

A contemporaneous evaluation of the degree of success of the Financial Markets Test Case Scheme in the seminal case of *Financial Conduct Authority v Arch Insurance (UK) Ltd and Others* (2021) UKSC 1

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**ABSTRACT**

*COVID-19 had catastrophic consequences on all parts of day-to-day life, especially the economy. Businesses were mandated to shut down on public health grounds, costing them huge sums of money and destroying some altogether. Many businesses that did manage to survive found themselves in dire situations and subsequently instigated business interruption insurance claims (insurance which covers loss of income arising from some event or disaster, such as COVID), for an indemnity to cover the money which had been lost. Such an indemnity operates to ensure businesses can survive through otherwise catastrophic disasters and situations, with different policies covering differing heads of loss. The sheer scale of this public health emergency resulted in an extraordinary number of claims being submitted. Unsurprisingly, these claims were largely rejected by insurers. This left hundreds of thousands of policyholders in uncertain positions as, in many cases, legitimate claims were rejected. The Financial Conduct Authority recognised the sheer scale of the potential fallout of a lack of insurance to businesses and thus sought to commence a special type of claim under the Financial Markets Test Case Scheme under the newly founded Financial List. This Scheme was conceived to provide a forum for the expedited resolution of financial market issues of general importance as a whole. This article will evaluate and assess the degree of success of the use of this Scheme in the case of *Financial Conduct Authority v Arch Insurance (UK) Ltd and Others*.*

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## INTRODUCTION

At the time of writing, the COVID-19 pandemic has largely receded, lockdown seems a memory of the past, and no businesses remain closed due to Government restrictions. This was not always the case. The emergence of COVID-19 posed such a significant health risk that the Government had to impose draconian restrictions, forcing many businesses to close. These restrictions cost businesses huge sums of money, and some were subsequently forced to close permanently. Many surviving businesses found themselves in an appalling financial condition and, consequently, had to initiate business interruption insurance claims to recover an indemnity that reflected the losses caused by these restrictions. The scale of the pandemic led to an enormous number of such claims being brought forward. There was inconsistency between insurers in accepting and rejecting claims, with many legitimate and proper claims being rejected, causing substantial confusion for hundreds of thousands of policyholders. Thus, the Financial Conduct Authority ('FCA') had to acknowledge the potential for serious negative economic consequences and they initiated a specialised type of proceeding in the (at that time) new Financial List.<sup>1</sup>

The Financial List was a significant step forward and was initiated because of its axiomatic importance in the financial services sector in the UK, which contributed £132 billion to the UK economy in 2019 and generated 6.9% of total economic output.<sup>2</sup> The importance of this sector was instrumental in

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<sup>1</sup> 'Result Of FCA's Business Interruption Test Case' (FCA, 2015) <<https://www.fca.org.uk/news/press-releases/result-fca-business-interruption-test-case>> accessed 3 July 2022; Bank of England, 'The Impact Of Covid-19 On Businesses' Expectations: Evidence From 'The Decision Maker Panel' (*Bank of England*, 2020) <<https://www.bankofengland.co.uk/quarterly-bulletin/2020/2020-q3/the-impact-of-covid-19-on-businesses-expectations-evidence-from-the-decision-maker-panel>> accessed 1 August 2022.

<sup>2</sup> Georgina Hutton, Ali Salchi and Matthew Ward, 'Financial Services: Contribution To The UK Economy', (*House of Commons Library*, 1 September 2022) <<https://commonslibrary.parliament.uk/research-briefings/sn06193/>> accessed 26 February 2022; D. Reid, 'New York Stretches Lead Over London As The World's Top Financial Centre, Survey Shows' (*CNBC*, 19 September 2019) <<https://www.cnb.com/2019/09/19/new-york-beats-london-again-as-the-worlds-top-financial-center.html>> accessed 7 June 2021.

the creation of the Financial List, which was first proposed by Lord Thomas in his capacity as Lord Chief Justice in July 2014. He stated that the ‘prosperity of the nation’ was dependent on the Courts providing ‘fast, efficient and economical dispute resolution’.<sup>3</sup> This was implemented in the ensuing year, culminating in the Dinner for Her Majesty’s Judges speech, by the same Lord Chief Justice, in July 2015. In this speech, it was announced that ‘we [the Ministry of Justice] are now ready to introduce a Financial List’.<sup>4</sup> The reasons given for the introduction of this Financial List expressly denoted in the speech were, *inter alia*, that:

First, it will promote access to the courts and the expertise of trial judges, for market actors in an area that is of significant importance to the development of both the domestic economy, and to open markets internationally. Secondly, and particularly through the test case procedure, the Financial List will help to avoid costly and time-consuming litigation, through providing a mechanism for authoritative guidance before disputes have arisen. Thirdly – and flowing from the first and second points – I hope that this initiative will promote the rule of law both nationally and internationally.<sup>5</sup>

It is the second of these reasons which are of particular importance and relevance to this article. The ‘test case procedure’, more properly called the Financial Markets Test Case Scheme (hereinafter ‘the Scheme’), was created to allow issues which have been categorised as being of ‘general importance’ to the wellbeing of the financial markets as a whole, and which require ‘immediate relevant authoritative English law guidance’, to be heard in the Financial List without the usual requirement of a present cause of action or dispute between

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<sup>3</sup> Lord Chief Justice of England and Wales Thomas of Cwmgiedd, ‘Speech’ (Dinner For Her Majesty’s Judges, London, 9 July 2014) <<https://www.judiciary.uk/wp-content/uploads/2014/07/lcj-speech-mansion-house-dinner-for-hm-judges.pdf>> accessed 26 February 2023, para 13.

<sup>4</sup> Lord Chief Justice of England and Wales Thomas of Cwmgiedd, ‘Speech’ (Dinner For Her Majesty’s Judges, London, 8 July 2015) <<https://www.judiciary.uk/wp-content/uploads/2015/07/speech-lcj-mansion-house-2015.pdf>> accessed 26 February 2023, 3.

<sup>5</sup> Lord Chief Justice of England and Wales Thomas of Cwmgiedd (n 4) 4.

the parties. Claims can be brought by way of mutual agreement between market participants with opposing interests in an issue which is to be resolved. The Court must be satisfied that the arguments of all parties with opposing interests will be properly represented before the court, and for that purpose may allow relevant trade, professional or regulatory bodies, or any affected third parties, to be joined as a party or otherwise represented in the proceedings.<sup>6</sup> It is these characteristics of the Scheme that seemingly made it highly suitable to hear the intricate and complicated case of *Financial Conduct Authority v Arch Insurance (UK) Ltd and Others*<sup>7</sup> (hereinafter ‘FCA test case’).

On 9<sup>th</sup> June 2020, the FCA commenced one of these test cases against eight defendant insurers, as well as Lloyd’s managing agents. The case addressed issues of legal principle raised by COVID-19 business interruption claims made under coverage clauses, which are clauses defining the scope of cover that expressly do not require actual property damage. At the preliminary case management conference, which was held on the 16<sup>th</sup> of June 2020, Mr Justice Butcher decided that the case raised issues of general importance to the financial markets because they were relevant to widely-used policy wordings. Mr Justice Butcher ruled that the Scheme was applicable to the claim, and gave directions for an expedited trial before him and Flaux LJ to commence on 20<sup>th</sup> July 2020. This was the first time the Scheme had been utilised, despite being introduced several years earlier.<sup>8</sup> The case progressed as follows:

On 1 May 2020, the FCA issued a statement setting out their intention to obtain court declarations aimed at resolving the contractual uncertainty around the validity of many business interruption claims. On 15 May 2020, the FCA invited policyholders of business interruption insurance, who were in dispute with their insurers over the terms of their policies, to submit their arguments to the Court by 20 May 2020 if they wanted the FCA to take them

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<sup>6</sup> ‘Practice Direction 63AA PD 6.5.A.– Financial List’ (*Justice*, 2020)

<<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/financial-list/practice-direction-63aa-financial-list>> accessed January 31, 2023.

<sup>7</sup> *Financial Conduct Authority v Arch Insurance (UK) Ltd and Others* (2021) UKSC 1, (2021) 2 WLR 123.

<sup>8</sup> ‘Test Case Concerning COVID-19 Business Interruption Claims Becomes The First Case To Proceed Under The Financial Markets Test Case Scheme’ (*Fountain Court*, 2020) <<https://www.fountaincourt.co.uk/test-case-concerning-COVID-19-business-interruption-claims-becomes-the-first-case-to-proceed-under-the-financial-markets-test-case-scheme/>> accessed 4 July 2021.

into account as part of the test case. As noted above, on 16 June 2020 the first Case Management Conference commenced before Mr Justice Butcher. Mr Justice Butcher considered the application for expedition and admission to the Financial Markets Test Case Scheme, fixed the timetable for the case (including the date for the court hearing in the second half of July) and dealt with other procedural matters. On 10 June 2020, proceedings commenced in the High Court. At the first hearing on 30 June 2020, Lord Justice Flaux and Mr Justice Butcher gave various directions relating to how the test case was to proceed. On 13 July 2020, the FCA's and Interveners' skeleton arguments (written submissions) were published for a trial commencing on 20 July. On 15 July 2020, the Defendants' skeleton arguments (written submissions) were published for trial.

The trial commenced on 20 July 2020 and concluded on 31 July 2020. On 15 September 2020, the FCA published the judgment in the test case, which was handed down by the High Court. On 29 September 2020, the deadline for parties to apply for a 'leapfrog' appeal to the Supreme Court passed. The Supreme Court published a press release stating the FCA's position on the appeals process. On 16 November 2020, the parties agreed to the full running order for the Supreme Court hearing. On 15 January 2021, the Supreme Court handed down its judgment, substantially allowing the FCA's appeal and largely dismissing the insurers' appeals. On 3 March 2021, the finalised guidance and feedback statement was provided. On 14 July 2021, the FCA published the Supreme Court Order varying the High Court declarations made in the test case.

This article will evaluate and assess the degree of success of the use of the Scheme in this FCA test case. This analysis will proceed in three sections. Each section will attempt to answer the various research questions stated below, and the answers to these questions will provide a basis for evaluating the degree of success of the Scheme in the FCA test case. The first section, entitled 'The Scheme', will explore the Scheme in depth. It will examine what the Scheme is, why the Scheme was utilised, how a claim can qualify for the Scheme, and finally the purpose behind the use of the Scheme in the FCA test case specifically. The consideration of these questions will allow an assessment to be formed as to the suitability of the Scheme to hear the FCA test case. The objectives of the Scheme must align with the objectives of the FCA test case — as they both had an overriding necessity for speed and effectiveness — and so it will be assessed

whether this necessity was satisfied. This will aid determination of whether the Scheme was successful in the FCA test case in the ensuing chapters.

The second section, entitled ‘The Disputes’ will evaluate whether the disputes which were considered were satisfactorily resolved. The criteria for evaluating this question will be derived from the objectives of the Scheme and the objectives of the FCA test case as a whole. Thus, for each dispute considered, it will first be considered whether immediately relevant and authoritative English law guidance was provided, per the objectives of the Scheme. Once this has been determined, it will subsequently be considered whether this guidance clarified the relevant key issues of contractual uncertainty, per the objective of the FCA test case. The first dispute relates to disease clauses, followed by disputes relating to prevention of access and hybrid clauses. The second dispute relates to causation. This is followed by evaluations of disputes relating to trends clauses, then finally an evaluation of disputes relating to the controversial *Orient Express Hotels*<sup>9</sup> case. The FCA test case can only be considered successful if these disputes are resolved in a satisfactory manner. The resolution of these disputes must be conducted in accordance with the objectives of the process utilised to resolve them. In essence, unless it is concluded that the resolution of these disputes provides immediate relevant authoritative English law guidance which clarifies key issues of contractual uncertainty, then the use of the Scheme in the FCA test case cannot be considered successful as its overriding objective would not have been met.

The third and final section, entitled ‘The Success’, follows from the evaluation of the success of the resolution of the disputes in the FCA test case, and will evaluate the role of the Scheme in coming to these resolutions. This section will explore whether or not the Scheme resolved the issues mentioned in the second section, and further whether the resolution of these issues has generated any new or unforeseen issues. It will evaluate whether the Scheme achieved its overall purpose in the FCA test case. This section will additionally evaluate whether the Scheme has improved financial services dispute management and whether the pre-existing Financial Ombudsman Service would have produced a better outcome. This discussion will progress into evaluating whether the Scheme should be extended to cater to other areas of law and

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<sup>9</sup> *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* (UK) [2010] EWHC 1186 (Comm), [2010] Lloyd's Rep IR 531.

whether its permanence in the Financial List is a positive development. The fundamental objective of this article is to undertake a contemporaneous evaluation of the degree of success of the Scheme in the seminal FCA test case. The discussion within this article will assist in making such an evaluation.

## CHAPTER I – THE SCHEME

### ***(1) WHY UTILISE THE SCHEME?***

The first part of this section will explore why the Scheme was utilised in the FCA test case to begin with. It will look at the intrinsic necessity for an effective outcome in an unusually short period of time, and further whether the Scheme would be an appropriate means of achieving this. The FCA was entirely aware of the degree of complexity which characterised the issues surrounding the business interruption policies (as they were designed to cover the loss to businesses during periods of interruption to their revenue, as in the present case) and the extent to which these issues had the potential to cause a lot of trepidation for both insurers and policyholders alike.<sup>10</sup> For the benefit of both, it was recognised that there was a need for a quick and clear elucidation of the matters to determine which policies existed to provide cover. This was largely because the FCA acknowledged that there was such a wide range of policy wordings and resultant types of insurance covers that it was difficult to ascertain whether or not their cover included the relevant COVID-19 business interruption claims.<sup>11</sup> The genuine doubts surrounding these policies and their proper interpretation led to uncertainty, which eventually culminated in many feasible claims being denied by the insurers at what was, for some, their darkest time.<sup>12</sup>

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<sup>10</sup> *Financial Conduct Authority* UKSC (n 7) [3].

<sup>11</sup> Sarah Turpin and Alexander Bradley-Sitch, 'COVID-19: Considering The Wider Impact Of The FCA's Test Case' (*K&L Gates Hub*, September 2020) <<https://www.klgates.com/COVID-19-Considering-the-Wider-Implications-of-the-FCA-s-Test-Case-9-22-2020>> accessed 22 July 2021.

<sup>12</sup> 'Civil Justice Statistics Quarterly' (*Gov.uk*, 2021) <<https://www.gov.uk/government/collections/civil-justice-statistics-quarterly#2019>> accessed 21 July 2021; Pinsent Masons, 'An overview of civil proceedings in England and Wales' (*Pinsent Masons*, 2011) <<https://www.pinsentmasons.com/out-law/guides/an-overview-of-civil-proceedings-in-england-and-wales>> accessed 21 July 2021.

The amalgamation of these factors and circumstances compounded by the COVID-19 pandemic led to a situation whereby any uncertainty required amelioration within a short timeframe. The issue with normal litigation, however, is that it is notoriously time-consuming and requires an actual dispute or cause of action between two parties.<sup>13</sup> This rendered the usual course of litigation futile for the proposed purpose of the action, which was to reach a clear and expedited decision. This led to the Scheme being proposed, and not long after, being quickly accepted, as it was recognised that it could potentially be the primary means by which clarity could be provided in a timely manner.<sup>14</sup> The FCA subsequently commenced proceedings in pursuit of a declaratory judgment with regard to the interpretation of numerous representative sample business interruption policy wordings.

The FCA explained that the proposed test case needed to explore a variety of sample representative business interruption policies and was consequently compatible with an expedited court process, such as the process ingrained within the Scheme. Moreover, the test case was not intended to resolve all of the disputes nor provide a comprehensive analysis with regard to the multitude of situations in which policyholders found themselves, but rather to quickly provide clarity and authority to some of the most pertinent contractual uncertainties and key causation issues.<sup>15</sup> For example, the FCA test case did not endeavour to determine precisely how much is payable under each policy wording as would likely be the case in individual litigation, but instead provided the means for doing so through the analysis of the operation of the various clauses. The FCA commenced this action in the public interest, obtaining guidance and authority in the way it did by means of the Scheme, and allowing for a decision to be provided in a faster and cheaper way than through litigation.<sup>16</sup>

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<sup>13</sup> 'Civil Justice Statistics Quarterly' (*Gon.uk*, 2021) <<https://www.gov.uk/government/collections/civil-justice-statistics-quarterly#2019>> accessed 21 July 2021.

<sup>14</sup> *Financial Conduct Authority v Arch Insurance (UK) Ltd and Others* [2020] EWHC 2448 (Comm).

<sup>15</sup> Sarah Turpin, Oliver Richardson and Edward Brown-Humes, 'Covid-19: FCA Business Interruption Test Case - Unresolved Issue And Wider Implications Of Supreme Court Judgment' (2021) 11 (75) *The National Law Review* 210.

<sup>16</sup> *ibid.*

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**(II) A 'QUALIFYING CLAIM' UNDER THE SCHEME**

This section will look at precisely what constitutes a qualifying claim under the Scheme. It will look at the relevant authoritative guidance and will determine whether the FCA test case fell neatly under the criteria for a claim to be classified as a qualifying claim, or alternatively, whether the parameters of the criteria were stretched in order for the case to be heard under the Scheme. This is important because, as previously mentioned, the FCA test case was the very first case to be considered under the Scheme, despite it being introduced several years prior.<sup>17</sup>

Like many of the rules and procedures relating to civil litigation, the Scheme is encompassed in a Practice Direction: namely Practice Rules (CPR) Part 63AA. At paragraph 6.1, the Practice Direction denotes that a 'qualifying claim' for the Scheme must be 'a Financial List claim which raises issues of general importance in relation to which immediate relevant authoritative English law guidance is needed'.<sup>18</sup> This inclusion of the Financial List at the beginning of the requisite qualifications for the Scheme is particularly important. The Financial List Guide, which is found within Practice Direction CPR Part 63A of the White Book, acknowledges that parties are permitted to transfer an action into the Financial List under the protection of the CPR Part 30, even in cases which fail to conform to the specific criteria of the Financial List.<sup>19</sup> This allows cases which fall 'within the spirit but not the letter', of the stipulated criteria, admission into the Financial List.<sup>20</sup> This is especially important because the Financial List Guide further states that:

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<sup>17</sup> 'Test Case Concerning COVID-19 Business Interruption Claims Becomes The First Case To Proceed Under The Financial Markets Test Case Scheme | Fountain Court Chambers' (*Fountain Court Chambers*, 2021)  
<<https://www.fountaincourt.co.uk/test-case-concerning-COVID-19-business-interrupti-on-claims-becomes-the-first-case-to-proceed-under-the-financial-markets-test-case-scheme/>> accessed 4 July 2021.

<sup>18</sup> 'Practice Direction 63AA - Financial List' (*Justice.gov.uk*, 2020) at 6.1  
<<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/financial-list/practice-direction-63aa-financial-list#fin>> accessed 5 July 2021.

<sup>19</sup> UK Government, 'The White Book 2022 (Volume 2)' (*Sweet and Maxwell* 2017), 942-943.

<sup>20</sup> Ministry of Justice, 'Guide To The Financial List' (*Ministry of Justice*, 1 October 2015)  
<<https://www.judiciary.uk/wp-content/uploads/2022/11/financial-list-guide.pdf>> accessed 11 March 2023.

case[s] concerning insurance, re-insurance or professional negligence, or a case falling within the normal specialist jurisdiction of the Companies Court (insolvencies, capital reductions, schemes of arrangement as well as shareholder disputes like unfair prejudice petitions and equitable petitions) will not generally fall within the definition of Financial List Claims. However, if issues arising in such a case were to require financial market expertise or were issues of general market importance, then it may be appropriate to issue the claim in the Financial List or transfer such a case or part of it into the Financial List.<sup>21</sup>

Despite the fact that the FCA test case provided guidance on insurance, which per the above quotation would preclude it from being admitted onto the Scheme, it was permitted into the Financial List and onto the Scheme because of the final part of the preceding statement, namely that the case required financial market expertise and involved issues of general market importance to English law.<sup>22</sup> In particular, it assessed legal principles in relation to policy coverage under a number of different specimen policy wordings which had been underwritten by the defendant insurers with respect to claims by policyholders to be indemnified for business interruption losses arising from the COVID-19 pandemic, and the consequential measures which had been imposed by the UK Government. Thus, the scope of the claims within the FCA test case fell within the Financial List and, subsequently, the concerned parties were able to utilise the Scheme.<sup>23</sup>

In the court of first instance, Mr Justice Butcher and Flaux LJ were tasked with determining the correct construction of the policy terms and whether cover was to be available in principle, with reference to a set of mutually-agreed and assumed facts between the parties in accordance with the

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<sup>21</sup> *ibid* para 2.3.

<sup>22</sup> Sabur Malik, 'The Empire Strikes Back: Derivatives Disputes, The Financial List, Test Case Scheme And Arbitration' [2021] *Capital Markets Law Journal*.

<sup>23</sup> John Jarvis QC, Dr Stuart Dutton and Michael Green, 'Financial List In English High Court Opens Its Doors To Cases' [2021] *Journal of Law and Medicine; Financial Conduct Authority UKSC(n 7) [2]*.

stipulated Framework Agreement.<sup>24</sup> The fairly unusual notion of having an even number of judges is a facet of the Scheme<sup>25</sup> that operated to only hinder any possibility of swift progression of the FCA test case. In the normal course of events, a dispute is decided in line with the majority of the Bench. To always establish a majority, there must be an odd number of judges. This is a simple and well-recognised principle of the English legal system.<sup>26</sup> Thus, the obvious potential problem with having two judges is that in the event of a disagreement, the Scheme's advancement may come to a standstill: both judges' rulings carry exactly the same weight, and it becomes an impossible task to determine a fair outcome. There is no logical reason as to why the Scheme was designed in this manner, and there is a complete omission of any guidance on what to do in such an impasse. There exists some authority on the matter, however, found embedded within s 54 and s 66 of the Senior Courts Act 1981. This guidance relates specifically to matters being heard in the High Court of England and Wales and subsequently would *prima facie* be applicable to the FCA test case at first instance.<sup>27</sup>

Section 54 of the Senior Courts Act 1981 expressly denotes that, in the scenario where two High Court judges consider an appeal from a lower court and they offer differing views on the outcome of the case, the appeal should stand. This is a process which was simply not suitable for the FCA test case. It was a claim that commenced in the High Court and so there was no prior judgement following which a decision could be made. The whole point of the FCA test case being admitted onto the Scheme was to create authoritative precedent and to do so quickly.<sup>28</sup> This accompanying statutory commentary additionally explains that, wherever the situation makes it viable, the provisions relating to disagreement between members of the Court of Appeal will be applied, by analogy, to disagreement between two judges in a Divisional Court.<sup>29</sup> The practice in the Court of Appeal where an even number of judges are equally divided on the outcome is that the case shall, on the application of any party to the appeal, be re-argued before and determined by an uneven number of judges

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<sup>24</sup> *Financial Conduct Authority* EWHC (n 14) [1]-[2].

<sup>25</sup> *ibid* [2].

<sup>26</sup> Alisdair A Gillespie and Siobhan Weare, '14. Those in Court' in Alisdair A Gillespie and Siobhan Weare, *The English Legal System* (Oxford University Press 2021) 500-504.

<sup>27</sup> Senior Courts Act 1981, s 54, 66.

<sup>28</sup> *ibid*.

<sup>29</sup> *ibid*.

not less than three, before any appeal to the Supreme Court. Therefore, it may be that in Financial List cases where the two presiding judges disagree, a party may apply for the test case to be re-argued before three judges before any appeal will be determined.

This is one of the factors behind ‘leapfrogging’ the appeal straight from the High Court up to the Supreme Court.<sup>30</sup> Throughout the preliminary stages, as well as throughout the High Court case, there was a particular emphasis on speed. In fact, one of the factors that qualified the FCA test case for the Scheme was the necessity for a quick and efficient outcome. At paragraph 9.1, the Financial List Guide expressly states that the procedure’s object is to provide a process through which ‘immediate relevant authoritative English law guidance’ can be sought.<sup>31</sup> Appeals can be long-winded and would serve only to postpone the provision of any actionable guidance on incredibly serious matters. This is another advantage of the Scheme. It is flexible to the needs of the people who have an interest in the decision which is being sought. Claims of this nature, which require quick conclusions on practical financial market matters, are to benefit enormously from this flexibility.<sup>32</sup>

This flexibility is found again in the Practice Direction CPR Part 63A, at paragraph 6.3. It is additionally stated that for a claim to be classified as a qualifying claim, it must be

advanced by a person who is or was actively involved in business in the relevant market against another person who similarly is or was actively involved in the business in the relevant market, provided that other person has opposing interests as to how the law of England and Wales issue(s) raised by the qualifying claim should be resolved.<sup>33</sup>

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<sup>30</sup> Katie Scott, ‘FCA Files “Leapfrog” Appeal Application To The Supreme Court For BI Test Case’ (*Insurance Times*, 2020) <<https://www.insurancetimes.co.uk/news/fca-files-leapfrog-appeal-application-to-the-supreme-court-for-bi-test-case/1434761.article>> accessed 24 July 2021.

<sup>31</sup> ‘Guide to the Financial List’ (*Judiciary.uk*, 2015) <<https://www.judiciary.uk/wp-content/uploads/2022/11/financial-list-guide.pdf>> accessed 26 February 2023.

<sup>32</sup> Malik (n 22).

<sup>33</sup> Practice Direction (n 18) para 6.3.

In the FCA test case, however, the FCA could not accurately be described as ‘a person who is actively involved in business in the relevant market’. The FCA is undoubtedly involved in the relevant market. In the words of the Association of British Insurers, the FCA possesses and exercises enforcement jurisdiction with regard to regulating how insurance firms behave, as well as more broadly upholding the integrity of the UK insurance market.<sup>34</sup> Yet, it would simply not be accurate to state that the FCA is involved in any business in the relevant market: it may be involved in the relevant market while not conducting business there.

Notwithstanding this factual barrier, the claim was still permitted for determination through the Scheme. This is because the FCA was representing policyholders who purchased relevant business interruption policies, and these people could be accurately described as people who were actively involved in business in the relevant market. This fairly lenient approach to qualification demonstrates that the court recognised both the importance of the matters at hand as well as the suitability of the Scheme to determine such disputes.<sup>35</sup> Thus, the FCA was able to represent the interests of the insurance policyholders, the vast majority of which were small or medium-sized businesses (SMEs) in dire need of clarity and support. Once the claim had been categorised as a ‘qualifying claim,’ it could then proceed through the preliminary stages of the case. This was done at the first case management conference, and in the FCA test case was completed by Mr Justice Butcher.

### ***(III) THE PURPOSE OF THE SCHEME IN THE FCA TEST CASE***

The third and final part of this chapter will look at the purpose of the Scheme in the FCA test case specifically. This is perhaps the most important consideration for the purposes of this article. It is essential that the purposes behind the introduction of the Scheme align with the requirements of the FCA test case (or any test case for that matter). If the two are explicitly unaligned, then it cannot be said that the Scheme was a success in the FCA test case.

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<sup>34</sup> Association of British Insurers, ‘How our industry is regulated’ (ABI, 2023) <<https://www.abi.org.uk/data-and-resources/tools-and-resources/regulation/>> accessed 10 March 2023.

<sup>35</sup> Nicholas Bartlett and Chris Ives, ‘FCA Business Interruption Test Case: Cover For COVID-19’ (2020) 30 (10) PLC Magazine 4-5.

Whether the aims and purposes of the Scheme and the FCA test case align assists in determining whether utilising the Scheme for the first time was in fact the optimal means of resolving the disputes at hand. The FCA test case had an overriding necessity for speed and effectiveness, the satisfaction of which will be assessed. The degree of success will be evaluated according to the satisfaction of the objectives of the Scheme and the FCA test case, and these objectives will be explored to assist in this evaluation. Consideration and evaluation of these three aspects of the Scheme will later assist in determining whether the Scheme has been a success in the FCA test case.

As stated earlier, the Scheme was utilised in the FCA test case due to its potential to resolve important issues in short periods of time. In the normal course of things, a case such as the FCA test case would take many months to reach the High Court, and many years to reach the Supreme Court.<sup>36</sup> The Scheme provides a means by which a court can grant declaratory relief in an action where there is no ‘real’ dispute, which is the reason the claim in the FCA test case has been termed friendly action. This is another fairly unique aspect of the Scheme, the success of which shall be judged in the ensuing sections. The ability to grant declaratory relief in a friendly action is qualified, per the ruling in *Rolls-Royce PLC v Unite the Union*.<sup>37</sup> In short, the action must be brought in the public interest; there must be a pre-agreed set of facts to establish the context in which the decision is to be made; and the court must be satisfied that all parties will have an opportunity to properly advance their case.

More specifically, the primary purpose of the utilisation of the Scheme, whether in the FCA test case or in any test case at all, is to provide immediately relevant authoritative English law guidance. This has been expressly stated in the preliminary stages of the introduction of the Scheme, as well as in the preliminary stages of the FCA test case.<sup>38</sup> Yet, this purpose must operate to fulfil the purpose of the FCA test case. The overarching reason why the FCA test

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<sup>36</sup> *Financial Conduct Authority* UKSC (n 7); ‘Civil Justice Statistics Quarterly’ (*Gon.uk*, 2021) <<https://www.gov.uk/government/collections/civil-justice-statistics-quarterly#2019>> accessed 21 July 2021.

<sup>37</sup> *Rolls-Royce PLC v Unite the Union* [2009] EWCA Civ 387.

<sup>38</sup> *Financial Conduct Authority* UKSC (n 7); ‘Test Case Reassures On COVID Insurance’ (*New Law Journal*, 2021) <<https://www.newlawjournal.co.uk/content/test-case-reassures-on-covid-insurance>> accessed 26 February 2023.

case was initiated was to provide guidance to clarify key issues of contractual uncertainty. This reason is the standard against which success can be measured. The resolution of the disputes must subsequently not only offer guidance on the matters at hand but must further ensure that any such guidance resolves the contractual uncertainty that the FCA test case intended to resolve.

The three preceding sections evaluated the suitability of the FCA test case in being admitted to the Scheme, and further highlights the advantages and disadvantages of utilising the Scheme in the FCA test case. The first section explored why the Scheme was used in the first place. It found that the Scheme was used because of its hugely expedited process and its subsequent ability to come to a decision in an unusually short period of time, despite having to tackle complex and intricate issues.

The second section looked at a qualifying claim under the Scheme, and whether the FCA test case falls within the parameters of the requisite criteria. It illuminated the flexibility of the Scheme and how this has massively assisted the fast resolution of the FCA test case by, for example, taking a lenient approach to the inclusion of the FCA.

This led to the third section, which examined the purposes behind the Scheme and whether these purposes have helped the advancement of the FCA test case. The purpose of the Scheme, in sum, is to provide immediately relevant authoritative guidance in areas of general importance to English law and — with regard to the FCA test case — for any such guidance to clarify matters of contractual uncertainty. This chapter has confirmed that the Scheme was a seemingly excellent choice of means by which to resolve the disputes. However, the use of the Scheme in the FCA test case can only be deemed successful if all the disputes were met with satisfactory outcomes, per the objectives of the Scheme in the FCA test case, which will be explored in the next chapter.

## CHAPTER II – THE DISPUTES

As explored in the preceding section, the Scheme is *prima facie* an excellent choice through which the FCA test case could be resolved. It utilises an expedited process for decisions, one of the main reasons the Scheme was proposed and utilised to begin with. This section seeks to ascertain whether this

suitability has translated into satisfactorily-resolved disputes. Additionally, by examining the actual issues and disputes that were dealt with by the Court, this article explores whether the usually uncompromising quality of Supreme Court judgments has been lost to make way for this hastened process of litigation.

The ensuing discussion does not attempt to comprehensively assess or evaluate the substantive decisions surrounding the various areas of dispute. As such, the substantive law will not be considered in any great detail. It merely assesses whether each dispute in question was satisfactorily resolved. Firstly, it will be considered whether immediately relevant authoritative English law guidance was provided, per the objective of the Scheme. Following this, it will be considered whether any such guidance has clarified the key issues of contractual uncertainty, as per the objective of the FCA test case overall. The first dispute considered is related to disease clauses, followed by the prevention of access/hybrid clauses, causation, trends clauses, and an evaluation of the *Orient Express Hotels*<sup>39</sup> case. It should be noted that the use of the word ‘dispute’ is not entirely accurate: the Scheme was used to provide guidance on uncertain areas of law. Thus, the following discussion will not relate to actual disputes as such, but the word ‘dispute’ will be used to describe the relevant areas of uncertainty.

### **(1) THE DISEASE CLAUSES**

‘Disease’ clauses are used to provide non-damage business interruption cover, which, in the case of the sample policy wordings used, are triggered by an occurrence of a notifiable disease within the vicinity or a specified radius of the insured premises.<sup>40</sup> The determination by the Supreme Court honed in on a standard disease extension clause, one which provides cover for ‘any ... occurrence of a Notifiable Disease within a radius of 25 miles of the Premises’.<sup>41</sup> For these purposes, ‘Notifiable Disease’ was defined by the policy as ‘illness sustained by any person resulting from ... any human infectious or human contagious disease ... an outbreak of which the competent local authority has

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<sup>39</sup> *Orient-Express Hotels* (n 9).

<sup>40</sup> ‘Covid-19: Business Interruption Insurance’ (*The Law Gazette*, 2021) <<https://www.lawgazette.co.uk/law-reports/covid-19-business-interruption-insurance/5107125.article>> accessed 2 August 2021.

<sup>41</sup> *Financial Conduct Authority* UKSC (n 7) [50], [54], [61], [88], [93].

stipulated shall be notified to them'.<sup>42</sup> The Supreme Court agreed with the insurers' interpretation of the scope of cover provided under 'disease' clauses of this nature, namely that they cover only relevant effects of COVID-19 cases that occur at, or within, the specified radius of a premises.<sup>43</sup> However, this determination by the Supreme Court proves somewhat futile, as will be discussed.

The Supreme Court rejected the High Court's decision that the insured peril was, in effect, COVID-19. The Supreme Court's analysis focused on the ordinary, plain English language meaning of the words used.<sup>44</sup> In particular, the meaning of 'occurrence of a Notifiable Disease' referred to the well-established meaning of the word 'occurrence' in insurance law (that is, something that happens at a particular time and place and in a particular way).<sup>45</sup> In reaching this view, the Supreme Court considered that the High Court had erred in its exercise of interpretation and had wrongly taken into account two 'fundamental' issues, which the Justices considered were relevant solely to the separate issue of causation.<sup>46</sup> The first issue concerned the High Court's observations that a typical 'disease' clause does not expressly confine cover to business interruption resulting only from cases of a notifiable disease within the specified area, as opposed to cases elsewhere. The second issue was that the nature of a notifiable disease meant that it had the potential to affect a wide area and prompt the authorities to take action in response to an outbreak as a whole, as opposed to localised parts of it.<sup>47</sup> In this case, there was no such ambiguity, as no reasonable reader would understand the words 'any occurrence of a Notifiable Disease within a radius of 25 miles' to include the occurrence of such disease outside that radius. To decide otherwise would be to 'stand the clause on its head', and so, the plain English meaning of the words was given effect.<sup>48</sup> This interpretation resultantly ensured that many policyholders were able to recover compensation, owing to the fact that COVID-19 was a disease that reached the entire country.

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<sup>42</sup> *ibid* [51].

<sup>43</sup> *ibid* [210].

<sup>44</sup> *ibid* [67].

<sup>45</sup> *Axa Reinsurance (UK) Ltd v Field* [1996] 1 WLR 1026 (HL); *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1999] UKHL 12; *Mann v Lexington Insurance Co* [2001] 1 Lloyd's Rep 1 (CA).

<sup>46</sup> *Financial Conduct Authority* UKSC (n 7) [56].

<sup>47</sup> *ibid* [52]-[56].

<sup>48</sup> *ibid* [61].

In any event, the Supreme Court considered the overriding question to be how the words of the contract would be understood by a reasonable person.<sup>49</sup> In the case of an insurance policy sold principally to SMEs, the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to minute textual analysis. It is an ordinary policyholder who, on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting.<sup>50</sup>

These considerations by the Supreme Court would suggest that the Scheme was successful for this aspect of the ruling. The overriding objective of the Scheme was to provide immediately relevant authoritative English law guidance. The Supreme Court provided such when it overruled the decision of the High Court. The decisions of the High Court are innately less authoritative than Supreme Court decisions, and so the quick appeal allowed for a more authoritative stance to be provided.

The Supreme Court expressly stated that the guidance aimed to be clear and concise for the benefit of the ordinary policyholder and was to be provided in an unusually short period of time.<sup>51</sup> It eliminates any controversy with regard to disease clauses of this nature. Moreover, this ruling provides guidance which clarifies a key issue of contractual uncertainty. Thus, the Scheme has successfully operated to largely resolve this issue of disease clauses. Whilst this will greatly assist many aggrieved policyholders, there is scope for future litigation if policyholders and insurers construe the Supreme Court's guidance differently. There is no doubt that immediately relevant authoritative English law guidance was provided, but it is questionable to what extent this guidance clarified the issues of contractual uncertainty in relation to the disputes around disease clauses, as further disputes could arise from differing interpretations of the ruling.

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<sup>49</sup> Peter Blakemore, 'Back to Basics: Drafting Pandemic Clauses' [2021] 2114 Estates Gazette 48-49.

<sup>50</sup> *Financial Conduct Authority* UKSC (n 7) [77].

<sup>51</sup> *ibid.*

## **(II) PREVENTION OF ACCESS CLAUSES AND HYBRID CLAUSES**

The aptly named ‘hybrid clauses’ are an amalgamation of both disease clauses, as discussed above, and prevention of access clauses, which are clauses that provide cover where some form of authority so acts or there is some occurrence that prevents or restricts access to, or use of, the insured premises. At first instance in the High Court, the FCA was semi-successful in arguing that such clauses would provide cover for the pandemic and its resulting consequences.<sup>52</sup> On appeal, the Supreme Court was tasked with resolving three issues. The first of these was whether the public authority measures were imposed by law. The Supreme Court affirmed the ruling of the High Court in stating that ‘restrictions imposed’ was tantamount to a legally binding compulsive instruction.<sup>53</sup> Conversely, though, the Supreme Court rejected the notion that all restrictions refer to the use of legal powers.<sup>54</sup> The test for interpreting the relevant words was how they would be understood by the standards of a reasonable person.

The Supreme Court did not consider, however, the individual circumstances of each measure, both general and specific, with regard to this reasonable person test. Furthermore, there was no consideration of whether the measures were set out in a reasonable way that allowed for an easy determination of precisely what satisfactory compliance required.<sup>55</sup> The Supreme Court should have gone further by expressly stating how the policyholders could comply with their policies, and so it is submitted that the process of interpretation was not thorough enough. This represents a failure of the use of the Scheme. Naturally, expediting any process will require truncation. Yet, it would appear that by omitting any discussion about what a reasonable person may understand by each measure, there is scope for further confusion.

There could be future claims arising from thwarted interpretations of these restrictions, something which could have been avoided through a more

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<sup>52</sup> John Wright, ‘High Court Test Case - Not Conclusive’ [2020] 31 (10) Construction Law 30-32.

<sup>53</sup> *Financial Conduct Authority* UKSC (n 7) [112]-[116].

<sup>54</sup> *ibid* [120].

<sup>55</sup> Stuart Pemble, ‘Does Business Interruption Insurance Cover Covid-19?’ (2020) 2043 *Estates Gazette* 45.

thorough consideration of the individual measures.<sup>56</sup> Whilst this was not feasible within the FCA test case timeline, per the usage of the Scheme, normal litigation would have likely provided ample time to do so. Litigation would have facilitated not only a far more thorough examination of how the policies would be understood but could have also facilitated contributions from policyholders to ensure that ordinary people interpreted the policies correctly. This would have decreased the likelihood of future litigation. There may have been immediately relevant authoritative English law guidance provided, but this guidance did not clarify the key issues of contractual uncertainty surrounding the ‘imposed by law’ requirement.

The second of these issues concerns the level of interruption to the business for cover to be triggered. The analysis primarily centred around extensions relating to the ‘inability to use’, ‘prevention of access’ and ‘interruption’. With ‘inability to use’, the Supreme Court did not depart from the ruling of the High Court that a mere hindrance or impairment of use would be satisfactory, further qualifying the ruling by expressing that there was no requirement for interruption to the entirety of the premises for all purposes.<sup>57</sup> This requirement would therefore be satisfied even where only a ‘discrete’ part of a business’ premises or activities were interrupted.<sup>58</sup> This is a good example of both the success and the failures of the FCA test case. This facet of the judgment has not provided an express answer to the issues surrounding ‘inability to use’ clauses. However, it has provided the means for doing so. As a fact-dependent inquiry would be necessary on a case-by-case basis to determine whether the tests have been satisfied, it would take a far longer period of time to establish whether, for example, a business has not been able to operate a ‘discrete part of its business’. However, the ruling provided immediately relevant authoritative English law guidance and offered some degree of clarity within an especially short period of time.

The Supreme Court further held that the wording of ‘prevention of access’ clauses was to be construed to mean that there was a wholesale prevention of the use of the premises, as distinct from mere hindrance.<sup>59</sup> This

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<sup>56</sup> *Financial Conduct Authority* UKSC (n 7) [61].

<sup>57</sup> *ibid* [128]-[145].

<sup>58</sup> *ibid* [127], [281].

<sup>59</sup> *ibid* [146]-[152].

falls neatly in line with the above analysis regarding ‘inability to use’. The ‘interruption’ extensions were interpreted as including disruption, however slight, which may not entirely close the business and its operations, so long as there is a material effect on the finances of the business in question.<sup>60</sup> Moreover, for the third issue, it was for the Supreme Court to determine whether the restrictions imposed needed to be directed at the policyholder and not the general public, per the insurers’ submissions. The Supreme Court rejected this notion<sup>61</sup> and subsequently found that there was no requirement for the restrictions to be directed at the policyholder.<sup>62</sup> This determination was made in adherence with the aims of the FCA test case. This part of the ruling is clear and provides immediately authoritative English law guidance. Moreover, the guidance provides clarity to an issue of contractual uncertainty, and is satisfactory in that policyholders will be able to claim for cover in situations where, prior to the ruling, cover was not granted.

Overall, it can be asserted that the determinations of the Supreme Court operate overwhelmingly in favour of policyholders and have overruled the High Court on a number of issues. It has interpreted prevention of access and hybrid clauses considerably more widely than the High Court at first instance. These rulings are also made in line with the objectives of both the FCA test case and the Scheme. Immediately authoritative English law guidance was provided through declaratory relief in a friendly action in a manner that clarified key issues of contractual uncertainty. Thus, it can be established that this part of the judgment was mostly successful.

### **(III) CAUSATION**

Due to the causative nature of insurance contracts, causation is often the trickiest issue that arises during insurance litigation, and this trend continued in the FCA test case. The most pertinent issue before the Supreme Court centred around the interpretation and resultant application of the infamous ‘but-for’ test.<sup>63</sup> The insurers’ submissions advanced the proposition that the

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<sup>60</sup> *ibid* [158].

<sup>61</sup> Ed Hundleby, ‘FCA Business Interruption Test Case - Lessons’ (2021) *Pensions Today* 4-5.

<sup>62</sup> *Financial Conduct Authority UKSC* (n 7) [128].

<sup>63</sup> Mexian Song, ‘Revisiting Concurrent Causation And Principles In English Insurance Law: A Legal Fiction’ (2021) 6 *Journal of Business Law* 457-474.

policyholder needed to demonstrate that the loss would not have been suffered but for the occurrence of the insured peril.<sup>64</sup> The Supreme Court sternly rejected this notion. In doing so, they inadvertently affirmed the usefulness of the Scheme. The Justices undertook a whirlwind revision of not only proximate causation but also of the law of concurrent causation in an extraordinarily short time period.<sup>65</sup> They expressly acknowledged how, since the 19<sup>th</sup> century, proximate cause has not been concerned with the cause most proximate from the loss in terms of time, but refers instead to the efficient cause of the loss.<sup>66</sup> This test was devised for the benefit of the reasonable, average man, not for a scientist or any other person who would consider different interpretations of the word proximate.<sup>67</sup>

The Supreme Court did note, however, that this is not a matter of ‘unguided gut feeling’; rather, it is usually determined through various principles that have emerged from centuries of jurisprudence.<sup>68</sup> The Court would typically consider whether the peril covered had any causal involvement in the loss; whether any excluded perils had a part in the loss; and whether in the event of concurrent losses, there is covered loss or not.<sup>69</sup> In these more common types of cases, the peril covered was still a cause in the causal chain of events. The differentiator in the FCA test case is that the Supreme Court considers each case of COVID-19 to be a separate occurrence and insured peril.<sup>70</sup> The Supreme Court expressly acknowledged that, as per their own interpretations, there were not to be merely two or three concurrent causes of the loss suffered, but a vast number, possibly stretching into the millions, depending on the precise number of known infections in the country at the time restrictions were introduced by the UK Government.<sup>71</sup>

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<sup>64</sup> *Financial Conduct Authority* UKSC (n 7) [238]; *ibid.*

<sup>65</sup> *ibid* [162]-[171].

<sup>66</sup> *ibid* [165]-[167]; See *Reischer v Borwick* [1894] 2 QB 548, 550; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, 365 (Lord Atkinson); *Becker, Gray & Co v London Assurance Corpn* [1918] AC 101, 113-114.

<sup>67</sup> *Yorkshire Dale Steamship Co Ltd v Minister of WarTransport* [1942] AC 691 per Lord Wright at 706; Joseph Arnould and others, *Arnould On The Law Of Marine Insurance And Average* (20th edn, Sweet & Maxwell 2021).

<sup>68</sup> *Financial Conduct Authority* UKSC (n 7) [168].

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid* [201].

Once this line of reasoning had been established, it was for the Supreme Court to determine whether the causal requirements for the different clauses were satisfied. With regard to the disease clauses, the Supreme Court concluded that it could not be the commercial intentions of the parties to treat any uninsured cases of COVID-19 occurring outside the radius of the policy to preclude a policyholder of indemnity in relation to business interruption cover.<sup>72</sup> The Supreme Court saw this interpretation as not only relatively clear and simple, but also as constituted in accordance with the overarching need for clarity and certainty.<sup>73</sup> It is submitted that the Supreme Court's analysis here is correct: they have adhered to the objectives of both the Scheme and the FCA test case as a whole. A slightly different interpretation was adopted for the prevention of access and hybrid clauses as compared to these clauses, where more than one condition needs to be satisfied to conclude that an interruption to the business has been caused by an insured peril.<sup>74</sup> The Supreme Court held that there were two or more causes of the loss — the covered peril as described in the policy as well as the pandemic and broader social considerations — each of which would have caused the loss. As per the correct interpretation of the policy, the requisite causal connection could be satisfied by finding that each case of COVID-19 was 'a separate and equally effective cause of the restriction'.<sup>75</sup>

#### ***(IV) TRENDS CLAUSES***

Trends clauses are provisions that dictate the relative adjustment of an insured loss to ensure, *inter alia*, that the indemnity granted is not unjustifiably increased for uninsured reasons. As noted in the judgment, 'whilst the basic comparison between the turnover of the business in the prior period and in the indemnity period will produce a rough quantification of the lost revenue, there may be specific reasons why a higher or lower figure would be expected for the indemnity period apart from the operation of the insured peril'.<sup>76</sup>

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<sup>72</sup> *ibid* [237].

<sup>73</sup> Joanna McCunn, 'Fallen Arch: Construction, Causation And Covid-19' (2021) 37 (2) *Professional Negligence* 85-89.

<sup>74</sup> *ibid*.

<sup>75</sup> *ibid*.

<sup>76</sup> *Financial Conduct Authority UKSC* (n 7) [254].

The purpose of trends clauses is to provide for adjustments to be made to reflect ‘trends’ or ‘circumstances’ that result in an inflated or deflated figure.<sup>77</sup> In the FCA test case, the Supreme Court had to establish the extent to which, if at all, the insurers could reduce the indemnity as, if the policyholder’s business had managed to remain open it would have suffered a downturn in revenue due to the effects of the COVID-19 pandemic.<sup>78</sup>

At paragraph 262, the Supreme Court expressly denotes its objective of striving to identify an interpretation of the trends clauses aligned with the insuring clauses ‘so as not to take away the cover provided by the insuring clauses’.<sup>79</sup> This consideration operates only to advantage policyholders. It was the opinion of the Supreme Court that the most unproblematic means by which the trends clauses should be construed is, in the absence of any provisions to the contrary, by acknowledging that the objective of such clauses is to consider the result that would have occurred but for the insured peril and the circumstances stemming from the same originating cause.<sup>80</sup> Conversely, the insurers’ submissions would see a quantification procedure transform into an exclusionary procedure.<sup>81</sup> Subsequently, there must be a complete omission of the numerous COVID-19 consequences when calculating the success of the business had the insured peril not occurred. This determination is consistent with the earlier discussion of causation.<sup>82</sup> It further provides a clear route through which policyholders can claim indemnity where it was previously unavailable or substantially reduced by insurers.<sup>83</sup> Here, clear authoritative English law guidance has been provided, clarifying key issues of contractual uncertainty concerning trends clauses. It is an important aspect of the overall judgment and plays into the objectives of the FCA test case.

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<sup>77</sup> *ibid* [253]-[255], [284].

<sup>78</sup> *ibid* [289]-[294].

<sup>79</sup> *ibid* [262].

<sup>80</sup> *ibid* [268].

<sup>81</sup> *ibid* [146]-[152].

<sup>82</sup> *ibid* [168].

<sup>83</sup> Harris J, ‘Supreme Court Judgment Favours FCA In Business Interruption Insurance Appeal’ (2021) 42 (4) *Company Lawyer* 122.

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**(V) ORIENT EXPRESS HOTELS**

The Supreme Court's treatment of the watershed High Court case, *Orient Express Hotels*,<sup>84</sup> was highly anticipated for its potential resounding effect on the future insurance market. In *Orient Express Hotels*, a claim was advanced for business interruption to a hotel arising from a hurricane under an all-risks policy. This claim was subsequently rejected as the 'but-for' test was interpreted as meaning that the business interruption damage would have occurred regardless due to the fact the area as a whole had been subjected to substantial hurricane damage.<sup>85</sup> The interpretation considered what precisely would have happened if the damage had not occurred, but the hurricanes had. The insurers used this judgment to submit that, in the contemporary context of the COVID-19 pandemic, the policyholders would have suffered a loss notwithstanding the Government impositions, as the pandemic would have caused a loss in revenue.<sup>86</sup>

The Supreme Court rejected this analysis and expressly overruled *Orient Express Hotels*.<sup>87</sup> It held that, in a scenario where both the insured peril, as well as the uninsured peril, operate concurrently, and from this concurrent operation the same fortuity is produced, then so long as the damage which is caused by the operation of the uninsured peril is not expressly or otherwise excluded from the policy, the loss stemming from both of these causes is covered.<sup>88</sup> This outcome will certainly see enormous implications for insurers and policyholders alike for the adjustment of property damage, as well as for non-damage business interruption claims.<sup>89</sup> This ruling massively relaxed the law established in *Orient Express Hotels*.<sup>90</sup> It was limited in scope as it was made under the aegis of the Arbitration Act 1996, s.69, which is limited to questions 'arising

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<sup>84</sup> *Orient-Express Hotels* (n 9)

<sup>85</sup> N.B. the case was heard by Hamblen J (as he then was) on appeal from a decision of an arbitral tribunal (which included Mr George Leggatt QC, as he then was). Ten years later, Lord Hamblen and Lord Leggatt are now Justices of the Supreme Court and gave the main judgment in the FCA test case.

<sup>86</sup> 'Test Case Reassures On COVID Insurance' (*New Law Journal*, 2021) <<https://www.newlawjournal.co.uk/content/test-case-reassures-on-covid-insurance>> accessed 11 March 2023.

<sup>87</sup> *Financial Conduct Authority* UKSC (n 7).

<sup>88</sup> *Orient-Express Hotels* (n 9) [306]-[308].

<sup>89</sup> *Financial Conduct Authority* UKSC (n 7).

<sup>90</sup> *ibid.*

out of an award'.<sup>91</sup> Additionally, as it was an arbitration award, there was far less scope for a detailed argument; in contrast, despite its expedited process, the FCA test case allowed for a far more thorough consideration of the matter. Moreover, this ruling adheres to both the objectives of the FCA test case as well as the Scheme. Immediately authoritative English law guidance has been provided, with this guidance clarifying the contractual uncertainty stemming from the *Orient Express Hotels*<sup>92</sup> decision. The resulting position is clearer, and thus far more satisfactory, than before.<sup>93</sup>

In summary, it can be generally stated that the preceding disputes were resolved satisfactorily, with some minor exceptions. In all five of the main disputes, immediately relevant authoritative English law guidance was provided. However, in some determinations, this guidance does not necessarily provide clarity on some contractual uncertainty. Guidance provided for the disease clauses clarified issues of contractual uncertainty, namely, how to construe such clauses. With prevention of access and hybrid clauses, three matters required resolution. The first issue on 'imposed by law' was met with authoritative guidance, but this guidance fell short of wholly clarifying matters of contractual uncertainty. A longer process, perhaps through litigation, would likely have resolved this, highlighting a disadvantage of using the Scheme. This judgment has provided the basis for a negotiated settlement and the FCA test case has subsequently provided updates on settlement in this area. However, the issue was not competently dealt with by the FCA test case, most likely due to the expedited process of the Scheme. The other two issues – namely, interruption extensions and whether impositions need to be 'directed at the policyholder' – were resolved soundly, with the guidance provided clarifying issues of contractual uncertainty.

The causation issues were also satisfactorily answered. The Supreme Court offered immediately relevant authoritative English law guidance. This guidance resolved the issues of contractual uncertainty, especially those relating to the interpretation of the 'but-for' test and the proximate cause of the loss. There was a similar level of success with the trends clauses, with the guidance clarifying areas of contractual uncertainty by declaring that the effects of

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<sup>91</sup> Arbitration Act 1996, s 69(1).

<sup>92</sup> *ibid.*

<sup>93</sup> *Financial Conduct Authority UKSC* (n 7) [253]-[255], [284].

COVID-19 were not to be considered when quantifying cover. The final issue, that of *Orient Express Hotels*,<sup>94</sup> was also resolved successfully. The guidance overruled the judgment, clarifying the position for many insureds and ensuring many more policyholders will be entitled to cover.

Overall, this chapter has demonstrated that the disputes were soundly and successfully resolved per the objectives of the Scheme in the FCA test case. In the vast majority of the rulings, there was immediately relevant authoritative English law guidance provided. Moreover, this guidance has largely clarified key issues of contractual uncertainty. This would denote that the use of the Scheme in the FCA test case, per the objectives of the Scheme, was a success. However, the judgment is lacking in some areas, and a more thorough consideration of some of the issues could have resulted in an even more satisfactory outcome. For example, a minute analysis of the extent to which damages would be payable would have improved the judgment. If there had been more robust and complete guidance, it would have resulted in more of the issues of contractual uncertainty being resolved, but this was not possible in the truncated timeframe. Thus, perhaps the Scheme was not the most optimal method by which the issues ingrained in the FCA test case could have been resolved. This will be explored in the next chapter.

### CHAPTER III – THE SUCCESS

#### ***(1) EVALUATING THE SUCCESS OF THE SCHEME IN THE FCA TEST CASE***

The first part of this section will provide an overall assessment of the degree of the Scheme's success. It will do so by tackling several research questions. It will explore whether the Scheme achieved its purpose, as well as whether the objectives behind initiating the FCA test case were met. Furthermore, it will assess whether all of the issues were satisfactorily resolved, and further whether there were any new issues created by the judgment. The use of Scheme in the FCA test case can only be judged as successful if the objectives set out at the preliminary stages of the action have been met.<sup>95</sup> As has been continuously noted throughout this article, the objective of the use of the

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<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*

Scheme in the FCA test case was to provide immediately relevant authoritative English law guidance, with any such guidance needing to clarify key issues of contractual uncertainty.<sup>96</sup> To this end, the Scheme was largely successful and the use of it in the FCA test case is an excellent endorsement for the continuation of the Scheme, despite being used for the first time. It is an extraordinary feat for a claim of such magnitude to progress from commencement to the Supreme Court in a little over seven months. The Supreme Court noted that ‘this determination will facilitate prompt settlement of many claims and achieve considerable savings in time and cost’.<sup>97</sup> However, it is this ‘considerable savings in time and cost’ which has the potential to give rise to future issues.

The individual disputes were all dealt with in a satisfactory standard, per the objective of the use of the Scheme in the FCA test case. However, whilst clarificatory guidance was provided in most of the relevant disputes, for some the determinations gave rise to future uncertainty.<sup>98</sup> With disease clauses, the Supreme Court’s ruling described how to interpret relevant policy wordings. Whilst this will greatly assist many aggrieved policyholders, there is larger scope for potential future litigation than for other clauses if policyholders and insurers construe the Supreme Court’s guidance differently. The Supreme Court’s rulings in relation to both prevention of access and hybrid extensions (such as the determination that some measures which were not imposed under the force of law could still trigger coverage) could cause additional claims to be brought or increase indemnities being paid on individual claims. The judgment of the Supreme Court will not be applicable to all scenarios and thus, these excluded scenarios will need to be identified and adjusted on a case-by-case basis. Whilst individual litigation would have taken significantly longer and been significantly more expensive, it would have resulted in a finalised interpretation of the relevant policy without any issues.

The use of the Scheme in the FCA test case also illuminated other disadvantages compared to litigation. At the preliminary stages, there were 16 insurers invited to participate in the test case. Out of these 16, only 8 accepted

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<sup>96</sup> *ibid.*

<sup>97</sup> *ibid* [43].

<sup>98</sup> Becca Hogan, ‘Partner Becca Hogan examines the under-utilised collective redress tool’ (*Signature*, 21 June 2001)

<<https://www.signaturelitigation.com/partner-becca-hogan-examines-the-under-utilised-collective-redress-tool/>> accessed 1 September 2021.

the invitation, largely due to the probable unfavourable outcome for insurers.<sup>99</sup> This rejection of admittance onto the FCA test case represents a negative aspect of the Scheme. Parties join through a process of mutual agreement and advance on the basis of an agreed set of facts, or in this case, policy wordings. If a party does not agree to be involved in the test case, there can be no guidance provided by the court in relation to that party. This resulted in the High Court (as well as the Supreme Court once appealed) working with sample policy wordings which were statistically only representative of half of the insurers in the business interruption insurance market. Thus, the judgment given cannot necessarily be utilised as a universal reference point for determining the outcome of claims for business interruption cover. This exemplifies a situation where litigation would be advantageous instead as actors cannot disagree to be a party to a litigation. The issue with litigation, however, is that there is a need for a real and present dispute between the parties for an action to proceed. When using the Scheme, a party can commence a pre-emptive action prior to an actual dispute arising — one of the Scheme's most attractive features. If it was necessary for a dispute to arise before parties could commence an action, more significant loss and harm would have to occur before guidance can be provided.

Moreover, the FCA was arguably over-selective with the choices of policy wordings they put before the High Court. All of the policy wordings considered were from larger insurers in the market. As mentioned in the preceding paragraph, several very large insurers were not invited or had their invitations rejected, such as AXA and Aviva. There was also an extremely large number of smaller insurers who were excluded altogether. The FCA approximates that there are around 700 different types of business interruption policies in use in the UK insurance market from around 60 different insurers.<sup>100</sup> Given that the judgment considers only specific policy wordings, there are likely to be further disputes between insurers and policyholders that may result in litigation. Situations like these render the use of the Scheme somewhat futile.

Whilst it is accepted that litigation involving all these insurers and policyholders is unreasonable in terms of time and cost, it is submitted that the

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<sup>99</sup> 'Update on FCA Test Case of the Validity of Business Interruption Claims' (FCA, 1 June 2020)

<<https://www.fca.org.uk/news/press-releases/update-fca-test-case-validity-business-interruption-claims>> accessed 10 March 2023.

<sup>100</sup> *ibid.*

FCA test case could have considered a wider range of sample policy wordings to ensure the guidance provided in the judgment would apply more universally. It is acknowledged that this is asking a lot of an expedited mechanism, but whilst dealing with such important issues, this request can be justified. The Scheme's objective was to provide 'immediate' guidance. If there is litigation commencing after the Supreme Court judgment on the correct interpretation of a policy, it would have been quicker just to litigate in the first place. Nevertheless, insurers will now be aware that they have far less room for manoeuvre with regard to interpretation than before the FCA test case.

Overall, the judgment is beneficial to policyholders and undoubtedly puts them in a better position than before the FCA test case. It is submitted, however, that it is questionable just how much better this position is. The use of the Scheme has allowed for immediately relevant authoritative English law guidance to be provided for in all of the disputes considered. As explored above, this guidance was provided in an extraordinarily short period of time, albeit perhaps not 'immediately' in light of the appeal to the Supreme Court. Moreover, the guidance was relevant to the disputes and authoritative in its nature. In this respect, the use of the Scheme was successful. It achieved its overarching objective whilst simultaneously saving enormously on time and, consequently, on cost as well. The concept of running a case without a 'real dispute' has proven to work incredibly well. It has allowed for guidance to be provided in relation to a dispute which would likely arise in the future, and thus could represent the beginning of a paradigm shift in the way litigation is conducted in England and Wales. This will be explored in the next section of this chapter.

However, whilst the primary objective of the Scheme was largely achieved — namely, to provide immediately relevant authoritative English law guidance — the primary objective of the test case as a whole was not quite as closely met. The FCA test case strived to clarify key issues of contractual uncertainty. This was achieved only to a limited degree. Some areas of dispute, such as causation, were indeed largely clarified. However, in other areas of dispute (such as disease clauses, prevention of access clauses and hybrid clauses) the attempted clarification inadvertently gave rise to potential future uncertainty. Whilst the guidance provided will greatly assist many aggrieved policyholders, there is scope for potential future litigation if policyholders and insurers

construe the Supreme Court's guidance differently. As has been previously mentioned, any litigation stemming from the guidance would render the use of the Scheme in the FCA test case wholly futile. Any resultant litigation would take a significant period of time, especially if there are appeals. In addition, if the guidance provided does not clarify areas of uncertainty but rather causes further uncertainty resulting in litigation, then the use of the Scheme in the FCA test case cannot be judged to be entirely successful.

## ***(II) TEST CASES – THE FUTURE OF CIVIL DISPUTE RESOLUTION?***

This final section will look at the wider context of the future use of the Scheme. It will explore whether the Scheme has improved financial services dispute resolution or whether the pre-existing methods, such as ordinary litigation, are better. It will look at whether the Scheme should be extended to other areas of law or whether it should be restricted to financial services. This section will propose improvements to the Scheme in addition to assessing its disadvantages. Consideration of the above will assist in making a contemporaneous evaluation of the degree of success of the Scheme in the seminal FCA test case.

It is clear, however, that the Scheme is here to stay, at least for the resolution of similar disputes. It was promoted to a permanent fixture of Practice Direction CPR Part 63A on the 1<sup>st</sup> of October 2020.<sup>101</sup> Yet, despite the fairly successful use of the Scheme in the FCA test case, it must be applied cautiously in the future. As previously discussed, the FCA test case affected many insurers and policyholders, none of whom were actually party to the proceedings. The whole test case was heard in a vacuum devoid of human emotion. There was a complete absence of any opportunity for either the High Court or the Supreme Court to hear from aggrieved policyholders whose businesses were financially devastated by the COVID-19 pandemic, or by employees whose livelihoods have been destroyed.<sup>102</sup> This was to ensure that the whole process could be concluded as quickly as possible, in order for the Court to then provide immediate guidance. It is submitted that whilst the judgment was largely, but not wholly, in favour of policyholders, the guidance could have been different had these people been heard. This would have made the

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<sup>101</sup> Hogan (n 98).

<sup>102</sup> *Financial Conduct Authority UKSC* (n 7).

judgment more relatable and accessible to ordinary people, as they could compare the fact-pattern heard in the case to their own situations. It is accepted that aspects of normal litigation will have to be disposed of in this expedited process for the sake of speed, but the inclusion of an opportunity for laypeople to be heard would be beneficial to the judgment overall despite the consequent delay.

The guidance provided in the judgment has also been written with little regard to laypeople affected by it, given that it is written in such a jargon-filled sesquipedalian manner that it is an impossible task for laypeople to understand it.<sup>103</sup> While true that the case involves incredibly complicated issues and the judgment was always going to require the communication of nuanced ideas, it is submitted that there could have been more consideration made by the court to the people who will be affected by the judgment. It is important for the future of the test case procedure to consider the needs of a person's access to justice by allowing individual voices to be heard where appropriate.<sup>104</sup> This will allow for more tailored guidance to be provided, which will benefit the ordinary people for whom the Scheme was invented.

Similar sentiments have been expressed in *Rolls Royce PLC v Unite the Union*,<sup>105</sup> a case which is viewed by some as a sort of 'precursor' to the FCA test case. In this case, the parties disputed whether the inclusion of length of service within a selection matrix for redundancy purposes would amount to unlawful age discrimination. The court was asked whether it was correct to make a declaratory judgment when the case had otherwise been effectively settled. In doing so, the court provided guidance as to the interpretation of The Equal Treatment Directive in an omission of any actual dispute between the relevant parties. Relevant to this discussion in particular was the recognition that the guidance would affect a significant number of people, yet none of these people were heard in the case.<sup>106</sup> The judge at first instance, Sir Thomas Morison, recognised this flaw and expressed his disdain at the situation, stating that he

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<sup>103</sup> Lucy Pert, 'The FCA Test Case And Collective Justice - The Jury Is Out' (Hausfeld, 23 February 2021)

<<https://www.hausfeld.com/en-gb/what-we-think/perspectives-blogs/the-fca-test-case-and-collective-justice-the-jury-is-out/>> accessed 5 September 2021.

<sup>104</sup> *ibid.*

<sup>105</sup> *Rolls-Royce* (n 37).

<sup>106</sup> *ibid.*; Hogan (n 98).

had ‘considerable misgivings’ about the proceedings omitting ‘the advice and wisdom’ of lay members or any oral evidence from lay members at all.<sup>107</sup>

The court made it clear that they endeavoured to avoid any future confusion or scope for dispute by interpreting the direction in an accessible way. No similar considerations were made in the FCA test case. The *Rolls Royce PLC v Unite the Union* case additionally demonstrates that some of the aspects of the Scheme are not wholly original but have been seen in previous cases. *Rolls Royce PLC v Unite the Union* was heard at least five years prior to the consideration of the setting up of the Financial List in which the Scheme resides, yet it exemplifies a case being heard without an actual dispute having arisen and without the direct involvement of any aggrieved parties.<sup>108</sup> It can thus be stated that the Scheme encompasses aspects of civil procedure which were already in use and has merged them into a more defined procedure. This neatly codifies the Scheme and is therefore a welcome advantage to its creation and use.

This Scheme and the procedures included therein are not the only means of financial services dispute resolution outside the traditional route of litigation. The Financial Ombudsman Service (hereinafter FOS) resolves thousands of financially-centred disputes annually whilst retaining the advantages of the scheme.<sup>109</sup> The FOS does this whilst still retaining many of the advantages of the Scheme. It does not incur nearly as much cost as litigation, does not involve the innate procedural complexity of litigation, and takes a considerably shorter period of time.<sup>110</sup> Yet, it is not perfect and has several flaws that are not found within the Scheme. There is no scope or platform for the FOS to engage with external stakeholders in a case, such as the FCA, when passing a judgment.<sup>111</sup> Thus, the FOS is very well-suited to resolving fact-specific, individual complaints, but much less suited to dealing with cases that involve a large number of disputes, the resolution of which have wide implications. Additionally, there is no appeals process ingrained into the FOS, making it even less suited to reconcile larger-scale financial disputes as there is

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<sup>107</sup> *Rolls-Royce plc* EWCA (n 37) [7].

<sup>108</sup> *ibid*; Hogan (n 98).

<sup>109</sup> ‘Complaints We Can Help With’ (*Financial Ombudsman*, 2021)

<<https://www.financial-ombudsman.org.uk/consumers/complaints-can-help>> accessed 14 September 2021.

<sup>110</sup> *Orient-Express Hotels Ltd* (n 9) [3].

<sup>111</sup> *ibid*.

less scope for scrutiny of far-reaching decisions.<sup>112</sup> The Scheme does not suffer from any of these flaws in the FOS, or those ingrained into litigation. It is not even remotely comparable to litigation in terms of cost or speed, with the Scheme being far cheaper and faster even with an appeal. Thus, it is submitted that, to a fairly substantial degree, the inception of the Scheme has improved financial dispute resolution in England.

The relative success of the Scheme has been recognised by practitioners across the legal profession, and it has been suggested that it could be extended to other types of disputes with significant importance to the market.<sup>113</sup> For example, the Scheme could be utilised to resolve similar disputes arising from the aftermath of the COVID-19 pandemic or even to resolve an avalanche of issues inevitably arising from Brexit.<sup>114</sup> It should be noted that as the FCA test case was the first to be heard under the Scheme, it cannot be concluded that the Scheme's implementation has been overall positive. For that to be concluded, there would need to be other cases which utilise the Scheme at least to the same level of success as in the FCA test case. The FCA test case was a good endorsement for the continued use of the Scheme, but as has been discussed earlier in this article, it was far from perfect.

It can be stated that the utilisation of the Scheme in the FCA test case was largely successful. The overarching objective of the Scheme — namely, to provide immediate relevant authoritative English law guidance — was met in all of the disputes at hand. Moreover, the overarching objective of the FCA test case — namely, to assist in clarifying key issues of contractual uncertainty — was also met, but to limited degrees in some of the disputes. The FCA test case has proven to primarily be a good endorsement, and an example of the advantages of the Scheme when compared to litigation or the FOS, but it has also demonstrated disadvantages which must be considered. Overall, it can be said that the Scheme has improved financial services dispute resolution, given its advantages over the alternative pre-existing methods.

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<sup>112</sup> *ibid.*

<sup>113</sup> Pert (n 103); Blundell, Donnelly and Emson, 'Financial Services And Markets Dispute Resolution Quarterly Update: October 2020' (*Macfarlanes.com*, 2021) <<https://www.macfarlanes.com/what-we-think/in-depth/2020/financial-services-and-markets-dispute-resolution-quarterly-update-october-2020/#Financial>> accessed 3 September 2021.

<sup>114</sup> Financial Services (n 113).

## CONCLUSION

The COVID-19 pandemic has given rise to unthinkable social, medical, and economic ramifications. Fortunately, seldom does a situation arise where the livelihoods of hundreds of thousands of people are contingent upon the judgment of a single case. There was an urgent need for resolutions to assist people in these difficult times. As a result, the FCA test case bore considerable importance. At the same time, the adoption of the test was also relatively risky given the untested nature of the Scheme. It is the success of the Scheme being used in the FCA test case which forms the centrepiece of this article. More specifically, this article has provided evidence to make a contemporaneous evaluation of the degree of success of the Scheme in the seminal FCA test case.

The first section introduced the Scheme and found that it is an expedited court process aimed at providing authoritative guidance before disputes arise. This made the FCA test case seemingly perfect for admission onto the Scheme. The second section evaluated the level of success the Scheme had in resolving each of the individual disputes. It found that the level of success varied across disputes. The third section assessed the overall level of success of the utilisation of the Scheme in the FCA test case and evaluated its potential for future and extended use. It found that the objectives behind the Scheme were largely met, whilst the objectives behind the FCA test case were met but not to the same degree. Immediately relevant authoritative English law guidance was provided, yet for some disputes, the degree to which the guidance serves to clarify contractual uncertainty is questionable. Notwithstanding these issues, it finds that the FCA test case was a good endorsement for the Scheme as it does away with many problems of the pre-existing methods. Thus, it is a positive development that the implementation of the Scheme onto the Financial List is permanent.

Overall, it can be stated that the endeavour was a success. The FCA test case, through utilising the Scheme, did provide immediate relevant authoritative English law guidance and, to a degree, this guidance subsequently clarified key issues of contractual uncertainty. It is certainly true to state that the FCA test case's success has been a good endorsement of the Scheme and has justified its implementation as a permanent fixture of the Financial List. While

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the Scheme does require some improvements, these changes can be identified and implemented as future cases utilising the Scheme arise. The COVID-19 pandemic has had catastrophic consequences, but the FCA test case has helped in mitigating the potential fallout and chaos that could have occurred had the case not been conducted. The Scheme has not resolved all the issues stemming from the COVID-19 pandemic, but will likely have saved many people from financial ruin and kept many businesses operating. When viewed in this light, it is hard to say that the utilisation of the Scheme could be construed as anything other than a positive exercise, and it is likely that the aggrieved policyholders saved by this expedited process will agree.