



<b><u>Decision Ref:</u></b>	2021-0252
<b><u>Sector:</u></b>	Insurance
<b><u>Product / Service:</u></b>	Service
<b><u>Conduct(s) complained of:</u></b>	Rejection of claim
<b><u>Outcome:</u></b>	Upheld

#### **LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

The Complainant, a limited company trading as a public house, hereinafter ‘the Complainant Company’, holds a Public House insurance policy with the Provider.

#### **The Complainant Company’s Case**

The Complainant Company’s Broker notified the Provider on **19 March 2020** of a claim for business interruption losses, as a result of the Complainant Company’s temporary closure in **March 2020** due to the outbreak of coronavirus (COVID-19).

In making such a claim, the Complainant Company relied on ‘Section 3: Consequential Loss’ of the applicable ‘Public House Insurance Policy Document’, as follows:

*“The Company shall indemnify the Insured in respect of:-*

- (A) The loss of gross profit during the indemnity period calculated by comparing the gross profit earned during the indemnity period with the gross profit earned during the corresponding period in the previous year, adjusted for the trend and other circumstances affecting the business.*
- (B) Increase in the cost of working: the additional expense necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in gross profit during the indemnity period, but not exceeding the sum which would have been payable under (A) had such additional expenditure not being insured.*

(C) *Professional auditors charges for producing and certifying the particulars or details by the Company in connection with the claim.*

...

*The Company will also indemnify the Insured in respect of (A), (B) or (C) above as a result of the business being affected by:-*

1. *Imposed closure of the premises by order of the Local or Government Authority following:- ...*

(d) *Outbreaks of contagious or infectious disease on the premises or within 25 miles of same.*

Following its assessment, the Provider wrote to the Complainant Company on **8 April 2020**, to advise that it was declining the claim, as follows:

*“We have carefully considered your insurance policy to assess whether it provides cover in circumstances where your business had to close to assist nationwide measures introduced by the government to slow the spread of the COVID 19 pandemic. The business interruption section of the policy is normally triggered following physical damage to the premises or stock caused by one of the insured events listed in the policy. There is also an extension to the cover for enforced closure due to an outbreak of a notifiable infectious or contagious disease either at the premises or within 25 miles of the premises ...*

*[The Provider] have carefully considered your claim and do not consider that the claim falls within cover under the Policy. In particular, [the Provider] is satisfied that the claim notified is not covered for the following reasons, each of which apply independently of each other.*

1. *A requirement of cover is that any closure would have to be a closure following outbreaks of contagious or infectious disease in the premises or within 25 miles of same. That requires that the closure be caused by outbreaks of contagious or infectious disease on or within 25 miles of the premises. The closure on any view was not caused by outbreaks of infectious disease on or within 25 miles of the premises, rather it was caused by national considerations resulting from the global pandemic including in particular, the requirements of social distancing.*

2. *It is clear that taken as a whole, clause 1(d) does not cover the Covid-19 pandemic and could not reasonably be interpreted as extending to such a situation. It is not clear from sub-clause 1(d) that the cover provided is cover in respect of outbreaks of contagious or infectious diseases particular to a locality. A pandemic manifestly does not fall within the scope of the clause. The WHO Covid-19 declared pandemic is by its nature, scale and consequences entirely different to localised outbreaks of contagious or infectious diseases that might reasonably have been contemplated by the parties when this policy was entered into.*

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3. *It is clear from clause 1(d) that the agreement to indemnify in respect of the risk at 1(d) is provided only where the business interruption loss has been caused by the matters specified at 1(d). It is quite clear having regard, inter alia, to social distancing practices (including now the restrictions on more than 4 people gathering together outdoors) and widespread public concern regarding the risk of infection, any business interruption loss has been caused by such social practices and public concerns and not by clause 1(d)."*

Following receipt of this letter, the Complainant Company wrote to the Provider on **16 April 2020**, as follows:

*"I reject your interpretation of the cover provided by the Policy to indemnify my company for business loss consequential to the imposed closure of my business premises on March 15<sup>th</sup> due to the outbreak of infectious disease (Covid-19) within 25 miles of my premises.*

*A local infectious disease can become national or global if its transmission is not curtailed. As an experienced insurer [the Provider] should have known that such a risk existed."*

By letter dated **10 June 2020**, the Provider advised the Complainant Company's Broker that it was upholding its decision to decline the claim, as follows:

*"... a requirement of cover is that any closure would have to be closure following outbreaks of contagious or infectious disease on the premises or within 25 miles of same. In this instance, the closure of the business is part of a nationwide indefinite closure of all businesses and is not related to the premises covered by this Policy or the locality. The indefinite closure of businesses throughout the state would be considered as a risk of a completely different nature from the insured risk.*

*The cover provided under clause 1(d) is cover in respect of outbreaks of contagious or infectious disease on or within 25 miles of the premises and does not cover the Covid-19 pandemic. Cover for a pandemic is very different from cover for localised outbreaks of infectious diseases that affect individual public houses.*

*The closure of the public house premises, envisaged by the relevant policy wording was a closure specific to the premises and for a short duration. The suggestion that business interruption cover not triggered by damage to the premises, but provided by way of an extension relating to specific and limited insured perils extends to a risk of an entirely different nature, is inconsistent with the policy wording. The cover that you are contending for is not in respect of an insured peril. The closure is unrelated to the premises or locality and is part of a nationwide indefinite closure of all businesses. An indefinite closure of business premises throughout the state is a risk of a completely different nature from the insured risk.*

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*Furthermore, the general underwriting risks and considerations arising in relation to cover for a pandemic are very different to those that arise in connection with the limited business interruption extension provided in this Policy free of charge. Apart from any other consideration, an insurer's exposure in circumstances of a pandemic is of an entirely different nature.*

*It is clear that any business interruption loss has been caused by social distancing practices and public concerns and not by matters specified the clause 1(d) of the Policy. The proximate cause of any losses in this case are the social and other practices adopted by the public and the various measures taken arising from the public concern about the risk of infection. These matters independently of the closure of the premises are the dominant and proximate cause on the losses in respect of which this claim is made.*

*Even if liability and causation could be established, further complicated issues arise in relation to the application of the trends clause in the Policy. Any claim for loss of gross profit under that clause will need to be adjusted to take account of trends and an indemnity period. In circumstances, where for reasons already set out, at present it is highly unlikely that any individuals would be attending public houses, a very significant adjustment would be required. Even if there is some easing of restrictions as regards individuals movements, issues will arise as to whether there could be sufficient revenues to justify opening a public house having regard to the number of persons either permitted to be present and/or likely to attend having regard to public concern by risk of infection and entirely changed economic circumstances are very relevant factors. Other the relevant considerations will include the cancellation of sporting events and/or events which would otherwise affect the public houses' normal Clients and public houses' normal revenue stream.*

*We do not agree with the suggestion that there is an ambiguity in the policy that requires to be construed in favor of the insured. The position adopted by [the Provider] is not in any way inconsistent with the communications from the Central Bank of Ireland. [The Provider] is entitled to rely on the policy wording, if that policy wording, properly construed, does not provide cover for the insured loss. That is so in the present case. We can confirm that we have been fully and properly advised with regard to our legal obligations and are compliant with the same."*

The Complainant Company considers that its claim for business interruption losses is a result of its temporary closure due to the outbreak of COVID-19 and is covered by the terms and conditions of its Public House insurance policy. In this regard, the Complainant Company sets out its complaint in the Complaint Form, as follows:

*"Letter of Declinature of my claim [dated 8 April 2020] which I have received from [the Provider] is refusing to accept liability on the grounds that the infection was a pandemic rather than a local infection, that the cover could not reasonably be interpreted as extending to Covid-19 and the business closure was a result of public health regulations arising from Covid-19.*

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*I reject [the Provider's] interpretation of the cover provided by their insurance policy to indemnify my company for business loss consequential to the imposed closure of my business premises on March 15<sup>th</sup> due to the outbreak of an infectious disease (Covid-19) within 25 miles of my premises ...*

*[The Complainant Company's] business is situated 36km from C. U. H. This falls within the radius outlined in the Policy Wording which confirms a 25 miles radius. It is clear that there was an outbreak of an infectious disease at C. U. H. which unfortunately, resulted in people dying ... & others who contracted the disease. It is clear that [the Complainant Company's] business was closed on Government orders as a result of an infectious disease outbreak in various parts of the country & one of those locations is within the 25 miles radius. [The Complainant Company's] business was not closed because of "requirements of Social Distancing" & this is an incorrect statement to make ...*

*Can you point out please, in the Policy Wording, where it specifically excludes cover in relation to Pandemics? According to WHO website definition, Infection diseases are caused by pathogenic microorganisms, such as bacteria, viruses, parasites or fungi, the diseases can spread, directly or indirectly, from one person to another. This is why the Government ordered [the Complainant Company's] business to close, not due to Social Distancing Requirements. You will note though that Minister for Finance ... and the Central Bank of Ireland have both advised, that both amount to the same thing so how can [the Provider] distinguish between the two when the Minister for Finance and & the Central Bank are both saying that they amount to the same thing. Are [the Provider] going against both of those offices? ...*

*We wish to seek financial compensation for business loss consequential to the imposed closure of my business premises on March 15<sup>th</sup> due to the outbreak of an infectious disease (Covid-19) within 25 miles of my premises.*

*The loss cannot be quantified at present due to the uncertain duration of the closure arising from the pandemic."*

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

### **The Provider's Case**

The Provider said it originally declined the Complainant Company's claim for business interruption losses "resulting from its temporary and ongoing closure due to the outbreak of coronavirus" because it was the Provider's position that the relevant policy, being a 'Public House Insurance Policy' (the "Policy") did not respond in the circumstances that have arisen, for a number of reasons.

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Before outlining those reasons, the Provider said it was important that this Office understood that it considered the position very carefully, including seeking legal advice from Senior Counsel (in respect of which privilege is maintained), before arriving at its position on declining cover.

In broad terms, the Provider said, the reasons why it declined claims under the Policy, including the claim of the Complainant Company, are (i) there has been no insured event so as to trigger an indemnity; and (ii) even if there had been an insured event, the losses resulting from the event were also caused by an independent concurrent proximate cause of loss such that the insured event cannot be considered the cause of the insured's loss. In setting out fully the Provider's position on each of these issues, the Provider said it would be helpful in the first instance to set out in full, the relevant insuring clause (the "Clause"):

*"The Company shall indemnify the Insured in respect of:-*

- (A) The loss of gross profit during the indemnity period calculated by comparing the gross profit earned during the indemnity period with the gross profit earned during the corresponding period in the previous year, adjusted for the trend and other circumstances affecting the business.*
- (B) Increase in the cost of working: the additional expense necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in gross profit during the indemnity period, but not exceeding the sum which would have been payable under (A) had such additional expenditure not being insured.*
- (C) Professional auditors charges for producing and certifying the particulars or details by the Company in connection with the claim.*

*Resulting from the business being affected by loss or damage for which liability has been admitted and payment has been made under Section 1 and 2 of this Policy.*

*Less any sum saved during the indemnity period in respect of such of the charges and expenses of the business payable out of the gross profit as may cease or be reduced in consequences of the damage.*

*Provided that if the sum insured on gross profit be less than the sum produced by applying the rate of gross profit to the annual takings of the business, the amount payable shall be proportionately reduced.*

*The Company will also indemnify the Insured in respect of (A), (B) or (C) above as a result of the business being affected by:-*

- 1. Imposed closure of the premises by order of the Local or Government Authority following:-*
  - (a) Murder or suicide on the premises*
  - (b) Food or drink poisoning on the premises*
  - (c) Defective sanitary arrangements, vermin or pests on the premises*
  - (d) Outbreaks of contagious or infectious disease on the premises or within 25 miles of same. ..."*

[Provider emphasis]

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The Provider said that also of relevance was the definition of 'indemnity period' in the Clause, which is defined as follows:

*"The period beginning with the occurrence of the loss or damage and ending not later than the twelve months thereafter during which the results of the business shall be effected [sic] in consequence of the loss or damage."*

In interpreting the clause, the Provider said it was obviously crucial to consider the relevant principles of contractual interpretation. An insurance policy is a contract like any other, and thus, its meaning falls to be interpreted by the well-established principles of contractual interpretation.

Those principles, the Provider said, as confirmed by the Supreme Court in **Law Society v. Motor Insurers Bureau of Ireland** [2017] IESC 31 ("MIBI"), are primarily the principles set out by Lord Hoffmann in **Investors Compensation Ltd v. West Bromwich** [1988] 1 All ER 98. The Provider cited a number of passages from these decisions.

The Provider submitted that these authorities were clear that the agreement as a whole must be considered when seeking to interpret the clause in dispute. The Provider also submitted that agreements are concluded against a background of facts which were known to, or which should have been known to, the parties as reasonable people, at the time when they concluded their agreement. In interpreting an agreement, regard must be had to this 'factual matrix' as referred to by Lord Hoffman and O'Donnell J.

The foregoing principles were relevant, the Provider said, in considering the appropriate interpretation of the Policy, including the Clause, and therefore, the validity of the Provider's declinature of the Complainant Company's claim.

Turning to the specific reasons for that declinature, the Provider said:

**(i) No insured event**

All insurance policies must define the circumstances in which an indemnity is triggered, referred to as the "insured event". This is the control mechanism by which an insurer can manage and assess its exposure to risk, and it is also the event that the insured understands is covered on their insurance policy.

In the context of this complaint regarding the Clause, the insured event is the *"Imposed closure of the premises by order of the Local or Government Authority following ... (d) Outbreaks of contagious or infectious disease on the premises or within 25 miles of same."*

The Provider said a number of points were relevant about this insured event provision:

1. The insured event is the *"imposed closure of the premises"*, rather than the outbreak of disease *per se*.
2. The imposed closure most arise as a result of an order from the Local or Government Authority.

3. The order of the Local or Government Authority most “follow” one of a number of potential triggers, including *“outbreaks of contagious or infectious disease on the premises are within 25 miles of same”*.
4. The term *“the premises”* can only sensibly be interpreted as meaning the premises of the insured under the individual insurance policy concerned. This is clear from the definition of “buildings” in Section 1 of the Policy and a cursory review of the remainder of the Policy.
5. The word “following” requires a causal link between the order of the Local or Government Authority and the outbreak of contagious or infectious disease on the premises or within 25 miles of same.

Thus, it is not sufficient that there are outbreaks of disease on the premises or within 25 miles of same, and the Local or Government Authority has separately ordered the closure of the premises. The imposed closure must be ordered because of the outbreaks of contagious or infectious disease in the specific premises concerned, or within 25 miles of same.

Applied in the context of the COVID-19 pandemic on the closure of the Complainant Company’s premises, the Provider said:

1. It accepted that the closure of the Complainant Company’s premises was *an “imposed closure ... by order of the Local or Government Authority ...”* The Government requested public houses to close on the evening of 15 March 2020, which the Provider said it accepted that this amounted to *“imposed closure”* for the purpose of the Clause.
2. The Provider accepted that COVID-19 was a *“contagious or infectious disease”* within the meaning of the Clause.
3. The Provider also accepted that there were, or plausibly may have been, outbreaks of contagious or infectious disease, in the form of COVID-19, within 25 miles of the Complainant Company’s premises. The Provider also said that it noted that no claim was being made that there was an outbreak actually on the premises.
4. The crucial link was missing. The Government’s request (or order) that public houses close was not caused by the *“outbreak of contagious or infectious disease on the [Complainant Company’s] premises or within 25 miles of same”*. Indeed, the Government’s request was not caused by the outbreak of contagious or infectious disease on or within 25 miles of the premises of an individual public house, whether insured by the Provider or otherwise. Instead, at the Government’s request (or order) the public houses closed was caused by general considerations relating to the need to contain and limit the spread of COVID-19 in the State.

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5. That this was so is clear from the press release the Government issued on Sunday 15 March 2020 when public houses were requested to close. In particular, the press release made clear that the public houses were being asked to close for the following reasons:

*“... The LVA and VFI outlined the real difficulty in implementing the published Guidelines on Social Distancing in a public house setting, as pubs are specifically designed to promote social interaction in a situation where alcohol reduces personal inhibitions.*

*The government, having consulted with the Chief Medical Officer, believes that this is an essential public health measure given the reports of reckless behavior by some members of the public in certain pubs last night.*

*While the government acknowledges that the majority from the public and pub owners are behaving reasonably, it believes that it is important that all pubs are closed in advance of Saint Patrick’s Day ....”*

6. It is clear from the foregoing that the closure request had nothing to do with the outbreak of contagious or infectious disease on the premises of any particular public house, or within 25 miles of same. Instead, the closure related to the general risk of community transmission.
7. This is further evident from the fact that, on 7 April 2020, the Minister for Health signed the Health Act 1947 (Affected Areas) Order 2020 which designated the entire State as *“an area where there is known or thought to be sustained human transmission of Covid-19.”*
8. As a result, there is no causal link between the *“imposed closure ... by order”* and the *“outbreak of contagious or infectious disease on the premises or within 25 miles of same”*. Simply put, no insured event had occurred under the Clause and thus no indemnity was available under the Policy.
9. The foregoing was predicated on a textual analysis of the Clause, set against certain facts surrounding the closure and the reason for same. The Provider’s position was further reinforced by the *“factual matrix”* against which the Policy was concluded.
10. With respect to the relevant *“factual matrix”*, it was clear that, when the Complainant Company entered into the Policy, it never considered that it was purchasing general pandemic insurance. Similarly, the Provider did not consider that it was underwriting general pandemic insurance. While general pandemic insurance was available at the time the Policy was entered into, it was a bespoke and niche product, and was not offered by the Provider or, indeed, any general insurer in the State. It was clear, therefore, that the intentions of the parties at the time the policies were entered into did not include the intention that the Policy would cover a pandemic such as COVID-19.

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11. This aspect of the “factual matrix” was reinforced by independent expert evidence which the Provider had commissioned from underwriting and insurance broking experts. In that regard, the Provider referred to an expert report from an expert in the area of insurance broking and an expert report from an underwriting expert. The Provider said a number of points emerged from their reports:

- a. The Clause must be considered in the context of the murder/suicide clause – i.e. it concerns perils associated with the specific premises as opposed to broader concerns.
- b. Clauses of this sort are generally considered to relate solely to localised (as opposed to generalised) risks.
- c. Specifically, such clauses would not be considered to relate to pandemic risk.
- d. Pandemic cover is a highly specialised, exotic and expensive type of cover that is only available on specialised contingency markets and is generally provided as part of a bespoke offering.
- e. Pandemic coverage was generally confined to risk surrounding cancellation of particular events.
- f. Any policy that contained pandemic cover would have to be priced specifically to reflect same - in that regard it was significant that there was no premium charge for the additional cover provided by the Clause under consideration here.
- g. Had the Clause being intended to cover pandemic risk then this would have given rise to specific regulatory considerations for the Provider.

12. A further aspect of the relevant “factual matrix” was that a pandemic was of an entirely different nature, scale and consequence to localised outbreaks of disease, and thus it represented an entirely different risk proposition. As adverted to in the expert reports referred to above, had the Provider intended to underwrite pandemic insurance, there would have been various regulatory implications for it, not the least being the need to hold additional regulatory capital against the risk. The Provider did not do so, nor was it required to do so in circumstances where it was simply not a risk that the Provider underwrote.

13. This aspect of the “factual matrix” was reinforced by independent expert evidence which the Provider commissioned from infectious diseases specialists. In this respect, the Provider referred to an expert report which described the origins and development of current the pandemic. The Provider said this was clear on any view that a pandemic is an event (and a risk) of an entirely different scale and magnitude to localised outbreak. This was further reinforced by independent expert evidence which the Provider commissioned from insurance prudential specialists. At the time of submitting its Complaint Response to this Office, the Provider said this evidence was currently in draft form and the Provider was not in a position to furnish this report.

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However, the Provider would be in a position to furnish this report at a later date. In this respect, number of additional expert reports were provided to this Office under cover of letter dated **9 November 2020**.

14. A further relevant aspect of the “factual matrix” was that the actions taken by the government to order and impose closure of almost every business in the State was entirely unprecedented, whether in response to the outbreak of contagious or infectious disease or otherwise. The parties simply could not have considered that the Clause was underwriting such an eventuality.
15. This aspect of the “factual matrix” was reinforced by independent expert evidence commissioned by the Provider from an expert in public administration which the Provider said set out in considerable detail the nature of the State’s response to the COVID-19 pandemic. The Provider submitted that this was particularly relevant in the context of identifying the actual cause of the business losses claimed. It was clear from this report and the account of the governmental and public health response that, absent a government mandated closure of pubs, the other restrictions and extant public health advice would have rendered the continued operation of pubs wholly non-viable.
16. It was the Provider’s position that each of these aspects of the relevant “factual matrix” were known, or were reasonably available to, the parties at the time the Policy was concluded, and thus it must inform the interpretation of the Clause, and the definition of the insured event therein. To the extent that there would be any dispute about the foregoing, the Provider said it reserved its right to rely on such other evidence of the relevant “factual matrix” as may be necessary to establish its position.
17. In addition to the textual and “factual matrix” assessment above, the Provider’s position that no insured event occurred was further reinforced by the application of business common sense. It was a common-sense proposition that an extension in a general insurance policy for businesses involved in the hospitality trade relating to the outbreak of contagious or infectious disease was intended to cover localised events. The existence of a 25 mile radius within which such an event could occur did not detract from that proposition. The alternative proposition (a) that the Clause could be interpreted to cover nationwide outbreaks of disease that could occur both within and outside the 25 mile radius, (b) that the Provider would have underwritten such insurance for over 1,000 public houses across the entire State, and (c) that the Provider would have provided such an extension free of charge, is commercially nonsensical.

In summary, the Provider said that having regard to the foregoing, it declined cover because no “insured event” occurred for the purposes of the cover provided by the Clause, taking into account its text, the relevant “factual matrix” and business common sense.

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**(ii) Concurrent independent proximate cause of loss**

The Provider said even if an insured event had occurred, it was necessary to consider what loss had been caused by that event. An insurance contract is a contract of indemnity, and it is only the loss that has actually been caused by the insured event that is covered by the insurance contract. Furthermore, the Provider said, it was only where the insured event was the proximate (i.e. the dominant, effective, or operative) cause of the loss that an indemnity could be provided, and this is a fundamental principle of insurance law.

When assessing the issue of causation, the Provider submitted, it is a well-established principle that the appropriate approach is to utilise a “but-for” test - in other words, it was necessary to consider the counterfactual of what would have happened “but-for” the insured event occurring.

The Provider said, in certain circumstances, a loss may be caused by more than one proximate and concurrent cause, only one of which is insured. Where there were multiple concurrent independent proximate causes of the loss so that any of the causes of loss would, on their own, have caused the loss, then there is no indemnity available.

The Provider said a good example of such a scenario was provided by the case of *Orient-Express Hotels Ltd v. Assicurazioni Generali* [2010] Lloyd’s Rep IR 531 (“Orient Express Hotels”). In *Orient Express Hotels*, the Provider said, the appellant hotel, which was located in New Orleans, was insured against business interruption arising from damage to the property. It sustained significant physical damage as a result of Hurricanes Katrina and Rita in August 2005, and it was closed in September and October 2005. It sought to claim for the business interruption, and the claim was denied on the basis that the business interruption losses would in any event have been caused by the general damage to New Orleans by the Hurricanes, the resulting loss of attraction, and the publicly ordered evacuation that took place at the time. The Provider said this argument was accepted by the arbitrator in the case, and upheld an appeal on point of law to the English High Court. The loss in question was caused by concurrent but independent proximate causes - either the damage to the hotel would have caused the loss, or the damage to the surrounding area, loss of attraction, and evacuation would have caused the loss. Only the former was insured, but in the circumstances the “but-for” causation test was not satisfied; “but-for” the damage to the property, the business interruption losses would have occurred anyway, and thus legally the damage to the hotel did not cause those losses.

In the context of *Orient Express Hotels*, the Provider said it was clear there was a requirement that the loss suffered be causally linked to the insured event. The Clause provides that: “*The Company will also indemnify the Insured in respect of (A), (B) or (C) above as a result of the business being affected by [the insured event]*”. The Provider said, the term “*as a result of*” makes clear that the indemnity only extends in respect of the losses caused by the insured event. Precisely the same reasoning as was used in *Orient Express Hotels*, the Provider said, applied in the context of the COVID-19 business interruptions claims under the Policy.

The losses sustained by the Complainant Company in this case, and all of the other insureds under the Policy, would have been caused irrespective of whether the insured event (i.e. imposed closure) occurred. Even if there had been no imposed closure, the same losses would have occurred because all of the other aspects of the COVID-19 pandemic, and the government response to it, would still have occurred. The Provider also referred to the report of its public administration expert.

The Provider said that since **8 March 2020**, the Government has taken significant public health measures, both through the giving of guidance and advice, and the enactment of legally binding restrictions (together, the “Public Health Measures”). The adverse impact of the response of the Government, businesses and individuals, and the adverse impact of such response on economic activity and public confidence, was immense. The combined effect of the COVID-19 pandemic, the Public Health Measures (other than the imposed closure) introduced by the Government, social distancing practices, the widespread public concern regarding the risk of infection, on the economic slowdown would have resulted in the Complainant Company earning no gross profit during the period, and/or making a loss during the period such that it would not have been economically viable for it to open, irrespective of any enforced closure.

In summary, the Provider said, any loss suffered by the Complainant Company was caused by a concurrent independent proximate cause, and the Complainant Company would not be able to show that “but-for” the closure, it would not have suffered the losses that it is claiming are covered as a result over the occurrence of the insured event. In the circumstances, there was no cover under the Policy for the Complainant Company’s losses.

#### **Causation even if cover is triggered**

The Provider said there was another important issue on causation that should be noted. Even if it was found that an insured event occurred, and even if it was accepted that insured event caused some losses to the Complainant Company that it would not have suffered anyway, it was clear that the Complainant Company could not claim for the entirety of its lost gross profit under the Clause.

The Provider said the same textual analysis of the Clause as set out above in section (ii) was relevant here; it was clear that the Clause only provided an indemnity in respect of loss caused by the insured event, and not *all* loss. Even if it was the case that some of the loss was caused by the insured event (i.e. the imposed closure), there was simply no basis for suggesting that the entirety of the loss was caused by the insured event. All of the other factors set out at (ii) above would have continued to operate on the Complainant Company’s business, and would have caused it loss, entirely independently of any imposed closure. This was a fact that was recognised by the industry itself. The Licensed Vintners’ Association (the “LVA”) and the Vintners’ Federation of Ireland (the “VFI”) published a report which demonstrated the level of reduction in capacity that publicans themselves say would occur on licensed premises as result of social distancing measures.

The Provider said that it accepted the Complainant Company closed its public house as a result of a Government direction. As was clear from the letter of declinature, the Provider said it did not rely on any argument that the closure of the Complainant Company's premises was not an "imposed closure" within the meaning of the Policy. However, it was the Provider's position that the direction from the Government was not causally connected to the outbreak of contagious or infectious disease on the Complainant Company's premises or within 25 miles of same, or indeed, to the outbreak on the premises or within 25 miles of any individual public house. Rather, the Government issued the direction as part of a general suite of Public Health Measures that were designed and intended to limit the spread of COVID-19 throughout the entire State.

The Provider said that it considered its decision to decline the Complainant Company's claim was fair and reasonable in circumstances where it believed, and had been advised, that the Policy did not cover the claim. The Provider, as a large publicly listed insurance company, has many different stakeholders, including its staff, its shareholders, and all of its 500,000 customers (many of whom are classified as consumers). Clearly, the Provider said, it cannot fairly and reasonably pay out claims in respect of which it believed it had no legal liability. Doing so, the Provider said, would have implications both for the Provider, and for every other stakeholder in the business, including its other customers.

The Provider said its position with respect to the declinature was and remained that there was no insured event, and even if there was, that insured event did not cause the Complainant Company's loss. However, even if an insured event occurred, and that event caused loss, the indemnity in question would need to be adjusted for trends and other circumstances.

As was clear in the correspondence between the Provider and the Complainant Company, the application of the "trends and circumstances" clause was not one of the matters relied on by the Provider in declining the Complainant Company's claim. The Provider said the matters relied on were clearly set out in its declinature letter of **8 April 2020**, and some additional information was provided to the Complainant Company in its further letter dated **19 June 2020**.

As to the relevance of the "trends and other circumstances" clause, the Provider said that the amount of gross profit in respect of which an indemnity was provided must be adjusted for the "trends and other circumstances affecting the business". This was clear on the face of the Clause:

*"The Company shall indemnify the Insured in respect of;- (A) The loss of gross profit during the indemnity period calculated by comparing the gross profit earned during the indemnity period with the gross profit earned during the corresponding period in the previous year, adjusted for the trend and other circumstances affecting the business. ..."*

The Provider said “**MacGillivray on Insurance Law**”, one of the leading texts on insurance law, described a term providing for adjustments for “trends and variations” as follows:

*“A further common term provides for “trends and variations”. Under this, the period before the loss is to be examined in order to give an indication of the loss of profit but this can be adjusted to take account of trends and variations in the period before loss which render the profits in that period an unreliable guide to future profits and trends, and variations in the indemnity period which show that higher or lower profits than in the period before loss could have been anticipated.”*

The Provider said it was well established that, when applying a trends clause to adjust the lost gross profit for the “*trends and other circumstances affecting the business*”, it was necessary to have regard to matters that would have impacted the insured’s gross profit during the indemnity period.

During the indemnity period, all of the other effects of the COVID-19 pandemic and the measures taken to mitigate it, including the Public Health Measures (other than the imposed closure) introduced by the Government, social distancing practices, the widespread public concern regarding the risk of infection, and the economic slowdown would have impacted the Complainant Company’s business and its gross profit and, thus, the gross profit in respect of which an indemnity might be payable would have to be adjusted for those matters. In practice, this would have had a very similar impact to the causation adjustment required to be carried out as described above. Furthermore, various events, including the St. Patrick’s festival, were cancelled, and there was no live sport available.

The Provider said it was its position that, when those matters were applied to the gross profit little, if any, indemnity would in fact have been payable under the Policy to the Complainant Company or any other insured. Once the gross profit of the Complainant Company, or any other insured, had fallen below a certain level, it would not have been economically viable for them to open irrespective of whether or not there was an enforced closure in place.

However, it was not possible to carry out this exercise in circumstances where (a) it must first be established that an insured event occurred and that it caused at least some loss to the insured (and the Provider disputed these propositions) and (b) even if these matters could be established, the actual indemnity to be provided could not properly be adjusted for the “*trends and other circumstances*” until the insured event ended and it was clear what trends and circumstances during that period would have impacted the premises.

With respect to the length of the indemnity period, the Provider said, it was necessary to consider the relevant wording in the Policy, which defines “*indemnity period*” as follows:

*“The period beginning with the occurrence of the loss or damage and ending not later than the twelve months thereafter during which the results of the business shall be effected in consequence of the loss or damage.”*

The Provider said, the indemnity period can last for a maximum of 12 months (and the Provider has underwritten a number of policies with a period of 18 or 24 months in individual cases), but only so long as the *“results of the business shall be effected in consequence of the loss or damage”*. The loss or damage in this context was the imposed closure, which is the insured event.

The Provider said it was its position that the indemnity period commenced on the date of the imposed closure order and it is highly likely that there would already have been a downturn in business in the period leading up to that date when the virus was already present, and people were modifying their behaviour as result. This demonstrated that there was likely to have been an element of uninsured loss which would have continued into, and beyond, the period up closure. In addition, upon reopening, the turnover of the business may well not have fully recovered but this was not the result of the closure order, and thus the indemnity period would not continue because the results of the business were no longer being affected by the closure order. The imposed closure order (i.e. the “damage”) related to COVID-19 would not have given rise to any ongoing loss of business. In practical terms, the Provider said the indemnity period under the Policy therefore ended when the order was lifted. To the extent that an indemnity was available at all under the Policy (and for the reasons given above, the Provider denied that an indemnity was so available), any loss subsequent to the date of reopening could not be recovered under the Policy. Public houses which served food reopened on **29 June 2020**, and thus the indemnity period in respect of those businesses ended.

In summary, the Provider said that when the point was reached that the insured event was at an end and the Complainant Company could quantify the claim that it was making, the application of the *“trends and other circumstances”* provision in the Clause was likely to significantly or entirely reduce any indemnity to be paid under the Policy, even if it was established that an insured event had occurred and that event had caused the Complainant Company at least some loss. Furthermore, the indemnity period under the Policy ceased once the business was no longer the subject of an enforced closure.

Thus, the Provider said, while the application of the trends and other circumstances clause was not relevant to the declinature, and was not relied on as a reason for the declinature, the Provider’s position was that even if the claim had been admitted, in the context of the adjustment process it was highly likely that the amount of indemnity available to the Complainant Company under the Policy would be negligible.

The Provider said that as was clear from its Complaint Response, the issues arising in this complaint are legally complex and four policyholders have initiated actions before the Commercial Division of the High Court (the “Test Cases”). The Provider said the judgment of the Commercial Court on the correct interpretation of the Policy, whether or not an insured event has occurred it, how causation was to be assessed and determined, and how the *“trends and other circumstances”* clause was to be applied would be directly relevant to the complaint of the Complainant Company, and the circumstances of every other insured under the Policy.



The Provider stated that it would comply with the determination of the courts on the correct approach to the Policy, and that may entail revisiting its declinature position. However, the Provider said it was confident that the legal position its adopted, and as set out in detail above, would be affirmed by the Court in the Test Cases, and thus no indemnity would be available under the Policy to any policyholder, including the Complainant Company.

The Provider also referred to test cases in the UK regarding the interpretation of business interruption insurance. The Provider said that this Office, when considering the matters arising in this complaint, ought to consider the detailed oral argument that took place before the High Court of England and Wales which it said was materially relevant to the issues to be determined in this complaint. The Provider also provided copies of the transcripts and legal submissions in respect of those cases.

Having adopted that position at all material times during 2020, nevertheless more recently, the Provider advised this Office by letter dated **5 March 2021** that arising from the decision of the High Court in *Hyper Trust v. FBD Insurance Plc* [2021] IEHC 78, delivered on 5 February 2021, it would not be appealing this decision, it would be accepting liability under the relevant policy, it was arranging to make interim payments to policyholders pending final determination of certain remaining issues of principle in the quantum module of the court proceedings, and that it had commenced the process of adjusting claims. The letter also advised that the Complainant Company's claim for cover had been accepted, and an interim payment had been offered to the Complainant Company.

### **The Complaint for Adjudication**

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

### **Decision**

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

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

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A Preliminary Decision was issued to the parties on **12 April 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.

### ***The Complainant Company's Policy***

The Complainant Company held an insurance policy with the Provider. In this regard, I note that '**Section 3: Consequential Loss**' of the Complainant Company's 'Public House Insurance Policy Document' wording stated at pg. 16, as follows:

*"The Company shall indemnify the Insured in respect of:-*

*(A) The loss of gross profit during the indemnity period calculated by comparing the gross profit earned during the indemnity period with the gross profit earned during the corresponding period in the previous year, adjusted for the trend and other circumstances affecting the business.*

*(B) Increase in cost of working: the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in gross profit during the indemnity period, but not exceeding the sum which would have been payable under (A) had such additional expenditure not been incurred.*

*(C) Professional auditors charges for producing and certifying the particulars or details required by the Company in connection with a claim.*

*Resulting from the business being affected by loss or damage for which liability has been admitted and payment has been made under Section 1 or 2 of this Policy.*

*Less any sum saved during the indemnity period in respect of such of the charges and expenses of the business payable out of gross profit as may cease or be reduced in consequence of the damage.*

*Provided that if the sum insured on gross profit be less than the sum produced by applying the rate of gross profit to the annual takings of the business, the amount payable shall be proportionately reduced.*

*The Company will also indemnify the Insured in respect of (A), (B) or (C) above as a result of the business being affected by:-*

*(1) Imposed closure of the premises by order of the Local or Government Authority following:-*

*(a) Murder or suicide on the premises*

*(b) Food or drink poisoning on the premises*

*(c) Defective sanitary arrangements, vermin or pests on the premises*

(d) *Outbreaks of contagious or infectious diseases on the premises or within 25 miles of same.*

(2) *Explosion or collapse of steam pipes and or vessels.*

(3) *Prevention of access to or use of the premises following loss of or damage to property in the vicinity of the premises by a peril insured by Section 1 or 2 of this Policy.*

(4) *Failure of the public supply following loss or damage by any peril insured under Section 1 or 2 of this Policy or to property at any:-*

(i) *Electricity generating station or sub-station*

(ii) *Land based gas works premises*

(iii) *Water works or water pumping station*

*of the Public Authority or supply undertaking from which the Insured obtains electricity, gas or water.*

(5) *Loss or damage by any peril insured under Section 1 or 2 of this Policy of or to any property at the premises of a supplier of the Insured."*

Section 3 defines 'indemnity period' as:

*"The period beginning with the occurrence of the loss or damage and ending not later than the twelve months thereafter during which the results of the business shall be effected in consequence of the loss or damage."*

I note that the Complainant Company's 'Public House Multiperil Schedule' describes its business as 'Publican and Property Owner'. I also note that the policy schedule provides, in respect of consequential loss, as follows:

**"3. Consequential Loss**  
**On Gross Profit: €400,000**  
**Indemnity Period: 12 months"**

### ***The Test Case***

In reaching my decision in respect of this complaint, I am conscious of the recent decision of the High Court in ***Hyper Trust Limited trading as Leopardstown Inn v. FBD Insurance plc*** [2021] IEHC 78 (the **Test Case**), and the judgment delivered by Mr. Justice McDonald on **5 February 2021**. I note that the policy at issue in the Test Case and the wording of the relevant section, being 'Section 3 Consequential Loss', is identical to the policy wording which is the subject of this complaint.

When considering the proper interpretation of section 3(1), McDonald J. was of the view that it was necessary to read the entire extension:

*“133. ... In order to ascertain what is covered under extension (1) it is necessary to have regard to the entire of the language of the extensions. It is important, in this context, to bear in mind that the opening words of the extensions state, in plain terms, that FBD will indemnify the insured as a result of the business being affected by any of the circumstances described in extensions (1) to (5). In the case of extension (1), it is clear, in my view, that what is covered is not an effect on the business by an imposed closure but an effect arising from an imposed closure by an order made by either a local authority or a government authority “following” one or more of the specific circumstances described in sub-paras. (a) to (d). ...*

*[I]t seems to me that the more natural and obvious way to describe the matters set out at sub-paras. (a) to (d) is that they constitute words of definition of the relevant risk or peril which is covered. Rather than breaking up the clause in the manner suggested by FBD, it seems to me that the clause needs to be read as a whole. In my view, that is how the clause would be read by a reasonable person standing in the shoes of the parties to these proceedings. While the plaintiffs here (with the exception of the Lemon & Duke plaintiff) did not give any great thought to the terms of extension (1) when reaching agreement with FBD, I must approach the matter by reference to how a reasonable person in the position of the parties would do so. When read in that way, it seems to me that one does not pause at the reference to imposed closure and regard everything which follows as a limitation or restriction on those words. One would read the clause as a whole in order to understand the precise perils which are covered by the extension. FBD is essentially telling the policy holder what it will indemnify under this extension. In order to understand what FBD will indemnify, it is necessary to read the entire extension. ...*

*[E]xtension (1) in s. 3 of the policy takes a different course. It does not use any language suggestive of a proviso or an exclusion. It simply describes the types of imposed closure which are covered. Any other types of closure that may arise are simply not within the ambit of cover.”*

[Underlining added for emphasis]

Following on from this, at paragraph 136, McDonald J. formed the view that extension 1, of section 3, “*must be read as a whole in order to understand the perils covered by its terms*”, and that:

*“the relevant peril for present purposes as described in extension (1)(d) is a composite one in which (a) an imposed closure (b) by order of a local or government authority (c) follows an outbreak of a contagious or infectious disease either on the premises itself or within a radius of 25 miles.”*

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In considering whether the cover available under the relevant extension was confined to closures arising solely from localised outbreaks, which the Court was satisfied it was not, McDonald J. stated as follows:

“145. ... I do not believe that FBD is correct in suggesting that reasonable persons in the position of the parties would have understood the cover available under extension 1(d) to have extended solely to closures following an outbreak of disease in the specified localised area and not beyond that area.

146. While it is clear that, for cover to be available under extension 1(d), there must be an outbreak of disease at least within 25 miles of the premises, there is no suggestion in the language used that outbreaks occurring simultaneously outside that radius would deprive the insured of cover. It would have been a simple and straightforward matter for FBD to so provide in its policy. As the plaintiffs argued, extension 1(d) could have referred to outbreaks of disease “on the premises or wholly within 25 miles of same”. ... Thus, it would have been a simple matter for FBD to make clear that extension 1(d) was intended to apply solely in respect of closures following an outbreak of disease in the specified localised area. It would equally have been a straightforward matter for FBD to expressly exclude cover where there was a nationwide outbreak or to exclude cover for pandemics ...

147. In all of the circumstances, I have come to the conclusion that reasonable people in the position of the parties to the FBD policy would not have understood the cover available under extension 1(d) to have been confined solely to closures following a localised outbreak of disease within the specified 25 mile radius. Nonetheless, in order for the relevant peril the subject of extension 1 (d) to apply, there must be an outbreak of a contagious or infectious disease either on the premises or within a 25 mile radius. But, in my view, once that element of the peril is satisfied, the fact that there are also outbreaks outside that radius does not per se disapply the extension. The existence of such outbreaks outside the 25 mile radius may, however, make it more difficult to demonstrate a causative connection between the imposed closure and the localised outbreaks and that is an issue that is addressed in paras. 148 and following paras.”

[Underlining added for emphasis]

Over the course of several pages, McDonald J. dealt with the meaning of the word ‘following’. In considering the meaning of this word, McDonald J. posed the following question:

“148. ... The question which arises is whether the use of the word “following” means that an imposed closure of the premises by order of a government or local authority must have been proximately caused by an outbreak of contagious or infectious disease on the premises or within 25 miles of the premises or whether the word should be interpreted as imposing some lesser standard of causation.”

McDonald J. formed the view that ‘following’ was not intended to have a purely temporal meaning (para. 159).

The Court also noted that the Defendant did not choose to use language (i.e. 'following') with an established or *prima facie* meaning in an insurance context (para. 166). In coming to an interpretation of this word, the McDonald J. held that:

*“173. ... I do not believe that the word “following” can be given a purely temporal interpretation. It seems to me that some element of causal connection is intended by the use of the word “following”. However, when one considers the way in which the word is used in context, I believe that it is clear that the word “following” is not intended to denote proximate causation. This seems to me to follow from the way in which, in close juxtaposition to the use of the word “following”, one finds the words “as a result of” and “resulting from”. The words “as a result of” have a clear proximate cause connotation. ...*

*174. ... I believe that it is reasonable to conclude that the choice of the word “following” was deliberately intended to signify something other than proximate cause. This is also consistent with the ordinary meaning of the word “following” even when used in a causative way. ... The ordinary meaning of “result” or “resulting” is therefore much more consistent with a proximate cause requirement than the use of the less forceful word “following”. For completeness, I should add also say that the use of the less forceful word “following” also supports a conclusion that the FBD policy does not require that the “but for” standard of causation ... should be applied in so far as the causative link between the outbreaks and the imposed closure is concerned. ...*

*175. ... I have come to the conclusion that the word “following” as used in extension (1) of the FBD policy should be construed as requiring that the matter described in para. (d) (namely the outbreak of disease within a 25 mile radius of the insured premises) should be a cause, but not necessarily the dominant cause, of the imposed closure. ...”*

[underlining added for emphasis]

Following on from this, and in considering the ambit of the cover available under extension 1(d), McDonald J. stated:

*“180. Having regard to the conclusions which I have reached in relation to the constituent elements of extension (1)(d), I believe that the extension responds to business interruption claims where that business interruption is shown to have been proximately caused by a government imposed closure which, in turn, has had as one of its causes, an outbreak (as defined above) of an infectious or contagious disease within 25 miles of the insured public house premises. Although the proximate cause standard applies to that extent, it seems to me, for the reasons outlined above that it is not necessary for the insured to also establish that the outbreak was the proximate cause of the imposed closure so long as the outbreak was a cause. Furthermore, it is clear from the definition of “outbreak” that a single instance of a serious disease such as Covid-19 within the 25 mile radius would be sufficient to satisfy the definition, so long as the single instance can be shown to be have been a cause of the closure.*

**181.** *For the reasons explained in paras. 143 to 147 above, the fact that there are cases outside the relevant 25 mile radial distance which may also have been a cause of the government imposed closure does not seem to me to be relevant. The policy responds once the closure had, as one of its causes, an outbreak within a 25 mile radius of the public house in question. ...”*

In terms of causation, the Court noted the first step was to determine whether the Government imposed closure followed the admitted outbreaks of COVID-19 within 25 miles of the insured premises. The Court addressed this question using two alternative bases for interpreting the word ‘following’: (a) the *looser causal connection*; and (b) proximate causation.

In considering the standard at (a), McDonald J. noted:

**190.** *... In circumstances where FBD accepts, for the purposes of these proceedings, that there were outbreaks within 25 miles of each of the plaintiffs' premises, those outbreaks were, at minimum, a cause of the decision to close each of the public houses the subject matter of these proceedings. ...*

**191.** *Thus, in circumstances where the word “following” means that an outbreak of disease must be a cause (but not necessarily the proximate cause) of a government imposed closure, that test is plainly satisfied on the facts. ...”*

In considering the standard at (b), McDonald J. noted:

**194.** *I do not believe that the result would be any different if one was to interpret the word “following” as requiring proximate cause. ...*

**198.** *... Applying the approach outlined in the cases, it seems to me that the real or effective or dominant reason for the imposition of the closure of public houses in Ireland was the existence of the outbreaks. Those outbreaks made it necessary to move to the delay phase described in the minutes of the NPHET meeting of 11th and 12th March, 2020 and the need to impose social distancing measures. [T]he dominant cause was the underlying outbreaks of disease. ...*

**199.** *... As noted earlier, there is no provision excluding liability in so far as closure arising also from outbreaks outside the 25 mile radius are concerned. Thus, once the local outbreaks within that radius were an efficient cause of the closure, that is sufficient to satisfy the proximate cause test in relation to that issue even if each of the other outbreaks in every other part of the country were also efficient causes of the closure. ... I am therefore of opinion that, even if the word “following” connotes proximate cause, that test is satisfied. ...”*

Leading on from this, the Court proceeded to consider “*whether the interruption of the plaintiffs’ businesses as a result of the composite peril (comprising the imposed closure following the outbreaks) was the proximate cause of the plaintiffs’ loss.*” (para. 200).

McDonald J. also noted that it was not possible, at that stage of proceedings to make any definitive findings as to whether the loss was proximately caused by the composite peril embodied in extension 1(d), and this was a matter for a quantum hearing. However, McDonald J. opined that:

*“201. ... it is improbable that the closure following the outbreaks in question is not, at least, an effective (i.e. proximate) cause of some of the claimed losses. To state the obvious: if pubs are closed for business, they are unable to trade and make a profit. FBD has sought to argue that the effective cause of the loss is the public reaction to the emergence of the Covid-19 disease. It may be that the closure following the outbreaks in issue is not the only effective cause of loss but, as the approach taken in Miss Jay Jay shows, that will not necessarily mean that the plaintiffs are unable to recover under the FBD policy at least in those cases where the effective causes overlap and where it is not possible to distinguish between the effects of one from the effects of the other. As noted previously, there is no relevant exclusion in the FBD policy which rules out such an approach.*

[underlining added for emphasis]

Addressing the situation where there is more than one cause of the loss, McDonald J. reconciled this issue as follows:

*“211. ... where it is not possible to determine whether a loss sustained by the plaintiff was caused but for the occurrence of the insured peril, on the one hand, or some other interdependent or interrelated non-insured (but not excluded) cause, on the other, it seems to me that the insured peril should be regarded as a sufficient cause for the purposes of the “but for” test. This seems to me to be the only fair and reasonable approach to take in the circumstances. If this approach is not taken, the application of the “but for” test could lead to recovery being denied to an insured under a policy notwithstanding that the insured peril was an effective cause of the loss sustained by the insured. That result would seem to be inconsistent with the approach taken in the concurrent cause cases ...*

*213. Accordingly, in this case, to the extent that there are overlapping proximate causes of the plaintiffs’ losses, one of which is the composite peril and the other is the alteration of societal behaviour in response to Covid-19, it seems to me that, subject to what I say below in relation to the issues of the appropriate counterfactual and disaggregation, it is appropriate, in those cases where societal behaviour is shown to be as much a cause as the composite peril, to apply the approach suggested in the passage from Hart & Honore quoted in para. 210 above and to modify the “but for” test to that extent.”*

In considering the appropriate ‘counterfactual’ (i.e. what would have been the position of each of the plaintiffs’ businesses but for the occurrence of the insured peril), McDonald J. held as follows:

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*“215. ... FBD had sought to argue that imposed closure was the relevant peril. For the reasons previously discussed, I have come to the conclusion that the FBD argument should be rejected. In my view, the insured peril is the imposed closure which “follows” (in the sense previously explained) the outbreaks of disease within the 25 mile radius. Having regard to that finding, it follows that FBD is incorrect insofar as it has suggested that the appropriate counterfactual should be taken to be a situation where each of the plaintiffs’ premises would remain open but the premises would continue to be affected by the impact of outbreaks of Covid-19. That would have significant consequences for the plaintiffs because it would have the potential to significantly curtail what they could recover under the policy. On FBD’s hypothesis, the premises would continue to be affected by society’s behavioural reaction to the outbreaks of disease including a desire of many people to limit their contacts and maintain physical distance from others. In my view, that would not properly strip out the composite nature of the insured peril. In this context, having regard to the terms of extension (1) (d), it is clear that the peril envisages outbreaks of an infectious or contagious disease which are sufficiently serious to warrant intervention by the authorities by means of an order to close public houses within a 25 mile radius. For as long as the closure endures, the outbreaks are an inherent element of the peril and, for that reason, it seems to me that, for the duration of the period of closure, both the closure and the effects of outbreaks of the disease must be stripped out of the counterfactual. ...*

*222. Thus, so long as the plaintiffs can establish that the closure following the outbreaks within the 25 mile radius was a proximate cause of their loss, their recovery under the policy will not be reduced just because the change in societal behaviour (whether within or outside that radius) as a result of the pandemic was also a proximate cause. In such event, the attitude of the general public will be stripped out of the counterfactual along with the specific elements of the composite peril. ...”*

In the course of his judgment, McDonald J. observed in the context of the ‘trends and other circumstances’ provision at section 3(A), that the terms ‘trend’ or ‘other circumstances affecting the business’ were not defined in the policy (para. 233).

Giving his view on the correct approach to this aspect of section 3(A), McDonald J. stated:

*“236. ... It seems to me that, in applying the trends and circumstances provisions of s.3 of the FBD policy, one must exclude the effects of the insured peril from the calculation. In the absence of clear language to the contrary, it would be contrary to the nature of an insurance policy as a contract of indemnity, to allow the effects of the insured peril to reduce the payment to be made to an insured who has the benefit of cover for that peril. As the FBD submissions acknowledged, the purpose of the trends and circumstances clause is to ensure, in so far as reasonably practicable, that the adjusted figures reflect the financial results which, but for the occurrence of the peril, would have been achieved during the subsistence of the peril.*

*For the reasons previously discussed in paras. 227 to 229 above, this approach seems to me to be applicable whether the losses were proximately caused by the events within the relevant 25 mile radius or by a combination of the events within and beyond that radius. ...*

**248.** *... It seems to me that one must start from the principle (which I believe to be accepted by FBD) that, in the absence of clear language to the contrary, an insured is entitled to recover under a policy of insurance in respect of any losses which are proximately caused by an insured peril and which would not have arisen in the absence of that peril. On that basis, it seems to me to be contrary to principle that an insured's right of indemnity under the policy should be reduced by a trend based on losses which have been caused by that peril. Similarly, in the case of a composite peril, it seems to me to be equally contrary to principle that an insured's claim should be reduced to take account of a trend proximately caused by any element of that composite peril once that composite peril has eventuated. ...*

**249.** *Of course, as the plaintiffs have accepted, account has to be taken of any downturn in business caused by Covid-19 prior to 15th March, 2020. Everyone accepted at the hearing that the insured peril did not eventuate before that date. That has the consequence that the revenue for the relevant comparator period of twelve months prior to 15th March, 2020 must take account of the reduction in business which occurred in the days leading up to 15th March. ... However, it is altogether a different matter to suggest that those losses must necessarily be carried forward as a trend for the duration of the insured peril. That would mean that losses which have, since 15th March, 2020, arisen as a consequence of an element of the insured peril would be taken into account in adjusting the indemnity owed even though those losses flow from the insured peril itself. In my view, that would completely undermine the fundamental principle that a policy of insurance is a contract of indemnity. In my view, such an approach would require explicit provision to that effect in the relevant policy of insurance. In this context, as discussed in an earlier section of this judgment, the policy must be read as a whole. The "trends and circumstances" provisions of the policy must be read in light of the clear promise made by the terms of Extension (1)(d) to provide business interruption cover in respect of business interruption arising as a result of a closure of the premises by government authority following outbreaks of a contagious or infectious disease within 25 miles of the premises. If the trends and circumstances provision of the policy was intended to cut down on the indemnity available in respect of such an explicit peril (rather than to estimate, as far as reasonably practicable, the results which, were it not for the insured peril, the business would have realised during the indemnity period) clear words to that effect would, in my view, be required. Those words are entirely absent in this case and I must therefore conclude that the trends and circumstances provisions of s.3 of the policy cannot be used to cut down the indemnity in that way. ..."*

## **Analysis**

On **19 March 2020**, the Provider was notified of a claim for business interruption losses arising from the temporary closure of the Complainant Company's business on **15 March 2020**, due to the outbreak of coronavirus (COVID-19).

I note that on **8 April 2020**, following its assessment, the Provider wrote to the Complainant Company to inform the Complainant Company that it had declined its claim, and advised, amongst other things, that:

*"[The Provider] have carefully considered your claim and do not consider that the claim falls within cover under the Policy. In particular, [the Provider] is satisfied that the claim notified is not covered for the following reasons, each of which apply independently of each other.*

1. *A requirement of cover is that any closure would have to be a closure following outbreaks of contagious or infectious disease in the premises or within 25 miles of same. That requires that the closure be caused by outbreaks of contagious or infectious disease on or within 25 miles of the premises. The closure on any view was not caused by outbreaks of infectious disease on or within 25 miles of the premises, rather it was caused by national considerations resulting from the global pandemic including in particular, the requirements of social distancing.*
2. *It is clear that taken as a whole, clause 1(d) does not cover the Covid-19 pandemic and could not reasonably be interpreted as extending to such a situation. It is not clear from sub-clause 1(d) that the cover provided is cover in respect of outbreaks of contagious or infectious diseases particular to a locality. A pandemic manifestly does not fall within the scope of the clause. The WHO Covid-19 declared pandemic is by its nature, scale and consequences entirely different to localised outbreaks of contagious or infectious diseases that might reasonably have been contemplated by the parties when this policy was entered into.*
2. *It is clear from clause 1(d) that the agreement to indemnify in respect of the risk at 1(d) is provided only where the business interruption loss has been caused by the matters specified at 1(d). It is quite clear having regard, inter alia, to social distancing practices (including now the restrictions on more than 4 people gathering together outdoors) and widespread public concern regarding the risk of infection, any business interruption loss has been caused by such social practices and public concerns and not by clause 1(d)."*

[underlining added for emphasis]

I note that a complaint was made by the Complainant Company on **16 April 2020** regarding the Provider's decision to decline indemnity.

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A formal complaint response issued to the Complainant Company's Broker on **10 June 2020**, where the Provider maintained its decision to decline the claim. The Complainant Company states in the Complaint Form it completed for this Office, as follows:

*"I reject [the Provider's] interpretation of the cover provided by their insurance policy to indemnify my company for business loss consequential to the imposed closure of my business premises on March 15<sup>th</sup> due to the outbreak of an infectious disease (Covid-19) within 25 miles of my premises ...*

*[The Complainant Company's] business is situated 36km from [hospital]. This falls within the radius outlined in the Policy Wording which confirms a 25 miles radius. It is clear that there was an outbreak of an infectious disease at [hospital] which unfortunately, resulted in people dying ... & others who contracted the disease. It is clear that [the Complainant Company's] business was closed on Government orders as a result of an infectious disease outbreak in various parts of the country & one of those locations is within the 25 miles radius. [The Complainant Company's] business was not closed because of "requirements of Social Distancing" & this is an incorrect statement to make ..."*

I note in that regard, that the reason advanced by the Complainant Company for the closure of its business was its compliance with the Government direction and due to the presence of active COVID-19 cases within a 25 mile radius of its business premises.

In its Complaint Response, the Provider's position was that there was no 'insured event' so as to trigger cover, and if there had been an insured event, the losses arising from this were caused by independent proximate causes such that the 'insured event' cannot be considered the cause of the insured loss. Further to this, the Provider said that even if it was found that an insured event occurred, and even if it was accepted that insured event caused some of the Complainant Company's losses that it would not have suffered anyway, the Complainant Company could not claim for the entirety of its lost gross profit, under the extension 1(d).

Insofar as concerns the insured event, the Provider's position was that there was an absence of a causal link between the outbreaks of COVID-19 on or within 25 miles of the Complainant Company's premises and the imposed closure. The Provider argued that it was not sufficient that there were outbreaks of COVID-19 on or within 25 miles of the premises, and the Local or Government Authority had separately ordered the closure of the premises. The Provider maintained that the imposed closure must be ordered because of the outbreaks of contagious or infectious disease on the premises or within 25 miles of the premises, and as far as the Provider was concerned, this link was missing.

In reaching my decision in respect of this complaint, I am cognisant of the fact that the circumstances of this complaint and the relevant wording of section 3, including extension 1(d), fall within the circumstances that were considered by the Test Case. I also note that the arguments advanced by the Defendant in the Test Case are essentially the same as those made by the Provider in the present complaint.

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In this respect, I note that following the judgment of McDonald J. of the High Court in the Test Case, the Provider wrote to this Office on **5 March 2021**, as follows:

*“The complainant is insured under the Policy, and made a claim on the 20 March 2020 which was declined by [the Provider] on the 8 April 2020 on the same basis as every other claim that had been made under the Policy, including the claims of the plaintiffs in the Test Cases.”*

As can be seen from the Test Case, McDonald J. did not accept the Defendant’s interpretation of extension 1(d) and adopted the view that *reasonable people* in the position of the parties to the policy would not have understood cover under extension 1(d) to have been confined solely to closures following a localised outbreak of disease within the specified 25 mile radius. I also note the Court’s remarks at the relative ease at which the Defendant could have confined cover to such localised outbreaks, should it have been its intention to do so.

In terms of the use of the word ‘following’, I note that the Court found it was *reasonable* to conclude that the choice of this word was *deliberately intended* to signify something other than proximate cause (i.e. a looser causal connection), which the Court also believed to be consistent with the ordinary meaning of the word. Nonetheless, the Court found that the necessary test was met even when applying a proximate cause standard.

The Court also noted that in circumstances where there were overlapping proximate causes, of which the insured peril was one, the insured peril should be regarded as a sufficient cause. Further to this, in considering the counterfactual, the Court noted that recovery under extension 1(d) would not be reduced, simply because a change in societal behaviour as a result of COVID-19 was also a proximate cause.

I also note that in considering the insured peril, McDonald J. determined that cover was triggered when:

- (a) an imposed closure,
- (b) by order of a local or government authority,
- (c) follows an outbreak of a contagious or infectious disease either on the premises itself or within a radius of 25 miles.

In the course of his judgment, McDonald J. noted that the language of extension 1 was not suggestive of a proviso or an exclusion but rather, it described the types of imposed closures which were covered. The Court also took the view that the outbreak of COVID-19 must be a cause, but not necessarily the dominant cause, of the imposed closure. The Court further observed that cover is not lost where the closure is prompted by nationwide outbreaks of COVID-19 provided that there is an outbreak within the 25 mile radius of the insured premises.

Further to this, the Court remarked that:

*“190. ... it is clear that each outbreak of the disease in the State was instrumental in the government decision to close down all public houses wherever they were in the State. ...*

*193. In my view, while I entirely accept that extension (1) (d) of the FBD policy requires the plaintiffs to prove that localised outbreaks of the disease were a cause of the imposed closure, I believe that the necessary causal connection is plain. ...”*

I am conscious 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 *“Diseases specified to be infectious diseases and their respective causative pathogens”*.

I note that 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**. Throughout his judgment in the Test Case, McDonald J. referred to this as a Government imposed closure. On **24 March 2020**, the Government adopted certain NPHEAT recommendations for the nationwide closure of non-essential retail outlets and services which later became a legal requirement on **27 March 2020**.

When the Complainant Company notified the Provider of its claim in mid-**March 2020**, I am satisfied that the Complainant Company’s business had been subject to an imposed closure since **15 March 2020**, which I also note is the date recorded as the *‘Incident Date’* on the Provider’s letter to the Complainant Complaint on **8 April 2020**. I am also satisfied that this imposed closure was ‘by order’ of the Government. It is also clear that since **February 2020**, COVID-19 was a recognised infectious disease.

It is not clear from the evidence whether, at the time of submitting its claim under the policy, the Complainant Company provided any evidence of an occurrence of COVID-19 within 25 miles of its premises. In correspondence to the Provider dated **16 April 2020** in response to its decision to decline the Complainant Company’s claim, the Complainant Company rejected the Provider’s decision to decline its claim on the basis of localised outbreaks not being covered.

Owing to the timing of this letter and the fact that it was in response to the Provider’s declinature of the Complainant Company’s claim, I am satisfied that the Complainant Company sought to challenge the Provider’s interpretation of the policy and to argue that local outbreaks of COVID-19 within 25 miles of the Complainant Company’s premises were covered. I also note that in its Complaint Form, the Complainant Company also made reference to outbreaks of COVID-19 within the area covered by the policy’s 25 mile radius.

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While extension 1(d) required the Complainant Company to show that localised outbreaks of COVID-19 were a cause of the imposed closure, in its assessment of the claim, I note the Provider did not dispute that there were local outbreaks of COVID-19, nor did the Provider require the Complainant Company to further demonstrate the presence of any such outbreaks or ask that it show that such outbreaks were a cause of the imposed closure, as part of its consideration of the claim despite the position adopted by the Complainant Company following the declinature of its claim. This appears to arise from the fact that the Provider simply did not consider that extension 1(d) would respond to a claim on the basis of a localised outbreak of COVID-19. However, in taking this position, it is my opinion that the Provider did not adopt the correct approach to the assessment of the Complainant Company's claim and, as a consequence, incorrectly assessed that claim.

However, I note it is accepted by the Provider that the closure of the Complainant Company's business was an imposed closure by order of the local or government authority within the meaning of section 3(1)(d).

It is also accepted by the Provider that COVID-19 is a 'contagious or infectious disease' within the meaning of section 3(1)(d) and that there were, or plausibly may have been, outbreaks of contagious or infectious disease, in the form of COVID-19, within 25 miles of the Complainant Company's business premises. It is also accepted that that there was no occurrence of COVID-19 on the Complainant Company's premises.

While the Provider accepts there were, or plausibly may have been, outbreaks of contagious or infectious disease, in the form of COVID-19, within 25 miles of the Complainant Company's business premises, the date from which this is accepted to have been the case is unclear, particularly as the Complainant Company has not tendered evidence to show when the first incident of COVID-19 within 25 miles of its premises occurred.

Having considered the appropriate interpretation of extension 1(d) and in light of the comments of McDonald J., I outlined my opinion in the preliminary decision of this Office, that the earliest date from which the Complainant Company could seek to have its claim admitted, was 15 March 2020, if the Complainant Company could demonstrate the presence of COVID-19 within 25 miles of its premises, in the period leading up to that closure. Since that time however, the Provider has accepted the claim for assessment.

The position adopted by McDonald J. in the Test Case was clear and unequivocal in terms of whether claims under the policy on the basis examined by the Court, should be admitted. The implication of this, in light of the circumstances pertaining at the time the Complainant Company submitted its claim to the Provider and the matters accepted by the Provider in respect of the constituent elements of extension (d), is that the Complainant Company's claim should not have been declined but rather, should have been admitted by the Provider, subject to receipt of suitable evidence from the Complainant Company, of the existence of COVID-19 within 25 miles of the insured premises.

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Therefore, having considered the matter in some detail, it is my opinion that, on a proper and reasonable construction of the policy, the Provider ought not to have declined the Complainant Company's claim under the policy, and it ought to have proceeded expeditiously with the identification of the date from which benefit was payable and an assessment of the benefit payable, in accordance with the applicable policy provisions.

Although the Provider sought the advice of Senior Counsel in respect of the interpretation of the policy, exercised its right of access to the courts and endeavoured to expedite proceedings through the Commercial Court (which issued in **May 2020**) having considered the Provider's correspondence with the Complainant Company regarding its decision to refuse indemnity, the Provider's position as set out in its Complaint Response and the judgment of McDonald J. in the Test Case in addressing the arguments posed by the Defendant and the Court's conclusions on the appropriate interpretation of the policy, I take the view that the Provider's original decision to decline the Complainant Company's claim, and its subsequent standing over of that position, until **February 2021**, was inappropriate and unfair and, in my opinion, it was unreasonable and unjust within the meaning of **Section 60(2)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

I note that in the Provider's Complaint Response, it intimated that it would comply with the determination of the Court in the Test Case(s) on the correct approach to the policy, and that this may entail revisiting its declinature position. After this judgment was delivered on **5 February 2021**, the Provider advised this Office on **5 March 2021**, that the Complainant Company's claim under the policy had been accepted by the Provider and that an interim payment had been offered to the Complainant Company.

The Provider's representative advised in that regard that:

*"Having carefully considered the Judgment with its legal advisers, [the Provider] has publicly confirmed that it will not be appealing same, that it will accept liability under the Policy, and that it will arrange to make interim payments pending the final determination of a number of remaining issues of principle in the quantum module of the Test Cases...."*

*In light of the High Court's judgment [the Provider] has now accepted the claims are covered and has commenced the process of making payments under the Policy. The complainant's claim for cover has, accordingly, been accepted and an interim payment has been offered to the complainant. ..."*

*[The Provider] has already commenced the process of adjusting these claims in light of its updated position on cover. ..."*

The Provider's submissions since the preliminary decision, have commented in detail regarding the role of the Court in the Test Case, notwithstanding that the role of the FSPO is entirely different from that of the Courts. The Provider has referred to what indeed this Office accepts, was a very broad range of determinations, which the Court was called upon to make in the Test case in question.

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The role of this Office however is more limited, insofar as this Office must determine whether only the conduct of the Provider which is the subject of this complaint, was wrongful within the meaning of **Section 60** of the **Financial Services and Pensions Ombudsman Act 2017**.

The Provider has pointed out, on a number of occasions, that once the High Court delivered judgment in the Test Case, it moved swiftly to confirm publicly that the Judgment of the High Court was accepted by it, and that it would not be appealing that decision. The Provider has made clear its opinion that the approach it adopted regarding the Test Case (including the fact that it elected not to bring an application to “stay” the Test Case proceedings) *“is very material when it comes to assessing the reasonableness of [the Provider’s] conduct”*.

The Provider has also pointed in that regard to the provisions of **Section 60(2)(b)** and **(g)** and it takes the view that its decision to decline the Complainant Company’s claim in early 2021 was not unreasonable, unjust or otherwise improper. It has referred in that regard to its obligations pursuant to the Central Bank of Ireland’s Consumer Protection Code 2012 (CPC). It has also referenced its Constitutional right of access to the Courts in respect of which it says it *“cannot be penalised for utilising its right”* and it points to the fact that almost all insurers in the UK and Irish markets *“reached the same conclusion in relation to similarly-worded policies, and it was only after significant litigation in different jurisdictions that the insurers were shown to have been incorrect in their interpretation of those policies.”*

The Provider suggests that any finding that it has acted unreasonably, unjustly or otherwise improperly in declining the Complainant Company’s claim:

*“...has much wider ramifications, as it suggests that an insurer which carefully considers a claim and decides it is not liable is automatically considered to be acting unreasonably, unjustly, or otherwise improperly if it subsequently turns out to have been incorrect. That simply cannot be correct.”*

It is important to note that the FSPO has made no finding that an insurer which carefully considers a claim and decides that it is not liable to pay benefit, *“is automatically considered to be acting unreasonably, unjustly or otherwise improperly”*. This Office agrees that such a finding would be incorrect. Rather, if an insurer assesses a claim and considers it appropriate to decline that claim, an eligible complainant may choose to pursue a complaint to the FSPO. Following an investigation by this Office, it may be determined that, in all of the circumstances based on the individual merits of that complaint, the insurer’s conduct was unreasonable. Likewise, it may be considered that the insurer’s conduct was contrary to law, or that it was based wholly or partly on a mistake of law or fact. Such an outcome is not however in any way automatic and will always turn on a determination of the individual facts and events, taking account of the evidence available and the parties’ submissions and observations. It may indeed be considered by this office that there was no element of wrongdoing by the insurer.

In offering comment on the preliminary decision of this Office, the Provider has pointed to the Test case, seeking to rely on the learned comments of Mc Donald J., which noted the *“sheer extent of the arguments advanced by both sides”* which had *“occupied the greater part of the eleven-day hearing”* and opined that *“few, if any of the arguments advanced ...can be dismissed as wholly implausible ...”* In that context the Provider contends that a finding that it acted unreasonably, unjustly or otherwise improperly, in declining the Complainant Company’s claim, is unsupportable.

The Provider has also suggested that within the preliminary decision issued by this Office in this matter, the *“sole basis on which [the FSPO’s] finding of unreasonable conduct appears to be made is the references to “reasonableness” in the Judgment of McDonald J.”* This comment is not accepted. The position adopted by McDonald J. of the Court, is however of interest and of relevance to the considerations of this Office in this matter, taking account of the particular circumstances of this complaint against the Provider, and indeed being cognisant of the reliance the Provider has placed on the steps it took to engage in that process, as indicative of the reasonableness of its conduct.

The role of the FSPO however is to assess the conduct of a financial service provider, in the context of **Section 60(2)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**, and to do so *“in an informal manner and according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form”* in accordance with **Section 12(11)** of the governing legislation.

In considering whether or not this complaint should be upheld, I have also been conscious of the recent comments of Hyland J. of the High Court, on **19 February 2021**, in **Danske Bank A/S v FSPO and Anor, [2020 121 MCA]**, when she addressed an argument from the Appellant Bank to the effect that, where there was no illegality identified by the FSPO in the conduct of the Appellant, this Office was not entitled to uphold the complaint which had been made. I note that in dismissing that argument, Hyland J. concluded that:

*“... this argument fails to recognise the import of the jurisdiction being exercised by the respondent under s.60(2)(b) and (g) of the 2017 Act, which respectively permit him to uphold a complaint on the basis that the conduct was unreasonable, unjust, oppressive, or improperly discriminatory in its application to the complainant or that the conduct complained of was otherwise improper. Having regard to this jurisdiction, it was open to the respondent to uphold the complaint under s.60(2)(b) and (g), irrespective of whether the appellant had acted in accordance with law.*

*Even where the complainants had signed up to the mortgage documentation and where the appellant had no black letter duty under statute, or “soft” law obligation under a regulatory standard, to give information in a specific form as to the redemption of the tracker mortgage and the inability to return to a tracker rate under the new mortgage, the respondent was still entitled to find an ambiguity and lack of clarity in the information provided. In short, the statutory scheme and the case law on same make clear that the mere absence of a breach of law does not immunise a financial services provider from a finding of unreasonable and improper conduct under s.60(2)(b) and (g).”*

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The delay of almost a year in the Provider accepting that the claim should be admitted and assessed for payment has, in my opinion, led to very considerable inconvenience for the Complainant Company, during a period when it was no doubt under significant financial pressure.

I am mindful of the fact that this claim was made to the Provider on **19 March 2020**, and ultimately, some eleven months later, on **10 February 2021**, the Provider notified the Complainant Company that:

*“Judgment was handed down by the Commercial Court in relation to the application of business interruption insurance under the consequential loss extension in the [Provider] Public House Insurance policy on Friday, 5th February. This judgment provided the necessary clarity in relation to policy cover. There will be a further hearing to provide clarity in relation to how claims’ settlements are to be calculated. In the meantime, we are engaging with affected policyholders to commence the claims process and provide interim payments. Once the outstanding issues in relation to calculation are resolved in the ‘Test Cases’, we will endeavour to finalise claims as smoothly and efficiently as possible.”*

It seems that because the Complainant Company advised the Provider that it wished to leave the matter in the hands of this Office:

*“...no specific interim payment amount was ever offered by [the Provider]. Nevertheless, and in line with its approach to other customers underwritten under the Policy, [the Provider] was willing (and remains willing) to offer an amount equal to 5% of the Complainant’s annualised sum insured (i.e. **€16,000**) as an immediate interim payment. A second interim payment, based on [the Provider]’s preliminary assessment of a policyholder’s losses, is made to all affected policyholders within 3 days of sufficient information being received from them to enable calculation of losses to date. [The Provider] is still awaiting engagement on the part of the within Complainant in relation to the necessary information. Accordingly, any direction that [the Provider] accept the Complainant’s claim is unnecessary in circumstances where [the Provider] has already done so.”*

[my emphasis]

The Provider takes issue with the intention of this Office, as signalled in the preliminary decision issued to the parties last April, of directing the Provider to make an advance payment of policy benefits to the Complainant Company of **€50,000**, (if not already paid) pending the final calculation of the total benefit payable, once the claim is fully assessed and agreed by the parties. It has pointed out that, in the case of this Complainant Company, the Provider’s loss adjusters have currently assessed its net claim at c. **€64,000**, a calculation which it advises has:

*“necessarily been made on the basis of a number of assumptions in the absence of detailed financial information from the Complainant, and will be refined as further information is obtained from the insured.”*

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As outlined above, the Provider has confirmed, that an interim payment in the amount of **€16,000** is available to the Complainant Company on the basis that it represents an amount equal to 5% of the Complainant Company's annualised sum insured. Given that the Complainant Company was insured at the relevant time with the Provider for Consequential Loss, for a 12 month indemnity period, for a maximum figure of **€400,000**, I do not accept that the Provider's interim payment, as offered, is adequate, in the circumstances.

I note that the Complainant Company's gross profit, to year end 2019, stood at some **€394,000**. In those circumstances, and taking account of the Provider's submissions in relation to this aspect of the matter, and also bearing in mind the Provider's comment that "*A further module [of the Test case] dealing with complex quantum issues will also now be heard, probably in this legal year*", I consider it appropriate, pending the conclusion of that loss adjustment process, to direct the Provider to now make an advance payment of policy benefits of **50,000**, to the Complainant Company representing 12.5% of its annualised sum insured, pending the calculation of finalised figures. It will of course be important for the Complainant Company to engage with the Provider's loss adjusters in that assessment process, in order to progress the adjustment of the claim, as expeditiously as possible.

The Provider has also taken issue with the level of compensation which the Preliminary Decision of this Office signalled the intention to direct, in the sum of **€20,000**. In that regard, **Section 60(4)** of the Act prescribes that

*"Where a complaint is found to be upheld, substantially upheld or partially upheld, the Ombudsman may direct the financial service provider to... pay an amount of compensation to the Complainant for any loss, expense or inconvenience sustained by the Complainant as a result of the conduct complained of."*

In assessing the inconvenience suffered by the Complainant Company, this Office does not seek in any manner to "*punish*" the Provider for exercising its right to litigate certain issues by way of a test case, as it has recently contended. Nor indeed would this Office ever consider it appropriate to direct compensation in a punitive manner.

This Office must be conscious however of the inconvenience suffered by the Complainant Company as a result of the Provider's decision to decline the Complainant Company's claim in early 2020. In my opinion, that inconvenience was made no less, by virtue of the reasons of the Provider in originally declining the claim. Neither was that inconvenience eliminated or even significantly reduced, in my opinion, by the updates sent by the Provider to policyholders (holding a policy of this nature) on 29 June 2020 or 30 November 2020. Similarly, in my opinion, the Provider's premium rebate payments, to the Complainant Company, which the Provider has advised totalled €4,506.20, did not, in any way meaningfully, reduce the inconvenience it suffered, as a result of its inability in early 2020, or indeed throughout 2020, to secure payment of the policy benefits to which it was entitled.

This Office is very conscious of what has to have been a very significant impact on cashflow, during the months which followed closure of the Complainant Company's premises in March 2020. The convening of the Provider's board at an extraordinary meeting, on eight occasions throughout this period, as referred to by the Provider, did not result in the payment to the Complainant Company of the policy benefits to which it was entitled, and which ought to have been paid at an earlier juncture.

It is in those circumstances that I consider it appropriate to direct the Provider to make a compensatory payment to the Complainant Company of **€20,000**, in order to compensate the Complainant Company for the tremendous inconvenience encountered throughout a very difficult period, as a result of the Provider's disappointing approach to this claim, and its unsatisfactory, unreasonable and unjust failure to recognise the claim as one which was very likely covered by the policy provisions, subject only to receipt of appropriate evidence of the existence of a case of COVID-19, within 25 miles of the premises.

### **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) 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 an advance payment of policy benefits to the Complainant Company of **€50,000** pending the calculation of finalised figures, to conclude the claim. I also direct the Provider to make a compensatory payment to the Complainant Company in the sum of **€20,000**, (entirely separate from the policy benefits payable under the policy) to an account of the Complainant Company's choosing, within a period of 35 days of the nomination of account details by the Complainant Company 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**

20 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.

