DRN-5901453

The complaint

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

Mr L, as a director of R, has brought the complaint on its behalf. Mr L is also represented but, for ease, I will refer to Mr L or R throughout this decision.

What happened

R is a hair salon. In 2020, R registered 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 refused the claim but agreed to review it following the outcome of the Financial Conduct Authority's business interruption Covid-19 test case.

Having reviewed the claim, Hiscox agreed that R had been required to close as a result of the Government restrictions imposed, from 24 March 2020 to 2 July 2020; 5 November 2020 to 2 December 2020; and 26 December 2020 to 12 April 2021 (the three lockdown periods), and that this triggered cover under the "*public authority*" section of the policy for these periods.

The policy renewed in April 2020, so the settlement for lockdown one was assessed under the policy in force between April 2019 and April 2020. Hiscox said R was significantly underinsured under this policy, as it had said the sum insured for business interruption should be £50,000 when Hiscox said it should have been just over £300,000. At renewal in April 2020, R set the sum insured at £500,000.

Hiscox settled the claims but made a deduction for the underinsurance for lockdown one, in accordance with an amended underinsurance clause in the policy. This was based on the difference between the business interruption premium that R paid based on declared gross profit (£75 net of tax) versus the business interruption premium R should have paid based on the actual gross profit during the 12 months immediately preceding the start of the period of insurance (£428.23 net of tax). This meant that R effectively received 17.5% of the calculated loss for this period. Hiscox also paid R £500 compensation for any inconvenience while the claim was processed.

Mr L was unhappy with this settlement and complained. Mr L does not consider the deduction for underinsurance to be fair. He also says that Hiscox incorrectly deducted the amount R received from the Government under the furlough scheme from the settlement. Mr L also said that R had continued to be impacted by the restrictions imposed by the Government after and between each period of complete closure and Hiscox should also provide cover for those losses.

Hiscox did not change its position and as Mr L remained unhappy, he referred the complaint to us. Mr L has made a number of points in support of its complaint. I have considered everything he has said and have summarised his main points below:

- In interpreting any contract, it is the reasonable objective intentions of the contracting parties at the time that matter. It was fair and reasonable for R to expect the policy to cover these losses.
- 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 R'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 because it could only use a limited number of seats and so reduce the capacity of the business.
- The cumulative 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 R consistently from March 2020 and the impact should therefore be covered for two years.
- Hiscox also deducted from the settlement the amounts that R received as furlough grants, which is unfair. While Hiscox has acted in line with the current legal position regarding the treatment of furlough payments, it asked that a declaration be provided that Hiscox be compelled to reconsider this, if a higher court determines that they should not be deducted.
- With regard to the underinsurance, Hiscox has not evidenced that it would have increased the premium if the higher sum insured had been declared, and even if it would have charged a higher premium it has not evidenced that this would have increased proportional to the sum insured.
- Hiscox has used a calculation for the underinsurance set out in the insurance contract but this is disadvantageous to R compared to the remedy available to it under the Insurance Act 2015, so the Act should apply.
- Hiscox also used the turnover figures inclusive of VAT but would never insure any VAT elements, so this has unfairly inflated the impact of the underinsurance.

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 R by any

Government restrictions during the times that it was allowed to open. 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 furlough payments and underinsurance in the way it had.

Mr L 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 Mr L's submissions that the Covid-19 pandemic has had a significant financial and personal impact. I am sorry to disappoint him but I do not intend to uphold R's 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.

R's policy provided cover for losses arising from interruption to its business. That interruption had 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 within one mile of the business premises..."*

It is accepted that there were restrictions imposed on R's business by a public authority following an occurrence of a notifiable human disease that could trigger cover under this clause. The dispute is about the extent of the period that this resulted in R being unable to use the business premises.

Hiscox has accepted that R was mandated to close for the three lockdown periods set out above. Hiscox therefore agreed that R was unable to use the premises during those periods and that there was cover for the losses arising from that. It has settled the claim for those periods. As far as I can see the settlement is agreed – save for deduction of the furlough amounts and the underinsurance. I will address both of these issues later in this decision.

The question for me to consider now, is whether there were restrictions imposed on R, over and above those that required it to close, that meant R suffered an inability to use the business premises outside of the lockdown periods set out above.

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.

Mr L says the indemnity should have started as soon as the Government announced that it would require non-essential businesses to close, but businesses like R's were not required to shut until 24 March 2020, so I am not persuaded it was unreasonable for Hiscox to treat 24 March 2020 as the start of the first indemnity period.

As Mr L 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.

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 R's. For example, the social distancing rules.

Mr L has said that the inability to use the premises was because it was unable to "*offer substantially the same service due to sanitation and social distancing guidance"* and unable to use its premises in full. Specifically, he has said the simultaneous and cumulative impact of the restrictions meant R was unable to use the premises, or a discrete part of them, for all or a discrete part of its business activities for the following reasons:

- It had to reduce the number of appointments it could offer to allow for cleaning between customers and so the total number of customers allowed in was reduced.
- Some chairs were not accessible to clients, to allow for social distancing.

- It had to add screens between chairs and basins.
- The screens delineated areas of the salon that customers could not access, creating an inability to use those areas: "*more often than not the complainant would not use the middle seat in the washing area*."
- It had to stop all walk-in appointments and extended its opening hours, to keep staff on rotation.
- It had to remove a toilet from the staff room, to allow more space to comply with social distancing.

I have carefully considered everything Mr L has said. However, having done so I am not persuaded that the changes that R made to the way the business operated in the periods it was able to open amounted to an inability to use all, or a discrete part of, the premises, or that it was unable to use her premises for a discrete part of the business.

I can see Mr L says it had to restrict the service R was able to provide in order to comply with social distancing requirements. However, R's staff were able to use the premises during these periods and it was allowed to have customers attend in person. I do not agree that putting dividers between workstations meant they were unable to be used. It seems to me that all areas were able to be used but at a reduced capacity. Mr L's example of not having someone sit in the middle of a row of three seats, if the other two were occupied, does not establish that the middle seat was a discrete area of the business premises that could not be used, rather it was not used on occasions to comply with social distancing.

In my opinion the evidence provided shows that R was able to operate all aspects of its business, albeit with some precautions and adjustments in place and at reduced capacity. I do not therefore agree that the restrictions and adjustments R made (set out above) amounted to an inability to use the premises during the periods it was open, even if the combined and cumulative impact was significant.

I do not agree that R's situation was similar to the examples given in the Supreme Court judgement. In my opinion, the changes R made to the way it did business 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."*

As Mr L 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 Mr L entered into its policy, that the policy would mean that reducing the number of customers she could let in, or a fall in demand for services, would amount to an inability to use the premises. Having considered everything very carefully, I am not therefore persuaded that Hiscox has acted unfairly when assessing the indemnity periods applicable to R's claims.

<u>Underinsurance</u>

As mentioned above, the underinsurance only applies to the lockdown period 1, as the policy renewed before the second and third lockdowns.

R's policy is a commercial one so the law that applies here is the Insurance Act 2015 ("the Act"). The Act sets out the duty of the commercial customer to make a fair presentation of the risk to the insurer.

In order to fulfil this duty, the Act says a commercial customer must disclose everything they know, or ought to know, that would influence the judgment of an insurer in deciding whether to insure the risk and on what terms. If it is found that they didn't fulfil this duty then the insurer might have remedies available to it under the Act. The remedies it might have depend on the difference the qualifying breach of the duty to make far representation had.

I've considered whether R made a fair presentation of the risk in April 2020. R's policy was set up based on the figures it provided. As set out above, it declared that its annual gross profit was £50,000 when the figure should have been just over £300,000. It seems to me this would have been information that R ought to have known and there was not therefore, in my opinion, a fair representation of the risk when R applied for this policy.

As there was an underinsurance, Hiscox was entitled to take that into account when settling the claim. Hiscox has said that it would still have offered the policy but would have charged a higher premium for the business interruption cover.

It has applied the remedy set out in the policy for underinsurance which says it will reduce the amount it pays for any claim in the proportion that the premium *"paid bears to the premium we would have charged you if you had declared the actual value".*

I think it is clear in the correspondence from Hiscox to R about this that Hiscox has only used the premium for the business interruption part of the cover and has not suggested a proportionate increase of the entire premium. It said in correspondence to R that the business interruption premium had been £75, based on the sum insured of £50,000, and it would have charged £428.23 for the business interruption cover, if it had known the actual revenue in the 12 months prior had been over £300,000. This meant proportionately R paid 17.5% the premium it should have done for this cover, so it is only entitled to 17.5% of the loss in settlement of the claim.

Hiscox has provided evidence of the premium it would have charged, if it had known the correct figures. R disputes that these are credible and says the business interruption cover was only part of the cover provided, so does not accept that the premium would have increased by so much. R has also said that the £300,000 figure used by Hiscox included VAT, so the actual figure should have been lower. I have seen nothing to support that. Hiscox has said this was the gross profit figure and this appears to be supported in the documents I have seen.

I am also satisfied that Hiscox has established it would have charged the extra premium it has said. In further support of this, I note that the premium charged in April 2020, when R requested cover for £500,000 in relation to loss of gross profit, went from £390 to £843. (R says it was £436.80 in 2019 and £944.16 in 2020, but this is not what the insurance schedules I have seen show.) As far as I am aware there were no other significant changes to the cover, so the increase of £453 in the premium would seem to be due to the significant increase in level of cover requested for business interruption. This is close to the amount that Hiscox says it would have charged in 2019 for business interruption cover (£428.23). I therefore see no reason to doubt what Hiscox has said about the premium it would have charged, if R had made a fair presentation of risk when taking out the policy in April 2019 and under which the claim for lockdown one was considered.

I have therefore also considered the remedy that Hiscox is entitled to as a result of the fact R did not make a fair presentation of risk. R has said it has applied a proportionate remedy set out in the policy that is disadvantageous to it and because it did not make this sufficiently clear to R, Hiscox should instead apply the remedy available under the Insurance Act 2015.

The remedy under the Act is the same as that applied by Hiscox under the policy. Under the Act, where an insurer has shown that it would have charged a higher premium if the correct information had been provided, it allows the insurer to settle the claim on a proportionate basis based on the proportion of premiums that were paid, compared to those that should have been paid.

Based on the evidence about the premium that would have been charged, R paid 17.5% of the required premium (£75 divided by £428.23 x 100). Therefore, under the Act and under the policy, Hiscox was entitled to settle the business interruption claim for lockdown one at 17.5% of its value.

I do not therefore intend to ask Hiscox to make any additional payment to R.

Furlough

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

R has accepted that the current legal position (as set out in the judgment of Stonegate Pub Company v MS Amlin and Others [2022] EWHC 2548 (Comm) ("Stonegate")) is that insurers are entitled to take account of furlough payments in the way Hiscox has here. It has, however, asked that Hiscox be required to reconsider this if case law changes.

I cannot make any direction about what Hiscox should do, if at any point the courts determine that furlough payments should not be taken into account in the way that Hiscox has done. I can only determine complaints about things that have happened and make awards, if appropriate, to put right things that have gone wrong. I cannot therefore make a conditional award in the way R has asked. And, for the avoidance of doubt. as Hiscox has deducted furlough payments, in line with the current law, I do not think it has done anything wrong.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask R to accept or reject my decision before 27 February 2026.

Harriet McCarthy
Ombudsman