An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0196
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Claim handling delays or issues Dissatisfaction with customer service
Outcome:	Upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a sole trader and trading as a hair salon, held a commercial combined insurance policy with the Provider.

The Complainant's Case

The Complainant's Broker notified the Provider of the closure of the Complainant's business on **25 March 2020** and the Complainant's claim for business interruption losses as a result of the temporary closure of her business on **14 March 2020** for a period, due to the outbreak of coronavirus (COVID-19).

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

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

Following its assessment, the Provider wrote to the Complainant's Broker on **12 May 2020** to advise it was declining indemnity in this matter as it had concluded that the Complainant's losses did not fall within the scope of cover provided by the relevant business interruption infectious disease extension policy wording.

On **15 May 2020**, the Complainant's Broker emailed a complaint to the Provider in relation to its decision to decline indemnity. Following completion of its review, the Provider wrote to the Complainant via her Broker on **8 June 2020** to advise that it was upholding its decision to decline indemnity.

In this regard, the Complainant states in her **Complaint Form** that she has:

> *"… information I believe is sufficient to confirm that a claim is rightly due, given the policy segment also attached –* [newspaper] *news media dated the 13/03/2020 stating the first death from Covid-19 occurred in* [hospital] *… directions from* [the Complainant's premises] *to* [the hospital] *stating it is 22.8 KM – KM-Miles converter stating 22.8 km equates to 14.16726Miles –* [phone message] *screenshot dated 26/03/2020 stating a staff member*['s] *Partner was tested for Covid-19 on Tuesday 24/03/2020 – that test came back positive …*
>
> *my partner had also been tested as he had symptoms and underlying conditions that made him susceptible to the virus – that test came back negative …*
>
> *As was stated in their letter the Government recognised Covid-19 as a notifiable disease on the 20th of February 2020. Therefore based on all of the above my conclusion is that given the distance of the hospital where the first case was reported on 13/03/2020, is within the policy radius. The staff member immediate close family member contracting the virus 11 days after the salon closed is with*[in] *the two-week incubation time frame. I had no option but to disagree with the conclusion of* [the Provider] *I believe there is an absolute case for cover under this policy. …"*

In addition, in her email to this Office on **31 August 2020**, the Complainant submitted, *inter alia*, as follows:

> *"… we did close on the 14th of March due to the increase of cases and the close proximity of cases of Covid-19 to the premises as shown in the articles I sent with original complaint, from* [newspaper]*, stating the death of a patient in* [hospital] *on the 11th of March …*
>
> *… the distance between the premises and* [the hospital] *being 14.16 miles away, well within the 25 miles limit, and since my catchment area stretched from [location] Co. Dublin to [location] Co. Kildare, I was extremely conscious of clients attending their appointments and unknowingly spreading the virus to us and other vulnerable clients.*
>
> *I recall a nurse on that Saturday the 14th March making an appointment to get her hair done in our premises even though 22 out of 25 staff on her ward were sent home to self isolate. I also had Garda making appointments after they had self isolated for the 2 weeks prior, along with elderly clients with cancer wanting to keep their appointment for the following week.*

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I decided on the 16th not to reopen, stating

> *We are a close contact business and we cannot guarantee compliance with the current regulations regarding Covid-19' and 'we need to act responsibly and protect our clients, staff and our families.*

It was a distressful period with the Irish Hairdressers Federation calling on the government to officially close the industry on the 18th and the 21st March see attached. There was much confusion and information changed daily so I took the decision to close until there was more information available to act responsibly.

Unfortunately, due to circumstances out of my control when we were given the go ahead to open again on the 29th June, I was unable to meet the landlord's request due to cashflow issues and have not been able to reopen, resulting in 3 full time staff [losing] *their jobs and my business in jeopardy.*

One of my staff members had informed me her partner had contacted Covid-19 and was tested positive on the 24th March 10 days after we closed our doors. Again in hindsight there was a high chance he was infected from our staff member or he could have infected our staff member and the virus would have been spread further then necessary had I not acted responsibly and closed on the 14th …"

As a result, the Complainant seeks for the Provider to admit and pay her claim for business interruption losses, as follows:

> *"I want to retrieve the loss of earnings accumulated from being closed due to COVID-19. €89,808.00 is the figure the business turned over from 16/03/2019 – 20/07/2019, the same time frame in 2020 … that should include inflation of 1% totalling €90,706.08."*

The Provider's Case

The Provider says that its records indicate that the Complainant, who held a commercial combined insurance policy with the Provider, submitted a claim in on **2 April 2020** for business interruption losses as a result of the temporary closure of her hair salon on **14 March 2020**.

In order to assist and to provide context, the Provider, in responding to this Office, first set out a chronology of the material facts relevant to, and measures taken in respect of, the COVID-19 pandemic in Ireland, including where the Complainant's business interruption claims fits into that chronology, as follows:

20 February 2020: Covid-19 became a notifiable disease in Ireland, as did its virus agent SARS-CoV-2, by way of the *Infectious Diseases (Amendment) Regulations 2020*.

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29 February 2020: First diagnosis of COVID-19 in Ireland.

11 March 2020: First death in Ireland attributable to COVID-19.

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

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

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

In addition, a statement from An Taoiseach also stated:

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

14 March 2020: Second death in Ireland attributable to COVID-19. By this date, there were 129 confirmed cased of COVID-19 in the country. The Complainant closed her hair salon premises.

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

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

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

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

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

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

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

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

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

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

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

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

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

a. hardware stores;

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

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

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

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

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

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

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

The Provider says that it is understood that the Complainant did not reopen her hair salon on **29 June 2020**.

Against this background, the Provider says that it was notified by email on **25 March 2020** of a claim from the Complainant, for business interruption losses arising from the temporary closure of her hair salon on **14 March 2020**.

The Provider says it was provided with no further details at that point, and it instructed its Loss Adjuster on **30 March 2020**. The Provider says the Loss Adjuster wrote to the Complainant and her Broker on **1 April 2020** attaching a one page form to be completed with details of the claim. The Provider says the form was completed by the Complainant and returned to the Loss Adjuster by email on **2 April 2020**.

The Provider says by letter dated **12 May 2020**, it wrote to the Complainant via her Broker setting out the reasons why it did not consider there to be cover for the claim under the terms and conditions of the commercial combined insurance policy, as follows:

> *"… I note that on the 14th March 2020, your client ceased trading following the issuance of guidelines by the Government regarding social distancing. Your client was unable to fully adhere to these guidelines and as consequence took the decision to close their business on Health and Safety grounds. As a consequence of the present situation your client has suffered a loss of revenue and has sought to establish the extent of cover under their policy.*
>
> ***The Coverage Position***
>
> *The main policy is triggered in the event that business interruption losses arise as a consequence of damage to the property insured (subject to any exclusions). As we understand it, your client's claim is based upon the economic effects that the Covid-19 situation has had on your client's business.*

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

Infectious Disease/Murder or Suicide Extension

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

The Extension may respond where:

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

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

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

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

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

Conclusion

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

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The Provider says that a complaint was forwarded to it by the Complainant's Broker by email dated **15 May 2020**. As part of the complaint, the Provider says the Complainant provided further information on the location of a hospital within 25 miles of her premises and screenshots of a conversation with a staff member whose partner had been tested for COVID-19 on **24 March 2020,** which came back positive.

Following its review, the Provider says it issued a final response letter to the Complainant on **8 June 2020**, detailing the reasons why the claim was not considered to be covered, specifically the infectious disease extension, as follows:

> *"Whilst we had considered that the circumstances of the losses being experienced by the Insured fell outside the scope of policy cover, in order to ensure that the correct decision was made we sought legal opinion on the policy wording, with particular reference to Extension 3.3.4 (Infectious diseases/murder or suicide). Our letter of 12th May 2020 detailed the findings of the review, which confirmed we had correctly interpreted the wording and that on this occasion the losses the Insured are experiencing fall outside the scope of the policy.*
>
> *Having now completed my review of the file, I can see no basis on which to reconsider the decision on policy cover. The policy is very specific in that for consideration to be given under Extension 3.3.4 losses must be in consequence of an occurrence of a notifiable disease at the premises, or in consequence of an occurrence of a notifiable disease within a radius of twenty five (25) miles of the premises, there being no cover for losses resulting from measures introduced to curtail the spread of Coronavirus or the extremely challenging economic conditions that exist at present."*

The Provider notes that on **8 June 2020**, the Complainant completed a Financial Services and Pensions Ombudsman Complaint Form.

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

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

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

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

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

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

provided that the

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

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

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

The Provider says the infectious disease extension requires that the Complainant must prove:

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

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

(iii) which resulted in the financial losses claimed.

The Provider says that (i)-(iii) above, constitute the insured peril.

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

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

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

In **October 2020**, when the Provider replied to the formal investigation of this Office, it indicated its position that this was the precise question, on the exact wording of clause (c) of the infectious disease extension, which was considered by the English High Court in the **15 September 2020** decision of *The Financial Conduct Authority v. Arch Insurance (UK) Ltd and others* [2020] EWHC 2448, ("the FCA Test Case"). The Provider advised that this litigation had been before the English High Court, which considered the extent of COVID-19 related coverage, if any, under 21 separate business interruption coverage wordings for test case purposes.

The Provider says the wording of its infectious disease business interruption extension that was under consideration before the English High Court in the FCA Test Case is identical to the wording of the business interruption extension 3.3.4 'Infectious diseases/murder or suicide' contained in the Complainant's commercial combined insurance policy.

In this regard, the Provider noted that the English High Court stated in the FCA Test Case, as follows:

> *231. … in* [the Provider's wording]*, there is a combination of factors which together, to our minds, indicate that the cover is indeed intended to be confined to the results of specific (relatively) local cases. …*
>
> *In particular, the relevant clause has the following features. In the first place, the insuring clause itself identifies the matters in (a) to (f) as "events".*
>
> *This indicates that what is being insured is matters occurring at a particular time, in a particular place and in a particular way: see the dictum of Lord Mustill in Axa Reinsurance v Field [1996] 1 WLR 1026 at 1035 as to the meaning of "event".*
>
> *This is the context within the clause in which Clause 3.2.4(c) refers to "any occurrence of a notifiable disease".*
>
> *Given the reference to "events", and taken with the nature of the other matters referred to in (a), (b) and (d) to (f), the emphasis in (c) appears to us in this clause not to be on the fact that the disease has occurred within 25 miles, but on the particular occurrences of the disease within the 25 miles.*
>
> *It is the "event" which is constituted by the occurrence(s) of the disease within the 25 mile radius which must have caused the business interruption or interference.*

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

232. This focus of the clause is then emphasised by the fact that in (h), it is stated that the insurer is only to be liable for loss arising at those premises which are directly subject to the "incident", …

These uses of the word "incident" appear to us to reinforce the fact that the clause is concerned with specific events, limited in time and place. …

234. We accept that, for the purposes of [the Provider's wording]*, there will be an "occurrence" of COVID-19 within the radius when a person has the disease within the area, whether symptomatically or not, because that person has then "sustained" the illness within the definition in Clause* [15.61 of the current policy]. *However, as we have said, the terms of Clause 3.2.4* [i.e. Clause 3.3.4 in the present case] *show that there is cover only if there is business interruption as a result of the "event" of the person(s) sustaining that illness within the area. It is difficult to see how there could be such consequential interference if the disease was asymptomatic and undiagnosed.*

235. Given our construction of Clause 3.2.4, the issues as to causation largely answer themselves. We accept that the words "in consequence of" imply a causal relationship.

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

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

[This Office notes that since the Provider's response was delivered to this Office, the UK Supreme Court has since determined an Appeal arising from that separate litigation outside of Ireland].

The Provider has maintained that the effect of these passages from the FCA Test Case, and the effect of the infectious disease extension, as a matter of Irish law, even without reference to that decision is that:

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(i) the Complainant will only be able to recover under clause (c) of the infectious disease extension for business interruption that is *"in consequence of … c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises"* if she can show that the business interruption has been proximately caused by the specific occurrence(s) of the disease within the 25 miles radius (being the relevant "event" and insured peril);

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

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

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

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

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

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

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

   ii. alternatively, if it can be said that "but for" the event comprising the local occurrences within 25 miles the business would not have suffered the relevant interruption/losses, then the local incidents *are* the factual cause of those losses – the business would not have suffered the same losses in any case;

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

c. if the above tests are satisfied by an insured i.e. "but for" the local 25 mile COVID-19 event the business interruption losses would not have occurred, the losses will be covered.

The Provider says that these tests are not satisfied in the present matter, which it says must be analysed from the perspective of the period both prior to, and after, the Government directed closure of the Complainant's business on **24 March 2020**.

In respect of Interruption/Financial Loss prior to 24 March 2020, the Provider says that:

(i) The Complainant's business was closed voluntarily on **14 March 2020**, prior to any Government direction that businesses close on **24 March 2020** or that direction becoming a legal requirement on **27 March 2020**;

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

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

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

i. during the period prior to **14 March 2020** (when the downturn was apparently experienced); and
ii. between the **14** and **23 March 2020** (when the Complainant closed the business without any Government direction to that effect)

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

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

(iii) The Complainant has provided a newspaper article dated **13 March 2020** confirming that a patient in a hospital within a 25 mile radius of her business died of COVID-19 on **11 March 2020**. The Complainant has also provided evidence that this hospital is within a 25 mile radius of the Complainant's premises (being approximately 14 miles away). The Complainant has further indicated that she closed her premises on **14 March 2020** due to an inability to comply with the 2 metre social distancing advice that the Government issued on **12 March 2020**.

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(iv) Although the Complainant had provided evidence showing a difference in turnover between the period **1** and **13 March 2020** relative to the same period in **March 2019**, she has not provided any evidence proving on the balance of probabilities that the drop in turnover/gross profit was caused by an incident of COVID-19 illness within the 25 miles radius i.e. that but for that "local" COVID-19 incident the drop in turnover would not have occurred;

(v) Rather, it is the Provider's position that:

a. the Complainant's pre-14 March 2020 gradual downturn would have occurred in any event, irrespective of the local position within the 25 mile radius. All business trade was affected nationwide due to national disquiet/generalised fear/consequent reduction in footfall during the pre-14 March 2020 period. The burden of proof is accordingly on the Complainant to provide evidence that the extent of her pre-14 March 2020 Losses was greater that other similar small businesses in the same hairdresser sector across the country. If the downturn suffered by the Complainant mirrored, or was less than, the average drop-off of other similarly placed businesses in Ireland, it cannot be said that the drop-off in trade was specific to/in consequence of local occurrences of COVID-19 within 25 miles, as similar drop-off was encountered by all similar businesses *across the country*;

b. regarding the "down to zero" loss during the period **14** to **23 March 2020** (when the Complainant voluntarily closed her premises), the Complainant says that the closure and ensuing loss was caused by COVID related social distancing requirements imposed by the Government. Whether or not that is the case, those social distancing requirements were not *"in consequence of"* a specific incident/event of COVID-19 illness within the 25 miles radius: those restrictions would have been imposed by the Government in any case.

In other words, it cannot be stated that but for a local incident of COVID-19 illness within the 25 mile radius (which is the insured peril), the social distancing restrictions would not have been imposed, and the business could have continued. Those restrictions would have been imposed, and the business would have been prevented from continuing, in any event, due to the increasing incidents of COVID-19 nationwide. The **14** to **23 March 2020** interruption and losses cannot, therefore, be said to have been *"in consequence of"* the insured peril – i.e. an *"occurrence of COVID-19 illness within a radius of 25 miles of the premises …"* – and are not therefore covered.

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In respect of Interruption/Financial Loss After 24 March 2020, the Provider says:

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

(ii) This is because that government-directed closure (like prior Government guidance on social distancing) was not *"in consequence of"* (i.e. proximately caused by) the insured peril, being the local event of *"occurrences of* [COVID-19] *within* [the 25 mile radius]*."* It cannot be stated that but for the local occurrences, the closure order would not have been imposed: it would have been imposed in any case, due to the separate uninsured events of COVID-19 elsewhere in the country. As was stated in the FCA Test Case in a different context:

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

(iii) As the interruption losses post-24 March 2020 were in consequence of a Government direction introduced as a national response to a national health issue to reduce the spread of the virus (which is an uninsured peril) – not a local response to the Complainant's 25 mile radius event (which is the insured peril) – clause (c) of the infectious disease extension is not triggered.

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

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

In this regard, the Provider says it does not accept that the Complainant closed her business on **14 March 2020** as a result of a Government direction to close, as no direction had issued on that date. Such direction issued on **24 March 2020** and became law on **27 March 2020**. The Provider says it accepts that the Complainant closed her business on **14 March 2020** due to her concerns about an inability to comply with Government advice on social distancing. However, that advice and the ensuing decision to close/losses was not in consequence of local incidents of COVID-19 illness within the 25 mile radius, and is not therefore covered.

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The Provider accepts that if the Complainant's business had remained open from **14 March 2020**, the Complainant would have had to close her business on **24 March 2020**. Insofar as the business was already closed as at **24 March 2020**, the closure from that date was as a result of the Government closure direction on that date.

However, as that closure direction was not in consequence of a local event comprising occurrences of COVID-19 within the 25 mile radius of the premises (the insured peril), but rather was a direction that would have issued in any case irrespective of the position within that radius, the interruption and losses due to the closure direction are not covered.

Insofar as the Complainant's business was not an "essential service", the Provider says that it does not consider that the Complainant would have been permitted to remain open and trading if it had attempted to do so after **24 March 2020**, or after **27 March 2020** at the latest. The Provider does not consider either that the Complainant's employees would have been permitted to travel to and from the business, if she had remained open and trading, for the duration that the Regulations required non-essential employees to remain at home and not attend workplaces.

The Provider says that it is for the Complainant to prove that her business would likely have incurred financial loss as a direct result of the implementation of the Regulations, if her business had remained open and trading, insofar the Complainant shows that her customer base would not have been permitted to travel to and from, or avail of, the services offered by the Complainant.

However, even if this proof is provided, the Provider says this is not the relevant question for coverage purposes. The relevant question is whether any such interruption and loss is *insured*. The Provider's position is that it is not insured, as the Regulations – and resulting business interruption – were not imposed in consequence of (i.e. were not proximately caused by) the relevant insured event i.e. a local occurrence of COVID-19 within a radius of 25 miles of the premises. They would have been imposed, and the interruption/losses would have been suffered, in any case.

In respect of the Complainant's claim for €90,706.08, the Provider says the *"Sum insured"* is defined in the policy as *"the sum specified as the sum insured in the schedule."* The schedule of insurance in this matter provides for a sum insured for Business Interruption purposes of €125,000.

On this basis, the potential indemnity available under the infectious disease extension is 15% of €125,000 which amounts to €18,750, far short of the €90,706.08 claimed.

However, the Provider says its further position is that the maximum indemnity available under the infectious disease extension is €10,000 for any one claim and €10,000 for the **20 April 2019** to **19 April 2020** period of insurance.

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The Provider says that this is for the following reasons:

(i) the infectious disease extension expressly provides for a €10,000 annual limit, irrespective of the number of claims made;

(ii) against that background it makes no sense, and clearly was a typographical error, for the extension to provide for an "any one claim" limit of €50,000. This should accordingly be read as providing for a limit of €10,000 any one claim;

(iii) such a reading is consistent with the preceding clauses in clauses 3.3.1 ("Damage to Property at Contract Sites"), 3.3.2 ("Denial of Access") and 3.3.3 ("Supply Utilities"):

a. all of which provide business interruption limits of €10,000 per claim/occurrence; and

b. all of which – like the infectious disease extension at clause 3.3.4 ("Infectious Diseases/Murder or Suicide") – involves situations where there is no physical damage at the insured premises but business interruption is nonetheless suffered by the Complainant;

(iv) further, there is nothing to suggest that the nature of the risks covered under the infectious disease extension in clause 3.3.4 are of a type so different to those in the three preceding clauses as to justify a substantially higher per claim limit (here, €18,750 rather than €10,000). There is no particular reason to construe a clause 3.3.4 incident if murder or suicide, or vermin, at the premises as presenting a likelihood of business interruption that is substantially greater than, for example, damage to a supply utility that knocks out power to the insured for a substantial period. Insofar as the latter is a potentially extensive risk that is still subject to a limit of only €10,000 per claim/occurrence, the same reasoning applies to the notifiable disease, murder, vermin and other terms of clause 3.3.4;

(v) on this basis it is the Provider's position that the infectious disease extension should in fact be read as follows:

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

/Cont'd…

(vi) accordingly, the maximum amount available to the Complainant per claim and in total for the annual period under clause (c) of the infectious disease extension – assuming cover is triggered under that clause, which it is not – is €10,000.

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

> *" … As you may be aware, a recent Court decision on 5 February 2021 arising out of cases brought by Hyper Trust Ltd and others against the insurer FBD in the Irish High Court (**the FBD Decision**) considered the operation of certain business interruption coverage clauses in the context of Covid-19. While the terms of your* [Provider] *policy were not before the Court, various aspects of the Court decision have provided welcome clarity as regards the operation of cover under clauses such as the notifiable disease extension in your* [Provider] *policy.*
>
> *As a result of that clarity,* [Provider] *are pleased to confirm that policy cover for your above claim is now admitted in principle, subject to validation detailed below. This is the case even though we have previously indicated that there is no cover available under the notifiable disease extension in your policy, which has led to your above reference to the FSPO. The reason for this change is because the above FBD Decision has now clarified the manner in which your notifiable disease extension operates as a matter of Irish law. We are therefore now upholding your complaint.*
>
> *…"*

The Complaint for Adjudication

The complaint is that the Provider declined the Complainant's claim for business interruption losses as a result of the temporary closure of her business in March 2020, due to the outbreak of coronavirus (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.

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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 **15 March 2021**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. Following the consideration of additional detailed submissions from the parties, the final determination of this office is set out below.

The Complainant is a sole trader and trades as a hair salon. In March 2020, she held a commercial combined insurance policy with the Provider. On **14 March 2020**, the Complainant closed her hair salon and submitted a claim to the Provider in **April 2020** for business interruption losses, arising from this temporary closure. In making this claim, the Complainant sought to rely on extension 3.3.4, '**Infectious diseases/murder or suicide**', of the '**Business Interruption**' section at pg. 27 of the Combined Commercial Insurance Policy Document, and in particular the emphasised wording, as follows:

*"**The insurer will pay to the insured:***

3.3.4 Infectious diseases/murder or suicide

***Loss resulting from interruption of or interference with the business in consequence of** any of the following events:*

a) any occurrence of a notifiable disease at the premises or attributable to food or drink supplied from the premises;

b) any discovery of any organism at the premises likely to result in the occurrence of a notifiable disease;

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

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

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

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

provided that the

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

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

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

[Emphasis added]

The '**Insured Details'** section of the Complainant's Schedule of Insurance with the Provider for the period **20 April 2019** to **19 April 2020** states:

"BUSINESS INTERRUPTION INSURED
Indemnity Period: 12 Months €125,000"

Therefore, looking at the wording of extension 3.3.4(i) and the Schedule of Insurance, the maximum amount recoverable by the Complainant under the business interruption infectious disease extension, per claim, is **€18,750**.

Since the Preliminary Decision was issued by this Office on 15 March 2021, the Complainant has made a number of submissions, to the effect that she was unaware of or did not understand the limits of the potential benefits recoverable under this insured peril within the policy. Any complaint however regarding the mis-selling of this policy cover to the Complainant, does not form part of this investigation. Rather, this complaint concerns the conduct of the Provider that it wrongfully failed to admit and pay her claim for policy benefit, as outlined above.

Any complaint regarding the suggested mis-selling of the policy cover to the Complainant is an entirely separate matter and should be taken up by the Complainant directly with the entity which sold her the policy, in order to seek a resolution, before seeking if necessary to pursue any such separate complaint to this Office.

The Provider in its submissions to this Office originally, made the point that the maximum indemnity under the infectious disease extension is €10,000 for any one claim, and €10,000 for the period **20 April 2019** to **19 April 2020**. The Provider says that the inclusion of a claim limit of €50,000 makes no sense and was a typographical error.

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In my opinion, Extension 3.3.4(i) is somewhat awkwardly worded in that the inclusion of the words *"any one claim and EUR10,000 any one period of insurance."* appears incongruous.

While the Provider pointed to the limits of liability contained in extensions 3.3.1, 3.3.2 and 3.3.3, I noted that these provisions are drafted quite differently from extension 3.3.4(i) in that they simply impose a limit on liability. However, extension 3.3.4(i) is different and though it imposes a limit on liability, it does so in an alternative manner. As a result, in terms of drafting, I was not satisfied the Provider was comparing like with like.

In the preliminary decision of this office, I noted that the sum insured for the entire period of insurance in respect of business interruption as stated in the Schedule of Insurance is €125,000. I accepted that the policy wording in Clause 3.3.4(i) did indeed contain a typographical error but in my opinion, the error in question was more likely to be the inclusion of the words "*any one claim and EUR10,000 any one period of insurance*" at the end of that particular paragraph. The Provider has clarified that the intention of this wording was to apply an annual limit provision; it has now more recently suggested that the typographical error is such that that annual limit ought to read €100,000, rather than €10,000. This does not however align with the overall insured limit of €125,000 within the policy schedule.

Whatever the explanation for the typographical error, I am satisfied that the provisions, as drafted limit the Provider's liability per claim, to a figure of €50,00 or 15% of the sum insured (in this instance €125,000) amounting to €18,750, whichever is the lesser. Therefore, I do not accept the maximum amount payable in respect of a single claim is €10,000. I am satisfied that the maximum amount recoverable by the Complainants under the business interruption infectious disease extension, per claim, is **€18,750**, that is, 15% of the business interruption sum insured.

I note that following its claim assessment, the Provider wrote to the Complainant on **12 May 2020** to advise that it was declining indemnity as it had concluded that the Complainant's losses did not fall within the scope of cover provided by the relevant business interruption infectious disease extension policy wording, a decision it upheld on review in its letter of **8 June 2020**.

I note that on **24 March 2020**, the Government adopted certain NPHET recommendations for the nationwide closure of non-essential retail outlets and services, which included hairdressing businesses. I also note that hairdressers were permitted to reopen on **29 June 2020** (though they were again directed by the Government to close nationwide from **21 October 2020** to **1 December 2020**, and more recently from **31 December 2020** to a yet to be determined date).

In the circumstances of the complaint before me, it is clear that the Complainant closed her hair salon on **14 March 2020**, prior to any Government direction to do so. The Provider-appointed Loss Adjuster forwarded a spreadsheet to the Complainant and her Broker on **1 April 2020**. The Complainant completed the spreadsheet and returned it to the Loss Adjuster under cover of email dated **2 April 2020**.

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The spreadsheet states:

> *"COVID-19 Government social distancing guidelines prohibited work from being carried out safely for staff and clients. …*
>
> *… First death from Covid-19 recorded in Ireland on the 11th March was in [hospital] 20.8KM (12.92miles) from salon.*
>
> *… First death from Covid-19 recorded in Republic of Ireland on the 11th March was in [hospital] 20.8KM (12.92miles) from salon premises.*
>
> *… On Saturday the 14th March I made the decision to put staff on short time week due to reduction in appointments starting the week of 16th March.*
>
> *However by Monday the 16th the crisis has escalated to the necessity to social distance of 2FT (sic) which made it impossible to conduct our business so for safety of staff and clients the salon had to close."*

As a result, the Complainant has stated two separate reasons for the closure of her salon on **14 March 2020**:

- an inability to abide by the social distancing guidelines introduced by the Government; and
- the presence of active COVID-19 cases within a 25 mile radius of her business premises.

I note that the Provider addressed both of these reasons in its original Complaint Response to this Office of **21 October 2020**, as follows:

1. *The Complainant's closure of her hair salon due to its inability to abide by the social distancing guidelines introduced by the Government*

The Provider says that the Government did not introduce social distancing measures *"in consequence of a notifiable disease* [COVID-19] *within a radius of 25 miles of the* [Complainant's business] *premises."*, but rather that such measures were introduced as a national response to a nationwide health issue, which is not an insured peril. As a result, the Provider says that any losses arising from these social distancing measures, or the Complainant's inability to abide by same, are not covered.

The Provider also says that it cannot be stated that "but for" a local incident of COVID-19 within a 25 mile radius of the Complainant's business premises, which is the insured peril, that the social distancing guidance would not have arisen, and the business would have continued and not closed or suffered loss, but rather that the social distancing guidance would have issued in any event, due to increasing incidents of COVID-19 nationwide.

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Similarly, and regardless of the fact that the Complainant's business had already voluntarily closed her hair salon from **14 March 2020**, the Provider says that the later Government direction on **24 March 2020**, ordering the closure of non-essential retail outlets and services, including hairdressing businesses, was not introduced *"in consequence of"* the insured peril of an *"occurrence of a notifiable disease* [COVID-19] *within a radius of 25 miles of the* [Complainant's] *business premises."*

Rather, the Provider says that this was introduced as a national response to a nationwide health issue, designed to reduce the spread of the virus nationally, which is not an insured peril, and would have issued in any event, irrespective of the occurrence of COVID-19 within the 25 miles radius of the Complainant's business premises, and as such any losses due to the closure direction are not covered, as they would have been suffered in any case.

2. *The Complainant's closure of her hair salon due to the presence of active COVID-19 cases within a 25 mile radius of her business premises*

The Complainant submits that when she closed her hair salon on **14 March 2020**, customers due to attend for appointments had been self-isolating and there were local incidents of COVID-19 as well as documented cases in a hospital within 25 miles of her business premises. The Provider says that the presence of occurrences of COVID-19 within the 25 mile radius of the Complainant's business premises is not enough to trigger cover.

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

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

> *"275. … In my view, the relevant insured peril is not confined to the imposed closure of the insured premises. The relevant peril is the imposed closure following outbreaks of infectious or contagious disease (in this case Covid-19) on or within 25 miles of the premises. I am also of the view that cover is not lost where the closure is prompted by nationwide outbreaks of disease provided that there is an outbreak within the 25 mile radius and that outbreak is one of the causes of the closure.*

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276. … it seems to me that the outbreaks which occurred within 25 miles of each of the plaintiffs' premises … were, in any event, a proximate cause of the imposed closure of public houses announced by the government on 15th March, 2020. The fact that outbreaks outside that 25 mile radius were also proximate causes of the government decision does not alter that conclusion. …"

I am also conscious of the Provider's position as outlined in its Complaint Response to this Office on **21 October 2020**, that:

"… for proximate cause purposes, therefore a two-step test must thus be undertaken:

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

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

    ii. *alternatively, if it can be said that "but for" the event comprising the local occurrences within 25 miles the business would not have suffered the relevant interruption/losses, then the local incidents are the factual cause of those losses – the business would not have suffered the same losses in any case;*

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

c. *if the above tests are satisfied by an insured i.e. "but for" the local 25 mile Covid-19 event the BI losses would not have occurred, the losses will be covered.*

These tests are not satisfied in the present matter …"

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

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

Having examined the matter in detail, I am of the opinion that there is nothing within this particular policy clause indicating that for cover to be triggered, the business premises must have been required to close as a result of, say, a government or public authority order or direction to do so. Indeed, I take the view that there is nothing within this particular policy clause indicating that for cover to be triggered, the business has to be closed, at all.

Rather, I am satisfied that for cover to be triggered by clause 3.3.4 c), there must be a loss to the policyholder, arising from the interruption of or interference with the business, as a result of the insured peril, that is, in this instance because of the occurrence of COVID-19 within 25 miles of the Complainant's business premises. I am of the opinion that the reasonable interpretation of the plain meaning of clause 3.3.4 c) is that *"**any**"* occurrence of a notifiable disease (in this case COVID-19) within a radius of 25 miles of the Complainant's business premises, once that occurrence had caused an interruption of or interference with the business, resulting in loss, is sufficient in itself to trigger cover. I am satisfied that there is no stipulation within the policy provision that other occurrences of the notifiable disease elsewhere outside of the 25 mile radius, will in some manner nullify or cancel the operation of the insured peril, which the policy specifies.

In this regard, I am of the opinion that if it had been the intention of the underwriters that the occurrence of the notifiable disease must only be within a radius of 25 miles of the policyholder's premises (and not also beyond that 25 mile radius) in order for the particular insured peril at clause 3.3.4 c) to operate, it would have been open to the underwriters to have specified that particular requirement. In this instance, however, the underwriters did not do so.

As a result, it seems to me that once there is an occurrence of a notifiable disease within a radius of 25 miles of the policyholder's business premises, then cover is potentially triggered. This is the position, regardless of whether there are also occurrences of this notifiable disease elsewhere outside of that radius. I am satisfied that even if the official response to the notifiable disease, that is occurring both within and outside of the radius is, or becomes, a national response, or is recognised to be in some way greater than a localised response, it does not follow from the policy provisions that the interference with or interruption to the policyholder's business is not thereby covered.

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I note that the Complainant has identified two separate reasons for the closure of her hair salon on **14 March 2020**; the first is her inability to abide by social distancing guidelines introduced by the Government, and the second is the presence of active COVID-19 cases within a 25 mile radius of her business premises.

Having considered the evidence and the parties' submission, I am satisfied that it ought to have been clear to the Provider that there was an occurrence of a case of COVID-19 within the 25 mile radius of the Complainant's business premises in and around the time when she closed her business on **14 March 2020**.

That said, I accept the Provider's position that it is not sufficient to simply point to a case or cases of COVID-19 within a 25 mile radius of the policyholder's premises and expect benefits to be paid. This is a potential trigger only for policy benefits. I am satisfied that, on foot of that trigger, the policyholder must demonstrate that the occurrence of the notifiable disease within that area interrupted or interfered with the policyholder's business, causing financial loss.

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

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

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

In this regard, I note that on **20 February 2020**, the Minister for Health signed Statutory Instrument No. 53/2020 – Infectious Diseases (Amendment) Regulations 2020, to include the coronavirus (COVID-19) (SARS-Cov-2) on the list of notifiable diseases. I note that the 'Notifying Infectious Diseases' page of the Health Protection Surveillance Centre website states as follows, at https://www.hpsc.ie/notifiablediseases/notifyinginfectioudiseases/:

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

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I am therefore satisfied that the occurrence of a notifiable disease by its nature, can and does attract public health interventions, the purpose of which is to assist in preventing the spread of infection and further cases.

In addition, the inclusion by the underwriters of business interference cover for policyholders, in the event of a notifiable disease occurring within 25 miles of the policyholder's premises (thereby covering a surrounding area of almost 2,000 square miles) suggests to me that the policy recognises that notifiable diseases, by their nature, will often trigger the implementation of measures, including public health measures, over a specified area, for the purpose of seeking to limit the spread of the notifiable disease in question.

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

It is somewhat inevitable, in my opinion, that a strict adherence to these social distancing measures renders it difficult, if not impossible for some businesses to continue trading efficiently and effectively, or indeed in some cases at all, because of either the nature of the business activity itself or indeed because of the space within which such individual businesses conduct their operations.

Therefore, in light of the foregoing, and in circumstances where I am satisfied of the presence of the insured peril referred to at clause 3.3.4 c) of the policy, that is, that there was an occurrence of a case or cases of COVID-19 within 25 miles of the Complainant's business premises, in and around the time when the Complainant closed her business on **14 March 2020**, I am satisfied that the interruption of or interference with the business caused by the presence of the notifiable disease and the consequent social distancing measures directed by the Government, in response, gave rise to the Complainant experiencing business interference losses. As a result, I take the view that the Provider's original decision to decline the Complainant's claim was inappropriate and unfair and that it was unreasonable and unjust within the meaning of ***Section 60(2)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017***.

I am mindful that the Government, on **12 March 2020**, directed the closure of museums, galleries, tourism sites, schools, crèches, childcare and higher education facilities. I am also mindful of the exhortations of An Taoiseach, that *"businesses [were] to take a sensible and level-handed approach"* in the context of the Government Guidelines, including the required implementation of social distancing. I consider that it was appropriate in such circumstances for each individual business to assess its ability to continue trading, whether on a restricted basis, or at all, within the confines of those Government guidelines on **12 March 2020**.

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I note that, in this instance, the Complainant considered it necessary in such circumstances, to close her business with effect from **14 March 2020**, owing to the need to comply with social distancing requirements. I also note that had she not done so already on **14 March 2020**, the Complainant would have been required to close her hair salon from **24 March 2020** in any event, when the Government directed the nationwide closure of non-essential retail outlets and services.

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

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

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

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

I am also conscious of the Provider's regulatory obligations under the Central Bank of Ireland's Consumer Protection Code, to act honestly, fairly and professionally in the best interests of its customers in its dealings with them. I take the view that, in this instance, the Provider did not act fairly in its dealings with the Complainant in the assessment of the claim for benefit payment, made by the Complainant under her insurance policy in **March/April 2020**. In my opinion, that position regarding the claim, was unreasonable and unjust within the meaning of ***Section 60(2)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017***.

I note that since the preliminary decision was issued by this Office, the Provider has suggested that upholding the complaint on that basis, suggests that it acted unfairly or capriciously. The provider has therefore suggested that the more appropriate basis for upholding the complaint is ***section 60(2)(e)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, that:

> *"the conduct complained of was based wholly or partly on a mistake of law or fact."*

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Whilst I do not agree that upholding the complaint on the basis outlined above, is suggestive of capricious conduct by the provider, as opposed to conduct that was unfair in the circumstances, nevertheless, I accept the Provider's submission that it may be appropriate to also uphold the complaint on that separate ground.

Accordingly, having considered the matter at length, and for the reasons outlined above, it is my Decision, on the evidence before me that it is appropriate to uphold the complaint against the Provider, that it wrongfully or unfairly declined to admit and pay the Complainant's claim for business interruption losses, incurred as a result of the temporary closure of her business premises due to the outbreak of COVID-19. This Office is of the opinion that the Provider acted wrongfully in failing to recognise that the Complainant met the criteria for cover specified at clause 3.3.4 c) of the policy, regardless of whether her losses were concurrently caused by other consequences of the presence elsewhere of COVID-19.

I had intended to direct the Provider to rectify the conduct complained of by admitting the Complainant's claim for business interruption losses with effect from **14 March 2020**, for assessment of the benefit payment to be made, in accordance with the terms of the policy. I note however that at this juncture, the Complainant has been offered a settlement figure of €18,750, representing the upper limit of 15% of the total business interruption sum of €125,000 insured, per claim, during the policy period.

In those circumstances, as the maximum benefit for the claim has been offered to the Complainant, I consider it appropriate to direct the Provider to make that payment to the Complainant in settlement of the claim, if it has not already been paid. In addition, I consider it appropriate to conclude by directing the Provider to make an additional compensatory payment of **€3,500** to the Complainant in recognition of the inconvenience she encountered as a result of the significant delay in securing access to the benefits payable to her under the policy. This payment is directed to be made to the Complaint by the Provider, separate from the policy benefits.

Conclusion

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

- Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to rectify the conduct complained of by making the benefit payment of €18,750, to the Complainant, if not already paid. I also direct the provider to make a compensatory payment to the Complainant in the sum of €3,500, 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.

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- 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

17 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.