DRN-4402201

## The complaint

The partners of an enterprise I will refer to D, complain about the handling and settlement of their business interruption insurance claims by Hiscox Insurance Company Limited. The claims were 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 in correspondence, I have just referred to D and Hiscox for the sake of simplicity.

D operates as a business with a number of activities. Primarily though it is concerned with the repair and service of musical instruments, and the sale instruments and accessories. It held a commercial insurance policy underwritten by Hiscox, and this included cover for business interruption. As a result of the interruption to D's business caused by the COVID-19 pandemic, D contacted Hiscox to raise a claim on the policy.

Ultimately, the losses this complaint relates to span three periods of interruption and also more than on period of insurance. In some circumstances the Financial Ombudsman Service might consider each of these periods separately as separate claims and complaints. However, given the circumstances of this complaint, I consider it is beneficial for all if the matter is considered as one.

Hiscox initially declined the claim in May 2020, and D complained about this decision. At the time the Financial Conduct Authority was, in conjunction with a number of insurers, bringing a test case through the Courts to consider aspects of how business interruption insurance should respond to the pandemic. Hiscox did not immediately deal with D's complaint as a result of this.

Following the conclusion of this test case in early 2021, Hiscox wrote to D inviting it to resubmit its claim for consideration. This happened in November 2021. Also at this time, D raised a further complaint about the process.

Hiscox then contacted D in January 2022 to make an unconditional interim offer of £2,500. D did not accept this though and wanted its claim dealt with.

D's claim was considered and ultimately accepted under the following clause:

> "We will also insure you for your loss of gross profit up to the limit stated in the schedule as applicable resulting solely and directly from an interruption to your business caused by the following:
>
> …
>
> d. your inability to use the business premises due to restrictions imposed by a public authority following:
>
> …

ii. an occurrence of any human infectious or human contagious disease an outbreak of which must be notified to the local authority"

In April 2022, Hiscox made its first settlement offer of around £1,600. D was unhappy with this and a further complaint was raised. A second offer was made in November 2022, for just under £1,800. Again, D remained unhappy.

In early December 2022, D referred its complaint to the Financial Ombudsman Service.

A third offer was then made later in December 2022, for £8,760 plus an amount of interest. This offer was later increased in February 2023 to take into account £850 of accountancy costs D had incurred.

The complaint D made covered a number of different points. I have summarised these below, which I acknowledge is a simplification of D's concerns. D was unhappy that:

1. Payments received from the Self-Employed Income Support Scheme (SEISS) have been deducted from the claim settlement,
2. The claim settlement from Hiscox does not include losses relating to the repair and servicing activities of its business,
3. The cost of D taking out a Bounce Back Loan (BBL) has not been included in the settlement, and
4. The handling of the claim was not to the standard that ought reasonably to be expected.

Hiscox responded to the complaint points, essentially saying that SEISS payments D's partners had received were income that saved on costs D would otherwise have had to meet. And that the repair and servicing activities had not been prevented by restrictions imposed by a public authority.

But Hiscox did agree that the level of service provided during the claim process and the time taken were not to the appropriate standard. Hiscox offered £500 for the distress and inconvenience caused by the service provided and said the interest part of the settlement addressed the time taken to resolve the claim.

Hiscox later said that the interest payment was also greater than any interest D would have had to pay in relation to the BBL. So, D had not suffered any financial loss in respect of this.

D remained unhappy with Hiscox's responses. Part of this was because Hiscox had indicated the interest payment was to reflect the time take to resolve the complaint, rather than to address the BBL.

Our Investigator considered the complaint. Largely speaking, he thought Hiscox's ultimate response to the complaint was appropriate. He agreed that Hiscox could deduct the SEISS payments from the settlement, but that the basis of the calculation needed to be amended slightly. He also thought that Hiscox was correct when concluding that the losses incurred by the repair and servicing element of D's business was not something the policy covered in the circumstances.

The Investigator agreed that the level of service provided was not to the standard that it ought to have been, but felt that the compensation offered by Hiscox was fair and reasonable in the circumstances. He was not entirely persuaded that D would not have taken the BBL regardless of Hiscox's actions, but considered that the interest award did appropriately cover any cost of this anyway.

D did not agree with this outcome. Hiscox also was unhappy with the recommended adjustment to how the SEISS payments should be calculated. As our Investigator has been unable to resolve the complaint it has been passed to me for a final 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 have come to the same conclusions as our Investigator, largely for the same reasons. I'll explain why.

I should firstly say that both D and Hiscox have provided a great deal of evidence and commentary about the events and complaint points. I have considered all of these, but I am not going to address each point individually. Instead, I am going to focus on what I consider to be the key issues. I will do so by addressing, in turn, each of the four complaint categories I have set out above.

SEISS

D is unhappy that Hiscox has deducted sums, received by the partners, from the settlement of D's claim. D is unhappy that, effectively, taxpayer's money is being used by Hiscox to reduce the amount it has to pay. D does not believe the Government intended these payments to deduce insurers' responsibilities.

Both parties are familiar with SEISS, so I will not set this out in detail here. However, 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[1]. 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.

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

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

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.

The judge explained this in detail, but ultimately said there were three matters to consider in terms of a payment received from a third party. He set these out at paragraph 284 as:

> "(1) If a third party has made a payment which has eliminated or reduced the loss to the insured against which it had insurance, then, subject to the exception below, the insurers are entitled to the benefit of that payment, either in reducing any payment that they might have to make under the policy or, if they have already paid, by claiming the amount from the insured.
>
> (2) This will not be the case, however, if it can be established that the third party. In making the payment, intended to benefit only the insured to the exclusion of the insurers ...
>
> (3) In assessing the intentions of the third party payor, it does not matter whether that payor gave any thought to the position of insurers. A payment can still diminish the loss even if no such thought is given."

D or its partners 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 D.

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 D. This might either be because they reduced a cost that D otherwise would have had to meet. Or because the SEISS payments limited the reduction in income D experienced as a result of the pandemic.

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 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 D's loss of income where the partners that make up D 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. D has said that all of the SEISS payments received by the partners were put into the business as a drip feed for the lost income to keep it going.

Thinking about the situation holistically, I am persuaded that Hiscox considering the money received from SEISS to be income into D would be fair and reasonable. The receipt of this money did provide D with funds it otherwise would not have had and which acted to reduce the overall losses it sustained as a result of the pandemic.

So, for the purposes of D's claims, I consider it was fair and reasonable for Hiscox to treat the SEISS payments as "a payment which has eliminated or reduced the loss to the insured against which it had insurance" – i.e. as income.

The second matter that the judge in Stonegate listed was whether the third-party making the payment intended to benefit only the insured to the exclusion of the insurers; i.e. whether the Government intended to benefit D only and not Hiscox. If Hiscox deducts the SEISS payment from the settlement, the payment will have benefitted Hiscox in that it has reduced the sum it needs to pay D.

The arrangements for SEISS were set out in Directions[2] issued by the Government and said:

> "The purpose of SEISS is to provide for payments to be made to persons carrying on a trade the business of which has been adversely affected by the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease."

No comment was made about this payment being intended only to benefit the businesses receiving these sums though.

HM Treasury did make some comments of its own about government grants. However, this was in relation to discussions around the business support grants. And did not reference, and was not in relation to a conversation concerning, furlough or SEISS.

Thinking about this in relation to the judgment in Stonegate, which was issued some time after these comments from the Treasury, in relation to furlough the judge said at paragraph 286:

> “As to the intention of the Government in paying, Stonegate has not shown that this was with the intention of benefiting Stonegate alone to the exclusion of insurers. There is no express statement by the Government to that effect. The Government did not indicate that the payment was being made only in respect of uninsured losses.”

So, it does not seem the judge considered the Treasury letter to be relevant to furlough. And, given the Government hasn’t said anything different in relation to SEISS than it did to furlough, it seems likely that the judge would not have considered the Treasury letter was relevant to SEISS either.

Taking these points into account, I don’t think the payor (the Government) intended to benefit the insured (D) only to the exclusion of the insurer (Hiscox). It follows that Hiscox can fairly and reasonably deduct the SEISS payment from the claim settlement.

I do appreciate that as a partnership the SEISS payments were made to D’s partners as individuals, rather than as a payment to the 'business' itself. However, there is limited legal separation between a partnership and its partners. And this issue ultimately comes down to whether or not a payment was made by a third party (the Government) which reduced the losses of the policyholder (the partnership).

As a result of the SEISS payments, the losses felt by the partnership were reduced; D has said it paid this money into the partnership and used it, effectively, as a form of income. And, unlike in relation to some of the other grants provided businesses during the pandemic, the Government did not say that these SEISS payments were not to benefit insurers.

I do also understand the argument that, effectively, this means the insurers are benefitting from taxpayers' money. But this is not an issue I am in a position to determine. My role is merely to decide whether or not Hiscox is entitled to deduct these payments from the settlement of D’s claim. Taking into account the circumstances of D’s case, including the policy and legal background, I consider Hiscox is entitled to make this deduction.

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[2] See the Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Self-Employment Income Support Scheme) Direction

However, it is necessary to also think about how Hiscox has deducted the SEISS payments from the settlement.

The policy sets out how claims should be settled and says Hiscox will pay:

> "The sum produced by applying the rate of gross profit to any reduction in income during the indemnity period … less any business expenses or charges which cease or are reduced."

Currently, Hiscox has treated the SEISS payment as an expense or charge which has ceased or reduced; i.e. a saving. However, Hiscox has not identified any specific expense or charge which has been reduced, and D has said it used the SEISS payments effectively as income for D. So, I consider that Hiscox should treat the SEISS payment as being income. This means the correct methodology is to deduct this sum from the reduction in income prior to the application of the rate of gross profit.

Hiscox considers that the appropriate rate of gross profit to be used in this calculation should be 100% as there were no costs that D incurred in generating this profit. Whilst I note Hiscox's position, I am not persuaded that this is fair and reasonable.

The policy defines "rate of gross profit" as:

> "The percentage produced by dividing gross profit by your income during the financial year immediately before any insured damage."

So, the required calculation is to apply the previous year's rate of gross profit to the reduction in income, less any reduction in expenses or charges.

Applying this formula without any adjustment isn't necessarily appropriate in all circumstances. However, I do consider this to be fair and reasonable in D's circumstances. I have noted the policy contains a Business trends clause, which makes provision for taking into account variation in circumstances or trends that mean a different sum might be payable. I have previously set out to Hiscox that I do not consider it is appropriate to apply this clause to the circumstances of claims such as D's.

I have explained that, in thinking about whether this can be applied to such claims it is necessary to refer to the Supreme Court judgment in the FCA test case. The court considered this type of clause and said, at paragraph 287 and 288:

> "… we consider that the trends clauses in issue on these appeals should be construed so that the standard turnover or gross profit derived from previous trading is adjusted only to reflect circumstances which are unconnected with the insured peril and not circumstances which are inextricably linked with the insured peril in the sense that they have the same underlying or originating cause.
>
> … the trends clauses do not require losses to be adjusted on the basis that, if the insured peril had not occurred, the results of the business would still have been affected by other consequences of the COVID-19 pandemic."

The SEISS payments were only made due to the pandemic, so I consider that they were inextricably linked with the insured peril as they had the same underlying or originating cause. I do consider it is reasonable that they are included in the settlement calculation as they have reduced the loss to D. But, applying this reasoning to the current situation, it would not be appropriate to consider there was effectively no cost associated with this income as being a trend or other circumstance that Hiscox is able to take into account in adjusting the gross profit.

In responding to the Investigator's view, Hiscox has reference a previous decision where I set out my reasoning on this issue. Hiscox has said that the position I have taken incorrectly applies both the law and the policy, and that I have either ignored or misunderstood the paragraphs from the FCA test case judgment preceding those quoted above.

I can assure Hiscox this is not the case.

Hiscox itself has set out that the analysis in the judgment is principally 'backward looking' and the conclusion is that standard turnover should not be adjusted to reflect the impact of COVID-19. Hiscox considers that the approach I consider should be taken is forward looking. But I agree with Hiscox that the only forward looking aim was to ensure the loss was assessed without the impact of any COVID-19 factors impacting the indemnity.

However, Hiscox then seemingly wants to adjust the rate of gross profit – which is inherently based on the historic turnover of D – i.e. its standard turnover, to reflect the impact of COVID-19. Hiscox seeks to apply a rate of gross profit of 100% on the basis that the SEISS payments were income achieved without any cost. But the reason this was income achieved without any cost is because of the wider circumstances of the pandemic. The SEISS payments were made by the Government as a result of the pandemic.

Hiscox has referred to the principle of indemnity, which I consider inherent to the general findings over SEISS payments. And has said that the position I have taken on the calculation then ignores this. However, as I have previously explained in some detail to Hiscox, on more than one occasion, SEISS payments were not a direct replacement of money business might make. The amount payable under SEISS was not limited to the full losses of the business. And a business might receive more through the scheme than it lost as a result of the pandemic. As such, the principle of indemnity is only applicable so far in these unique circumstances.

It is possible that a court might reach a different conclusion in relation to SEISS. However, even if I am wrong about any aspect of the legal position set out above, I still think that considering D's complaint in the way set out is fair and reasonable in all of the circumstances of the case.

Ultimately, I do not consider it fair or reasonable in the circumstances of this complaint to treat SEISS payments received by D as a saving on an expense or charge. I do consider it reasonable to consider these payments as a form of income. However, as this was, at most, income generated due to the activity of D's business that had been interrupted I do not consider it would be appropriate to apply the business trends clause to this income.

It follows that the appropriate methodology of calculating the settlement of D's claim is to deduct the relevant SEISS payment from the reduction in income, and then apply the rate of gross profit during the financial year prior to the claim.

Finally, I note Hiscox has expressed dissatisfaction that the Financial Ombudsman Service has not agreed to meet Hiscox to discuss this issue verbally. However, multiple decisions across multiple complaints have been issued to explain the general position. Whilst Hiscox may disagree with this position, it has been provided with a clear rationale as to why it is the position that has been taken.

Repair and servicing

I should start by saying that I agree that some of the suggestions made by Hiscox do not appear reasonable in relation to certain aspects of this side of D's business. Based on my understanding of D's business, it is clear why some of the work D normally carries out may

not have been possible during the pandemic.

However, it does seem that D would have been able to carry out some repair and servicing work. And it would be difficult to say that the elements D could carry out are a part of its business activities that are discrete from those repair activities it was unable to carry out. Repairing a smaller musical instrument is, effectively, the same business activity as repairing a larger one. I do appreciate that from a technical point of view this is arguably inaccurate as the requirements of the instruments will be different - but ultimately it is the repair of a musical instrument and hence the 'same' business activity.

This is an issue for this aspect of D's claim, as the relevant clause as set out above – and taking into account the legal background - requires an "inability to use" (a discrete part of) the premises for a (discrete) business activity.

I do not consider the ability only to repair smaller instruments, or potentially only a smaller number of instruments, to satisfy this requirement. That would likely be considered a hindrance of D's business activity, but not an inability. A 'hindrance' would not satisfy the policy requirements.

I do appreciate that D considered it was doing as instructed at the time and that it felt that, as it was a non-essential business, it should close. I note the comments provided via D's local MP, and also D's own comments about viewing the situation with hindsight. I have a great deal of sympathy for businesses such as D's, which had to make decisions in the face of uncertainty and a rapidly changing situation.

However, on 23 March 2020, the Prime Minister said that there was a requirement to "close all shops selling non-essential goods", and this is effectively the wording of the regulations that then followed this. Either the Prime Minister's speech or the regulations themselves might be considered "restrictions imposed by a public authority". But they were limited to shops selling or hiring goods, as well as those businesses specifically listed in the regulations. No instruction was given for "non-essential businesses" generally to close.

Some such businesses – like D's – did close, and arguably this was the correct moral choice in the circumstances they were in. But my role is to consider whether the losses following such a closure are those that are covered by the insurance policy in question. And, whilst I appreciate this is not the outcome D would hope for, I am unable to come to this conclusion based on the circumstances of this complaint.

Ultimately, there was no restriction imposed by a public authority that caused an inability of D to use its premises for the business activity of repairing and servicing instruments. As such, I consider the outcome Hiscox reached in respect of this part of the claim to be in line with the policy terms, and fair and reasonable in all the circumstances of this complaint.

BBL

I potentially disagree slightly with the reasoning of the Investigator in relation to this issue. I note that the BBL D took out was limited to £10,000. It seems likely D would have been able to take out a loan far exceeding this. And this is somewhat indicative of D making this decision based on the initial outcome of the claim. Had the claim been met in May 2020 a different decision on the loan may have been taken.

However, the settlement offer from Hiscox includes interest at a rate of 8% simple per annum (I do note that this appears to have been made partly in relation to the customer

service issues, but I will return to this). When considering the settlement of a complaint, our role would be to put the parties in the position they would have been in had there been not 'mistake'.

So, if there had been no 'mistake' in Hiscox's claim decision the position would potentially be that D would have not taken out the BBL (or would only have taken a small loan). And D would have been paid around £8,760 (the value of the settlement without interest or accountancy fees).

As a result of the mistake, D has been without this money for several years (albeit the settlement would have been paid over a period of time), and has instead had to take out the BBL. This means the consequential loss of the mistake (from a purely financial point of view) is the interest D has had to pay on this loan. For the first 12 months of the loan, I do not believe any interest would be payable. And interest since has been, I believe, at around 2.5%. So, the interest payable on the loan is significantly lower than the offer made by Hiscox in relation to the 8% interest.

As above, I do recognise that the offer of interest was made in relation to the customer service issues. However, this letter also makes it clear that this interest offer is in relation to the time D was waiting for your claim to be resolved. I.e. this is a payment partly for not having the money ought to have received a short period after it suffered the relevant losses.

And I would take the view that this needs to be taken into account when thinking about the impact of not having received the settlement earlier. D has effectively said that one of the consequences of not having its claim met in 2020 was that it took the BBL. But the cost of this has been offset by the interest offer.

So, whilst I disagree slightly with the Investigator's reasoning here, I do ultimately agree with him that any financial loss associated with the BBL has already been resolved by this part of Hiscox's offer.

Customer service

It is clear that the claim did not progress as it ought to. Both parties agree with this. So this issue is merely for me to determine what the appropriate level of compensation is to address this. I should say that I am not going to address the timeline in a detailed manner. Rather I am going to look at the situation holistically.

I note that D was unhappy that a number of questions it raised were not answered. To be frank, I would not expect an insurer to provide a customer with details of their corporate practices. But I do agree these questions might at least have been acknowledged. And a clearer explanation of some other aspects at an earlier stage may have been helpful.

I also note that D was unhappy with deadlines it was given to respond, and that Hiscox did not seem to be applying strict timeframes to its own actions. Whilst I appreciate D's position here, I do also note that Hiscox was always willing to extend these deadlines and offered an explanation for them. It is common practice that deadlines are set, partly to help progress matters but also so that the parties know when a response should be chased. Ultimately, whilst I agree Hiscox took longer than it should, I don't consider it acted inappropriately by setting deadlines for D to respond.

I also agree that it would have been helpful had D had a single point of contact. I am unable to direct Hiscox to change its operational processes in this regard, and having this set-up is fairly common. But I have taken the difficulty and crossed-correspondence this caused into account.

It did take a number of reviews for Hiscox to fully appreciate D's business operations, and to identify the relevant losses and costs to be taken into account. Dealing with business interruption claims is often complex, and D's own business set up is varied and more complex than for other businesses. So, I do not consider that there being some initial issues with reaching an appropriate settlement figure to be unexpected. And a certain level of inconvenience is an unfortunate consequence of making any insurance claim.

But I do think this whole process could have been smoother. And a clearer understanding from Hiscox at an earlier stage would have helped this and avoided requests for information already provided. It seems that by late April 2022 at the latest Hiscox had a reasonable level of information about D's operations. And although there was a period of around a month or two after this when Hiscox was waiting for D to clarify points, it isn't clear why it took until December 2022 for a generally reasonable offer to be made (the final offer effectively only dealing with the accountancy fees).

Whilst the financial loss caused by the time taken to resolve the claim has essentially been redressed by the interest offer, I do note that the ongoing uncertainty has likely had a non-financial impact. The partners of D have set out details of this.

Given the actual cost of the BBL, it is though necessary to consider that the rest of the interest payment formed an award of compensation to reflect this. I note that the interest calculation has been made to include the accountancy fees which would not have been payable so early. Additionally, it should be noted that Hiscox made an offer of £2,500 as an interim settlement in January 2022. This was not accepted, but arguably interest might not be payable on this part of the settlement from this date.

So, an element of this interest payment needs to be taken into account when considering the appropriate compensation for the customer service issues. Adding this to the £500 specifically offered by Hiscox in relation to these issues means that I consider the compensation as a whole to be fair and reasonable in the circumstances of the complaint.

**Putting things right**

Hiscox Insurance Company Limited should put things right by:

- Recalculating the SEISS element of the claim by deducting the SEISS payments D's partners received, relevant to the indemnity periods, prior to the application of the rate of gross profit. And the rate of gross profit applied should be the standard rate of gross profit based on the previous financial year.

- Settling the claim as set out in its offer letter of 2 February 2023, other than in relation to the SEISS calculation.

- Paying D £500 compensation if it has not already done so.

**My final decision**

My final decision is to uphold D's complaint in part. Hiscox Insurance Company Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask D's partners to accept or reject my decision before 24 November 2023.

Sam Thomas

**Ombudsman**