DRN-5831276

The complaint

A limited company, which I will refer to in this decision as T, has complained about the handling of a claim for business interruption losses under its commercial insurance policy with Hiscox Insurance Company Limited.

Mr M, as director of T, has brought the complaint on its behalf. Mr M is also represented in this complaint, but for ease I will refer to Mr M or T throughout.

What happened

T operates as a music centre, providing lessons and space as an exam centre. T held a policy with Hiscox from October 2018 until October 2020.

In March 2020, T contacted Hiscox to make a claim for business interruption, as a result of the Covid-19 pandemic. T said that as a result of the Government restrictions imposed in March 2020 it had to close. Hiscox did not accept the claim.

In late 2020, the Financial Conduct Authority ('FCA') issued a business interruption insurance 'test case' in which it asked the courts to consider a sample of policy wordings and how they should respond to the pandemic. One of the policies considered in this case had the same wording as T's policy with Hiscox. The Supreme Court handed down its judgment in January 2021. Following this, and further correspondence from T's solicitors, Hiscox agreed to reconsider T's claim.

Hiscox confirmed there might be cover for the claim in principle. The policy provided cover in the event of business interruption as a result of an inability to use the business premises, following restrictions as a result of a notifiable illness. Hiscox accepts T was required to close by the restrictions imposed by the Government in March 2020 and asked for further information about the impact on T to substantiate the claim. Hiscox has said this information was not provided and so it closed the claim.

T was unhappy with this and complained. T's solicitors also wrote to Hiscox to ask for £7,000, being the limit of indemnity under the policy, to be paid.

Hiscox did not agree to make any interim payment, as it said the claim had not yet been substantiated; and it was entitled to close the claim as it had not received the information requested to allow it to do so. Hiscox, however, indicated it would pay £500 compensation for the initial decline of the claim.

Some time later, T made a second complaint that Hiscox would not consider a claim for business interruption losses after the initial lockdown period, during the period that it was allowed to reopen; the closure of the claim; and also that Hiscox should increase the compensation offered.

Hiscox does not accept that the policy provided cover for any additional period and considers the original evidence it asked T for in relation to the first period of lockdown has still not been provided. It said it would consider the claim, for that period, further if that is

received. Hiscox also restated its offer of £500 compensation for any distress or inconvenience experienced by T for the initial decline of the claim.

As T remained unhappy, it referred its complaint to us. T asked us to consider the complaint about the period of indemnity but I will also touch on the other complaint points it raised with Hiscox. T has made a number of points in support of its complaint. I have considered everything it has said and have summarised its main points below:

- This is the only policy in the market to use the wording "*inability to use"* and it must be considered what cover T reasonably expected to receive when it entered the contract of insurance.
- The policy provided cover of up to £7,000 for business interruption and provided cover for periods outside of the enforced closure, when there were still restrictions on how it operated.
- The possibility that an interruption may be partial is inherent in the policy wording; the policy contains a number of heads of cover for perils causing *"interruption to your activities*" which are plainly intended to apply in circumstances where there is only limited interruption and not a complete cessation of activities
- The relevant policy clause relied on in this case was specifically referenced during the FCA test case and the Supreme Court interpreted the word "*interruption"* more widely than just being the complete closure of the premises.
- The Supreme Court also held that an *"inability to use"* would be established under the Hiscox policy wording if the insured "*is unable to use the premises for a discrete part of its business activities or is unable to use a discrete part of its premises for its business activities."*
- The Supreme Court set out examples to illustrate its judgment on this point:
  (i) a department store which had to close all parts of the store except its pharmacy;
  (ii) a golf course that was allowed to remain open but which had to close its clubhouse so that there is an "*inability to use*" a discrete part of the golf club for a discrete but important part of its business, namely the provision of food and drink and the hosting of functions;
  (iii) a bookshop which was required to close which resulted in the prevention of use to all its walk-in customers, which constituted 80% of income for the business, but could continue to use the premises for telephone orders.
- The "*inability to use*" issue has not been exhaustively decided in the test case and the examples provided by the Supreme Court were not, and were not intended to be, exhaustive.
- The Supreme Court's analysis should apply to T's business, as it suffered an "*inability to use*" part of their premises during reopening periods as social distancing measures, including the "*rule of 6*", forced the Complainant to reduce the capacity of its business by only using some of its available chairs to offer its service. Therefore, T was unable to use its premises for offering a discrete part of its business and was unable to use a discrete part of its premises during periods of reopening in between enforced complete lockdown periods due to restrictions that were imposed on it.
- T's circumstances are analogous to the department store and book shop examples provided by the Supreme Court test case because there were discrete areas of the premises that customers were not permitted to access.
- Hiscox deliberately used the phrase *"inability to use"* when drafting the policy. If it wanted cover to only apply when there was complete closure at the premises, it should have chosen different language to convey this.

One of our Investigators looked into the matter. He did not recommend the complaint be upheld, as he was not persuaded that there was cover for the impact on T by any restrictions after it was allowed to reopen in July 2020 and the later periods of lockdown happened after T's policy with Hiscox ended, so they were not covered either. The Investigator also said that Hiscox had not received the information requested to further consider the initial claim period, so it could not criticise its actions in closing that file; and he did not recommend any additional compensation.

T does not accept the Investigator's assessment.

As the Investigator was unable to resolve the complaint, it has been passed to me.

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.

It's evident from T's submissions that the Covid-19 pandemic has had a significant financial impact. However, I don't intend to uphold its complaint. I'll explain why.

Business insurance policies provide protection for some of the common things which might happen to a business. No policy will cover every eventuality however and each policy may provide different cover.

T's policy provided cover for losses arising from interruption to its business. That interruption has to be the result of one of the events specified in the policy. In this case the section of the policy that both parties agree is relevant is the "*public authority*" section. This section of the policy says there will be cover for loss as a result of business interruption caused by:

> "*Public Authority*
> *7. Your inability to use the business premises due to restrictions imposed by a public authority during the period of insurance following…*
> *b) an occurrence of a notifiable human disease..."*

It is accepted that there were restrictions imposed on T by a public authority following an occurrence of a notifiable human disease. The dispute is whether this led to an inability to use the business premises and if so, for how long.

Hiscox has accepted in principle that T was mandated to close 24 March 2020 to 4 July 2020, although it says there has not been an admission of policy coverage, as it has not received the further information it has asked for in relation to this.

I can see that Hiscox asked for further information about the closure and what T was required to do, in order to comply with the regulations, as well as financial information to allow it to make a decision on liability and assess the claim. I do not consider that these were unreasonable requests and, in my opinion, it is information Hiscox is entitled to in order to be able to properly assess the claim. I have not seen that this information has been provided to Hiscox. Given this, I do not think it was unreasonable for Hiscox to have decided to close the claim.

Hiscox has confirmed that it will consider the claim if that information is provided.

T also says that there should be cover for the continued financial impact on it after 4 July 2020, when it was allowed to reopen but under certain conditions.

Hiscox has said there is no cover for lockdown two (from 5 November 2020 to 2 December 2020) or lockdown three (from 31 December 2020 to 17 May 2021) because the policy lapsed in October 2020 and was not renewed. These lockdowns were new and separate events. The start date of any event has to be within the period of insurance for there to be cover and these lockdowns started after the policy with Hiscox ended. I therefore think Hiscox is correct that there would be no cover for these periods. In any case, I cannot see that T has disputed this.

So, the question for me to consider now is whether there were restrictions imposed between July and October 2020 that meant T suffered an inability to use its business premises.

T says that the inability to use the premises, during the period of lockdown, had an ongoing impact because customers did not come back; and the restrictions in place from July 2020 onwards meant it still suffered an inability to use a discrete part of its premises, and/or it suffered an inability to use its premises for a discrete part of its business.

T has said that roughly 90% of its business is from teaching and the rest from providing an exam centre space. It says that it suffered an inability to use its premises after July 2020 because of the social distancing measures put in place. It says that it was not able to offer as many chairs and it suffered loss due to the cancellation of exams.

I accept that the policy might cover partial closure or a partial interruption to business activities. But in this instance the relevant section of cover requires an inability to use the premises. So, an interruption to normal business activities is not enough on its own to trigger cover.

As T has stated, the above policy term was considered by the Supreme Court as part of the FCA test case. The Supreme Court's judgment said, at paragraph 129:

> *"The public authority clauses in Hiscox 1-4 (set out at para 111 above) do not cover all business interruption due to "restrictions imposed" by a public authority following an occurrence of a notifiable disease. They apply only where the interruption is caused by the policyholder's "inability to use" the business premises due to such restrictions*."

The court went on to say, at paragraph 136:

> *"… an inability of use has to be established; not an impairment or hindrance in use."*

The court also made it clear that it may be possible for a business to claim for losses that arose because it was "*unable to use the premises for a discrete part of its business activities or is unable to use a discrete part of its premises for its business activities".*

As such, I agree that this policy term would provide cover to a business that had been caused an inability to use their insured premises, for all or for a discrete part of its business.

The Supreme Court judgement included examples of situations it considered would mean that a business was unable to use the premises for a discrete part of its business activities or unable to use a discrete part of its premises. I agree that the examples given are not exhaustive. There could be many possible scenarios and each case would be considered on its own particular facts. But the examples given provide important guidance.

They all involved a complete closure of a part of the business premises or complete cessation of a discrete part of the insured's business activities. None of the examples given involved a situation similar to T's, where there was a reduced capacity within the premises.

The Government regulations at the time did impose restrictions on people that would likely have had an impact on businesses that were able to open, such as T. For example, the restrictions on the number of people that could meet together, the "*rule of six".*

However, T's staff were able to use the premises after July 2020 and it was allowed to have customers attend in person. I've not seen any reliable evidence that T was not able to operate a discrete part of its business, for instance it was able to still offer teaching (albeit with adjustments) and was still able to offer exam space but it seems the exams were cancelled. I have not seen any reliable evidence that the exams were cancelled as the premises could not be used for them.

In addition, I have not seen any evidence T was unable to use a discrete part of its premises. T has said it had to reduce the numbers of people attending and so could not offer as many chairs, but this is a reduction in capacity that in my opinion was not due to an inability to use a discrete part of the premises.

T says that its situation was akin to the "*book shop"* example in the Supreme Court judgement, which could not accept customers instore and could only offer telephone sales. This is similar to the impact on T for the period it had to close its premises, when it offered online lessons. But for the period after July 2020, which is what I am addressing here, I do not consider this applies. T has also said it is similar to the "*department store*" example, as there were parts of its premises that its customers couldn't access. However, I have not seen any reliable evidence that there was a discrete part of T's premises that customers couldn't access.

It seems that rather than there being a restriction on the use of the premises, any impact as to how T was able to carry on its business, from July to October 2020, was due limits on the number of customers that could enter the premises at the same time and a legacy effect of a loss of customers from the period it was closed.

In my opinion, these would amount to a hindrance of use of the premises and not an inability of use. To refer back the Supreme Court, it said: *"… an inability of use has to be established; not an impairment or hindrance in use."*

Finally, as T has said an insurance contract is correctly interpreted based on the understanding a reasonable person, with the background knowledge of the parties to the contract, would have had at the time the contract was entered into. The contract should not be interpreted with hindsight. Rather the question is how the words would have been understood by the reasonable small business owner, perhaps assisted by a broker, with all the background knowledge which would have been reasonably available at the time the parties entered into the contract.

The insurance contract was entered into before Covid-19 had been identified. I don't think such a person would consider, at the time T entered into its policy, that the policy would mean that reducing the number of customers it could let in, or the cancellation of exams, would amount to an inability to use its premises.

Having considered everything very carefully, I am not therefore persuaded that Hiscox has acted unfairly. If T wants the claim for the period March to July 2020 considered further it should provide the information requested.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask T to accept or reject my decision before 6 February 2026.
Harriet McCarthy
Ombudsman