



<u>Decision Ref:</u>	2021-0188
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Rental Property
<u>Conduct(s) complained of:</u>	Claim handling delays or issues
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainants are the owners of a property which comprises a retail shop unit and residential accommodation. The Complainants held a business insurance policy with the Provider.

The Complainants' Case

The Complainants submitted a claim to the Provider in **March 2020** for loss of rent receivable because their tenant, trading as a hairdresser, was unable to pay the Complainants the rent reserved under the lease agreement, due to the temporary closure of the tenant's business arising from the outbreak of coronavirus (Covid-19).

In this respect, the '**Additional extensions that apply to section 2: Business interruption**' of the applicable business insurance policy document, states, 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."*

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

"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."

The Complainants submitted a complaint to the Provider regarding its decision to decline indemnity, which was received by the Provider on **14 May 2020**, as follows:

"I am most dissatisfied with the response provided in this letter. I have suffered significant loss as a result of suffering significant business interruption, an occurrence which until your letter of the 7th of April, I understood I was fully covered against.

Your letter dated the 7th April implies that I was aware of a number of conditions, I would be grateful if you would confirm when I was made aware of these conditions, what the entire conditions are and also a full copy of the conditions attached to the business disruption.

I am firmly of the view as are the Courts that in the event of any ambiguity or a failure on your part to disclose full conditions in an appropriate and accessible manner in respect of insurance clauses; that the clauses should be interpreted against the insurer, I therefore call upon you to once again make good my insured risk of "business interruption".

I am also disgusted and insulted at your comments in clause 3:2, is your company of the view that one must actually get Covid-19 in order to successfully claim. At time of a national pandemic to wish such an illness on one to satisfy a clause is nothing short of ridiculous. Furthermore, Covid-19 is notifiable at present and is fully reportable. The issue that your definitions are out of date or are not extendable at any time should not affect my claim for "business interruption".

The fact remains that I have suffered significant loss which I have insured against. There is no dispute that "business interruption" is included in my insurance agreement and I again demand that you make good on this clause."

In a letter to this Office dated **21 May 2020**, the First Complainant explained that:

"I am most dissatisfied with the response provided in their letter of 7th April. I have suffered significant loss as a result of suffering significant business interruption, an occurrence which until the [Provider] letter of the 7th of April, I understood I was fully covered against.

Furthermore, the [Provider's] letter dated the 7th April implies that I was aware of a number of conditions, I was never made aware of same. Until now I have been of the understanding that business interruption meant that in the current circumstances I would be covered, this apparently is not the case due to a subsection of a paragraph. I was never made aware of such a subsection and have asked [the Provider] to provide evidence of them notifying me of the existence of such alleged exemptions"

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Following its review of the complaint, the Provider wrote to the Complainants on **9 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 rent receivable 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.

I note in addition to your complaint regarding the above declinature you request when you were made aware of the business terms and conditions relating to Business Interruption. I firstly would like to note that as with all our policies the policy documentation is issued to the customer at the inception of their policy and if misplaced is available on request thereafter. However in addition to receiving the terms and conditions booklet at inception I can confirm that on the 28th September 2017 your policy was transferred from a business multiperil to a business complete policy and you where (sic) issued your policy cover letter, your policy schedule and the policy documentation/policy booklet outlining all the terms and conditions of the policy. ... Therefore I do not accept this aspect of your complaint.

Please note that the same policy wording regarding business interruption was in your old business multiperil policy also. ...”

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In response to this, in a letter to the Provider dated **14 June 2020**, the Complainants stated, as follows:

“Covid-19 is a notifiable disease therefore should be covered under the terms of my insurance policy, the list of which has not been updated in a number of years.

Please note that this letter should be used as a letter of objection when the Court Service of Ireland look favourably upon other cases involving a “disruption of business” clause ...

Please note that my loss is insured, significant and ongoing and should be reimbursed in full in due course. ...”

The Complainants set out their complaint in their Complaint Form, as follows:

“I have business interruption insurance with [the Provider] As part of the policy I have Business Interruption and am insured for a notifiable disease as well as a number of other conditions.

From the 15th March, the premises as a hairdresser was no longer in a position to trade due to Covid-19 and the instructions provided to businesses as a result of same. I am therefore at a loss of rental income of €270.29 per week, €3,513.77 to date and a loss which is ongoing since.

I duly notified the insurance company ... however heretofore [the Provider] have provided inadequate and most unsatisfactory responses in relation to same.

I am covered for business interruption to include amongst other matters in the event of a notifiable disease, Covid-19 is a notifiable disease, however they are failing to cover my insurable risk for rental income....”

In a letter to this Office dated **19 October 2020**, the First Complainant made the following submission:

- “1. I wish to make reference to the findings of the Courts in the UK which should be a guide to such matters who have found against Insurance companies in similar circumstances.*
- 2. My claim is only for loss of rent only, this is crucial as assurances were given in or around September 2018 that the rent would be protected under my insurance policy. This assurance was given as a result of discussions in relation to queries over loss of rent as a result in the change of tenant and should be available from [the Provider]. I reiterate that we fully understood that in the event of a closure for any reason our rental income was assured. This was given to [the Second Complainant] at the time.*

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3. *I submit that ongoing High Court proceedings should also provide a reference point in relation to the conduct of [the Provider] and assurances provided.”*

The Complainants seek for the Provider to admit their claim for business interruption losses arising from the outbreak of Covid-19.

The Provider’s Case

The Provider explains that as notified by the Complainants, their tenant closed their business on **15 March 2020** as a result of the Covid-19 pandemic and was unable to pay rent. 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 three 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.

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 (page 36), 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 at page 39 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(a): Building, Trade Contents, Stock 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 circumstances. 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 rent receivable 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**.”*

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 incepted. 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.”

The Provider says that in the event that the Complainants do, 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 Complainants are 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 tenant's business on **15 March 2020** does not come within the terms of the extension.

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 Complainants in the letter dated **9 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 Complainants found themselves 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.

Addressing the circumstances in which the policy provides cover for loss of rent receivable, the Provider says the business interruption section of the policy provides the Complainants with cover for loss of rent receivable 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. The Provider refers to the following policy wording:

*"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 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."*

The Provider quotes the policy wording relating to 'Basis of settlement', as follows:

"Basis of settlement

D - For loss of rent receivable

*The Company will pay as indemnity the amount of **rent receivable** lost due to (a) **loss of rent receivable** and (b) additional expenditure, as described below, less any savings in costs or expenses which cease or reduce as a result of the **damage**.*

(a) In respect of loss of rent receivable:

*The amount by which the **rent receivable** during the **indemnity period** shall in consequence of the **damage** fall short of the **insurable amount of rent receivable**.*

(b) In respect of additional expenditure:

*The additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the loss of **rent receivable** and which, but for that expenditure, would have taken place during the **indemnity period** in consequence of the **damage**, but not exceeding the amount of the reduction in **rent receivable** thereby avoided.*

*Provided that should the amount shown against this item in the schedule be less than the **insurable amount of rent receivable**, the amount payable shall be proportionately reduced."*

The Provider says that contrary to its Final Response letter of **9 June 2020**, the **'Additional' extensions that apply to section 2: Business interruption** do not apply for loss of rent only cases. The insurance provided by the additional extensions in section 2 are only applicable where gross profit or gross revenue (or estimated gross profit or estimated gross revenue) are insured. In this case, the Complainants were only insured against loss of rent under business interruption, therefore, the only cover for loss of rent is 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 refers to the following policy wording (at page 43):

"Additional extensions that apply to section 2: Business interruption

The insurances 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."

Having pointed this out, the Provider says it accepts that it made an error in communicating to the Complainants as if extension H - Human Notifiable Diseases did apply where loss of rent was insured under the policy though it says that it did reserve its right in its declination and Final Response letters, to rely on further grounds as may be applicable in the event of a dispute. The Provider states that it is opting not to rely on the wording of this provision as one of its grounds for declining this claim, in view of the fact it had not alerted the Complainants to the provision before now. The Provider says notwithstanding that it is accepting the Complainants are entitled to rely on extension H as if it did apply to the policy for the purpose of this complaint, it is satisfied for the reasons already outlined above that the claim does not fall within the terms of cover provided under this extension.

In respect of Complainants' submission regarding a telephone conversation where it is stated by the Complainants that the Second Complainant was advised that business interruption cover was in place for any type of closure, the Provider says the call in question took place on **28 November 2018**. The Provider says the Second Complainant was not advised that business interruption cover was in place for any type of closure. The Second Complainant was advised that should the premises be damaged by an insured peril and the tenant had to move out then the business interruption cover for loss of rent would operate.

The Complaint for Adjudication

The complaint is that the Provider wrongly or unfairly declined the Complainants' claim in respect of a loss of rent receivable as a result of the temporary closure of their tenant's business in March 2020, arising from the outbreak of 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 **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 Complainants' policy schedule include:

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

The second page of the policy schedule contains a number of tables outlining the sums insured under the previously mentioned Operative Sections. In respect of business interruption, it states, as follows:

Item	Cover Description	Indemnity Period	Sum Insured
1.	Loss of Rent	12 Months	€30,000
	<i>Total</i>		€30,000

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.*

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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."*

I take the view that for business interruption cover to become operative, pursuant to section 2 of the Complainants' policy, it required damage to property at the premises caused by any of the perils insured against under section 1(a).

Section 1(a), 'Buildings, Trade Contents, Stock', of the policy document 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 then set out, beginning at page 14 of the policy document, 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.

Accordingly, having considered the nature of various perils and the circumstances giving rise to the Complainants' claim, I am of the opinion that the occurrence of a disease such as Covid-19 does not come within any of these perils. Accordingly, I take the view that the business interruption cover provided by section 2 of the policy was not triggered.

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However, the Complainants' 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. The cover offered by these extensions does not automatically apply in the case of every policy and the extensions are only operative when gross profit or gross revenue (or estimated gross profit/gross revenue) are insured.

In this respect, I note that page 43 of the policy states that:

“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.”

The Complainants' policy schedule states that the only item insured in respect of business interruption was loss of rent and, as can be seen, no cover was place in relation to gross profit, gross revenue, estimated gross profit or estimated gross revenue. This meant that the various extensions contained in this section of the Complainants' policy were not applicable and the Complainants were not entitled to the cover or benefits provided by those extensions. Despite this, the Provider nonetheless assessed the Complainants' claim as if the additional policy extensions were operative and declined cover on **7 April 2020**.

What this shows, however, is that the Provider did not properly review the Complainants' policy schedule to determine the cover provided by the policy or, alternatively, the Provider failed to identify by reference to the policy wording at page 43, that a certain type of cover was required to be in place before the additional extensions could be invoked. The effect of this was that the Provider created an impression that the Complainants were covered in respect of the additional business interruption extensions but that the circumstances giving rise to their claim did not satisfy the relevant extension criteria.

The Provider's incorrect assessment of the claim does not appear to have been identified in the course of its investigation of, and response to, the Complainants' complaint either. This begs the question as to the extent of the investigation conducted by the Provider into the Complainants' challenge to its decision to decline cover and the steps taken by the Provider to ascertain either the precise cover in place under the Complainants' policy or that the claim had been properly declined by reference to the applicable policy provisions.

While the Provider did not appreciate that the business interruption extensions were not applicable to the Complainants' policy, I note in its Complaint Response, the Provider has adopted the position that it is not opting to decline cover on the basis that these extensions are not applicable and that it has accepted that the Complainants are entitled to rely on Extension H. 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

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

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. The Complainants' 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 pursuant to that clause. 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 Complainants have made the point that Covid-19 is a notifiable disease, a position which I understand to arise from the amendment to the Infectious Disease Regulations 1981 brought about by the Infectious Diseases (Amendment) Regulations 2020, which provided for the inclusion of coronavirus (Covid-19) (SARS-Cov-2) on the list of notifiable diseases. However, I do not consider that these Regulations have the effect of amending the Complainants' policy such that Covid-19 is to be included in the table of notifiable diseases at Extension H.

The parties have not identified any policy provision which requires this table to be updated in line with amendments to the Infectious Disease Regulations 1981, when new infectious diseases are discovered or on an annual basis, for example. It is my view therefore, that the cover provided by Extension H is in respect of a definite and specific list of diseases set out in the table and for this extension to become operative, the disease in question must be one of those listed diseases.

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 Complainants have not provided any expert evidence to contradict the conclusions of this report.

On the basis of the 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 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.

The Complainants have also taken issue with the fact that certain terms in the policy were not brought to their attention. In respect of the business interruption cover provided by the Complainants' policy, I do not consider that there were any particular terms or conditions that the Provider should have specifically brought to the Complainants' attention when incepting or renewing the policy.

Separately, in the letter dated **19 October 2020**, the First Complainant made the following remarks regarding certain assurances given by the Provider:

*"... assurances were given in or around September 2018 that the rent would be protected under my insurance policy. This assurance was given as a result of discussions in relation to queries over loss of rent as a result in the change of tenant and should be available from [the Provider].
I reiterate that we fully understood that in the event of a closure for any reason our rental income was assured. This was given to [the Second Complainant] at the time."*

The Provider has furnished a recording of a telephone conversation which took place between one of its agents and the Second Complainant on **28 November 2018**. I have listened to this conversation and I do not accept that any assurances were given along the lines suggested in the above submission. In particular, the discussions surrounding loss of rent appear to have been in the specific context of a tenant's departure from, or vacating of, the premises. Therefore, I do not accept that any assurance was given by the Provider's agent that would have given rise to an understanding that *"in the event of a closure for any reason our rental income was assured."* [My emphasis].

However, in the circumstances of this complaint, I take the view, for the reasons outlined above, that the Provider failed to properly assess the Complainants' claim for business interruption losses, insofar as it failed to identify the applicable cover that was in place under the Complainants' policy. I consider such conduct to have been unfair and indeed to have been unjust within the meaning of **Section 60(2)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

Although, as it transpires, there was no cover even on a correct assessment of the policy cover, nevertheless in recognition of this error by the Provider, which I have no doubt caused confusion and ensuing inconvenience to the Complainants, I consider it appropriate to partially uphold this complaint and to direct the Provider to make a compensatory payment to the Complainants in the sum of €750.00, to conclude.

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) and (g)**.

/Cont'd...

- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €750, 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.