Neutral Citation Number: [2026] EWCA Civ 50

Case No: CA-2025-000368
CA-2025-002966

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr David Halpern KC sitting as a deputy judge of the High Court
[2025] EWHC 170 (Ch)

AND ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST
Ms Caroline Shea KC sitting as a deputy judge of the High Court
[2025] EWHC 2881 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2026

Before :

LORD JUSTICE SINGH
LORD JUSTICE PHILLIPS
and
LORD JUSTICE ZACAROLI

- -

Between :

ADCAMP LLP	**Appellant**
- and -	
(1) OFFICE PROPERTIES PL LIMITED (in liquidation) **(2) BRIAN JOHNSON** **(3) PETER KUBIK (as joint liquidators of Office Properties PL Limited)**	**Respondents**
-and-	
RICHARD CHENERY	**Defendant**

And Between :

(1) BDB PITMANS LLP (now known as Broadfield Law UK LLP) **(2) ADCAMP LLP (formerly known as Pitmans LLP)**	**Appellant**

- and -

(1) MARK WILLIAM LEE **Respondents**
(2) KENILWORTH CLAIM LIMITED (in liquidation)

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Jamie Carpenter KC (instructed by **DAC Beachcroft LLP** in CA-2025-000368 and **Kennedys Law LLP** in appeal CA-2025-002966) for the **Appellants** in both appeals
Patrick Lawrence KC (instructed by **Penningtons Manches Cooper LLP**) for the **Respondents** Office Properties PL Limited Brian Johnson and Peter Kubrik in appeal CA-2025-000368
Thomas Grant KC and Ryan James Turner (instructed by **Milners Solicitors**) for the **Respondents** Mark William Lee and Kenilworth Claim Limited in appeal CA-2025-002996

Hearing dates: 14 & 15 January 2026
Post-hearing written submissions received on 20 & 22 January 2026

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Approved Judgment

This judgment was handed down remotely at 10.00am on 6 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Judgment Approved by the court for handing down.

Lord Justice Zacaroli:

1. These two appeals, heard together, concern the correct interpretation of CPR rule 19.6(3)(b), which empowers the court to add or substitute a party after the expiration of a relevant limitation period where it is necessary to do so because "the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant".

The facts

2. The first appeal, *Office Properties PL Limited v Adcamp LLP* (the "**Office Properties Appeal**") is against the decision dated 30 January 2025 of David Halpern KC sitting as a deputy High Court Judge. Office Properties PL Limited ("**Office Properties**") engaged the firm of solicitors then known as Pitmans LLP ("**Pitmans**") to advise it in relation to a dividend paid, and a lease guarantee entered into, by Office Properties on 9 January 2017 and 20 January 2017 respectively. The advice given by Pitmans is alleged to have been negligent.

3. In December 2018, the partnership business of Pitmans was acquired by Bircham Dyson Bell LLP, which then changed its name to BDB Pitmans LLP ("**BDB**"). There was, however, no novation of liabilities from Pitmans to BDB.

4. In 2019, Pitmans changed its name to Adcamp LLP. It was dissolved in 2021 but restored to the register in 2023. Notwithstanding its name change, for simplicity I will continue to refer to this firm as Pitmans.

5. Office Properties issued a claim form against BDB on 23 August 2022. It claimed that Pitmans' advice in connection with the dividend and lease guarantee entered into in January 2017 had been negligent, that BDB had assumed responsibility for Pitmans' liabilities and that BDB was accordingly liable to compensate Office Properties. The parties agreed, and the court approved, a number of extensions of time for service of the claim form.

6. Following receipt of a letter from BDB's solicitors on 15 September 2023, in which BDB denied that there had been any assumption of responsibility by BDB for the acts and omissions of Pitmans, Office Properties amended the claim form to add Pitmans (under its new name Adcamp LLP) as the first defendant, re-numbering BDB as the second defendant. On 22 December 2023, the claim form was further amended to delete BDB as second defendant. The remaining claim is against Pitmans for damages for its negligence. As the claim form had not yet been served, CPR rule 17.1 permitted these amendments to be made without permission.

7. It is common ground that Office Properties issued the original claim form against BDB in the mistaken belief that BDB had, as a matter of law, assumed responsibility for any liability which Pitmans had to Office Properties.

8. The re-amended claim form was served on Pitmans with a deemed service date of 2 September 2024. On 13 September 2024, Pitmans issued an application to disallow the amendments made without permission. On such an application, the court must consider whether it would have allowed the amendment had permission been required.

9. The second appeal, *Mark William Lee and another v BDB Pitmans LLP and another* (the "**Lee Appeal**") is against the decision dated 5 November 2025 of Caroline Shea KC sitting as a deputy judge of the High Court.

10. The claimants, Mr Lee and Kenilworth Claim Limited (in liquidation) (the "**Lee Claimants**") retained Pitmans to advise on a property transaction in February 2018. The Lee Claimants contend that Pitmans' advice was negligent, and that this led to the Lee Claimants suffering loss, having contracted to sell property without a binding development agreement in place or the contract being conditional on such an agreement having been concluded.

11. The Lee Claimants issued a claim form on 14 February 2024. The sole defendant was BDB, on the basis that BDB was alleged to have assumed responsibility for any liability that Pitmans had to the Lee Claimants upon the acquisition by BDB of Pitmans' business in December 2018.

12. On 4 September 2024, BDB issued an application to strike out the claim, contending that there was no arguable basis on which it could be liable for Pitmans' alleged wrong. On 25 January 2025, the Lee Claimants cross-applied for permission to amend the particulars of claim to add particulars of novation, estoppel or acknowledgment, alternatively to substitute Pitmans (under its current name Adcamp LLP) as defendant. By the time of the hearing before the deputy judge, in July 2025, BDB had changed its name to Broadfield Law UK LLP. For consistency between the two appeals, however, I will continue to refer to the firm which acquired Pitmans' business in December 2018 as BDB.

13. In both appeals, the relevant limitation period for a claim against Pitmans was current at the time of the issue of the original claim form (in each case naming BDB as the defendant). The limitation period had expired, however, by the time the amendments were made to add, and then substitute, Pitmans as defendant in the Office Properties Appeal. Similarly, the limitation period had expired by the time application was made in the Lee Appeal to substitute Pitmans as a defendant.

The Limitation Act 1980 and the relevant rules

14. Provision is made for new claims made in the course of an existing action by s.35 of the Limitation Act 1980 (the "**1980 Act**"). S.35(1)(b) provides that any new claim made in the course of an existing action shall be deemed to be a separate action and to have been commenced (in the case of new claims other than by way of third party proceedings) on the same date as the original action.

15. A "new claim" is defined by s.35(2) as "any claim involving either (a) the addition or substitution of a new cause of action; or (b) the addition or substitution of a new party".

16. By s.35(3) of the 1980 Act, except as provided by s.33 (which is not relevant on this appeal) or by rules of court, neither the High Court nor the county court shall allow a new claim within s.35(1)(b), other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim. This is an important protection for potential defendants, enabling them to continue to rely on an accrued limitation defence.

17. By s.35(4) rules of court may make provision for allowing a new claim to which s.35(3) applies, subject to the conditions in s.35(5).

18. By s.35(5), the condition for adding or substituting a party, in the case of a claim involving a new party, is that the addition or substitution is "necessary for the determination of the original action". By s.35(6), the addition or substitution of a party is *not* to be regarded as necessary unless either:

> "(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."

19. I will refer to sub-paragraph (a) as the "first gateway" and to sub-paragraph (b) as the "second gateway".

20. The rules of court relating to the addition or substitution of new parties after the expiry of a relevant limitation period are to be found in CPR rule 19.6. The court (by sub-rule (2)) may only do so if the relevant limitation period was current when the proceedings were started *and* the addition or substitution is "necessary".

21. By rule 19.6(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;
>
> (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or
>
> (c) the original party has died or had a bankruptcy order made against them and their interest or liability has passed to the new party."

22. Sub-paragraphs (a) and (b) repeat the first and second gateways as set out in s.35(6), albeit with slightly changed wording. The first change is that the rule refers to a claim "by or against the original party", whereas the statute refers to a claim "by or against an original party". Neither party suggested that this made any difference. The second change is that the rule refers to a claim that "cannot properly be carried on" by or against the original party, whereas the statute refers to a claim that "cannot be maintained" by or against an existing party. In this instance, the appellants place emphasis on the wording of the rule – a point to which I return below.

The first gateway

23. It was common ground before both Mr Halpern KC and Ms Shea KC, that it was not open to Office Properties or the Lee Claimants to contend that their case fell within the first gateway, which provides for the substitution or addition of a party where the

original party was included in the claim form "in mistake for the new party". That is because there is binding Court of Appeal authority to the effect that a distinction must be drawn between a mistake as to the *name* of a party and a mistake as to their *identity*, and that only a mistake as to name will suffice for the purposes of rule 19.6(3)(a): *The Sardinia Sulcis* [1991] 1 Lloyd's Rep 201.

24. The relevant rule, which implemented s.35(6)(a) of the 1980 Act at the time of *The Sardinia Sulcis*, was Order 20 rule 5 of the Rules of the Supreme Court. It was in materially different terms to the current rule under the CPR, and permitted an amendment to correct the name of a party after the expiry of a limitation period:

> "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 identify of the person intending to sue or, as the case may be, intended to be sued."

25. This Court, in *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2008] 1 WLR 585, however, held that the *Sardinia Sulcis* test continued to apply in relation to the first gateway in CPR rule 19.6(3)(a): see the judgment of Lord Phillips of Worth Maltravers CJ, at §56.

26. The continued application of the distinction required by the *Sardinia Sulcis* test was questioned by Leggatt J (as he then was) in *Insight Group Ltd v Kingston Smith* [2012] EWHC 3644 (QB); [2014] 1 WLR 1448 ("***Insight Group***").

27. In that case, the claimants sued a limited liability partnership of accountants (the "**LLP**") seeking damages for the negligent advice of the LLP. In fact, most of the alleged acts of negligence had been committed before the LLP came into existence, by the predecessor firm (the "**firm**"). The claimants applied to substitute the LLP for the firm, after the expiry of the limitation period. An order was initially made before the Master but subsequently set aside on the basis that the claimants' mistake had been one of law, because they wrongly believed that the LLP was liable in law for the negligence of the firm. Leggatt J reversed that decision, finding that the claimants' mistake had been one of fact, being the mistaken belief that it was the LLP that had carried out the allegedly negligent acts. The case therefore fell within the first gateway.

28. Leggatt J noted, at §39 to §42, that the language of rule 19.6(3)(a) is wider than that of RSC Order 20 rule 5 (which is itself replicated in CPR rule 17.4(3)). At §55, Leggatt J said that if it was necessary to maintain the distinction between the name of a party and the identity of the party, then it was impossible to improve on the *Sardinia Sulcis* test, "seen as a method for distinguishing in effect between errors of fact and law". He continued:

> "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 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."

29. There is considerable force in these criticisms, but none of the parties in the appeals before us suggested that it was open to us to depart from the decision in *Adelson*. Accordingly, we must assume for the purposes of these appeals that a mistake as to the identity of a party falls outside the ambit of the first gateway.

30. All of the parties were agreed that the nature of the mistake made by the claimants in the two appeals before us was as to the identity of the defendant, and not merely their name. That was because it was the intention of each of Office Properties and the Lee Claimants to sue BDB in the mistaken belief that BDB had assumed responsibility for the liabilities of Pitmans. That was a mistake of law, as to the identity of the defendant, and not a mistake as to the name of the party whom they intended to sue. There would, in contrast, have been a mistake that fell within the first gateway if the claimants in each case had sued BDB in the mistaken belief that it was BDB, and not Pitmans, that had given the negligent advice on which the claims were based (as in *Insight Group*).

31. Accordingly, the only question for us is whether, under the second gateway, the claim already made in each of the actions could not properly be carried on "by or against the original party" unless Pitmans was added or substituted as defendant.

The judgments below

The Office Properties Appeal

32. Mr Halpern KC concluded that the case did fall within the second gateway. Having reviewed the case law (to which I refer in more detail below), he determined (at §42) that the key question is whether the new claim (a claim against Pitmans for loss caused by its negligence) is the same claim as the old claim (a claim against BDB for loss caused by Pitmans' negligence, in circumstances where BDB is alleged to have assumed liability for Pitmans' negligence).

33. At §43, the deputy judge referred to an "infelicity" in the rule, insofar as it presupposes that the claim will continue to be carried on by or against the original party, which cannot have been intended given that the rule expressly contemplates substitution as well as addition of a new party, and held that the rule must be read as: "the claim by or against the original party cannot be carried on unless the new party is added or substituted".

34. At §44, he noted the classic definition of a "claim" in *Letang v Cooper* [1965] 1 QB 232 at 242-3 per Diplock LJ: "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person", but said that could not be applied literally to the second gateway because the minimum facts which have to be pleaded in order to found a claim against one party will necessarily be different from the minimum facts which have to be pleaded to found a claim against a substituted

party. He then held that the allegation in the original claim form that BDB was liable as the successor practice was not a necessary ingredient of the claim for loss caused by Pitmans' negligence but was added solely to show why liability should attach to BDB. Accordingly, it was correct to characterise the substitution of Pitmans for BDB as necessary in order for the claim against BDB to be carried on. In so doing, he purported to apply the *obiter* reasoning of Leggatt J in *Insight Group*, to which I refer in more detail below.

35. The power to add or substitute a party under CPR 19.6(2) is discretionary. Having concluded that the power arose, Mr Halpern KC exercised the discretion in favour of permitting the amendment to substitute Pitmans for BDB.

The Lee Appeal

36. Ms Shea KC declined to strike out the Lee Claimants' claim because they had a realistic prospect of establishing at trial that any liability Pitmans had to the Lee Claimants was novated to BDB, or that BDB was estopped from denying that it had assumed liabilities, or that the Lee Claimants could rely on the doctrine of acknowledgment. That meant, according to the deputy judge, that the application for substitution became unnecessary. She nevertheless dealt with that application, and reached the same conclusion as Mr Halpern KC.

37. That was, in part, because there was no material difference in the mistake made in the case before her and the mistake made in *Office Properties* and, whilst she was not technically constrained to follow Mr Halpern's decision, the general rule is that the High Court should follow judgments of a court of coordinate jurisdiction unless there was a powerful reason for not doing so. In addition, she concluded that the authorities (to which I refer below, including the *obiter* conclusions of Leggatt J in *Insight Group*) supported that outcome. The deputy judge went on to exercise the discretion under rule 19.6(2) in favour of making the substitution, albeit only on a conditional basis. That was because, in view of her conclusions on the novation, estoppel and acknowledgment issues, the claim *can* properly be carried on against BDB, so the condition in the second gateway is not satisfied. If, either at the trial of a preliminary issue or following the main trial, the Lee Claimants fail on those issues then it would, at that point, be apparent that the action cannot be maintained against BDB. The deputy judge's order on this point was framed as follows:

> "The Claimants are entitled to substitute Adcamp LLP for BDB Pitmans LLP as Defendant in the event that it is found or agreed that BDB Pitmans LLP has not acquired any liability which Adcamp LLP may have had to the Claimants (whether by way of novation or the doctrine of acknowledgment) and that BDB Pitmans LLP is not estopped from denying that it has acquired such liability".

38. With no criticism of the deputy judge, because neither party suggested she ought not to go on and deal with the question of discretion, it seems to me that – having concluded that the condition in the second gateway was not satisfied – the court had no jurisdiction to substitute Pitmans for BDB and therefore no discretion to be exercised at this stage. Nothing turns on this point, however, for the purposes of the issues we need to determine on this appeal.

The appellants' grounds of appeal

39. The deputy judge in each of the cases granted permission to appeal their order.

40. The grounds of appeal in the Office Properties Appeal are that the judge erred in refusing to set aside the joinder of Pitmans in particular because he (i) misinterpreted s.35(6)(b) of the 1980 Act; (ii) failed to give appropriate weight to the reasoning of the Court of Appeal in the case of *Nemeti v Sabre Insurance Co Ltd* [2013] EWCA Civ 1555 ("***Nemeti***"), a case to which I refer in detail below; and (iii) concluded that the claim to be made against Pitmans was that previously made against the party (BDB) against whom the action has been discontinued.

41. The single ground of appeal in the Lee Appeal is that the deputy judge erred in law in holding that substitution of Pitmans for BDB would be permitted under the second gateway.

42. Pitmans' and BDB's essential case, advanced on their behalf by Mr Carpenter KC with conspicuous skill, is that there are two limbs to the requirement imposed by the second gateway, neither of which is met in these cases: first, that it must be demonstrated that without the substitution of Pitmans, the existing claim against BDB could not be determined on its merits and, second, that the claims before and after substitution must be the same, in every material respect.

43. Mr Carpenter submitted that the first limb is not satisfied in the Office Properties appeal because there is no impediment to its claim against BDB being determined on the merits; it is just that it is bound to fail on the merits. That is because BDB has no liability at all to Office Properties (given that it is accepted that such liability as Pitmans may have had to Office Properties has not been transferred to BDB). He submitted that the position is even stronger in the Lee Appeal, because Mr Lee's claim clearly can be determined on its merits against BDB, the deputy judge having found that the claims as to novation, estoppel and acknowledgement are arguable.

44. Mr Carpenter submitted that the second limb is also not satisfied in either case because the phrase "the claim" in the second gateway encompasses all the facts asserted by the claimant which, if established, would give rise to liability against the defendant. That includes the facts upon which it is asserted that the particular defendant is liable. In this case, it includes therefore the facts leading to the conclusion that BDB has acquired through one legal route or another the liabilities which Pitmans owed to the claimants. The claim, if Pitmans were to be substituted as defendant, would be materially different, because it would not include all of those facts. Put another way, although both the original claim and new claim are based on the same alleged duty, breach and loss giving rise to a right to recover damages, the original claim is one *against BDB* (for damages caused by the negligence of Pitmans) and the new claim is one *against Pitmans* (for damages caused by its negligence), and those are two different claims.

45. Mr Carpenter frankly acknowledged that this interpretation of the second gateway means that it is difficult to envisage any situation in which it could apply in one of the circumstances expressly envisaged by it, namely where "the claim cannot properly be carried on by … the original party unless the new party is … substituted as … defendant". Indeed, neither party was able to suggest any circumstances in which the second gateway would apply to enable the substitution of a defendant, on Mr

Carpenter's construction. Mr Carpenter submitted, however, that this was not fatal, for reasons which I develop below.

Analysis and conclusions

46. As I have already observed, a principal reason for the conclusion of both Mr Halpern KC and Ms Shea KC was the reasoning of Leggatt J in *Insight Group* as to the application of the second gateway. I will start, therefore, with an analysis of *Insight Group*, at §86 to §99, and the cases cited there. The whole of the passage in Leggatt J's judgment dealing with the second gateway was obiter, because he had already concluded that the nature of the mistake in that case was such as to fall within the first gateway.

47. The defendant in *Insight Group* contended that the second gateway should be given a narrow construction, in reliance on the decision of Judge Cotter QC (as he then was) sitting as a deputy judge of the High Court at first instance in the *Nemeti* case ([2012] EWHC 3355 (QB)).

48. In *Nemeti* the claimants were injured in a car accident in Romania. The driver died in the accident. The car belonged to his father, who had taken out an insurance policy with Sabre. The driver was not, however, insured to drive the car. The claimants initially sued Sabre, on the ground that it was directly liable to the claimants for the negligence of their insured pursuant to regulation 3 of the European Communities (Rights against Insurers) Regulations 2002. That claim was bound to fail, however, because (1) the Regulations applied only to accidents occurring within the UK and (2) the driver of the vehicle was not the insured, but his son. After expiry of the limitation period, the claimants applied to substitute the estate of the driver as defendant via the second gateway. The Master granted the order, but the deputy judge set it aside, because "it simply cannot be said that the substitution of the estate is necessary for the determination of the original action" (see §46 of the judgment of HHJ Cotter QC).

49. In reaching his conclusion, HHJ Cotter QC conducted a detailed review of the legislative history of s.35 of the 1980 Act, in particular the report of the Law Reform Committee's "Final Report on Limitation of Actions" (1977, Cmnd 6923). This led him to express the view (at §41) that the second gateway is "solely aimed at errors in the constitution or formality of the action, relating to the parties joined to it, or the capacity in which they sue or are sued, which made the extant action unsustainable".

50. HHJ Cotter QC's decision in *Nemeti* was upheld on appeal (subsequent to Leggatt J's decision in *Insight*), but this part of his reasoning was disapproved. Hallett LJ with whom Sharp LJ and the Chancellor of the High Court agreed, said (at §28) that the debate on whether s.35 should be interpreted in a generous or restrictive fashion was "somewhat sterile", and that she was "distinctly wary of adding any gloss to the statutory provisions as HH Judge Cotter purported to do at [41]". She preferred "to construe the unvarnished words of the section which, to my mind, are clear" (see §29).

51. Leggatt J did not have the advantage of the Court of Appeal's rejection of the approach taken by HHJ Cotter QC at first instance in *Nemeti*, but reached a similar conclusion to that of Hallett LJ on the basis of two earlier decisions of the Court of Appeal that had not been cited to HHJ Cotter QC.

52. The first was *Parkinson Engineering Services plc (in liquidation) v Swan* [2009] EWCA Civ 1366; [2010] Bus LR 857 ("***Parkinson***"). In that case, an administration order had been made in respect of the claimant company in May 2003. That order was discharged in November 2003. The company was wound up and the administrators were released from liability under s.20 of the Insolvency Act 1986 (the "**1986 Act**") except for claims notified to them by 13 February 2004. In 2009 the liquidator brought proceedings in the name of the company claiming damages against the administrators for their alleged breach of duty. The administrators, however, had a cast-iron defence to that claim by virtue of their release under s.20 of the 1986 Act. The liquidators therefore applied to substitute themselves in place of the company as claimants so that they could pursue a misfeasance claim under s.212 of the 1986 Act. Such a claim could be brought, with the leave of the court, even after the administrator had been released under s.20.

53. Floyd J's decision to allow the substitution under the second gateway was upheld by the Court of Appeal. At §28, Lloyd LJ (with whom Sullivan LJ and Sedley LJ agreed) concluded:

> "The original action, asserting the company's claim against the former administrators, cannot be determined without the substitution of the liquidator whereas if brought by the liquidator under s.212 it can. Without that substitution it could only, and would be bound to be, determined in favour of the defendants because of the s.20 defence. The claim would be struck out, because of that defence, and it could not be decided on its merits, either way, as the proceedings stand. In terms of the rule, it cannot be carried out by the original party, the company, whereas it can be maintained and carried on if the liquidator is substituted."

54. The distinctive feature in *Parkinson* was that whether the claim was brought in the name of the liquidator or in the name of the company, it involved the very same cause of action (see §13 and §26). That cause of action belonged to the company. S.212 of the 1986 Act does not create any new cause of action. It merely provides a separate procedure within a winding-up for the pursuit of claims by the company against its former officers and others: see *Re Eurocruit Europe Ltd (In liquidation)* [2007] EWHC 1433 (Ch), per Blackburne J at §24, cited with approval by Lloyd LJ in *Parkinson* at §12. That was critical, because, as Lloyd LJ expressed it at §16:

> "The starting point under the Act and the rule … is whether the substitution is necessary for the determination of the original proceedings or, in other words, whether the original claim could not be maintained or properly carried on without the substitution. It must be necessary for the maintenance of the existing action, not for the assertion of a new action."

55. The second case was *Irwin v Lynch* [2010] EWCA Civ 1153 ("***Irwin***"). The facts of this case were the reverse of those in *Parkinson*. The company was in administration, and the administrator brought proceedings in his own name against the company's former directors, seeking a declaration that a transaction carried out by the company with the directors was at an undervalue (within the meaning of s.238 of the 1986 Act)

and that the directors were liable to compensate the company for their misfeasance and breach of trust. The declaration as to misfeasance was bound to fail because the administrators had no standing to bring such a claim in their own name. Section 212 of the 1986 Act applies only in a winding-up, and only the official receiver or a liquidator, creditor or contributory can apply under it. (The claim under s.238 on the other hand was properly constituted, as the section provides that such a claim is to be brought by a liquidator or administrator.) The administrator applied to substitute the company as claimant, pursuant to the second gateway. At first instance, the judge dismissed the application, but that was reversed on appeal.

56. The judgment was again given by Lloyd LJ (with whom Wilson LJ and Gross LJ agreed). The case involved the same distinctive feature as *Parkinson*: the claim which the administrator purported to assert was identical to the claim which would be brought if the company was substituted as claimant. The administrator's problem was that he lacked the necessary standing: see §26:

> "Here the original claim was liable to be struck out, as it has indeed been, because of lack of standing, but I see no good reason to regard the reason for the striking out as being a critical distinction between that case and this. I would also reject the contention that the cause of action is not the same because of the identity of the claimant. Sometimes the identity of the party might be, indeed often it might be, a vital distinction, but here Mr Irwin plainly asserted the company's cause of action and asserted it on behalf of the company, just as the substituted liquidator did in the *Parkinson Engineering* case. So the cause of action is identical; it is already pursued for the benefit of the company, but it is doomed to failure because of the lack on Mr Irwin's part of the necessary locus standi. It seems to me that it is possible and appropriate for the court to exercise its discretion under rule 19.5 to allow the joinder of the company so as to assert the relevant claims."

57. As noted at §94 of Leggatt J's judgment in *Insight Group*, the argument in favour of a narrow construction of s.35(6)(b) that had found favour at first instance in *Nemeti*, had been rejected by the Court of Appeal in *Irwin* – see §19 of Lloyd LJ's decision, where he eschewed reliance on the historical development of the legislation in favour of construing the statute and the rule in accordance with the normal principles of construction.

58. At §96 of his judgment, Leggatt J concluded as follows:

> "The principle which I derive from these two decisions of the Court of Appeal is that the court has power to order substitution under section 35(6)(b) and CPR 19.5(3)(b) if: (1) a claim made in the original action is not sustainable by or against the existing party; and (2) it is the same claim which will be carried on by or against the new party."

59. Applying that principle to the facts of the case before him, Leggatt J concluded that the first requirement was satisfied, it being common ground that the claim was

unsustainable against the LLP. The second requirement was not satisfied, however, because the original claim asserted that the LLP had itself been negligent, whereas the proposed claim against the firm was that it was the firm that had been negligent: "the new claims, therefore, allege different facts and are not identical to the original claims".

60. He went on to consider what his conclusion would have been if the claimants' mistake had been, instead, that the firm had taken over the liabilities of the LLP (i.e. the same mistake as was made in both of the appeals before us). In that event, he would have concluded that the requirements of the second gateway were met, because (see §98):

> "if the original claims had asserted negligence in the provision of professional services by the firm, they would have been the same claims as those which are now pursued. The only difference would have been that the claimants were no longer contending that the LLP was liable in law for the acts alleged. Substituting the firm because that contention was abandoned would seem to me to be equivalent in its effect to the substitution of the liquidator for the company in the *Parkinson Engineering* case … and of the company for the administrator in the *Irwin* case."

61. I have already noted that HHJ Cotter QC's decision in *Nemeti* (though not all of his reasoning) was upheld by the Court of Appeal. The test set out at §96 of Leggatt J's judgment in *Insight Group* was cited by Hallett LJ, at §27. Apart from recording that counsel for the respondent described this formulation as "bland", she made no criticism of it.

62. The argument advanced by the appellant in *Nemeti* was that the cause of action in the original claim (against the insurer of the driver's father) and new claim (against the estate of the deceased driver) were identical throughout, being a claim "for personal injury based on the alleged negligence of [the driver]." The Court of Appeal disagreed. The two claims were substantially different: the original claim was a claim for indemnity under statute, limited to the insurer's liability to its insured, whereas the new claim was a claim in negligence against the alleged tortfeasor (see §43 of Hallett LJ's judgment). Therefore, (see §44) although the deceased driver's negligence underlay both claims, the claims were not the same, and the proposed substitution of a new party was not designed to maintain the original claim, but was "designed to launch a new claim against a new party" (§45). The flaw in the claimant's analysis of the original cause of action (see §41) was that he stopped at the negligence of the driver and the relief sought, and thus ignored an additional and vital element in the original claim for relief against the respondents, namely the provisions of regulation 3.

63. Before addressing the parties' arguments under each of Mr Carpenter's first and second limbs (see §42 above) in turn, I make two preliminary observations as to the interpretation of the 1980 Act and the relevant rules.

64. First, it is important to keep in mind that the 1980 Act is intended to strike a balance between the hardship to a claimant in being prevented from pursuing a good cause of action for damages to which there may be no defence, and the hardship to a defendant in having a cause of action hanging over him for an indefinite period. Each provision of the 1980 Act represents Parliament's attempt to strike a balance between those

irreconcilable, but legitimate, interests: *Haward v Fawcetts* [2006] UKHL 9; [2006] 1 WLR 682, per Lord Scott at §32.

65. Second, as Mr Carpenter stressed, s.35 of the 1980 Act provides for amendment outside the limitation period in specified circumstances only. The question for the court in any given case is whether it falls within those circumstances or not. There is no power or general discretion "to do justice" where a mistake has been made: *Nemeti*, per Hallett LJ at 29.

Limb 1: whether it is necessary to show that unless the new party is substituted the original claim cannot properly be made "on its merits"

66. The condition, in the case of a claim involving a new party, is that the addition or substitution is "necessary for the determination of the original action": s.35(5)(b) of the 1980 Act. In the statute, necessity is confined to the case where the original action cannot be "maintained" without the addition or substitution, whereas in the rule it is confined to cases where the original action "cannot properly be carried on". Mr Carpenter submitted that each of these formulations is not intended to capture *all* situations where the original claim will fail, including because it is bad on its merits. If that was the intention, the drafter would have used a phrase such as "cannot succeed". Accordingly, he submitted, the intention was to capture only those cases where the claim cannot be determined on its merits, because of some constitutional or procedural issue with the claim, i.e. because there is something other than the claim's merits which prevent it from being determined.

67. The problem with his submission is that it flies in the face of this court's rejection, in *Nemeti*, of the attempt by HHJ Cotter QC to put a gloss in materially similar terms on the words of the second gateway (see §50 above). Mr Carpenter suggested that he was not seeking to place a gloss on the words but was seeking to provide the context within which the words should be construed. That is a distinction without a difference, as he was relying on that context to impose a restrictive meaning of the words.

68. Mr Carpenter laid particular stress on the formulation in the rule, that the claim could not "properly" be carried on. While all parties agreed that the rule was intended to have the same meaning as the statute, Mr Carpenter suggested that the use of the phrase "properly carried on" in the rule gave colour to the meaning of "cannot be maintained" in the statute, and suggested that this supported the view that the second gateway is concerned with hurdles of a procedural nature.

69. That, as Mr Grant pointed out, however, is the wrong way round. The words chosen by the drafter of the rules, made subsequent to the passing of the statute, cannot have any bearing on the true interpretation of the statute.

70. Mr Carpenter cited a passage in the judgment of Mann J in *Various Claimants v G4S* [2021] EWHC 524 (Ch); [2021] 4 WLR 46, a case concerned with amendments under CPR rule 17.1. At §152, in a passage dealing with an alternative argument made on the then equivalent to rule 19.6(3)(b), Mann J said that insufficient attention had been paid to the word "properly" and that, while it was not possible to define its precise effect, it seemed to be intended to correct errors which are in the nature of *locus standi* errors. He did not think that was inconsistent with the Court of Appeal authorities which bound

him. It does not appear, however, that *Nemeti* was cited to Mann J, and his formulation involved much the same sort of gloss that was rejected in that case.

71. Mr Carpenter suggested that his interpretation is supported by Lloyd LJ in *Parkinson* where, at §28, he referred to the fact that without the substitution of the liquidator for the company, the claim "could not be decided on its merits". Lloyd LJ referred in the same paragraph, however, to the fact that the claim was bound to be determined in favour of the defendant because of the "defence" that the administrators were released from liability by statute. As Mr Grant pointed out, that was a substantive defence which went to the merits of the claim, and it is difficult to see any difference in this respect between the defence in *Parkinson* and (i) the defence in *Nemeti* that the insurer was not liable because the accident did not take place in the UK and/or because the car was driven by the insured's son, or (ii) the defence that BDB is not liable because it did not assume responsibility for Pitmans' liabilities.

72. This demonstrates the lack of utility in the supposed distinction between determining a claim "on the merits" or otherwise. Wherever a claim is brought against B based on the negligence of A, it depends on whether the merits are viewed as being confined to establishing that A was liable in negligence or include establishing liability against B. That suggests that the real question arises under the second limb, to which I now turn.

Limb 2: the meaning of "the claim", and the extent to which the original and new claim must be the same

73. The respondents did not dispute that in order to comply with the second gateway the original and new claim must be the same. The disagreement between the parties is what is meant by the "same" claim. The respondents contend that it refers to the facts which give rise to a claim for damages against Pitmans, excluding the additional facts necessary to demonstrate that BDB had assumed liability for the claim. The appellants contend that it refers to all the facts which give rise to a claim against BDB, including therefore the facts establishing BDB's liability for Pitmans' negligence.

74. The respondents' position reflects the obiter conclusion of Leggatt J at §98 of *Insight Group*, where he said (citing *Parkinson* and *Irwin* in support) that – had the mistake by the claimant in that case been that the LLP had taken over the liabilities of the firm – he would have found that the requirements of the second gateway were met, because both claims would have asserted negligence in the provision of professional services by the firm.

75. Mr Grant submitted that there is no relevant distinction between *Parkinson* and the circumstances in these appeals. He pointed to the fact that Lloyd LJ in *Parkinson* held, notwithstanding that the identity of the claimant was different, that the original claim, and the claim following substitution, were identical, involving no change to the allegations of duty, breach and loss. That, Mr Grant submitted, shows that the focus is properly on what the original case is "about", and that Lloyd LJ was rejecting the notion of "the claim" advanced by Mr Carpenter, namely that it included the identity of the specific claimant and defendant.

76. I do not accept this submission. As Lloyd LJ was at pains to point out in both *Parkinson* and *Irwin*, the distinctive feature in those cases was that the identity of the person in whom the claim was vested was the same before and after substitution, namely the

company itself. The interposition of the liquidator as named claimant in *Parkinson* was pursuant to a purely procedural provision, enabling an alternative method of pursuing the *company's* cause of action in a winding-up. That is not so in either of the appeals before us, where substitution would involve a substantive change to the identity of the person against whom the claim is asserted.

77. For that reason, I also respectfully disagree with the last sentence of §98 of Leggatt J's judgment in *Insight Group*, in which he regarded substitution in the case before him as equivalent in its effect to the substitution made in *Parkinson* and *Irwin*.

78. Mr Grant also submitted that in order to allow the appellants' appeals it would be necessary to accept the proposition, which he said was made by Mr Carpenter, that an alteration to *any* of the pleaded facts in the original claim would prevent the claims being the same. I do not accept this. The question is whether the two claims are in substance the same, not whether every pleaded fact is the same. Mr Carpenter's proposition was not in fact as narrow as suggested by Mr Grant; it was that the second gateway can only be invoked where the "essential facts which have to be averred" are the same, which I regard as equivalent to where the claims are in substance the same.

79. There is considerable force in the respondents' contention that if the appellants are correct, then the second gateway cannot work in one of the possible scenarios which is expressly contemplated by the statute, namely the *substitution* of a defendant. It is here, however, as Mr Carpenter submitted, that the legislative history is relevant, as explained by Lord Collins in *Roberts v Gill* [2010] UKSC 22; [2011] 1 AC 240, at §27 to §30. The 1977 report of the Law Reform Committee, which led to the 1980 Act, rejected the solution of legislating for specific cases, recognising the difficulty in devising the necessary formula. It recommended, therefore, that the legislation provide a general formula, with the Rule Committee being given power to provide for specific cases falling within that formula. The fact that, in those circumstances, the second gateway does not work in all of the permutations of addition/substitution of a claimant/defendant is less significant. The fact that it does not do so is the consequence of the remaining statutory language: specifically, the condition in s.35(5)(b) that amendment or substitution is necessary "for the determination of the original action", and the limitation within the second gateway that "the original action" cannot be maintained by or against an existing party.

80. One circumstance where it might be thought obvious that substitution should be allowed is where, after proceedings have begun, either the claimant's interest in, or the defendant's liability for, a claim is transferred to a new party, whether by assignment, novation or according to a statutory merger or transfer of liabilities.

81. This scenario was specifically addressed in Order 15 rule 7 of the RSC, albeit this was dealing with the position generally, and said nothing about changes made after the expiry of the limitation period. There is no equivalent within the CPR, although one such scenario is identified in rule 19.6(3)(c) of the CPR as an example of necessity for the purposes of rule 19.6(2)(b) – where the original party has died or is made bankrupt, and their interest or liability has passed to a new party.

82. It is pointed out in the notes to rule 19.6 in the White Book, at paragraph 19.6.6, that there is no mention of such a case within s.35(6) of the 1980 Act, so this is merely a specific example of the second gateway.

83. If that were correct, then it would lend support to the respondents' broader view of "the claim" (because if this scenario falls within the second gateway then substitution must be regarded as necessary for the maintenance of the original claim notwithstanding that the identity of the defendant is different). I am satisfied, however, that it is not correct, for the reasons given by Mr Carpenter in reply. In short, neither s.35(6) nor rule 19.6 is intended to deal with the case where a claim is properly constituted within the limitation period and there later arises a need to substitute either the claimant or defendant because of a subsequent transfer of the interest in or liability for the claim. That is because such an event gives rise to no limitation issue in the first place.

84. That was the conclusion reached by Mance J in *The Choko Star* [1996] 1 WLR 774, in which the claimant Italian company, having commenced proceedings within the limitation period, was subsequently merged by incorporation into a new company. In the face of an application by the defendant to strike out the claim, on the basis that to allow the new company to be named as claimant would involve the introduction of a new claim after the expiry of the limitation period, contrary to s.35 of the 1980 Act, at p.782D-F, he observed that, unlike RSC Order 20, rules 5 & 6 (which focused on correcting defects or inadequacies in proceedings as originally constituted), RSC Order 15 rule 7 addressed a different problem, where *during the course of proceedings* there was some change affecting the identity of the correct claimant (or, I would add, defendant). At p.782H, he said:

> "In all such situations, of which death is only the most striking, it seems self-evident that any existing proceedings, properly constituted within the limitation period, should be allowed to continue for or against the party to whom the relevant right or obligation has been transferred in law, and that this should be permitted whether the transfer occurs before or after the expiry of the limitation period."

85. Mance J's decision was approved by the Court of Appeal in *Yorkshire Regional Health Authority v Fairclough Building Ltd* [1996] 1 WLR 210, another case involving the transfer of a claimant's rights to a new party after commencement of proceedings. Millett LJ, at p.218F-G, referred to the two different kinds of substitution provided for in the rules of court, one where the party substituted has succeeded to a claim or liability already represented in the action, and one where it has not, and said:

> "It would be outside the scope of the Act of 1980 to alter the law relating to the former kind of substitution, which involves no question of limitation."

86. Evans LJ, at p.222F-G agreed, concluding that "substitution" in s.35(2) of the 1980 Act is limited as a matter of statutory interpretation to substitution of the kind provided for in RSC Order 15, rule 6, (the predecessor provision to CPR rule 19.6) and does not include the different kind of substitution which takes place under RSC Order 15, rule 7, adding:

> "The reason for distinguishing between them is not far to seek. When a case of "substitution" arises under Ord.15, r.7, no new cause of action is introduced. No question can arise, therefore, of the defendant having a limitation defence by reason of the

> introduction of a new claim at that stage: there may or may not already be a limitation defence by reason of the date when the writ was issued. The Limitation Act 1980 simply does not apply when one party is substituted for another in order to proceed with the same claim or cause of action as before. There is, therefore, no scope for the operation of section 35."

87. In *Roberts v Gill* (above), at §104 to §106, Lord Walker JSC referred with approval to Mance J's analysis in *The Choko Star* and to the decision of the Court of Appeal in the *Yorkshire Regional Health Authority* case to the effect that no question of limitation arises in the case of an assignment or transmission of a cause of action after proceedings have been commenced, although he doubted whether Millett LJ's additional reasoning at p.218 – where he expressed views about the interpretation of s.35 – was correct. (Lord Walker noted the "oddity" that rule 19.5(3)(c) covered some, but not all, cases of transmission of a cause of action or liability and suggested this was possibly the result of the drafter feeling some residual doubt about the position.)

88. Wherever A sues C for B's wrongdoing, where – at the outset of proceedings – B's liability has *not* been transferred to C (or vice versa) then, save in the case of a deliberate tactical choice, it will necessarily be the result of a mistake. Mr Lawrence and Mr Grant stressed the importance of the rules applying coherently, and the lack of any coherence in there being a different outcome between (1) a claimant suing C because he mistakenly believes that B's liability for negligence has been transferred to B, and (2) a claimant suing C because he mistakenly believes that it was C, not B, whose negligence caused him loss.

89. I have considerable sympathy with the apparent anomaly that this creates. Where I part company with the respondents, however, is that the answer is to be found in the interpretation of the second gateway. Mistake is specifically catered for in the first gateway but, according to authority binding on this Court, the drafter of the 1980 Act deliberately limited the circumstances in which a mistake can be relied on to where it is a mistake as to name not identity. If that is correct, then it is difficult to construe the second gateway in such a way that it covers the type of mistake which is deliberately excluded from the first gateway.

90. Moreover, to seek to address that anomaly by a broader interpretation of the second gateway would in turn create further anomalies. Since it is not a requirement of the second gateway that the claimant's decision to sue B was a mistake, it could be relied on where a claimant made a deliberate tactical choice to sue B, for example knowing that there was doubt whether B had assumed responsibility for A's liabilities. That would go materially beyond the first gateway, where mistake is a necessary condition. As Mr Carpenter submitted, that anomaly would extend to a wider class of cases than the particular circumstances of these appeals. It would include, for example, cases involving vicarious liability. He gave the example of a claim against an employer based on a wrong committed by its employee, where it turned out that the employer, but not the employee, had a defence to the claim.

91. The respondents' answer to this was that a broader interpretation of the second gateway only expanded the range of cases that could *potentially* overcome a limitation defence, because the court retains a discretion to disallow an amendment even if it falls within either of the gateways. That, however, is not a convincing response. The exceptions to

the general rule, in s.35(3), that an addition or substitution cannot be made after the expiry of a limitation period are narrowly drawn. It is unlikely that Parliament envisaged an expansive interpretation of the gateway, to be narrowed at the discretion of the court on a case-by-case basis. Where Parliament intends the application of limitation periods to be subject to the discretion of the court, that is expressly catered for – see, for example, the discretionary power to exclude a time limit in the case of actions in respect of personal injuries or death in s.33 of the 1980 Act.

92. A second anomaly is that, on the respondents' case that the claim against Pitmans can be regarded as the same as that made against BDB, because the *additional* facts relied on to establish liability against BDB can be ignored as surplusage, this only works where the mistake made is that B's liability has been transferred to C. It could not work where A sues B, in the mistaken belief that B remains liable when in fact there has been a transfer of liabilities to C. In such a case, additional facts need to be pleaded to establish C's liability. It is difficult to see a coherent basis for that distinction.

93. The incoherence of which the respondents complain is, in substance, directed at the distinction between a mistake of fact and a mistake of law in relation to the first gateway. The parties are agreed, however, that we are precluded by *Adelson* from interfering with the interpretation of the first gateway. If it needs putting right, it is for the Supreme Court to do so. The Lee Claimants expressly reserved the right to argue for that outcome if the case goes further.

Conclusion

94. For the above reasons I would allow both of these appeals.

Lord Justice Phillips

95. I agree.

Lord Justice Singh

96. I also agree that these appeals should be allowed for the reasons given by Zacaroli LJ but would like to add some words of my own in view of the importance of the issue, which has never previously been decided by this Court, and out of deference to the judgment of Leggatt J in *Insight Group*, with whose obiter dicta we are disagreeing.

97. Although to some extent the issues in this case turn on the provisions of the Civil Procedure Rules, in particular rule 19.6, formerly rule 19.5, the fundamental issue in these appeals concerns the correct interpretation of a provision in primary legislation: s.35(6) of the Limitation Act 1980.

98. In cases of the present kind, which are materially similar to *Insight Group*, the difficulty arises because of the limited scope which has been given to para (a) of s.35(6). This Court has authoritatively decided that, in order to fall within para (a), the mistake must be as to the name of the party rather than as to the identity of the party: see *Adelson*, approving, in the context of the Civil Procedure Rules, *The Sardinia Sulcis*, also a decision of this Court, in which this Court had considered the previous rule in RSC Order 20, rule 5(3).

99. It is clear from Leggatt J's judgment in *Insight Group*, at §39, that he wondered why in these circumstances *The Sardinia Sulcis* test should be retained at all. The wording of the Civil Procedure Rules is different from the former Rules of the Supreme Court. I sympathise with that view but, as Leggatt J recognised, this Court and lower courts are bound by the decision in *Adelson*.

100. As is common ground, what Leggatt J had to say about s.35(6)(b) of the 1980 Act and CPR rule 19.5(3)(b) was obiter, since in fact he decided the case before him under para (a). Leggatt J's discussion of the para (b) issue, can be found at §89-99. Leggatt J relied in particular on two decisions of this Court: *Parkinson* and *Irwin*. It should be noted that those two decisions concerned the substitution of a new claimant, not of a new defendant. The principle which Leggatt J derived from those two decisions was formulated as follows at §96:

> "The principle which I derive from these two decisions of the Court of Appeal is that the court has power to order substitution under section 35(6)(b) and CPR r 19.5(3)(b) if: (1) a claim made in the original action is not sustainable by or against the existing party; and (2) it is the same claim which will be carried on by or against the new party."

101. Leggatt J then proceeded to apply the law to the case before him, at §97-98:

> "97. Applying this test to the facts of the present case, it is common ground that the claims made in this action were unsustainable against the LLP. The first requirement was therefore satisfied. However, the second requirement was not satisfied, as the claims which the claimants sought to carry on against the firm were not the same claims as were made against the LLP. I have concluded earlier that the claims originally made against the LLP alleged that the LLP had been negligent in auditing the accounts of the second claimant and providing administrative and fiduciary services during the relevant period. In contrast, the claims asserted against the firm after the claimants had realised their mistake alleged that the firm (and not the LLP) acted as auditor and provided the relevant services. The new claims, therefore, allege different facts and are not identical to the original claims.
>
> 98. My conclusion on this issue would have been different if I had agreed with the master's view as to the nature of the mistake made by the claimants when they issued the proceedings against the LLP. As mentioned earlier, on the master's view the claims were originally brought against the LLP on the basis that the firm had provided the relevant services but in the mistaken belief that the LLP had taken over the liabilities of the firm. If I had accepted that analysis of the claims, then I would also have agreed with Master Fontaine that the requirements of CPR r 19.5(3)(b) were met in this case. That is because, if the original claims had asserted negligence in the provision of professional services by the firm, they would have been the same claims as

> those which are now pursued. The only difference would have been that the claimants were no longer contending that the LLP was liable in law for the acts alleged. Substituting the firm because that contention was abandoned would seem to me to be equivalent in its effect to the substitution of the liquidator for the company in the *Parkinson Engineering* case [2010] Bus LR 857 and of the company for the administrator in the *Irwin* case."

102. With respect to Leggatt J, the decisions in *Parkinson* and *Irwin* did not support a proposition as broad as the one formulated by him at §96(1). Those cases did not address the question of where a claim made in the original action is not sustainable "against the existing party", as distinct from a case where it was not sustainable "by … the existing party."

103. Furthermore, I do not agree with Leggatt J that such cases can be regarded as being "equivalent" to the substitution of a defendant. One reason for this is that it overlooks the important but fundamental starting point that Parliament has chosen to give a defendant a statutory defence by reason of the passage of time in the Limitation Act: see *Haward v Fawcetts (a firm)* (above), at §32 (Lord Scott of Foscote). As Lord Scott said there:

> "it is the task of the judiciary to identify from the statutory language and the purpose of each amending enactment the balance that that enactment has endeavoured to strike and to apply the enactment accordingly. It is emphatically not the function of the judges to try to strike their own balance, whether as a response to the apparent merits of a particular case or otherwise."

104. In other words, the court is not given a general discretion to waive what would otherwise be the impact of the Limitation Act in the interests of justice or otherwise. The discretion which has been conferred by s.36(5) of the 1980 Act and rules made to give it effect only arises if the jurisdictional threshold for the exercise of that discretion has been passed.

105. I also do not think that it is an appropriate approach to the interpretation of para (b) to try to give it an expansive scope because of what is perceived to be too narrow a scope on the present interpretation of para (a). If there is a problem with the interpretation which has to date been given by this Court to para (a), in particular in the decision in *Adelson*, the remedy for that is for the Supreme Court to correct that error (if there has been an error). It seems to me that Parliament has decided what is to happen in "mistake" cases in para (a) and the scope of that provision should not be circumvented by artificially giving a broad interpretation to para (b) in order to avoid a perceived problem with para (a).