DRN-3657000

The complaint

Mrs C has complained that Hiscox Insurance Company Limited unfairly turned down her business interruption insurance claim after she closed her business premises due to the Covid-19 pandemic.

Mr J, a loss assessor, has brought the complaint on Mrs C's behalf.

What happened

Mrs C held a business interruption insurance policy with Hiscox. She is a medical professional with a private practice.

After government restrictions due to Covid-19 were first introduced in March 2020, she says she wasn't required to close but her professional body only allowed her to treat patients who had a high medical risk or were in urgent need of treatment. Mrs C said she only treated patients with routine conditions. Mrs C closed her practice until 1 June 2020.

Mrs C claimed on the policy for her business interruption losses.

The Financial Conduct Authority ('FCA') pursued a business interruption insurance 'test case' in which it asked the courts to consider a sample of policy wordings, including different types of Hiscox policies, and how they should respond to the pandemic. The Supreme Court handed down its judgment in January 2021. Hiscox subsequently reviewed Mrs C's claim in light of the judgment but maintained that cover didn't apply in her circumstances. It said her losses weren't covered under the policy because government regulations hadn't prevented Mrs C from using her premises.

Mrs C brought a complaint to this service. Our Investigator didn't recommend the complaint be upheld. She thought Hiscox had declined the claim in line with the policy terms.

Mrs C asked for an Ombudsman's decision. She said she'd had to comply with the instructions of her professional body regarding what treatment she could offer. She thought the professional body should be classed as equivalent to a public body for the purpose of the policy wording.

Mr J pointed out that Mrs C had been prevented from accessing the premises for the discrete purpose of routine treatment which he thought should be covered by her policy.

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.

Business interruption insurance offers protection from risks common to a business, but different policies can provide different types of cover. What is and isn't covered is set out in the policy terms and conditions. I've therefore looked carefully at this particular policy to see

whether Hiscox has acted fairly, reasonably and in line with the terms and conditions of the policy when declining the claim.

The policy covers business interruption caused by:

*"4. **your** inability to use the **business premises** due to restrictions imposed by a public authority following:*

a. a murder or suicide;
*b. an occurrence of a **notifiable human disease**;*
c. injury or illness of any person traceable to food or drink consumed on the premises;
d. vermin or pests at the premises."

The most relevant of these is "b". So, for this term to provide cover, the interruption to Mrs C's health care practice would need to be as a result of her inability to use the insured premises due to restrictions imposed by a public authority following an occurrence of any notifiable human disease.

It doesn't appear to be in dispute that Covid-19 is a notifiable human disease.

In my opinion, Mrs C falls into the category of businesses listed in Part 3 of Schedule 2 to the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 as "*other medical and health services*". The regulations expressly permitted these businesses to remain open.

In the test case the Supreme Court said at paragraph 116 *" 'restrictions imposed' by a public authority would be understood as ordinarily meaning mandatory measures 'imposed' by the authority pursuant to its statutory or other legal powers. 'Imposed' connotes compulsion and a public authority exercises compulsion through the use of such powers. We would not, however, accept that a restriction must always have the force of law before it can fall within this description."*

I think a reasonable person would understand the words "*restrictions imposed by a public authority*" as an instruction which has to be complied with. The test case gives the example of a public health officer giving an instruction to close a restaurant immediately after discovering vermin in it with the legal order to close the restaurant following later.

The Supreme Court went on to say, at paragraph 136 of the judgment: "*… an inability of use has to be established; not an impairment or hindrance in use*."

In paragraph 144 of the judgment referring to the "*inability to use*" wording in the policy, the Supreme Court said: "*it must be an inability to use rather than hindrance or disruption. It is likely that it will be difficult for Category 3 and Category 5 businesses which were allowed to remain open to demonstrate the requisite inability*."

From what Mrs C has said, she feels her business was impacted because of restrictions on the type of treatment she could carry out which had been imposed by her professional body.

To practice in Mrs C's profession, you must be registered with the Health and Care Professions Council in the UK (HCPC). However, membership of the professional body referred to by Mrs C is optional. That body describes itself as a "*membership body and a trade union*". It offers a range of services to its members including insurance cover for

professional indemnity and other risks. It is also an independent trade union which (amongst other things) negotiates pay and conditions of service within the NHS.

I've looked at what Mrs C's professional body told its members in 2020. On 25 March it said:

"***Whilst your clinic can remain open, we continue to advise that you treat those who have a high risk or urgent … need only*** *and not to treat low … risk routine patients*".

On 27 March it said:

"*We would like to reassure members that all our guidance which we have issued recently has been written in line with legislation, UK Government advice, WHO guidance and TUC support."*

That suggests to me that Mrs C's professional body wasn't a public body imposing restrictions but rather it analysed, interpreted and communicated to its members the effect of government restrictions and advice.

Mr J has drawn my attention to a note to members issued by the same professional body on 16 April 2020. That referred to concerns that some members were "*working as normal, including not screening/triaging their patients and not spreading their appointments out to avoid cross over as much as possible*". It went on to say that members must follow government, HCPC and its guidelines at all times and if they failed to do so, they might be putting their insurance and registration at risk. It seems to me that this was more to do with measures designed to reduce the spread of Covid-19 in the workplace as opposed to restrictions which would have led to Mrs C being unable to use her business premises.

I don't accept Mr J's point that Mrs C was prevented from accessing the premises for the discrete purpose of routine treatment. As explained above, I don't think there was a mandatory instruction given by a public authority which prevented Mrs C from using her premises for a discrete part of her business.

I appreciate my decision will be disappointing to Mrs C. But, having considered the matter carefully, I don't think I can fairly require Hiscox to pay this claim.

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 18 January 2023.

Elizabeth Grant
Ombudsman