

The complaint

W, a charity, complains Hiscox Insurance Company Limited turned down a claim it made on its professional insurance portfolio policy.

What happened

In September 2012 W contacted Hiscox (via its broker) and requested assistance to defend fraud charges the relevant authorities were pursuing against it. Hiscox requested further information but, as that wasn't provided, closed its file at the end of August 2013. It appears charges weren't pursued at that time but in August 2021 they were changed to ones relating to breach of trust. W claimed for legal assistance in relation to those.

Hiscox turned down the claim. It said if W was aware of any claim, investigation or circumstance prior to the start of its 2011/12 or 2020/21 policies the claim wouldn't be covered by them. In this case the investigation into W began in 2009 so should have been notified during the 2009/10 policy period. That policy said it wouldn't make payment unless any investigation was notified during the period of insurance or within 45 days after it expired. And that hadn't happened in this case. It also said that when W included enhanced cover for professional and legal liability in summer 2010 it didn't disclose information about the investigation at that point which it thought it should have done.

Our investigator thought W should have told Hiscox about a circumstance that would reasonably give rise to a claim around October 2009 (which was within the 2009/10 policy period). Subsequent claims on the trustee liability section of the policy were therefore excluded because W was aware of the circumstance prior to taking out the policy.

The exclusion for the professional and legal liability section of the policy was worded differently and might not exclude this situation. But when taking out that cover in 2010 W should have told Hiscox about the circumstance and didn't. And he was satisfied if given the correct information Hiscox wouldn't have agreed to provide this cover at all. He accepted there had been some delay in dealing with the more recent claim but didn't think this was something that warranted compensation. And while he agreed the letters Hiscox sent when declining the claim were robust he didn't think they were rude or inappropriately worded.

W didn't agree. It provided a copy of an email from its legal counsel in January 2010 which said a request for an interview with the original judge was for fact finding. And its bank account had only been partially frozen at that point and it was still able to receive donations. It was advised the investigation was nothing to be worried about and, as soon as the position changed, it informed Hiscox of that. So I need to reach a final 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.

The relevant rules and industry guidelines say Hiscox has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.

I think it's accepted there are two sections of the policy which could potentially cover the claim W made in 2021. Those are 'Trustees and Individual Liability' which was included in the policy from the outset and 'Charities – Professional and Legal liability' which was included following a mid-term adjustment in August 2010.

I've thought first about the claim under the 'Trustees and Individual Liability' section. Solicitors for W have argued this should be considered under the 2020/21 policy. They say the relevant exclusion only applies to claims attributable to or arising out of *"any prior or pending litigation or proceedings, including allegations deriving from the same or essentially the same facts, involving a relevant person, you or an outside entity, initiated before the prior and pending date"*. They say the charges of aggravated breach of trust were not based upon, attributable to or arising out of the previous claim (which related to aggravated fraud) and so this exclusion wouldn't apply.

I don't think that's the key issue in relation to that exclusion. It relates to proceedings initiated before the prior and pending date which is defined in the policy as *"the date on which you first purchased trustees and individual liability or other equivalent insurance that has run continuously without a break in cover"*. As I understand this cover has been in place since the start of October 2009, I'm not sure this claim would be caught by that exclusion.

I think more significant is the policy says *"we will not make any payment under this section...unless you or an insured person notifies us as soon as reasonably practicable of the following within the period of insurance...the insured person's first awareness of any wrongful act that is likely to lead to a claim"*. Wrongful act is defined as *"any actual or alleged act, error or omission committed or attempted by an insured person arising from the performance of the insured person's duties solely in their capacity as a trustee, governor, committee member, director, officer or employee"*.

I appreciate W did provide notification of the charges against it during the 2020/21 policy period. But it had already told Hiscox about previous charges in September 2012. So unless the charges made in 2021 were unrelated to the previous ones I don't think the notification given following that can reasonably be said to be W's first awareness of the wrongful act. In considering that I do accept it's clearly taken an extremely long time for the new charges to be brought. But having reviewed documentation relating to them I can see they are evidenced with reference to the full history of the investigation dating back to 2009. So I can't reasonably conclude W's first awareness of a wrongful act was within the 2020/21 policy period. And it was fair of Hiscox to conclude cover wasn't available under this policy.

I've considered whether the claim should be covered under the policy which started in October 2011 given W made its initial notification of the claim in September 2012. The 'Trustees and Individual Liability' section of that policy says it won't make any payment for any claim, loss or investigation *"based upon, attributable to or arising out of any claim, investigation or circumstance which you were aware of, or that has been reported under any policy existing or expired prior to the start of the period of insurance"*.

I don't think it's in dispute that in October 2009 W was aware that its bank account had been partially frozen. And its legal representative subsequently met with the investigating judge who carried out interviews with staff members. I think it would therefore have been aware of a *"circumstance"* which its subsequent claim arose out of prior to the start date of this policy. So I don't think this policy would cover the claim it made.

I don't think cover would be available under the 2009/10 policy either. That says (as part of the general claims conditions which apply to the whole policy) that Hiscox won't make any payment unless the policyholder *"give us prompt notice of anything which is likely to give rise to a claim under this policy, in accordance with the terms of each section"*. The 'Trustees and

Individual Liability' section says *"We will not make any payment under this section unless you notify us promptly of the following within the period of insurance or at the latest within 45 days after it expires...any investigation into you"*.

The definition of investigation includes *"An official examination, official enquiry or official investigation into you or any insured person conducted by any regulator, government department or other body legally empowered. Investigation does not include routine regulatory supervision, enquiry or compliance review, any internal investigation or any investigation which is not solely related to your or any insured person's conduct"*.

In this case W didn't provide any notification to Hiscox during this period of insurance (or within 45 days of the expiry of it). I recognise W may well have thought the inquiries being made at that time were to satisfy the judge it had done nothing wrong. And I appreciate the email from its legal representative sent in January 2010 did refer to the request from the judge (for the interview of staff members) as being for fact finding.

But as I've already set out it was aware from October 2009 its bank account had been partially frozen. And during this policy period it had provided information to the investigating judge and staff members had been interviewed (and given the status of 'assisted witness'). I think it's fair to say it would therefore have been aware the relevant authorities were carrying out an investigation which amounted to more than routine regulatory supervision.

The policy says *"You may notify us of any circumstance you reasonably expect to give rise to a claim giving reasons for such expectation and including full particulars as to the dates and persons involved"*. So I think W could have notified Hiscox of what had happened within the 2009/10 policy term even if it didn't know at that stage it would need to claim on its policy (meaning that any subsequent claim it did make would likely have fallen within the coverage offered by that policy).

I've gone on to consider whether Hiscox should provide cover for the claim under the Charities – Professional and Legal liability' section which was included following a mid-term adjustment in August 2010. That contains a differently worded exclusion for prior claims, investigations and circumstances. It says it won't make payment for any claim *"based upon, attributable to or arising out of any claim or circumstance that has been reported under any policy existing or expired prior to the start of the period of insurance"*. And as it's clear no claim or circumstance had been reported prior to the start of the 2011/12 policy I don't think this exclusion would apply to the claim W made.

However, this section of cover also says that no payment will be made unless notification is made within the period of insurance (or at the latest 45 days after it expires) of *"your first awareness of any wrongful act"*. Wrongful act is defined here as *"any actual or alleged act, error or omission committed or attempted by you arising from the performance of your duties"*. And given my findings on what W was aware of during the earlier part of the 2009/10 policy period I think it likely its first awareness of a wrongful act was prior to the commencement of this section of policy cover.

In any event, as our investigator explained, when this cover was taken out the relevant law (the Marine Insurance Act 1906) placed a duty of utmost good faith on the parties meaning the insured was required disclose every circumstance they knew, or should have known, which would influence an insurer in deciding whether to underwrite a risk or what premium to charge. And I can see the proposal form relating to the addition of cover specifically asked *"After enquiry, are any of the trustees, directors or employees of the charity aware of any fact, circumstance, allegation or incident which may give rise to a claim under the proposed policy"*.

That section (and a preceding one which asked about claims or investigations against the charity) was left blank by W. But given what it knew about the ongoing investigation (and taking into account the relevant law) I think it should reasonably have told Hiscox about this. And Hiscox has provided information which satisfies me that, if it had been given the correct information, it wouldn't have offered this cover to W at all. So W wouldn't have been able to make a claim on this section of its policy as it wouldn't have been covered by it. As a result I don't think there are grounds on which I could fairly ask Hiscox now to do so.

I've also considered whether Hiscox should refund any additional premiums paid for this cover. That would normally be the case where it had voided the policy from the outset (provided there was no fraud or illegality on the part of the insured). However, here Hiscox hasn't voided the policy. And I note W is only one of a number of insured organisations on the policy. There doesn't seem any reason why cover wouldn't have been offered to the other named insureds even if Hiscox declined to offer it for W. So cover would continue to have been offered (and the premium paid) for that. Given that I don't think it would be right to require Hiscox to refund the premium for this element of cover (I'm also not clear any premium was paid by W given the issues with its bank account at the time).

Finally, I've considered the points made by W about how its claim was handled. I appreciate it did take around four months from the claim being made in September 2021 to an initial claim decline response being issued in February 2022. However, I think it was appropriate that Hiscox initially sought further information on the claim (which was received at the end of October). And given the significant amount of paperwork to review and the length of time elements of the claim dated back I don't feel the time then taken to reach an outcome was unreasonable.

I do appreciate the correspondence from solicitors acting for Hiscox was direct and I can understand why some of those comments would have appeared accusatory to W. But I'm also mindful of the fact this was correspondence between solicitors. Given that context I don't think the tone of the letters was inappropriate.

My final decision

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask W to accept or reject my decision before 10 May 2024.

James Park
Ombudsman