DRN-4285406

The complaint

A limited company I will refer to as B complains about the decision of Hiscox Insurance Company Limited to limit the settlement of its business interruption insurance claim, made as a result of the COVID-19 pandemic.

What happened

The following is intended only as a brief summary of events. Additionally, whilst other parties have been involved, for the sake of simplicity I have just referred to B and Hiscox.

B operates, in part, as a medical centre owner and included in this is the provision of paid-for car parking. B held a commercial insurance policy underwritten by Hiscox. In 2020, B made a claim on the policy for losses incurred as a result of the COVID-19 pandemic. Ultimately, Hiscox accepted the majority of the claim under the following clause:

> "We will insure you for your financial losses and other items specified in the schedule, resulting solely and directly from an interruption to your activities caused by:…
>
> > your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following:…
> >
> > > an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority…"

However, Hiscox said that there was no inability to use B's car parking facilities for the purpose of paid-for parking. B disputed this, largely on the basis that it said it had been instructed to stop the use of touchscreens and that this was the only way charges could be collected.

When Hiscox did not change its position, B brought its complaint to the Financial Ombudsman. Our Investigator did not recommend the complaint be upheld though. He thought that any inability to use the touchscreens was not an inability to use the premises themselves. And that B could have set up alternative methods of payment.

B remained unsatisfied and its complaint 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.

A number of different arguments have been raised in the course of the claim and complaint. This includes whether or not there was a relevant restriction imposed by a public authority. However, at its heart this complaint comes down to whether an inability to use touchscreens for the purpose of collecting payment leads to an inability to use the premises for the purpose of chargeable car-parking. It is an inability, rather than a hindrance, that is required

by the policy.

B has confirmed that the car park was used throughout for the purpose of parking cars. There was no interruption of this physical activity. The claimed for interruption was limited to the collection of charges for the parking of cars.

The touchscreens themselves are likely to be part of the premises in that they are likely considered fixtures and fittings, and so form part of the buildings at the premises. However, the use of touchscreens is not an activity of the business as a such. No charge is made for using the touchscreens and they do not generate revenue themselves. They merely facilitate the normal use of the car park in that they are a mechanism allowing for the collection of charges for the service of providing car parking. So, an inability to use the touchscreens is not in itself an inability to use the premises for a business activity.

The question is whether there was an inability to use the car park for the discrete activity of providing paid-for parking. This is the business activity B has said was interrupted leading to a loss. So, did the inability to use the touchscreens mean that there was an inability to provide paid-for parking, i.e. did this mean B was unable to collect money for providing car parking?

The policy does include a claim condition which requires a claimant to:

> "…make every reasonable effort to minimise any loss, damage or liability and take appropriate emergency measures immediately if they are required to reduce any claim"

B has suggested this should be interpreted as only requiring a policyholder not to act recklessly. But I don't consider this is accurate. Effectively, such terms requiring mitigation and minimisation of loss require a policyholder to act as though they were not insured. So, rather than relying on the insurance to cover any loss, they should take reasonable steps to ensure as much continuity of business as is possible. This is not the same as not acting recklessly.

Regardless, I don't actually consider this clause to be the only relevant factor in the situation B found itself in. First and foremost is whether there was an inability – as opposed to a hindrance – in providing paid-for parking.

And, ultimately, I do not consider the inability to collect revenue via a specific channel to have led to an inability to collect revenue at all.

Many car parks, especially historically, function without the use of an automated ticket machine. Whilst it may be less common in more recent times, having a parking attendant collect money would have been a possibility as the Investigator suggested. I appreciate B's comments in relation to this – including the fact that the users of the car park were likely vulnerable and interaction during a pandemic needed to be minimised. But I consider these factors would have likely only amounted to a hindrance rather than an inability. Additionally, if face-to-face transactions were not appropriate, electronic bank transfer would have offered an alternative.

Taking everything into account, I am not persuaded there was an inability to use the premises for the discrete activity of providing paid-for parking. And it follows that I consider Hiscox's decision not to meet B's losses for this part of its business was, in all the circumstances of this case, fair and reasonable.

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 12 October 2023.

Sam Thomas
Ombudsman