NEWCASTLE BUSINESS AND PROPERTY COURT FORUM

Talk on the Latent Damage Act 1986 and joinder of parties outside of limitation by HH Judge Kramer

I recently watched an interview with Bertrand Russell from 1963 through the medium of YouTube. I was particularly struck by something he said about his upbringing. He told the interviewer that for a period he was brought up by his grandfather who was born in the dying days of the French Revolution and that he had been an MP during the Napoleonic wars as well as a prime minister in the mid-19th-century and architect of the 1832 Reform Act which ushered in wider democracy. I was so amazed to see someone who was around in my lifetime having lived with a grandfather born in the 18th century that I checked the dates. True enough, the first Earl Russell, for he was the grandfather in question, was born in 1792. He in turn will have known people to whom the 1745 Jacobite uprising and the American War of Independence constituted news and anxiety, not historic inevitability. Now why am I telling you this, the subject of the lecture being neither philosophy nor history. Apart from passing on a Michael Caine -type "not many people know that" piece of information, what these facts have in common with today's lecture is shaking hands with history. For I am old enough to have been sent by my Chambers as a pupil barrister to take notes in the judicial committee of the House of Lords when the case of *Pirelli General Cable works v Oscar Faber and partners [1983] 2 AC 1*, was being

argued. So, this is your shaking hands with history moment so far as Pirelli is concerned.

1. I shall come to the case of Pirelli shortly, but first the basics. The Limitation Act 1980 makes provision for time periods after which an action may not be brought. Leaving to one side provisions relating to land, the effect of the act is to bar the remedy not to extinguish the right. The time limit for actions in tort, simple contract and to recover money due under a statute is six years; s.2, 3 and 9 of the Act. There are special time limits for personal injury actions and cases of theft and defamation but we are not concerned with those. An action brought on a specialty, may not be brought after the expiration of 12 years from the date on which the cause of action accrued; s.8. A speciality includes a contract contained in a deed, but also extends to claims to enforce rights under a statute; *Collin v Duke of Westminster [1985] 1 QB 581* where it was held to apply to a tenants right to purchase the freehold under the Leasehold Reform Act 1967.

2. In tort, the cause of action accrues when damage occurs. This is in contrast to a contract where the cause of action accrues on breach and claims under statute where the date of accrual depends upon the construction of the relevant statutory provision. For example, the Defective Premises Act 1972 deems this to be the date on which the dwelling was completed, but

even there the Act provides for a further date where rectification works are undertaken. It will be readily apparent that where the complaint is of a breach of duty, a claim in the tort of negligence has the attraction that the time from which the limitation period starts to run can be substantially more than 6 years after the breach of duty because in negligence, the cause of action does not accrue until there is damage. The question as to what constitutes damage thus becomes key in determining whether limitation had expired in a claim for negligence.

3. It is here that the case of Pirelli comes into play. The facts in that case were that the claimant engaged the defendant consulting engineers to advise upon and design an addition to their factory premises, including the construction of a tall chimney. The chimney was built in June and July 1969 but no later than April 1970 cracking developed at the top of the chimney due to the use of unsuitable concrete material in the lining known as Lytag. The claimant discovered the cracks in 1977 and it was found, at trial, could not have discovered with reasonable diligence before October 1972. In October 1978 the claimant issued a writ claiming damages for negligence. Both in the High Court and Court of Appeal it was held at the cause of action accrued when the damage ought reasonably to have been discovered.

4. The House of Lords held, however, that in the tort of negligence the cause of action accrues when the damage came into existence, not when it ought to have been discovered. Thus, the damage dated back to April 1970 when the first cracking occurred and the claim was statute barred. Lord Fraser, whose speech forms the main judgement, further contemplated that where a building was so defective that it was doomed from the start, the cause of action would accrue immediately upon its completion. He considered this exceptional situation was unlikely to arise because a building so unsatisfactory was unlikely to survive the six years. The harshness of this approach, that the building owner could have time running against him when he could not have had knowledge of the defect, was recognised by the House of Lords but it was considered that any amelioration was a matter for legislation, not an alteration in the common law.

5. The decision in Pirelli relied upon a 1963 decision of the House of Lords *Cartledge v E Jopling & Sons Ltd [1963] AC 758*. That was a personal injuries case in which the claimant steel dressers suffered pneumoconiosis as a result of inhaling injurious dust. The limitation period for personal injury actions at that time was 6 years. They could not prove breaches of duty in the 6 years before the issue of their claims due to changes to the factory. The damage to their lungs started well in advance of any knowledge on their part that they had been injured but more

than 6 years before issue. It mattered not that they were not aware that they had been injured until the period of 6 years before action, their claims were statue barred. This very harsh result was reversed by the Limitation Act 1963 which introduced the provision, now found in s.11 of the Limitation Act 1980, which dates the running of limitation from that on which the cause of action accrued or the victim's date of knowledge, if later; a power to override the time limit, now one of 3 years, was also introduced; see s. 33 of the Act. Date of knowledge for the purposes of personal injuries is defined in s.14. The law as to other damage, however, remained.

6. Latent damage can come in many forms. Pirelli was a case of building defects, but it can arise in any situation where the damage is not discoverable so as to give rise to knowledge. It may arise from a negligent survey leading to the purchase of a house where the defects which should have been noted were not discoverable until more than 6 years after purchase or from negligent investment, financial or legal advise. But it was in the light of Pirelli, the Law Reform Committee considered the problems raised by this case and recommended changes which were enacted as the Latent Damage Act 1986, which leant heavily on the reforms ushered in to deal with Cartledge by providing for a later date for the running of limitation based upon knowledge.

7. Before looking at the Act, a further important development in the law needs to be mentioned. You may have thought that with the introduction of an extended period of limitation based on knowledge of the defect the owners of defective buildings could express a collective sigh of relief. But the law giveth and the law taketh away and in *Murphy v Brentwood DC [1990] 3 WLR 414* the House of Lords held that Pirelli was really a case in which the claimant had suffered economic loss not physical damage. It had been provided with a building which required repair and its loss was thus economic in nature.

8. In Murphy, Lord Keith said that the principles for the recovery of economic loss did not extend beyond situations where loss occurred through negligent misstatement. Thus, the engineers could be liable for negligent misstatement in the design if they came within the principles of *Hedley Byrne v Heller [1964] AC 465* but the builder responsible for defective construction was not liable in tort for economic loss, only for damage to persons or other property caused by defects in the building. So if the building collapsed onto the owner's car that would amount to damage to other property, but if it collapsed in on itself, notwithstanding that, for example, an insecure roof fell onto the walls below and caused damage, that was not damage to other property but to the thing itself, *Broster v Galliard Docklands Ltd [2011] EWHC 1722 (TCC)*, and the builder designer of the of the properties affected owed not duty of care to subsequent

purchasers for such damage. Lord Keith's observation in relation to the liability of professional advisors in the case of building works has been said to be problematic, see *Payne v John Setchell Ltd [2002] PNLR 146* and the default position, in the absence of special circumstances, is that the professionals, such as architects, surveyors and engineers engaged in construction contracts have the same protection as the builder; *Preston v Torfaen BC [1994] 26 HLR 149*.

9. Lord Keith recognised that there may be a situation in which a building was a complex structure in respect of which it could not be said that where one part damages another it is not damaging itself, a point mooted by Lord Bridge in *D&F Estates v Church Commissioners [1989] AC 177*, but, and I mention this because of its topicality, in *Tesco Stores Ltd v The Norman Hitchcox Partnership Ltd (1997) 56 Con LR 42* the court did not accept that a failure to install fire stopping which exacerbated the effects of a fire fell with in the complex structure theory, though the architect's liability turned upon the scope of its duty of care in that case . On the other hand, in *Sahib Foods Ltd v Paskin Kyriakides Sands (a firm) [2004] PNLR 22* a firm of architects was held to be negligent where a lack of fire proofing in the design of a food preparation area resulted in a spread of a fire which destroyed the claimant's factory. The architects had a duty to guard against the effects of fire in their design of the building.

10. That is as much as I propose to say on the nature of damage which could take a whole lecture on its own, if not two. It is, however, important background. I now need to turn to the 1986 Act if I am not to run short of time, which would be ironic given the title to the lecture.

11. There are, broadly, 3 changes to the law made by the Act. S.1 adds sections 14A and 14B to the Limitation Act 1980. Section 2 introduces a s.28 to the 1980 Act to deal with persons under a disability and s.3 deals with the position of successive owners of a property suffering from latent damage. I shall only deal with the new sections 14A and 14B. The Act came into force on 18 September 1986 and under transitional provisions it does not enable the bringing of claims which were statue barred by that date.

12. Section 14 A applies to any action for damages for negligence other than one in which the special time limits for actions for personal injuries applies. It disapplies the provisions of section 2 of the Act to an action to which 14A applies and in its place provides that an action may not be brought after the expiration of 6 years from the date on which the cause of action accrued or three years from the 'starting date', as defined in the section, if that period expires later.

13. The 'starting date' is the earliest date on which the claimant, and any person in whom the cause of action is vested

before him, first had both the knowledge required to bring an action for damages in respect of the relevant damage and a right to bring such action; s.14A(5).

14. The knowledge required is both as to the material facts of the damage in respect of which damages are claimed and the other facts relevant to the action set out in subsection 8.

15. The material facts are such facts as would lead a reasonable person who has suffered such damage to consider it sufficiently serious to justify their instituting proceedings against a defendant who did not dispute liability and was able to satisfy the judgment. The last two factors are never subject to argument, merely introducing an assumption that proceedings would be worthwhile if damage is proved.

16. The other relevant facts are that (a) the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence and (b) the identity of the defendant and (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of the action against the defendant-as to this last requirement, it may be the case that the claimant is unaware until after the 6 year limitation period has passed that the defendant is vicariously liable for the acts of the wrongdoer.

17. Knowledge that the act or omission of which complaint is made involved negligence, as a matter of law, is irrelevant. S14A(9)

18. Knowledge includes knowledge which a person may reasonably be expected to acquire from facts observable or ascertainable by him or ascertainable with the help of expert advice which it is reasonable for him to seek, but a person is not taken to have knowledge ascertainable only with expert advice so long as he has taken all reasonable steps to obtain that advice. In *Bracknell Forrest BC v Adams [2004] UKHL 29* Lord Hoffman said that an equivalent provision in the Act relating to personal injury requires one to assume that a person who suffers an injury serious enough to be something about which he would go and see a solicitor if he knew he had a claim would be curious enough as to its cause to seek appropriate expert advice. I have not seen that relied upon in a s.14A case and it has to be borne in mind that the point was made, in Adams, that the threshold for knowledge in personal injury cases should be low as the claimant may take the benefit of s.33 of the Act, as to which there is no equivalent for other damage.

19. Section 14B places a long stop on claims of 15 years from the last date on which there occurred an act or omission which is alleged to constitute negligence and to which the damage in respect of which damages are claimed is alleged to be

attributable in whole or in part.Thus, in a case where there are successive acts of negligence, the 15 year period could expire substantially after the first negligent act, as was the case in *Pearson Education Ltd v The Chartered Partnership [2007] EWCA Civ 130*, a case concerning the design of a rainwater system for a warehouse which was inadequate due to insufficient flow capacity. The defendant argued that a claim, brought on 7 January 2004, was barred by the longstop as the negligent act was the adoption of the inadequate flow rate in the original design for the system, albeit the final design was of a different system, in 1988. The Court of Appeal rejected this argument on the grounds that there had been causative acts of negligence post January 1989, i.e within the 15 year period before action, in failing to check the adequacy of the capacity at the Buildings Regulation stage and the appointment of the contractor.

20. The longstop operates as a procedural bar to bringing proceedings, it does not extinguish the right; *Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd [2005] EWCA 1408* per Lloyd LJ at 48. This has particular relevance where claims for contribution under the Civil Liability (Contribution Act) 1978 are concerned. Under s.1 of that Act, any person liable in respect of damage suffered by another may recover contribution from any other person liable in respect of the same damage. All that need be proved is that the person

seeking contribution, I shall call them the defendant, is liable and that that the other person, I shall call them the third party, could have been successfully sued by the claimant for the same damage.; s1(6). The third party remains liable to make contribution even though he has ceased to be liable in respect of the damage in question since the damage occurred unless the liability ceased by virtue of a period of limitation which extinguished the right on which the claim was based.

21. As the longstop does not extinguish the right, the claim for contribution is preserved even though the time at which contribution is claimed is beyond the 15 year period. The right to contribution accrues when the defendant is held liable for the damage by a judgment in civil proceedings, an arbitration award, we are talking here of a quantified judgment or award, or, in the case of settlement, the earliest date on which the settlement sum is agreed. The limitation period for claiming contribution is 2 years from that date.

22. You can envisage a case in which the defendant first has knowledge just inside the 15 year period, issuing the proceedings at the last minute. The parties to the claim agree a stay to allow each to investigate. After a year, or so, the proceedings get going leading to a trial 2 years later where damages are awarded to the claimant. The defendant will have a further 2 years to seek contribution, 20 years from their own

negligence and, possibly, even a longer time from the negligence of the third party. This may seem a surprising outcome and McGee on Limitation challenges the correctness of the decision in *Financial Services Compensation Scheme* as to the barring of the remedy as opposed to the extinguishing of the right, but for the present we have to be guided by the judgment of the Court of Appeal in that case.

23. The longstop applies to all claims for damages for negligence other than personal injury actions or those under the Consumer Protection Act 1987. This has far reaching consequences as it bites even if the cause of action has yet to accrue or starting date yet occurred. The provision, however, does not apply in cases where there has been concealment of material facts to which s.32(1)(b) applies; s.32(5).

24. S14A does not apply to claims in contract; *Iron Trades Mutual Insurance v J.K. Buckenham [1990] 1 All ER 808*, approved by the Court of Appeal in *Société Commerciale de Reassurance v ERAS International Ltd [1992] 2 All ER 82*. It does not apply to claims for negligent misrepresentation under s.2 of the Misrepresentation Act 1967; *Laws v Lloyds [2003] EWCA 1887*. It is undecided whether section 14A applies to action in nuisance. McGee on Limitation suggests that it does not, adopting the argument in *Iron Trades Mutual* that s.14A of the Act only speaks of negligence, unlike s.11 of the Act, which

deals with personal injury claims, and refers to "negligence, nuisance or breach of duty." Thus, where the claim can only be framed in nuisance, because the claimant cannot otherwise show breach of duty, there is no room for the operation of s.14A.

25. More difficult is the question as to whether it applies to breaches of the measured duty of care which one landowner may owe to another, such as by failing to prevent the fire in a Red Gum tree from escaping onto neighbouring land in *Goldman v Hargrave [1967] 1 AC 645* or taking no steps to prevent the landslip onto adjoining land in *Leakey v National Turst [1980] QB 485*. The cause of action is nuisance but it is the defendant's negligent failure to take reasonable steps to prevent damage to the neighbouring land which gives rise to the nuisance; see *Bockenfield Aerodrome Ltd v Clarehugh & another [2021] EWHC 848 (Ch)* at[113] to [119]. On that basis, it appears that s.14 A could apply. It has to be borne in mind, however, that, in practice, damage in such cases is unlikely to be latent as, of its nature, it occurs when there has been an unreasonable interference in the victim's enjoyment of, or damage to, their land.

26. The Act will not apply to deliberate wrongdoing or for a claim under s.9 of the 1980 Act for money due under an enactment; *Martin v Britannia Life [2000] L.R.P.N 412*. Neither does it apply to claims under the Defective Premises Act

1972 ; *Warner v Basildon Development Corp (1991) 7 Const LJ 146*, or claims for deliberate damage or where there is strict liability.

27. Let us look at what may constitute knowledge, both as to the fact of damage and its attribution. Here the courts have relied upon the jurisprudence relating to personal injury actions under section 14 of the Act. The purpose of these provision has been said, by Lord Nicholls, in *Haward v Fawcetts [2001] 1 WLR 682*, at [7] to identify the type of knowledge the claimant needs to possess to make it fair and reasonable for time to run against them.

28. In order to rely upon Section 14A, the claimant must plead and prove knowledge within the 3 years prior to the issue of proceedings; per Lord Manse in *Haward* at [106].

29. The first question under S 14(A) is what knowledge did the claimant have of the material facts about the damage in respect of which damages are claimed, taking into account S14(A) (7) and the reference there to the seriousness of the damage.

30. McGee on Limitation suggests that where the damage is slight but there is a risk of more serious damage to follow, it may be reasonable to wait until more damage has occurred as only one action may be brought on a cause of action, relying

upon *Harris Springs Ltd v Howes, [2007] EWHC 3271 (TCC)*. In that case a property owner was held not to have knowledge of defective foundation when the defendant, the engineer who had designed the foundations, had informed the claimant's architect that cracks appearing on the property should be monitored and he reviewed the cracking over a number of years.

31. The decision is explained on the basis that the claimant was in receipt if the defendant's advice upon which it was reasonable for them to rely. It was found that the reason that the claimant did not think that the cracks were significant was because the defendant has told the claimant's director he was not unduly concerned by them and they were probably due to climatic change.

32. The 'wait and see' approach is certainly at odds with *3M United Kingdom Plc v Linklaters & Paines (a firm) [2006] P.N.L.R. 30*, a solicitors negligence case, in which the claimant complained it had lost the benefit of break clauses but did not know that it had suffered significant damage at the time because it thought that it might be able to avoid a loss if the other side was not alive to the point. The claimant lost on limitation. Moore-Bick LJ said of s.14A(7) at [33], *"In a commercial context damage does not have to be very substantial to satisfy those requirements in view of the limited cost of issuing proceedings."* I would not use the cost of proceedings as the

touchstone for the requirement of seriousness. McGee, at 6.015 n.25, refers to a decision of HH Judge Bowsher QC where he considered that a repair of £132 was sufficiently serious for the purposes of the section.

33. My own view is that the claimant who adopts such a stance is taking a big risk, and one which can be avoided, in this jurisdiction at least, with a standstill agreement under which the proposed defendant agrees not to take a point on limitation without giving a fixed period of notice to allow the claimant to issue proceedings in the interim.

34. If the claimant has knowledge of the damage, the next question splits into two limbs, the first is as to knowledge of a relevant act or omission and second, that the damage was attributable to such act or omission. For these purposes Lord Nicholls said in *Haward,* at [9] , that the claimant must know enough for it to be reasonable to investigate further. He quoted Lord Donaldson MR in *Halford v Brookes, [1991] 1 WLR 428* at 443E, who said that vague suspicion will not be enough, particularly if it is unsupported, but reasonable belief will normally suffice.

35. In essence, 'knowledge' means knowledge, in broad terms ,of the facts on which the complaint is based and of the defendant's acts or omissions, knowing there was a real possibility that they had been the cause of the damage. This has

been expressed in a number of ways in the cases. In *Nash v Eli Lilly & Co [1993] 1 WLR 782* Purchas LJ said at 799 that the plaintiff must know the "essence of the act or omission to which the injury is attributable", in *Dobbie v Medway Health Authority [1994] 1 WLR 1234 at 1238*, Sir Thomas Bingham MR referred to the "essential thrust of the case" and in *Broadley v Guy Clapham & Co [1993] 4 Med LR 328 at 332*, Hoffman LJ said "one should look at the way the plaintiff puts his case, distill what he is complaining about and ask whether he had in broad terms knowledge of the facts on which the complaint is based."

36. The test of knowledge is a good deal easier to apply in the personal injury context as it is the knowledge of one person, the injured claimant, which is in issue. In a commercial context, however, the knowledge will often be that of a corporation. It may be that different officers of the company have separate pieces of information which have to be aggregated before it could be said that the company has knowledge. In *3M United Kingdom Plc*, at first instance, *[2005] PNLR 46*, Hart J, at 915, rejected the argument that it had to be shown that there was a suitably responsible person in the organisation who had all the required information. He said that knowledge could be attributed to a corporate claimant if, in the particular circumstances, it could reasonably be supposed that the relevant information would be aggregated within the organisation.

37. The question as to whether a claimant can rely upon s.14A is highly fact sensitive. It is frequently dealt with as a preliminary issue but rarely susceptible to summary judgment or strike out. In *Jago v Mortgage4You Ltd [2019] EWHC 533(QB)*, May J held that the correct approach at the summary judgment stage was to ask if the defendant had satisfied the court that it was fanciful for the claimant to allege knowledge within 3 years of issue. That was followed in the case of a strike out in *Elliot v Hattens Solcitors [2021]EWCA Civ 720*. In *Richardson v Hills Contractors & Construction Ltd [2021] EWHC 479 (TCC)*, however, documentary evidence from mid- 2015 that the claimant was aware of serious problems of roof movement which needed looking into was sufficient to demonstrate that their reliance on a date of knowledge in December 2015 was sufficiently fanciful for summary judgment to be given.

The position in Scotland

38. I add a few words on the position in Scotland to pass on some background knowledge given you may come across cases involving cases across the border. I give my thanks to Nicholas Ellis QC from whose lecture on prescription, their equivalent of limitation, to the Society of Construction Lawyers, these observations have been drawn. The relevant legislation is the Prescription and Limitation (Scotland) Act 1973. S.6 and the first schedule deals with non-personal injury claims for damages

for negligence, S.11 for the time starting to run and s.24 deals with contribution.

39. The first difference to note in our two systems is that prescription operates to extinguish the obligation by passage of time. It is more than a procedural bar. The prescription period under S.6 is 5 years, but in computing that period you disregard any period when the creditor, i.e. claimant, was induced to refrain from making a claim due to fraud or error induced by words or conduct on the part of the debtor, i.e. defendant, or persons acting on his behalf. Error has been generously construed. For example, in a construction case, it was sufficient that the pursuers requests to contractors, architects and engineers for expert investigation had been ignored for months and there was a failure to advise them to take advise elsewhere; *ANM Group Ltd v Gilcomston North Ltd 2008 SLT 835*.

40. Time starts to run when breach and damage from the breach come together. In the context of construction, where there has been a failure to build in accordance with the contract, time starts to run from practical completion but in the case of construction defect, i.e. negligent construction, when physical damage first occurs. The Pirelli problem is overcome by s.11(3) which provides for the substitution for the date on which the person who suffered the damage had knowledge or, would with reasonable diligence have been aware of the error. There is a 20

year longstop under the Act. Standstill agreements are outlawed by s.13 of the 1973 Act. The period for contribution is 2 years from decree, i.e. court order. If you reach settlement outside court you still need a decree to trigger the claim for contribution.

41. Finally, coming back south of the border, let us look at the situation where the damage came to light after the primary limitation period and you have managed to issue within the 3years and 15 years limits, just. The 15 years expires and you breathe a sigh of relief. But then, as further paperwork emerges you realise that the defendant is not correctly named on the claim form. What then? That is the situation faced by BDW Trading Ltd, a national housebuilding known to you by the use of the Barratt name.

42. In the 1980s the company built 130 apartment blocks over 26 developments. In early 2019, work was undertaken to remove aluminium composite cladding at one of the developments following the Grenfell fire. In the course of the works, structural defects were discovered which led to a general review of that particular development and other sites. In all, something like 27 blocks over 12 developments were found to need remedial work to concrete pillars and floor slabs.

43. Leave aside anything I have said about damage and economic loss. BDW looked to the consulting engineers who had designed the system of concrete pillars and slabs supporting

the blocks for compensation for their outlay in remedial work. The original drawings were prepared outside the 15 years limit, but there were revisions with that period. BDW thought that AECOM were the engineers concerned and issued against them on 6 March 2020. It turned out that AECOM, which originated in the US, had bought up engineering practices in the UK including engineering companies which had provided design works on the various blocks. When this became apparent, the claimant amended, before service, to add two further companies, URS and Cameron Taylor Consulting Ltd. It turned out that it was not the latter company which had provided the design work but Cameron Taylor One Ltd. An issue arose as to whether this last company could be substituted for Cameron Taylor Consulting.

44. A court can only add or substitute a party if the relevant limitation period was current when the proceedings were started and the addition or substitution is necessary; CPR 19.5(2) In this case the limitation period was current at issue but was substitution necessary? CPR 9.5(3), insofar as it is relevant to the facts of this case, provides that the for substitution, in such a case, the court has to be satisfied that the new party to be substituted for a party was named in the claim form in mistake for the new party. I want to look at what constitutes a mistake.

45. The cases you need to look at are *Adelson v Associated Newspapers Ltd [2008] 1 WLR 485, TRW Pensions Trust Ltd v Indesit Company Polska SP Zoo [2020] EWHC 1414* and the *Sardinia Sulcis [1991] 1 Lloyd's Rep 201*. From these cases it appears that:

a. The mistake must be as to the nomenclature of the party who was joined and is sought to be substituted, not the identity. If you intended to sue the engineer but got the name wrong, that may qualify as a mistake. If, however, you sued the engineer but decided the fault lay with the architect and sought to substitute the latter , that would be a mistake of identity not nomenclature.

b. The test as to mistake is that in the *Sardinia Sulcis* ; the mistake must be genuine, it must not be misleading and the mistake must not cause reasonable doubt as to who it was intended to be sued.

c. The determination that a mistake was made can be ascertained by asking who it was intended to be sued That will often be apparent from the particulars of claim where there is a description of the party, but it can also be supported by evidence

d. It does not matter who made the error leading to the mistake. Whether it was the claimant, the solicitor or a loss adjuster.

It does not matter, if it was a genuine mistake, why the mistake was made.

e. The question as to what would have happened had the mistake been made can be answered by a determination as what was the intention of the mistaken individual

46. The BDW case is reported at 10 WLUK 206 and is to found on Westlaw. To put those of you without access to a case database out of you misery, I allowed the substitution on the basis that it was perfectly clear that BDW had wanted to sue the engineer who had contracted to produce the design, on the correspondence there can have been no doubt in the mind of those representing the defendant that this was what they were seeking to do, the mistake was genuine and that had it not been made, the defendant would have been correctly named. You will be happy to hear that, like a Dicken's novel, this case comes in instalments, the second of which will be available after December 2021 when it is before the Court of Appeal.

Philip Kramer

21 June 2021