



<u>Decision Ref:</u>	2021-0111
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Service
<u>Conduct(s) complained of:</u>	Rejection of claim
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainants, who trade primarily as a guesthouse and occasional wedding venue, hold a business insurance policy with the Provider.

The Complainants' Case

The Complainants notified the Provider by telephone on **31 March 2020** of a claim for business interruption losses sustained as a result of the temporary closure of their business from 15 March 2020, due to measures imposed by the government to curb the spread of the coronavirus (COVID-19). The Complainants were advised during this call that their claim circumstances were not covered by the terms of the business insurance policy. The Provider also wrote to the Complainants on **3 April 2020** to advise that it had declined indemnity in this matter, a decision it subsequently stood over upon review in its final response letter of **27 April 2020**.

The Complainants set out their complaint in the Complaint Form they completed, as follows:

“Our business [is] based on tourism, both self-catering & catered for tourists and we have had no business since the 16th of March 2020. We have had cancellations & deposit refunds totalling in excess of €60,000 and [the Provider] have refused to accept liability for business interruption”.

In addition, in their letter to this Office dated **28 April 2020**, the Complainants submit, as follows:

"I write to you regarding the refusal by [the Provider] to allow us any compensation for business interruption on our policy, even though this is in our insurance.

Our business is totally tourism-related, consisting of short breaks, self-catering or catered holidays. Since the Government announcement to restrict movement, our business is totally stopped and all we are doing is returning deposits on bookings previously made.

As we are both over 66, we could get no help anywhere. Our only income is the State contributory pension.

... [the Provider] seem to be hiding behind the fact that COVID-19 is not listed on their schedule but as we know, it couldn't be as COVID-19 was not heard of last year".

The Complainants seek for the Provider to admit and pay their claim for business interruption losses.

The complaint is that the Provider wrongfully or unfairly declined to admit and pay the Complainants' claim for business interruption losses sustained as a result of the temporary closure of their business, due to measures imposed by the government to curb the spread of COVID-19.

The Provider's Case

Provider records indicate that the Complainants first notified the Provider by telephone on 31 March 2020 of a claim for business interruption losses arising from the temporary closure of their business from 16 March 2020, due to measures imposed by the government to curb the spread of COVID-19. The Provider notes that the Complainants were advised during this telephone call that their claim circumstances were not covered by the terms of the business insurance policy. In addition, the Provider wrote to the Complainants on 3 April 2020 to advise that it had declined indemnity in this matter, a decision it also stood over upon review in its final response letter of 27 April 2020.

The Provider notes that business interruption is only covered by the Complainants' 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 Complainants' claim, as follows:

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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. 40 of the policy document, as follows:

"For loss of gross revenue (or estimated gross revenue)

*The Company will pay as indemnity the amount lost due to (a) loss of **gross revenue** and (b) **increased costs of working** as described below, less any savings in costs or expense which cease or reduce as a result of the **damage**".*

The Provider says that the bold highlighting, as it appears in the original policy document, emphasises the fact that a business interruption claim can only be made as a result of damage to the premises and not in any other circumstance. In this regard, the Provider says that it is quite clear that the interruption to the Complainants' 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 policy only responds to claims for loss of gross profit arising from damage caused to the premises. As the Complainants' claim is manifestly not such a claim, 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>
<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 the very least, was entirely unknown at the time when the policy was incepted.

In addition, the Provider says that it 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 of any of the diseases on the list of notifiable diseases – none of which are coronaviruses, and 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 Complainants are not asserting that the temporary closure of their 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.

When assessing the issue of causation, the Provider says that it is a well-established principle that the appropriate approach is to utilise a “but-for” test – in other words, it is necessary to consider the counterfactual of what would have happened “but-for” the insured event occurring. 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, 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 Complainants 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 Provider says 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 Complainants 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 Complainants by correspondence dated 3 April 2020, and again in its final response letter dated 27 April 2020.

It is the Provider's position that the terms of the Complainants' business insurance policy are abundantly clear. Whilst it is very much alive to the very difficult situation which the Complainants, along with many other businesses, find themselves 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 Complainants' business by reason of the COVID-19 pandemic.

Accordingly, the Provider is satisfied that it declined the Complainants' 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 Complainants' claim for business interruption losses sustained as a result of the temporary closure of their business in March 2020, due to measures imposed by the government to curb the spread of 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 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 **29 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 Complainants held a business insurance policy with the Provider. They notified the Provider by telephone on 31 March 2020, of a claim for business interruption losses sustained as a result of the temporary closure of their business on 15 March 2020 due to the outbreak of coronavirus (COVID-19). I note that the Complainants were advised during this call that the claim circumstances were not covered by the terms of the business insurance policy. In addition, I note that the Provider wrote to the Complainants on 3 April 2020 to advise that it had declined indemnity in this matter, a decision it subsequently stood over upon review in its final response letter of 27 April 2020.

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

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 Complainants' business was not closed or interrupted, as a result of damage to the property. Instead, I note that the Complainants temporarily closed their business due to the outbreak of COVID-19 in Ireland, and because of the measures imposed by the government to curb the spread of this virus.

The '**Additional extensions that apply to section 2: Business interruption**' of the applicable policy document, provide at 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.*

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- Any organism likely to cause a notifiable disease (as listed below) being discovered at the premises ...

[My emphasis]

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, there must be the operation of the insured peril, that is, that the business interruption must have been caused by the presence of a notifiable disease on the policyholder's premises (or have been caused by food and drink supplied from that premises), and the notifiable disease must also have been one of those diseases specified in the policy wording.

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, I note that it is not one of the notifiable diseases specified in the Complainants' business insurance policy.

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. As a result, the business interruption human notifiable disease extension only responds 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 is only provided in respect of the notifiable diseases within the meaning of, and listed in, the policy.

Accordingly, I am satisfied that the Provider was entitled to adopt the position which it did, that the claim circumstances did not satisfy the insured peril in the business interruption human notifiable disease extension.

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I am satisfied therefore that the Provider was entitled to decline the Complainants' claim in accordance with the terms of their business insurance policy. As the evidence available discloses no wrongdoing by the Provider, I take the view that this complaint cannot be upheld.

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**

22 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.