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Covid-19 judgment update: South Africa and Australia

COVID-19 business interruption claims have been very much in the news lately. In terms of industry-wide class actions, the UK's Financial Conduct Authority (FCA) has been leading the way with its test case, judgment in which was handed down on 15 September 2020 (the FCA Test Case Judgment).

More recently, the FCA Test Case Judgment has been appealed directly to the Supreme Court, which is likely to hand down its judgment either before Christmas or in January 2021. In the meantime, we have been watching the progress of other court actions around the world. In this article, we focus on two recent decisions, one in South Africa and one in Australia.

(1) Ma-Afrika Hotels (Pty) Ltd (2) The Stellenbosch Kitchen (PTY) Ltd v Santam Limited, a division of which is Hospitality and Leisure Insurance – Case No: 6499/2020

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(2) HDI Global Specialty SE v Wonkana No. 3 Pty Ltd [2020] NSWCA 296

Both decisions have been considered in further detail in an [article](#) by HFW's Thomas Neighbour, Richard Jowett, Brendan McCashin, Sam Wakerley and Jonathan Bruce.

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Covid-19 policy review: FCA deadline passes

Insurance firms are required by the FCA to have reviewed their products in light of the exceptional circumstances arising from the ongoing Covid-19 pandemic, which has caused the value of many insurance policies to their policyholders to be reduced because of the lockdown and other factors. Firms will be aware that the FCA published its guidance on 3 June 2020 and required insurance firms to have carried out the necessary review by 3 December 2020.

The guidance explains that the FCA expects insurance firms to identify any material issues caused by the Covid-19 pandemic which could affect *"the value of their products, and their ability to deliver good customer outcomes"*. Examples of products which are potentially affected include motor insurance (where there has been a marked reduction in the use of motor vehicles), medical insurance (where certain services including some health checks have been unavailable) and public liability insurance (where many venues such as pubs have been closed and those policies are therefore not required).

Once insurance firms have carried out the required review, they must also consider how they could take action in relation to insurance products which do not deliver value. Examples are delivering benefits in a different way, reducing premiums or partially refunding premiums which have already been paid.

It is expected that the FCA will select certain insurers to demonstrate how they have carried out the assessments required by the guidance, and if no action has been taken insurers must be ready to explain their reasons. More generally, whilst the 3 December 2020 deadline has passed, insurance firms will need to continue to monitor the potential effects of the pandemic on their products and therefore continue to monitor those products beyond the deadline.

The FCA's Guidance FS20/7: "Product Value and coronavirus: guidance for insurance firms" is available [here](#).

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SMCR and Coronavirus – Employers granted additional time to comply with the Certification Regime and Conduct Rules

The FCA has extended, from 9 December 2020 until 31 March 2021, the deadline for solo-regulated firms to have undertaken certain Certification and Conduct Rules requirements under the Senior Managers and Certification Regime (SMCR).

This presents a window of opportunity within which employers can implement training, review their employment contracts, and adjust their policies and procedures.

The FCA has given solo-regulated firms affected by the coronavirus pandemic more time to fully and properly implement the Certification Regime and to train staff effectively in the Conduct Rules.¹ Firms may wish to take this opportunity to make adjustments to their training programmes, employment contracts and policies and procedures, to ensure full compliance with the SMCR.

The extension extends to the following SMCR deadlines:

- the date the Conduct Rules come into force, for staff who are not Senior Managers, Certification Staff or board directors;
- the date by which relevant employees must have received training on the Conduct Rules;
- the deadline for submission of information about Directory Persons to the Financial Services Register (**FS Register**); and
- the statutory deadline by which firms must have carried out their first assessment of Certified Persons as fit and proper (following the delay of such deadline implemented by a HM Treasury statutory instrument)².

Who does it affect?

The relevant extensions apply to all solo-regulated firms (except benchmark administrators). Appointed Representatives also fall within the scope of the extension to the reporting deadline for Directory Persons and therefore need to submit the relevant information to the FS Register by 31 March 2021.

What must you do?

Firms are required to take the following steps by 31 March 2021, or preferably sooner if possible³.

- certify relevant staff based on sound fitness and propriety (**F&P**) assessments;
- deliver high-quality training to staff on the Conduct Rules. This will need to be tailored to deal with the differing obligations placed on Senior Managers, Non-Executive Directors, Certified staff, and other staff to which the Conduct Rules apply; and

- submit in a timely manner the required Directory Persons data to the FCA to be included on the FS Register.⁴

As well as complying with the above requirements under the Certification Regime and Conduct Rules, it is essential that firms also maintain effective systems and controls to meet their obligations under the Senior Managers Regime, which is already in force.⁵ In particular, firms should note that the Conduct Rules continue to apply for Senior Managers and Certified staff.

Additional employment considerations

In addition to the above, there are two key steps from an employment perspective which firms should consider during this window of opportunity.

Firstly, firms may wish to review their employment contracts to ensure that relevant staff are expressly obliged to comply with those requirements under the Certification Regime and Conduct Rules which apply to them. For example, Certified staff should be explicitly required to comply with the Conduct Rules and F&P assessment requirements, and to provide prompt details of any changes to personal circumstances. The latter requirement will enable firms to update Directory Persons data for the FS Register promptly. Firms should seek legal advice on how to implement any necessary amendments to employment contracts.

Secondly, firms may wish to review their policies and procedures to ensure that they are SMCR-compliant. Not only will firms require an F&P assessment policy and procedure, a breach-reporting policy and, if an enhanced firm, a handover policy for Senior Managers, but other policies may also be affected. For example, a disciplinary policy should include a breach of the Conduct Rules as a specific example of misconduct, and should also state that disciplinary measures taken against an employee may (i) impact on the employee's assessment as fit and proper to perform their role, and (ii) be disclosed in a regulatory reference.

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Footnotes

- 1 The FCA's Policy Statement (PS20/12) confirming its final rules can be accessed here: <https://www.fca.org.uk/publication/policy/ps20-12.pdf>
- 2 The Bank of England and Financial Services Act 2016 (Commencement No. 6 and Transitional Provisions) (Amendment) Regulations 2020
- 3 The FCA has made it clear that it will not make a further extension beyond 31 March 2021.
- 4 Further FCA guidance on submitting Directory Persons data for inclusion on the FS Register, including in relation to landing slots, can be accessed here: <https://www.fca.org.uk/firms/directory-persons>
- 5 Further guidance on applying the SMCR is set out in the FCA's "SM&CR Guide for FCA solo-regulated firms", which can be accessed here: <https://www.fca.org.uk/publication/policy/guide-for-fca-solo-regulated-firms.pdf>

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