



<u>Decision Ref:</u>	2021-0239
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Service
<u>Conduct(s) complained of:</u>	Rejection of claim Complaint handling (Consumer Protection Code) Failure to provide product/service information Failure to process instructions
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainants, a partnership that lets property to a tenant, held a Property Owners' insurance policy with the Provider. The policy period in which this complaint falls, is from 22 December 2019 to 21 December 2020. The Partnership is referred to below, as "the Complainant"

The Complainant's Case

The Complainant, through its Broker, notified the Provider on **25 March 2020** of a business interruption claim for loss of rent receivable, as the tenant that it let its premises to, and which trades as a hairdressing salon, was unable to pay rent as a result of its temporary closure due to the outbreak of coronavirus and the government measures introduced to curb the spread of COVID-19.

In this regard, the Complainant emailed the Provider-appointed Loss Adjuster on **6 April 2020**, as follows:

"I was notified on Monday the 16th of March [2020] that [our tenant] had ceased trading with immediate effect as it was not possible for them to comply with the HSE Distancing Guidelines and they indicated that they would not be able to pay the rent at the end of March until further notice. I then spoke to them on the phone and they are obviously hoping that as soon as they possibly can that they will return to work and be in a position to pay rent. Subsequently, the Government announced specifically that Hairdressers were in fact to shut ...

The Tenant has confirmed that they have an inability to pay as they have been forced to shut due to both the HSE Guidelines initially and then subsequently the Government announcement, a specific instruction for Hairdressers to cease trading. There has not been to my knowledge any incident of Covid-19 infection at the property”.

In making its claim, the Complainant relies upon the following Extension to Section 2, ‘Loss of Rent Receivable’, at pg. 26 of the applicable Property Owners’ Insurance policy booklet:

“Disease, Infestation and Defective Sanitation

This Section shall extend to apply to Consequential Loss arising from the occurrence at the Premises of: ...

- (b) a notifiable human, infectious or contagious disease (other than Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) that is required by law to be reported to government authorities;*

which results in closure or causes restrictions on the use of the Premises by order of any person or authority holding the appropriate statutory power”.

Following its claim assessment, the Provider-appointed Loss Adjuster wrote to the Complainant on **14 July 2020** to advise that it had declined the business interruption claim.

The Complainant’s Solicitors wrote to the Provider on **15 July 2020** to appeal the claim declinature, as follows:

“We believe under the insuring clause of section 2 as extended in respect of item A – ‘Loss of rent receivable’ the intent of the clause clearly is that should the premises be shut by order of a statutory power such as the government as a result of an infectious or contagious disease that coverage would be in place.

We note that the decision seems to have been made not to cover on the basis that COVID-19 did not occur at the premises and we believe that a reasonable interpretation of the clause would cover the present situation. We agree with the conclusion that the cause of our loss is the regulations issued by the government rather than a specific occurrence of COVID-19 at the property however we believe a fair interpretation of the clause would cover such a situation”.

Following its review of the matter, the Provider wrote to the Complainant on **17 August 2020** to advise that it was standing over its decision to decline the claim.

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

“A business interruption claim was made but not upheld & we believe the policy does & should cover the specific circumstances.

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Loss of rent from March to July [2020] inclusive as the hairdressers who are tenants were forced by government direction to close due to COVID-19. Rent is €15,000 per year, so 5 months claim equals €6,250”.

The complaint is that the Provider wrongfully or unfairly declined to admit and pay the Complainant Partnership’s business interruption claim for loss of rent receivable, as the tenant that it let its premises to, and which trades as a hairdressing salon, was unable to pay rent as a result of its temporary closure from March 2020, due to the outbreak of coronavirus and the government measures introduced to curb the spread of COVID-19.

The Provider’s Case

Provider records indicate that the Complainant, via its Broker, notified the Provider on 25 March 2020 of a business interruption claim for loss of rent receivable, as the tenant that it let its premises to, and which trades as a hairdressing salon, was unable to pay rent as a result of its temporary closure due to the outbreak of coronavirus and the government measures introduced to curb the spread of COVID-19.

The Provider understands that on **16 March 2020**, the Complainant was notified by its tenant, a hairdressing salon, that it would be unable to make further rental payments due to the Health Service Executive’s Social Distancing Guidelines imposed on 12 March 2020, which had caused a significant downturn in trade. Later, on 24 March 2020, the Government declared that all non-essential businesses had to close, and this specifically included hairdressers.

Following receipt of the claim notification on **25 March 2020**, the Provider assigning a Loss Adjuster to assess the claim. The Complainant advised the Loss Adjuster by email on 6 April 2020 of the circumstances of the loss, as follows:

“The Tenant has confirmed that they have an inability to pay as they have been forced to shut due to both the HSE Guidelines initially and then subsequently the Government announcement a specific instruction for Hairdressers to cease trading. There has not been to my knowledge any incident of Covid-19 infection at the property”.

Following its claim assessment, the Loss Adjuster wrote to the Complainant on **14 July 2020** to advise that it had declined the business interruption claim, as follows:

“Our understanding of your claim is based on the information you have kindly submitted to us. We note that you have sought to recover loss of rental income due to the outbreak of COVID-19.

We understand that no specific cases of COVID-19 have been identified at the Property.

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Your Insurer has given careful consideration to the facts and documents presented in support of your claim and we now write to confirm your Insurer's coverage position. Your Insurer has concluded that the Policy does not respond to your claim. We set out the reasoning for this decision below ...

Policy Response

The Policy is a Property Owners Policy...We refer you to the below applicable Policy Wording (version 3.2019).

The Insuring Clause in the Policy states:

"In consideration of the Insured having agreed to pay the Premium, the Insurer will reimburse, pay or cover the Insured, on and subject to the terms, limits, conditions clauses and exceptions of this Policy, against the events set out in the Sections operative (specified herein) and occurring in connection with the Business during the Period of Insurance, or any subsequent period for which the Insurer agrees to accept payment of the Premium".

The operative section in this instance is Section 2 - Loss of Rent Receivable. The Insuring Clause in Section 2 states as follows:

"The Cover

The Insurer will cover the Insured against Consequential Loss arising from an Incident occurring during the Period of Insurance".

The covered loss in this instance, must arise from an "Incident" that is: "Damage from a Defined Insured Event to Building(s) or property situated at the Premises and used by the Insured for the purpose of the Business".

In this regard:

1. *"Damage" is defined as "physical loss, damage or destruction". It is your Insurer's opinion that no "Damage" (as defined) has occurred.*
2. *A "Defined Insured Event" means "fire, lightning, explosion, aircraft or other aerial devices or articles dropped therefrom, riot, civil commotion, strikers, locked-out workers, persons taking part in labour disturbances, malicious persons other than thieves, earthquake, storm, flood, escape of water from any tank, apparatus or pipe, water freezing in any tank, apparatus or pipe, or impact by any vehicle or animal as more fully detailed under Section 1 Property Damage, Operative Covers 1 - 7". Section 1 Property Damage Operative Covers 1 - 7 includes fire explosion, earthquake, riot, civil commotion, strikers, locked out workers etc, storm or flood, escape of water, water freezing, impact by any road vehicle but there is no reference to infectious diseases contained therein.*

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Considering the above, your Insurer does not believe that a covered loss has arisen under this Section.

Where cover is available under the Insuring Clause of Section 2 (which your Insurer does not believe to be the case), the cover available would be as follows:

“Item A - Loss of Rent Receivable

The insurance under this Item is limited to:

- (a) Loss of Rent Receivable; and*
- (b) Increase in Cost of Working.*

The amount payable by the Insurer as reimbursement in respect of this item shall be:

(1) in respect of Loss of Rent Receivable the amount by which the Rent Receivable during the Indemnity Period shall in consequence of the Incident fall short of the Standard Rent Receivable, and

(2) in respect of Increased Cost of Working the additional expenditure incurred by the Insured for the sole purpose of avoiding or diminishing the reduction in Rent Receivable which but for that expenditure, would have taken place during the Indemnity Period in consequence of the Incident but not exceeding the amount of the reduction in Rent Receivable avoided less any sum saved during the Indemnity Period in respect of such of the charges and expenses of the business payable out of the Rent Receivable as may cease or be reduced in consequence of the incident”.

The above is then varied by the following Extension which is applicable in respect of “Item A - Loss of Rent Receivable”:

3. This Section shall extend to apply to Consequential Loss arising from the occurrence at the Premises of:

- (a) murder, suicide, or food or drink poisoning;*
- (b) a notifiable human, infectious or contagious disease (other than Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) that is required by law to be reported to government authorities;*

which results in closure or causes restrictions on the use of the Premises by order of any person or authority holding the appropriate statutory power.

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The maximum amount that would be paid by the Insurer under this Special Extension shall not exceed 10% of the total Sum Insured under this section or €60,000 whichever is the lesser unless otherwise stated in the Schedule”.

Extension 3 then applies to extend the cover afforded under Item 2 to cover “loss...resulting from interruption of, or interference with, the Business carried on by the Insured at the Premises” where there has been an occurrence “at the Premises” of a notifiable disease.

But whilst COVID-19 may be a “notifiable human, infectious or contagious disease”, in this instance, we are advised that there has not been an outbreak of COVID-19 at the Property and in order for the Extension to respond, the proximate cause of your losses suffered must be because of a specific occurrence of COVID-19 at the Property. In other words, the loss claimed must directly result from the manifestation of COVID-19 at the Property.

As there is no suggestion that your losses claimed are because of a specific case of COVID-19 at the Property, your Insurer is of the view that this Extension is not triggered (in addition to the fact that Section 2 does not provide cover for the reasons stated above in any event). For the same reason, Extension 2 “Denial of Access” is also not triggered and does not provide cover (and the claim does not relate to “Damage” as defined either). Based on the information that you have provided, the view of your Insurer is that the proximate cause of your loss is the guidance and regulations issued by the Government, rather than a specific occurrence of COVID-19 at the Property.

In this regard, please note that the Policy is not intended to provide cover for a general loss of income caused by the negative effects of the global or national COVID-19 outbreak, for example, downturn in trade experienced by all businesses due to a reduction in customer footfall.

In the circumstances, and on the information provided to date, your Insurer has made the decision that the Policy does not respond to the claim presented and on behalf of Underwriters, we hereby decline the claim”.

Following a subsequent review of the matter, the Provider wrote to the Complainant on **17 August 2020** to advise that it was standing over its decision to decline indemnity. The Provider says that the policy cover relating to “a notifiable human, infectious or contagious disease” is an ‘on premises’ hybrid, which is different from and outside the scope of the recent High Court judgment delivered in *Hyper Trust Limited t/a The Leopardstown Inn v. FBD Insurance plc*, on 5 February 2021.

The Provider agrees that COVID-19 is “a notifiable human, infectious or contagious disease”, and was classified as such within the Republic of Ireland on 20 February 2020. It further agrees that the appropriate authorities closed or caused restrictions on the use of the let premises.

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The Provider says that in order for the “*notifiable human, infectious or contagious disease*” extension to respond, the proximate cause of the losses suffered must be a specific occurrence of COVID-19 at the property, which results in closure or causes restrictions on the use of the premises. In other words, the loss claimed must directly result from the authorities closing or restricting the use of the premises as a result of the occurrence of COVID-19 at the premises.

The Provider says however, that in this instance, it has been advised by the Complainant that there has not been, to its knowledge, an outbreak or occurrence of COVID-19 at the insured property.

Instead, the Provider is of the view that the premises were closed as a result of the general Government order to close non-essential businesses, not the presence of COVID-19 at the Complainant’s let premises. As a result, the Provider is satisfied that the Complainant’s losses do not trigger the cover provided by the “*notifiable human, infectious or contagious disease*” policy extension.

Separately, the Provider notes that the exceptional circumstances associated with COVID-19 and the associated, unprecedented claims frequencies (with claims volumes being many times normal levels) resulted in unavoidable delays in engaging with its policyholders regarding policy liability. Additionally, because COVID-19 was at the time a rapidly evolving situation, there was a necessity to observe the regulatory, legislative, and litigation environments. The policy response to COVID-19 claims was complicated, requiring legal consideration and also was being influenced by the examination of well publicised test cases. This was a lengthy process as a very large number of policies all at once required a legal and full review before a position on liability could be taken.

The Provider says that consideration should also be given to the fact that operationally all businesses, the Provider included, had to adapt to the exceptional circumstances encountered due to the COVID-19 pandemic. As of **11 March 2020**, working within any of the Provider’s offices was for essential use only, with exceptions relating to critical business needs or personal circumstances only. In a matter of hours and days, the Provider had to move operations to a remote model. At the same time, insurers were inundated with calls about policy coverage and were attempting to provide answers to questions posed by stakeholders regarding business interruption policies in particular, all the while continuing to process claims in general.

Unfortunately, for the reasons outlined above, the Provider says that this resulted in the timeline of its response to the Complainant falling short of what it would strive to achieve in the normal claims processing environment. That said, the Provider was first notified of the Complainant’s claim on 25 March 2020 and the declinature letter issued on 14 July 2020. The Provider received a complaint regarding the declinature on 17 July 2020 and following its review, the Provider sent its Final Response letter to the Complainant on 17 August 2020.

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The Complaint for Adjudication

The complaint is that the Provider wrongfully or unfairly declined to admit and pay the Complainant Partnership's business interruption claim for loss of rent receivable, as the tenant that it let its premises to, and which trades as a hairdressing salon, was unable to pay rent as a result of its temporary closure from March 2020, due to the outbreak of coronavirus and the government measures introduced to curb the spread of COVID-19.

Decision

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

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

A Preliminary Decision was issued to the parties on **22 June 2021**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

The Complainant is a partnership which lets property to a tenant. The Complainant held a Property Owners' insurance policy with the Provider for the period from 22 December 2019 to 21 December 2020.

The Complainant, through its Broker, notified the Provider on 25 March 2020 of a business interruption claim for loss of rent receivable, because the tenant that it let its premises to, and which trades as a hairdressing salon, was unable to pay rent as a result of its temporary closure due to the outbreak of coronavirus and the government measures introduced to curb the spread of COVID-19.

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Following its claim assessment, the Provider-appointed Loss Adjuster wrote to the Complainant on 14 July 2020 to advise that it had declined the business interruption claim.

The Complainant's Solicitors wrote to the Provider on 15 July 2020 to appeal the claim declination and following its review of the matter, the Provider wrote to the Complainant on 17 August 2020 to advise that it was standing over its decision to decline indemnity.

The Complainant's Property Owners' insurance policy, like all insurance policies, does not provide cover for every possible eventuality; rather the cover is subject to the terms, conditions, endorsements and exclusions set out in the policy documentation.

As there was no damage to the Complainant's property, I note that the policy wording pertinent to the Complainant's claim circumstances was the following Extension to Section 2, '**Loss of Rent Receivable**', at pg. 26 of the applicable Property Owners' Insurance policy booklet:

"Disease, Infestation and Defective Sanitation

*This Section shall extend to apply to Consequential Loss arising from **the occurrence at the Premises** of: ...*

(b) a notifiable human, infectious or contagious disease (other than Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) that is required by law to be reported to government authorities;

which results in closure or causes restrictions on the use of the Premises by order of any person or authority holding the appropriate statutory power".

[underlining added for emphasis]

I note that COVID-19 and its virus agent SARS-CoV-2, were designated as notifiable diseases in Ireland on 20 February 2020. However, in order for the cover provided by the "*notifiable human, infectious or contagious disease*" policy extension to be triggered, I note that the policy wording clearly stipulated that there had to have been an occurrence of the disease, in this case COVID-19, at the premises and that this occurrence of COVID-19 at the premises resulted in the authorities closing or restricting the use of the premises.

I note that in its email to the Provider-appointed Loss Adjuster on 6 April 2020, the Complainant confirmed:

"There has not been to my knowledge any incident of Covid-19 infection at the property".

As there has been no occurrence of COVID-19 at the Complainant's premises, I accept the Provider's position that the cover made available by the "*notifiable human, infectious or contagious disease*" extension in the Complainant's policy was not triggered.

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Accordingly, I am satisfied that the Provider was entitled to decline the Complainant's business interruption claim in accordance with the terms and conditions of the Complainant's Property Owners' insurance policy.

Although the Complainant Partnership takes the view that the intent of the clause is such that its circumstances should be covered, I accept, from the clear wording of the policy, that recovery of benefit was clearly made dependent upon the outbreak of a contagious disease at the premises which, in this instance, did not arise.

Although the Complainant Partnership is dissatisfied with the literal interpretation of the clause which has been taken by the Provider, I accept that the Provider was entitled to maintain the position which it did, that the Complainant's claim was one which did not give rise to the payment of benefit under the policy, for the reasons outlined above. Accordingly, I am satisfied on the evidence available, that there is no reasonable basis on which this complaint can be upheld.

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

14 July 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.