DRN-6111743

## The complaint

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

## What happened

P operates a pub. P contacted Hiscox to make 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 P 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 (two lockdown periods), and that this triggered cover under the "*public authority*" section of the policy for these periods when it was unable to use its premises.

Hiscox said the policy ran from 8 November 2019 to 8 November 2020 and was not renewed in 2020, so there would be no cover for the lockdowns imposed after 8 November 2020.

Hiscox settled the claims for the two lockdown periods together with interest and Hiscox also paid P £500 compensation for any inconvenience while the claim was processed.

Mr C was unhappy with this settlement and complained. Mr C says Hiscox deducted the amount that it received in furlough payments from the settlement, which is unfair. Mr C also said that P 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 C remained unhappy, he referred the complaint to us. Mr C has made a number of points in support of the 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 P to expect the policy to cover the losses in suffered outside of the indemnity periods set by Hiscox.
- 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*" (which is the policy requirement for over under the public authority section) 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 was 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 P'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 outside of the lockdown periods 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 P consistently from March 2020 and the indemnity period should therefore be from 21 March 2020 to 17 May 2021.
- Hiscox also deducted from the settlement the amounts that P received as furlough payments, 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 P by any Government restrictions during the times that it was allowed to open. Instead, the Investigator thought the impact during those periods 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.

Mr C does not accept the Investigator's assessment. He says he had not asked us to consider the deduction of furlough payments.

Mr C also says P 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,

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 had a significant financial and personal impact on P. I am sorry to disappoint him but I do not intend to uphold P'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.

P's policy provided cover for loss of gross profit 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 part of the policy that both parties agree is relevant is the "*public authority*" section. This 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 premises…"*

Hiscox accepted that there were restrictions imposed on P's business by a public authority following an occurrence of a notifiable human infectious disease that triggered cover under this clause for the lockdown periods set out above. Hiscox agreed that P 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.

P's initial submission to us did ask us to consider the fact that Hiscox had taken account of the furlough payments when assessing the claim. P has since said it didn't ask us to consider this point but it was part of its initial submission. In any case, I cannot make the direction it asked for. P seems to 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 make a conditional award in the way P 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.

The question for me to consider now, is whether there were restrictions imposed on P, over and above those that required it to close, that meant P suffered an inability to use its 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.

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 8 November 2020. As long as the indemnity period started before this date, it would continue beyond expiry of the policy.

As Mr 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 by the court 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 reopen, such as P's. For example, the social distancing rules.

Mr C 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 was unable to use its premises in full. Specifically, he has said the simultaneous and cumulative impact of the restrictions meant P 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 an obligation to offer table service only.
- It had to remove tables from use, so there was an inability to use these discrete parts of the business premises.
- A basement room that was used for functions had to be closed completely, as it could not comply with social distancing rules in the confined space.
- Parties had to be cancelled.

- Customers were not permitted to go to the bar, which meant the bar was also a discrete area of the premises that it was unable to use.
- It had to reduce the number of customers on the premises at the same time.

I have carefully considered everything Mr C has said. Having done so I am not persuaded that the changes that P 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 the premises for a discrete part of the business. I can see P had to restrict and adapt the service it was able to provide in order to comply with social distancing requirements. However, P'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 the requirement for table service and removing tables and chairs meant that there were discrete parts of the business premises that could not be used.

I have also thought about what Mr C has said about the basement room. I have seen no reliable evidence that this could not be used but by fewer people in the same way as the rest of the premises. I do not therefore agree that P was unable to sue this part of the premises. And while parties and larger gatherings were cancelled, it seems to me that this would be because of the restrictions on what the public could do, rather than an inability of P to use its premises.

In my opinion the evidence provided shows that P 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 P made (set out above) amounted to an inability to use all or part of the premises during the periods it was open, even if the combined and cumulative impact was significant.

I do not agree that P's situation was similar to the examples given in the Supreme Court judgement. In my opinion, the changes P 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."*

Given the above, I am not persuaded that the indemnity period should run from March 2020 to May 2021 and am satisfied that Hiscox has applied the correct indemnity periods.

As Mr 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 P 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 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 P's claims.

**My final decision**

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask P to accept or reject my decision before 5 March 2026.

Harriet McCarthy
**Ombudsman**