Neutral Citation Number: [2017] EWHC 3377 (Comm)

Case No: CL-2016-000523

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th December 2017

Before :

MR ANDREW HENSHAW QC
(sitting as a Judge of the High Court)

- -

Between :

ROSGOSSTRAKH LIMITED	**Claimant**
- and -	
(1) YAPI KREDI FINANSAL KIRALAMA A.O.	**Defendants**
(2) MEHTAP DENIZCILIK SAN. VE TIC. LTD. STI	

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Saira Paruk (instructed by **Campbell Johnston Clark Limited**) for the **Claimant**
Chris Smith (instructed by **Norton Rose Fulbright LLP**) for the **First Defendant**
The Second Defendant did not appear and was not represented

Hearing date: 7 December 2017
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Andrew Henshaw QC:

(A) INTRODUCTION

1. The Claimant applies by notice dated 30 May 2017 for permission to amend the claim form and Particulars of Claim, after expiry of the applicable limitation period, "*to reflect the correct name of the Claimant, namely "Rosgosstrakh Insurance Company (Public Joint Stock Company)"*, on the ground that "*as a result of a mistake, the incorrect name for the Claimant was used on the statements of case. This mistake was genuine and was not intended to and did not mislead the Defendants in any way.*"

2. The application was originally made under CPR 17.4, but the Claimant notified the First Defendant by email dated 5 October 2017 of its intention also to make the application under CPR 19.5; and the First Defendant has not objected to the expansion of the application in that manner. The Second Defendant has not yet been successfully served with these proceedings and has taken no part in the application.

3. At the hearing on 7 December 2017 I granted the Claimant's application, indicating that my reasons would follow. This judgment sets out my reasons.

(B) BACKGROUND TO THE LITIGATION

4. The currently-named Claimant, Rosgosstrakh Limited, underwrote a protection and indemnity ("***P&I***") policy in respect of the MV *Medy* bearing policy number 53/10/33/938 dated 27 May 2010 ("***the Policy***"). The assureds under the Policy were stated as being the First Defendant as owner and the Second Defendant as manager. Both Defendants have their registered offices in Turkey.

5. The First Defendant is a financing institution, and at all material times was the registered owner of the vessel. The Second Defendant was the lessee of the vessel pursuant to a transaction between the defendants originally concluded in or around 28 February 2007 ("***the lease***").

6. As a result of an incident that led to the sinking of the vessel on 1 September 2010, the Claimant says it paid out to or on behalf of the assureds approximately US$1,550,000 pursuant to the Policy.

7. However, the Claimant later became aware of the existence of the lease, which it says was in substance a bareboat charter and was a material circumstance that ought to have been but was not disclosed to the Claimant, and which induced the Claimant to underwrite the risk on the relevant terms. The Claimant alleges that it was entitled to avoid the Policy by reason of that material non-disclosure, and that it did so on 2 July 2012.

8. By these proceedings, the Claimant seeks the repayment of the sums paid out under the Policy, plus interest, and a declaration of non-liability for any other losses which may be claimed by the Defendants under the Policy.

9. Further, the Claimant alleges that it is not liable for the sums paid out, or for any sums yet to be claimed by the Defendants under the Policy, because the Defendants (or either of them) were in breach of section 39(5) of the Marine Insurance Act 1906 in

that the vessel was put to sea in an unseaworthy state which caused the loss of the vessel and the losses claimed under the Policy.

10. The First Defendant's case is that in accordance with its obligations under the lease, the Second Defendant was obliged to obtain both hull & machinery cover and P&I cover over the vessel. Whilst the lease provided that the First Defendant was to be included as a beneficiary to the hull & machinery cover, there was no provision to that effect in relation to the P&I cover. Accordingly the Second Defendant had no authority to conclude P&I club cover for the *Medy* in the name of the First Defendant.

11. Thus the First Defendant contends that it was not bound by any acts of the Second Defendant in this regard and is not a party to the Policy. Equally, the First Defendant says the claims under the Policy were made not by it but by the Second Defendant alone.

(C) PROCEDURAL HISTORY

12. The claim form was issued on 26 August 2016 seeking repayment of the sums paid out and a declaration of non-liability. In December 2016 permission was granted to serve the claim form and accompanying documents on the Defendants out of the jurisdiction.

13. The claim form, and the application for permission to serve the claim form out of the jurisdiction, were served on the First Defendant on 22 March 2017. In the claim form the Claimant was named as "Rossgosstrakh Limited"[1] and in the application for permission to serve out it was named as "Rosgosstrakh Limited".

14. Particulars of Claim were served on 30 May 2017 and the First Defendant filed its Defence on 11 July 2017. The First Defendant defends the claim primarily on the basis that:

    i) it was not a party to the Policy for the reasons outlined earlier;

    ii) the Policy was a composite rather than a joint policy, and all the payments said to have been made by the Claimant were either made to the Second Defendant or were on account of liabilities owed by the Second Defendant (or, at least, not owed by the First Defendant). Thus, even if the First Defendant was a party to the Policy, and even if it has been legitimately avoided, the First Defendant is not liable to the Claimant for the sums claimed; and

    iii) having had no knowledge of the conclusion of the Policy or involvement in the day to day operations of the vessel, the First Defendant is unable to admit or deny most of the other facts alleged in the Particulars of Claim.

15. As set out in a consent order dated 2 May 2017, the First Defendant agreed not to contest jurisdiction.

[1] Apparently due to a spelling mistake, "Rosgosstrakh" was incorrectly spelt "Rossgosstrakh".

(D) BACKGROUND TO AND EVIDENCE IN THE APPLICATION

16. The Claimant's application was served on 30 May 2017. The application is necessary because, whilst the named claimant Rosgosstrakh Limited entered into the Policy, by the time proceedings were commenced it had ceased to exist by reason of the matters set out below. On the Claimant's case, those matters were not known to the Claimant's solicitor at the time at which he issued the proceedings.

17. With effect from 31 December 2015, Rosgosstrakh Limited underwent a corporate restructuring, the details of which were set out in a notice which the company issued in December 2015 for the attention of its business partners. The notice stated:

> "Hereby, we inform that with effect from the 31st December 2015 Rosgosstrakh Ltd will be joined to Public Joint-Stock Company Rosgosstrakh…by virtue of reorganization through adjunction.
>
> We also confirm that due to this adjunction PSJC Rosgosstrakh will become the full legal successor of Rosgosstrakh Ltd according to Par. 2 of art. 58 of the Civil Code of the Russian Federation.
>
> PJSC Rosgosstrakh will take over all rights and liabilities of Rosgosstrakh Ltd. from 12/31/2015.
>
> Please find below corporate and invoice details of PJSC Rosgosstrakh to use from day when the reorganization of Rosgosstrakh Ltd. will become effective …
>
> …
>
> Please note that reorganization will not affect our contractual relationships. All terms and conditions of the contracts and agreements, including insurance contracts, remain unaffected."

18. Subsequently, with effect from 14 April 2016, PJSC Rosgosstrakh changed its name to Rosgosstrakh Insurance Company (Public Joint Stock Company).

19. The belated discovery of these matters led the Claimant's solicitors Campbell Johnston Clark Limited ("***CJC***") to issue the current application on 30 May 2017, contemporaneously with service of the Particulars of Claim. The application was supported by a witness statement from the relevant partner, Mr Johnston, exhibiting among other things the December 2015 notice quoted above.

20. The First Defendant's evidence is that after service of the application it sought Russian law advice, the gist of which is set out in a letter dated 18 August 2017 from the First Defendant's solicitors Norton Rose Fulbright to CJC, exhibited to the witness statement of Mr Heward of Norton Rose Fulbright. According to the letter, Rosgosstrakh Limited's December 2015 notice indicates that the company underwent a "*reorganization through accession*", a process under which a company "*ceases its*

activity (i.e. ceases to exist), but its rights and obligations are transferred to the company to which it has accessed".

21. Mr Johnson's 2nd witness statement in this action (his first in support of the Claimant's application) stated that the "*incorrect name given on the Claim Form was the result of a genuine mistake*". However, the First Defendant objected that the statement did not satisfactorily explain the mistake or how it came to be made, and in due course Mr Johnston provided two further witness statements, his 3rd and 5th witness statements in this action.

22. Mr Johnston's 3rd witness statement indicates that CJC was instructed by Rosgosstrakh Limited in early 2011, the vessel having been lost in September 2010. The individual instructing CJC at all times was Mr Aleksandr Bilev, a marine claims handler. Attempts to settle the case with the First Defendant were unsuccessful, and with the sixth anniversary of the loss approaching CJC were on 26 August 2016 instructed to issue proceedings (without the need to show the client the claim form in draft). CJC identified the client as the named insurer under the Policy, Rosgosstrakh Limited, and the claim form was issued in that name.

23. Mr Bilev saw the issued claim form after his return from holiday on 13 September 2016, and according to Mr Johnston's statement:

> "noted the incorrect name in the claim form and wrote to me that Rosgosstrakh Limited had changed its name in April 2016 to Rosgosstrakh Insurance Company (Public Joint Stock Company). With service not effected at that time I informed Aleksandr that we would need to amend the Claim Form at a later date to reflect this."

It appears from this evidence that Mr Bilev did not tell Mr Johnston that there had been not merely a change of name in April 2016 but also a corporate reorganisation as at 31 December 2015.

24. In his 5th witness statement, Mr Johnston's confirms that, so far as he is aware, CJC had not been informed about the correct name of the Claimant prior to the issuance of the claim form. He adds that "*the last e-mail which Mr Bilev sent to me before the Claim Form was issued, which I received earlier on 26 August 2016 (i.e. on the day the Claim Form was issued), was signed by Mr Bilev of "Claims dept", "Rosgosstrakh Ltd".*" Mr Johnston also states:

> "I learned of the mistake on 13 September 2016. Mr Bilev informed me that "the name" of Rosgosstrakh Limited "was changed" to Rosgosstrakh Insurance Company (Public Joint Stock Company) and that earlier there had been another "Interim change of name". Mr Bilev thought that we had been informed of the changes, but as explained above I do not believe that we had been informed. I responded that day to tell Mr Bilev that the Claim Form could (i.e. would) be amended."

He further states:

> "If I had known that Rosgosstrakh Limited had become PJSC Rosgosstrakh, which had then changed its name to Rosgosstrakh Insurance Company (Public Joint Stock Company), I would have ensured that the Claim Form was issued in the name of Rosgosstrakh Insurance Company (Public Joint Stock Company). With many years' experience of conducting litigation and arbitration proceedings, I am perfectly aware that proceedings should be issued using the current name of the party with title to sue."

25. It is common ground that the present application was issued after the expiry of the applicable limitation period.

(E) LEGISLATION AND RULES

26. Section 35(4) of the Limitation Act 1980 provides that rules of court may provide for allowing a new claim after a relevant limitation period has expired, but only if the conditions specified in section 35(5) are satisfied and subject to any further restriction the rules may impose.

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

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

> "(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or (b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action."

29. CPR 17.4(3) provides that:

> "The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question."

30. CPR 19.5 provides as follows:

> "(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…"

31. CPR 17.4(3) and CPR 19.5(2) have different fields of application. CPR 17.4(3) is concerned with mere misnomers, where the correct party has been sued (or is suing) but has been inaccurately described. CPR 19.5, by contrast, concerns cases where it is necessary to substitute or add one party for another, see *Lockheed Martin Corp v Willis Group* [2010] EWCA Civ 927, [2010] PNLR 34 at § 16.

32. The predecessor to both provisions was Order 20 rule 5(3) of the Rules of the Supreme Court.

(F) CASE LAW

33. In reviewing the case law a logical starting point is *Sardinia Sulcis*, because (a) the test it set out has, with one modification, been accepted in later cases as the applicable test under CPR 19.5, and (b) its facts resemble those of the present case.

34. The vessel Sardinia Sulcis suffered collision damage while under charter. Its owner was Sardanavi Societa di Navigazione Maritima S.p.A. ("***Sardanavi***"), a wholly-owned subsidiary of Sindicaco Immobiliare Turistico S.p.A. ("***SIT***"). The time charterers were Kawasaki Kishen Kaisha Ltd. ("***KKK***"). The damage occurred during a lightening operation being carried out by the vessel "*Al Tawwab*". The charterers paid the cost of repairs amounting to $443, 914, and brought proceedings in the name of Sardanavi as owners of the vessel to recover the cost of repairs from the owners of the *Al Tawwab*. The writ was issued a few days before the expiry of the applicable limitation period.

35. However, it was subsequently discovered that Sardanavi had merged with SIT in 1980, and that as from the date of the merger SIT took over all Sardanavi's liabilities and obligations, as well as all of its assets and rights including rights to sue. Sardanavi had been "*absorbed*" into SIT, resulting in the extinction of Sardanavi and the transfer of all its rights, titles, debts etc into SIT. The Court of Appeal concluded that this meant Sardanavi had ceased to exist.

36. The Court of Appeal held that the name of the plaintiff could be corrected pursuant to Order 20 rule 5(3) of the Rules of the Supreme Court:

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

37. The court found there had been a genuine mistake. The solicitor handling the case knew that Sardanavi had been incorporated into another company, but it never occurred to him, nor was it ever suggested, that Sardanavi had ceased to exist. His mistake was in assuming that Sardanavi remained the company with the right to sue in

respect of the collision damage. Further, "*mistake*" in O. 20, r. 5(3) was not limited to mistakes without fault.

38. The main focus of the decision was on the requirement ("*condition (3)*") that the mistake not be such as to cause reasonable doubt as to the identity of the person intending to sue. The Court of Appeal cited previous cases including *Evans Constructions Co. Ltd. v. Charrington & Co. Ltd.,* [1983] 1 Q.B. 810, where the plaintiff applied for a new tenancy under s. 29(3) of the Landlord and Tenant Act, 1954. He mistakenly named his former landlord as defendant instead of the current landlord. By a majority the Court of Appeal allowed the substitution. Donaldson LJ said at p. 821:

> "In applying Ord. 20, r. 5(3) it is, in my judgment, important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of and seeking to sue B, but mistakenly describing or naming him as A and thereby ending up suing A instead of B."

and Griffiths LJ said at p. 825:

> "The identity of the person intended to be sued is of course vital. But in this case I have no doubt that the identity of the person intended to be sued was the current landlord, Bass. The wording of the rule makes it clear that it is not the identity of the person sued that is crucial, but the identity of the person intended to be sued, which is a very different matter."

39. After reviewing this and other case law, Lloyd LJ in *Sardinia Sulcis* stated at p207:

> "It is thus established by three or more decisions of the Court of Appeal that a name may be "corrected" within the meaning of O. 20, r. 5(3), even though it involves substituting a different name altogether, and the name of a separate legal entity, and even though it is objected (see per Lord Justice Donaldson in Evans v. Charrington & Co. at p. 822) that the effect of substituting the new name will be to substitute a new party. But the amendment will not be allowed where there is reasonable doubt as to the identity of the person intending to sue or intended to be sued.
>
> The "identity of the person intending to sue" is a concept which is not all that easy to grasp, and can be difficult to apply to the circumstances of a particular case, as is shown by the fact that in two of the cases to which I have referred there has been a dissenting judgment.
>
> In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would

> always be given. So there must be some narrower test. In *Mitchell v. Harris Engineering* the identity of the person intended to be sued was the plaintiff's employers. In *Evans v. Charrington* it was the current landlord. In *Thistle Hotels v. McAlpine* the identity of the person intending to sue was the proprietor of the hotel. In *The Joanna Borchard* it was the cargo-owner or consignee. In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case. Thus if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise. …
>
> Returning to the facts of the present case, there could be no reasonable doubt as to the identity of the person intending to sue, namely, the person in whom the rights of ownership were vested at the date when the writ was issued. That was, as Mr. Connoley says in his affidavit, the whole point of the exercise on which Messrs. Richards Butler had embarked, as the defendants well knew. The description of the intending plaintiffs was clear enough. It follows that Mr. Pertwee's mistake was a mistake as to name, and not a mistake as to identity. I would hold that condition (3) has been satisfied."

40. Stocker LJ agreed with Lloyd LJ and added:

> "Although I agree with the whole of the reasoning of Lord Justice Lloyd I should, for my part, be content to rest my conclusion that the appeal of the defendants be dismissed on the proposition that the writ itself identifies the party intending to sue - viz. the owners of the vessel *Sardinia Sulcis*. At all times the owners of that vessel existed. The only error (assuming it was an error) was the name of the owners. I therefore doubt if amendment of the writ was necessary save for the address - an irregularity only. It was the statement of claim which required a substitution of a different name.
>
> …
>
> From the judgments of Lord Justice Donaldson and Lord Justice Griffiths in the *Evans* case and Lord Justice Russell and Lord Justice Mann in the *Thistle* case a distinction has to be drawn between the "identity" of the party suing or to be sued and the name of that party. In those cases the identity of the party was manifest from the nature of the claims. It seems to me that the reasoning of the majority in those cases applies a fortiori to the instant case where the identity of the party suing is manifest from the writ itself. The appropriate question therefore would have been, had it been asked, "what is the

> name of the plaintiff owners?" The answer given might have been wrong, but the correction of the name would be permitted by the terms of O. 20, r. 5(3) if all the other factors relevant were satisfied.
>
> The difficult question in any given case is to decide whether the application to amend involves the identity of the party suing or only the name of such party. In the instant case, for the reasons I have given, no real problem arises since the identity of the party suing appears on the front of the writ. I agree with Lord Justice Lloyd that the distinction between the identity of a party and the name of that party may present great difficulties - the dissenting judgments in the cases cited indicate the problem. If a solution to the problem is to be stated in terms of general application I do not feel I can improve on the test suggested by Lord Justice Lloyd - can the intending plaintiff or defendant be identified by reference to a description which is specific to the particular case - e.g. landlord, employer, owners or shipowners? If the identification of the person intending to sue or be sued appears from such specific description any amendment is one of name, where it does not it will in many if not all cases involve the description of another party rather than simply the name. The nature of the claim will usually provide the answer to this problem."

41. In *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 2 Lloyd's Rep 474, two Bahamian companies had been dissolved in 1985 and 1986. Their trustee in bankruptcy claimed that all the relevant causes of action against the defendants had been vested in him since, at latest, July 1981. Arbitrations were commenced in 1980 and the awards were issued in April 1984. The two companies were named as claimants in the arbitration, and the defendants objected that the companies were no longer the proper plaintiffs. However, the trustee resisted this and the arbitrator ruled in his favour that *"title to sue is vested in the Trustee and that he correctly brings his suits in the name of the claimant parties"*.

42. The awards were made in favour of the companies as claimants in the arbitration. In 1988 proceedings to enforce the awards were begun, and the companies were again named as plaintiffs. It was then discovered that the companies had been dissolved after the awards were made but before the enforcement proceedings were begun. After the limitation period had expired an application was made to substitute as plaintiff the trustee in bankruptcy in whom the companies' assets were vested.

43. At first instance Judge Diamond QC held that there was no power to permit substitution as *"[t]he decision was taken to sue in the names of the disponent owners, contracting parties and parties to the awards"*. The Court of Appeal affirmed this decision. In reviewing the case law, Evans LJ began by referring to *Sardinia Sulcis* and to *Central Insurance Co. Ltd. v. Seacalf Shipping Corporation ("The Aiolos")* [1983] 2 Lloyd's Rep. 25.

44. The *Aiolos* was an example of a 'mistake of rights'. The plaintiff insurer, relying on subrogation rights, had brought proceedings in its own name against the defendant

vessel-owner for short delivery of cargo. It had mistakenly assumed that the effect of subrogation was to vest title to sue in it, as opposed to entitling it to bring proceedings in the names of its insureds. At pp30-31 of that case Oliver LJ stated

> "No doubt if the fact were that the actual insurer was not the plaintiff, but, say, a subsidiary company, there could or might be a true analogy with that case. But the instant case was not a case, as was the Charrington case, of a mistaken belief that the person made party to the proceedings fulfilled a particular description, videlicet that of landlord or insurer, but a case of an erroneous belief that the plaintiff, because he was in fact what he was thought to be, that is, the insurer, had as a result of that certain legal rights which he did not in fact have. There was therefore no error either as to the name or as to the identity of the party which fell to be corrected, but simply an error of law as to the rights possessed by the correctly identified party. Order 20, r. 5 (3) simply does not extend to this sort of error …"

45. Evans LJ in *International Bulk Shipping* continued:

> "When it is said that the wrong plaintiff has been named, this must be taken as a reference to the intention of the persons who caused the writ to be issued, rather than of the person in fact named. Those persons in the present case were the trustee and his legal advisers. They intended that the plaintiffs should be the companies rather than the trustee or the bankruptcy estate. They were mistaken in thinking that the companies were still in existence and entitled to sue. If they had known the true facts, they would or might well have named the trustee or the bankruptcy estate as sole plaintiff or as a co-plaintiff. But that was a decision as to who the plaintiffs should be, and no doubt for good reasons they chose to assert the companies' rights under the awards, rather than whatever rights the trustee or the bankrupt estates had acquired.
>
> The rule envisages that the writ was issued with the intention that a specific person should be the plaintiff. That person can often but not invariably be identified by reference to a relevant description. The choice of identity is made by the persons who bring the proceedings. If having made that choice they use the wrong name, even though the name they use may be that of a different legal entity, then their mistake as to the name can be corrected. But they cannot reverse their original identification of the party who is to sue. This interpretation of the rule derives not only from the phrase "correct the name of a party" but also from the requirement that the mistake must not have been such as to cause any reasonable doubt as to the identity of the person intending to sue.
>
> …

> The analogy of assignor (the companies) and assignee (the trustee or the bankruptcy estate) is not exact, indeed it may be disputed by the trustee, but it is sufficiently close to be useful here. It was intended that the plaintiff should be the assignor, not the assignee. Although the underlying cause of action is the same, there are additional features of the assignee's claim, not least the assignment itself and the possible consequences for a set-off defence. It is that decision which the trustee seeks to reverse, not merely a mistake as to the name of the person who was identified as the plaintiff.
>
> …
>
> The trustee brought the proceedings in order to assert rights which, he claimed, the companies were entitled to assert in their own names. He was in error as to the extent of those rights. To seek now to assert even the same rights in his own name and on his own behalf whether as trustee or assignee, is to reverse the original decision as to who the plaintiffs should be, by reference to the specific description which is relevant in the circumstances of this case."

46. In *Adelson v Associated Newspapers Ltd* [2008] 1 WLR 585 the Court of Appeal held that when considering an application under CPR 19.5, the following principles applied:

> "(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."

47. The Court of Appeal noted that the *Sardinia Sulcis* had been applied in cases under CPR 19.5(3)(a), and concluded:

> "56 The nature of the mistake required by the rule is not spelt out. This court has held that the mistake must be as to the name

> of the party rather than as to the identity of the party, applying the generous test of this type of mistake laid down in *The Sardinia Sulcis*. …
>
> 57 Almost all the cases involve circumstances in which (i) there was a connection between the party whose name was used in the claim form and the party intending to sue, or intended to be sued and (ii) where the party intended to be sued, or his agent, was aware of the proceedings and of the mistake so that no injustice was caused by the amendment. In the SmithKline case [2002] 1 WLR 1662, however, Keene LJ accepted that the Sardinia Sulcis test could be satisfied where the correct defendant was unaware of the claim until the limitation period had expired. We agree with Keene LJ's comment that, in such a case, the court will be likely to exercise its discretion against giving permission to make the amendment."

48. The court's discussion of *Sardinia Sulcis* also included the following passage:

> "[37] … In The Sardinia Sulcis [1991] 1 Lloyd's Rep 201 the ship Sardinia Sulcis was damaged by the *Al Tawwab* in the course of a lightening operation. The charterers of the *Al Tawwab* paid for the damage to be repaired and became subrogated to the owners' rights against the owners of the *Al Tawwab*. They brought proceedings in rem in the name of "the owners of the *Sardinia Sulcis*". By the time that they did so, however, the owners had assigned their rights to another company, the demise charterers of the vessel. The issue was whether the name of the demise charterers could be substituted for that of the owners pursuant to RSC Ord 20, r 5. This court held that they could. Lloyd LJ, at pp 205–206, summarised the criteria that had to be satisfied under that rule:
>
> > "The first point to notice is that there is power to amend under the rule even though the limitation period has expired: see Ord 20, r 5(2). The second point is that there is power to amend, even though it is alleged that the effect of the amendment is to add a new party after the expiration of the limitation period. But the court must be satisfied (1) that there was a genuine mistake, (2) that the mistake was not misleading, (3) that the mistake was not such as to cause reasonable doubt as to the identity of the person intending to sue, and (4) that it would be just to allow the amendment."
>
> 38 The basis upon which the court found that these criteria were all satisfied is perhaps questionable. In particular, Lloyd LJ made the following comment, at p 207: *"The 'identity of the person intending to sue' is a concept which is not all that easy to grasp, and can be difficult to apply to the circumstances of a particular case …"* …"

> He then went on to consider the test to be applied to ascertain "the person intended to be sued" …"

The Court of Appeal then quoted the passage from *Sardinia Sulcis* starting *In one sense …*", quoted in § 39 above, and stated *"This has become known as 'the test in the Sardinia Sulcis'"*.

49. The Court of Appeal in *Lockheed Martin v Willis Group* [2010] EWCA Civ 927 confirmed, *obiter*, that the requirement under former RSC Order 20 rule 5 that the mistake must not be misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or be sued, does not apply under CPR 19.5. Instead, the *Sardinia Sulcis* test under that rule is

> "properly confined to the substantive test that it is possible to identify the intending claimant or intended defendant "*by reference to a description which was more or less specific to the particular case*" (per Lloyd LJ at 207 …). That after all will ensure that the court can be satisfied that a genuine mistake has been made and that the mistake in question has caused the wrong party to be named." (§ 41)

50. In *Insight Group v Kingston Smith* [2012] EWHC 3644, Leggatt J reviewed the authorities again, and permitted substitution of the claimant in a professional negligence claim incorrectly commenced against an LLP rather than the partnership whose business the LLP took over. Leggatt J said in this context:

> "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)."

51. Leggatt J's judgment also included commentary on *Sardinia Sulcis*, describing it as a case where *"the proceedings were mistakenly brought in the name of the owners of the ship Sardinia Sulcis, when the owners had in fact assigned their claims to another party"* (§ 29). Leggatt J went on to state:

> "45 In practice, as was noted in the Morgan Est case [2005] 1 WLR 2557, para 20 and the Adelson case [2008] 1 WLR 585 , para 43, the courts have adopted a generous interpretation of

what can be treated as a mistake as to name. This is illustrated by the result of The Sardinia Sulcis [1991] 1 Lloyd's Rep 201 itself. When Lloyd LJ came to apply his test he said, at p 207:

> "Returning to the facts of the present case, there could be no reasonable doubt as to the identity of the person intending to sue, namely, the person in whom the rights of ownership were vested at the date when the writ was issued … The description of the intending plaintiffs was clear enough. It follows that Mr Pertwee's mistake was a mistake as to name, and not a mistake as to identity."

As Jacob LJ observed in Morgan Est [2005] 1 WLR 2557, para 20, this is very close to saying that the relevant description amounted to the person who had the right to sue."

and

"48 It is not easy to distinguish the facts of the International Bulk Shipping case from those of The Sardinia Sulcis [1991] 1 Lloyd's Rep 201. In The Sardinia Sulcis the person responsible for issuing the proceedings was mistaken in believing that the right to sue remained vested in the owners of the vessel, being unaware that the right had been assigned. In the International Bulk Shipping case the mistake made was also in thinking that the companies were still in existence and entitled to sue when the right of action had been transferred to another party. However, in the former case substitution was allowed whereas in the latter case it was held to be impermissible as the error was one as to the rights of the original party.

…

52 It is not easy to derive from these authorities any clear guidance as to where and how the line is to be drawn between those mistakes which on the Sardinia Sulcis test the court has power to correct by substitution and those which it does not. It seems to me, however, that the only way in which the Sardinia Sulcis test is workable at all is to identify the relevant description of the intended claimant or defendant by reference to what description is material from a legal point of view to the claim made. For example, in the SmithKline case [2002] 1 WLR 1662 the claim was founded on the Consumer Protection Act 1987 which gives a right to a person injured by a defective product to recover compensation from the producer of the product. It was thus material to allege that the party sued was the producer of such a product. On the other hand, the fact that the product was a vaccine and identity of the batch from which it came were not material to the existence of the cause of action and are therefore not essential facets of the description of the party whom the claimant intended to sue.

53 If one leaves aside the puzzling reference to the Rodriguez case [1967] 1 QB 116, the descriptions given as examples by Lloyd LJ in The Sardinia Sulcis [1991] 1 Lloyd's Rep 201 — of employer, landlord, property owner and cargo owner— were all of this kind. A person who is an employer or a landlord or who owns property or cargo carried on board a ship acquires by virtue of that role a set of legal rights and obligations which will generally be material to the claim made in the action. Thus, where for example the defendant is sued for breach of a duty owed by reason of being the claimant's employer, or landlord, then that will be the relevant description of the intended defendant, and if the claimant turns out to have been mistaken in thinking that the person sued fitted that description because the actual employer or landlord was someone else, the mistake can be characterised as one as to name.

54 The clearest case in which the Sardinia Sulcis test was held not to be satisfied is the International Bulk Shipping case [1996] 1 All ER 1017 . The claims in that case were brought to enforce arbitration awards and were founded on the fact that the plaintiffs had obtained arbitration awards in their favour against the defendant. The assertion of this fact was sufficient to plead a cause of action and was therefore the relevant description of the intended plaintiffs. The companies named as the plaintiffs in the writ satisfied that description. There was accordingly no mistake “as to name”. The mistake made was in overlooking the fact that the companies had subsequently been dissolved and their rights had passed to their trustee in bankruptcy. The error was accordingly classified as one as to the legal rights of the person intending to sue, which was outside the scope of the rule.

55 In his concurring judgment in The Sardinia Sulcis [1991] 1 Lloyd's Rep 201, Stocker LJ said, at p 209:

> “I agree with Lloyd LJ that the distinction between the identity of a party and the name of that party may present great difficulties. If a solution to the problem is to be stated in terms of general application I do not feel I can improve on the test suggested by Lloyd LJ—can the intending plaintiff or defendant be identified by reference to a description which is specific to the particular case—eg landlord, employer, owners or shipowners? … The nature of the claim will usually provide the answer to this problem.”

I respectfully agree that, if it is necessary to draw this distinction, it may be impossible to improve on the Sardinia Sulcis test, seen as a method for distinguishing in effect between errors of fact and law. The difficulties in drawing the distinction, however, seem to me to be at least three. The first is that the distinction between what counts as an error of fact and

> one of law can itself be elusive. Second, even where the distinction can in principle be drawn with reasonable clarity, there may be considerable practical and evidential difficulty in identifying the precise nature of the mistake made by the person responsible for preparing the claim form—not least because the mistake may often have arisen as a result of the failure of that person to give the matter any proper thought. The third difficulty is that it is not clear why it should matter which type of mistake was made. There is no obvious rationality in drawing a distinction between mistakes of fact and mistakes of law in this context any more than there is in other contexts, such as the recovery of money paid under a mistake, where a similar distinction has been abolished or questioned in recent years."

52. Leggatt J's conclusion on the case before him was:

> "83 … the proper conclusion to draw from the evidence is that the LLP was named in the claim form as the defendant to the action in the mistaken belief that it had provided the professional services which were the subject of the claim. The mistake was therefore as to which body satisfied the description of auditor of the second claimant and provider of fiduciary services in relation to the Nevis entities during the relevant period. It was not simply an error of law as to the legal liability of the LLP for prior negligence of the firm. The mistake accordingly satisfies the Sardinia Sulcis test."

This passage provides a further illustration, comparable to the *Aiolos* case referred to earlier, of the meaning of mistake of rights or law in this context. Had the LLP been named because the person commencing the proceedings had wrongly formed the view that as a matter of law the LLP was liable for negligence committed by the predecessor firm, then the mistake would not have qualified under CPR 19.5.

(G) SUMMARY OF THE PARTIES' SUBMISSIONS

53. The Claimant submits that permission to substitute Rosgosstrakh Insurance Company (Public Joint Stock Company) as claimant should be granted. The mistake was a genuine one. At the time the claim form was drafted and issued, Mr Johnston was not aware of the change, and even if his firm had received notification of its client's change of name, he did not recall it. The description of the Claimant has at all times been clear and unequivocal, and there has been no suggestion from the First Defendant that the mistake led to any confusion. The present case is directly comparable to the facts of *The Sardinia Sulcis.* If the substitution is permitted, it will (as in *Sardinia Sulcis*) relate back to the date of commencement of proceedings such that there will never have been a non-existent claimant.

54. The First Defendant submits that the Claimant cannot show the existence of a mistake of the kind required to engage CPR 17.4 or 19.5. On the basis of the principles set out above, the Claimant needs to establish that the parties responsible for drawing up the Claim Form:

> (1) Correctly identified the description of the party who was to be "claimant", i.e. the insurer under the P&I Policy.
>
> (2) Named Rosgosstrakh Limited as the Claimant on the Claim Form in the mistaken belief that that entity had in fact been the insurer under the P&I Policy, when in fact it was another party that had adopted that role.

55. The First Defendant submits that in this case *"It appears that CJC/those instructing them had in mind that the description of the claimant was the insurer under the P&I policy at the time the Claim Form was issued. However, there was no mistake as to who the insurer was under the P&I Policy. The relevant mistake was as to whether Rosgosstrakh Limited had retained its rights qua insurer. This is not a mistake as to name though, and so the application must fail."*

56. The First Defendant contends that the decision in *The Sardinia Sulcis* was, on its facts, wrong and that whilst the test laid down in that case is regarded as good law, subsequent authorities have been critical of the actual result that was reached in that case. The First Defendant refers to the comments in *Adelson, Morgan Est (Scotland) Ltd* and *Insight Group* quoted earlier.

57. The First Defendant submits that *Sardinia Sulcis* does not bind this court to reach the same result unless the facts of the present case are identical to those in *Sardinia Sulcis.* It says the claimant in *Sardinia Sulcis* sued in the name of party A, the shipowners, thinking that the right to sue vested in that party and being unaware that it had been assigned to party B; thus the claimant named the exact party that it had intended to name, and the error that it made was as to the shipowners' actual rights.

58. Similarly, the First Defendant argues, in the present case the party intending to sue was the insurer under the P&I policy. The originally named claimant satisfied that description and there was no mistake as to "name". Rather, the relevant mistake was the oversight of the fact that the named Claimant had been dissolved and its rights had passed to another entity. This was an error going to the legal rights of the person intending to sue, and, as *International Bulk Shipping* confirms, such a case falls outside the rule in the *Sardinia Sulcis.* If a claim is made in the name of a party in ignorance of the fact that that person's rights have by the time of the claim form been assigned to a third party, then the mistake is a mistake as to rights so no substitution can be made under CPR 19.5.

59. It is inherent in these submissions, and the First Defendant expressly submitted in oral argument, that the intended claimant here was the original insurer under the policy as opposed to the insurer as at the date of the claim form. Thus, in applying the *Sardinia Sulcis* test, the relevant description of the intended claimant was simply the original insurer under the policy as distinct from any successor or assignee.

60. Finally, to the extent that this application can legitimately be made pursuant to CPR 17.4, the First Defendant submits that the Claimant cannot satisfy the requirement that the mistake is not one which could have caused reasonable doubts as to the identity of the Claimant. The First Defendant had limited knowledge about the Policy, and when it received a claim form in the name of Rosgosstrakh Limited it would not have

appreciated that that company no longer existed and/or who the true claimant was intended to be.

(H) DISCUSSION

61. I agree with the First Defendant that as the proposed substitution would involve the substitution of a new entity as claimant, the case does not fall within CPR 17.4. Counsel for the Claimant did not press this aspect of the application at the hearing.

62. The position is different, however, under CPR 19.5. Applying the *Sardinia Sulcis* test, the identity of the person whom the solicitors intended should sue was in my judgment the insurer under the policy, meaning the entity which as at the date of the issue of the claim form was the insurer under the Policy detailed in the claim form (or who would, but for a valid avoidance of the Policy, have been the insurer). That is consistent with Mr Johnston's evidence that the intended claimant was "*the P&I insurers of the policy with the date and number stated in the Claim Form*" (3rd witness statement § 22) when read alongside the documentary evidence, particularly the claim form itself (as later reflected in the Particulars of Claim).

63. The claim form as issued on 26 August 2016 included claims for recovery of sums paid out prior to the notice of avoidance, and the claim that *"Further or alternatively, the Claimant is not liable for the sums paid out under the Policy or for any sums yet to be claimed as the Defendants or either of them was in breach of section 39(5) of the Marine Insurance Act 1906"* because the vessel was sent to sea in an unseaworthy state. These claims were later reflected in the Particulars of Claim dated 30 May 2017, which allege that Rosgosstrakh Limited "*was at all material times the P&I underwriters*" of the vessel pursuant to the policy (§1), that the Claimant avoided the policy on 2 July 2012, and that the Claimant claims "*the repayment of the sums paid out under the Policy*"; and which seek "*a declaration of non-liability for any other losses which may be claimed by the defendants under the Policy*" (§ 14).

64. The claims in the claim form, and (so far as relevant) those later set out in the Particulars of Claim, are incompatible with the suggestion that the intended claimant was, or at least was confined to, the entity that originally issued the policy as opposed to any different entity who as at the date of issue of the claim form may have been the policy insurer. The claim form and the evidence as a whole indicate that Mr Johnston when issuing the claim form did intend to bring proceedings on behalf of the current insurer under the policy.

65. Equally, if one applies the approach set out by Leggatt J in *Insight Group* §§ 52-53, the present claim is founded on a policy of insurance, under which the claimant insurer seeks recovery of sums allegedly wrongly paid out and a declaration of non-liability for future claims under the policy. The relevant description of the intended claimant is, or at least includes, the insurer under the policy as at the date of the claim form. As at that date there was only one possible entity fitting that description, namely Rosgosstrakh Insurance Company (Public Joint Stock Company).

66. In these circumstances it would be highly artificial to classify this as a case where the legal representative has made no mistake as to the intended party but, rather, a mistake as to legal rights. Such a contention might conceivably have had some merit if, for example, Mr Johnston had been aware when he issued the claim form that

Rosgosstrakh Limited had been joined to Rosgosstrakh Insurance Company (Public Joint Stock Company) by way of adjunction, but had wrongly assumed that in law Rosgosstrakh Limited remained the insurer under the policy and for that reason chose to issue the claim form in the name of Rosgosstrakh Limited rather than Rosgosstrakh Insurance Company (Public Joint Stock Company): though even then it would have been necessary for the First Defendant to find a relevant ground of distinction from *Sardinia Sulcis* itself. But those are not the facts of this case.

67. Moreover, as counsel for the Claimant postulated during oral argument, it may be illuminating to consider the position if the roles had been reversed and the First Defendant ("***YKFK***") as insured had issued proceedings against Rosgosstrakh Limited in respect of a claim made under the policy, unaware of the reorganisation through adjunction. Could it be contended that, having identified the original issuer of the policy as Rosgosstrakh Limited and having correctly named that entity in the claim form, YKFK would have made no mistake as to the identity of the defendant but only a mistake as to legal rights/obligations, with the result that an application under CPR 19.5 to substitute Rosgosstrakh Insurance Company (Public Joint Stock Company) would have failed? In my view it would not have failed. The position would have been that YKFK had intended to sue the insurer under the policy, but due to a mistake of fact (its ignorance of the reorganisation) had named the wrong entity by referring to the original unadjoined entity rather than the merged entity. I consider that also to be the position where, as in the present case, it is the claimant's solicitors who have made the error.

68. Further, the material facts of the present case are in my view indistinguishable from those in *Sardinia Sulcis*, save that in one respect they are *a fortiori* the facts of that case. In *Sardinia Sulcis* the claimant's solicitors commenced proceedings in the name of Sardanavi as owner of the vessel, realising that the company had merged but not realising that as a result it had ceased to exist with all its rights and obligations being assumed by the SIT. In the present case, the Claimant's solicitors commenced proceedings in the name of Rosgosstrakh Limited <u>not</u> realising either that the company had been adjoined to Rosgosstrakh Insurance Company (Public Joint Stock Company), or that as a result Rosgosstrakh Insurance Company (Public Joint Stock Company) had become "*the full legal successor*" of Rosgosstrakh Limited and had assumed all its rights and obligations.

69. As pointed out in *Adelson* (§ 44), the statutory authority for CPR 19.5, section 35 of the Limitation Act 1980, was intended to reflect the provisions of RSC Order 20 rule 5, which was applied in *Sardinia Sulcis*, and as interpreted in *Adelson* both RSC Order 20 rule 5 and CPR 19.5 require[d] it to be shown that the mistake was as to the name of the party rather than his description, giving 'mistake as to name' a generous interpretation. In these circumstances I consider that I am bound to follow *Sardinia Sulcis.*[2] Even if that is wrong, I consider that I should follow *Sardinia Sulcis* unless

[2] Cf Halsbury's Laws of England, Civil Procedure (Volume 11 (2015), section (5) "*Judicial Decisions as Authorities*" § 25: "*What constitutes binding precedent is the ratio decidendi, and this is almost always to be ascertained by an analysis of the material facts of the case, for a judicial decision is often reached by a process of reasoning involving a major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration*", citing *FA and AB Ltd v Lupton* [1972] AC 634 at 658, HL, per Lord Simon of Glaisdale, who added that, where the decision constitutes new law, frequently the new law appears only from subsequent comparison of the material facts inherent in the major premises with the material facts which constitute the minor premise; and Halsbury (*supra*)

persuaded that later authorities require a different outcome on facts which I consider to be materially indistinguishable from those of *Sardinia Sulcis*.

70. As noted earlier, Leggatt J in *Insight Group* (§ 48) suggested that the facts of *International Bulk Shipping* are hard to distinguish from those of *Sardinia Sulcis*. At § 54 Leggatt J stated:

> "The clearest case in which the Sardinia Sulcis test was held not to be satisfied is the International Bulk Shipping case [1996] 1 All ER 1017. The claims in that case were brought to enforce arbitration awards and were founded on the fact that the plaintiffs had obtained arbitration awards in their favour against the defendant. The assertion of this fact was sufficient to plead a cause of action and was therefore the relevant description of the intended plaintiffs. The companies named as the plaintiffs in the writ satisfied that description. There was accordingly no mistake "as to name". The mistake made was in overlooking the fact that the companies had subsequently been dissolved and their rights had passed to their trustee in bankruptcy. The error was accordingly classified as one as to the legal rights of the person intending to sue, which was outside the scope of the rule."

71. It could be contended that, equally, in *Sardinia Sulcis* the fact that Sardanavi had prior to the merger been the vessel owner was sufficient to plead a cause of action; that Sardanavi in that sense fitted the description of the "*Owners*" referred to in the writ; and there was thus no mistake as to name but only as to the legal rights of the person intending to sue.

72. However, that is not the conclusion which the Court of Appeal arrived at in *Sardinia Sulcis*, and I am not persuaded (even if it is open to me to conclude) that the Court of Appeal reached the wrong decision on the facts before it. Applying the *Sardinia Sulcis* test to the facts of *Sardinia Sulcis*, the intended claimant was the owner of the vessel. As at the date of the writ, the owner of the vessel was not Sardanavi but the entity (SIT) into which Sardanavi had been subsumed.

73. The criticisms of *Sardinia Sulcis* in observations in later cases may be explicable on the basis that the solicitor in *Sardinia Sulcis* was apparently aware of the merger but made a mistaken assumption about its legal effect. Had he not been so aware, then it seems to me that any criticism would be misplaced. Where proceedings are intended to be brought by or against an entity identifiable by description, such as employer, landlord, shipowner or insurer, but the person preparing the proceedings is unaware that the entity has meanwhile been subsumed into another corporate body and ceased to exist in its original form, then that person has in my view misnamed the entity and the case falls within the *Sardinia Sulcis* test and CPR rule 19.5. It would be entirely artificial to classify such a case as involving no mistake as to the party's name but only as to its rights. In reality, there has been a mistake of fact – ignorance of the fact

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§ 27 "*a decision that certain legal consequences follow from certain facts is binding in another case raising substantially similar facts*", citing *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA.

of the reorganisation by adjunction – which has led to the wrong entity being named as fitting the identifiable description.

74. The dicta in *Adelson* might also have been conditioned by the court's understanding of the facts of *Sardinia Sulcis*. As quoted earlier, the court in *Adelson* § 37 stated:

> "The charterers of the *Al Tawwab* paid for the damage to be repaired and became subrogated to the owners' rights against the owners of the *Al Tawwab*. They brought proceedings in rem in the name of "the owners of the *Sardinia Sulcis*". By the time that they did so, however, the owners had assigned their rights to another company, the demise charterers of the vessel. The issue was whether the name of the demise charterers could be substituted for that of the owners pursuant to RSC Ord 20, r 5."

The reference to an assignment to the demise charterers in *Sardinia Sulcis* is unclear: whilst there are brief references in *Sardinia Sulcis* to correspondence and evidence mentioning an assignment and to the demise charterers (see p203 LH and p206 LH column), the issue which the Court of Appeal addressed in *Sardinia Sulcis* arose from a "*merger*" of Sardanavi into SIT, by virtue of which the former company was "*absorbed into*" (p204 RH column) or "*incorporated into*" the latter (p206 LH column), rather than simply an assignment.

75. In any event, on the facts of the present case:

i) The solicitors issuing the claim form in the name of Rosgosstrakh Limited were wholly unaware of its having been joined to Rosgosstrakh Insurance Company (Public Joint Stock Company) by virtue of reorganisation by adjunction. Thus it could not be suggested (as might have been suggested in *Sardinia Sulcis*) that they had simply made an error of law in assuming that the effect of the reorganisation was not to make the appropriate claimant Rosgosstrakh Insurance Company (Public Joint Stock Company) rather than Rosgosstrakh Limited. They did not know about the reorganisation at all.

ii) There was thus no mistake as to legal rights – the mistake was factual, arising from the solicitors' lack of knowledge that any reorganisation or other transaction had occurred at all.

iii) It is clear from the contents of the claim form and the evidence as a whole that the intended claimant was or at least included the current insurer under the policy.

iv) There was no deliberate choice, as had occurred in *International Bulk Shipping*, to sue in the name of Rosgosstrakh Limited rather than Rosgosstrakh Insurance Company (Public Joint Stock Company). No question of choice arose at all, because the solicitors had no knowledge that any relevant entity existed other than Rosgosstrakh Limited.

v) The present case also differs from *International Bulk Shipping* in that there was in that case a clear bifurcation between the rights of the companies and

those of the trustee in bankruptcy in whom the companies' assets had been vested. In the present case, Rosgosstrakh Limited has been adjoined to Rosgosstrakh Insurance Company (Public Joint Stock Company), so that (a) rather than there being a choice of potential claimants, there has at any given time only ever been a single entity which was the insurer under the policy, and (b) the current entity, Rosgosstrakh Insurance Company (Public Joint Stock Company), is the "*full legal successor*" of Rosgosstrakh Limited.

vi) Accordingly it is not a case of Party A having simply assigned rights to Party B: instead Party A has been adjoined to Party B, with Party B thereby becoming its full legal successor and taking over all Party A's rights and obligations including all its insurance contracts. In these circumstances, the mistake can readily be seen to be an incorrect naming of an entity identifiable by description, as opposed to either (a) a deliberate selection of one entity over another or (b) a mistake as to legal rights.

vii) Moreover, that would have been the case in my view even if the claim form had not sought a declaration of ongoing non-liability and even if one were to take the intended description of claimant as simply 'the company who underwrote the insurance policy'. The effect of the reorganisation through adjunction is that it is now Rosgosstrakh Insurance Company (Public Joint Stock Company) which, as Rosgosstrakh Limited's full legal successor, fits that description.

viii) For completeness, I would observe even in a case of simple assignment it is not at all obvious why a mistaken selection of a party arising from ignorance of the assignment should not be regarded as a mistake falling within CPR 19.5. To take a variant of the facts of *Evans v Charrington*, if the claimant intended to sue the current landlord, but his solicitor issued proceedings against the previous landlord because he did not know the reversion had been assigned, then that would be a mistake of fact, and not a mistake as to rights in the sense used in *The Aiolos* and *Insight Group*: see §§ 44 and 52 above. The solicitor would not have commenced proceedings against the former landlord because he mistakenly considered that person as a matter of law to be the person liable, but rather because he did not know that the current landlord (whom the claimant intended to sue) was now a different person. Further, the situation would not involve a conscious choice of the kind considered in *International Bulk Shipping*, where as quoted in § 45 above "*It was intended that the plaintiff should be the assignor, <u>not</u> the assignee*" (my emphasis).

76. In all these circumstances, I conclude that the Claimant's solicitors did make a mistake falling within the *Sardinia Sulcis* test, and hence within CPR 19.5, with the result that the court has jurisdiction to allow the substitution of Rosgosstrakh Insurance Company (Public Joint Stock Company) for Rosgosstrakh Limited as claimant.

(I) DISCRETION

77. The question therefore arises whether it is just to make such an order in the present case.

78. The Claimant submits that the solicitors made an innocent mistake, which has caused no prejudice to either Defendant, and that it would be just to exercise the discretion.

79. The First Defendant submits that the relevant factors include whether or not there has been a failure on the part of the claimant to make pre-action contact with the defendant, or delay in bringing the application to correct the name of the claimant, and the impact of the defendant being deprived of a limitation defence that it would otherwise have enjoyed (citing *American Leisure Group Ltd v Olswang LLP* [2015] EWHC 629 (Ch) at [52], [56] & [67]).

80. The First Defendant contends that:

    i) There was no attempt by the Claimant to engage in pre-action correspondence with the First Defendant. Rather, the Claimant, due to its own dilatoriness, was rushed into commencing proceedings at the very last minute and thus failed to afford itself the chance to have the mistake discovered before the claim form was issued.

    ii) The Claimant and its legal advisors CJC were alerted to the mistake on 13 September 2016, and inexplicably waited 9 months to apply to correct this error. Given that the proceedings as originally commenced were a nullity, it was incumbent on them to rectify the position immediately. Moreover, CJC during this period held themselves out as acting on behalf of an entity that they knew no longer existed, for instance on 2 May 2017 signing a draft consent order in the name of Rosgosstrakh Limited.

    iii) Despite having been informed of the true position on 13 September 2016, the Claimant did not make the present application until 30 May 2017, approximately 9 months later. In the interim, the Claimant applied for permission to serve the claim form out of the jurisdiction on 28 October 2016, but did not inform the court that it was seeking permission to serve the claim form out of the jurisdiction in the name of a non-existent entity. That was a breach of the Claimant's duty of full and frank disclosure. The Court has emphasised on repeated occasions how important the duty of full and frank disclosure is (see *Diag Human Se v The Czech Republic* [2015] EWHC 3190 (Comm) at §§ 7-8).

    iv) Had the Claimant made proper disclosure at the time of the application for permission to serve out, the First Defendant would have had an opportunity to challenge the jurisdiction on that basis.

    v) The granting of the relief sought will deprive the First Defendant of a time bar defence.

81. I would accept that the Claimant and its solicitors have been at fault: the Claimant (through Mr Bilev) ought to have provided details of the reorganisation to CJC at the outset, before the claim form was issued, and should not have provided inadequate information to Mr Johnston on 13 September 2016 leading him to believe there had been no more than a simple change of name. CJC ought in my view to have made more prompt and thorough enquiry into the "change of name", which should have led

to the true position being discovered earlier, quite possibly before the application for permission to serve out.

82. At the same time, I consider that the First Defendant's contentions summarised above considerably overstate the matter.

83. CJC's evolving state of knowledge or realisation has been explained by Mr Johnston in his 5th witness statement, where he says:

> "As to the failure to raise the issue at the time the application was made to serve out of the jurisdiction, this was a regrettable oversight on my part. When the application to serve out was made, I simply failed to recall the e-mail I had received from Mr Bilev on 13 September 2016. It was only when Particulars of Claim were being finalised and the whole file was considered that the issue came to light again. The application was issued quickly after that, on the same day that the Particulars of Claim were served."

84. The Particulars of Claim were served on 30 May 2017, which is also the date on which the present application was issued and the date of Mr Johnston's 2nd witness statement exhibiting the corporate notices relating to Rosgosstrakh Limited's organisation and subsequent change of name. The other evidence before me gives me no reason to doubt Mr Johnston's statement quoted above.

85. The First Defendant points out that Mr Johnston's 2nd witness statement in two places refers to the December 2015 corporate reorganisation as the claimant having "*changed its name*" or becoming "*known as*" PJSC Rosgosstrakh Limited, and invites the court to infer from his evidence as a whole that Mr Johnston knew the full position by the time of the application to serve out. I do not accept that submission. I consider it clear from Mr Johnston's evidence that as of 13 September 2016 he had been told only about a simple change of name, and that he then forgot about the matter entirely until shortly before the Particulars of Claim were being finalised in or about May 2017.

86. I conclude, therefore, that at the time of the application for permission to serve out in October 2016, and up until shortly before 30 May 2017, Mr Johnston had not appreciated that the December 2015 reorganisation had occurred or that there had been any change in relation to Rosgosstrakh Limited other than a mere change of name.

87. Taking the First Defendant's contentions in turn:

i) The contention that there was no attempt by the Claimant to engage in pre-action correspondence with the First Defendant is inconsistent with the evidence, in that Mr Johnson states in his second witness statement that *"At various stages of this dispute attempts were made to settle the matter with [the First Defendant]. However, there were not successful and with the 6th anniversary of the loss approaching on 31st August 2016 we received instructions on the morning of Friday 26th August from the clients to issue High Court Proceedings to protect time"*.

ii) It is inaccurate to contend that the Claimant and its legal advisors were alerted to "*the mistake*" on 13 September 2016 but inexplicably waited 9 months to apply to correct this error, or that CJC during this period held themselves out as acting on behalf of an entity that they knew no longer existed. Mr Johnston's evidence quoted in §§ 24 and 83 above, which I accept, indicates that as of September 2016 Mr Johnston realised only that there had been a mere change of name; that he then forgot about that fact until the Particulars of Claim were being prepared; and that only at that latter stage did he realise that anything more than a change of name had occurred. On that basis I conclude that CJC did not realise until shortly before 30 May 2017 that Rosgosstrakh Limited as a separate entity had ceased to exist.

iii) For the same reasons, it is incorrect to suggest that the Claimant's solicitors were "*informed of the true position on 13 September 2016*" but waited 9 months before applying; and it would be incorrect to suggest that there was any knowing failure to inform the court of "*the true position*" when applying for permission to serve out of the jurisdiction. CJC did not know the true position at the time of that application. The failure to disclose it at that stage arose from the combination of (a) Mr Johnston having forgotten about what he understood to have been a change of name, and (b) CJC's unawareness (because the Claimant had not told it) that there had been a change of entity. It goes almost without saying that the duty of full and frank disclosure is of fundamental importance. Moreover, the duty is a strict one: the fact that a failure to disclose arises by oversight does not mean there has been no breach of the duty. Nonetheless, in the circumstances of the present case I do not consider the circumstances are such as to justify refusal of the order currently sought, with the consequence that the claim would be time barred. The non-disclosure was inadvertent, and I do not consider the Claimant thereby to have obtained any advantage of which it ought to be deprived in the context of the current application.

iv) The First Defendant argues that had the Claimant made proper disclosure at the time of the application for permission to serve out, then the First Defendant would have had an opportunity to challenge the jurisdiction on that basis. However, if CJC had realised the true position at the time of the application to serve out, then the probable outcome would have been a combination of an application to substitute the named claimant (i.e. the equivalent of the present application) and an application to serve out. On the basis that the application to substitute would have succeeded, I do not accept that the First Defendant has as a result missed a relevant opportunity. Nor do I consider the First Defendant to have suffered any other prejudice by reason of the error in naming the claimant in this case. It is also relevant to note that the relief which the Claimant seeks, if granted, will have retrospective effect as of the date of issue of the claim form.

v) I do not consider the fact that the substitution will deprive the First Defendant of a time bar defence to be a relevant, alternatively a weighty, factor in this context. That factor will by definition always exist in applications of this nature, yet the Limitation Act and Civil Procedure Rules make express

provision for the substitution of parties after the expiry of a limitation period in cases falling within the rules.

88. As to the timing of the application, it is also relevant to note that although some months had elapsed since the claim form was issued, the application was issued prior to the First Defendant's Defence and thus at a fairly early stage of the proceedings.

89. In all the circumstances, I consider it just to make the order sought.

(J) CONCLUSIONS

90. For these reasons, I consider that I have jurisdiction to grant the Claimant's application under CPR 19.5 to substitute Rosgosstrakh Insurance Company (Public Joint Stock Company) for Rosgosstrakh Limited as claimant, and that in the exercise of my discretion it is just to do so.

91. I am grateful to both counsel for their clear and helpful written and oral submissions.