An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0140
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Claim handling delays or issues Rejection of claim
Outcome:	Upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a limited company trading as a printing shop, hereinafter 'the Complainant Company', held a commercial combined insurance policy with the Provider.

The Complainant Company's Case

The Complainant Company notified the Provider on 1 May 2020 of a claim for business interruption losses as a result of the temporary closure of its printing shop premises from **21 March 2020.**

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

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

Following its assessment, the Provider wrote to the Complainant Company on **10 June 2020** to advise that it was declining indemnity as it had concluded that the Complainant Company's losses did not fall within the scope of cover provided by the relevant business interruption infectious disease extension policy wording.

The Complainant Company's Broker emailed the Provider on **7 July 2020** to complain about its decision to decline indemnity, as follows:

> *"*[The Complainant Company] *feels very strongly that according to the* [business interruption infectious disease] *wording they should be covered under their policy".*

Following the completion of its review, the Provider emailed the Complainant Company on **15 July 2020** to advise that it was upholding its decision to decline indemnity in this matter.

The Complainant Company set outs its complaint in the Complaint Form, as follows:

> *"Due to COVID-19* [the Complainant Company] *closed their premises from 21 March 2020 for the protection of staff and customers"*.

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 premises from 21 March 2020 due to the outbreak of COVID-19 and in that regard, it states in the Complaint Form:

> *"*[The Complainant Company] *has suffered a financial loss due to business interruption … Closed 46 days* [loss of] *€12,531 gross profit".*

The complaint is that the Provider wrongfully or unfairly declined to admit and pay the Complainant Company's claim for business interruption losses arising from the temporary closure of its business premises due to the outbreak of the coronavirus (COVID-19).

The Provider's Case

Provider records indicate that the Complainant Company holds a commercial combined insurance policy with the Provider and that it submitted a claim on **1 May 2020** for business interruption losses as a result of the temporary closure of its printing shop premises from 21 March 2020.

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

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

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

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

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

In addition, a statement from An Taoiseach also stated:

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

14 March 2020: Second death in Ireland attributable to COVID-19. By this date, there were 129 confirmed cases of COVID-19 in the country.

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

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

21 March 2020: The Complainant Company closed its printing shop premises.

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

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

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

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

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

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

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

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

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

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

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

a. hardware stores;

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

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

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

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

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

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

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

The Provider says it is not clear from the complaint papers, the date from which the Complainant Company reopened its printing shop business premises.

Against this background, the Provider was notified by the Complainant Company on **1 May 2020** of a claim for business interruption losses as a result of the temporary closure of its printing shop premises from 21 March 2020.

On **5 June 2020**, the Complainant Company emailed the Provider-appointed Loss Adjuster with the following information:

> *"Circumstances of Closure:*
> *Coronavirus Covid-19*
>
> *Reason for Closure:*
> *Social distancing of staff and customers.*
>
> *Outbreak of Covid-19 on Premises:*
> *Not aware of Covid-19 outbreak on premises on date of closure 20th March 2020".*

The Provider says that following its assessment, it wrote to the Complainant Company on 10 June 2020 setting out the reasons why it did not consider there to be cover for the claim under the terms and conditions of the commercial combined insurance policy, as follows:

> *"I note that on the 20th March 2020, you ceased trading following the issuance of guidelines by the Government regarding social distancing. You were unable to fully adhere to these guidelines and as a consequence took the decision to close your business on Health and Safety grounds. As a consequence of the present situation you have suffered a loss of revenue and have sought to establish the extent of cover under your policy.*
>
> ***The Coverage Position***
> *The main policy is triggered in the event that business interruption losses arise as a consequence of damage to the property insured (subject to any exclusions). As we understand it, your claim is based upon the economic effects that the Covid-19 situation has had on* [her] *business.*

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The policy does provide some limited cover, by way of extensions, for certain situations where the business is adversely affected by a specific event, happening at or near the premises. The extension of relevance to Covid-19 claims of this nature is the Infectious Diseases/Murder or Suicide Extension.

Infectious Diseases/Murder or Suicide Extension
In the event that, losses have arisen due to the occurrence of Covid-19, cover may be available under the Infectious Diseases/Murder or Suicide Extension. This Extension is designed to be the only potential source of cover for losses arising from diseases such as Covid-19.

The Extension may respond where:

(a) Loss results from the occurrence of a notifiable disease at the premises; or

(b) Loss results from the occurrence of a notifiable disease within the specified vicinity of the premises.

Covid-19 was added to Irish government list of notifiable diseases on 20 February 2020. This Extension will therefore respond in respect of losses suffered after that date as a consequence of the occurrence of Covid-19 at the relevant locations. Cover will not be back-dated to apply to any losses suffered before Covid-19 became notifiable in Ireland.

It is important to note that this Extension will only provide cover where loss is in consequence of the occurrence of Covid-19 at the relevant locations, and not where losses are in consequence of, for example, wide-scale government measures. The effect of (for example) government-mandated blanket shutdowns, or the effect of the Covid-19 outbreak on the regional, national or global economy, will not trigger cover. Cover will only be available where a specific outbreak of Covid-19 at the premises, or within the specified vicinity, has had a direct effect on the business.

Where a case of Covid-19 has occurred at the insured premises, it is likely that cover under the Extension would be engaged to the extent that that occurrence has required the premises to close for a short period, subject to the terms and conditions of the policy. Where it is shown that there has been an occurrence of Covid-19 within the radius of the relevant premises as specified in the policy, interruption loss at the premises will only be recoverable to the extent that that loss is in consequence of that particular occurrence, and not some other cause.

Conclusion
Having carefully considered your claim, unfortunately I do not believe there is any cover, as the notified circumstances and losses do not fall within the terms of your policy, for the reasons set out above".

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The Provider says that the Complainant Company's Broker emailed the Provider on **7 July 2020** to complain of its decision to decline indemnity.

Following its review, the Provider issued a final response letter to the Complainant Company on 15 July 2020, detailing how the losses she incurred fell outside the scope of policy cover, specifically the infectious disease extension, as follows:

> *"Whilst we had considered that the circumstances of the losses being experienced by* [the Complainant Company] *fell outside the scope of policy cover, in order to ensure that the correct decision was made we sought legal opinion on the policy wording, with particular reference to Extension 3.3.4 (Infectious diseases/murder or suicide). Our letter dated 10th June 2020 detailed the findings of the review, which confirmed we had correctly interpreted the wording and that on this occasion the losses* [the Complainant Company] *are experiencing fall outside the scope of the policy.*
>
> *Having now completed my review of the file, I can see no basis on which to reconsider the decision on policy cover. The policy is very specific in that for consideration to be given under Extension 3.3.4 losses must be in consequence of an occurrence of a notifiable disease at the premises, or in consequence of an occurrence of a notifiable disease within a radius of twenty five (25) miles of the premises, there being no cover for losses resulting from measures introduced to curtail the spread of Coronavirus or the extremely challenging economic conditions that exist at present"*.

The Complainant Company then completed a Financial Services and Pensions Ombudsman Complaint Form on **17 July 2020**, wherein it set out its complaint as follows:

> *"Due to COVID-19* [the Complainant Company] *closed their premises from 21 March 2020 for the protection of staff and customers"*.

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

> *"The insurer will pay to the insured: …*
>
> *3.3.4 Infectious diseases/murder or suicide*
>
> *Loss resulting from interruption of or interference with the business in consequence of any of the following events:*
>
> *a) any occurrence of a notifiable disease at the premises or attributable to food or drink supplied from the premises;*
>
> *b) any discovery of any organism at the premises likely to result in the occurrence of a notifiable disease;*

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

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

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

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

provided that the

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

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

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

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

(i) an interruption of or interference with the business;

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

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

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

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

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

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In responding to this complaint, the Provider said that point (ii) above constitutes the insured peril, which must proximately cause the financial losses claimed by the Complainant Company. In this regard, the Provider says that the Complainant Company must prove:

(i) the existence of an "event", in the sense of an occurrence, or occurrences, of COVID-19 within a radius of 25 miles;

(ii) *"in consequence of"* which business interruption or interference occurred;

(iii) which resulted in the financial losses claimed.

The Provider also said that this means, in short, and as a matter of Irish law, that:

(i) to trigger cover, the occurrences or incidents of COVID-19 within the 25 mile radius (being local events which are the concentration of the business interruption infectious disease extension) must be the specific proximate cause of the interruption, in the sense that, but for/without those local occurrences/incidents, no interruption would happen. If the interruption would happen in any event, independent and irrespective of the specific occurrences with the 25 mile radius, the Provider says the interruption is then not *"in consequence of"* those 25 mile radius occurrences and there is no cover. Accordingly, it is not enough that there simply happen to be such occurrences or incidents within the radius; unless they are the dominant and effective cause of the interruption in question, they are simply state of affairs and not the proximate cause of the interruption;

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

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

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

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

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

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

    i. if the business interruption and losses would have occurred in any case, through a separate independent event (in the form of incidents of COVID-19 outside the radius), then the incidents of COVID-19 within the 25 mile radius (this being the insured peril) did not cause the interruption and losses, such that those losses are not covered;

    ii. alternatively, if it can be said that "but for"/without the event comprising the local occurrences within 25 miles the business would not have suffered the relevant interruption/losses, then the local incidents are the factual cause of those losses – the business would not have suffered the same losses in any case;

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

c. if the above tests are satisfied by the Complainant Company, i.e. "but for"/without the local 25 mile COVID-19 event the business interruption losses would not have occurred, then the losses will be covered.

The Provider noted that these issues, on the exact policy wording of clause c) *"any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises"*, were considered by the English High Court in the 15 September 2020 decision of *The Financial Conduct Authority v. Arch Insurance (UK) Ltd and others* [2020] EWHC 2448, hereinafter 'the FCA Test Case', wherein the English High Court considered the extent of COVID-19-related coverage, if any, under 21 separate business interruption coverage wordings for test case purposes. The Provider notes that the wording of its infectious disease business interruption extension that was under consideration before the English High Court in the FCA Test Case is identical to the wording of the business interruption extension 3.3.4 'Infectious diseases/murder or suicide' contained in the Complainant's commercial combined insurance policy. In this regard, the English High Court stated in the FCA Test Case, as follows:

> *"In* [the Provider's wording]*, there is a combination of factors which together, to our minds, indicate that the cover is … intended to be confined to the results of specific (relatively) local cases …*
>
> *In the first place, the insuring clause itself identifies the matters in (a) to (f) as "events".*

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This indicates that what is being insured is matters occurring at a particular time, in a particular place and in a particular way …

This is the context within the clause in which [the clause] *refers to "any occurrence of a notifiable disease".*

Given the reference to "events", and taken with the nature of the other matters referred to in (a), (b) and (d) to (f), the emphasis in (c) appears to us in this clause not to be on the fact that the disease has occurred within 25 miles, but on the particular occurrences of the disease within the 25 miles.

It is the "event", which is constituted by the occurrence(s) of the disease within the 25 mile radius, which must have caused the business interruption or interference.

If there were occurrences of the disease at different times and/or different places [i.e. outside the 25 mile radius] *then these would not constitute the same "event", and the clause provides no cover for interruption or interference with the business caused by such distinct* [outside-the-radius] *"events".*

This focus of the clause is then emphasised by the fact that in (h), it is stated that the insurer is only liable for loss arising at those premises which are directly subject to the "incident" … These uses of the word "incident" appear to us to reinforce the fact that the clause is concerned with specific events, limited in time and place …

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

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

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

The Provider said that the effect of the business interruption infectious disease extension as a matter of Irish law, even without reference to the above FCA Test Case, is that the Complainant Company will only be able to recover under clause c) of the extension – for business interruption that is *"in consequence of … c) any occurrence of a notifiable disease within a radius of 25 (twenty five miles of the premises)* – if it can show that the business

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interruption has been proximately caused by the specific occurrence(s) of the disease within the 25 mile radius (this being the relevant "event" and insured peril).

However, the Provider said that the requirements for showing proximate cause, as set out in points (i)-(iv) above and as endorsed in the FCA Test Case judgement, are not satisfied in the present matter, which must be analysed from the perspective of the period both prior to, and after, the Government-directed closure of the Complainant Company's business on 24 March 2020.

Interruption / Financial Loss prior to 24 March 2020

(i) The Complainant Company's business closed voluntarily on 21 March 2020, prior to any Government direction that businesses close on 24 March 2020 or that direction becoming a legal requirement on 27 March 2020;

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

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

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

i. during the period prior to voluntary closure on 21 March 2020; and

ii. between 21 March and 23 March 2020, when the Complainant Company closed its business without any Government direction to that effect

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

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

(iii) No evidence, whether in the form of documented statistical data, accounts, newspaper reports or otherwise, has been provided by the Complainant Company showing on a balance of probabilities:

a. the occurrence of a case of COVID-19 in the 25 miles radius of its business premises in the period prior to 24 March 2020;

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

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c. which drop in turnover/gross profit was proximately caused by (i.e. would not have occurred but for/without) the local COVID-19 occurrences within the 25 miles radius;

(iv) Even if evidence of a local occurrence of COVID-19, and coincidental drop-off in business, were to be documented on a balance of probabilities, it was the Provider's position that:

a. any pre-21 March 2020 gradual downturn that might have been experienced by the Complainant Company would have occurred in any event, irrespective of the local position within the 25 mile radius. All business trade was affected nationwide due to national disquiet/generalised fear/consequent reduction in footfall during the pre-21 March 2020 period. Hence the burden of proof is on the Complainant Company to provide evidence that the extent of its pre-21 March 2020 losses was greater than other similar businesses in the same printing and copier sector across the country. If the downturn suffered by the Complainant Company mirrored, or was less than, the average drop-off of other similar businesses in Ireland, it cannot be said that the drop-off in trade was specific to/in consequence of local occurrences of COVID-19 within 25 miles, as similar drop-off was encountered by all similar businesses across the country;

b. regarding the 'down to zero' loss during the period 21 March to 23 March 2020, when the Complainant Company voluntarily closed its premises, the Complainant Company says that that closure and ensuing loss was caused by COVID-related social distancing guidance issued by the Government.

Whether or not this is the case, the social distancing guidance was not *"in consequence of"* a specific incident/event of COVID-19 illness within the Complainant Company's 25 mile radius: that guidance would have been, and was, introduced by the Government in any case. In other words, it cannot be stated that but for/without a local incident of COVID-19 illness within the 25 mile radius (which is the insured peril), the social distancing guidance would not have been introduced, and the business would have continued. That guidance would have been introduced, and the business would not have continued, in any event, due to the increasing incidents of COVID-19 nationwide.

Proof of this is found in the fact that when the 24 March 2020 closure direction by the government required all non-essential businesses to shut, that direction included businesses in counties which had no cases of COVID-19 at all at that time (Wexford, Monaghan, Roscommon, Leitrim, or Carlow). This is proof that even if there were no cases of COVID-19 within a particular 25 miles radius, closure by order would have – and did – issue in any case.

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Insofar as that was the position on 24 March 2020, that was even more evidently the position on 12 March 2020, when social distancing guidance was introduced across the country, and 21 March 2020, when the Complainant Company voluntarily closed its business.

The 21 March to 23 March 2020 interruption and losses cannot, therefore, be said to have been *"in consequence of"* the insured peril – i.e. an *"occurrence of* [COVID-19 illness] *within a radius of 25 (twenty five) miles of the premises"* – and are not therefore covered.

<u>Interruption / Financial Loss after 24 March 2020</u>

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

(ii) This is because that Government-directed closure, like the prior Government guidance on social distancing, was not *"in consequence of"* (i.e. proximately caused by) the insured peril, this being the local "event" of *"occurrences of* [COVID-19] *within* [the 25 miles radius]*"*. It cannot be stated that "but for"/without the local occurrences, the closure order would not have been imposed: it would have been imposed in any event – whether or not there were cases within a particular radius or county due to the separate uninsured events of COVID-19 elsewhere in the country. As was stated by the English High Court in the FCA Test Case in a different context:

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

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

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

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

In this regard, the Provider does not accept that the Complainant Company closed its printing shop business on 21 March 2020 as a result of a Government direction to close, as no such direction to close had issued on that date. In this regard, such direction only issued on 24 March 2020 and became law on 27 March 2020.

The Provider said it accepted that the Complainant Company closed its business on 21 March 2020 due to concerns about an inability to comply with Government advice on social distancing. However, the Provider said it had already set out above how that advice, and the decision to close and the ensuing losses, were not in consequence of local incidents of COVID-19 illness within the 25 mile radius, which was the only insured peril for the purpose of the infectious disease extension, and was not therefore covered.

The Provider noted that if the Complainant Company's business had remained open from 21 March 2020, it would have had to close its printing shop premises on 24 March 2020. Insofar as the premises was already closed at that date, the Provider accepts that the closure from 24 March 2020 was as a result of the Government direction on that date.

However, for the reasons set out extensively above, the Provider said that as that closure direction was not in consequence of a local event comprising occurrences of COVID-19 within the 25 mile radius of the Complainant Company's premises (the insured peril), but rather was a direction that would have issued in any case irrespective of the position within that radius, the business interruption and losses due to the closure direction are not covered, as they would have been suffered in any case.

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

Although this was the position of the Provider during all material times in 2020, nevertheless, on 24 February 2021, the Provider wrote to the Complainants as follows:

> *" … As you may be aware, a recent Court decision on 5 February 2021 arising out of cases brought by Hyper Trust Ltd and others against the insurer FBD in the Irish High Court (**the FBD Decision**) considered the operation of certain business interruption coverage clauses in the context of Covid-19.*

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While the terms of your [Provider] *policy were not before the Court, various aspects of the Court decision have provided welcome clarity as regards the operation of cover under clauses such as the notifiable disease extension in your* [Provider] *policy.*

As a result of that clarity, [Provider] *are pleased to confirm that policy cover for your above claim is now admitted in principle, subject to validation detailed below. This is the case even though we have previously indicated that there is no cover available under the notifiable disease extension in your policy, which has led to your above reference to the FSPO. The reason for this change is because the above FBD Decision has now clarified the manner in which your notifiable disease extension operates as a matter of Irish law. We are therefore now upholding your complaint.*

…"

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 **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. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

The Complainant Company held a commercial combined insurance policy with the Provider. On 21 March 2020, the Complainant Company closed its printing shop and later submitted a claim to the Provider on **1 May 2020** for business interruption losses arising from this temporary closure.

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

> *"**The insurer will pay to the insured:***
>
> *3.3.4 Infectious diseases/murder or suicide*
>
> ***Loss resulting from interruption of or interference with the business in consequence of** any of the following events:*
>
> *a) any occurrence of a notifiable disease at the premises or attributable to food or drink supplied from the premises;*
>
> *b) any discovery of any organism at the premises likely to result in the occurrence of a notifiable disease;*
>
> ***c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises;***
>
> *d) the discovery of vermin or pests at the premises which cause restrictions on the use of the premises on the order or advice of the competent local authority;*
>
> *e) any accident causing defects in the drains or other sanitary arrangements at the premises which causes restrictions on the use of the premises on the order or advice of the competent local authority;*
>
> *f) any occurrence of murder or suicide at the premises;*
>
> *provided that the*
>
> *g) insurer shall not be liable for any costs incurred in cleaning, repair, replacement, recall or checking of property;*
>
> *h) insurer shall only be liable for loss arising at those premises which are directly subject to the incident;*
>
> i) ***insurer's maximum liability under this cover extension clause in respect of any one claim shall not exceed** EUR50,000 or **fifteen per cent (15%) of the total sum insured** (or limit of liability) for this insured section, whichever is the lesser, any one claim and EUR10,000 any one period of insurance".*
>
> ***[Emphasis added]***

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The 'Insured Details' section of the Complainant's Schedule of Insurance with the Provider for the period from 6 May 2019 to 5 May 2020 states:

"BUSINESS INTERRUPTION INSURED

Indemnity Period: 12 months €120,000".

Therefore, looking at the wording of extension 3.3.4(i) and the Schedule of Insurance, I take the view that the maximum amount recoverable per claim by the Complainant under the business interruption infectious disease extension is 15% of €120,000, or **€18,000**.

The Provider makes the point that the maximum indemnity under the infectious disease extension is €10,000 for any one claim and €10,000 for the policy period. The Provider says that the inclusion of a claim limit of €50,000 makes no sense and was a typographical error. In my opinion, Extension 3.3.4(i) is somewhat awkwardly worded in that the inclusion of the words *"any one claim and EUR10,000 any one period of insurance."* appears incongruous. While the Provider points to the limits of liability contained in extensions 3.3.1, 3.3.2 and 3.3.3, I note that these provisions are drafted quite differently from extension 3.3.4(i) in that they simply impose a limit on liability. However, extension 3.3.4(i) is different and though it imposes a limit on liability, it does so in an alternative manner. In this instance the limit is €50,000 or 15% of the total sum insured. As a result, in terms of drafting, I am not satisfied the Provider is comparing like with like.

Further to this, the Provider says extensions 3.3.1, 3.3.2, 3.3.3 and 3.3.4 involve situations where there is no physical damage at the insured premises. However, having considered the wording of extension 3.3.5, I am satisfied that this extension can also involve situations where there is no physical damage to the insured premises.

I note that the sum insured for the entire period of insurance in respect of business interruption as stated in the Schedule of Insurance is €120,000. I am satisfied from the policy wording that Clause 3.3.4(i) does indeed contain a typographical error, but in my opinion, the error in question is more likely to be the inclusion of the words "*any one claim and EUR10,000 any one period of insurance*" at the end of that particular paragraph.

I am satisfied that with the removal of those offending words, the paragraph in question is logical and limits the Provider's liability per claim to a figure of €50,000 or 15% of the sum insured (in this instance €120,000) i.e. €18,000, whichever is the lesser. Therefore, I do not accept the maximum amount payable in respect of a single claim is €10,000. I am satisfied that the maximum amount recoverable by the Complainants under the business interruption infectious disease extension, per claim, is **€18,000**, that is, 15% of the total business interruption sum insured.

I note that following its claim assessment, the Provider wrote to the Complainant Company on 10 June 2020 to advise that it was declining indemnity as it had concluded that the Complainant Company's losses did not fall within the scope of cover provided by the relevant business interruption infectious disease extension policy wording, a decision it upheld upon review in its letter of 15 July 2020.

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On 24 March 2020, the Government adopted certain NPHET recommendations for the nationwide closure of non-essential retail outlets and services, which included the Complainant Company's printing shop. In the circumstances of the complaint before me, it is clear that the Complainant Company closed its printing shop form 21 March 2020, prior to any government direction to effect a closure.

I note the Complainant Company stated in its Complaint Form that:

> *"Due to COVID-19* [the Complainant Company] *closed their premises from 21 March 2020 for the protection of staff and customers"*.

I note too that the Complainant Company emailed the Provider-appointed Loss Adjuster on 5 June 2020 and advised as follows:

> *"Circumstances of Closure:*
> *Coronavirus Covid-19*
>
> *Reason for Closure:*
> *Social distancing of staff and customers".*

In addition, I note that the Complainant Company's Broker emailed the Provider on 7 July 2020 to complain of its decision to decline indemnity, as follows:

> *"*[The Complainant Company] *feels very strongly that according to the* [business interruption infectious disease] *wording they should be covered under their policy".*

As a result, I take the view that the Complainant Company advanced two separate reasons for the closure of its printing shop from 21 March 2020, namely, its inability to abide by the social distancing guidelines introduced by the Government, and the presence of active COVID-19 cases within a 25 mile radius of its business premises. I note that the Provider addressed both.

In relation to the first reason stated, that the Complainant Company closed its printing shop from 21 March 2020 as it was unable to abide by the social distancing guidelines introduced by the Government, I note the Provider originally said that the Government did not introduce social distancing measures *"in consequence of"* the business interruption infectious disease insured peril of an *"occurrence of a notifiable disease* [COVID-19] *within a radius of 25 miles of the* [Complainant Company's] *premises"*, but rather that such measures were introduced as a national response to a nationwide health issue, which is not an insured peril. As a result, it said that any losses arising from these social distancing measures, or the Complainant Company's inability to abide by same, were not covered.

In relation to the second reason stated, that the Complainant Company closed its business from 21 March 2020 because of the presence of active COVID-19 cases within 25 miles of its printing shop, I note the Provider said that the presence of any occurrences of COVID-19 within 25 miles of the Complainant Company's business premises was not enough in itself to trigger cover.

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Rather, the Provider maintained that any such occurrences must be the specific proximate cause of the interruption, insofar as "but for" those occurrences, no interruption would have occurred. In this regard, the Provider says that the interruption to the Complainant Company's business would have taken place, irrespective of the occurrences of COVID-19 within the 25 mile radius of its business premises, firstly because of the social distancing measures introduced nationwide by the Government and secondly, as a result of the later Government direction that non-essential retail outlets and services nationwide, including the Complainant Company's printing shop, were to close.

More specifically, I am conscious of the Provider's position as outlined in its Complaint Response to this Office of 17 November 2020, that:

> *"It cannot be stated that but for/without the local occurrences, the* [Government] *closure order would not have been imposed: it would have been imposed in any event – whether or not there were cases within a particular radius or county…**due to the separate uninsured events of COVID-19 elsewhere in the country**".*
>
> *[Emphasis added]*

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

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

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

I am of the opinion that the reasonable interpretation of the plain meaning of clause 3.3.4 c) is that *"**any**"* occurrence of a notifiable disease, in this case COVID-19, within a radius of 25 miles of the Complainant Company's business premises, once that occurrence has caused an interruption of or interference with the business resulting in loss, is sufficient in itself to trigger cover.

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I am satisfied that there is no stipulation within the policy provisions that other occurrences of the notifiable disease elsewhere outside of the 25 mile radius, will in some manner nullify or cancel the operation of the insured peril, which the policy specifies. I take the view that if it had been the intention of the underwriters, that the occurrence of the notifiable disease must only be within a radius of 25 miles of the policyholder's premises (and not also beyond that 25 mile radius) in order for the particular insured peril at clause 3.3.4 c) to operate, it would have been open to the underwriters to have specified that particular requirement. In this instance, however, the underwriters did not do so.

As a result, it seems to me that once there is an occurrence of a notifiable disease within a radius of 25 miles of the policyholder's business premises, then cover is triggered. This is the position regardless of whether there are also occurrences of this notifiable disease elsewhere outside of that radius.

I am also satisfied that even if the official response to the notifiable disease, that is occurring both within and outside of the radius is, or becomes, a national response, or is recognised to be in some way greater than a localised response, it does not follow from the policy provisions that the interference with or interruption to the policyholder's business, is not thereby covered. It should therefore be noted that, in the opinion of this Office, the policy cover was available to the Complainant Company, regardless of whether the losses were concurrently caused by other consequences of the presence elsewhere of COVID-19, once the Complainant Company can demonstrate that its meets the policy criteria specified.

I note that the Complainant Company has stated two separate reasons for the closure of its business premises from 21 March 2020; the first its inability to abide by the social distancing guidelines introduced by the Government, the second the presence of active COVID-19 cases within a 25 mile radius of its business premises.

As it is with all insurance claims, it is a matter for the Complainant Company, as the policyholder, to furnish the Provider, as the insurer, with proofs of the operation of an insured peril, in this instance, an occurrence of a case or cases of COVID-19 within the 25 mile radius of the Complainant Company's business premises, in support of its claim.

However, I accept the Provider's position that it is not sufficient to simply point to a case or cases of COVID-19 within the 25 mile radius of the policyholder's premises and expect cover to be triggered. Instead, I am satisfied that it must also be shown that the particular case or cases referred to, interrupted or interfered with the policyholder's business, causing financial loss.

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

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

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*"**Notifiable disease***

> *Notifiable disease means illness sustained by any person resulting from:*
>
> *food or drink poisoning, or*
>
> *any human infectious or human contagious disease an outbreak of which the competent local authority has stipulated shall be notified to them excluding Acquired Immune Deficiency Syndrome (AIDS), an AIDS related condition or avian influenza"*.

I note in this regard, that on 20 February 2020 the Minister for Health signed Statutory Instrument No. 53/2020 - Infection Diseases (Amendment) Regulations 2020, to include the coronavirus (COVID-19) (SARS-Cov-2) on the list of notifiable diseases.

The 'Notifying Infectious Diseases' page of the Health Protection Surveillance Centre website states, at https://www.hpsc.ie/notifiablediseases/notifyinginfectiousdiseases/, as follows:

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

I am therefore satisfied that the occurrence of a notifiable disease by its nature, can and does attract public health interventions, the purpose of which is to assist in preventing the spread of infection and further cases. The inclusion by the underwriters of business interference cover for policyholders, in the event of a notifiable disease occurring within 25 miles of the policyholder's premises (thereby covering a surrounding area of almost 2,000 square miles, approximately $^{1}/_{16}^{th}$ of the country) suggests to me that the policy recognises that notifiable diseases, by their nature, will often trigger the implementation of measures, including public health measures, over a specified area, for the purpose of seeking to limit the spread of the notifiable disease in question.

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

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

I consider that it was appropriate in such circumstances for each individual business to assess its ability to continue trading, within the confines of those Government guidelines. It was, in my opinion, somewhat inevitable that a strict adherence to these social distancing measures rendered it difficult, if not impossible, for some businesses to have continued trading efficiently and effectively, or indeed in some cases at all, because of either the nature of the business activity itself or indeed because of the space within which such individual businesses conduct operations. In this regard, I note that the Complainant Company considered it necessary in those circumstances, to close its business with effect from 21 March 2020, owing to the need to comply with social distancing requirements.

In considering the present complaint, I have noted the recent High Court decision of Mr Justice McDonald in *Hyper Trust Limited v. FBD Insurance plc & Ors* [2021] IEHC 78, which considered a number of policy provisions similar to the one the subject of this complaint. I note the following concluding paragraphs of McDonald J.'s decision:

> *"275. … In my view, the relevant insured peril is not confined to the imposed closure of the insured premises. The relevant peril is the imposed closure following outbreaks of infectious or contagious disease (in this case Covid-19) on or within 25 miles of the premises. I am also of the view that cover is not lost where the closure is prompted by nationwide outbreaks of disease provided that there is an outbreak within the 25 mile radius and that outbreak is one of the causes of the closure.*
>
> *276. … it seems to me that the outbreaks which occurred within 25 miles of each of the plaintiffs' premises … were, in any event, a proximate cause of the imposed closure of public houses announced by the government on 15th March, 2020. The fact that outbreaks outside that 25 mile radius were also proximate causes of the government decision does not alter that conclusion. …"*

Therefore, in light of the foregoing, if the Complainant Company furnished the Provider with proofs of the operation of the insured peril referred to at clause 3.3.4 c) of the policy, that is, that there was an occurrence of a case or cases of COVID-19 within 25 miles of the Complainant Company's business premises, in and around the time it closed its business premises from 21 March 2020, I am satisfied that the interruption of or interference with the business caused by the presence of the notifiable disease and the consequent social distancing measures directed by the Government, in response, then gave rise to the Complainant Company experiencing business interference losses.

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As it is with all insurance claims, it is a matter for the Complainant Company, as the policyholder, to furnish the Provider, as the insurer, with proofs of the operation of an insured peril, in this instance, an occurrence of a case or cases of COVID-19 within 25 miles of its printing shop when it closed the premises from 21 March 2020, in support of its claim.

I note from the documentary evidence before me, the Provider-appointed Loss Adjuster emailed the Complainant Company on 21 May 2020 asking it for certain information, including:

> *"Confirmation if you are aware of any outbreak of Covid-19 on the premises"*.

In ascertaining whether any person at the premises had tested positive for COVID-19, it would appear to me that the Loss Adjuster was prepared to consider the claim with regard to clause 3.3.4 a), that is, *"any occurrence of a notifiable disease at the premises"*.

I take the view that the Loss Adjuster ought also, at that time, to have considered the claim with regard to clause 3.3.4 c), *"any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises"*.

Although it was a matter for the Complainant Company to establish that as a matter of fact there were active cases of COVID-19 within a 25 mile radius of its printing shop business premises on the date that it closed, I take the view that it would have been appropriate for the Loss Adjuster to have asked the Complainant Company if there had been any such cases, and then invite it to submit proof of same.

I also note that, had it not done so already on 21 March 2020, the Complainant Company would have been required to close its printing shop from 24 March 2020, in any event, when the Government directed the nationwide closure of non-essential retail outlets and services. In this regard, whilst the business interruption losses caused to the Complainant Company no doubt also arose as a result of measures taken by the public authority to limit the spread of COVID-19, the Government direction for the closure of all non-essential retrial outlets and services, is not in itself enough to trigger cover for the Complainant Company under the policy in question, unless it can show the presence of a notifiable disease within 25 miles of its premises.

I am conscious that Section 2 of the S. I. No. 120/2020 - Health Act 1947 (Affected Areas) Order 2020 (7 April 2020) stated:

> *"It is hereby declared that the State (being every area or region thereof) is an area where there is known or thought to be sustained human transmission of COVID-19".*

As a result, this Office takes the view that it is reasonable to conclude that by **7 April 2020**, there was an active case or cases of COVID-19 within a 25 mile radius of every premises nationwide, such as to satisfy the policy criteria specified at clause 3.3.4 c), *"any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises"*.

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Accordingly, it was open to the Complainant Company to submit any such relevant evidence to the Provider to address the period prior to 7 April 2020, to identify the date upon which it believed that policy cover was initially triggered, so that any claim thereby arising could then be assessed. In the absence of such evidence, it was open to the Complainant Company to request the assessment of the claim, with effect instead from 7 April 2020, though I note that as a result of the change in position of the Provider, more recently, the specific date in that regard no longer seems to be in issue.

As a result, I take the view that the Provider's decision to decline the Complainant Company's claim was inappropriate and unfair and that it was unreasonable and unjust within the meaning of ***Section 60(2)(b***) of the ***Financial Services and Pensions Ombudsman Act 2017,*** because the policy criteria considered and assessed by the Provider were incorrect, in the context of the particular claim which the Complainant Company sought to make. There is no evidence available of any assessment of the claim by the Provider on the basis of whether there was an active case or cases of COVID-19 within 25 miles of the Complainant Company's business premises on 21 March 2020, or within the period immediately thereafter.

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

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

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

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

I am mindful too of the Provider's regulatory obligation under the Central Bank of Ireland's Consumer Protection Code, to act honestly, fairly and professionally in the best interests of its customers in its dealings with them. I take the view that in this instance, the Provider did not act fairly in its dealings with the Complainant Company in the assessment of the claim for benefit payment, made by the Complainant Company under its insurance policy on 1 May 2020.

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Accordingly, having considered the matter at length, and for the reasons outlined above, it is my Preliminary Decision, on the evidence before me that it is appropriate to uphold the complaint against the Provider, that it wrongfully or unfairly declined to admit and pay, or at least to accurately assess, the Complainant Company's claim for business interruption losses, incurred as a result of the temporary closure of its business premises due to the outbreak of COVID-19.

This Office is of the opinion that the Provider acted wrongfully in failing to recognise that the Complainant potentially met the criteria for cover specified at clause 3.3.4 c) of the policy, regardless of whether its losses were concurrently caused by other consequences of the presence elsewhere of COVID-19. As a result, I take the view that the Provider's decision to decline the Complainant Company's claim was inappropriate and unfair and that it was unreasonable and unjust within the meaning of ***Section 60(2)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017***.

Whilst more recently the Provider has indicated that it will now admit the claim for payment of benefit, the delay of 8 months in the Provider accepting that the claim should be paid has, in my opinion, led to very considerable inconvenience for the Complainant Company, during a period when it was no doubt under significant financial pressure.

In a matter such as this, I would consider it appropriate to direct the Provider to rectify the conduct complained of by assessing the Complainant Company's claim for business interruption losses with effect from **21 March 2020**, for calculation of the benefit payment to be made, in accordance with the terms of the policy. I note however that in February 2021, the Provider wrote to the Complainant confirming that arising from the decision of Mr. Justice McDonald that I have referred to above, it was now admitting the Complainant Company's claim in principle, subject to validation. It seems in that regard, that the claim assessment has since been proceeding in accordance with the usual processes, though regrettably for the Complainant this, in my opinion, is many months after the Provider ought to have correctly assessed the claim for payment in accordance with the clear wording of the policy provisions which are quoted above.

I am mindful of the fact that this claim was made to the Provider in **May 2020**, and that the full assessment of the claim will take additional time to finalise. Noting that the Complainant Company was insured at the relevant time with the Provider under the particular "business interruption" peril for a maximum figure per claim of **€18,000** (being 15% of the total business interruption sum of €120,000 insured), if the claim has not now been finalised I consider it appropriate to direct the Provider to make an advance payment of policy benefits to the Complainant Company of **€12,000**, pending the final calculation of the total benefit payable once the claim is fully assessed.

I also intend to direct the Provider to make an additional compensatory payment of **€4,000** to the Complainant Company. This direction is separate from the policy benefits payable and is to compensate the Complainant Company for the tremendous inconvenience it has encountered throughout a very difficult period, as a result of the Provider's disappointing approach to this claim, and its unsatisfactory, unreasonable and unjust failure to recognise the claim as one which was clearly covered by the plain meaning of the policy wording.

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Conclusion

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is upheld on the grounds prescribed in ***Section 60(2)(b) and (g).***

- Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** if the claim assessment process has not already been finalised, I direct the Respondent Provider to rectify the conduct complained of by making an advance payment of policy benefits to the Complainant Company, in the sum of **€12,000**, pending the conclusion of that assessment process to calculate the final benefit figure payable by the Provider. I also direct the provider to make a compensatory payment to the Complainant Company in the sum of **€4,000**, to an account of the Complainant Company's choosing, within a period of 35 days of the nomination of account details by the Complainant Company to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

- The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

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

10 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.