



<u>Decision Ref:</u>	2021-0187
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Retail
<u>Conduct(s) complained of:</u>	Rejection of claim Claim handling delays or issues
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a sole trader trading primarily as a bakery, cake and craft shop, held a business insurance policy with the Provider.

The Complainant's Case

The Complainant notified the Provider on **2 April 2020** of a claim for business interruption losses as a result of the temporary closure of her shop on **29 March 2020** for a period due to the outbreak of coronavirus (Covid-19).

Following its assessment, the Provider wrote to the Complainant on **7 April 2020** to advise that it had declined her claim, as follows:

“As you are aware, “The Cover” provided by the Policy for consequential loss, insofar as relevant to your claim, is as follows:

- 1. Section 2 of the Policy provides cover for business interruption. “Business Interruption” is defined as “Interruption of or interference with the **business** carried on by the Insured at the **premises** in consequence of **damage** to property used by the Insured at the **premises** for the purpose of the **business**.”¹*
- 2. The Policy specifies a number of additional extensions that apply to section 2 business interruption cover, one of which at clause H (“**the clause**”) provides:-*

*“This extension provides cover against **business interruption** resulting from the following.*

- 1. A case or cases of any of the notifiable diseases (as listed below) at the **premises**, or caused by food or drink supplied from the **premises**.*
- 2. Any organism likely to cause a notifiable disease (as listed below) being discovered at the premises.*
- 3. Murder or suicide at the premises.*

Notifiable diseases

<i>Acute encephalitis</i>	<i>Diphtheria</i>	<i>Measles</i>	<i>Smallpox</i>
<i>Acute poliomyelitis</i>	<i>Dysentery</i>	<i>Meningitis</i>	<i>Tetanus</i>
<i>Anthrax</i>	<i>Legionellosis</i>	<i>Mumps</i>	<i>Tuberculosis</i>
<i>Bubonic or pneumonic plague</i>	<i>Legionnaires’ disease</i>	<i>Paratyphoid fever</i>	<i>Typhoid fever</i>
<i>Chickenpox</i>	<i>Leprosy</i>	<i>Rabies</i>	<i>Viral hepatitis</i>
<i>Cholera</i>	<i>Leptospirosis</i>	<i>Rubella</i>	<i>Whooping cough</i>
<i>Conjunctivitis</i>	<i>Malaria</i>	<i>Scarlet fever</i>	<i>Yellow fever</i>

- 3. [The Provider] have carefully considered your claim and do not consider that the claim falls within cover under the Policy. In particular, [the Provider] is satisfied that the claim notified is not covered for the following reasons, each of which apply independently of each other.*
 - 3.1 The definition of notifiable diseases covered by the extension does not include Covid-19. Accordingly, it cannot be said on any view that business interruption has resulted from any of the matters specified at 1, 2 or 3.*
 - 3.2 The extended business interruption cover is specifically limited by reference to the insured property. In particular, the relevant sub clauses which relate to notifiable diseases require that the notifiable disease should be at the premises or be caused by food or drink supplied from the premises or result from an organism likely to cause a notifiable disease “being discovered at the premises”. None of these events occurred and accordingly, it cannot be said on any view that business interruption has resulted from any of the matters specified at 1, 2 or 3.*
 - 3.3 It is clear that the agreement to indemnify in respect of the risks at 1, 2 or 3 is provided only where the business interruption has been caused by the matters specified at 1, 2 or 3. It is quite clear having regard, inter alia, to social distancing practices ... and the widespread public concern regarding the risk of infection, any business interruption loss has been caused by such social practices and public concerns and not by the matters at 1, 2 or 3.”*

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The Complainant made a complaint to the Provider in **June 2020** by telephone regarding its decision to decline indemnity and she also raised the matter of cover for loss of stock. Following its review of the complaint, the Provider wrote to the Complainant on **29 June 2020**, affirming its decision to decline indemnity, as follows:

“[The Provider] have carefully considered your claim and do not consider that the claim falls within cover under the Policy. In particular, [the Provider] is satisfied that the claim notified is not covered for the following reasons, each of which apply independently of each other:

1. Cover for loss of gross profit only applies following damage caused to the property used in connection with the Insured’s business by any of the perils insured under Section 1(a) Buildings, Trade Contents, Stock of the policy. Business interruption cover for loss of gross profit becomes operative upon a payment made or liability admitted under Section 1(a) of the policy.

2. The definition of notifiable diseases covered by the extension does not include Covid-19.

3. The extended business interruption cover is specifically limited by reference to the insured property. In particular, the relevant sub clauses which relate to notifiable diseases require that the notifiable disease should be at the premises or be caused by food or drink supplied from the premises or result from an organism likely to cause a notifiable disease “being discovered at the premises”. None of these events occurred and accordingly it cannot be said that business interruption has resulted from any of the matters covered by the Policy in response to the claim notified by you.

4. It is clear that the agreement to indemnify in respect of the risks as outlined above is provided only where the business interruption loss has been caused by the risks outlined. It is quite clear having regard to social distancing practices, the Government direction for people to stay indoors and the widespread public concern regarding the risk of infection, any business interruption loss has been caused by such social practices, Government directions and public concerns and not by the matters covered by the Policy.

... Please note that in order to make a claim for stock the damage to same must be as a result of an insured peril, as per policy wording below. ...

[Section 1(a)]

Given your stock was not damaged as a result of an insured peril I have no option but to decline any claim being made for same. ...”

The Complainant set out her complaint in the Complaint Form, as follows:

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"I have Business interruption cover on my policy and [the Provider] have refused to pay out on this cover due to Covid 19 not being on their list of diseases."

The Complainant seeks for the Provider to admit her claim for business interruption losses arising from the outbreak of Covid-19, as follows:

"I would like [the Provider] to pay out on the product I purchased as when I purchased my insurance I ask to be universal due to climate change and recent events. I believed I was paying I higher premium for the ultimate cover."

The Provider's Case

The Provider explains that as notified by the Complainant, she closed her business on **29 March 2020** as a result of the Covid-19 pandemic. The Provider says that business interruption is only covered under the policy in certain defined circumstances – none of which include closure or interruption as a result of Covid-19. In broad terms, the Provider says there are four distinct reasons why the claim was declined. These are as follows:

1. The claim did not come within the terms of business interruption cover as set out in section 2 of the policy.
2. Covid-19 is not a *notifiable disease* for the purpose of the infectious diseases extension in section 2 of the policy.
3. The infectious diseases extension only covers business interruption arising from the presence of a disease on the premises or caused by food or drink from the premises.
4. The losses suffered by the business were caused by reason of social practices, government directions and public concern – none of which are matters covered by the policy.

The Provider says that each of these points are expanded upon and set out in greater detail below.

Business Interruption Cover

The Provider says that business interruption is defined in section 2 of the policy, as follows:

"Business interruption

Interruption of or interference with the business carried on by the Insured at the premises in consequence of damage to property used by the Insured at the premises for the purpose of the business."

As is apparent from this definition, the Provider submits, cover is only provided in circumstances where the business is interrupted as a result of damage to the property.

This is repeated under the heading *cover* where the policy provides:

*“The Company will indemnify the Insured for the amount of loss against each item insured shown in the schedule, in the manner and to the extent as described under ‘Basis of settlement’ below, following **damage** caused to property used in connection with the Insured’s business at the **premises** by any of the perils insured against under section 1: Property Damage of this policy.”*

The Provider says it is relevant to note that the highlighting in bold in the above passage appears in the original policy wording and explains that the purpose of this was to emphasise and highlight in as clear a way as possible the fact that a business interruption claim can only be made as a result of damage to the premises and not in any other circumstance. It also emphasises that the highlighted words have specific definitions under the policy and must be considered in light of this.

It is quite clear, the Provider says, that the interruption to the business in this case arose, not as a result of damage to the premises, but rather as a result of both the suite of public health measures including social distancing measures introduced in mid-March and other governmental restrictions which prohibited the making of unnecessary journeys by the public.

In summary, the policy only responds to claims for loss of gross profit arising from damage caused to the premises. The Provider submits that this is manifestly not such a claim and it follows that the Provider was correct to decline the claim.

Covid-19 not a notifiable disease

The Provider says there is an extension to the cover provided in respect of business interruption in section 2 in the following terms:

“H Human notifiable diseases, murder or suicide

*This extension provides cover against **business interruption** resulting from the following:*

- *A case or cases of any of the notifiable diseases (as listed below) at the **premises**, or caused by food or drink supplied from the **premises**.*
- *Any organism likely to cause a notifiable disease (as listed below) being discovered at the **premises**.*
- *Murder or suicide at the **premises**.”*

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The Provider says, again it is relevant to note that the bold highlighting is present in the original policy document – this emphasises the requirement that the disease or organism must actually be present on the premises. Importantly, this extension is confined to a specified and finite list of diseases – described as *notifiable diseases*. The Provider has set out the list of these diseases in its Complaint Response.

The Provider says it is quite clear that Covid-19 is not a notifiable disease for the purpose of this extension. Indeed, it could not have been listed in circumstances where the disease was not in existence or, at the very least, was entirely unknown at the time when the policy was inception. The Provider advises that it has obtained an expert report on this issue which is dated **19 July 2020**. In the course of this report, the Provider says the author discusses the origins of Covid-19 and concludes that it is an entirely new disease.

The report goes on to specifically consider the question of whether it can properly be regarded as coming within a ‘sub family’ of any of the notifiable diseases listed in the infectious disease extension. The Provider says the report identifies the relevant virus families that cause the listed notifiable diseases – none of which are coronaviruses. The report points out that the viruses which give rise to the listed diseases are actually taxonomically distinct from SARs-CoV2 and concludes that:

“Considering both the disease agent itself and the symptoms it causes, my view is that Covid-19 cannot reasonably be described as a subset of the diseases listed in Table 1.”

In the event that the Complainant does, at any stage during the investigation of this complaint, assert that Covid-19 falls within the list of notifiable diseases set out in the policy, the Provider says it will be necessary for it to be furnished with the information relied on in that regard and be afforded an opportunity to respond to it. The Provider says it is clear that Covid-19, a disease of very recent origin, is one that post-dates the inception of the policy and does not come within the list of notifiable diseases.

No notifiable disease on the premises

The Provider says quite apart from the fact that Covid-19 is not a notifiable disease for the purpose of the policy, it is quite clear that the Complainant is not asserting that the closure was caused by the disease or the organism causing it, SARS-CoV2, being present on the premises, or present in food or drink supplied by the business. Rather, the closure arose as a result of the public health measures referred to above. Having regard to the very clear policy wording, the Provider says the closure of the Complainant’s business on **29 March 2020** does not come within the terms of the extension.

Loss caused by other factors

The Provider says that even if an insured event occurred (which is obviously not the case), it would be necessary to consider what loss has been caused by that event. An insurance contract is a contract of indemnity, and it is only the loss that has actually been caused by the insured event that is covered by the insurance contract.

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Furthermore, the Provider says it is only where the insured event is the proximate (i.e. the dominant, effective, or operative) cause of the loss that an indemnity can be provided. The Provider submits that this is a fundamental principle of insurance law.

When assessing the issue of causation, the Provider says it is a well-established principle that the appropriate approach is to utilise a “but-for” test – in other words, it is necessary to consider the counterfactual of what would have happened “but-for” the insured event occurring. In certain circumstances, a loss may be caused by more than one proximate and concurrent cause, only one of which is insured. The Provider submits that as confirmed in *Orient-Express Hotels Ltd v Assicurazioni Generali* [2010] Lloyd’s Rep IR 531, where there are multiple concurrent independent proximate causes of the loss so that any of the causes of loss would, on their own, have caused the loss, then there is no indemnity available.

The Provider says the losses sustained by the Complainant in this case would have been caused irrespective of whether the insured event (i.e. the *“business interruption resulting from ... a case or cases of any of the notifiable diseases (as listed below) at the premises, or caused by food or drink supplied from the premises”*) occurred. Even if there had been no business interruption arising from a case of disease at the premises or caused by food or drink supplied from the premises (and it is denied that this insured event has occurred), the same losses would have occurred because all of the other aspects of the Covid-19 pandemic, and the government response to it, would still have occurred.

Since **8 March 2020**, the Provider say the Government has taken significant public health measures, both through the giving of guidance and advice, and the enactment of legally binding restriction (together, the *“Public Health Measures”*). The adverse impact of the response of the government, businesses and individuals, and the adverse impact of such response on economic activity and public confidence, was immense. The Provider says the combined effect of the Covid-19 pandemic, the Public Health Measures (other than the imposed closure) introduced by the Government, social distancing practices, the widespread public concern regarding the risk of infection, and the economic slowdown would have resulted in the Complainant earning no gross profit during the period, and/or making a loss during the period such that it would not have been economically viable for it to open.

The Provider’s Conclusion

The Provider says the explanation of the reasons for the declinature, as set out above, is essentially the same as the reasons given to the Complainant in the letter dated **29 June 2020**. It is the Provider’s position that the terms of the policy are abundantly clear. The Provider says whilst it is alive to the very difficult situation the Complainant has found herself in, along with many other businesses, it is clear that the policy was not responsive to a business interruption claim arising from the closure of the business by reason of the Covid-19 pandemic.

In respect of the Complainant’s claim for loss of stock, the Provider says in order to make a claim for stock, the damage to stock must be as a result of an insured peril, as per the following policy wording:

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“Section 1(a): Buildings, Trade Contents, Stock

Cover under this section is operative only where shown in the policy schedule.

Cover

The **insured property** is covered against **damage** caused by the following perils, except as otherwise shown in the schedule.

1. (a) Fire, but excluding **damage** caused by:

(i) Explosion resulting from fire;

(ii) Earthquake or subterranean fire;

(iii) The **insured property** undergoing any process involving the application of heat.

(b) Lightning

(c) Earthquake and subterranean fire.

Basis of Settlement

C – Stock and other property insured

In respect of stock and other property insured under the policy, the Company will pay:

i) Where the property is destroyed, the value of the property at the time of its destruction;

ii) Where the property is damaged, the cost of repairing or restoring the damaged portions to a condition substantially the same as, but not better or more expensive than, its condition when new;

iii) The cost of debris removal, being the cost incurred with the Company’s consent in removing debris and dismantling, demolishing, shoring up, and propping portions of the property.

However, this policy does not cover:

1. Any costs or expenses incurred in removing debris from outside the site of the **premises** at which the **damage** has occurred, other than from the area immediately adjacent to that site;

2. Any costs or expenses arising from pollution or contamination of property not insured by this section.

Limitation of liability

In the event of loss, the liability of the Company in respect of property to which this provision applies will not exceed the sum insured shown in the schedule for each item.

In respect of the cost of removal of **stock** debris (where no sum insured is shown in the schedule against the item), the liability of the Company shall not exceed 15% of the **stock** sum insured or €33,000, whichever is the lesser.

If, at the time of the **damage**, the sum insured for the relevant item is less than the insurable value of the property insured, arrived at in accordance with the basis of settlement described in paragraph C, items i) to ii), the amount payable by the Company will be proportionately reduced.”

The Provider says that given that the Complainant’s stock was not damaged as a result of an insured peril, there is no cover.

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The Complaint for Adjudication

The complaint is that the Provider wrongly or unfairly declined the Complainant's claim for business interruption losses as a result of the temporary closure of her shop in March 2020, 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 Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint. Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

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.

I note that the 'Operative Sections' identified on the Complainant's policy schedule, include:

- "1. Property Damage*
 - (a) Buildings, Trade Contents, Stock'*
 - (d) Deterioration of Stock*
- 2. Business Interruption ..."*

The second and third pages of the policy schedule contain tables outlining the sums insured under the previously mentioned Operative Sections. In respect of section 1(a), the sum insured for stock is €20,000 and for section 1(d) the sum insured for deterioration of stock is €2,000. In respect of business interruption, the relevant table states, as follows:

<i>Item</i>	<i>Cover Description</i>	<i>Indemnity Period</i>	<i>Sum Insured</i>
<i>1.</i>	<i>Gross profit</i>	<i>12 Months</i>	<i>€100,000</i>
	<i>Total</i>		<i>€100,000</i>

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Section 1(a), '**Buildings, Trade Contents, Stock**', of the policy states, as follows:

“Cover

*The **insured property** is covered against **damage** caused by the following perils, except as otherwise shown in the schedule. ...”*

The perils insured against at section 1(a) of the policy are set out beneath this clause under 12 numbered sections. While I do not propose to set out each of these perils in detail, I note these perils cover, for example, fire, lightning and earthquake; aircraft and aerial devices falling from the sky; explosion; riot, civil commotion, labour disturbances; certain physical impacts to the premises; storm and flood; escape of water; theft; subsidence; and other forms of physical and accidental damage. As can be seen, to invoke the cover provided by section 1(a), *damage* must be *caused* by one of the stated perils.

Section 2 of the policy, '**Business Interruption**', provides the following cover:

*“The Company will indemnify the Insured for the amount of loss against each item insured shown in the schedule, in the manner and to the extent as described under ‘Basis of settlement’ below, following **damage** caused to property used in connection with the Insured’s **business** at the **premises** by any of the perils insured against under section 1(a): Buildings, Trade Contents, Stock of this policy.*

Provided that the following conditions are met:

- 1. Payment is made or liability admitted for the **damage** under an insurance covering the interest of the Insured in the property, or payment would have been made or liability admitted for the **damage** but for the operation of a policy excess.*
- 2. The total liability under this section is restricted to:*
 - the total sum insured shown in the schedule in respect of any item listed in the schedule; or*
 - the sum insured remaining after deducting any amount the Company has already paid under this section during the same **period of insurance**, unless the Company shall have agreed to reinstate such sum insured;*

whichever is less.”

'Business interruption' is defined as:

*“Interruption of or interference with the **business** carried on by the Insured at the **premises** in consequence of **damage** to property used by the Insured at the **premises** for the purpose of the **business**.”*

'Damage' is defined at page 3 of the policy document as: *“Accidental loss, damage or destruction.”*

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I am satisfied that for business interruption cover to become operative, pursuant to section 2 of the policy, it requires *damage* to property at the premises *caused* by any of the perils insured against under section 1(a). I have considered each of the insured perils at section 1(a) and the circumstances giving rise to the Complainant's claim. Having done so, I am not satisfied that the occurrence of a disease such as Covid-19 comes within any of these perils. Accordingly, it is my opinion that the business interruption cover provided by section 2 of the policy was not triggered by the Complainant's circumstances.

However, the Complainant's policy also contains a number of additional extensions in respect of business interruption at the 'Additional extensions that apply to section 2: Business interruption' section of the policy, beginning at page 43. For these extensions to apply, the Complainant's policy states, on page 43, as follows:

"Additional extensions that apply to section 2: Business interruption

The insurance provided by the extensions in this section shall only be applicable where gross profit or gross revenue (or estimated gross profit or estimated gross revenue) are insured."

As can be seen from the business interruption table on the Complainant's policy schedule, gross profit is insured. Accordingly, I am satisfied that the additional extensions applicable to business interruption are operative on the Complainant's policy.

In this respect, Extension H provides, as follows:

"H Human notifiable diseases, murder or suicide

*This extension provides cover against **business interruption** resulting from the following:*

- A case or cases of any of the notifiable diseases (as listed below) at the **premises**, or caused by food or drink supplied from the **premises**.*
- Any organism likely to cause a notifiable disease (as listed below) being discovered at the **premises**.*
- Murder or suicide at the **premises**.*

Notifiable diseases

<i>Acute encephalitis</i>	<i>Diphtheria</i>	<i>Measles</i>	<i>Smallpox</i>
<i>Acute poliomyelitis</i>	<i>Dysentery</i>	<i>Meningitis</i>	<i>Tetanus</i>
<i>Anthrax</i>	<i>Legionellosis</i>	<i>Mumps</i>	<i>Tuberculosis</i>
<i>Bubonic or pneumonic plague</i>	<i>Legionnaires' disease</i>	<i>Paratyphoid fever</i>	<i>Typhoid fever</i>
<i>Chickenpox</i>	<i>Leprosy</i>	<i>Rabies</i>	<i>Viral hepatitis</i>
<i>Cholera</i>	<i>Leptospirosis</i>	<i>Rubella</i>	<i>Whooping cough</i>
<i>Conjunctivitis</i>	<i>Malaria</i>	<i>Scarlet fever</i>	<i>Yellow fever</i>

This extension does not cover:

- *any amount over €15,000 or the limit shown against this extension in the schedule.”*

In determining whether the Provider was entitled to decline cover under Extension H, the question which must be addressed, in light of the particular wording of Extension H, is whether Covid-19 constitutes a notifiable disease pursuant to that clause. The Complainant’s policy does not contain a specific definition of ‘notifiable disease’ nor does it set out the criteria which must be satisfied before a disease will be considered a notifiable disease. However, I am satisfied that, on a reasonable interpretation of Extension H, cover is only provided in respect of the notifiable diseases “*as listed below*” by the policy, i.e. as set out in the above table. It is my opinion, therefore, that to trigger the cover provided by Extension H, business interruption must arise from one of the notifiable diseases listed in the table at Extension H. As can be seen, this table does not include Covid-19.

The Provider has furnished a report from a professor working in a department of infections and immunology at an English university. The views expressed in this report were that Covid-19 “*is a new disease of humans.*” and “*cannot reasonably be described as a subset of the diseases listed in Table 1.*”

I note that the Complainant has not provided any expert evidence to contradict the conclusions of this report. On the basis of the undisputed expert evidence tendered by the Provider, having regard to the wording of Extension H and on the basis of the available evidence, I am of the view that Extension H does not provide cover in respect of any variants or subsets of the diseases listed in the above table.

In forming my views on the cover provided by Extension H, I note the following passages from the recent High Court decision of McDonald J. in ***Brushfield Limited v. Arachas Corporate Brokers Limited and AXA Insurance DAC*** [2021] IEHC 263, where a similar clause to the one at issue in the present complaint was considered:

“115. ...the clause in the [Insurer’s] policy is restricted to the specific diseases listed. Business interruption which arises as a consequence of the occurrence of a disease which is not on that list will not give rise to cover under para. 1 of the MSDE [Murder, Suicide or Disease] clause. This is a crucially important aspect of the MSDE clause in the [Insurer’s] policy. In terms of its specificity, the MSDE clause is different to a number of disease clauses to be found in other policies available on the Irish market at the time this policy was put in place in April 2019.

...

118. ... Critically, neither COVID-19 nor any variant thereof is included in the list of specified diseases contained in para. 1 of the MSDE clause. In those circumstances, it seems to me to follow that ... para. 1 of the MSDE clause does not provide cover for business interruption losses caused by an occurrence of COVID-19 even where that occurs on the hotel premises or within a 25-mile radius of it. It cannot be disputed that the cover available under the first paragraph of the MSDE clause is limited to business interruption which arises as a consequence of the occurrence of one of the

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specific diseases expressly listed in the clause. In circumstances where COVID-19 is not listed, it must follow that there is no cover for business interruption losses which are attributable to cases of COVID-19 per se whether or not they manifested themselves either on the premises or within the relevant 25-mile radius.”

Therefore, it is my opinion that Extension H does not provide cover for business interruption arising from Covid-19.

Accordingly, having considered the evidence available, I am satisfied that the Provider was entitled to decline the Complainant’s claim for business interruption losses pursuant to section 2 and Extension H of the policy.

The Complainant has also sought to claim for loss of stock. In light of my observations in respect of the cover provided by section 1(a) above, it is my opinion that any damage to the Complainant’s stock was not caused by one, or any, of the insured perils. Therefore, I take the view that cover under section 1(a) was not triggered. However, it would appear that there are two further sections of the policy which can apply to a loss of stock claim.

As per the Complainant’s policy schedule, Section 1(d), ‘Deterioration of Stock’, is an operative section of the policy. Section 1(d) states, as follows:

“Cover

*The Company will indemnify the Insured in respect of **damage to stock** which is contained in a chill room, cold store or adjoining holding area shown in the schedule, by deterioration, contamination or putrefaction caused by or arising from:*

- a) rise or fall in temperature as a result of:
 - i) **breakdown** or inherent defect in the **refrigeration plant**;*
 - ii) non-operation of the thermostatic or automatic controlling devices forming part of the plant;*
 - iii) accidental failure of the public supply of electricity not occasioned by the deliberate act of any supply authority;*
 - iv) accidental **damage** to the **refrigeration plant**.**
- b) accidental leakage of refrigeration or refrigerant fumes from the **refrigeration plant**.”*

The precise circumstances giving rise to the Complainant’s claim for deterioration of stock are not clear. However, they appear to arise from a loss of stock which resulted from the closure of the Complainant’s business for a period due to Covid-19. In this respect, I note that in an internal Provider email dated **10 June 2020**, it is stated:

“Complaint is for no cover for Business Interruption or no cover for her goods/stock that has gone to waste over the past 3 months.”

Section 1(d) sets out the circumstances which will trigger cover under this section. As can be seen, at sub-paragraph (a), the damage must be caused by temperature related issues arising from a breakdown, non-performance or damage to the refrigeration plant, or a failure in electricity supply; and, at sub-paragraph (b), the damage must arise from fumes from the refrigeration plant.

On the basis of the available evidence, there is no evidence to suggest that the Complainant's stock was damaged as a result of any of the perils provided for in section 1(d). The loss of the Complainant's stock appears to have arisen from the closure of her business caused by Covid-19. However, damage to stock as a result of a closure due to Covid-19 (whether due to social distancing practices, public health advice or Government restrictions) is not covered by section 1(d) of the Complainant's policy.

At Extension G, 'Deterioration of stock', of the additional extensions applicable to section 2, it is stated that:

"G Deterioration of stock

*This extension provides cover against **business interruption** resulting from deterioration or contamination of stock held for business purposes and stored in refrigeration plant.*

This extension does not cover:

- *deterioration of stock not covered under this policy; or*
- *any amount over €7,500 or the limit shown against this extension in the schedule."*

As already stated above, 'business interruption' is defined as:

*"Interruption of or interference with the **business** carried on by the Insured at the **premises** in consequence of **damage** to property used by the Insured at the **premises** for the purpose of the **business**."*

The term 'The business', is defined as: *"The business activities of the Insured as described in the schedule."* The description of the Complainant's business in the policy schedule is: *"Bakery/Cafe & Craft Shop including videos"*. As a result, I take the view that Extension G provides cover in circumstances where there is interruption of or interference with the Complainant's business resulting from some form of deterioration or contamination to the Complainant's stock.

From the available evidence, it seems that a claim for loss of stock was not made by the Complainant as part of her initial claim notification in **April 2020**. However, it appears that the Complainant sought to raise the issue of loss of stock as part of her formal complaint to the Provider in **June 2020**. In the Provider's letter of **29 June 2020**, it declined this claim by reference to section 1(a). In its Complaint Response, the Provider defended its declinature of this particular claim solely on the basis of section 1(a).

However, the above analysis suggests that the Complainant had cover for a loss of stock claim under more than just section 1(a) of the policy. As noted above, section 1(d) (which is expressly stated in the policy schedule) and Extension G of the additional extensions attaching to section 2 would appear to apply to a loss of stock claim. The evidence shows that the Provider did not identify these provisions as applying to the Complainant's claim for loss of stock and that the Provider did not assess the Complainant's claim on the basis of section 1(d) or Extension G. However, it is not clear why this was the case. This is particularly disappointing in circumstances whether the Provider was asked to respond to the following question in the Schedule of Questions furnished by this Office on **23 November 2020**:

"Is the Provider satisfied that it correctly assessed the Complainant's claim in accordance with the policy terms and conditions and that her business insurance policy does not provide cover for the circumstances of this particular claim?"

In its Complaint Response, the Provider responded, as follows:

"Yes were (sic) are satisfied the claim was correctly assessed and does not fall to be covered under the policy terms and conditions. The policy does not provide cover in these circumstances."

In this respect, I note that section 7.7(d) of the **Consumer Protection Code 2012**, states as follows: *"the regulated entity must offer to assist in the process of making a claim, including, where relevant, alerting the claimant to policy terms and conditions that may be of benefit to the claimant;"*. A similar message was also conveyed by the Central Bank of Ireland in its letter to insurance undertakings on **27 March 2020**.

In light of this, I am not satisfied that the Provider identified all of the potential cover available under the Complainant's policy that was applicable, or likely to have been applicable, to her claim for loss of stock. As a result of this, I am not satisfied that the Provider properly assessed the Complainant's claim for loss of stock and in my opinion, this was unfair and indeed it was unreasonable and unjust within the meaning of **Section 60(2)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**. In such circumstances, I am of the view that the claim for loss of stock should be re-considered and more fully assessed by the Provider.

While I have made certain remarks regarding the cover likely provided by section 1(d) and Extension G, I do not consider it appropriate to offer an opinion as to whether the Complainant's claim for loss of stock based on section 1(d) or Extension G should be admitted or declined by the Provider. Rather, the parties should engage further so that the Provider can more fully assess the Complainant's claim. Accordingly, I consider it appropriate to direct the Provider to rectify the conduct complained of by assessing the Complainant's claim for loss of stock on the basis of section 1(d) and Extension G, and any other provisions of the policy which might apply to such a claim.

I also direct the Provider to make a compensatory payment of €750.00 to the Complainant in recognition of the Provider's failure to properly assess her claim for loss of stock.

/Cont'd...

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld on the grounds prescribed in **Section 60(2)(b),(f) 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 assessing the Complainant's claim for loss of stock, on the basis of section 1(d) and Extension G, of the policy and any other provisions of the policy which might apply to such a claim. I also direct the provider to make a compensatory payment to the Complainant in the sum of €750, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant 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.