



**Decision Ref:** 2021-0186

**Sector:** Insurance

**Product / Service:** Service

**Conduct(s) complained of:** Rejection of claim

**Outcome:** Rejected

### **LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

The Complainants, a partnership practicing as a firm of solicitors, held a commercial insurance policy with the Provider.

#### **The Complainants' Case**

The Complainants notified the Provider in **April 2020** of a claim for business interruption losses as a result of the temporary closure of their practice on **27 March 2020** for a period, due to the outbreak of coronavirus (Covid-19).

Following its assessment, the Provider wrote to the Complainants' Broker on **3 June 2020** to advise that it had declined the Complainants' claim, as follows:

*"As you are aware, the Business Interruption section of the Policy is set out in Section 2(b).*

*The definition of DAMAGE is extended to include for section 2(b) only:-*

*"1(a) an outbreak of any NOTIFIABLE DISEASE occurring at the Premises or which is attributable to food or drink supplied from the PREMISES."*

*NOTIFIABLE DISEASE is defined as:-*

*"Illness sustained by any person resulting from:-*

- food or drink poisoning*

- *any human infectious or human contagious disease [excluding Acquired Immune Deficiency Syndrome (AIDS)], an outbreak of which the competent local authority has stipulated must be notified to them.”*

*The loss insured is set out in Section 2(b) under the heading “WHAT IS INSURED”. As is clear therefrom, for any loss to fall within cover, it must result from DAMAGE by an insured cause.*

*We have carefully considered the Policy and do not consider that the claim is covered. In particular, we are satisfied that the claim is not covered for the following reasons, each of which apply independently of each other:-*

- 1. The closure of the Premises was not “as a result” of an outbreak of any NOTIFIABLE DISEASE occurring at the Premises. The closure arose from preventative measures taken by the Government, arising from national considerations due to the global pandemic including in particular, social distancing measures.*
- 2. Any loss which has occurred, has occurred as a result of the consequences of the pandemic and in particular the requirements of social distancing, including the restrictions on the gathering of persons, travel restrictions, requirements for remote working and the economic slowdown and has not occurred as a result of an outbreak of a NOTIFIABLE DISEASE occurring at the Premises.*
- 3. It is clear that the agreement to indemnify in respect of the risk specified Section 2(b) Clause 1(a) is provided only where the business interruption loss has been caused by the matters specified at Clause 1(a). Having regard to the Government directions as regards social distancing, including restrictions on travel and the widespread public concern regarding the risks of infection and the economic slowdown, any business interruption loss has been caused by such social practices and public health concerns and not by the matters specified at Clause 1(a). ...”*

The Complainants made a complaint in respect of the Provider’s decision to decline their claim around **2 September 2020**. Following a review of their complaint, the Provider wrote to the Complainants on **21 September 2020** advising that its decision to decline the claim remained unchanged. In the Complaint Form completed by the Complainants, they set out their complaint, as follows:

*“This firm of Solicitors made a Business Interruption Claim on foot of their Policy [number] for Business Interruption Claim as a result of COVID-19 Pandemic and pursuant to the Office Commercial Insurance Policy. The firm of Solicitors did have Business Interruption Insurance. The Indemnity period is 12 months from the date of the Policy being the 16th of December 2019. The Policy of Insurance is still in existence and the renewal date is December 2020. ...*

*We believe the reasons for declining our claim are not sound in law, in that in the Policy there is no exclusion of the "Pandemic at the premises" same is covered under the "Notifiable Disease". The Contra Proferentum Rule applies and any ambiguity in the said Policy must be read in favour of the Policy Holder."*

As a result, the Complainants want the Provider *"to indemnify us on foot of the Business Interruption claim."*

### **The Provider's Case**

The Provider says the Complainants claim was declined because there was no cover for their loss under the terms of the policy. The policy wording sets out the requirements for cover as follows:

*"The definition of DAMAGE is extended to include...  
1(a) an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES."*

The Provider says that *NOTIFIABLE DISEASE* is defined as:-

*"Illness sustained by any person resulting from:-*

- *Food or drink poisoning*
- *Any human infectious or human contagious disease ...."*

The Provider says the claim was investigated by its appointed Loss Adjusters who met with the Complainants on **22 April 2020**. The Provider says the Complainants advised that it had been decided on grounds of safety to close the practice on **27 March 2020**. The Provider says the Complainants advised that no staff member or customer tested positive for COVID-19 to their knowledge and therefore there was no outbreak occurring at the premises as required under the policy wording.

The Provider states that the claim was declined because cover did not operate and, in the absence of cover operating, the Provider was not relying on any policy exclusion.

### **The Complaint for Adjudication**

The complaint is that the Provider wrongly or unfairly declined the Complainants' claim for business interruption losses as a result of the temporary closure of their practice in March 2020 for a period, due to the outbreak of COVID-19.

## Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The 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 **19 May 2021**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

The Complainants held a commercial insurance office policy with the Provider. The Complainants' policy schedule records that the Complainants held business interruption insurance in the amount of €300,000 during a 12 month indemnity period.

Business interruption insurance is provided for at section 2(b) of the policy which provides the following cover:

*"WE will pay for loss of INCOME occurring during the INDEMNITY PERIOD, resulting from DAMAGE by an insured cause under Section 2(a) to any of the following:*

- *the CONTENTS or glass insured under this section*
- *the BUILDINGS of the PREMISES shown in Schedule.*
- *property in the vicinity of the PREMISES which prevents or hinders the use of the PREMISES or access to it.*

*Provided that:*

- *at the time of the DAMAGE this policy shall be in force covering YOUR interest in the property at the PREMISES against DAMAGE and*
- *a valid claim has been admitted under Section 2(a) of this Policy ...."*

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For the purpose of section 2(b), I note that the definition of DAMAGE is extended, as follows:

*"The definition of DAMAGE is extended to include for this Section 2(b) only:*

1. (a) *an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES.*
- (b) *the discovery of vermin or pests at the PREMISES which causes a competent local authority to restrict the use of the PREMISES*
- (c) *closure of the PREMISES by the appropriate local authority because of defects in the drains or other sanitary arrangements.*
- (d) *murder or suicide occurring at the PREMISES."* [My emphasis]

The term 'NOTIFIABLE DISEASE' is defined, as follows:

*"Illness sustained by any person resulting from:*

- *food or drink poisoning*
- *any human infectious or human contagious disease [excluding Acquired Immune Deficiency Syndrome (AIDS)], an outbreak of which the competent local authority has stipulated must be notified to them."*

I note that in February 2020, the Infectious Diseases (Amendment) Regulations 2020 amended and provided for the inclusion of coronavirus (COVID-19) (SARS-Cov-2) on the list of notifiable diseases contained in the Infectious Disease Regulations 1981. I also note that the Provider does not dispute that COVID-19 is a notifiable disease for the purposes of section 2(b) of the policy. Therefore, in light of the policy definition of notifiable disease, I am satisfied that COVID-19 comes within, and is, a notifiable disease for the purposes of section 2(b) of the policy.

The definition of DAMAGE is extended for the purposes of business interruption claims pursuant to section 2(b) of the policy. This definition extends to include damage under four sub-clauses, 1(a) to (d). For clause 1(a), the outbreak of the notifiable disease must occur *at the PREMISES* or be attributable to food or drink supplied *from the PREMISES*. For clause 1(b), the discovery of vermin or pests must be *at the PREMISES*; clause 1(c) requires the closure of the premises; and clause 1(d) requires murder or suicide to occur *at the PREMISES*. As can be seen, the language used in each of these sub-clauses is premises specific.

In this respect, the policy schedule identifies the 'Risk Address' as the Complainants' office/business premises and the language used in defining the term premises (and related terms) is very specific and confined to the buildings and grounds comprising the Risk Address. For instance, 'PREMISES' is defined as: *"The Buildings and the land within the boundaries belonging to them."*

*I further note that 'BUILDINGS' is defined as:*

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*“... the structure of the Office, including all OUTBUILDINGS, at the PREMISES and includes:*

- (a) landlord’s fixtures and fittings therein and thereon*
- (b) walls gates and fences*
- (c) car parks yards and pavements*
- (d) telephone gas water and electric installations ...*
- (e) foundations*
- (f) drains and sewers within the perimeter of the PREMISES ....”*

*“OUTBUILDINGS” is defined as: “... BUILDINGS other than the main Office, which are not accessible to the public.”*

In my opinion, giving the words of the definition of “DAMAGE” at section 2(b), their plain and ordinary meaning, reasonably interpreted, clause 1(a) requires there to be an outbreak of a notifiable disease (i.e. COVID-19) actually and specifically at the Complainants’ premises, being their office or outbuildings, in order to trigger cover under section 2(b) of the policy in respect of business interruption losses arising from COVID-19.

In reaching this conclusion, I note the following passages from the judgment of McDonald J. in the recent High Court case of ***Brushfield Limited (T/A The Clarence Hotel) v Arachas Corporate Brokers Limited and AXA Insurance Designated Activity Company*** [2021] IEHC 263, where he made certain remarks regarding an *at the premises* requirement contained in a clause somewhat similar to 1(c) above:

*“167. ... Those words “at the premises” are also to be found in paras. 2 and 3 of the MSDE [Murder, Suicide or Disease] clause where they are clearly used in a premises specific sense. The inclusion of the word’s “at the premises” strongly suggest to me that the relevant closure must be prompted by a specific defect in the drains or other sanitary arrangements at the premises in question and not as a consequence of concerns about the way in which public bars or hotels are run generally or their ability to contribute to the spread of COVID-19. In turn, it seems to me to follow that the order of the public authority envisaged by para. 5 is an order directed at the particular defect found at the premises. This suggests that the order will be a premises specific one.*

*168. For all of these reasons, I have come to the conclusion that para. 5 of the MSDE clause will only apply where there is a specific order of a public authority requiring closure of all or part of the premises as a result of a defect in the drains or other sanitary arrangements at the premises.”*

The Complainants completed a claim form dated **20 April 2020**. The claim form stated the date of loss as **27 March 2020** and the ‘Cause of Loss/Damage’ as *“COVID-19 Corona Virus”*. In the ‘Detail Circumstances’ section of the claim form, the following information was provided:

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*“Claim on foot of COVID-19/corona virus pandemic pursuant to office commercial insurance policy”.*

The Provider retained a Loss Adjuster to assess the Complainant’s claim. The Loss Adjuster prepared a report dated **5 May 2020** which states that a meeting took place with the Complainants on **22 April 2020**. Regarding the presence of COVID-19 at the Complainants’ premises, I note the following passages from this report:

***“Circumstances of Claim:***

*[The Complainants] advised that they decided on grounds of safety to close their practice on 27 March 2020. In addition, they advised that the courts were restricting work and it was no longer safe for clients to visit the office. Staff were immediately let go and the business has remained closed with no turnover since then. ...*

***Interruption Features:***

***Business interruption Sum Insured: €300,000***

*The Insured advised that no staff member or customer has tested positive for Covid-19 to their knowledge. However, to date there have been over [number redacted] confirmed cases of COVID-19 in the [Complainants’] region. The practice closed on 27 March 2020. ...*

***Policy Terms & Conditions***

*The Insured advises as far as they are aware none of their staff or clients had COVID-19 and that there was no outbreak of COVID-19 at the premises. ...”*

On the basis of the evidence, I am satisfied that the reason for the closure of the Complainants’ practice in March 2020, was safety concerns associated with COVID-19 and not an outbreak of COVID-19 *at the premises*. It is also clear that there is no evidence of an outbreak or any instance of COVID-19 having occurred at the Complainants’ premises and, as a result, I am satisfied that cover pursuant to section 2(b) was not triggered.

While I appreciate that the Complainants have very likely suffered significant disruption to their practice as a result of COVID-19 and that my decision will come as a disappointment, I am satisfied that the Provider was entitled to decline their claim for business interruption losses, because cover under clause 2(b) of the policy was not triggered.

**Conclusion**

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017** is that this complaint is rejected.

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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.