



Neutral Citation Number: [2019] EWCH 3514 (Ch)

Claim No. BL-2018-001516

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

7 Rolls Buildings Fetter Lane London, EC4A 1NL

Date: Tuesday, 3rd December 2019

Before:

MR. JUSTICE ZACAROLI

Between:

DAVID MCCLEAN & OTHERS

Claimants

- and -

ANDREW THORNHILL QC

Defendant

MS. ANNELIESE DAY QC (instructed by **Stewarts Solicitors**) appeared
for the **Claimants**.

MR. TOM ADAM QC and **MR. DANIEL PICCININ** (instructed by **Mayer Brown
International LLP**) appeared for the **Defendant**.

APPROVED JUDGMENT

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MR. JUSTICE ZACAROLI :

1. The claimants and the defendant have agreed that it is appropriate, in a case where there are 110 claimants and a large degree of commonality in the issues raised by all claimants, that the matter should proceed to a first full trial in respect of sample claimants only. There has been a large measure of agreement between the parties, but I am asked to give directions in order to resolve matters that remain in dispute.
2. The jurisdiction to do so falls under the court's broad case management powers, designed to further the overriding objective. I do not accept that the defendant's interests should be given preference in exercising these powers on the basis that he is making a concession from the default position of a full trial involving 110 claimants.
3. True it is that the default position would be the trial of all 110 claims, but the overriding objective requires the court actively to case manage the proceedings, taking into account the interests of all claimants, the defendant and other court users. This necessarily involves some give and take from all angles. Nevertheless, I do accept that whatever procedure is followed must result in a trial that is fair to the defendant.
4. The principal purpose of identifying sample claimants is so that the common issues can be determined. It is agreed that the court's determination on the common issues will be binding on all the claimants.
5. The secondary purpose of sample claims is, however, to ensure that the decisions made by the court in respect of the individual issues provide as much guidance for as many of the other claims as possible, while recognising that the court's decision on any of those issues will not be binding on any other claimant.
6. Where issues are truly common then it is difficult to see why more than three claimants would be needed, that is one to represent all of the claimants in each of the three schemes in issue. The defendant contends however that more claimants are needed in respect of the common issues to cater for the fact that the answer to one of those issues, characterised as a common issue, may differ depending on the different fact patterns of certain groups of claimants. That issue is whether a duty care was owed in the first place by the defendant to each of the claimants.
7. Mr. Adam QC, who appears for the defendant, accepts that this is largely an issue that is common between all the claimants. Indeed, I understand his principal argument will be that, on the basis of what was known to the defendant, there could have been no reasonable reliance and that is sufficient to preclude a duty arising. He relies in particular on the terms of the information memoranda and other documents which not only cautioned the investors to take their own advice, but contained assurances from them that they had done so, in combination with the fact these were schemes that could only be introduced to the claimants by their individual financial adviser ("IFA").

8. He submits, however, on the basis of recent Supreme Court authority as to the circumstances in which a defendant will be held to have assumed a responsibility towards a claimant, that the question whether a duty is owed might involve, among other things, consideration of two issues: first, whether a claimant reasonably relied on the advice; secondly, whether it was reasonable for the defendant to appreciate that the claimant might rely on his advice.
9. For the first proposition he relies on *Steel v NRAM Ltd* [2018] 1 WLR, 1190. If he is correct, it would self-evidently require an examination of the circumstances of a particular claimant in order to answer the question whether the defendant owed that person a duty of care at all.
10. As to the second proposition, he submits that a central issue of relevance to the existence of the duty is whether the defendant reasonably anticipated that the claimants would get their own advice. His case on that, he says, might be enhanced, or at least the court might gain some comfort in reaching a conclusion in his favour on the point, if he could show that the claimants did in fact get their own advice.
11. As to the first point, Ms Day QC, who appears for the claimants, disputes that this is a correct interpretation of the law. She also points out that the agreed list of issues – so far as it concerns the question of whether a duty is owed – contains two sub-issues relating to the defendant's knowledge of numerous matters, and the meaning and effect of disclaimers, but nowhere is it articulated as an issue or sub-issue going to the existence of the duty that the claimants' reliance was not reasonable.
12. On an application such as this I have not been presented with full argument or full citation of authority on this point, and it would be wrong to reach a conclusion on it. It is, in any event, unnecessary for me to do so. If, as Mr. Adam suggests, it may be necessary to explore the reasonableness of reliance by each claimant, then the question of whether a duty is owed is not a common issue at all.
13. While Mr. Adam recognised the logic of that point, he did not go so far as to say that it would be necessary to do so. He may be wrong about the legal point and, if he is right, it may nevertheless prove unnecessary to delve into the circumstances of each claimant's reliance in order to establish the question of whether a duty was owed.
14. Even if it turned out that this aspect of the question is not a common issue then, in my view, that would not sufficiently undermine the utility of the sample claimants process so as to reject it altogether. It would simply mean that the first trial would not be wholly determinative of the question of whether a duty was owed. While it would dispose of significant aspects of that question, a part of it would move from the basket of common issues to the basket of individual issues.

15. Understood in that way, if Mr. Adam's submission as to the legal requirements for establishing a duty of care is correct, then all it means is the multiplicity of claimants i.e. more than one for each scheme, is not a necessity for the purpose of determining the common issues, but falls into the "good to have" category of trying to maximise the non-binding guidance that the court's judgment will provide on individual issues for the non-sample claimants.
16. So far as Mr. Adam's second argument is concerned, as to the *fact* that the claimants sought independent advice bolstering his argument that it was reasonable for the defendant to expect them to do so, I do not think that this goes to the appropriate number of sample claimants at all. Instead it raises a point of evidence, which would arise whether one or all of the claims are tried on the first occasion.
17. If the point is pleaded, and Mr. Adam says if it is not then it will be, it is clearly an issue that is common to all defendants. It cannot have been reasonable in the circumstances of this case, where it is common ground the defendant knew nothing of the individual circumstances of any of the claimants, for the defendant to expect claimant A to take advice because claimant A subsequently did take advice but not to be reasonable for the defendant to expect claimant B to take advice because claimant B did *not* subsequently do so.
18. At this stage I express no view as to the merits of the argument or whether it would entitle the defendant to seek disclosure from any non-sample claimant as to the advice taken by them from other advisors.
19. The claimants' proposed selection process is already largely designed to address the variance that exists between the claimants so far as reliance is concerned. The parties have agreed, for example, to ensure that a claimant who was introduced to the scheme by each of the three most commonly used IFAs is included, and all of the three "reliance categories", as defined by the parties, are represented.
20. In deciding how many sample claims there should be, I need to balance, firstly, the potential advantage of getting guidance on as many individual issues as possible against, secondly, the need to ensure that the trial is manageable.
21. In arriving at their number of eight, the claimants have sought to do so by reference to the number needed in order to cover certain identified bases. The defendant on the other hand has adopted a much more broad-brush approach. Starting from the default position that all claims should be tried together, Mr. Adam works backwards contending that having 18 sample claimants is a number which maximises the number of variants covered but is still consistent with a manageable trial.
22. One reason given by the defendants for the higher number is that it is necessary to multiply the variants. That is, for example, there ought to be a claimant falling within each reliance category for each scheme, which immediately makes nine, and with each IFA, which I think would then require

27. If the variant as to obtaining advice is added then the number is further doubled.
23. I am not convinced by this, the logic of which would, in any event, take the number far higher than that which the defendant proposes. Provided the court has the relevant variants raised by the cases before it, I do not see that it matters that a particular variant arises in a case with only one of the IFAs or only one of the schemes. In my judgment, the claimants' approach to selection is to be preferred. I take particular account of the fact that variants and fact patterns are required, not in order for the common issues to be determined, but to provide the widest guidance to the non-sample claimants. That is a worthwhile aim but not one that justifies overcomplicating the trial whose principal purpose, so far as the vast majority of claimants is concerned, is to resolve the common issues.
24. The approach I adopt therefore is to identify the variants that it would be helpful to have, having recognised the necessity of having three claimants (one for each scheme).
25. First, I agree with the agreement already reached between the parties that having one claimant to represent each of the reliance categories will be helpful. These have been agreed between the parties as distinct categories, although I record that the defendant does not accept that they cover all or even the principal variants as to reliance.
26. Those categories are: (1) the claimants that received the defendant's opinion; (2) the claimants that read the information memorandum and saw reference to the opinion in it; and (3) the claimants who were merely told about the existence of a positive opinion.
27. Second, I also agree with the agreement recorded in the draft order that there should be one claimant from each of the three main IFAs, that is the three IFAs with whom the largest number of claimants were connected.
28. The defendant seeks to add a fourth IFA, Charterhouse. In fact, the defendant says there really ought to be all eight IFAs represented because the reasonableness of reliance will be informed to a large extent by the house style in which the IFAs initiated contact with the investors. The reason for having Charterhouse in particular is because the claimants who were introduced via Charterhouse took independent advice from a tax accountant.
29. As to that, it seems to me that it would be reasonable to ensure that among the sample claimants there is one who did obtain such advice, and I propose to increase marginally the number of sample claimants in the first instance to cater for this additional variable. The questionnaires reveal that relatively few did obtain advice but it seems to me that the court at trial is likely to be assisted, in determining the relevance of advice being obtained to the question of reliance (or, if the point is a good one, to the question of duty), by reaching a determination both where independent advice was, and where it was not, obtained.

30. Taking into account these points, therefore, and in the absence of a more scientific basis to increase the number of claimants further, for example by reference to other fact patterns which should be incorporated, I propose to direct at this stage that there will be ten sample claimants -- that is slightly more than
- the claimants' number -- to reflect the additional variable I have suggested relating to taking advice.
31. So far as the details to be included set out in sub-paragraphs 4.3.4 and 4.3.5 of the draft order are concerned:
- i) Given my conclusion as to the need to include a claimant who took advice, I do not see the need to increase the number of IFAs that must be represented. Therefore, I will direct that there will be three;
 - ii) I do not see that living abroad should be a reason for disqualifying a claimant from being selected. Such a claimant has chosen to pursue these proceedings and the additional costs and effort of litigating from abroad are significantly reduced than in former times, given the ease of communication and travel.
32. The next question is as to the pool of claimants from which the sample will be selected. The burden on those in the pool is that they will be required to produce documents, not by way of a disclosure exercise pursuant to the CPR pilot, but in order to provide the defendant with sufficient information to make a betterinformed choice in the selection process.
33. Before concluding on the correct number for the pool, however, there is a dispute between the parties as to the scope of the document-production exercise. The principal dispute is that the defendant seeks, in relation to certain advice taken by the claimants, to include all communications with third-party advisers. The claimants on the other hand complain of the burden this exercise will place on them.
34. In reaching a conclusion on this point, I seek to balance the burdensome nature of the exercise against the utility of the disclosure at this stage, which is purely for the purpose of identifying sample claimants. I note that the broader approach is likely to be required for the full disclosure exercise in the context of the claim, but that will only affect, at the stage of the first trial, the sample claimants. I bear in mind that a significant benefit of proceeding by way of sample claimants is the impetus it might give to settlement of all other claims, thus negating the need for disclosure from the bulk of claimants.
35. With that balance in mind, I will direct as follows.
- i) On paragraph 2 of annex 2 to the draft order, I propose to make a direction in the terms asked for by the defendant. This relates to communications with IFAs or other advisers before investment was made in the schemes. The timescale is relatively short. It is unlikely that the widening of this category will result in a considerable additional burden to any of the claimants. There is force in Mr Adam's

point that the simple production of all communications would be easier for the claimants than having to decide whether a particular communication contained advice or not. Moreover, I think the terms in which the claimants communicated with advisers is capable of casting light on the nature of their reliance on the opinions of the defendant.

- ii) In relation to paragraphs 5 and 6 of annex 2, however, I will direct in the terms asked for by the claimants. These paragraphs go to the question of limitation, in particular the extent to which the claimants can rely on section 14A of the Limitation Act 1980. I accept that the wider disclosure sought by the defendants might throw up a greater number of variants. However, I balance against that first, that these categories cover a much longer period, so the burden on the claimants is that much greater. Second, in the context of the limitation question, less light is likely to be shed on the question when the claimants ought to have appreciated the facts which gave rise to a claim against the defendant from mere communications with advisers as opposed to the advice actually received by them. Similarly, while I can see that correspondence relating generally to the schemes might again throw up a wider number of variants, it is the correspondence relating to HMRC's enquiries which is most likely to produce relevant documents. Third, I am not convinced that the greater degree of variation provided by the wider disclosure exercise would ultimately be of utility in identifying fact patterns that are sufficiently widespread so as to enable valuable guidance to be obtained in the first trial.
36. Returning to the number of claimants in the pool, having reduced the burden of the disclosure exercise, and thus the burden on claimants being in the pool in the first place, I propose to lean towards the defendant's preferred, larger number. I accept the basic point that while there has been considerable information provided to the defendant via the answers to the questionnaire from most, if not soon all, of the claimants, the defendant still has far less access to information concerning the claimants than they themselves have, certainly in terms of sight of relevant documents. I also take into account the fact that while being in the pool will impose a burden on a greater number of claimants, it should not be forgotten that they are all pursuing and hoping to benefit from these proceedings. It is not intrinsically unfair that those who end up being in the pool but not selected as sample claimants end up shouldering a burden of at least some disclosure at this stage.
37. Nevertheless, I consider 40 to be still too high. This is a relatively rough and ready exercise, but I consider that 30 claimants, that is a ratio of three times the number that are to be chosen as sample claimants, is fair to both sides.
38. The parties are agreed that, both in the selection of the pool and in the selection of the sample claimants, each side will put forward half, i.e. (on the numbers I have directed) 15 each in respect of the pool and five each in respect of the sample claimants.
39. I will direct that each side's selection is produced to the other simultaneously at both stages. If there is duplication in the claimants offered by each side at either stage, then there will be the option of adding further claimants, always

on the basis of equality between the parties (subject to the overall limits I have already mentioned).

40. There is a dispute between the parties as to whether, at a later stage in the action, when the court comes to review the number of sample claimants, any adjustment should be downwards only. I do not think that it should. At this stage I consider it unlikely that there would be a need to increase the number of sample claimants and indeed would hope that, as a result of the selection process between now and then, there can be a reduction in the number of sample claimants. It is not appropriate, however, to bind the court's hands now.
41. I would also point out that, in view of the fact that the sample claimants will all have produced detailed pleadings by the stage the court comes to consider the question of adjustment, the court would probably take some persuading that the sample should be increased, when that may well have the effect of delaying the proceedings further.
42. Finally, there is a dispute in paragraph 4.3.6 of the draft order as to the preferences which should be expressed in selecting claimants. The claimants would like to include preference being given to those who invested in more than one scheme and those with a larger investment value. In my judgment, these are peripheral concerns and should not be forced upon the defendant even as preferences. Accordingly, I decline to make the direction in terms of paragraph 4.3.6.

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