

## **The complaint**

Mrs P is a sole trader, trading as S. She complains about the settlement of her business interruption insurance claim by Hiscox Insurance Company Limited. The claim was made as a result of the COVID-19 pandemic.

## **What happened**

The following is intended only as a brief summary of events. Additionally, whilst a number of other individuals have been involved on both sides, for the sake of simplicity I have largely just referred to S and Hiscox.

S operates as a hairdressers and held a commercial insurance policy underwritten by Hiscox. The policy provided a number of areas of cover, including for business interruption. Following the government-imposed restrictions introduced in March 2020 as a result of the COVID-19 pandemic, S made a claim on the policy for its loss of income.

Ultimately, Hiscox agreed that the claim was covered, and offered S a settlement. Several issues were raised by S at this time, but they've largely been dealt with. However, one of the issues S raised was that Hiscox should not have deducted from the settlement the payments S received from the Government under the Self-Employed Income Support Scheme ("SEISS").

Hiscox did not change its stance and ultimately S's complaint was brought to the Ombudsman Service. S said that the SEISS payments were not made to support specific fixed costs and that deducting them from the claim settlement was at odds with the fact other Government grants which were used to support businesses have not been deducted.

Our Investigator largely agreed with S and recommended the complaint be upheld. She said that the SEISS payments did not have to be used by a receiving business for any particular purpose, so they could not be said to be a saving against any particular cost. She also did not consider the payments were made for work S had done, so she did not consider they were takings of the business which might act to reduce S's losses.

Hiscox disagreed. It said that the SEISS payments were analogous to payments under the Coronavirus Job Retention Scheme ("furlough"). And that the Ombudsman Service has considered such furlough payments to be deductible from claim settlements. Hiscox also said SEISS payments were not one of the grants included in the Financial Conduct Authority ("FCA") list of payments that should not be deducted from settlements.

Hiscox considered the SEISS payments must be considered income, a saving, or a mitigated loss. They were calculated and paid to replace the business' income. And that if they were not deducted, the customer would be better off than they would have been had a claim not been required – which would breach the indemnity principle.

As Hiscox did not agree with the Investigator's recommendation, this complaint was passed to me for a decision.

Since then, a judgment has been handed down in *Stonegate Pub Company v MS Amlin and Others* [2022] EWHC 2548 (Comm) (“Stonegate”). This judgment, in part, considered whether furlough payments should be deducted from relevant business interruption insurance claims. As Hiscox consider SEISS payments to be analogous to furlough payments, I considered this judgment to be relevant. So, I contacted Hiscox to set out my initial thoughts.

I explained that I considered there were key differences between the SEISS payments and the furlough ones. I thought that the furlough payments were made specifically to cover the wages of employees who were not working, whereas the SEISS payments were made even where businesses remained in operation and the self-employed owners were still working. There was no requirement for SEISS payments to be used by receiving businesses in any particular way. And that the SEISS payments did not directly correlate the reduction in turnover of the relevant businesses.

I felt these SEISS payments were more akin to the other business grants provided by the Government, such as the Small Business Grant, that the FCA had said insurers shouldn’t deduct from claim settlements. I also did not think the SEISS payments would be interpreted as income, nor that they reduced the expenses or costs of the business.

Hiscox responded, saying that the common law position – as outlined in *Stonegate* – meant that SEISS payments could be deducted. Hiscox felt these were payments that reduced the loss S experienced. And the Government hadn’t expressly intended S to benefit from the payments to the exclusion of Hiscox. Hiscox also considered that the SEISS payments were either a saving or income.

As Hiscox did not agree to change its stance, I’ve gone on to reach a final determination.

### **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.

Hiscox has provided detailed submissions as to why it considers SEISS payments made to S can be fairly deducted from the claim settlement. Hiscox has argued that the wording of S’s policy allows for this, on the basis that these payments are either income or a saving, and that even if the policy does not allow for this the indemnity principle under which insurance operates means these payments should be taken into account – that not doing so would lead to S being put in a better position than it would have been had a claim not been required.

I will deal with each of these aspects in turn. Firstly though, I think it is first necessary to think about what these SEISS payments were, why they were made, and how they compare to other funding businesses received from the Government during the COVID-19 pandemic.

### ***Government funding during the pandemic***

The Government provided businesses with funding via a number of different schemes. The initial raft of schemes included furlough, SEISS, and various other grants (including Small Business, Retail, Hospitality and Leisure or Local Authority Discretionary grants – which I will refer to collectively as “business support grants”).

The arrangements for both furlough and SEISS were introduced under powers granted by

sections 71 and 76 of the Coronavirus Act 2020. The arrangements were set out in Directions issued by the Government in April 2020. Entitlement to a payment under one of these schemes did not prevent a business from receiving any of the other grants or payments to which it might be entitled.

The Direction relating to SEISS said:

*“The purpose of SEISS is to provide for payments to be made to persons carrying on a trade the business of which has been adversely affected by the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease.”*

The payment made under the first version of SEISS, introduced in April 2020, was the lower of £7,500 or 80% of the business’ estimated profit for a three-month period.

All that was required to claim was for an eligible business to have “*been adversely affected by reason of circumstances arising as a result of coronavirus or coronavirus disease*”. It isn’t clear what “adversely affected” required, but it is clear that a business need not have suffered either a £7,500 or 80% loss of profit in order to receive this sum from the Government. Later iterations of the scheme made this even more clear, stating that a business suffering a 30% reduction in turnover would be entitled to a payment equivalent of 80% loss of profit.

Businesses receiving SEISS payments were also not required to use these funds for any particular purpose. Whilst some businesses would have used the money, either partially or wholly, to provide personal finance to the owner of the business, others would not. The money may have been spent on operating costs, invested into the business, or saved for later use.

These points can be contrasted with the arrangements for the furlough scheme. The relevant Direction from the Government for this scheme made it clear that furlough payments were to be used to pay employment costs. The Direction stated:

*“The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease.”*

And:

*“The total amount to be paid to reimburse any employer national insurance contributions must not exceed the total amount of employer’s contributions actually paid by the employer for the period of the claim.”*

My understanding is that separate furlough claims were required for each calendar month. However, claims under SEISS were for a single one-off payment relating to the full three-month period of the scheme.

The business support grants were introduced to “*support [businesses] with their cashflow and fixed costs*”<sup>1</sup>. The Government did not specifically state that these payments were to cover uninsured losses only or that they were made to exclusively benefit the recipient and not insurers. However, the FCA, HM Treasury, and a number of insurers through the

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<sup>1</sup> <https://www.gov.uk/government/speeches/chancellor-of-the-exchequer-rishi-sunak-on-covid19-response>

Association of British Insurers (“ABI”) made a number of statements in 2020 in relation to these grants. They confirmed that how these grants were treated for tax purposes was not determinative of how they should be treated for insurance claims. And that, ultimately, insurers should not be deducting the amount of such grants from the settlements of relevant claims.

### *The insurance contract*

S’s policy provided cover for “Loss of Income” and defined this as:

*“the difference between your actual income during the indemnity period and the income it is estimated you would have earned during that period or, if this is your first trading year, the difference between your income during the indemnity period and during the period immediately prior to the loss, less any savings resulting from the reduced costs and expenses you pay out of your income during the indemnity period. We will also pay for increased costs of working and alternative hire costs.”*

I have added my own emphasis to the most relevant sections. Effectively, in order for Hiscox to fairly and reasonably deduct SEISS payments from the settlement of the loss of income sustained by S, these payments would need to either be actual income or a reduction in costs and/or expenses. Hiscox has argued that both of these could be said to be true, and that the payments must fall into one of these categories.

A number of the words within the above definition carried their own specific meanings within the policy. The policy defined income as:

*“The total income of the business carried out from your salon.”*

However, as this definition refers to income in itself, it is necessary to think about what this term would be understood as meaning by a reasonable person at the time the contract was entered.

Income has a different meaning in different circumstances. From an accounting point of view, it might mean one thing. And grants such as those claimable by business in relation to the COVID-19 pandemic have been treated as income for tax purposes. But its use in insurance may mean something different.

The judgment in *Stonegate*, with reference to *Riley on Business Interruption Insurance* (11th ed), suggests account classification in tax returns, etc. is not determinative for insurance purposes. The FCA “Dear CEO” letter in relation to business support grants also stated that:

*“We therefore do not consider the Government’s treatment of [business support grants] for tax purposes is a proper basis for insurers treating those payments as turnover under the policies”*

When setting out its arguments to this Service, Hiscox equated income with revenue. It is the understanding a reasonable person would have had, when the contract was entered, that is relevant though. Largely speaking, I think it likely a reasonable person would have considered “income”, in the context of the policy, to be the money generated by the insured activity of the business.

I acknowledge Hiscox’s point that the definition above does not require the money to be “generated by” the business. And that income is likely to be more than just the money paid for providing “hairdressing” – the business of S as set out on the policy schedule. As well as ancillary beauty treatment activities that might be provided, this would also likely include the

money the business received through, for example, interest on savings it held in a bank.

However, to a party entering this contract of insurance, I think it is reasonable they would consider “income” to refer to insured income. The definition refers to “total income”, but the policy then sets out that the insured loss is the difference between actual and received income (less savings). So, reading the contract as a whole, I think it a reasonable person would understand income to only refer to sums that would be claimable if not received.

It doesn't seem to me that a government grant, of the nature of those paid to businesses in relation to a novel situation such as the pandemic, is something a business would regard as being insurable income. So, I do not consider SEISS payments would be considered income as defined in the policy.

Hiscox has also argued that SEISS payments ought to be considered as amounting to a saving resulting from reduced costs or expenses.

However, in direct contrast to furlough payments, SEISS payments did not have to be used for any specific purpose. Whereas furlough payments directly reduced the employment costs of the business – given they were to be used exclusively for this purpose, SEISS payments could be and were used for a number of different purposes. They were not specifically a saving against a fixed cost. Whilst some SEISS payments were likely used to cover the income of self-employed people, the SEISS payments could be and were used for various other purposes which enabled these businesses to remain active. Some businesses will even just have retained the money to increase their liquidity.

Further, it is likely that part of the business support grants were also used to cover staff wages - certainly the 20% not covered by the furlough payments. So, in this regard also, the SEISS payments are more analogous to the business support grants.

The judge in *Stonegate* made specific reference to the fact that employment costs were a 'cost normally payable' out of income/turnover. And then made a finding that employment costs were at least reduced pro tanto by payments of corresponding amounts under the furlough scheme. SEISS payments were not made to cover employment costs in the same way. Whilst some of the money may have been used by some businesses to cover employment costs, the purpose of the Government making these payments was much broader. And was to support the receiving businesses in remaining active.

I note that Hiscox has said that it does not matter that the Government did not specify which costs the SEISS payment was to be used for. And that regardless which costs and expenses a business used the SEISS payment to fund, there was a reduction in costs and/or expenses of the business.

However, it is necessary to consider the basis on which the payments were made. The amount claimable was not specific to any particular loss or cost a business faced. Rather it was based on a proportion of profit (capped at £7,500) received in previous years. The retention of profits within a business cannot, to my mind, be described as a cost or expense of that business. And a highly profitable business that retained its capital would potentially be able to claim more under SEISS than a business with large costs or expenses.

Additionally, it is necessary to think about the approach taken to other funding and consider what is fair and reasonable in all the circumstances. I will return to this point below.

### *The indemnity principle*

Insurance is historically provided on the basis that a claimant is only able to recover their

losses and is not able to put themselves back in a better position than they otherwise would be. This is not always the case even in policies generally provided on an indemnity basis; for example, some contents insurance policies offer a “new-for-old” basis of settlement. But the doctrine of subrogation is a relevant consideration in S’s complaint.

The judge in *Stonegate* explained this in detail, but ultimately said there were three matters to consider in terms of a payment received. He set these out at paragraph 284 as:

*“(1) If a third party has made a payment which has eliminated or reduced the loss to the insured against which it had insurance, then, subject to the exception below, the insurers are entitled to the benefit of that payment, either in reducing any payment that they might have to make under the policy or, if they have already paid, by claiming the amount from the insured.*

*(2) This will not be the case, however, if it can be established that the third party, in making the payment, intended to benefit only the insured to the exclusion of the insurers...*

*(3) In assessing the intentions of the third party payor, it does not matter whether that payor gave any thought to the position of insurers. A payment can still diminish the loss even if no such thought is given.”*

In terms of the first of these, the judge in *Stonegate* reasoned that furlough payments had reduced the employment costs to the same extent as the size of those payments. They were payable to businesses that were required, effectively, to pay their employees the corresponding amount either before or after the furlough payments had been made.

In considering whether SEISS payments had a similar effect, it is necessary to determine what the “relevant costs” of the business were that these payments reduced. However, as has already been stated, SEISS payments were not made to specifically cover any particular cost. And, as stated above, I don’t think the SEISS payments reduced the loss of insured income.

Even if I am wrong in this, it is necessary to consider whether it is fair and reasonable for Hiscox to deduct the amount of SEISS payment received from the claim settlement.

#### *Fair and reasonable*

Hiscox has argued that the SEISS payments were analogous to the furlough payments. But it is clear there are significant differences. The payment under SEISS was not necessarily the equivalent of the loss suffered nor of any particular cost the business incurred. And it was not to be used specifically to cover any specific cost or expense – for example employment costs. It is arguable that, in relation to these points, SEISS payments are more closely aligned with business support grants.

Other, historic grant schemes – for example those introduced in relation to flooding – have explicitly said that they only for uninsured losses. However, it is clear that the FCA and Government did not intend money received from business support grants to be used to reduce claim settlements by insurers. This is despite the lack of any explicit comment on this point when the grants were introduced. So, whilst the Government did not make any statement in relation to SEISS payments in terms of whether they were exclusively to the benefit of the recipient, I consider it is necessary to think about whether a different approach should be taken to SEISS payments compared with business support grants.

The Government was specific, within the relevant Direction, that furlough payments were to

reduce a specific cost of the receiving business. No such reference was made in relation to SEISS payments or those made through the business support grants.

Taking these points, and all of the other circumstances of the complaint, into account I am persuaded that the fair and reasonable approach is to treat SEISS payments in the same way as payments made through the business support grants. I consider the SEISS payments to be most comparable to those through the business support grants, rather than furlough payments. And I don't think it is fair and reasonable to take a different approach to SEISS payments to that applied to business support grants.

It follows that, even if I have erred above in applying the law, I do not consider it fair and reasonable for Hiscox to deduct the money S received through SEISS payments from the settlement of its claim.

### **Putting things right**

Hiscox Insurance Company Limited should not have deducted the amount Mrs P, trading as S, received in SEISS payments from the claim settlement. Hiscox should therefore increase the settlement payable to Mrs P by this amount. Hiscox should also add interest on this amount at a rate of 8% simple per annum from a date two months after Mrs P's claim was made up to the date this complaint is settled.

### **My final decision**

My final decision is to uphold the complaint of Mrs P, trading as S. 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 Mrs P to accept or reject my decision before 28 March 2023.

Sam Thomas  
**Ombudsman**