Case 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)
CITATION No.: [2021] EWHC 1049 (Ch)

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

Date: **31 March 2021**

Before :

The Hon. Mr Justice Fancourt and Master Kaye

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Between :

David Lancaster & Ors	**Claimant**
- and -	
Jonathan Peacock QC and Peter Breitenbach & Others	**Defendant**
-and-	
Canaccord Genuity Financial Planning Limited	**Defendant**
CMC	

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- -

Andrew Onslow QC and Dominic Kennelly (instructed by **Stewarts Law**) for the **Claimant**
Tom Adam QC and Emma Mockford (instructed by **Clyde & Co**) for the **First Defendant**
Ben Hubble QC and Shail Patel (instructed by **Macfarlanes**) for the **Second Defendant**

Hearing date: **31st March 2021**

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Approved Judgment

MR JUSTICE FANCOURT:

(**12:21** pm)

1. The first substantial matter to be decided at the second case management conference today is the question of whether expert evidence should be permitted. It is Canaccord who apply for permission to adduce the expert evidence of an independent financial adviser in connection with the claims of the sample claimants against Canaccord.

2. The terms in which a direction for expert evidence was sought are as follows:
"Canaccord shall have permission to file and serve expert evidence as to whether the explanations and advice provided by Canaccord were within the range which a reasonably competent financial adviser could have provided to sophisticated clients in respect of Invicta 43 and as to reasonable market practice at the time."

3. The two principal requirements before the court grants permission for expert evidence are that there has to be a recognised body of expertise to draw on and the court must be satisfied that the evidence to be adduced is likely to be needed by the court to assist it to resolve matters in dispute.

4. The expertise to be drawn on is the experience of an independent financial adviser who has practised or is practising under the FSA's Conduct Rules, or Sourcebook as it is now called. No particular professional qualification of the independent financial adviser is identified, but nonetheless I am satisfied, and I think eventually Mr Onslow was inclined to accept, that there is a sufficiently clear body of experience/expertise of independent financial advisers so practising to draw on.

5. The second requirement is where the main debate has focused: the extent to which the court is likely to be assisted by evidence called on behalf of Canaccord addressing the issues as formulated in the draft order.

6. In the case of solicitor or counsel defendants no expert evidence is, of course, needed, because the court is fully able to form a view as to the extent of duties and whether or not the duties were broken in a given case. However, the claim against Canaccord is different. Canaccord is a corporate independent financial adviser. The relevant professional field is therefore not one of law, it is independent financial advice given on investments for a category of relatively well-off and relatively sophisticated investors. Their business was covered at the relevant time, as I have said, by rules, the FSA's conduct rules and sourcebook, but these rules, like the rules of other professional regulators, do not cover specifically the type of investment that I am concerned with in this case, that is to say tax-driven investments of a sale and leaseback film scheme type.

7. The relevant question seems to bes what a reasonably competent independent financial adviser would be expected to cover and address in giving any advice to a prospective investor on such a scheme. That probably has two aspects to it. First, what steps would the

adviser take to appraise the investment scheme and understand its implications and, second, what type of matters would be contained in the advice given to the prospective investor.

8. The sort of evidence that is likely to assist the court will be general evidence of the approach that any competent independent financial adviser would be likely to take in both those respects in relation to investment schemes such as the ones in issue in this case. I emphasise the words "in general".

9. The court will not be assisted on the facts of these cases by an expert witness giving his or her own opinion of whether Canaccord failed on the particular facts of the four sample cases to advise in a non-negligent way or, which amounts to the same thing, to say what he or she would have advised in the circumstances. However, I consider that as trial judge I may well be assisted by evidence of the nature and extent of the advice that a competent independent financial adviser would generally give to such a client in relation to such an investment in general terms.

10. As for the proposal for expert evidence of reasonable market practice at the time, no such market practice was pleaded or relied upon by Canaccord and there is therefore nothing beyond the evidence that I have just identified that needs to be addressed by an expert witness.

11. It follows that the order for expert evidence that is sought is, in my judgment, inappropriate. Instead, in broad terms, the expert evidence should address the nature and extent of the advice that any reasonably competent independent financial adviser governed by the FSA's rules would be expected to have given an eligible investor during the period October 2007 to January 2008, who was considering investing in a tax mitigation-driven film scheme. That is a broad description of the category of evidence that would assist the court, but it seems to us that what is important in this case is that the exact issues that the expert witnesses should address should be formulated with complete clarity, to ensure that the experts are only being asked to address the broad matters that I have indicated and not to give what really amounts to an opinion on the final question that the court will have to decide at trial.

12. The formulation of those issues should be attempted to be resolved collaboratively by the parties in the first instance and then approved by the court. If the parties are then unable to resolve them, the court will determine the outstanding matters on paper.

13. We considered briefly whether or not, in view of the limits on the nature of the expert evidence that should be allowed, this might be a rare case of a substantial claim where a single expert could be appointed jointly by the parties. Having heard the parties and reflected on the matter, we accept that the usual order should be made that each of the sample claimants and Canaccord will be at liberty to instruct their own expert. However, in view of the intention that the issues for the expert witnesses are to be agreed and determined in advance, we do not consider that sequential exchange of expert reports is appropriate: the issues to be addressed will be clarified at the outset.

14. However, we do consider that it is important that the expert witnesses should meet to discuss the scope of their reports and the issues that they are to address before they produce their

expert reports and not only after the expert reports have been formulated. The exact directions in relation to the preparation and exchange of expert reports can be agreed in due course.

(**14:19** pm)

1. In view of the fact that there is going to be Model D plus narrative searches in relation to issues 1 and 3, we are very sceptical that there is space for anything else in terms of unidentified documents for issue 2 that will not be thrown up as either being relevant to issues 1 and 3 or, if it is important, as being an adverse document that has become known as a result of those disclosure searches. We therefore do not consider that there should be more extensive Model D plus narrative disclosure in relation to issue 2.

2. We think there should be Model C disclosure for that issue, but that the requests should be identified at this stage, not today but as part of the finessing of the first round of disclosure, because otherwise dealing with follow-up Model C requests at a later stage is going to give rise to greater work and greater expense.

3. So we will direct there should be Model C disclosure for the claimants in relation to issue 2, with the particular requests to be defined and approved by the court in due course.

(**15:03** pm)

4. We have been asked to provide some preliminary guidance in relation to the scope of the disclosure exercise to be undertaken by the claimants in respect of third party documents to assist the parties in finalising Section 2 of the DRD. Ultimately, the responsibility is on the claimants and their solicitors to ensure that they give appropriate disclosure on Model D with narrative documents, having regard to the Issues for Disclosure and their duties set out in paragraph 3 of PD51U.

5. Our view is one cannot say that documents held by any of the identified third parties are necessarily excluded from the scope of disclosure. On the other hand, we recognise that neither are they an immediate starting point for the disclosure exercise, but, rather, given that the disclosure is to be on Model D with narrative documents, the responsibility is on the parties' solicitors giving disclosure to pursue investigation of documents as necessary to comply with their disclosure duties. So, for example, it may be that gaps in documentation held by the sample claimants are identified as a result of which it may become appropriate, reasonable and proportionate, for the sample claimants to make enquiries of HMRC or their accountant in order to comply with their disclosure duties.

6. So far as Fieldfisher is concerned, again it may be appropriate to make requests of Fieldfisher, but on the face of it, we think it is relatively unlikely that there will be documents there that are sufficiently material that are otherwise not available from the disclosure exercise that is already to be undertaken. Disclosure is an iterative exercise. If the circumstances are such that it becomes apparent that documents do exist which would have fallen within the scope of Model D with narrative documents disclosure (which then may fall

into the category of know adverse documents) and the sample claimants do not have them for some reason and Fieldfisher may be an appropriate source, then at that stage we consider it would be reasonable and proportionate for the claimants to make enquiries of Fieldfisher.

7. We think it is impossible to say at this stage whether the sample claimants' accountants do or do not have documents which would fall within the scope of Model D with narrative documents disclosure which would not otherwise be disclosed or whether they should or they should not be the subject of requests for documentation. It depends on the facts as they emerged from the disclosure exercise and we do not feel able to give any more prescriptive guidance at this stage. However, in Mr Trott's case, we think there is a strong basis for expecting attempts to be made to obtain documents relating to his divorce proceedings because they may well have relevant material relating to Mr Trott's state of knowledge.

8. On the end date for the date range, we are both clearly of the view that the end date should be 1 February 2016, that being the date specified in the claimants' own pleaded case. There is a real possibility that there will be later factual matters relating to the discovery of information which will reveal the state of the claimants' knowledge at an earlier time. As a matter of principle we think the later date is the appropriate date for the end of the date range.