An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0254
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Rejection of claim
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a sole trader trading as a medical clinic, holds a business insurance policy with the Provider.

The Complainant's Case

On **31 March 2020**, the Complainant's Broker advised the Provider of a claim for business interruption losses as a result of the temporary closure of the Complainant's business due to the outbreak of coronavirus (Covid-19).

The Provider wrote to the Complainant on **13 April 2020** to advise that it was not accepting her claim, as follows:

> *"Please note that under the Business Interruption Section of your policy booklet it states:*
>
> ***Murder suicide or disease cover***
>
> *1 We will cover you for any business interruption insured by this section as a result of the occurrence of any of the following specified human infectious or human contagious diseases:*
>
> *Acute Encephalitis, Acute Poliomyelitis, Anthrax, Chicken Pox, Cholera, Diphtheria, Dysentery, Legionellosis Disease, Leprosy, Leptospirosis, Malaria, Measles, Meningococcal Infection, Mumps, Ophthalmia Neonatorum, Paratyphoid fever, Plague, Rabies, Rubella, Scarlet Fever, Smallpox, Tetanus, Tuberculosis, Typhoid Fever, Viral Hepatitis, Whooping Cough or Yellow Fever manifested by any person whilst at the premises or within a 25 mile radius of it.*

The loss is not covered under the Murder suicide or disease cover extension as Covid-19 is not listed in the contagious diseases.

Denial of access (non damage) cover

We will cover you for any loss insured by this section resulting from interruption of or interference with the business where access to your premises is restricted or hindered for more than 24 hours arising directly from

1. *the actions taken by the police or any other statutory body in response to a danger or disturbance at your premises or within a 1 mile radius of your premises*

2. *the unlawful occupation of your premises by third parties*

Please note that cover also does not apply as the current pandemic clearly does not come within that definition.

As no cover is in force for this loss, we regret that we cannot make any financial contributions towards your claim and must now formally decline your claim."

By email to the Provider on **15 April 2020**, the Complainant's Broker set out what they considered to be the correct position regarding the Complainant's claim, as follows:

"As regards the declinature of this claim, under the 'Denial of access (non-damage)' cover extension to this policy, we believe the correct position to be as follows:

Our client has clearly been denied access by a statutory body in response to a danger posed (by definition 'the possibility suffering or injury')
This section of the policy excludes 'notifiable diseases as detailed in the Murder suicide or disease cover'
As the 'Notifiable Diseases' as defined / detailed in the policy specified do not include COVID-19, the exclusion does not apply and therefore cover applies under the 'Denial of access (non-damage)' extension

In other words the policy extension 'Denial of access (non-damage)' provides cover for the loss with specific exclusions which do not include COVID-19."

By way of a further email to the Provider on **15 April 2020**, the Complainant's Broker passed on the Complainant's comments in respect of the Provider's letter of **13 April 2020**, which are as follows:

"I am disappointed in the letter and I don't believe it is consistent with what has been agreed between insurance companies and the Minister for Finance in respect of the adjudication of these business interruption claims.

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Irrespective of that point at this time, it's also clear that their attempt at denial of the claim is spurious. The decision around business closures was made by the government on foot of a recognized danger at business premises to which the public have entry and where exposure to Covid 19 can be expected to occur.

This is a danger which is national and which is recognized by government to exist throughout the country and clearly therefore in the vicinity of my premises.

In respect of my own particular business my work involves close personal contact with patients and the specific risk of droplet infection from my patients/to my patients.

The impossibility of such work continuing as a consequence of the manifest personal risks of infection with Covid 19 to my patients and myself is clear.

This is irrespective of any societal benefit which may accrue from the flattening of the curve in respect of Covid 19 generally.

I trust [the Provider] *will reconsider their decision in this case as I believe it's unjustified and in breach of their duty as a responsible insurer."*

This correspondence appears to have been treated as a formal complaint by the Provider. Following this, on **8 May 2020**, the Complainant's Broker informed the Provider that there were a number of cases of Covid-19 within a one mile radius of the Complainant's premises, at the time she decided to close her business. Following a review of the claim, the Provider wrote to the Complainant on **23 June 2020** advising that it was upholding its decision to the decline the claim, as follows:

*"**Your business interruption cover***

The core business interruption cover provided under your policy is for loss resulting from an interruption to or interference with your business at the insured premises as a result of property damage. We are not aware of any damage to your property. If that understanding is incorrect, please let us know.

The Policy provides business interruption cover in certain specified circumstances where there is no property damage. The cover that can take effect without property damage is set out in two extensions of this cover;

Murder, suicide or disease cover

This extension provides cover for Business Interruption which results from one of five specified events. Cover for interruption as a result of the occurrence of specified human infectious or human contagious diseases is provided for in this extension. The cover however is limited to diseases which are specified in the clause. You will note that neither Covid-19 nor any variant thereof is included in the list, which you can find at page 51 of your Policy. Therefore no cover will take effect in respect of the occurrence of Covid-19 under the Policy.

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1. Denial of access (non damage) cover

Cover is also provided for any loss from an interruption with your business where access to your premises is restricted or hindered by the actions of the police or other statutory body in response to a danger or disturbance at your premises or within 1 mile radius thereof. The reference to danger does not include notifiable diseases which to the extent there is cover available under the Policy, is provided for under the Murder, suicide, disease extension. In addition, the requirements under the Denial of access (non damage) extension that the actions of the police or a statutory body restricting access to your premises are in response to a danger at your premises or within a 1 mile radius thereof, have not been met in this case and so unfortunately your claim is not covered by this extension. …

<u>Outcome of Investigation</u>

As a result, we cannot accept the claim you have made, and we are proceeding to close our file. …"

The Complainant wrote to this Office on **18 June 2020** in respect of the declinature of her claim, as follows:

"[The Provider] *have denied my claim as not being eligible under the Murder Suicide or Disease cover as COVID 19 is not a specified condition on the policy.*

They have also denied my claim under the Denial of access (non damage) cover as 'the current pandemic clearly does not come within that definition'.

… I am of the view that their interpretation of the denial of access cover is clearly incorrect.

[The Provider] *specifically exclude under this cover 'notifiable diseases as detailed in the Murder suicide or disease cover'.* [The Provider's] *rejection of my claim under the Murder suicide disease cover is on the basis that COVID 19 is not listed in this section. How can this therefore be a valid rejection under the denial of access cover? The Denial of access cover excludes denial of access caused by notifiable diseases listed under the Murder suicide disease clause. COVID 19 is not listed here.*
My business closure was as a result of the actions of the DOH and government in response to the danger of COVID 19 which was generalized but specifically which also occurred within a 1 mile radius of my premises in [location]*. These are exactly the circumstances listed as the basis of cover in the Denial of access cover clause.*

I understand the difficulties for insurance companies but denial of valid claims is clearly not an appropriate response. In addition the delay in responding to my claim is entirely unreasonable. I have a valid claim which they won't engage on …."

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In an email to this Office dated **2 July 2020**, the Complainant explained that:

> *"I have now received the attached letter of rejection of my claim from* [the Provider]*.*
>
> *I would welcome your view as to their statement that the policy as a whole makes it clear that denial of access cover is not available for COVID 19.*
>
> [The Provider] *have specifically listed diseases that are excluded under denial of access cover and COVID 19 is not among them.*
>
> *It's not reasonable for* [the Provider] *to claim that COVID 19 is excluded by 'reading the policy as a whole' – If* [the Provider] *meant to exclude all diseases under the denial of access cover extension then they should have said that all diseases were excluded and not just that notifiable diseases were excluded.*
>
> *Finally* [the Provider] *say that even if COVID 19 were to be covered under denial of access it wouldn't be in this case because the Government is not a statutory body and the direction was general and did not apply to a circumstance 1 mile from me.*
>
> *On this I would say that a reasonable man would say that* [the] *government is set up under the laws of the land therefore is a* [statutory] *body and that if a danger occurs everywhere then it* [certainly] *occurs within one mile of a policy holder. In any event in my case COVID 19 did specifically occur within 1 mile of my business. …"*

The Complainant set out her complaint in her **Complaint Form**, as follows:

> *"*[The Provider] *are rejecting my claim under the denial of access (non damage) cover although the policy exclusions listed refer to a list of notifiable diseases of which Covid 19 is not.*
>
> *In addition they are saying the Government notice of closure was general and not because of an occurrence close to my premises although I informed* [the Provider] *of cases within 1 mile of my premises.*
>
> [The Provider] *are saying that the policy 'as a whole' makes this clear.*
>
> *If an insurance policy has specific named exclusions for particular diseases it is unfair to later claim that there are other undisclosed exclusions eg Covid 19. How can such a policy be fair to purchasers? …."*.

As a result, the Complainant seeks for the Provider to admit her claim for business interruption losses as a result of the temporary closure of her business due to the outbreak of Covid-19 and make *"*[p]*ayment of the financial loss I have incurred due to the closure of my business due to Covid 19 …."*

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The Provider's Case

The Provider delivered its Complaint Response on **9 December 2020**, as follows.

Introduction

The Provider says that it declined the Complainant's claim for business interruption losses because it did not fall to be covered under the Complainant's policy. The Provider says the Complainant claimed for business interruption losses under the Denial of Access – Non-Damage cover (the "the DOA-ND Extension"). However, the Provider says there is no cover for claims arising from Covid-19 under the DOA-ND Extension.

In summary, the Provider says, there is no cover under the DOA-ND Extension because:

1. Covid-19 is not a "danger or disturbance" within the meaning of the DOA-ND Extension;
2. There was no "action" by the police or any statutory body;
3. The Complainant relies on a decision of the Government, which is not an action of the police or a statutory body; and
4. Even if the Government should be considered a "statutory body", the action relied on was not in response to a danger or disturbance at or within 1 mile of the insured premises.

The Provider notes that the Complainant has set out the basis of her claim, as follows

> *"*[The Provider] *are rejecting my claim under the denial of access (non damage) cover although the policy exclusions listed refer only to a list of notifiable diseases of which COVID 19 is not.*
>
> *In addition* [the Provider] *are saying the government notice of closure was general and not because of an occurrence close to my premises although I informed* [the Provider] *of cases within 1 mile of my premises.*
>
> [The Provider] *are saying that the policy "as a whole" makes this clear.*
>
> *If an insurance policy has specific named exclusions for particular diseases, it is unfair to later claim that there are other undisclosed exclusions e.g. COVID 19."*

The Provider says that the Complainant is seeking payment of the financial loss incurred due to the closure of her business as a result of Covid-19. The Provider says the Complainant has produced a letter from her accountant dated **12 August 2020** advising that the turnover of the business for the period **1 March 2019** to **12 March 2020** was €29,892.50. The Provider says the Complainant has not provided the figure for the total losses incurred since the closure of her business on **12 March 2020** nor has the Complainant provided details of the losses she is claiming under the policy. While not strictly necessary (given its position that there is no cover under the policy) the Provider says that for completeness, it has explained the quantification/adjustment of claims in its Complaint Response.

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Background to the claim

The Provider says the Complainant is a sole trader trading as a medical clinic and that she purchased a policy of insurance with the Provider through her Broker, with a period of cover from **25 January 2020** to **24 January 2021**. On **31 March 2020**, the Provider says it was notified of the Complainant's claim under the policy.

Where, in the context of the unprecedented Covid-19 pandemic, business interruption cover was available under the policy, the Provider says it engaged with policyholders to deal with their valid claims. Where cover did not operate, as in the present case, the Provider says it wrote to policyholders to explain in detail why there was no cover.

The Provider says that by letter dated **13 April 2020**, it declined the Complainant's claim explaining that there was no cover under the policy for the loss, and in particular, there was no cover under the DOA-ND Extension. The Provider says the reasons for the declinature were clearly set out in this letter. The Provider says the declinature was challenged by the Complainant through her broker and a Final Response letter issued on **23 June 2020** further explaining this decision and provided an explanatory note (the "Explanatory Note") on the Denial of Access cover under the policy. The Provider says it continues to rely on the April letter, the Final Response letter and the Explanatory Note.

Cover under the DOA-ND Extension

Prior to addressing the specific points raised in this complaint, the Provider says it is appropriate to address the nature of the cover provided by the policy and the DOA-ND Extension under which the claim is made.

The Provider says the policy provides cover for a wide range of risks, including business interruption for losses resulting from specified insured perils. The core business interruption cover under the policy is for loss resulting from physical damage to property. The Provider notes there is no physical damage to property claimed by the Complainant.

The Provider says there are two non-damage extensions in the policy, namely the Murder Suicide and Disease extension (the "MSD Extension") and the DOA-ND Extension. The claim made by the Complainant is under the DOA-ND Extension only. The Provider says the Complainant has not sought to advance a claim under the MSD Extension which is not surprising as this provides cover in respect of specified diseases only and Covid-19 is not one of the diseases specified in the extension.

The Provider says the DOA-ND Extension provides, as follows:

> *"Denial of access (non damage) cover*
>
> *We will cover you for any loss insured by this section resulting from interruption of or interference with the business where access to your premises is restricted or hindered for more than 24 hours directly from*

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*1 the action taken by the police or any other statutory body in response to a danger or disturbance at your premises or within a **1 mile radius of your premises** …*

We will not cover you where access to your premises is restricted or hindered as a result of:
…

4. notifiable diseases as detailed in the Murder suicide or disease cover."

The Provider submits that the DOA-ND Extension only provides cover for the specific events set out in that clause and it clearly defines circumstances where it does not provide cover. It specifically excludes cover for an interruption as a result of disease, losses from which are addressed exclusively in the MSD Extension of the policy. Therefore, it is clear that any action taken by the police or statutory authority in response to an outbreak of disease at or within a 1 mile radius of the insured premises which restricts or hinders access to the insured premises is not covered under this extension.

The Provider says that when the policy is read as a whole, it is clear that the reference to "danger or disturbance" does not include the occurrence of a disease. That being so, Covid-19 does not fall within the meaning of "danger or disturbance" as that term appears in the DOA-ND Extension. The Provider says the term "danger or disturbance" refers to an event or activity such as a riot, a protest, or a damaged building.

However, the Provider says that even if an occurrence of Covid-19 could be considered to be a **"danger or disturbance"** within the meaning of the DOA-ND Extension (which it is not), cover would not be triggered in the circumstances of the present complaint. For cover to operate, the Provider says <u>all</u> of the following elements of the clause must be met, namely:

- the denial of access must arise directly from
- actions of the police or a statutory body
- in response to a danger or disturbance
- at or within 1 mile of the insured premises

The Provider says that cover is only triggered, where there is an interruption or interference with the business where access to the premises is restricted or hindered. However, the Provider submits that it is not necessary for this Office to determine this question given the clear position on cover under the DOA-ND Extension. The Provider says the Complainant has not provided any information to confirm that there was an interruption or interference with the business where access to the premises was restricted or hindered. For example, the Complainant operates a medical clinic and has not indicated whether the business was required to close by the relevant regulations.

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The Provider says that the **"action"** relied on by the Complainant, is the *"government notice of closure"* **following an outbreak of** Covid-19. The Provider says the Complainant has not confirmed the specific Government decision upon which she relies. While no further details have been provided as to precisely when the business closed and re-opened, the Provider says that it is not clear that the Complainant was required to close her business. In these circumstances, the Provider says the Complainant has failed to provide basic information that would be required in order to assess whether the DOA-ND Extension could be triggered. However, based on the very limited information provided, it is evident that the "action" relied on is not relevant in circumstances where the requirement under the DOA-ND Extension is specifically an action of the police or statutory body.

Furthermore, the Provider says that if the Government advices and restrictions could somehow be regarded as constituting an "action of the police or statutory authority", they were national and of general application and not in response to a danger or disturbance within the meaning of the DOA-ND Extension and did not cause loss or damage to the Complainant. The Provider submits that any loss suffered by the Complainant has been caused by uninsured perils independently of any restriction or hindrance of access to the premises such as social distancing practices and measures to reduce the risk of transmission of Covid-19, restrictions on travel, the widespread public concern regarding the risk of infection and the economic slowdown and, as such, are not losses that are covered under the policy. In the circumstances, the Provider says that restriction or hindrance of access to the premises is not the proximate cause of loss.

The Provider says that it is therefore clear from the above that cover is not triggered in the circumstances of the claim and where cover is not triggered, it is not necessary to have an express exclusion. Notwithstanding the foregoing, the Provider says cover under the DOA-ND Extension is expressly excluded in respect of *"notifiable diseases as detailed in the Murder suicide or disease cover."* Where access to the insured premises is hindered by reason of a notifiable disease, the extent to which that event is covered (or not covered) is addressed in the MSD Extension, exclusively.

The Provider says the Complainant argues that there is cover, because Covid-19 is not listed in the policy exclusions. However, for the reasons set out above, the Provider says the policy does not provide cover for pandemics such as Covid-19 and therefore, it was not necessary to expressly exclude such risks.

The Provider notes the Complainant's position that it is not reasonable for the Provider to claim that Covid-19 is excluded by reading the policy as a whole and suggests that the Provider is relying on "undisclosed exclusions". The Provider says this is not the position that it set out in its correspondence and is further explained above.

Furthermore, and without prejudice to the above position, the Provider says that for any losses claimed to be covered, the Complainant must establish that, but for the restriction or hindrance of access to the premises, she would not have suffered the loss and it does not appear that the Complainant can establish this.

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Quantification of the Claim

Although the Policy Schedule mentions a different figure on its face, the Provider says the limit of cover under the relevant section of the policy is €50,000 and the policy sets out in detail how to calculate gross profit, gross revenue and rent receivables. The Provider says that any claim made must provide sufficient information to enable figures in this regard to be calculated in accordance with the policy. The Provider states that the Complainant has not provided sufficient information to enable it to calculate the suggested loss being claimed in accordance with the policy terms and conditions. The Provider says the Complainant states in her Complaint Form that she has attached details of the losses suffered from her accountant, however, the only information from the Complainant's accountant is a letter confirming the turnover of the business in the period **1 March 2019** to **12 March 2020**.

The Provider says that to the extent that this Office may determine that there is cover for the losses claimed under the policy (which is denied) the Complainant will need to prove the quantification of her losses under the policy. The Provider says the Complainant has not provided any details of her losses and it is simply not possible to calculate the losses that might be recoverable. This cannot be done, the Provider says, without the provision by the Complainant of detailed financial information and disclosure of underlying financial records. Furthermore, the Provider says that it should be noted that if cover is triggered under the policy, the claim must be adjusted pursuant to the relevant provisions of the policy, including the Business Trends clause contained in Note 3 at page 44 of the policy which would require the losses claimed to be reduced.

Engagement with the Complainant

The Provider says that while not specifically referenced in the Summary of Complaint, it is noted that the Complainant states in her letter of **18 June 2020** to this Office, that the Provider's delay in responding to her claim is entirely unreasonable and she suggested that the Provider would not engage with her regarding her claim. The Provider says this is incorrect and is not supported by the correspondence between the parties.

The Provider says the Complainant's Broker first notified it of the Complainant's claim on **31 March 2020** and following consideration of the claim, a declinature letter was issued on **13 April 2020**. The Provider says it received the Complainant's request to reconsider the decision in respect of her claim after closure of business on **15 April 2020**. The Provider says this was treated as a complaint and registered on the Provider's system on **17 April 2020**. The Provider says it was brought to its attention on **27 April 2020** by the Complainant's Broker that the complaint had not been formally acknowledged. The Provider says this was because the complaint was inadvertently logged as closed on its system.

The Provider says that a letter of acknowledgement was sent to the Complainant on **29 April 2020** confirming that the Provider would be in touch within the next 15 working days. On **14 May 2020** (i.e. within 20 business days of first receiving the complaint and 10 working days after the letter of **29 April 2020**), the Provider says it updated the Complainant that its review of the claim was still ongoing and that the Provider would be in contact within the next 20 working days.

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The Provider says it further updated the Complainant on **11 June 2020** that she could refer the matter to this Office as 40 business days had expired from receipt of her original complaint. The Provider says it subsequently wrote to the Complainant on **23 June 2020** to advise her of the outcome of the review.

The Provider says that at all times it endeavours to handle claims and complaints promptly and in accordance with its legal and regulatory obligations. Given the complex matters involved, the Provider says that together with its legal advisers, it took time to fully and properly consider the points raised by the Complainant in respect of her claim. The Provider says that while it regrets that there was a short delay in acknowledging the complaint, its respectfully submits that it has at no time acted unreasonably, with undue delay or failed to engage with the Complainant on her claim.

Irish Test Case

The Provider refers to a test case that was due to be heard before the High Court in **January 2021** in respect of issues relating to the interpretation of the DOA-ND Extension. The Provider says that the test case would be heard on a modular basis with the first module focussing solely on the contractual interpretation of the policy wording [identical to the policy wording the subject of this complaint] and the cover available under the policy terms. The Provider says the agreed issues to be determined in the first module included (but were not limited to) whether Covid-19 constitutes a danger or disturbance, whether the outbreak of Covid-19 or the actions of the police or statutory body have to be on the premises or within a 1 mile radius, whether the Government restrictions amount to an action by the police or a statutory body, and what constitutes a prevention or hindrance.

The FCA Test Case

The Provider also referred to a decision of a Divisional Court in England in a test case which was brought by the Financial Conduct Authority (the "FCA") seeking the court's interpretation of various business interruptions covers, ***Financial Conduct Authority v Arch & ors*** [2020] EWHC 2448 (Comm) (the "FCA Test Case").

The Provider says that while it was not part of the FCA Test Case and none of the clauses under consideration were on identical terms to the DOA-ND Extension, this is nevertheless an important judgment which is likely to be a persuasive authority in this jurisdiction. The Provider says that the court made the following declaration which is relevant to the interpretation of the DOA-NA Extension and is consistent with its position that Covid-19 is not a "danger or disturbance":

> *"33.7 The phrase "a danger or disturbance in the vicinity of the Premises":*
>
> *(a) contemplates an incident specific to the locality of the premises;*
>
> *(b) indicates that this is narrow localised cover; and*
>
> *(c) does not indicate a continuing, countrywide state of affairs."*

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The Provider says that as regards "danger or disturbance", "danger" gains some form of colour from its juxtaposition with "disturbance" and that the overall phrase *"contemplates an incident specific to the locality of the premises rather than countrywide state of affairs"* (para. 500 of the FCA Test Case). The court said that the paradigm example of a "disturbance" in this context would be an affray or brawl.

The Provider says the court found that the imposition by the UK Government, of regulations to deal with the national pandemic could not be said to be following a danger in the vicinity, in the sense of in the neighbourhood, of the insured premises (paras. 418, 436, 466 and 501 of the FCA Test Case and Declarations 21.7 and 33.7).

The Provider says that these findings, which are not subject to appeal, clearly establish that there is no cover under the DOA-ND Extension and are sufficient to determine this complaint in favour of the Provider. The court also found that the presence of someone with Covid-19 within a one mile radius of the premises was not sufficient for there to be "an incident within a one mile radius" (Declarations 18.2, 18.6 and 22.1). In addition, the Provider says, the court found that an "action" by police or other authority connotes a step taken by the relevant authority which has to be force of law, such as any regulations or legislation with the force of law (para. 497 of the FCA Test Case). However, the Provider advised at that stage that the meaning of "action" was subject to appeal by the FCA.

Further Submissions from the Provider

Following the Provider's Complaint Response of **9 December 2020**, a further exchange of submissions took place between the parties. While these submissions were considered in detail as part of the investigation and adjudication of this complaint, I do not consider it necessary to set them out in detail. However, I note that on **19 April 2021**, the High Court delivered its decision in the test case of ***Brushfield Limited (T/A The Clarence Hotel) v Arachas Corporate Brokers Limited & Or*** [2021] IEHC 263 (the "Irish Test Case"), referred to in the Provider's Complaint Response.

On **30 April 2021**, the Provider delivered a further submission to the Office arising from the decision in the Irish Test Case, which I set out here. In this submission, the Provider says that the High Court found that there was no cover under the policy for business interruption losses arising from Covid-19. The Provider says the High Court found that there was no cover under the DOA-ND Extension for business interruption losses resulting from the closure of the premises on foot of restrictions introduced in response to the Covid-19 pandemic. While the High Court stated that the occurrence of a notifiable disease could, in principle, be capable of constituting a "danger" within the meaning of the DOA-ND Extension, the Court found that the word "danger" must be read in context, and when read in context, the Court considered that the reference to "danger or disturbance" in the DOA-ND Extension was not intended to extend to a pandemic which has nationwide effects (para. 190) for the reasons summarised below.

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The Provider relies in that regard, on the Court's opinion that:

1. By confining the dangers or disturbances to those which occur within a one mile radius, the clause has a similar effect to one of the clauses considered in the FCA Test Case. The reference to a one mile radius strongly suggested a localised form of cover.

2. "Danger" is used in juxtaposition with the word "disturbance". In the Court's view, the latter has a very obvious local connotation.

3. A consideration of the reference to "actions" by the police or by a statutory body was also important. The use of the word "actions" was intended to extend to measures which do not have the force of law such as those which may have to be taken urgently to address an immediate danger before there is time to invoke specific powers. Typically, that will arise at a local level where, for example, members of An Garda Síochána may need to seal off an area where there is a building in danger of collapse or there is a bomb scare or unruly protest.

4. It is crucial to keep in mind the terms of the clause as a whole. The Provider says the clause is concerned with a restriction on access to the insured premises as a consequence of the actions of the police or a statutory body in response to a danger or disturbance within a one mile radius. The restriction is therefore expressly linked to the danger or disturbance within that radius. The effect of the clause is that there will only be an entitlement to an indemnity under the clause if the insured can demonstrate that it was the risk of Covid-19 which led to the relevant restrictions which restricted access to its premises. Here, the Provider says, the relevant actions relied upon by the Plaintiff were the measures taken by the Government on **15 March 2020** and the Regulations subsequently enacted by the Minister for Health. While there was an attempt to rely on the presence of An Garda Síochána on the streets and at checkpoints, there was no evidential basis to suggest that access to the premises was hindered or restricted by Garda action. The Court observed:

   > *"I cannot see how it could plausibly be contended that the measures taken at national level by the Government or the Minister for Health could be said to have been proximately caused by a risk of COVID-19 within a one mile radius of the hotel. The measures in question were taken in response to the position in the State as a whole. In my view, there is a significant difference between the terms and the effect of the denial of access clause in the* [Insurer] *policy and the clause successfully relied on by the plaintiffs in the* [other Insurer] *case."*

   The Provider says that the Court concluded that for the reasons outlined, the clause has a local focus and appears to be concerned with actions taken to address local events in the nature of danger or disturbances.

5. Paragraph 5 of the exclusions to the denial of access clause supports the conclusion that the clause is local in nature.

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6. Although not decisive, the historical origin of the clause supports the conclusion that the clause is intended to address local rather than national dangers.

The Provider says that in its Complaint Response, it set out four grounds as to why there was no cover for the Complainant under the DOA-ND Extension. The Provider has repeated these with the following additional comments:

1. Covid-19 is not a "danger or disturbance" within the meaning of the DOA-ND Extension

   While the Court considered that Covid-19 could in principle be a "danger", it found that it was not a "danger or disturbance" within the meaning of the DOA-ND Extension.

2. There was no "action" by the police or any statutory body

   The High Court held that measures taken by the Government or by the Minister for Health cannot be said to constitute actions by the police. In the present complaint, the Provider says that while the Complainant did not confirm the specific Government decision upon which she relied, the "action" relied upon was "government notice of closure".

3. The Complainant relies on a decision of Government, which is not an action of the police or a statutory body.

   The Court found that the DOA-ND Extension will only respond where a restriction on access to the premises is attributable to actions taken by the police or a statutory body in response to a danger or disturbance at the premises or within a one mile radius of it. It was further held that measures taken by the Government or by the Minister for Health could not be said to constitute actions by the police, nor could they be said to constitute actions by a statutory body based on the arguments made by the Plaintiff.

   The Provider says it should be noted that at paragraph 200 of the High Court judgment, the Court identified an argument potentially open to the Plaintiff that the Minister for Health could be regarded as a statutory body having regard to the provisions of the Minister and Secretaries Acts 1924-2017. The Court afforded the parties an opportunity to make supplemental submissions on this point. However, the Court was very clear at paragraph 232 that even if this issue was decided in favour of the Plaintiff, it would not alter the result of the proceedings and there would still be no indemnity available under the policy.

4. Even if the Government should be considered a "statutory body", the action relied on was not in response to a danger or disturbance at or within 1 mile of the insured premises

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> The High Court held that the DOA-ND Extension was "intended to respond to localised dangers or disturbances" which occur within a one mile radius of the premises. The measures taken by the Government were not prompted by concerns about any dangers or disturbances within the one mile radius of the premises.

The Provider says it was always satisfied that its position in respect of cover under the policy was correct and the High Court has now confirmed that its position on cover was correct.

The Complaint for Adjudication

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

Decision

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

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

A Preliminary Decision was issued to the parties on **5 July 2021**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

I note that the Complainant's Broker notified the Provider of a claim for business interruption losses arising from the closure of the Complainant's business due to Covid-19 on **31 March 2020**. On **13 April 2020**, the Provider wrote to the Complainant declining to accept cover for the claim.

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In respect of denial of access cover, the Provider advised that *"cover also does not apply as the current pandemic clearly does not come within that definition."* Following a further series of correspondence between the parties, the Provider wrote to the Complainant on **23 June 2020** where it maintained its decision to decline to accept a business interruption claim arising from a denial of access to the insured premises, as follows:

> *"Cover is also provided for any loss from an interruption with your business where access to your premises is restricted or hindered by the actions of the police or other statutory body in response to a danger or disturbance at your premises or within 1 mile radius thereof. The reference to danger does not include notifiable diseases which to the extent there is cover available under the Policy, is provided for under the Murder, suicide, disease extension. In addition, the requirements under the Denial of access (non damage) extension that the actions of the police or a statutory body restricting access to your premises are in response to a danger at your premises or within a 1 mile radius thereof, have not been met in this case and so unfortunately your claim is not covered by this extension."*

In this respect, I note that the Complainant held a business insurance policy with the Provider. According to the Complainant's policy schedule, the Complainant's policy included cover for business interruption in respect of gross profit with an insured sum of €10,000 for a 12 month indemnity period.

Business interruption cover was provided for at pg. 44 of the Complainant's policy document. In respect of the cover provided, pg. 47 states, as follows:

> *"**We** will cover **you** for the items shown in **your** schedule other than for **book debts**. If any **building**(s) or other property used by **you** at the **premises** for the purpose of the **business** suffers **damage** during the **period of insurance** and as a result the **business** is interrupted or interfered with, then **we** will pay **you** for each item in **your** schedule the amount of loss resulting from the interruption or interference. …."*

The policy then set out a number of 'Extensions of cover'. In the context of this complaint, the 'Denial of access (non damage) cover' extension (the "DOA-ND Extension"), stated, as follows:

> *"**We** will cover **you** for any loss insured by this section resulting from interruption of or interference with the **business** where access to **your premises** is restricted or hindered for more than 24 hours arising directly from*
>
> *1 the actions taken by the police or any other statutory body in response to a danger or disturbance at **your premises** or within a 1 mile radius of **your premises***
>
> *2 the unlawful occupation of **your premises** by third parties.*
>
> *…*

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> ***We*** *will not cover* ***you*** *where access to* ***your premises*** *is restricted or hindered as a result of*
>
> *1 physical* ***damage*** *to property at* ***your premises*** *or elsewhere*
>
> *2 strikes, picketing, labour disturbances or trade disputes*
>
> *3 the condition of or the* ***business*** *conducted within* ***your premises*** *or any other* ***premises*** *owned or occupied by* ***you***
>
> *4 notifiable diseases as detailed in the Murder suicide or disease cover*
>
> *5 actions where* ***you*** *have been given prior notice."*

In the circumstances of the Complainant's claim, I note that cover was triggered under the DOA-ND Extension when access to the insured premises was restricted or hindered due to *"the actions taken by the police or any other statutory body in response to a danger or disturbance at your premises or within a 1 mile radius of your premises"*.

The parties to this complaint are not in agreement as to the proper interpretation of the DOA-ND Extension. In this respect, I note that McDonald J. delivered judgment on **19 April 2021** in the High Court case of ***Brushfield Limited (T/A The Clarence Hotel) v Arachas Corporate Brokers Limited & Or*** [2021] IEHC 263, the Irish Test Case. Significantly, the Irish Test Case considered the proper interpretation of a clause identical to the DOA-ND Extension the subject of this complaint.

In considering the application of the denial of access clause in response to a claim arising from Covid-19, McDonald J. remarked that at first sight it would appear self-evident that Covid-19 constituted a 'danger' within the meaning of the clause (para. 190). However, the trial judge was of the view that this term must be read in context and he concluded that such a clause was not intended to include the Covid-19 pandemic, stating:

> *"190. … However, the word "danger" must be read in context. It cannot be construed in isolation. When read in context, I do not believe that the reference to "danger or disturbance" in the denial of access clause was intended to extend to a pandemic which has nationwide effects. …*
>
> *191. Bearing all of the considerations outlined in para. 190 above in mind, I have come to the conclusion that a reasonable person in April 2019* [when the policy was incepted] *would consider that the denial of access clause was intended to respond to localised dangers or disturbances. For the same reason, I do not believe that a reasonable person in April 2019 would have regarded a disease having the characteristics and geographic spread of COVID-19 as coming within the ambit of a "danger or disturbance" as those words would be understood in the specific context of the denial of access clause."*

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While a number of reasons were identified by McDonald J. for the conclusion that Covid-19 did not constitute a danger, I do not consider it necessary to set these reasons out here - the conclusion reached by the Court regarding the scope of the terms 'danger' and 'danger or disturbance' is sufficient for the purposes of this complaint investigation.

Later in his judgment, McDonald J. expressed the view that the measures taken by the Government and by the Minister for Health in response to Covid-19 could not be said to constitute actions taken by the police and that Government measures could not be said to constitute actions of a statutory body (para. 206(a) and (b)). In particular, the Court stated:

> *"197. … I cannot see any basis upon which the Government measures can be said to be in response to an outbreak of COVID-19 at or within one mile of the insured premises. The denial of access clause is focused on the existence of a particular danger or disturbance which occurs within a one-mile radius of the hotel. …*
> *198. A fundamental difficulty facing the plaintiff here is that no statutory body has been identified which took any of the measures which led to the closure of the hotel or the hotel bar. The actions which led to the closure of the hotel and bar were actions of the Government or of a Minister of the Government. … I have not heard any argument to establish that these measures* [the advice issued by the Government on 15 March 2020] *can be said to have been taken by a statutory body. … In my view, the ordinary reasonable person would understand a reference to a statutory body to embrace a body which is established by statute. …* [A]*t the time this policy was put in place, there were many statutory bodies in Ireland carrying out public functions and I can see no basis upon which the language of the policy can be ignored or on which an unusually broad interpretation can be given to the term "statutory body"."*

In the concluding paragraphs of his judgment, McDonald J. stated:

> *"231.* [The] *plaintiff has not established that any of the measures taken by the Government in March 2020 or subsequently were prompted by concerns about any danger or disturbance within the one-mile radius of the hotel prescribed by that clause.*
>
> *232. Furthermore, the denial of access clause will only apply where a restriction on access to the hotel premises is shown to be attributable to actions taken by the police or by a statutory body in response to a danger or disturbance at the hotel or within a one-mile radius of it. The measures taken by the Government or by the Minister for Health cannot be said to constitute actions by the police. …*
>
> *233. Having regard to the language and context of the denial of access clause and for the reasons discussed in paras. 190 to 191 above, I have concluded that the clause is intended to respond to localised dangers or disturbances which occur within a one-mile radius of the hotel. I do not believe that, as of the date the* [Insurer] *policy was put in place in April, 2019, a reasonable person would regard a disease having the characteristics and geographic spread of COVID-19 as falling within the ambit of a "danger or disturbance" as those words would be understood in the specific context of the denial of access clause."*

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I note that the reason for the closure of the Complainant's business is succinctly captured in her letter to this Office dated **18 June 2020**:

> *"My business closure was as a result of the actions of the DOH* [Department of Health] *and government in response to the danger of COVID 19 which was generalized but specifically which also occurred within a 1 mile radius of my premises …."*

In light of the decision of the Irish Test Case, it is my opinion that the DOA-ND Extension in the Complainant's policy does not provide cover in respect of the Covid-19 pandemic nor do the measures introduced by the Minister for Health or the Government in response to the pandemic, come within the meaning of the DOA-ND Extension. I accept that the provider was entitled to take the view that, properly construed, the DOA-ND Extension responds to localised dangers or disturbances and not to a national response to Covid-19.

Therefore, having considered the circumstances of the Complainant's claim, I take the view that the Provider was entitled to determine that the cover provided under the DOA-ND Extension was not triggered in this instance. While I appreciate that the Complainant has likely suffered significant disruption to her business as a result of Covid-19 and that this decision will come as a disappointment, I am satisfied that the Provider was entitled to decline her claim for business interruption losses.

I note that in the Complainant's letter of **18 June 2020**, she states that *"the delay in responding to my claim is entirely unreasonable. I have a valid claim which they won't engage on …."* In this respect, I note that a claim was notified to the Provider on **31 March 2020** and 9 business days later, on **13 April 2020**, the Complainant was advised that the Provider would not be accepting the claim. This was followed by further correspondence on **15 April 2020** which, the Provider says, was treated as a formal complaint and registered on its system on **17 April 2020**. The Provider also explains that it was brought to its attention by the Complainant's Broker on **27 April 2020** that the complaint had not been formally acknowledged. The Provider further says this was because the complaint was inadvertently logged as closed on its system.

I note that on **29 April 2020**, the Provider wrote to the Complainant acknowledging her complaint. However, this letter is not correctly addressed in that it refers to the Complainant as her trading name and as 'Mr'. While this may have been a system generated letter, better care and attention is required from the Provider when issuing correspondence to customers. With a correctly addressed letter, the Provider wrote to the Complainant on **14 May 2020** to advise her that the complaint was still being investigated and that the investigation was expected to be completed within the next 20 working days.

A letter in similar terms was also issued on **11 June 2020**. However, this letter also advised the Complainant that *"in the meantime, you may now refer your complaint to the Financial Services and Pensions Ombudsman …."* This was followed by a Final Response letter on **23 June 2020**.

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Provision 10.9(a) of the ***Consumer Protection Code 2012*** ("the Code") requires the Provider to acknowledge a complaint within 5 business days of receiving it. In this instance, the Complainant's email expressing dissatisfaction with the Provider's decision to decline her claim was sent on **15 April 2020** and logged as a complaint on **17 April 2020**. An acknowledgement letter was then issued on **29 April 2020** which is outside of the 5 day period prescribed in the Code. However, taking it that the 5 day period for acknowledging the complaint began to run from **15 April 2020**, the complaint was nonetheless acknowledged with 10 business days. A Final Response letter issued approximately 49 business days after **15 April 2020**, this is only 9 days outside of the 40 period prescribed by Provision 10.9(d) of the Code. I would also note that the Provider issued two letters to the Complainant in **May** and **June 2020** updating her regarding the status of the complaint and of her entitlement to make a complaint to this Office.

While there was a technical breach of CPC provisions, and a small a delay on the part of the Provider in acknowledging the Complainant's complaint and issuing a Final Response letter, given the length of these delays, I do not consider that this is sufficient to show that the Provider unreasonably delayed in responding to or engaging with the Complainant's claim. Further to this, in its correspondence with the Complainant, the Provider set out its position regarding the claim, on the basis of its interpretation of the relevant policy provisions. Although the Complainant did not agree with the position adopted by the Provider, I am not satisfied that just because the Provider maintained a contrary position to that of the Complainant, that it failed to engage with her claim as she has suggested.

Accordingly, on the balance of the evidence available, I do not consider it appropriate to uphold this complaint.

Conclusion

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

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

MARYROSE MCGOVERN
Deputy Financial Services and Pensions Ombudsman

27 July 2021

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

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(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,

and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.