An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0255
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 limited company trading as a restaurant, hereinafter 'the Complainant Company', holds a business insurance policy with the Provider.

The Complainant Company's Case

On **24 March 2020**, the Complainant Company's Broker advised the Provider by email, amongst other matters, that *"… the food court in* [the shopping centre] *where this client operates out of has closed due to the Covid-19 outbreak. …."* Responding to this email on **25 March 2020**, the Provider explained that *"… closure due to Covid 19 unfortunately No cover applies under the notifiable diseases extension as it is not one of the listed contagious diseases under the* ***Murder suicide or disease cover*** *extension …."*

By email dated **3 April 2020**, the Complainant Company's Broker queried whether there was business interruption cover in respect of a prevention of access claim. The Provider responded to this email the same day, advising that:

> *"*[The] *policy provides cover based on a specified list of diseases and there polices do not provide Business Interruption cover for COVID-19.*
>
> *The denial of access (non-damage section) would also not provide indemnity for Covid-19.*
>
> - *This extension is for instances where Police or relevant agencies restrict or hinder access to the premises for more than 24 hours due to danger or disturbance within the premises or within 1mile of the premises.This would not respond to the ongoing incident where measures are being taken nationwide to prevent the spread of COVID-19."*

On **24 April 2020**, the Complainant Company's Broker notified the Provider of a claim for business interruption losses as a result of the temporary closure of its business in March 2020, for a period, due to the outbreak of coronavirus (Covid-19), as follows:

> *"I am writing to formally advise that* [the Complainant Company] *wish to formally put you on notice of their intention to pursue a business interruption claim due to the state enforced closure of their business. …"*

A telephone conversation subsequently took place between the parties on **8 May 2020** to discuss the business interruption cover provided under the policy.

Following its assessment of the claim, the Provider wrote to the Complainant Company on **25 June 2020** to advise that it was not accepting 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 out set 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.*
>
> ***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.*

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

In response to this, the Complainant Company's Broker emailed the Provider on **29 June 2020** to request that the claim be kept open and advised that the Complainant Company did not accept the Provider's position regarding its claim as there was a known occurrence of Covid-19 within 1 mile of the Complainant Company's premises, details of which were provided in this email. The Provider responded the same day stating that it had issued a final response to the claim which contained its position on the matter.

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

> *"We filed a claim on our policy under business interruption (BI) re Covid 19. Due to an outbreak in* [Dublin city centre] *we feel we are entitled to BI cover this was within 1 mile of our premises and was part of the government decision to close our restaurant. This was expressly stated in our policy. The fact that there were other instances is immaterial as the Central bank has issued a directive that any ambiguity in insurance policies re Covid 19 should be interpreted in favour of the client. …"*

The Complainant Company seeks for the Provider to admit its claim for business interruption losses as a result of the temporary closure of its business in March 2020 due to the outbreak of Covid-19. In this regard, the Complainant Company states:

> *"There is a €50000 limit on this section of our policy which we are seeking as our business was closed for 3 months."*

The Provider's Case

The Provider delivered its Complaint Response on **10 November 2020**, as follows.

Introduction

The Provider says that it declined the Complainant Company's claim for business interruption losses because it did not fall to be covered under the Complainant Company's policy. The Provider says the Complainant Company 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;

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3. The Complainant Company relies on a decision of 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 Company has set out the basis of its claim, as follows

> *"We filed a claim on our policy under business interruption re COVID 19. Due to an outbreak COVID-19 in* [Dublin city centre] *we feel we are entitled to [business interruption] cover [as] this was within 1 mile of our premises and was part of the government decision to close our restaurant. This was expressly stated in our policy. The fact that there were other instances is immaterial as the Central Bank [of Ireland] has issued a directive that any ambiguity in insurance policies re COVID-19 should be interpreted in favour of [the policyholder]"*.

The Provider says that the Complainant Company is seeking a payment of €50,000 on the basis that this is the limit of indemnity applicable to the DOA-ND Extension and the business was closed for 3 months. While not strictly necessary (given its position that there is no cover under the policy) the Provider says for completeness, that it has explained the quantification/adjustment of claims in its Complaint Response.

Background to the claim

The Provider says the Complainant Company is a limited company trading as a restaurant and purchased a policy of insurance through its Broker, with a period of cover from **11 December 2019** to **10 December 2020**. On **27 April 2020**, the Provider says it was notified of the Complainant Company'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 **25 June 2020**, it declined the Complainant Company's claim explaining that there was no coverage under the policy for the loss, and in particular, there was no coverage under the DOA-ND Extension. The Provider says the reasons for the declinature were clearly set out in this letter and in the explanatory note which accompanied it (the "Explanatory Note"). The Provider says it continues to rely on this declinature and 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.

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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 Company.

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 Company is under the DOA-ND Extension only. The Provider says the Complainant Company 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*
>
> *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. The Provider says this 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.

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The Provider says however, 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 all 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 Company 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 Company has not confirmed whether it was operating a takeaway business which it was permitted to do in accordance with the relevant regulations.

The Provider says that the "action" relied on by the Complainant Company is the *"government decision to close our restaurant"* following an outbreak of Covid-19 at an identified location in Dublin city centre. The Provider says that the Complainant Company has not confirmed the date on which it closed, the specific Government decision upon which it relies nor does it provide any information regarding the outbreak at the identified Dublin city centre location or any connection between such an outbreak and the national decision upon which it relies.

The Provider says that while no further details have been supplied as to precisely when the business closed and re-opened, it is not clear that the Complainant Company was required to close. In these circumstances, the Provider says the Complainant Company 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 Company.

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The Provider submits that any loss suffered by the Complainant Company 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 was not the proximate cause of loss.

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

Ambiguity

The Provider notes that on the Complaint Form, the Complainant Company states that the *"Central Bank has issued a directive that any ambiguity in insurance policies re COVID 19 should be interpreted in favour of the client."* The Provider says this appears to be a reference to the Central Bank of Ireland's Business Interruption Insurance Supervisory Framework (the "CBI Framework") which sets out the Central Bank's expectations of insurance firms handling Covid-19 related business interruption insurance claims. This states:

> *"The Central Bank is aware that in many cases BI insurance policy wording will be clear in relation to customer entitlements concerning COVID-19 related claims. However, where there is a doubt about the meaning of a term, the interpretation most favourable to the customer should prevail.*
>
> [Provider emphasis]

Similarly, in a letter to the insurance industry on **27 March 2020** known as the "Dear CEO Letter" letter, the Central Bank said that:

> *"Although the Central Bank expects that most policy wordings are clear in terms of what cover is provided and what cover exclusions are in place, where there is a doubt about the meaning of a term, the interpretation most favourable to their customer should prevail."*
>
> [Provider emphasis]

The Provider submits that, in this instance, there is no ambiguity in the policy wording and this principle does not therefore apply. The Provider says the policy wording is clear and unambiguous and that there is no doubt about the meaning of any terms.

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Quantification of the Claim

The Provider notes that the Complainant Company states that the limit of cover under the relevant section of the policy is €50,000 and, on that basis alone, it asserts that it is entitled to a payment of €50,000 on the basis that it was closed for 3 months, without submitting any proof of the losses argued to have been suffered. The Provider says this is manifestly incorrect and the policy sets out in detail how to calculate gross profit, gross revenue and rent receivables. Any claim must provide sufficient information to enable figures in this regard to be calculated in accordance with the policy.

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 Company will need to prove the quantification of their losses under the policy. The Provider says the Complainant Company has not provided any details of its 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 of detailed financial information and disclosure of underlying financial records. Furthermore, the Provider says 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.

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 consistent with its position that Covid-19 is not a "danger or disturbance":

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"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."

The Provider says that as regards "danger or disturbance" the court found that "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. 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 **10 November 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.

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The Provider says that 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. 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."*

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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.

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 in its Complaint Response, it set out four grounds as to why there was no cover for the Complainant Company 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 Company did not confirm the specific Government decision upon which it relied, the "action" relied upon was "government decision to close out business".

3. The Complainant Company 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.

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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.
5. 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 Company's claim for business interruption losses as a result of its temporary closure 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 Company was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

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

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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 on **3 April 2020**, the Complainant Company's Broker queried whether the business interruption cover under the Complainant Company's policy would respond to a denial of access claim arising from the closure of the Complainant Company's business due to Covid-19.

Responding the same day, the Provider advised that the denial of access (non-damage) section of the policy would not provide an indemnity for Covid-19 and *"would not respond to the ongoing incident where measures are being taken nationwide to prevent the spread of COVID-19."* A formal claim for business interruption losses was made by the Complainant Company's Broker on **23 April 2020**. Following further communication between the parties, the Provider wrote to the Complainant Company on **25 June 2020** to advise that it was not accepting 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 Company held a business insurance policy with the Provider. According to the Complainant Company's policy schedule, the Complainant Company's policy includes cover for business interruption in respect of gross profit, with an insured sum of €2million for a 12 month indemnity period.

Business interruption cover was provided for at pg. 44 of the Complainant Company'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:

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*"**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.*

…

***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 Company'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"*.

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. …

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> *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."*

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.*

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> *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."*

The Complainant Company considers that its claim for business interruption losses comes within the cover provided by its business insurance policy. In this respect, the Complainant Company states in its Complaint Form that:

> *"Due to an outbreak in* [Dublin city centre] *we feel we are entitled to BI cover this was within 1 mile of our premises and was part of the government decision to close our restaurant. This was expressly stated in our policy. The fact that there were other instances is immaterial …."*

In light of the decision of the Irish Test Case, it is my opinion that the DOA-ND Extension in the Complainant Company'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 that 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 Company's claim, it is my opinion that 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 Company has likely suffered significant disruption to its 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 its claim for business interruption losses.

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

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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—

(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.