

THE IMPACT OF THE FCA TEST CASE IN THE UK AND BEYOND

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The Current Position: FCA Data

Firm name (Top 10 by claims accepted)	Accepted by the insurer	Pending	Unsettled BI claims, initial/interim payment made	Settled in full
Covea Insurance plc	3,210	757	114	2,294
AXIS Managing Agency Limited	2,566	688	367	1,547
QBE UK Limited	2,392	32	19	95
Allianz Insurance plc	2,352	297	379	1,459
AXA Insurance UK plc	1,646	2,109	393	921
Canopus Managing Agents Limited	1,333	-	-	-
Arch Insurance (UK) Ltd	1,070	240	-	307
Royal & Sun Alliance Insurance Plc	1,062	1,071	51	105
Fairmead Insurance Limited	735	216	21	541
Markel International Insurance Company Limited	725	378	152	326

Total interim: £192,084,302 Total Final: £279,823,468

Process

- Two cases ([*TKC v Allianz*](#), [*Rockliffe v Travelers*](#)) are routine litigation;
- FCA Test case ([*FCA v Arch*](#) [2021] UKSC 1; [2021] 2 WLR 123; [2021] Lloyd's Rep IR 63) was not.
- Pilot scheme, now [permanent](#) under CPR, PD63AA:
 - 6.1 The Financial Markets Test Case Scheme applies to a claim started in the Financial List which is a Financial List claim and which raises issues of general importance in relation to which immediately relevant authoritative English law guidance is needed (“a qualifying claim”).
 - 6.2 In such cases the Financial Markets Test Case Scheme enables the qualifying claim to be determined without the need for a present cause of action between the parties to the proceedings.

Issues

1. COVID AS PROPERTY DAMAGE BI
2. COVID AS NON-PROPERTY DAMAGE BI
 - a) Notifiable Disease occurrence
 - b) Denial of access, public authority.

Issues tested in Litigation (and not)

1. COVID-19 AS PROPERTY DAMAGE

- FCA, *Dear CEO* (15/04/20): ‘Based on our conversations with the industry to date, our estimate is that most policies have basic cover, do not cover pandemics and therefore would have no obligation to pay out in relation to the Covid-19 pandemic. While this may be disappointing for the policyholder we see no reasonable grounds to intervene in such circumstances’.

TKC London Ltd v Allianz Insurance Plc
[2020] EWHC 2710 (Comm)

- Frozen stock (for restaurant).
- Was deterioration of stock ‘property damage’, defined as ‘Accidental loss or destruction of or damage to Property Insured’ to trigger BI cover?
- Was denial of access = loss of property?
- For BI cover:
 - Requirement that property be insured separately (not met); AND
 - Exclusions for inherent vice, latent defect etc.

Result?

- Summary dismissal
- (Transient) Denial of use of property \neq property damage (would make BI cover simply property damage cover).
- Damage to frozen stock did not cause BI loss; it was a symptom of it.
- In any case, inherent vice.

2. COVID-19 & EXTENDED COVER

- Beyond property damage BI.
- Optional extra cover.
- ‘Notifiable Disease, Vermin, Defective Sanitary Arrangements, Murder and Suicide’
 - Disease
 - Denial of access (public authority)

2a. Disease

- Defined list: *Rockliffe v Travelers Ins Co Ltd* [2021] EWHC 412 (Comm): ‘(ii) Cholera / **Plague** / Relapsing fever / Smallpox / Typhus’. No liability for COVID-19.
- Notifiable disease:
 - ‘iii. occurrence of a Notifiable Disease within a radius of 25 miles of the Premises;
...’
 - Core issue for FCA Test Case.

2a. Notifiable Disease and FCA Test Case

- BI -> Disease Occurrence within radius...
- Proof?
- Is it ONLY the consequences of disease occurrence within radius that is insured?
- What of effects of disease outside the radius?
Uninsured cause?
 - Interpretative
 - Causative

'Over-subscribed' Causal Models

- Business would have been closed if occurrence within radius AND even if occurrence not within 25 miles. 'But for' test & Prof J Stapleton...
- Causal rules are a matter of context:
- 'We do not consider it reasonable to attribute to the parties an intention that in such circumstances the question whether business interruption losses were caused by cases of a notifiable disease occurring within the radius is to be answered by asking whether or to what extent, but for those cases of disease, business interruption loss would have been suffered as a result of cases of disease occurring outside the radius', [195].

The new Causal Model

- Where wide effect from a single fortuity (e.g. flood, hurricane, pandemic) and insurer covers local effects, no defence to say that generalised effects would also have diminished business...
- UNLESS wording to that effect [ONLY].
- Overturns [*Orient-Express Hotels Ltd v Assicurazioni General SpA*](#) [2010] Lloyd's Rep IR 531 on property damage and Hurricanes Katrina / Rita.

2b. Denial of Access

- “loss ... resulting from ... Prevention of access to the Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property”.
- Interpretation.
- Did not require full force of law to constitute ‘restrictions’;
- Did not require total denial of access (eg café starts new take away service).

Lessons...

- Underwriting
- Add-ons
- And correlated losses...

