DRN-5560273

The complaint

Mrs S, trading a micro-enterprise which I will refer to as B, complains about the handling and settlement, by Hiscox Insurance Company Limited, of B's business interruption insurance claim. The claim was made as a result of the COVID-19 pandemic.

What happened

Both parties are aware of the circumstances of this complaint. So, the following is intended only as a summary. Additionally, even though other parties have been involved, for the sake of simplicity I have just referred to B and Hiscox.

B operates a beauty salon and held a commercial insurance policy underwritten by Hiscox. The policy offered a number of areas of cover, including business interruption. Following the introduction of the government-imposed restrictions relating to the COVID-19 pandemic, B's business was interrupted. And it claimed on the policy.

Ultimately, Hiscox has agreed to meet the claim. However, B is unhappy with the process of calculating the claim, and also the settlement offered. B brought a complaint to the Financial Ombudsman Service. B said that it only wanted some of the issues it had experienced to form part of this complaint. However, our Investigator thought it was appropriate to consider the settlement as a whole.

Having considered the complaint, our Investigator's final opinion was that Hiscox had not acted inappropriately in relation to several of the disputed issues. But that it did need to recalculate the claim on a couple of aspects; Self-Employment Income Support Scheme (SEISS) payments and the applicable indemnity periods.

Neither party fully accepted the outcome. So, the complaint was passed to me for a decision. I contacted both parties to explain my own provisional thinking. In summary, I said:

- When a claim is made, it is largely for an insurer to determine what evidence is needed to assess that claim – as long as such requirements are reasonable. Hiscox had requested evidence that I considered was reasonably required. And B hadn't provided this. So, it was reasonable for Hiscox to assess the claim based on the available evidence.
- However, as further evidence has now been provided, and Hiscox has not demonstrated that considering this would cause it to suffer prejudice, Hiscox should now consider this evidence to see if the settlement should be amended.
- I explained that the position in relation to Coronavirus Job Retention Scheme (furlough) and SEISS had been considered previously by the Financial Ombudsman Service. And that I was not minded to depart from this approach in the circumstances of B's complaint.
- I also thought that, as B had set the sum insured lower than it should have been, Hiscox had applied underinsurance to the claim in line with the Insurance Act 2015 and its underwriting criteria. I also explained that, as this was commercially sensitive information, it was unlikely that I would be able to share the evidence relating to this, or a full explanation, with B.

- I explained that, whilst there had been some issues with the handling of the claim, Hiscox had provided B with £500 to compensate it for this. And that I considered this was appropriate in the circumstances.
- Lastly, I explained that I disagreed with our Investigator's opinion on the indemnity period. Largely, the Investigator had been persuaded that there were discrete areas of the premises that had not been usable for periods outside of the national lockdowns. This was based on there being restrictions imposed on B during these times. However, I did not think that these areas could fairly and reasonably be described as discrete areas of the premises. I did not think that certain chair stations or sinks within the premises would constitute discrete areas for the purpose of considering the claim. So, I thought the way Hiscox had treated this part of the claim was appropriate.

Hiscox responded, disagreeing with the issue of SEISS. Hiscox made a number of comments in relation to this, referring to its previous submissions, other complaints the Financial Ombudsman Service has dealt with relating to this issue, and various legal cases.

B responded, asking to see details of the documents that set out what Hiscox would charge if B had set the sum insured higher.

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 reached the same conclusions as I did provisionally. I've explained why below.

Firstly, I would like to confirm that whilst both parties have provided detailed submissions, and that I have considered these in full, I am not going to comment on each issue or argument. This is not intended as a discourtesy, but rather reflects the informal nature of the Financial Ombudsman Service.

A number of issues have been considered as part of this complaint. Many of them no longer appear to be overly disputed. But it is worth saying a few words on several of these nonetheless.

Information requests and claim handling

When a claim is made, it is largely for an insurer to determine what evidence is needed to assess that claim. This should not prevent a claimant supplying other evidence that it considers relevant. And the insurer's requests should not be unduly onerous. But unless the evidence the insurer reasonably requires is provided, insurers may be within their rights to decline claims or settle them based on 'assumptions'.

It is also reasonable that requests for information are complied with in a reasonable timeframe. I do note there have been a number of points raised around the specific timeline on this particular claim. I don't intend to discuss these in detail.

But, fundamentally, Hiscox seems to have requested specific evidence at a reasonably early stage of the claim process (following the Supreme Court judgment in the FCA test case). And whilst reports were provided to Hiscox, it doesn't seem that the evidence behind those reports was provided. I think it would be reasonable for this evidence to be required/requested.

If evidence that has been requested is not supplied, a claim process may reach a stage where an insurer can reasonably close the claim even though the claimant remains unsatisfied with the settlement offer. Where additional evidence is then provided, as long as this is within a reasonable timeframe, I would hope that the claim is reopened. There may be reasons why reopening a claim is not appropriate though - for example where this would prejudice the position of the insurer. The specifics of the case will likely determine much of this.

In terms of this specific claim, I do agree that there were some delays on Hiscox's part. However, Hiscox has offered compensation to B in relation to this. And, taking into account the overall claims experience, I consider the £500 offered to be fair and reasonable.

I should also add that, arguably, Hiscox may have been entitled to take into account any unreasonable periods of time it took for claim evidence to be provided when thinking about the length of time interest might be due on the claim.

Taking things in the round, it is difficult to conclude that Hiscox acted unreasonably by reaching a settlement offer and then closing a claim, after having waited for around two years for information to be provided.

Hiscox has not however demonstrated that considering the additional evidence would prejudice its position. So, I do think it should now consider the financial information that has been provided. It isn't clear that this would lead to a significantly different settlement figure – but this is something Hiscox will need to determine in the first instance.

Underinsurance

Hiscox has reduced the claim based on B being underinsured.

When B's policy was set up, the level of cover selected for the business interruption section of the policy was set at £50,000. Based on Hiscox's assessment of B's financials at the point the claim was being considered, Hiscox determined that B should have set this amount at £90,686.

B has said that it is VAT registered, and has said that Hiscox would not insure the VAT element of its income. So, this should not be included in the calculation of the correct sum insured. However, the sum insured is based on B's gross profit. The policy includes a definition of this. But ultimately, I am satisfied that a claim settlement would not deduct VAT. So, the sum insured should have been based on the gross profit B believed it would make.

As B is a commercial customer, it was required to make a declaration at the time the policy was taken out that met the requirements of the duty of fair presentation under the Insurance Act 2015. In essence, this meant that B needed to accurately declare its gross profit, and hence the level of cover it required for this. Where a commercial customer breaches this duty, and this means that the insurer would have charged more for the policy, the insurer is entitled to reduce a claim settlement proportionately.

Hiscox has provided the Financial Ombudsman Service with evidence that, had B set the sum insured for business interruption cover at £90,686 it would have charged more for the policy. And that this means B was only entitled to 55% of the total settlement amount for its claim.

I appreciate B – as well as its representative, who also represents a number of customers in a similar position – has asked to see the evidence setting out how Hiscox would have calculated the (additional) premium. But the way an insurer sets its prices is commercially

sensitive information. Release of this information into the public domain could allow other insurers to unfairly compete and would be prejudicial to Hiscox. So, whilst I appreciate – and understand – B's desire to see this information, I do not think it is appropriate to share it.

My role is to consider the evidence to determine the fair and reasonable outcome to a complaint. I have seen enough from Hiscox to persuade me that it would have increased B's premium had the higher sum being declared. And that it is fair and reasonable in the circumstance of this complaint for Hiscox to only meet 55% of B's final claim settlement.

Indemnity period

The relevant cover provided by B's policy is based on there being an inability to use the premises due to restrictions imposed by a public authority in certain circumstances. That the circumstances exist in this case is not in dispute, so I have not expanded on that part of the clause here. The question is how long was there an inability to use the premises.

It should be noted that the wording in this clause was considered by the Supreme Court as part of the FCA Test Case. And a number of points were established. These include that an inability of use has to be established; not an impairment or hindrance in use. And that this can be established if either the premises can't be used for a discrete part of the business' activities, or if the business can't use a discrete part of the premises.

B has argued that, after the end of the lockdown periods, it suffered an inability to use its premises due to government-imposed restrictions.

The first point I would make is that it is not entirely clear whether some of the measures B has referred to would meet the requirement for there to be a restriction imposed. Social distancing measures, for example, were never imposed by the UK Government, and instead formed guidance. Secondly, other measures – such as the "rule of six" – would have hindered the use of the premises, but would not necessarily have created an inability of use. Using the premises for a limited number of people, is not a prevention of use.

Regardless, assuming that there were restrictions that potentially could be relevant, I am not persuaded that these caused an inability to use (a discrete part of) B's premises. Or for a discrete part of B's business activities. B's argument is essentially that the restrictions meant that only certain sinks and chairs/stations, in the salon could be used at any one time. So, B considers that this created discrete areas of the business premises that it was unable to use.

Whilst I note B's arguments around this, I am not persuaded by them. I do not consider that individual sinks or chairs/stations could reasonably be described as discrete areas of the business. B compares this with the example in the Test Case of a department store that was only able to use the pharmacy part of its premises. But a pharmacy is clearly a discrete part of such a business, and is distinct from the rest of the business. I do not consider an individual sink or chair/station to be the same in a salon.

If the restriction was that, for example, none of the sinks could be used, but the chairs could, then there might be an argument that the area of the sinks were a discrete part of the premises. Or that activities requiring use of the sinks was prevented. But being able to only use one of the two sinks within the area of the sinks is a hindrance of the use of this area – not an inability to use it.

And there was also seemingly nothing that would prevent the use of all of these areas, as long as this did not occur at the same time. Even taking into account the above "restrictions", each individual chair was capable of being used, as long as the adjacent chair was not occupied at the same time. So, this creates a hindrance, rather than an inability of use.

It follows that I consider Hiscox treated this part of the claim appropriately. And that I cannot fairly and reasonably direct Hiscox to do anything more here.

Furlough

It isn't clear that the issue of furlough payments remains disputed as part of this complaint. There has been further, third party, legal judgments that have explored this issue during the course of this complaint process. I note that this issue may yet be considered by the Supreme Court. But my role is to make a decision based on the situation as it currently exists. Should this situation change, I would hope that all insurers impacted by such a change revisit the claims they have dealt with. Should they not, complaints about those individual decisions would need to be made before I was able to comment further.

Regardless, given the discussion over SEISS that follows below, it is worthwhile briefly commenting on the deduction of furlough payments from claim settlements.

Furlough payments were introduced by the UK Government at the time it initially responded to the COVID-19 pandemic. Effectively, employers were able to claim for payment/reimbursement of 80% of the expenditure incurred on costs of employment. Various requirements and limitations existed, but it isn't necessary to set these out.

The question is whether these payments can be deducted from B's settlement on the basis that receipt of them created a reduction in a business expense.

The court judgments which have addressed this issue – and which the parties are familiar with – agree that the provision of furlough payments to policyholders meant that they did not have to bear the expense of this part of their wage bill. And that the employment costs were reduced pro tanto. The judgments have also concluded that the furlough payments were made in consequence of the insured peril – and this has included consideration of clauses similar to that in B's policy. And that there was nothing within the construction of this scheme, or within the later documents provided by HMRC Treasury etc. that stated these payments were for the benefit of the recipients alone, to the exclusion of insurers.

Ultimately, the courts have held that furlough payments can be deducted from claim settlements as a saving on expenses the policyholder would otherwise have had to pay. Whilst I am required to take into account the law, I am not necessarily bound by it. However, I am not persuaded that there is anything in B's complaint that means reaching a different outcome to the courts would be fair or reasonable.

It follows that I consider Hiscox has acted fairly and reasonably by deducting the furlough payments received by B from the claim settlement.

SEISS

I have previously issued a number of final decisions on complaints brought against Hiscox relating to the application of SEISS to settlements. And B, via its representative, is aware of these. So, I do not intend to revisit the entirety of what has previously been discussed.

SEISS and furlough do have some similarities. They were both schemes introduced by the UK Government to assist businesses impacted by the pandemic. So, the findings of the courts in relation to furlough are a useful starting point. However, the schemes also had some significant differences.

SEISS was aimed at persons carrying on a trade the business of which has been adversely affected by the health, social and economic emergency in the UK resulting from coronavirus

and coronavirus disease. These persons did not have to stop trading to claim, and could still be generating an income. The level of impact from the pandemic, as long as the business was adversely affected, was not relevant to the size of the payment made. Capped at £7,500, the size of payment was (in relation to the first iteration of the scheme) 80% of three months' worth of trading profits, based on the previous years' profits.

A specific use of these payments by B has not been identified – as opposed to furlough payments which reduced its employment expenses. So, I don't consider these SEISS payments can be considered a saving of a business expense that otherwise would've existed. But these payments were money received by Mrs S which reduced B's overall losses. So, I do consider it is fair and reasonable that Hiscox takes these payments into account when considering the claim settlement. I consider that the fair and reasonable way to do this is to consider these payments as forming income B received.

Hiscox largely agrees with this. The issue is whether this income/profit ought to be calculated with reference to the rate of gross profit during the financial year immediately before the restriction, or whether the rate of gross profit on this government payment ought to be considered 100% - i.e. as pure profit.

Hiscox's calculation is effectively to consider the loss of income, exclusive of SEISS payments, and to apply the rate of gross profit to this. And then to deduct the entire SEISS payment from the remainder. (Proportionally adjusting for the relevant periods of restriction, etc.) I do appreciate the reasoning behind Hiscox's stance here. B did not incur any cost at the time the SEISS payments were made, so there is an argument that these should be considered 100% profit.

However, the policy terms set out that claims are calculated by applying the rate of gross profit from the financial year immediately before the restriction to the reduction in income. The SEISS payment acted to limit the reduction in income. Based on this, it would be appropriate to feed the SEISS payment into the calculation of the loss of income, before applying the rate of gross profit. So, the historic rate of gross profit should be applied to the overall reduction in income – without adjusting for the direct cost (or absence of this) of receiving SEISS payments.

I consider this feels fair, given the SEISS payments were calculated with reference to the historic trading profit of the relevant business that received them. The amount the recipient would receive was based on their historic rate of profit, so it is fair and reasonable that this not then be ignored with regard to the claim settlement.

Hiscox has said that issues of correlation are not a relevant consideration. It refers here to the Liberty Mutual Insurance Europe SE & Ors v Bath Racecourse Company Limited & Ors [2025] EWCA Civ 153 judgment.

However, my interpretation of the relevant part of this judgment is that it was saying that just because the cause of furlough payments was not limited to the impact on the relevant policyholder, does not mean that furlough payments were not concurrently caused by the insured event. The issue being addressed was whether the payment of furlough correlated with the insured peril.

I agree that this should also be applied to SEISS payments. This scheme was introduced because the businesses of self-employed persons were affected by the pandemic, including that some businesses were unable to use their premises due to the restrictions introduced. Mrs S was one of those persons, and B was one of those businesses. So, it follows that one of the concurrent causes of the scheme being introduced was the restrictions placed on B.

Not all businesses that claimed SEISS had to demonstrate, or even suffer, an inability to use their premises. And had B not suffered an inability to use the premises, it still likely would've received a SEISS payment – it is likely its business would still have been adversely affected. But the scheme was not based on the person making an insurance claim. And the appropriate test here is the proximate causation test, rather than the but for test. So, it is fair and reasonable that the fact B received SEISS payments should be taken into account.

But it does not follow that this means it is not fair and reasonable to consider these payments reduced the loss of income, and that the resulting loss of income should then be calculated with reference to the previous year's rate of gross profit.

The policy does say that special circumstances or business trends can be taken into account to adjust this, so that the amount paid reflects as near as possible the result that would've been achieved if the restriction hadn't occurred. Hiscox and I hold different views on whether this should apply.

At this point, I'll make reference to the Supreme Court judgment in the FCA Test Case. The court considered trends clauses and how they should be applied. Again, though it should be noted that the issue being addressed wasn't quite the same as it is here, this doesn't mean the principles can't or shouldn't be applied.

The court was essentially considering the argument from the insurers in the case as to whether the losses sustained by customers ought to be excluded from cover on the basis that the wider circumstances of the pandemic meant that the losses would've been sustained anyway. To put this in the context of B's claim, the argument was that even if there hadn't been an inability to use the premises, nobody would be going to beauty salons due to the widespread concerns over the pandemic generally. I.e. that the special circumstances or business trend should be applied to essentially remove cover. The other argument over trends was on whether pre-trigger losses ought to be taken into account. I.e. whether any downturn in business prior to, in B's case, the inability to use the premises ought to be considered a trend that would allow an insurer to reduce the expected turnover during the indemnity period.

The court held that trend clauses should not be interpreted to take away cover from the insuring clauses on the basis of concurrent causes of losses. And that it is not appropriate to apply the "but for" counterfactual to trend clauses, any more than it is to the insuring clause. The court stated, at paragraph 268 that:

> "…the aim of such clauses is to arrive at the results that would have been achieved but for the insured peril and circumstances arising out of the same underlying or originating cause. Accordingly, the trends or circumstances referred to in the clause for which adjustments are to be made should generally be construed as meaning trends or circumstances unrelated in that way to the insured peril."

The court went on to say, at paragraph 284:

> "The next step is, for those activities interrupted by the insured peril, to identify the income actually earned from those activities during the period of interruption. This amount is then compared with the standard turnover, adjusted to reflect any trends or circumstances which affected those activities before the occurrence of the insured peril or which would have affected them had the insured peril not occurred. As discussed, for this purpose the trends or circumstances for which adjustments should be made do not include trends or circumstances arising out of the same underlying or originating cause as the insured peril, namely the COVID-19 pandemic."

I should point out that this step is, as is stated, based on an assessment of the income earned on the activities which were interrupted. It is perhaps this point that leads to the different positions Hiscox and I have reached. Receiving a SEISS payment is not income that would be normally earned by B. So, was this income earned on an activity which was interrupted?

If not though, the alternative is that it is not income generated by a business activity. B's policy does not define income with reference to the money received needing to be generated by business activity. But there are limitations on what I consider it would be fair and reasonable to consider income to be. I don't, for example, consider it would be fair or reasonable to reduce a settlement because the husband of a self-employed person sold their car and used the money to support their wife's business. I think, before deductions can be made, it is appropriate to consider that the income a business receives needs to be connected to its business activities, regardless of the policy definition.

I do think it is fair and reasonable that SEISS be considered income, but this can only be appropriate if it is considered income generated by the activities of the business. At the time a business received such a payment, it was not carrying out activities (at least not any that directly led to this income). So, I do appreciate that even considering the payments to be income is somewhat shoehorning this in. But, overall, I consider it appropriate. The fact this is happening though needs to be taken into account.

Taking things in the round, I consider it is fair and reasonable to say that the money B received through the SEISS was income that was earned on an activity that was interrupted. The fact B received this income, and the size of this payment, was because of the business activities that were interrupted. As I have set out, the calculation for the payment was based on B's historic trading profit. And the activity of generating this profit was that which was interrupted. I don't believe any comments of the courts as to correlation change this conclusion. That B would have received this money even if it had retained use of its premises, but been affected in other ways, does not mean this is not money that was earned on an activity which was interrupted. This was the activity that was adversely affected. And so, it is not appropriate to apply a special circumstance or business trend adjustment to it.

Hiscox's underlying argument is that the approach taken by the Financial Ombudsman Service does not lead to a situation where the settlement is being made in accordance with the principle of indemnity. I do recognise this argument and appreciate the reservations Hiscox has over the approach being taken here. The principle of indemnity however does not sit in isolation. And I am required to determine what is fair and reasonable in all the circumstances of a complaint.

Ultimately, the issue of SEISS is an unusual one. Whilst guidance can be found in court judgments addressing similar issues, or in – as Hiscox has referred to – training materials on the usual and standard approach business interruption claims, the very fact the circumstances here are unusual means that an unusual outcome might be reached.

It is possible that, were this issue to come to court, a different outcome might be reached. However, as I say, I am required to come to my decision based on what I consider to be fair and reasonable in all the circumstances of the complaint.

I consider that SEISS ought to be considered income. But that the level of this income paid to recipients was based on their historic trading profits. And it is not appropriate to adjust this payment based on a 'special circumstance' where that circumstance is the same as that leading to the payment and to the claim. So, it is fair and reasonable to apply these payments to the claim settlement without adjusting for the level of cost the recipient actually incurred at the point the payment was made. Whilst not determinative, I will add here that

other insurers do approach the payments in this manner.

It follows that, in order to calculate the settlement of B's claim, Hiscox should deduct the SEISS payments from the loss of income B received, and then apply the historic rate of gross profit to this residual loss. As I understand it, once the underinsurance element of the claim is taken into account, the difference in settlement will be around £127.

Loss of profit v Loss of income policies

Hiscox has referred to the fact that the approach the Financial Ombudsman Service has taken over SEISS leads to a different result between those Hiscox policyholders with a loss of profit based policy, to those with a loss of income based policy. The current complaint is about a loss of profit policy. However, with a view to providing clarity I will briefly address this point.

Previously, in relation to other complainants, I have essentially said that whilst it is appropriate to apply the historic rate of gross profit to loss of profit based claims, this is not necessary on loss of income based claims. This is due to the mechanics of the claim calculation set out by the two types of policy though.

As above, loss of profit based policies involve calculating the reduction in income, and then applying the rate of gross profit from the previous year – adjusting for trends and circumstances unconnected with the insured event.

Hiscox uses a rate of gross profit to calculate settlements on loss of income policies. Those calculations should, technically, be made by identifying the actual savings those customers made as a result of the interruption to their business and deducting these from the settlement. I appreciate that, both for Hiscox and for policyholders, it may well be a more straightforward process to apply a rate of gross profit. Largely speaking this will achieve the same result. Particularly where there are no (or limited) variable costs to take into account.

Loss of income based policies are largely intended for businesses which have very limited variable costs. And their insurable gross profit is essentially the same as their income because the rate of gross profit is very close to 100%.

Given all income received for a "loss of income policyholder" ought to be (close to) 100% profit though, applying such a rate to SEISS income is not inconsistent with how the rest of these claims ought to operate.

So, if there is an issue here, it is not necessarily the application of an approach to SEISS. Rather it would seem to be whether customers have been sold the correct policy for their circumstances.

It may be that customers have taken out loss of income based policies whereas a loss of profit policy might be more suitable. And this may mean that, in the unusual circumstances of these SEISS payments, they are being treated differently to loss of profit based customers. But this is due to the mechanics of the policy they have been sold. Some customers were sold policies that do not cover the circumstances of the pandemic at all, and they will receive a different claim outcome to those with a policy that did. The fact that different customers, with different policies, will receive different outcomes is not surprising. And I do not consider this to be an inconsistency which means it is inappropriate to treat customers with a loss of profit based policy as set out above.

I appreciate both parties to this complaint may not be entirely happy with the outcome reached. However, hopefully the explanation I have provided for my decision allows them to

understand this and also assists in the resolution of other complaints, as well as B/Mrs S's.

Putting things right

Hiscox Insurance Company Limited should put things right by:

- Reconsidering the claim based on the additional financial information provided by B after the 2023 settlement offer.
- Recalculate the settlement offer on the basis that the payment of SEISS be considered to reduce the loss of income, prior to applying the historic rate of gross profit.
- Pay interest at a rate of 8% simple per annum, on any increase in the settlement that results from this. The interest ought to be calculated in line with the manner set out in Hiscox's 2023 settlement offer, and accrue until the additional settlement is made.

My final decision

My final decision is that I uphold this complaint in part. 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 B to accept or reject my decision before 12 August 2025.

Sam Thomas
Ombudsman