

Class action test cases: selection and strategy

In a recent judgment relating to film finance tax deferment schemes, the High Court has taken the rare step of commenting on how test cases should be selected in group litigation (*Lancaster and others v Peacock QC* [2020] EWHC 1231 (Ch)).

In the decision, the court set out useful commentary on the purpose of selecting test cases which will assist those running group litigation cases. Litigants also need to consider the strategic issues that can arise, particularly where there is an information imbalance between the parties.

Purpose of test cases

Any group litigation will include issues that are common to some, or all, of the claimants, as well as individual issues that must be determined on the facts of the particular claims in which they arise. In trying group litigation, the court will often employ the technique of selecting a number of test cases for trial, rather than seeking to determine all of the claims together, which would rarely be an efficient way of proceeding, particularly where there are large numbers of claimants (see box “Comments on test cases”).

The litigation

Lancaster involved two overlapping sets of proceedings that were being case managed together. There were 123 claimants in the first claim which related to a film finance tax deferment scheme (the scheme) and 33 in the second, of whom 18 brought claims concerned with the scheme (and were also claimants in the first claim). The first claim and the part of the second claim relating to the scheme were to be tried together, with the remainder of the second claim stayed until after that trial.

The parties disagreed as to how test cases should be selected for trial. It was common ground that all 123 claimants should be sent a questionnaire asking about various matters relating to their investment in the scheme including, for example, whether they had taken any independent professional advice before investing, and whether they had taken any advice on the tax consequences of the investment after investing, and in each case when and from whom. However, at that point the parties’ preferred approaches diverged.

Comments on test cases

In *Lancaster and others v Peacock QC*, the High Court commented that the purpose of selecting test cases is twofold:

- To decide the common issues in a way that is binding on all parties.
- To decide other factual and legal issues in a way that assists in the settlement of the remaining claims by giving the parties a clear indication of how those claims would be likely to be decided if tried ([2020] EWHC 1231 (Ch)).

The first of these purposes does not require the selection of a large number of test cases. The reason for having a broader selection, the court said, is to generate sufficiently broad guidance for the disposal of all the other claims, whose particular facts will vary, while at the same time not overcomplicating or encumbering the trial, or significantly adding to the costs.

The rival proposals

The claimants, supported by the defendant to the second claim, proposed a two-stage approach where, based on the answers to the questionnaires, the parties would each select a number of initial sample claimants who would be required to search for, and produce, supporting documents relating to the answers they had given. A final selection of test cases would then be made by each of the parties, taking into account the information provided.

The defendant to the first claim instead proposed that, at the same time as answering the questionnaire, all 123 claimants should produce certain categories of documents relating to their answers. This would obviously be quicker than the two-stage approach. However, the question about whether the claimants had received any advice after investment could raise issues of legal professional privilege so, on this approach, each claimant would have to receive advice about privilege and, potentially, make a decision about whether to assert or waive the privilege.

The court’s decision

While the court saw the attraction of trying to shorten the process, on balance it preferred the claimants’ two-stage proposal.

This was principally because, at the time the judgment was given in late April 2020, the 2019 novel coronavirus disease pandemic and associated lockdown were causing significant

difficulties for many people’s personal and business affairs. Against that background, at least some of the 123 claimants were bound to be significantly adversely affected by the need to search for and produce the relevant documents, which would be a more complex exercise than simply having to answer the questionnaire.

The court was also influenced by the difficulties surrounding issues of privilege, which it said could place a substantial burden on the claimants if they had to be dealt with as part and parcel of answering the questionnaire.

To counterbalance the impact of this approach on the defendant, however, the court considered it appropriate to take 36 initial sample claimants, a larger number than the claimants had proposed. This would ultimately be reduced to a total of 12 test cases after the relevant documents were produced.

Strategic issues

The process of selecting test cases for trial is a key strategic consideration in the conduct of group litigation (see feature article “Class actions in England and Wales: key practical challenges”, www.practicallaw.com/w-015-9333). As well as ensuring that the test cases adequately cover all of the common issues and the spectrum of relevant factual scenarios, each side will wish to select the test cases that best serve its own interests. Typically, for the claimants that

will mean selecting the strongest claims, and for the defendants it will mean selecting the weakest.

If follows that where there is a significant information imbalance between the parties in relation to individual claims at the time that the test claims are selected, this will tend to give the claimants a strategic advantage. Defendants will therefore generally wish to ensure that as much information as

possible is available by the time the test cases are selected. Where, however, the court considers that searching for, and producing, the relevant material at this early stage will place significant time and cost burdens on the claimants, this will weigh against a broad approach.

As with any case management decision, where the balance is ultimately struck will depend on what the court considers

to be reasonable and proportionate in the particular circumstances of the case.

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