

The complaint

Mrs A, a sole trader, complains about the settlement of her business interruption insurance claim, made as a result of the COVID-19 pandemic, by Hiscox Insurance Company Limited.

What happened

The following is intended only as a brief summary of events. The events actually span more than one period of insurance and involve more than one claim. As these are technically events at different times, it might be appropriate to consider these matters separately. However, given the stage of this complaint, the financial sums involved and the similarity between the policies and claim circumstances, I consider it appropriate to consider this as a single complaint. And for the sake of simplicity, I will refer to there being a single policy.

Mrs A operates as, what I will refer to as, a cosmetic clinic. She held commercial insurance, underwritten by Hiscox. The policy offered a number of areas of cover including for business interruption. In March 2020, Mrs A's business was interrupted as a result of the government-imposed restrictions introduced as a result of the COVID-19 pandemic. I'll refer to this as lockdown one. Mrs A's business was subsequently interrupted again by, what I'll refer to as, lockdowns two and three.

Mrs A claimed under the policy. Her claims were initially declined, but Hiscox later agreed to meet them following wider legal developments. Hiscox made a number of settlement offers, adjusting these following Mrs A's responses. Its final offer was made in June 2022. Mrs A was unhappy with this offer. I will go into a number of these reasons below. And she ultimately brought a complaint to the Financial Ombudsman Service.

Since then, Hiscox has revised its offer somewhat, removing the deduction it had made as a result of considering Mrs A underinsured. The reasons for this appear to be related to an error by a third-party broker in updating the policy documents following a change to the insured sum in 2019. As Hiscox is no longer treating Mrs A as underinsured, I have not discussed this matter in depth below. But this does mean the resolution of this complaint is already a change in outcome.

Having considered Mrs A's complaint, our Investigator agreed that Hiscox should not be applying any reduction relating to underinsurance and should add interest to the underpayment made in relation to this. He also thought Hiscox should pay Mrs A £150 to compensate her for the impact of this error. However, he considered that Hiscox had otherwise settled Mrs A's claim fairly and reasonably.

Hiscox agreed with this recommendation. But Mrs A did not. As a result, her complaint was passed to me for a decision. I issued my provisional decision on 9 December 2024. The following is an extract from that decision:

"Mrs A has raised a number of points of concern with the settlement of her claim. I have considered all of her submissions. However, I will not address each individual point within this decision. Rather I have tried to consider matters holistically where possible and to focus on what I consider to be the key issues. This is not meant as a discourtesy to Mrs A, but rather reflects the informal nature of the Ombudsman

Service.

I would also stress that it is not the role of the Ombudsman Service to calculate Mrs A's claim. Our role is to determine whether or not Hiscox has acted fairly and reasonably when dealing with the claim. There will likely be a number of potential ways of trying to calculate a business interruption loss, and it is likely that none of them will ever provide a figure that exactly matches the loss. There are just too many variables when estimating what is effectively a hypothetical counterfactual where the insured event did not happen.

I will briefly set out some of the more relevant parts of the policy wording, before discussing the issues raised.

Both parties are aware of this wording, so I have not sought to reproduce it in full here. The clause providing cover is not disputed, and this essentially provides cover where Mrs A was unable to use her premises due to the lockdown restrictions. The cover provided is for loss of income, which is the difference between the actual income achieved over the indemnity period and the income that was expected, adjusting for any trend of the business. Savings from reduced costs and expenses are deducted from this.

Rate of gross profit / savings

It is in this section that I disagree slightly with the outcome reached by our Investigator.

Mrs A's policy does not technically operate on the basis of a rate of gross profit being used to calculate the insured loss. However, this is the calculation Hiscox has initially used.

The gross profit is essentially the income received less any 'variable costs' (albeit I use the terms variable and fixed somewhat loosely). Where a policy provides cover in relation to gross profit, this will be the amount of expected income not achieved less the costs that would have been incurred to generate that income. This might include cost of materials, etc. and has been referred to during the claim as being the cost of sales. The rate of gross profit is then the percentage of this profit divided by the income achieved over a relevant period. After this is applied, other savings on 'fixed costs' are deducted. In most cases there will not be a saving on fixed costs – as they will be payable regardless of the business being interrupted; for example loan repayments, etc.

Were Hiscox to have actually applied the loss of gross profit approach outlined in the policy, it is quite possible that the cost of rent would have been taken into account as part of the percentage. Rent would not normally be a variable cost though (hence my reference to this term being used loosely). Instead, Hiscox has considered this as being a fixed cost, though still largely deductible from lockdown one claim as Mrs A did not have to pay rent during this period. This has not made a material difference to the settlement, and I comment on it only for the sake of completeness.

Hiscox has calculated the relevant rate of gross profit percentages for each of the claim periods, initially by referring to Mrs A's accounts, and applied these percentages to the expected income not achieved. Hiscox has then deducted any savings of what it has listed as being fixed costs (including savings on rent, bank charges, telephone/internet, etc.).

Mrs A's policy actually requires the calculation to be based on the expected income not achieved less any savings resulting from reduced costs and expenses that otherwise would have been paid. Essentially, it imagines an individual deduction of each saving from the lost income. Sometimes this is necessary, but it depends on the type of business involved.

Generally speaking, as long as the same costs are deductible under both the loss of income approach to the loss of gross profit approach, the results should be the same. And looking at the deductions Hiscox has made I am satisfied that this is the case here.

The issue is not this methodology, but rather the rate of gross profit used.

Mrs A has raised the issue that changes she made to increase efficiencies in her business actually mean that there was a reduction in her variable costs and therefore an increase in the rate of gross profit. Mrs A considers that a rate of gross profit of 95% is appropriate.

Hiscox has used a rate of gross profit of 86.8% for the lockdown one claim and a rate of 94.7% for the lockdown two and three claims. This is an increase on its initial assessment. The initial assessment was seemingly made using Mrs A's annual accounts, which is what had been provided at that time. The revision was based on Hiscox using Mrs A's monthly accounts which were subsequently provided.

Mrs A has said that her rate of gross profit was substantially greater during and after the indemnity period than in the 2018/2019 financial year. One difficulty is trying to rationalise this against the figures presented. For example, the figures provided show a rate of gross profit for January and February 2019 of 99.5% and 94.9%, compared with 56.5% and 80.6% for these months in 2020. This all adds to the difficulty of quantifying the appropriate rate for the period of indemnity.

The main issues appear to be over when the efficiencies were (or would have been) introduced in the absence of the pandemic. Hiscox has said that it understands this to have been from the summer of 2020. If so, these efficiencies would not have led to an increase in profitability that would apply to the claim for lockdown one. This is why it has used figures from 2019 to quantify this rate. It isn't clear, other than basing this on the monthly figures, why Hiscox has said the changes would only have had an impact from the summer though. And given there were not monthly figures for the lockdown period, it isn't clear to me that this is appropriate.

It does seem that some of these efficiencies were introduced prior to this point. Mrs A has for example referred to purchasing her own printer in January 2020 to reduce printing costs. I do note that there is an absence of printing costs included in the list of expenses provided (there are some photocopying costs, but I note these are also present after the purchase of the printer). But this isn't the only change Mrs A has referred to. And this does indicate changes were being made prior to lockdown one.

It is difficult to say when other changes would have been made. Mrs A has referred to a move toward bulk buying of 'stock', at a better rate. But, as her business was not active during the lockdown, she would not have made these purchases at that time. So, it is not clear when she otherwise would have made these changes.

As Mrs has pointed out though, it does seem the impact of these changes was being fully felt by August 2020, as the rate of gross profit from this date onwards is significantly higher than previously. And Hiscox has accepted that this higher rate is what should apply to the lockdown two and three claims.

Having considered the information provided, whilst I note Mrs A was making some changes prior to the pandemic, it is not clear to me that these were sufficiently structured to demonstrate exactly when they would otherwise have led to an increase in gross profit. But I do consider that there would have been some change to the rate of gross profit within lockdown one, and I so I do not consider it reasonable for Hiscox to base this period wholly on the pre-lockdown rate.

In the absence of anything conclusive, I suggest that a fair and reasonable rate of gross profit for lockdown one would be 90%. An alternative would be a gradually

increasing rate, to take this from 86.8% to 94.7% over the lockdown period – but a flat rate of 90% seems simpler. And I think it would be reasonable for Hiscox to increase the settlement of this claim accordingly.

In terms of lockdown two and three, Mrs A has indicated a rate of gross profit of 95% is appropriate whereas Hiscox has used 94.7%. I think the difference here is marginal and it is difficult for me to say Hiscox is acting inappropriately in the circumstances. The figures being relied upon are those that are tainted by the existence of COVID-19 – which I discuss in more detail below. So, a truly accurate figure is going to be difficult to achieve.

Taking things in the round, I don't consider the difference here to be significant enough to say Hiscox should do anything differently for the lockdown two and three claims. There is a range of what is fair and reasonable, and in the absence of anything conclusive, I consider Hiscox offer here is within this range.

Expected revenue

The second issue I will discuss essentially relates to the trend of the business.

In determining the level of expected income, the starting point was to consider the amount earned in the previous comparable period. For example, to consider the income achieved in April 2019, to work out the expected income in April 2020. An adjustment is then made to take into account any increase in the amount of expected income, i.e. the trend of the business. Hiscox has applied a 3.89% increase as a trend.

Mrs A says that this is not enough though. And that she made changes to her business that meant, not only was she more profitable, she could expect to generate more business.

The main change that she says increased her level of income was the introduction of a website to allow online bookings, etc. Mrs A has said that following the introduction of this website, around 45% of her bookings were online. So, she considers the expected income should be adjusted by an equivalent amount.

Whilst I appreciate Mrs A's argument here, I don't think it has been demonstrated that a higher proportion of online bookings (from 0% to 45%) corresponds to a directly comparable increase in bookings overall. I don't think it has been demonstrated that the number of bookings overall would have most likely increased by 45% during the periods Mrs A's business was closed.

I appreciate that Mrs A has said that she had excess capacity prior to introducing this website, but I do not consider she has demonstrated that this capacity has actually been filled – or that it would have been had it not been for the COVID-19 pandemic. So, I do not consider it would be fair or reasonable to require Hiscox to apply this percentage as a trend.

Mrs A has also raised concern over Hiscox's use of income figures from the period July to December 2021 to calculate the expected trend during the indemnity period prior to this. The use of trading figures from a period after the indemnity period is not automatically inappropriate (see for example *SugarHut Group Ltd v AJ Insurance Service* [2014] EWHC 3775 (Comm)). However, I do appreciate Mrs A's point that whilst the main restrictions relating to COVID-19 had been removed by the government after this point, this does not mean her business had returned to normal. Use of such 'tainted' figures is best avoided.

However, it is difficult for me to conclude that, even though best avoided, Hiscox has acted unfairly or unreasonably by using them here. This is because it is difficult to see what other options were available. As has been pointed out, all financial figures

since COVID-19 arose are likely to be impacted in one way or another. This would mean it would not be possible to rely on any figures subsequent to early 2020. The only real alternative – other than accepting Mrs A's proposal above – would be to look at the trend of Mrs A's business prior to 2020. However, this certainly would not take into account the changes Mrs A made to her business after this date.

So, in the absence of a reasonable alternative, I consider Hiscox acted fairly and reasonably.

SEISS

The final significant issue raised by Mrs A, that has not already been resolved, relates to the deduction from the settlement of payments she received through the Self-Employment Income Support Scheme (SEISS).

My role is to assess each complaint on its own individual circumstances. However, where circumstances are similar, it is likely that a similar outcome will apply. And we have reached certain approaches to certain situations. Our Investigator has already set out the current approach of the Ombudsman Service in relation to these payments and their interaction with policies like Mrs A's.

As the Investigator noted, our position on SEISS has evolved somewhat over time, as our understanding developed and as new case law emerged. So, whilst Mrs A has referred to a particular final decision which had a different conclusion to that in the decision the Investigator referred to, it is the latter which is our current approach. I would point out that both of these final decisions were those I personally reached on the relevant complaints.

As our Investigator has set the approach out clearly, and as both parties are aware of my previous decisions on other cases, I do not consider I need to go into full detail in this decision on the background.

In brief, the Government provided financial support to businesses during the pandemic via a number of different schemes. These included SEISS, furlough, and also a range of other grants that I will refer to them collectively as "business support grants". Following action taken by the FCA and HM Treasury, many insurers including Hiscox agreed not to deduct money received from business support grants from settlements.

However, Hiscox, like other insurers, considers that payments through furlough or SEISS schemes are deductible from claim settlements. The position on furlough was considered in *Stonegate Pub Company v MS Amlin and Others* [2022] EWHC 2548 (Comm). This did not consider SEISS payments at all, but I consider the reasoning of the judge is nevertheless something I need to take into account when thinking about the SEISS payments.

As the judge in *Stonegate* referred to, in paragraph 267 of the judgment, the clauses in a policy should be construed, if there is any room for argument, to accord with the basic principle that the policy was a contract of indemnity. So, thinking about the principle of indemnity and the fact that insurance is, effectively, there to cover losses of a policyholder that can't otherwise be recovered, I need to consider whether it is fair for Hiscox to cover Mrs A's loss of income where she received money from a different source, which is based on the money they would likely have received were it not for the cause of the claim.

Thinking about the situation holistically, I am persuaded that Hiscox considering the money received from SEISS to be income would be fair and reasonable.

Mrs A has referred to the determining factor to be how the policy should be interpreted. I should point out that even if this is true as this might relate to a court,

my role is to consider all of the circumstances of a complaint. Whilst I need to take into account the law, this is not my only consideration.

However, with reference to the policy wording, income is essentially defined as the total income of the business carried out from the premises. I note that there is an argument that the SEISS payments have not been the result of Mrs A providing cosmetic treatment to the Government. But the amount of money Mrs A received through the SEISS was determined in part by the level of cosmetic treatment carried out in previous years.

Mrs A received less than the maximum allowed under the scheme, which indicates this was capped by the level of "trading profit" generated in previous tax years. These were the rules under which the scheme operated. And had Mrs A not been previously trading, she would not have been entitled to any payment.

So, for the purposes of Mrs A's claim(s), I consider it is fair and reasonable to consider that the money she received through the SEISS scheme amounts to income.

I also appreciate that this is not the exact way Hiscox assessed the claim. It considered the SEISS payments were a saving against a cost Mrs A would otherwise have had to meet. However, in order to do this, I think Hiscox would need to identify the cost that was saved. And, to my knowledge, Mrs A has not indicated these payments were used for anything specific. But I do not consider Hiscox's inability to identify the cost saved, means that it is fair and reasonable for the money received not to be deducted from the settlement of the claim(s). And the appropriate alternative to this is to consider the money received to be a form of income.

Interest

Mrs A has included a further issue, though it does not appear any real discussion of this is needed. Mrs A has said that Hiscox should be adding interest onto the settlement to take into account the length of time it took for her claim(s) to be settled.

However, this is something that has actually already been included. The settlement offer in June 2022 included a breakdown of this (albeit it seems this contained a slight error which was amended in April 2024). And our Investigator also included a recommendation, accepted by Hiscox, that interest be added to the additional payment relating to the underinsurance element of the claim. I also consider such interest ought to be added to the further adjustment required to the claim settlement for lockdown one.

In terms of this underinsurance element, as noted this has largely now been resolved. But, in addition to paying interest on the additional settlement relating to this, I agree that Hiscox ought to compensate Mrs A for the impact of initially relying on this. A certain level of impact will have been caused to Mrs A due to this error. However, given the other areas of disagreement over the claim settlements, I consider that much of the inconvenience experienced would still have occurred. So, I agree that £150 is an appropriate amount for this."

I invited both parties to provide any further evidence they wanted me to consider.

Hiscox did not agree that increasing the rate of gross profit to 90% for the period of the first national lockdown was appropriate. It said month end adjustments and adjusting journals were not taken into account, so the position it had reached may already be favourable for Mrs A. I also said that the year end financial statement to 30 April 2020 shows a rate of gross profit lower than the previous year. And that the rate of gross profit had not reached 90% for any month since April 2019. And there was nothing to suggest the laddering to 90% would have occurred.

Hiscox said that the sudden increase at the end of the first lockdown was more likely reflective of factors at that time, possibly Mrs A increasing her prices. Hiscox considered that an adjustment would only be reasonable if this were to be evidenced rather than assumed.

Mrs A responded also, making comments relating to a number of the issues above. She said it was not possible for her to prove what she would have earned in terms of the expected revenue, and said that the onus for this should not be on her. She said that if it were possible to speculate in relation to the rate of gross profit, it should be possible for this to be done here and that the 3.89% uplift was not reasonable.

Mrs A also maintained her position on SEISS and said it was not appropriate to consider this as income. She queried whether my approach was a departure from the law, and if so why this was fair and reasonable. Mrs A also referred to a fixed cost saving issue in relation to her sundry expenses. And explained that her issue over interest was that a higher rate ought to be applied.

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 outcome as set out in my provisional decision.

I have done this largely for the reasons set out in that decision, and above. So, within this part of my decision, I will only respond to the additional points made by the parties.

In terms of the rate of gross profit, whilst I understand Hiscox's position on this, I have not been provided with any evidence that there was sudden change after the first national lockdown that otherwise would not have occurred sooner. Hiscox has said that Mrs A may have increased her prices at this point. This is possible, though there is limited evidence of this and Hiscox has had the opportunity to investigate this point. But it is also possible that, even if there was such an increase, this would have happened sooner had her business been open.

I appreciate Hiscox would like more evidence of the financial situation. But I consider it has had ample opportunity to obtain this. And much of the required evidence will not exist. It would not be possible for Mrs A to provide evidence of the actions that she did not take as a result of the pandemic. These did not happen, so such evidence does not exist.

I also appreciate the other side of the coin to this. Mrs A has said it is not possible for her to prove what the expected revenue would have been had it not been for the pandemic. She has queried why it should be possible to make assumptions on the rate of gross profit, but not on the expected revenue. However, I consider that assumptions are being made on both.

Contrary to Mrs A's position, it is necessary for a claimant to demonstrate their losses. So, the onus is on her to show what she would otherwise have earned. This applies to both the rate of gross profit and the expected revenue. However, it is recognised that there are limits to what can be evidenced of both of these aspects. And it is necessary to consider the evidence that is available and then to, essentially, come to a fair and reasonable estimation.

Overall, I find that there is persuasive evidence that the rate of gross profit would most likely have increased during the period of the first lockdown. So, I don't think Hiscox has fairly and reasonably applied the available evidence to this part of the claim. And I consider it is fair and reasonable that the higher rate of 90% be used for this.

However, I am not persuaded by the evidence that it is more likely than not that Mrs A's expected revenue would have increased in the manner she has indicated. Mrs A has said that it is open to me to suggest an alternative option. However, this would only be the case if I considered Hiscox had not acted fairly or reasonably in relation to this point. And I am not persuaded this is the case here. So, I am unable to fairly and reasonably ask Hiscox to do more.

In terms of the SEISS payments, whilst I appreciate Mrs A's points, I am not persuaded to change my outcome here. The situation with SEISS payments is complex. But I need to reach an outcome that is fair and reasonable in relation to both parties. Ultimately, Mrs A has received sums of money from the Government for, essentially, the same reason as she is making a claim for losses from Hiscox. The Government did not say this should not be taken into account by insurers. So, I consider it is fair and reasonable for this to be taken into account when Hiscox considers the settlement of Mrs A's claim.

I do think this is the same outcome that a court would come to were it to apply the relevant legal principles to this case. However, as I have previously said, even if I am wrong on this, I consider it would be fair and reasonable to come to this conclusion when considering all of the circumstances of this case, as I am required to do.

Mrs A has referred to costs she incurred in March 2021, which have been listed as sundry expenses. She has queried why these have not been taken into account when calculating the losses she experienced in the third national lockdown. Mrs A's argument, seemingly, is that the sundry expenses she incurred during this period should act to offset the savings she made on other expenses.

The policy provides that the settlement of the claim will be based on the difference in turnover, less any savings. During the third lockdown, Mrs A saved on a number of costs; cleaning, travel, etc. Hiscox has deducted these savings from the loss of turnover, to generate the settlement. These were expenses that she did not have to incur as a result of her business being interrupted.

The sundry expenses on the other hand are far in excess of Mrs A's normal costs in this area. They seem to be an additional expense. It is not clear what these were for exactly. But, based on the evidence available, I don't consider it would be fair and reasonable to require Hiscox to offset these expenses against the savings she made on other costs.

These sundry expenses seem most likely to be increases in costs Mrs A incurred in order to have her business ready to reopen following the end of the lockdown period. The policy also provides for increased costs of working. But this only applies where such costs reduce the losses experienced during the period of indemnity, i.e. during the lockdown period.

Lastly, whilst I note Mrs A has said that she thinks a higher rate of interest should be applied to the delayed settlement payments, I have not been persuaded by any evidence that has been provided that this would be fair or reasonable.

8% simple interest per annum is the starting point that the Ombudsman Service directs respondents to pay where there has been an error that has led to a complainant being without money for a period of time. This rate of interest will be altered depending on the circumstances. If, for example, a complainant was forced to take out borrowing, the rate of interest might need to match the rate applicable to that borrowing – whether higher or lower than 8% simple. Or if a complaint relates to investment issues, the rate of return that might be expected from that type of investment might be considered to be the fair rate of interest.

In Mrs A's case, whilst I appreciate she was without these funds for some time, and this

would likely have had some impact on her ability to operate her business, etc. I have not been provided with evidence that she had to take out borrowing at a higher rate of interest than 8% simple as a result of Hiscox's "errors". Nor do I consider that her business would otherwise have returned a higher rate of growth to the extent that 8% simple is not a fair and reasonable rate of interest to apply.

For the reasons above and in my provisional decision, I have come to the same outcome as previously set out.

Putting things right

If it has not already done so, Hiscox Insurance Company Limited should:

- Recalculate Mrs A's claims on the basis that she was not underinsured, and pay Mrs A the additional settlements that result from this.
- Additionally, recalculate the claim for lockdown one on the basis that the applicable "rate of gross profit" used should be 90%, and pay Mrs A the additional settlement that result from this.
- Add interest to these payments, from the date they otherwise would have been made to the date of settlement. The rate of interest should be 8% simple per annum.

Pay Mrs A £150 to compensate her for the inconvenience caused by this error.

My final decision

My final decision is that I uphold this complaint. 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 A to accept or reject my decision before 21 January 2025.

Sam Thomas
Ombudsman