



Neutral Citation Number: [2020] EWHC 1231 (Ch)

Claim No.'s: BL-2019-000813 / BL-2019-001282

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

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

Date: 28 April 2020

Before :

Mr Justice Fancourt and Master Kaye

Between :

David Lancaster & Others **Claimant**
- and -
Jonathan Peacock QC **Defendant**

Peter Breitenbach & Others **Claimant**
-and-
Canaccord Genuity Financial Planning Limited **Defendant**

CMC

Jonathan Nash QC and Dominic Kennelly (instructed by **Stewarts Law**) for the **Claimant**
Tom Adam QC and Emma Mockford (instructed by **Clyde & Co**) for the **Defendant**
Jamie Smith QC and Shail Patel (instructed by **Macfarlanes**) for the **Defendant**

Hearing date: 28th April 2020

Approved Judgment

Mr Justice Fancourt and Master Kaye:

1. We have heard detailed argument, both orally and in careful written submissions for which we are both grateful, on the question of taking sample claimants in two separate claims which overlap to some extent on facts and law. There are 123 claimants altogether in the first claim (“the Peacock claim”) and 33 claimants in the second claim (“the Canaccord claim”). Given the lateness of the hour, I will give brief reasons for our decision on the appropriate procedure for selecting sample claimants.
2. The purpose of taking sample claimants is twofold. First, to ensure that issues that are common to all the claimants' claims can be decided in such a way as to bind them all; and, second, to decide other factual and legal issues where the decision will not necessarily bind other claimants but is likely to give a very clear indication of the way that their cases too will be decided if tried, with the expected consequence that the parties will then be able to settle the remaining claims.
3. It is not, of course, necessary to have very many sample claimants in order to decide common issues. The purpose of a broader selection of sample claimants, beyond what is needed to try the common issues, is to generate sufficiently broad guidance for the likely disposal of all the other claims, whose particular facts will vary, while at the same time not overcomplicating or encumbering or significantly adding to the cost of the trial.
4. The context is that the parties are agreed that the two cases should be case managed together and that the Peacock claim and a part of the Canaccord claim (brought by 18 individuals) concerned with the same film finance tax deferment scheme as is in issue in the Peacock claim (“the Scheme”) should be tried together with it. Subject to the question of a preliminary issue in the Canaccord claim, it is agreed that other parts of the Canaccord claim should be stayed until after the first trial. The issue of sample claimants relates to the first trial.
5. There were essentially two rival proposals as to how the process of selecting sample claimants should take place, with a few other disagreements along the way. I will explain first the proposal of the claimants (which Canaccord supports) and then explain how Mr Peacock's proposal differs.
6. The claimants' proposal is that all 123 claimants should be sent a questionnaire asking a number of questions about their own particular circumstances and questions relating to their claims. On the basis of the answers to those questions, it is then intended that the parties (the claimants collectively and Mr Peacock) should be able each to select a significant number of “initial sample claimants”. The precise number varies as between the parties: the claimants generally seek a smaller number and the defendants a larger number. Those “initial sample claimants” will then be required to search for and produce for inspection certain documents relating to the answers to the questions that they have given - not, it should be emphasised, as an exercise in preliminary or initial disclosure as such, but so as to facilitate a final selection of sample claimants by each party, to ensure that all non-common factual issues are

sufficiently covered by the sample. It is proposed by the claimants that, after the initial sample claimants have disclosed their documents, a final selection of sample claimants will be made by each of the parties. All the claimants in the part of the Canaccord claim that is being tried are also claimants in the Peacock claim, and it is proposed that some of these are selected as sample claimants by the claimants and by Canaccord.

7. A number of the questions in the claimants' questionnaire ask the claimants about matters that occurred before they committed to investment in the Scheme and matters that occurred afterwards. The questions about what happened before the investment include the following. First, whether an advisor, such as an accountant or independent financial advisor or promoter, summarised the contents of an information memorandum about the Scheme for the claimant. If so, the claimant is required to provide the date on which it was done and identify the person who summarised it. Second, whether any independent professional advice was taken in relation to the Scheme or the decision to invest in it and, if so, the claimant is required to provide the date on which that occurred and identify the advisor.
8. The questions relating to what happened after the investment include the following. First, whether any correspondence or communications from any other party in relation to HMRC's enquiries into the tax affairs of the LLP were received by the claimant and, if so, the claimant is required to identify the person and their organisation and give the date of the correspondence. Second, whether at any stage after investing in the Scheme the claimant sought or received advice on the tax consequences of the investment and, if so, the date of the advice and the provider of the advice should be provided.
9. Under the claimants' proposal, it was not intended that any of the documents identified by the answers to those questions should be provided at the stage of answering the questionnaire. Only the "initial sample claimants" should provide documents at the next stage. There is a list of disclosure documents to be provided by the "initial sample claimants" and by Canaccord separately identified in a different annex to the draft order (Annex 4). These documents, when provided, will aid the final selection of sample claimants.
10. The proposal of the claimants results in a timetable, or a suggested timetable, that would complete the selection exercise of the claimants on 16 October 2020, and then there would be a further period of some 22 weeks for pleadings in each the selected claimants' cases. That would not be completed until about March 2021.
11. Mr Peacock is dissatisfied with the speed of progress (which Mr Adam QC on his behalf described as "glacial") and with the risk for unnecessary costs being incurred in a two-stage proposal. He instead suggests that the selection of claimants can be done in a much quicker way, by each of the 123 claimants being required not just to answer the questionnaire but at the same time to produce the documents relating to the answers to the four questions that I have already briefly summarised. Those categories of document are more limited than the categories that it was otherwise broadly agreed would be provided at stage 2 of the claimants' proposal, as set out in Annex 4.
12. It is, therefore, suggested by Mr Peacock that documents would be searched for and provided on an initial basis by all 123 claimants. Mr Adam says, with some apparent justification, that if each of the claimants is required to go to the trouble of finding out exactly when they

obtained advice or received communications relating to the questions asked and from whom, it does not require very much more work for each claimant to print out or otherwise produce the documents in question and to provide them at the same time. He argues that, since the answers to the questionnaire are to be supported by a statement of truth, the claimants should not be treating lightly the process of giving correct answers to the questions, which are important for the purpose of sample claimant selection.

13. Mr Adam, however, recognises that in relation to the question about any advice received after investment, there may well be an issue of legal professional privilege that arises. So it would be necessary for each claimant in those circumstances, on Mr Peacock's proposal, to receive advice about whether privilege exists and, potentially, to make a decision about whether to assert or waive the privilege.
14. The timeline flowing from Mr Peacock's proposal is a much shorter one, in that it cuts out a number of intermediate steps. On his proposal, the final selection process would have been completed by 17 July 2020, and the pleadings would then close 22 weeks after that, so by about the start of the New Year 2021.
15. Master Kaye and I have given consideration to the rival proposals. It seems to us that although in principle there is some attraction in trying to shorten the process of selecting the claimants and to make it as economical as possible, nevertheless it is the claimants' proposal that is preferable in principle, although there need to be some counterbalances in order to make the proposal fairer to Mr Peacock in particular.
16. The principal reason why we reach that conclusion is that, at a time where a number of people are having significant difficulties with their personal and business affairs because of the COVID-19 pandemic and the lockdown associated with it, there would almost inevitably be a number of people within the 123 claimants that are significantly adversely affected by it, even though in many cases it may be relatively straightforward for the claimant in question to search for the necessary information in their records, and then print out or produce or email relevant documents to the claimants' lawyers. It will inevitably be a more complex exercise if it involves not simply searching for an event on a computer or in paper records to answer questions on a questionnaire, but also to produce, assemble and transmit all the relevant documents associated with it.
17. The second reason is that, despite Mr Adam's attempt to persuade us to the contrary, we recognise that issues of legal professional privilege are not always straightforward, may require individual advice to be given, and could therefore amount to a substantial burden on the claimants if issues of that kind were required to be dealt with as part and parcel of answering the questionnaire.
18. Instead therefore of dealing with answers to the questions and limited provision of documents as a single process, we prefer the claimants' approach, where they will be done sequentially, and only the "initial sample claimants" will be required to give disclosure of the documents set out in Annex 4. The purpose of the exercise is not to give the defendants advance disclosure of documents but to enable a fair selection of sample claimants to take place.

19. There is a further point associated with that in that the limited production of documents proposed for the “initial sample claimants” will be broader than the disclosure Mr Peacock’s scheme sought, and will also include the provision to all the parties of the Canaccord files for those of the “initial sample claimants” who were advised by Canaccord. It seems to us that that is more appropriate and fairer to all the parties, for the purpose of selecting suitable sample claimants, than the more limited form of provision that Mr Peacock proposed.
20. However, the counterbalances to which I referred are the following. If Mr Peacock, who it is rightly said by Mr Adam to be, to some extent, an outlier in this litigation, because he had no direct contact with any of the claimants, is not to be potentially prejudiced by a relative lack of knowledge in relation to the position of the claimants, then it is appropriate to take a larger number of “initial sample claimants” who will be required to produce documents for the selection process. We therefore favour a larger number of “initial sample claimants” than the claimants themselves proposed.
21. Second, we do accept that the timetable that was originally advanced by the claimants is far too extended as it stands, though in the course of argument the timetable was modified on behalf of the claimants to result in a timetable which would give a final selection of the sample claimants by 18 September 2020, which is a full month earlier than the original proposal. That we regard in principle as acceptable, given the difficult circumstances at present. I will return to the timetable in a moment.
22. I come then to the appropriate numbers for the sample claimants. It seems to us that the larger number of “initial sample claimants” to be selected by the parties should be 12 each for the parties in the Peacock claim and six each for the parties in the Canaccord claim; that is 36 in total.
23. So far as the sample claimants eventually to be selected is concerned, there is no substantial difference between the parties. We consider that eight claimants in total in the Peacock claim are appropriate, that is to say each of the parties will select four claimants from among the “initial sample claimants”, and in the Canaccord claim there will be an additional four claimants in total, that is two to be selected by each of the parties. We could not accept a proposal that there be only two claimants in total in the Canaccord claim, in view of the substantial issues that are not common issues that seem to exist in those proceedings.
24. Having indicated the overall numbers, we would not preclude Mr Peacock from selecting Canaccord claimants as part of his selection in the Peacock action, but we would limit that number to no more than two, in order to ensure that there is no excessive number of Canaccord claimants as sample claimants.
25. I turn, then, to issues with the questions on the questionnaire. A number of points were in dispute and I will take them briefly. We consider that question 2, inserted on behalf of Canaccord, is in principle an appropriate question, but we would prefer wording that ends in the following way:
“...invested in other film finance schemes or similar tax schemes.” Subject to that, question 2 is approved.

26. Questions 3.3 and 5 we have dealt with in principle by rejecting Mr Peacock's proposal for selection of the sample claimants.
27. Question 11.1. We do not consider that a sufficient case has been made by Canaccord for including the additional paragraphs (c) and (d) that they wish to insert into question 11.1, and we note that these were not matters that were specifically pleaded by Canaccord in its defence. We consider that the description of the documents appearing there is liable to confuse by not being specific enough and may result in confusion on the part of the claimants, so we do not allow the insertion of those paragraphs.
28. Question 12. There are two separate points here beyond the issue of disclosure of documents that has already been dealt with. First, we agree with Canaccord that the words "...or challenges to the tax affairs of Invicta 43" should be added in and it should not just be limited to "HMRC's enquiries into the tax affairs of Invicta 43". We also consider that the appropriate date in paragraph 12 and also in paragraph 13 should be 1 February 2016, that being the specific date that has been pleaded by the claimants. It is appropriate that whether any correspondence or advice up to that date has been obtained by any of the claimants is disclosed by them in answer to the question.
29. A further issue in relation to paragraph 13 is whether the words "as a result of HMRC's enquiries", qualifying what goes before, should be added. We do not consider that those words of qualification should be added: the broader category of advice should be caught by question 13.
30. Question 14. Similarly to question 2, we agree that it is an appropriate question asked but would make the same amendment to the wording, so the question ends "in other film finance schemes or similar tax schemes".
31. There was a similar issue that divided the parties on the wording of the disclosure schedule. In paragraph 6 of part 2 of annex 4, we would allow the same changes proposed (substantially) by Canaccord: the relevant date of 1 February 2016, and including the words "and/or challenges to Invicta 43".
32. There is then a dispute about the criteria to be applied in selecting the sample claimants. The parties have agreed a number of criteria in paragraph 15 to the draft order. In addition to those criteria, Canaccord proposes an additional criterion that the parties endeavour to pick a cohort of Invicta 43 sample claimants with variations as to sophistication and knowledge of film finance tax deferment schemes, investment history and knowledge and awareness of HMRC's enquiries and challenges to Invicta 43 and other film finance schemes following investment.
33. We do not consider that this further criterion is necessary. It is partly covered by the criterion in paragraph 15.5, insofar as investment in the Eclipse Partnership by any of the claimants will have performed a similar function by giving a degree of sophistication and knowledge of film finance schemes. The other criteria in any event will result in a sufficiently broad selection of claimants. But, further, Canaccord is in a position - or will be in a position as a result of the answers it receives to the questionnaire, including the additional questions that it has requested to be inserted and to which we have agreed - to make its own selection of two

appropriate sample claimants in the Canaccord claim, who will help to satisfy the criterion that is sought to be introduced at paragraph 15.6. We therefore do not allow the introduction of that criterion.

34. Turning, I hope finally, to the timetable for the process of selecting the initial sample claimants and then the sample claimants. The first date, for questionnaire responses, should be 26 June 2020. We do consider that a substantial amount of time needs to be allowed for that process to be conducted by all 123 claimants given the current difficult circumstances and in order to ensure that each of the claimants has time to do a sufficiently thorough job and answer the questions as accurately as possible.
35. The deadline for any application to the court in relation to the number of initial sample claimants is 3 July 2020. The date for the selection of initial sample claimants will be 24 July 2020. The date for production of documents by the initial sample claimants should be 28 August 2020, allowing a full 5 weeks for that relatively more complicated process to take place.
36. There is then a deadline for any applications in relation to the number of sample claimants, which should be one week later on 4 September 2020. Subject to that, the selection of sample claimants will be done by 11 September 2020 and the deadline for any applications to the court in relation to the final selection of sample claimants will be 18 September 2020.
37. Thereafter, the parties have agreed between themselves that there should be 8 weeks for the individual points of claim, a further 8 weeks for the individual points of defence, and a further 6 weeks after that for the individual points of reply.
38. It seems to us that those times are generous and there may be some scope for shaving a week or two off each, but we will not make an order to that effect but leave it to the parties to consider whether that is practicable at a later stage, once the documents and questionnaires have been produced.