DRN-3595648

The complaint

A limited company, that I'll refer to as C, has complained about Hiscox Insurance Company Limited's refusal of a claim for business interruption cover under its business insurance policy.

Mr S, as a director of C, has brought the complaint on its behalf. Mr S is also represented in this complaint but for ease, I will refer to Mr S or C throughout.

What happened

C is engaged in sports media activities. In April 2020, C contacted Hiscox to make a claim for business interruption, as a result of the Covid-19 pandemic.

C said that as a result of the Government restrictions imposed in March 2020, it had to close its business, which resulted in a loss of revenue.

Hiscox refused the claim. C did not agree the claim was not covered. In the meantime, the Financial Conduct Authority ('FCA') issued a business interruption insurance 'test case' in which it asked the courts to consider a sample of policy wordings and how they should respond to the pandemic. One of the policies considered in the test case had the same wording as C's policy with Hiscox. The Supreme Court handed down its judgment in January 2021.

Hiscox reconsidered C's claim, following that judgment, but it maintained its refusal of the claim, as it did not think the outcome of C's claim was impacted by the case. Hiscox said the policy provides cover for losses arising as a result of C not being able to use its premises following closure by a public authority. However, Hiscox said that C was not one of the types of business that was required to close as part of the Government's March 2020 restrictions and had been permitted to continue to operate.

Hiscox also said C's website makes clear that it is involved in various activities, including editorial and written content; player ratings systems; club features and so on, as well as video production. Hiscox said that most video production was away from the studio, so the studio video work was a small part of the business but in any event could continue. Hiscox said that any hindrance to the studio work continuing was due to measures on the movement of people, rather than any restriction imposed on the premises; and in any case the inability to use means C cannot use the studio at all and it is not established that it could not use the studio at all.

Ultimately Hiscox said C's losses were caused by the fact there was no live sport during the lockdown period, rather than any inability to use its premises.

One of our Investigators looked into the matter. She did not recommend the complaint be upheld, as she was satisfied Hiscox was entitled to refuse the claim. The Investigator said that whilst C may have suffered business interruption, and a loss of income, it was not a type of business that had been required to close by the Government in March 2020. So, it had not

been caused an inability to use its premises, as required by the policy. The Investigator didn't think the claims were covered under any other part of the policy either.

Mr S does not accept the Investigator's assessment. He has made a number of submissions in the initial complaint and in response to the Investigator. I've considered everything Mr S has said but have summarised the main points below:

- It is incorrect to only consider whether it was mandated under the Government restrictions to close. The Supreme Court concluded there were some instances where measures such as social distancing could lead to an inability to use the premises.
- It was able to continue office based work and those employees could work from home but its studio was very small, 2.5m by 3m, and each video requires three or four people in the studio at the same time (interviewer, interviewee, presenter, sound engineer and cameraman). It would have been impossible to use the studio without breaching social distancing regulations and the risk of prosecution from the Health and Safety Executive.
- There was therefore an inability to use a discrete part of the insured premises, for photographic and film production, which was the main part of its business.
- Hiscox has misunderstood the business. Before the pandemic it was a video led media company. Since then it has had to change the work it does.
- Hiscox says there was no sport being played, so it couldn't have produced any content anyway but in fact, as there was no live sport, there was an increased demand for content such as interviews, discussion and analysis
- It lost around £90,000 and spent around £20,000 in website development to mitigate losses looking for alternative ways to generate revenue. These increased costs of working should also be covered.

As the Investigator was unable to resolve the complaint, it has been passed to me.

C also later made claims in respect of the two other lockdown periods, from November 2020 and January 2021. Hiscox turned down the second and third claims on the same basis as the first claim. However, as they are separate claims and relate to different periods of time, I am only going to address the first claim for the period from March 2020 in this decision.

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.

It's evident from C's submissions that the Covid-19 pandemic has had a significant financial impact. However, I won't be upholding its complaint. I'll explain why.

Business insurance policies provide protection for some of the common things which might happen to a business. No policy will cover every eventuality however and each policy may provide different cover.
I have considered C's entire policy carefully. The business interruption section of the policy provides cover for a number of events, most of which clearly do not apply to the circumstances of this claim. I have considered the section of cover that both parties consider is relevant to this claim below:

<u>Public Authority</u>

This provides cover for losses, including increased cost of working, caused by:

> *"your inability to use the office due to restrictions imposed by a public authority during the period of insurance following …*
> *b. an occurrence of a notifiable human disease …"*

The policy defines 'office' as being "*the office space you occupy at the premises shown in the schedule".*

I think it is reasonable to consider this includes the studio within the offices.

The term "*inability to use*" in relation to policies with the same wording as B's was considered as part of the FCA's test case. Paragraph 129 of the Supreme Court's judgment said:

> *"The public authority clauses in Hiscox 1-4 (set out at para 111 above) do not cover all business interruption due to "restrictions imposed" by a public authority following an occurrence of a notifiable disease. They apply only where the interruption is caused by the policyholder's "inability to use" the business premises due to such restrictions."*

The court went on to say, at paragraph 136*:*

> *"… an inability of use has to be established; not an impairment or hindrance in use."*

There were restrictions imposed by a public authority following an occurrence of Covid-19 and Covid-19 is a notifiable human disease. I don't consider that this occurrence needed to have been either at or in the vicinity of the premises. And I don't consider that the restrictions needed to have specifically targeted C's business alone.

The court also made it clear that it may be possible for a business to claim for losses that arose out an inability to use its premises for a discrete part of its business activities. As such, this extension would provide cover to a business that had been caused an inability to use their insured premises, for all or for a discrete part of its business. So the question is whether or not C suffered an inability to use its premises, or a discrete part of them.

C's premises consisted of a video production studio and offices. It accepts that office based staff were able to work from home but says the studio was not able to be used.

An email from Mr S to Hiscox dated 14 May 2020 in support of the claim says C is a "*global sports entertainment website that delivers* …[sports] *news, live scores and gaming information and betting tips on … matches around the world. We derive a substantial part of our revenues from betting company advertising and promotion, which is directly linked to live … match coverage of matches and match previews with betting tips*". He went to say that as live sport shutdown, it substantially reduced its user base and revenues. It tried to continue and staff worked from home "*but our revenues from gaming for this period have been substantially affected by no live … [sports] and also certain other advertising promotions with … equipment manufacturers and sponsors*".

Mr S does not mention the studio or video led only work at this stage. I am not therefore persuaded that the majority of the business was video and film production. However, it doesn't really matter how much was to do with the studio, as if C was unable to use the studio, it would only be the loss of revenue directly from the studio work that would be covered.

The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the March Regulations) were important in setting out which businesses were required to close.

C's business doesn't seem to fall clearly into any of the types of business specifically mentioned in the March Regulations, either as being a business that was required to close or that was permitted to stay open. I've therefore considered all the evidence to determine whether it is reasonable to conclude that C was required to close.

Non-essential shops and some other retail service industries (such as hair salons and leisure centres) were listed specifically as being required to close, as were theatres, cinemas, museums. These categories of business would all seem to be places that members of the public could gather or attend for recreational, non-essential retail purposes and sometimes for services that could not be undertaken at a distance (such as hair dressing services).

The regulations also stated that certain professional services firms were not required to close.

I also note that Section 4 (5) (a) of the 26 March 2020 Regulations stated that while theatres and cinemas (and other such venues) were required to close to public visitors, those premises could be used to "*broadcast a performance to people outside the premises, whether over the internet or as part of a radio or television broadcast".* This suggests people could work together at venues such as C's on content to be broadcast.

The March Regulations also allowed people to leave home to attend work, if they were unable to work from home. I consider that both C's own employees and any interviewees that might need to attend its premises would be seen to be travelling for the purposes of work when attending the premises.

Having considered the types of businesses required to close and those that were permitted to stay open, as well as the comments about the use of theatres and cinemas etc for broadcasting, I think it is reasonable to conclude that C was not required to close the studio as a result of the March Regulations.

C says that it is not just the March regulations that are relevant and that, regardless of the March regulations, the studio was too small to be safely used.

I agree that for there to be cover under the policy, the restrictions imposed do not necessarily always have to have the force of law behind them and the March regulations are not the only consideration. But I do consider that there must be a mandatory instruction that is given by a public authority which causes an inability to use the premises. And as stated above, the Supreme Court stated that the inability to use the premises must be absolute and not a mere hindrance or impairment.

There might have had to be some adjustment about how the premises were used, to comply with social distancing regulations and other guidance, but I don't think C was unable to use the studio entirely. It might not have been possible to use the studio in the way C would normally have done so but it seems to me this would amount to a hindrance, rather than an inability to use it at all.

Whilst I do not doubt C suffered a disruption to the normal operation of its business, the policy requires that there be an inability to use its premises. And I do not consider C suffered such an inability to use its premises. As such, I do not consider Hiscox acted inappropriately in declining C's claim under this section.

And whilst social distancing guidelines may have made certain parts of its operation more difficult, the policy requires there to be an inability to use the premises. This can be contrasted with other policies that provide cover where there is a "*hindrance of use*". I don't think making the changes to its normal operation that would have been required by these guidelines would have led to an inability to use the premises. So, I am satisfied Hiscox's decision to decline the claim was in line with the policy, and in all the circumstances of this case fair and reasonable.

Having considered the rest of the policy carefully, I do not consider there to be any area of cover that means Hiscox should have met C's claim.

My final decision

For the reasons given above, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask C to accept or reject my decision before 17 March 2023.

Harriet McCarthy
Ombudsman