

FCA HIGH COURT CASE SUMMARY: DAY ONE



The
Royal
Courts
of
Justice

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- The FCA counsel confirmed that, whilst there were a limited number of insurers and policies included in the action, it is estimated that there are in fact over 60 insurers with 700 types of policy and around 370,000 policyholders who could be affected by this legislation.
- The counsel also confirmed that if the FCA are not arguing a point this does not mean that it does not have merit and should not prejudice clients pursuing a case via the Financial Ombudsman Service (or any other means). This does mean however that the court has been asked not to make findings on issues that are not before it.
- Ms Mulcahy was called by the FCA counsel to provide information on the developments of the pandemic by way of a 'factual backdrop' to the relevant policy conditions. The assertion made by Ms Mulcahy was that the 3rd March was the date on which it was possible to say that the pandemic constituted an 'emergency', and that policy references to 'danger' or synonymous terms should be viewed as being in effect from this date. The date of the 3rd March seems to be related to the announcement by the UK Government of an action plan designed to respond to the disease.
- Alternatively, at least one insurer (Ecclesiastical) has asserted that the 12th March should be viewed as the date that the situation constituted an 'emergency'. This was the date after the disease was declared a pandemic by the World Health Organisation and on which the government raised the risk level from 'moderate' to 'high', passing down advice regarding self-isolation for those who exhibited symptoms of the disease.
- Ms Mulcahy advised that official figures for the 16th March suggested that there were 3,220 cases across England. However it is accepted by all parties that the true number of cases at this stage would have been much higher. Whilst there is currently no agreement on the actual figure, the FCA introduced figures from Cambridge Public Health England that suggested that there were in fact **391,000** cases across England on the 16th March. This date is relevant as it was the date on which the Prime Minister urged people to work from home where possible and to "avoid pubs, clubs, theatres and other such social venues". The FCA assert that this was part of a national strategy to deal with a national emergency, and a key turning point in public behaviour.
- Ms Mulcahy raised the issue of school closures that she asserted was mandated from the 20th March. However it is noted that at least one insurer (Ecclesiastical) have sought to insist that this edict was not a legal prohibition on schools, but merely advisory. The 20th March is also the date on which the Prime Minister advised nightclubs, theatres, cinemas, gyms and leisure centres to close.
- The following day (21st March) the government enshrined this advice in legislation, forcing "*the closure of businesses selling food or drink for consumption on the premises, and businesses listed in the schedule, to protect against the risks to public health arising from coronavirus. The closure lasts until a direction is given by the Secretary of State ... required to keep ... under review every 28 days*".
- Ms Mulcahy pointed out that these regulations provided an exemption for take-aways, which has meant that the defendant insurers have argued that there was therefore no 'prevention of access' or complete closure to affected businesses.
- On the 23rd March further government advice was broadcast, which included reference to the police having powers to enforce the new rules.

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- Ms Mulcahy advised that on the 26th March official figures recorded 17,956 cases. However Cambridge University's modelling suggested that there was in fact likely to have been 2.47m cases across England.
- Ms Mulcahy made a very clear point on the connection between the disease and the government legislation:

"We have a national disease, we have a national public authority response. We have intermingled effects on individuals and businesses. We would say that this is all two sides of the same coin. If you are telling people on the one hand to stay away from businesses, and you are closing the business on the other, we would say that is one and the same thing; the purpose is to prevent access to those businesses, even it is for the ultimate purpose of protecting public health. We would say from the beginning, the danger and emergency of COVID-19 posed a national threat. It spread nationally and it required an elicited national response; and at each stage, one can see from these announcements and the regulations, the government is acting on the basis of emergency, danger and health concerns. The restrictions prevented activity on the part of individuals and businesses in combination, collectively causing losses. That's why we contend that the disease and...the specific types of public authority action form an indivisible whole."

- This point is clearly crucial for a consideration of 'trends' clauses within policies. The FCA seem to be seeking to state that the losses experienced by a business flow from COVID-19 through the government response – as such, the argument would seem to follow that losses must be calculated on the basis of what a business would have taken 'but for' COVID-19, as opposed to 'but for' the government lockdown.
- It seems that certain insurers have attempted to assert that the government advice regarding closure of businesses was on the same level as previous instructions to eat five portions of fruit and a vegetables a day or stop smoking. Both Ms Mulcahy and Mr Edelman, the FCA counsel, sought to rubbish this notion, asserting that the public are very aware of the difference between general advice and emergency directions issued by a government in the midst of a health crisis. This, Mr Edelman asserted, differentiates us from a Police State and insurance policies need to be interpreted based on this notion. Furthermore, it is clear that had businesses remained open they would have been in breach of their Health and Safety obligations to their employees.
- Ms Mulcahy also addressed certain assertions by insurers on the issue of whether the UK Government was a body synonymous with 'civil authority' as stipulated within their policy wordings. The presiding judge advised that he was 'not convinced' by the insurers' argument on this point.
- Mr Edelman also addressed the issue of the Orient Express case but asserted that the ruling in that case was too recent to be viewed as 'settled' and indeed most legal commentators have serious concerns over its correctness. As such, in his view, the Orient Express case is too problematic to be used as an authority in this hearing.
- Mr Edelman contended that policyholders should be able to utilise the analyses of Cambridge or Imperial University as part of the evidence submitted in support of the case. This brings in the difference between the 'official' figures and those produced by these institutions' modelling.

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- Mr Edelman also sought to bring in the issue of the dormancy of the disease. If it is accepted that the disease only manifests symptoms ten days after infection, those people who have been identified as having the disease must have caught it approximately ten days prior. As such, Mr Edelman sought to widen the timescale on which we might be considering there to have been a 'presence' of the notifiable disease within a certain area. Mr Edelman also sought to suggest that a weighted average methodology should be viewed as reliable for the purposes of calculating the number of cases of the notifiable disease within a given area.

- Mr Edelman engaged in a long and detailed argument about how one might interpret the action of a 'pandemic' in light of the policy conditions. This argument addressed the principle of whether the disease or the government action was the triggering cause of the loss of turnover and whether it is reasonable to suggest that these are two separate things. This argument also brought in the question of the 'but for' principle – ie. what would businesses have experienced as turnover 'but for' the lockdown and 'but for' the disease manifesting itself? The below quote sums his position up neatly:

- o *"What these policies are insuring, according to the insurers, is a notifiable disease as long as it's not too bad a notifiable disease. If it is a really bad notifiable disease, which really impacts on your business, then we won't insure you. Because if it is a really, really bad disease, we have always got the "but for" causation test to fall back on.*

- Crucially, Lord Justice Flaux responded to issues of the disease being within a 25- or 1-mile radius by stating:

- o *"The 1 mile and 25-mile point is... completely meaningless, because the reality is that if it is everywhere, then the 1 mile/25 miles restriction is going to be satisfied in every case."*
 - o *Notice that the judge suggests that, as a pandemic, the disease is 'everywhere'.*

- Mr Edelman concluded with a detailed argument relating to causation, specifically in relation to what caused the losses to each client's business. He raised an example of a café in a town that had flooded – he draws a parallel with the insurer arguments regarding COVID-19 by saying that, applying a 'but for' test, an insurer could say to this café: *"no one could have got to your property anyway because the rest of the town was devastated. No business interruption loss for you."* However, if there were an isolated burst pipe which flooded only the café the client would have received cover for business interruption. Therefore this theoretical policy is stating that the worse the scenario, the less the coverage. This applies to the current scenario because insurers are seeking to argue that businesses would have been affected by a significant downturn even if they had stayed open because of the prevalence of COVID-19 and the public's measures to stay safe. However, this seems to reduce the coverage in inverse proportion to the severity of the incident, meaning that if a business had one case of Ebola (say) in the vicinity of the premises then it could claim for business interruption precisely because the disease had not grown into a pandemic.

You can follow the case live by visiting the FCA website, or by clicking [here](#).