DRN-5898684

The complaint

A limited company that I will refer to as S, has complained about the settlement offered by Hiscox Insurance Company Limited following a claim for business interruption losses under its business insurance policy.

Mr B, as Director of S has brought the complaint on its behalf. Mr B is also represented in this complaint, but for ease I will refer to Mr B or S throughout this decision.

What happened

S is a fitness centre. In March 2020, S made a claim for business interruption losses under its policy with Hiscox, as it had been required to close under the Government restrictions imposed in response to the Covid-19 pandemic.

Hiscox initially rejected the claim but agreed to review that decision following the outcome of the Financial Conduct Authority's ("FCA") Covid-19 business interruption test case in early 2021.

Having reviewed the claim, Hiscox agreed that S had been required to close as a result of the Government restrictions imposed, from 24 March 2020 to 31 August 2020 and that this triggered cover under the "*public authority*" section of the policy. In mid-2022, Hiscox made a settlement offer of £7,197, together with interest of £1,083.77, for the losses suffered during this period. It also paid £500 compensation for the delay in the claim being processed.

Hiscox said that, as the policy expired on 4 July 2020, the further periods when S was mandated to close would not be covered.

S was unhappy with this settlement and complained. S says that Hiscox incorrectly deducted the amount it received from the Government under the Self-Employed Income Support Scheme ("SEISS") from the settlement. S also said that it had continued to be impacted by the restrictions imposed by the Government after August 2020 and Hiscox should also provide cover for those losses, for the full indemnity period for that claim, which would end in March 2021.

Hiscox did not change its position and as S remained unhappy, it referred its complaint to us.

S 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:

- The relevant policy clause relied on in this case was specifically referenced during the Financial Conduct Authority ("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:
  - a department store which had to close all parts of the store except its pharmacy;
  - 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 part of its business; and
  - a bookshop which was required to close for walk-in customers, but could continue to use the premises for telephone orders.

  These examples were not intended to be exhaustive.
- The Supreme Court's analysis should apply to S's business, as it suffered an *"inability to use"* a discrete part of its business or was unable to use a discrete part of its premises due to the restrictions imposed by the Government at the time.
- This is because social distancing measures forced S to reduce the capacity of its business and restrict certain business activities; it was also unable to use its premises for offering a discrete part of its business during periods of reopening, for instance, it had to curtail group class activities and restrict access to changing and showering facilities.
- S's circumstances are analogous to the examples given above because there were discrete areas of the premises that customers were not permitted to access.
- The impact of such restrictions on the conduct of the business, and the service it offered, were so significant that they must be considered more than a "*mere hindrance".*
- The possibility that an interruption to business 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 Supreme Court also said that the indemnity period would begin on the date the restriction is imposed, and would last for the period that income is affected as a result of such a restriction. Government restrictions were imposed on S consistently over the period of 20 March 2020 until 19 March 2021, so this is the appropriate indemnity period.
- SEISS payments received should not have been taken into account at all when calculating the settlement. But in the alternative, it should be treated as income and therefore only a portion should be deducted, having adjusted the amount against S's average rate of gross profit.
- HM Treasury wrote to the Association of British Insurers ("ABI"), in September 2020 confirming insurers were not to deduct business grants received by businesses from claim payouts.

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 S by any Government restrictions after it was allowed to reopen its premises in August 2020. Instead, the Investigator thought the impact was due to a reduction in capacity, which would amount to a hindrance rather than an inability to use the premises, which is what was required under the policy.

The Investigator also said that Hiscox was entitled to take account of the SEISS payments in the way it had.

S does not accept the Investigator's assessment. S says it was not just required to reduce the number of people that could access the premises but there were specific delineated

parts of the premises that could not be accessed. The cumulative impact of the restrictions on it are analogous to the department store example, provided by the Supreme Court test case, and set out above, where the Supreme Court said that an *"inability to use*" would be found.

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.

I can see that the Covid-19 pandemic has had a significant financial impact on S. However, I don't intend to uphold its complaint. I'll explain why.

Is S covered for business interruption losses after 31 August 2020?

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.

S'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*
>
> *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 S by a public authority following an occurrence of a notifiable human disease.

Hiscox accepted that S was mandated to close as a result of these restrictions from March 2020 to August 2020 and so there was cover for the losses arising from that closure. Hiscox has settled that part of the claim. I will address the issue of the SEISS deductions later in this decision.

The question for me to consider now, is whether there were restrictions imposed on S, over and above those that required it to shut its premises between March and August 2020, that meant S suffered an inability to use its business premises after 31 August 2020. Any such restriction would need to have been imposed within the policy period. I've seen no evidence that this policy was renewed, so this would have to therefore be before 4 July 2020.

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 S 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 where there was a reduced capacity within the premises.

I have considered everything S has said about this carefully, S has said that it could not use discrete parts of its premises, and could not use its premises for a discrete part of its business activities, after 31 August 2020, because of the restrictions imposed. In particular it has said:

- Its customers could only use the gym for an hour at a time, which meant they could not use all the equipment.
- It had to restrict access to showering facilities, which resulted in loss of members. This was an area of the premises that customers were not permitted to access, so it amounts to an inability to use a discrete part of the business premises.
- It was unable to offer normal service to the same number of users, due to social distancing.
- It had to limit to the number of members able to use facilities at any one time, so there were parts of the premises that could not be used.
- It was unable to provide the same level of group fitness classes, and group personal training sessions, so there was an inability to use the premises for a discrete part of its business.

As mentioned above, the examples given by the Supreme Court involved a complete inability to use a discrete part of the premises. I do not agree that S's situation aligns with any of the examples provided by the FCA test case. I will explain why.

S has provided some photos of the premises, which show: Perspex screens between gym equipment and signage relating to social distancing, that customers should use the showers only if absolutely necessary, and a limit of three people in the changing rooms at any one time, and the cleaning of equipment. However, I have seen no reliable evidence that any part of the premises was cordoned off to prevent access entirely. From the evidence

provided, all the gym equipment was available, and all areas of the gym, including showers and changing rooms, were accessible, to staff and customers. I do not therefore agree that there was an inability to use any part of the premises.

S has also said that it could not offer group fitness classes and group personal training sessions, so was unable to use the premises for a discrete part of its business. In correspondence to Hiscox, S said it could not offer the same level of group classes, and was *"predominantly*" offering one-to-one session instead. However, this is not the same as not being able to provide them at all due to an inability to use the premises.

I also note that Hiscox provided evidence that in March 2020, S had advertised group fitness classes in the car park, which would be within the premises and was offering group training sessions in September 2020. In addition, the relevant regulations at the time allowed gatherings in a public place for organised exercise. I have not seen any reliable evidence that S was unable to use the premises for group sessions (albeit with perhaps a smaller group) after end August 2020.

S has also said that it was the cumulative effect of these restrictions that meant there was an inability to use the premises that should trigger cover under the policy. I do not agree that this is the case.

S's business activities are providing a gym, personal training and group classes and the evidence is that all these activities could take place after end August 2020. While the maximum indemnity period is a year, the restrictions imposed in March 2020 were lifted in August 2020 and, as stated, no other restrictions were imposed before July 2020 that I consider meant S was unable to use its premises, or a discrete part of them.

In my opinion, for the reasons set out above, rather than there being a restriction on the use of the premises, any impact as to how S was able to carry on its business, from end August 2020 was due limits on the number of customers that could enter the premises at the same time.

In my opinion, this 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."*

Having considered everything very carefully, I am not therefore persuaded that Hiscox has acted unfairly in not considering losses after end August 2020.

<u>SEISS</u>

During the COVID-19 pandemic, the UK Government introduced a number of grant schemes to support businesses. These included SEISS.

S says the SEISS payments should not be taken into account at all. It has referred to a previous decision by an Ombudsman colleague, which supports this. Each case is dealt with on its own merits and we do not have a system of precedent, in addition our approach to issues naturally evolves. In this instance, the matter has been considered by the courts and so our approach has evolved since the pandemic to take this into account.
HM Treasury and the Financial Conduct Authority ("FCA") made a number of comments around how government support should be treated in insurance claim calculations. But the letter from HM Treasury, that S has referred to, did not mention SEISS payments when setting out its view of how government support grants should be treated. The Government did not indicate that the payment was being made only in respect of uninsured losses and there has been no such declaration since.

Since that letter, relevant case law has emerged. The judgment in Stonegate Pub Company v MS Amlin and Others [2022] EWHC 2548 (Comm) ("Stonegate") set out the relevant tests in relation to the principle of indemnity. While it was not specifically asked to consider SEISS payments, I think the conclusions reached by the court in that case are relevant here.

The judge ultimately said that payments from third parties that reduced the loss to the insured can be taken account by insurers, unless the payments were intended only to benefit the insured to the exclusion of the insurer. As mentioned, there has been no such declaration by the Government concerning SEISS grants.

S was insured against a loss of income. Income was defined in the policy was being: "t*he money paid or payable to you in respect of your activities*." And loss of income was defined as being:

> *"the difference between your actual income during the indemnity period and the income it is estimated you would have earned during that period … less any savings resulting from the reduced costs and expenses you pay out of your income during the indemnity period."*

Hiscox considered the SEISS payments to be costs saving but the SEISS payments were calculated by looking at the amount the relevant business previously generated, so in my view they were money paid to S in respect of its activities and as such would be rightly considered to be income. But I do not think it makes any difference to the outcome here whether it is treated as a saving or income.

S's actual income received during the period of indemnity included the SEISS payment, and there was no cost to S in generating that income.

Given this, I am satisfied that Hiscox was entitled to take account of the full amount of the SEISS payment when calculating the actual income S received (so effectively reducing the settlement it paid by the same amount).

I do not intend to require Hiscox to make any further payment to S.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 13 February 2026.
Harriet McCarthy
Ombudsman