An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0261
Sector:	Insurance
Product / Service:	Retail
Conduct(s) complained of:	Rejection of claim Failure to process instructions in a timely manner Failure to provide product/service information
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a limited company trading as a fabric shop, hereinafter 'the Complainant Company', incepted, by way of a Broker, a Retail Package insurance policy with the Provider on **31 October 2019**.

The Complainant Company's Case

The Complainant Company's fabric shop is situated in a shopping mall. The Managing Agent of this shopping mall notified the tenants on 21 March 2020 that it was closing the mall to the general public from **23 March 2020**, in light of the coronavirus (COVID-19). As a result, the Complainant Company notified the Provider by email on **25 March 2020** of a claim for business interruption losses, as follows:

> *"I am the owner of the fabric retail shop…which is situated within the gated* [mall].
>
> *My landlord sent me a letter on Saturday evening notifying me that he was closing the premises from 23rd March* [2020]. *He cited COVID-19 as the reason. We can no longer trade"*.

In making such a claim, the Complainant Company relies upon the following wording of the 'Extensions of cover under **Section 2 – Business Interruption ("All Risks")'** section at pg. 23 of the applicable Retail Package Policy Wording document:

"Subject to the terms of the Policy loss as insured by this Section resulting from interruption of or interference with the Business in consequence of Damage (as within defined) at the undernoted situations or to property as undernoted shall be deemed to be loss resulting from Damage to property used by the Insured at the Premises: …

iii. ***Prevention of Access***

Property in the vicinity of the Premises, Damage to which shall prevent or hinder the use of the Premises or access thereto, whether the Premises or property of the Insured therein shall have sustained Damage or not, but excluding Damage to property of any supply undertaking from which the Insured obtains electricity, gas or water or telecommunications services which prevents or hinders the supply of such services to the Premises.

iv. ***Notifiable Disease Cover***

Damage is extended to include:

1. *(a) any occurrence of a Notifiable Disease (as defined below) at the Premises or a Notifiable Disease attributable to food or drink supplied at the Premises;*

   (b) any discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease ….

which causes restrictions on the use of the Premises on the order or advice of the competent local authority; …

SPECIAL PROVISIONS

(a) Notifiable Disease shall mean illness sustained by any person resulting from:

(i) food or drink poisoning; or

(ii) an occurrence of a human infectious or human contagious disease which the competent local authority has stipulated shall be notified to them, with the exception of any occurrence, whether directly or indirectly, of Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition, Severe Acute Respiratory Syndrome (SARS), any mutation of H5N1 that manifests itself as a human infectious or human contagious disease which are all specially excluded hereunder".

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The Complainant Company says that following its assessment, the Provider emailed on **8 April 2020** to advise that it was declining indemnity in the matter, because there was no evidence presented of any occurrence of COVID-19 or the discovery of any organism likely to lead to the discovery of COVID-19 at the Complainant Company's premises, and the decision of the Managing Agent to close the shopping mall to the general public, was a precautionary measure taken to protect or minimise patrons from contracting COVID-19, rather than in response to the disease or virus being present at the Complainant Company's premises.

The Complainant Company emailed the Provider on **17 April 2020** regarding its decision to decline indemnity, as follows:

> *"The decision taken by our landlord to close the premises was taken as a direct result of the government's assertion that COVID-19 was present in enough of the population to make it necessary to interrupt our business.*
>
> *As testing for COVID-19 was not widely available it is not possible to prove that the virus was present in our staff or customers in the premises or not. Therefore the only reasonable course of action was to follow the expert and authoritative assumption that the virus was present.*
>
> *It is not reasonable for* [the Provider] *to withhold cover by insisting that the virus must be proved to be on the premises. A member of staff did display four of the symptoms of COVID-19 and notified the HSE on 5th March* [2020]*. She was told that she would not be tested. It was her GP's opinion that she should be tested but the tests weren't available unless you had been to Italy or China. Italian tourists were regular customers in the shop"*.

The Complainant Company also forwarded to the Provider on **6 May 2020** a medical report confirming that one of its employees had fallen ill on 3 March 2020 with a suspected case of COVID-19.

Following its review of this additional information, the Provider emailed the Complainant Company on 27 May 2020 to confirm that it was standing over its decision to decline indemnity, and adding that even though an employee had fallen ill on 3 March 2020 with a suspected case of COVID-19, this did not cause the Complainant Company's premises to close, but rather it had remained open for business until 23 March 2020, some three weeks later, when the Managing Agent made the decision to close the shopping mall.

In this regard, the Complainant Company sets out its complaint in the Complaint Form it completed on 14 July 2020, as follows:

> *"I understood that I was covered for business interruption closure due to a notifiable disease or under Prevention of Access cover since my landlord prevented public access from 23rd March* [2020]*.*

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> *I was refused* [cover] *and then I appealed and supplied the requested medical certificate stating that there was a case of COVID-19 on the premises* [and] *was refused again.* [The Provider] *seem to be nit-picking over dates and why the business had to close. I think they are avoiding* [its] *obligation and not honouring the policy …*
>
> *The Prevention of Access cover maximum is €75,000. I'm not clear and* [the Provider] *have not made it clear whether I am covered under prevention of access"*.

As a result, the Complainant Company advises that it seeks from the Provider, as follows:

> *"The loss of business earnings for the time we were closed, calculated a comparison with the same period last year amount to approximately €60,000 however the maximum cover provided under the notifiable disease clause is €37,500. I would be satisfied if* [the Provider] *paid this"*.

The complaint is that the Provider wrongfully or unfairly declined to admit and pay the Complainant Company's claim for business interruption losses as a result of its temporary closure due to the outbreak of coronavirus (COVID-19).

The Provider's Case

Provider records indicate that the Complainant Company notified the Provider by email on **25 March 2020** of a claim for business interruption losses as a result of its temporary closure on 23 March 2020, as follows:

> *"I am the owner of the fabric retail shop…which is situated within the gated* [mall].
>
> *My landlord sent me a letter on Saturday evening notifying me that he was closing the premises from 23rd March* [2020]. *He cited COVID-19 as the reason. We can no longer trade"*.

Following its claim assessment, the Provider emailed the Complainant Company on 8 April 2020, as follows:

> *"On the basis of the information provided, our preliminary view is that the policy will not provide cover …*
>
> *The Notifiable Disease Cover Extension under Section 2* [Business Interruption] *of your policy requires there to have been (a) an occurrence of a Notifiable Disease at the Premises or (b) the discovery of an organism likely to lead to the discovery of a Notifiable Disease, which has caused restrictions on the use of the premises on the order / advice of the competent local authority.*
>
> *We understand your landlord notified tenants of the shopping mall in which you operate that it was closing the mall to the general public as of 23 March 2020 in light of COVID-19.*

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There does not appear to have been any occurrence of COVID-19 or the discovery of any organism (being the coronavirus) likely to lead to the discovery of COVID-19 at your Premises. We understand that the decision to close the shopping mall was taken as a protective measure in light of concerns associated with the potential spread of the disease rather than in response to the disease or virus being present at your Premises".

The Provider says that it then received additional information from the Complainant Company, namely, an email on 17 April 2020 advising that one of its employees had fallen ill in early March 2020 with a suspected case of COVID-19, and by email on 6 May 2020 a medical report confirmed this.

The Provider says that having considered this additional information, it emailed the Complainant Company on **27 May 2020**, as follows:

"We note that the employee was not tested but that she was suspected of having COVID-19. However, even if it were confirmed that the employee had COVID-19, the closure of the Premises and any loss incurred by you, the Insured, as [a] *result do not appear to have been caused by such an occurrence. In this respect, we note that the Insured was required to close the Premises on 23 March 2020 at the direction of…the managing agent of the…[ ]. This was nearly three weeks after the employee fell ill on 3 March 2020 and stayed at home without returning to work. We note that the Premises remained opened for business until 23 March 2020 notwithstanding that the employee may have had COVID-19.*

Consequently, even if it is accepted that the employee had COVID-19, this does not appear to have caused the Premises to close. Instead, the closure was as a result of the decision of [the managing agent of the shopping mall] *some three weeks later. Consequently, not only is* [it] *not clear that an occurrence of COVID-19 occurred at the Premises as the employee was not tested, but, even if it had, this was not the reason why the Premises were closed.*

Further, we note that as from midnight on 27 March 2020, the government introduced more stringent social mobility restrictions, and the Insured Premises would have had to close as in compliance with those in any event and not as a result of any occurrence of COVID-19 at the Premises, meaning that even if the Notifiable Disease extension at Section 2 was triggered, the period of cover would be limited to only a matter of three days.

Unfortunately, therefore, the requirements of the Notifiable Disease Extension at Section 2 of the Policy have not been made in order for the Policy to respond".

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Furthermore, the Provider says that it emailed the Complainant Company on **2 June 2020** to advise that:

> *"Whilst we note that various advices have been provided to businesses generally to close or restrict their operations by the Irish government, including most recently those announced with effect from midnight on 27 March 2020, the Notifiable Disease Cover extension in your Policy does require an incidence of COVID-19 at your Premises in order to respond, as well as any direction or order to close being made as a result of such incident. Unfortunately, this is not the case in the circumstances to hand, and the Policy does not provide wider cover for interruptions to your business as a result of a less specific cause, such as a pandemic".*

The Provider notes the relevant wording of the '**Extensions of cover under Section 2 – Business Interruption ("All Risks")**' section of the Complainant Company's Retail Package Policy Wording document, at pg. 23, as follows:

> *"Subject to the terms of the Policy loss as insured by this Section resulting from interruption of or interference with the Business in consequence of Damage (as within defined) at the undernoted situations or to property as undernoted shall de deemed to be loss resulting from Damage to property used by the Insured at the Premises: …*
>
> *iv.* ***Notifiable Disease Cover***
>
> *Damage is extended to include:*
>
> 1. *(a) any occurrence of a Notifiable Disease (as defined below) at the Premises or a Notifiable Disease attributable to food or drink supplied at the Premises;*
>
>   *(b) any discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease ….*
>
> *which causes restrictions on the use of the Premises on the order or advice of the competent local authority; …*
>
> ***SPECIAL PROVISIONS***
>
> *(a) Notifiable Disease shall mean illness sustained by any person resulting from:*
>
> *(i) food or drink poisoning; or*
>
> *(ii) an occurrence of a human infectious or human contagious disease which the competent local authority has stipulated shall be notified to them, with the exception of any occurrence, whether directly or indirectly, of Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition, Severe Acute Respiratory Syndrome (SARS), any mutation of H5N1 that manifests itself as a human infectious or human contagious disease which are all specially excluded hereunder".*

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The Provider says that this business interruption notifiable disease extension extends the definition of 'Damage' under Section 2 to include an occurrence of a notifiable disease at the insured premises or the discovery of an organism at the insured premises likely to result in the occurrence of a notifiable disease, which has caused restrictions on the use of the insured premises on the order or advice of the competent local authority.

The Provider notes that on **20 February 2020**, COVID-19 became a notifiable disease in Ireland, as did its virus agent SARS-CoV-2, by way of the *Infectious Diseases (Amendment) Regulations 2020*. It says that in order for the business interruption notifiable disease cover extension to respond, there must have been an occurrence of COVID-19 or an organism likely to result in the discovery of COVID-19 at the Complainant Company's premises as well as an order or direction by a competent local authority, such as the HSE, restricting the use of the Complainant Company's premises, as a result of such an occurrence.

The Provider says that because the information submitted by the Complainant Company in support of its business interruption claim did not demonstrate that there was an occurrence of COVID-19 at the premises or the discovery of any organism at the premises likely to lead to the occurrence of COVID-19, it declined the claim.

It says that as part of its claim assessment, it did take into account the GP letter dated 5 May 2020 that the Complainant Company had forwarded by email on 6 May 2020, stating that an employee of the Complainant Company had fallen ill on 3 March 2020 and had attended her GP on 5 March 2020, when she was suspected of having COVID-19 and was advised by her GP to self-isolate, and that the employee did not meet the testing criteria at the time. The Provider confirms that it did not decline the Complainant Company's claim because there was no definitive determination of whether or not the employee had COVID-19.

Instead, the Provider says that it declined the claim because the Complainant Company closed its premises on 23 March 2020 at the direction of the Managing Agent of the shopping mall, who explained in its letter to the Complainant Company dated 21 March 2020 that it was closing the mall to the general public to protect those who work and trade there. As a result, the Provider concluded that the Managing Agent closed the shopping mall and, in turn, the Complainant Company's premises, as a precautionary measure to protect or minimise the shopping mall's patrons from contracting COVID-19.

The Provider says that the closure of the Complainant Company's business was therefore not caused by restrictions imposed by the HSE or any other competent local authority as the result of an occurrence of COVID-19 or the discovery of an organism likely to result in the discovery of COVID-19 at the Complainant Company's premises, which is the insured peril.

The Provider says it is also of note that the Complainant Company's premises remained open immediately after the employee was suspected, but not confirmed, to be infected with COVID-19 on 5 March 2020 and that her self-isolation period of 14 days had ended by the time the Managing Agent had announced on 21 March 2020, that it would be closing the shopping mall from 23 March 2020.

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In summary, the Provider says that it declined the Complainant Company's claim for business interruption losses because it did not meet the requirements for cover under the notifiable disease cover extension, as follows:

1. the Complainant Company has not been able to demonstrate that there was an occurrence of COVID-19 or the discovery of the coronavirus, at its premises;

2. the decision to close the shopping mall was made by the Managing Agent of the mall - not by a competent local authority;

3. that decision in any event was made to protect those who work and trade in the mall and not because of any occurrence of COVID-19 or the discovery of the coronavirus at the Complainant Company's premises;

4. in any event there is no casual connection between the incidence of the suspected case of COVID-19 at the Complainant Company's premises in or around 5 March 2020 (when the Complainant Company's premises remained open) and the later decision of the Managing Agent on 21 March 2020 to close the shopping mall from 23 March 2020.

In addition, the Provider also notes the wording of the **'Extensions of cover under Section 2 – Business Interruption ("All Risks")**' section of the Complainant Company's Retail Package Policy Wording document, at pg. 23, as follows:

> *"Subject to the terms of the Policy loss as insured by this Section resulting from interruption of or interference with the Business in consequence of Damage (as within defined) at the undernoted situations or to property as undernoted shall be deemed to be loss resulting from Damage to property used by the Insured at the Premises: …*
>
> *iii.* ***Prevention of Access***
>
> *Property in the vicinity of the Premises, Damage to which shall prevent or hinder the use of the Premises or access thereto, whether the Premises or property of the Insured therein shall have sustained Damage or not, but excluding Damage to property of any supply undertaking from which the Insured obtains electricity, gas or water or telecommunications services which prevents or hinders the supply of such services to the Premises".*

The Provider says that this business interruption prevention of access extension, extends business interruption cover to circumstances where access to the insured premises is prevented or hindered due to damage to property in the vicinity of the insured premises. In this regard, it points to the '**Definitions applicable to Section 2 – Business Interruption ("All Risks")**' section of the Policy Wording document which defines 'Damage' at pg. 21, as follows:

> *"**Damage** means physical loss or destruction of, or damage to, tangible property"*.

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The Provider says that as there has been no suggestion that access to the Complainant Company's premises has been prevented or hindered due to physical loss or destruction of, or damage to property in the vicinity of the insured premises, the Provider is satisfied that cover under the prevention of access extension was not triggered.

The Provider reiterates that the Complainant Company's policy provides cover for business interruption losses under the notifiable disease extension if the disease is a notifiable disease; that the notifiable disease occurs at the insured premises; and as a result of such an occurrence, the competent local authority advises or orders restrictions on the use of the premises.

The policy does not provide cover for business interruption losses where there is a pandemic and the government imposes restrictions on the movement of persons, for the purpose of preventing, limiting, minimising or slowing the spread of the notifiable disease.

It is therefore the Provider's position that in circumstances where an insured closed its business as a result of the COVID-19 pandemic and the government-imposed social distancing restrictions generally rather than because of an actual occurrence of COVID-19 at the insured premises, cover under the notifiable disease extension is not triggered.

The Provider notes that part of the Complainant Company's initial complaint to the Provider itself was that it had not previously been supplied with a copy of the policy documents. Provider records confirm that the policy was purchased online at 15:37 on 31 October 2019 by the Complainant Company's Broker (acting as an agent of the Complainant Company), and that the policy documents were immediately made available to download and were then downloaded by the Broker at **15:40** on **31 October 2019**.

As an agent of the Complainant Company, the Provider says that the Broker was responsible for providing the policy documents to the Complainant Company. In this regard, the Provider notes that the Broker confirmed on 21 August 2020, that on 31 October 2019 it posted the Statement of Fact and the Policy Documents to the Complainant Company and that it also emailed the Statement of Fact to the Complainant Company and confirmed that the policy documents were being sent by post that day. The Provider notes that there were no changes to the policy during the period between when it was incepted on 31 October 2019 and the date of the claim notification on 25 March 2020.

In conclusion, the Provider is satisfied that it declined the Complainant Company's claim in accordance with the terms and conditions of the insurance policy, insofar as the claim circumstances as presented did not meet the criteria of the insured peril as set out under the business interruption notifiable disease or prevention of access extensions. In this regard, the Provider is satisfied that the policy requirements for cover are clear and that it has acted fairly and applied the terms of the policy correctly.

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The Complaint for Adjudication

The complaint for adjudication is that the Provider wrongfully or unfairly declined to admit and pay the Complainant Company's claim for business interruption losses, as a result of the temporary closure of its business in March 2020, due to the occurrence/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 **12 February 2021**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

The Complainant Company, a limited company trades as a fabric shop in a shopping mall, and holds a Retail Package insurance policy with the Provider.

I note that the Managing Agent of the shopping mall that the Complainant Company is a tenant of, notified the tenants in writing on **21 March 2020** that it was closing the mall to the general public from 23 March 2020, as follows:

> *"We continue to monitor the situation as it evolves with COVID-19 and updating operational procedures in line with best practice.*

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> *Based on the info at hand the decision has been taken to close* [the mall] *to the general public as of 23 March 2020. This decision is not taken lightly and is a measure to protect those that work and trade in the* [mall].
>
> *As there have been several tenants in* [the mall] *that have been closed to the public but continue to trade via post and online the mall will remain open to the tenants of the mall. However, in order to control access to the site we will close the* [J.] *and* [C.] *entrances to the mall. All access and egress will be through the* [B.] *street entrance where a security presence will be maintained"*.

The Complainant Company notified the Provider by email on **25 March 2020** of a claim for business interruption losses arising from this temporary closure.

I note that the Provider emailed the Complainant Company on **8 April 2020** to advise that it was declining indemnity in the matter, as there was no evidence presented of any occurrence of COVID-19 or the discovery of any organism likely to lead to the discovery of COVID-19 at the Complainant Company's premises, and that the decision of the Managing Agent to close the shopping mall to the general public was a precautionary measure taken to protect or minimise patrons from contracting COVID-19, rather than in response to the disease or virus being present at the Complainant Company's premises.

The documentary evidence before me confirms that the Complainant Company then informed the Provider by email on **17 April 2020** that one of its employees had fallen ill in early March 2020, with a suspected case of COVID-19, and that it forwarded a medical report to the Provider by email on 6 May 2020 confirming same.

I note that the Provider emailed the Complainant Company on **27 May 2020** to confirm at that point that it was standing over its decision to decline indemnity and to advise that even though an employee had fallen ill on **3 March 2020** with a suspected case of COVID-19, it noted that this did not cause the Complainant Company's premises to close, but rather it remained open for business until 23 March 2020, some three weeks later, when the Managing Agent then made the decision to close the shopping mall.

In this regard, I note that the Complainant Company says in the Complaint Form it completed:

> *"*[The Provider] *seem to be nit-picking over dates and why the business had to close. I think they are avoiding* [its] *obligation and not honouring the policy"*.

I am also conscious of the submissions contained in the letter the Complainant Company emailed to this Office on **6 August 2020**. This letter highlighted in yellow, certain of the provisions and wording within the policy, and advanced a number of different reasons as to why the Complainant Company considered that such policy wording and such provisions contained in the Retail Package Policy Wording document should provide cover in the circumstances of its claim.

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The Complainant Company also maintained in that submission that:-

> "*As reflected in the [Provider] email of 21 July, the fundamental flaw in their refusal of our claim on 24 March for financial losses under the notifiable disease extension, is their contention that a mandatory 100% denial of access to the precise premises is required. While that may, which is contestable, apply to the cover for the Prevention of Access (for the usual business use of the building which is serving customers face to face), that is not the wording at Clause 5(IV) which relates to restrictions, not total closure, based on an "order or advice". That advice, for example on social distancing, dates from at least 12 March 2020 (as reflected in an article in …). The restrictions followed inexorably from the classification in Ireland of COVID-19 as a notifiable disease on 20 February 2020, but the first trigger date in the chain of causation was the manifestation of the disease in December 2019….".*

The Complainant Company also confirmed at that time, that its location in the shopping mall had re-opened but there was still "*interruption of or interference with*" its usual business, because of the continuing restrictions as at **25 July 2020**.

The Complainant Company's Retail Package insurance policy, like all insurance policies, does not provide cover for every possible eventuality. Rather the cover will be subject to the terms, conditions, endorsements and exclusions set out in the policy documentation. In this context, although the Complainant Company has sought to argue that the Provider did not adopt certain wording, when the policy was put in place, it is the specific policy wording that was adopted, and is contained within the Complainant Company's policy which I have examined, as it is the meaning of those words that is relevant to the Complainant Company's claim, which the Provider declined.

I note from the Complainant Company's Policy Schedule, that under the heading "**What is Insured**?", the Schedule provides that, amongst other things, the following cover applies:-

> "*Section 2 – Your Gross Profit should your business close for a period of time as a result of an insured peril*."

It is the identification of the insured perils for which the Complainant Company is covered, that must be extracted from the policy document and can be viewed under the heading:-

> … **'Extensions of cover under Section 2 – Business Interruption ("All Risks")**' section at pg. 23 of the applicable Retail Package Policy Wording document. This provides:
>
> > *"Subject to the terms of the Policy loss as insured by this Section resulting from interruption of or interference with the Business in consequence of Damage (as within defined) at the undernoted situations or to property as undernoted shall be deemed to be loss resulting from Damage to property used by the Insured at the Premises: …*

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i ***Failure of Public Utilities*** *…*

ii ***Unspecified Suppliers*** *……*

iii. ***Prevention of Access***

Property in the vicinity of the Premises, Damage to which shall prevent or hinder the use of the Premises or access thereto, whether the Premises or property of the Insured therein shall have sustained Damage or not, but excluding Damage to property of any supply undertaking from which the Insured obtains electricity, gas or water or telecommunications services which prevents or hinders the supply of such services to the Premises.

iv. ***Notifiable Disease Cover***

Damage is extended to include:

2. *(a) any occurrence of a Notifiable Disease (as defined below) at the Premises or a Notifiable Disease attributable to food or drink supplied at the Premises;*

(b) any discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease ….
which causes restrictions on the use of the Premises on the order or advice of the competent local authority; …

[my underlining for emphasis]

SPECIAL PROVISIONS

(a) Notifiable Disease shall mean illness sustained by any person resulting from:

(i) food or drink poisoning; or

(ii) an occurrence of a human infectious or human contagious disease which the competent local authority has stipulated shall be notified to them, with the exception of any occurrence, whether directly or indirectly, of Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition, Severe Acute Respiratory Syndrome (SARS), any mutation of H5N1 that manifests itself as a human infectious or human contagious disease which are all specially excluded hereunder".

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Since the preliminary decision of this Office was issued, in **February 2021**, the Complainant Company has pointed out that the manging agent was not operating "*on some sort of 'solo run'",* or *"some frolic of its own".* The Complainant points out that the direction requiring closure may have issued through the managing agent, as a conduit, but that in fact that closure requirement, originated from the Government, on the emerging advice of NPHET.

I note that the Provider considers this argument to be "*untenable*". In fact, whether the Complainant Company is right or wrong, I am conscious that, as a retailer offering non-essential services, it would have been required in any event to close within a matter of days, after the date when it actually closed its doors. I am satisfied however that quite apart from the interpretation of the words "*competent local authority"* the Complainant Company's entitlement to policy benefits, is also dependent upon the other policy wording, which is explored in detail below, and which has created an obstacle for the Complainant Company to overcome, in order to establish that it is entitled to the payment of policy benefits under the policy.

It is not in dispute that COVID-19 was designated a notifiable disease by the Government on **20 February 2020**. In that context, a claim for business interruption losses was open to the Complainant Company under the sections quoted above:

i ***Failure of Public Utilities***
ii ***Unspecified Suppliers***
iii. ***Prevention of Access***
iv. ***Notifiable Disease Cover***

I am satisfied that it is clear that the only prospect of cover, for the circumstances in which the Complainant Company found itself, was under "iii" and "iv" above, as the other heads of insured peril were not relevant.

Prevention of Access

I note that this business interruption prevention of access extension extends business interruption cover to circumstances where access to the insured premises is prevented or hindered, due to damage to property in the vicinity of the insured premises.

I note that the term 'Damage' is clearly defined in the '**Definitions applicable to Section 2 – Business Interruption ("All Risks")**' section of the Policy Wording document at pg. 21, as follows:

> *"**Damage** means physical loss or destruction of, or damage to, tangible property"*.

As a result, I accept that for cover to be triggered under the business interruption "**prevention of access**" extension, the Complainant Company's access to its insured premises, would need to have been prevented or hindered, due to the physical loss or destruction of, or damage to property in the vicinity of the insured premises.

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I note however from the documentation before me that the Complainant Company itself does not suggest that its access to its insured premises was prevented or hindered due to damage to property in the vicinity of its insured premises, as that term 'damage' is so defined.

I am therefore satisfied that the Provider was entitled to conclude that the cover provided by the business interruption prevention of access extension, had not been triggered by the circumstances of the Complainant Company's claim.

Notifiable Disease

I note that the business interruption "**notifiable disease**" extension, extends business interruption cover to circumstances where the "competent local authority" has placed restrictions on the use of the insured premises caused by the occurrence of a notifiable disease at the insured premises, or the discovery of an organism at the insured premises, likely to result in the occurrence of a notifiable disease.

In this regard, in order for cover to be triggered under the business interruption notifiable disease extension, I am satisfied that the policy wording is clear that there must first be two events, as follows:

1. an occurrence of a notifiable disease, in this case COVID-19, or an organism likely to result in the discovery of COVID-19 at the Complainant Company's insured premises;

   and

2. a competent local authority then places restrictions on the use of the Complainant Company's insured premises as a result of such an occurrence or discovery.

In this regard, it is the occurrence of COVID-19, as a notifiable disease, or the presence of an organism likely to result in the COVID-19 disease, at the Complainant Company's premises, coupled with restrictions imposed on the use of the premises, by the competent local authority, caused by that occurrence, which constitutes the insured peril.

The evidence before me does not suggest that the Provider was supplied by the Complainant Company with suitable confirmation of a notifiable disease "at the premises". As a result, I am satisfied that the Provider was entitled to take the position that there was no cover under the business interruption "**notifiable disease**" extension.

I have noted that an employee of the Complainant Company was suspected of having COVID-19 on **3 March 2020**, but it does not appear that this employee was in fact tested for COVID-19, because it seems that testing for the virus was not widely available. I do not accept in that regard, the Complainant Company's contention that:

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> "*This was, as a matter of undisputed fact, the occurrence of 'any notifiable Disease' under clause 2(a) and the 'discovery of an organism' under clause 2(b) but the Provider demands too much of the wording in their arguments because the policy does not say that the disease must be 'manifested by a person at the premises'*"

As no test to establish COVID-19 was conducted, I do not accept that the presence of COVID-19 at that time, is an undisputed fact. In the absence of a test, it is impossible to establish at this remove, whether or not the Complainant Company's suspicions were correct, that this was the illness from which the employee was suffering, simply because that employee displayed certain symptoms which are now associated with this virus.

In any event, this situation with the employee, did not give rise to any closure consequences, insofar as the Complainant Company continued to trade for some three weeks thereafter, and no restrictions on the use of the Complainant Company's insured premises, were put in place by a competent local authority, as a result of an occurrence of COVID-19 at the premises, at the time when this employee was displaying the symptoms that have been referred to.

I am satisfied therefore that the Provider was entitled to take the position that there was no cover under the business interruption "notifiable disease" extension, because the closure was neither in response to a confirmed occurrence of COVID-19 at the premises, nor in response to the presence of an organism at the Complainant Company's insured premises, likely to result in the discovery of COVID-19, even if it were to be accepted that the Managing Agent was communicating the position of the competent local authority, a contention which remains very firmly disputed by the Provider.

Accordingly, I am satisfied that the Provider was entitled to decline the Complainant Company's claim for business interruption losses, which arose from the temporary closure of its business. I accept that the Provider was entitled to adopt that position, in strict accordance with the terms and conditions of the contract of insurance in place between the parties.

I do not accept the Complainant Company's argument that the Provider is simply "*nit picking over dates and why the business had to close*". The assessment of any claim under a policy of insurance, requires an insurer to examine the particular policy criteria which offer cover with ensuing benefit payments, and the reasons for the claim advanced, in order to establish whether the circumstances match those criteria, which are laid down within the policy wording.

Whilst the Complainant Company has sought to establish that "*Each disease case is part of the web of causation*" and "*there are undoubtedly cases of COVID-19 in the vicinity of [shopping mall] which were part of the causative web that resulted in the Government restrictions*", it is the Complainant Company's policy provisions which specify the circumstances in which benefit will be payable, in the event of a claim for business interruption losses.

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I am satisfied that the "*at the premises*" clause requires certain specific criteria to be met, in order for policy benefits to become payable, but in this instance the information which the Complainant Company offered in support of its claim, did not result in the Provider confirming cover. On the basis of the evidence available, I am satisfied that the Provider was entitled to adopt that position.

In reaching this conclusion, I note the following passages from the judgment of McDonald J. in the recent High Court case of ***Brushfield Limited (T/A The Clarence Hotel) v Arachas Corporate Brokers Limited and AXA Insurance Designated Activity Company*** [2021] IEHC 263, where he made certain remarks regarding an "*at the premises"* requirement contained in a clause somewhat similar to the Complainant Company's policy provisions:

> *"167. … Those words "at the premises" are also to be found in paras. 2 and 3 of the MSDE* [Murder, Suicide or Disease] *clause where they are clearly used in a premises specific sense. The inclusion of the word's "at the premises" strongly suggest to me that the relevant closure must be prompted by a specific defect in the drains or other sanitary arrangements at the premises in question and not as a consequence of concerns about the way in which public bars or hotels are run generally or their ability to contribute to the spread of COVID-19. In turn, it seems to me to follow that the order of the public authority envisaged by para. 5 is an order directed at the particular defect found at the premises. This suggests that the order will be a premises specific one.*
>
> [my underlining]

I note that the Complainant Company has not been in a position to provide evidence of an occurrence of COVID-19 at its premises, or an organism likely to result in COVID-19 at its premises, at the time of its closure in **March 2020**. As one of the requirements of sub-clause 2(a) and sub-clause 2(b) is to demonstrate the occurrence of Covid-19 or an organism likely to result in COVID-19 at the insured premises, I am satisfied that the Provider was entitled to adopt the position that cover was not triggered under those clauses.

I am conscious of the Complainant Company's position that "*It is a reasonable inference, on the balance of probability, that the virus was at our premises at some stage and form part of the web of causation that prompted the Government restrictions*".

The Complainant Company has also sought, in that context to point to the provisions of ***section 12(11)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, which prescribes that:

> *"Subject to this Act, the Ombudsman, when dealing with a particular complaint, shall act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form."*

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The Complainant Company has also sought to remind this Office of the comments of Hogan J of the High Court (as he was then) in *Koczan v FSO [2010] IEHC 407* when he said:

> "*The Ombudsman's task, therefore, runs well beyond that of the resolution of contract disputes in the manner traditionally performed by the Courts. It is clear from the terms of s.57BK(4) that the Ombudsman must, utilising his or her specialist skill and expertise, resolve such complaints according to wider conceptions of* ex aequo et bono *which go beyond the traditional limitations of the law of contract. This is further reflected by the terms of s.57CI(2)* of the *Central Bank and Financial Services Authority of Ireland Act 2004 …"*

The Complainant Company points out that the same judge in the case of *Lyons and Murray v FSO and Bank of Scotland plc, Notice Party HC [2011/22MCA]* referred to the decision of Judge McMahon in *Square Capital Limited v FSO [2009] IEHC407, [2010] 2I.R.514,* and said:

> "*One may venture the suggestion that* Koszan *and* Square Capital *represent classic examples of the kind of complaints which the Oireachtas intended would be investigated by the Ombudsman, since they relate to instances of unfair dealing and perhaps even forms of sharp practice for which the ordinary judicial system and the law of contract may provide no adequate remedy*."

The Complainant Company maintains that:

> "*It seems to us that the Ombudsman has neglected, refused or overlooked that enlarged jurisdiction which exceeds that of the courts in the interests of consumers such as ourselves and has done so for reasons that are not provided in the [preliminary decision]"*.

The task of this Office requires the impartial adjudication of complaints, on the basis of the individual merits and circumstances of each such complaint, taking account of the parties' submissions and the evidence which has been made available. That function does not include the adjudication of complaints on the basis of inferences, or assumptions, but rather requires an evidential basis, to ground any finding that the conduct of a financial service provider has been wrongful, within the meaning of ***Section 60(2)*** of the ***Financial Services and Pensions Ombudsman Act 2017***.

The events of March 2020 onwards were exceptionally difficult for businesses, many of which suffered a complete loss of the ability to trade. As with all insurance claims however, whether or not a claim to be indemnified for such losses will be successful, will always be dependent on the particular cover available under the policy of insurance in place.

As the evidence in this matter, does not disclose any wrongdoing on the part of the Provider, for the reason outlined above, it is my decision therefore that this complaint cannot be upheld.

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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

29 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.