SUBSTITUTION OF A DEFENDANT AFTER EXPIRY OF THE LIMITATION PERIOD
INSIGHT GROUP LTD V KINGSTON SMITH OVERRULED

INTRODUCTION

1. The Court of Appeal has handed down a judgment which marks a seismic shift in the approach to substitution of a defendant after expiry of the limitation where the claimant realises that they have sued the wrong defendant. In two appeals, *Adcamp LLP v Office Properties PL Ltd* and *BDB Pitmans LLP v Lee* [2026] EWCA Civ 50, the Court held that the obiter dicta of Leggatt J in *Insight Group Ltd v Kingston Smith* [2014] 1 WLR 1448 concerning the situation where the claimant wrongly believes that the entity which they originally sued has taken over the liabilities of the entity which they should have sued were wrong and should not be followed.

THE ISSUE

2. Where a claimant wishes to bring a claim for professional negligence against solicitors (or indeed, any other professional) who acted for them, it is very common for the manifestation of that entity to be different from the entity which acted for the claimant by the time the claimant comes to issue proceedings. This may be because a traditional partnership has incorporated to an LLP or a limited company, or because the original entity has merged with or been taken over by another.

3. In normal circumstances, the claimant's cause of action will remain against the original entity, but a claimant may nevertheless issue proceedings against the current entity. In those circumstances, they may find that, once they realise their mistake, the limitation period has expired for a fresh claim against the entity which they should have sued.

4. In those circumstances, their ability to substitute the entity which they should have sued for the entity which they have sued is governed by s. 35 Limitation Act 1980. This essentially prohibits substitution unless *"the addition or substitution of the new party is necessary for the determination of the original action"* (s. 35(5)(b)). Section 35(6) provides for the only two circumstances in which that test will be satisfied, namely:

> *(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.*

5. While it was open to rules of court to impose further restrictions, the relevant rule (CPR 19.6(3)) effectively mirrors the wording of the Act.

6. After some uncertainty, the Court of Appeal held in *Adelson v Associated Newspapers Ltd* [2008] 1 WLR 585 that a mistake within (a) had to be a mistake as to name, in other words, the claimant had to have correctly identified the attributes of the party intended to be sued (such as employer, landlord etc.) but wrongly believed the named defendant to have those attributes. In doing so, the Court applied the pre-CPR test laid down in *The Sardinia Sulcis* [1991] 1 Lloyd's Rep 201.

7. There has been less authority on s. 35(6)(b), but the Court of Appeal had held in two cases, *Parkinson Engineering Services plc v Swan* [2010] PNLR 17 and *Irwin v Lynch* [2011] 1 WLR 1364 that it could be relied on where, in one case, a cause of action asserted by a company in liquidation could only proceed if it was instead asserted by the liquidator and, in the other, where an administrator had no locus to bring the claim, but the same claim could be brought by the company instead. In both cases, the Court stressed that the causes of action in each case were identical.

8. In *Insight Group*, Leggatt J was faced with a case where the claimant should have sued a firm of accountants, but had instead issued proceedings against the subsequent LLP. He held that such cases could be divided into two categories. In one category was a case where the claimant intended to sue the entity which had done the work complained of and wrongly believed that the named defendant was that entity. In the other category was a case where the claimant knew that the named defendant had not done the work, but wrongly believed that it had acquired the liabilities of the original entity.

9. Leggatt J held that the case before him was in the first category and that, in such cases, there was a mistake as to name, which could be corrected under s. 35(6)(a). Such cases remain unaffected by these appeals.

10. However, Leggatt J then went on to consider, obiter, what the position would have been if the case had been in the other category. He held that s. 35(6)(b) could be invoked where the claim which had been issued could not succeed and the claim to be pursued post-substitution was the same claim as the claim originally made. He then held that a case in the second category would meet that test, because both claims would be based on the asserted negligence of the original entity. Leggatt J regarded a substitution in those circumstances as equivalent to that which had been permitted in *Parkinson Engineering* and *Irwin*.

11. The question in these appeals was whether that approach was correct.

THE FACTS

12. Both appeals happened to involve the same two entities: Pitmans LLP[1] and BDB Pitmans LLP ("**BDBP**"), the latter being the result of a merger between Pitmans LLP and Bircham Dyson Bell LLP and a different entity from Pitmans LLP.

13. In both cases, the claimants allege negligence by Pitmans LLP, but issued proceedings against BDBP. In both cases, the claimants knew that BDBP had not done the work complained of, but they alleged that BDBP had acquired Pitmans' alleged liability to the claimants. In *Office Properties*, the claimants acknowledged their mistake and sought to substitute Pitmans LLP for BDBP. In *Lee*, the claimants continue to maintain that BDBP is liable to them on the basis either that Pitmans' putative liability has been novated to BDBP or that BDBP is estopped from denying liability to the claimants. On BDBP's application for summary judgment, the claimants cross-applied contingently to substitute Pitmans LLP. Although the summary judgment application failed, the Judge nevertheless

[1] Now called Adcamp LLP, but referred to here as Pitmans LLP for clarity.

gave a full judgment on the substitution application so that decision could be appealed independently.

14. In both cases, the Judges below followed the obiter dicta in *Insight Group* and held that substitution could be permitted.

THE COURT OF APPEAL'S DECISION

15. The Court allowed the defendants' appeals. The Court rejected the defendants' submission that s. 35(6)(b) was inherently limited to claims that would fail for reasons other than their merits, for example for constitutional or procedural reasons. The Court therefore implicitly endorsed Leggatt J's formulation of the test to be applied under s. 35(6)(b). However, that test was not met, because the two claims were not the same. For the two claims to be the same, the essential facts which had to be averred in each case had to be the same and this would not be the case where there were two different defendants being sued on two different bases. The cases were therefore materially different from *Parkinson Engineering* and *Irwin*.

16. The Court acknowledged that the effect of this decision might well be that there could never be substitution of a defendant under s. 35(6)(b), despite the Act apparently expressing permitting it, but held that that could be explained by the legislative history.

17. The result is that the distinction between Leggatt J's two categories of case now really matters. Substitution can be permitted in the first type of case, but not the second.

POSTSCRIPT

18. Leggatt J's approach in *Insight Group* had been influenced by what he perceived as an unjustified distinction under the *Sardinia Sulcis* test between mistakes as to name and mistakes of law. He regarded it as a good thing that the effect of his decision was that, in cases such as these, it would not matter which type of mistake the claimant had made: it would either be remediable under s. 35(6)(a) or under s. 35(6)(b) and it would simply be a question of discretion whether to permit it.

19. In these cases, the Court of Appeal acknowledged the force of Leggatt J's criticisms of the *Sardinia Sulcis* test, but held that it was a matter for the Supreme Court whether that was the right test under s. 35(6)(a) and criticism of that test should not be reflected by an inappropriate construction of s. 35(6)(b). It remains to be seen whether the Supreme Court will be asked to revisit this area of the law in its entirety.

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Jamie was counsel for the appellants in *Office Properties* and *Lee*. In *Office Properties* he was instructed by Sarah Crowther's team at DAC Beachcroft. In *Lee*, he was instructed by Paul Castellani's team at Kennedys.