The rights in r. 3.3(5) do not, however, apply where the court disposes of an application without a hearing on the basis that the parties have agreed that it should do so (r. 23.8(b)) or have agreed a consent order (r. 23.8(a)). That is unsurprising: where the court has made an order without a hearing on the basis of agreement between two or more parties, there is no good reason why those same parties should then have an automatic right to apply to set aside or vary that order.

The substitution of a defendant

44. CPR r. 17.1(1) provides that:

“A party may amend their statement of case, including by removing, adding or substituting a party, at any time before it has been served on any other party.”

45. An amendment made pursuant to r. 17.1(1) is, however, subject to CPR r. 17.2, which sets out the court’s power to disallow amendments made without permission:

- “(1) If a party has amended their statement of case where permission of the court was not required, the court may disallow the amendment.
- (2) A party may apply to the court for an order under paragraph (1) within 14 days of service of a copy of the amended statement of case on them.”

46. Specific rules governing the procedure for adding and substituting parties are set out in CPR r. 19.4. The relevant provisions in the present case are:

- “(1) The court’s permission is required to remove, add or substitute a party, unless the claim form has not been served.



- ...
- (9) A new defendant does not become a party to the proceedings until the amended claim form has been served on them.

47. Where parties are added or substituted with the permission of the court after the end of a relevant limitation period, CPR r. 19.6 applies. The material provisions of that rule are as follows:

- “(1) This rule applies to a change of parties after the end of a period of limitation under –
- (a) the Limitation Act 1980; ...
- (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; ...”

Jurisdiction

48. CPR r. 11 sets out the procedure for disputing the court’s jurisdiction to try a claim. The main relevant provisions are as follows:

- “(1) A defendant who wishes to –
- (a) dispute the court’s jurisdiction to try the claim;
- (b) argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no jurisdiction or should not exercise any jurisdiction which it may have.
- (2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
- (3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court’s jurisdiction.
- (4) An application under this rule must –
- (a) be made within 14 days after filing an acknowledgment of service; and
- (b) be supported by evidence.
- (5) If the defendant –
- (a) files an acknowledgment of service; and
- (b) does not make such an application within the period specified in paragraph (4),



he is to be treated as having accepted that the court has jurisdiction to try the claim.”

49. In relation to the jurisdiction issue, it is also necessary to consider the provisions of CPR r. 3.10, which provides:

“Where there has been an error of procedure such as a failure to comply with a rule or practice direction –

- (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
- (b) the court may make an order to remedy the error.”

The jurisdiction issue

Summary of the issue

50. The first issue is whether the defendants should have expressly contested jurisdiction pursuant to r. 11 in their acknowledgement of service and strike out application, and if so whether that error can be corrected under r. 3.10.
51. It is common ground that the defendants did not, in their strike out application of 3 October 2023, expressly contest the court’s jurisdiction pursuant to r. 11 in relation to the application to set aside the orders extending time for service of the claim form; nor did their acknowledgement of service indicate an intention to contest jurisdiction. The claimants nevertheless did not, after service of the defendants’ application notice, take issue with the defendants’ entitlement to pursue their application to set aside the extension of time orders. Nor was that point taken in Mr Lawrence’s skeleton argument for the claimants, which instead addressed the merits of the defendants’ strike out application (on both grounds on which it was based).
52. Mr Wood’s skeleton argument for the defendants, however, properly and conscientiously drew the court’s attention to the judgment of the Court of Appeal in *Hoddinott v Persimmon Homes (Wessex)* [2007] EWCA Civ 1203 as to the consequences of failure to dispute jurisdiction formally under r. 11. Mr Wood nevertheless submitted that in so far as the defendants’ application notice and acknowledgement of service were procedurally defective by failing to raise a r. 11 jurisdiction issue, the claimants had waived any procedural point in that regard by seeking to engage with the defendants’ application on its merits rather than taking a procedural point in that regard.
53. Mr Lawrence in response filed a supplemental note saying that the claimants had not been asked to and had not in fact waived any non-compliance with r. 11. He did, however, note that in the recent judgment of the Court of Appeal in *Pitalia v NHS England* [2023] EWCA Civ 657, [2023] 1 WLR 3584, the Court had distinguished *Hoddinott*, on the basis that on the facts of the case the relevant errors of procedure in the application of r. 11 could be corrected by the court under CPR r. 3.10.
54. Mr Wood gratefully adopted the reference to *Pitalia* and submitted that in this case the same analysis should apply. Mr Lawrence neither conceded nor positively opposed that



submission; rather, his position was essentially that it was a matter for the court, considering the principle in *Hoddinott* in the light of the more recent judgment in *Pitalia*.

Discussion and conclusions

55. In its judgment in *Hoddinott*, the Court of Appeal confirmed (at §§25–30) that r. 11 is engaged where a defendant seeks to argue that the court should not exercise its jurisdiction to try a claim, on the grounds that an order extending time for service of the claim form should be set aside. In such a case, the court held, the making of an application to set aside the extension of time for service of the claim form does not disapply the requirement for an application contesting jurisdiction to be made under r. 11.
56. Accordingly, where the defendant in that case had applied to set aside the extension of time for service of the claim form, but thereafter failed to dispute jurisdiction on the acknowledgement of service form, and made no r. 11 application disputing jurisdiction, the defendant was treated as having accepted that the court should exercise its jurisdiction to try the claim notwithstanding the late service of the claim form. The effect of r. 11(5) was, in other words, to treat the defendant as having abandoned its earlier application to set aside the order extending the time for service.
57. The principle set out in *Hoddinott* must, however, now be considered in the light of the recent judgment of the Court of Appeal in *Pitalia*. In *Pitalia* the claim form had been served outside the four-month time period specified in CPR r. 7.5. The defendant had filed an acknowledgement of service, ticking the box indicating that it intended to defend the claim, but not the box which indicated that it intended to contest jurisdiction. The defendant had, however, already written to the claimants indicating that it intended to apply to strike out the claim on the grounds of late service of the claim form, and the cover letter filed with the acknowledgement of service also raised the issue of late service and stated an intention to apply to strike out the claim. Three days after the acknowledgement of service was filed, the defendant filed its application to strike out the claim for non-compliance with r. 7.5.
58. The Court of Appeal considered (at §§34–38) that the failure of the defendant’s solicitors to tick the box on the acknowledgement of service form indicating an intention to contest jurisdiction was not fatal to the strike out application. The critical question was rather whether the strike out application could, by the use of r. 3.10, be treated as having been made under r. 11(1). As to that point, the court held that the failure to make express reference to r. 11(1) in the covering letter accompanying the acknowledgement of service, and in the strike out application itself, was an error capable of rectification under r. 3.10, given that the documents taken together made the defendant’s intentions clear: namely that it was applying to stop the case on the grounds of failure to serve the claim form in time. The failure of those documents to make express reference to r. 11(1) was, the court held, “just the sort of technical error for which CPR r. 3.10 was designed”.
59. In my judgment the present case is likewise a case in which r. 3.10 can and should be applied. As in *Pitalia*, the intention to contest jurisdiction was not indicated in the



acknowledgement of service, and the strike out application did not specifically refer to r. 11. But the substance of the defendants' strike out application made clear that their intention was to bring the claim against Pitmans to an end on the grounds (among others) that one or more of the extension of time orders should be set aside, such that the claim was served out of time.

60. The fact that in the present case the strike out application was filed a few days before, rather than a few days after, the acknowledgement of service does not, to my mind, introduce a material distinction between this case and the situation in *Pitalia*. The relevant question is whether the defendants' intentions were clear to the claimants from the documents filed by the defendants. In this case, the defendants' intentions were indeed at all times clear and were understood by the claimants, and there is no suggestion by the claimants that they understood the defendants to have abandoned their application to set aside the orders extending time for service. On the contrary, the claimants proceeded to serve their evidence for this hearing on the basis that the defendants were pursuing their application to set aside the extensions of time for service, and the jurisdiction point was not raised as an issue until Mr Wood himself referred to *Hoddinott* in his skeleton argument. As in *Pitalia*, therefore, the defendants' error is a technical one which can be readily corrected under r. 3.10.
61. It is therefore appropriate to grant relief so as to correct the defendants' errors of procedure in not ticking the "dispute jurisdiction" box on the acknowledgement of service form and not expressly raising a r. 11 application in their strike out application.

The set aside application: procedural issues

Summary of the issue

62. The second issue is whether Pitmans may now apply to set aside one or more of the five orders extending time for service of the claim form, and (if so) whether an extension of time should be given to permit Pitmans to do so.
63. Although the 3 October 2023 application referred to all five of the extension of time orders made by the court, at the hearing Mr Wood made substantive submissions only in relation to the first order in February 2022 and the last order in August 2023. I will therefore consider the procedural and the substantive issues only in relation to those two orders.
64. In their skeleton arguments and oral submissions at the hearing both parties proceeded on the basis that there was in principle a right under r. 3.3(5) to apply to set aside both the February 2022 and August 2023 orders, which extended to Pitmans, subject only to the question of whether a short extension of time should be given for that application, given that the strike out application was not filed until 3 October 2023. Since that extension of time was not opposed by the claimants, the submissions of both Mr Wood and Mr Lawrence focused on the merits of the defendants' set aside applications.
65. The matter is not, however, as straightforward as the parties assumed, for two reasons. The first is that while the August 2023 order was undoubtedly made on the basis of r. 23.8(c), such that both BDBP and Adcamp had the right under r. 3.3(5) to set aside the



order, the parties had not addressed the way in which they contended that rr. 23.8 and 3.3(5) should apply to the February 2022 order, which was made with the consent of BDBP but not Adcamp. The second issue is that Pitmans was not a party to the proceedings when any of the extension of time orders were made.

66. Following the hearing, I asked the parties to provide further submissions on whether, in these circumstances, r. 3.3(5) could nevertheless be relied upon by Pitmans in relation to both of the orders. In response to that invitation, Mr Lawrence changed his position and submitted that r. 3.3(5) was inapplicable in respect of the February 2022 order. He also said that in any event Pitmans could not pursue an application to set aside either of the February 2022 or August 2023 orders given that they were made at a time when it was not a party to the proceedings.
67. Mr Wood disagreed. He said that once Adcamp was restored to the register it was to be treated as having been a party to the various extension orders when made, and that the February 2022 order and subsequent orders were therefore not made by consent since Adcamp had not consented to them. In the circumstances, he contended that r. 23.8(c) applied such that r. 3.3(5) could be relied upon in relation to those orders. As to the position of Pitmans, Mr Wood said that once it was substituted as a defendant it was a party for the purposes of r. 3.3(5) and could therefore rely on that provision in relation to both orders.
68. In light of those submissions, three separate questions arise: (i) whether a r. 3.3(5) set aside right arose at all in relation to the February 2022 order; (ii) whether Pitmans can apply under r. 3.3(5) to set aside orders made before it became a party to the proceedings; and (iii) whether an extension of time should be given to permit Pitmans to do so.

The application of r. 3.3(5) to the February 2022 order

69. The circumstances in which the February 2022 order was made means that its effect needs to be considered separately for the two defendants specified on the order. It is clear from the recitals to the order that the order was a consent order in relation to BDBP, but not in relation to Adcamp: Adcamp could not give its consent, because it was dissolved at the time. In substance, therefore, the order must be interpreted as if the body of the order made separate provision for the extension of time for service of the claim form on BDBP and Adcamp respectively, with the former but not the latter expressed to be an order made by consent.
70. In relation to BDBP, therefore, the order was in substance made by consent pursuant to r. 23.8(a), and no set aside right arose under r. 3.3(5).
71. In relation to Adcamp, at the time the order was made the action against Adcamp was a nullity due to its dissolution: as Munby LJ noted in *Joddrell v Peakstone* [2012] EWCA Civ 1035, [2013] 1 WLR 784 at §42, “[t]he proceedings are a nullity because there is no lis; one of the parties does not exist.” Once Adcamp was restored to the register, however, the proceedings against it were retrospectively validated pursuant to s. 1032(1) of the Companies Act 2006, which provides that the effect of an order for registration “is that the company is deemed to have continued in existence as if it had



not been dissolved or struck off the register”. The effect of restoration was therefore that once restored Adcamp was bound by the terms of the February 2022 order made in relation to it.

72. Since, however, Adcamp did not and could not consent to the February 2022 order, the order extending time for service on Adcamp must be regarded as having been, in substance, made pursuant to r. 23.8(c). Adcamp therefore had the right to apply to set aside the order under r. 3.3(5), once it was restored to the register and the order was served on it. A statement of that right was not set out on the face of the order, no doubt because the order adopted the draft provided by the claimants which did not contain that rubric. That cannot, however, affect the question of whether as a matter of procedure Adcamp had a right to apply to set aside the order pursuant to r. 3.3(5).
73. The answer to the first question is that Adcamp had, but BDBP did not have, a right to apply to set aside the February 2022 order pursuant to r. 3.3(5).

Whether Pitmans can apply under r. 3.3(5) to set aside the February 2022 and August 2023 orders

74. Mr Wood acknowledged that by contrast with the deeming provision of s. 1032(1) of the Companies Act, the effect of CPR r. 19.4(9) is that a new defendant does not become a party to the proceedings until the amended claim form has been served on it. Accordingly, Pitmans only became a party to the proceedings once service was effected on the individuals said to be former partners of Pitmans, on 21 September 2023.
75. Pitmans was therefore not a party to the proceedings when the February 2022 and August 2023 orders were made. Mr Wood nevertheless contended that once Pitmans was served with the claim form and became a defendant in the proceedings, it was “a party affected” by the extension of time orders within the meaning of r. 3.3(5). As such, Mr Wood said that Pitmans must have a right to apply to set aside those orders pursuant to that provision. He submitted that the editors of the White Book were wrong to suggest in the commentary at 40.9.2 that r. 3.3(5) restricts the entitlement to apply to set aside “to those who are parties to the order or judgment in question”. As a matter of principle, Mr Wood said that it would be unjust if a new defendant did not have standing to challenge procedural decisions that were agreed or ordered prior to its involvement.
76. I do not entirely accept those submissions. The purpose of r. 3.3(4)–(6) is to enable the court to make an order without hearing the parties, subject to the safeguard that a party affected by the order may apply to set the order aside, with the hearing of such an application being treated as a rehearing of the issue, rather than a review of the decision: *Al-Zahra (PVT) Hospital v DDM* [2019] EWCA Civ 1103, §67. The corollary of that right to a rehearing is that it is circumscribed by a strict time limit: either seven days from service on the relevant party, or such other period as is specified by the court. That provides finality and avoids a situation where one or other party seeks to dispute the order long after it has been served on them, at a point at which the order has already taken effect.



77. The provisions of r. 3.3(4)–(6) must be interpreted as referring to the rights of the parties to the order in question. Those are the parties on whom the order will be served, and who will have the prescribed period from service to make their application to set aside. Rule 3.3(5) cannot sensibly be interpreted as giving a party subsequently joined to the proceedings the right to seek to unravel any and all orders made under r. 3.3(4), which may have been made years previously, and which may long since have been fully implemented by the relevant parties to the order.
78. That conclusion is reinforced by the interaction between r. 3.3(5) and r. 23.8, in a case where the order is made on an application by one of the parties rather than on the court’s own initiative. In such a case, it is necessary for the court to ascertain, at the time the order is made, whether the relevant parties have agreed the terms of the order sought (such that r. 23.8(a) applies), or have agreed that the court should dispose of the application without a hearing (such that r. 23.8(b) applies). If neither of those is the case, then the court has to consider under r. 23.8(c) whether it is nevertheless appropriate to proceed without a hearing, thereby triggering the set aside provisions of rr. 3.3(4)–(6). That assessment must necessarily be made on the basis of the facts and evidence before the court. The references in r. 23.8 to the “parties” can therefore only be a reference to the parties to the relevant application which leads to the order: if the court were required to take account of a hypothetical (as yet unidentified) party who might subsequently be joined to the proceedings, the application of r. 23.8 would be impossible.
79. In the alternative to Mr Wood’s primary submission that the word “party” in r. 3.3(5) includes a party joined to the proceedings after the order was made, Mr Woods advanced an alternative – albeit somewhat tentative – suggestion that a party joined to the proceedings by substitution should “stand in the shoes” of its predecessor party, and should on that basis be treated as if it had been a “party” to the order with a right to apply under r. 3.3(5).
80. It is not, however, clear how that would resolve the difficulty with the combined application of rr. 3.3(5) and 23.8 to a hypothetical future substituted party, who by definition would not be in the same position as the parties at the time the order was made. Mr Wood did not, moreover, point to anything in the rules suggesting that a party substituted in proceedings pursuant to rr. 17.1 and 19.4 should be treated as if it had been a party at an earlier date for the purposes of r. 3.3(5) or any other provision, in the face of the express contrary wording of r. 19.4(9). Nor is there any principled reason why a distinction should be drawn in that regard between the rights of a party who is joined by substitution, and the rights of a party who is simply added as an additional party to the proceedings.
81. The correct analysis is, in my judgment, that the right to apply to set aside an order pursuant to r. 3.3(5) applies only to the parties to that order, and cannot be relied upon by a person who is subsequently added as a party to the proceedings.
82. That does not mean that a party who is added to the proceedings is fixed with all of the consequences of previous procedural orders, with no possibility of seeking to vary those. CPR r. 3.1(7) provides the court with a broad discretion to vary or revoke an order. One of the situations in which that discretion may be exercised is where there has



been a material change of circumstances since the order was made: *Tibbles v SIG* [2012] EWCA Civ 518, [2012] WLR 2591, §39. and *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537, [2014] 1 WLR 795, §44. Mr Lawrence acknowledged that the addition of a new party might well amount to a material change of circumstances in relation to certain types of procedural orders, such as orders providing for disclosure and setting the timetable to trial.

83. Mr Wood did not, however, seek to rely on r. 3.1(7) in the present case. That is no doubt because it cannot be said that the substitution of Pitmans is a material change of circumstances for the purposes of any of the extension of time orders made in the present case: the rationale for and effect of those orders remains the same, whether the defendants are as originally named or as substituted by the claimants.
84. I also note, for completeness, that both Mr Lawrence and Mr Wood referred to the provision in CPR r. 40.9 that a person who is not a party but who is directly affected by a judgment or order may apply to have that judgment or order set aside. Mr Wood did not, however, contend that Pitmans could rely on that provision, presumably because it cannot be said that Pitmans is directly affected by the extension of time orders. Rather, as Mr Lawrence noted, it is indirectly affected in that those orders created a situation in which the claimants were able to substitute it as a defendant. What has directly affected Pitmans is therefore its joinder to the proceedings. Pitmans is able to apply to disallow that joinder, and has done so.

Whether an extension of time should be given for Pitmans' set aside application

85. If, contrary to the conclusions set out above, Pitmans did in principle have a right to apply to set aside any of the extension of time orders pursuant to r. 3.3(5), and assuming that those orders are taken to have been served on Pitmans on 22 September 2023 with the provision of USB memory sticks containing (among other things) the five orders, then the seven-day period pursuant to r. 3.3(5) expired on 29 September 2023. The defendants' strike out application was not, however, filed until 3 October 2023. Pitmans would therefore require a short extension of time to permit it to advance the set aside point as part of that strike out application.
86. The claimants did not oppose the application for an extension of time which would, in the circumstances, be no more than a few days. If Pitmans did have a right to apply to set aside the relevant orders, it would have been appropriate in the circumstances to grant a short extension of time to enable it to do so. In light of the conclusions I have reached above, however, this issue does not arise.

The set aside application: substance

Summary of the issue

87. If my conclusions on the second issue are correct, then Pitmans cannot pursue its application to set aside any of the extension of time orders, and the third issue as to the substance of that application does not arise. I will, however, address Pitmans' submissions on this issue, in case my conclusions on the second issue are wrong, and since the substance of the set aside application was debated extensively at the hearing.



88. As noted above, Mr Wood’s submissions focused on the first and the last extension of time orders, in February 2022 and August 2023. His arguments for disputing those orders were different: in the case of the February 2022 order, he disputed the court’s jurisdiction to make the order; in the case of the August 2023 order, he contended that the evidence in support of the order showed no good reason for an extension of time to be granted. Mr Lawrence disputed both of those grounds for setting aside the orders, and contended that both orders were validly made.
89. In *R (Kuznetsov) v Camden* [2019] EWHC 3910 (Admin), §24 Mostyn J considered the approach that should be taken to an application to set aside an order under r. 3.3(5). He formulated the test as being that the court should give due weight to the decision of the judge who dealt with the matter without a hearing, and should be able to identify a good reason for disagreeing with that decision. That is the approach which I will adopt in respect of the arguments as to the substance of the February 2022 and August 2023 orders.

The February 2022 order

90. It was not in dispute that the conditions for the grant of an extension of time are more stringent for an application made under r. 7.6(3) than for an application under r. 7.6(2). In the case of an application falling under r. 7.6(3), where the application is made *after* the end of the period specified by r. 7.5 or by an order made under r. 7.6, in circumstances where it is the claimant rather than the court which has failed to serve the claim form, the extension of time may only be granted where the court is satisfied that claimant has taken “all reasonable steps” to serve in time but has been unable to do so. By contrast, where the application is made under r. 7.6(2) *before* the expiry of the relevant period of time, it is still necessary to justify the extension of time sought, and if the relevant limitation period has or may have expired since the commencement of proceedings the claimant will be expected to show that it has taken reasonable steps to serve within time, but the claimant is not required to show that it has taken *all* reasonable steps to do so: *ST v BAI* [2022] EWCA Civ 1037, §62.
91. The claimants’ first application for an extension of time was filed on 18 February 2022, which was of course long after the expiry of the four-month period specified in r. 7.5, since the claim form had been issued on 22 April 2021. That period had however, as set out above, been extended to 22 February 2022 by agreement between the parties. The Court of Appeal confirmed in *Thomas v Home Office* [2006] EWCA Civ 1355 that an effective agreement to extend time for service of a claim form may be made under r. 2.11, and it is common ground that the parties’ agreement in the present case was a compliant agreement for the purposes of r. 2.11.
92. The February 2022 application was made pursuant to r. 7.6 without specifying which of r. 7.6(2) or (3) was said to be applicable. The witness statement of Mr Colledge in support of the application explained, however, that the current extension of time was due to expire on 22 February 2022, and said that the dissolution of Adcamp represented a “very good reason” for the extension of time. It was not said that the claimants had taken “all reasonable steps” to comply with r. 7.5 but had been unable to do so. Implicitly, therefore, the application was made under r. 7.6(2) rather than (3).



93. Mr Wood’s case was that an extension of time could not, in this case, have validly been granted under r. 7.6(2), because an agreement between the parties cannot be taken into account when determining whether the application has been made within the relevant time period for the purposes of r. 7.6(2). Rule 7.6(2), he said, refers only to the period specified by r. 7.5 or the period specified by an order made under r. 7.6, and does not refer to a different period specified in an agreement between the parties to vary the time limit in r. 7.5. Accordingly, if following such an agreement a further extension of time is sought by order of the court under r. 7.6, the claimant is out of time to make an application under r. 7.6(2). Instead, an application may only be made under the stricter provisions of r. 7.6(3).
94. Applying that analysis to the present case, since the claimants’ application for an order extending time beyond February 2022 was made after the expiry of the r. 7.5 period, Mr Wood said that the order could only have been made if the court was satisfied that the condition of “all reasonable steps” in r. 7.6(3) was met. That condition was not addressed in the claimants’ evidence in support of the February application, and Mr Wood said that it could not in any event have been satisfied by the claimants. On that basis he said that the February 2022 order was non-compliant with r. 7.6 and should be set aside. (That would then, in his submission, render each of the subsequent orders in turn non-compliant with r. 7.6 on the basis of a domino effect, since each of those orders was made under r. 7.6(2) on the basis of an assumption that the order was made within the time period specified by the previous order.)
95. I do not accept those submissions. The central flaw with Mr Wood’s interpretation of r. 7.6(2) is that it fails to give effect to an agreement between the parties to extend time which, as *Thomas v Home Office* confirmed, may validly be made under r. 2.11. The effect of such an agreement is to vary the period specified by r. 7.5. The “period specified by rule 7.5” in r. 7.6(2) must therefore be read as a reference to that period as varied. It would be nonsensical for an extension agreement under r. 2.11 to be effective for the purposes of varying the period specified in r. 7.5, so as to render the claimant compliant with that provision if the claim form is served within the varied time limit, but for that same agreement then to be ineffective for the purposes of any provision referring back to the period specified in r. 7.5.
96. Mr Wood’s response was to say that if a claimant wants to be able to take advantage of the possibility of applying under r. 7.6(2) for an order further extending time beyond an agreed extension period, then the agreement should be embodied in a consent order which is approved by the court. But that ignores the point that r. 2.11 entitles the parties precisely to avoid having to obtain the court’s approval of a consent order, if their agreement is in writing (and provided that there is no provision in the rules or practice directions or court order specifying otherwise). Again, it would be entirely incoherent with the scheme of the rules for the parties to be able to agree an extension of time for the purposes of r. 7.5, but to have to put that agreement into the form of a consent order in order for it to take effect for the purposes of r. 7.6.
97. Mr Wood also suggested that a r. 2.11 agreement to extend time could take some effect as between the parties to that agreement, in that they would not thereafter be able to dispute the applicability of r. 7.6(2) to a subsequent extension application made within the extended time period. But that agreement should not, he said, bind a stranger to the



agreement, who should be able to argue that the order should only have been made if the stricter conditions of r. 7.6(3) were satisfied.

98. That analysis is, however, unworkable, because it would render entirely uncertain the test to be applied by the court when considering an application for an order under r. 7.6. As with the court's consideration of r. 23.8, its determination of whether the order is made under r. 7.6(2) or (3) must be made on the facts and evidence before it at the time. On the basis of that material, either the application is made within the relevant period specified in r. 7.6(2), in which case the test in *ST* applies, or the application is made after the expiry of the relevant period, in which case the stricter test set out in r. 7.6(3) applies. The determination of which of those two provisions applies cannot be affected by the possibility that at some later stage a new party may be added to the proceedings who has not consented to the r. 2.11 agreement.
99. The correct analysis is, in my judgment, that an agreement between parties to vary a time limit in a rule, which is validly made under r. 2.11, will have effect not only in relation to the specific rule which is varied, but also – by necessary consequence – in relation to any other rule which refers to that time limit. That is the only analysis which preserves the coherence of the rules and certainty for the parties and the court in applying those rules.
100. I would therefore have rejected Mr Wood's challenge to the February 2022 order, if that had arisen for determination.

The August 2023 order

101. As I have already noted, Mr Wood's objection to the August 2023 order was put on a quite different basis. In respect of that order, he said that the evidence adduced by the claimants in support of the further extension of time did not set out any good reason why the claim form could not be served promptly at that point, sufficient to meet the *ST* test for the application of r. 7.6(2).
102. In particular, Mr Wood submitted that the claimants had not provided a sufficiently good explanation for why, after receipt of the files from BDBP in October 2022, it had taken them until August 2023 to realise the problem with the identity of the defendants; nor why the claimants had then waited for another month before serving the amended claim form. In reality, he said, the claimants had used the extension of time in order to "keep warm" the claim form in order to allow the substitution of Pitmans as a defendant after the limitation period for bringing a new claim against Pitmans had expired. That was not (he said) properly explained to the court in the claimants' application. In addition, he noted that the consequence of the repeated extensions of time was that by the time the claim form was finally served it was almost 15 years after the cause of action had accrued, and (even on the claimants' case) around five years after they had obtained the requisite knowledge for s. 14A of the Limitation Act. His submission was that this was an important consideration which should have weighed against the grant of a further extension of time.
103. I do not accept those submissions. The circumstances in which repeated extension of time orders were sought and obtained, largely with the agreement of BDBP, is set out



above. It is apparent that the extensions of time were driven by three central factors. The first was that the first of the two original defendants (and, on the claimants' case at the time, the primary defendant) had been dissolved and not yet restored to the register. When Adcamp was eventually restored to the register, it was (for reasons which remain unknown) two months before the claimants were informed of that. The second factor was that BDBP and its solicitors RPC did not produce the client files relating to the matter until October 2022, despite those files having been requested by the claimants in June 2021, and despite repeated chasing on the part of the claimants in the intervening period. The third factor was the four-month delay in the service of BDBP's full response to the letter of claim, again in the face of repeated chasing by the claimants.

104. Mr Wood did not contend that there was any reasonable justification for the delay in producing the client files. The files eventually produced amounted to around 350 pages of documents. It is quite extraordinary that it took BDBP and RPC over 15 months to collate those documents and provide them to the claimants. Nor has any explanation ever been given for the delay in BDBP's response to the letter of claim, which was not provided until the end of February 2023.
105. What Mr Wood did say was that once the client files were provided to the claimants, they should have reviewed them and alighted upon the mistaken identity of the defendants earlier than they did. The problem was, however, that the claimants did not know that there was a problem with the identification of Adcamp as the entity which had given the relevant advice. The issue was therefore an "unknown unknown", and the claimants' initial review of the client files was not carried out with that point in mind, as Mr Colledge confirmed in his witness statement for the purposes of this hearing.
106. The claimants' belief as to the correctness of their identification of Adcamp was, moreover, reinforced by BDBP's response to the letter of claim, which likewise asserted that Adcamp was the entity that had been asked to advise on the issue in dispute. That response had (presumably) been prepared following a review of the same client files by BDBP and RPC, who had (presumably) not discovered anything in the files to suggest that the advising entity was in fact Pitmans rather than Adcamp.
107. In those circumstances, I do not think that the claimants can fairly be criticised for the time taken to identify the issue with the names of the defendants. It is certainly not the case that the claimants failed to review the client files after they were obtained. In fact, as Mr Colledge explained in his evidence, after his initial review of the client files when they were first received, he subsequently reviewed them again on two further occasions. It was only the second of those reviews, at some point prior to August 2023, which led him to reconsider the names on the claim form.
108. Having identified the issue and raised it in correspondence with the defendants on 7 August 2023, I do not consider that the claimants thereafter delayed matters unreasonably. It is apparent from the correspondence that the claimants were seeking to resolve various procedural matters, including the question of whether RPC had instructions to act for Adcamp and Pitmans. RPC replied to the claimants' questions on a notably unhurried basis, and by the time that the claimants filed their application to the court for an extension of time RPC had still not confirmed its instructions to act on behalf of either Adcamp or Pitmans.



109. Mr Wood said that Mr Colledge’s witness statement in support of the claimants’ application for an extension of time did not state, in terms, that the claimants intended to use that extension of time to amend the names of the defendants. Again, I do not think that is a fair criticism. Mr Colledge’s witness statement explained that the further short extension of time was sought in order to allow the parties to correspond on and resolve outstanding points of procedure as set out in the correspondence between the parties from 7–16 August. That correspondence was exhibited to the witness statement, and the proposed change of defendants was a central issue on the face of that correspondence.
110. Accordingly, applying the test set out in *Kuznetsov*, I have not identified a good reason for disagreeing with the decision to grant the August 2023 extension of time. On the contrary, there were good reasons for the claimants’ application for that extension of time, and the claimants explained those reasons properly in their evidence in support of that application. The period which had by then accrued between the cause of action and the service of the claim form was simply a consequence of the succession of extensions of time, and was not in itself a reason to refuse a further extension of time. I would therefore have rejected Mr Wood’s challenge to the August 2023 order, if that had arisen for determination.

Application to disallow the substitution of Pitmans

Summary of the issue

111. It follows from my conclusions on the second and third issues that I do not consider that Pitmans has either the standing to apply to set aside the extension of time orders, or good grounds for saying that the February 2022 or August 2023 orders should be set aside in any event. The extension of time orders were in my judgment properly made and the claim was therefore served in time. The real question is whether the substitution of Pitmans as a defendant should be disallowed by the court pursuant to r. 17.2, in all the circumstances of this case.
112. It is common ground that an application under r. 17.2 to disallow an amendment substituting a party may be made on the grounds that if the court’s permission to amend had been necessary, permission would not have been granted. That does not mean that if permission would not have been granted it will invariably be appropriate to make an order disallowing a r. 17.1(1) amendment. The question whether permission would have been granted for the relevant amendment is, however, a highly material factor in the exercise of the court’s discretion in an application under r. 17.2.
113. In the present case, there is no dispute that Pitmans was added as a defendant after the expiry of the s. 14A Limitation Act period of three years from the claimants’ knowledge required to bring an action for damages. If the court’s permission to add Pitmans had been required, therefore, r. 19.6 would have been applicable. As set out above, that allows the court to add or substitute a party if the relevant limitation period was current when the proceedings were started (which is the case here) and if the addition or substitution is “necessary”: r. 19.6(2). Under r. 19.6(3), the addition or substitution of a party is necessary only in certain defined circumstances, the relevant



circumstance here being that the new party is substituted for a party named in the claim form in mistake for the new party.

114. The naming of an LLP as the defendant to a claim for solicitors' negligence, in the mistaken belief that the LLP provided the services said to have been performed negligently, failing to recognise that the services were in fact provided by the former partnership, is a mistake for which the court can grant relief under the provisions set out above: *Insight Group v Kingston Smith* [2012] EWHC 3644 (QB), [2014] 1 WLR 1448, §§56–7.
115. Mr Wood did not dispute that the mistake in the present case was a mistake falling into that category, such that r. 19.6(3) would in principle apply. His submission was that the court should nevertheless disallow the substitution on the grounds of delay and the consequent prejudice to Pitmans. In his written submissions following the hearing he added that if the court concluded that Pitmans did *not* have standing to apply to set aside the extension of time orders, that would be a further powerful reason to disallow its substitution under r. 17.2.
116. Mr Lawrence disputed those submissions and contended that the defendants' application should be refused in circumstances where Pitmans was the proper defendant, and where the entities which carried on the practice of the former partnership had been on notice since 2021, with the same insurer standing behind all of them.

Discussion and conclusions

117. In *Insight v Kingston*, Leggatt J found that the justice of the case was overwhelmingly in favour of ordering substitution in circumstances (very similar to the present) where the claimant's solicitors had mistakenly believed the relevant LLP to be the correct defendant to the claim. Relevant factors included the fact that the mistake was also made by the LLP's solicitors, who carried on correspondence for over two years on the footing that the LLP was the correct defendant (§106), and that the delay in bringing the claim was partly caused by the defendant's failure to provide a timely response to the letter of claim (§110). Any delay in making the application to amend, after the claimant's solicitors had realised that they had named the wrong defendant, was a minor factor in the overall balance of considerations (§111).
118. There was, moreover, no prejudice to the new defendant, because those representing the partnership had been aware of the claim since long before the proceedings were issued and had themselves contributed to the error; it was also assumed that the partnership had the same insurance cover as the LLP. The "commercial reality" was therefore that the change of party had made no difference to the defence of the claim. The opposition to substitution was therefore a purely technical point, which if successful would give a windfall to both the partnership and the LLP (§112).
119. The decision in *Insight v Kingston* was considered and distinguished by HHJ Walden-Smith in *American Leisure v Olswang* [2015] EWHC 629 (Ch), on which Mr Wood placed considerable reliance. In the *Olswang* case the court upheld a decision to refuse permission to amend the name of the defendant to a solicitors' negligence claim from



Olswang LLP to Olswang, the former partnership. Particular features justifying that decision included the facts that the claim form was issued only days before the limitation period expired, that the particulars of claim were issued only days before the end of the four-month period after issue of the claim form, and that the claimant had failed to enter into any correspondence with either Olswang LLP or Olswang prior to issuing the proceedings, such that the defendants had had no opportunity to correct the error regarding the identity of the correct party (§57). It was noted that within weeks of service of the claim on Olswang LLP, their solicitors wrote to the claimants pointing out the error, but it then took the claimants more than three months to apply to substitute Olswang for Olswang LLP (§§17–22 and 60–1). The court also referred to the prejudice to the former partners of Olswang, who would have individual personal exposure to an “enormous” damages claim if they were deprived of their limitation defence by being substituted as defendants in the claim (§66).

120. While helpful guidance may be obtained from the earlier authorities as to exercise of the court’s discretion in the application of r. 17.2 (or r. 19.6 as the case may be), each case will turn on its own facts. In the present case, I do not consider that the claimants delayed to such an extent as to justify an order disallowing the substitution of Pitmans. The claim form was issued well within what was (on the claimants’ case) the expiry of the s. 14A limitation period, and the claimants then commenced pre-action correspondence with the defendants’ solicitors. The delays thereafter were, as I have already found, not caused by dilatoriness on the part of the claimants, but were rather primarily due to the delay in restoration of Adcamp to the register, a very significant (and unexplained) delay in provision of the client files by BDBP, and a further (likewise unexplained) delay by BDBP in responding to the letter of claim. The chronology of the proceedings shows that the claimants pursued their claim with reasonable diligence, repeatedly asking for the client files from BDBP, eventually serving their letter of claim before the client files had been received by them, and then repeatedly requesting BDBP’s response to that. I have also already found that there were good reasons for the extension of time in August 2023.
121. It is of course true that the effect of the operation of s. 14A of the Limitation Act and the extensions of time agreed and subsequently ordered is that the claim was eventually served on Pitmans around 14–15 years after the alleged negligent advice. But that is not a particularly unusual feature in a case in which reliance is placed on the extended time limit for bringing a negligence claim under s. 14A. The present case is moreover, for the reasons given above, not one in which the claimants “dealt with everything at the last moment”, as Walden-Smith J found to be in the case in *American Leisure v Olswang*. Mr Wood referred to the s. 14B Limitation Act longstop date of 15 years from the last of the dates on which the alleged negligent acts or omissions occurred, but the present claim was issued some years before the expiry of that date.
122. Mr Wood contended that there were ways in which the claimants could have identified Pitmans as the correct defendant earlier than they did. With the benefit of hindsight, there were no doubt steps which could have been taken which might have enabled the claimants to identify Pitmans as the entity which gave the advice. Mr Colledge’s evidence explained, however, that his initial Companies House search revealed that Adcamp had been incorporated on 19 June 2008 (then under the name of Pitmans (UK) LLP). Given that incorporation date, he had concluded that this was the entity which



had given the advice to the claimants in 2008/9. What he did not know was that Adcamp had remained dormant at that stage, nor did he at that stage have sight of various documents referred to by the defendants which might have indicated that the claimants were dealing with the former partnership.

123. I do not consider that explanation to be either implausible or unreasonable. Notably, as with the *Insight v Kingston* case, and by contrast with the facts of *American Leisure Olswang*, during the entirety of the correspondence between June 2021 and August 2023, BDBP's solicitors RPC likewise proceeded on the basis that Adcamp was the entity which had been instructed by the claimants in 2008/9, confirming the point in the full response to the letter of claim. The error in naming Adcamp was not identified by BDBP or RPC, but by the claimants' solicitors. I have already found that once that error was identified, the claimants did not unreasonably delay the amendment and service of the claim form and particulars of claim.
124. Some reference was made to the fact that three of the 13 individuals served with the claim remain partners of BDBP. Those individuals might, therefore, be expected to have been aware of the claim following the pre-action correspondence. I do not regard that as a significant factor in my assessment, given that the majority of the individuals served were not in that position. What is more important is that BDBP, Adcamp and now Pitmans are and have been represented by the same set of solicitors, and are also covered by the same insurers. The situation is therefore precisely the same as in *Insight v Kingston*, in that the commercial reality is that the substitution of Pitmans will make no difference to the defence of the claim.
125. Mr Wood noted that of the 13 individuals served with the claim against Pitmans, four are no longer practising solicitors and several of them have health problems. The latter point was addressed in the defendants' further evidence filed on the morning of the hearing, and no objection was raised by the claimants to that evidence being before the court. What was, however, conspicuously not said by the defendants (either in their evidence or in Mr Wood's submissions) was that the passage of time had made it difficult for Pitmans to obtain the evidence required by it to defend the claim. That is not surprising, given that RPC has been aware of the substance of the claim since June 2021, and was able to obtain from BDBP what turned out to be a fairly small file of documents relating to the matter. The identity of the relevant partner of Pitmans responsible for the advice given in 2008/9 is not in dispute; that person remains a practising solicitor (albeit not at BDBP); and it has not ever been suggested that there has been any difficulty in obtaining evidence from him (in so far as necessary) for the purposes of these proceedings.
126. I was told that the insurance policy covering the defendants, including Pitmans, is subject to an excess of £100,000. That excess is relatively modest, particularly when divided between the 12 individuals (after the removal of Mr Davies) alleged to have been partners of Pitmans at the relevant time. There is no evidence of any particular hardship which is or may be suffered by any of those individuals, if they were required to pay their share of that excess; nor is there evidence before me as to the availability (or unavailability) of any indemnity as against BDBP for the payment of that excess. On that basis I do not think that the insurance excess can be given any significant weight in the assessment.



127. In all of these circumstances Mr Wood's submission that the partners of Pitmans should "not be vexed" by this matter goes nowhere. Most defendants do not wish to be vexed by a claim against them. That is not a reason to disallow the substitution of a defendant. What is relevant is whether the substitution of the defendant causes any real prejudice to that defendant, over and above the normal consequences for any defendant who has to address a claim made against it. None has been identified.
128. Nor does Pitmans' inability to apply to set aside the extension of time orders assist it in this regard. This is not a situation where Pitmans is materially prejudiced by orders which were improperly made but which it is unable to challenge. Rather, for the reasons set out above, those orders were properly made and Pitmans is unable to demonstrate that they have led to any relevant prejudice to its position.
129. In conclusion on the final issue, therefore, I do not consider that it would be appropriate to exercise my discretion to disallow the substitution of Pitmans pursuant to r. 17.2. This is a claim which the claimants have pursued with reasonable diligence, and the delays have largely not been of their making. BDBP, the successor to Pitmans, has been aware of the claim since June 2021, and a single set of solicitors and single insurer stands behind both the former and the new defendants to the proceedings. No real prejudice has been identified as arising from the substitution of Pitmans as the correct defendant. In all the circumstances it is clearly in the interests of justice for the claim to be allowed to proceed against Pitmans. Any contrary conclusion would give Pitmans an unjustified windfall.

Conclusion

130. For the reasons set out above, my conclusions are as follows:
- i) In order to argue that the claim should be struck out on the grounds that the orders extending time for service of the claim form should be set aside, the defendants should have disputed jurisdiction on their acknowledgement of service form, and should have expressly raised a r. 11 application contesting jurisdiction in their strike out application. It is, however, appropriate to grant relief under r. 3.10 to correct the defendants' failure to do so.
 - ii) In relation to the February 2022 order, Adcamp had a right to apply to set aside that order under r. 3.3(5), but BDBP did not. Pitmans did not have standing under r. 3.3(5) to apply to set aside any of the extension of time orders made before it became a party. The question of an extension of time for Pitmans' set aside application therefore does not arise.
 - iii) The merits of the Pitmans' applications to set aside the February 2022 and August 2023 orders therefore do not arise for determination. If it had been necessary to decide those issues, however, I would have rejected Pitmans' challenges to both orders.
 - iv) I reject Pitmans' application to disallow its substitution as a defendant.



131. The defendants' application to strike out the claim against Pitmans is therefore dismissed. As already indicated, however, the application to strike out the claim against Adcamp is not opposed; and it is common ground that Mr Davies will be removed from the claim.