

Financial Markets Law Committee (“FMLC”)

Insurance and Pensions Scoping Forum

Date: 25 June 2020

Time: 2.00pm to 3.30pm

Virtual meeting



Attendees

Clare Swirski (Moderator)	Debevoise & Plimpton LLP
George Belcher	Skadden, Arps, Meagher & Flom LLP
Peter Bloxham	
Nigel Brook	Clyde & Co LLP
Pollyanna Deane	Fox Williams LLP
Beth Dobson	Slaughter and May
Jennifer Donohue	Algorithm and Extremal Consulting Limited
Ben Lyon	Debevoise & Plimpton LLP
Adam Levitt	Ashurst LLP
Alison Matthews	Herbert Smith Freehills LLP
Martin Membery	Sidley Austin LLP
Sarah Parkin	Linklaters LLP
James Phythian-Adams	Sidley Austin LLP
Chris Sage	TransRe
James Smethurst	Freshfields Bruckhaus Deringer LLP
Sarah Turpin	K&L Gates LLP
Venessa Parekh	FMLC Secretariat
Chhavi Sinha	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

Registered Charity Number: 1164902.

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Minutes

1. Introductions

- 1.1. Ms Swirski opened the meeting.

2. Linking with the FMLC (Venessa Parekh)

- 2.1. Ms Parekh provided an overview of some of the ways in which Forum members, or their institutions, could contribute to the work of the FMLC, aside from, or in addition to, a financial donation.¹ These include contributing to its research, hosting meetings and events and seconding lawyers to the Secretariat.

3. FCA's upcoming test case on business interruption insurance claims in the context of the pandemic (Clare Swirski and Ben Lyon)

- 3.1. Ms Swirski and Mr Lyon presented an overview of a test case brought by the Financial Conduct Authority (the "FCA") on business interruption insurance claims in the context of the COVID-19 pandemic.² Mr Lyon explained that the FCA has launched the action with the aim of providing insured and insurance companies some certainty in this regard. On May 1, 2020, the FCA announced that it will be seeking a court declaration to settle ongoing business interruption policy disputes. In this regard, eight U.K. insurers have signed the framework agreement to participate in the test case. The FCA has also identified 17 different policy wordings which would form the subject of the test case. Furthermore, none of the policies specifically include cover for pandemic-related disruption. The FCA will argue for policyholders. The test case is not intended to encompass all possible disputes, but it is hoped that it will assist in resolving some key contractual uncertainties. Mr Lyon explained that the court has fixed a timetable for the case and determined other procedural matters.
- 3.2. Ms Swirski drew attention to some key questions on which the FCA is hoping to get clarity so as to lend some interpretative guidance to COVID-19 related cases. This includes, for example: insurers arguing for the "but for" test in the light of the different elements of the pandemic to be necessary for a valid claim; that is "but for" the specific insured peril the insured would not have suffered the loss claimed. She further explained that there are seven different categories of business designated by the government in

¹ Please see Appendix I below

² Please see Appendix II below

response to Covid-19 each treated slightly differently in terms of closure orders or advice. Insurers may therefore dispute the occurrence of denial of access triggers, for example, where businesses were not forced to completely close down. Where denial of access is accepted insurers may claim it is not the actual reason for loss and claim that other elements of the COVID-19 response caused the loss suffered. The applicable test here the insurers argue would be to ascertain whether, if the businesses were open, in the circumstances of the pandemic, the loss would not have occurred. Furthermore, there may be cases under policies providing cover for losses caused by notifiable diseases in the vicinity where the pandemic may not be the cause of the denial of access but where restrictions put into place by the government have made usual business practice impossible. Referring to her presentation, Ms Swirski stressed that some of the key issues include questions like—what does it mean for COVID-19 to be in the “vicinity” of the insured premises; whether the general spread of COVID-19 will be considered enough or a local spread is to be proved; what effect on the business is required in order for it to be interrupted or interfered; to what extent was the advice given by HM Government an order, action, restriction or advice of, by or imposed by the government; is Covid-19 a notifiable disease, a human infectious disease and/or a human contagious disease; are the non-damage insuring clauses covered (in principle) in respect of losses arising as a result of interruption or interference with the insured’s business by Covid-19? Ms Swirski noted that the insurers have argued that a localised spread of COVID-19 should be considered a present factor in determining the damage rather than comparing with the situation without Covid-19. Members discussed what could constitute a business interruption and whether HM Government’s policy may be construed as a restriction on business activities.

- 3.3. Ms Swirski drew members’ attention to the various benefits and drawbacks of FCA’s approach. Some of the benefits include a (potentially) shorter timeframe for the decision; attempting to minimise contractual uncertainty; potential for more consistency in the response to business interruption policy claims and disputes. The drawbacks include appeals by the insurers or possibly by the FCA delaying the response for the market, furthering the uncertainty. She noted that the result does not bind policyholders or the Financial Ombudsman Service, although it is expected to be persuasive in many cases. Members discussed that it would be interesting to see how the test case progressed. The FCA had received many applications from policyholders and has had over 45 consultations with them. Members discussed the approach adopted by the other E.U. regulators and whether the result of the test case might reflect badly on the FCA’s ability to regulate insurance companies.

4. The new criminal sanctions proposed in the Pension Schemes Bill 2020 (Sarah Parkin)

4.1 Ms Parkin drew members' attention to the proposed Pension Schemes Bill 2020 (“**the Bill**”) which is currently progressing through Parliament.³ She explained that the Bill introduces a new set of criminal offences of avoidance of employer’s debt and of conduct risking accrued scheme benefits. Ms Parkin noted that the scope of these offences is very broad, as they would apply to any person and in relation to any action or failure to act. She further pointed out that if the Bill is passed as written, it could mean all business advisers, trustees, lenders, non-executive directors, etc. could be caught under this section. Ms Parkin also observed that words like “willful” or “reckless act” have been omitted. Furthermore, the person committing the offense may argue that he had a “reasonable excuse” for his conduct but the Bill does not offer guidance as to the meaning of the term. She noted that two other small offences—the offence of failing to comply with a contribution notice and the offence of neglecting or refusing to attend an interview—have been introduced by the Bill.

4.2 Moving on to the second part of the presentation, Ms Parkin provided a summary of new financial penalties introduced by the Bill. These included unlimited fines or seven years of imprisonment (or both) for offences of avoidance of employer’s debt and of conduct risking accrued scheme benefits. The other financial penalties included fine for the non-compliance with the Pensions Regulator and a financial penalty on the trustees if they failed to take all reasonable steps to secure compliance with certain requirements.

4.3 Ms Parkin stated that the new fines and criminal sanctions would give the Pensions Regulator stronger powers to deter bad behaviour and ensure criminal prosecution in the right circumstances.

4.4 Ms Parkin offered a timeline of the Bill’s passage through Parliament. Members agreed to monitor developments with regards to the Bill, including how it would be applied.

5. Any other business

5.1. No other business was noted.

³ Please see Appendix III below



Insurance and Pensions Scoping Forum

25 June 2020

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Linking into the work of the FMLC

Venessa Parekh
Research Manager



Non-pecuniary involvement with the FMLC

The FMLC's work in furthering legal certainty in the wholesale financial markets, addressing legal risk, and providing impartial analysis is vitally important at this time when so much is happening.

The FMLC appreciates your support through participation in this Scoping Forum. Do you know other ways you can engage with and contribute to the FMLC, aside from a monetary donation?

Engaging with the FMLC

Alerting the FMLC Secretariat to issues of legal uncertainty

Participation in FMLC scoping forums, either as a member or a guest speaker

Joining FMLC working groups, contributing legal expertise and drafting chapters of papers

Participation in FMLC events, either as a attendee or guest speaker

Supporting FMLC Events



Your organisation can host FMLC events and/or provide logistical support for events, such as printing.

For example:

- Judicial Seminar
- Quadrilateral Conference
- Spring and Autumn Seminars
- Patrons' Dinner, and
- Festive drinks reception

FMLC Secondment Programme



Law firms can supply lawyers on secondment to the FMLC Secretariat, in the role of Legal Analyst.

The secondment provides an opportunity to conduct detailed research on specific issues and will hone key skills such as drafting, legal research and stakeholder relationships.

Each secondment typically lasts for a period of 6 months. Recent secondees have included trainee solicitors and associates at NQ level, as well as associates who are one year or more PQE.

Supporting the FMLC



If you wish to find out more about the FMLC secondment programme and how your organisation can participate, please contact Emma McClean (operations@fmlc.org)

If you wish to find out more about upcoming FMLC events and the ways you can offer support, please contact Rachel Toon (executivesupport@fmlc.org)

If you have an issue of legal uncertainty you would like to raise with the FMLC, or if you or your organisation would like to contribute to the FMLC's work via a Scoping Forum or Working Group, please contact Venessa Parekh (research@fmlc.org) or Katja Trela-Larsen (forums@fmlc.org)



FCA Business Interruption Insurance Test Case

Clare Swirski

Benjamin Lyon

Background

- On 1 May 2020, the FCA announced that it would seek a court declaration to settle ongoing business interruption policy disputes.
- Eight UK insurers — MS Amlin, Arch, Argenta, Ecclesiastical, Hiscox, QBE, Royal & Sun and Zurich — signed the framework agreement to participate in the test case.
- The FCA identified 17 policy wordings in connection with the test case.
 - As well as the eight participating insurers, Allianz, AIG, Aspen, Aviva, Axa, Chubb, Liberty Mutual and Protector, also use the relevant policy wordings.
- The test case is taking place under the Financial Markets Test Case Scheme.
- The FCA is responsible for putting forward policyholders' arguments to their best advantage.
- The test case is not intended to encompass all possible disputes, but it is hoped that it will assist in resolving some key contractual uncertainties.

Timetable

9 June: The FCA started claim in the English High Court. The particulars of claim were made publicly available on the FCA's dedicated website:

<https://www.fca.org.uk/firms/business-interruption-insurance>.

16 June: First case management conference, at which the court fixed the timetable for the case and other procedural matters.

23 June: The insurers filed their defences to the FCA's particulars of claim.

26 June: Second case management conference, at which the court will deal with any outstanding procedural matters.

3 July: The FCA will file its reply to the insurers' defences.

1st half July: Skeleton arguments and replies will be served.

20-23 July and 27-30 July: The hearing is scheduled to take place over eight days before two judges: Lord Justice Flaux (Court of Appeal) and Mr. Justice Butcher (QBD).

Key Issues

- Causal links between Covid-19 and the insured's loss?
- What does it mean for Covid-19 to be in the “vicinity” of the insured premises?
- What effect on the business is required in order for it to be interrupted or interfered?
- To what extent was the advice given by the UK Government an “order”, “action”, “restriction” or “advice” of, by or imposed by the government.
- Is Covid-19 a notifiable disease, a human infectious disease and/or a human contagious disease?
- Are the non-damage insuring clauses covered (in principle) in respect of losses arising as a result of interruption or interference with the insured's business by Covid-19?
- The extent to which the exclusions cited by the insurers apply.

Analysis of the FCA's approach

Benefits

- Shorter timeframe for the decision (potentially).
- Attempting to minimise contractual uncertainty.
- Potential for more consistency in the response to business interruption policy claims and disputes.
- Lower cost to policyholders than if they brought their own actions.
- Reduces the number of other competing disputes in the market.

Drawbacks

- Appeals by the insurers or the FCA might delay the response for the market, furthering the uncertainty.
- The result does not bind the policyholders or the FOS, although it is supposed to be persuasive.
- Other actions are ongoing in market (i.e., the Hiscox Action Group arbitration).
- The policy language under consideration is not comprehensive and so there will likely be continuing disputes over other language.
- The test case will not determine how much is payable under individual policies.

Contact Details



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Pension Schemes Bill: Criminal offences and financial penalties

Sarah Parkin

June 2020



New criminal offences

Offence of avoidance of employer debt

A person commits an offence if:

- > the person does an act or engages in a course of conduct that:
 - > prevents the recovery of the whole or any part of a Section 75 debt which is due from the employer in relation to the scheme,
 - > prevents such a debt becoming due,
 - > compromises or otherwise settles such a debt, or
 - > reduces the amount of such a debt which would otherwise become due,
- > the person intended the act or course of conduct to have such an effect, and
- > the person did not have a reasonable excuse for doing the act or engaging in the course of conduct

Punishable by an unlimited fine or up to seven years' imprisonment (or both)

Offence of conduct risking accrued scheme benefits

A person commits an offence if:

- > the person does an act or engages in a course of conduct that detrimentally affects in a material way the likelihood of accrued scheme benefits being received (whether the benefits are to be received as benefits under the scheme or otherwise),
- > the person knew or ought to have known that the act or course of conduct would have that effect, and
- > the person did not have a reasonable excuse for engaging in such conduct

Punishable by an unlimited fine or up to seven years' imprisonment (or both)

Other offences

Offence of failing to comply with a contribution notice

A person commits an offence if they fail, without reasonable excuse, to pay the debt due by virtue of a contribution notice to the trustees of the scheme or the Board of the Pension Protection Fund (as the case may be) before the date specified in the contribution notice

Offence of neglecting or refusing to attend an interview

A person commits an offence if they neglect or refuse, without reasonable excuse, to:

- > attend an interview with the Pensions Regulator, or
- > answer a question or provide an explanation on a matter specified in the Pensions Regulator's notice when attending an interview

Punishable by a fine

New financial penalties

Summary of new financial penalties

- > Financial penalties
 - > for avoidance of employer debt
 - > for conduct risking accrued scheme benefits
- > Financial penalties apply to a person where
 - > a person fails, without reasonable excuse, to pay the debt due by virtue of a contribution notice before the date specified in the contribution notice
 - > trustees fail to take all reasonable steps to secure compliance with the notifiable events regime or any other person fails, without reasonable excuse, to comply with the notifiable events regime
 - > a person fails, without reasonable excuse, to comply with the new declaration of intent requirements
 - > a person has knowingly or recklessly provided the Pensions Regulator or the trustees with information which is false or misleading in a material particular

Summary of new financial penalties cont'd

- > Financial penalties where a person has:
 - > failed to comply with a Section 72 notice requiring the person to produce documents or other information,
 - > failed to comply with the new requirement to attend an interview with the Pensions Regulator, or
 - > prevented or hindered an inspector exercising any power to inspect premises
- > Financial penalties apply to trustees where they have failed to take all reasonable steps to secure compliance with
 - > the requirements in relation to the new funding and investment strategy, or
 - > the requirements in relation to the new statement of strategy

How will the Pensions Regulator use its new powers?

How will the Pensions Regulator use its new powers?

Fines and criminal sanctions ... have the potential to act as a strong deterrent in respect of behaviour that represents a risk to savers

Criminal prosecution would be a high bar and we would only use this power in the right circumstances

And in relation to civil fines up to £1 million, this is a big increase from the existing position which would give us flexibility to issue fines at the appropriate level depending on severity

State of play of the Bill

Current state of play

- > Next stage of the Pension Schemes Bill's passage through Parliament – report stage – is due to start on 30 June
- > List of amendments to be considered at report stage
- > These include
 - > amendments to limit the scope of the new criminal offences and associated financial penalties to employers and those associated or connected with the employer
 - > These amendments would be a significant change and would address some of the concerns about the potentially wide scope of these provisions
- > Bill originally expected to be passed by end of 2021
- > Government has recently stated it remains a priority despite current circumstances

Questions



Appendix: Summary of offences and fines

Summary

New offence	New penalty
Avoidance of employer debt	Criminal offence: unlimited fine / up to 7 years' imprisonment Civil penalty: up to £1 million
Conduct risking accrued scheme benefits	Criminal offence: unlimited fine / up to 7 years' imprisonment Civil penalty: up to £1 million
Failure to comply with a contribution notice	Criminal offence: unlimited fine Civil penalty: up to £1 million
Failure to comply with TPR's information-gathering powers	Criminal offence of neglecting or refusing to attend an interview: fine of up to £5,000 Civil penalty: fixed (up to £50,000) and escalating (up to £10,000 per day)
Failure to comply with the notifiable events framework	Civil penalty: up to £1 million
Failure to comply with declaration of intent requirements	Civil penalty: up to £1 million
Knowingly or recklessly providing false information to TPR or the trustees	Civil penalty: up to £1 million
Failure to comply with new funding requirements	Civil penalty: up to £5,000 (individuals) or £50,000 (any other case)