



<b><u>Decision Ref:</u></b>	2021-0093
<b><u>Sector:</u></b>	Insurance
<b><u>Product / Service:</u></b>	Retail
<b><u>Conduct(s) complained of:</u></b>	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 restaurant and Airbnb, hereinafter 'the Complainant Company', held a business insurance policy with the Provider.

#### **The Complainant Company's Case**

The Complainant Company notified the Provider by telephone on 16 March 2020 of a claim for business interruption losses as a result of its temporary closure from **15 March 2020** due to the outbreak of coronavirus (COVID-19), however the Provider advised the Complainant Company in a further telephone call later that same day, that the claim circumstances were not covered by the terms of its business insurance policy.

In the Complaint Form that it completed in **April 2020**, the Complainant Company submitted, as follows:

*"I am disappointed that [the Provider] are not standing over [their] policy.*

*March 15<sup>th</sup> [2020] - [the Complainant Company business] closed due to COVID-19.*

*March 16<sup>th</sup> - I contacted [the Provider] regarding closure and discussed Business Interruption and Stock. I was informed by [the Provider] that I was not covered and [it] would not be honouring their policy under these clauses.*

*I requested to suspend/cancel the [Complainant Company] policy as [the Provider] would not honour their policy, many options were discussed including transferring equipment cover to [a named] policy (the landlord).*

*Confirmation of the policy cancellation was received on April 8<sup>th</sup> and backdated by [the Provider] to March 16<sup>th</sup>.*

*March 19<sup>th</sup> - a copy of the policy was requested and sent by email, showing business interruption included on policy at that time.*

*April 1<sup>st</sup> - I sent a letter to [the Provider] expressing my disappointment of their handling of this policy.*

*April 8<sup>th</sup> - [Mr S.] call me to discuss my letter, later confirming by email, cancelling [the Complainant Company] policy, cheque being issued as a pro rata rebate on policy, confirming that Business Interruption cover does not extend to the Covid-19 pandemic and that he would log our closure with the claims department.*

*April 16<sup>th</sup> – cheque received from [the Provider] for the sum of €729.64, accepted without prejudice to our claim of Business Interruption.*

*April 16<sup>th</sup> – received email from [Provider] underwriters refuting my claim.*

*However the claims adjuster never mentions a “pandemic exclusion clause”, but rather that Covid-19 is not listed on their list of diseases, however it is a brand new disease and arguably a sub-family of one of those listed.*

*Section 2 of policy: Business Interruption, “12 months indemnity period”, translates, security or protection against a loss or other financial burden.*

*Business Interruption, indemnity period insured for €310,000 annually. [The Complainant Company] now entering the seventh week of closure, due to Covid-19 and government lockdown. I expect [the Provider] to honour their policy in full”.*

The Complainant Company seeks for the Provider to admit and pay its claim for business interruption losses.

### **The Provider’s Case**

The Provider says that its records indicate that Complainant Company telephoned the Provider on 16 March 2020 to notify it of a claim for business interruption losses due to the temporary closure of its business from 15 March 2020, due to the outbreak of COVID-19. During a further telephone call later that same day, the Complainant Company was advised that the claim circumstances were not covered by the terms of its business insurance policy.

The Provider says that the Complainant Company telephoned on 23 March 2020 to cancel its policy and it wrote on 1 April 2020 expressing its dissatisfaction at the decision to refuse cover.

The Provider says it confirmed the policy cancellation on 8 April 2020 and backdated it to 15 March 2020, the date the business ceased. The Provider also wrote to the Complainant Company on 16 April 2020 to confirm that the claim was not covered and it enclosed a pro-rata premium refund cheque in the amount of €729.64.

The Provider says that the Complainant Company made a complaint to the Provider on **8 May 2020**, which the Provider acknowledged on 11 May 2020. Following its review of this matter, the Provider sent its final response letter to the Complainant Company on 28 May 2020 setting out its reasons for declining indemnity.

The Provider notes that business interruption is only covered by the Complainant Company's business insurance policy in certain defined circumstances, none of which include 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 Complete 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".*

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.

In summary, the Provider says that the policy only responds to claims for loss of gross profit arising from damage caused to the premises. As the Complainant Company's claim was manifestly not such a claim, the Provider says that it follows that the Provider was correct to decline the claim.

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 at 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>

/Cont'd...

<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 that 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 the very best, was entirely unknown at the time when the policy was incepted.

The Provider notes that in its complaint, the Complainant Company states that:

*“COVID-19 is not listed on [the Provider’s] list of diseases, however it is a brand new disease and arguable a sub family of one of those listed”.*

The Provider has sought and obtained expert advice and evidence on this issue, which confirmed that COVID-19 is an entirely new disease that could not reasonably be described as a subset or “*sub family*” of any of the diseases on the list of notifiable diseases – none of which are coronaviruses. It also says that the viruses that give rise to the listed diseases are actually taxonomically distinct from SARS-CoV2, the virus agent of COVID-19.

- 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.*

Quite apart from the fact that COVID-19 is not a notifiable disease for the purpose of the policy, the Provider says it is quite clear that the Complainant Company is not asserting that the temporary closure of its business on 15 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, then the Provider says 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 that 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. The Provider says, for example, that 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 furnished by the Provider to the Complainant Company by correspondence dated 16 April 2020, and again in its final response letter dated 28 May 2020.

The Provider says that whilst no criticism of the Complainant Company is intended, it is notable that no attempt is made by the Complainant Company in its complaint to engage with any of the reasons given for declining indemnity beyond the assertion that:

1. COVID-19 might be regarded as a “*sub family*” of one of the listed notifiable diseases; and
2. the business insurance policy does not contain a specific “*pandemic exclusion clause*”.

In relation to the Complainant Company’s assertion that COVID-19 might be regarded as a “*sub family*” of one of the listed notifiable diseases, the Provider sought and obtained expert opinion on this matter, which confirmed that COVID-19 is an entirely new disease that could not reasonably be described as a subset or “*sub family*” of any of the diseases on the list of notifiable diseases – none of which are coronaviruses. The Provider says that the viruses that give rise to the listed diseases are actually taxonomically distinct from SARS-CoV2, the virus agent of COVID-19.

In relation to the Complainant Company’s comment that the business insurance policy does not contain a specific “*pandemic exclusion clause*”, the Provider notes that though it is correct that the policy contains no specific exclusion of pandemic risk, this is not of any relevance in circumstances where the purpose of an exclusion is to restrict cover of a risk which, but for the exclusion itself, would otherwise be covered. The Provider says for the reasons set out extensively above, this issue simply does not arise. The terms of the business insurance policy very clearly identify and define the precise circumstances in which a business interruption claim will be covered. The Provider says that, ignoring for a moment the fact that COVID-19 is not a notifiable disease listed in the policy, it is quite clear that any claim in relation to business interruption is confined to interruption losses arising from (a) damage to the premises or (b) the presence of a disease/organism on the premises or in the food and drink supplied. As a result, the Provider is satisfied that the question of a specific pandemic exclusion therefore simply does not arise in this matter.

It is the Provider’s position that the terms of the Complainant Company’s business insurance policy are abundantly clear. Whilst it is very much alive to the very difficult situation with the Complainant Company, along with many other businesses, has found itself in, the Provider is satisfied that it is quite clear that the policy is not responsive to a business interruption claim arising from the closure of the Complainant Company’s business, by reason of the COVID-19 pandemic.

Accordingly, the Provider is satisfied that it correctly declined the Complainant Company’s claim in accordance with the terms and conditions of the business 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 as a result of its temporary closure in March 2020, due to the outbreak of COVID-19.

/Cont’d...

## **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 **25 March 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, which at the time held a business insurance policy with the Provider, notified the Provider by telephone on 16 March 2020 of a claim for business interruption losses as a result of its temporary closure from 15 March 2020 due to the outbreak of coronavirus (COVID-19). I note that the Provider advised the Complainant Company by telephone later that same day that the claim circumstances were not covered by the terms of its business insurance policy, a decision the Provider subsequently confirmed in writing on 8 April 2020 and stood over upon review, in its letter of 28 May 2020.

The Complainant Company's business insurance policy, like all insurance policies, did not provide cover for every possible eventuality; rather the cover was 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 defined business interruption 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**".*

/Cont'd...



I note that the Complainant Company's business was not however closed or interrupted as a result of damage to its property. Instead, I note that the Complainant Company temporarily closed its business as a result of the outbreak of COVID-19 in Ireland.

In this regard, I see that the '**Additional extensions that apply to section 2: Business interruption**' of the applicable policy document provides 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 ...*

**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 am satisfied that, in order for **Extension H, 'Human notifiable diseases'**, to provide business interruption cover under this policy, there must be the operation of the insured peril. Accordingly, the business interruption must have been caused by the presence of the notifiable disease on the premises (or caused by food and drink supplied from the premises) and that notifiable disease must also be one of those diseases specified in the policy.

Although COVID-19, and its virus agent SARS-CoV-2, were designated as notifiable diseases in Ireland on 20 February 2020, by way of the Infectious Diseases (Amendment) Regulations 2020, it was not one of the notifiable diseases specified in the business insurance policy.

The Complainant Company states in its Complaint Form that:

*“ ... Covid-19 is not listed on [the Provider’s] list of diseases, however it is a brand new disease and arguably a sub-family of one of those listed”.*

I am conscious that the Provider sought and obtained expert opinion on this issue, and on that basis, I accept that COVID-19 is an entirely new disease that, *“considering both the disease agent itself and the symptoms it causes”*, could not reasonably be described as a subset of any of the notifiable diseases specified in the business insurance policy.

In any event, it is an insurance standard that the onus is on the policyholder to demonstrate that there has been the operation of an insured peril when making a claim to an insurer and in that regard, I note from the documentary evidence before me that the Complainant Company has not supplied any evidence indicating that COVID-19, or its virus agent SARS-CoV-2, are a subset of any of the notifiable diseases specified in the business insurance policy.

In addition, I note that the Complainant Company also states in its Complaint Form that:

*“ ... the [Provider’s] claims adjuster never mentions a “pandemic exclusion clause””.*

I accept the Provider’s position that the absence of a *“pandemic exclusion clause”* in the business insurance policy is not directly relevant, because the purpose of an exclusion clause is to restrict cover in relation to a risk which (were it not for the exclusion itself) would otherwise be covered. In this instance, I am satisfied that the business insurance policy very clearly identifies and defines the precise circumstances in which a business interruption claim will be covered and the Complainant Company’s circumstances did not meet those criteria.

I therefore accept that the business interruption human notifiable disease extension of this policy which was in place in March 2020, only responded to cover business interruption arising from the presence of a notifiable disease on the premises or caused by food and drink supplied from the premises, and indemnity was only provided in respect of the notifiable diseases within the meaning of, and listed in, the policy. As a result, I accept the Provider’s position that the absence of a specific pandemic exclusion had no bearing in the matter of the Complainant Company’s claim.

As the claim circumstances did not satisfy the insured peril in the business interruption human notifiable disease extension of the policy, I am satisfied that the Provider was entitled to decline the Complainant Company’s claim, in accordance with the terms of its business insurance policy. The evidence before me does not disclose any wrongdoing by the Provider in adopting this position.

**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**

20 April 2021

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

**(a) ensures that—**

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

**and**

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