



<u>Decision Ref:</u>	2021-0041
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Retail
<u>Conduct(s) complained of:</u>	Rejection of claim
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a limited company trading as a clothing wholesaler, hereinafter 'the Complainant Company', holds a commercial insurance policy with the Provider.

The Complainant Company's Case

The Complainant Company notified the Provider in **April 2020** of a claim for business interruption losses due to the temporary closure of its business on **16 March 2020** for a period, as a result of measures imposed by the government to curb the spread of the coronavirus (COVID-19).

Following its assessment, the Provider wrote to the Complainant Company on **29 April 2020** to advise that it was declining indemnity as the Complainant Company's commercial insurance policy only provides business interruption cover where there has been damage to the insured property caused by one of the specified perils listed in the policy, as follows:

"[The Provider's] standard business interruption cover, which applies to this policy, provides cover in the event of the Business carried on by the insured at the Premises being interrupted or interfered with as a consequence of DAMAGE (being loss or destruction of or damage to property used by the insured at the Premises for the purpose of the Business) by any of the Contingencies A-M specified as being insured in Section 1 of the policy. The policy also references cover for Suppliers Customers and Property Stored, Prevention of Access and Loss of Attraction, all of which require damage to have occurred. Neither the occurrence of Covid-19, nor of the SARS-Cov-2

virus, constitutes “damage” to property or Premises and in addition, none of the specified contingencies in your policy are relevant to the Covid-19 pandemic. In view of these circumstances, I regret to inform you that, under the [Provider] policy that you hold, we will not indemnify you for the interruption to your business caused by the Covid-19 pandemic”.

The Complainant Company subsequently emailed the Provider on **5 May 2020**, as follows:

“The cessation of our business trading was brought about by a direction from the Government.

The policy wording does not exclude Global Pandemic.”

Following its review, the Provider wrote to the Complainant Company on **29 June 2020** to advise that it was standing over its decision to decline indemnity in this matter.

In this regard, the Complainant Company sets out its complaint in the **Complaint Form** it completed, as follows:

“We are insured for business interruption, we want to submit a complaint following the advices from the claims department of [the Provider] that the policy does not provide cover in respect of the recent claim submitted for business interruption due to COVID-19. We dispute this as we were closed down by the Government and the word pandemic is not in the policy.

We have suffered loss of earnings for the period which our business had to close and we are still suffering with ongoing cashflow problems as trading is not back to normal, we chose to have business interruption insurance so we would be covered for this loss of earnings. We calculate that so far we have lost earnings of approx. 50,000 euro.”

The Provider’s Case

Provider records indicate that the Complainant Company notified the Provider by way of email on 8 April 2020 of a claim for business interruption losses as a result of the temporary closure of its business on 16 March 2020, due to measures imposed by the government to curb the spread of the COVID-19.

Following its assessment, the Provider wrote to the Complainant Company on 29 April 2020 to advise that it was declining indemnity, as follows:

“[The Provider’s] Business Interruption insurance covers risks that are specific, pre-defined and local to your business, such as closure caused by a fire, flood or a break-in. Our wording does not provide cover for national or global threats such as wars, nuclear risks, or pandemics. While some [Provider] policies have extensions for ‘specified diseases’, these cover a pre-defined list of conditions and not new and emerging diseases ...

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[The Provider's] *standard business interruption cover, which applies to this policy, provides cover in the event of the Business carried on by the insured at the Premises being interrupted or interfered with as a consequence of DAMAGE (being loss or destruction of or damage to property used by the insured at the Premises for the purpose of the Business) by any of the Contingencies A-M specified as being insured in Section 1 of the policy. The policy also references cover for Suppliers Customers and Property Stored, Prevention of Access and Loss of Attraction, all of which require damage to have occurred. Neither the occurrence of Covid-19, nor of the SARS-Cov-2 virus, constitutes "damage" to property or Premises and in addition, none of the specified contingencies in your policy are relevant to the Covid-19 pandemic.*

In view of these circumstances, I regret to inform you that, under the [Provider] policy that you hold, we will not indemnify you for the interruption to your business caused by the Covid-19 pandemic and that I do not propose to take further action in respect of your claim. I can assure you that this decision has not been reached lightly, but I should emphasise that your [Provider] policy will not and was never designed to respond to such circumstances".

The provider says that following receipt of an email complaint from the Complainant Company on 5 May 2020 and having reviewed the matter in full, it wrote to the Complainant Company on 29 June 2020 to advise that it was standing over its decision to decline indemnity in this matter, as follows:

"My understanding of your complaint is that you are dissatisfied that your 'Business Interruption' claim arising from closure of your business due to the COVID-19 pandemic has not been met by your policy. You complain that the cessation of your business trading was brought about by Government direction and you note that the policy wording does not exclude global pandemic.

As set out in our letter dated 29 April 2020, the Business Interruption section of your policy cover is only triggered –

"In the event of the Business carried on by the Insured at the Premises being interrupted or interfered with as a consequence of DAMAGE (being loss or destruction of or damage to the property used by the Insured at the Premises for the purpose of the business) by any of the Contingencies A-M specified as being insured in Section 1 [Material Damage]"

In the context of the current COVID-19 situation, it is a material fact that no "loss or destruction of or damage" has been caused to the Premises, or to any of the property within it. SARS-Cov-2, COVID-19, or indeed pandemic of any description, is not an insured peril that is covered under the 'Material damage' section of the policy. Accordingly, as no insured peril relative to Section 1, Contingencies A-M has operated, the Business Interruption section of your policy is not triggered. None of the specified contingencies in the policy are relevant to the COVID-19 pandemic.

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Our letter dated 29 April 2020, also sets out that while the policy references Business Interruption cover arising from the ‘Suppliers Customers and Property Stored’, ‘Prevention of Access’ and ‘Loss of Attraction’ extensions; again, the current COVID-19 situation does not constitute “DAMAGE” to the Premises, or to any of the property within it.

It is for these reasons that we have come to the view that your policy has no application to any losses arising as a result of the closure of your business due to the COVID-19 pandemic. Your insurance policy is a contract of insurance and it will not cover every eventuality. Like any contract, your policy is subject to terms, conditions and exclusions. We are completely satisfied that the policy terms are straightforward, clear and free of any ambiguity.

Having carefully considered both your claim, and your subsequent complaint, we are completely satisfied that your policy does not respond, and our position remains unchanged. Your policy will not, and was never designed to, respond to such circumstances”.

The Provider says that in order for the commercial insurance policy business interruption cover to be triggered, that there must first have been damage to the insured property caused by one of the contingencies listed in the policy. In this regard, the Provider notes that the Complainant Company’s business was not closed as the result of any damage to the insured property. Rather it was closed due to measures imposed by the government to curb the spread of COVID-19, a reason that does not fall under any of the listed contingencies.

Accordingly, the Provider is satisfied that it declined the Complainant Company’s claim in accordance with the terms and conditions of its commercial insurance policy.

The Complaint for Adjudication

The complaint is that the Provider wrongly or unfairly declined to admit and pay the Complainant Company’s claim for business interruption losses as a result of the temporary closure of its business due to measures imposed by the government to curb the spread of the coronavirus (COVID-19).

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant Company was given the opportunity to see the Provider’s response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

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Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties 27 January 2021, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

I note that the Complainant Company, which holds a commercial insurance policy with the Provider, notified the Provider on 8 April 2020 of a claim for business interruption losses due to the temporary closure of its business on 16 March 2020 for a period, as a result of measures imposed by the government to curb the spread of the coronavirus (COVID-19).

Following its assessment, I note that the Provider wrote to the Complainant Company on **29 April 2020** to advise that it was declining indemnity as the commercial insurance policy only provides business interruption cover where there has been damage to the insured property caused by one of the specified perils listed in the policy.

I am satisfied that the Complainant Company's commercial insurance policy, like all insurance policies, does not provide cover for every possible eventuality. Instead, the cover will be subject to the terms, conditions, endorsements and exclusions set out in the policy documentation which the parties agreed to put in place.

I note that **Section 1, 'Material Damage'**, of the applicable commercial insurance policy booklet provides, at pg. 11, as follows:

"The [Provider] agrees that if any of the Property Insured described in the Schedule be lost destroyed or damaged by any of the Contingencies in force as specified in the Schedule the Company will pay to the Insured the value of the property at the time of its loss or destruction or the amount of the damage or at the Company's option reinstate or replace such property or any part of it".

In this regard, I note that the **'Material Damage - Contingencies'** section of the policy booklet provides at pgs. 12-14, as follows:

- "A. FIRE ...
- B. LIGHTNING ...
- C. EXPLOSION ...
- D. AIRCRAFT ...
- E. EARTHQUAKE ...
- F. RIOT, CIVIL COMMOTION, STRIKERS, LOCKED-OUT WORKERS ...
- G. SUBTERRANEAN FIRE ...
- H. STORM OR FLOOD ...
- I. ESCAPE OF WATER FROM ANY TANK APPARATUS OR PIPE ...
- J. IMPACT ...
- K. ACCIDENTAL ESCPAE OF WATER FROM ANY AUTOMATIC SPRINKLER INSTALLATION ...
- L. ANY ACCIDENTAL CAUSE (ALL RISKS) ...
- M. STEALING OR ATTEMPTED STEALING"

I note that the Complainant Company's claim is for business interruption losses. In that context, **Section 2, 'Business Interruption'**, of the commercial insurance policy booklet provides, *inter alia*, at pg. 30, as follows:

"In the event of the Business carried on by the Insured at the Premises being interrupted or interfered with as a consequence of DAMAGE (being loss or destruction of or damage to the property used by the Insured at the Premises for the purpose of the Business) by any of the Contingencies A-M specified as being insured in Section 1 ['Material Damage'] then the Company will pay to the Insured in respect of each item shown as insured in the Schedule the amount of loss resulting from such interruption or interference provided that the liability of the Company shall not exceed

- (i) *in respect of Increase in Cost of Working/Income/Gross Profit/Tax Relief/Rent Receivable the sum insured by each item*

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(ii) *133⅓% of the sum insured on Estimated Income/Estimated Gross Profit/Estimated Tax Relief*

(iii) *in respect of each other item its sum insured*

as stated in the Schedule at the time of the DAMAGE”.

[My emphasis]

I note that “DAMAGE” is defined at pg. 11 of the policy booklet, as follows:

“The word “DAMAGE” in capital letters shall mean loss or destruction of or damage to the Property Insured”.

I am satisfied that the terms and conditions of the Complainant Company’s commercial insurance policy clearly stated that in order for the business interruption cover to be triggered, there must first have been damage to the insured property caused by one of the specified perils, that is, the listed contingencies. In this regard, I accept the Provider’s position that the reason for the temporary closure of the Complainant Company’s business in this instance, namely the measures imposed by the government to curb the spread of the coronavirus (COVID-19), does not fall under one of the contingencies listed in the commercial insurance policy.

I note that in its email to the Provider on 5 May 2020 the Complainant Company says, “*The policy wording does not exclude Global Pandemic*”. In this regard, I am satisfied that the commercial insurance policy only provides cover where the loss being claimed for is caused by one or more of the specified perils (the listed contingencies). I take the view that where the loss is caused by any other reason which is not so specified, then the Provider is entitled to adopt the position that such loss is simply not covered by the policy.

Accordingly, I am satisfied that the Provider declined the Complainant Company’s claim for business interruption losses in accordance with the terms and conditions of its commercial insurance policy. There is no evidence available to me that the Provider acted wrongfully in coming to the conclusion that the losses claimed for by the Complainant Company were not covered by the policy agreement in place.

For the reasons outlined above, I take the view that there is no reasonable basis upon which it would be appropriate to uphold this complaint.

Conclusion

My Decision is that this complaint is rejected, pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



MARYROSE MCGOVERN
DEPUTY FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

19 February 2021

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,
- (ii) a provider shall not be identified by name or address,

and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.