DRN-5992540

The complaint

A charity, which I will refer to as T 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 W has brought the complaint on T's behalf. Mr W is also represented but, for ease, I will refer to Mr W or T throughout this decision.

What happened

In March 2020, T contacted Hiscox to make a claim for business interruption losses under its policy, 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 following the outcome of the Financial Conduct Authority's Covid-19 business interruption test case ("FCA test case), it agreed to reconsider the claim. Hiscox accepted that T had been required to close discrete parts of the premises for various times, as a result of the Government restrictions imposed, and that this triggered cover under the "*public authority*" section of the policy. Hiscox settled the claim for the losses incurred during the periods it had assessed these parts of the business were mandated to close (the lockdown periods), together with interest. Hiscox also paid £500 compensation for any inconvenience while the claim was being proceed.

T was unhappy with this settlement and complained. T says that Hiscox incorrectly deducted the amounts T received from the Government under the employee furlough scheme from the settlement.

T also says that it had continued to be impacted by the restrictions imposed by the Government between each period of complete closure and Hiscox should also provide cover for those losses, for the full 12 month indemnity period to March 2021, and a further 12 months under the next year's policy.

Hiscox did not accept that the impact on the business after it was allowed to reopen was due to an inability to use the premises, as required by the policy, so does not accept that any further period of interruption is covered. It also said that the policy renewed in August 2020, with an exclusion for Covid-19 related claims, so any further period of lockdown or mandated closure imposed after August 2020 would not be covered.

As Hiscox did not change its position and as T remained unhappy, it referred the complaint to us. T has made a number of points in support of its complaint. I have considered everything he has said and have summarised its 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 W 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 T'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 times it was open because it makes its income from a café, catering and hiring of rooms for events, and it had to it had to reduce the capacity of the business to comply with social distancing measures.
- The cumulative impact of such restrictions on the conduct of the business was 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 T consistently from March 2020, so the indemnity period should be the full period that T was subject to these restrictions.
- 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.
- Hiscox deducted from the settlement the amounts that T 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 this point is considered further and a declaration be provided that Hiscox be compelled to reconsider this, if a higher court determines that they should not be deducted.

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 Government restrictions during the times that it was allowed to open each part of its business. 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 in the way it had.

T does not accept the Investigator's assessment.

It said that it did not ask us to consider the issue about the furlough payments.

T 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.

It's evident from T's submissions that the Covid-19 pandemic has had a significant financial impact. I am sorry to disappoint Mr G but I do not intend to uphold T'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.

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*
>
> *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 that could trigger cover under the above clause.

Hiscox has accepted that W was mandated to close the following parts of its premises, as follows:

- Café 21: March to 4 July 2020
- Unserviced room hire and commercial room hire: 21 March to 25 July 2020
- Event catering, conference and events: 24 March to 14 August 2020

Hiscox therefore agreed that T was unable to use these parts of the premises, or was unable to use them for discrete parts of its business activities, during those periods; and that there was cover for the losses arising from that. Hiscox has settled the claim for those periods. As far as I can see the settlement is agreed, save for deduction of the furlough payments, which I will address below.

The question for me to consider, is whether there were restrictions imposed on T, over and above those that required it to close for the period stated above, that meant T suffered an inability to use its business premises. 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.

The Government regulations at the time did also impose restrictions on people that would likely have had an impact on businesses that were able to open, such as T's and for the type of business activities that took place at T's premises. For example, the restrictions on group gatherings and other social distancing rules.

T has said that its inability to use the premises was because it was unable to operate at its usual capacity and had to take precautionary measures against infection, and that it was unable to use certain spaces within the premises. Specifically, T has said the simultaneous and cumulative impact of the following restrictions meant it was unable to use its premises, or a discrete part of them, for all or a discrete part of its business activities:

- It lost a large proportion of its catering income and almost all income from events and conference room hire.
- It installed counter screens, safety signage and floor markings, introduced hygiene measures, provided PPE and enforced social distancing.

- It had to reduce the number of tables in the café which meant there were discrete areas of the premises that customers could not access.
- It had to close its sports hall and ballroom, in order to comply with social distancing rules.
- Also a gallery and small conference centre rooms could not be used.

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

I can see it restricted the numbers it was able to accommodate in the café for instance and had it take some protective measures. However, I am not persuaded that reducing the number of tables and chairs means that each space in which there was previously a table would be a discrete part of the business premises in accordance with the court case above.

In addition, there is no reliable evidence that T was unable to use the sports hall, ballroom, gallery and conference rooms. Rather it seems to me they were not used because of the restrictions on the number of people that could meet together. So, they could not be used for their usual purpose but this is not due to an inability to use because of Government restrictions imposed on T but because of restrictions imposed on the general public about the activities they could partake in.

As far as I can see, the evidence is that (outside of the lockdown periods already accepted by Hiscox) T's staff were able to use the premises and it was allowed to have customers attend in person.

Therefore, in my opinion, T was able to operate all aspects of the business, albeit with some precautions and adjustments in place. I do not agree that the restrictions set out by T amounted to an inability to use the premises during the periods it was open, even if the combined and cumulative impact was significant.

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, 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."*

I am therefore satisfied that Hiscox has applied the correct indemnity periods.

T has also 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 a fall in demand for repair services, would amount to an inability to use its premises. Having considered everything very carefully, I am not therefore persuaded that Hiscox has acted unfairly when assessing the indemnity periods applicable to T's claims.

Furlough payments

T said to the Investigator recently that it did not ask us to consider the deduction of the furlough payments. However, this was a specific request in its initial complaint submission to us. I think it is therefore right that I address it.

T seems to now accept that Hiscox has acted in line with the current legal position. 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 T previously 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 T to accept or reject my decision before 18 February 2026.

Harriet McCarthy
Ombudsman