Decision Ref:	2021-0247
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Rejection of claim Claim handling delays or issues
Outcome:	Upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

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

The Complainant's Case

The Complainant submitted a claim for business interruption losses to the Provider in **April 2020** as a result of the temporary closure of his public house from **15 March 2020** for a period, due to the outbreak of coronavirus (COVID-19).

Following an assessment of the claim, the Provider's Loss Adjusters forwarded a letter from the Provider to the Complainant's Broker on **12 May 2020** and then to the Complainant on **25 May 2020** (in identical terms) where the Provider advised that it was declining the claim, as follows:

> *"Unfortunately, for the reasons explained below, we have concluded that there is no cover available under the Policy for your claim.*
>
> *Please be assured that* [the Provider] *appreciates you may be disappointed with this position and of the potential implications our response may have on your business. We have carefully considered the terms of your policy and have obtained legal advice on how our policies respond, which forms the basis of our decision.*

The Claim Made

My understanding of your claim is based upon the information provided during recent communications with our Loss Adjusters. I note that on the 15th March 2020, you ceased trading following a directive from the Government to close all Public Houses and that the reason for the closure of your business was a direct result of Government stipulations. As a consequence of the present situation you have suffered a loss of revenue and have sought to establish the extent of cover under your 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 claim is based upon the economic effects that the Covid-19 situation has had on your business. 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 event 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.

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

By emailed dated **22 June 2020**, the Complainant's Broker forwarded a copy of an undated letter to the Provider's Loss Adjusters from the Complainant for the attention of the Provider in response to the Provider's declinature of the claim. When submitting his complaint to this Office, the Complainant furnished a copy of a letter dated **22 June 2020** addressed to the Provider in response to the declinature of the claim. However, there are slight differences between this letter and the undated letter. Accordingly, the letter which appears to have been received by the Provider (the undated letter) stated, as follows:

"Your decision to reject my claim is based on two factually incorrect assumptions which I outline below;

1. *Your letter states that I ceased trading following a directive from the government; this is the first though unfortunately not the only inaccuracy in your letter. The decision to close the pub was in fact taken* ***prior*** *to any government announcement which can be seen on our* [social media] *page posted at 11am on 15th March as follows;*

   Dear customers and friends,

   In the health and safety interests of both our staff and customers, we have taken the unprecedented decision to shut our doors until the Covid-19 crises is under control. We will be here when this is all over. In the meantime we urge everyone to heed the official advice and look after yourselves and your loved ones at this time. *…*

Your letter fails to acknowledge this salient fact despite your loss adjuster being in full possession of this information. That you applied such a generic language and lazy assumptions to my individual case suggests that your company has simply issued a circular letter generated by your lawyers to deny all Covid-19 related claims regardless of their individual legitimacy. Such stonewalling tactics are disappointing albeit predictable.

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2. *Your letter states that "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"*

Your rejection of my claim assumes that the losses incurred did not arise due to the occurrence of a notifiable disease within the specified vicinity of my premises. This basis is demonstrably false as an outbreak of Covid-19 was confirmed within a couple of miles of my pub. Beyond that, [the pub's location]*, while still a village, has a population of over three thousand people many of whom work 8 miles away in* [redacted] *City, a population centre of over sixty thousand.*

Pursuant to statistics maintained by the Health Service Executive's Health Protection Surveillance Centre, as of 15 March 2020 there were confirmed cases of Covid-19 in the HSE [redacted] *region, comprising counties* [redacted] *(including a substantial proportion within 25 miles of* [the Complainant's pub]*.*

[The Complainant's] *pub has been in operation … since* [year]*. Many banks and insurance companies have come and gone since then. It is a business that has survived famines, world wars, British occupancy, civil war and apart from Christmas Days and Good Fridays, it has closed its door only for* [family] *funerals. The decision to close was taken against this backdrop, was not taken lightly and was taken specifically due to Covid-19 being in the local community.*

In view of the facts as outlined I would ask that you reconsider your inexplicable decision to reject my perfectly legitimate claim for cover. …

The blanket rejection by insurance companies of legitimate claims from small publicans and restaurateurs is a scandal and will undermine people's faith in the insurance concept itself. If small businesses cannot rely on insurance companies upholding their part of the insurance contract when insurable events incur then insurance itself is a conspiracy against society, a sham, a stitch up. …."

Following its review of the complaint, the Provider wrote to the Complainant on **2 July 2020** to advise that it was standing over its decision to decline the claim, as follows:

"I have now completed my review of the complaint, relating to the declinature of your claim which insurers have confirmed does not fall for consideration under the policy.

In addition, we note your comments in your complaint as follows:

> *"Your letter states that I ceased trading following a directive from the government; this is the first though unfortunately not the only inaccuracy in your letter. The decision to close the pub was in fact taken prior to any government announcement."*

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To recap the claim relates to the temporary closure of your business … from 15th March 2020 due to health and safety concerns in accordance with the Government Directive and the resultant impact this has caused as a result of Government guidelines and recommendations in response to the Covid-19 crisis. A claim for business interruption was notified under the policy, which was received by our office on 16th April 2020.

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 25th 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 Complainant sets out his complaint in his Complaint Form, as follows:

"[The Complainant's Pub] *closed its doors on March 14th as a direct result of the prevalence of Covid-19 in the community and the health and safety risk to our staff and customers (this was before the government instruction to close all pubs). Our insurance with* [the Provider] *provides for losses that have arisen due to the occurrence of a notifiable disease at the premises or within 25 miles of the premises but despite this* [the Provider] *denied our claim as you can see in their letter on May 25th and subsequent letters. A 25 miles radius from our premises takes in such populations centres as* [redacted] *City (just 8 miles away),* [names of six other locations redacted] *and the virus was clearly active within this area and was directly attributable to the closure of our premises."*

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

"The pub was shut from March 15th to September 20th inclusive (27 weeks). For calendar year year (sic) *2019, turnover as per certified accounts submitted to Revenue was €368,336 (exclus 23% VAT) or circa €6.95k per week, a gross profit of 54.2% and a net profit of €42,398 (11.5% or circa €799.96 per week). Indicative losses therefore for the closed period would be in the region of €21,600 (27*€799.96). Trading is down about 50% in the first week of trading therefore losses from the Covid-19 are ongoing and are likely to last into the foreseeable future.*

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I would expect my insurers to honour the insurance contract and to reimburse me for the losses I incurred while my business was closed and for those losses I continue to incur due to Covid-19."

The Provider's Case

In order to assist and to provide context, the Provider 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 claim 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*.

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 Irish Government announced the following measures to control the spread of COVID-19:

a. the closure was ordered of museums, galleries, tourism sites, schools, creches, 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 the 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 his public house business.

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.

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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;

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 businesses such as the Complainant’s public house business.

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 enable 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.

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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;

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.

The Provider says that the Complainant's policy provides business interruption cover for 12 months with a limit of indemnity of €185,000. The relevant Extension at clause 3.3.4 of the policy's 'Business Interruption' section provides, as follows:

> *"**Infectious diseases/murder or suicide***
>
> [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:*
>
> *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;*

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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 ID Extension**)

Clause 15.61, the Provider says, defines 'Notifiable disease' as:

"… illness sustained by any person resulting from:

15.61.1 food or drink poisoning; or

15.61.2 any human infectious or human contagious disease, 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".

As above, the Provider says COVID-19 and its virus agent, SARS-CoV-2, were designated as notifiable diseases in Ireland on **20 February 2020**. Reading the provisions relevant to this matter together, the Provider says, the ID Extension provides cover for losses resulting from:

(i) interruption of or interference with the business;

(ii) "in consequence of" any of the following events:

a) any occurrence of COVID-19 at the premises;
b) any discovery of any organism at the premises likely to result in the occurrence of COVID-19;
c) any occurrence of COVID-19 within a radius of 25 miles of the premises;

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(iii) provided that the Provider shall only be liable for loss arising at those premises which are directly subject to the incident.

The Provider says points (ii) a) – c) above, constitute the Insured Peril which must proximately cause the financial losses claimed by the Complainant.

Against this background, the Provider says the Complainant's Broker notified the Coverholder of a potential claim under the policy on **15 April 2020**. The Provider was provided with no further details at this point. The Provider says it instructed their Loss Adjusters on **16 April 2020** and, on **20 April 2020**, the Loss Adjusters sent an email to the Broker requesting the Complainant's contact number to discuss the claim. On **29 April 2020**, the Loss Adjusters spoke to the Complainant who confirmed that he had not been aware of a COVID-19 outbreak on the premises or amongst staff and that the business had closed on **14 March 2020** due to Government guidelines and concern for the safety of customers and staff.

By letters dated **12 May** and **25 May 2020**, the Provider says it set out the reasons why it did not consider there to be coverage for the claim under the terms of the policy, including the ID Extension. A complaint was made by the Complainant in an undated letter that was forwarded to the Provider by the Broker by email dated **22 June 2020**. A Final Response Letter was forwarded to the Complainant on **2 July 2020** detailing the reasons why the claim was not considered to be covered. The Provider says the Complainant completed and filed a Financial Services and Pensions Ombudsman Complaint Form on **28 September 2020**.

Referring to sub-sections c) and h) of the ID Extension, the Provider says this requires the Complainant to prove:

(i) the existence of an "event", in the sense of an occurrence, or occurrences, of COVID-19 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)-(ii) above, constitute the Insured Peril.

When originally assessing the claim and in advance of the outcome of the High Court decision in ***Hyper Trust Ltd v. FBD Insurance plc*** [2021] IEHC 78 (the **Irish Test Case**), the Provider said the key consideration for the Provider concerned when business interruption could be said to be *"in consequence of"* occurrences of COVID-19 within the 25 mile radius. The Provider's view was that to trigger cover, those occurrences within the radius had to be the specific proximate cause of the interruption, in the sense that, but for those occurrences, no interruption would have been suffered. The Provider said that if the interruptions would have occurred in any event, independent and irrespective of the local occurrences within the 25 mile radius, there was no cover. It was not enough that there simply happened to be such occurrences in the radius.

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The Provider says this meant that:

(i) the Complainant in the present complaint was only able to recover under clause (c) of the ID Extension for business interruption that was *"in consequence of … c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises"* - if he can show that his business interruption had been proximately caused by the specific occurrence(s) of the disease within the 25 mile radius (being the relevant "event" and Insured Peril);

(ii) that was 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) further, 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 unambiguous. Such words have been interpreted as relating to the proximate cause …"*;

(iv) for proximate cause purposes, therefore, it was the Provider's position that a two-step test had to be undertaken:

a. firstly, the "but for" test (factual causation) had to be applied. This boiled 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 outside the 25 radius, or a government order to close that would have been imposed whether or not there were incidents within the 25 mile radius), then the incidents of COVID-19 within the radius (being the Insured Peril) did not cause the interruption and losses, such that those losses were not covered;

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ii. alternatively, if it could be said that "but for"/without the event comprising the local occurrences within 25 miles the business would not have suffered the relevant interruption/losses, then the local incidents within the radius *were* the factual cause of those losses – the business would not have suffered the same losses in any case;

b. secondly - and assuming factual causation had 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 were satisfied by the Complainant i.e. "but for" the local 25 mile COVID-19 events/incidents the business interruption losses would not have occurred, the losses would be covered.

The Provider said that these issues, on the exact policy wording as relevant in the present complaint, were 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 said this case considered the extent of COVID-19 related coverage, if any, under 21 separate business interruption coverage wordings for test case purposes. In this regard, the Provider says the Court considered the COVID-19 related operation of an identical infectious disease extension to the one the subject of this complaint, 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.*

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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.

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 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]*."*

[Provider emphasis]

The Provider said the effect of the underlined sections from the FCA Test Case and the effect of the ID Extension as a matter of Irish law as the Provider understood it (even without reference to the decision in the FCA Test Case), was that the Complainant would only be able to recover under clause (c) of the ID Extension – for business interruption that was *"in consequence of … c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises"* –

/Cont'd…

if he could show that the business interruption had been proximately caused by the specific occurrence(s)/incidents of the disease within the 25 miles radius (being the relevant "event" and insured peril).

The Provider says the requirement for showing proximate cause in points (i)-(iv) above and as endorsed in the FCA High Court judgment as underlined above, were not considered by the Provider to be satisfied in the present matter, which had to be analysed from the perspective of the period both prior to, and after, the government-directed closure of businesses such as the Complainant's pub on **15 March 2020**.

In respect of Interruption/Financial Loss prior to 15 March 2020, the Provider says that:

(i) The Complainant's business closed voluntarily on **14 March 2020**, prior to any government direction that public houses close (on 15 March) or that direction becoming a legally enforceable requirement (on 8 April).

(ii) The burden was on the Complainant to prove, on the balance of 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 **15 March 2020**;

b. turnover/gross profit loss was suffered during that period relative to the same period in the previous year:

i. during the period prior to **14 March 2020**; and

ii. between **14** and **15 March 2020** (when the Complainant closed his business without any government direction to that effect)

(together, **the Pre-15 March Losses**); and

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

(iii) The Complainant's letter of **22 June 2020** stated that:

a. there was a confirmed outbreak of COVID-19 within a couple of miles of his premises;

b. beyond that, where the premises are located, has a population of over 3,000 people, many of whom work 8 miles away in [redacted] City, a population centre of over 60,000; and

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c. pursuant to statistics maintained by the HSE's Health Protection Surveillance Centre, as of **15 March 2020** there were confirmed cases in the HSE [redacted]region, comprising counties [redacted], including a substantial proportion within 25 miles of his premises.

However, no evidence, whether in the form of documented statistical data, accounts, newspaper reports or otherwise, had been provided by the Complainant showing on the balance of probabilities:

a. the occurrence of a case of COVID-19 in the 25 mile radius in the period prior to **14 March** or **15 March 2020**;

b. a pre-**14 March** or pre-**15 March 2020** drop in turnover/gross profit relative to the same period for the previous year;

c. which drop in turnover/gross profit was proximately caused by (i.e. would not have occurred but for/without) the "local" COVID-19 occurrences within the 25 mile radius;

(iv) Even if evidence of a local occurrence of COVID-19, and coincidental drop-off in business, *were* to be documented on a balance of probabilities, it was the Provider's position that:

a. any pre-**14 March 2020** gradual downturn that might have been experienced by the Complainant 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 was accordingly on the Complainant to provide evidence of any pre-**14 March 2020** downturn in business, and that the extent of his pre-**14 March 2020** Losses was greater than other similar businesses in the same public house sector outside the 25 mile radius, across the country. If the downturn suffered by the Complainant mirrored, or was less than, the average drop-off of other similar businesses outside the radius, it could not 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 **14-15 March 2020** (when the Complainant voluntarily closed his premises), the Provider says it understood that that closure decision by the Complainant, and the ensuing loss, was in light of COVID-related social distancing guidance issued by the government.

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Even assuming that was the case, the social distancing guidance was not considered to the *"in consequence of"* a specific "incident"/ "event" of COVID-19 illness within the Complainant's 25 mile radius: that guidance would have been, and was, introduced by the government in any case. In other words, it could not be stated that but for/without a local incident of COVID-19 illness within the 25 mile radius, the social distancing guidance would not have been introduced, and the business would have continued. That guidance would have been introduced, and the business would have continued, in any event, due to the increasing incidents of COVID-19 nationwide.

Proof of this was considered to be found in the fact that when (as referenced in the next section below) the **15 March** closure direction by the government required all public houses to shut, that direction included businesses in counties which apparently had no, or virtually no, reported cases of COVID-19 at all at that time (i.e. [county names redacted], as per the official statistics on which the subsequent **24 March 2020** decision was based). This was proof that even if there were no cases of COVID-19, within a particular 25 mile radius of the Insured's premises, closure by order would have issued in any case. Insofar as that was the position on **15 March**, that was even more evidently the position on **12 March** (when social distancing guidance was introduced) and **14 March** (when the Complainant voluntarily closed his business).

The Provider's position at the time of declining the claim, therefore, was that the "down to zero" **14-15 March 2020** interruption and losses could not 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 were not therefore covered.

In respect of <u>Interruption/Financial Loss After 15 March 2020</u>, the Provider says:

(i) Regarding the Complainant's business interruption that occurred post-**15 March 2020** (when he would have been required to close (if the business had not already been closed) by government direction) the ensuing post-**15 March** losses were similarly considered to be irrecoverable;

(ii) This was because that **15 March 2020** government-directed closure interruption 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]*."*

Even if there were such cases within the radius, it could not be stated that "but for"/without such local occurrences, the closure order would not have been imposed, and no losses would have been suffered.

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That order would have been imposed, and the losses would have been suffered, in any case, due to the separate uninsured incidents/events of COVID-19 outside the radius, elsewhere in the country. In this regard, the Provider was mindful of the statement in the FCA Test Case in a different context, as follows:

"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-**15 March** were:

a. in consequence of a government direction introduced as a national response to reduce the spread of the virus nationally (which was considered by the Provider to be an uninsured peril);

b. not as a local response to specific occurrences/"incident"/"events" in the Complainant's 25 mile radius (which was considered to be the only Insured Peril for the purpose of the ID Extension)

clause (c) of the ID Extension was not considered by the Provider to be triggered.

The Provider said that the above explained why it declined the Complainant's claim for business interruption losses as a result of his temporary closure due to the outbreak of COVID-19 by reference to the policy wording of Extension 3.3.4, (the ID Extension).

Effect of the Irish Test Case on the Declinature of the Claim

Since the original declinature of the claim on the above grounds and the receipt of this Office's Schedule of Questions dated **4 January 2021**, the Provider says:

(i) the UK Supreme Court on **15 January 2021** varied the **15 September 2020** High Court decision referenced above (including the High Court's above observations regarding the Provider policy cover); and

(ii) the Irish Test Case decision was handed down by the Irish High Court on **5 February 2021**.

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In short, the Provider says the analysis and decision of both Courts do not support the above reasoning of the Provider which underpinned its denial of coverage of the claim under the ID Extension in the Complainant's policy. While the Irish Test Case did not consider the precise ID Extension wording at issue in the present policy, the Provider says it was concerned with a similar clause which provided business interruption cover where the relevant Insured's business was:

> *"… affected by:-*
>
> *(1) Imposed closure of the premises by order of the Local or Government Authority following … (d) Outbreaks of contagious or infectious diseases … within 25 miles of same."*

In brief, the Provider more recently says:

(i) the Irish Test Case found that under the above extension COVID-19 related business interruption was covered as:

a. there was an occurrence of COVID-19 within a radius of 25 miles of the premises; and

b. the said occurrence was an equal proximate cause, along with occurrences outside the radius, of the business closure/interruption suffered;

(ii) such "equal cause" proof was found in NPHET documentation on **11/12 March 2020** which referenced the general national situation as the basis for closing schools/museums/tourist sites on **12 March** (and subsequently pubs on **15 March** and non-essential businesses on **24 March**) i.e. the closure recommendation was triggered by the conglomeration of individual instances of COVID-19 everywhere in the country, each instance being an equally efficient proximate cause of the closure and ensuing interruption;

(iii) in the absence of any relevant evidence to the contrary, therefore, the Provider now acknowledges and accepts that a "within radius" occurrence of COVID-19, where reasonably proven by the Complainant, is an equal proximate cause of the interruption claimed by the Complainant along with occurrences outside the radius, such that cover will trigger in those circumstances under the ID Extension in the policy;

(iv) the Provider will accordingly not now argue (as it originally did, as above) that the occurrences of COVID-19 outside the radius, as opposed to those within the radius, were the proximate cause of the interruption, such that no cover triggers.

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The Provider says the Court also ruled that negative business trends related to COVID-19, insofar as that forms part of the insured peril, cannot be used to reduce the indemnity calculation. This is the case whether those trends pre-dated or post-dated the triggering of the insured peril (i.e. the occurrence of a case of COVID-19 within the 25 mile radius).

The Provider says that it considers that the "incident" referred to in clause 3.3.4.h) refers back to each of the insured "events" set out in clauses a) to f), including clause 3.3.4.c). The Provider says it has set out above the reasons why it originally concluded that the interruption and losses incurred by the Complainant as a result of the closure of his public house premises were not in consequence of an event comprising an *"occurrence(s) of a notifiable disease within a radius of 25 (twenty five) miles of the premises"*, and why that analysis has now changed in light of the Irish Test Case decision.

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 his business on **14 March 2020** as a result of a Government direction, as no direction to close had issued on that date. Such direction issued on **15 March 2020** and became legally enforceable on **8 April 2020**. The Provider accepts that the Complainant would have had to close his business on **15 March 2020** and, insofar as the business was already closed at that date, the closure from **15 March 2020** was as a result of a Government direction on that date.

The Provider says it does not consider the Complainant's public house to be an "essential service" or an "essential retail outlet" for the purpose of the 7 April 2020 Regulations.

Referring to the Complainant's position regarding the resolution of this complaint, the Provider says it was with a view to dealing with the quantum element of the claim that its **24 February 2021** letter to the Complainant and this Office, set out the next adjustment steps that the Provider proposed. Since then, the Provider says its Loss Adjusters emailed the Complainant on **26 February 2021** with a Request for Information to assist with the adjustment process.

However, the Provider says it would point out that the ID Extension's limit of cover is, as follows:

> *"… i) Insurer's maximum liability under this cover extension clause in respect of any one claim shall not exceed EUR 50,000 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 EUR 10,000 any one period of insurance."*

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"Sum insured", the Provider says, is defined in the policy at clause 15.94 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 €185,000.

On this basis and acknowledging the typographical error in the above clause i), the Provider says it accepts that the potential indemnity available under ID Extension (subject to proof of loss) is 15% of €185,000 which amounts to **€27,750**.

The Complaint for Adjudication

The complaint is that the Provider wrongfully or unfairly declined the Complainant's claim for business interruption losses as a result of the temporary closure of his 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 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 **10 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. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

On **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**. On **24 March 2020**, the Government adopted certain NPHET recommendations for the nationwide closure of non-essential retail outlets and services.

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This was followed by the introduction of further Government measures to combat the spread of COVID-19 which came into effect from mid-night on **27 March 2020**.

The Complainant is a sole trader and trades as a public house. On **14 March 2020**, the Complainant closed his premises due to health and safety concerns surrounding COVID-19 and he submitted a claim to the Provider in **April 2020** for business interruption losses arising from the temporary closure of his business.

I note that following the claim assessment process, the Provider wrote to the Complainant and his Broker in **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 **July 2020**.

The Complainant held a commercial combined insurance policy with the Provider. It can be seen from the Complainant's Schedule of Insurance that the 'Period of Insurance' covered the period **4 November 2019** to **3 November 2020**. In terms of business interruption, the 'Insured Details' section stated that business interruption cover was operative under the Complainant's policy, as follows:

> *"BUSINESS INTERRUPTION INSURED*
> *Indemnity Period: 12 Months €185,000"*

Section 3 of the Complainant's policy document deals with business interruption. In the context of the Complainant's claim, the relevant extension of the business interruption section is extension 3.3.4, '**Infectious diseases/murder or suicide**', at pg. 27 of the policy document, which states, 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;*

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*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**."*

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 policy in detail, I am of the opinion that there is nothing within this particular policy clause indicating that for cover to be triggered, a policyholder's 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.

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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 has caused an interruption of or interference with the business, resulting in loss, is sufficient in itself to trigger cover. I am also satisfied that there is no stipulation within this policy provision that 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. Further to this, 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.

I find support for such an interpretation in the Irish High Court decision in *Hyper Trust Limited trading as Leopardstown Inn v. FBD Insurance plc* [2021] IEHC 78 and in the UK Supreme Court decision in *The Financial Conduct Authority v. Arch Insurance (UK) Limited & Ors* [2021] UKSC 1.

In that context, I note that clause 15, '**General definitions and interpretation**', of the Complainant's policy document defines 'notifiable disease' at 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. Accordingly, I am satisfied that COVID-19 is a notifiable disease within the meaning of clause 3.3.4 c) of the Complainant's policy.

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It appears from the evidence that when the Complainant's claim was submitted to the Provider, evidence of an occurrence of COVID-19 within a radius of 25 miles of his business premises was not provided. Following contact between the Provider's Loss Adjusters and the Complainant, it appears, from the Provider's evidence, that information was sought regarding the occurrence of COVID-19 on the Complainant's premises and amongst the Complainant's staff. However, it is disappointing to note that there is no evidence of any enquiries being made regarding any occurrences of COVID-19 within 25 miles of the Complainant's premises. In correspondence forwarded to the Provider in **June 2020**, the Complainant advised that there were occurrences of COVID-19 within 25 miles of his premises and referenced HSE statistics regarding incidents of the disease in [redacted].

While the Complainant does not appear to have provided a copy of these statistics or documentation to support his statements, I am satisfied that he was making efforts to demonstrate the presence of occurrences of COVID-19 within a radius of 25 miles of his premises. However, in its assessment of the claim, I note that the Provider did not dispute the presence of COVID-19 within a radius of 25 miles of the Complainant's business premises nor did the Provider require the Complainant to demonstrate the presence of any such occurrences as part of its consideration of the claim. This appears to have arisen from the position the Provider was adopting, towards causation requirements. However, having considered the evidence, I am of the opinion that, on the balance of probabilities, the Complainant would have been in a position to demonstrate, at the time of making his claim, an occurrence of COVID-19 within a radius of 25 miles of his premises (an area covering approximately 1,963 square miles) when his business closed on **14 March 2020** had he been requested to do so by the Provider or had the Provider sought further information from the Complainant regarding the occurrences of COVID-19 referred to in this correspondence.

That said, I accept that it is not sufficient to simply point to an occurrence or occurrences of COVID-19 within a 25 mile radius of the Complainant's premises and expect the policy benefit to be paid. This is only a potential trigger for policy benefit. Accordingly, I am satisfied that, on foot of this trigger, the Complainant must demonstrate that the occurrence of the notifiable disease within the 25 mile radius interrupted or interfered with his business, causing financial loss.

As a result, 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.

The inclusion by the underwriters of business interruption cover in the Complainant's policy in the manner set out in clause 3.3.4 and in particular, in the event of a notifiable disease occurring within 25 miles of a policyholder's premises, suggests to me that the policy recognises that notifiable diseases, by their nature, will often trigger the implementation of measures (including public health measures) for the purpose of seeking to limit the spread of a notifiable disease, and led to the adoption of certain practices by business owners and members of the public or cause general changes in societal behaviour.

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For instance, the social distancing measures introduced by the Government in **March 2020,** were in response to the outbreak of the notifiable disease of COVID-19. The concept of "social distancing" is one of the tools used 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 others, and in keeping social contacts to a minimum, the opportunities whereby people come into contact with infected persons 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.

The Complainant's decision to close his premises on **14 March 2020** was motivated by the outbreak of COVID-19 within the community and the health and safety concerns this gave rise to in respect of customers and staff. As such, the reasons underpinning this decision suggest that the Complainant's decision to close his business on **14 March 2020** was motivated by local occurrences of the virus or occurrences well within the very large area covered clause 3.3.4 c).

Further to this, on **15 March 2020** and in response to the outbreak of COVID-19, the Government called on all public houses to close their businesses from that evening. In this respect, I note that the Provider accepts in its Complaint Response that, if the Complainant's business had not already been closed, the Complainant would have had to close his business on that date and that this closure would have been the result of a Government direction.

Therefore, in light of the proper construction of clause 3.3.4 c), it is my opinion that, on the balance of probabilities, the occurrence of COVID-19 within a radius of 25 miles of the Complainant's premises gave rise to the Complainant experiencing business interruption losses within the meaning of clause 3.3.4 c).

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***.

In considering this complaint, I am cognisant of the provisions of the ***Financial Services and Pensions Ombudsman 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."*

I am also conscious that in considering whether this complaint should be upheld, pursuant to ***Section 60(2)*** of the FSPO Act 2017, I should be 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.

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I note that 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) …."*

Accordingly, having considered the matter at length, and for the reasons outlined above, I consider it appropriate on the evidence before me, 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 his 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 his losses were concurrently caused by other consequences of the presence elsewhere of COVID-19.

In response to the preliminary decision of this Office, the Provider has indicated that in its opinion, this finding suggests that the Provider's conduct was in some manner capricious. I do not agree. This office has not found that the Provider acted capriciously in its dealings with the Complainants. Indeed, it is notable that the Provider reacted swiftly to the outcomes of certain litigation in early 2021, both in this jurisdiction, and in the UK.

It is however disappointing that before that change in position, the Provider failed to adequately assess the nature of the claim which was sought to be made by the Complainants, in order to establish whether the Complainants met the clear policy criteria. It is for that reason that this office considers the Provider's conduct to have been unreasonable and unjust within the meaning of ***Section 60(2)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017***.

The Provider has also suggested that the complaint should instead have been upheld under Section 60(2)(e) of the Act, because the conduct was based wholly or partly on a mistake of law or fact. I accept the Provider's position that this ground may also be relied upon, in this adjudication, as an additional basis for upholding this complaint.

In the usual course, in a matter such as this, I would direct the Provider to rectify the conduct complained of by, immediately admitting the Complainant's claim for an immediate assessment of the benefit payment to be made, in accordance with the terms of the policy. However, by letter dated **24 February 2021**, the Provider wrote to the Complainant following judgment being delivered in the Irish Test Case, as follows:

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> *"*[The Irish Test Case] *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,* [the 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 …. The reason for this change is because the above* [Irish Test Case] *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 Provider's Loss Adjusters subsequently wrote to the Complainant by email on **9 March 2021**, to advise that while it was awaiting receipt of certain financial information, the Provider was satisfied to offer an interim payment of €13,875 (being 50% of the maximum amount recoverable for business interruption losses) and a further redress payment of €750 for the likely costs incurred and inconvenience caused in submitting a complaint to this Office. In a further email from the Provider's Loss Adjusters to the Complainant on **18 March 2021**, the Loss Adjusters advised that the Provider was offering €27,750 in settlement of the Complainant's claim, as follows:

> *"We are satisfied based on our review and recalculations that your loss in this case will exceed the allowable inner limit on Infectious Disease cover, of 15% of the Business Interruption Sum Insured, ie €185,000 * 15% = €27,750 in your case. We are also satisfied that the review would indicate that the policy excess will also be exceeded so in this context we are satisfied to offer the inner limit of €27,750 to conclude matters. This is having taking into account the information provided, in terms of turnover, rates of gross profit, likely savings during the closure periods and also wage subsidies and available grants and rates waiver etc …."*

Having regard to the amount of cover in place in respect of business interruption as per the Complainant's Schedule of Insurance and the wording of extension 3.3.4 i), I am of the view that the maximum amount recoverable by the Complainant for this individual claim under the business interruption infectious disease extension is €27,750, being the lesser of €50,000 or 15% of the business interruption sum insured. Whilst the Complainant has indicated that his losses for the year have been more in the order of €70,000, the Provider is obliged only to indemnify the Complainant in accordance with the limits set out within the policy provisions.

I note that since the preliminary decision of this Office was issued in June 2021, the Provider has advised on **1 July 2021**, that it is in the process of paying the Complainant's claim at a figure of €27,750, being the maximum amount of benefit payable under the infectious disease extension. This is a welcome development.

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However, while the Provider's decision to admit the Complainant's claim and pay the maximum benefit payable under the infectious disease extension, is welcome, it is nonetheless the case that it took more than 10 months before the claim was admitted. In such circumstances, I consider it appropriate to direct the Provider to make an additional compensatory payment to the Complainant in the sum of €8,000 (entirely separate from the claim benefit amount of €27,750). This direction is to compensate the Complainant for the tremendous inconvenience encountered throughout a very difficult period, as a result of the Provider's disappointing approach to his claim, and its unreasonable and unjust failure to recognise the claim as one which was clearly covered by the plain meaning of the policy wording.

I note that since the preliminary decision of this Office issued in June 2021, the Provider confirmed on 1 July 2021, that it was in the process of making this compensatory payment to the Complainant, in addition to the payment of benefit, irrespective of its submissions as to the content of the preliminary decision. This is also a welcome development, to bring finality to this dispute between the parties.

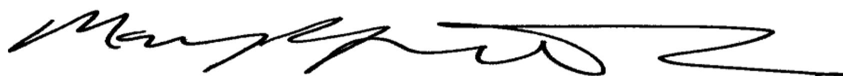
Conclusion

- 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 a policy benefit payment to the Complainant in the sum of €27,750, if it has not already done so. I also direct the Provider, if it has not already done so, to make a compensatory payment to the Complainants in the sum of €8,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

- The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



MARYROSE MCGOVERN
DEPUTY FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

19 July 2021

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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.