

The complaint

Mrs H has complained about the settlement offered by Hiscox Insurance Company Limited following a claim for business interruption losses under her business insurance policy.

Mrs H is represented in this complaint but, for ease, I will refer to her throughout.

What happened

Mrs H operated a bridal store, which also offered clothes hire and alteration services. In March 2020, Mrs H made a claim for business interruption losses under her policy with Hiscox, as she had been required to close as a result of 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 Mrs H had been required to close as a result of the Government restrictions imposed, from 24 March 2020 to 15 June 2020; 5 November 2020 to 2 December 2020; and 26 December 2020 to 12 April 2021, and that this triggered cover under the "*public authority*" section of the policy for these periods.

Hiscox made a settlement offer of £13,960, plus interest and also paid £750 (increased from £500) compensation for any inconvenience while the claim was processed.

Mrs H was unhappy with this settlement and complained. Mrs H says that Hiscox incorrectly deducted the amount she received from the Government under the Self-Employed Income Support Scheme ("SEISS") from the settlement. Mrs H also said that she 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. Mrs H has also said the initial refusal of her claim, and the delay in adequate settlement, caused her immense stress, resulting in the end of her marriage and closure of the business. She says Hiscox should pay the SEISS amount it deducted from her settlement, together with interest, plus increased compensation for the extremely poor service provided.

Hiscox did not change its position and as Mrs H remained unhappy, she referred her complaint to us. Mrs H has made a number of points in support of its complaint. I have considered everything Mrs H has said and have summarised her 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 her 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 her business, as it suffered an *“inability to use”* the premises for a discrete part of the business, and/or was unable to use a discrete part of its premises, due to the restrictions imposed by the Government at the time because she was unable to use the changing room area.
- The cumulative impact of such restrictions on the conduct of the business, and the service she was able to offer, 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 Mrs H’s business consistently from 20 March 2020, for the whole policy year, so this is the appropriate indemnity period.
- SEISS payments 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 Mrs H’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 Mrs H by any Government restrictions during the times that she 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 SEISS payments in the way it had.

Mrs H does not accept the Investigator’s assessment. Mrs H says she 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.

Mrs H also says she should receive an enhanced compensation award, given the impact of Hiscox’s conduct on her.

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

Mrs H'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..."

It is accepted that there were restrictions imposed on Mrs H's business by a public authority following an occurrence of a notifiable human disease that could trigger cover under this clause. The dispute is whether this led to an inability to use the business premises and if so, for what activities and for what periods.

Hiscox has accepted that Mrs H was mandated to close her shop with effect from 24 March 2020 to 15 June 2020; November 2020 to 2 December 2020; and 26 December 2020 to 12 April 2021, the periods of 'lockdown'. Hiscox therefore agreed that she 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 SEISS, which I will address below.

The question for me to consider now, is whether there were restrictions imposed on Mrs H, over and above those that required the shop to close, that meant Mrs H suffered an inability to use her 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.

Mrs H says the indemnity should have started from 20 March 2020 when the Government announced that it would require non-essential businesses to close, but shops like Mrs H'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 Mrs H 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 Mrs H's. For example, the social distancing rules.

Mrs H has said that her inability to use the premises was because she was unable to *"offer substantially the same service due to sanitation and social distancing guidance"*. Specifically, she has said the simultaneous and cumulative impact of the following restrictions meant she was unable to use her premises, or a discrete part of them, for all or a discrete part of her business activities for the following reasons:

- She could only see one customer at a time (whereas customers usually like to being family and friends with them).
- In light of concerns about infection, dresses had to be quarantined for 72 hours, so she could only see customers every three days.
- It was a small shop with one dressing room, which made it difficult to adhere to the two- metre rule.
- The changing room was closed off to customers so they could not try on hire clothes or wedding dresses; and the changing area was too small because of the unduly uncomfortable small size of the room.
- She had to restrict walk-in customers.
- Due to concerns about infection, she only offered alteration service for items purchased from her shop.
- Her seamstress had to work in a small space which impacted her productivity.
- She could not offer toilet facilities or refreshments.

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

I can see Mrs H restricted the service she was able to provide in order to comply with social distancing requirements. However, I have not seen any evidence that some of the measures were the result of a restriction imposed by a public authority, such as quarantining dresses, or refusing access to the toilets. I have also seen any reliable evidence as to why the changing room could not be used at all.

Mrs H and her seamstress were able to use the premises during these periods and she was allowed to have customers attend the shop in person. In my opinion the evidence provided shows that Mrs H was able to operate all aspects of her business, albeit with some precautions and adjustments in place. I do not agree that the restrictions set out by Mrs H amounted to an inability to use the premises during the periods she was open, even if the combined and cumulative impact was significant.

Mrs H says that her situation was similar to the examples given in the Supreme Court judgement. However, I have not seen any reliable evidence that there was a discrete part of Mrs H'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 Mrs H was able to carry on her business, from 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.*"

Finally, as Mrs H 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 Mrs H 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 Mrs H's claims.

SEISS

During the COVID-19 pandemic, the UK Government introduced a number of grant schemes to support businesses. These included SEISS. Mrs H says the SEISS payments should not be taken into account at all. She 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 Mrs H 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.

Mrs H was insured against a loss of gross profit, which was defined in the policy as being:

"The sum produced by applying the rate of gross profit to any reduction in income during the indemnity period plus increased costs of working and alternative hire costs, less any business expenses or charges which cease or are reduced."

Income was defined in the policy as being: *"the total income of the business."* And gross profit was defined as: *"The difference between the sum of your income, closing stock and work in progress and the sum of your opening stock, work in progress and uninsured working expenses."*

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 Mrs H in respect of her business and as such would be rightly considered to be income. Ultimately, however, I do not think it makes any difference here, whether it is treated as a saving or income.

Mrs H's actual income received during the periods of indemnity included the SEISS payment, and there was no cost to her in generating that income, so the rate of gross profit on that part of her income was 100%.

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 Mrs H received (so effectively reducing the settlement it paid by the same amount). I do not therefore intend to ask Hiscox to make any further payment.

Compensation

I have read Mrs H's statement about the impact of the initial notification by Hiscox that she was not insured and the fact she has not been covered for all her losses. I am truly sorry to read everything Mrs H has gone through. And I am sorry that this is not the outcome she was hoping for. However, I think Hiscox has settled the claim correctly.

I do agree that the claim should have accepted the claim sooner but I do not consider I can reasonably conclude that all that happened to Mrs H thereafter was due to anything done wrong by Hiscox. I have considered everything carefully, having done so I am satisfied the £750 already offered is in line with our awards and I do not intend to ask Hiscox to pay any more.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 16 February 2026.

Harriet McCarthy
Ombudsman