

## **The complaint**

A limited company, that I'll refer to as F, has complained about the settlement received for its claim for business interruption under its business insurance policy with Hiscox Insurance Company Limited.

Mr M, as one of the directors of F, has brought the complaint on its behalf.

## **What happened**

F is a music shop. In March 2020, F contacted Hiscox to make a claim for business interruption, as a result of the Covid-19 pandemic. F 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 initially rejected the claim.

In June 2020, 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 F's policy with Hiscox. The Supreme Court handed down its judgment in January 2021.

Following that judgment Hiscox asked F to resubmit its claim which it did in February 2021. F also made claims for the later periods of Government restrictions, in November 2020 and January 2021. Hiscox took until June 2021 to confirm that it accepted that F was required to close during each of the three lockdown periods and that its claims were covered.

Hiscox assessed that F had lost £41,294 in gross profit. However, after deducting the furlough payments F had received and other costs savings it said F had made while closed, it said there was nothing to pay in respect of lockdown one, £1,186 for lockdown 2 and £4,050 for lockdown 3. So Hiscox said the settlement due was £5,236 in total.

F was not happy with the amount offered and the time taken by Hiscox to deal with the claim. In November/December 2021 Hiscox made a revised offer of settlement of £9,358. This was after using the average income from the preceding six months instead of 12 months, as F had only started trading in early 2019 and so Hiscox said the loss of gross profit was £43,581 less total savings of £34,021. Hiscox says it dealt with the claim within a reasonable time, given the issues involved and the test case.

F was still not happy that the settlement offered reflected its loss. After F brought the complaint to this service, Hiscox said it would also pay interest of at 8% per annum on the settlement offered in recognition of the time taken to settle the claim (based on the dates it could have made payment of the claim in 2020) and paid a total of £650 compensation for the delay and trouble caused by the matter.

One of our Investigators looked into the matter. He asked Hiscox to review the business plan and forecast provided by F, as he said this would provide a fair representation of F's expected revenue over the indemnity period.



Hiscox agreed to use this as a basis of assessment, instead of the previous months' revenue figures. As a result it made another increased offer of settlement of £10,683.

The investigator considered this offer to be fair and reasonable and in line with the policy terms and conditions. The Investigator also considered that the interest and compensation already offered was reasonable to reflect the delays in dealing with the claim.

F still didn't agree that the offer was enough to reflect its losses and did not accept the Investigator's assessment. F has made a number of submissions in support of the initial complaint and in response to the Investigator's assessment. I've considered everything F has said but have summarised the main points below:

- It had to take a bounce back loan of £25,000 in November 2020 to get through the pandemic, which it would not have had to do if Hiscox had dealt with the claim properly in 2020.
- Hiscox has not been clear and consistent about the way it has calculated its losses. It received multiple offers and it is hard to see that there has been a fair process.
- Hiscox initially based the calculation of losses on the previous year's figures, which was its first year of trading, which does not represent the turnover it could expect in a normal trading year.
- Hiscox has deducted the furlough payments its staff received, which is not right. They were humanitarian payments to prevent redundancies, which would have been necessary otherwise.
- It incurred costs putting the furlough payments through his accountants at £50pm.
- When it reviewed the settlement, Hiscox said it used the average of the preceding six months to work out the difference between its forecast figures and actual revenue but it didn't include the figures for Christmas, which fell in this time.
- Hiscox said it would not consider online sales but then deducted an amount from the settlement to reflect that it thought F had made more in online sales than it would normally have done, because of the closure of its premise and other stores like it. This is an example of Hiscox's inconsistency.
- Hiscox has offered various 'final settlements' and it doesn't understand how this can be if a fair process was in place.
- The whole matter has been extremely difficult and stressful.

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

### **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 F's submissions that the Covid-19 pandemic has had a significant financial impact. However, I won't be asking Hiscox to increase its offer. 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 the section of cover that both parties agree is relevant to this claim below: The policy provides cover for loss of gross profit, including increased costs of working, as a result of business interruption under the following term:

*"Public Authority*



7. Your ability to use the business premises due to restrictions imposed by public authority during the period of insurance following...  
b) an occurrence of a notifiable human disease within one mile of the business premises.”

The policy sets out how it will assess the loss of gross profit as follows:

*“How much we will pay...The amount we pay for each item will be calculated as follows:*

*Loss of gross profit*

*The sum produced by applying the rate of gross profit to any reduction in income during the indemnity period plus increased costs or working or alternative hire costs, less any business expenses or charges which cease or are reduced...*

*Business trends*

*The amount we pay for loss of gross profit will be amended to reflect any special circumstances or business trends affecting your business, either before or after the loss, in order that the amount paid reflects as near as possible the result that would have been achieved if the insured damage, insured failure, cyber-attack or restriction had not occurred.”*

Rate of gross profit is defined as:

*“The percentage produced by dividing gross profit by your income during the financial year immediately before the date of any insured damage, insured failure or restriction.”*

I do not think there is any debate about the rate of gross profit but F is unhappy with the amount Hiscox has said it lost in gross profit during the indemnity period and that it has made certain deductions to that loss figure.

The policy term above makes clear that business trends will be taken into account and Hiscox agreed to do so.

F had only been trading for around a year before the first lockdown happened. Hiscox therefore said it would base its calculations on the previous six months trading, rather than over 12 months, as the first few months of trading would probably not be a fair representation of the business performance. It initially included the Christmas period in this.

However, F said it would have achieved higher sales than Hiscox said in the closure period if it had been able to remain open.

The policy provides that Hiscox would normally look at past performance but after the complaint was considered by the Investigator, Hiscox agreed to use the forecast revenue figures F had provided in its business plan instead. F provided two sets of forecast figures, one which he says was realistic and one that was more optimistic about expected revenue.

Hiscox used the ‘realistic’ figures F provided and compared the forecast figures from September 2019 to February 2020 against the actual performance in that time. When doing so, it excluded the December 2019 figures. Hiscox said there’d been a peak in December 2019 but as the indemnity periods did not include the Christmas period, it was reasonable to exclude this. Having done so, it said the actual performance was 4.49% less than the



forecast figures, so it applied this percentage to the forecast figures for the indemnity periods, to work out what F was likely to have achieved in actual revenue if it had not had to close in the three closure periods. And offered the forecast figures less 4.49% in settlement.

I think this was fair. As it is reasonable to consider that F would have continued performing at 4.49% less than the forecast figures. And I also agree it was reasonable to exclude the December 2019 figures, as these were not reflective of normal month's performance and the indemnity periods didn't include Christmas. I also note that the percentage that actual performance was less than actual performance would have been just over -20%, if Hiscox it had used the 12 month period for comparison. So I think it was fair to use the figures for the previous six months instead.

F has also complained that Hiscox used the lower 'realistic' forecast figures but if it had used the 'optimistic' forecast figures that difference between the actual sales against forecast would have been greater (-13.11%) so it would be entitled to make a more substantial deduction to expected performance. I do not therefore think the figures Hiscox used have disadvantaged F.

F also said Hiscox has based its calculations on the number of days it was closed but it opens six days a week so he thinks this is not accurate. Hiscox has said it doesn't matter how many trading days there are in the indemnity periods, as it is the loss of revenue over the entire period that is relevant. I think this is reasonable and do not consider this has made a difference to the settlement offered.

F also said that the business would have been improving over the relevant periods and this has not been properly accounted for. I can see that Hiscox did consider if there was any upward trend in the business performance. Hiscox said that the trend after F reopened was actually negative but it did not apply this to the loss calculation. I have seen the analysis of sales in the months April, May, June, July and August in 2019, 2020 and 2021 respectively and overall the trend was -22% in 2021 compared to 2019.

However, as Hiscox has now based the offer on the forecast revenue figures provided by F, which include a forecast upward trend in the business, I do not think Hiscox needs to make any other adjustment for trends in the business.

F was still allowed to make online sales and so any losses in this side of the business were not covered. However, F says it is contradictory that Hiscox also deducted an amount from the settlement to reflect that it thought F had made more in online sales than it would normally have done, because of the closure of its premise and other stores like it.

I don't think it is contradictory or unfair that Hiscox said it would not consider any losses to online sales as that part of F's business could continue but it did go on to consider if there had been benefits to F when considering the loss of direct sales. Hiscox said online sales had previously represented 5% of total sales and during the first and second lockdown periods it increased by around 5 times to 25% and in the third lockdown period it went up by about 3.5 times.

While a better explanation may have helped, I do not think that what Hiscox did in relation to this is unfair or unreasonable. I also note F does not state that it thinks the deduction made to reflect increased online sales was unfair or incorrect.

Having worked out the loss of income/revenue over the indemnity period, Hiscox then deducted savings in costs that it says F had over the same period as a result of being closed. The policy term above which sets out how loss of gross profit will be calculated



makes clear that Hiscox is entitled to deduct any expenses or charges “*which cease or are reduced*” during the period of indemnity.

F is unhappy that Hiscox deducted the value of the furlough payments it received for staff. I will deal with this separately below. Hiscox also deducted savings it said F made in relation to general fixed costs. I’ve not seen any evidence that it has made any deductions that it should not have done.

F has said it has reason to doubt the process, and Hiscox has not been clear or consistent in its approach, given Hiscox has revised its settlement offers and changed the calculation methods. However, this is not unusual. Assessing such losses is not always straightforward but I can see Hiscox has taken account of points F raised and reassessed the losses in response, which I think this was reasonable. It is almost impossible to work out exactly what F lost as a result of having to close its premises during the three indemnity periods. However, having considered everything, I think Hiscox’s approach, which resulted in the latest offer of £10,683, was reasonable.

### Furlough payments

The relevant part of F’s policy (set out above) explains how the reduction in income would be calculated and says the final settlement is this amount:

*Loss of gross profit*

*The sum produced by applying the rate of gross profit to any reduction in income during the indemnity period plus increased costs or working or alternative hire costs, less any business expenses or charges which cease or are reduced...*

I think the above wording makes it clear that any charges and expenses saved during the indemnity period would be deducted from the claim settlement.

The wages F paid its staff during lockdown were a charge and expense of the business. The furlough payments received by F therefore represent a saving on F’s wage bill and that in turn is a saving in the charges and expenses of the business. It doesn’t seem fair to me to require an insurer to pay for an expense of a business for which the business has already been compensated from elsewhere.

In reaching a decision, amongst other things I have to consider relevant law and I think the following judgment is helpful when considering this complaint: *Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd and others* [2022] EWHC 2548 (Comm). That’s because, one of the issues considered by the Court was whether payments received by a policyholder under the furlough scheme were to be taken into account when calculating the sums recoverable under the policy. The Court found that payments received by businesses for furlough should be taken into account when calculating any indemnity as they did “*diminish the insured loss*”

So, I think Hiscox was entitled under the terms of the policy to deduct the amount F received in respect of furlough payments from its settlement of F’s business interruption claim.

Hiscox also deducted the 20% sum of wages not covered by the furlough payments, as F confirmed it did not top up its employees’ wages during the period furlough payments were made. So again, this was a saving on its normal expenses and I think Hiscox was entitled to deduct this. Hiscox said it would reconsider this amount, if F could show it had topped up the furlough amount, which I think is reasonable.

### Interest and compensation



F submitted the claim to Hiscox in March 2020. It was not until June 2021 that Hiscox accepted the claim and made a settlement offer. It made an offer of settlement in July 2021, which F rejected. An increased offer was made later in 2021.

Whilst I understand the difficulties insurers faced with claims of this nature, the clarity provided by the courts in the test case has shown that F had a valid claim and that the decision to decline the claim in 2020 was incorrect. I do therefore think that Hiscox should have paid F's claim sooner.

My role is to consider what a business might or might not have done wrong and to put a customer back in the position they would have been in had things happened as they should have. Because Hiscox turned down F's claim, it was without funds that it should have had. I have to therefore consider what impact this had on F.

F says it took a bounce back loan for £25,000 in November 2020, repayable over 10 years because Hiscox had not met the claim.

The loan was for more than the settlement due under the claim, so I do not think F was forced to take the total amount of the loan that it did due to Hiscox's delay. I do accept that F might not have taken £25,000 and might have taken only £15,000 as a loan, if Hiscox had met the claim sooner.

The rate of interest on the bounce back loan is 0% for the first year and 2.5% thereafter. Hiscox has already offered to pay interest on the settlement offered based on the dates that it could have made payment towards the claim at 8% per annum, which is our usual rate, up to July 2022. Hiscox has said if the claims had been accepted when first submitted, it would made the following payments:

Claim 1: the first interim payment 24 May 2020, then 24 June and 15 July 2020 .

Claim 2: 2 January 2021

Claim 3: 2 and 6 March, 6 April, 6 May and 12 May 2021.

The way Hiscox has calculated the interest is generally in line with the way we would assess interest and I think this was fair and reasonable. As Hiscox has already agreed to pay interest on the settlement due at 8%, which is more than the interest on the bounce back loan, I think this is enough to reimburse F's financial loss in taking that part of the loan that it would likely not have done if Hiscox had paid the claims sooner.

F is also unhappy that Hiscox has made different offers of settlement and it has not been clear and consistent about its assessment of the claim throughout the process. It is not unusual for there to be changes to offers made when dealing with a claim such as this. Hiscox assessed the claim and then agreed to consider other information and made increased offers as a result. I have not seen anything unreasonable in the way it assessed the claim once it was accepted. F is unhappy at some of the decisions made about the calculations but I have addressed this above. I do agree that there were delays and the process was frustrating.

Hiscox has already offered £650 compensation for the delays in meeting the claim. I can only make an award that recognises the impact on the eligible complainant. In this instance, the eligible complainant is a limited company, rather than any individual. A limited company cannot suffer distress or frustration and so I can't make an award in this category. I can make an award for inconvenience. Having considered all the circumstances, I think the compensation offered is reasonable and do not intend to make Hiscox pay any more.



## **My final decision**

For the reasons given above, I uphold the complaint in part and require Hiscox Insurance Company Limited to do the following:

1. pay the sum of £10,683 in settlement of the claims (Hiscox has made some interim payments, so it only needs to pay the balance).
2. Pay interest on the settlement amount due. Hiscox has offered to pay this at 8% simple per annum from when each claim payment should have been paid to the date of payment of each amount. I consider these dates to be as follows:

Claim 1: the first interim payment from 24 May 2020, the second month's amount from 24 June and the third month's amount from 15 July 2020;

Claim 2: from 2 January 2021; and

Claim 3: on the first month's payment from 6 March, the second month's payment from 6 April, the third month's payment from 6 May and on the final payment from 12 May 2021

3. Pay the sum of £650 compensation for the delays in dealing with the claim.

If any payment has already been made in relation to 1 and 2 above, Hiscox can offset this against the total due and so only needs to now pay the difference between what has been paid and the totals due.

Under the rules of the Financial Ombudsman Service, I'm required to ask F to accept or reject my decision before 13 July 2023.

Harriet McCarthy  
**Ombudsman**