Neutral Citation Number: [2020] EWHC 1354 (Ch)

Case No: 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 Buildings
Fetter Lane, London
EC4A 1NL

Date: **18 May 2020**

Before :

Mr Justice Fancourt and Master Kaye

- -

Between :

Peter Breitenbach and others	**Claimants**
- and -	
Canaccord Genuity Financial Planning Limited	**Defendant**

- -
- -

Jonathan Nash QC (instructed by **Stewarts Law**) for the **Claimants**
Jamie Smith QC and Shail Patel (instructed by **Macfarlanes**) for the **Defendant**

Hearing date: **18th May 2020**

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Approved Judgment

Mr Justice Fancourt and Master Kaye:

MR JUSTICE FANCOURT:

1. In this professional negligence claim, the defendant ("Canaccord") defends claims brought by among others 18 claimants in respect of the Invicta 43 film finance scheme and 12 claimants in respect of the Claremont film finance scheme. The defence is on the basis of, among other things, limitation. All those Invicta 43 claimants and others also claim damages in other proceedings against Mr Peacock QC. At a previous combined CMC hearing, we gave directions in relation to the selection of sample claimants from among all the Invicta 43 claimants for the purpose of trying claims against Mr Peacock QC and Canaccord. We adjourned the question of whether there should be a limitation preliminary issue in the claims against Canaccord in relation to the Claremont scheme to this hearing.

2. There are also ten claims against Canaccord in relation to different film finance schemes, known generally as "Eclipse" though there were several different Eclipse LLPs in which claimants invested. The parties are agreed and we ordered that the Eclipse claims should be stayed pending the outcome of the Invicta 43 trial.

3. The issues in the limitation defences in the Invicta 43 and Claremont claims against Canaccord are: first, when the primary limitation period for the purposes of section 2 of the Limitation Act 1980 started to run, that is to say when was relevant loss and damage first suffered by the claimants; and, second, if the primary limitation period had expired, at what time did each of the claimants have sufficient knowledge to be able to bring a negligence claim against Canaccord in respect of the loss suffered for the purpose of section 14A of the Limitation Act. If that time in any individual case is more than three years before the relevant standstill agreement for that claim, the claim will be statute-barred.

4. The two limitation issues that I have described are of course different and it is agreed that the first is a "common issue" as between all the Invicta 43 claimants, so that a decision for or against the sample claimants in those claims will bind all the Invicta 43 claimants, subject only to an appeal.

5. The second, the section 14A issue, is not a common issue because it depends on the state of knowledge of each individual claimant. There are two aspects to that issue. First, in principle, what degree or kind of knowledge, either actual or imputed, suffices in this type of claim to start the three-year period running; and, second, when, in any individual case, that degree of knowledge first came into existence.

6. Given the issue of principle involved in the section 14A issue in the Invicta 43 claims and given that some of the principal facts in dispute will apply in the case of all the claimants, the section 14A issue is nevertheless thought to be likely to be highly persuasive in the cases of the non-sample Invicta 43 claimants, even though they are not technically bound by the outcome, and even though some of the individual facts may be somewhat different.

7. It is to cater for the section 14A issue and some other unrelated, non-common issues in the Invicta 43 claims, that a spread of sample claimants has been selected, with a view to covering, so far as reasonably possible, all common fact patterns that may emerge at trial.

8. If the Claremont limitation issues are stayed and not tried at the same time as or immediately following the Invicta 43 sample claims, the decision in the Invicta 43 claims on the section 2 issue will nevertheless in practice decide the same issue in the Eclipse and the Claremont claims. That is because the question of whether loss has been caused by the alleged negligence and when it is suffered will be answered either as at the time when the investor commits to the investment or only at a much later time when HMRC treats the investor as being liable to tax. That decision is essentially a question of law based on the broad factual basis for this type of tax scheme investment.

9. The decision on that issue against the Invicta 43 claimants may not technically bind the Claremont claimants, but nevertheless it is likely to be regarded as deciding the issue in the Claremont claims too.

10. The same may be broadly true of the decision in principle under the section 14A issue. A decision in the Invicta 43 sample claims on that issue will establish what kind of knowledge or what degree of knowledge suffices to start the three-year period under section 14A running. That will also give some clear guidance to Claremont claimants and Cannacord about the facts that are likely to amount to knowledge in individual cases in Claremont claims, but it will not be any more than persuasive as to how such a decision would be made on somewhat different facts in those claims. None of the Claremont claimants or Cannacord will of course be bound by the decision on that issue in the Invicta 43 claims.

11. The question therefore is whether two Claremont claimants should effectively be added as claimants to the sample claimants in the Invicta 43 trial, in order to have the section 14A limitation issue decided as against them in the Claremont claim.

12. An important question in considering whether to direct those preliminary issues to be tried in the Claremont claim is how many additional claimants would be needed in order to have a trial of that issue and make a decision on it significantly more persuasive than any decision in the Invicta 43 claim, so that the other Claremont claimants and Canaccord would be likely to treat it as deciding the issue of principle in all the Claremont claims.

13. That, in turn, it seems to me, will depend on how different the material facts are in Claremont as compared with Invicta 43 and indeed how many factual variants there are amongst the Claremont claimants.

14. Adding a trial of the preliminary issue in the Claremont claim to the Invicta 43 claims will of course add to the time needed for the trial and add to the costs of preparing it, and the more new claimants are required, the greater the cost and the time. The added benefit of any determination of the preliminary issue has to be balanced against the cost that it will generate.

15. I consider that the relevant questions to address are the following:

a. First, how different are the material facts in the Claremont claims from the Invicta 43 claims? In other words, how much will a decision on the section 14A issue in the Claremont claims add to a decision that is only persuasive and not binding.
b. Second, how different are the individual facts within the Claremont claims; that is to say, how many additional claimants will be needed in order to create a valuable and persuasive decision on the section 14A issue in the Claremont claim.
c. Third, how beneficial is a decision on the section 14A issue in the Claremont claims likely to be; and
d. Fourth, what is the impact in terms of additional cost and time likely to be.

16. So far as the difference in the material facts of Invicta 43 and Claremont is concerned, it is certainly true that the focus in terms of the critical time at which sufficient knowledge might have been acquired is different in the Claremont claim as compared with the Invicta 43 claim. In the Claremont claim it is the period from 2012 up to the spring of 2014, whereas in the Invicta 43 claim it is principally from 2014 up to February 2016.

17. The draft questionnaire that has been prepared for the Claremont claims indicates that the events on which Canaccord will seek to rely relate to publicity given to the Eclipse 35 scheme in 2012 as a result of tribunal challenges succeeding and facts relating to the Revenue's opening of enquiries into the Claremont scheme.

18. The relevant dates are different, but in principle, in my judgment, the kinds of facts with which the court will be concerned are substantially the same in both claims; that is to say, in particular, the awareness of the claimants of the fact that an enquiry had been opened by HMRC into the relevant scheme and the significance of such knowledge; awareness by claimants of decisions by the tax tribunals in the case of the Eclipse 35 scheme or other schemes and the significance of such knowledge; and the individual claimant's receipt of communications from the promoters of the schemes or intermediaries referring to the fact of those tribunal decisions and their potential impact.

19. The significance of the receipt of such knowledge and communications, where it was received, will clearly be a matter of some importance on the section 14A issue in all the claims.

20. As to the second factor, the difference of facts within the 12 Claremont claims, Canaccord now accepts that only two Claremont claimants are needed to give sufficient coverage, although it had previously suggested it should be four. Canaccord says that these can both be claimants who, in any event, are Invicta 43 sample claimants, so that in fact no additional claimants will be necessary at trial to try the preliminary issue on limitation in the Claremont claim.

21. However, it seems to me, given that there are only five overlap claimants in that category as compared to seven who are not (six of whom are "Claremont only" investors), that if a decision on this preliminary issue is to be of considerable persuasive force in the case of all Claremont claimants, there needs to be at least one Claremont only claimant involved. The significance of that is therefore that there will be one additional claimant involved in the trial.

22. Ultimately, of course, findings on the section 14A issue will depend on the state of knowledge of the individual claimant and there is a limit to how much can be read across from a decision of principle or a factual decision on only two out of 12 claimants. So whether one has two additional claimants or none, the question is essentially the same: how persuasive is going to be a decision that does not strictly bind the other (or any of the) Claremont claimants.

23. As to the third factor, the value of a decision on the Claremont preliminary issue, there are only 12 Canaccord/Claremont claimants in total. Even if Canaccord were to succeed in its limitation defence in Claremont, that would not dispose of the other 28 claims against Canaccord. And, as I have said, the other Claremont claimants technically would not be bound by the decision on section 14A in any event.

24. If, on the other hand, Canaccord succeeded in its limitation defence in Invicta 43 and there were no Claremont limitation issue decision, that would leave undetermined the Claremont claims if the Invicta 43 decision was not sufficiently persuasive on the section 14A issue.

25. It seems to me, therefore, that the main advantage of the Claremont preliminary issue would be that if the limitation defence were to succeed in the Invicta 43 claim, there would then be a more strongly persuasive decision so far as the Claremont claimants were concerned. That, in turn, might be of significance in helping to resolve the Eclipse claims too.

26. There is no significant benefit, in my judgment, if the limitation defence in Invicta 43 fails, because then a decision in Canaccord's favour in the Claremont claims would only remove six of the claimants from the proceedings.

27. Of course, it is impossible for the court at this stage to predict whether the limitation defence will fail or succeed.

28. Overall, therefore, it seems to me that this is not a case in which there is an overwhelming case for the trial of limitation preliminary issues because the benefit over and above a determination of the same issues in the Invicta 43 claim does not appear to be substantial. That is because there will, in any event, be a substantial degree of read-over from the reasoning and decision on the section 14A issue in the Invicta 43 claim to the Claremont claims.

29. Of course, the argument in favour of these preliminary issues is that if all these issues are being argued and determined anyway in the Invicta 43 claim, then it is convenient to deal with similar issues in the Claremont claims if there is relatively little additional cost or time involved. As to that, the fourth of the relevant considerations, if there are to be two sample claimants in relation to the Claremont claim, one of those will, it seems to me, necessarily have to be a new claimant who is not otherwise involved.

30. The process of arriving at identifying that claimant and the overlap claimant and the extra work involved is not insubstantial. There needs to be a new selection process, which will be running in parallel with the selection process for the Invicta 43 claim. That will require 12 Claremont claimants to complete a questionnaire. There will then be a selection of six of those claimants who will each be required to find and produce documents, a different suite of

documents from the documents to be produced in the Invicta 43 claim. Then there will be the process of selecting two sample claimants.

31. Then there will have to be statements of case, which is a little complex, in the sense that the overlap claimant will simply plead a consolidated claim relating to both Invicta 43 and Claremont, whereas the Claremont only claimant will provide an abbreviated form of particulars of claim (adopting the generically pleaded claim against Canaccord) but specifically pleading facts relevant to limitation, for the purpose of establishing the pleaded cases in relation to the limitation issues only.

32. There will then, of course, have to be disclosure by the sample claimants and Canaccord in relation to the Claremont investments and, in relation to the Claremont only claimant, a further witness statement from that claimant and evidence given by that claimant at trial.

33. The assessment, which I consider to be realistic, is that this will add two days to the overall length of the trial, but of course it is not simply the extra length of the trial: it is all the additional work leading up to the involvement of the Claremont claimants in a trial which is significant. Although we can see that the limitation defence appears to be a substantial plank of Canaccord's defence to all these claims, we consider, on balance, that there is insufficient additional benefit identified by adding a trial of the preliminary issue in the Claremont claims, given the significant extra work and costs that will be involved in having a trial of the limitation preliminary issue in those claims.

34. It seems to us that the key legal issues on the limitation defences will be decided in the Invicta 43 claims, both under section 2 and under section 14A, and although that judgment will not bind the claimants who have Claremont claims, or indeed Canaccord in relation to its defence of those claims, it will be likely to create a very strong legal precedent to apply in the Claremont claims.

35. The section 2 issue will be a pure question of law, which inevitably will apply in the Claremont claims too, but the decision in principle on the section 14A issue of the knowledge required of an investor in such a scheme and whether certain factual events trigger sufficient knowledge are also likely to be applicable in the Claremont and indeed in the Eclipse schemes. Although the individual facts may vary slightly, we consider that the Invicta 43 judgment will give a very clear indication to the parties in the Claremont claim of the way that the same issues are likely to be decided.

36. For those reasons, on balance, we consider that the exercise of balancing the additional value of the trial of preliminary issues against the extra cost and time involved comes down against a direction for the preliminary issues.