

The complaint

The partners of a business I will refer to as M, complain about the settlement of their business interruption insurance claim, made as a result of the COVID-19 pandemic, by Society of Lloyd's.

Specifically, they complain about the settlement offer including a deduction for money received via the Self-Employment Income Support Scheme ("SEISS").

What happened

The following is intended only as a brief summary of the main events. Additionally, references to Lloyds includes Society of Lloyd's, the relevant underwriters, and their agents. For the sake of simplicity, I have largely just referred to M and Lloyds.

M is a partnership and operates as a holiday accommodation business and held a commercial insurance policy underwritten by Lloyds. The policy provided a number of areas of cover, including business interruption. Following the government-imposed restrictions, introduced in March 2020 to limit the spread of COVID-19, M claimed for its losses.

Ultimately, Lloyds agreed to meet the claim and offered a sum in settlement. However, M was unhappy with the offer. This complaint is limited to considering whether it was fair and reasonable for Lloyds to deduct SEISS payments at least one of M's partners had received. Initially, the complaint also included that Lloyds had deducted a saving in relation to business rates relief, but Lloyds has confirmed that no deduction is being made in relation to this.

Lloyds did not change its stance on the SEISS deduction and M referred its complaint to the Ombudsman Service. Our Investigator didn't think Lloyds should have deducted the SEISS payments. But as Lloyds disagreed the complaint was passed to me for a decision.

I issued a provisional decision on 14 August 2023. In that provisional decision I set out some of the background to the SEISS, the Coronavirus Job Retention Scheme ("furlough") and some other COVID-19 related business support grants. I explained that there were some similarities and some differences between these types of funding. And that insurers had generally agreed not to deduct the other 'business support grants' from claim settlements. But that they considered SEISS and furlough should be treated differently.

I also set out that the issue of furlough payments had been considered by the Courts, including in *Stonegate Pub Company v MS Amlin and Others* [2022] EWHC 2548 (Comm) ("Stonegate"). And that whilst M did not receive any furlough payments, the Court's reasoning in this judgment was useful in considering SEISS.

I explained that the judge had said furlough payments acted to reduce a cost or expense the claimant would otherwise have had to pay, so they were in effect a saving. And that the judge had come to this conclusion thinking about both the contractual position and the principle of indemnity and associated doctrine of subrogation, which effectively means that a claimant is only able to recover their losses and is not able to put themselves back in a

better position that they otherwise would be. And where the circumstances mean the loss the claimant has suffered has been reduced – such as because of a payment made by a third party – the insurer may be entitled to benefit from this reduction in loss.

I set out that as M's partner had used the money received via SEISS to cover household costs, this in effect reduced the expenses the business would otherwise have incurred, in that the partner did not need to draw this money from M. So, I considered this money could be treated as a saving, and hence deducted from the claim settlement.

I also set out that even if all or some of the money had been used for a different purpose, I considered this was money that had reduced the overall losses M sustained as a result of the pandemic. And that it in those circumstances it would be fair and reasonable to treat this as income M had received.

I also set out that, given the lack of any statement to such an effect by the Government, I didn't think the payor (the Government) intended to benefit the insured (M) only, to the exclusion of the insurer (Lloyds).

So, ultimately, I considered Lloyds was entitled to deduct the SEISS payment received from the claim settlement. And said that I was minded not to uphold this complaint.

M responded to my provisional decision making some detailed comments. These included that Lloyds had overstated the amount claimed under the scheme. M also disagreed that the SEISS payment should be deducted, and stressed that this had been paid directly to the partner rather than into the business' accounts. M also queried how the Stonegate reasoning could be applied to this complaint when the judgment did not include any comment on SEISS.

Lloyds did not make any direct response to the provisional decision. However, when provided with some further information supplied by M, Lloyds confirmed it would only be deducting the sum actually received by M's partner from the settlement. Lloyds had, in the absence of specific information, estimated this as £10,000. The actual sum received, relevant to the indemnity period, was £1,218.

Lloyds had indicated that £34 relevant to the second SEISS grant should be included in this, but I have confirmed that this would only be payable to businesses that were adversely affected after 14 July 2020 – after the end of the indemnity period. So, this sum should not be included. I also set out that, whilst Lloyds would not have been able to accurately calculate the size of the SEISS payment M's partner received without the information M has only recently provided, this could only have ever been a maximum of £7,500. And so, I did not think including a deduction of £10,000 in the initial calculation was fair and reasonable.

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.

I will just highlight that M has more than one complaint with the Financial Ombudsman about the handling of its claim by Lloyds. The current complaint is limited to considering the SEISS element of the claim. So, I am only going to refer to this issue.

As I say, M has made some detailed comments in response to my provisional decision on this complaint. Whilst I have considered all of these, I am not going to address each point.

I note M has raised some concerns about the application of the Stonegate judgment to this

complaint. It is true that the judge in this case did not make any comments around SEISS payments. As set out in my provisional decision, this was because the circumstances of that case did not involve any payment through this scheme. The lack of any specific comment on SEISS does not however mean that the general principles and reasoning set out in the judgment are not applicable to other situations. I consider that the judge's reasoning around the principle of indemnity and associated doctrine of subrogation are something that does apply to M's complaint.

The judge's comments at paragraph 284 apply generally to forms of payment made by a third party that have reduced the loss to the claimant. The judge said there were three key matters to consider in terms of a payment received from a third party:

"(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."

These principles are not specific to furlough. And I consider that ought to be applied to SEISS. This is what I have done and what has led me to provisionally conclude it is fair and reasonable for Lloyds to deduct the SEISS payment M's partner received in relation to the first national lockdown from the claim settlement.

I do appreciate that the SEISS payment would have been made directly to M's partner. All SEISS payments were made to individuals. However, the question is whether this payment reduced the loss M experienced. Even though the payment was not made to M, as a result of the SEISS M did not have to make any payment to the partner for her to cover her household expenses. Normally the partner would draw an amount from M's profits to cover these costs, but this was not required as a result of the SEISS payment. Thereby this payment reduced the overall loss M experienced.

Additionally, there is also limited legal separation between a partner and the partnership. So, ultimately, I consider it is fair and reasonable for Lloyds to deduct the SEISS payment from M's claim settlement.

In the circumstances of this particular complaint, I consider this SEISS payment can be considered a saving of a normal business expense that has been reduced as a result of circumstances connected with the insured peril. And so it is fair and reasonable for Lloyds to deduct this from the claim settlement.

However, I do consider that the deduction should reflect the sum actually received relevant to the indemnity period. And, whilst I appreciate that M may not have provided the actual figures until recently, there does not seem to be any reasonable justification for Lloyds to have used an estimated figure of £10,000 given the maximum limit of £7,500.

Putting things right

Lloyds should recalculate M's claim to only deduct the SEISS payment received by M's partner relevant to the indemnity period.

My final decision

My final decision is to uphold this complaint in part. Society of Lloyd's should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask M to accept or reject my decision before 27 October 2023.

Sam Thomas
Ombudsman