

## The complaint

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

## What happened

C is a restaurant. In May 2021, C registered claims 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 accepted that C had been required to close as a result of the Government restrictions imposed, from 21 March 2020 to 4 July 2020; and 5 November 2020 to 17 May 2021 and that this triggered cover under the “*public authority*” section of the policy. Hiscox made an interim payment to C of £2,500.

However, after Hiscox had assessed the financial information provided by C, it said that having taken account of income actually received and costs savings, there was no net loss as the savings exceeded the loss of gross profit C had experienced. Hiscox said it would not seek to recover the £2,500 interim payment. It also offered £500 compensation for any inconvenience while the claim was being proceed.

Mr C was unhappy with this settlement and complained. He says that Hiscox incorrectly deducted the amount C received from the Government under the Self-Employed Income Support Scheme (“SEISS”) and furlough scheme from the settlement as a cost saving.

Mr C also says that C 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.

Hiscox did not change its position and as C remained unhappy, it referred the complaint to us. Mr C 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 C 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 C’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 C consistently from March 2020.
  - 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. Therefore SEISS payments received should not have been taken into account at all when calculating the settlement. But in the alternative, should be treated as income and therefore only a portion should be deducted, having adjusted the amount against C’s average rate of gross profit.
  - Hiscox also deducted from the settlement the amounts that C 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.

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 C 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 SEISS payments and furlough payments in the way it had.

C does not accept the Investigator’s assessment. C 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. And that 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 Mr C's submissions that the Covid-19 pandemic has had a significant financial impact. I am sorry to disappoint Mr C but I do not intend to uphold C'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.

C'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 any human infectious or human contagious disease, an outbreak of which must be notified to the local authority, within one mile of the insured..."*

It is accepted that there were restrictions imposed on C by a public authority following an occurrence of a notifiable human disease that could trigger cover under the above clause. Hiscox has accepted that C was mandated to close with effect from 21 March 2020 to 4 July 2020 and 5 November 2020 to 17 May, the periods of 'lockdown'.

Hiscox therefore agreed that C was unable to use the premises during those periods and that there was cover for the losses arising from that. It has, however, assessed that there was no loss to be covered, but that it would not seek to recover the interim payment it made of £2,500. Other than the objection to the SEISS and furlough payments, which I will address below, it does not appear that this is disputed. I think Hiscox has acted reasonably in not seeking recovery of the interim payment.

The dispute is whether there was an inability to use the business premises outside of the 'lockdown' periods when C had to entirely close, and, if so, for what periods.

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 C 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 C’s. For example, the social distancing rules.

C 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. Specifically, it 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 normally seats 28 people but to comply with the two-metre rule had to reduce this to 16.
- Tables and chairs had to be removed and screens placed between remaining tables. This meant that customers could not access a discrete parts of its premises
- It had to remove all seats from the bar and bar service
- It had to allocate 25 minutes to clean surfaces between sittings.

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

I can see C restricted the numbers it was able to accommodate at the same time and had to take some protective measures. However, I am not persuaded that each space in which there was previously a table or chair would be a discrete part of the business premises. I have also not seen any reliable evidence that the bar was a discrete part of the business. There’s no suggestion in anything I have seen, for instance, that C accommodated drinkers that were not also dining in.

Mr C and all the other staff were able to use the premises during these periods and it was allowed to have customers attend in person. The evidence is that C was able to operate all aspects of the business, albeit with some precautions and adjustments in place. I do not

therefore agree that the restrictions set out by C 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 C 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.”

Finally, as C 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 C entered into its policy, that the policy would mean that reducing the number of customers it could let in, 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 C's claims.

#### SEISS and Furlough payments

During the COVID-19 pandemic, the UK Government introduced a number of grant schemes to support businesses. These included SEISS and furlough. C says the SEISS and furlough payments it received should not have been taken into account in the assessment of the claim for loss of profit at all.

C has however 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. It has 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 C 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.

With regard to the SEISS payments, C has referred to a previous decision by an Ombudsman colleague, which supports that they should not have been deducted. Each case is dealt with on its own facts 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 Mr C 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. And as mentioned, since that letter, relevant case law has emerged.

The judgment in Stonegate set out the relevant tests in relation to the principle of indemnity. While the court was not specifically asked to consider SEISS payments, I think the conclusions reached by the court in that case about furlough payments are relevant and reasonably apply to SEISS payments also. The judge said that payments from third parties that reduced the loss to the insured can be taken into 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. Therefore, I am satisfied that the SESS payments can be taken into account.

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 C in respect of its 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.

C 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.”*

The rate of gross profit was defined in the policy as: *“The percentage produced by dividing gross profit by your income during the financial year immediately before the date of any insured damage, insured failure or restriction”*.

However, the policy includes a *“trends clause”*. This allows adjustment of the settlement to reflect any special circumstances or business trends affecting the business, either before or after the loss, in order that the amount paid reflects as near as possible the result that would have been achieved if the insured event had not occurred.

C’s actual income received during the period of indemnity included the SEISS payment, and there was no cost to it in generating that income. I think it is fair and reasonable to consider that the rate of gross profit on that part of its income was therefore 100%. Given this, I am satisfied that Hiscox was entitled to take account of the full amount of the SEISS payment and I do not intend to ask Hiscox to make any payment to C.

### **My final decision**

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask C to accept or reject my decision before 17 February 2026.

Harriet McCarthy  
**Ombudsman**