

The complaint

A group of limited companies, that I will refer to as D, complain about the handling and settlement of a business interruption insurance claim, made as a result of the COVID-19 pandemic, by Hiscox Insurance Company Limited.

What happened

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

D operates a number of coffee shops and held a commercial insurance policy underwritten by Hiscox. In March 2020, D was forced to close by the government-imposed restrictions introduced as a result of the COVID-19 pandemic. D claimed on its policy but Hiscox declined the claim.

Following the conclusion of the Financial Conduct Authority test case¹, D contacted Hiscox again in early 2021. Hiscox reconsidered the claim, as well as a claim for losses relating to the second national lockdown, and accepted that the policy did provide cover in the circumstances.

There then followed a lengthy period whilst the losses were quantified. Hiscox did make interim payments during this period, albeit it appears that D had to request these.

In November 2021, Hiscox made an offer of around £79,000 relating to both claims. The offer included an amount relating to accounting fees D had incurred. D responded, saying that it accepted the “first lockdown payment, but still disputed the second lockdown offer”. D said that it would provide reasons for this shortly.

In March 2022, D said that the reason for rejection was because the amount was too low compared to its accountant’s figures. And that the accountant’s fees had not been paid. These fees were £5,500. Hiscox asked what figure D considered the settlement should be and for a breakdown of the accountant’s fees and work.

In April 2022, D provided a breakdown of the accountant’s work, and in May 2022, figures relating to the second lockdown. There then followed a further lengthy period before Hiscox responded with an amended offer in October 2022.

This offer set out that Hiscox actually considered D’s insured losses to only be around £70,000, but said that it would not seek to recover this overpayment. The offer did add interest of almost £7,000 as well as a £500 payment, in relation to the time taken to resolve the claim and any inconvenience caused by the claim handling.

D remained unsatisfied with this, as well as only being given 28 days to respond to the offer. And complaints were raised with Hiscox about these points and the overall time taken.

¹ *The Financial Conduct Authority & Ors v Arch Insurance (UK) Ltd & Ors* [2021] UKSC 1

Hiscox responded, saying that the reason the full accountant's invoice was not being met was not due to the fees being too high – although this may have previously been suggested – but because not all of the work carried out by D's accountant fell into the bracket of what would be covered by the policy. And that the offer made included over £2,000 of these costs. Hiscox also said that given the claim was already overpaid, even if the full accountant costs were added there would be no further settlement due.

Hiscox explained that the 28 day deadline could be, and indeed was, extended but that claims could not be kept open indefinitely. Hiscox did however apologise for the time taken to deal with the claim, but said that it had paid D £500 as well as adding interest to the settlement to compensate for this. And Hiscox also apologised for further service issues and offered D £150 in relation to this.

Soon after, Hiscox increased the amount of interest payable in relation to the claim, as it had calculated this based on the £70,000 rather than £79,000 figure.

D brought its complaint to the Financial Ombudsman Service. However, our Investigator did not recommend it be upheld. He thought that Hiscox had demonstrated that it had reached its settlement calculation reasonably, and that D had not persuaded him that this was inaccurate. He referred to D's calculation being based on a longer indemnity period than was applicable.

Our Investigator also thought that, as the claim had been overpaid, even if he thought Hiscox should pay more for the accountant's fees, he couldn't fairly ask them to increase the overall settlement to reflect this – so he made no finding on the fairness of Hiscox decision to limit the accountant's fees it was willing to meet.

Finally, our Investigator thought Hiscox had fairly and reasonably compensated D for the delay and inconvenience suffered by Hiscox's customer service.

D was not satisfied with this. It felt that any overpayment made was in relation to the second national lockdown claim, so this could not be used to offset any lack of payment of the accountant's fees for the first lockdown claim. D also did not agree with the settlement offered in relation to the second lockdown. And has provided a summary of what it considers this settlement should be.

Ultimately, as our Investigator has not been able to resolve this complaint it has been passed to me for a decision.

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, I am not upholding this complaint. I'll explain why. In doing so, I will focus on what I consider to be the key issues. But, as well as making my formal findings, I will try to provide more detail and information to help D understand why this is a fair and reasonable outcome overall.

The claim settlement

Quantifying losses in business interruption insurance claims is complex. And it often is not possible to reach an exact figure. My role here is to consider whether or not the offer made by Hiscox is fair and reasonable in the circumstances, or if it is detrimental to D.

D has said that it accepts the settlement relating to the first national lockdown, but disputes that relating to the second national lockdown.

One of the significant differences between D's accountant's summary and Hiscox's offer relates to D claiming for increased costs of working, a large proportion of which is made up of wages. D has not provided evidence to show such an increase in the cost of wages during this period minimised the loss D sustained, which is required for such costs to be covered. So, I consider that Hiscox not including this in its settlement was fair and reasonable.

Looking at the figures provided by D's accountant and the settlement offer from Hiscox, it appears that – largely speaking there is something close to agreement on the actual loss of revenue. D has this at around £60,000, whereas Hiscox has this at around £53,000. However, it should be noted that D's figures are based on cover applying for a period of 57 days, rather than the 49 days Hiscox has used.

It seems likely neither of these periods is technically correct. But, if so, this has acted to benefit D.

Hiscox has based its calculation on the period from 14 October to 2 December 2020. The first of these dates is when tier restrictions were introduced. These did impose some limits on D's business – but these related to closing hours, gatherings and whether customers needed to remain seated. And D's policy requires an "inability to use the insured premises". To my mind, restrictions on closing hours, etc. would be a hindrance of use, rather than an inability to use. So, Hiscox appears to be interpreting the circumstances somewhat generously. The area in which D operates was subject to further restrictions than other parts of the country at this time, but these do not appear to have caused an inability to use the premises throughout this entire period.

There was likely an inability to use the premises from 5 November 2020, when the second national lockdown came into force – and even at this point this inability may not have applied to the whole of D's business activities given takeaway and online services would still have been permissible. These restrictions lasted four weeks until 2 December 2020. At this point, different tier restrictions came into operation. But D would only have been subject to similar restrictions to those before 5 November 2020.

Based on the above, the actual indemnity period applicable to D in relation to the second national lockdown claim would only be 27 days. And this would potentially not cover all of D's business activities. So, the true value of D's claim may be far less than Hiscox's offer.

I make no finding on this point though. Hiscox has assessed the claim and determined that the relevant indemnity period is 49 days. This causes no detriment to D. And my decision is based on whether Hiscox has fairly reached a settlement figure based on there being cover for losses during this period.

Ultimately though, I consider the settlement offered by Hiscox is fair and reasonable. I consider Hiscox calculations to have been based on an appropriate assessment of the losses D sustained and savings it is likely to have made (albeit taking into account a period it may not have needed to).

Hiscox has made a number of errors during the course of its calculations, and these have led to multiple offers being made. But, other than causing inconvenience, etc. which I will discuss below, I do not consider these errors have caused any detriment to D.

I am satisfied that, overall, Hiscox has come to a conclusion that does not detriment D. Hiscox has calculated the insured losses across the two claims to be approximately £70,000,

including over £2,000 towards accounting fees which I will discuss below. Hiscox has said that there may be some minor adjustments that would be needed to this offer to take into account certain additional factors. But, given Hiscox has paid D about £9,000 more than this, I consider that any minor adjustments required would not change the amount D would receive. And this does not even take into account the issue with the indemnity period.

So, I consider that the settlement offer made by Hiscox to be fair and reasonable.

D has more recently provided a different calculation of loss. Effectively, it has divided the total expected turnover for 2020, which it has said is just over £1.1M, by the number of days in the year, and multiplied it by the 49 days Hiscox has used. It has then deducted the fixed costs and Government scheme savings Hiscox used for its settlement offer to come to a claim amount of around £117,000.

However, even if the initial estimated expected turnover used is accurate, there are a number of issues with this.

Firstly, it assumes that there is a steady rate of income across the year. D's accountant's figures show that this was highly variable across different months. This is why Hiscox's (and D's own accountant's) calculations are based on comparing the equivalent periods from the previous year(s). Both D's account and Hiscox reached a figure around £30,000 less than D's recent calculation.

Secondly, it does not take into account the actual revenue D generated during this period. As explained above, during the 49-day period there were times when D's operations would have been able to continue. And the figures provided by D's accountant set out the income actually achieved as over £60,000. This would need to be deducted from the estimated loss.

Thirdly, the required calculation needs to take into account variable costs as well, as well as the fixed costs. Hiscox has done this by applying a rate of gross profit to the claim. This is not a perfect way of making this calculation, but it does tend to provide a reasonable output barring any particular reasons why it should not be used. Hiscox used a figure of 75% to calculate this, which is not significantly different to the figures suggested by D's accountant.

Given these points, I am not persuaded by D's recent or previous submissions that Hiscox offer is not fair and reasonable.

Accountant fees

Generally speaking, in cases like this, I try to consider matters holistically. So, whilst I note D's comments around the settlement for the first lockdown being separate from the second – and hence any overpayment in relation to the second not being used to offset the accountant's fees – I will consider the situation in the round and not make such a distinction.

I also note that D accepted the settlement in relation to the first national lockdown claim, and this settlement included an amount of over £2,000 to cover accountant's fees. So, were I to apply the facts rigidly, I might conclude that D had accepted this part of the claim settlement in relation to this first claim, and that all that could be disputed was the accountant's fees in relation to the second claim, which would make D's objection to considering the overpayment redundant. I do not think it would be fair on D to interpret the situation in this way. But I also must be fair to Hiscox when considering the circumstances.

Ultimately, as Hiscox has overpaid the claims D has made by more than the entire accountant's fees, and has not sought to recover this sum, I don't consider it is fair and reasonable to ask it to do more. D has received more than Hiscox might reasonably have

paid, even if it were to cover the entire accountant's fees.

As such, I make no findings on the fairness of Hiscox's decision to limit this specific payment to just over £2,000. But, again, I will add some further comments in an attempt to provide D with a more rounded explanation of the events.

I note D's representative had asked Hiscox to confirm what reasonable accountant fees might generally be for some time, and it does not appear that an answer was forthcoming. Providing a specific answer to this may not have been possible, as the individual circumstances of each claim are likely to have a bearing on this. But it is unfortunate that Hiscox do not have appeared to respond to this request for some time – and that this response was after D had already instructed its accountants.

However, this does not mean that all of an accountant's fees would be covered. As set out in the policy, these costs need to be reasonable – which I appreciate is open to interpretation. But they also need to be for producing information Hiscox requires in support of a request for settlement. And Hiscox has said that much of the work carried out by D's accountant did not fall within this category.

There is a difference between an accountant pulling together the relevant figures so that an insurer can assess these and make the necessary calculations, and the accountant actually making these calculations themselves. A complainant may wish their accountant to carry out such calculations so that they can be satisfied, for example, that the insurer has reached a correct settlement. But the cost of this activity is not something the policy covers.

Customer service and delays

It is clear that there were some lengthy delays with the process. On occasion, Hiscox was waiting for D to provide required information. But the majority of the delays were caused by Hiscox's actions. From the correspondence, it is also clear that Hiscox did not keep D updated as often as it should have.

As a group of limited companies, D is unable to suffer distress. But it can suffer inconvenience. And although the claim and complaint process has largely been handled by its third party representative, D would no doubt have been avoidably inconvenienced by the circumstances.

However, Hiscox has offered D £650 to compensate for these issues, as well as adding interest to the claim settlement amount at a rate of 8% simple per year. I consider this to be fair and reasonable in the circumstances. And I am not directing Hiscox to do anything more.

I appreciate this is not the outcome D was hoping for. But I hope that I have provided it and its directors with a thorough explanation of why this is a fair and reasonable 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 D to accept or reject my decision before 20 December 2023.

Sam Thomas
Ombudsman