

The complaint

Mr F complains about the decision of Hiscox Insurance Company Limited to decline his business interruption insurance claim, made following the COVID-19 pandemic.

What happened

The following is intended merely as a brief summary. Mr F operates as a travel agency. This was a partnership he had with his wife, who has sadly passed away during the course of this complaint. I would like to express my sympathy to Mr F for his loss. From this point though, I will just refer to Mr F and Hiscox.

Mr F held a commercial insurance policy underwritten by Hiscox. The policy provided cover for a number of areas of risk, including business interruption. The policy was annually renewable. This complaint relates to the policy that ran from April 2020 to April 2021. Mr F has a separate complaint with the Ombudsman Service about a claim on the policy that existed prior to this renewal. Whilst the overall circumstances of, and hence my findings in relation to, both of these complaints are fundamentally the same, the cover provided by the policies was substantially different. And if, following this provisional decision, I am persuaded to come to a different conclusion, the redress for each complaint may be quite different.

The business interruption cover under this 2020 to 2021 policy provided for loss of income or profit caused by certain events. The events covered included:

“Public authority

11. your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following: ...

b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority...”

Following the introduction in 2020 of the government-imposed restrictions introduced to limit the spread of COVID-19, Mr F contacted Hiscox to claim for his losses. The claims were considered under the term above, but Hiscox said that Mr F had not suffered an inability to use his premises as a result of the Government’s restrictions. Hiscox said that Mr F’s business was not one of those required to close by the restrictions, that people could leave their homes for the purposes of work, and that Mr F was able to continue acting as a travel agent in a non face-to-face capacity. Hiscox also said that it considered the restrictions which prevented travel were the substantive cause of loss rather than the ability of customers to visit Mr F’s business’ premises.

Mr F said that his business did not provide an online booking system and that only 1% of its sales were by phone. He said that face-to-face transactions were a discrete part of his business that he had been unable to offer due to the restrictions. And that it was this inability to make face-to-face sales that was the cause of his losses.

Mr F was also unhappy with the service he received from Hiscox, including delays and issues with communication. Hiscox apologised for these and offered Mr F £250 compensation – which effectively is split across this and the other complaint Mr F has.

Mr F ultimately brought a complaint about this to the Ombudsman Service. However, as our Investigator has not been able to resolve it, the complaint was passed to me for a decision. I issued my provisional decision on 18 July 2023 and asked both parties for any additional evidence they wanted me to consider.

In my provisional decision I said:

“Following the outbreak of COVID-19 in 2020, the Government introduced various restrictions. COVID-19 is a disease that would fall into the clause above. So, if these restrictions caused an inability of Mr F to use his premises, he has a potential claim.

However, even if there was an inability to use the premises, this would have to be the ‘proximate cause’ of Mr F’s losses.

During the majority of the periods Mr F is claiming for, Mr F’s business as a travel agent would not have been directly forced to close by the government-imposed restrictions. Travel agents were not, for example, one of the businesses listed in the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 as being required to close. This is not the case in relation to, for example, the period from 6 January 2021 when travel agents were included on the list of businesses required to close¹.

However, whether or not the business was forced to temporarily close, Mr F’s argument is essentially that people would not have been able to visit the premises as a result of the restrictions requiring people to remain at home except for certain reasons. As people would not have been able to leave their homes without reasonable excuse, they would not have been able to attend Mr F’s premises to book holidays, etc.

It does not appear that any of the facts here are greatly disputed. The questions are whether this restriction caused an inability to use the premises for the discrete purpose of face-to-face transactions, and whether this, in turn, caused Mr F’s business to suffer losses.

Mr F has said that because the general public were not allowed to leave their homes, without a reasonable excuse, they were unable to come to his business premises. This is true. It does not seem likely that visiting a travel agent would be considered a reasonable excuse.

However, I am not entirely persuaded that this means there was an inability to use the premises for the purpose of the business. The ‘inability’ was in relation to people leaving their home, not using the premises. Other than from January 2021, there was no restriction directly preventing people entering the premises or on the premises being used. So, whilst the inability of people leaving their homes would have indirectly impacted the business, I am not persuaded there was an inability to use the premises (other than the period travel agents were specifically required to close).

Regardless, even if I am wrong on this point and/or in relation to the period from 6 January 2021, this still leaves the second question. If there was an inability to use the premises, was this the proximate cause of Mr F’s business suffering a loss?

At this point it is necessary to consider the situation at the time. There were a number of issues that were causing difficulties for businesses to trade. Many of these arose

¹ See The Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021

out of the wider circumstances of the pandemic – and so had the same underlying cause.

Mr F has referred to various legal arguments around insurance claims where there is potentially more than one cause of loss. Mr F has indicated some acknowledgment that the wider travel restrictions that existed contributed to the downturn in bookings. But has said that this is an uninsured but non-excluded risk, and is due to the same underlying reason for the losses – i.e. the COVID-19 pandemic. His argument therefore is that these wider circumstances is not a reason for the claims not to be met. He considers that there was at least one insured reason for this loss and so his claims should be covered.

Mr F has referred to the Supreme Court's comments in the FCA test case². And has submitted that the restriction on people leaving their home, and the impact of this on the ability to conduct face-to-face transactions, "*in combination with many other similar uninsured events..., brings about a loss with a sufficient degree of inevitability, even if the occurrence of the insured peril is neither necessary nor sufficient to bring about the loss by itself.*" Mr F has seemingly made this comment based on paragraph 191 of the judgment.

However, whilst I have taken account of the comments of Mr F and the judgment of the Court in relation to this, this point is really only one part of the relevant consideration. The question is not, in my view, only whether there is more than one cause of loss. But also whether the events are each of equal causal efficacy. The events don't have to be precisely equally effective, but they must have a similar level of efficacy in order for Mr F's argument to be successful.

When the Court was making the comments referred to above, it was talking about the many separate occurrences of COVID-19 that were happening in the country. It is easy to see that separate occurrences of a disease can each be of an equal causal efficacy when thinking about the Government's decision making process (which was largely what the Court was considering here).

However, it does not automatically follow that restrictions on people leaving their homes was an equally effective cause of the losses Mr F's business sustained as, for example, the wider travel restrictions. Each case will turn on its own facts and the circumstances have to be considered carefully.

This can be seen by the Court's own comments at paragraph 244:

"...we would point out that this interpretation depends on a finding of concurrent causation involving causes of approximately equal efficacy. If it was found that, although all the elements of the insured peril were present, it could not be regarded as a proximate cause of loss and the sole proximate cause of the loss was the COVID-19 pandemic, then there would be no indemnity. An example might be a travel agency which lost almost all its business because of the travel restrictions imposed as a result of the pandemic. Although customer access to its premises might have become impossible, if it was found that the sole proximate cause of the loss of its walk-in customer business was the travel restrictions and not the inability of customers to enter the agency, then the loss would not be covered."

I should stress here that I don't consider the Court was making a finding that these two particular causes were not of equal efficacy in relation to a travel agent. It was

² *The Financial Conduct Authority & Ors v Arch Insurance (UK) Ltd & Ors* [2021] UKSC 1

merely using this as a hypothetical example. The Court was not tasked with considering the impact of the pandemic on travel agents specifically, and crucially the above quote includes “if it was found...”. This is a finding that, effectively, I am currently tasked with making – more precisely, I am tasked with considering what finding a court would most likely make were it actually determining this point.

So, whilst losses caused in part by an uninsured but non-excluded risk could still be covered by a policy if an insured risk also caused the loss, this is only the case where the two causes are of approximately equal causative effect. As such, the question here then is whether the proximate cause of loss is the wider travel restrictions, etc. or the loss of face-to-face business, or both of these with an equal effect – i.e. can it be found that they are causes of the loss with an equal efficacy.

I have previously asked Mr F for financial information covering the relevant period, but this has not been provided. My intention here was to use this information to assess the impact of the wider situation on the part of Mr F’s business that remained functional – the phone-based 1% of sales. If these remained constant or increased, it might be arguable that a similar trend would have been seen in the face-to-face sales had customers been able to visit the premises. However, if the phone-based sales also significantly decreased, it might indicate that it was the wider circumstances of the pandemic that were the proximate cause of any loss of income Mr F’s business might suffer. Similarly, the impact on sales at times within the policy term when potential customers were able to leave their home could be considered. Without this information, I’ve had to think about what is more likely than not.

Due to what was an ongoing global pandemic, I think it likely that holiday bookings in general would have significantly decreased. I don’t think that, even if there had not been a restriction on people leaving their homes for local movement, people would have been booking holidays as frequently as they used to. There were restrictions on global travel at various times, either almost completely preventing this or requiring quarantine periods. And even outside of these, I think it’s likely there was a general downturn of people wanting to travel due to fear of exposure to Covid-19. I also don’t think the proximate cause of this downturn was the inability of people to leave their homes to attend travel agents. The restrictions on people leaving their homes only existed during certain periods, yet I consider there was most likely a significant downturn in Mr F’s business in any event outside of these periods which was, in my view, the main cause of the losses Mr F experienced.

I have also thought about what the Court said around trend clauses. Essentially, the Court said that it is not reasonable to reduce the settlement of a valid claim because of the wider trend caused by circumstances arising out of the same underlying or originating cause. So, where there is a valid claim for losses because a business was forced to close because of the pandemic, the fact that demand may have decreased due to the pandemic more generally should not be a reason to reduce the claim settlement. However, this still requires there to be a valid claim. And that will only be the case where the proximate cause of loss is the insured cause.

To quote from paragraph 309 of the Court’s judgment when discussing a situation involving physical damage to insured premises as well as the wider area:

“...business interruption loss which arose because both (a) the hotel was damaged and also (b) the surrounding area and other parts of the city were damaged by the hurricanes had two concurrent causes, each of which was by itself sufficient to cause the relevant business interruption but neither of which satisfied the “but for” test because of the existence of the other. In such a

case when both the insured peril and the uninsured peril which operates concurrently with it arise from the same underlying fortuity (the hurricanes), then provided that damage proximately caused by the uninsured peril (ie in the Orient-Express case, damage to the rest of the city) is not excluded, loss resulting from both causes operating concurrently is covered.”

I have underlined what I consider to be key in Mr F’s case. Before considering any issue over trends, it is necessary that each of the potential causes of loss are concurrent and that they were equally effective causes of the loss. For the reasons already given, I am not satisfied that this is the case in Mr F’s claim.

This means that, even if I was persuaded that the restriction on people leaving their homes caused an inability of Mr F’s business to use its premises – which I am not, I do not consider this to be the proximate cause of Mr F’s losses. So, I don’t consider Hiscox acted inappropriately when declining Mr F’s claim. It follows that my provisional findings are that I would not uphold this complaint in relation to Hiscox’s decision to decline Mr F’s claim.

It is clear however that Hiscox did not deal with Mr F’s claim as quickly as it might have. And Mr F has complained about what he considered to be systematic delays in Hiscox’s handling of his claim. Hiscox has offered Mr F £250 in relation to all the claims he made across both policies.

Hiscox, as with most insurers during the period in question, would have been having to deal with large numbers of claims. It is perhaps not surprising that this led to some delays and that Mr F did not receive the service he might reasonably expect. But, whilst I note this and appreciate that business interruption insurance claims generally can be complicated and can take some time to fully resolve, it is also clear that Mr F had to wait longer for a resolution than he ought to. Hiscox accepts this, so the question is whether £250 adequately compensates Mr F for these issues. I don’t think that it does.

As I have mentioned above, Mr F’s complaint has been split between the claims made on the 2019 to 2020 and the 2020 to 2021 policies. I think that, due to the issues Mr F experienced with making these claims, he should be awarded £600 compensation in total. This means Hiscox should pay him £300 in relation to this particular complaint.”

Hiscox did not respond to the provisional decision. Mr F did. He said his records showed a massive decline in retail sales during the lockdown periods and a significant gain in relation the periods in between. He also pointed out that bookings were made for holidays a long time in advance.

I requested the records Mr F was referring to, confirming these had been previously requested but not supplied. He provided details of bookings taken from the end of March 2020 to the end of 2021. I then requested both the figures relating to the period prior to the first lockdown, and a split of the figures for the telephone and store sales for the periods. No response to this was received from Mr F.

What I’ve decided – and why

I’ve considered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint.

Neither party has commented on the level of compensation I have referred to above. And I

am satisfied this is an appropriate award in the circumstances.

I am grateful for the booking figures Mr F has provided, but as I have explained these only show part of the picture. I don't know how the bookings in between the national lockdowns compare to sales prior to the pandemic. So, I am unable to use these to determine whether holiday bookings in general were higher or lower than would normally have been expected.

And without a split, or clear details, of what happened in relation to the part of Mr F's business that remained operational – the telephone sales – I am unable to use the figures supplied to think in more depth about whether the proximate cause of any loss was the wider circumstances or the inability of customers to leave their homes.

What the figures do show is that there was an overall increase in sales once the first lockdown period ended, and then a decline again when the second period started. On the face of it, this does suggest that it was these lockdown periods that had an impact on the sales. But it isn't clear whether this impact was on the face-to-face or telephone sales, or both.

And the lockdown periods were not just about whether people could leave their homes. These periods were introduced at points in time when the Government and public had an increased cause to be alarmed about the pandemic. At these times, cases of COVID-19 were elevated. Not only would this have led to the introduction of restrictions, but I also think it would have led to a decrease in people being willing to book holidays.

It wasn't until mid-2021 that the figures show a significant increase in bookings. This coincides with both the removal of various restrictions and the general relaxation of people's behaviour. But this then sharply drops off after October 2021. No new rules were introduced at this point that prevented people from leaving their homes. Rather the emergence of the omicron variant of COVID-19 seems, in my opinion, to have had an impact on public behaviour. This supports my conclusion that the proximate cause of loss during these periods was the wider circumstances, rather than restrictions imposed that caused any inability to use Mr F's premises.

Whilst I note Mr F's comments about clients booking for periods long in advance of when they intended to travel, I still consider it more likely than not that there was a general downturn in bookings as a result of the wider circumstances.

Additionally, none of this addresses the first fundamental question in this case. This is whether there was an inability to use the premises due to restrictions imposed. And I do not consider the inability of people to leave their homes caused an inability to use the premises.

There was a period from January 2021 where Mr F's premises would have actually been forced to close as a result of restrictions imposed on it. However, it seems that during this period numbers of bookings were higher than they had been in the first lockdown period. Given these were periods when, presumably, all of these bookings were being placed via telephone this again supports the conclusion that it was public behaviour and willingness to actually book during these periods – rather than an inability to leave their homes – that was the driver behind changes in booking numbers. As people became more accustomed to the pandemic, their concern over making bookings seems to have decreased.

Ultimately, having considered the evidence provided, I have come to the same conclusion as that in my provisional decision and expressed above.

Putting things right

Hiscox Insurance Company Limited should pay Mr F £300 compensation for the service failings experienced, if it has not already done so.

My final decision

My final decision is that I uphold this complaint in part. Hiscox Insurance Company Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 7 September 2023.

Sam Thomas
Ombudsman