DRN-4313515

The complaint

Mrs M, on behalf of a limited liability partnership (LLP) that I will refer to as B, complains about the decisions of Hiscox Insurance Company Limited when settling her business interruption insurance claim(s), made as a result of the COVID-19 pandemic.

What happened

The following is intended as only a brief summary of the key events. Additionally, whilst other parties have been involved in the claim and complaint process, for the sake of simplicity, I have largely just referred to Mrs M, B and Hiscox.

B operates as a business providing swimming lessons and held a commercial insurance policy underwritten by Hiscox. The policy provided a number of areas of cover, including for business interruption. In March 2020, following the introduction of the government-imposed restrictions around the COVID-19 pandemic, B contacted Hiscox to claim for its losses.

Hiscox initially declined the claims, but following the outcome of a legal test case[1], it agreed to meet B's claims. However, Hiscox said that cover was limited to the periods that swimming pools were prevented from opening by the relevant regulations. Hiscox also deducted payments received from the Self-Employment Income Support Scheme (SEISS) from the settlement.

Mrs M is unhappy with both of these points. She has said that certain swimming pools B operates out of remained closed throughout 2020 and beyond. And that SEISS payments were not received by B, but rather by the separate partners, so this was not income of B or a saving of its costs.

Mrs M brought B's complaint to the Ombudsman Service. Our Investigator thought that Hiscox had acted reasonably by limiting the claim to the periods swimming pools were specifically required to close. But he did think that Hiscox should not have deducted the SEISS payments.

Both Mrs M and Hiscox disagreed with this outcome. So, this complaint was passed to me for a decision.

I issued my provisional decision on 4 August 2023.

The following is an extract from that decision:

> "Largely, this complaint is limited to two key issues, and these are the focus of this decision. I do note that B has raised separate concerns over certain other savings that have been deducted from the settlement, but these concerns do not form part of the current complaint.
>
> The two key issues for this complaint are whether the policy covers losses throughout 2020 and whether SEISS payments should be deducted from the

[1] *FCA v Arch Insurance (UK) Ltd and others* [2021] UKSC 1

settlement. I will deal with each of these in turn.

The periods of cover

The most relevant clause in B's policy provides cover for:

> "…financial losses and any other items specified under this section in the schedule, resulting solely and directly from an interruption to your activities caused by:…
>
> > 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;"

A number of terms in this clause are defined within the policy. But it is not disputed that COVID-19 is a notifiable human disease for the purpose of the claim(s). Public authority is not defined by the policy though, and I do not think this is limited to the UK Government. I consider it could include local authorities – but only when acting in their capacity as such.

The majority of losses Hiscox has agreed to cover relate to the period between 21 March 2020 and 25 July 2020. Hiscox has also agreed to provide cover in relation to one pool that was subject to local restrictions in August to September 2020. During these periods, the regulations introduced by the Government directed swimming pools to be closed. For example, regulation 4(4) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 said:

> "A person responsible for carrying on a business or providing a service which is listed in Part 2 of Schedule 2 must cease to carry on that business or to provide that service during the emergency period"

And swimming pools were specifically listed in Part 2 of Schedule 2. This restriction continued until 25 July 2020. As mentioned, there was also a localised restriction that impacted one swimming pool B used and that Hiscox agreed to cover. I do not consider it necessary to go into detail on this, as the form of restriction was the same – merely limited geographically.

So, it was only within these periods that swimming pools were specifically required to close.

There were other restrictions and guidelines which would likely have impacted B's business. These included the social distancing guidelines and so on. However, whilst these restrictions may have caused a hindrance of use, they would not themselves have led to an inability to use the relevant premises. B may have had to adapt its processes and may not have been able to provide for as many customers as it would have wanted to, but this would not be an inability of use which is what the policy requires.

These, and other, guidelines may though have led other parties to make certain decisions. The nature of B's business means it operates out of various different swimming pools owned by third parties. Some of these third parties are local authorities. And some of these owners, including local authorities, took the decision not to open their swimming pools to B.

Taken in the round, it seems the underlying reason for this was that the swimming pools were primarily used by other groups – including schools – and that the

additional procedures required to make sure the pools adhered to the guidelines meant it was not practical to open the pools to B as well.

But this means it was the decision of these third parties that caused the inability of B to use the premises, rather than the restrictions themselves.

Mrs M has provided a great deal of evidence around this part of the complaint. And I appreciate that the third-party owners may have found themselves in a position where guidelines and risk assessments meant that decisions were taken not to allow B to use the premises.

But there were alternative options. The third parties could have opened the swimming pools for exclusive use by B. And if swimming facilities were required for school children, that could've been provided by another pool. It seems very likely this would not have been practical and it is not surprising that this was not the decision taken. But this does demonstrate it was the third-parties' decision of who to open the pools to.

As mentioned, some of the third-party owners were local authorities. However, this does not mean that when making a decision over the use of swimming pools owned by the authority, it was exercising a public authority function. And even if it could be argued that it was, I do not consider that making a decision over who to rent a swimming pool to is acting to impose a restriction – which is what the clause above requires.

To quote from paragraph 116 of the Supreme Court judgment in the test case:

> "We agree with the court below that "restrictions imposed" by a public authority would be understood as ordinarily meaning mandatory measures "imposed" by the authority pursuant to its statutory or other legal powers. "Imposed" connotes compulsion and a public authority exercises compulsion through the use of such powers."

The local authorities in B's case did not impose a restriction on who could use the swimming pools or on who they could be rented to. They merely made the decision not to open them to B's business.

Taking everything into account, I am not currently persuaded that during the period of insurance there was a restriction imposed by a public authority that caused an inability of B to use the swimming pools in question outside of the periods Hiscox has agreed to cover.

It follows that I consider Hiscox has acted fairly and reasonably when declining to cover any losses outside of these periods.

SEISS

Mrs M is also unhappy that Hiscox deducted money received from the Government through SEISS payments from the settlements of B's claims. Our Investigator agreed with Mrs M. He thought the payments from this scheme did not act as a saving against a fixed cost, so he did not think Hiscox was entitled to deduct these payments from the settlement.

I have come to a different provisional finding and have set out my reasons for this below.

However, before discussing Hiscox actions here, it is helpful to set out some of the background to this scheme. The Government provided financial support to businesses during the pandemic via a number of different schemes. These included SEISS, furlough, and also a range of other grants that I will refer to them collectively as “business support grants”.

In 2020, the FCA, HM Treasury, a range of insurers and the Association of British Insurers, ("ABI") made a number of statements particularly in relation to these business support grants. They confirmed that how these grants were treated for tax purposes was not determinative of how they should be treated for insurance claims. And that, ultimately, insurers should not be deducting the amount of these grants from claim settlements. Hiscox has agreed not to deduct money received from business support grants from settlements.

However, no such statements were made in relation to furlough or SEISS. And Hiscox considers that payments through these schemes are deductible from claim settlements.

Hiscox’s position on furlough is directly supported by the judgment in Stonegate[2]. This judgment, in part, considered whether furlough payments should be deducted from relevant business interruption insurance claims. The judge in Stonegate determined that furlough payments were deductible from the relevant claim settlement as a saving.

The judge’s findings were made based partly on the fact that furlough payments were paid to businesses by the Government to cover part of the cost of paying employees’ wages. Paying employees their wages is an expense the policyholder would normally have. As a result of the furlough payments, the policyholder saved on having to pay these wages.

The judge in Stonegate considered not only the contractual position presented by the policy in the court case, but also the principle of indemnity and associated doctrine of subrogation.

This is the basis which insurance, largely speaking, works. And effectively means that a claimant is only able to recover their losses and is not able to put themselves back in a better position that they otherwise would be. And where the circumstances mean the loss the claimant has suffered has been reduced – such as because of a payment made by a third party – the insurer may be entitled to benefit from this reduction in loss.

B did not receive any furlough payments, and the judgment did not involve any consideration of SEISS, as no payments under this scheme were made to the parties involved. However, I consider the reasoning of the judge something I need to take into account when thinking about the SEISS payments received by the partners involved in B.

In considering whether SEISS payments had a similar effect to that set out above, it is necessary to determine whether they reduced the loss suffered by B. This might either be because they reduced a cost that B otherwise would have had to meet. Or

[2] *Stonegate Pub Company v MS Amlin and Others* [2022] EWHC 2548 (Comm)

because the SEISS payments limited the reduction in income B experienced as a result of the pandemic.

It is helpful at this point to confirm that B is a limited liability partnership (LLP). As such, it is technically a legal entity in its own right. It is this entity that is insured and so is the policyholder. And it should also be pointed out that the partners involved in this LLP received the SEISS payments directly – they were not paid to the LLP for distribution and the LLP had no legal right to them.

However, the LLP is also essentially formed by the partners involved. These partners are entitled to a proportion of the profits of the LLP and any SEISS payment paid to them was effectively linked to the profits of the LLP in previous years[3]. (It should be noted that the partners may have been entitled to SEISS payments in respect of any other business activity that was unconnected with B, but Hiscox has only deducted the proportion relating to B.)

So, it is clear that the LLP, the partners and the SEISS payments are all intrinsically linked. The LLP may not have received the money itself, but it was paid to the partners based on the previous performance of the LLP.

B's accountant has referred to the tax position, and confirmed the SEISS payments would have been recorded on each of the partners' own tax returns. However, the judgment in Stonegate, with reference to Riley on Business Interruption Insurance (11th ed), suggests account classification in tax returns. etc. is not determinative for insurance purposes in these situations.

It is fairly common that there is a difference between accounting practices and the way funds are treating from an insurance point of view. As long as this is done fairly and reasonably, there is no issue with this. So, I don't think the tax position in relation to these payments is particularly helpful or determinative.

Our Investigator did not consider Hiscox had demonstrated the SEISS payments had reduced a cost to B. I agree with this to an extent, and I am not persuaded that Hiscox has demonstrated that the SEISS payment received by the partners has reduced any specific cost or expense B would otherwise have had.

The only payments out that would be potentially relevant are the drawings by and distribution of the profits to the partners. But this distribution is based on the amount of profit generated. And this is subject to other decisions of the business on what to spend its income on – for example whether some of it needs reinvesting back into the business. So, the amount of money the LLP generates doesn't necessarily dictate the amount the partners are provided. Given the separation of the LLP and its partners, this means there is not a direct correlation between these SEISS payments and the distribution of B's profits.

However, the other way of considering the SEISS payments is that they were a form of income. Income is defined in B's policy as:

> "The money paid or payable to you in respect of your activities."

The Ombudsman Service's understanding of what is fair and reasonable in relation to SEISS payments has been one that has evolved, much like the wider legal landscape around business interruption insurance claims. Previously, we have

[3] See The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Self-Employment Income Support Scheme) Direction

considered that an individual may not have considered a government grant, of the nature of those paid to businesses in relation to a novel situation such as the pandemic, to be "income".

However, as the judge in Stonegate referred to, in paragraph 267 of the judgment, the clauses in a policy should be construed, if there is any room for argument, to accord with the basic principle that the policy was a contract of indemnity.

So, thinking about the principle of indemnity and the fact that insurance is, effectively, there to cover losses of a policyholder that can't otherwise be recovered, I need to consider whether it is fair for Hiscox to cover B's loss of income where the partners that make up B have received money from a different source, which is based on the money they would likely have received were it not for the cause of the claim.

Thinking about the situation holistically, I am persuaded that Hiscox considering the money received from SEISS to be income would be fair and reasonable. If Hiscox does not deduct the SEISS payments, the larger claim settlement that then resulted would be paid to B. But then this, assuming it amounted to profit, would be distributed to the partners who had received the SEISS payments. They would, effectively, be being paid twice. I don't consider this would align with the principle of indemnity even taking into account the structure of an LLP.

So, for the purposes of B's claim(s), I consider it was fair and reasonable for Hiscox to treat the SEISS payments as income.

In some circumstances there may be a difference in the calculation that needs to be made to the claim settlement. However, B's policy provides cover for loss of income. So, whilst Hiscox has applied a rate of gross profit to work out whether B saved any variable costs, the SEISS payment would directly reduce the amount of income lost. So Hiscox does not need to amend its calculation in this situation."

I invited both parties to provide any further comments or evidence that they wanted me to consider. Neither party responded to my provisional decision disagreeing with the outcome.

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.

Having done so, and noting that neither party provided any further evidence to disagree with the outcome, I have come to the same decision as in my provisional decision for the same reasons.

As set out above, I am not persuaded that during the period of insurance there was a restriction imposed by a public authority that caused an inability of B to use the swimming pools in question outside of the periods Hiscox has agreed to cover. And I consider that Hiscox's decision to limit the settlement to the periods it has was, in all the circumstances of this case, fair and reasonable.

I also consider that the SEISS payments received by the partners involved in B acted to reduce the loss B otherwise would have incurred. So, for the purposes of B's claim(s), I consider it was fair and reasonable for Hiscox to treat the SEISS payments as income.

I know this outcome will be disappointing for B, but I hope I've provided Mrs M with a thorough explanation of why I have come to this decision.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask B to accept or reject my decision before 13 October 2023.

Sam Thomas
Ombudsman