Neutral Citation Number: [2007] EWCA Civ 701

Case No: A2/2007/0903/QBENI

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
The Honourable Mr Justice Tugendhat
TLQJ/06/0677

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2007

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RIGHT HONOURABLE LORD JUSTICE JACOB
and
THE RIGHT HONOURABLE LORD JUSTICE MOSES

- -

Between :

(1)Sheldon Gary Adelson **(2)Las Vegas Sands Corp**	**Appellants**
- and -	
Associated Newspapers Limited	**Respondent**

- -
- -

Mr J. Price QC, Mr J. Rushbrooke and **Mr G. Busuttil** (instructed by **Schillings**) for the Appellants
Mr M. Warby QC and Mr W. McCormick (instructed by **Reynolds Porter Chamberlain LLP**) for the Respondent

Hearing dates : Monday 11th June 2007

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Approved Judgment

Lord Phillips CJ :

This is the judgment of the Court

Introduction

1. This is an appeal from an order made by Tugendhat J on 1 May 2007 refusing an application by the Claimants to join two further corporate claimants to this libel action. The application was made pursuant to provisions of CPR 19.5(2) and (3), dealing not with adding parties, but with substituting parties. The relevant provisions read as follows:

> "(2) The court may…substitute a party only if-
>
> (a) the relevant limitation period was current when the proceedings were started; and
>
> (b) the…substitution is necessary.
>
> (3) The…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…"

The action was commenced within the 12 month limitation period that applies to defamation proceedings, but this period had elapsed before the application was made to join the additional claimants. We will explain at the outset how it is that the claimants rely on provisions dealing with the *substitution* of parties when what they are seeking is the *addition* of two parties.

2. The First Claimant, Mr Adelson, is the Chairman and Chief Executive of the Second Claimant. The Second Claimant is the parent of a number of subsidiaries and, is essentially a holding company. The application seeks to join two of those subsidiaries to this action: Las Vegas Sands LLC (formerly Las Vegas Sands Inc) and Las Vegas Sands (UK) Ltd. For convenience we shall follow the example of the trial judge and refer to these as the Third and Fourth Claimants. The original Particulars of Claim alleged that:

> "The Second Claimant predominantly trades and operates in the gambling industry, developing and running casino based gambling, entertainment and leisure resorts and their associated hotel, restaurant and retail facilities."

It is common ground that this is not accurate. The true position has now been pleaded by amending the Particulars of Claim with the permission of the judge, to add "(through its operating subsidiaries)" after the words "Second Claimant". It is the First and Second Claimants' case that the original pleading mistakenly claimed in the name of the Second Claimant relief in respect of a libel not merely of the First and Second Claimants, but of the Third and Fourth Claimants as trading arms of the Second Claimant. The pleading had, in effect, mistakenly rolled up into a single cause of action asserted in the name

of the Second Claimant causes of action enjoyed by the Second, Third and Fourth Claimants. The Claimants submit that the application is, in effect, to substitute for the Second Claimant the Third and Fourth Claimants in relation to parts, but not the whole, of the claim originally pleaded in the name of the Second Claimant.

3. The judge rejected the application for two reasons. First, he held that the Claimants' application involved not merely the addition of new Claimants but the addition of new claims. In the law of libel, each Claimant had its own separate claim based on an allegation of damage to its individual reputation. The proposed amendments went beyond substituting Claimants in respect of part of an existing claim advanced by the Second Claimant. They asserted separate claims and causes of action, each one based on its own facts. Such amendments could only be made pursuant to an application under CPR 17.4. No such application had been made. Secondly, the judge held that no mistake had been established that fell within CPR 19.5(3).

4. Mr Price QC for the Claimants submitted to us that the judge adopted an unduly restrictive interpretation of CPR 19.5(3). He further sought to rely, should this be necessary, on CPR 17.4. Mr Warby QC, for the Defendant, made no objection to his seeking to do so.

5. When granting permission to appeal, Sir Henry Brooke remarked that CPR 19.5(3) is 'notoriously causing problems'. Indeed it is. There are conflicting decisions of this Court in relation to its effect. We propose by this judgment to clarify this difficult area of procedural law.

The background to the claim

6. The claim is made in respect of an Article published by the Defendant in the Daily Mail on 28 May 2005. This concerned the relationship between Mr Malcolm Glazer, a US businessman who had recently taken over Manchester United Football Club, and the First Claimant. It described the First Claimant as 'the ruthless casino baron who rules Las Vegas' and as having been described as 'perhaps the most vilified man in Nevada'. The article contained a critical account of the First Claimant's career and family life from the age of 12 up to his the present age, said to be 72. None of the companies controlled by the First Claimant was referred to by name, but there was specific reference to 'his Las Vegas Sands parent company'. The article alleged that the First Claimant was planning to build a vast gambling complex on land owned by Manchester United Football Club and there was reference to 'United's proposed joint venture with Las Vegas Sands'. The theme of the Article was that such a venture would be adverse to the interests of football and, in particular, of Manchester United.

7. A letter before action was sent on 2 June 2005 by Salans, solicitors who stated that they represented 'Las Vegas Sands Inc. and Mr Sheldon Adelson, the Chairman of the company'. Initially the complaint was directed to allegations of secrecy and collusion between the First Claimant and Mr Glazer in relation to dealings affecting Manchester United. In a subsequent letter dated 7 June 2005 headed 'Our Clients: Mr Sheldon Adelson and Las Vegas Sands Inc.' Salans stated that 'Both Mr Adelson personally and Las Vegas Sands Corporation have achieved very considerable success in the gaming entertainment and leisure business'. The letter went on to refer to establishments in Las Vegas and Macau and to the pursuit of gaming activities in

association with Manchester United at Old Trafford. Salans threatened to 'issue libel proceedings… for Mr Adelson and Las Vegas Sands Corporation'.

8 When Salans wrote on 20 September 2005 the heading of their letter had changed to 'Our Clients: Mr Sheldon Adelson and Las Vegas Sands Corp.' This letter stated:

> "Having carefully considered the position, our clients have decided that they cannot allow this gross smear on Mr Adelson and, by implication, on the company of which he is chairman, to go unchallenged. Accordingly you should understand that their complaint now extends to the other seriously libellous attacks made in this article. They complain of the entirety of the article, including headlines, photographs and captions, as the words and context conveying these libels."

The claim

9. The Particulars of Claim issued by Salans on 19 October 2005 commenced as follows:

> "The First Claimant is the Chairman and Chief Executive Officer of the Second Claimant, which is a public company incorporated in Nevada, USA. The Second Claimant predominantly trades and operates in the gambling industry, developing and running-casino-based gambling, entertainment and leisure resorts and their associated hotel, restaurant and retail facilities."

10. The Defence was served on 12 January 2006. It did not admit paragraph 1 of the Particulars of Claim and set out its own case as to the position of the Second Claimant:

> "It is admitted and averred that the Second Claimant owns, controls and directs the operation of a number of companies which conduct business of the kind described in that sentence. However, according to its own Annual Report filed with the United States Securities and Exchange Commission for the fiscal year ended December 21, 2004, the Second Claimant is, 'a parent company with limited business operations. Our main asset is the stock of our subsidiaries.'"

The paragraph went on to express confusion over the corporate structure of the group, but suggested that it was the subsidiary company Las Vegas Sands LLC (formerly Las Vegas Sands Inc) which operated the well known Venetian casino resort in Las Vegas, 'the best known operation with which the Claimants' names are associated'. So far as identification and reference were concerned, paragraph 4 of the Defence admitted only that the specific references to the 'Las Vegas Sands parent company' and to 'United's proposed joint venture with Las Vegas Sands' were capable of being understood to refer to the Second Claimant. There was a substantial plea of justification.

11 A Reply was served on 15 May 2006, shortly before the expiry of the 12 month limitation period. It joined issue with the Defence but did not plead specifically to the description of the Second Claimant advanced by the Defendant. It then responded in detail to the particulars of justification. In the course of so doing it made the following statements in relation to the role of various companies associated with Mr Adelson: The Sands Hotel was purchased by 'LVS LLC'. Las Vegas Sands (UK) had been planning to develop one or more regional casinos in the UK as provided for by the Gambling Act 2005 (paragraph 4.6 (9) (b)) and there had been meetings between Manchester United supporters and Mr Rodney Brody, UK representative for that company.

12 Salans came off the record shortly after the Reply was served and were replaced by Schillings.

13 On 13 April 2007 the Claimants issued a notice of an application to amend the Claim Form and Particulars of Claim to add the Third and Fourth Claimants. The letter serving the draft amendments, dated 4 April 2007, stated that this amendment arose

> "out of the fact that, as contended in your client's defence, the principal trading operations of the second claimant are carried out through its operating subsidiary Las Vegas Sands LLC. It is therefore necessary to correct the error in the second sentence of paragraph 1 and substitute the third claimant as the appropriate corporate entity to recover the loss claimed in respect of damage to Las Vegas Sands' trading reputation, leaving the second claimant to claim in respect of damage to its reputation as a publicly traded holding company.
>
> Similarly, the addition of the proposed fourth claimant is in order to obviate the need for arid disputes about which corporate entity can properly recover in respect of likely damage to Las Vegas Sands' ability to establish a casino business in the UK."

The letter went on to state that the Fourth Claimant had not yet established any operating subsidiary in the UK.

The application to amend

14 The application not merely sought permission to add the Third and Fourth Claimants to the Action. It sought permission to make substantial additions to the Particulars of Claim. The only one of significance in the present context that the judge permitted was the addition of the plea that the Second Claimant traded 'through its operating subsidiaries'. The other proposed additions gave information as to the different roles played by the Second, Third and Fourth Claimants. It was alleged that the Third Claimant was a wholly owned subsidiary of the Second Claimant which operated the 'renowned Venetian Resort-Hotel-Casino'. The Fourth Claimant was alleged to have been incorporated with the intention that it, or a wholly owned subsidiary, would hold any UK gaming licence granted in the future and that the subsidiary would then operate the business. It was alleged that the Second Claimant had concluded an exclusivity agreement with Birmingham City Football Club, the Third Claimant with Manchester United Football Club and the Fourth Claimant with Middlesbrough Football Club.

15 It was alleged that the Second and Third Claimants had an international reputation so that reference to Las Vegas Sands would be understood to refer to the Second and Third Claimants. In the context of the Claimants activities in the UK, the article would be taken to refer to the Fourth Claimant. The amended pleading continued:

> "In the premises, the claimants will aver that the words complained of were and would be understood to refer to the first, second, third and fourth claimants and that the said words were likely to damage (i) the reputation and goodwill of the second claimant as a publicly traded corporation in the eyes of the financial and investment community, (ii) the trading reputation and goodwill of the third claimant and (iii) the reputation and capacity to trade and/or establish trading subsidiaries and/or successfully bid for casino licences of the fourth claimant."

A new meaning defamatory of the Fourth Claimant alone was added:

> "That by reason of it being owned and controlled by the First, Second and Third Claimants it was unfit to own a casino business or hold a casino licence in this country."

The Limitation Act 1980

16 By an amendment made in 1996, section 4A of the 1980 Act imposes a period of limitation of one year in respect of claims for libel and slander. Section 32A gives the Court a discretion to direct that section 4A is not to apply where, having regard to specified matters, it appears that it would be equitable to allow the action to proceed.

17 Section 35 of the 1980 Act provides:

> "**New claims in pending actions: rules of court**
>
> (1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced-…
>
> (b)…on the same date as the original action.
>
> (2) In this section a new claim means any claim by way of set-off or counterclaim, and 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;
>
> (3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any county court shall allow a new claim within subsection 1(b) above, 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…

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following-

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and

(b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

(6) The addition or substitution of a new party shall not be regarded for the purposes of subsection 5(b) above as necessary for the determination of the original action unless either-

(a) the new party is substituted for a party whose name was given in any claim in the original action in mistake for the new party's name; or

(b) any claim 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."

The rules

18 CPR 17.4 provides:

"17.4(1) This rule applies where - (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and (b) a period of limitation has expired under – (i) the Limitation Act 1980; (ii) the Foreign Limitation Periods Act 1984; or (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

(3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine

> and not one which would cause reasonable doubt as to the identity of the party in question."

19 CPR 19.5 provides:

> "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; (b) the Foreign Limitation Periods Act 1984; or (c) any other enactment which allows such a change, or under which such a change is allowed.
>
> (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; (b) the claim cannot 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 him and his interest or liability has passed to the new party."

Previous rules and their relevance

20 Prior to 1965 the courts would not permit any amendment that introduced a new cause of action or a new party after the relevant time limit under the Limitation Act 1939 had expired. In 1964 Order 20 rule 5 was added to the Rules of the Supreme Court. It provided:

> "(1) Subject to Order 15, rules 6, 7 and 8 the following provisions of this rule, the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
>
> (2) Where such an application to the court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
>
> (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the

> person intending to sue or, as the case may be, intended to be sued.
>
> (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of the issue of the writ or the making of the counterclaim, as the case may be, he might have sued.
>
> (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

21 The wording of rule 5(3), 'notwithstanding that *it is alleged* that the effect of the amendment will be to substitute a new party' left open the question of whether, in the circumstances covered by the rule, the effect of amending to alter the name of a party would, on true analysis, constitute the substitution of a new party.

22 It can be seen that the provisions of section 35 of the Limitation Act 1980 and of CPR 17.4(3) and CPR 19.5 (3) cover the same ground as O.20 r 5 and bear some similarity to it. In a number of instances this Court has applied decisions on O. 20 r 5 as being relevant to the interpretation of CPR 19.5(3). In *Morgan Est v Hanson Concrete* [2005] EWCA Civ 134; [2005] 1 WLR 2557 Jacob LJ, giving the leading judgment of a two judge court, deprecated this course. He stated that

> "the 1980 Act had the obvious intention of liberalising the position from that under the Limitation Act 1939."

This *obiter* observation was made without the Court having been referred to the legislative history of the 1980 Act or to a number of judgments that had analysed this. The observation was not correct and the reasoning in *Morgan Est* should not be followed.

23 So far as the amendment of the names of parties in order to correct the effect of mistake is concerned, there is reason to doubt whether the 1980 Act was intended to make any change in the law. The preamble to the Bill, which became that Act without relevant amendment, stated that it implemented most of the recommendations made in the Law Committee's 21st Report on Limitation of Actions (Cmnd. 6923). That Report, published in September 1977 referred to O.20, r 5(3) at paragraph 5.16 and commended its wording and the result that it achieved. The Report recommended that the law should be changed in a number of respects to allow the addition of parties in order to validate a claim and Brooke LJ drew attention to these in *Martin v Kaisary (No 1)* [2005] EWCA Civ 594; [2006] PIQR 5. In general, however, the Report made it plain that the Committee did not recommend any relaxation of the restrictive effect that the Limitation Act 1939 had had on the grant of permission to amend pleadings out of time.

24 Perhaps the clearest summary of the object of the 1980 Act is to be found in the judgment of Millett LJ in *Yorkshire Regional Health Authority v. Fairclough Building Ltd* [1996] 1 All ER 519 at p. 527:

> "The 1980 Act was enacted in order to implement the recommendations of the Twenty-First Report of the Law Reform Committee (Final Report on Limitation of Actions) (Cmnd 6923) (1977). The dichotomy between amendments to existing proceedings which involved the addition or substitution of new parties and those which did not is to be found in the committee's recommendations. The committee recommended that no change was required in the rules which enabled a new cause of action to be added out of time (a reference to Ord 20, r 5); that a minor amendment be made to allow a change in capacity to be made out of time (which required an amendment to Ord 20, r 5(4)); and that the rule-making powers of the Supreme Court and County Court committees should be enlarged so as to confer power to enable parties to be added out of time in five specific cases which the committee had identified (which led to the addition of paras (4) to (6) to Ord 15, r 6). The purpose of these recommendations was to allow a limited number of amendments to existing proceedings to be made after the expiry of the limitation period which could not have been made before. They were not intended to deprive the court of any existing power to allow amendments after the expiry of the limitation period, nor were they intended to cover amendments which, though made after the expiry of the limitation period, were not statute-barred. It would have been completely outside the committee's terms of reference to make any recommendation of the latter kind."

25 In *Payabi v Armstel Shipping* [1992] 1 QB 907 at p. 924 Hobhouse J, stated:

> "But it is clear that Ord. 20, r. 5 must now be read with the [1980] Act and is implicitly (but inelegantly) giving effect to the first alternative, (a), in section 35(6). The result is that the rule relevant to the present case, Ord 20. r. 5, must be construed as being made under the general power to regulate procedure and under the more specific power given *for the purposes of that Act* by section 35 of the Act of 1980"

26 In the light of this history when interpreting the provisions of the CPR in respect of the substitution of parties, which closely follow the form of the relevant parts of section 35 of the 1980 Act, it is necessary to have regard to the jurisprudence in relation to O.20 r 5. Before turning to the provisions of the CPR, we propose to review the authorities relating to O. 20, r 5.

Order 20 rule 5.

27 The wording of O. 20, r 5 suggests that the following requirements must be satisfied before an amendment can be made under that rule:

i) A mistake must have been made;

ii) The mistake must be genuine;

iii) The mistake must not have been misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

28 The following questions arise in relation to this rule:

iv) What is the nature of the mistake?

v) Who is it who must be responsible for the mistake?

vi) What criteria govern whether the mistake is misleading and, in particular, must the court be satisfied that, despite the mistake the person intended to be sued should have been aware of the true identity of the person intending to sue and that he was the person intended to be sued?

vii) Can an amendment under the rule have the effect a substituting a new party?

29 Before turning to these questions we would make some general observations, using the current descriptions of claimant and defendant to describe the parties to an action. Most of the problems in this area arise out of the difference, sometimes elusive, between an error of identification and an error of nomenclature. An error of identification will occur where a claimant identifies an individual as the person who has caused him an injury, intends to sue that person, describes him in the pleadings by the correct name, but then discovers that he has identified the wrong person as the person who has injured him. An error of nomenclature occurs where the claimant identifies the correct person as having caused him the injury, but describes him in the pleadings by the wrong name.

30 A problem arises in distinguishing between the two types of error where the claimant knows the attributes of the person that he wishes to sue, for example the manufacturer of an object, but has no personal knowledge of the identity of that person. If on enquiry he is incorrectly informed that a named third party has those attributes and he commences an action naming that third party as defendant but describing in the pleading the attributes of the person intended to be sued, is the case one of misnomer of the person intended to be sued or error of identification? A similar problem can arise when attempting to identify the parties to an alleged contractual offer and acceptance – see for example *Ingram v Little* [1961] 1 QB 31.

31 The rule presupposes that there is a person intending to sue. The mistake envisaged in relation to the name of the claimant is one under which the name used for the claimant is not the name of the person wishing to sue. Such a mistake is likely to be made by an agent of the person intending to sue. Where the claimant is a company the mistake will always be that of an agent, but identifying the person intending to sue may create difficulties.

32 The rule also envisages that there will be a person intended to be sued. The mistake envisaged in relation to the defendant will be one under which the name used for the defendant is not the appropriate name to describe the person that the claimant intends to sue. Thus the rule envisages a defendant identified by the claimant but described by a name which is not correct.

33 In either case the mistake that the rule envisages is one of nomenclature, not of identification. This conclusion receives support from the authorities. We shall consider these in chronological order.

34 The first decision of this court on O.20, r 5 of which we are aware was *Mitchell v Harris Engineering* [1967] 2 QB 703. The plaintiff was seeking to claim against his employers for personal injuries. There was correspondence with them before action that did not lead to a settlement. When the writ was issued a junior clerk made a mistake and issued it in the very similar name of an associated company of the employers. James J gave permission to amend to substitute the name of the employers pursuant to O. 20, r.5. In relation to the nature of the mistake he said this:

> "In my judgment, there was a genuine mistake on the part of the junior clerk who issued the writ. Was the mistake one which was misleading or caused any reasonable doubt as to the person intended to be sued? The test is what would a reasonable person receiving this writ, accompanied as it was by the statement of claim, understand from it in regard to the person intended to be sued? The name was not the correct name of the person intended to be sued and there was a misnomer; that misnomer in fact accurately named an existing but different person. In my judgment, a reasonable person would say of this writ: 'Although on the face of it there is a clear statement that the plaintiff is suing an existing person there is no doubt at all that he intends to sue a different person who has a slightly different name.' I do not consider that the mistake made was misleading, nor do I consider that it created any doubt as to the person whom the plaintiff intended to sue."

35 In the Court of Appeal the primary point taken by the defendant was that the rule was *ultra vires.* It was, we think, implicit in this argument that the amendment was being treated as substituting a party out of time. The Court rejected the defendant's argument, adding in relation to discretion:

> "It was a very proper case for amendment. It was a genuine mistake by the plaintiff's solicitors; and the secretary of the two companies must have realised it as soon as he read the writ and the indorsement".

While the judgments did not focus expressly on the nature of the mistake, this case can be placed into the category of misnomer rather than misidentification. The person intending to sue was in no doubt as to the identity of the person that he intended to sue and the clerk, acting on his behalf, simply made a mistake as to the defendant's name. The agent of the company intended to be sued was served with the proceedings, was aware of the mistake and was under no misapprehension as to the identity of the intended defendant.

36 In *Evans v Charrington* [1983] 1 QB 810 the plaintiffs wished to renew a lease that had been granted to them by Charrington and made an originating application in the County Court to this end, naming Charrington as the Landlord. Charrington had, however, assigned the reversion of the lease to Bass, a company in the same group, for which Charrington acted as managing agent. The issue before the Court of Appeal was whether, in these circumstances, Bass could be substituted for Charrington under O.20, r 5. The mistake was made by the plaintiff's solicitor, who thought that Charrington was the landlord. The Court agreed that O.20 r 5 only permitted substitution if there had been a mistake as to the name of the defendant rather than a mistake as to the identity of the defendant. By a majority they held that the mistake was only as to the defendant's name. Donaldson LJ put the matter as follows at p. 821:

> "In applying Ord. 20, r. 5 (3) it is, in my judgment, important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of and seeking to sue B, but mistakenly describing or naming him as A and thereby ending up suing A instead of B. The rule is designed to correct the latter and not the former category of mistake. Which category is involved in making any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in light of al the surrounding circumstances. In the instant case I have not the slightest difficulty in accepting Mr. Greenwood's assertion that he intended to sue the relevant landlord under the Act. After all, he was responding on behalf of his lessee client to a notice to quit given on behalf of the landlord and it would have been surprising, to say the least, if he had thought that it was appropriate to respond by claiming a new lease from the managing agent or other stranger to the landlord and tenant relationship. Accordingly I would conclude that he made a genuine mistake of a character to which Ord. 20, r. 5 (3) can apply.
>
> However, the matter does not stop there, because it is not every mistake of this character which can be corrected under the rules. The applicant for leave to amend has to satisfy the court that the mistake was not misleading or such as to cause any reasonable doubt as to the identity of the person intended to be sued. On the facts of the present case, I do not see how Charringtons or Bass or anyone else familiar with the surrounding circumstances, could have been misled or could have had any real doubt as to the identity of the person intended to be sued. The notice to quit had been given by Charringtons as managing agent for Bass and the application in reply was intended for Bass albeit addressed to Charringtons."

37 The next case that we come to is particularly important for two reasons. The first is that it involved a mistake in relation to the name of the plaintiff. The second is because it laid down a test that has been applied in a number of subsequent cases. In *The Al Tawwab* [1991] 1 Lloyd's Rep 201 the ship '*Sardinia Sulcis'* was damaged by the '*Al Tawwab'* in

the course of a lightening operation. The charterers of the *Al Tawab* paid for the damage to be repaired and became subrogated to the owners' rights against the owners of the *Al Tawwab.* They brought proceedings *in rem* in the name of 'the Owners of the '*Sardinia Sulcis'*. By the time that they did so, however, the owners had assigned their rights to another company, the demise charterers of the vessel. The issue was whether the name of the demise charterers could be substituted for that of the owners pursuant to O.20, r 5. This court held that they could. Lloyd LJ at p. 205-6 summarised the criteria that had to be satisfied under that rule:

> "The first point to notice is that there is power to amend under the rule even though the limitation period has expired: see O.20, r. 5(2). The second point is that there is power to amend, even though it is alleged that the effect of the amendment is to add a new party after the expiration of the limitation period. But the Court must be satisfied (1) that there was a genuine mistake, (2) that the mistake was not misleading, (3) that the mistake was not such as to cause reasonable doubt as to the identity of the person intending to sue, and (4) that it would be just to allow the amendment."

38 The basis upon which the court found that these criteria were all satisfied is perhaps questionable. In particular, Lloyd LJ made the following comment at p. 207:

> "The 'identity of the person intending to sue' is a concept which is not all that easy to grasp and can be difficult to apply to the circumstance of a particular case"

He then went on to consider the test to be applied to ascertain 'the person intended to be sued':

> "In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would always be given. So there must be some narrower test. In *Mitchell v. Harris Engineering* the identity of the person intented to be sued was the plaintiff's employers. In *Evans v. Charrington* it was the current landlord. In *Thistle Hotels v. McAlpine* the identity of the person intending to sue was the proprietor of the hotel. In *The Joanna Borchard* it was the cargo-owner or consignee. In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case. Thus if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be other wise."

This has become known as 'the test in the *Sardinia Sulcis*'.

39 Purporting to apply that test to the 'person intending to sue' Lloyd LJ held that

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

Mr Pertwee was the solicitor who commenced the proceedings.

40 In a concurring judgment Stocker LJ put the test as follows:

> "can the intended plaintiff or defendant be identified by reference to a description which is specific to the particular case – e.g. landlord, employer, owners or ship owners. If the identity of the person intending to sue or be sued appears from such specific description any amendment is one of name; where it does not it will in many if not in all cases involve the description of another party rather than simply the name"

41 The *Sardinia Sulcis* test was applied by this Court in a case where the alleged mistake was as to the name of the plaintiffs in *International Bulk Shipping v Trading Corp of India* [1996] 1 All ER 1017. Actions to enforce arbitration awards were brought, each in the name of a ship-owning company. At the time of the arbitrations the assets of each company had vested in a trustee in bankruptcy appointed under New York law, but the trustee had persuaded the arbitrators that the companies were the proper claimants and had commenced the enforcement actions on the same basis. His decision to do so was intended to avoid the possibility that set-offs would be raised in respect of debts owed by associated ship-owning companies if he sued in his own name. When he started the actions, however, the companies had been wound up and thus ceased to exist. The trustee applied, after the limitation period had expired, to have his name substituted for those of the companies pursuant to O. 20 r 5.

42 The Court of Appeal held that the trial judge had correctly refused this application. Giving the judgment with which the other two members of the Court agreed, Evans LJ said this:

> "The rule refers to 'the party intending to sue or… intended to be sued'. When it is said that the wrong plaintiff has been named, this must be taken as reference to the intention of persons who caused the writ to be issued, rather than of the person in fact named. Those persons in the present case were the trustee or the bankruptcy estate. They were mistaken in thinking that the companies were still in existence and entitled to sue. If they had known the true facts, they would or might well have named the trustee or the bankruptcy estate as sole plaintiff or as a co-plaintiff. But that was a decision as to who the plaintiffs should be, and no doubt for good reasons they chose to assert the companies' rights under the awards, rather

> than whatever rights the trustee or the bankrupt estates had acquired.
>
> The rule envisages that the writ was issued with the intention that a specific person should be the plaintiff. That person can often but not invariably be identified by reference to a relevant description. The choice of identity is made by the persons who bring the proceedings. If having made that choice they use the wrong name, even though the name they sue may be that of a different legal entity, then their mistake as to the name can be corrected. But they cannot reverse their original identification of the party who is to sue. This interpretation of the rule derives not only from the phrase 'correct the name of the party' but also from the requirement that the mistake must not have been such as to cause any reasonable doubt as to the identity of the person intending to sue."

43 These authorities have led us to the following conclusions about the principles applicable to O.20 r 5.

i) The mistake must be as to the name of the party in question and not as to the identity of that party. Such a mistake can be demonstrated where the pleading gives a description of the party that identifies the party, but gives the party the wrong name. In such circumstances a 'mistake as to name' is given a generous interpretation.

ii) The mistake will be made by the person who issues the process bearing the wrong name. The person intending to sue will be the person who, or whose agent, has authorised the person issuing the process to start proceedings on his behalf.

iii) The true identity of the person intending to sue and the person intended to be sued must be apparent to the latter although the wrong name has been used.

iv) Most if not all the cases seem to have proceeded on the basis that the effect of the amendment was to substitute a new party for the party named.

CPR 17.4 and 19.5

44 We now turn to the authorities dealing with substitution of parties under the CPR. The relevant rules replaced O.20 r 5. The statutory authority for them, insofar as they involve issues of limitation, is section 35 of the 1980 Act which, as we have explained, was intended to reflect the provisions of O.20 r 5. What is puzzling is that those who have drafted the rules have dealt with a mistake in relation to the name of a party both in CPR 17.4 (3) and in CPR 19.5 (2) and (3). The former rule uses language similar to O. 20 r 5. The latter does not. It seems to us that you have to read CPR 17.4 and 19.5 together to give full effect to O. 20, r 5. Nevertheless, section 35 and CPR 19.5(3), in contrast to CPR 17.4(3) and O.20, r 5, do not specify that the mistake must not be such as to cause any reasonable doubt as to the party intending to sue or be sued.

45 In *Gregson v Channel Four Television Corporation* [2000] CP Rep 60, the claimant issued a claim form claiming damages for libel in respect of a broadcast on Channel Four. The publisher was Channel Four Television Corporation, but the claim form mistakenly named the defendant as Channel Four Television Company Limited, a dormant wholly owned subsidiary of the former company. Nobody was misled by this error. Permission to amend the claim form to substitute the correct name was granted pursuant to CPR 17.4(3). In the Court of Appeal it was argued that the change of name involved the substitution of a new party, which should have been sought under CPR 19. 5 (2) and (3). Giving the leading judgment of a two judge court, May LJ rejected this argument. He observed at paragraph 13 that it was conceded that the misnaming of the defendant was a genuine mistake as to the name of a party and not one which would cause reasonable doubt as to the identity of the party in question. He held that in these circumstances rule 17.4 (3) applied. The amendment did not involve substituting a new party. He went on to say at paragraph 16:

> "There were provisions in the former Rules of the Supreme Court providing for cases where an application was made to correct a mistake in the name of a party or to substitute a new party for one who had been joined by mistake. The Civil Procedure Rules are a new procedural code and there is, in my view, no basis for supposing that these new rules were intended to replicate, or for that matter not replicate, the former provisions. It is not generally appropriate to refer to authorities decided under the former rules to determine what the new rules mean or how they should be applied."

46 Concurring, Gibson LJ observed of rule 19.5:

> "Nothing more is said about the mistake, but it is clear from the rule as a whole that the relevant mistake is one necessitating a change of parties. By comparison and contrast with r. 17.4(3) that mistake is not a mere mistake as to name such as causes no reasonable doubt as to the identity of the party in question but is something more fundamental which can only be cured if a new party is substituted."

47 As we have explained, contrary to what May LJ thought, there is good reason to believe that the new rules were intended to replicate the provisions of O.20 r 5. In the next three decisions to which we refer the Court acted appropriately in having regard to the jurisprudence relating to O.20 r 5.

48 *Horne-Roberts v SmithKline Beecham* [2001] EWCA Civ 2006; [2002] 1 WLR 1662 involved one of a large number of claims for damage alleged to have been caused by the MMR vaccine. There had been three different manufacturers of this vaccine at the relevant time and the manufacturer could be identified from the batch number of the vaccine. The claimant's solicitor made a mistake and identified from the relevant batch number Merck as the manufacturer rather than SmithKline. The claim form was issued naming Merck as the defendant. After the expiry of the limitation period an application was made to substitute SmithKline pursuant to section 35(3) of the 1980 Act and CPR 19.5. The Court of Appeal upheld the decision of the judge to accede to this application. Giving the judgment with which the other two members of the Court agreed, Keene LJ

applied the *Sardinia Sulcis* test. He held that the test was satisfied because the claimant had "always intended to sue the manufacturer of vaccine batch No 108A41A". He added at paragraph 44:

> "Instinctively one is reluctant to accept an interpretation of section 35(6) of the 1980 Act which might allow the substitution of a new defendant unconnected with the original defendant and unaware of the claim until after the expiry of the limitation period. Such a reaction initially led me to doubt the conclusion reached by Bell J. But on further consideration it seems to me that any potential injustice can be successfully avoided by the exercise of the court's discretion under section 35. It is perhaps not without significance that there is no appeal in the present case against the exercise by Bell J of his discretion against SK."

49 It is not clear from the report whether the description of the defendant as the manufacturer of vaccine batch No 108A41A appeared in the pleading, although it is clear that Merck's solicitors were aware of it. Nor is it clear whether those acting for SmithKline were aware that a claim had been made erroneously naming Merck as defendant in respect of that batch number.

50 *Parsons v George* [2004] EWCA Civ 912; [2004] 1 WLR 3264 was another case where tenants who were seeking a new tenancy, brought proceedings under the Landlord and Tenant Act 1954 naming the wrong persons as the landlord. The judge refused permission to substitute the name of the correct landlord pursuant to CPR 19.5, holding that, on its true construction, it could not apply to the time limit imposed by the 1954 Act. The Court of Appeal reversed this decision. Dyson LJ, giving the only judgment, observed that it would be surprising if the new rules restricted the circumstances in which amendments could previously be made. He observed that the language of the new rule was not significantly different from that of O. 20 r 5 and went on to apply the *Sardinia Sulcis* test. He observed that the solicitors who had been served were also acting for the landlord and must have understood that the claimants were intending to apply for a new tenancy from the competent landlord.

51 In *Kesslar v Moore & Tibbits* [2004] EWCA Civ 1551; [2005] PLNR 17 the claimant sued for the negligence of a solicitor, R, and erroneously named as defendant a firm that had taken over the firm of which she had been a partner. She, however, did not join the new firm. The Court of Appeal allowed the names of R, and her then partner K, to be substituted as defendants under CPR 19.5(3)(a). The Court purported to follow the *SmithKline* case and to apply the "more expansive" view of the rule stated by Dyson LJ in *Parsons v George.* Buxton LJ observed at paragraph 23:

> "The best source for what the claimant actually intended is to be found in the points of claim. At most the error made there was in identifying the proper way of interpleading a person whom they had always intended to sue."

It is not clear from the report whether common insurers were involved, so that those representing R and K were aware of the proceedings and of the mistake.

52 The next case in the sequence is *Morgan Est* in which Jacob LJ sought to sweep away such restrictions as the *Sardinia Sulcis* test places on the meaning of 'mistake' in section 35 of the 1980 Act and in CPR 19.5. For the reasons that we have already given, *Morgan Est* should not be followed.

53 The final decision is one to which Tugendhat J attached some importance. *Weston v Gribben* [2006] EWCA Civ 1425 involved a claim against the Foreign and Commonwealth Office for breach of a duty of care in issuing an apostille confirming a notarisation by a person who was not authorised to act as a notary in England. The consequence of this was alleged to be that a fraudulent scheme was enabled under which the owner of property in Spain was deprived of that property. The legal owner of that property was a Spanish Company 'Grass'. The named claimant, Mr Weston, at whose instigation the action was commenced, was the sole administrator or director of Grass and claimed to be indirectly the owner of 67% of that company as well as having a direct interest in the property that Grass owned. Mr Weston sought to substitute Grass as the claimant pursuant to CPR 19.5(3)(a). He alleged that he had sued in his own name because he mistakenly believed that, as sole administrator of Grass, he could sue on behalf of Grass. In the only judgment, with which the other two members of the Court agreed, Lloyd LJ was faced with the fact that Jacob LJ in *Morgan Est* had denounced the *Sardinia Sulcis* test. In these circumstances Lloyd LJ approved an alternative test, which had been suggested by Sedley LJ in the course of argument:

> "…it may be a convenient working test to ask whether you can change the identity of the claimant or, as the case may be, the defendant without significantly changing the claim. For my part that seems to me to be a sensible approach, consistent with the terms of the rule and in particular of the Act".

54 Lloyd LJ held that Mr Weston could not satisfy this test. If Grass were substituted as claimant, then it would be necessary to reformulate the basis for asserting that the FCO had owed a duty of care and the case advanced of misfeasance. In any event, Lloyd LJ held that he was not satisfied that Mr Weston had made the mistake that he alleged.

Conclusions

55 CPR 19.5(3)(a) makes it a precondition of substituting a party on the ground of mistake that:

> "The new party is to be substituted for a party who was named in the claim form in mistake for a new party"

It is clear from this language that the person who has made the mistake must be the person responsible, directly or through an agent, for the issue of the claim form. It is also clear that he must be in a position to demonstrate that, had the mistake not been made, the new party would have been named in the pleading.

56 The nature of the mistake required by the rule is not spelt out. This Court has held that the mistake must be as to the name of the party rather than as to the identity of the party, applying the generous test of this type of mistake laid down in *Sardinia Sulcis*. The 'working test' suggested in *Weston v Gribben*, in as much as it extends wider than the *Sardinia Sulcis* test, should not be relied upon.

57 Almost all the cases involve circumstances in which (i) there was a connection between the party whose name was used in the claim form and the party intending to sue, or intended to be sued and (ii) where the party intended to be sued, or his agent, was aware of the proceedings and of the mistake so that no injustice was caused by the amendment. In *SmithKline*, however, Keene LJ accepted that the *Sardinia Sulcis test* could be satisfied where the correct defendant was unaware of the claim until the limitation period had expired. We agree with Keene LJ's comment that, in such a case, the Court will be likely to exercise its discretion against giving permission to make the amendment.

The result of this appeal

Substitution or addition of parties?

58 Tugendhat J made the following finding in paragraph 60:

> "It is not in issue that there has been a mistake. It was incorrect to plead of the Second Claimant that it trades and operates in the gambling industry. But Mr Price QC also submits that the law permits a non-trading company to sue for libel, and the Second Claimant wishes to pursue a claim for libel on that footing in this action. If the mistake as to the Second Claimant being a trading company had not been made, then it seems to me at least one of them, would have been named in the claim form in addition to the Second Claimant. In fact I think it probable that they would have done what they now apply to do, and joined all three from the start. If that is right, or may be right, then it is not shown that the Second Claimant was named in the claim form in mistake for either of the Third Claimant or the Fourth Claimant."

59 The reasoning of the judge appears to be that CPR 19.5(3) (a) was not satisfied because the mistake did not cause those responsible for the claim form to name the Second Claimant *rather than* the Third and Fourth Claimants. This is closely linked to his conclusion that each of the Second, Third and Fourth Claimants had an individual claim based upon its individual circumstances and reputation. Had the mistake not been made there would have been three corporate Claimants, each asserting an individual claim.

60 Mr Warby QC supported the judge's analysis. He submitted that, just as in *Weston v Gribben*, the proposed amendment involved an alteration of the claim made in the original pleading. This was illustrated by the other amendments that the Claimants sought to make. They were essential to establish causes of action in relation to the Third and Fourth claimants. The causes of action were not the same as that originally pleaded.

61 Mr Price argued that what the amendment sought to do was to effect a partial substitution. The trading members of the group had causes of action as trading companies. Those causes of action had, as a result of the mistake, been claimed in the name of the Second Claimant. It was arguable, however, that the Second Claimant had an independent right to claim for damage to its reputation as a holding company and in relation to certain activities, such as seeking licences, that it carried on in the interests of the group. The claim as originally pleaded included the Second Claimant's own claim. There was no

reason in principle why, in circumstances such as this, CPR 19.5(3) should not permit partial substitution.

62 In so far as the amendments involved adding new claims, Mr Price submitted that there was no reason in principle why permission to make these should not be granted provided that they fell within CPR 17.4(2), nor why permission should not be given to make, at one and the same time, amendments that substituted parties and amendments that added new claims.

63 We have not found it easy to get to grips with these submissions, in part because the law is not clear as to whether, or on what basis, the Second Claimant can advance a claim in its own right. In principle we can see no reason why permission should not be given both to substitute a claimant under CPR 19.5 and to add new claims that fall within CPR 17.4(3). What is not permissible, however, is to rely upon the new claims in order to assist in demonstrating that the action has been brought in the name of the wrong party.

64 The judge did not consider that the amendments sought in relation to the activities of the Third and Fourth Defendants had the effect of advancing claims that differed from that originally pleaded on behalf of the Second Claimant. He held that the specific roles that these amendments attributed to the Third and Fourth Claimants could be regarded as particulars of the role originally alleged to have been performed by the Second Claimant, namely trading and operating in the gambling industry, developing and running casino based gambling, entertainment and leisure resorts.

65 If the particulars of the activities of the three corporate Claimants that the Claimants seek to add by amendment had been pleaded as relating to the Second Claimant alone in the original pleading, it would have strengthened the Claimants' case that they were indeed seeking partial substitution. In any event, however, if one asks the question whether the claims that the Third and Fourth Claimants seek to advance are the same as the claims that the Second Claimant would have been able to advance had it carried on the activities of the Third and Fourth Claimants itself, rather than through subsidiaries, we are inclined to think that the answer is 'yes'. If a company runs a number of businesses in different parts of the world and the company is defamed, the damage is likely to depend upon the extent to which the reputation of the individual businesses is harmed. It does not seem to us that it should affect the overall damage, or the overall damages, if each individual business is carried on by a subsidiary and claims are brought by all the companies in the group.

66 For these reasons we are not convinced that it is impossible to treat this as a case of substitution, merely because the proposed amendments result in three corporate claims rather than one, albeit that to permit addition of parties in such circumstances pursuant to CPR 19.5(3) would certainly break new ground. We are not convinced by the reason given by the judge for refusing the Claimants' application.

The nature of the mistake

67 It is common ground that the allegation in the Particulars of Claim that the Second Claimant was a trading company was erroneous. The judge concluded that this error reflected a mistaken belief that the Second Claimant was a trading company and that, if this mistake had not been made, it is probable that the Second, Third and Fourth Claimants would all have been joined as Claimants. This conclusion was founded on no

more than the fact of the error in the original pleading. No evidence was adduced as to how the error came to be made or what would have been done had the error not been made. The judge earlier referred to the correspondence before action and remarked that:

> "Something must have happened which led Salans to understand that their corporate client was not the Third Claimant but the Second Claimant".

68 Mr Warby challenged the Claimants' assertion that the Second Claimant had been named in the Particulars of Claim *in mistake for* the Third and Fourth Claimants. He submitted that there was no basis on which the Court could find that there was the kind of mistake that fell within CPR 19.5. It was possible, indeed likely, that a deliberate strategic decision had been taken to select the Second Claimant as the appropriate party. That decision might have been mistaken, but such a mistake would not fall within the ambit of the rule. Mr Price submitted that the fact that a mistake had been made was evident from the Particulars of Claim. He further submitted that a broad meaning should be given to 'mistake' in the rule, relying upon a statement to this effect made by Jacob LJ in *Morgan Est.*

69 We have explained why *Morgan Est* should not be followed. If those responsible for the Particulars of Claim had knowledge of the corporate structure of the Las Vegas Sands Group and of the part played by each company in the group activities and deliberately decided to sue in the name of the Second Claimant alone, the fact that this decision may have been mistaken will not bring the case within CPR 19.5. To do this the Claimants must establish that those responsible for the Particulars of Claim were under a mistake as to the group structure or the roles played by the members of the group and, but for that mistake, would have included as claimants the Third and Fourth Claimants. This is the very minimum that they need to achieve if they are to have an arguable case that a mistake of name within the *Sardinia Sulcis* test occurred.

70 The Particulars of Claim were settled by junior counsel, who no longer represents the Claimants, and a declaration of truth was signed on behalf of the Claimants by a member of Salans. No evidence has been adduced to show that there was a mistake on the part of Salans or counsel as to the roles played by the claimant companies, but for which mistake the Third and Fourth Claimants would have been joined in the action.

71 In the court below Leading Counsel for the Claimants said:

> "It was not thought that it was a useful use of costs or proportionate to chase up with the old firm of solicitors why the mistake was made".

That statement was not a satisfactory alternative for evidence. Its implication was that the Claimants' solicitors had misinformed counsel who settled the Particulars of Claim and carried the further implication that, had counsel been aware of the true position, he would have ensured that the Third and Fourth Claimants were joined in the action. Such a scenario is difficult to reconcile with the fact that this counsel was clearly aware of the true position when he received instructions to settle the Reply, before the limitation period had expired, and yet no application was made at that stage to add the Third and Fourth Claimants.

72 There is no reason to believe that Salans were under any misapprehension as to the true position in relation to the corporate structure of the Las Vegas Sands Group or as to the roles of the companies in the group. We have no information as to the instructions given by Salans to counsel. Only one thing is clear. Those responsible for the Particulars of Claim thought it appropriate to plead that the Second Claimant "trades and operates" without adding the words "through its operating subsidiaries". We find it impossible to deduce from that fact that those responsible for the Particulars of Claim were under a misapprehension of the material facts but for which they would have added as Claimants the Third and Fourth Claimants.

73 Mr Price has not conceded that on the facts of this case the Second Claimant cannot bring a claim for any damage done to the group's reputation. It is at least possible that, rightly or wrongly, an informed decision was taken that the Second Claimant was the appropriate corporate claimant. The attempt to add the Third and Fourth Defendants may reflect no more than a belated decision to attempt to avoid lengthy argument as to the nature of the cause of action of the Second Claimant. Indeed in the course of argument Mr Price said that it had been hoped to achieve this.

74 For these reasons, which differ from those of the judge, we agree with his conclusion that the Claimants have failed to prove that "the Second Claimant was named in the claim form in mistake for any other company".

75 We regret this conclusion. The Particulars of Claim made it clear that complaint was made both of the serious personal allegations made against the First Claimant and of the damage caused by these allegations to the reputation of his corporate gambling business, in the particular context of the Manchester United transactions. The plea that the action has been brought in the name of the wrong company is a technical defence. We think that it might have been preferable for this action to have addressed the primary issues rather than involve what are likely to be lengthy arguments as to title to sue. However, we note that the Claimants did not consider it appropriate to invite the Court to exercise the general discretion that it enjoys under section 32A of the Limitation Act 1980. There may well have been good reason for this.

76 For the reasons that we have given, this appeal is dismissed.