

Neutral Citation Number: [2020] EWHC 1572 (Comm)

Case No: FL-2020-000018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 June 2020

Before :

Mr Justice Butcher

Between :

The Financial Conduct Authority	<u>Claimant</u>
- and -	
Arch Insurance (UK) Ltd and Others	<u>Defendants</u>

Colin Edelman QC, Leigh-Ann Mulcahy QC and Richard Coleman QC (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**

Gavin Kealey QC, Andrew Wales QC, Sushma Ananda and Henry Moore (instructed by **DAC Beachcroft LLP**) for the **Third and Fifth Defendants**

Jonathan Gaisman QC, Adam Fenton QC, Miles Harris and Harry Wright (instructed by **Allen & Overy LLP**) for the **Fourth Defendant**

Simon Salzedo QC and Michael Bolding (instructed by **Simmons & Simmons LLP**) for the **Second Defendant**

David Turner QC and Anthony Jones (instructed by **DWF Law LLP**) for the **Seventh Defendant**

Rachel Ansell QC and Sarah Bousfield (instructed by **Clyde & Co LLP**) for the **Sixth Defendant**

Andrew Rigney QC, Craig Orr QC, Caroline McColgan and Michelle Menashy (instructed by **Clyde & Co LLP**) for the **Eighth Defendant**

John Lockey QC and Jeremy Brier (instructed by **Clyde & Co LLP**) for the **First Defendant**

Hearing date: **16th June 2020**

RULING

Mr Justice Butcher
(2.19 pm)

Tuesday, 16 June 2020

Ruling by MR JUSTICE BUTCHER

1. The issue which has been debated relates to expert evidence on paragraphs 24 to 28 of the FCA's Particulars of Claim and more particularly paragraphs 26, 27 and 28.3 and 28.4.
2. What is said by the insurers is that there cannot be expert evidence and that there cannot be a determination of any matter which would depend on expert evidence relating to the actual incidence of the disease; in other words, the point in paragraphs 26, 27 and those subparagraphs of 28 which I have mentioned.
3. The insurers complain that the suggestion that there should be a determination of that as a factual matter was something which was not clear to them until 9 June 2020. I do not need to go into the rights and wrongs of that. Suffice it to say that I accept that insurers did not understand that and cannot be criticised for their lack of understanding. But in saying that, I make it clear also that I am not criticising the FCA or its representatives.
4. Furthermore, the insurers say that it is simply impossible for that matter to be dealt with at the hearing in July. They say that they have not found a suitable expert given, as they say, that most of the qualified experts in the field are already heavily engaged, unsurprisingly, in other advisory work.
5. They say that the timetable, even allowing for the amendments suggested today, actually envisages that they, the insurers, should have to serve an expert report on 24 June in exchange for any evidence which might be being served by the FCA. They say that there would then need, if there were expert evidence, to be the opportunity for supplemental reports and a meeting of experts. They say, correctly in my view, that those steps cannot be fitted in. And they also say, with force, as it seems to me, that there will not be time to have cross-examination of experts and thus this debate, as a matter of expert evidence, within the time allotted for this trial at the end of July of this year.
6. Mr Edelman's argument is, in effect, that the insurers should not dispute the conclusions of the Flaxman et al report or should not dispute it to such an extent that it makes any difference. He may

be right, he may not be, but I find it impossible to say that I should proceed on the basis that he is right or, more specifically, to make orders which proceed on the basis that he is right.

7. So I am going to say that there cannot be expert evidence going to the issue of actual prevalence and that the insurers are not expected to produce expert evidence in relation to actual prevalence, which includes obviously as to the under-counting rate, by 18 or 24 June.
8. Let me, however, make certain things clear.
9. Firstly, that decision will not of itself preclude arguments as to whether a type of proof could be sufficient to satisfy whatever onus of proof is on the insured.
10. Secondly, it would clearly not preclude arguments on the basis of assumptions as to actual incidence.
11. Thirdly, I expect insurers to plead properly and responsibly to the issue in their defences, in accordance with the mutual objective, and that may itself mean -- it may not, but it might -- that there is a narrowing of the issue(s) here.
12. Fourthly, I intend to revisit this at the next CMC in the light not only of the defences but also, I hope, of discussions between the parties in the meantime, with one of the possibilities being whether, if there remain issues which depend on a finding of actual prevalence, there should be directions for their resolution.