Neutral Citation Number: **[2020] EWHC 1724 (Comm)**

Case No: FL-2020-000018

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

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

Date: **26 June 2020**

Before:
LORD JUSTICE FLAUX
-and-
MR JUSTICE BUTCHER
Between :

The Financial Conduct Authority	**Claimant**
- and -	
Arch Insurance Limited and Others	**Defendants**

- -

Colin Edelman QC, Leigh-Ann Mulcahy QC, Richard Coleman QC, Richard Harrison, Adam Kramer, Deborah Horowitz and Max Evans (instructed by **Herbert Smith Freehills LLP**) **(THE FINANCIAL CONDUCT AUTHORITY)** for the **Claimant**
John Lockey QC and Jeremy Brier (instructed by **Clyde & Co LLP**) (**ARCH INSURANCE (UK) LIMITED**) for the **First Defendant**
Simon Salzedo QC and Michael Bolding (instructed by **Simmons & Simmons LLP) (ARGENTA SYNDICATE MANAGEMENT LIMITED)** for the **Second Defendant**
Gavin Kealey QC, Andrew Wales QC, Sushma Ananda and Henry Moore (instructed by **DAC Beachcroft LLP**) (**ECCLESIASTICAL INSURANCE OFFICE PLC and MS AMLIN UNDERWRITING LIMITED)** for the **Third and Fifth Defendant**

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

Mark Howard QC, Rachel Ansell QC, Martyn Naylor and Sarah Bousfield (instructed by **Clyde & Co LLP**) **(QBE UK Limited)** for the **Sixth Defendant**
David Turner QC, Anthony Jones, Clare Dixon and Shail Patel (instructed by **DWF Law LLP**) **(ROYAL & SUN ALLIANCE INSURANCE PLC)** for the **Seventh Defendant**
Andrew Rigney QC and Craig Orr QC (instructed by **Clyde & Co LLP**) **(Zurich Insurance LLP)** for the **Eighth Defendant**
Hearing dates: **26th June 2020**

RULINGS

Rulings by **LORD JUSTICE FLAUX and MR JUSTICE BUTCHER**

Ruling 1:

1. The application is for the adduction of evidence as to the existence of another policy wording which it is said is more favourable to the insureds in relation to, if I may put it in this way, the Orient Express principle.
2. We do not consider that it is necessary or appropriate for that wording to be part of the hearing. It does not, in our view, pass the test of whether it is relevant factual matrix. As Mr Edelman says, there is no particular reason as to why the brokers of the policies in question should have known about the existence of this policy. It is not a standard market wording or anything like that.
3. In our view, it will not be of any assistance in the task which we have to engage in, which is the construction of the policies which are in question. We are concerned about the adduction of other wordings because, as I have said, the task which is before us is actually the construction of certain specific wordings and reference to others, which might exist, is not going to be of assistance and may complicate matters.

Ruling 2:

1. We intend to permit the applications by the HIAG and Hiscox groups to intervene. We regard it as important to ensure that all points which a significant group of policyholders wish to make in relation to the issues which have been identified by the FCA are made.
2. That appears to us to be in accordance with paragraph 2.5(a) of Practice Direction 51M and in accordance with the indication given by the Master of the Rolls in the case of Gawler v Raettig, albeit in a different context but one which is analogous, which is that it is necessary in relation to such issues that the argument is fully and properly put and that in the vast majority of cases that will involve counsel being instructed by solicitors instructed by those with a real interest in the outcome of the hearing.
3. Now, we have no doubt that the vast majority of relevant points will, indeed, be put before us by the FCA and we are not in doubt that the FCA will properly represent policyholders, but there may be some issues where, perhaps because there may be a conflict between various different policyholders as to the precise points which should be put or differences of nuance or emphasis, or for some other reason, the FCA cannot fully put all points before us.
4. That it is desirable that those two groups should be capable of making submissions, albeit obviously not duplicative is, as Ms Mulcahy has very fairly put it on behalf of the FCA, in the interests of fairness, because the FCA cannot rule out that there may be different arguments which may be advanced. Because the test case scheme permits interventions, it appears to us that these two interventions ought to be permitted.
5. It will, however, be subject to stringent case management directions and it will be on the basis, as has been common ground that it must be, that the representative terms, ie the wordings, will not be increased in number and the issues which will be debated at the July hearing will not be added to by the interventions, although, as we said, there may be somewhat slightly different arguments put forward.
6. The insurers do not oppose the interventions, but they want the case management restrictions, and as I have said, that will be the case.
7. As to Mr Sheehan's application to intervene, we do not accept that that intervention should be permitted. This is a case where the FCA has carefully chosen a range of types of policy for the test case, and one important limitation has been that it has not chosen policies which

require or are contingent on property damage. It appears to us that this policy would fall into that category and that also it is not one of the policies which is currently under consideration for the purposes of the test case. To extend the issues for the purposes of the July hearing appeared to us to be unrealistic, given the extreme constraints of time which there are in any event.

8. For those reasons, we decline to permit this intervention. We are not satisfied that it would be a sensible or legitimate extension of the test case scheme.

Ruling 3:

1. This is an application by the FCA to adduce expert evidence from a Dr Bhatt, an eminent doctor at Imperial College, in relation to the Specified Diseases clause of the Ecclesiastical, which identifies a large number of specified diseases.
2. The evidence which the FCA seeks to adduce from Dr Bhatt is to the effect that those diseases are not diseases which are likely, in the 21st century, to lead to a widespread outbreak nationally, but are likely to be localised.
3. The reason for wishing to adduce that evidence is that within the prevention of access clause in the Ecclesiastical wording with which the court is concerned, there is an exclusion at (iii):

> "Closure or restriction in the use of the premises due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease."

4. Those words, "competent local authority", are also used in the Specified Disease clause in the Ecclesiastical wording, and the concern is that one of the grounds for declining cover has been to refer to the fact that cover is provided for specified diseases. It is said that this expert evidence is relevant to the issue of construction for the court of the relevant part of the prevention of access clause to which I have referred.
5. We are quite satisfied that this evidence is not admissible in this case. Despite Mr Edelman's valiant attempts in reply to suggest that it was somehow evidence which went to some special or technical wording or meaning, the reality is that this is evidence which is sought to be adduced as an aid to construction of the contract. It is extraneous evidence. It is well established that only in limited circumstances is such evidence admissible and, furthermore, subsequent events such as the basis of declinature of cover are not an aid to construction in any event.
6. So it seems to us that Dr Bhatt's evidence is, on any view, a very large sledgehammer to crack a very small nut, but perhaps more fundamentally, it is in truth an attempt to adduce evidence by way of factual matrix and on any view, this is not factual matrix.
7. Mr Kealey is quite right that there is simply no attempt on the part of the FCA to put forward evidence to show that any of the policyholders of Ecclesiastical, (which, as Mr Kealey points out, are in large measure clerics of one kind or another, or in the case of one of its other policies nursery school owners and teachers,) were aware of the sort of expert evidence Dr Bhatt would give or they had any sense in which the Specified Disease clause was listing out diseases which would not be widespread in a modern context.
8. This goes far too far and it seems to us it is not relevant or admissible and we dismiss the application.

Ruling 4:

1. So far as this particular debate is concerned, we consider that for determination at trial, as really indicated in paragraphs 9 and 10 of Mr Justice Butcher's ruling at the last case management conference, are two matters: first of all, arguments as to the type of proof which could be sufficient to discharge a burden, and that is essentially what Mr Gaisman calls methodology; and, secondly, on the assumption that this is the best evidence available, and

by "this" I mean the matters pleaded by the FCA, would it be sufficient as a matter of principle to discharge the burden of proof placed upon particular insureds?

2. We are, in fact, very much of the view that those issues are the only issues in play at the July hearing following my Lord's ruling against the FCA in relation to expert evidence last Tuesday, which has not been and cannot be revisited, and we believe very firmly that they are actually well within the currently pleaded case.
3. Having said that, and in a sense to avoid repetition of the same argument over again, we will give Mr Edelman permission to amend, but on the strict understanding that those are the issues which we consider are in play and we are unlikely to be sympathetic to any attempt to move beyond those to, as it were, the position where it is said: well, this should be the gold standard, as it were, and nothing else will suffice.
4. In the event that it is not possible for this to be agreed, it will have to be resolved, because the issue of prevalence is pleaded and it will have to be resolved.
5. Now, it seems to us, despite Mr Edelman's pleas in terrorem about the position that the FCA might adopt, we have to be pragmatic about this. We are having a trial right at the end of the summer term and what is proposed, certainly by the court, is that if there had to be a further hearing, it would be dealt with in either the first or the second week of September (I do not have my diary here, but that is before, I think, 13 September) at a further hearing.
6. We will hear whatever submissions parties wish to make. Mr Turner, I think, was dealing with this point. But we do not at the moment see how it really could be more than two days. We would expect, on that basis, that the insurers would continue their efforts to find an expert and, assuming they do find an expert, that they are in a position to tell the court at the outset of the hearing on 20 July that they have found an expert and to provide a report from that expert by the end of July on the basis that anything that the FCA want to say in response would be dealt with during the course of August and we would have to have a further hearing in September in the event these matters cannot be agreed.
7. But I do emphasise again the very firm view of the court that the issues for hearing in July are the ones I have identified as opposed to anything wider than that.