An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0052
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Claim handling delays or issues
Outcome:	Upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a limited company trading as a hair salon, referred to hereafter as 'the Complainant Company', holds a commercial combined insurance policy with the Provider.

The Complainant Company's Case

The Complainant Company submitted a claim to the Provider in **May 2020** for business interruption losses as a result of the temporary closure of its business on 14 March 2020 for a period, due to the outbreak of coronavirus (COVID-19).

In making such a claim, the Complainant Company relies upon the following wording of Extension 3.3.4, '**Infectious diseases/murder or suicide**', of the 'Business Interruption' section at pg. 27 of the applicable **Commercial Combined Insurance Policy** Document:

> *"The insurer will pay to the insured: …*
>
> *Loss resulting from interruption of or interference with the business in consequence of any of the following events: …*
>
> *c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises".*

Following its assessment, the Provider wrote to the Complainant Company on **21 May 2020** to advise that it was declining indemnity in this matter as it had concluded that the Complainant Company's losses did not fall within the scope of cover provided by the relevant business interruption infectious disease extension policy wording.
On **3 June 2020** the Complainant Company emailed a complaint to the Provider in relation to its decision to decline indemnity.

Following the completion of its review, the Provider wrote to the Complainant Company on **23 June 2020** to advise that it was upholding its decision to decline indemnity.

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

> *"My insurance policy has a clause that states I am covered for business interruption caused by infectious diseases on premises or within a 25 mile radius.* [The Provider] *says that Covid-19 is exempt from this but my policy does not seem to exclude pandemics. I got my first refusal and what I deduct is that they claim I have no evidence of an active case within 25 miles, I argued that [first named] Hospital is 3.5km away and [second named] Hospital is 4.4km away, also Trinity College is [distance] away where they announced publicly that they had an outbreak, also Dublin had the highest amount of active cases in Ireland and from our premises if you travel 25 miles in any direction you are outside of the Dublin line. The* [Provider-appointed Loss Assessor] *also claims that my policy is not covered by government shutdown, however we closed a week before the government made the decision to close hair salons. We did it because Trinity College had an outbreak.* [The Provider] *replied with a second letter that I don't understand the wording of but basically declining a second time"*.

In addition, in its email to this Office on **28 September 2020**, the Complainant Company submitted, *inter alia*, as follows:

> *"*[The Provider] *claim that had we not close*[d] *the business ourselves that the government would have closed us the following week and apparently we are not covered* [for] *government closures, but they also claim we have no proof of an active* [COVID-19] *case within the 25 mile radius or that the pandemic caused our closure, but I find those two statements contradictory to each other. Had we not had active* [COVID-19] *cases, then the government wouldn't have initiated* [a national] *lockdown in the first place.*
>
> *Also,* [the Provider] *agree we closed a week before the government's decision to lockdown but they haven't offered to cover our losses for that week. It is factually known that Dublin was and is the epicentre of the pandemic in Ireland and should you travel 25 miles in any direction from our business you will leave Dublin, so how can we not have proof of an active case within the radius of 25 miles?"*

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As a result, the Complainant Company seeks for the Provider to admit and pay its claim for business interruption losses, incurred as a result of the temporary closure of its hair salon due to the outbreak of coronavirus (COVID-19) and in this regard it submits:

> *"I am claiming for the maximum cover of €17,000 over a 12 month period based on the fact that our salon would generate that amount in two weeks but we were closed for four months."*

The Provider's Case

Provider records indicate that the Complainant Company, which holds a commercial combined insurance policy with the Provider, submitted a claim in **May 2020** for business interruption losses as a result of the temporary closure of its hair salon on **14 March 2020**.

In order to assist and to provide context, the Provider first set out a chronology of the material facts relevant to, and measures taken in respect of, the COVID-19 pandemic in Ireland, including where the Complainant Company's business interruption claim fits into that chronology, as follows:

20 February 2020: COVID-19 became a notifiable disease in Ireland, as did its virus agent SARS-CoV-2, by way of the *Infectious Diseases (Amendment) Regulations 2020*.

29 February 2020: First diagnosis of COVID-19 in Ireland.

11 March 2020: First death in Ireland attributable to COVID-19.

12 March 2020: On the advice of the National Public Health Emergency Team (NPHET), the Irish Government announced the following measures to control the spread of COVID-19:

a. the closure was ordered of museums, galleries, tourism sites, schools, creches, other childcare facilities and higher education institutions; and

b. no mass gatherings involving more than 100 people indoors or 500 people outdoors.

In addition, a statement from the Taoiseach also stated:

> *"… Public transport will continue to operate … Shops will remain open … Businesses are to take a sensible and level-headed responsible approach … Restaurants, cafes, and other businesses can stay open but should look at ways to implement the public health advice on social distancing".*

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14 March 2020: Second death in Ireland attributable to COVID-19. By this date, there were 129 confirmed cases of COVID-19 in the country. The Complainant Company closed its hair salon premises.

15 March 2020: Following discussions with the Licensed Vintners Association and the Vintners Federation of Ireland and with their support, the Government requested that all public houses and bars, including hotel bars, close from 15 March 2020 to at least 29 March 2020.

20 March 2020: The *Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020* was enacted, which at that time was valid until 9 November 2020. This Act empowered the Minister for Health, on an emergency basis, to prohibit and restrict the holding of certain events and to close certain premises.

24 March 2020: The Government adopted the following NPHET recommendations:

a. non-essential retail outlets were closed to members of the public;

b. all theatres, clubs, gyms/leisure centres, hairdressers, betting shops, marts, markets, casinos, bingo halls, libraries and other similar outlets were closed;

c. all hotels were limited to non-social and non-tourist occupancy;

d. all playgrounds and holiday or caravan parks were closed;

e. all organised social indoor or outdoor events of any size were not to take place; and

f. all cafes and restaurant were to operate on a take-away or delivery basis, with strict physical distancing measures applied to queuing for this service.

27 March 2020: From midnight, strict public health measures came into force requiring all members of the public to stay at home, excluding essential service workers. The Provider notes that Schedule 2, 'Essential Services', of the *Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) Regulations (S.I. 121 of 7 April 2020)*, hereinafter 'the 7 April 2020 Regulations', did not include hairdressing businesses.

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8 April 2020: An Garda Síochána given additional powers under the 7 April 2020 Regulations to levy fines for not complying with the above restrictions.

1 May 2020: The Government published its '**Roadmap for Reopening Society and Business**', setting out its plans for easing COVID-19 restrictions and enabling a phased reopening of Ireland's economy, with Phase 1 on 18 May 2020, Phase 2 on 8 June 2020, Phase 3 on 29 June 2020, Phase 4 on 20 July 2020 and Phase 5 on 10 August 2020.

18 May 2020: Phase 1 of reopening commenced with the following enterprises allowed to recommence trading:

a. hardware stores;

b. builders' merchants and those providing essential supplies and tools for gardening;

c. farming and agriculture; garden centres and farmers markets;

d. opticians/optometrists/outlets providing hearing test services, selling hearing aids and appliances;

e. retailers involved in the sale, supply and repair of motor vehicles, motorcycles and bicycles and related facilities (for example, tyre sales and repairs); and

f. office products and services; electrical, IT and phone sales, repair and maintenance services for home (not including homeware stores).

8 June 2020: Phase 2 of reopening commenced with all retail outlets permitted to recommence trading, but all workers otherwise still required to work from home where possible.

29 June 2020: Phase 3 of reopening commenced with businesses such as hairdressers, barbers, beauty salons, spas, tanning, tattooing and piercing services allowed to reopen.

The Provider says it is not clear from the complaint papers whether and when the Complainant Company reopened its hair salon. Against this background, the Provider says that it was notified by email on **13 May 2020** of a claim from the Complainant Company for business interruption losses, arising from the temporary closure of its hair salon on 14 March 2020.

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The Provider says that following direct contact with the Complainant Company as part of its assessment, the Provider-appointed Loss Adjuster wrote to the Complainant Company's Broker on **21 May 2020** setting out the reasons why it did not consider there to be cover for the claim under the terms and conditions of the commercial combined insurance policy, as follows:

> *"I note that on the 14th March 2020, you ceased trading following the issuance of guidelines by the Government regarding social distancing. You were unable to fully adhere to these guidelines and as a consequence took the decision to close your business on Health and Safety grounds.*
>
> *As a consequence of the present situation you have suffered a loss of revenue and have sought to establish the extent of cover under your policy …*
> *As we understand it, your claim is based upon the economic effects that the Covid-19 situation has had on your business. The policy does provide some limited cover, by way of extensions, for certain situations where the business is adversely affected by a specific event, happening at or near the premises. The extension of relevance to Covid-19 claims of this nature is the Infectious Diseases/Murder or Suicide Extension…*
>
> *In the event that, losses have arisen due to the occurrence of Covid-19, cover may be available under the Infectious Diseases/Murder or Suicide Extension. This Extension is designed to be the only potential source of cover for losses arising from diseases such as Covid-19.*
>
> *The Extension may respond where:*
>
> *(a) Loss results from the occurrence of a notifiable disease at the premises; or*
>
> *(b) Loss results from the occurrence of a notifiable disease within the specified vicinity of the premises.*
>
> *Covid-19 was added to Irish government list of notifiable diseases on 20 February 2020. This Extension will therefore respond in respect of losses suffered after that date as a consequence of the occurrence of Covid-19 at the relevant locations …*
>
> *It is important to note that this Extension will only provide cover where loss is in consequence of the occurrence of Covid-19 at the relevant locations, and not where losses are in consequence of, for example, wide-scale government measures. The effect of (for example) government-mandated blanket shutdowns, or the effect of the Covid-19 outbreak on the regional, national or global economy, will not trigger cover. Cover will only be available where a specific outbreak of Covid-19 at the premises, or within the specified vicinity, has had a direct effect on the business.*

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> *Where a case of Covid-19 has occurred at the insured premises, it is likely that cover under the Extension would be engaged to the extent that that occurrence has required the premises to close for a short period, subject to the terms and conditions of the policy. Where it is shown that there has been an occurrence of Covid-19 within the radius of the relevant premises as specified in the policy, interruption loss at the premises will only be recoverable to the extent that that loss is in consequence of that particular occurrence, and not some other cause …*
>
> *Having carefully considered your claim, unfortunately I do not believe there is any cover, as the notified circumstances and losses do not fall within the terms of your policy, for the reasons set out above"*.

The Provider says that it received an email complaint from the Complainant Company dated **3 June 2020**, which the Provider acknowledged in writing on 9 June 2020.
Following its review, the Provider says that it issued a final response letter to the Complainant Company on **23 June 2020**, detailing how the losses they incurred fell outside the scope of policy cover, specifically the infectious disease extension, as follows:

> *"Whilst we had considered that the circumstances of the losses being experienced by* [the Complainant Company] *fell outside the scope of policy cover, in order to ensure that the correct decision was made we sought legal opinion on the policy wording, with particular reference to Extension 3.3.4 (Infectious diseases/murder or suicide). Our letter dated 21st May* [2020] *detailed the findings of the review, which confirmed we had correctly interpreted the wording and that on this occasion the losses* [the Complainant Company] *are experiencing fall outside the scope of the policy.*
>
> *Having now completed my review of the file, I can see no basis on which to reconsider the decision on policy cover. The policy is very specific in that for consideration to be given under Extension 3.3.4 losses must be in consequence of an occurrence of a notifiable disease at the premises, or in consequence of an occurrence of a notifiable disease within a radius of twenty five (25) miles of the premises, there being no cover for losses resulting from measures introduced to curtail the spread of Coronavirus or the extremely challenging economic conditions that exist at present"*.

The Provider says that on **20 July 2020**, the Complainant Company completed a Financial Services and Pensions Ombudsman Complaint Form. As part of its complaint, the Provider notes that the Complainant Company advised that it had closed its hair salon on **14 March 2020** as there had been an outbreak of COVID-19 at Trinity College, Dublin, which it stated was very close to its business premises.

Similarly, the Provider notes that the Complainant Company had advised in its email to its Broker on **9 June 2020** that:

> *"*[The Loss Adjuster] *says that we are not covered where the government has* [instructed] *us to close the business, however we closed a week earlier than the government decision because there was an outbreak of cases in Trinity College."*

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However, the Provider notes that the Complainant Company informed the Loss Adjuster on **18 May 2020** that the reason for closure on 14 March 2020 was due to difficulty complying with social distancing guidance, rather than the alleged outbreak in Trinity College, Dublin or any hospital within a 25 mile radius of its hair salon.

The Provider says that the relevant extension in the '**Business Interruption'** section of the Complainant Company's commercial combined insurance policy is Extension 3.3.4, '**Infectious diseases/murder or suicide'**, which reads, as follows:

"The insurer will pay to the insured: …

3.3.4 Infectious diseases/murder or suicide

Loss resulting from interruption of or interference with the business in consequence of any of the following events:

a) any occurrence of a notifiable disease at the premises or attributable to food or drink supplied from the premises;

b) any discovery of any organism at the premises likely to result in the occurrence of a notifiable disease;

c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises;

d) the discovery of vermin or pests at the premises which cause restrictions on the use of the premises on the order or advice of the competent local authority;

e) any accident causing defects in the drains or other sanitary arrangements at the premises which causes restrictions on the use of the premises on the order or advice of the competent local authority;

f) any occurrence of murder or suicide at the premises;

provided that the

g) insurer shall not be liable for any costs incurred in cleaning, repair, replacement, recall or checking of property;

h) insurer shall only be liable for loss arising at those premises which are directly subject to the incident;

i) insurer's maximum liability under this cover extension clause in respect of any one claim shall not exceed EUR50,000 or fifteen per cent (15%) of the total sum insured (or limit of liability) for this insured section, whichever is the lesser, any one claim and EUR10,000 any one period of insurance".

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The Provider acknowledges that COVID-19 and its virus agent SARS-CoV-2, were designated as notifiable diseases in Ireland on **20 February 2020**. The Provider says that reading the provisions relevant to this matter together, therefore, the infectious disease extension provides cover for losses resulting from:

(i) interruption of or interference with the business;

(ii) *"in consequence of"* any of the following events:

a. any occurrence of COVID-19 at the premises;

b. any discovery of any organism at the premises likely to result in the occurrence of COVID-19;

c. any occurrence of COVID-19 within a radius of 25 (twenty-five miles) of the premises;

(iii) provided that the Provider shall only be liable for loss arising at those premises which are directly subject to the *"the incident"*.

The Provider says that (i)-(iii) above constitute the insured peril, which must proximately cause the financial losses claimed by the Complainant Company. The Provider also says that if proved, the maximum recoverable by the Complainant Company under the business interruption infectious disease extension is **€2,550**, this being 15% of the business interruption sum insured (€17,000).

The Provider says the key question concerns when business interruption can be said to be *"in consequence of"* occurrences of COVID-19 within a 25 mile radius of the insured premises:

(i) is it enough that there simply happen to be such occurrences within the radius, which thereby act as the trigger for cover of any COVID-19-related interruption suffered (whether or not directly due to those occurrences within the radius)?; or

(ii) is it required that those occurrences within the radius must be the specific proximate cause of the interruption, in the sense that but for those occurrences, no interruption would be suffered? So, if the interruption would have occurred in any event, irrespective of the local occurrences with the 25 mile radius, is it that there is then no cover?

In October 2020, when the Provider replied to the formal investigation this Office, it indicted its position that this was the precise question, on the exact wording of clause

> *"c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises)*"

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which was considered by the English High Court, in the 15 September 2020 decision of *The Financial Conduct Authority v. Arch Insurance (UK) Ltd and others* [2020] EWHC 2448, ("the FCA Test Case"). The Provider advised that this litigation had been before the English High Court, which considered the extent of COVID-19-related coverage, if any, under 21 separate business interruption coverage wordings for test case purposes.

The Provider says that the wording of its infectious disease business interruption extension that was under consideration before the English High Court in the FCA Test Case is identical to the wording of the business interruption extension 3.3.4 'Infectious diseases/murder or suicide' contained in the Complainant Company's commercial combined insurance policy.

In this regard, the Provider noted that the English High Court stated in the FCA Test Case, as follows:

> *"In* [the Provider's wording]*, there is a combination of factors which together, to our minds, indicate that the cover is … intended to be confined to the results of specific (relatively) local cases …*
>
> *In the first place, the insuring clause itself identifies the matters in (a) to (f) as "events".*
>
> *This indicates that what is being insured is matters occurring at a particular time, in a particular place and in a particular way …*
>
> *This is the context within the clause in which* [the clause] *refers to "any occurrence of a notifiable disease".*
>
> *Given the reference to "events", and taken with the nature of the other matters referred to in (a), (b) and (d) to (f), the emphasis in (c) appears to us in this clause not to be on the fact that the disease has occurred within 25 miles, but on the particular occurrences of the disease within the 25 miles.*
>
> *It is the "event", which is constituted by the occurrence(s) of the disease within the 25 mile radius, which must have caused the business interruption or interference.*
>
> *If there were occurrences of the disease at different times and/or different places* [i.e. outside the 25 mile radius] *then these would not constitute the same "event", and the clause provides no cover for interruption or interference with the business caused by such distinct* [outside-the-radius] *"events".*
>
> *This focus of the clause is then emphasised by the fact that in (h), it is stated that the insurer is only liable for loss arising at those premises which are directly subject to the "incident" … These uses of the word "incident" appear to us to reinforce the fact that the clause is concerned with specific events, limited in time and place …*

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Given our construction of [the clause]*, the issues as to causation largely answer themselves. We accept that the words "in consequence of" imply a causal relationship.*

As we have found that this clause … is drawing a distinction between the consequences of the specific cases occurring within the radius and those not doing so., because the latter would constitute separate "events", we consider that insureds would only be able to recover if they could show that the case(s) within the radius, as opposed to any elsewhere, were the cause of the business interruption.

In the context of this clause, it does not appear to us that the causation requirement could be satisfied on the basis that the cases within the area were to be regarded as part of the same cause as that causing the measures elsewhere, or as one of many independent causes each of which was an effective cause, because this clause, in our view, limits cover only to the consequences of specific events [within the 25 miles radius]*".*

[This Office notes that since the Provider's response was delivered to this Office in October 2020, the UK Supreme Court has more recently determined an Appeal arising from that separate litigation outside of Ireland.]

The Provider has maintained that the effect of this extract from the FCA Test Case – and the effect of the infectious disease extension, as a matter of Irish law, even without reference to that decision – is that:

(i) the Complainant Company in the present case will only be able to recover under clause (c) of the infectious disease extension – for business interruption that is *"in consequence of… c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises"* – if they can show that the business interruption has been proximately caused by the specific occurrence(s) of the disease within the 25 mile radius (being the relevant *"event"* and insured peril);

(ii) this is entirely consistent with section 55(1) of the *Marine Insurance Act 1906* (a pre-independence statute that is in force in Ireland), which provides that:

> *"Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against"*;

(iii) further, as stated in the Irish insurance text, '**Buckley on Insurance Law'**, at paras. 8.71, 8.76 and 8.77:

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"The fundamental rule of insurance law is that the insurer is only liable for losses proximately caused by a peril covered by the policy … The use of words such as "in consequence of" or "originating from" does not … prevent the operation of the doctrine … [Further]*, words such as "caused by" or "arising from" are unambiguous. Such words have been interpreted as relating to the proximate cause …";*

(iv) for proximate cause purposes, therefore a two-step test must thus be undertaken:

a. firstly, the "but for" test (factual causation) must be applied. This boils down to a simple question: what would have happened had the Insured Peril not occurred i.e. had there been no *"occurrence(s) of* [COVID-19] *within a radius of 25 miles of the* [Complainant Company's] *premises"*?;

i. if the business interruption and losses would have occurred in any case, through a <u>separate independent event</u> (in the form of incidents of COVID-19 outside the radius, or government order to close that would have been imposed whether or not there were local incidents within the 25 mile radius), then the incidents of COVID-19 within 25 miles (being the Insured Peril) did not cause the interruption and losses, such that those losses are not covered;

ii. alternatively, if it can be said that "but for" the event comprising the local occurrences within 25 miles the business would not have suffered the relevant interruption/losses, then the local incidents are the factual cause of those losses – the business would not have suffered the same losses in any case;

b. secondly – and assuming factual causation has been satisfied as in (ii) above – were the incidents inside the 25 mile radius also the proximate cause (i.e. the dominant or effective cause) of the presented losses (legal causation)?

c. If the above tests are satisfied by the Complainant Company, i.e. "but for" the local 25 mile COVID-19 event the business interruption losses would not have occurred, the losses will be covered.

The Provider says that these tests are not satisfied in the present matter, which it says must be analysed from the perspective of the period both prior to, and after, the Government-directed closure of the Complainant Company's business on 24 March 2020.

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The Provider also says regarding: Interruption/Financial Loss prior to 24 March 2020

(i) The Complainant Company's business closed voluntarily on 14 March 2020, prior to any government direction that businesses close on 24 March 2020 or that direction becoming a legal requirement on 27 March 2020;

(ii) The burden is on the Complainant Company to prove, on a balance of probabilities, that:

a. there was an occurrence of COVID-19 within the 25 mile radius of its business premises during the period prior to 24 March 2020;

b. a reduction in turnover/gross profit loss was suffered during the period relative to the same period in the previous year i.e.:

i. during the period prior to 14 March 2020; and

ii. between 14 March and 23 March 2020, when the Complainant Company closed the business without any government direction to that effect

(together, the Pre-24 March 2020 losses); and

c. those losses would not have been suffered but for/without the occurrence(s) of COVID-19 illness *"within a radius of 25 (twenty five) miles of the premises"*;

(iii) The Complainant Company stated in its email complaint of 3 June 2020 that there were known outbreaks of COVID-19 within a radius of 25 miles of its business premises, in particular at [first named hospital], [second named hospital] and Trinity College, Dublin. Similarly, in its email to its Broker of 9 June 2020, the Complainant Company stated that the business was closed because there was an outbreak of cases in Trinity College Dublin, [stated distance] from its premises. Notwithstanding the Complainant Company's position that it closed its business because of an outbreak within 25 miles of its business premises, no evidence, whether in the form of documented statistical data, accounts, newspaper reports or otherwise, has been provided by the Complainant Company proving on a balance of probabilities:

a. the occurrence of a case of COVID-19 in the 25 miles radius of its business premises in the period prior to 24 March 2020, albeit that the Provider is prepared to accept that this is likely given the Dublin city centre location of the business premises;

b. a pre-24 March 2020 drop in turnover/gross profit relative to the previous year for the same period;

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c. which drop in turnover/gross profit would not have occurred but for the "local" COVID-19 occurrences within the 25 miles radius;

(iv) Rather it is the Provider's position that:

a. any pre-14 March 2020 gradual downturn that might have been experienced by the Complainant Company would have occurred in any event, irrespective of the local position within the 25 mile radius. All business trade was affected nationwide due to national disquiet/generalised fear/consequent reduction in footfall during the pre-14 March 2020 period. The burden of proof is accordingly on the Complainant Company to provide evidence that the extent of their pre-14 March 2020 losses was greater than other similar businesses in the same hairdresser sector across the country. If the downturn suffered by the Complainant Company mirrored, or was less than, the average drop-off of other similarly placed businesses in Ireland, it cannot be said that the drop-off in trade was specific to/in consequence of local occurrences of COVID-19 within 25 miles, as similar drop-off was encountered by all similar businesses across the country;

b. regarding the 'down to zero' loss during the period 14 March to 23 March 2020, when the Complainant Company voluntarily closed its premises, the Complainant Company states alternatively, that that closure and ensuing loss was caused by COVID-related social distancing requirements introduced by the Government, or was caused by a local outbreak in Trinity College.

The Provider says there is simply no evidence either of when the latter outbreak occurred or that it proximately caused the closure, and that none has been provided. Regarding the social distancing reason that has been given, the social distancing requirements were not *"in consequence of"* a specific incident/event of COVID-19 illness within the 25 miles radius: that guidance issued, and would have been issued, by the Government in any case.

In other words, it cannot be stated that but for a local incident of COVID-19 illness within the 25 mile radius (which is the insured peril), the social distancing guidance would not have arisen, and the business would have continued and not closed. That guidance would have issued, and the business would have stopped on 14 March 2020, in any event, due to the increasing incidents of COVID-19 nationwide. The 14 March to 23 March 2020 interruption and losses cannot, therefore, be said to have been *"in consequence of"* the insured peril – i.e. an *"occurrence of* [COVID-19] *within a radius of 25 (twenty five) miles of the premises"* – and are not therefore covered.

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The Provider says regarding: <u>Interruption / Financial Loss after 24 March 2020</u>

(i) Regarding the Complainant Company's business interruption that occurred post-24 March 2020 (when it would have been required to close (if it had not already been closed) by government direction), the ensuing losses are similarly not recoverable;

(ii) This is because that government-requested closure interruption was not *"in consequence of"* (that is, proximately caused by) the insured peril, being the local "event" of *"occurrences of* [COVID-19] *within* [the 25 miles radius]*"*. It cannot be stated that "but for"/without the local occurrences, the closure order would not have been imposed: it would have been imposed in any case, due to the separate uninsured events of COVID-19 elsewhere in the country. As was stated by the English High Court in the FCA Test Case in a different context:

> *"Even if these were a total closure of insured premises pursuant to the* [Government] *Regulations, there could only be cover if the insured could demonstrate that it was the risk of COVID-19 in the vicinity, in that sense of the neighbourhood* [i.e. in the present case, the 25 mile radius]*, of the insured premises, as opposed to in the country as a whole, which led to the action of the government in imposed the Regulations. It is highly unlikely that that could be demonstrated in any particular case…."*

(iii) As the interruption losses post-24 March 2020 were in consequence of a government direction introduced as a national response to a national health issue, designed to reduce the spread of the virus nationally (which is an uninsured peril), and were not a local response to specific occurrences/incidents/events in the Complainant Company's 25 mile radius event (which is the insured peril), clause (c) of the business interruption infectious disease extension is not triggered.

The Provider notes that in its '***Expectations of Insurance Undertakings in Light of COVID-19***' correspondence to Insurers dated 27 March 2020, the Central Bank of Ireland stated:

> *"The Central Bank is of the view that where a claim can be made because a business has closed, as a result of a Government direction due to contagious or infectious disease, that the recent Government advice to close a business in the context of COVID-19 should be treated as direction".*

In this regard, the Provider does not accept that the Complainant Company closed its business on 14 March 2020, as a result of a government direction, as no such direction to close issued until 24 March 2020 and this then became law on 27 March 2020.

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The Provider does accept that the Complainant Company would have had to close its business on 24 March 2020 and, insofar as the business was already closed as at 24 March 2020, the closure from that date was as a result of the Government direction on that date.

However, for the reasons set out extensively above, the Provider says that this government direction was not imposed *"in consequence of"* (i.e. was not proximately caused by) the relevant insured peril of a local occurrence/incident/event of an infectious notifiable disease within a radius of 25 miles of the premises, but rather was a direction that would have issued in any event irrespective of the position within that local radius, and as a result, the losses due to the closure direction are not covered, as they would have been suffered in any event.

The Provider therefore concluded that the Complainant Company's ensuing losses do not fall within the scope of cover provided by the relevant business interruption infectious disease extension (section 3.3.4) of the commercial combined insurance policy. Accordingly, the Provider is satisfied that it declined indemnity in this matter, in accordance with the terms and conditions of the Complainant Company's commercial combined insurance policy.

The Complaint for Adjudication

The complaint is that the Provider wrongfully or unfairly declined to admit and pay the Complainant Company's claim for business interruption losses, incurred as a result of the temporary closure of its business in March 2020, due to the outbreak of 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.

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.

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A Preliminary Decision was issued to the parties on **22 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.

Following the consideration of an additional submission from the Provider dated 12 February 2021, to which the Complainant Company elected not to reply, the final determination of this office is set out below.

The Complainant Company, a limited company trading as a hair salon, held a commercial combined insurance policy with the Provider in March 2020. I note that on **14 March 2020** the Complainant Company closed its hair salon and later submitted a claim to the Provider in **May 2020** for business interruption losses arising from this temporary closure.

In making such a claim, the Complainant Company relies upon extension 3.3.4, '**Infectious diseases/murder or suicide**', of the '**Business Interruption**' section at pg. 27 of the Commercial Combined Insurance Policy Document, and in particular the emphasised wording, as follows:

> *"**The insurer will pay to the insured:***
>
> *3.3.4 Infectious diseases/murder or suicide*
>
> ***Loss resulting from interruption of or interference with the business in consequence of** any of the following events:*
>
> *a) any occurrence of a notifiable disease at the premises or attributable to food or drink supplied from the premises;*
>
> *b) any discovery of any organism at the premises likely to result in the occurrence of a notifiable disease;*
>
> ***c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises;***
>
> *d) the discovery of vermin or pests at the premises which cause restrictions on the use of the premises on the order or advice of the competent local authority;*
>
> *e) any accident causing defects in the drains or other sanitary arrangements at the premises which causes restrictions on the use of the premises on the order or advice of the competent local authority;*
>
> *f) any occurrence of murder or suicide at the premises;*

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provided that the

g) insurer shall not be liable for any costs incurred in cleaning, repair, replacement, recall or checking of property;

h) insurer shall only be liable for loss arising at those premises which are directly subject to the incident;

i) ***insurer's maximum liability under this cover extension clause in respect of any one claim shall not exceed*** *EUR50,000 or* ***fifteen per cent (15%) of the total sum insured*** *(or limit of liability) for this insured section, whichever is the lesser, any one claim and EUR10,000 any one period of insurance"*.

[Emphasis added]

The **'Insured Details'** section of the Complainant Company's Schedule of Insurance with the Provider for the period from 14 August 2019 to 13 August 2020 states:

"BUSINESS INTERRUPTION INSURED

Indemnity Period: 12 months €17,000".

I am therefore satisfied that the maximum recoverable by the Complainant Company under the business interruption infectious disease extension is **€2,550**, that is, 15% of the business interruption sum insured.

I note that following its claim assessment, the Provider wrote to the Complainant Company on **21 May 2020,** to advise that it was declining indemnity as it had concluded that the Complainant Company's losses did not fall within the scope of cover provided by the relevant business interruption infectious disease extension policy wording, a decision it upheld upon review in its letter of **23 June 2020**.

I note that on **24 March 2020**, the Government adopted certain NPHET recommendations for the nationwide closure of non-essential retail outlets and services, which included hairdressing businesses. I also note that hairdressers were permitted to reopen on 29 June 2020 (though they were again directed by the Government to close nationwide from 21 October to 1 December 2020, and more recently from 31 December 2020 to a yet to be determined date).

In the circumstances of the complaint before me, it is clear that the Complainant Company closed its hair salon on **14 March 2020**, prior to any Government direction to do so. In its Preliminary Report dated **18 May 2020**, the Provider-appointed Loss Adjuster stated:

> *"I spoke with the Insured* [M.] *today to discuss the claim.* [M.] *advised he closed the Hairdressers on Saturday March 14th as he could not abide by social distancing guidelines.* [M.] *confirmed that there was no outbreak of COVID-19 on the premises. He also advised of annual* [turnover] *of €170,000 plus"*.

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In addition, in its email complaint of **3 June 2020** (which the Broker forwarded to the Provider that same day), the Complainant Company stated:

> *"The* [Provider-appointed Loss Adjuster] *claims there has to have been active cases within the 25 miles radius while the salon was closed,* [first named] *Hospital is 2.3km from our salon,* [second named] *Hospital is 3.4km away from the salon, Trinity College is only* [short distance] *away from our salon, these locations all have or had publicly known active COVID-19 cases and the hospitals still have. Dublin City Centre has the highest amount of cases in Leinster,* [the Complainant Company's hair salon] *are right in the middle of city centre, 25 miles in any direction brings you out of the city"*.

As a result, the Complainant Company has stated two separate reasons for the closure of its hair salon on 14 March 2020:

- its inability to abide by the social distancing guidelines introduced by the Government
  and
- the presence of active COVID-19 cases within a 25 mile radius of its business premises

I note that the Provider addressed both of these reasons in its Complaint Response to this Office of **27 October 2020**, as follows:

1. *The Complainant Company's closure of its hair salon due to its inability to abide by the social distancing guidelines introduced by the Government*

   The Provider says that the Government did not introduce social distancing measures *"in consequence of"* the insured peril of an *"occurrence of a notifiable disease* [COVID-19] *within a radius of 25 miles of the* [Complainant Company's] *premises"*, but rather that such measures were introduced as a national response to a nationwide health issue, which is not an insured peril. As a result, the Provider says that any losses arising from these social distancing measures, or the Complainant Company's inability to abide by same, are not covered.

   The Provider also says that it cannot be stated that "but for" a local incident of COVID-19 within a 25 mile radius of the Complainant Company's business premises, which is the insured peril, that the social distancing guidance would not have arisen, and the business would have continued and not closed or suffered loss, but rather that the social distancing guidance would have issued in any event, due to increasing incidents of COVID-19 nationwide.

   Similarly, and regardless of the fact that the Complainant Company had already voluntarily closed its hair salon from 14 March 2020, the Provider says that the later Government direction on 24 March 2020, ordering the closure of non-essential retail outlets and services, including hairdressing businesses, was not introduced *"in consequence of"* the insured peril of an *"occurrence of a notifiable disease* [COVID-

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19] *within a radius of 25 miles of the* [Complainant Company's] *premises"*. Rather, this was introduced as a national response to a nationwide health issue, designed to reduce the spread of the virus nationally, which is not an insured peril, that would have issued in any event, irrespective of the occurrences of COVID-19 within the 25 mile radius of the Complainant Company's business premises, and as such any losses due to the closure direction are not covered, as they would have been suffered in any case.

2. *The Complainant Company's closure of its hair salon due to the presence of active COVID-19 cases within a 25 mile radius of its business premises*

The Complainant Company submits that when it closed its hair salon on 14 March 2020, there was a local outbreak of COVID-19 in Trinity College, very close to its business premises, as well as documented cases in hospitals within a 25 mile radius of its business premises. The Provider says that the presence of occurrences of COVID-19 within the 25 mile radius of the Complainant Company's business premises, is not enough in itself to trigger cover. Rather, it maintains that those occurrences must be the specific proximate cause of the interruption, insofar as "but for" those occurrences, no interruption would have occurred.

In this regard, the Provider says that the interruption to the Complainant Company's business would have taken place, irrespective of the occurrences of COVID-19 within the 25 mile radius of its business premises, firstly because of the social distancing measures introduced nationwide by the Government and secondly, as a result of the later Government direction that non-essential retail outlets and services nationwide, including hairdressing businesses, were to close.

I am conscious of the Provider's position as outlined in its Complaint Response to this Office of 27 October 2020, that:

"… for proximate cause purposes, therefore a two-step test must thus be undertaken:

a. firstly, the "but for" test (factual causation) must be applied. This boils down to a simple question: what would have happened had the Insured Peril not occurred i.e. had there been no "occurrence(s) of [COVID-19] within a radius of 25 miles of the [Complainant Company's] premises"?;

i. if the business interruption and losses would have occurred in any case, through a separate independent event (in the form of incidents of COVID-19 outside the radius, or government order to close that would have been imposed whether or not there were local incidents within the 25 mile radius), then the incidents of COVID-19 within 25 miles (being the Insured Peril) did not cause the interruption and losses, such that those losses are not covered;

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ii. *alternatively, if it can be said that "but for" the event comprising the local occurrences within 25 miles the business would not have suffered the relevant interruption/losses, then the local incidents are the factual cause of those losses – the business would not have suffered the same losses in any case;*

b. *secondly – and assuming factual causation has been satisfied as in (ii) above – were the incidents inside the 25 mile radius also the proximate cause (i.e. the dominant or effective cause) of the presented losses (legal causation)?*

c. *If the above tests are satisfied by the Complainant Company, i.e. "but for" the local 25 mile COVID-19 event the business interruption losses would not have occurred, the losses will be covered.*

These tests are not satisfied in the present matter …"

In that context, I have examined the specific policy wording relevant to the Complainant Company's claim, which can be extracted from the business interruption extension 3.3.4, '**Infectious diseases/murder or suicide**', hereinafter 'clause 3.3.4 c)', as follows:

"The insurer will pay to the insured: …

Loss resulting from interruption of or interference with the business in consequence of …

c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises".

Having examined the matter in detail, I am of the opinion that there is nothing within this particular policy clause indicating that for cover to be triggered, the business premises must have been required to close as a result of, say, a government or public authority order or direction to do so. Indeed, I take the view that there is nothing within this particular policy clause, indicating that for cover to be triggered, the business has to be closed, at all. Rather, I am satisfied that for cover to be triggered by clause 3.3.4 c), there must be a loss to the policyholder, arising from the interruption of or interference with the business, as a result of the insured peril, that is, in this instance, because of the occurrence of COVID-19 within 25 miles of the Complainant Company's business premises.

I am of the opinion that the reasonable interpretation of the plain meaning of clause 3.3.4 c) is that *"**any**"* occurrence of a notifiable disease (in this case COVID-19) within a radius of 25 miles of the Complainant Company's business premises, once that occurrence has caused an interruption of or interference with the business, resulting in loss, is sufficient in itself to trigger cover. I am satisfied that there is no stipulation within the policy provisions that other occurrences of the notifiable disease elsewhere outside of the 25 mile radius, will in some manner nullify or cancel the operation of the insured peril, which the policy specifies.

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In this regard, I am of the opinion that if it had been the intention of the underwriters, that the occurrence of the notifiable disease must only be within a radius of 25 miles of the policyholder's premises (and not also beyond that 25 mile radius) in order for the particular insured peril at clause 3.3.4 c) to operate, it would have been open to the underwriters to have specified that particular requirement. In this instance, however, the underwriters did not do so.

As a result, it seems to me that once there is an occurrence of a notifiable disease within a radius of 25 miles of the policyholder's business premises, then cover is potentially triggered. This is the position, regardless of whether there are also occurrences of this notifiable disease elsewhere outside of that radius. I am satisfied that even if the official response to the notifiable disease, that is occurring both within and outside of the radius is, or becomes, a national response, or is recognised to be in some way greater than a localised response, it does not follow from the policy provisions, that the interference with or interruption to the policyholder's business, is not thereby covered.

I note that the Complainant Company has stated two separate reasons for the closure of its hair salon on **14 March 2020**; the first its inability to abide by the social distancing guidelines introduced by the Government, the second the presence of active COVID-19 cases within a 25 mile radius of its business premises. I note that the Provider has stated that it is prepared to accept that there was an occurrence of a case of COVID-19 within the 25 mile radius of the Complainant Company's business premises in and around the time that the Complainant Company closed its business on 14 March 2020.

That said, I accept the Provider's position that it is not sufficient to simply point to a case or cases of COVID-19 within the 25 mile radius of the policyholder's premises and expect benefits to be paid. This is a potential trigger only for policy benefits. I am satisfied that, on foot of that trigger, the policyholder must demonstrate that the occurrence of the notifiable disease within that area, interrupted or interfered with the policyholder's business, thereby causing financial loss.

Accordingly, it would appear to me that the question to be asked is whether the insured peril, that is, *"any occurrence of a notifiable disease* [COVID-19] *within a radius of 25 miles of the* [Complainant Company's] *premises"*, resulted in *"an interruption of or interference with"* the Complainant Company's business.

I note that section 15, '**General definitions and interpretation'**, of the applicable Commercial Combined Insurance Policy Document defines 'notifiable disease' at pg. 81, as follows:

> *"**Notifiable disease***
>
> *Notifiable disease means illness sustained by any person resulting from:*
>
> *food or drink poisoning, or*

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> *any human infectious or human contagious disease an outbreak of which the competent local authority has stipulated shall be notified to them excluding Acquired Immune Deficiency Syndrome (AIDS), an AIDS related condition or avian influenza"*.

In this regard, I note that on **20 February 2020** the Minister for Health signed Statutory Instrument No. 53/2020 - Infection Diseases (Amendment) Regulations 2020, to include the coronavirus (COVID-19) (SARS-Cov-2) on the list of notifiable diseases. I note that the 'Notifying Infectious Diseases' page of the Health Protection Surveillance Centre website states as follows, at https://www.hpsc.ie/notifiablediseases/notifyinginfectiousdiseases/:

> *"All medical practitioners, including clinical directors of diagnostic laboratories, are required to notify the Medical Officer of Health(MOH)/Director of Public Health (DPH) of certain diseases. This information is used to investigate cases thus preventing spread of infection and further cases. The information will also facilitate the early identification of outbreaks. It is also used to monitor the burden and changing levels of diseases, which can provide the evidence for public health interventions such as immunisation".*

I am therefore satisfied that the occurrence of a notifiable disease by its nature, can and does attract public health interventions, the purpose of which is to assist in preventing the spread of infection and further cases. The inclusion by the underwriters of business interference cover for policyholders, in the event of a notifiable disease occurring within 25 miles of the policyholder's premises (thereby covering a surrounding area of almost 2,000 square miles) suggests to me that the policy recognises that notifiable diseases, by their nature, will often trigger the implementation of measures, including public health measures, over a specified area, for the purpose of seeking to limit the spread of the notifiable disease in question.

The social distancing measures introduced by the Government in **March 2020**, were introduced due to the outbreak across certain areas in Ireland, of the notifiable disease of COVID-19. The concept of "social distancing" is one of the tools which was introduced, and has since been widely promoted, as a measure for reducing the spread of COVID-19, amongst a population. The rationale for this practice is that by remaining at a distance of at least 2 metres from other individuals, and in keeping social contacts to a minimum, the opportunities whereby individuals come in contact with infected persons and/or contaminated surfaces are reduced, thereby limiting the spread of the virus itself.

It is somewhat inevitable, in my opinion, that a strict adherence to these social distancing measures renders it difficult, if not impossible for some businesses to continue trading efficiently and effectively, or indeed in some cases at all, because of either the nature of the business activity itself or indeed because of the space within which such individual businesses, conduct their operations.

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Therefore, in light of the foregoing, and in circumstances where the parties accept the presence of the insured peril referred to at clause 3.3.4 c) of the policy, that is, that there was an occurrence of a case or cases of COVID-19 within 25 miles of the Complainant Company's business premises, in and around the time when it closed its business on 14 March 2020, I am satisfied that the interruption of or interference with the business caused by the presence of the notifiable disease and the consequent social distancing measures directed by the Government, in response, gave rise to the Complainant Company experiencing business interference losses.

As a result, I take the view that the Provider's decision to decline the Complainant Company's claim was inappropriate and unfair and that it was unreasonable and unjust within the meaning of ***Section 60(2)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017***.

I am mindful in that regard that the Government, on **12 March 2020,** directed the closure of museums, galleries, tourism sites, schools, crèches, childcare and higher education facilities. I am also mindful of the exhortations of An Taoiseach, that "*businesses [were] to take a sensible and level-headed responsible approach"* in the context of the Government guidelines, including the required implementation of social distancing.

I consider that it was appropriate in such circumstances for each individual business to assess its ability to continue trading, whether on a restricted or reduced basis, or at all, within the confines of those Government guidelines on 12 March 2020. I note that, in this instance, the Complainant Company considered it necessary in such circumstances, to close its business with effect from 14 March 2020, owing to the need to comply with social distancing requirements.

I also note that had it not done so already on 14 March 2020, the Complainant Company would have been required to close its hair salon from 24 March 2020, in any event, when the Government directed the nationwide closure of non-essential retail outlets and services.

In considering this complaint, I am cognisant of the provisions of the ***Financial Services and Pensions Ombudsman Act 2017***, herein after 'the FSPO Act 2017', which prescribes at section 12 (11) that:

> *"… the Ombudsman, when dealing with a particular complaint, shall act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form."*

I am also conscious that in considering whether this complaint should be upheld, pursuant to the provisions of section 60(2) of the FSPO Act 2017, I should be mindful that those provisions are identical to the then equivalent provisions in the governing legislation of the Financial Services Ombudsman, which came under the scrutiny of Mr. Justice Hogan (of the High Court at the time) in *Koczan v FSO* [2010] IEHC 407.

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Hogan J., having referred to the powers given to the Financial Services Ombudsman, and in advance of quoting from those same provisions, observed:-

> "*The Ombudsman's task, therefore, runs well beyond that of the resolution of contract disputes in the manner traditionally performed by the Courts. It is clear from the terms of s.57BK(4) that the Ombudsman must, utilising his or her specialist skill and expertise, resolve such complaints according to wider conceptions of* ex aequo et bono *which go beyond the traditional limitations of the law of contract. This is further reflected by the terms of s.57CI(2) ….*"

I am also mindful of the Provider's regulatory obligation under the Central Bank of Ireland's Consumer Protection Code, to act honestly, fairly and professionally in the best interests of its customers in its dealings with them. I take the view that in this instance, the Provider did not act fairly in its dealings with the Complainant Company in the assessment of the claim for benefit payment, made by the Complainant Company under its insurance policy in May 2020.

Accordingly, having considered the matter at length, and for the reasons outlined above, it is my Decision, on the evidence before me that it is appropriate to uphold the complaint against the Provider, that it wrongfully or unfairly declined to admit and pay the Complainant Company's claim for business interruption losses, incurred as a result of the temporary closure of its business in March 2020, due to the outbreak of COVID-19. This Office is of the opinion that the Provider acted wrongfully and unreasonably in failing to recognise that the Complainant Company met the criteria for the cover specified at Clause 3.3.4 c) of the policy, regardless of whether its losses were concurrently caused by other consequences of the presence elsewhere of Covid-19.

When the Preliminary Decision was issued to the parties on **22 January 2021**, I indicated that it was my intention to direct the Provider to rectify the conduct complained of, by admitting the Complainant Company's claim for business interruption losses with effect from **14 March 2020**, for assessment of the benefit payment to be made, in accordance with the terms of the policy. I was mindful of the fact that this claim had been made to the Provider in **May 2020**, and that following the direction of this Office, the full assessment of the claim might take additional time to finalise.

In those circumstances, having noted that the Complainant Company was insured at the relevant time with the Provider under the particular "business interruption" peril for a maximum figure of **€2,550** (being 15% of the total business interruption sum of €17,000 insured) I indicated my intention to direct the Provider to make an advance payment of policy benefits to the Complainant Company, of **€2,000**, pending the final calculation of the total benefit payable, once the claim was fully assessed. I also indicated my intention to direct the Provider to make a further compensatory payment of **€750** to the Complainant Company, in recognition of the inconvenience it had encountered as a result of the delay in securing access to the benefits payable by the Provider to it, under the policy.

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I note that in its submission of **12 February 2021**, the Provider confirmed that it believed the terms of the Preliminary Decision of this Office dated **22 January 2021**, to be consistent with the subsequent **5 February 2021** judgment of the Irish High Court in *Hyper Trust et al -v- FBD* and also with the UK Supreme Court decision dated 15 January 2021 in *Financial Conduct Authority -v- Arch Insurance (UK) Ltd and Ors.* The Provider indicated in those circumstances that it would immediately contact the Complainant Company to communicate its acceptance of cover for the claim and it would expeditiously progress the final adjustment process. It confirmed its intention to make an interim advance payment of €2,000, as indicated by this Office in the Preliminary Decision, whilst this assessment process was being completed.

The Provider has since confirmed that it has discharged a total of €3,300 to the Complainant Company, which is taken by this Office to comprise the maximum figure of **€2,550** payable under the policy for business interruption losses, together with the additional compensatory payment of €750, as indicated by the Preliminary Decision.

The Provider also submitted in February 2021, that the more appropriate basis for the Decision of this Office, was considered by the Provider to be *section 60(2)(e)* of the *Financial Services and Pensions Ombudsman Act 2017* i.e. that the declinature conduct complained of was based wholly or partly on a mistake of law or fact.

In bringing this matter to a conclusion, I have noted that in the period since the Preliminary Decision was issued to the parties by this Office, the Provider has already implemented the directions which had been indicated on 22 January 2021. Accordingly, the details noted below make no direction for any payment to be made to the Complainant Company, as it is already in receipt of the payments which this Office had indicated to the parties in January 2021, should be paid by the Provider.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is upheld on the grounds prescribed in ***Section 60(2)(b)(e) and (g).*** I make no directions as the Provider has already made the payments totalling €3,300 indicated within the Preliminary Decision issued to the parties in January 2021.

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

1 March 2021

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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.