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| <b><u>Decision Ref:</u></b>             | 2021-0053   |
| <b><u>Sector:</u></b>                   | Insurance   |
| <b><u>Product / Service:</u></b>        | Retail  |
| <b><u>Conduct(s) complained of:</u></b> | Claim handling delays or issues<br>Rejection of claim |
| <b><u>Outcome:</u></b>                  | Rejected  |

#### **LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

The Complainant, a limited company trading as a carpet and floor covering sales and fitting business, hereinafter ‘the Complainant Company’, holds a business insurance policy with the Provider.

#### **The Complainant Company’s Case**

The Complainant Company notified the Provider by telephone on **13 April 2020** of a claim for business interruption losses due to the temporary closure of its business on **27 March 2020**, as a result of measures imposed by the government to curb the spread of the coronavirus (COVID-19).

During the course of this telephone call, the Provider-appointed Loss Adjuster who took notification of the claim, advised the Complainant Company that the claim circumstances fell outside the scope of cover provided by the business insurance policy.

Following a subsequent review, the Provider wrote to the Complainant Company on **19 May 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 that it completed, as follows:

*“I feel my policy should cover loss of profit & continued overheads during the forced closure due to the Covid-19 Pandemic”.*

As a result, the Complainant Company seeks for the Provider to admit and pay its claim for business interruption losses, which it calculates to be €6,070 for each week of its closure, that is, €2,070 weekly overhead expenses and €4,000 weekly loss of profit.

### **The Provider's Case**

Provider records indicate that Complainant Company telephoned the Provider on **13 April 2020** to notify it of a claim for business interruption losses due to the temporary closure of the Complainant Company's business on **27 March 2020** for a period, as a result of measures imposed by the government to curb the spread of the coronavirus (COVID-19).

The Provider-appointed Loss Adjuster who took notification of the claim advised the Complainant Company during this call that it was declining indemnity as the circumstances of the claim fell outside the scope of cover provided by the business insurance policy that the Complainant Company holds with the Provider.

The Provider says that following a subsequent review, it wrote to the Complainant Company on **19 May 2020** to advise that it was standing over its decision to decline indemnity in this matter. The Provider notes that business interruption is only covered by the Complainant Company's business insurance policy in certain defined circumstances, none of which includes closure or interruption as a result of COVID-19. In broad terms, the Provider says that there are four distinct reasons why it declined the Complainant Company's claim, as follows:

1. *The claim did not come within the terms of the business interruption cover as set out in Section 2, 'Business Interruption', of the business insurance policy document.*

Section 2, 'Business Interruption', of the applicable business insurance policy document defines business interruption at pg. 36, as follows:

#### ***"Business interruption***

*Interruption of or interference with the **business** carried on by the Insured at the **premises** in consequence of **damage** to property used by the Insured at the **premises** for the purpose of the **business**".*

This is repeated at pg. 39 of the policy document, as follows:

#### ***"Cover***

*The Company will indemnify the Insured for the amount of loss against each item insured shown in the schedule, in the manner and to the extent as described under 'Basis of settlement' below, following **damage** caused to property used in connection with the Insured's **business** as the **premises** by any of the perils insured against under section 1(a): Buildings, Trade Contents, Stock of this policy".*

/Cont'd...

The Provider says that the bold highlighting, as it appears in the original policy document, emphasises that the policy only responds to a business interruption claim for loss of gross profit in circumstances where the business is interrupted as a result of damage to the property and not in any other circumstance. In this regard, the Provider says that it is quite clear that the interruption to the Complainant Company's business in this case arose, not as a result of damage to the premises, but rather as a result of both the suite of public health measures including social distancing measures introduced in mid-March 2020 and other governmental restrictions which prohibited the making of unnecessary journeys by the public.

2. COVID-19 is not a notifiable disease for the purpose of the infectious diseases extension in Section 2, 'Business Interruption', of the policy document.

The 'Additional extensions that apply to section 2: Business interruption' of the applicable policy document provides, *inter alia*, as pg. 45, as follows:

***"H. Human notifiable diseases, murder or suicide***

*This extension provides cover against **business interruption** resulting from the following.*

- *A case or cases of any of the notifiable diseases (as listed below) at the **premises**, or caused by food or drink supplied from the **premises**.*
- *Any organism likely to cause a notifiable disease (as listed below) being discovered at the **premises**.*
- *Murder or suicide at the **premises**".*

The Provider says that the bold highlighting, as it appears in the original policy document, emphasises the requirement that the notifiable disease or organism must actually be present on the premises. In this regard, the infectious disease extension only covers business interruption arising from the presence of a notifiable disease on the premises or caused by food and drink supplied from the premises. In addition, the Provider notes that this extension is confined to a specified and finite list of notifiable diseases listed at pg. 45 of the policy document, as follows:

**Notifiable diseases**

|                              |                                    |
|------------------------------|------------------------------------|
| <i>Acute encephalitis</i>    | <i>Acute poliomyelitis</i>         |
| <i>Anthrax</i>               | <i>Bubonic or pneumonic plague</i> |
| <i>Chickenpox</i>            | <i>Cholera</i>                     |
| <i>Conjunctivitis</i>        | <i>Diphtheria</i>                  |
| <i>Dysentery</i>             | <i>Legionellosis</i>               |
| <i>Legionnaires' disease</i> | <i>Leprosy</i>                     |
| <i>Leptospirosis</i>         | <i>Malaria</i>                     |
| <i>Measles</i>               | <i>Meningitis</i>                  |

|                       |                          |
|-----------------------|--------------------------|
| <i>Mumps</i>          | <i>Paratyphoid fever</i> |
| <i>Rabies</i>         | <i>Rubella</i>           |
| <i>Scarlet fever</i>  | <i>Smallpox</i>          |
| <i>Tetanus</i>        | <i>Tuberculosis</i>      |
| <i>Typhoid fever</i>  | <i>Viral hepatitis</i>   |
| <i>Whooping cough</i> | <i>Yellow fever</i>      |

The Provider notes that COVID-19 does not fall within this list of notifiable diseases, nor can it reasonably be described as a subset of any of the diseases listed. The Provider says it is clear that COVID-19 is a disease of very recent origin and one that postdates that inception of the policy and as a result, COVID-19 does not and could not come within the list of notifiable diseases in circumstances where the disease was not in existence or, at best, was entirely unknown at the time when the policy was inceptioned.

3. *The infectious disease extension only covers business interruption arising from the presence of a disease on the premises or caused by food and drink supplied from the premises.*

The Provider says that quite apart from the fact that COVID-19 is not a notifiable disease for the purpose of the policy, it is quite clear that the Complainant Company is not asserting that the temporary closure of its business on 27 March 2020 was caused by the disease or the organism causing it, SARS-CoV2, being present on the premises, or present in food or drink supplied from the premises. Rather, the closure arose as a result of both the suite of public health measures including social distancing measures introduced in mid-March 2020 and other governmental restrictions which prohibited the making of unnecessary journeys by the public.

4. *The losses suffered by the Complainant Company were caused by reason of social practices, government directions and public concern, none of which are matters covered by the policy.*

The Provider says that even if the insured event of a ***“business interruption resulting from...a case or cases of any of the notifiable diseases (as listed below) at the premises, or caused by food or drink supplied from the premises”*** had occurred, which it says is obviously not the case in this instance, it would then be necessary to consider what loss has been caused by that event.

In this regard, the Provider notes that an insurance contract is a contract of indemnity, and it is only the loss that has actually been caused by the insured event that is covered. The Provider submits that it is a fundamental principle of insurance law that it is only where the insured event is the proximate cause of the loss, as in the insured event is the dominant, effective or operative cause of the loss, that indemnity can be provided. In certain circumstances, a loss may be caused by more than one proximate and concurrent cause, only one of which is insured.

In this regard, the Provider says that where there are multiple concurrent independent proximate causes of the loss so that any of the causes of loss would, on their own, have caused the loss, it maintains that there is no indemnity available.

The Provider submits that the losses sustained by the Complainant Company in this instance would have been incurred irrespective of whether the insured event had occurred, insofar as even if there had been a business interruption arising from a case of a notifiable disease at the premises in circumstances where COVID-19 had been listed as a notifiable disease for the purpose of the policy, which it is not, the same losses would have occurred because all of the other aspects of the COVID-19 pandemic, and the government response to it, would still have occurred. For example, the combined effect of the COVID-19 pandemic, the public health measures (other than the imposed closure) introduced by the Government, social distancing practices, the widespread public concern regarding the risk of infection, and the economic slowdown would have resulted in the Complainant Company earning no gross profit during the period, and/or making a loss during the period such that it would not have been economically viable for it to open.

The Provider notes that these reasons for declining indemnity are essentially the same as those previously given by the Provider to the Complainant Company by letter dated **19 May 2020**, as follows:

*"In order to fully investigate the complaint I have examined the cover, terms and conditions of your Business Complete policy. This claim was considered under Section 2 of the policy which provides cover for business interruption. "Business Interruption" is defined as:*

***"Business interruption***

*Interruption of or interference with the business carried on by the Insured at the premises in consequence of damage to property used by the Insured at the premises for the purpose of the business".*

*You have advised that following the Government directive of 12 March 2020 your business has been unable to operate as normal and the loss reported to the Company relates to a loss of gross profit.*

*Section 2 of the Policy provides cover in respect of loss of Gross profit with a sum insured of €900,000 for a 12 month indemnity period as outlined on your policy schedule. The Policy will only respond to claims presented for loss of Gross profit following damage caused to the property used in connection with the Insured's business by any of the perils covered under Section 1(a): Buildings, Trade Contents, Stock of the policy. Business interruption policy cover for loss of gross profit becomes operative upon a payment made or liability admitted under the property damage section of the policy. For ease of reference, the relevant policy wordings are outlined below:*

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## **“Section 2: Business Interruption**

### **Cover**

*The Company will indemnify the Insured for the amount of loss against each item insured shown in the schedule, in the manner and to the extent as described under “Basis of settlement” below, following damage caused to property used in connection with the Insured’s business at the premises by any of the perils insured against under section 1(a): Buildings, Trade Contents. Stock of this policy”.*

*The Policy specifies a number of additional extensions that apply to Section 2 Business Interruption cover, one of which at clause H of the Policy “Human notifiable diseases, murder or suicide” provides:-*

### **“H. Human notifiable diseases, murder or suicide**

*This extension provides cover against business interruption resulting from the following.*

- *A case or cases of any of the notifiable diseases (as listed below) at the premises, or caused by food or drink supplied from the premises.*
- *Any organism likely to cause a notifiable disease (as listed below) being discovered at the premises.*
- *Murder or suicide at the premises.*

### **Notifiable diseases**

|                             |                                    |
|-----------------------------|------------------------------------|
| <i>Acute encephalitis</i>   | <i>Acute poliomyelitis</i>         |
| <i>Anthrax</i>              | <i>Bubonic or pneumonic plague</i> |
| <i>Chickenpox</i>           | <i>Cholera</i>                     |
| <i>Conjunctivitis</i>       | <i>Diphtheria</i>                  |
| <i>Dysentery</i>            | <i>Legionellosis</i>               |
| <i>Legionnaires disease</i> | <i>Leprosy</i>                     |
| <i>Leptospirosis</i>        | <i>Malaria</i>                     |
| <i>Measles</i>              | <i>Meningitis</i>                  |
| <i>Mumps</i>                | <i>Paratyphoid fever</i>           |
| <i>Rabies</i>               | <i>Rubella</i>                     |
| <i>Scarlet fever</i>        | <i>Smallpox</i>                    |
| <i>Tetanus</i>              | <i>Tuberculosis</i>                |
| <i>Typhoid fever</i>        | <i>Viral hepatitis</i>             |
| <i>Whooping cough</i>       | <i>Yellow fever”.</i>              |

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[The Provider] have carefully considered your claim and do not consider that the claim falls within cover under the Policy. In particular, [the Provider] is satisfied that the claim notified is not covered for the following reasons, each of which apply independently of each other:

1. Cover for loss of gross profit only applies following damage caused to the property in connection with the Insured's business by any of the perils insured under Section 1(a) Buildings, Trade Contents, Stock of the policy. Business interruption cover for loss of gross profit becomes operative upon payment made or liability admitted under Section 1(a) of the policy.
2. The definition of notifiable diseases covered by the extension does not include Covid-19.
3. The extended business interruption cover is specifically limited by reference to the insured property. In particular, the relevant sub clauses which relate to notifiable diseases require that the notifiable disease should be at the premises or be caused by food or drink supplied from the premises or result from an organism likely to cause a notifiable disease "being discovered at the premises". None of these events occurred and accordingly it cannot be said that business interruption has resulted from any of the matters covered by the Policy in response to the claim notified by you.
4. It is clear that the agreement to indemnify in respect of the risks as outlined above is provided only where the business interruption loss has been caused by the risks outlined. It is quite clear having regard to social distancing practices, the Government direction for people to stay indoors and the widespread public concern regarding the risk of infection, any business interruption loss has been caused by such social practices, Government directions and public concerns and not by the matters covered by the Policy ...

*Having reviewed this matter carefully I am satisfied that the correct decision has been made to decline this claim on the basis the loss presented does not fall within the scope of the cover provided under the Policy".*

In summary, the Provider says that it is satisfied that the Complainant Company's business insurance policy only responds to a business interruption claim for loss of gross profit in circumstances where the business is interrupted due to damage to the property and not in any other circumstance. In addition, it says that the business interruption policy infectious disease extension, only covers business interruption arising from the presence of a notifiable disease on the premises or caused by food and drink supplied from the premises. In this regard, indemnity is only provided in respect of the notifiable diseases within the meaning of, and listed in, the policy, and COVID-19 is not such a disease.

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Furthermore, the Provider says that the losses suffered by the Complainant Company were caused by reason of social distancing practices, government directions and public concern, none of which are covered by the policy, to the extent that even if an insured event had occurred, which it did not, it would have caused no losses; the Provider says that therefore no indemnity would have been available.

Accordingly, the Provider is satisfied that it declined the Complainant Company's claim in accordance with the terms and conditions of the business insurance policy in place.

### **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 due to the temporary closure of its business for a period, as a result of 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.

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 on **9 February 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.

The Complainant Company held a business insurance policy with the Provider. It notified the Provider by telephone on **13 April 2020** of a claim for business interruption losses due to the temporary closure of its business on **27 March 2020** as a result of measures imposed by the government to curb the spread of the coronavirus (COVID-19).

I note that the Provider advised the Complainant Company during this telephone call on **13 April 2020** that the claim circumstances fell outside the scope of cover provided by the business insurance policy, a decision it stood over upon review on **19 May 2020**.

The Complainant Company's business insurance policy, like all insurance policies, does not provide cover for every eventuality. Rather the cover will be subject to the terms, conditions, endorsements and exclusions set out in the policy documentation.

I note that **Section 2, Business Interruption'**, of the applicable business insurance policy document defines business interruption at pg. 36, as follows:

***"Business interruption***

*Interruption of or interference with the **business** carried on by the Insured at the **premises** in consequence of **damage** to property used by the Insured at the **premises** for the purpose of the **business**".*

I note that the Complainant Company's business was not closed or interrupted as a result of damage to its property.

Instead, it does not appear to be in dispute, that the Complainant Company temporarily closed its business as a result of measures imposed by the government to curb the spread of the COVID-19.

In this regard, I have examined the '**Additional extensions that apply to section 2: Business interruption'** of the applicable policy document, which provides, as pg. 45, as follows:

***"H. Human notifiable diseases ...***

*This extension provides cover against business interruption resulting from the following.*

- *A case or cases of any of the notifiable diseases (as listed below) at the premises, or caused by food or drink supplied from the premises.*
- *Any organism likely to cause a notifiable disease (as listed below) being discovered at the premises ...*

[underlining added for emphasis]

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**Notifiable diseases**

|                             |                                    |
|-----------------------------|------------------------------------|
| <i>Acute encephalitis</i>   | <i>Acute poliomyelitis</i>         |
| <i>Anthrax</i>              | <i>Bubonic or pneumonic plague</i> |
| <i>Chickenpox</i>           | <i>Cholera</i>                     |
| <i>Conjunctivitis</i>       | <i>Diphtheria</i>                  |
| <i>Dysentery</i>            | <i>Legionellosis</i>               |
| <i>Legionnaires disease</i> | <i>Leprosy</i>                     |
| <i>Leptospirosis</i>        | <i>Malaria</i>                     |
| <i>Measles</i>              | <i>Meningitis</i>                  |
| <i>Mumps</i>                | <i>Paratyphoid fever</i>           |
| <i>Rabies</i>               | <i>Rubella</i>                     |
| <i>Scarlet fever</i>        | <i>Smallpox</i>                    |
| <i>Tetanus</i>              | <i>Tuberculosis</i>                |
| <i>Typhoid fever</i>        | <i>Viral hepatitis</i>             |
| <i>Whooping cough</i>       | <i>Yellow fever”.</i>              |

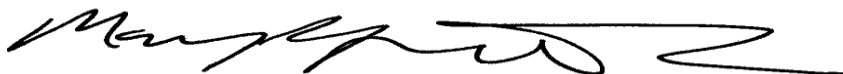
I accept that in order for **Extension H, ‘Human notifiable diseases’**, to provide business interruption cover, the business interruption must have been caused by the presence of a notifiable disease on the premises (or be caused by food and drink supplied from the premises), and that the notifiable disease itself must also be one of those diseases specified in the policy.

As the claim circumstances in this instance do not satisfy these very specific criteria laid down within the policy provisions, for cover to apply, I accept that the Provider was entitled to decline the Complainant Company’s claim in accordance with the terms and conditions of its business insurance policy. Accordingly, whilst I appreciate that the Complainant Company will be disappointed, I am satisfied that there is no evidence available of any wrongdoing on the part of the Provider and for that reason, it would not be appropriate to uphold this complaint.

**Conclusion**

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

**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**

2 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.

