DRN-4944812

The complaint

A limited company, which I will refer to as E, complains about the decision of Hiscox Insurance Company Limited in relation to its business interruption insurance claim, arising out of the COVID-19 pandemic.

What happened

The following is intended only as a brief summary. Additionally, for the sake of simplicity, I have only referred to E and Hiscox in this decision, even where other parties have at times been involved on their behalf.

E held a commercial insurance policy underwritten by Hiscox. The policy included cover for interruption of E's business as an operator of public houses and host of weddings/events. In March 2020, E's business was interrupted by the COVID-19 pandemic and associated government-imposed restrictions. E's business was further impacted in November 2020 by separate government-imposed restrictions. E claimed under the policy.

The policy clause that Hiscox found responded to the claims read:

> "We will insure you for your financial losses and other items specified in the schedule, resulting solely and directly from an interruption to your business caused by:
>
> …
>
> your inability to use the venue due to restrictions imposed by a public authority during the period of insurance following:
>
> …
>
> an occurrence of a notifiable human disease…"

Venue is defined as:

> "The space you occupy at the premises shown in the schedule located in a building of standard construction unless otherwise notified to us and to which we have confirmed our agreement…"

The policy said that where a claim was met, Hiscox would pay:

> "the difference between your actual income during the indemnity period and the income it is estimated you would have earned during that period"

And defined the indemnity period as:

> "The period, in months, beginning at the date of the insured damage or insured failure, or the date the restriction is imposed, and lasting for the period during which your income is affected as a result of such insured damage, insured failure or restriction, but for no longer than the number of months shown in the schedule."

The policy also said:

> "We will pay up to the amount insured unless limited below or shown in the schedule."

The policy schedule said both that the indemnity period was 24 months and that the special limit that applied to a claim under the above clause was, effectively, £100,000. The schedule also listed two premises.

It should be noted that the policy actually renewed in August 2020, however the terms were materially the same and I do not consider this fact to be overly relevant. I would say that, technically speaking, as there are multiple claims and multiple policies, the Ombudsman Service might consider these to be separate events. Additionally, Hiscox issued separate final responses to different aspects of the complaint. However, given the stage of proceedings and the outcome I have reached, I consider it appropriate to consider these matters as a single complaint.

I will also just note at this point that, apparently, the policy that renewed ought to have had an endorsement included that would have excluded any further COVID-19 related claims. However, it appears, through some form of error, that this endorsement was not added correctly. As Hiscox has accepted that this policy does provide cover, it is not necessary for me to consider this point further.

It is helpful to consider that there are essentially two parts to E's business. The pub and the wedding receptions/events. These receptions/events were held at two different venues. I'll briefly summarise the main restrictions on these activities, but this is not intended to be exhaustive. I have also focussed on wedding receptions in this description, rather than the other events E put on.

The first national lockdown, introduced in March 2020, caused an inability to use the venues for both of these activities. Pubs were able to reopen in July 2020, but wedding receptions were not allowed until mid-August 2020. The ability to operate both of these activities was somewhat restricted, and these restrictions changed, but there was not an inability for venues to be used for them during this late summer period. It should be noted that E's venues were not in an area that fell under the Tier Three restrictions in October 2020.

This changed in early November 2020, with the start of the second national lockdown. Again, there was an inability to use the venues for either of these activities. The second national lockdown ended in December 2020, and the country moved into the second Tier restrictions. E's venues fell within Tier Four, which prevented both activities. And then in January 2021, the third national lockdown began. These restrictions were lifted in April to May 2021, depending on the circumstances of the activity.

Hiscox eventually agreed to settle E's claims for £200,000 in total. It considered that there was one claim that related to the restrictions imposed from March 2020, and another for those from November 2020.

E was unhappy with Hiscox's handling of the claims and the time taken. The claims had been initially declined. And, whilst interim payments were made, it wasn't until July 2022 that the claims were settled to the amount Hiscox considered appropriate. E referred to the fact that it had taken out a significant loan during this period and said that Hiscox should pay for the cost of this.

E was also unhappy about the claim outcomes themselves. It considers that there are three separate venues and that these were impacted on six separate occasions. E considers the policy limit should apply to each of these separately, effectively amounting to 18 claims.

Hiscox did not change its stance on the claim decision. Essentially, it said that there had been an inability to use the venues from March 2020 onwards. And that whilst some activity had then been possible from July 2020, once this was again prevented in November 2020 this inability continued until April/May 2021.

However, Hiscox did offer to pay £850 compensation to reflect the inconvenience caused, and to add interest at a rate of 8% simple onto the claim settlements. Hiscox said that the interest payment would more than cover any cost to E of the loan that was taken out. And that the claim settlement would have allowed E to pay off the loan.

E remained unhappy and brought its complaint to the Ombudsman Service. Our Investigator ultimately upheld the complaint in part. He did not consider E could validly claim for each of its venues separately, but he did think that, essentially, the introduction of different regulations during the period between November 2020 and April/May 2021 created the potential for new interruptions that Hiscox should consider as separate claims. Neither E nor Hiscox fully agreed with these recommendations, so this complaint was passed to me for a decision.

I issued my provisional decision on 12 July 2024. The following is an extract from that decision:

> "I am minded to conclude that Hiscox has appropriately settled E's claims and that, whilst there were issues with Hiscox's handling of the claims, it appropriately redressed these. I'll explain why I have come to this provisional conclusion.
>
> In coming to my decision, part of what I am required to take into account is the relevant law. This includes case law.
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> Of particular note to this decision are the judgments in the *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, on appeal from the decision of the Divisional Court [2020] EWHC 2448 (Comm) ("the FCA test case"), *Stonegate Pub Company Limited v MS Amlin Corporate Member Limited & Others* [2022] EWHC 2548 (Comm) ("Stonegate, *Greggs Pic v Zurich Insurance Plc* [2022] EWHC 2545 (Comm) ("Greggs") "), *Various Eateries Trading Limited v Allianz Insurance Plc* [2022] EWHC 2549 (Comm) ("Various Eateries") – and the appeal to this judgment ([2024] EWCA Civ 10, "VE Appeal"), *Corbin & King Ltd and others v Axa Insurance UK Plc* [2022] EWHC 409 (Comm) ("Corbin & King"), *London International Exhibition Centre PLC v Royal & Sun Alliance Insurance PLC and others* [2023] EWHC 1481 ("Excel"), and *Gatwick Investment Limited & Others v Liberty Mutual Insurance Europe SE & Others* [2024] EWHC 124 (Comm) ("Gatwick").
>
> This is not an exhaustive list of the relevant case law, and I'll also not refer to each of these judgments individually. A number of them have, as far as is relevant, merely established that the clause above is capable of responding to the type of claim in question. This is not something that is disputed in this case. However, what this demonstrates is that this is a heavily litigated area. And that it is necessary for me to take into account the position currently reached by the courts when I consider E's complaint.
>
> What is disputed in E's complaint is, essentially, how many separate claims arise in E's case. And the courts have been asked to determine similar questions in similar circumstances.
>
> In order to be able to claim under E's policy, there needs to have been an interruption to E's business caused by restrictions imposed by a relevant authority which have been made due to at least one occurrence of a relevant disease, and which has caused an inability to use the venue. In essence, this will be met where the Government (a term I use loosely to refer also to other relevant authorities), has said

that E was unable to use its venues for the purpose of its business, due to occurrences of COVID-19, and this has caused an interruption to E's business. I would point out that one of the things determined by the FCA test case was that, for the wording of the clause above, what is required is a prevention of use, rather than merely a hindrance of use.

As a result of occurrences of COVID-19, the Government introduced a number of restrictions that impacted the use of E's venues during 2020 and beyond.

The first question is, how many of these restrictions caused a separate claim event? And the second question is, can E is claim separately for each venue? I'll consider these in turn.

How many claim events were there?

Hiscox accepts that the first national lockdown, starting in March 2020, is a separate claim event from later restrictions. So, it is accepted that there can be more than one claim event.

The Investigator's view was that the change from the tier restrictions to the national lockdowns (and vice-versa) created a new claim event. This was essentially based on the comments in the Greggs judgment about the Leicester restrictions (and other local restrictions). However, it is notable that in making the relevant points, the judge in Greggs was discussing the application of the aggregation clause in the policy relevant to that judgment. He was not discussing causation as such, which is a separate issue that he had previously dealt with.

The issue relating to aggregation is whether a business interruption loss can be said to arise from, be attributable to, or to be in connection with a 'single occurrence' so as to be aggregated as a single loss. It was then necessary for the judge to consider what a 'single occurrence' would be in respect of this. The policy in the Greggs case contained definitions and terms that meant that aggregation was applicable. E's policy does not contain such wording in relation to the clause above. Other parts of the policy to refer to aggregation, but this only applies, for example, to certain public and products liability issues. There is no reference to aggregation in respect of business interruption losses in E's policy. So, the application of aggregation principles does not directly apply to E's complaint.

The issue of aggregation can be contrasted with the discussion in the Greggs judgment over how the insuring clauses initially operated in terms of claim, which referred to "covered events" and the "triggers" of these. In the judgment, a covered event and/or a trigger are not the same concepts as a single occurrence. As far as is relevant, a covered event was essentially described as taking place each time restrictions imposed by the Government caused an inability to use the premises.

At paragraph 24 of the Greggs judgment, the judge, who was the same judge as in Stonegate and Various Eateries, also said:

> "…the number of Covered Events will be the number of occasions on which there were materially different restrictions imposed or advised by government or a relevant agency which prevented or hindered the use or access to [the premises] and that steps taken or advice given which merely repeated or renewed an existing prevention or hindrance of access would form part of one set of 'actions or advice'."

This is effectively a summary of what the judge said in paragraph 73 of the Stonegate judgment. This suggests that it is not the number of restrictions that are imposed, but the number of times use of the venue was prevented that is the key question.

It should be noted that the wording of the clause in these judgments was not exactly

the same as that in E's policy. However, there are enough similarities to mean I consider that the reasoning of the judge can be fairly and reasonably applied to the current situation.

Paragraph 69 of the Stonegate judgment deals with a slightly different type of policy clause. This was an "Enforced closure" clause, which required the relevant authority to have forced the closure of the insured premises. In referring to this, the judge said:

> "The 'trigger' is the enforced closure, and in my view there will be one such 'trigger' unless and until the Location opens and is then closed again."

This is slightly different to the requirements in E's policy. The judge in this case did not make an explicit comment that the type of clause in E's policy operated in similar manner. But the reference in the paragraph 24 quote above to the repetition or renewal of an existing prevention or hindrance does align with this.

Further comments to this effect can be found in the Gatwick judgment. The judge in that case was, in part, considering a claim made by "Hollywood Bowl" in relation to a clause requiring business interruption as a result of action of a relevant authority that prevented or hindered use of or access to the insured premises. This case was considering whether new restrictions introduced in July 2020, when the first national lockdown came to an end, meant there was a new claim event for Hollywood Bowl – which had to remain closed. The judge explained that the insurer had set out its defence by saying:

> ""a closure is a closure is a closure". Nothing changed in July. There was no significance to the change in regulations: the status quo remained the same. Other businesses may have been permitted to reopen, but that was not the case with Hollywood Bowl."

He went on to conclude:

> "There was indeed a continuum of closure as far as Hollywood Bowl is concerned. It was an agreed fact that their premises in England were not permitted to open until 15 August 2020, and accordingly the limited exceptions in the July Regulations (blood donation etc) were of no relevance to Hollywood Bowl. There was, as [the insurer] submitted, nothing at all which changed in July, except for the identity of the regulations pursuant to which Hollywood Bowl's premises remained shut. Against the factual background described above, I do not consider that it can sensibly be said that there were new restrictions."

These comments are definitive and deal with the application of a clause that has similar requirements to that in E's policy, and to circumstances which are also similar. Once there was an inability to use E's venues, the fact that the regulations requiring this inability changed does not mean there was a new claim event. There was a single "closure", and so a single claim.

I consider this to be the position set out in current case law, and I see no reason to fairly and reasonably depart from this in E's case.

It follows that I consider it was appropriate for Hiscox to conclude that there was only one claim between November 2020 and April/May 2021, and so to restrict the settlement of this claim to a single maximum figure of £10,000. It follows that I cannot fairly and reasonably ask Hiscox to do anything more in relation to E's losses between November 2020 and April 2021.

<u>Can E claim separately for each venue?</u>

There is some dispute over whether there are two or three venues insured under the policy. E has referred to some of its activities taking place in a separate

'non-standard construction' building and that it had agreed in writing with Hiscox that this building would be insured. And so, this should be considered a separate venue. However, as I shall explain, I don't consider that E can claim separately for each venue, so I have not explored this point here.

Again, this is a point that has already been considered by the courts. Paragraphs 71 and 72 of the Stonegate judgment say:

> "71. The structure of this sub-clause is that it is the actions of the relevant authority, if they prevent or hinder the use or access to one or more Insured Locations, which are the Covered Event.
>
> 72. In the case of this clause, therefore, the number of 'triggers', in the sense I am using it, is properly regarded as the number of such actions or advices. I do not consider that the number of 'triggers' is the number of such advices multiplied by the number of premises…"

As mentioned above, the wording of the clause being considered in this legal case is slightly different to that in E's policy. However, once again, I consider that it is similar enough that it is appropriate to draw parallels and apply the reasoning here to E's policy.

E's policy provides cover where there has been a restriction imposed that has caused an inability to use the venue. So, the number of 'triggers' is the number of restrictions imposed, rather than the number of restrictions imposed multiplied by the number of venues. And, as has been set out above, the number of restrictions imposed is the number of times use of the venues has been prevented. This is not the same as the number of times there has been an inability to use each of the separate venues individually.

Taking all of this into account, I consider Hiscox appropriately concluded there were only two claim events. And that is paid the maximum sum due in relation to these. Any accountancy costs E incurred would form part of this loss settlement.

Claim handling

It is however clear that Hiscox took a long time to deal with these claims. And E has referred to financial losses it incurred as a result.

However, Hiscox offered E £850 compensation for the inconvenience it had suffered as a result of the claim handling issues. Taking into account the fact that, as a limited company, E is unable to suffer distress, I consider this to be a fair and reasonable offer.

Additionally, the level of interest Hiscox added to the settlement of the claim means that any financial losses E incurred as a result of the borrowing it took out will also have been covered.

So, whilst there were some communication issues and delays, I consider Hiscox's response to these has fairly and reasonably compensated E for the inconvenience and financial loss it incurred.

I appreciate that this is not the outcome E and its directors were hoping for. And I also appreciate that E has suffered a loss through no fault of its own. But having considered how the policy applies to the circumstances, I am unable to fairly and reasonably ask Hiscox to do anything more."

I asked E and Hiscox to provide any further comments or evidence they wished me to consider. Hiscox said that it had not further submissions to make.

E provided a detailed response. I have briefly summarised its main points as follows:

- The policy includes a clause providing cover for non damage denial of access, and this has not been referred to.
- The Corbin & King judgment held that the claimants in that case could claim separately for their separate businesses.
- Hiscox has treated the different elements of E's business separately.
- The regulations changed both in form and content. And there were small gaps in time between these regulations.
- Contracts to provide large weddings were cancelled and refunded, but Hiscox has not provided any compensation for these.
- E's wedding and liquor licences were effectively suspended, so a claim under the relevant endorsement relating to licences ought to be considered.
- The delay in settling the claim caused the permanent loss of one of E's venues, when the freeholder had to sell the property following E's inability to pay the rent.

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.

Having done so, I have come to the same conclusions as I reached in my provisional decision for the same reasons – as set out above.

Hiscox had nothing further to add, I have focussed the following on responding to E's comments. I have focussed on the key points outlined above, though I have considered the response in full.

One further point that E has made relates to the changing conclusions around the law. And it has referred to the fact that a different outcome might be reached at a different time, if a later judgment changes how legal principles should be interpreted. I do appreciate this. However, I need to make the determination of what Hiscox is responsible for under the policy by taking into account the relevant law. The law, and its interpretation, does change over time. So, I agree that it is possible that, in years to come, there might be different legal principles that mean a different outcome would be reached. However, I need to make my assessment taking into account the law as it currently exists.

That law includes the Corbin & King judgment. And E has made two main points around this.

Firstly, whether the "non damage denial of access" clause in E's policy might provide cover in the circumstances. This clause provides cover where an incident within a one mile radius of the venue has caused a denial or hindrance of access.

It isn't clear that this has been specifically considered by Hiscox in this claim. However, I am aware of Hiscox's general position in relation to this clause, as well as the Ombudsman Service's approach. So, I consider I am able to respond to this point

Ultimately, this clause would require the occurrence(s) of COVID-19 to be considered an incident. And this question has been considered, both prior to and subsequent to the judgment in Corbin & King. As well as the findings of the courts in the FCA test case, the judgment in Gatwick considered this point (see paragraphs 469-482). The judge here concluded that:

> "A case [or cases] of COVID-19" does not, in and of itself/ themselves, amount to an

> “incident likely to endanger human life”... it/they does not in and of itself/ themselves amount to an “incident”."

Whilst the clause in this part of the Gatwick judgment was worded slightly differently to that in E’s policy, the judge did also specifically discuss the Hiscox policy wording. Taking this into account, I am to come to a conclusion that Hiscox ought to have covered E’s claim under this clause.

The second point made around the Corbin & King judgment concerns the question of aggregation. However, not only was the construction of the policy in that judgment different to E’s policy with Hiscox, one of the main factors for the judge concluding that there were separate claims was that there were separate companies that were named on, and insured by, the policy.

E has said that it is a holding company that exists to control other companies. But there are no other companies that E controls. Whilst there may be multiple premises and whilst E may even consider the income streams and, for example, business plans separately, this does not mean that there are separate companies in the way Corbin & King and its subsidiary companies exist. I am not persuaded that E’s comments on this point change the outcome on this issue or the reasons for those conclusions, as set out above.

Additionally, whilst Hiscox may have treated the different elements to E’s business (restaurant and venue) separately, this is seemingly a reflection of the fact that it is possible to claim for the interruption of a discrete part of a business. In discussing the Hiscox policy wording generally, the Supreme Court in the FCA test case said, at paragraph 145:

> "[an] “inability to use” the business premises may include a policyholder’s inability to use either the whole or a discrete part of its premises for either the whole or a discrete part of its business activities."

Most often, the issue will be that one part of a business' operation was able to continue, but another was prevented (one of the examples in the judgment is a bookshop that can't sell to in-person customers, but can sell online). E’s situation is a little different in that both discrete elements of the business have been interrupted, but for different periods. I do not consider this means there are separate claims for these periods though. Merely that the extent of interruption to the business as a whole was different at different points.

I will set out the following as an alternative as an example; a fire in part of a building causes an interruption to part of a business. It is necessary to stop the rest of the business for a period to allow for repair work (let's say the electrics needed replacing), and then the undamaged part is able to reopen again prior to the damaged part being fully repaired. This would then be a situation where part of the business was initially interrupted, then the whole business, and then just part of the business again. This would though all be one claim - just with differing degrees of interruption over the course of that claim.

That is essentially what happened with E. That discrete parts of the business are capable of being interrupted even though the policy requires an inability to use the venue, does not mean that interruptions of each of those discrete parts of the business form separate claims.

E has referenced the restrictions being "different" and there being gaps in between the restrictions. That the regulations were different pieces of legislation does not change the reasoning in my provisional decision though. The regulations impacting Hollywood Bowl were different pieces of legislation. It is the impact of the restrictions imposed by these regulations that it is relevant. Ultimately, the different regulations still caused an inability of E to use the venue(s).

And whilst there may have been separation of minutes/hours between some of these regulations, this might only be of relevance if E actually operated its business during these gaps. E has provided no substantial evidence to support that E carried out any business within these "gaps", and given the timescales involved, I am doubtful that this would have been possible.

For those periods where smaller weddings were allowed, whilst I appreciate this would have prevented – and caused the cancellation of – the larger weddings, this would be a hindrance of use of the premises as a wedding venue. Weddings were still possible, just not the size of wedding that was desirable/had been booked. E's policy does not provide specific cover for cancelled events per se. The cover provided is, in the current case, based on interruption of the business in general caused by an inability to use the venue.

In terms of E's argument over loss of licence, this endorsement to the policy only refers to the liquor licence, rather than the wedding licence. The liquor licence was not suspended though. Restrictions were placed, more generally, on when relevant businesses could open to sell liquor, etc. But at most, I consider this could only reasonably be described as a temporary modification to the terms of the licence. Such licences will set out the times in which a business can operate. The licence is not suspended overnight during the periods when the business is restricted from operating by the terms of the licence, and then reinstated each day.

I will add that I am also not persuaded that E's wedding licence was actually suspended either. And, even if it was, this would have needed to have been the proximate cause of loss. If weddings are prevented across the country, whether or not one particular venue has a licence will not be the main factor in that venue being able to host a wedding.

The last point I will address here is that around the loss of the premises E rented. E has not previously raised this issue, as far as I am aware. Regardless, whilst I do note its comments, I need to consider any arguments around consequential loss in terms of what has been done to mitigate that loss.

E has said that it took out a £125,000 loan in late 2020. E has said that, had the insurance payment been made, it would not have taken this lending. So, given E has said that it would not have taken the loan out had the insurance settlement been made, I need to be satisfied that the only reason it could not have resolved the issue with this venue was because of the difference in that loan and the amount that ought reasonably to have been paid by then. This would also need to take account of what other actions it would have been reasonable for E to take – for example, whether further borrowing would have been possible.

I do appreciate that there were a number of difficult choices E would have needed to make, and that it would not have had any desire to increase its borrowing. But in order to say Hiscox ought to be responsible for this loss, it would need to be demonstrated that there was no reasonable opportunity for E to have mitigated these circumstances. Based on what has been provided, I am not satisfied of this.

I should also point out that the compensation Hiscox has offered in relation to the delays also includes adding 8% simple interest to the settlement of the claims. This was around £24,000, and this as well as the £850 for inconvenience needs to be considered when thinking about the consequential loss Hiscox can reasonably be responsible for.

Taking everything into account, I am persuaded that Hiscox has done all it can fairly and reasonably be required to in relation to E's claim and complaint.

I appreciate E will not welcome this outcome. This is an issue E understandably feels

strongly about. I do agree that E is an "innocent business", as it has described itself, and that the impact the pandemic had was through no fault of its own. So, it does have my sympathies.

However, my role is to consider whether Hiscox ought to be responsible for covering more of the losses sustained than it already has. I am required to assess the matter impartially. To use the same description, Hiscox is also an innocent business in terms of the losses sustained; it is also not responsible for the pandemic or the impact of this on E. I can only fairly and reasonably require it to cover the losses it is responsible for under the policy. And having considered the circumstances in full, I am unable to ask it to do more.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask E to accept or reject my decision before 6 September 2024.

Sam Thomas
Ombudsman