Neutral Citation Number: [2020] EWHC 1692 (Ch)

Case No: HC-2017-002378

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)CHANCERY DIVISION

Rolls Building, 7 Rolls Buildings
Fetter Lane, London.
EC4A 1NL

Date: 06/07/2020

Before :

MASTER SHUMAN

- -

Between :

POWIS STREET ESTATES (NO. 3) LIMITED	**Claimant**
- and -	
(1) WALLACE LLP	**Defendant**
(2) CRADICK RETAIL LLP	

- -
- -

David Halpern QC (instructed by **Forsters LLP**) for the **Claimant/Applicant**
Jamie Smith QC (instructed by Clyde & Co LLP) for the First Defendant/Respondent
Graeme McPherson QC (instructed by Kennedys) for the Second Defendant/Respondent

Hearing dates: 5 December 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MASTER SHUMAN

MASTER SHUMAN :

1. This is a professional negligence claim brought against solicitors and property agents arising out of their conduct of two transactions on behalf of the claimant: the sale of 138-152 Powis Street, Woolwich, London SE18 6NL ("138-152") and the abortive sale of 132-136 Powis Street ("132-136"). Contracts for the sale of 138-152 were exchanged on 16 August 2011. On 15 August 2017 the claim was issued.

2. The claimant seeks permission (1) pursuant to CPR 17.4(3) or CPR 19.5(3)(a) and/or (b), to amend the claim form and particulars of claim to substitute Cradick Retail (a firm) ("the partnership") in place of the second defendant and (2) pursuant to CPR 17.4(2) to make additional amendments to the particulars of claim. The claimant accepts for the purposes of the application that the earliest date on which limitation expired was 16 August 2017.

3. The first defendant is neutral in relation to (1) and objects to some of the proposed amendments in (2) on the basis that they are new causes of action and not arising out of the same facts or substantially the same facts so that the court has no jurisdiction to allow them. The second defendant objects to (1) asking the court to refuse permission and then strike out the claim against it. As to (2) and assuming permission is given it also alleges that some but not all of the amendments would add a new claim, and do not arise out of the same facts or substantially the same facts. By agreement, the parties have made submissions on the first part of the application only, substitution.

4. The claimant relies on: two witness statements from Jonathan Ross, solicitor at Forsters LLP, dated 25 July 2019 and 29 November 2019; a witness statement from Anuj Moudgil, solicitor, formerly at Winston & Strawn LLP ("WS LLP") dated 2 December 2019 and a witness statement from Martin Keith Rodwell dated 4 December 2019. The second defendant has filed two witness statements from Donald McDonald, solicitor at Kennedys Law LLP, dated 4 November 2019 and 5 December 2019.

THE FACTUAL MATRIX

5. The claim concerns a triangle of land in Woolwich, London SE18. In or about 2000 the claimant purchased 132-136 and 138-152. The properties share a common boundary between numbers 136 and 138.

6. In or about 2011 the claimant retained the partnership to inspect, value, market and negotiate the sale of both properties. The second defendant's defence admits that the partnership was so instructed save that it was limited to "assist in the negotiation of the sale".

7. The partnership negotiated a sale of 138-152 to Dagmar Ventures Limited ("Dagmar") for a price of £1,500,000. The heads of terms contained an overage provision without any temporal limit which was said to run with the title and therefore would bind successors in title. A plan, which may have pre-dated 1966, was attached to the heads of term and on the claimant's case was out of date and did not reflect the precise boundary on the different floors.

8. The claimant instructed the first defendant to act on its behalf on the conveyance to Dagmar. Contracts were exchanged on 16 August 2011 ("the Dagmar contract") and the extent of the property being sold was defined by reference to an attached plan, ("the 138-152 plan").

9. The Dagmar contract provided that completion of the sale would be conditional on planning consent being granted and that the contract would automatically terminate unless extended by agreement or by the terms of the contract on, amongst other events, "the longstop date". It also contained an overage provision which in broad terms entitled the claimant to receive an additional payment if a plot, as defined, at 138-152 was sold during a fixed period of five years, commencing 16 August 2011, for an enhanced value. It is unnecessary for me to go into the overage provisions, which are complex, in any further detail for the purposes of this interim application.

10. In or about February 2013 Dagmar obtained planning permission to redevelop 138 – 152. On 6 June 2013 the claimant completed the sale of 138 – 152 to Dagmar. Simultaneously Dagmar sold 138 – 152 with the benefit of planning permission to Laxcon Developments Limited ("Laxcon").

11. Laxcon developed 138 – 152 into residential units. However, none of these were sold within the overage period and therefore no additional payment was due from Dagmar to the claimant.

12. In March 2013 the partnership negotiated a sale of 132 – 136 to Provenance Pub Limited ("Provenance") for £395,000.

13. The first defendant was again instructed to act on the conveyance. Contracts were exchanged on 19 August 2013 ("the Provenance contract"). The property was sold with full title guarantee and completion was due on 10 January 2014. The Provenance contract attached a plan as part of the definition of the extent of the property being sold ("the 132-136 plan").

14. The claimant alleges that on 7 January 2014 the partnership notified the first defendant that there was an error in the 132-136 plan; which is admitted by the first defendant. Although the second defendant asserts that it was the first defendant that notified the partnership that there was an error. It goes on to plead at paragraph 65(d) of the second defendant's defence that on 7 January 2014 Mr Cradick emailed the first defendant saying "the transfer plan" for the sale of 132-136 was "obviously wrong" and the title plan for 138-152 "doesn't look entirely correct either when comparing it to the as existing plan".

15. Mr McPherson QC encapsulates the issues in his submissions as: part of the development of 138-152 over sailed 132-136 and the basement area extended beneath both 138-152 and 132-136. Whilst the parties do not agree about the legal consequences of the errors on both plans they do seem to accept that the boundary between the properties was not a straight line, as the plans recorded, and that the lift shaft serving 138-152 was not included in the 132-136 plan.

16. There was litigation between the claimant, Laxcon and Provenance which was compromised in May 2016. The claimant alleges that the boundary issues was the

cause of Provenance refusing to complete on the purchase of 132-136. This is disputed.

17. On 15 August 2017 WS LLP issued the claim and they continued to act for the claimant until early 2019.

THE LAW

18. Under section 35 of the Limitation Act 1980 ("the 1980 Act"):

> "(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—
>
> (a) in the case of a new claim made in or by way of third-party proceedings, on the date on which those proceedings were commenced; and
>
> (b) in the case of any other new claim, 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 the 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.
>
> For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.
>
> (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 made in the original action in mistake for the new party's name; or
>
> (b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.
>
> …"

19. CPR 17.4 provides that where a party applies to amend his statement of case after a period of limitation has expired:

> "(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".

20. CPR 19.5 provides that:

> "(1) This rule applies to a change of parties after the end of a period of limitation under—"
>
> (a) the Limitation Act 1980 …
>
> (2) The court may add or substitute a party only if—
>
> (a) the relevant limitation period(GL) 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 properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant;
>
> (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.… ”

21. As to the discrete question of whether the court should permit a party to be substituted, the following questions need to be answered:

    (1) Was the relevant limitation period current when the claim was issued?

    (2) If yes, is the substitution "necessary" because:

    (i) the original defendant was named by mistake; or

    (ii) the claim cannot be maintained without joining the substitute party.

    (3) If the substitution is necessary, should the court exercise its discretion to permit the amendment?

    (4) If it is not necessary, the court has no discretion and must refuse permission.

22. In Insight Group Ltd v Kingston Smith (a firm) [2012] EWHC 3644 (QB) the claimants sued a limited liability partnership of accountants seeking damages arising out of negligent advice. Most of the acts of negligence occurred before the LLP came into existence. After the limitation period expired the claimant obtained an order under section 35(6)(a) of the 1980 Act and CPR 19.5(3)(a) substituting the firm for the LLP, which was set aside. The appeal from that decision was allowed. Leggatt J accepted that the restrictions in CPR 19.5(3) add nothing to those already imposed by section 35(6) of the 1980 Act. The primary argument on appeal was whether commencing the claim in the name of the LLP instead of the firm was a "mistake" for the purposes of section 35(6)(a).

23. At paragraph 52 the judge, having reviewed the test in The Sardinia Sulcis [1991] 1 Lloyds Rep 201 which considered whether the description was specific to the case, said,

    > "It seems to me, however, that the only way in which the Sardinia Sulcis test is workable at all is to identify the relevant description of the intended claimant or defendant by reference

> to what description is material from a legal point of view to the claim made."

24. The facts in that case are strikingly similar to those before me. Notwithstanding that an LLP unlike a partnership is a distinct legal entity, a body corporate registered at Companies House, the judge considered that the relevant description in a claim for damages for professional negligence was "that of professional adviser". At paragraph 57 he identified two types of mistake,

> "(1) The claimant sues the LLP in the mistaken belief that the LLP provided the services which are said to have been performed negligently, failing to recognise that the services were provided by the former partnership and not the LLP. (2) The claimant knows that that the services were provided by the former partnership but mistakenly believes that the LLP is legally liable for the negligence of the earlier firm. The court has the power to grant relief in case (1) but not in case (2)."

25. Leggatt J went on to state that it is necessary to review all the evidence to determine in which category the case fell. He emphasised that objective evidence was particularly important given that the explanation of the person who was responsible for the mistake may, with hindsight, be seeking to rationalise what had happened rather than to articulate his or her thought processes at the time. At paragraph 58 he said,

> "If particulars of claim were prepared when the claim was issued or at any rate before the mistake was recognised, they may be the best source for inferring what the claimant intended. It is also potentially relevant to consider what was said in any correspondence which preceded the issue of the claim form and in subsequent correspondence in so far as it sheds light on what the reason was for naming the LLP as the defendant."

26. The Master concluded that the solicitor had been aware of both the firm and LLP but named the LLP believing that it had either continuing duties or had taken over the liabilities of the firm. She therefore decided that the solicitor acted under an error of law not fact. The Judge applying the same test took a different view. At paragraph 83,

> "… the LLP was named in the claim form as the defendant to the action in the mistaken belief that it had provided the professional services which were the subject of the claim. The mistake was therefore as to which body satisfied the description of auditor of the second claimant and provider of fiduciary services in relation to the Nevis entities during the relevant period. It was not simply an error of law as to the legal liability

> of the LLP for prior negligence of the firm. The mistake accordingly satisfies the Sardinia Sulcis test."

THE APPLICATION

27. The claim form details the claim as "damages for losses suffered or to be suffered by the claimant arising from breach of contract and/or negligence and/or breach of duty" of the defendants. Mr Ross' first witness statement, paragraph 4, summarises the 3 areas in which it is alleged that the defendants acted in breach of contract or duty or were negligent.

    (1) By providing for a 5 year period from the date of the Dagmar contract for overage to run;

    (2) The failure to advise that the Dagmar contract had automatically terminated when the longstop date had passed;

    (3) The preparation of incorrect plans in relation to the sale of 138-152 and the sale of 132-136.

Substitution

28. Mr McDonald of Kennedys records that Brian Cradick and Stephen Cradick, who were brothers, founded a partnership trading under the name of Brian Cradick & Company in 1981. From 1 January 2011 the brothers together with 3 other partners traded under a new partnership known as Cradick Retail. On 1 January 2013 a new partnership was entered into by 4 of the 5 partners, Brian Cradick was no longer a partner. It appears to have traded under the name of Cradick Retail until the second defendant started trading in January or February 2014. The second defendant was incorporated on 25 October 2013. Stephen Cradick continued to work in each of the entities until his appointment as a member of the second defendant was terminated on 7 January 2015.

29. The incorporation of the second defendant postdates the facts pleaded by the claimant which are said to give rise to the claim. It is clear that the claimant retained the partnership to act on its behalf; that is not disputed by the second defendant. The second defendant accepts that Stephen Cradick was the individual at the partnership who had conduct of this matter.

30. This application provides another salutary lesson for lawyers issuing claims at the eleventh hour. The claimant's new legal team assert that "an obvious and clear mistake was made." It is said that the claimant always intended to sue the entity that acted for it on the transactions. Paragraph 9 of the particulars of claim specifically refers to the claimant retaining Cradick "to inspect, value, market, and negotiate the sale of both 138-152 and 132-135."

31. Whilst each alleged cause of action has accrued at different times the second defendant accepts for the purposes of the application that each limitation period was current at the date of issue of the claim form.

32. Is the substitution of the partnership necessary? The claimant argues that its former legal advisers made a mistake of fact choosing to sue the LLP rather than the partnership; section 35(6)(b) of the 1980 Act and CPR r.19.5(3)(a).

33. Mr McPherson QC is critical of the claimant's evidence in support of the substitution application which, until shortly before the hearing, comprised Mr Ross's statement dated July 2019. Although Mr Ross explained that the relevant people at WS LLP had not been available to make statements earlier. Whilst it is scant it does set out his understanding from the claimant's relevant representatives "that they always understood and intended that the claim should be, and was being, pursued against the entity that acted on behalf of the claimant". Mr Ross goes on at paragraph 9 to confirm that WS LLP understood that it was the LLP that provided the services not appreciating that they were in fact provided by the partnership. He observes that this point was not picked up by the second defendant's solicitors until preparation of the defence.

34. Mr McDonald of Kennedy's takes issue with this in his witness statement dated 4 November 2019 stating that it was around 2017 that it became apparent to him that the LLP was not the correct defendant: Kennedys having reviewed the publicly available records filed at Companies House. He observes that the letter of response stated that it was subject to the overriding contention that the LLP bears no responsibility whatsoever for the loss alleged and goes on to state that Cradick Retail was a firm of surveyors.

35. The main thrust of the second defendant's submissions is that the claimant knew that the relevant services had been performed by the partnership and that WS LLP simply named the wrong defendant in the claim form. I do not accept that submission.

36. Whilst being cautious of the dangers of hindsight creeping into evidence the witness statement of Mr Moudgil is more probative of the analysis by WS LLP at the time that the claim was issued when considered with the underlying correspondence. The claimant's understanding is also confirmed in Mr Rodwell's statement dated 4 December 2019, paragraph 6: the claimant had understood the entity providing the relevant services to be the second defendant until the second defendant's defence was served. Although I do note that Mr Rodwell fails to identify the source of his belief.

37. There is some proximity in time between the transactions in relation to the sale of 138-152 and 132-136, between the period April 2011 and 19 August 2013, and the incorporation of the second defendant on 25 October 2013 with trading commencing 1 January 2014.

38. Mr Moudgil confirms at paragraph 6 that, "I always understood that it was the LLP (trading as Cradick Retail) which provided the relevant services to the Claimant as claimed in the Letters of Claim and the draft Standstill Agreement (which I worked on), and as finally set out in the Claim Form." At paragraph 8, "When I referred to Cradick Retail, it was as a shorthand for the LLP, who traded under that name". That is consistent with the pre-issue correspondence. For example, the letter of claim dated 1 August 2017 sent via email uses "Cradick Retail LLP – Letter of Claim" in the subject heading. As does the letter dated 9 August 2017 also sent via email by WS LLP inviting Cradick Retail to enter into a standstill agreement. This is also consistent with the letter of claim dated 1 August 2017 sent to the first defendant which refers to

the claimant's selling agents as "Cradick Retail LLP ("Cradick")". The draft standstill agreement names the second defendant as the party who was engaged on the claimant's behalf in relation to both transactions, recital B.

39. Kennedys did not correct this misunderstanding. In its letter dated 10 August 2017 the subject was "Your client: Powis Street Estates (No 3) Limited" and states "We are instructed in this matter". They refer to "our client's position" is reserved in respect of the standstill, not identifying who the client is. The claim form was issued on 15 August 2017. When Kennedys returned the standstill agreement by letter dated 15 August 2017, they stated that they had only been recently instructed and could not make any admission as to Cradick's role and deleted recital B. In their letter dated 23 August 2017 responding to the letter of claim they state that they are instructed by "Cradick Retail LLP ('Cradick Retail')".

40. On 26 October 2017 the claim form was served which gave the brief details of claim as,

> "The Claimant claims damages for losses suffered or to be suffered by the claimant arising from breach of contract and/or negligence and/or breach of duty on the part of the first defendant (solicitors engaged by the claimant) and/or on the part of the second defendant (professional property agents engaged by the claimant), acting in connection with the sale in or about 2011-2013 of freehold land and premises owned by the claimant situated at known as: (i) 138-152 Powis Street, Woolwich, London, SE18 6NL; and (ii) 132-136 Powis Street, Woolwich, London, SE18 6NL."

41. In Mr McDonald's evidence he says that it was only around the time of the second defendant's letter of response dated 10 November 2017 that Kennedys appreciated that the second defendant was not the correct defendant. In the third paragraph of the letter it is stated that, "this letter of response is subject to the overriding contention that Cradick Retail LLP bears no responsibility whatsoever for the loss alleged. The claimant's claim is accordingly denied in its entirety." The letter of response goes on to refer to Cradick Retail as a firm of surveyors and that the matter partner was Stephen Cradick. At paragraph 1.6 it is stated that, "Cradick Retail's role in respect of the sale of 138-152 Powis St (as described below) was set out in their invoice to the claimant c/o of Wallace dated 29 May 2013." The invoice attached is from Cradick Retail. I did point out in the course of submissions that if the payment was made by cheque one would expect that to be made out to the partnership, as the second defendant did not exist at that time. Mr Halpern tells me that is irrelevant because the evidence demonstrates that WS LLP made a mistake of fact. Indeed, Mr Moudgil believed Cradick Retail to be the trading name of the second defendant. One might charitably say when looking at the letter of response, through the lens of the now known facts, that there was information contained within it that questioned the status of the second defendant. At best that was opaque. I am satisfied on the evidence that it was not obvious until the claimant received the second defendant's defence or about 29 June 2018 that it had made a mistake.

42. This position is also consistent with the particulars of claim that were served on 19 April 2018 which clearly sets out that the second defendant was retained by the claimant in or prior to 2011 in respect of both transactions.

43. I accept that the claimant sued the second defendant in the mistaken belief that it was the second defendant and not the partnership who provided the services that are complained of and that they failed to recognise that the services were provide by the partnership not the second defendant. This was a mistake falling within the meaning of section 35(6)(a) of the 1980 Act and CPR r.19.5(3)(a).

44. Mr Halpern QC in the alternative argued that if this was not a mistake of fact then it was a mistake of law which the court has power to correct under CPR r19.5(3)(b). In Insight v Kingston Smith (a firm) Leggatt J distilled the relevant principles at paragraph 96 and set out a two-part test that a party must satisfy,

> "(1) claim made in the original action is not sustainable by or against the existing party; and (2) it is the same claim which will be carried on by or against the new party."

45. Unquestionably the first part is satisfied, the claim cannot be maintained against the second defendant. In relation to the second part, Mr McPherson QC argues that, as in Insight v Kingston Smith (a firm), the claim against the partnership is not the same as the claim against the second defendant.

46. I am not persuaded by Mr Halpern QC that the reasoning in Insight v Kingston Smith (a firm) does not apply with equal force to the facts before me. This is not a case where the claimant has argued that WS LLP issued the claim in the mistaken belief that the second defendant had taken over the liabilities of the partnership, rather they mistakenly believed that the second defendant had performed the services complained of. It cannot therefore be said that the cause of action described as breach of contract and/or negligence and/or breach of duty against the second defendant is the same as the cause of action against the partnership. It is the partnership who provided the services of which the claimant complains. It is flawed to categorise this as an error of law that falls within section 35(5)(b).

47. Should the discretion be exercised to permit substitution? It is important to bear in mind, as Leggatt J said in Insight v Kingston Smith (a firm) at paragraph 100, "the discretion must be exercised in accordance with the overriding objective of enabling the court to deal with cases justly." The burden is on the claimant to satisfy the court that the discretion should be exercised in its favour.

48. Mr McPherson QC referred me to the facts of American Leisure Group Ltd v Olswang LLP [2015] EWHC 629 (Ch) a decision of Master Bragge, upheld on appeal. In that case he held that the court had jurisdiction under CPR r19.5(3)(a) but then refused to exercise his discretion. What Mr McPherson has sought to do is to superimpose the facts of that case with those before me. He focuses on delay and prejudice both to the partners of the partnership and the second defendant. Although the same approach could be taken by the claimant, relying on Insight v Kingston

Smith (a firm). What I am concerned with is applying the agreed legal principles to the facts of the case before me.

49. Mr McPherson is critical of delays pre-issue, issuing on the eve of the sixth anniversary of the execution of the Dagmar contract, delay in the pursuit of these proceedings and why it took a year for the application for substitution to be made. Mr Ross explains at some length in his witness statement dated 29 November 2019 the steps taken by WS LLP and from early 2019 Forsters and appends a detailed chronology. Whilst this case illustrates the inherent dangers in professional negligence claims being issued right 'up to the wire' in respect of the limitation period and matters could have been progressed more quickly, I am satisfied broadly with the explanations given by Mr Ross. Delay is of course a factor but not one that in this case militates against granting permission to substitute. I set out the salient timings below.

50. The preliminary notice of claim was sent to Cradick Retail on 11 February 2015 alleging an issue with the 132-136 plan. Stephen Cradick replied by email dated 10 March 2015 saying that the professional indemnity insurers had been put on notice and the footer in the email refers to the second defendant. The letter of claim dated 1 August 2017 has the subject heading in the email as "Cradick Retail LLP – Letter of Claim". Whilst Kennedys say that they became aware of the issue of the status of the second defendant in or around November 2017 I have already accepted that the claimant was only made aware of this when it received the second defendant's defence on 29 June 2018. The defence itself whilst reserving its position that the claim should be struck out goes on to plead fully to the claim.

51. By letter dated 1 August 2018 from WS LLP to Kennedys and Clyde & Co they sought additional time to consider whether to serve replies, stated that they would anticipate making an application to add the partnership to the claim and proposed a stay to allow mediation.

52. On 6 August 2018 Kennedys admitted in open correspondence that the partnership had been negligent in respect of "the use of inaccurate plans"; which must relate to both the 132-136 plan and the 138-152 plan. An offer was made to settle that part of the claim in the sum of £125,000, that being the sum that the claimant had agreed to pay in respect of the Laxcon and Provenance litigation. This sum was paid on 3 May 2019.

53. On 3 September 2018 the proceedings were stayed, save for service of the replies, until 9 January 2019 for the purposes of mediation and the stay was extended twice until 30 June 2019. A mediation took place on 2 May 2019 with Kennedys acting for both the partnership and the second defendant.

54. On 5 June 2019 Kennedys proposed that Forsters serve a draft amended claim form and draft amended particulars of claim, "in order to determine whether any proposed amendments can be agreed by consent." An order was agreed by consent for the draft amended statements of case to be served by 5 July 2019. On 18 July 2019 Kennedys stated, for the first time, that they objected to the substitution of the partnership. Forsters issued the application on 25 July 2019.

55. Mr McPherson QC also submits that the prejudice to both the partnership and the second defendant would be such that the court should not exercise its discretion. I note no prejudice was identified by Kennedys in its letter dated 18 July 2019 objecting to the substitution and indeed the first time it was raised was in Mr McDonald's statement dated 4 November 2019. Having been taken through the correspondence at some length I do consider there is something in Mr Halpern's observation that had there been serious prejudice Kennedys would have applied to strike out the claim at an early stage, possibly when the claim form was served or more likely when the particulars of claim were served.

56. Mr McDonald says the claim is pleaded with a value in excess of £5 million. The limit of indemnity insurance is £2 million for any one claim. He says that none of the former partners of the partnership are "especially wealthy individuals" and they would potentially face bankruptcy if the claim succeeded. He goes on to set out broad details about the finances of each of the former partners. There is also an observation that Brian Cradick, the brother of Stephen Cradick, despite them remaining in contact only became aware of the potential claim in Autumn 2017, a few weeks after the limitation period had expired. Mr McDonald also sets out the trading position of the second defendant; under a business transfer agreement it is obliged to indemnify the partnership. Mr Halpern makes the valid point that in the second defendant's accounts for 31 December 2018, after the claim was intimated in February 2015, the members' interests after profit was £925,483 and that they elected to draw £706,440, which could have been used to meet the indemnity. Businesses make choices and here the second defendant elected to distribute the members' interests at a time when they knew that there was a claim and one that partly admitted breach.

57. Mr Halpern is critical of this prejudice. He submits that the prejudice is of their own making. Without any evidence to the contrary I am left to infer that the partners and the directors have elected to take out this level of insurance cover and to do so without any excess layer. That would seem imprudent. They also only elected to limit their liability when they incorporated the second defendant on 25 October 2013, starting to trade in place of the partnership in early 2014.

58. I also factor in the prejudice to the claimant if this substitution is not allowed. Whilst the claimant has a potential remedy against its previous legal advisers that is likely to be on the basis of a loss of chance and given the inherent difficulties that is likely to be less than the current claim against the second defendant or, if substituted, the partnership.

59. The partnership had known since 2015 of this claim. The partnership and the second defendant have the same legal team and insurers. They have been able to carry out the necessary investigations into the claim because a very full defence was served on behalf of the second defendant. The former partners have the benefit of an indemnity from the second defendant.

60. Having regard to the countervailing factors identified by Mr Halpern and Mr McPherson and the overriding objective I am satisfied that I should exercise my discretion and permit the substitution of the partnership for the second defendant. To do otherwise would be unjust.