



<u>Decision Ref:</u>	2021-0205
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Retail
<u>Conduct(s) complained of:</u>	Claim handling delays or issues Delayed or inadequate communication Failure to provide product/service information Failure to process instructions Rejection of claim
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a limited company trading as a clothing and footwear retailer, hereinafter 'the Complainant Company', holds a business insurance policy with the Provider.

The Complainant Company's Case

The Complainant Company notified the Provider in **March 2020** of the temporary closure of its business on **16 March 2020** for a period, due to the outbreak of coronavirus (COVID-19). As part of its claim notification, the Complainant Company, in a letter dated **23 March 2020**, explained, as follows:

"On the 16/03/20 we had to close our retail clothing and footwear department store due to the Covid-19 pandemic.

Our business posed a high risk in the spreading of the virus for the following reasons,

- We have a high level of customer and staff interaction in the way [of] personal measuring and fitting.*
- We have a high level of customer and product interaction in the way of trying on multiple garments and the repeated handling of several goods in making a decision*
- Customers and staff not been able to maintain a safe social distance to ensure the virus is not spread within the confined space of our store.*
- Due to several confirmed tests of covid-19 in our local community. ..."*

In making its claim, the Complainant Company relied on the '**Business Interruption Section Extensions**' of the applicable business insurance policy document. Following receipt of the Complainant Company's claim notification, the Provider issued correspondence on **8 April 2020** outlining the cover provided under Notifiable Disease extension of the policy, as follows:

"The cover, provided under the Notifiable Diseases Section of the policy, operates only where there is loss resulting from interruption or interference with the business as a result of any occurrence of a notifiable disease at the premises, which causes restrictions on the use of the premises on the order or advice of the competent authority. The indemnity period is from the date on which the restrictions on the premises are applied for a maximum period up to three months, and is subject to a limit as noted in the policy. ..."

On **9 May 2020**, the Complainant Company advised the Provider, as follows:

"A regular client and his wife were both present in our store on numerous occasions and for a significant period of time between the dates of the 28/02/2020 and 8/03/2020. On the 13/03/2020 we were contacted by the couple to say that they were self-isolating due to the covid -19 virus and were awaiting test results. It was later confirmed to us that one of the couple received a positive test result for COVID-19.

With the health of our staff, customers and wider community in mind we made the decision to close our business on the 14/03/2020 and are closed to present.

The government issued an order for all non-essential businesses to close on the 27/03/2020 which included our business and under his order we are still unable to trade at present.

We believe that as a result of both or either of these instances our insurance policy indemnifies us for the interruption incurred to our business. ..."

Following its assessment, the Provider's Loss Adjuster wrote to the Complainant Company on **24 June 2020**, to advise that the Provider had declined the Complainant Company's claim for business interruption losses, as follows:

"After conducting a careful review of your claim and considering all the information you have provided, our Principals have concluded that this claim is not covered under the policy. The cover, provided under the Notifiable Disease Extension of your Policy, operates only where there is loss resulting from interruption or interference with the business as a result of any occurrence of a Notifiable Disease at the Premises, which causes restrictions on the use of the Premises on the order or advice of the competent authority. In this case, a customer at the Premises displayed symptoms of Covid-19 but the restrictions on the use of the Premises by the competent authority was not brought about as a direct result of an outbreak of the Notifiable Disease at the Premises the closure on any view was not caused by an outbreak of a Notifiable

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Disease at the risk premises [the Complainant Company's], rather it was brought about by national considerations resulting from the global pandemic including in particular, the requirements of social distancing and public concerns."

The Complainant Company made a complaint to the Provider on **1 July 2020** in respect of the decision to decline indemnity, as follows:

"Your letter refers to "a customer at the premises displayed symptoms of COVID-19" this is not correct. We clearly stated that we had a regular client and his wife on the premises on numerous occasions between the dated of the 18/02/2020 and the 8/03/2020 for periods of time ranging from 15 minutes to 55 minutes at a time. Both of these people later displayed symptoms of Covid-19 and one of them subsequently tested positive. They felt that they had spent enough time in our store and that the nature of their interaction with us warranted them to contact us on the 13/03/20 and inform us of their illness. Covid-19 is one of the most infectious and contagious diseases that the country has ever experienced and has resulted in almost two thousand deaths and your principals believe that this instance was no reason to take action to prevent the spread of the virus, this does not seem reasonable. If we did not take the decision to close our business and let our staff self-isolate, we would have been ignoring all Government directions.

*I would like to draw your attention to the wording of our policy on page 39. 6.1.ii that states "any discovery of an organism at the premises **likely** to result in the occurrence of a notifiable disease". The word "likely" in the sentence has major importance as one could argue against the reality that due to the interactions our staff had on the premises with a confirmed positive Covid case that the virus was present and likely to cause infection.*

I would like to point out that the continuous closure of our business was as a direction of Government and not as a national consideration as you say in your previous letter. This is a point that has been made by the Central Bank on the 27/03/20 where they stated "Where a claim can be made because a business has closed as a result of a Government direction due to contagious or infectious disease, the Central Bank is of the view that that (sic) the recent Government advice to close a business in the context of COVID-19 should be treated as a direction". This is a view that has also been set out by the Minister for Finance, Public Expenditure and Reform.

Our policy Contains Business Interruption cover that indemnifies against any infectious and contagious disease (Only excluding AIDS) which we requested from your broker / agent when we negotiated and purchased the policy. Our business has experienced significant disruption in the way of closure between the dates of 14/03/2020 and the 08/03/2020 and now that you say we are not covered for infectious and contagious disease leads us to the conclusion that we were mis-sold the policy.

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In your previous letter you also state that our closure was as a result of the “requirements of social distancing” this is untrue as we are able to currently trade and still abide by all social distancing rules.

Also, in reviewing our claim clause 7 on page 40 in the Business interruption section (Prevention of Access) should also be taken into consideration. As due to the travel restrictions which where (sic) signed into law our company’s key employees were unable to travel to work. ...”

In response to the complaint, the Provider wrote to the Complainant Company on **17 July 2020**, advising that:

“The Notifiable Diseases Section of the policy, operates only where there is loss resulting from interruption or interference with the business as a result of any occurrence of a notifiable disease at the premises, which causes restrictions on the use of the premises on the order or advice of the competent authority. The indemnity period is from the date on which the restrictions on the premises are applied for a maximum period up to three months, and is subject to a limit as noted in the policy.

Following a review of the circumstances as set out in your correspondence with us and the appointed Loss Adjuster, we have determined that the criteria for a valid claim under the Notifiable Disease Extension of your Policy has not been met. The fact that a customer tested positive for Covid-19 doesn’t constitute an outbreak of a notifiable disease. There wasn’t therefore an outbreak of COVID-19 at your Premises, and the closure of your Premises was not brought about by a competent authority as a direct result of an outbreak of a Notifiable Disease at your Premises.

In your correspondence to us you refer to the Prevention of Access cover and that the claim should be considered under this cover.

Under the Prevention of Access cover it states “Loss as insured by this Section resulting from interruption of or interference with the Business in consequence of Damage by an insured Defined Peril to property as undernoted will be deemed to be loss resulting from damage to property used by the Insured at the Premises, subject to limits. Property in the immediate vicinity (meaning within 1.5 kilometres) of the Premises destruction of or damage to which will prevent or hinder the use of the Premises or access thereto whether the Premises or Property of the Insured within will be damaged or not”. This claim would not fall for consideration under this section of the policy.

Our position is that as with all claims we must be bound by the terms and conditions of your insurance policy. Having completed my review, our decision to decline your claim is correct and no cover can be provided.”

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The Complainant Company responded to the Provider's letter on **10 August 2020**, as follows:

"... I feel that your last letter did not address all of the issues I raised in my previous correspondence and I would appreciate it if you could address the following questions.

- 1. A customer who was on our premises tested positive for the corona virus. They do not know where they contracted the virus but it was somewhere they had been in the previous 2 weeks, possibly our premises. If the customer was infected while on our premises and due to the nature of the covid virus then the organism was definitely on our premises. How can you say otherwise? In our policy it is worded "any discovery of an organism at the premises **likely** to result in the occurrence of a notifiable disease" we feel that the organism was on our premises and it was likely to cause infection how can you be sure otherwise? Can you be sure that some of our employees had not been infected as a result of their interaction with this infected customer and where (sic) asymptomatic?*
- 2. We would also like you to inform us why the governments direction for our business to close is not considered a direction by a competent authority? The Minister for Finance and the Central Bank have made it clear that our business was closed on the direction of a competent authority. ..."*

The Provider responded to this letter on **18 August 2020** referring to its earlier correspondence.

The Complainant Company sets out its complaint in the **Complaint Form** it completed, as follows:

"Our business insurance policy has business interruption cover due to infectious and contagious disease under the clause "The cover, provided under the Notifiable Disease Extension of your Policy, operates only where there is loss resulting from interruption or interference with the business as a result of any occurrence of a Notifiable Disease at the Premises, which causes restrictions on the use of the Premises on the order or advice of the competent authority". On the 13th March 2020 we were contacted by a customer who had been on the premises the week before for a period of 45 min, the purpose of the call was to inform that they had tested positive for covid-19. On the 14/03/20 we took the decision to close the business in an effort to protect our staff and customers and on the 27/03/20 the government issued an order for our business to remain closed. [The Provider] has refused to honour their policy. We feel that our policy does cover these occurrences and if not we feel that we were mis-sold the policy as we requested to be covered for loss of business due to infectious disease at time we negotiated the policy."

As a result, the Complainant Company seeks for the Provider to admit its claim for business interruption losses as a result of the temporary closure of its business in March 2020, due to the outbreak of COVID-19.

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The Provider's Case

The Provider notes that the Complainant Company has held a business insurance policy with it since **2 August 2018**.

The Provider says that on **26 March 2020**, it received a completed claim form together with a letter from the Complainant Company dated **23 March 2020** advising that the Complainant Company's business had closed since **16 March 2020** due to the COVID-19 pandemic. The Provider says that the Complainant Company stated that the reasons for its closure were due to the nature of its business – there was a higher risk of the virus spreading i.e. high level of customer and staff interaction, measuring and lifting products, high levels of customer and product interaction, customers and staff unable to maintain a safe social distance, and that there were several confirmed cases of COVID-19 in the Complainant Company's local community.

The Provider states that the '**Business Interruption Section – Extensions**' of the Complainant Company's business policy document issued on **21 August 2018** provides at pages 47-48 that:

"6. Notifiable Disease

The insurance by this Policy will extend to include loss resulting from interruption or interference with the Business carried on by the Insured at the Premises in consequence of:

1. *(i) any occurrence of a Notifiable Disease (as defined below) at the Premises [my emphasis] or attributable to food or drink supplied from the Premises.
(ii) any discovery of an organism at the Premises [my emphasis] likely to result in the occurrence of a Notifiable Disease*
2. *the discovery of vermin or pests at the Premises*
3. *any accident causing defect 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*
4. *any occurrence of murder or suicide at the Premises*

Special Condition:

(a) Notifiable Disease means illness sustained by any person resulting from:

- (i) food or drink poisoning or*
- (ii) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent authority has stipulated will be notified to them.*

(b) For the purposes of this Extension:

Indemnity Period means the period during which the results of the Business will be affected in consequence of the occurrence, discovery or accident beginning:

- (i) in the case of 1, 2 and 3 above with the date from which the restrictions on the Premises are applied or*
- (ii) in the case of 4 above with the date of the occurrence*

and ending not later than the Maximum Indemnity Period thereafter.

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Maximum Indemnity Period means 3 months.

Premises will only mean those locations stated in the Premises definition; In the event that the policy includes an extension which deems loss destruction or damage at other locations to be an incident such extension will not apply to this Extension.

(c) The Company will not be liable for any costs incurred in the cleaning, repair, replacement, recall or checking of property.

(d) The Company will only be liable for the loss arising at those Premises which are directly affected by the occurrence discovery or accident.

The liability of the Company will not exceed €250,000 in respect of any one occurrence or €250,000 in any one Period of Insurance."

Upon receipt of the Complainant Company's claim, the Provider says that on **8 April 2020**, it requested the following information:

1. The date of the occurrence of the Notifiable Disease at the Premises or when it was first brought to the Complainant Company's attention;
2. The date on which the restrictions by the competent authority were put in place;
3. The period of the restrictions; and
4. Copies of any notices or relevant documents in support of the claim.

On **12 May 2020**, the Provider says it received correspondence (dated **9 May 2020**) from the Complainant Company advising that some of its regular customers were present in the store on numerous occasions between **28 February 2020** and **8 March 2020** and that on **13 March 2020**, the Complainant Company was advised that the customers in question were self-isolating due to COVID-19. Subsequently, the Complainant Company was informed that one of these customers received a positive test for COVID-19. The Provider says that in light of this information, the Complainant Company advised that it took the decision to close its business effective from **14 March 2020**.

On **14 May 2020**, the Provider says it advised the Complainant Company of the appointment of a firm of Loss Adjusters to investigate the claim. The Provider says the Loss Adjuster contacted the Complainant Company the same day and on **15 May 2020**, the Complainant Company's representative contacted the Loss Adjuster who requested a series of documents in order to evaluate the claim i.e. the Complainant Company's financial accounts, turnover figures, employment details summaries.

Upon receipt of the above documents, the Provider says the details of the claim were investigated. The Provider states that the Business Interruption Notifiable Disease Extension provides cover where there is an outbreak of a disease at the Premises causing an interruption or interference with the Business carried on at the Premises. In order for this extension to apply, the Provider says the following criteria must be satisfied:

1. The outbreak of the Notifiable Disease is at the Premises; and
2. The closure of the Premises is brought about on the advice of the competent authority as a result of an outbreak at the Premises; and
3. There is a verified financial loss directly resulting from 1 and 2 above.

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The Provider says that for cover to apply, there must be an outbreak of a notifiable disease such as COVID-19 at the insured premises and the premises must then be closed by order of a competent authority as a direct result of the outbreak of the notifiable disease at the premises. The Provider says that the Business Interruption Notifiable Disease Extension provides cover for loss of income where the outbreak of the disease is at the Premises and the closure of the premises by order of a local or government authority is as a direct result of an outbreak at the Premises. As there was no occurrence of COVID-19 at the premises, the first two criteria outlined above were not satisfied in order to confirm policy indemnity. On **24 June 2020**, the Provider says the Complainant Company was issued with a declinature letter.

The Provider says that the Complainant Company has quoted only part of the Notifiable Disease Extension wording in isolation without any conditions attaching. As those conditions, as quoted above, have not been satisfied, the Provider says there is no cover under the policy.

The Provider says page 48 of the Complainant Company's business policy document states that:

"7. Preventions of Access

Loss as insured by this Section resulting from interruption of or interference with the Business in consequence of Damage by an insured Defined Peril to property as undenoted will be deemed to be loss resulting from damage to property used by the Insured at the Premises, provided that after the application of all other terms, Conditions and provisions of the policy the liability under this Extension in the immediate vicinity (meaning within 1.5 kilometres) of the Premises destruction of or damage to which will prevent or hinder the use of the Premises or access thereto whether the Premises or Property of the Insured within will be damaged or not."

The Provider says that the Complainant Company's business insurance policy provides cover in relation to loss, damage or legal liabilities which result from one of the insured events as outlined in the policy document i.e. defined peril. Like all insurance policies, it does not provide cover for all eventualities.

On pages 15-20, defined perils are defined as: *Fire, Lightning, Explosion, Aircraft, Riot, Civil Commotion, Strikers, Lock-Out Workers, Earthquake, Storm, Flood, Escape of Water from Any Tank Apparatus or Pipe, Impact, Accidental Escape of Water from any Automatic Sprinkler Installation, Theft, Accidental Damage.*

The Provider submits that the outbreak of COVID-19 does not result in damage to property by an insured defined peril; therefore, this extension is not applicable. The Provider explains that a broker/agent is appointed by it to act as an 'Insurance Intermediary'. The Provider notes that the Complainant Company purchased the business insurance policy through one of its appointed intermediaries. The Provider says there is no record on its file to suggest that Notifiable Disease cover was requested and/or a conversation around this cover had formed part of negotiations when purchasing the policy or at subsequent renewals.

Moreover, the Provider says that the Complainant Company was issued with policy documents at inception of the policy where all terms, definitions, exclusions, extensions, conditions and any endorsements were set out and the policy was renewed in 2019 on the same basis.

The Provider says that the terms of business agreement between it and the Intermediary states that the Intermediary is not empowered to and shall not bind the Provider by any statement, written or oral, unless expressly authorised in writing to do so by the Provider. Furthermore, the Provider says it is not bound by any unauthorised statement and the Intermediary is not empowered to vary in any way, the terms or conditions of any Provider policy or other documentation.

The Complaint for Adjudication

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

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant Company was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

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

A Preliminary Decision was issued to the parties on **27 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.

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The Complainant Company held a business insurance policy with the Provider. The Complainant Company submitted a 'Property Damage/Loss Claim Form' to the Provider dated **23 March 2020** together with the letter dated **23 March 2020** outlining the reasons for its closure. On the claim form, the Complainant Company stated that:

"We had to close our retail clothing + footwear department store due to the Covid-19 pandemic. See attached cover letter with full explanation".

The reasons advanced in the Complainant Company's letter of **23 March 2020** which necessitated its closure were related to customer and staff interaction, customer and product contact, inability to adhere to social distancing protocols, and local outbreaks of COVID-19.

The Provider advised the Complainant Company's broker of the nature of the cover provided under the Notifiable Disease extension of the policy on **8 April 2020** and also requested "details of the occurrence of COVID-19 at the premises." In response to this, the Complainant Company wrote to the Provider on **9 May 2020** identifying two instances which it considered would trigger cover under the policy; namely, the regular customers who attended the Complainant Company's premises (one of whom subsequently tested positive for COVID-19) and the Government imposed closure of all non-essential businesses.

Following this, the Loss Adjuster emailed the Complainant Company on **18 May 2020** setting out the information required to assess the Complainant Company's claim. There also appears to have been certain telephone contact between the Complainant Company and the Loss Adjuster around this time.

The documentation requested by the Loss Adjuster was furnished by the Complainant Company on **4 June 2020**. Following this, the Loss Adjuster prepared a 'Preliminary Report' dated **19 June 2020** for the Provider. I note the following sections of this report:

"Circumstances/Discovery

Following our discussions with [Complainant Company Director], were advised that a regular customer and his wife visited the store on a number of occasions between the 28th February 2020 and the 8th March 2020. On the 13th March 2020, the Insured was contacted by the customer's wife who confirmed that her husband was showing Corona Virus symptoms and that a test was ordered through her local GP. Therefore in light of this information and due to the Government lockdown, the Insured closed the premises on the 14th March 2020. The Insured received a telephone call from the customer's wife approximately one week later and it was confirmed that her husband had indeed contracted the Corona Virus and was self-isolating. The Insured confirmed that the ... customer ... lives locally in [location], not far from the loss address. ...

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Reserve For Insurers:

[I]t is also a matter of fact that the competent authorities such as Environmental Health Officer did not force closure of the premises following an outbreak of the disease at the Insured's premises, in the same way that a competent authority has not agreed to a reopening, as would normally be the case when a localised outbreak and the circumstances that would typically prevail in such circumstances

Policy Liability:

We are aware that [the Provider] is considering each claim on a case by case basis and apart from the actual indemnity period, other important considerations arise including special/other circumstances clause – wide area damage (WAD). Obviously Covid 19 cases or pandemics are clearly not typical claims we met on the notifiable disease section of the Policy, both in terms of causation and duration. In this regard we have requested vouching documentation ...

We have requested proof that a customer did exhibit symptoms of the Corona Virus and were on the premises before a decision was taken to close down, mindful that this decision coincided with the announcement from [the Minister for Health] and the LVA/VFI to voluntarily close all non-essential retail premises on Sunday evening 15th March, on advice of MPHAT (sic) and request from Government at that time."

On **24 June 2020**, the Loss Adjuster advised the Complainant Company of the Provider's decision to decline its claim, on the following basis:

"The cover, provided under the Notifiable Disease Extension of your Policy, operates only where there is loss resulting from interruption or interference with the business as a result of any occurrence of a Notifiable Disease at the Premises, which causes restrictions on the use of the Premises on the order or advice of the competent authority. In this case, a customer at the Premises displayed symptoms of Covid-19 but the restrictions on the use of the Premises by the competent authority was not brought about as a direct result of an outbreak of the Notifiable Disease at the Premises the closure on any view was not caused by an outbreak of a Notifiable Disease at the risk premises [the Complainant Company], rather it was brought about by national considerations resulting from the global pandemic including in particular, the requirements of social distancing and public concerns."

In a letter dated **1 July 2020**, the Complainant Company expressed its disagreement with the Provider's decision to decline its claim under the Notifiable Disease extension. In addition to this, the Complainant Company considered that its claim was covered under two further sections of the policy, as follows:

*"... I would like to draw your attention to the wording of our policy on page 39. 6.1.ii that states "any discovery of an organism at the premises **likely** to result in the occurrence of a notifiable disease".*

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The word “likely” in the sentence has major importance as one could argue against the reality that due to the interactions our staff had on the premises with a confirmed positive Covid case that the virus was present and likely to cause infection. ...

Also, in reviewing our claim clause 7 on page 40 in the Business interruption section (Prevention of Access) should also be taken into consideration. As due to the travel restrictions which where (sic) signed into law our company’s key employees were unable to travel to work. ...”

In this letter, the Complainant Company also raised the issue of the policy being mis-sold.

The Provider responded to the Complainant Company on **17 July 2020**, as follows:

“The Notifiable Diseases Section of the policy, operates only where there is loss resulting from interruption or interference with the business as a result of any occurrence of a notifiable disease at the premises, which causes restrictions on the use of the premises on the order or advice of the competent authority. ...

The fact that a customer tested positive for Covid-19 doesn’t constitute an outbreak of a notifiable disease. There wasn’t therefore an outbreak of COVID-19 at your Premises, and the closure of your Premises was not brought about by a competent authority as a direct result of an outbreak of a Notifiable Disease at your Premises. ...”

The Provider also quoted the relevant policy provision dealing with prevention of access and advised that the Complainant Company’s claim did not come within the terms of this provision.

The parties have provided a copy of the applicable policy document from when the policy was incepted in **August 2018**. At page 44, ‘Business Interruption Section’, the term ‘Business Interruption’ is defined, as follows:

“... loss resulting from 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.”

Clause 6 of the ‘Business Interruption Section Extensions’ states (at pages 47-48), as follows:

“6. Notifiable Disease

The insurance by this Policy will extend to include loss resulting from interruption or interference with the Business carried on by the Insured at the Premises in consequence of:

1. (i) *any occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises*

(ii) any discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease

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2. *the discovery of vermin or pests at the Premises*
3. *any accident causing defect 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

4. *any occurrence of murder or suicide at the Premises*

Special Conditions

(a) *Notifiable Disease means illness sustained by any person resulting from:*

- (i) *food or drink poisoning or*
- (ii) *any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent authority has stipulated will be notified to them.*

(b) *For the purposes of this Extension:*

Indemnity Period means the period during which the results of the Business will be affected in consequence of the occurrence, discovery or accident, beginning:

- (i) *in the case of 1, 2 and 3 above with the date from which the restrictions on the Premises are applied or*
- (ii) *in the case of 4 above with the date of the occurrence*

and ending not later than the Maximum Indemnity Period thereafter.

Maximum Indemnity Period means 3 months.

Premises will mean only those locations stated in the Premises definition; In the event that the policy includes an extension which deems loss destruction or damage at other locations to be an incident such extension shall not apply to this Extension.

(c) *The Company will not be liable for any costs incurred in the cleaning, repair, replacement, recall or checking of property.*

(d) *The Company will only be liable for the loss arising at those Premises which are directly affected by the occurrence discovery or accident.*

The liability of the Company will not exceed €250,000 in respect of any one occurrence or €250,000 in any one Period of Insurance."

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Analysis

It can be seen from the wording of clauses 6(1) to (4) of the Notifiable Disease extension that the perils identified under each of those sub-clauses must occur *at the Premises*; and in the context of clauses 6(1) to (c), the policy further requires the imposition of restrictions on the *use of the Premises*. Accordingly, it is my opinion that the policy wording is clear and unambiguous in terms of the premises specific, *at the Premises* requirement. The term 'Premises' is defined (at page 13) of the policy as: "... *the location of Property Insured as stated in the Schedule.*" 'Property Insured' is defined as:

- "(a) Buildings at the Premises:
Buildings being built mainly of brick, stone or concrete and roofed ... including:*
- (i) landlord's fixtures and fittings*
 - (ii) outbuildings*
 - (iii) walls, gates and fences*
 - (iv) piping, ducts ...*
 - (v) yards, car-parks, roads and pavements. ..."*

The location of the Property Insured as stated on the Complainant Company's policy schedule is its store/business premises.

Given the very clear *at the Premises* requirement, the policy definitions of the terms 'Premises' and 'Property Insured' together with the express identification of the Complainant Company's store/business premises as that Property Insured, it is my opinion that giving the words their plain and ordinary meaning, reasonably interpreted, clause 6(1) requires that for cover to be triggered, there must be an occurrence of a Notifiable Disease actually and specifically at the Complainant Company's store/business premises or the discovery of an organism actually and specifically at the store/business premises, which is likely to result in the occurrence of a Notifiable Disease.

In reaching this conclusion, I note the following passages from the judgment of McDonald J. in the recent High Court case of ***Brushfield Limited (T/A The Clarence Hotel) v Arachas Corporate Brokers Limited and AXA Insurance Designated Activity Company*** [2021] IEHC 263, where he made certain remarks regarding an *at the premises* requirement contained in a clause somewhat similar to clause 6(3) above:

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

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

Therefore, for cover to become operative pursuant to clause 6(1)(i), the Complainant Company must first show there was *an occurrence at* its premises of a Notifiable Disease. Similarly, in respect of clause 6(1)(ii), the Complainant Company must first show that an organism was *discovered at* its premises which was likely to result in the occurrence of the Notifiable Disease. When the Complainant Company satisfies these policy requirements, it must then show that these were the cause of restrictions being imposed on the use of the premises by a competent authority. In this respect, I note it is not disputed that COVID-19 is a notifiable disease for the purposes of clause 6.

The Complainant Company has set out the reasons for the closure of its business in its letters dated **23 March 2020** and **9 May 2020**. However, having considered the reasons for the closure of the Complainant Company's business, the Complainant Company has not provided any evidence to show, within the meaning of the policy, that there was an occurrence of a Notifiable Disease at its premises or that there was the discovery of an organism at its premises, likely to result in the occurrence of a Notifiable Disease.

While the evidence indicates that one of the Complainant Company's regular customers, who was present at its store on dates between **28 February** and **8 March 2020** tested positive for COVID-19 and notified the Complainant Company of this on **13 March 2020**, I do not accept that this is sufficient to show there was an occurrence of a Notifiable Disease at the Complainant Company's premises. Whilst the circumstances of the customer in question may have given rise to contact tracing assessment requirements, this is not evidence that a notifiable disease occurred at the Complainant company's premises.

Leading on from this, the Complainant Company has not demonstrated that any organism was discovered at its store that would likely result in the occurrence of a Notifiable Disease. In particular, I do not consider that the presence of a customer in the Complainant Company's store who subsequently tested positive for COVID-19, sufficiently demonstrates the discovery of an organism at the premises likely to result in the occurrence of a Notifiable Disease, especially as there was no information made available in the context of the claim, as to whether the individual in question had been infected with COVID-19 while in its store.

Accordingly, I am of the view that the Complainant Company has not provided any evidence of an occurrence of COVID-19 at its premises, nor has it shown the discovery of any organism at its premises likely to result in a Notifiable Disease. The Complainant Company's evidence is simply that it was informed by a customer who was present on the premises between **28 February** and **8 March 2020** that they had tested positive for COVID-19. In light of this, it is my opinion that the Provider was entitled to form the view that this was not sufficient to satisfy the requirements of clause 6 of the policy.

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As the Complainant Company has not been able to establish there was an occurrence of a Notifiable Disease at its premises or the discovery of an organism at its premises likely to result in a Notifiable Disease, I do not believe it necessary to consider the second aspect of clause 6, being the imposition of restrictions on the use of the Complainant Company's premises.

The Complainant Company also considers that it is entitled to rely on the Prevention of Access extension to invoke cover under the policy. Clause 7 of the policy document provides, as follows:

"7. Prevention of Access

Loss as insured by this Section resulting from interruption of or interference with the Business in consequence of Damage by an insured Defined Peril to property as undernoted will be deemed to be loss resulting from damage to property used by the Insured at the Premises, provided that after the application of all other terms, Conditions and provisions of the policy the liability under this Extension in respect of any one occurrence or in any one Period of Insurance will not exceed €250,000.

Property in the immediate vicinity (meaning 1.5 kilometres) of the Premises destruction of or damage to which will prevent or hinder the use of the Premises or access thereto whether the Premises or Property of the Insured within will be damaged or not."

I note the '**Defined Perils**' set out at page 15 of the policy document, each of which are set out under 13 individual headings (Clause 7, A to K), as follows: Fire, Lightning, Explosion; Explosion; Aircraft; Riot, Civil Commotion, Strikers, Locked-Out Workers; Earthquake; Storm; Flood; Escape of Water from Any Tank Apparatus or Pipe; Impact; Accidental Escape of Water from any Automatic Sprinkler Installation; Theft; Accidental Damage; and Subsidence or Ground Heave.

In response to the Provider's Complaint Response, the Complainant Company stated in a submission dated **20 January 2021** that "... the law restricting the movement of people to a 2km radius of their home falls under the peril of "Lock-Out Workers"" I understand this to be a reference to the travel and other restrictions introduced by the Government in **March and April 2020**.

At page 16 of the policy document, clause 7D states, as follows:

"Riot, Civil Commotion, Strikers, Locked-Out Workers or persons taking part in labour disturbances or Malicious Persons excluding:

(a) Damage or Business Interruption arising from confiscation requisition or destruction by order of the government or any public authority.

(b) Damage or Business Interruption arising from cessation of work

(c) as regards Damage or Business Interruption (other than by fire or explosion) directly caused by malicious persons not acting on behalf of or in connection with any political organisation

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- (i) *Damage or Business Interruption by Theft*
- (ii) *Damage or Business Interruption in respect of any Building which is Unoccupied."*

When interpreting the cover provided by clause 7D it is necessary to consider the clause as a whole. The term 'Locked-Out Workers' must be read in the context of clause 7D and not looked at in isolation. As a result, it is my opinion that on a proper construction of clause 7D, the language and terms used suggest that this peril provides cover in the event of instances of civil disobedience and labour disputes, rather than Government imposed travel restrictions which applied to essentially every citizen in the State with certain limited exceptions for essential travel and essential workers.

The travel restriction referred to by the Complainant Company was one of the public health measures introduced by the Government to combat the spread of COVID-19 and was not in response to any civil disobedience or labour dispute as contemplated by clause 7D, such as **"Riot, Civil Commotion, Strikers, Locked-Out Workers or persons taking part in labour disturbances"** Accordingly, I do not accept the Complainant Company's position that the closure of its business constituted 'Locked-Out Workers' within the meaning of clause 7D.

Further to this, clause 7 is clear in that the cause of the 'Damage' must be one of the Defined Perils. Having considered the evidence and each of the Defined Perils, I am satisfied that the Provider was entitled to determine that the circumstances giving rise to the Complainant Company's claim, did not come within any of the Defined Perils and, consequently, the cover provided by clause 7.

In its letter to the Provider dated **1 July 2020**, the Complainant Company stated that when the policy the subject of this complaint was incepted, the Complainant Company requested business interruption cover against infectious and contagious diseases from the Provider's broker/agent. The letter continued by stating that *"... now that you say we are not covered for infectious and contagious disease leads us to the conclusion that we were mis-sold the policy."* In its Complaint Form, the Complainant Company stated that: *"We feel that our policy does cover these occurrences and if not we feel that we were mis-sold the policy as we requested to be covered for loss of business due to infectious disease at time we negotiated the policy."*

The evidence of the parties suggests that the Complainant Company's policy was sold by the Provider's tied intermediary.

It is quite clear from the policy document that the Complainant Company is covered for business interruption losses arising from contagious or infectious disease. However, like any policy, certain conditions must be satisfied before a claim is admitted and the benefit becomes payable. Clause 6 is no different and sets out these conditions, in a clear manner. In this instance, the circumstances giving rise to the Complainant Company's claim did not meet the necessary policy conditions.

In the course of its assessment of the Complainant Company's claim, it was never suggested by the Provider that the Complainant Company did not have cover for business interruption losses arising from contagious or infectious disease; rather it was a case of not satisfying the necessary policy conditions. This is quite distinct from not have cover in the first place, as suggested by the Complainant Company. Therefore, simply because the Complainant Company's claim was declined does not mean the Complainant Company did not have cover for business interruption losses arising from contagious or infectious disease.

This formal complaint investigation was commenced in November 2020, in the context of the Complainant Company's complaint, which remained unresolved, that the Provider had wrongfully declined the Complainant Company's claim for policy benefits on the basis of a business interruption claim. That complaint is an entirely separate complaint from a different complaint which has more recently emerged that the policy in question was mis-sold to the Complainant Company. If the Complainant Company wishes to pursue a complaint of that nature, it should raise the matter directly with the Provider setting out details of precisely how the mis-selling occurred. In the absence of a comprehensive investigation of a complaint of that nature, I do not consider it appropriate to make any finding in that regard at this juncture.

Insofar as this complaint is concerned however, that the Provider wrongfully declined the Complainant Company's claim however, while I appreciate that this will be disappointing for the Complainant Company, I am satisfied for the reasons outlined above, that the Provider was entitled to decline its claim.

Conclusion

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

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**

21 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—

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- (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.**

