An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0184
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 Complainants, trading as a public house, held a commercial combined insurance policy with the Provider.

The Complainants' Case

Following discussions with the Licensed Vintners Association and the Vintners Federation of Ireland, the government called on all public houses and bars in the Republic of Ireland to temporarily close from **15 March 2020**.

As a result, the Complainants' Broker notified the Provider by email on 19 March 2020 of a claim for business interruption losses as a result of the temporary closure of the Complainants' public house on **15 March 2020** for a period, as follows:

> *"This pub has closed in…*[location] *and within 25 miles of the Regional Hospital* [location] *where 14 cases were confirmed"*.

In making such a claim, the Complainants rely 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 Complainants' Broker on **7 May 2020** and to the Complainants themselves on **25 May 2020** to advise that it was declining indemnity in this matter as it had concluded that the Complainants' losses did not fall within the scope of cover provided by the relevant infectious disease extension policy wording.

The Complainants telephoned the Provider on **26 May 2020** to complain about its decision. Following the completion of its review, the Provider emailed the Complainants on **15 June 2020** to advise that it was upholding its decision to decline indemnity.

In this regard, the Complainants set out their complaint in the **Complaint Form** they completed, as follows:

"On the 15th of March [2020] *the government announced that all pubs would have to close down because of COVID-19. I did this and checked my insurance policy and saw that I was covered for business interruption and for diseases within a radius of twenty five miles. There were plenty of cases in our area so I don't understand why they are refusing to pay my claim. I am in this business forty years and this is my first time having a claim from my insurance".*

The Complainants advised at that time, that they sought for the Provider to admit their claim for business interruption losses as a result of the temporary closure of their public house on 15 March 2020 for a period, due to the outbreak of coronavirus (COVID-19) and in that regard, the Complainants advise:

"I am out of business now for four months and the financial loss has been huge, I need this money to get started and cover costs to get back to where I was before all this happened".

The Complainants' complaint is that the Provider wrongfully or unfairly declined to admit and pay the Complainants' claim for business interruption losses as a result of the temporary closure of their public house in March 2020, due to the outbreak of coronavirus (COVID-19).

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The Provider's Case

The Provider says that the Complainants, who held a commercial combined insurance policy, submitted a claim on 19 March 2020 for business interruption losses as a result of the temporary closure of their public house from 15 March 2020.

In order to assist and to provide context, the Provider 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 Complainants' 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.

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, crèches, 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. The Complainants closed their public house.

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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.

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;

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.

8 April 2020: An Garda Síochána were 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:

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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

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 whether and when the Complainants reopened their public house.

Against this background, the Provider was notified by the Complainants' Broker by email on 19 March 2020 of a claim for business interruption losses as a result of the temporary closure of their public house on 15 March 2020 for a period, as follows:

> *"This pub has closed in…*[location] *and within 25 miles of the Regional Hospital* [location] *where 14 cases were confirmed"*.

The Provider-appointed Loss Adjuster telephoned the Complainants' Broker on **31 March 2020** and obtained further details regarding the claim.

The Provider says that following its assessment, the Loss Adjuster wrote to the Complainants' Broker on **7 May 2020** and to the Complainants themselves on **25 May 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:

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"I note that on the 15th March 2020, [the Complainants] *ceased trading following a directive from the Government to close all Public Houses and that the reason for closure of your business was a direct result of Government stipulations. 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 …*

As we understand it, your claim is based upon the economic effects that the Covid-19 situation has had on your business. 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 …

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 …

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 …

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> *Having carefully considered* [the Complainants'] *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"*.

The Provider says that the Complainants telephoned on **26 May 2020** to complain about its decision, a complaint the Provider acknowledged in writing on 28 May 2020.

Following its review, the Provider issued a final response letter to the Complainants on **15 June 2020**, detailing how the losses they 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 Complainants] *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 of 7th May 2020 detailed the findings of the review, which confirmed we had correctly interpreted the wording and that on this occasion the losses* [the Complainants] *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 Provider noted that the Complainants completed a FSPO Complaint Form on **29 June 2020** when they advised:

> *"On the 15th of March* [2020] *the government announced that all pubs would have to close down because of COVID-19. I did this and checked my insurance policy and saw that I was covered for business interruption and for diseases within a radius of twenty five miles. There were plenty of cases in our area so I don't understand why they are refusing to pay my claim. I am in this business forty years and this is my first time having a claim from my insurance"*.

The Provider says that the relevant extension in the 'Business Interruption' section of the Complainants' 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:*

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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".

The Provider notes 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 Provider says that the infectious disease extension provides cover for losses resulting from:

(i) 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;

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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 (twenty-five 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 *"the incident"*.

(iv)

The Provider says that (i)-(iii) above constitute the insured peril which must proximately cause the financial losses claimed by the Complainants. If proved, the maximum recoverable by the Complainants under the business interruption infectious disease extension is **€3,750**, this being 15% of the business interruption sum insured (€25,000).

The Provider says the key question concerns when business interruption can be said to be *"in consequence of"* occurrences of COVID-19 within a 25 mile radius of the insured premises and it asks:

(i) is it enough that there simply happen to be such occurrences within the radius, which thereby act as the trigger for cover of any COVID-19-related interruption suffered (whether or not directly due to those occurrences within the radius)?; or

(ii) is it required that those occurrences within the radius must be the specific proximate cause of the interruption, in the sense that but for those occurrences, no interruption would be suffered? So, if the interruption would have occurred in any event, irrespective of the local occurrences with the 25 mile radius, is it that there is then no cover?

When the Provider originally sent its formal response to the investigation of this Office, it noted that this exact question, on the exact clause *"c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises)* wording, was 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 noted that the wording of its infectious disease business interruption extension that was under consideration before the English High Court in the FCA Test Case was identical to the wording of the business interruption extension 3.3.4 'Infectious diseases/murder or suicide' contained in the Complainants' commercial combined insurance policy.

In this regard, in **October 2020**, when the Provider responded to the formal investigation by this Office, it noted that the English High Court stated in the FCA Test Case, as follows:

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"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".

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 miles radius]*".*

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The Provider maintained that the effect of this extract from the FCA Test Case – and the effect of the infectious disease extension as a matter of Irish law even without reference to that decision – was that:

(i) the Complainants in the present case will only be able to recover under clause (c) of the infectious disease 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 they can show that the business interruption has been proximately caused by the specific occurrence(s) of the disease within the 25 mile radius (being the relevant *"event"* and insured peril);

(ii) this is entirely 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, therefore a two-step test must thus be undertaken:

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* [Complainants'] *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, or government order to close that would have been imposed whether or not there were local incidents within the 25 mile radius), then the incidents of COVID-19 within 25 miles (being the Insured Peril) did not cause the interruption and losses, such that those losses are not covered;

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ii. alternatively, if it can be said that "but for" 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 Complainants, i.e. "but for" the local 25 mile COVID-19 event the business interruption losses would not have occurred, the losses will be covered.

The Provider said that as these tests were not satisfied in the present matter, the Complainants' ensuing losses from the business interruption that occurred on and after 15 March 2020 when they were requested to close by the government, were not recoverable, as follows:

(i) The government-requested closure interruption was not *"in consequence of"* (that is, proximately caused by) the insured peril, 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 case, 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…."*

(ii) As the losses experienced by the Complainants on and after 15 March 2020 were in consequence of a government direction introduced as a national response to reduce the national spread of the virus (which is an uninsured peril), and were not a local response to the Complainants' specific 25 mile radius event (which is the insured peril), 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 direction".*

In this regard, the Provider accepted that the government request to the Complainants and other publicans to close their pub businesses on 15 March 2020 amounted to a direction to do so. However, for the reasons set out extensively above, the Provider maintained that this government direction was not imposed *"in consequence of"* (i.e. was not proximately caused by) the relevant insured peril of a local occurrence/incident/event of an infectious notifiable disease within a radius of 25 miles of the Complainants' premises, but rather was a direction that would have issued in any event, irrespective of the position within that local radius, and as such the losses due to the closure direction are not covered, as they would have been suffered in any case.

The Provider therefore concluded that the Complainants' 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 declined indemnity in this matter, in accordance with the terms and conditions of the Complainants' commercial combined insurance policy.

This Office noted that the UK Supreme Court subsequently in January 2021 delivered Judgment in the appeal of *FCA v Arch Insurance (UK) Limited & Ors.* and thereafter, on **24 February 2021** the Provider wrote to the policyholder referring to other litigation in Dublin and to a Judgment of the High Court on 5 February 2021. The Provider advised that although the terms of its policy were not before the Court in that matter, various aspects of the court decision had provider welcome clarity regarding the operation of cover.

As a result, the Provider advised at that juncture that it was pleased to confirm that policy cover for the Complainants' claim was admitted in principle, subject to validation to be undertaken.

The Complaint for Adjudication

The complaint is that the Provider wrongfully or unfairly declined to admit and pay the Complainants' claim for business interruption losses as a result of the temporary closure of their public house in March 2020 due to the outbreak of coronavirus (COVID-19).

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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 Complainants were 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 Complainants, who held a commercial combined insurance policy with the Provider, closed their public house on 15 March 2020, following a government direction to do so. In this regard, I note the Press Release on 15 March 2020 from the Department of An Taoiseach 'All pubs advised to close until March 29' (available at https://www.gov.ie/en/press-release/20fc58-all-pubs-advised-to-close-until-march-29/), as follows:

> *"Following discussions today with the Licenced Vintners Association (LVA) and the Vintners Federation of Ireland (VFI), the government is now calling on all public houses and bars (including hotel bars) to close from this evening (Sunday 15 March) until at least 29 March.*
>
> *The LVA and VFI outlined the real difficulty in implementing the published Guidelines on Social Distancing in a public house setting, as pubs are specifically designed to promote social interaction in a situation where alcohol reduces personal inhibitions.*
>
> *For the same reason, the government is also calling on all members of the public not to organise or participate in any parties in private houses or other venues which would put other peoples' health at risk.*

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The government, having consulted with the Chief Medical Officer, believes that this is an essential public health measure given the reports of reckless behaviour by some members of the public in certain pubs last night.

While the government acknowledges that the majority of the public and pub owners are behaving responsibly, it believes it is important that all pubs are closed in advance of St. Patrick's Day.

The Licenced Vintners Association (LVA) and the Vintners Federation of Ireland (VFI) both supported this decision and urged all their members to close in line with the government's request.

The government and the LVA and VFI also discussed the support measures for businesses and their staff affected by the COVID-19 crisis which have been put in place last week.

The government will continue to monitor the situation, including the compliance of all pubs with this request, as well as any further or different measures which might be required in the future.

The effectiveness of the Guidelines on Social Distancing in other parts of the hospitality and leisure industry, for example restaurants and cinemas, will also be kept under review and subject to further consultation with stakeholders in the coming days".

As a result, the Complainants' Broker notified the Provider by email on **19 March 2020** of a claim for business interruption losses, as a result of the temporary closure of the Complainants' public house from 15 March 2020.

I note that following its claim assessment, the Provider wrote to the Complainants' Broker on 7 May 2020 and to the Complainants themselves on 25 May 2020 to advise that it was declining indemnity as it had concluded that the Complainants' losses did not fall within the scope of cover provided by the relevant infectious disease extension policy wording, a decision it upheld upon review in its letter of 15 June 2020. I note that the Complainants' Broker stated in the claim notification email to the Provider on 19 March 2020 that:

> *"*[The Complainants'] *pub has closed in…* [location] *and within 25 miles of the Regional Hospital* [location] *where 14 cases were confirmed"*.

In addition, I note that the Complainants stated in the Complaint Form they completed that:

> *"On the 15th of March* [2020] *the government announced that all pubs would have to close down because of COVID-19. I did this and checked my insurance policy and saw that I was covered for business interruption and for diseases within a radius of twenty five miles. There were plenty of cases in our area so I don't understand why they are refusing to pay my claim"*.

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Notwithstanding the Government direction on 15 March 2020 requesting all public houses and bars in the Republic of Ireland to temporarily close from that date, I am mindful that the Complainants, in making its business interruption claim to the Provider, were relying upon the presence of active COVID-19 cases within a 25 mile radius of its public house.

I note Extension 3.3.4, 'Infectious diseases/murder or suicide', of the 'Business Interruption' section at pg. 27 of the Commercial Combined Insurance Policy Document states:

> *"**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 Complainants' Schedule of Insurance with the Provider for the period from 9 April 2019 to 8 April 2020 states:

"BUSINESS INTERRUPTION INSURED

Indemnity Period: 12 months €25,000".

Since the preliminary decision of this Office was issued, the Complainants have queried why the benefit recoverable is limited to €3,750, rather than €25,000.

As noted above, the relevant policy provisions prescribe that:

> ***"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"*

I am satisfied therefore that, in the event of a valid claim, the maximum recoverable by the Complainants under the business interruption infectious disease extension for any one claim was **€3,750**, that is, 15% of the total business interruption sum insured of €25,000.

I am conscious of the Provider's original position as outlined in its Complaint Response to this Office of 22 October 2020, that:

> *"… for proximate cause purposes, therefore a two-step test must thus be undertaken:*
>
> *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 [Complainants'] 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 (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" 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;*

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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 Complainants, i.e. "but for" the local 25 mile COVID-19 event the* [business interruption] *losses would not have occurred, the losses will be covered.*

These tests are not satisfied in the present matter …
Regarding the Complainants' business interruption that occurred on and after 15 March 2020 when they were requested to close by the government, their ensuing losses are…not recoverable;

This is because that government-requested closure interruption was not "in consequence of" (i.e. proximately caused by) the Insured Peril, being the local "event" of "occurrences of a [COVID-19] within [the 25 mile radius]". It cannot be stated that "but for" the local occurrences, the closure order would not have been imposed: it would have been imposed in any case, due to the separate uninsured events of COVID-19 elsewhere in the country …

As the Post-15 March [2020] *Losses were in consequence of a government direction introduced as a national response to reduce the national spread of the virus (which is an uninsured peril) - not as a local response to the Complainants' specific 25 mile radius event (which is the Insured Peril), clause* [3.3.4] *(c) of the* [Infectious Disease] *Extension is not triggered".*

More specifically, I note the Provider's position was that:

"… It cannot be stated that "but for" the local occurrences, the [government] *closure order would not have been imposed: it would have been imposed in any case,* ***due to the separate uninsured events of COVID-19 elsewhere in the country*** *…"*

[Emphasis added]

In its detailed chronology of the material facts relevant to, and measures taken in respect of, the COVID-19 pandemic in Ireland, I note that the Provider advised that on 14 March 2020, the date prior to the Complainants closing their public house, there were 129 confirmed cases of COVID-19 in the country.

In that context, I have examined the specific policy wording relevant to the Complainants' 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:

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"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 examined the matter in detail, I am of the opinion 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 COVID-19 within 25 miles of the Complainants' 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 Complainants' 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. 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.

In this regard, I am of the opinion 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 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 - in this case, the Government direction on 15 March 2020 requesting all public houses and bars in the Republic of Ireland to temporarily close from that date - it does not follow from the policy provisions that the interference with or interruption to the policyholder's business, is not thereby covered.

That said, I accept the Provider's position that it was 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.

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

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

> *"**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"*.

In this regard, I note 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, or 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. I note that the aforesaid Department of An Taoiseach 'All pubs advised to close until March 29' press release of 15 March 2020 stated that:

> *"Following discussions today with the Licenced Vintners Association (LVA) and the Vintners Federation of Ireland (VFI), the government is now calling on all public*

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houses and bars (including hotel bars) to close from this evening (Sunday 15 March) until at least 29 March.

The LVA and VFI outlined the real difficulty in implementing the published Guidelines on Social Distancing in a public house setting, as pubs are specifically designed to promote social interaction in a situation where alcohol reduces personal inhibitions.

For the same reason, the government is also calling on all members of the public not to organise or participate in any parties in private houses or other venues which would put other peoples' health at risk.

The government, having consulted with the Chief Medical Officer, believes that this is an essential public health measure given the reports of reckless behaviour by some members of the public in certain pubs last night".

It is understood that this Government direction for all public houses and bars nationwide to close from 15 March 2020, was made in response to the inevitable difficulties of ensuring that those patrons and staff in such premises would at all times abide by the social distancing measures introduced by the Government in March 2020 due to the outbreak across Ireland, of the notifiable disease of COVID-19.

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, where the Complainants furnish 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 Complainants' business premises, in and around the time it closed its business premises from 15 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 measures directed by the Government, in response, gave rise to the Complainants experiencing business interference losses.

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As it is with all insurance claims, it was a matter for the Complainants, as the policyholder, to supply 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 premises when it closed the premises from 15 March 2020, in support of its claim.

I note from the documentary evidence before me, the Provider-appointed Loss Adjuster's handwritten notes dated 31 March 2020, as follows:

> *"… closed on Sunday 15/3/20 after government advice to close all pubs – closed earlier than normal*
>
> *normal trading hours for licenced premises*
> *no staff, only family*
>
> *premises trading normally prior to government announcement*
>
> *not aware of any family member, staff or customer testing positive at 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"*.

As a result, and given that it was clear that the Complainants themselves were, in making their business interruption claim, seeking to rely upon the presence of active COVID-19 cases within a 25 mile radius of their public house, 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 Complainants themselves to establish that as a matter of fact, there were active cases of COVID-19 within a 25 mile radius of their public house on the date that it closed, I take the view that it would have been appropriate for the Loss Adjuster to have asked the Complainants and/or their Broker during its interview with them in March 2020, if there were any such cases, and to then invite them to submit proof of same.

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 Complainants to submit any such relevant evidence to the Provider to address the period prior to 7 April 2020, to identify the date upon which they 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 Complainants to request the assessment of the claim, with effect instead from 7 April 2020.

As a result, I take the view that the Provider's decision to decline the Complainants' 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 Complainants 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 Complainants' business premises on 15 March 2020.

I note that since the preliminary decision was issued by this Office, the Provider has suggested that:

> *" the more appropriate basis for the FSPO's Preliminary Decision –which, as above, is accepted by [the Provider] – is section 60(2)(e) of the Financial Services and Pensions Ombudsman Act 2017 i.e. that the declinature conduct complained of was based wholly or partly on a mistake of law or fact."*

I accept the Provider's submission that it may be appropriate to also uphold the complaint on that separate ground.

In considering this complaint, I have been cognisant of the provisions of the Financial Services and Pensions Ombudsman Act 2017, hereinafter '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 have also been 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:

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> *"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 Complainants in the assessment of the claim for benefit payment, made by the Complainants under their insurance policy.

Accordingly, having considered the matter at length, and for the reasons outlined above, I consider it appropriate on the evidence before me to uphold the complaint against the Provider, that it wrongfully or unfairly declined to admit and pay the Complainants' claim for business interruption losses, incurred as a result of the temporary closure of its business premises in March 2020, due to the outbreak of COVID-19.

This Office is of the opinion that the Provider acted wrongfully in failing to recognise that the Complainants 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 Complainants' 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***.

In a matter such as this, I would usually direct the Provider to rectify the conduct complained of by admitting the Complainants' claim for business interruption losses with effect from **15 March 2020**, for assessment 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 Complainants confirming that arising from the decision of Mr. Justice McDonald that I have referred to above, it was now admitting the Complainants' claim in principle, subject to validation. It seems in that regard, that the claim assessment has been proceeding, though regrettably for the Complainants, this happened many months after the Provider ought to have more accurately assessed the claim, in accordance with the clear wording of the policy provisions, which are quoted above.

Such delay of effectively a year, before the Provider accepted that the claim should be paid has, in my opinion, led to very considerable inconvenience for the Complainants, during a period when they were no doubt under significant financial pressure. Accordingly, I consider it appropriate to direct the Provider to make an additional compensatory payment of **€1,250** to the Complainants. This direction is to compensate the Complainants for the tremendous inconvenience they have 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 potentially covered by the plain meaning of the policy wording, subject to the receipt of the required proof.

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I note the Provider's submission of 16 April 2021, confirmed that it was endeavouring to discharge the policy benefit payment for the claim, to the Complainants, in the sum of **€3,750** (being 15% of the total business interruption sum of €25,000 insured). On 5 May 2021 it confirmed that it was agreeable to making that payment, and the compensatory payment which had been indicated in the preliminary decision of this Office, but it remains unclear whether those monies have yet been paid.

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) (e) and (g).***

- Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to rectify the conduct complained of by making payment to the Complainants of €3750, in respect of policy benefits payable for the Complainants' claim under the policy, if that payment has not already been made. I also direct the Provider to make an additional payment in compensation to the Complainants in the sum of €1,250, to be paid to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants 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

11 June 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.