



<u>Decision Ref:</u>	2021-0129
<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 Complainant, a limited company trading as a guesthouse, hereinafter 'the Complainant Company', holds an insurance policy with the Provider.

The Complainant Company's Case

The Complainant Company's Broker notified the Provider by email on **26 May 2020** of the Complainant Company's claim for business interruption losses as a result of the temporary closure of its business due to measures imposed by the government to curb the spread of the coronavirus (COVID-19).

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

The Complainant Company then submitted a complaint to the Provider by email on 5 June 2020 regarding its decision to decline indemnity, as follows:

"We are very disappointed as customers that [the Provider] have adopted the position they have taken and are not willing to pay out anything towards the substantial loss that we have incurred due to the interruption to our business notwithstanding the fact that we took out a policy of insurance with [the Provider] at a substantial premium which contains business interruption cover".

Following its review, the Provider wrote to the Complainant Company on **10 July 2020** to advise that it was standing over its decision to decline indemnity in this matter. The Complainant Company sets out its complaint in the Complaint Form it completed, as follows:

“We were sold a policy that includes business interruption cover and having closed our premises in line with a Government directive owing to a global pandemic, we are now advised that [the Provider] will not cover our losses...we feel our insurers have a responsibility to pay out on this claim”.

In addition, in its email to this Office dated **18 September 2020**, the Complainant Company states:

“We closed our business as per a law [enacted] by our Government.

The Central Bank [of Ireland] have issued clear guidelines to all Insurers that as a result of this Government directive that in any areas where there is any ambiguity they should find in favour of the policyholders.

Once this Government directive was issued, we had as policyholders under liability cover a duty of care to protect our customers and staff.

Our policy does not specifically state that we are not covered for Pandemics, if we were not covered it should have formed part of the exclusions which it clearly does not.

The descriptive terms “loss or destruction” are open to interpretation. Did we suffer a loss? Yes. Did we suffer damage? Yes.

We have an insurance policy that includes Business Interruption, that’s why we wanted it. Our business has suffered a significant financial loss due to the closure and expect [the Provider] to honour this contract”.

Similarly, in its email to this Office dated **18 November 2020**, the Complainant Company submits, *inter alia*, as follows:

“The descriptive terms DAMAGE LOSS OR DESTRUCTION are open to interpretation and it is our contention that yes we did suffer a loss and yes our business did suffer damage. [The Provider] are choosing to use these descriptive terms to suit [its] own narrative of refusing our claim for business interruption which we do not accept ...

If as stated by [the Provider] that our policy does not cover us for a notifiable infectious disease, why is it not specifically listed as an exclusion in our policy. We do not accept as policyholders that [the Provider] can retrospectively list it now as an exclusion without it being clearly stated in our policy”.

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As a result, the Complainant Company seeks for the Provider to admit and pay its claim for business interruption losses as a result of the temporary closure of its business due to measures imposed by the government to curb the spread of COVID-19 and in that regard, the Complainant Company submits:

“During the three month period we were closed due to the Government directive our business suffered a loss of 500k – this figure is based on our trading figures for the same period last year”.

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 the temporary closure of its business in March 2020, due to measures imposed by the government to curb the spread of the coronavirus (COVID-19).

The Provider’s Case

The Provider says that the Complainant Company’s Broker first notified the Provider by email on 26 May 2020 of the Complainant Company’s claim for business interruption losses as a result of the temporary closure of its business due to measures imposed by the government to curb the spread of the COVID-19.

Following its assessment, the Provider wrote to the Complainant Company on 29 May 2020 to advise that it was declining indemnity because its insurance policy only provides business interruption cover where there has been damage to the insured property caused by one of the specified perils listed in the policy. The letter advised:

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

Specifically, in respect of your policy, the following is applicable, as set out in the policy wording:

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

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

The Provider says that following the Complainant Company’s email complaint of 5 June 2020 and having reviewed the matter in full, it wrote to the Complainant Company on **10 July 2020** to advise that it was standing over its decision to decline indemnity in this matter, as follows::

“My understanding of your complaint is that you are dissatisfied that your ‘Business Interruption’ claim arising from closure of your business due to the COVID-19 pandemic has not been met by your policy ...

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

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

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

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

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

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

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

Accordingly, the Provider is satisfied that it declined the Complainant Company’s claim in accordance with the terms and conditions of its pub 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 the temporary closure of its business in March 2020, due to measures imposed by the government to curb the spread of the coronavirus (COVID-19).

Decision

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

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

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 **12 April 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 trades as a guesthouse and holds a pub insurance policy with the Provider. Its Broker notified the Provider by email on 26 May 2020 of the Complainant Company's claim for business interruption losses as a result of the temporary closure of its business as a result of measures imposed by the government to curb the spread of the coronavirus (COVID-19).

Following its assessment, the Provider wrote to the Complainant Company on 29 May 2020 to advise that it was declining indemnity because its insurance policy only provides business interruption cover where there has been damage to the insured property caused by one of the specified perils listed in the policy, a decision it subsequently stood over upon review on 10 July 2020.

The Complainant Company's insurance policy, like all insurance policies, does not provide cover for every eventuality. The cover made available by the policy, is subject to the terms, conditions, endorsements and exclusions set out in the policy documentation.

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

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

[My emphasis]

In this regard, the '**Material Damage - Contingencies**' section of the Complainant Company's Policy Schedule document dated 10 March 2020 provides at pg. 3, as follows:

<i>"CONTINGENCIES (AS DEFINED IN POLICY BOOKLET)</i>	<i>INSURED YES/NO</i>
A. FIRE	YES
B. LIGHTNING	YES
C. (i) AND (ii) EXPLOSION	YES

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D.	AIRCRAFT	YES
E.	EARTHQUAKE	YES
F.	RIOT, CIVIL COMMOTION	YES
G.	SUBTERRANEAN FIRE	YES
H.	STORM OR FLOOD	YES
I.	BURST PIPES	YES
J.	IMPACT	YES
K.	SPRINKLER LEAKAGE	NO
L.	ANY ACCIDENTAL CAUSE (ALL RISKS)	YES
M.	STEALING	YES
N.	ACCIDENTAL BREAKAGE OF GLASS	YES
O.	MONEY AND PERSONAL ASSAULT	YES
P.	ACCIDENTAL DAMAGE TO MACHINES	NO
Q.	COMPUTERS	NO
R.	GOODS IN TRANSIT	YES
S.	FROZEN FOOD	YES"

I note in that regard that although the Provider's written communications in May and July 2020 referred to "any of the Contingencies A-M specified as being insured in Section 1 [Material damage]", the policy in fact provides for more contingencies than A to M and in fact there are also additional contingencies included at N – S.

I note that the Complainant Company's claim is for business interruption losses. In this regard, I note that **Section 2, 'Business Interruption'**, of the insurance policy booklet provides as follows:

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

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- (i) *in respect of Increase in Cost of Working/Income/Gross Profit/Tax Relief/Rent Receivable the sum insured by each item*
- (ii) *133⅓ of the sum insured on Estimated Income/Estimated Gross Profit/Estimated Tax Relief*
- (iii) *in respect of each other item its sum insured*

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

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

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

I am satisfied that the terms and conditions of the Complainant Company’s insurance policy clearly state that in order for the business interruption cover to be triggered, there must first have been damage to the insured property, caused by one of the specified perils, that is, the listed contingencies at A – S in Section 1 [Material Damage], as listed on pages 6 – 7 above.

The Complainant Company’s business interruption claim in March 2020, arose from the temporary closure of its business due to measures imposed by the Government to curb the spread of COVID-19. I am satisfied that this reason for the business interruption, did not constitute damage to the Complainant Company’s property, nor did it fall under one of the contingencies listed in the Complainant Company’s insurance policy schedule.

In its email to this Office dated **18 November 2020**, I note the Complainant Company submits:

“The descriptive terms DAMAGE LOSS OR DESTRUCTION are open to interpretation and it is our contention that yes we did suffer a loss and yes our business did suffer damage. [The Provider] are choosing to use these descriptive terms to suit [its] own narrative of refusing our claim for business interruption which we do not accept”.

The term “DAMAGE” is however clearly defined within the insurance policy booklet, as follows:

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

I am satisfied that this policy definition of “DAMAGE” is clear and unambiguous.

I note that “the Property Insured” referred to in the definition of “DAMAGE” is stated at pg. 2 of the Complainant Company’s Policy Schedule to be, as follows:

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*“THE PROPERTY INSURED ... BUILDINGS
... CONTENTS
... STOCK AND MATERIALS IN TRADE
... MISCELLANEOUS PROPERTY”.*

“DAMAGE”, in this context, relates to the loss or destruction of or damage to the property insured listed in the policy schedule, which is the physical property of the Complainant Company, and does not, as the Complainant Company appears to suggest in its email of 18 November 2020, include any loss to or destruction of the trading activities of the Complainant Company.

It is important to reiterate that for business interruption cover to be triggered, there must first have been damage to the insured property, that is, the physical property of the policyholder, caused by one of the specified perils, that is, the listed contingencies within the policy schedule. I note from the documentation before me that the Complainant Company does not suggest that any such damage on fact occurred at the relevant time.

In addition, I also note that the Complainant Company submits in its email to this Office dated 18 November 2020 that:

“If as stated by [the Provider] that our policy does not cover us for a notifiable infectious disease, why is it not specifically listed as an exclusion in our policy. We do not accept as policyholders that [the Provider] can retrospectively list it now as an exclusion without it being clearly stated in our policy”.

In this regard, I take the view that the absence of a policy exclusion in relation to notifiable infectious diseases has no bearing on this matter, because the purpose of a policy exclusion is to restrict cover which would be otherwise available, were it not for the exclusion itself. There is no such cover in this instance however, because the Complainant Company’s insurance policy very clearly identifies and defines the precise circumstances in which a business interruption claim will be covered, that is, there must first have been damage to the insured property caused by one of the specified perils, that is, the listed contingencies at A – S. Notifiable infectious diseases, is not however one of the listed contingencies.

Accordingly, I am satisfied that the Provider was entitled to decline the Complainant Company’s claim for business interruption losses in accordance with the terms and conditions of the insurance policy. As there is no evidence of wrongdoing on the part of the Provider in declining the claim, I take the view that there is no reasonable basis upon which it would 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**

5 May 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.