Neutral Citation Number: [2021] EWHC 17 (TCC)

Case No: HT-2020-LIV-000002

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

35 Vernon Street
Liverpool
L2 2BX

Date: 7th January 2021

Before:

DISTRICT JUDGE BALDWIN

- -

Between:

THE 52 OCCUPIERS OF THE CERAMIC WORKS, CRESSET ROAD / COLLENT STREET, HACKNEY, LONDON E9 6FS (as pursued by AmTrust Europe Limited via rights of subrogation)	**Claimants**
-and-	
BOWMER & KIRKLAND LIMITED (1) EHW LTD (formerly known as Eades Hotwani Partnership Limited) (2)	**Defendants**

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Mr Tom Owen (instructed by **Brabners LLP**)
for the **Claimants**
Mr Ben Quiney QC (instructed by **Mills & Reeve LLP**)
for Bowmer and Kirkland Limited and for B & K Building Services Limited, **proposed substituted First Defendant**
(there being no appearance from the **First or Second Defendant**)

Hearing date: 4th November 2020

Approved Judgment

I direct that copies of this version as handed down may be treated as authentic.

Introduction – Claimants' application to substitute the First Defendant

1. The Claimants apply, by way of application notice dated 11th August 2020, to join B & K Building Services Limited as a Defendant to these proceedings, conceding that the current First Defendant, Bowmer & Kirkland Limited, has been incorrectly joined.

2. The application notice on its face applies in the alternative, under both CPR rr. 17.4 and 19.5, it not being in issue that the primary limitation period expired prior to the making of the application, but in reality the application is pursued by way of substitution, rather than amendment, and the Court heard helpful submissions from counsel for the Claimants and for the proposed substituted First Defendant ("B & K") respectively.

3. The Court benefited from a 488 page .pdf bundle which incorporated both sides' skeleton arguments and a number of authorities were supplied for the Court's consideration.

4. The hearing was conducted by MS Teams (video) pursuant to CPR PD51Y in the context of the ongoing pandemic.

5. The Claimants rely upon the witness statements, in the bundle, of Anthony Willis and Suzanne Wood, a witness summary of Lucy Williams and the witness statements of Lucy Williams, all of the Claimants' solicitors, Brabners LLP ("Brabners"), with the first a witness statement of Mrs Williams, at

section 11 of the bundle, being corrected in a short second witness statement at the start of the hearing, by way of the substitution at paragraphs 13 line 4 and 15 line 1 of an ampersand ("&") for the word "and".

6. B & K opposes the application and relies upon the witness statements of Neil Frankland, a partner with Mills & Reeve LLP ("M & R"), Bowmer and Kirkland Limited's and B & K's solicitors, and Lena Barnes, associate at M & R.

7. I shall refer to bundle pagination thus [x].

Background and relevant chronology

8. These proceedings arise out of a JCT form of contract, entered into between Collent Property Limited and B & K, for the construction of 52 residential and 8 commercial units at the address cited in the title of these proceedings, the works having been completed on or around 4th April 2014.

9. An intention to make a claim against B & K was asserted by Brabners on behalf of the Claimants on 18th January 2019 by preliminary notice of defective works, alleging breach of duty arising by way of the Defective Premises Act 1972 and by way of a general duty of care owed to the Claimants. The losses were (and remain) estimated at £1.8 million.

10. Matters proceeded, M & R notifying Brabners of their instruction by B & K on 29th August 2019 and a site inspection taking place on 3rd December 2019. In January 2020 Mrs Wood joined Brabners and she reviewed the file on 14th January. At this time, M & R were pressing for a letter of claim and Mrs Wood drafted a letter in response dated 6th February 2020 [76 – 81] annexing Brabners' written record of the site inspection. This was the first time that anything other than B & K had been referred to in the exchange of correspondence between these parties to the dispute, in the context of M & R's client, the Brabners' letter referring in its heading to M & R's client in this way, "Your Client: Bowmer & Kirkland Limited".

11. This reference was repeated in the letter of claim dated 10th March 2020 [85 – 113], also drafted by Mrs Wood.

12. Mrs Williams prepared the Claim Form [116] on 26th March 2020, inserting the current First Defendant into it and the claim was issued.

13. On 1st April 2020 Mr Willis, on behalf of the Claimants, served an application, referring in the claim title to the current First Defendant, upon M & R, asking for a stay of proceedings and directions (prior to the service of proceedings) [126], [122-124] to enable compliance with the Pre-Action Protocol for Construction and Engineering Disputes, which application was granted by me on paper by way of the Order of 8th April 2020 [372-373], staying the claim until 16th June 2020.

14. Also on 8th April 2020, M & R responded to the letter of claim [128-130].

15. The Order of 8th April was served on M & R on 9th April 2020 [131] and Mr Frankland responded by way of an email on 14th April 2020 [134].

16. The issue of subrogation was then explored in further correspondence in May 2020, concluding by way of Mr Willis' email response on 27th May 2020 [144], leading to a request from Brabners, by way of letter dated 2nd June 2020, for a further Protocol-based stay until 30th September 2020.

17. M & R responded by way of a short letter dated 11th June 2020 [146] requesting service of the claim form first, which stance was pressed in subsequent email correspondence up to 19th June 2020 [147-156].

18. Brabners issued a further application for a stay dated 25th June 2020 [161-166] including a proposed direction for service of the claim form by 30th June 2020, which consequential Order was made by me on paper and issued by the Court on 26th June 2020 [171-172]. Brabners served the Order and the Claim Form [170].

19. The next correspondence from M & R was a letter dated 31st July 2020, sent by email at 4.34pm [173-174], contending (correctly) that the current First Defendant was not involved in the dispute and precipitating this application.

The essential test

20. I note the following as relevant provisions of CPR r. 19.5

"**Special provisions about adding or substituting parties after the end of a relevant limitation period**

19.5

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

(a) the Limitation Act 1980; …

(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; …"

21. It is also apparent that the potential exercise of the Court's power under this rule engages consideration of the exercise of discretion.

22. There is no issue that r. 19.5(2)(a) is satisfied and therefore the Court's task is to decide whether the substitution sought is necessary, on the grounds of mistake, and, if so, to consider whether to exercise its discretion to allow the substitution.

Claimant's evidence and submissions

23. Firstly, Mr Owen points out that the current First Defendant is a non-existent entity, the only close approximation being Bowmer *and* Kirkland Limited (my emphasis), of the same company number as cited on the Claim Form, which, it is accepted, has no connection with the project forming the subject matter of the claim, and, to that extent, the inclusion of the current First Defendant has to be mistaken.

24. He relies upon the progression of the correspondence and the associated witness statement evidence, in explanation of both the existence of the mistake and how it came to be made, by highlighting the following in particular:-

(i) Throughout 2019, the communications between the parties show that issues were being raised with the contractual performance of B & K. Indeed, if anything, it was M & R who fell into error during this period, see for example Mr Frankland's reference to "Bowmer & Kirkland" in the subject line of his email of 3rd September 2019 [70];

(ii) Pre-site inspection arrangements were clearly conducted with Brendan Doherty in his capacity as B & K's contracts manager, see for example [73] dated 22nd November 2019;

(iii) M & R responded, post-site inspection, in their capacity as solicitors for B & K [74], 20th December 2019;

(iv) When reviewing the file, upon becoming involved, on 14th January 2020, Mrs Wood noted a number of "colloquial references" to the contractor, see para. 15 [185], one of which was imported into her internal memo, "Main Contractor – Bowmer and Kirkland Building Services Limited" [192], but not exclusively so, "Possible Defendants… - The Builder – B & K Building Services Limited;" [195];

(v) The first erroneous reference in correspondence from Brabners was in Mrs Wood's letter of 6th February 2020 [76] – "Bowmer & Kirkland Limited". She explains that this was in error and that it was her intention to name the building contractor, see para. 27 [186]. Mr Owen highlights that this is supported by the body of the letter which clearly refers back to the site inspection, including the record of the inspection attached, which correctly identifies B & K, and indicates that contractual obligations are under scrutiny [77];

(vi) The letter in response from M & R is said to be on behalf of B & K and takes no point on any identity issue [82];

(vii) It is noteworthy that Mr Willis' follow up email of 18th February 2020 makes it clear that the request for a copy of the building contract was to understand M & R's client's share of the obligations in terms of design / build, not to identify the contractor per se [83];

(viii) M & R request a letter of claim on behalf of B & K on 26th February 2020 [84];

(ix) Whilst the letter of claim itself (10th March 2020) replicates the heading error, it is clearly directed to "A construction company and the

main contractor responsible for the construction and development of (the relevant premises)", see paras 2.4 and 3.3 [86] and sections 4 – 7 [88-90], referred to by way of the shorthand of "B&K", it also being pointed out by Mr Owen that any duty under the Defective Premises Act 1972 can only conceivably have been owed by a/the contractor;

(x) M & R's letter of acknowledgment (24th March 2020) was on behalf of B & K, took no point as to the company name and confirmed that B & K's insurers had been notified;

(xi) Mrs Williams is a trainee solicitor who was given the task of drafting the claim form, see para. 12 [393]. She relied upon the letter of claim, in the absence of the contract having been disclosed and researched "Bowmer & Kirkland Limited" (see her second statement), inserting "Bowmer & Kirkland Limited" into the claim form, as per the letter of claim. Her intention was to insert the name of the building contractor, and there were never any discussions about pursuing a different legal entity, see paras 18 & 19 [394];

(xii) M & R's letter of response of 8th April 2020 [128-130] was on behalf of B & K and was substantive, in terms of focussing on the Claimants' insurers' subrogation rights and not asserting that the letter of claim was not addressed to their client;

(xiii) Despite a copy of the claim form being provided (not constituting formal service) on 9th April 2020 [131-133], there was no response from M & R saying that they were not instructed in the claim as constituted, but rather they replied that they would take instructions on whether a hearing was required after receipt of the "without a hearing" order [134];

(xiv) It is not until the subrogation point is resolved that M & R appear to have become aware of the identity point, discernible by way of close analysis of their 11th June 2020 letter [146]. Their heading subtly changes to their client being "Bowmer & Kirkland Ltd" (a non-existent entity) and their approach changes to focussing on a request for service of the claim form, to be seen, argues Mr Owen, as setting a trap in terms of removing any "before service" ability to amend without involving application to the Court. This letter concludes, "…absent service of the claim form it is not even clear to us if our client has any standing in the proceedings", which perplexed Mr Willis at the time

[147], but is more understandable in the context of the ultimate position taken by the interestingly timed M & R letter finally positively raising the issue, post service, at the very end of July 2020 [174], which letter does not state the capacity in which M & R were acting;

(xv) Upon return from holiday on 3rd August 2020 Mr Willis realised the error and this application ensued in short course, see paras 94-97 [40].

25. Mr Owen then refers the Court to Leggatt J's analysis of the jurisdictional test to determine necessity on the grounds of mistake in *Insight Group v Kingston Smith* [2012] EWHC 3644 (QB), which Mr Owen helpfully sets out in this way in his skeleton:-

> "There are three requirements:
>
> (1) The person who has made the mistake must be the person responsible, directly or through an agent, for the issue of the claim form.
> (2) It must be shown that, had the mistake not been made, the new party would have been named.
> (3) The mistake must be as to the name of the party, applying the *Sardinia Sulcis* test. I.e. the mistake must be as to the name of the party rather than as to the identity of the party.
>
> The points derived from *The Sardinia Sulcis* [1991] 1 Lloyd's Rep 201 are helpfully set out in the White Book commentary at 19.5.4:
>
> (a) CPR r.19.5(3)(a) allows more than the mere correction of the name of a party as it is, after all, a provision that allows the substitution of a new party for the original named party.
> (b) In one sense, a claimant always intends to sue the person who is liable for the wrong that they have suffered; but the test cannot be that they have made a mistake which may be corrected where they sue another person, otherwise leave to substitute would always be granted.
> (c) So there must be a test that includes, but is broader than, mere correction of name but narrower than substitution of the person intended to be sued for the person actually sued.

(d) The test is: is it possible to identify the intended defendant "*by reference to a description more or less specific to the particular case*"?; if it is, it is a mistake of the type covered by r. 19.5(3)(a).

(e) If the claimant gets the right description but the wrong name for their intended defendant, there is unlikely to be any doubt as to the identity of the person intended to be sued; but if they get the wrong description, it will be otherwise.

(f) This test might allow the substitution of a new defendant, unconnected with the original defendant and unaware of the claim until after the expiry of a relevant limitation period; but any potential injustice can be avoided by the exercise of the court's discretion."

26. Mr Owen also prays in aid the decision of Fraser J in *TRW v Indesit* [2020] EWHC 1414 (TCC) where a similar approach to that requested here was adopted, arguably more generously, namely substitution was permitted where an assumption had been made as to the identity of the company to be joined as a claimant, in the absence of the contract which had been requested, which turned out to be erroneous, "there never having been any doubt as to which legal entity was intended to bring the proceedings as the Second Claimant…(I)ntended to be the leaseholder of the third floor" (para. 43). Mr Owen suggests that in the instant claim there was never any underlying doubt or uncertainty as to the correct identity of the contractor and therefore the existence of a mistake of the type to satisfy the test could not be clearer, and he asks the Court to accept the supporting evidence as to the mistake and the background to the mistake being made accordingly.

27. Mr Owen then moves to the exercise of the Court's discretion, should the test be made out.

28. He suggests that this is an entirely appropriate case for discretion to be exercised in the Claimants' favour. His theme is summarised at para. 65 of *TRW,* quoting this dictum of Leggatt J from *Insight,*

> "*The Court's discretion should not be exercised in a way that amounts, in effect, to punishing a party for a harmless error of its legal representatives.*".

29. He makes an impassioned plea in support of what is said to be a young and able team of lawyers working under the pressures and constraints of lockdown who have had the potential ramifications of this error hanging over them, as a result of what he argues was a genuine and innocent mistake.

30. B & K, he urges, have not been misled in any way, when seen in the context of what had gone before and the developing approach of M & R over time, and as such, this is said to be the paradigm case for relief to be granted.

31. He points out, interestingly, that Mr Frankland has never identified at what point M & R became instructed by Bowmer and Kirkland and suggests it is highly likely to have been around 11th June 2020 when the subtle changes in correspondence may be observed with the benefit of hindsight.

32. He contends that there is essentially no real prejudice on the merits as far as B & K are concerned, compared with significant prejudice to the Claimants who would be left with an action against their solicitors, which type of claim is notoriously harder to pursue on a number of bases.

33. Finally, he asks the Court to factor in apparent contributory conduct on the part of B & K, to include the failure to supply the contract and their tactical approach from 11th June 2020 to 31st July 2020.

B & K's submissions

34. Mr Quiney advances B & K's case that the Court should conclude that the Claimants have not made a simple mistake as to the name of the party intended to be sued, but rather that the evidence of repeated "errors" shows that a proper choice was made to sue the existing First Defendant or similar.

35. He accepts that the mistake was made by those involved in preparing the claim form, and thus, it seems that the satisfaction of the first limb of the *Insight* test is not in issue.

36. He further accepts that prior to the early part of 2020, certainly in January and perhaps up to March, it "appeared Brabners were getting it right", having properly identified B & K.

37. Mr Quiney then asks, rhetorically, why the "error" arose.

38. His answer begins by contending that it should not be seen to be anything to do with colloquial references to "Bowmer and Kirkland" or the lack of the building contract, as there was plenty of information available, see for example [194], the memorandum created by Mrs Wood in January 2020 and the concession by Mr Willis, see para. 12 [382] as to the identity of the correct Defendant being known. Further, nothing should be read into M & R's letter of 8th April 2020, as the claim form was not informally sent until 9th April [131].

39. What the Court should find, he submits, is that Mrs Wood made a positive choice on 6th February 2020 to identify the current First Defendant as being a better entity to sue and, as such, a positive choice was made, supported by the ignoring by the Claimants of the fact that M & R "kept pointing out" that they were representing a different entity, ie the presence of the headings of their letters referring to B & K as their client. The fact that that choice further turned into suing a non-existent entity should be seen, it is said, as no more than a slip of the pen, but that should not distract the Court from being persuaded that the Claimants intended to sue a different entity than B & K, which, it seems to me, must mean an inferred intention to sue "Bowmer and Kirkland Limited".

40. He asks the Court to reject the evidence relied upon by the Claimants as to the factual background leading to the error, suggesting that Mrs Wood's recollection is unsatisfactorily incomplete or contradictory, particularly when seen in the context of the reconstruction evidence of Lena Barnes of M & R [415-418] on the issue of the online searches.

41. The Claimants, argues Mr Quiney, inexplicably ignored red flags, for example, the name and address of B & K on the 2014 AmTrust "Builder Counter Indemnity Agreement" [48], the address being entirely different from that of the First Defendant on the claim form.

42. Similarly to his criticism of the evidence of Mrs Wood, he also criticises Mrs Williams and Mr Willis' evidence as lacking clarity and he is sceptical that Mr Willis is likely to have missed the obvious errors in the letters of 6th February 2020 and postulates that there must have been a positive choice to "change horses". In any event, says Mr Quiney, the burden was on Brabners to get things right and not upon M & R to point out any possible errors. Whilst the correspondence post 6th February 2020 could be evidence of repeated error making, it is more likely than not evidence that Brabners had made a decision and were sticking by it.

43. Mr Quiney also defends any decision not to point out any apparent errors once M & R became aware of the contents of the claim form, it being entirely permissible to take whatever tactical advantage might fairly arise in such circumstances. If it becomes apparent that there may be or is a fundamental error leading to an easy defence, it would be wrong for the client to lose this.

44. Any issue as to the timing of the pointing out of the error, once the die is cast, is not relevant to the jurisdictional test, but only, perhaps, in terms of any exercise of discretion, submits Mr Quiney. As such he commends B & K's narrative to the Court and contends that the jurisdictional test is not made out. As I understand it, in summary, B & K's position is that there was no essential mistake by the Claimants as to the name of the party intended to be sued, but rather a mistaken conscious choice to sue a different party, albeit coincidentally itself subsequently erroneously named, *Adelson v Associated Newspapers* [2007] EWCA Civ 701 paras 55 and 56 referring, this case falling into Leggatt J's second category, see *Insight* @ para. 57.

45. Should the Court reach the stage of considering exercising its discretion, Mr Quiney argues that this should not be exercised.

46. He serially criticises the Claimants for repeatedly falling into error, characterising this as a gross example which should not be forgiven. B & K through M & R were simply legitimately trying to protect their own interests "on the battlefield" or "in the competition" that is litigation. Sometimes, Mr Quiney submits, if a windfall presents itself, then it is right and proper to act in the client's interests, whether or not this is the "gentlemanly thing to do", in

order to take advantage of such, particularly so when the erroneous failure is of an egregious nature, as is suggested here.

47. The Court is also asked to weigh in the balance B & K's suggestion that the claim is also a relatively stale one, it now being over three years since it was intimated, to the prejudice of B & K, remedial works having previously been done, despite the site inspection in December 2019. Against this, Mr Quiney suggests that the Claimant's position is not as bad as is characterised by Mr Owen, namely there is still a claim against the architects and any claim against the solicitors will be subject to Brabners already having admitted their error, together with less chance of B & K being involved in terms of evidence.

Discussion

48. I am entirely satisfied that the First Defendant was named in the claim form in mistake for B & K, within the meaning of CPR r. 19.5(3)(a) and that the substitution of First Defendant as sought in this application is accordingly necessary within the meaning of CPR r. 19.5(2)(b), for the reasons which follow.

49. The inclusion of the First Defendant within the claim form was as a result of the combined actions of the relevant employees of Brabners, as conceded by Mr Quiney (see para. 35 above).

50. B & K, it is not disputed, is the correct contracting party for the purposes of these proceedings and was squarely in Brabners' sights up to and including the site inspection in December 2019 and into January 2020. But for the supervening alternative descriptions or names manifesting themselves in the documentation from January 2020, there is no sensible conclusion to be drawn other than that B & K as building contractor would have been named as the First Defendant. This part of the test is traditionally perhaps more easily scrutinised when Particulars of Claim are served, unlike in this instance, but the claim form itself [116], I accept, sufficiently manifests an intention to bring the claim, inter alia, against the entity responsible for alleged defective construction, which can only have been B & K. I also accept the other evidential references relied upon by Mr Owen at para. 60(2)(b) of his skeleton.

I don't believe that this second part of the *Insight* test is seriously disputed, either.

51. I am singularly unpersuaded that there is any evidence to which any weight can or should rightly be attached that there was a conscious and deliberate, but erroneous, decision by the team at Brabners to change their focus away from B & K to Bowmer and Kirkland Limited, ultimately further erroneously named as Bowmer & Kirkland Limited, as I understand B & K's position to be. To adopt this position, in my view, would be to fly in the face of the evidence in an attempted performance of an extreme form of mental gymnastics, which approach I roundly reject.

52. The best that can be said, in my view, in criticism of the evidence from the team at Brabners is that they do not have a precise or exact recollection of every step, but they are materially quite clear and persuasively so, in my judgment, that this was a pure and genuine error, which was not spotted. Further, the evidence does not support any contention that the error was repeated independently and suspiciously on countless occasions, but rather I find it was repeated on two or three occasions in February / March 2020 by the end of which time the claim form was issued and, at all material times during this period when the error was or ought to have been known to M & R, without relevant demur from the opponent. I am satisfied that each witness could not be clearer that no such deliberate decision was made, see the references at para. 62(2)(c)(vi) of Mr Owen's skeleton.

53. In my judgment, there is not one scintilla of evidence in the documentation disclosed which might begin to found a suspicion that these witnesses were engaged in any sort of cover-up of a disastrous decision to "change horses", which must be a consequential conclusion accompanying a finding of the sort contended for by Mr Quiney, nor anything in the evidence as a whole to sow the seeds of any theory that any sensible lawyer of the type instructed by the Claimants, knowing what the members of this team did up to and into January 2020, might begin consciously and deliberately to look elsewhere, other than to B & K for the building contractor defendant. This was ultimately, in my judgment, a "confusing of similar names" and a "perils of the use of shorthand" type of situation which fed on itself, leading to a genuine error as to the actual name of the intended building contractor defendant, spread as it

was amongst three lawyers, and of the type no less forgivable than that contemplated by Leggatt J at para. 57(1) of *Insight*. I would describe this situation as at the least serious end of the types of cases which might fall into that category, namely the claimant sues "x limited" having intended to sue "xyx limited" in the mistaken belief that "x limited" is "xyx limited".

54. I utterly reject any characterisation by B & K that the error was positively or intentionally pointed out by M & R by means of their letter headings and thus consciously ignored by Brabners. This could not be further from reality in my judgment. The first time that it can legitimately be said that the error was actively pointed out was on 31st July 2020. In my judgment, it is highly likely that M & R became alive to the error by 11th June 2020, when they began to press for the service of the claim form, described by Mr Owen as the setting of a trap, and I find they were potentially on notice of it on 1st April 2020 with the service of the Claimant's first application and draft order. On balance, I tend more to the feeling that the error was actually spotted later rather than sooner, and that fortifies me in my acceptance of the Claimants' position that this was an easy error both to make and thereafter to overlook. I rather suspect that both sides equally failed to spot it for some time. For example, M & R themselves were quite capable of falling into an error of similar nature, see the heading of their letter of 11th June 2020 [146].

55. As such, I now turn to considering whether I should exercise my discretion pursuant to CPR r.19.5(2).

56. I have equally no hesitation in so doing.

57. In my judgment, B & K through their solicitors, M & R, have been entirely apprised of the material factors throughout enabling them to defend this claim on the merits. They were aware that they were being pursued up to and including the site inspection in December 2019. They continued to respond, through M & R, in a material fashion, engaging with relevant issues, including enquiries as to the indemnity position arising in the subrogated aspect of the claim, from then until 11th June 2020.

58. At some stage, it would seem, from the tenor of the submissions I have heard (the evidence of Mr Frankland being somewhat less forthcoming on this and

on his general reaction to the error creeping into the correspondence), that B & K were alerted to the potential and potentially far-reaching legal advantage which could be achieved in successfully arguing this substitution point. At no stage, prior to the service of the claim form, were they minded to point out the error which, I have found, was likely to have come to their attention in advance of such service, given clear and obvious change of approach from 11th June 2020 onwards, because any advantage would be lost, the Claimants being entitled to amend without permission prior to such service, CPR r.19.4(1).

59. The prejudice to B & K is, I conclude, minimal and, where material, ie anything which has accrued from June 2020 onwards, equally of their own making in deciding to take this point in the manner that they have.

60. Whilst there is no stricture within the Civil Procedure Rules 1998 for the parties to behave in a gentlemanly fashion, to use Mr Quiney's word, the competitive and battlefield nature of civil proceedings must be seen to be tempered by the duty of the parties under r. 1.3 to help the Court to further the overriding objective and I am left pondering whether the type of battle engaged in here has been a proper use of both the resources of the Court and also of the financial resources of the parties, however much is at stake in these proceedings.

61. As such it would be entirely unjust for the Court to refuse to exercise its discretion. There was no material delay once the error with highlighted. I agree wholeheartedly with Mr Owen that this is a paradigm example of a situation where such discretion ought to be exercised and I give permission for the substitution sought accordingly.
