

The complaint

A, a limited company, complains Hiscox Insurance Company Limited didn't provide cover for a claim it made on its business protection insurance policy.

What happened

A took out business protection insurance with Hiscox in November 2022. Two days later A informed Hiscox that one of its clients (B) was carrying out an investigation into its sponsor. That included lines of inquiry into A though no allegations had been made against it. Hiscox said as no claim had been made against A the policy wouldn't engage but it would assist A (and its solicitors) in providing responses to B to ensure its rights were protected.

In January 2023 B said it didn't consider invoices A had submitted were due for payment. A asked Hiscox whether cover could now be provided as the investigation B was carrying out went beyond a routine inquiry or compliance review. Hiscox said it didn't think the insuring clause of the policy was triggered (as no claim had yet been made against A). Solicitors for A explained why they disagreed but Hiscox maintained its previous position.

B then told A in April 2023 invoices it had submitted (and which it had paid) were factually incorrect. The invoiced services hadn't been provided at the time of issue. That was against the law of its country. It said A owed it around £127,000 and, unless that was repaid, it would consider its legal rights.

A asked Hiscox to reconsider its position on policy coverage in the light of the now quantified claim from B. Hiscox accepted a claim had been made but raised concerns as to whether that was caught by policy exclusions relating to deliberate and dishonest acts and financial advantage. It also queried whether A had made a fair presentation of risk when taking out the policy. There was further correspondence between Hiscox and A and a meeting took place at the start of October 2023.

Following that Hiscox confirmed its position on policy coverage. It said there was no cover for defence costs prior to 5 April 2023 because there was no claim against A before that date. And the investigation B did carry out wasn't something the policy covered. The claim then made wasn't covered by the 'Professional Indemnity' section of the policy because that only covered amounts payable as compensation (arising out of A's business activity). And it thought a claim under the 'Corporate Legal Liability' section would be caught by the financial advantage exclusion. It continued to have concerns as to whether A made a fair presentation of risk when taking out the policy and reserved its position on that.

A didn't agree and explained why it thought the policy did cover the claim it had made along with costs it incurred in respect of the initial investigation from November 2022. Hiscox didn't change the position it had set out in previous correspondence.

Our investigator said as Hiscox has reserved its position on whether a fair presentation of risk had been made she didn't need to reach a finding on that. She agreed the 'Professional Indemnity' section of the policy didn't cover the claim A had made. She didn't think the investigation B carried out would fall within the definition of that the 'Corporate Legal Liability'

section of the policy contained. And she agreed a claim hadn't been made against A until April 2023. Overall, she didn't think Hiscox unfairly declined to provide cover for the claim A made on its policy.

A didn't agree. In summary it said:

- It thought it had made a fair presentation of risk when taking out the policy and drew attention to evidence from the sales calls in support of its position on this. It said this was the key reason Hiscox wasn't provided cover so was something on which a finding should be reached.
- The review B carried out was under a contract which enabled it to require A's director to attend interviews. It thought an objective and ordinary interpretation of the policy terms should mean cover was available for the investigation B carried out as the policy covered an investigation carried out by "*another body legally empowered*" which encompassed what had happened here.
- It didn't agree a private investigation wasn't covered by the policy (and didn't agree that was what had happened here as material parts of the investigation had been shared in public legal proceedings). And it said any grey area of interpretation should be read in its favour.
- It said the investigation A was aware of prior to the policy being taken out was separate from the investigation that took place after the policy had begun. And it had no option but to respond to that.
- It thought the contact it had from B at the time would have constituted a claim in any case. B's senior director had told A at the end of November 2022 it considered it liable and was making compensation claims because A had destroyed value. In January 2023 B said it would be offsetting A's invoices against an outstanding demand it had.
- And in April 2023 B expressly demanded A repay a sum of around £127,000. So it said there had been a written demand for compensation from B in addition to a claim for reputational damage. It said Hiscox had only raised arguments in relation to its reasons for declining the claim months after it became apparent its initial reasons for doing so were unsustainable and it thought adverse inference should be drawn from this. It set out what it thought Hiscox should do to put things right.

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. A has also said it thinks Hiscox is in breach of the requirements of the Financial Conduct Authority's 'Consumer Duty'. However, those rules don't apply until 31 July 2023 and don't have retrospective application. So they wouldn't apply to what Hiscox did prior to that date. But they would apply to decisions it took after that. I've therefore taken those rules into account as appropriate when deciding what's fair and reasonable in all of the circumstances of this complaint.

Where a claim is made the onus is on the policyholder to show, on the balance of probabilities, an insured event caused the damage or loss. If the insurer then considers an exclusion or condition applies, which means the claim isn't payable, the onus is on it to show that's the case.

Costs from November 2022 until April 2023

A says following correspondence from B it instructed solicitors to assist with its response and incurred significant costs as a result. It said the 'Corporate Legal Liability' section of the policy covered losses arising from an investigation (including legal representation) and it should therefore cover the costs incurred in this case.

The 'Corporate Legal Liability' section does say *"We will pay on your behalf the loss arising from an investigation and arising from any wrongful act, act, incident or occurrence performed, taking place, or alleged to have taken place within the geographical limits..."*. And the policy defines 'investigation' as *"an official examination, official enquiry or official investigation into you first notified as being required during the period of insurance and conducted by any regulator, government department or other body legally empowered"*

That means for cover to be available in this case A needed to have been notified of the investigation during the period of insurance and it needed to be conducted by one of the bodies set out in the definition. In this case Hiscox has argued A was aware of the investigation prior to the policy being taken out. A says it was only aware at that time of issues relating to its sponsor and hadn't been informed of an investigation into its actions.

But that's not something I need to determine because even if A is correct I don't think the investigation that then took place meets the definition the policy contains. B clearly isn't a regulator or government department. And I haven't seen evidence to show it was another body *"legally empowered"*. A has referred to powers B had but those appear to arise from its contractual rights rather than being something B had any statutory right to enforce.

A also says any grey area of interpretation should be read in its favour. I think it's referring here to the doctrine of '*contra proferentem*' which says where wording is unclear the preferred meaning should be the one that works against the interests of the party that provided the wording. However, while that might have relevance to a consumer contract it has a much more limited role in relation to commercial contracts such as this.

In my view more relevant here is the doctrine of '*ejusdem generis*'. That broadly means where the meaning of a word or phrase in a contract term is argued to be unclear, clarification can often be found in the overall context of other listed things. The other listed things in this case are a regulator and government department. So I think the reference to another body *"legally empowered"* can reasonably be read as being a body that is similar to those already listed. I think it was reasonable of Hiscox to conclude that wouldn't apply to B (a multinational company) regardless of whether its investigation was public or private.

A has also argued the contact from B in this period case represented a claim against it and should be covered by the policy on that basis. However, the policy specifically defines claim within 'Corporate Legal Liability' as *"Any written demand or civil, criminal, regulatory or arbitration proceeding first made against you during the period of insurance alleging a wrongful act and seeking monetary damages or other legal relief or penalty"*.

I've reviewed the correspondence between A and B in this period. I think it's clear no claim was made against A in the initial emails it sent; B said *"whether or not any claims may be made against [A] or any third party providing services to [B] via [A] will be objectively assessed based upon the information you are providing us during this process"*. Following further information provided by A additional questions were raised by B at the start of December but in the context of asking for assistance to reconcile invoices it had been sent.

But at the start of January B did reference *"non transparent"* invoicing and refer to *"damage"* to it. It also said it reserved the right to place an *"additional"* claim on A. And in subsequent emails there was further reference to invoices A had submitted when B said corresponding services had not been provided.

However, I've not seen evidence of a written demand for reimbursement of money paid to A being made prior to April 2023. I've taken into account the comments made in B's earlier emails but in my view prior to that date it was primarily seeking to clarify issues relating to the invoices. It was only following those discussions (and in particular a meeting at the end of March) it appears to have concluded further steps to resolve this issue weren't possible. And it then made a formal demand for repayment of sums it said were owed to it. Given that I don't think Hiscox did anything wrong in concluding no valid claim had been made within the 'Corporate Legal Liability' section of cover prior to April 2023.

I appreciate the 'Professional Indemnity' section of the policy could also cover a claim against A (in the circumstances it then describes). That section of cover doesn't contain a definition of claim. A has referenced what it says is the common law accepted definition of a claim which it believes was met in this case. I've reviewed the case law A has cited in support of its position and I think what's being defined there is a cause of action. I've taken into account relevant legal definitions and in my view it would be reasonable to regard a claim as encompassing the formal assertion of a cause of action by a claimant against a defendant. And for the same reasons I've already explained I don't think the contact between A and B prior to April 2023 would meet that definition.

Claim made in April 2023

I don't think it's disputed that in April 2023 B did make a formal claim against A. The issue is whether that claim was covered by A's policy. I've looked first at the cover provided by the 'Professional Indemnity' section. That says:

"If during the period of insurance, and as a result of your business activity for a client on or after the retroactive date within the geographical limits, any party brings a claim, including any injunctive proceedings, against you for [covered issues]... unless excluded under What is not covered below, we will indemnify you against the sums you have to pay as compensation, including any liability for claimants' legal costs and expenses. We will also pay defence costs but we will not pay costs for any part of a claim not covered by this section".

Hiscox says the amount B sought from A was for the recovery of monies it had paid in respect of what it regarded as an unlawful invoice. So this wasn't a claim for compensation. Compensation isn't defined in the policy. But Osborn's Concise Law Dictionary defines it "*as payment to make amends for loss or injury to person or property, or as recompense for some deprivation, e.g. compensation to the owner for the compulsory acquisition of his property*". I think it's arguable as to whether the claim B made would fall within that definition or not.

But for cover to apply in any case the claim needs to result from business activity A was carrying out for B. If it does cover could be provided for a claim which relates to, for example, negligence or dishonesty in relation to that activity. The business activity contained in A's schedule is 'Management Consultants'. But I don't think the claim in this case does result from that activity. The allegation is that invoices A submitted were for services which hadn't at that point been provided.

There's no suggestion of negligence or dishonesty or any other issue in the actual provision of those services. And while I appreciate there's clearly a connection between the services provided and invoicing for them I don't think there's a close enough link to say the claim "*results*" from the business activity A was carrying out. It's really about activity related to A's administration of its client account. So I don't think it was unreasonable of Hiscox to conclude the professional indemnity section of the policy wouldn't cover the claim A made.

A has argued there was also a claim against it for reputational damage which alleged it had caused B to suffer a loss. And B also said it had "*destroyed value*" for it. So the claim against it went beyond issues relating to an invoicing dispute. I appreciate that is referenced in correspondence and A says a loss relating to reputational damage was referenced in legal proceedings in B's home country.

But I've not seen clear evidence to show that's been pursued as part of a formal claim against A. I note when A emailed Hiscox in February 2024 it referred to a "*repeatedly threatened reputational damage claim*" from B. That would suggest the claim hadn't in fact been pursued. So I don't think this was something Hiscox needed to consider. I think it's correctly explained that if further claims do materialise from B those would need to be considered on their own merits against the relevant policy terms.

I've gone on to consider whether cover would be available for the existing claim under 'Corporate Legal Liability'. Hiscox hasn't disputed cover would potentially be available under this section. But it's declined the claim on the basis of an exclusion for 'Financial Advantage'. That says "*We will not make any payment for any claim, loss, investigation, or any other liability under this section... based upon, attributable to or arising out of the gaining of any financial advantage to which you were not entitled, including the repayment of any wrongfully received monies*".

I understand A believes it's the facts leading to a claim which the financial advantage needs to be based upon, attributable to or arising out of. And it shouldn't apply where wild or unreasonable allegations of receiving wrongful monies against a policyholder were made. Otherwise, a policyholder would be at risk of cover not being provided where exaggerated allegations were made against it.

I think it's accepted the exclusion needs to be read in line with the relevant policy definitions. The definition of claim includes that a 'Wrongful Act' has been alleged. That's separately defined in the policy as "*Any actual or alleged act, error or omission committed or attempted by you...*". Taking that wording into account if the alleged act arose out of the gaining of financial advantage to which A wasn't entitled in my view the exclusion would apply.

But I agree it might not be fair to rely on that to turn down a claim in a situation where an obviously unfounded or spurious allegation relating to the gaining of financial advantage had been made. I don't think that's the case here. The April 2023 email from B made clear the basis on which it's claim was being made which included that invoices submitted by A were unlawful as *"no services had been provided by [A] to [B] against those invoices at the time of issuing them. Each of these invoices claimed that the services had been fully executed"*.

I accept A didn't consider those allegations had merit and I believed it was invoicing in accordance with arrangements agreed with B. But I don't think that the allegations made by B were obviously unfounded or spurious. In my view Hiscox has done enough to show the financial advantage exclusion applies and I don't think it acted unfairly in concluding A's claim wasn't covered as a result. I recognise A feels a claim for reputational damage wouldn't be caught by the exclusion. But for the reasons I've already explained I think it was reasonable of Hiscox to say it hadn't seen evidence of that claim being pursued against A to date (and it would consider such a claim against the policy terms if that did take place).

A has also suggested this policy was mis-sold to it because this exclusion wasn't drawn to its attention by Hiscox at that time. However, I'm only considering in this decision the complaint about the decision Hiscox reached on the claim A made. If A wants to pursue a complaint about the mis-sale of this policy that's something we could potentially consider as a separate complaint. But it's an issue Hiscox would need an opportunity to look at before we could do so. And while I'm aware A has raised concerns about the sale of its legal expenses insurance policy (which we've considered as part of a separate complaint) I'm not clear it's complained about the sale of this policy to date.

A says Hiscox only raised new arguments in relation to the claim after it had become apparent its initial reasons for doing so were incorrect. But I don't think that is what happened. For the reasons I've explained I think it was reasonable of Hiscox to initially conclude no claim or investigation falling within the terms of the policy had been made. So it didn't need to consider matters further at that stage.

Once the position on that changed Hiscox then needed to review policy coverage based on the claim which had been made. I've reviewed the timeline in relation to that and, while I think there were occasions when Hiscox could have responded more quickly to A, overall I don't think the timeframe for it to provide a detailed response to the issues raised was unreasonable. So I don't think there's anything it needs to do to put things right here.

Finally, A says we should consider whether it made a fair presentation of risk when taking out the policy as that's what Hiscox are relying on to decline the claim. However, I think it's clear Hiscox reserved its rights in relation to the issue of fair presentation. And I've already explained why I think it was fair of it to decline the claim for other reasons. So I don't consider this is something I need to determine in this decision.

My final decision

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask A to accept or reject my decision before 21 March 2025.

James Park
Ombudsman