



Neutral Citation Number: [2020] EWHC 1355 (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	<u>Claimant</u>
- and -	
Canaccord Genuity Financial Planning Limited	<u>Defendant</u>

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**

Approved Judgment

Mr Justice Fancourt and Master Kaye:

MR JUSTICE FANCOURT:

1. At CMC1 the claimants sought disclosure and inspection of certain documents of which the defendant Canaccord is currently aware without having to make further searches for them. That was sought as part of initial disclosure pursuant to paragraph 5 of CPR Practice Direction 51U. The claimants contend that the documents should have been provided with Canaccord's statement of case.
2. Paragraph 5 of Practice Direction 51U states as follows:
 - "5.1 Save as provided below, and save in the case of a Part 7 claim form without particulars of claim or a Part 8 claim form, each party must provide to all other parties at the same time as its statement of case an Initial Disclosure List of Documents that lists and is accompanied by copies of --
 - (1) the key documents on which it has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case (and including the documents referred to in that statement of case); and
 - (2) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.
 - 5.2 This form of disclosure is known as 'Initial Disclosure'."
3. PD51U introduced a significant culture change in the approach to disclosure in the Business and Property Courts of England and Wales by limiting disclosure to documents that are reasonably necessary for a fair disposal of the claim, with the extent of disclosure being tailored to particular issues in the claim. However, key documents that are relied on or are necessary to understand a party's case are to be provided at an earlier stage with the relevant statement of case.
4. In its defence to the Invicta 43 claims, Canaccord denies liability and negligence on the basis that it was not liable to give the advice that the claimants allege it should have given, and that the advice and warnings it did give were reasonable in circumstances "where it received a legal opinions pack (with taxation advices from leading counsel and DLA and with related cash flows) and gave centralised consideration to the taxation (and other) aspects of the scheme, raising queries with Invicta Capital". A similar defence is pleaded in relation to the other film finance schemes.
5. Canaccord also pleads that the schemes were discussed in meetings or conversations with the individual claimants, and that at such meetings, "the Advisers' general practice was that the Scheme, its benefits and its risks were explained. The explanation of risks expanded on those set out in the Suitability Letter".
6. The documents of which the claimants sought initial disclosure were the following:
 - a. "Generic / standard form (i.e. non-individual specific) documents that relate to the oral advice allegedly provided pursuant to the '*general practice*' referred to in

paragraphs 30(2), 33(3) and 35(4) of Canaccord's Defence regarding potential investments in Invicta 43, Claremont and the Eclipse Partnerships, including (without limitation) preparatory materials, speaking notes, scripts, checklists, meetings/attendance notes and other similar documents provided to or used by Canaccord's advisors for the purposes of meetings and discussions with clients”;

- b. “Documents relating to the ‘*centralised consideration*’ and/or ‘*centralised due diligence process*’ alleged in paragraphs 43(5), 45(9) and 48(10)(b) of Canaccord's Defence relevant to its advice and recommendation in relation to Invicta 43, Claremont and the Eclipse Partnerships.”

7. The claimants therefore did not seek documents relating to the individual meetings and oral advice allegedly given. They only sought the standardised documents relating to Canaccord's alleged general practice and alleged centralised due diligence process.
8. We note that the claimants do not contend that the documents sought fall within paragraph 5.1(1) of the PD51U as being key documents relied on expressly or otherwise for the purposes of the defence. They contend only that the documents sought are key documents necessary to enable them to understand the defence that they have to meet.
9. In particular, they argue that, in the absence of the documents sought, it is impossible for them to understand what was done by way of due diligence and what conclusions were reached and what oral advice was given to the individual claimants pursuant to a general practice to advise.
10. We do not agree with these arguments. It seems to us that the defence of Canaccord in this respect is clear, namely, first, that they did review the tax schemes internally prior to recommending the schemes to investors because they had a centralised due diligence process requiring them to do so; and, second, that in addition to the written advice on the merits and risks of the schemes it was their practice to give advice and risk warnings orally to their clients and that they did so in the case of the claimants.
11. At present, the case against Canaccord and its Defence have only been pleaded generically. There are no allegations in relation to particular claimants' cases. The claimants' complaint that they do not understand what was done and what conclusions were reached is in part a complaint that they have not yet been provided with the evidence on which Canaccord relies to prove the Defence. The documents that are sought are certainly necessary to evaluate and weigh the prospects of success of Canaccord's Defence, but they are not necessary in order to understand the defence that the claimants have to meet and answer.
12. Furthermore, there are no documents expressly or impliedly identified in the pleaded paragraphs. The claimants are speculating that there must be some documents. However, the key aspects of the pleaded case do not depend on documents, though the proof of them may do so.
13. The key aspects of the pleaded case are that Canaccord itself reviewed the merits of tax schemes and gave oral, as well as written, advice to its clients when it recommended the schemes. It seems to us that no documents are necessary to enable the claimants to understand the case that they will have to meet.

14. In our view, therefore, the documents sought do not come within the scope of initial disclosure. Documents “relating to” a pleaded defence – that may or may not support the defence pleaded – may well be within the scope of extended disclosure, but key documents necessary to understand the pleaded case is a quite different criterion and concept under the Practice Direction.
15. In any event - not that it is material to our decision - the claimants will not have to wait until extended disclosure before they can review Canaccord's documented records of any oral advice given to various claimants. Canaccord has agreed, as part of the sample claimants selection process, to provide its files relating to all the initial sample claimants prior to selection of the sample claimants.
16. Those are our reasons for the decision that we were invited to reach on paper and had previously communicated to the parties.